1976

Albert J. Castagno and Bernice B. Castago v. Melvin Church and Esther C. Church : Brief of Appellant

Utah Supreme Court

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ALAN K. JEPPESEN; ATTORNEY FOR APPELLANTS.

IN THE SUPREME COURT OF THE STATE OF UTAH

ALBERT J. CASTAGNO and
BERNICE B. CASTAGNO, his
wife,

Plaintiffs-Respondants,

-vs-

Case No. 14412

MELVIN CHURCH and ESTHER
C. CHURCH, his wife,

Defendants-Appellants,

BRIEF OF APPELLANTS CHURCH

Appeal from a Judgment of the Third Judicial
District Court of Tooele County, State of Utah,
Honorable Gordon R. Hall, Judge

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Plaintiff-Respondants,	:	
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BRIEF OF APPELLANTS CHURCH

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NATURE OF CASE

This is an action for Breach of Contract arising out of a Uniform Real Estate Contract which included the sale--purchase of water rights with Defendants-Appellants as the sellers, and Plaintiffs-Respondents as buyers.

DISPOSITION IN LOWER COURT

The case was tried to the court. From a judgment in favor of the Plaintiffs, on their cause of action, Defendants appeal.

RELIEF SOUGHT ON APPEAL

Defendants seek reversal of the judgment as to Plaintiffs' cause of action, and entry of judgment in their favor as a matter of equity, or that failing, a new trial.

STATEMENT OF FACTS

Defendants had aquired a water right known as "the Buzianis right" (T. 40, Lines 18-24), which they sought to transfer to a well upon the subject property prior to the execution of the Uniform Real Estate Contract which Plaintiffs and Defendants subsequently executed. However, Defendants were prevented from transferring the point of diversion to the well because the right was in one water district and the well was in another. (T. 39, Lines 30 - 40, Line 10).

Thereafter, both parties had discussion with Rex Larson, the area engineer of the State Engineer's Office, Water Rights Division, about another right they could possibly transfer to the subject well. (T. 44, Lines 6 - 12 & T. 40, Lines 25-30). The parties thereafter obtained an assignment of this right. (The Castagno or Bernard Castagno right), (T. 56, Lines 5-6, 20-30, & T. 57, Lines 1-10). Bernard Castagno was the father of Plaintiff, Albert Castagno. His mother assigned the right, which represented five second feet of water to the Plaintiff, Albert Castagno, who assigned three second feet thereof to the Defendant, Melvin Church. These assignment were made in August of 1973. (T. 90, Lines 8-30 & T. 91, Lines 1-12). Thereafter,

in December, 1973, the parties executed the Uniform Real Estate Contract, out of which the controversy herein arises. (Ex. 1-P, T. 5, Lines 4-8). The contract was drafted by the Plaintiffs' attorney. (T. 84, Lines 8-12).

Attached to the contract was a sheet entitled, "Exhibit A", which Plaintiffs' attorney, Mr. Watson, indicated at trial was prepared by him. (T. 92, Lines 1-19). Paragraph three of Exhibit A provided as follows:

> "Upon payment in full of said contract price, Sellers will convey by Warranty Deed the final easterly contiguous Ten (10) acres of said property, together with all water rights to Well already drilled upon said property, Well Certificate #_____[sic], including Two [sic] second feet of water, one second foot of which Buyer will furnish..."

After the execution of the contract, Plaintiffs entered into possession of the premises and commenced pumping the subject well to irrigate a crop of barley.

Shortly after having so commenced, however, Mr. Larson ordered the well to be shut off, (T. 38, Lines 14-18), because there was a "question" about the title to the water right. (T.55, Lines 6-7).

Defendants then sought a hearing through the Division of Water Rights to clear the protests to the water rights, (T. 55, Lines 28-30), and on the day the hearing was scheduled, Defendant, Melvin Church went to the Plaintiffs' attorney's office to assist in preparing for the hearing. (T. 98, Lines 5-6, 14-23), but the hearing was continued and not held. (T. 58, Lines 1-16; T. 97, Lines 16-21; T. 98, Lines 24-29 & T. 99, Lines 1-13);

nor has the hearing since been held to approve or deny the transfer to the subject well, (T. 58, Lines 14-21); although, Rex Larson admitted that the hearing should have been set automatically by the State Engineer, and not at the request of the parties, (T. 61, Lines 7-11).

