

1981

Utah Farm Production Credit association v. Cox, Jeffrey J. and Elliott J. A Co-Partnership, Elliott J. Cox, Jeffery J. Cox, Yvonne Cox, Blanche. Cox, United States of America, Tracy-Collins Bank and Trust Company, Bank of Ephraim : Breif In Answer To Petition For Rehearing Utah Farm Production Credit association : Petition For Rehearing and Brief In Support thereof

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

UTAH FARM PRODUCTION CREDIT)
ASSOCIATION,)

Plaintiff-Appellant,)

v.)

Case No. 7588

16885

COX, JEFFREY J. and ELLIOTT J.)
a co-partnership, ELLIOTT J.)
COX, JEFFREY J. COX, YVONNE)
COX, BLANCHE COX, UNITED STATES)
OF AMERICA, TRACY-COLLINS BANK)
AND TRUST COMPANY, BANK OF)
EPHRAIM,)

Defendants-Respondents.)

PETITION FOR REHEARING AND
BRIEF IN SUPPORT THEREOF

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FILED

MAR 30 1981

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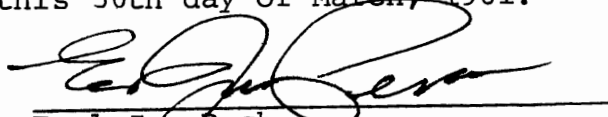
Defendants-Respondents.)

PETITION FOR REHEARING

Defendants and Respondents (hereinafter Defendants) respectfully petition this Court for a rehearing of its decision in the above-entitled case rendered on the 9th day of March, 1981.

Defendants allege that this Court erred in its finding for Plaintiff and Appellant (Plaintiff) in that (1) it failed absolutely to consider Defendants' actions as the proper mitigation of damages under the circumstances; and (2) it failed to recognize the undue hardship placed on Defendants as a result of its decision.

Respectfully submitted this 30th day of March, 1981.



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IN THE SUPREME COURT OF THE STATE OF UTAH

UTAH FARM PRODUCTION CREDIT)
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Plaintiff-Appellant,)

v.)

Case No. 7588)

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a co-partnership, ELLIOTT J.)
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COX, BLANCHE COX, UNITED STATES)
OF AMERICA, TRACY-COLLINS BANK)
AND TRUST COMPANY, BANK OF)
EPHRAIM,)

Defendants-Respondents.)

BRIEF IN SUPPORT OF PETITION
FOR REHEARING

STATEMENT AND DISPOSITION OF THE CASE

This is an action to recover monies under a promissory note. The issue on appeal concerned that portion of a lower court ruling which granted a setoff against judgment in Plaintiff's favor; the setoff arising from Plaintiff's breach of contract to lend money. This Court handed down its decision on March 9, 1981.

RELIEF SOUGHT

Defendants petition the Court for a rehearing. Upon rehearing, the trial court's setoff should be affirmed.

SUMMARY OF FACTS RELEVANT
OF THE REHEARING PETITION

1. In 1977 Cox took his farm and farm proceeds off the

market, even though a potential buyer had been found, after Plaintiff made a loan commitment to him to finance him in the raising of 60,000 turkeys during the growing year.

2. Plaintiff refused to fulfill its loan commitment after Cox had taken delivery of the first 20,000 turkey poults and after orders had been placed for 40,000 more in reliance upon Plaintiff's commitment.

3. After he finally learned that Plaintiff did not intend to honor its commitment, Cox learned that he had the fortunate opportunity to mitigate his damages. By acting promptly, he was able to cancel his order of the remaining turkey poults. This was by no means a matter of right on his part. In fact, a year earlier he had been forced to purchase a large order of turkeys he had already ordered. (Tr. 88). He was also fortunate to find someone who was willing to purchase the 20,000 poults he had been raising at a price which permitted him to pay his bill with the farmers cooperative, who had sold him the poults on credit upon Plaintiff's agreement to finance.

4. By acting promptly to mitigate his damages, Cox was able to avoid the financial liability the 20,000 turkey poults presented and the additional 40,000 would have presented.

5. By making a good, practical and quick decision, Cox was able to avoid the risk of 20,000 freezing and starving turkeys, together with the liability of failing to take 40,000 more turkeys. Cox was a farmer, knew that he could not ignore the fact that he faced tremendous liabilities which increased

with each day while he casted about for a hoped-for turkey financing source.

ARGUMENT

POINT I

THE COURT FAILED ABSOLUTELY TO CONSIDER DEFENDANTS' ACTIONS AS THE PROPER MITIGATION OF DAMAGES UNDER THE CIRCUMSTANCES.

The Supreme Court has endeavored to determine whether Cox actively sought alternate sources of financing and has overlooked the question of whether Cox mitigated damages. The issue correctly before this Court and addressed by the lower court correctly stated is: Did Cox mitigate the damages he suffered as a result of Plaintiff's breach? To assume that the only method of damage mitigation is active seeking of alternate sources of financing is error on the part of this Court.

Cox was in the business of raising turkeys--perishable items. Cox needed the money promised by Plaintiff to supply the day-to-day needs of the poults: heat, feed and care. At the time of Plaintiff's breach, Cox was already out of money (Tr. 100-102) and faced a difficult decision: Either seek out additional financing at the risk of losing the turkeys or sell the 20,000 turkeys on hand and seek to cancel the order of 40,000 additional turkeys, thereby avoiding additional liability. Both alternatives would mitigate damages.

Had Cox decided not to mitigate his damages by keeping the 20,000 turkeys, they would have starved to death if not frozen to death first. Indeed, it was Plaintiff's suggestion to kill them before the threatened foreclosure the following week.

