

1988

Herman Hertz v. Nordic Limited, Inc. : Reply Brief

Utah Supreme Court

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Reply Brief, *Herman Hertz v. Nordic Limited, Inc.*, No. 880086.00 (Utah Supreme Court, 1988).

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BRIEF

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DOCKET NO. 880086-CA

IN THE SUPREME COURT
OF THE STATE OF UTAH

HERMAN HERTZ,	:	
as Trustee for the	:	
SHERRY TRUST,	:	
a California Trust, and	:	District Court No. C-83-7988
CAL FUND, LTD.,	:	
a California unincorporated	:	
association,	:	
	:	
Plaintiffs/Appellants,	:	
	:	
vs.	:	
	:	
NORDIC LIMITED, INC.,	:	Supreme Court No. 860540
a Utah corporation,	:	
	:	
Defendant/Respondent.	:	88-0086-CA

REPLY BRIEF SUBMITTED
ON BEHALF OF THE APPELLANTS

APPEAL FROM THE JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT FOR
SALT LAKE COUNTY
HONORABLE DAVID B. DEE, JUDGE

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FILED
MAY 4 1987

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TABLE OF CONTENTS

ITEM	PAGE
TABLE OF CONTENTS	-i-
TABLE OF AUTHORITIES	-ii-
THE FIRST JUNE 29 AGREEMENT	1
THE SECOND JUNE 29 AGREEMENT	6
CONCLUSION	8

TABLE OF AUTHORITIES

<u>AUTHORITIES CITED</u>	<u>PAGE</u>
<u>American Savings & Loan Association</u> v. <u>Blomquist</u> , Utah, 445 P2d 1 (1968)	6
<u>Cannon</u> v. <u>Stevens School of Business, Inc.</u> , Utah, 560 P2d 1383 (1977)	8
<u>Morgan</u> v. <u>Board of State Lands</u> , Utah, 549 P.2d 695 (1976)	6

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vs.	:	
	:	
NORDIC LIMITED, INC.,	:	Supreme Court No. 860540
a Utah corporation,	:	
	:	
Defendant/Respondent.	:	
	:	

ON APPEAL OF A FINAL JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT OF
SALT LAKE COUNTY, STATE OF UTAH

REPLY BRIEF SUBMITTED
ON BEHALF OF THE APPELLANTS

THE FIRST JUNE 29 AGREEMENT

Respondent Nordic Limited, Inc. (hereinafter referred to as the "Respondent"), argues in its brief submitted in this appeal that the judgment rendered by the trial court is supported by the facts of the case. In its argument, Respondent focuses on Plaintiff's Exhibit 5 entered into evidence in this case consisting, in part, of a June 29, 1982, letter written by Rodney Sweet, an attorney retained by Seymore Hertz, to one John

Worthen and also on the testimony given in this case by David Ross, president of Respondent.

The July 29, 1982, letter from Rodney Sweet to John Worthen must be analyzed in detail. The first paragraph of that letter makes it clear that the subject matter of the letter is the settlement of the United States District Court litigation pending in the state of Kentucky between McMurray Petroleum, Inc., Jader-Corp., and others. The second paragraph of the letter states that in connection with the settlement of that case, the "transmittal of the documents with Seymore Hertz' signature is conditioned upon performance by Nordic Limited, Inc. and Jader Incorporated, dba Jader Resources." That paragraph further states: "You['re] requested to deliver to me by Monday, August 9, 1982, to hold until such time as the papers are filed with the Court and the settlement consummated, the following items: . . ." The sixth item of the items requested was the certificate for 200,000 shares of Nordic Limited, Inc., Investment stock issued to Cal Fund, Ltd. With respect to the 200,000 shares of Nordic common stock, Rodney Sweet stated in his letter: "My documents do not indicate whether or not there is still a requirement that these shares be placed in escrow for a period of not to exceed six months, and I would appreciate further instructions from you as to this."

In the final paragraph of Rodney Sweet's July 29, 1982, letter, he states that because Mr. Hertz is leaving the state of California for an extended period on Tuesday, August 10, 1982, Mr. Hertz requires that all of the items listed in the letter be

delivered to Rodney Sweet "to be held in trust so that I can distribute them immediately upon receipt of notice that the order has been entered in Kentucky." Not one single line in Rodney Sweet's July 29, 1982, letter can be read as establishing Rodney Sweet as the escrow agent for the 200,000 shares of Nordic. In fact, Rodney Sweet simply states that he will act as a trustee with respect to all items which he requested that Nordic send to him. In that regard, Rodney Sweet further inquires in his July 29, 1982, letter that further instructions be given him with respect to the escrow requirement for the 200,000 shares of Nordic common stock. It is very clear from the July 29, 1982, letter that Rodney Sweet was stating that he would act as trustee for the 200,000 shares of Nordic common stock until settlement of the United States District Court action in Kentucky. In addition, Rodney Sweet was simply inquiring as to whether or not the instruction to him as trustee for the 200,000 shares of Nordic common stock was that they be delivered to an escrow agent to be held in escrow.

