2001

# Titanium Metals Corporation of America v. Space Metals, INC and Valley Bank and Trust Company : Reply Brief

Utah Supreme Court


Alvin L Smith; Arnovitz, Smith & Nielson; Attorney for Respondent.
Irving H Biele; Biele, Haslam & Hatch; Attorneys for Defendant.

IN THE

# SUPREME COURT

OF THE

# STATE OF UTAH



TITANIUM METALS CORPORATION OF AMERICA, A DELAWARE CORPORATION,
*Plaintiff,*

vs.

SPACE METALS, INC., a Corporation, and VALLEY BANK AND TRUST COMPANY, a Utah Corporation,
*Defendants.*

Case No. 13474

## APPELLANTS' REPLY BRIEF

Appeal from a Judgment of the Third Judicial District of Salt Lake County, Honorable Joseph G. Jeppson

BIELE, HASLAM & HATCH
IRVING H. BIELE
*Attorneys for Defendants and Appellants*
80 West Broadway, Suite 300
Salt Lake City, Utah 84101

ARNOVITZ, SMITH & NIELSON
ALVIN L. SMITH
*Attorneys for Plaintiff and Respondent*
1305 J. C. Penney Building
310 South Main Street
Salt Lake City, Utah 84101

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued



## AUTHORITIES

### CASES CITED



### TEXT CITED

IN THE

# SUPREME COURT

OF THE

# STATE OF UTAH

---

TITANIUM METALS CORPORATION OF AMERICA, A DELAWARE CORPORATION,

*Plaintiff,*

vs.

SPACE METALS, INC., a Corporation, and VALLEY BANK AND TRUST COMPANY, a Utah Corporation,

*Defendants.*

Case No. 13474

---

## APPELLANTS' REPLY BRIEF

---

### STATEMENT OF NATURE OF CASE

This is a suit by the plaintiff-respondent against the defendant-appellant Bank in contract on a letter of credit.

### DISPOSITION BY LOWER COURT

The matter was tried before the Third Judicial District Court, sitting without a jury. The Honorable Joseph G. Jeppson rendered a judgment in favor of the plaintiff, Titanium Metals Corporation of America, and

against appellant, for the sum of $54,132.72 and costs of $22.00. The court found as a matter of fact and law that defendant Valley Bank and Trust Company, had obligated itself under a letter of credit and had waived certain conditions thereof.

## RELIEF SOUGHT ON APPEAL

Defendant-Appellant, Valley Bank and Trust Company seeks reversal of the judgment.

## SUPPLEMENTARY STATEMENT OF THE FACTS

Respondent's statement of the facts is essentially correct, however, several points need clarification.

First, Respondent's Brief, is not clear on the critical point that three separate letters of either guarantee or credit were issued by Valley Bank and Trust Company to Titanium Metals Corporation of America.

A. The first letter guaranteed the payment of *invoices*. All invoices submitted by Titanium Metals to Valley Bank under this letter were paid.

B. The second letter of credit differed in its terms from the first letter of credit and agreed to pay all *collection drafts*. It did not agree to pay invoices. Titanium continued to send invoices. The Bank never paid on an invoice covered by this letter of credit.

C. The third letter of credit issued by the Bank also agreed to pay collection drafts. Titanium con-

tinued to send invoices. This first invoice under this third letter of credit was paid by Space Metals, Inc., after Valley Bank sent it to Space Metals and refused to pay it. The remaining six invoices were returned by the Bank without payment.

None of the invoices were accompanied by a collection draft or collection drafts, nor were any drafts with respect thereto furnished to Appellants at any other time. The record is clear on this point.

In his statement of the facts, Respondent contends that, "at no time did Valley Bank and Trust Company notify Titanium Metals that the procedure which it was utilizing in the sending of invoices to Valley Bank was improper and that such procedure should be remedied or altered to conform to a diffirent banking procedure and particularly that formal commercial drafts should be presented in order to collect for the shipments." It is clear from this statement by Respondent that he assumes that Valley Bank had a duty to inform the Plaintiff Corporation that they were using an improper procedure. This assumption is erroneous. Titanium knew the proper procedure from the letter of credit. Also, Respondent's statement that Valley Bank did not give them any notice that the procedure was not satisfactory is incorrect. This is belied by the facts. The only invoice paid under the third letter of credit was paid by Space Metals, Inc., not by the Bank. This certainly constitutes notice that the Bank is not paying upon presentation of invoices. The invoices were not paid on receipt as would occur

in relation to a draft on the letter of credit. The invoices were returned unpaid. The conduct and advice in conjunction with the clearly stated terms of the letters of credit put Titanium on notice that collection drafts, not merely invoices were required, and that invoices would not be treated like drafts.

