

2001

Gibbons and Reed Company v. City of Ogden, Utah, Utah State Road Commission, Oscar A. Robin, Hardy Scales Co. : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH
BYU YOUNG UNIVERSITY
J. Reuben Clark Law School

GIBBONS AND REED COMPANY, a)
Utah Corporation,)

Plaintiff and Appellant,)

Case No. 14030

vs.)

CITY OF OGDEN, UTAH, a municipi-)
pal corporation; UTAH STATE ROAD)
COMMISSION; OSCAR A ROBIN; and)
HARDY SCALES CO., a corporation,)

Defendants and Respondents.)

RESPONDENT, CITY OF OGDEN, UTAH'S BRIEF

Appeal from a Judgment of the District Court
of Weber County
Honorable Ronald O. Hyde, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

GIBBONS AND REED COMPANY, a)	
Utah Corporation,	(
Plaintiff and Appellant,)	Case No. 14030
vs.	(
CITY OF OGDEN, UTAH, a municipi-)	
pal corporation; UTAH STATE ROAD	(
COMMISSION; OSCAR A. ROBIN; and)	
HARDY SCALES CO., a corporation,	(
Defendants and Respondents.)	

BRIEF OF DEFENDANT-RESPONDENT, CITY OF OGDEN, UTAH

NATURE OF THE CASE

This respondent agrees with appellant's statement of the nature of the case.

DISPOSITION IN LOWER COURT

The trial court entered judgment in favor of all defendants and respondents, no cause of action.

RELIEF SOUGHT ON APPEAL

Ogden City seeks the affirmance of the trial court's determination and judgment of no cause of action in favor of all defendants.

STATEMENT OF FACTS

The statement of facts submitted by the appellant are substantially correct but the city adopts the more com-

plete statement of facts made in the brief of Respondents Robin and Hardy Scales Company with the additional statement that the appellant filed its claim with Ogden City, on which this action is based, on September 3, 1968. The option, on which the suit is based, is dated September 30, 1965 and it expired by its terms December 31, 1966.

ARGUMENT

I

THE OPTION WAS DEFECTIVE AND INCOMPLETE AND WAS, THEREFORE, NOT A BINDING CONTRACT.

The option was drawn by the State Road Commission (R-560). It is to be construed against that commission in the event of ambiguity or uncertainty. Jensen vs. Anderson, 24 Ut. 2d 191, 468 P.2d 366, first head note reads "Option Agreement would be strictly construed against party who drew it."

The option clearly indicates as was testified to by the representatives of the Road Commission at the trial that it is in effect a hunting license. Witness Shrader, page 585, line 14-17, testified for appellant: "I think that a contractor before he even submits a bid, I think, should find out from the property owner if material is available or not." It merely attempted to advise potential or successful bidders as to where they might negotiate for and perhaps obtain fill material. The amount of fill to be sold, "if any", by the City was left to future negotiations, also, the removal of any material thereafter to be removed was at the owner's lines

and grades. It is obvious that a very critical element of a contract is missing from this document, and that is the amount of fill, if any, the City would be willing to have removed from this property. Appellant's witness Shrader (R-586) testified that under this "option" "the property owner could limit it to six inches or to top soil."

At the trial this interpretation was clearly shown by the evidence presented that the property is very valuable industrial property located at a strategic intersection of freeways (R-759). It was further testified that the sanitary sewer is available, (R-762) culinary water is available and the property lends itself to easy and profitable industrial development in its present condition but, if it is cut down as the plaintiff desired, its usefulness for industrial purposes would be practically destroyed (R-761 - 765). No reasonably intelligent owner of this property would, under any circumstances, have allowed the removal of the material claimed by the plaintiff. Such removal would have left slopes on that property to be maintained and stabilized by the owner. Those slopes would have made about three acres of the property, under the slopes, totally unusable. Such land removal would have required pumps to get the sanitary sewage into the sewer lines at a substantial cost and inconvenience. The access to the land would have been up an incline which would have to be maintained as well as using additional land for the incline (R-761-765).

