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Ernest E. Blake v. Hubert C. Lambert : Brief of Appellant

Utah Supreme Court

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13

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

ERNEST E. BLAKE,

Plaintiff and Appellant,

vs.

HUBERT C. LAMBERT,
STATE ENGINEER,

Defendant and Respondent.

CASE NO.

15668

BRIEF OF APPELLANT

Appeal from a Judgment and Decree in favor of the Defendant and Respondent of the Fifth Judicial District Court of Washington County, State of Utah.

The Honorable George E. Ballif, District Judge

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

ERNEST E. BLAKE, Plaintiff and Appellant, vs. HUBERT C. LAMBERT, STATE ENGINEER, Defendant and Respondent.	CASE NO. 15668

BRIEF OF APPELLANT

Appeal from a Judgment and Decree in favor of the Defendant and Respondent of the Fifth Judicial District Court of Washington County, State of Utah.

The Honorable George E. Ballif, District Judge

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TABLE OF CONTENTS

TABLE OF CONTENTS--Continued

CASES CITED

STATUTES CITED

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STATE OF UTAH

ERNEST E. BLAKE, Plaintiff and Appellant, vs. HUBERT C. LAMBERT, STATE ENGINEER, Defendant and Respondent.	)	CASE NO. 15668

BRIEF OF APPELLANT

THE NATURE OF THE CASE

Action on complaint by appellant, against the respondent for a judgment requiring the respondent to set aside respondent's order dated January 12, 1973, which refused to extend the time for the appellant to put water to beneficial use appropriated under three applications, Nos. 33554, 35444 and

36570, and declare the same to be in full force and effect and granting appellant a further extension of time with which to make proof of appropriation.

DISPOSITION OF THE CASE IN THE LOWER COURT

The case was tried by the Court, sitting without a jury, and the Court entered a Judgment and Decree on all issues in favor of respondent and against appellant.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the Lower Court's judgment and decree and he be granted a new trial, or determine that the Lower Court had erred in granting judgment and decree in favor of respondent and order as a matter of law from the facts adduced at the trial that the judgment and decree should have been rendered in favor of appellant and so order an extension.

STATEMENT OF FACTS

APPELLANT FILED A THIRD AMENDED COMPLAINT TO HAVE HIS APPLICATIONS TO APPROPRIATE WATER, BEARING APPLICATION NOS. 33554, 35444, and 36570, BE DECLARED TO BE IN FULL FORCE AND AFFECT AND TO GRANT TO HIM FURTHER EXTENSION OF TIME WITHIN WHICH TO MAKE PROOF OF APPROPRIATION UNDER EACH OF THE APPLICATIONS AND FOR OTHER RELIEF DEEMED JUST.

Appellant filed a complaint (R. Pages 1 and 2) on March 10, 1973, against respondent, which complaint was later amended and designated as amended complaint (R. Pages 5 and 6), and again amended and designated as third amended complaint (R. Pages 7 and 8), which substituted the name of Dee C. Hansen, who succeeded Hubert C. Lambert and Dean Smith as State Engineers for the State of Utah, but the Court below rendered its decision (R. Page 39), and its findings of fact (R. Page 43), and its decree (R. Page 50), naming Hubert C. Lambert, State Engineer, rather than his successor, Dee C. Hansen. In all complaints (R. Pages 5, 6 and 8), appellant alleged that he had filed with respondent three applications to appropriate water in varying quantities from points of diversion in the County of Washington, State of Utah, which applications were assigned Nos. 33554, 35444 and 36570 respectively. That each application was approved by respondent, subject to appellant making proof of appropriation on each application within stated times and extensions to make proof of appropriation on each application had been granted by respondent from time to time to November 30, 1972, at which time respondent refused to give a further extension to appellant and canceled all three applications.

Appellant further alleged that respondent in refusing

to grant him a further extension of time to make his proof of appropriation discriminated against him and acted arbitrarily, capriciously and contrary to law, causing him irreparable injury (R. Pages 5, 6, 7 and 8), and praying the Court declare all three applications in full force and effect, and he be granted a further extension of time in which to make proof of appropriation (R. Pages 2, 6 and 8).

