

2001

American Gypsum Trust v. Georgia-Pacific Corporation : Brief of Respondent

Utah Supreme Court

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

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AMERICAN GYPSUM TRUST,
common law trust, and JOHN PAUL
JONES, ROBERT JONES, JOHN
RUSSELL RITTER, DONALD
W. McEWEN and BARRY PHIL-
LIPS,

Plaintiffs-Respondents.

v.

GEORGIA-PACIFIC CORPORA-
TION, a corporation,

Defendant-Appellant.

BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

Case No.
13919

BRIEF OF RESPONDENTS

Appeal from the Judgment of the Sixth Judicial
District Court of Sevier County,
Don V. Tibbs, District Judge, Presiding

FILED

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Clerk, Supreme Court, Utah

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STATEMENT OF THE NATURE
OF THE CASE

Plaintiffs initiated this action, not for damages for breach of a lease, as stated by defendant in its brief, but to enforce a Declaratory Judgment previously entered with respect to defendant's obligations under said lease. (See plaintiffs' complaint, Record ("R.") 1-42.) The material documents, including Findings and Judgment, as well as the opinion of this Court, are part of the Rec-

ord. (R. 36-42; 383-425.) (The prior decision in the trial court is hereinafter referred to as "Case No. 6307," and in this Court as "The Prior Case.") Case No. 6307 was initiated as a claim for damages for breach of a "Fifty-Year Lease" ("the Lease") between the parties and for a declaratory judgment as to the rights and obligations of the parties. Violations of that Declaratory Judgment plainly constitute also breaches of the Lease. By endeavoring at the outset to characterize plaintiffs' claim as one for damages for breach of the Lease, rather than one to enforce the Declaratory Judgment previously entered, defendant begins in this Court what it attempted in the trial court, namely, an effort to secure a retrial of issues already fully adjudicated and laid to rest in Case No. 6307 and the Prior Case as decided by this Court.

DISPOSITION IN THE LOWER COURT

Defendant's statement of the disposition of this case by the trial court is not the statement contemplated by the Rules of this Court, but is a protracted argument that misstates both the disposition in the trial court and the record there made. Plaintiffs will defer to the appropriate parts of this brief rebuttal of the improper matters asserted on pages two to four of defendant's brief.

The proper statement of the disposition of this case in the lower court is that the matter was tried to the court, sitting without a jury by agreement; that the

court heard the evidence offered by plaintiff and an offer of proof made through defendant's counsel,¹ which offer was rejected; that the court thereupon ruled in favor of plaintiffs and against defendant, holding that defendant had continued to violate the Declaratory Judgment theretofore entered by that court; that the court thereafter made and entered its Findings of Fact and Conclusions of Law and Judgment, adjudging defendant to be indebted to plaintiffs in the sum of \$78,554 lease rentals for 1971, \$111,478 lease rentals for 1972, and \$91,429 lease rentals for 1973, together with interest in the aggregate sum of \$34,398.66 and attorneys' fees in the sum of \$15,000, constituting a total judgment of \$330,859.66.

STATEMENT OF FACTS

In its statement of facts, as in its statement of the disposition of the case in the lower court, defendant misstates the nature of this litigation, confuses the very simple facts of the case, and makes abundantly clear its intent and effort to secure, if it can, a complete retrial, and reversal, of the Declaratory Judgment previously

¹ Defendant argues in its brief (pp. 46-48) that the trial court's rejection of its offer of proof in some fashion denied defendant due process of law. The trial court in no way restricted or controlled defendant's presentation of its case. Defendant's counsel elected to proceed by a narrative offer of proof rather than by calling witnesses. The trial court repeatedly emphasized that defendant could call its witnesses if it wished to do so. (See, *e.g.*, Trial Transcript ("TR.") 109-111.) If defendant now regards its narrative offer of proof made through counsel as insufficient, that error is not the responsibility of plaintiffs, of the trial court, or of this Court.

entered by the trial court that was in all respects material to this case affirmed by this Court.

The following facts are the facts that are material to this litigation. Where the material facts were resolved without question by the Prior Case (No. 6307 in the District Court of Sevier County and No. 12887, 30 U.2d 6, 512 P.2d 658 (1973) in this Court), reference will be made to the findings therein. Where the material facts were or are controverted, the circumstances will be described.