These potential problems needed further negotiations by the land owner and anyone desiring to remove any soil from this property.

In no way does the option agreement either mention, hint at, or in any other way allude to any amounts of materials, let alone 500,000 cubic yards as mentioned in plaintiff's complaint.

In Hansen v. Snell, 11 Ut. 2d 64, 354 P.2d 1070 (1960), this court held that where a real estate listing contract stated "terms to suit the seller," seller was justified in asking for \$5,000 down and \$400 per month with ten per cent interest on the unpaid balance even though those terms prohibited the sale as a practical matter. In a well reasoned opinion, the court stated:

"She (the seller) cannot be held to any other commitment than that expressed therein: that she would sell the property on her own terms."
P. 1072 Pac.

In the present case, Ogden City can be held to no other commitment than that expressed in the option; that is, if at some future time the parties negotiate and agree that a certain amount of materials is to be taken, and establish lines and grades, etc. then the price will be \$.03 per cubic yard. Any agreements as to specific amounts of materials in the option, or commitments to furnish any materials whatsoever just aren't there.

If a contract is so indefinite that the courts can't

determine what is specifically contracted for, it is unenforceable.

In Valcarce v. Bitters, 12 Ut. 2d 61, 362 P.2d 427 (1961), plaintiff sought to have a promissory note cancelled which he had given to defendants. Plaintiff alleged that the note was a part of a side agreement on the sale of several mink. Plaintiff could not delineate the sale agreement with sufficient certainty to satisfy the court that the agreement could be enforced. This court stated that a contract requires definiteness to be enforceable.

"A condition precedent to the enforcement of any contract is that there be a meeting of the minds of the parties, which must be spelled out, either expressly or impliedly, with sufficient definiteness to be enforced."
P. 428 (Emphasis added)

Even though it is evident no minds met as to amounts, such amounts, if agreed upon, are not stated with any definiteness or at all. The plain, simple wording of the contract clearly declares that the City of Ogden reserved the right so to determine amounts. The contract requires future arrangements to be "made for each, or any, occupancy or removal." And, according to the option, any materials which may be removed "must positively be removed to the owner's lines and grades." Thus, if at some future time some amount might be agreed upon to be taken, arrangements for those amounts would have to be made, including what amount, what lines and what grades. From the plain wording of the agreement, it is

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be enforceable.

between the parties, therefore, it is illusory and unenforceable.

ARGUMENT II

COMPLY WITH THE STATUTE OF FRAUDS.

This "option" does not comply with Section 25-5-3, Utah Code Annotated, 1953, for much the same reasons as set forth under the previous argument. Clearly, the statute of frauds requires the writing to contain all the elements of the contract. This writing does not define the amount of fill to be removed and it, therefore, does not comply with the statute of frauds and it is unenforceable.

The case of Birdzell v. Utah Refining Co., 121 Ut. 412, 242 P.2d 578 (1952), was an action for damages for breach

of an oral contract to sub-lease land. The plaintiff used a letter from the defendant as the memorandum in writing to satisfy the statute of frauds. The court held the memorandum insufficient. The court said on page 580 of the Pacific Reporter:

"It is fundamental that the memorandum which is relied upon to satisfy the statute of frauds must contain all the essential terms and provisions of the contract. . . . Hawaiian Equipment Co. v. Eimco Corp., Utah, 207 P.2d 794. As will be noted, the letter does not state what amount the rent shall be but expressly leaves that question open for further negotiations. In an oral contract to execute a lease for a period longer than one year, the amount of the rent is clearly one of the essential terms which must appear in a memorandum. The court in Rohan v. Proctor, 61 Cal.App. 447, 214 P. 986, 988, stated that "it may be stated as settled law that a memorandum of agreement for a lease which is required to be in writing, in order to satisfy the statute of frauds, must contain all the essential and material parts of the lease which is to be executed thereafter according to its terms, and particularly must contain three essentials in order to (sic) its validity under the statute of frauds. These are: First, a definite agreement as to the extent and boundary of the property to be leased; second, a definite and agreed term; and third, a definite and agreed rental and the time and manner of its payment."