Respondent answered appellant's complaint (R. Pages 11 and 12), and in the second defense (R. Pages 11 and 12), alleged that in the extension issued on February 4, 1972, appellant had been advised that further application for extension would be critically reviewed and denied appellant had shown proper diligence or reasonable cause for delay in perfecting his water rights under the three applications.

The facts upon which appellant relies in support of his complaint are these:

The appellant filed application No. 33554 to appropriate one C.F.S. of water for irrigation and stock watering purposes from certain open cuts located in Section 35, Township 40 South, Range 16 West, Salt Lake Base and Meridian (Ex. 4), which was approved on November 23, 1962. Another application was filed by appellant and assigned No. 35444, (Ex. 3), and approved on February 11, 1965, which sought to appropriate .5 C.F.S. of water for domestic,

stock watering, and irrigation purposes from Rock Hollow Wash (Drain), located in Section 35, Township 40 South, Range 16 West, Salt Lake Base and Meridian. The water was to be used in the southeast 1/4th, Southwest 1/4th, of Section 35, Township 40 South, Range 16 West, Salt Lake Base and Meridian. The third application filed by appellant bore No. 36570 (Ex. 2), was approved on July 11, 1966, and sought to appropriate 3.0 C.F.S. of water for irrigation, domestic and stock watering purposes. This water was to be appropriated by means of drains located in Wide Canyon, Section 26, Township 40 South, Range 16 West, Salt Lake Base and Meridian.

Various extensions were granted to appellant by respondent to allow him to submit proof of appropriation for beneficial use of the water as follows.

Application No. 33554 (Ex. 4), approved on November 23, 1962, gave appellant to November 30, 1964, within which to construct his works, place the water to beneficial use, and submit proof of appropriation. Further extensions were granted to November 30, 1966, November 30, 1968, November 30, 1971, and the last extension to November 30, 1972.

The same procedure was followed as to application

No. 35444 (Ex. 3), that is, appellant was to complete what he was required to do by November 30, 1967, later extended to November 30, 1968, then to November 30, 1971, with the last extension terminating on November 30, 1972. Application No. 36570 (Ex. 2), was processed in the same manner. Appellant was allowed initially until November 30, 1968, to perform as required by respondent. This period was extended to November 30, 1969, and further extended to November 30, 1971, and ending with the extension to November 30, 1972.

Application No. 33554 was kept alive for a period of ten years, while No. 35444 died in less than six years, and application No. 36570 suffered the same fate after about seven years.

The appellant, without his own labor, spent for the development work required to be done by him to perfect his rights to the water spent on 35444 the sum of $400.00 (T. Page 25 Line 11), on Application No. 33554, $2,100.00 (T. Page 73 Line 4), and on 36570 the sum of $200.00 (T. Page 72 Line 17). These expenditures do not tell the complete story, for appellant did not keep detailed records (T. Page 30 Lines 8 to 10). Also, he did extensive work himself (T. Page 24, Lines 9 to 22, Page 25, Lines 15 to 19, Page 26, Lines 20 to 24).

Appellant needed the extensions on his three applications for various reasons as follows:

A. No. 33554 (Ex. 4, Tab 11), completion of development had been prevented by reason that appellant had been compelled to participate in a long drawn-out divorce, which was still in the Courts, and difficulties the appellant was having with the Bureau of Land Management. These were the grounds given for the extension requested on Form 29, in the office of the State Engineer of Utah in his request for reinstatement and extension of time dated November 18, 1973, (Ex. 4, Tab 11).

B. No. 33554 (Ex. 4, Tab 5), in the application for extension dated November 15, 1968, appellant stated he had been prevented from completing the development by the Bureau of Land Management of the United States, who accused him of trespassing on government land when he began digging ditch and laying pipe without first obtaining its permission. Appellant was compelled to remove the pipe and fill the ditch, and appellant believed from what he had understood from the agents of the Bureau of Land management that, since removal had been made and the ditch filled, he would be granted the necessary permission to go over the government land legally, thereby being able to do the necessary work to put the water into beneficial use.