The record is clear that subsequent to Rodney Sweet's July 29, 1982, letter, Nordic delivered the 200,000 shares of Nordic common stock registered in the name of Cal Fund, Ltd., directly to Seymore Hertz. In this regard, Plaintiff's Exhibit 10 entered into evidence in this case, the November 15, 1982, mailgram addressed to Cal Fund, Ltd., Attention: Seymore L. Hertz, states: "This is to verify that the Cal Fund shares for their interest in the Jader Kentucky properties were issued on August 10, 1982, and placed in escrow." Inasmuch as Nordic had

already delivered the 200,000 shares of Nordic common stock directly to Seymore Hertz, it is clear that Nordic was telling Seymore Hertz in the November 15, 1982, mailgram that he was the properly appointed escrow agent.

The delivery of the 200,000 shares of Nordic common stock to Seymore Hertz and the November 15, 1982, mailgram conform with other evidence in this case, i.e., (1) statements made by David Ross to Seymore Hertz to the effect that Seymore Hertz was to take possession of the 200,000 Cal Fund shares and hold onto those shares pursuant to the escrow provision of the first July 29th agreement (Transcript, pp. 154-157) ^{1/}; (2) the failure on the part of Nordic to respond to the request made in Rodney Sweet's July 29, 1982, letter as to whether or not there was an escrow requirement (Exhibit 5); and (3) the numerous items of correspondence which Seymore Hertz had with persons who, in 1983, were both officers and directors and former officers and directors of Nordic. (Exs. 12, 13, 15, and 18.)

Respondent points to the fact that there is a conflict between the testimony of Seymore Hertz and David Ross in this case. (Tr. pp. 154-157 and 233-251.) However, the testimony of Seymore Hertz is corroborated by other evidence. Rodney Sweet's July 29, 1982, letter is clear in that Rodney Sweet was not to

^{1/} References to the exhibits entered into evidence in this case are cited as "Ex. ___." References to the transcript of proceedings in this case are cited as "Tr. pp. ___."

Herman Hertz, et al. v. Nordic Limited, Inc.
In the Supreme Court of the State of Utah
Supreme Court No. 860540

Reply Brief Submitted on Behalf of the Appellants
(April 27, 1987)

ERRATA SHEET

Page 5, paragraph 2, sentence 1 presently reads:

Based on the foregoing, it is clear that the trial
court in applying the law to the facts of the case.

Page 5, paragraph 2, sentence 1 should read:

Based upon the foregoing, it is clear that the
trial court erred in applying the law to the facts of
the case.

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act as escrow agent with respect to the 200,000 shares of Nordic common stock registered in the name of Cal Fund, but instead was to act as trustee until settlement of the Kentucky United States District Court litigation. Rodney Sweet inquires in his July 29, 1982, letter as to the escrow provision relating to the 200,000 shares of Nordic common stock registered in the name of Cal Fund. It should be clear that Rodney Sweet was requesting instructions with respect to how he, acting as trustee, should deal with those shares at the conclusion of his trust relationship inasmuch as it appeared that his obligation might be to deliver those shares to an escrow agent. Nordic responded to Rodney Sweet's request by sending the shares not to Rodney Sweet, but directly to Seymore Hertz. Nordic then confirmed in writing that the shares had been placed "in escrow." In addition, there does not appear to be any question in the minds of the individuals with whom Seymore Hertz corresponded regarding the Nordic obligation to issue additional shares of Nordic common stock to Cal Fund, Ltd., until August 30, 1983, the date of David Ross' letter to Seymore Hertz informing him that Nordic would not issue additional shares to Cal Fund, Ltd. (Ex. 19.) It is significant to note that the correspondence between Seymore Hertz and persons then and formerly affiliated with Nordic began on February 25, 1983, and therefore continued for a period of approximately six months before any indication was given that Nordic would refuse to issue additional shares.

