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Malcolm N. McKinnon v. The Corporation of the President of the Church of Jesus Christ of Latter Day Saints, a corporation : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH
J. KEUBEN CLARK LAW SCHOOL

MALCOLM N. McKINNON,

*Plaintiff-Appellant,
Cross-Respondent,*

vs.

THE CORPORATION OF THE
PRESIDENT OF THE CHURCH
OF JESUS CHRIST OF LATTER-
DAY SAINTS, a corporation,

*Defendant-Respondent,
Cross-Appellant.*

Case No.
13553

BRIEF OF CROSS-RESPONDENT

An Appeal from the Judgment of the
Third Judicial District Court of Salt Lake County
State of Utah

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MALCOLM N. McKINNON,

*Plaintiff-Appellant,
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Case No.
13553

BRIEF OF CROSS-RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Plaintiff-Appellant and Cross-Respondent seeks money damages against defendant-respondent and cross-appellant arising out of the latter's breach of legal duty to provide appellant and cross-respondent with a haulage right-of-way to reach his substantial coal holdings in Emery County, Utah.

DISPOSITION IN THE LOWER COURT

Respondent and cross-appellant moved the Third Judicial District Court of Salt Lake County, Judge Ernest F. Baldwin, Jr., for Summary Judgment on appellant's Complaint. At the hearing, appellant requested leave to file an Amended Complaint and to add or substitute parties defendant. The trial court granted respondent and cross-appellant's motion for Summary Judgment on three enumerated bases and denied appellant leave to amend his Complaint and to add or substitute parties.

RELIEF SOUGHT ON APPEAL

Appellant and cross-respondent seeks reversal of the trial court's final Amended Order dismissing his Complaint, denying appellant leave to file an Amended Complaint and to add to or substitute parties and prays that this Court order:

1. That the case be remanded to the district court on its merits.
2. That appellant and cross-respondent be permitted to file his Amended Complaint, and alternatively,
3. That appellant and cross-respondent's motion to add or substitute parties be granted should this Court rule that the suit is now pending against the wrong defendant.

Appellant and cross-respondent further seeks a determination by this Court that defendant-respondent and cross-appellant's motion for Summary Judgment should be denied on the additional grounds that the existence of the contract between the parties has been established and the defense of Statute of Frauds is non-apropos by virtue of a constructive trust imposed upon respondent and cross-appellant.

STATEMENT OF FACTS

The facts of this case have been adequately delineated by appellant in his opening brief.

ARGUMENT ON CROSS-APPEAL

POINT I.

THE EXISTENCE OF THE CONTRACT BETWEEN THE PARTIES HAS BEEN ESTABLISHED AS A MATTER OF FACT AND LAW.

In its cross-appeal respondent and cross-appellant, hereinafter for convenience referred to as "respondent," contends that the lower court erred in not granting its motion for Summary Judgment on the alternative grounds that there was no binding contract between the parties and that the contract failed to comply with the Utah Statute of Frauds; both of these arguments must fail as neither is supported either by the record or applicable law.

The factual background surrounding the creation of the contract between the parties has been fully delineated in appellant's opening brief. In summary, appellant was initially contacted by Leonard Adams, the then General Manager of the coal mine properties of The Church of Jesus Christ of Latter-day Saints, hereinafter referred to as the "Church," located in Carbon and Emery Counties who requested appellant to abandon a United States Government preference lease on 640 acres adjacent to Church held property to allow the Church to acquire the lease upon public bid (McKinnon deposition pg. 7). After a series of meetings, it was agreed by the parties that appellant would abandon this lease right only on the specific condition that respondent grant appellant a right-of-way across Church held properties should such right-of-way be required for access around the end of the fault which existed in the area (McKinnon deposition, Exhibit 2).

Appellant's counsel, Frank Armstrong, met with Henry D. Moyle, an Apostle of respondent, and at that time President Moyle and Mr. Armstrong effectuated a meeting of the minds and the contract came into existence (Armstrong deposition, pg. 9). The contract was not reduced to writing at the specific request of respondent to avoid any possible claim that the actions of appellant in abandoning his lease right and agreeing to assist respondent in obtaining the lease amounted to collusive bidding, which practice was expressly forbidden by federal law. At that time, President Moyle, as an authorized representative of respondent, *expressly*

promised to Mr. Armstrong as counsel for appellant that the right-of-way would be given to appellant immediately upon the respondent obtaining the lease in question.

Q. Do you recall if Mr. Moyle said anything specifically regarding waiting until some future time to prepare the formal right-of-way agreement?

A. Well, I don't recall. It seems to me that I mentioned someone might claim there might be some collusion and he said, "That's right. We can't do that." He said, "We will wait until we get the lease and then we will prepare a right-of-way for him." (Armstrong deposition, pg. 10)

In its brief, respondent makes reference to several writings which it claims sustain its allegation that no contract was finalized. While appellant recognizes that interpretation of writings can lead to irreconcilable differences of opinion, the writings set forth in respondent's brief clearly show that a contract existed between appellant and respondent at sometime *prior* to January 6, 1960, for the letter of Frank Armstrong to President Moyle of that date set forth on page 8 of respondent's brief states:

I talked to you sometime ago just prior to the death of Leonard E. Adams regarding an appointment to meet with Brother Adams and Malcolm N. McKinnon to arrange the granting of a right-of-way to Mr. McKinnon over a portion of the land the Church was obtaining by lease from the Federal Government and to ar-

range for a contribution to the Church out of money to be paid Mr. McKinnon for a portion of his mine. (McKinnon deposition, Exhibit 9)

The writing speaks for itself: The right-of-way contract had been entered into and a subsequent meeting was to be arranged to enumerate the specific portions of property to be covered in the agreement. The letter of appellant to President Moyle under date of February 8, 1961, again clearly delineates the existence of the contract in the following language which is also cited by respondent on page 8 of its brief:

While there is no immediate rush to conclude this matter, I have been holding a sizeable donation for the Church. I want to turn this over to you at the time you give me a letter stating that: In the event I would require additional land to make it possible to go around the end of the faults that might otherwise prevent me from being able to extract the coal from land lying west of the faults, the Church would agree to make it available. This is in accord with the understanding you had with Mr. Armstrong. (Respondent's Exhibit "A", pg. 8)

Appellant recognizes that it is this Court's prerogative to interpret the writings but a fair reading of the above-quoted material indicates beyond doubt that an agreement had already been reached between Armstrong and Moyle and that appellant was now simply requesting a winding up of the mechanical details to the grant of the right-of-way.