The history of the trespassing on the United States Government land was due to a misunderstanding on the part of appellant. The respondent had approved the Application No. 33554 (Ex. 4), and shortly thereafter he got a letter, or a piece of paper, sent out by the Bureau of Land Management (T. Page 17, Lines 1 to 5), which stated the Bureau had no right to interfer with officers of the State, fish and game, and appropriation of water. Appellant took this to mean he had a right to go over the land owned by the United States to carry the water to his land, and he made a road (T. Page 17, Lines 6 to 10), dug a ditch and did other work. The Bureau of Land Management told him to stop any further work and accused the appellant of being a trespasser on the public domain (T. Page 17, Lines 11 to 30. This occurred in 1965 or 1966, (T. Page 18, Lines 2 to 4). He followed the instructions of the Bureau of Land Management and got back in their good graces, but it took a long time, sometime in 1968, (T. Page 18, Lines 25 and 26), and then further complication occured when the Bureau of Land Management required that he post a performance bond, but, due to his financial conditions at the time, was unable to do so, (T. Page 19, lines 7 to 29)

Appellant could not do the work required to perfect

proof of appropriations of water for the same reasons, upon the same grounds, more or less, stated for the other applications, but he had done work and spent money on all three applications (T. Pages 25, 72 and 73, also, (T. Page 25, Lines 9 to 22, Page 25, Lines 15 to 19, Page 26, Lines 20 to 24).

ARGUMENT

POINT I.

THAT THE COURT ERRED IN FINDING AND SO ENTERING ITS JUDGMENT AND DECREE THAT THE PLAINTIFF AND APPELLANT FAILED TO SHOW DUE DILIGENCE, OR REASONABLE CAUSE, FOR DELAY IN CONSTRUCTING HIS PROJECT PLACING THE WATER TO BENEFICIAL USE, AND SUBMITTING PROOF OF APPROPRIATION FOR APPLICATIONS NOS. 33554, 35444 and 36570.

73-3-12, Utah Code Annotated, 1953, and the Amendments thereto, provides "The construction of the work and the application of water to beneficial use shall be diligently prosecuted to completion within the time fixed by the State Engineer. Extension of time, not exceeding 50 years from date of approval of the application, may be granted by the State Engineer on proper showing of diligence or reasonable cause for delay- - - - but extensions beyond 14 years shall be granted only after appli-

cation, publication of notice and a hearing before the State Engineer- - - -".

The word "diligence" used in the statute supra has many meanings. In Carbon Canal Co., v. Sanford Water Users Assn., 10 Utah (2d, 376, 353 P. 2d, 916), the Court said to determine whether due diligence has been pursued to commence construction of works to appropriate water under an application is a question of fact to be determined from all the surrounding circumstances. Thus, the word "diligence" is not really defined by this criteria.

Let us examine the circumstances. We contend that the circumstances show diligence on the part of appellant. In the statement of facts, we brought out that appellant had spent money, had put in considerable labor of his own and done everything he could to put the water into beneficial use; that certain matters arose beyond his control which delayed his progress. True, this Court has held that personall reasons, such as financial and health, are not factors to be considered, but, in the instant case where these factors occur, a little more weight should have been given and ought to be given to the amount of money spent and the labor put in by the appellant, since,

on two applications only extensions amounting to less than seven years were given and on another, only about ten years. The State Engineer is given wide discretion by the statute in approving extensions up to fourteen years without having to give notice to anyone and can give up to fifty years by giving notice, publication, and having a hearing. We contend that the short time given to the appellant was arbitrary and capricious. The respondent said (T. Page 65, Lines 4 to 9),

> "MR. HANSEN: We approved those three and gave Mr. Blake the opportunity to secure the right-of-way for ten, seven, and six years, and he was unable to do that.
>
> If someone else were to file and ask for that same type of privilege, they probably wouldn't get that long now. I'm tougher than Mr. Lambert was".

Now, what kind of guide lines or standards does the office of the State Engineer have when the only grounds the present State Engineer gives as to why he thought others who may give the same reasons as the

appellant for extensions would turn them down on the grounds that he is tougher than his predecessor?