The essential item left out in that writing was the amount of the rental. In the case at bar, the essential item left out of the "option" is the amount of material to be removed, if any.

In Baugh v. Logan City, 495 P.2d 814, 27 Ut. 2d 291, the court held there was no memorandum in writing sufficient

to take the claimed agreement for the purpose of rent out of the statute of frauds. The court cited the Birdzell case with approval and, in that case the default was that the land to be exchanged was not adequately described and, therefore, the statute of frauds was not satisfied.

The appellant argues that even though this agreement is vague and incomplete, the court should determine that it is still a binding contract and the city is obligated to supply the fill dirt from the land involved to the extent that a "reasonable" owner would supply. The city totally disagrees with this concept. Land has been considered a unique item and the option reserved to Ogden City full control of this unique property. That control included the right to determine how much, if any, was to be removed and exactly the lines and grades of that removal. For the Court to now substitute its determination as to what is reasonable removal when the city reserved total control is for the court to make a totally new and different contract on behalf of the city.

In the recent case of Thomas J. Peck v. Lee Rock Products, 515 P.2d 446, 30 Ut. 2d 187, the item which was indefinite was the price. The applicable contract provision read as follows:

"Added Option

"Upon mutual agreement between Clinton L. Lee and Thomas J. Peck, Thomas J. Peck shall have the option to buy the equipment and business

from Clinton L. Lee for the price to be mutually agreed upon by both parties at any such time after business is in complete operation. The price shall be determined by two competent appraisers and agreed upon by both concerned parties - Lee and Peck.

"The payment is to be mutually agreed upon by both parties."

Certainly, a reasonable price is a much easier item for the court to have determined than how much fill can reasonably be removed from a piece of valuable industrial property. In the Peck case, the Utah Supreme Court held the option to purchase illusory and indefinite and unenforceable. The court did not hold, as the plaintiff urges in this case, that the parties intended a reasonable price which the court would undertake to determine and make the option enforceable.

Likewise, in the Birdzell case, supra, the only critical item left out of the memorandum was the amount of the rental for the property involved. Under the plaintiff's theory, the court in that case would have held the parties intended a reasonable rent and would have made a determination of what that amount would be. The court did not do that, it held that the proposed agreement was unenforceable because the parties had not agreed on and reduced to writing the essential item in that case, the amount of the rent, in the case at bar the essential item not agreed to and not reduced to writing was the amount of fill to be removed. This agreement is, therefore, unenforceable as it does not comply with the statute of frauds.

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In the event the court does interpret the contract that the city is bound to supply the amount of material reasonable under the circumstances, the amount authorized would, in no event, exceed six feet average depth because no reasonable owner would consent to destroying or to even slightly decrease the value of this property for industrial purposes in exchange for fill material at three cents per cubic yard. To determine the reasonable amount, the income to the owner balanced against the damage to the land would be the most critical factor to consider. The undisputed testimony is that the land is worth at least \$10,000.00 an acre (R-765) for industrial purposes. The removal of 500,000 yards would have netted the owner \$15,000.00 (R-765) for the material and it would have decreased the value of the land for industrial purposes from \$10,000.00 an acre to \$500.00 an acre (R-765). The removal of an average of six feet at the very most would have been authorized by any reasonable owner and, as testified by Mr. Griffin, this would have produced 198,000 yards (R-568).

Another problem arises, if the court takes the reasonable amount theory, the damages testified to by the plaintiff's agents would not be applicable. That amount of fill would have been used south of the railroad crossing and many of the cost factors included in plaintiff's computation would not be applicable and no damage figures could be

determined.