1. Plaintiffs are the owners of the lessor's interest under the Lease and the Declaratory Judgment heretofore entered, and have the right to assert the claims herein asserted. (Findings of Fact No. 1 in Case No. 6307, R. 383; 30 U.2d 6, 8; admitted by defendant's counsel at TR. 95-96.)

2. "Commencing at a time soon after the merger of Bestwall Gypsum Company into Georgia-Pacific Corporation, Georgia-Pacific Corporation departed from accounting requirements of the Lease and from the accounting practices developed and agreed upon between the plaintiffs and the predecessors of Georgia-Pacific Corporation." (Finding of Fact No. 19 in Case No. 6307 (R. 392); 30 U.2d 6, 8, 10, 13.) This finding was not attacked by defendant either on its appeal in the Prior Case or at the trial of this action.

3. "The accounting procedures adopted by Georgia-Pacific Corporation since its acquisition of the

Sigurd Plant and gypsum properties in April, 1965, and the accounting books and records maintained by Georgia-Pacific Corporation are inadequate and insufficient to make a proper determination of the actual net profit or loss of the Sigurd Plant for the period 1965-1970. *Georgia-Pacific's method of accounting is geared to an individual profit center concept for each individual facility of its conglomerate structure. The Profit & Loss Statements for the Sigurd Plant contain many intra-corporate allocations. The figure shown on the Sigurd Plant's Profit & Loss Statements does not reflect the actual dollar amount of the sales of gypsum products produced at Sigurd, but is based upon a 'transfer price' which is at least 9.8% lower than the 'list price' of the product involved, and in many instances the actual selling price is substantially higher than the 'list price.'*” (Finding of Fact No. 20 in Case No. 6307 (R. 392-393); emphasis added; 30 U.2d 6, 8, 10, 12-13.) Although this finding was attacked by defendant in its appeal in the Prior Case, the finding was affirmed by this Court.

4. “The accounting records maintained by defendant for the years 1971, 1972 and 1973 [the years at issue herein], as applicable to the issues of this case, are identical in form, and in the manner of their accumulation, form, and presentation, to the material accounting records maintained by defendant for the years 1968 through 1970, which years were at issue in Case No. 6307. . . .” (Finding of Fact No. 2 in this case (R.

102.) This finding is not attacked by defendant in its brief on this appeal.

5. "Due to the failure of Georgia-Pacific Corporation to maintain adequate books and records from which a proper computation of the net profit rentals can be made for the years 1965-1970 (the period after Georgia-Pacific Corporation assumed the obligations of the Lease), it is reasonable and proper to make such a computation by using as a historical base period the years 1962-1964 (the three years immediately preceding Georgia-Pacific Corporation's acquisition), and by computing the plaintiffs' lease rentals for 1965-1970 inclusive, by using the historical base period of 1962-1964. Such computation further should take into consideration the price declines affecting the selling prices of gypsum products actually experienced during 1965-1970, inclusive. The areas used as a base for measuring such price declines should include all of the areas of the United States, except the Western United States, inasmuch as the unilateral decision of Georgia-Pacific Corporation to increase dramatically its market penetration in the Western United States renders that area an inaccurate base for comparison. The balance of the United States is a reasonable area to use as a standard for measuring price declines inasmuch as the number of residential housing starts (the principal market for gypsum products) declined more in those areas than in the Western United States during the relevant period." (Finding of Fact No. 26 in Case 6307 (R. 397-

398); 30 U.2d 6, 13.) This finding was attacked by defendant in its appeal in the Prior Case, but was affirmed by this Court.

6. Defendant is obligated by the Declaratory Judgment previously entered to account for its net profits in accordance with the accounting procedures used by the parties prior to 1965. This fact is admitted by defendant in its brief.

7. The only reasonable basis for reflecting the accounting procedures used by the parties prior to 1965 in measuring defendant's net profits is the basis employed in plaintiffs' Exhibits 139-143 in the Prior Case. (Finding of Fact No. 28 and Conclusion of Law No. 6 in Case No. 6307 (R. 339, 404); 30 U.2d 6, 12-13.) Defendant attacks this finding, as it did on its previous appeal. The finding was, however, affirmed by this Court.