Subsequently, sometime after February 8, 1961, Mr. Armstrong met with President Moyle and de-

livered the "sizeable donation," referred to above, in the form of two \$7,000.00 checks and expressly instructed President Moyle that the checks should not be cashed "until this right-of-way was drawn up—the written right-of-way." (Armstrong deposition, pg. 11).

Q. When these checks were presented to President Moyle, did he make any response?

A. Yes. He said, "Fine. We will hold these checks until we can give you the right-of-way and until we get the lease from the government." (Armstrong deposition, pg. 13)

President Moyle handed the two \$7,000.00 checks to his assistant, Alfred W. Uhrhan, who placed them in an envelope and wrote in his own hand upon the face of the envelope: "Hold. Two checks totalling \$14,000.00. Malcolm McKinnon tendered for right-of-way. This matter is pending." (McKinnon deposition, Exhibit 12).

On September 17, 1969, in a letter to appellant, Alfred W. Uhrhan explained what Uhrhan had meant by his notation on the face of the envelope: "The two checks were handed to me personally by the late President Moyle with the instruction to hold them until the details of the right-of-way were worked out with mine management." (McKinnon deposition, Exhibit 12). This statement from President Moyle's assistant is proof positive that the agreement existed as Frank Armstrong had delineated it. The only item in the contract left for further clarification was the exact area to be affected by the right-of-way. Respondent had agreed

to grant appellant the right-of-way "around the end of the fault" (Armstrong deposition, pg. 9) and neither party then knew the extent of the faulting.

Appellant respectfully refers this Court to the arguments set forth in appellant's opening brief regarding the law in this matter. There was an agreement. The agreement was actively breached by respondent. No amount of legerdemain by respondent can obviate the *fact* that one of its highest three officials entered into a good faith agreement with appellant. Respondent obtained the benefit of the bargain when it acquired a lease it had long sought as well as \$14,000.00 from appellant. As the existence of the contract had been shown by uncontroverted evidence, respondent's first point on cross-appeal must fail.

POINT II.

THE DEFENSE OF STATUTE OF FRAUDS IS NON-APROPOS TO THE FACTS AND CIRCUMSTANCES OF THIS CASE.

Appellant has averred the existence of a constructive trust upon the lease of the 640 acres obtained by respondent under the agreement with appellant; the constructive trust arises by operation of law and, thus, the Statute of Frauds is non-apropos even though, as a matter of fact, sufficient writings are in existence to show the precise terms of the agreement. In his opening brief, appellant has set forth the relevant and material facts of this case which preclude the raising of the de-

fense of Statute of Frauds as a matter of law and this Court's attention is again respectfully directed to the argument therein contained.

Appellant would further submit that this Court should deny respondent the efficacy of the Utah Statute of Frauds by reason of respondent's unconscionable and unjust conduct toward appellant. It is beyond cavil that a party can be estopped from invoking the benefits of technical defenses such as Statute of Frauds and that such defenses should not be applied in a way which would perpetrate rather than prevent fraud. This is especially true of Statute of Frauds. *James Mack Company v. Bear River Milling Co.*, 63 Utah 565, 227 Pac. 1033 (1924); *Bracken v. Chadburn*, 55 Utah 430, 185 Pac. 1021 (1919).

The equities in this case point out precisely the difficulties encountered by courts in dealing with the defense of Statute of Frauds when the conduct of the party attempting to raise defense has been reproachful. This Court's attention is respectfully directed to a well written and thoroughly expositive article in the Utah Law Review entitled "An Appraisal of the Utah Statute of Frauds" found at 9 ULR at page 978 wherein the writer in reviewing such cases indicates that this Court has, without exception, denied the defense whenever the terms of the agreement were clear even though the rationale employed by the Court differed depending upon the facts of the particular case. See especially 9 ULR page 982-989 and cases cited therein.

A more recent case from this Court discussing the Statute of Frauds, although the decision ultimately granted defendant benefit of the defense based upon the peculiar facts of the case, is *Easton v. Wycoff*, 4 Ut. 2d 386, 295 P.2d 332 (1956) wherein the Court recognized the principle that reliance upon the promise of another to execute a writing in the future could estop the promisor to set up the Statute of Frauds as the defense to an action based upon contract. The Court cited precedent and authority including Williston on Contracts, II, Sec. 533A at 4 Ut.2d 388:

The doctrine of promissory estoppel has also been extended to permit recovery on the contract by one who has relied to his detriment on the promise of the defendant to execute and deliver a sufficient memorandum.

This rationale is critical in our case because this is exactly what respondent promised to do and then failed to perform. Thus, the unjust and unconscionable conduct of respondent gives rise to an estoppel and the Statute of Frauds is unavailable to it as a defense.

CONCLUSION

Appellant respectfully submits that the argument herein as well as that found in appellant's opening brief require reversal of the lower court's determination and remand of this cause for trial on the merits. Substantial

and material issues of fact must be resolved at trial. Respondent is not entitled to its judgment as a matter of law.

Respectfully submitted,

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