Based upon the foregoing, it is clear that the trial court ^{is} applying the law to the facts of the case. The trial

court concluded, based upon the facts, in substance, that there had been full performance by Nordic Limited under the terms of the First June 29 Agreement and further that the acts of Nordic did not cause Cal Fund to believe that Nordic had appointed Seymore Hertz to act as the escrow agent for the parties. The facts clearly establish that the intentional acts of Nordic and its appointed representatives caused Cal Fund Limited to rely to its detriment on what appeared to be the appointment of Seymore Hertz to act as escrow agent with respect to the 200,000 shares of Nordic common stock. Nordic should therefore be estopped from asserting that Seymore Hertz was the proper escrow agent. (Morgan v. Board of State Lands, Utah 549 P.2d 695, 697 (1976).) In the alternative, Nordic's intentional and knowing conduct should be deemed a waiver of the escrow provision of the First June 29 Agreement (American Savings and Loan Association v. Blomquist, Utah 445 P.2d 1 (1968).)

THE SECOND JUNE 29TH AGREEMENT

Respondent argues in its brief that Nordic cannot be held to have breached its agreement with Sherry Trust inasmuch as the abandonment of the Kentucky oil and gas leases came as a result of economic necessity. Respondent points to the testimony of David Ross in the trial of this case to support that argument. (Tr. p. 247.)

The testimony of David Ross is as follows:

Q. Okay. Nordic then did have Casey--leases in Casey--well, oil and gas leases in Casey and Adair counties; is that correct?

A. Through Jader, correct. Yes.

Q. In other words they were owned by the wholly-owned subsidiary of Nordic, Jaders?

A. Yes, they were.

Q. What happened to those leases?

A. These leases have all--to the best of my knowledge, have all been lost through a default.

Q. Do you know when that happened?

A. They happened over a span of time. I'm not so sure about the Hunter lease, but the other leases--actually there were some that were abandoned, too. I believe that the--now looking I think the Wesley and Trammell leases were abandoned probably shortly after this period of time as being deemed not feasible, economically feasible.

Q. Okay.

A. Fletcher also--

Q. But--

A. --Rubarts. Billy Neat was a good one. Clyde Neat I believe was an acceptable one. Coburn was abandoned opposed to losing it by default. Most were abandoned. Hunter, I don't know the status of Hunter today.

It is clear from the testimony of David Ross that certain of the oil and gas leases in Casey and Adair counties were in fact abandoned due to the fact that they were not economically feasible as is argued by Respondent. However, others were lost through "default." Mr. Ross clearly distinguishes between leases that were abandoned purposefully due to their lack of economic feasibility and those which were lost by "default." David Ross also acknowledges that certain of the oil and gas leases were good ("Billy Neat was a good one. Clyde Neat I believe was an acceptable one.")

Although there is an explanation offered by Nordic as to why certain of the oil and gas leases in Casey and Adair counties, Kentucky were abandoned (their lack of economic feasibility), there is no explanation whatsoever as to why certain of the leases were lost by default. The argument of appellant Sherry Trust in this case is that Nordic, by losing certain oil and gas leases which were "good" or "acceptable," breached its agreement with Sherry Trust. By defaulting on the leases, Nordic made its own performance under the Second June 29th Agreement impossible. This constituted a breach of the Second June 29th Agreement thus entitling appellant Sherry Trust to damages. (Cannon v. Stevens School of Business, Inc., Utah 560 P.2d 1383 (1977).)

CONCLUSION

Based upon the foregoing, the decision of the District Court should be reversed. Accordingly, Cal Fund is entitled to receive 1,222,222 additional shares of Nordic common stock pursuant to the first June 29 agreement. In addition, Sherry Trust is entitled to payment of the balance of \$58,500 together

with pre-judgment interest at the statutory rate of 10% based upon Nordic's breach of the second June 29th agreement.

DATED this 27th day of April, 1987.

Respectfully submitted,

KRUSE, LANDA & MAYCOCK
A Professional Corporation
Attorneys for Plaintiffs/
Appellants

By:

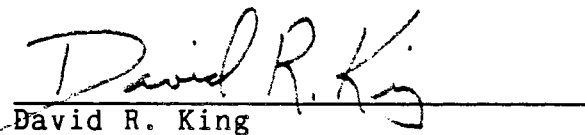

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CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed four (4) true and correct copies of the foregoing APPELLANT'S REPLY BRIEF to the following person, respondent's attorney, postage prepaid, this 27th day of April, 1987:

Keith Biesinger
1014 East 900 South
Salt Lake City, Utah 84105


David R. King