8. Defendant's accounting records for the period 1971-1973 are equally as deficient as were defendant's records for the 1965-1970 period, and for the same reasons. (Finding of Fact No. 3 in this case (R. 102-103.) Defendant attacks this finding only in part, as is more fully discussed in the Argument, *infra*.

9. The same accounting procedure that served as the basis for the judgment in Case No. 6307, as exemplified in Exhibits 139-143, as affirmed by this Court, is the "best and proper accounting procedure for the determination of the lease rentals owing by defendant to

plaintiffs for the years 1971 through 1973, in accordance with the accounting methods employed by the parties prior to 1965." (Finding of Fact No. 4 in this case. (R. 103)) Defendant attacks this finding. See Argument, *infra*.

10. Application of said accounting procedure results in the judgment entered below. (See Exhibits 139A-142A in this case (R. 114-119), which are admitted, indeed contended, by defendant to be the same accounting procedure as employed in Exhibits 139-143 in the Prior Case.) The computation of the judgment is not contested by defendant. Only the accounting method is attacked, and it is admittedly the same accounting method as was employed in the Prior Case. (See admission by defendant's counsel at TR. 50.)

ARGUMENT

THE TRIAL COURT PROPERLY FOUND THE FACTS AND APPLIED THE LAW AS PREVIOUSLY ADJUDICATED BY THIS COURT AND THE COURT BELOW, AND THE RESULTING JUDGMENT IS THEREFORE ENTIRELY PROPER.

Although it occupies forty-nine pages of text and four pages of appendix, defendant's brief, stripped of repetition and efforts to retry what has been settled by prior adjudication, represents only one argument, which

is fairly stated as follows: *Defendant's accounting records are sufficient to permit determination of net profits under the Lease for the years 1971-1973 because it is possible to determine the end price of all sales of gypsum products in the Western United States from those records.*

The plain answer to defendant's argument is that it overlooks the many additional reasons for which defendant's records were found "inadequate and insufficient" in the Prior Case, both by the trial court and by this Court. Defendant did not offer to prove, and cannot prove, that the intracorporate allocations and other deficiencies that impaired the adequacy and sufficiency of its records in the Prior Case have been eliminated from its present records. Indeed, the evidence is uncontroverted that the records are still the same. (TR. 43-44.)

Defendant did not offer to prove, and cannot prove, that its activities in the Western United States, as found by the trial court and by this Court in the Prior Case, and the effects of those activities, did not persist into the period that is the subject of this case. Indeed, any such assertion would be improbable on its face, for it is contrary to reason that such effects would continue to December 31, 1970 (as found in the Prior Case) and not persist on January 1, 1971. Thus, defendant's records are also inadequate and insufficient in this case, as they were in the Prior Case, for the purpose of determining the proper amount of net profits due to plaintiffs. Defendant made no offer of proof on

this issue. The only part of defendant's offer of proof that may be arguably related does not really reach the issue at all. (See TR. 103-104.)

Defendant offered no evidence tending in any way to prove that the same base period accounting method that was affirmed by this Court previously (30 U.2d 6) was not accurate for the period 1971-1973. The trial court was therefore entirely correct in finding that such method was accurate, and was the best available method. (Finding of Fact No. 4 in this case. (R. 103.))

In its brief defendant attempts, as it did in the trial court, to assert that plaintiffs voluntarily abandoned the accounting procedure exemplified by Exhibits 139-143. This false assertion is made repeatedly throughout defendant's brief. The short and compelling answer to this assertion is contained in defendant's brief itself, at page 34, wherein it quotes (for the only time fully and accurately) plaintiffs' counsel at the trial court hearing on modification of the Findings of Fact and Conclusions of Law in Case No. 6307 as follows:

"Now, it may be that the records they have will not allow such a [direct] calculation, and if so, I suppose we'll have to go to some sort of an extrapolation exhibit, such as was contained in Exhibits 139 and 143. . . ."

At the time the Declaratory Judgment was modified, plaintiffs had no way of knowing what changes, if any, defendant would make in its accounting records.