Consequently, although Defendants have segregated to the subject well one second foot of the three second feet assigned to them by the Plaintiffs, (T. 90, Lines 8-16 & 30; T. 91, Lines 1-12), Defendants have not been able to comply with their agreement. And, according to Rex Larson, the area engineer, there are no other water rights for sale in the area; the area is closed to new appropriations. (T. 46, Lines 5-30; T. 47, Lines 1-4).

Therefore, when Plaintiffs tendered full payment and demanded one second foot of water or a reduction in the price of the land, Defendants were frustrated by events beyond their control, or the foreseeability of the parties when the contract was executed, and thereby unable to perform. The Court erred in granting judgment in spite of Defendants' impossibility of performance.

ARGUMENT

POINT ONE

THE CONTRACT IS AMBIGOUS AS TO THE WATER RIGHTS INTENDED TO BE CONVEYED.

Paragraph two of the Contract (Ex. 1-P), and paragraph three of the attachment thereto, labled "Exhibit A ", contain provisions for the conveyance by the sellers to the buyers of

a second foot of water. Yet in both instances, a blank is left in the typewritten paragraph for the identifying number of the "certificate" by which the second foot of water is to be identified.

Even a cursory reading of paragraph three of the attachment would indicate that the parties had in mind a *distinct* and *particular* water right when the contract was executed.

The sentence in question reads in part as follows, (Ex. 1-P):

> "...Sellers will convey...*all water rights to Well already drilled upon said property.*" [Emphasis added.]

The sentence says, in part, that sellers are to convey the water rights which have been assigned or are permitted by law to be diverted from the well. It is conceded that since paragraph four of the attachment provides that the Plaintiffs are to have the exclusive use of the well and two second feet of water to be diverted therefrom during the life of the contract, it would appear that the parties understood that water was legally obtainable from the well, as opposed to the quit-claim type of situation wherein the seller only conveys what right he may possess, if any. The sentence then proceeds to identify the water rights:

> "...Certificate #_____, including Two (2) second feet of water,..."

Hence, the contract clearly demonstrates that the parties intended to convey a *specific* water right; which is not identified by number in either paragraph, the space for the identifying number being left blank.

Plaintiffs contended at the trial that the reference was not to a specific water right, however, but to the well drilling permit under which the well was drilled. (T. 20, Lines 5-18). Yet, it is undisputed that the contract, including the sentence in question, was drafted by Plaintiffs through their attorney, Mr. Watson; (T.92, Lines 1-19; T. 84, Lines 8-10), the Plaintiffs' attorney indicated that he had to redraft the attachment so that it would correctly express his clients' wishes. (T. 92, Lines 16-19):

> "MR. WATSON: I prepared that exhibit and I had it prepared wrong; and on first viewing, we had to prepare it, and it was changed accordingly."

This Court has previously ruled that when more than one meaning can be assigned to a term in a contract, that the term must be interpreted against the party who chose the term. In the case of *Handley v. Mutual L. Ins. Co.*, 106 Utah 184, 147 P.2d 319, 322, 152, ALR 1278 (1944) this court said:

> "It is to be granted that a contract in case of ambiguity must be construed against the party who drew it..."

Again, in the decision of *Byrant v. Deseret News Publishing Co.*, 120 Utah 241, 233 P.2d 355, 356 (1951):

> "Plaintiff also invokes the rule of interpretation that doubtful, ambiguous terms in a contract should be interpreted against the party who has chosen the terms. [citation omitted]. We agree that those rules of construction should be considered in determining what is a reasonable and fair interpretation of the intention of the parties." c.f. 2 Restatement Contracts, § 236(d); 17 Am.Jur.2d Contracts, § 275.

