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

GIBBONS AND REED COMPANY, a Utah corporation,

Plaintiff and Appellant,

-vs-

CITY OF OGDEN, UTAH, a municipal corporation; UTAH STATE ROAD COMMISSION; OSCAR A. ROBIN; and HARDY SCALES CO., a corporation,

Defendants and Respondents.

CASE NO. 14030

RESPONDENT, UTAH STATE ROAD COMMISSION'S BRIEF

APPEAL FROM A JUDGMENT OF THE DISTRICT COURT

OF WEBER COUNTY

HONORABLE RONALD O. HYDE, JUDGE

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DEFENDANT, UTAH STATE ROAD COMMISSION'S BRIEF

NATURE OF THE CASE

This respondent agrees with appellant's statement set forth in its brief.

DISPOSITION IN LOWER COURT

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

RELIEF SOUGHT ON APPEAL

Defendant and respondent, Utah State Road Commission seeks an affirmance of the trial court's determination that said respondent is not liable to appellant and that its option agreement with Ogden City was valid and binding and entitled appellant to remove a "reasonable" amount of material and that respondent, Utah State Road Commission, did not act improperly in obtaining the option agreement from Ogden City.

STATEMENT OF FACTS

The respondent, Utah State Road Commission, essentially accepts the statement of facts submitted by appellant as being a correct statement.

ARGUMENT

I

THE OPTION AGREEMENT WAS VALID AND WAS ENFORCEABLE BY GIBBONS AND REED COMPANY.

This respondent believes and, therefore, alleges that the argument of appellant in its brief concerning this point is a correct summary and conclusion of the law in this area and urges that the court accept the arguments of appellant regarding the validity of the option obtained by respondent, Utah State Road Commission, from the respondent, Ogden City.

By way of observation, respondent would point out that the only thing possibly lacking in its option agreement necessary to constitute a binding contract under any theory is the amount of material to be removed. Since, in any agreement of this nature the amount to be removed is contingent on many factors, including its suitability, location to the project, future use of the property, the owners desires, etc., and since either of the parties to the option agreement could be adversely affected by the insertion of a definite amount of material, it is submitted that the option should be considered as binding, at least for the removal of a "reasonable amount." The cost to either party or both if a complete investigation of

the material source is made in order to define an exact figure to be inserted in an option agreement of this nature could be an undue burden on the cost of doing business.

As to the argument that the term "reasonable amount" is indefinite, the facts in the instant case would seem to illustrate the point that it may not be too difficult to determine what is a "reasonable amount." For instance, the State and Ogden City obviously had in mind six-feet to eight-feet and possibly up to 12-feet of depth, depending on which testimony is considered significant. Six-feet to eight-feet is the amount Kelly represents (R-596). Six-feet is significant in relation to the existing option with Marquardt when the State obtained its materials option. Obviously, the landowner is not going to ruin the potential of the land. The fact they were excavating up to 12-feet leads one to conclude that this amount would not affect the lands potential. Appellant's projections on the other hand, (up to 30-feet) would appear to exceed the parameter of a "reasonable amount" since it would presumably reduce the "after value" of the land. Therefore, one can assume that when the State and Ogden City negotiated the option agreement "reasonable amount" meant something between six-feet and 12-feet of average depth. Mr. Griffin's estimate (D's Ex.No. 1) based on six-feet is 198,000 yards, simple arithmetic makes it 396,000 yards at 12-feet of depth.

It is submitted that the court's refusal to find a binding

agreement against the defendant, Ogden City, for the alleged reason that the option is not valid is unreasonable and works an injustice on appellant and respondent, Utah State Road Commission.

In any event, Ogden City's reasons for repudiating the contract were not based on the assertion that the option agreement was void, but were based either on the idea that they had some hidden agreement with the Road Commission that they did not have to honor the option or that they could restrict the amount of material to be removed to such a small amount that the practical effect was tantamount to no agreement.