It is obvious from the record that Titanium's personnel had the sophistication necessary to be aware of what constitutes a draft and of how a draft differs from an invoice. The Court in questioning Titanium's witness asked the following question: "And what is a draft, do you know, in your business? Or would we have to ask a banker?" (R-148). And the Answer was as follows: "Well, we do use drafts in our business. A draft is a check drawn on a customer, drawn by us, which the Bank accepts and remits" (R-148).

Respondent further contends that receipt of the drafts by Valley Bank and Trust Company was not essential and that if drafts had been received they would have been treated in the same way as invoices. Testimony in the record, which was previously cited in Appellants' Brief, makes it clear that this was not then, and is not now, the case. Valley Bank and Trust Company's cashier testified that if drafts had been received, "we would have paid the draft and notified the customer" (R-200). This entire law suit has, as its reason for being, the fact that the invoices were not treated this way. Obviously, when *invoices* were presented under the second and third letters of credit, Valley Bank and Trust

Company did not pay them. It notified the customer of the receipt of the invoice and awaited the customer's direction. If the invoices had been paid Titanium would not be bringing this action, because they would have the money they are now seeking.

## ARGUMENT

### POINT I.

### THE TRIAL COURT ERRED IN FINDING THAT APPELLANT WAIVED THE TERMS OF THE LETTER OF CREDIT, BECAUSE THERE IS NO EVIDENCE OF WAIVER.

Respondent's Brief states that there is a surfeiture of evidence establishing Valley Bank's waiver. The Brief reads:

> "The record is replete with statements by Bank officials which clearly support the lower Court's finding that the Bank did in fact waive strict compliance with the letter of credit in issue . . ."

Not surprisingly, Respondent fails to point out any specific statements in the record which support this stand. Obviously, Respondent is unable to find any such references.

The case of *Phoenix Insurance Company* v. *Heath, et al.*, 90 Utah 87, 61 P. 2d 308 (1936), which was cited in Appellant's Brief, is examined by Respondent in his Brief. Respondent briefly relates the facts in *Phoenix*,

and states that the facts are very different from those in the instant case. The differences spoken of are not specified because fundamentally there are none. Actually, the situation in *Phoenix* is very similar to our situation, in that in both the case of Phoenix Insurance Company and of Valley Bank and Trust Company, there was never the slightest manifestation of an intent to waive any requirement. Respondent seems to feel that when the Court in *Phoenix* stated:

> "a waiver is an intentional relinquishment of a known right. (citation) To constitute a waiver, there must be an existing right, benefit, or advantage, a knowledge of this existence, and an intention to relinquish it. It must be distinctly made, *although it may be express or implied* (citation)," (Emphasis added.)

that the language *express or implied* is helpful to his cause, but Appellant is not refuting the fact that waiver may be express *or* implied. However, in our case, there was no distinct waiver made, either express or implied. Waiver cannot be found where there was:

1. No intent.
2. No distinct conduct which either impliedly or expressly waived the requirement of a draft.

Respondent implies that Valley Bank and Trust Company had an affirmative duty to act, i.e. to give detailed prompt notice to Titanium that drafts were required.

Further, Respondent urges that since Valley Bank had this duty, its failure to give prompt detailed notice constituted an inference of intent to waive and constituted an implied waiver. Valley Bank and Trust Company had no affirmative duty to tell Titanium that their procedure, of submitting an invoice instead of a draft, was improper. The letters of credit were clear as to proper procedure. Valley Bank and Trust Company had already spoken on this subject of proper procedure when it conditionally extended credit in its letters.

Titanium Metals Corporation is not an artless or simple person thrown into a commercial jungle; but a sophisticated corporation of experts that commonly used Letters of Credit, Drafts, COD shipments, and other facets of the Law Merchant in conducting its Multi-State operations (R-148, et seq.). This corporation could have requested a change of the conditions, but it did not.