If Plaintiffs, through their attorney, had intended the

contract to identify a specific well drilling permit, they would have denominated the "permit" as such, not as a "certificate", the name commonly given to a document identifying and specifying a water right obtained by a person. The law of interpretation of integrated contracts clearly provides that common usage will be applied first to define a contract's terms, (2 Restatement Contracts § 230) and Plaintiffs' attorney certainly would have provided for a "well drilling permit" number if such was desired. Furthermore, since only one well was extant at the time, (T. 20, Lines 27-30), no useful purpose would have been accomplished by referring to that well's permit, whereas, the parties certainly would have clarified their intent and made it more incisive by referring to the number of the water certificate which was to be transferred to the well.

As will be seen later, the identity of the particular water right was, in fact, very important to the Defendant's case, yet the court would not permit testimony on the subject.

POINT TWO

THE COURT ERRED IN REFUSING TO LOOK BEYOND THE FOUR CORNERS OF THE CONTRACT TO DETERMINE THE PARTIES' INTENT REGARDING THE WATER RIGHT.

During the cross-examination of Albert Castagno, the purchaser, Defendants attempted to establish that water right which the contract, but for the blank space, would have identified. (T. 22, Lines 4-6):

"QUESTION: Was there any discussion as to where you were to acquire your additional water right?

ANSWER: There was.

MR. WATSON: Object, and my objection again goes those questions are going to parol evidence.

THE COURT: The objection is sustained."

And, again on recross examination, the Plaintiff was prevented from testifying as to the source of the water right to be conveyed with the well. (T. 32, Lines 21-27; T. 33, Lines 2-6):

" THE COURT: His question, however, is whether you discussed that?

ANSWER: Oh yeah, We discussed it, you bet.

MR. WATSON: I object to that again, Your Honor, that is his opinion and Your Honor is going to have to ...

THE COURT: The objection isn't timely and the answer is in; I had to prompt him to get the answer.

. . .

MR. JEPPESEN: QUESTION. What was the essence of your conversation regarding the source of the water?

MR. WATSON: Objection, Your Honor, it's going in violation of the parol evidence rule.

THE COURT: Sustained."

Defendants proffered or solicited testimony on several occasions as to the identity of the water certificate as being material to their defense, (T. 22-25; T. 32-33; T. 41-44; T. 86; T. 89-90), in spite of the fact that the number identifying the water right was left blank, thereby leaving an open hole in Plaintiff's protestations that there was no

ambiguity and that Plaintiffs were protected by the parol evidence rule.

In the case of *Mathis v. Madsen,* 1 Utah 2d 46, 261 P.2d 952, 956 (1953) the court quoted the trial court in concluding that an ill drawn and ambiguous exhibit does not relieve the court, whether trial court of court of review, of its responsibility,

> "...to ascertain its meaning if that can be done under the provision of law respecting this type of instrument. [real estate contract] In searching for meaning, the court must first examine that language used in the instrument itself and accord to it the weight and effect which the instrument itself may show that the parties intended the words to have. If then it meaning is still ambiguous or uncertain, the Court may consider other contemporaneous writings concerning the same subject matter, and may, if it is still uncertain, consider parol evidence of the parties intention."

Defendants were not afforded the opportunity of identifying the water right as *Mathis* provides they should have been allowed to do, and as buttressed by the decision of *Continental Bank and Trust Co. v. Bybee,* 6 Utah 2d 98, 101, 306 P.2d 773 (1957).

The refusal to permit this evidence was clearly in error, to which Defendants took exception. (T. 42, Line 3). The error is evident when the doctrine of frustration is considered, especially in light of the testimony with regards to the manner in which Defendants performance with regards to the water right was frustrated.

POINT THREE

THE FACTS INVOKE THE DOCTRINE OF FRUSTRATION TO EXCUSE THE DEFENDANTS' PERFORMANCE.

The general rule of equity is, that when a promisor's performance is impossible or highly impracticle because of superceding acts or events unforseen by the parties when the contract was executed, the performance of the parties will be excused, specific performance will not be imposed and the parties will be restored to their former estate.

Hence, in the case of *Perry v. Champlain Oil Co., Inc.*, 99 N.H. 541, 114 A.2d 885, 888, the Plaintiff contracted with the Defendant that he would open a specific named gas station on the subject premises. Through no fault of the Plaintiff's, he lost the right to represent that specific named company and his contract performance with the Defendant was therefore excused under the doctrine of frustration.