Respondent, Road Commission, alleges that there was no reservation express or implied that Ogden City would not have to honor the agreement, nor does the agreement give Ogden City the right to limit removal to such a degree that nothing could be removed. It is, however, asserted that a "reasonable amount" was available for removal and this "reasonable amount" would be between 198,000 cubic yards and 396,000 cubic yards and that Ogden City well knew this and recognized its obligation as is clear in the sale agreement to Robin.

Respondent, Road Commission, alleges that the court should give meaning to the option agreement if at all possible and alleges this can be done by finding that the parties to the option agreement (S.R.C. & Ogden City) both understood "reasonable amount" to be something between 198,000 and 396,000 cubic

yards and that to refine the amount to a precise figure is unnecessary and, in fact, would be burdensome.

II

OGDEN CITY IS ESTOPPED FROM CLAIMING THAT THE OPTION AGREEMENT WAS TOO VAGUE.

Respondent, State Road Commission, accepts and agrees with appellants assertion regarding estoppel and its application to Ogden City in this matter.

As pointed out under Point I, Ogden City considered itself bound to appellant and respondent, State Road Commission, as is obvious in the sale agreement with Robin and/or Hardy Scales. Its refusal to permit removal is a wrongful act and Ogden City should be estopped since its agents well knew that appellant was relying on the option when it made its bid. If the option agreement was indeed defective, the defect was, in effect, cured when appellant's representative consulted with Ogden's representative, Kimball, clothed with apparent authority, and determined an amount of material subject to removal.

This, then, completed the last requirement necessary to effect a binding agreement, to wit, a definite amount. Kimball may not have had sufficient authority to bind the city had he executed the agreement, but his determination of an available amount should be within his authority and thus binding, or at least sufficient to raise an estoppel against the city now repudiating the agreement.

III

OGDEN CITY BREACHED THE OPTION AGREEMENT.

The respondent, Utah State Road Commission, does not agree with the trial court's conclusion that there was no breach of the option agreement.

Respondent, Road Commission, agrees with the argument of appellant as set forth in appellant's brief on this point.

It should also be pointed out that Ogden City's actions prior to the sale to Robin and/or Hardy and as evidenced in that agreement of sale reveal that they considered the option agreement to be a binding agreement. For instance, they inform appellant that they will not allow removal of material, they reiterate this in the Weber Club meeting, (R-633, 634) at which time they were concerned enough about their actions to promise they would find other material, and three days later in the sale to Robin, they recognize the rights of the State and seek to protect themselves. (R-371)

Respondent, Road Commission, submits that at the time of the meeting in the Weber Club, it could not have been any more clear to the City of Ogden and its responsible governing body (City Commission) that the option agreement would be exercised, but for their refusal to honor the appellant's request as well as the respondent, Road Commission, both of whom were in effect saying, "We want the material, we'll exercise the option." The City, on the other hand in effect is saying, "We won't honor the option, but we recognize our responsibility and will

get you other material." To say the option must be exercised in writing to preserve the rights of the State and its contractor in this situation is to say the least, ridiculous. What additional notice could a writing communicate? Indeed, what good would a written notice be and what purpose would it serve?

The real question is, how do you exercise an option? The answer is, you communicate notice of intent to the party who gave the option and meet the requirements set forth in the option. Appellant obviously gave the notice, if not to Kimball (lack of authority?) certainly to the City Commission, City Manager and all the world before and during the Weber Club meeting. The appellant and respondent, Road Commission, were obviously prepared to meet the option terms and conditions.

It is clear that the option was "exercised" contrary to the trial court's conclusion at some point prior to or at least in the Weber Club meeting, and Ogden City could have complied with the option or caused Robin and/or Hardy Scales to comply at any time presumably.

Ogden City obviously breached the option agreement.

IV

THE OPTION AGREEMENT WAS ENFORCEABLE AND CONTAINED NO RESTRICTIONS ON REMOVAL OF MATERIAL BUT THIS WOULD BE DETERMINED BY WHAT WAS REASONABLE.

Appellant argues in its brief that respondent, Road Commission, may be liable to appellant for failure to disclose limiting conditions imposed by Ogden City upon removal of

material or for positive misrepresentations as to the source of materials.