The only communications between the corporations were:

1. The Letters of Credit.
2. Copies of Sales Orders marked "Invoice Copy" indicating payment within 30 days.
3. Valley Bank's advice indicating receipt of invoices acknowledging Titanium's instruction to "Hold 30 days".
4. Returned invoices accompanied by a cashier's check *purchased* by Space Metals (so indicated on face of check) or Valley Bank's advice "we return herewith unpaid".

Respondent contends that Valley Bank did not act immediately to inform Titanium of the existence of a problem and of its discontent. Respondent states, "Valley Bank and Trust Company *never*, during the entire period in question, defined its position, expressed any discontent." This statement is completely falacious. As discussed above, Valley Bank and Trust Company had expressed its position permanently and unambiguously in writings which Titanium had in its possession, i.e. the letters of credit.

A draft on the Letters of Credit is a demand on the Bank and would have resulted in immediate credit.

Titanium elected to charge the customer (Space Metals) and not the Bank and to extend 30 days credit to the customer.

Is it the Bank's duty to say "Don't charge the customer or extend it credit — charge me"? Obviously not, for Titanium may have been reserving the Bank credit line for later use and it certainly is not the prerogative of the Bank to tell a non-customer when to use a line of credit.

The Bank clearly indicated that it was not accepting these items by:

1. Not paying them immediately as required by the letters of credit.
2. Sending an advice indicating receipt of "*Invoice*" or "*Sales Draft*".

3. Payment when remitted was indicated as being "Space Metal's Funds" not Bank funds on the check.

4. The advices reflected Titanium Metal's Instructions, "Hold for 30 days".

Respondent indicates in his Brief that something more should have been done by Valley Bank. There is no authority for this belief. Neither case law nor statutory authority is cited to establish a rule requiring Appellant to do more in this situation. Nor did the letters of credit state that Appellants had an obligation to do more than they did.

It seems clear, that the reason Respondent does not cite any authority for this proposition is that there is no obligation on Valley Bank to do more than they did. Valley Bank did not fail to meet its obligations, it strictly followed the terms of the letters of credit. There was no conduct on Valley Bank's part which either impliedly or expressly waived the requirements of a draft.

*Reynolds* v. *Travelers Insurance Company*, 176 Wash. 36, 28 P. 2d 310, 314 (1934), which is cited in Respondent's Brief, says that waiver is unilateral and arises by *intentional* relinquishment of *a right*. This is in keeping with the holdings of other cases in the area of waiver, including the *Phoenix* case. There is no indication in the *Reynolds* case that the facts in the present case would constitute an intention to waive.

There was no course of conduct pursued by Valley Bank and Trust Company, which evidences an intention

to waive. Respondent states, on page 17 of his Brief, that, "the trial court clearly looked at the conduct of the Appellant as evidenced by the record" and based their determination on that conduct. However, Respondent never makes it clear to what conduct he is referring. There *was* no conduct on Valley Bank's part that indicated an intention to waive. This seems to be the reason why Respondent does not pin point any conduct.

Respondent states that Valley Bank waived strict compliance by "issuing and forwarding its drafts purchased by Space Metals totaling more than $19,000 on a similar letter of credit covering an earlier period as evidenced by the first invoices shipment covered by the letter of credit." Respondent simply misstates the facts in this conclusion. Valley Bank did not issue any drafts but merely forwarded to Titanium checks purchased by Space Metals, Inc., which so indicated the purchaser.

Respondent illustrates no facts constituting "waiver", nor does he even attempt to show facts indicating "Intention to Waive" or cite any cases involving similar facts and holding for waiver.

There is no fact in the record upon which the court could base a finding of waiver, and since this is the ultimate basis of the District Court decisions, the decision must fall.

## POINT II.

## STRICT COMPLIANCE WITH THE TERMS OF THE LETTER OF CREDIT SHALL NOT

BE WAIVED WHERE THERE IS NO CLEAR MANIFESTATION OF AN INTENT TO WAIVE.