Likewise, in *Midlothian v. Robbins*,, 81 Ill.App.2d 22, 225 N.E.2d. 651, 656, *cert denied*. 390 U.S. 948 (1967), the Plaintiff contracted to buy water from Defendant. It was subsequently determined that Defendant's supply was totally inadequate for Plaintiff's needs, and Plaintiff was excused from purchasing water from Defendant.

A brief review of the facts of this case relating to the one second foot of water Defendants agreed to supply

demonstrates that in spite of the transfer of the water to the subject well, Defendants have been frustrated in their performance, because the right to use that water has yet to be decided by the State Engineer's Office.

During redirect examination, Mr. Rex Lawson, area engineer for the Grantsville area of Tooele Valley, wherein the well and real property herein lies, (T. 35, Ex.1-P) testified under questioning by Mr. Watson that the Defendant, Melvin Church, had applied for the transfer of a second foot of water to the subject well from a water right known as the "Buzianis right", which change application was denied because the "Buzianis right" was for water located in a water shed or district other than the one where subject well was located. Subsequently, Mr. Church filed another change application known as the "Castagno right" or "Bernard Castagno right". (T. 48, Lines 3-19 & T. 54, Lines 9-20, 27-30):

"MR. WATSON: QUESTION. Mr. Larson, calling your attention to your testimony about Mr. Church filing application No. A-7783 (151881) that was an application to divert one second foot of water onto the subject property and that is covered by the contract; are you aware now of that application?

ANSWER: Yes, from the document you have just showed me.

QUESTION: The documents are you then advised by memory or after refreshing do you recall that there was [sic] two applications made by Mr. Church?

ANSWER: Apparently there was, yes.

QUESTION: One from Louis Buzianis, an application that was in the Tooele area, is that right?

ANSWER: Yes. That's right. I thought you were talking about — —

QUESTION: And then there was another application by Mr. Church to divert a source of water from other sources, is that correct?

ANSWER: Apparently that is.

. . .

THE COURT: So that I'll have this matter in mind properly as to what your testimony is; may I just briefly summarize what I believe you have told me and see if you agree?

ANSWER: All right.

QUESTION: Mr. Larson, As I understand your testimony, the so-called first application for change was the one that has been called the Buzianis matter?

ANSWER: Correct.

QUESTION: And that one was heard and denied by reason of the fact that you had to change district and policy of the district could not be changed?

ANSWER: That is correct.

. . .

QUESTION: Now, regarding the so-called second application; is that the one that might be called maybe the Castagno application?

ANSWER: Yes."

Mr. Church subsequently testified on direct examination that the second application was filed some four months prior to the execution of the subject Uniform Real Estate Contract. (T. 88, Lines 14-17, T.90, Lines 80-16):

"QUESTION: Now, are you speaking of what Mr. Larson referred to as the second assignment No. A-7783, or the Bernard Castagno assignment?

ANSWER: Yes.

QUESTION: And when did you acquire the water right?

ANSWER: Oh, prior to the signing of that agreement.

QUESTION: What is the date?

ANSWER: The 20th of August, 1973, was when this assignment was signed."

The Bernard Castagno right was acquired by the Defendants *from the Plaintiffs*, for the purpose of providing a water right that could be diverted from the well. (T. 90, Lines 30; T. 91, Lines 1-12):

"Mr. Jeppesen: Strike that. Would you tell us the procedure you followed in acquiring the water right which you intened or intend to convey pursuant to the contract?

ANSWER: Procedure was filing the necessary documents that establish the chain of the title from Albert's father to his mother, and his mother to him; and from him to me. Now along with a segregation application for the seperate one second foot and transfer it onto the property that was sold, that was established.

QUESTION: You have segregated one second foot and filed that?

ANSWER: Yes.

QUESTION: And that is, in fact, the A-7783 application?

ANSWER: Yes."

The Bernard Castagno right was brought to the parties' attention by Mr. Rex larson, the area engineer. (T. 40, Lines 25-30; T. 41, Lines 1-4):

"QUESTION: All right. I assume this is the so-called Buzianis right and after that right was denied, do you recall having a conversation in your office with Mr. Church with regard to possible other sources of water that could be transferred to the Plaintiff's land?

ANSWER: Yes, I do.