Respondent, Road Commission, disputes the conclusions of appellant and denies that the evidence shows what appellant erroneously asserts concerning removal of material.

The option agreement contains no indication of the amount of material available or any maximum or minimum depth of removal. The language says removal will be to the "owners lines and grades." The person who seeks to exercise the option has the burden of determining what, in fact, is available and what conditions are. (See language quoted in appellant's brief from Ex. M. [Standard Specifications] on Pages 7 and 8 requiring notice of intent to owner of material.) Appellant contacted a representative of the City, Ray Kimball, and based upon that contact reached certain conclusions regarding availability of material. If Mr. Kimball did not have the authority to bind Ogden City by his statements, the respondent, Road Commission, is legally and contractually not responsible to appellant for any erroneous information or representations when appellant fails to notify the right individuals or representatives of Ogden City. Incidentally, respondent, Road Commission, believes and asserts that the said Kimball had at least apparent authority to bind Ogden City, and certainly the City was on notice of appellant's intentions after the conversation with Kimball and their continued silence and failure to notify appellant that material would either not be available or at least not to the extent of their expectations as communicated to Kimball should either

bind them by their silence or estop them from now asserting that material was not available.

In any event, the written option contains no language which has the effect of a limitation on removal, but anyone seeking to exercise the option is in effect directed to Ogden City to determine what, in fact, is available. How can respondent, Road Commission, incur liability for alleged deficiencies in the amount of material available without a representation? How can it be liable if it is determined that notice was defective? In either event, appellant was in effect directed to Ogden City and if indeed its contact with Ogden City was not sufficient to bind the respondent Ogden City, it is the sole responsibility of appellant.

Notwithstanding the lack of language which would limit removal, was there, in fact, a limitation of this nature? The evidence would indicate that there was a discussion of an average removal depth of six-feet. Griffin stated, ". . . the notes that I took at that meeting he stated that an average depth of six-feet. They did not want to go below six-feet." (R.557) He further explains possible reasons for this limitation and other language in the option in response to Mr. Roe's question by stating, "As Mr. Kelly explained, that there was this option to purchase with the Marquardt Corporation, between the Marquardt Corporation and Ogden City, and they did not want to obligate the City to removing this material from the entire piece of property if the Marquardt Corporation decided to exercise their option to pur-

chase, as he explained it to us." (R-561). Counsel for the Road Commission called Griffin back later in the trial to explain in what context the six-foot limitation was discussed and this explanation followed: "We were informed that although Marquardt Corporation had the option with the City until approximately the 1st of April, 1966, material could be removed from this property, and the average six-feet in depth was discussed in relation to this present agreement between Marquardt and the City of Ogden that we could remove this much material.

QUESTION: Even if Marquardt exercised the option?

ANSWER: This was our understanding, yes.

QUESTION: All right, now was anything else said about going any deeper than that?

ANSWER: It was not stated specifically, but we were left with the impression that if Marquardt did not exercise the option that we possibly could obtain more material, but it would depend on the circumstances at the time. (R-737, 738).

The Marquardt option expired a few months after the subject option was signed and several months before the contract was advertised for bid. The City excavation for garbage fill was to a depth of 12-feet. These facts are significant when compared with Griffin's statements as well as those of Kelly.

The conclusions one gets from all the facts and statements is that: (1) Ogden City had property with available fill material. (2) The property was under option to Marquardt, but

it was apparent the sale would not be made to Marquardt. (R-600, 601). (3) That there was at least six-feet of average depth of fill material available. (4) That no exact determination of the removal depth was made by the City or the State Road Commission. (5) That both Ogden City and the State Road Commission expected the successful contractor would defer to a later determination by the City as to removal depth. ("Owners lines and grades"). (6) That regardless of the removal depth finally decided upon, the property was strategically located and its ultimate use would be considered and would be the major factor in determining removal depths, etc. (7) That appellant based its projections as to available material on information obtained from the Assistant City Engineer and not on information contained in the option agreement. (8) That whether six-feet, 12-feet or some other depth is selected as the removal depth will vary depending on whose opinion is solicited as to a proper depth, and the projected future use of the property. (9) That nothing in the written option states that the State Road Commission agreed in any way that Ogden City would not have to honor the option agreement.