In Respondent's Brief, he implies that since the drafters of the Uniform Commercial Code (UCC) expressed a belief in flexibility and the importance of liberal interpretation, and since the UCC provisions are broad in scope, one cannot form any hard and fast rules in dealing with any situation covered by the provisions of the UCC. This is a ridiculous argument. The UCC clearly has flexibility, but, this does not mean that there are no rules established by the Code upon which a court can rely. As stated in Appellants' Brief, "Uniform Law Annotated", a West publishing company consolidation of the various Uniform Commercial Codes, sets forth the Rule on interpretation of letters of credit. That rule is as follows, "Generally — essential requirements of a letter of credit must be strictly complied with". (Section 5-104 Note 1; Section 5-103 Note 1.) The purpose behind the requirement of strict compliance with the terms of a letter of credit is the promotion of easy, uncomplicated, and beneficial commercial transactions. When two people can enter into an agreement, i.e. a letter of credit agreement, and can rely upon the terms of that letter of credit in the conducting of their business, commercial transactions progress more easily and expeditiously.

Respondent cites the case of *Consolidated Sales Company, Inc.* v. *Bank of Hampton Roads,* 193 Va. 307, 68 68 S. E. 2d 652 (1952), which held that the Defendant

Bank by its conduct had waived strict compliance with the terms of the letters of credit involved.

In that case, the Plaintiff began to make sales to the Bank's customer and he attached the requested draft to each of the first seven invoices submitted to the Bank for payment. Subsequently, some eighteen to twenty shipments were made by the Plaintiff and the Defendant Bank *made* payments for these shipments *upon mere submission of invoices without drafts.* The Court held, ". . . by continuing to make payments upon receipt of the invoices alone, the bank had waived the provision in the letter which specified and had therefore required that a draft accompany the invoice." In our situation, the Bank did *not* continue to make payments under the second and third letters of credit when mere invoices were sent. Under the first letter of credit, which required only that invoices be sent, the Bank paid the invoices. Under the second and third letters of credit, where drafts were required, no invoices were paid. If an invoice were paid, Space Metals paid it, not the Bank.

*Richard* v. *Royal Bank of Canada*, 23 F. 2d 430 (2d Cir. 1928), was also cited in Respondent's Brief. This case also involved letters of credit. However, under the letters of credit in *Richard* the drawing of drafts was not required. As the Court pointed out, the sending of drafts was assumed from the general language of the letter of credit, but was not required. Also, in *Richard* the Bank upon receipt of the documents (the documents were sent without drafts), made many payments. In

our case, Valley Bank never made payments under the terms of the second and third letters of credit when mere invoices were presented.

Respondent's Brief states that a letter of credit shall be construed in the light most favorable to the recipient and that where there is ambiguity, the ambiguity shall be resolved in favor of the recipient.

The case of *Venizelos, S. A.* v. *Chase Manhattan Bank*, 425 F. 2d 461, (2d Cir. 1917), is cited to substantiate this point. *Venizelos* upholds the well known principal that it is preferable to construe an instrument so as to sustain it rather than so as to defeat it, *if* an instrument is "fairly capable" of being so construed. Here, there is no ambiguity in the letters of credit. The terms in the letters of credit involved are explicit and clear. The letters of credit in this case are not "fairly susceptible" to two constructions. There is only one possible construction and it requires Titanium Metals Corp. to submit drafts.

## POINT III.

### WAIVER WAS NOT PLED, THEREFORE THE TRIAL COURT ERRED IN FINDING THAT THE APPELLANT, VALLEY BANK AND TRUST COMPANY, WAIVED THE TERMS OF THE LETTER OF CREDIT.

The whole purpose of the rules of pleading is to put the other side on notice of the theory upon which you

are relying. The rationale behind this rule can be easily understood. It is essential that each party be able to prepare effectively to meet the arguments of each other party. Here that kind of preparation was not possible. There was no way in which Appellant could anticipate and deal with the question of waiver since the issue was never pled nor averred to, during the course of the law suit. Waiver, in the present case, should have been pled so that Appellant, Valley Bank and Trust Company, could have dealt with this subject. It is clear on the facts that no conduct by Valley Bank and Trust Company constituted either an express or an implied waiver. However, evidence on this matter was never really considered because of the fact that waiver was never put into issue by the pleadings.

The case of *Commercial Standard Insurance Company* v. *Remay*, 72 P. 2d 859 (1937), makes it clear that the Court won't take judicial notice of waiver if it is not pled.

It is clear under the Utah Rules of Civil Procedure that Appellant had no obligation to specifically mention waiver even if the opportunity had been present. Appellant's Motion for new trial was broad enough in scope to cover Appellant's dissatisfaction with how waiver was handled. It is also apparent that Appellant's Motion to amend or alter findings of fact and conclusions of law covered the question of waiver and notified the Court and Respondent of Appellant's objection to the lack of pleadings of waiver.