Surely, in the light of this Court's decision in the Prior Case, a reasonable business man may have been expected to have modified his accounting records to restore them to the equivalent of the records accumulated and maintained by defendant's predecessor before 1965. When this case was commenced and the records were obtained, however, plaintiffs found that defendant had made no changes whatever in its accounting methods or records. (TR. 43-44; Finding of Fact No. 2 in this case (R. 102.)) *There is no dispute as to this fact.* Thus, neither plaintiffs nor the trial court had any alternative except to use the same accounting method that was used and affirmed by this Court in the Prior Case, because all of the applicable accounting records are the same.

The possibly confusing effect of defendant's method of argument in its brief should not be permitted to obscure the obvious fact, namely, that if defendant should be successful in this appeal, it will have induced this Court to reverse entirely the position it took on the proper accounting method in the Prior Case, which method, on the facts of this case, is mandated by the Declaratory Judgment entered in the Prior Case.

On the issue here presented for decision by defendant's arguments, this Court was not divided. As we understand the position of the dissenting justices, the principal disagreement with the majority related to the requirement that the Sigurd Plant produce and account for at least 128,539,000 square feet of wallboard per year. The majority would permit plaintiffs to claim

credit to Sigurd for all product sold in the Sigurd marketing area. The dissenting opinion of Justice Ellett would restrict the claim to Sigurd's actual production. That issue is not now in dispute, for defendant has admitted an obligation to account for as much as all sales within the Sigurd Market, which are greatly in excess of 128,539,000 square feet per year (See admission of defendant's counsel at TR. 65), and does not contest the position of the majority in the Prior Case on this appeal. The dissenting opinion further urged that the determination of net profits be made "under the guidelines which the Bureau of Internal Revenue would approve if no consolidated return was made." (30 U.2d 6, 15.) Defendant has not attempted to present any such determination. Review of defendant's offer of proof establishes a complete failure to assert either that defendant had made any such determination, or that such a determination was possible from defendant's records.

Thus, the issues drawn between the majority and the dissenting opinions in the Prior Case are not presented again here. Defendant has not presented any evidence or asserted any claim in accordance with the reasoning or conclusions of the dissenting opinion. Rather, the issues presented for decision in this case relate entirely to the interpretation to be accorded the majority opinion, and the Declaratory Judgment entered and modified by the trial court. On this issue, the narrow question is whether defendant can overcome the deficiencies in its accounting records that required determination of net profits for the period 1965-1970 in

accordance with the method of Exhibits 139-143, by the *single expedient* of offering to prove that its records show the prices at which *all* gypsum products were sold in the *entire* Western United States during the relevant period. If we were concerned with all of such sales, and if the absence of this total sales data were the only deficiency in defendant's records, defendant's offer might then suffice. We are, however, only concerned with the proper part of such sales (and defendant has not asserted that its records showing final sales prices can be segregated so as to include only the proper sales). More importantly, defendant has offered no evidence and does not even claim that its records are not now subject to the other serious deficiencies that made them inadequate and insufficient in the Prior Case. If defendant's offer of proof had been that there were now records available that were accumulated and presented in the same manner and by the same methods as were employed between the parties in the pre-1965 period, we would have a different case. Defendant did not make any such assertion in its offer of proof because any such assertion would be contrary to fact. The uncontested evidence is, and the trial court found, that defendant's accounting records were in all material respects identical to those previously examined, and received in evidence, for the 1965-1970 period. That being the case, the trial court was plainly correct in applying to those records that same accounting method as was applied to the identical records in the Prior Case in arriving at its judgment in this case.

CONCLUSION

The Court should not permit defendant to secure a retrial, and a further appellate review, of issues settled by prior adjudication of the trial court and of this Court. The action of the trial court in this case conforms to the Opinion and Judgment of this Court in the Prior Case, and to the Declaratory Judgment entered by the trial court in that case. If defendant's argument is accepted, the prior adjudication, and the Declaratory Judgment, will be meaningless, and plaintiffs will be compelled to adjudicate anew each year. This would be the very result that the Declaratory Judgment was entered to avoid.

Respectfully submitted,

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