POINT II

THAT THE COURT ERRED IN FINDING AND SO ENTERING ITS JUDGMENT AND DECREE THAT THE SAME FACTS APPLIED EQUALLY TO THE THREE APPLICATIONS DESCRIBED IN POINT I FOR REFUSAL BY THE DEFENDANT AND RESPONDENT TO GRANT PLAINTIFF AND APPELLANT A FURTHER EXTENSION OF TIME TO PLACE THE WATER TO BENEFICIAL USE. ALTHOUGH EACH OF THE THREE APPLICATIONS WERE FILED AND APPROVED IN DIFFERENT YEARS.

We must emphasize strenuously that all three applications were denied, although each was a separate application and the number of years for which extensions have been given were not the same. That, in fact, for two of the applications, less than seven years was given to appellant to submit his proof. The respondent submitted no testimony why the amounts spent and the labor performed by the appellant was insufficient to show diligence towards making his proof of appropriation, nor is there any evidence that the amounts spent or the labor performed should have been the same for

each of the three applications. These three applications were lumped together.

The attorney for the respondent, (T. Page 72, Lines 11 to 30 and Page 73, Lines 1 to 10), argued that at the rate the appellant had been spending the money it would take many, many years for him to complete the program. This argument has no merit. The appellant can do the work necessary at a very excelerated pace. His past performance is no criteria. The only other argument was about getting a right-of-way over government land.

Exhibit 10 identified and marked (T. Page 27), as the Court will note, did not come out clearly in the reproduction, but on (T. Page 28), it was pointed out that the decision of the State Engineer in lapsing the application was the grounds for the Bureau of Land Management ordering the appellant to undue the trespass he had committed on government land. Presumably, since the appellant had no live applications for water over which a right-of-way was needed on government land, the Bureau of Land Management said nothing further about a right-of-way and the appellant couldn't do anything further until his applications were re-instated. So

the appellant found himself in the position where the respondent uses as an argument that the appellant does not have a right-of-way over government land and it would be a useless act to grant further extensions, while the Bureau of Land Management bases its decision on the ruling of the State Engineer. The appellant is caught in the cross fire between the two bureaucracies and cannot make a move unless given relief by this Court.

The decree of the Court (Page 50, File of the District Court), is limited to plaintiff's failure to show due diligence or reasonable cause for delay in constructing his project and the decision of the State Engineer was approved and affirmed. In the Findings of Fact (Page 46, File of the District Court, Para. 2(d), Page 47, Para. 3(d), findings were made that plaintiff had not secured the rights-of-way from the Bureau of Land Management necessary to perfect the applications, nor any assurances that they would ever be issued. This indicates that the Court below may have ruled differently had assurances been given but the Court did not take into consideration that the Bureau of Land Management would want assurances that the applications

would be revived. The Court below was unduly impressed and gave undue weight to this. The Bureau of Land Management has never refused giving him the right-of-way. The trespass confused the issue and the refusal to give further extensions compounded the confusion.

POINT III

THAT THE COURT ERRED IN FINDING AND SO ENTERING ITS JUDGMENT AND DECREE APPROVING AND AFFIRMING THE DECISION OF THE DEFENDANT AND RESPONDENT, WHICH DENIED APPELLANT FURTHER EXTENSIONS OF TIME AND LAPSING OF ALL THE APPLICATIONS DESCRIBED IN POINT I, AND SAID JUDGMENT AND DECREE IS IN VIOLATION OF THE LAWS OF EQUITY.

All the arguments made in support of Points I and II supra apply to Point III.

CONCLUSIONS

The appellant respectfully submits that the Lower Court should not have entered the decree it did, but should have found and so ordered that appellant had exercised due diligence in working to construct his project and had reasonable grounds for another extension, since all of the extensions were for a period of less

than 14 years, and on two of them the period was less than seven years.

Appellant believes that decree in favor of respondent should be reversed, and this Court give a reasonable extension of time for the appellant to complete his project, or order the trial Court to do so, or order the State Engineer to do so, or make any other order which would accomplish the purpose sought by the appellant.

Respectfully submitted,

JOSEPH C. FRATTO,
ATTORNEY FOR APPELLANT.

CERTIFICATE

Delivered two copies of the foregoing Brief of Appellant to Dallin W. Jensen, Assistant Attorney General, Attorney for Respondent, 442 State Capitol Building, Salt Lake City, Utah 84114, on the ____ day of June, 1978.