(Tr. 105) Cox would have been forced to take the additional 40,000 turkeys when they were ready as he had the year before (Tr. 88) and then lose them to starvation and cold or breach his contract with Moroni Feed Company and suffer the legal consequences therefrom.

Cox was well aware of the difficulties in obtaining loans for turkey farming. He had just been refused a loan by Plaintiff and knew the time involved in getting title reports, appraisals and finally the lending institution's approval. To complicate the matter, Cox had no collateral to offer as security to another lender. To successfully secure a second loan, it was necessary for Plaintiff to agree to release Cox's collateral in favor of the second lender--a procedure that doesn't take place quickly. Cox had no time. While Cox attempted to secure the new loan, he still had the responsibility to heat, feed and care for 20,000 turkeys with no money to pay for the heat, feed and other expenses. Moreover, he had an order of 40,000 turkeys that would need to be paid for soon.

The Court's decision permits Plaintiff to take advantage of a situation it created. It had placed Cox in a very difficult position. It was at Plaintiff's insistence and reassurance that Cox purchased 20,000 young turkeys and committed to purchase 40,000 more. It was only after Plaintiff's strong encouragement that Cox purchased the heaters, feed and equipment necessary to run the turkey farm. Plaintiff then continued to reassure Cox that the money would be ready any day. (Tr. 96, 97, 100-102)

It is at this point the Plaintiff refused the loan to Cox; and this Court would place Cox in the inenviable position of spending weeks looking for and attempting to finalize a highly unlikely loan, with no money to heat and feed 20,000 turkeys, and under the threat of immediate foreclosure.

Instead, Cox did what any reasonable turkey farmer would have done under the same circumstances. Rather than risk 60,000 turkeys while attempting to secure a highly unlikely loan, before being foreclosed on, Cox sought to mitigate his damages the best way he knew how. Rather than just letting the turkeys die, as Plaintiff had suggested (Tr. 105), Cox actively sought and found a buyer for the 20,000 turkeys on his farm. He also was successful in cancelling his order for 40,000 additional turkeys without incurring any penalty. (Tr. 106) In this, Cox and Plaintiff were very fortunate.

This Court has failed to recognize the unique character of this case and instead has speculated as to what may have happened if Cox could have found partial financial support. The Court's claim that had Cox "sought alternative financing, [he] may well have been able to satisfy the debt in full," and, "[h]ad he been able to secure even a lesser loan . . . he may have been able to stave off the threat of foreclosure," is irrelevant speculation. Utah Farm Production Credit Association v. Cox, No. 16885 (Utah, filed March 9, 1981). Such reasoning ignores the difficulty of getting the second loan and the grave danger of multiplying losses (turkey deaths) in the process.

This Court also fails to recognize that in the event of foreclosure, Plaintiff would take possession of Cox's farm

pending foreclosure proceedings. In that event, Cox would lose his 20,000 turkeys and have no place to run the additional 40,000.

Cox was aware of his mitigation alternatives. It was only by his immediate and quick action that he was able to sell the 20,000 turkeys and cancel his commitment on the 40,000 additional turkeys, thus averting any further damage already caused him by Plaintiff. Cox's actions were sensible and under the circumstances constituted the best possible mitigation of damages.

POINT II

THIS COURT FAILED TO RECOGNIZE THE UNDUE HARDSHIP PLACED ON DEFENDANTS AS A RESULT OF ITS DECISION.

Contrary to this Court's assertion that, "the above decision works no undue hardship on Defendant," Id. at 4, Cox is damaged by this decision. At the conclusion of the 1976 growing year, Cox decided to sell his farm and dividends to repay Plaintiff's loan. (Tr. 86-90) It was his desire to be completely finished in his dealings with Plaintiff.

Only after the continued urgings of Plaintiff did he cancel his listing with his real estate agent, his sale of dividends and make commitments to grow turkeys another year. As a result of Plaintiff's promises, Cox invested his time and energy into growing turkeys, incurred the expense of a personal loan for operations and gave up the opportunity to sell his farm and dividends at a price beneficial to his financial situation. In addition, the low interest bearing dividends

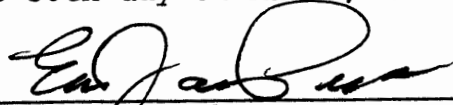
cannot have retained their value in today's high interest market. Cox withdrew his farm and dividends from the 1977 market where he could very well have made favorable sales because he was promised financing from Plaintiff for the next growing year.

Because of Plaintiff's broken promises, Cox has suffered not only the loss of profit, but also the lost opportunities of an advantageous sale in 1977.

CONCLUSION

A rehearing of this case is required. This Court should interpret Cox Corp. v. Dugger, 583 P.2d 96 (Utah 1978), as to include alternative methods of damage mitigation when justice requires. No reasonable thinking person will refuse to sell turkeys that he cannot raise. Had Cox's decision been the same as the Court's, he would have had 20,000 freezing and starving turkeys and a breach of contract lawsuit from the feed company for failure to take the additional 40,000 turkeys. The Court has erred in refusing to consider Cox's efforts as the proper and most sensible method of mitigating damages.

Respectfully submitted this 30th day of March, 1981.



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CERTIFICATE OF SERVICE

I hereby certify that I hand delivered a copy of the foregoing Petition For Rehearing and Brief in Support Thereof to David B. Boyce, BACKMAN, CLARK & MARSH, 500 American Savings Building, 61 South Main Street, Salt Lake City, Utah on the 30 day of March, 1981.

Anne O. Beckman