The appellant puts much reliance on the discussion between the assistant city engineer, Ray Kimball, and the representative of Gibbons and Reed. Interpreting this discussion most favorably to the appellant, it does not cure the defects in the "option" or it does not satisfy the statute of frauds requirement. The validity of the option as a binding contract or its compliance with the statute of frauds are to be determined by the document itself and not by parol evidence of subsequent events. Davison v. Robbins, supra.

ARGUMENT III

OGDEN CITY IS NOT ESTOPPED FROM CLAIMING THAT THE "OPTION" WAS TOO VAGUE AND THEREFORE UNENFORCEABLE.

The claimed estoppel seems to be based on the discussion between Mike Gibbons and C. R. Kimball, Assistant Engineer. That conversation should be put into its proper perspective. Gibbons was referred to Kimball by Kimball's old friends at Gibbons and Reed (R-617). The conversation seems to be primarily a discussion as to how much dirt would result from various removal depths. There is no clear statement that Mr. Kimball attempted to authorize on behalf of the city, the removal of any dirt or to any specific depth. Kimball's deposition states there was no attempt by him to establish lines or grades or by anyone in the city engineering office known to him (R-786). It was primarily an engineering discussion, not to the question as to how much the city, land-

owner, would allow removed. There is no testimony that Kimball purported or authorized the removal to any depth. Mr. Kimball was an employee only of the engineering department, he was not the city engineer, the public works director or the city manager. His authority was limited to advising the city engineer (R-756) (R-784). These facts were known or should have been known to Gibbons. The dealings concerning the option were made with Kelley as public works director and with Sam Hood as city manager. That alone is notice that the action of those officials would be required as to this important item as to depth of removal from this very expensive, valuable industrial property. Any damages Gibbons suffered was due to their own conclusions and desires. Appellant apparently desired to remove as much dirt from this land as it could because its location and the cost was very low. It made these determinations without any consideration of the landowner's interests. As testified by Mr. Kelley, the removal of the amount of dirt claimed would substantially destroy this very valuable property for industrial purposes. It would require the installation of sanitary sewer pumps where the land in its present condition can be served by sanitary sewer by gravity (R-762). Such removal would result in steep slopes, difficult to stabilize and expensive to maintain (R-760, 761 762 and 764). Such removal would require expensive, inconvenient, land consuming access roads (R-762). All of these factors would substantially reduce the

value of the property for its obvious use as prime industrial property--according to Kelley from \$10,000.00 an acre to \$500.00 an acre (R-765). All of these facts were known or should have been known to the appellant and rather than assuming that it could remove as much dirt as it wanted, it should have considered the landowner's position and negotiated with the officials of the city who had authority to act and take into consideration these factors which would result in only a small amount of dirt being removed from this property so that it could still retain its very valuable use as industrial land. Mr. Gibbons discussed none of these items with Mr. Kimball (R-619, 621). Appellant was going to handle this valuable industrial land the same as a gravel pit with no concern for its use for industry (R-618).

ARGUMENT
IV

THE OPTION, EVEN IF VALID, WAS NEVER EXERCISED TO BECOME A BINDING CONTRACT TO SELL MATERIALS FROM THE LAND.

The court found and the record shows that no demand was made for any fill to any responsible and authorized city official. The option, even if valid, was never exercised. There was, therefore, no breach by the city, even assuming a valid option. Mr. Reed, for appellant, testified no demand was made on the city (R-640, 641 and 645).

The Utah State Road Commission, in its brief, states

that the option agreement was enforceable and that Ogden City should respond in damages to Gibbons and Reed. The city's answers to this argument are set forth in Argument I and II of this brief, i.e. the option is illusory and unenforceable and that it does not comply with the statute of frauds. That being the case, the appellant does not have any claim against any defendant, including the State Road Commission based on that "option." If the State Road Commission has other obligations to appellant on the bidding documents, as claimed by appellant, that does not involve the city.

ARGUMENT

V

ANY DAMAGES SUFFERED BY APPELLANT WERE NOT CAUSED BY OGDEN CITY.