When all the foregoing facts and conclusions are viewed objectively, it is submitted that one must conclude the option agreement was binding on the City and obligated the City to supply a "reasonable amount" of material and that this would not have been less than 198,000 cubic yards (six-foot average depth).

It is further submitted that the weight of the evidence does not indicate any limitation on removal except what would be reasonable considering the expected future use of the property and that appellant must ascertain that fact from the proper representatives of the owner. The question of whether they were justified in relying on the Assistant City Engineer's representations or could assume that he would at least inform the proper city officials is the real question, not an alleged verbal reservation to the option by the city prior to executing the option agreement which would obviously be merged in the written option as any first year law student knows.

As to the question of a positive misrepresentation by the fact the plans show a total quantity available in "prospect No. 1 which includes the property of Ogden City and the railroad, the contractor well knows, that, "The quantities appearing in the prepared bid schedule are approximate only and are prepared for the comparison of bids. . . . and it is understood that the scheduled quantities of work to be done and materials to be furnished may each be increased, diminished, or omitted as hereinafter provided without in any way invalidating the unit prices bid." (Ex. M. Sec. 1-2.4) While generally they are reasonably accurate a reasonable deviation in actual quantities as compared to estimated quantities could deviate plus or minus ten percent. This same rationale applies to estimates of quantities available in materials sites. The deviation in this instance, assuming removal of twelve-

feet and all other factors being equal would be approximately ten percent less than projected. It is submitted that deviations are common and, in fact, are expected in the normal course of the construction business. Respondent, Road Commission, therefore, submits that there is no factual basis for appellant's allegation concerning misrepresentation of available quantities of fill material.

V

DEFENDANTS ROBIN AND HARDY SCALES TORTIOUSLY INTERFERRED WITH THE OPTION AGREEMENT BETWEEN GIBBONS AND REED COMPANY AND OGDEN CITY.

Respondent, Utah State Road Commission, is pursuaded by the argument of appellant with regard to this point and, therefore, asks that the court find against the respondents, Robin and/or Hardy Scales Company.

VI

DAMAGES, IF ANY, SUFFERED BY GIBBONS AND REED WERE THE RESULT OF THEIR OWN ACTIONS OR OF THE RESPONDENTS, OGDEN CITY; ROBIN AND/OR HARDY SCALES COMPANY AND ARE NOT CHARGEABLE TO THE STATE.

It has already been pointed out in this brief that respondent, Road Commission, contrary to the ruling of the trial court, believes the option it obtained from Ogden City to be a valid option agreement. Assuming that the option agreement was valid and binding, it then follows that it must be exercised properly. If it was not properly exercised, that is the

fault of the contractor for not contacting the proper representative of the respondent, City, or in some fashion failing to properly notify the City of its intent. Since an option is a continuing offer, it is hard to understand why there would not have been adequate notice to the City at some stage of the proceedings. If not in the conversation with the Assistant City Engineer (Kimball), certainly in the meeting with the City Council at the Weber Club.

There is the additional point raised by appellant regarding repudiation of the option agreement being an excuse for failing to exercise the option.

In any event, the option agreement should have been construed as binding. The State's responsibility or liability should terminate once it is construed as a binding option, except for the responsibility to protect the optionor as to payment for material removed and other internal features in the agreement itself. Once the contractor informs the City that it will exercise the option or the City informs the contractor it will not honor the option, the respondent, Road Commission, should be relieved of any further responsibility, except as noted. The agreement or non-agreement becomes a matter between the appellant and the respondent, City.

The appellant has attempted to raise the specter of a hidden reservation in the option agreement whereby the City would not have to honor the option unless it wanted to. This

is preposterous legally, and even more riduculous from a practical standpoint. The respondent, Road Commission, is concerned about providing material that is suitable and conveniently located at the best price possible, in order to minimize construction costs.