QUESTION: And did you mention to him a five second right that was in the estate of Bernard Castagno?

ANSWER: I mentioned this particular right that had been filed on by Bernard CAstagno, yes."

Mr. Larson discussed the right with both of the parties on numerous occasions. (T. 44, Lines 6-12):

"QUESTION: Have you had any conversation with either of the parties in this matter concerning the acquisition of a water right, or a permit to drill a well and divert water to that well on this property?

ANSWER: Yes, on numerous occasions.

QUESTION: In fact, you had conversations with both parties?

ANSWER: Yes."

The change application segregating the Defendants' one second foot of water and changing its point of diversion to the subject well was, however, protested by Myron Castagno and the Federal Land Bank. (T. 37, Lines 9-17; Ex. P-15, P-16). On the date the hearing on the protest was scheduled to be held, the Defendant, Melvin Church, came to the Courthouse to attend the hearing. (T. 97, Lines 16-20).

"MR. JEPPESEN: QUESTION. Let me ask you this; did you, in fact, go to the hearing assembly itself?

ANSWER: No.

QUESTION: Why not?

ANSWER: Because the phone call was made.

MR. WATSON: Your Honor, I object.

THE WITNESS: The hearing was canceled by Mr. Watson.

. . .

THE COURT: The record of any response that was made to that question is now stricken and I'll let you answer that question, why didn't you go to the hearing?

ANSWER: I was advised that —— ——

THE COURT: By whom?

ANSWER: By Eddie Watson."

According to Mr. Church, (T. 99, Lines 21-23) and Mr. Rex Larson, the hearing had not been rescheduled and held as of the date of the trial. (T. 58, Lines 14-16). As a consequence, Mr. Larson had to require the Plaintiffs to discontinue using the water from the well. (T. 38, Lines 14-18).

Mr. Larson also indicated the perdicament in which the Defendants were placed by this turn of events, there being no other water available for diversion from the subject well. (T. 40, & 47, Lines 1-4):

"MR. WATSON: QUESTION. One question, Mr. Larson, is it possible to get a water right to this piece of property now, the property in question?

ANSWER: The area is closed to new appropriations of water in excess of that required for domestic purposes of one family.

QUESTION: Excuse me,

ANSWER: However, if the applicant could obtain a water right by purchase or transfer from one who has an approved right, change application could be filed as long as that right is in the Grantsville area and it could transferred by change application to this location.

QUESTION: And at the present time, Mr. Larson, to your personal knowledge, are there presently permitted wells which have not been drilled in the Grantsville area that could possibly be purchased and transferred to this?

ANSWER: I am not aware of any approved applications that have not been drilled. We have numerous applications that have been filed and not yet approved.

QUESTION: And if those were disapproved, then would that open up possibility of water to be obtained?

ANSWER: Not necessarily.

QUESTION: Are there, in your mind and with your knowledge, purchasable rights in the Grantsville area if the person would sell?

ANSWER: I am not aware of any that are for sale, no.

QUESTION: But there are those that could be transferred?

ANSWER: If they could acquire the right, yes.

QUESTION: Or induce the owner of the right to transfer, is that what you mean?

ANSWER: Yeah."

Hence, Defendants are without a present means of supplying one second foot of water to the well, and will be until the hearing is scheduled and held pursuant to the notice of the State Engineer's Office. As Mr. Larson also indicated, the hearing will be set, not upon notice or request of one of the

parties, but when it comes up again automatically for hearing as set by the department. (T. 61, Lines 7-12):

"QUESTION: If one particular party asked for a continuance, would you require that party to request the matter be reset for hearing or would you automatically reset it for hearing?

ANSWER: It would be automatically reset to the next time when we scheduled hearings in the area."

Consequently, through no fault of the Defendants, the application for water which the parties intended to be used from the subject property is unavailable for use at the time Plaintiffs demand performance, which, it should be noted, is some six years prior to the expected date of full payment by the seller, (Ex. 1-P), since the purchase was to have been paid in annual installments of $2,500 each, and the water right and well was to be conveyed only upon final payment. Wherefore, the doctrine of frustration should be applied to aid defendants herein.