The first discussion of waiver as a reason for recovery was at the time of preparation of the Findings of Fact and this is too late.

Respondent also contends that there was testimony given to support the conclusion that the parties had "agreed" to a certain course of conduct, i.e. sending invoices instead of the requisite drafts, which Appellant *now* deems improper. Respondent goes on to say that Appellant, "should not be allowed ~~of~~ to alter the terms of the agreement which it voluntarily entered into and which later proved not to be in its best economic interest". The only agreement Appellant had with Respondent was the agreement laid out in the letters of credit. Appellant is not seeking to alter the terms of this agreement, rather Appellant is seeking to enforce the terms of the agreement. Appellant never agreed to any substitution for the terms in the letters of credit. In short, the terms of the letters of credit establish the agreement between Appellant and Respondent, and these terms require strict compliance.

## POINT IV.

## WHERE IT APPEARS CLEAR THAT THE COURT HELD ON A THEORY NEITHER PLED, REVEALED, OR SUPPORTED BY THE EVIDENCE, THE TRIAL COURT'S JUDGMENT MUST BE OVERTURNED.

The authority which was cited by Respondent in support of the idea that there is a presumption that the

Judgment of the trial court is correct, is not disputed by Appellant. However, where it appears, as it does here, that a court held on a theory not pled or revealed, the Trial Court's Judgment must be overturned. Appellant had no notice of the theory upon which the court was relying until the court came out with its findings and Appellant immediately objected thereto.

The case of *Buckley* v. *Cox*, 122 Utah 151, 247 P. 2d 277 (1952), was cited by Respondent, and the law it states *is* probably applicable to our situation. The court in *Buckley* v. *Cox* made the following determination, "the question is whether the decision made by the trial court finds support in the evidence." Here the decision finds no support in the evidence. Respondent claims that a "substantial amount of evidence in support of the trial court's decision" is present. Yet, he never says what this evidence is or where the evidence can be found in the record. Respondent does not allude to even one page in the record where this evidence can be found. Appellant has successfully met the burden of overcoming the presumption that the trial court's decision was correct. Appellant has made it clear that there was *no* evidence at all in the record which showed waiver. Thus, from Respondent's own authority, *Buckley* v. *Cox*, 122 Utah 151, 247 P. 2d 277 (1952), it is clear that *some* competent credible evidence was needed to support the findings made by the trial court. In our case, since there is no evidence, there can be no competent credible evidence.

## CONCLUSION

The only evidence of Waiver is opposing counsel's statement in his Brief.

Officers of the Bank would have been discharged for the negligent misappropriation of depositors' funds if they had paid the invoices as though they were drafts. There was no contract to pay invoices. Therefore, Space Metals, Inc. could refuse to reimburse the Bank for the volunteered payment claiming the materials were defective, not received, the payment not authorized, etc. The Plaintiff would have been richer and the Bank's depositors, stockholders and bonding Company poorer and without recourse against Space Metals.

If a draft had been presented, the Bank would have paid it immediately, not 30 days later, as it would be a direct obligation of the Bank under the letter of credit. The Bank could then provide for payment to the Bank from Space Metals, Inc. under the agreements giving rise to the letter of credit.

Since the Bank was not required to perform it had no reason to obtain payment from its customer, Space Metals, under the terms of its agreement with said Company.

Space Metals, Inc. is *now* insolvent, there would have been no loss if Titanium Metals, Inc. had forwarded drafts because the Bank would have paid and secured repayment from its then solvent customer. The failure to provide drafts and its agreement extending time of pay-

ment was solely Titanium Metal's responsibility and the proximate cause of their loss. If a loss must be taken, then the corporation who was not paid, because of its failure to comply with simple contract terms must absorb the loss.

To hold otherwise, the Court must re-write the contract between the parties and shift the loss to an innocent party. The Court must also create a very burdensome appendage on the Law Merchant which would substantially inhibit the flow of commerce.

The Plaintiff, a knowledgable and sophisticated foreign corporation, has tried to shift the loss incurred through its negligence to the Bank, who was playing the game by the established rules. There is neither legal, equitable or moral support for cause.

It is respectfully submitted that the decision of the District Court should be reversed and a Judgment of no cause of action entered.

Respectfully submitted,

BIELE, HASLAM & HATCH

*Attorneys for Appellants*

By .....