Exhibits E & F which are in evidence constitute an exchange of letters between the respondents, Road Commission and Ogden City relative to the availability of material from the city owned property. The only reservation is the statement by the City that, ". . . we will work closely with you for the removal of the material," and ". . . the property is under option until next April."

The facts developed at trial, it is submitted show the following by way of summary:

1. The State Road Commission and Ogden City saw a mutual benefit in removing material from the City property for use as highway fill.

2. The amount of material was not specified, but at least six-feet of average depth of removal was discussed.

3. The property was under an existing option which expired well before any attempt was made to exercise this option.

4. The property was sold by the City to respondent, Robin and/or Hardy Scales Company, and the buyer knew of appellant's intended exercise of the option.

5. A decision was reached by the respondents, Ogden City

and/or Robin (Hardy Scales) to refuse to honor the option agreement.

6. Ogden City considered the option to be binding as evidenced by its actions in referring to the "rights of the State Road Commission" in its sale agreement to Robin, and in the actions of the City Commissioners in the Weber Club meeting (R 633).

7. The only involvement by the respondent, Road Commission, after it obtained the option in any proceedings was as an advocate in behalf of appellant at the Weber Club meeting.

8. Ogden City and/or Robin intentionally refused to honor the option agreement with full knowledge of appellants intended exercise of the option as is obvious from the fact the sale of the property from Ogden City to Robin occurred three days after representatives of appellant, and the respondents, Road Commission and Ogden City met and discussed the sale and its implidations to the appellant.

Respondent, Road Commission, believes the foregoing facts make it abundantly clear that the damages, if any, sustained by appellant were not caused or contributed to by the respondent, Road Commission, but resulted from conscious decisions by Ogden City and Robin (Hardy Scales) to refuse to honor the option agreement which they obviously considered to be binding. It is equally clear that if it is concluded in some way that the option agreement was not properly exercised, then appellant

is chargeable with the failure to do so pursuant to the option agreement language as well as the Standard Specifications.

CONCLUSION

The respondent, State Road Commission, obtained an option from respondent, Ogden City, which was a valid option. Even taking a narrow view and viewing the option as incomplete because it failed to define the amount of material to be removed, the evidence shows that this defect was "cured" when appellant in consultation with a representative of respondent, Ogden City, determined what amount was available. The evidence further reveals that the respondents, Ogden City and Robin (Hardy Scales) acted both in verbal responses and in their written agreement as if they recognized a valid agreement existed to remove material from the property.

The respondent, State Road Commission, made no representations as to the amount of fill material available from Ogden City and appellant's allegation concerning a secret reservation or verbal agreement with respondent, Ogden City, that it would not have to honor the agreement with the Road Commission is not supported by the evidence. A fair interpretation of the evidence shows respondent, Road Commission, expected that its contractor could remove material from the Ogden City Property, that it would at least exceed six-feet average depth, and reasonable assumptions based on respondent city's use of the property indicated a removal depth of up to 12-feet. Evidence at trial clearly indicates

that if appellant was misled as to the amount of, or availability of material from Ogden City it was not the fault of respondent, Road Commission, but is, in fact, the negligence of appellant in failing to properly exercise the option or if the option was properly exercised, it is then Ogden City and/or Robin (Hardy Scales) which should respond because of their acts.

In any event, if appellant failed to properly exercise the option, it is in no way the fault of respondent, Road Commission. In fact, respondent, Road Commission, cannot be liable to appellant absent a showing that the option was not valid which it is respectfully submitted the evidence does not disclose, and further, it is submitted that legally the option was valid and binding under the best reasoned cases.

Respondent, Road Commission, urges that the court make additional findings of fact and conclusions of law to the effect that the option agreement was a valid agreement and that appellant either failed to properly exercise the option or that respondents, Ogden City or Hardy Scales, or both are liable for damages, but that in any event, respondent, Road Commission is not liable.

Respectfully submitted,

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