The doctrine is probably best expressed in the opinion of the Idaho Supreme Court in *Twin Harbors Lumber Co. v. Carrico*, 92 Idaho 343, 442 P.2d 753, 758-759 (1968):

> "The doctrine of impossibility excusing performance of a contractual obligation, insofar as relavent in the present setting, provides generally that if by express terms of a bargain or within the contemplation of the bargaining parties the existence of a specific thing is essentially necessary for the performance of a promise in the bargain, a duty to perform the promise...is discharged if the thing...subsequently is not in existence in time of seasonable performance."

Parsons v. Bristol Dev. Co., 62 Cal.2d 861, 44 Cal.Rptr. 767, 402 P.2d 839 (1965); c.f. *Cannon v. Huhndorf*, 67 Wash.2d 778, 409 P.2d 865 (1966); *United States v. Buffalo Coal Mining Company*, 345 F.2d 517, (on denial of petition for rehearing) (9th Cir. 1965); *Foster v. Atlantic Refingin Co.*, 329 F.2d 485 (5th Cir. 1964); *See gen.* Annot. Modern Status of Rules Regarding Impossibility of Performance as Defense in Action for Breach of Contract. 84 A.L.R.2d 12, §19, pp 92-102 (1962); 6 Corbin, Contracts &1339 (1962); 6 Williston, Contracts && 1948 and 1952-1953 (rev. ed. 1938); Simpson, Contracts & 182 (2nd Ed. [Hornbook] 1965)."

The case of *West Los Angeles Institute for Cancer Research v. Meyer*, 366 F.2d 220, 225, *cert. denied* 385 U.S. 1010 (C.A. 9th Cir. 1966) further gives support to the right of the Defendants to be excused performance here. Therein, stockholders agreed by contract to sell their tax exempt institute and to enter into a lease-back agreement for the use of the facilities of the institute. Subsequently, the Internal Revenue Service declared the arrangement invalid for capitol gains tax purposes, which the stockholders showed at trial to be the purpose of the arrangement. The court held that "commercial frustration" or supervening impossibility of performance applied, and the stockholders were relieved of transacting the sale.

As was shown by the testimony of Mr. Rex Larson, production of some *other* water right in this instance is highly unlikely as Mr. Larson, the supervising engineer knows of none for sale and indicated that the area was closed to new appropriations for any purpose but single family culinary use. (T. 46-47 *supra*).

The fact that the Defendants might be able to acquire another right if they were to come up with whatever exceedingly unreasonable price, the seller might wish does not take the Defendants' performance out of the doctrine of frustration, as the doctrine of frustration is invoked whenever the performance of the promisor is highly impractable or unreasonably difficult. *Kansas, Oklahoma & Gulf R. Co. v. Grand Lake Grain Co.*, 434 P.2d 153 (Okla. 1967); *Northern Corp. v. Chugach Elec. Ass'n.*, 518 P.2d 22 (1972); *Cherokee Water Dist. v. Colorado Springs*, 519 P.2d 339 (Colo. 1974); *Portland Section of Council of Jewish Women v. Sisters of Charity of Providence in Oregon*, 266 Or.448, 513 P.2d 1183 (1973).

CONCLUSION

The trial court was correct in all of its findings of fact and in the conclusions of law, as far as the same considered the Plaintiff' legal or equitable remedies. Nevertheless, the court erred in failing to invoke the doctrine of frustration so as to excuse Defendants' performance when the failure thereof was entirely unforseen by the parties and beyond their power to prevent. Had the court permitted testimony as to the parties identification of the source of water to be diverted from the well, that plus the testimony of Mr. Larson that no other water was available for diversion from the well, would have called for

the application of the doctrine of frustration and excused the Defendants' performance if not altogether, at least for sufficient time for the cloud on the water right in question to be cleared.

WHEREFORE, Defendants Church, respectfully pray that the trial court's judgment against them be reversed, and that failing, that they be granted a new trial

Dated this 17 day of March, 1976.

Respectfully submitted,

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MAILING CERTIFICATE

I hereby certify that two (2) copies of this brief were mailed, postage prepaid, to Edward A. Watson, Attorney for Plaintiffs-Respondants, 47 South Main Street, Tooele, Utah, on this 17 day of March, 1976.

Alan K. Jeppesen
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