Any damages suffered by Gibbons and Reed were due to the unreasonable and unfounded assumptions of its officers or employees. None of those losses were caused by Ogden City. It is amazing that such an experienced contractor and its officers would assume that Ogden City, or any other property owner would consent to receive \$15,000.00 (which is 3¢ a yard for 500,000 cubic yards of fill (R-765)) and allow the destruction of about twenty acres of prime industrial property which is reasonably worth \$10,000.00 an acre (R-765) or a total of \$200,000.00 before the dirt removal, but approximately only \$500.00 per acre (R-765) or a total of \$10,000.00 after the removal. The appellant's officers should have

assumed the landowner would reasonably protect its land and not allow its destruction and made their assumptions accordingly. The appellant's losses, if any, are not the city's obligation.

ARGUMENT
VI

ASSUMING THE APPELLANT'S CLAIM THERE ARE NOT FINDINGS ON ALL ISSUES IS CORRECT, THE FINDINGS MADE DISPOSE OF THE CASE AND FINDINGS ON OTHER ISSUES ARE UNNECESSARY.

The case is disposed of by the findings which were made and it is purposeless and unnecessary to make findings on the other issues. The findings support the judgment and the judgment should be affirmed.

ARGUMENT
VII

APPELLANT'S CLAIM AGAINST THE CITY WAS NOT TIMELY FILED.

The option was dated September 31, 1965, and it expired by its term December 31, 1966. The claim against Ogden City was filed by the plaintiff September 3, 1968. The Governmental Immunity Act, Title 30 of Section 63 which Governmental Immunity Act took effect July 1, 1966, Section 63-30-13 reads as follows:

"63-30-13. Claim against political subdivision--
Time for filing notice--Claim against city
or town for injury on highways, bridges, or
other structures.--A claim against a political
subdivision shall be forever barred unless notice

thereof is filed within ninety days after the cause of action arises; provided, however that any claim filed against a city or incorporated town under section 10-7-77, Utah Code Annotated, 1953."

That law requires the filing of the claim in this action to be within ninety days after the cause of action arose.

When did the cause of action arise? Appellant's brief, page 19, argues that the city repudiated the option in May, 1966. If that is so, the cause of action arose in May of 1966 and a filing September 3, 1968, does not comply with either the old filing law, Section 10-7-77, or the Governmental Immunity Act. The latest the cause of action could have arisen is December 31, 1966, the date the "option" expires. As to that, the ninety day filing applied and a filing September 3, 1968, is too late. The plaintiff argues that its time for filing the claim can be extended for many months by its activities on other property which has no relation to the one involved. This is not a situation involving "items of account." There is no question but that a claim under the statute could have been filed and was required to be filed at the latest one year after the date of breach which, under any theory, the last day for filing would have been in May of 1967. There is no question but what the filing of claims statute is mandatory and it was not complied with and, therefore, this action should be dismissed. Under plaintiff's theory, a person who suffers a personal injury can extend the time for filing

his claim against the city or other governmental unit until released by his doctor and each expense for a doctor's visit extends the time for filing.

The purpose of the filing statute is to advise the city officers of the claims so they can be timely investigated and protect the city's interest.

The recent case of Baugh v. Logan City, 495 P.2d 814, 27 Ut.2d 291, involved the time for and necessity of filing a claim for breach of contract against a city. The case holds that claimed damages for breach of contractual obligations are claims which must be filed and the filing time is ninety days after the cause of action arises.

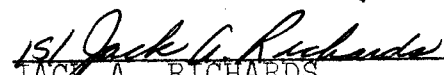
The time begins to run in a breach of contract action from when the breach occurs and not when the damage is ascertained. M.H. Walker Realty Co. v. American Surety Co., 60 Ut. 435, 211 P. 998.

No claim was timely filed so this action should be dismissed as to the defendant city.

CONCLUSION

It is, therefore, respectfully submitted that the judgment of the court below in favor of all defendants and respondents of no cause of action should be affirmed.

Respectfully submitted,


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