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

Utah Supreme Court

David B. Boyce; Attorney for Appellant Earl Jay Peck, Ross C. Blackham ; Attorney's for Respondent and Petitioner

IN THE SUPREME COURT OF THE STATE OF UTAH

UTAH FARM PRODUCTION CREDIT ASSOCIATION,

Plaintiff-Appellant,

vs.

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

Defendant-Respondents.

Case No. ~~7588~~ 16985

BREIF IN ANSWER TO PETITION FOR REHEARING
UTAH FARM PRODUCTION CREDIT ASSOCIATION

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IN THE SUPREME COURT OF THE STATE OF UTAH

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BREIF IN ANSWER TO PETITION FOR REHEARING

THE PETITION FOR REHEARING IS UNTIMELY

Rule 76 (e) of the Utah Rules of Civil Procedure provides that the petition for rehearing must be within 20 days after the filing of the decision. The decision was filed March 9, 1981. The petition for rehearing was filed March 30, 1981. Even if the day of March 9th is not counted in computing the 20 days, the 29th of March was the last day for the petition for rehearing. Therefore, the Court does not have jurisdiction.

THE POINTS RAISED IN THE PETITION HAVE BEEN FULLY CONSIDERED PREVIOUSLY

As is stated in the Appellant Advocacy Handbook of the Utah Supreme Court, a petition for rehearing will not be granted where the points raised in the petition have been fully considered in the original hearing. People v. Rogerson, 7 P.410 (Utah 1885); Brown v. Pickard, 11 P.512 (Utah 1886);

Ducherau v. House, 11P.618 (Utah 1886); Jones v. House. 11P.619 (Utah 1886).

The issue of mitigation and the agrument now being made by the petitioner was fully considered in the original hearing and should not be considered again.

THERE WAS NO MITIGATION AS REQUIRED BY LAW

Where there has been a breach of a loan commitment, the borrower must make a reasonable attempt to obtain the money elsewhere. Cox Corporation v. Dugger, 583 P.2d 96 (Utah 1978), 36 A.L.R. 1416; 22 Am Jur 2d §69 Damages; Restatement, Contracts §343 (1932); 5 A. Corbin, Contracts §1078, at 446 (1964); Davis v. Small Business Inv. Co. of Houston. 535 SW2d 740 (Tex. Civ. App. 1976). Special damages, such as lost profits, are only recoverable where the borrower is unable to obtain the money elsewhere. Cox Corporation v. Dugger, supra.

There is good reason why the mitigation must take the form of an attempt to obtain an alternate source of financing. That is because the alternate loan eliminates all special damages, such as lost profits, and reduces the damages to the difference in interest rates. Ordinarily there is no difference in interest rates and therefore damages cannot be more than nominal because the money may usually be procured elsewhere at the same rate. 36 A.L.R. 1409; 22 Am Jur 2d §69, Damages; Bank of New Mexico v. Rice, 429 P.2d 368 (N.M. 1967); Investment Service Company v. Smither, 556 P.2d 955 (Ore. 1967); Consolidated American Life Ins. Co. v. Covington, 297 So. 2d 894 (Miss. 1974).

The Petitioner would have the Court approve of an alternate form of mitigation which would have only reduced the damages by approximately $4,000.00

(20,000 poults sold at 20¢ each) compared to the $44,000 that could have been saved through alternate financing (assuming that any profit would have been made). Furthermore, the sale of the 20,000 turkeys was not done for the benefit of Utah Farm Production Credit Association (hereafter PCA), but solely for the benefit of the petitioner. PCA was not even credited with the money recieved by the petitioner from the sale. So the sale was not any form of mitigation. The only reasonable attempt at mitigation would have been to obtain alternate financing even if there was a risk that the turkeys could die in the meantime. It is unlikly the turkeys would have died because the petitioner had received a short term loan from the Bank of Ephriam to solve a similar problem and certainly that could have been done again. At least the petitioner is required to have made an attempt.

The petitioner would have the Court believe that canceling the order for 40,000 turkeys was an extraordinary effort by the petitioner to mitigate damages. Such is not the case. It is not even reasonably certain that petitioner would have been able to purchase the last 40,000 poults. Whether the order for 40,000 poults would have been accepted would have been at the option of the Board of Directors of the selling company. (Transcript 176-177) The manager of the selling company testified that petitioner would have been a second priority customer on its order because they were not paying cash.

The argument that the petitioner had no collateral to offer as security to another lender is without merit because the loan could have been one that refinanced the delinquent loan with PCA thereby making the collateral available. Such had been done in the past. (Transcript 137) This would have

given the petitioner a place to grow the turkeys because there would have been no foreclosure. So it is not a situation where PCA is taking advantage of a situation it created. Rather it is a situation where the petitioner has created his own problems by getting delinquent on the prior loan and in a position where there could be a foreclosure.

There is no evidence in the record to support the conclusion that the petitioner gave up the opportunity to sell his farm and dividends at a beneficial price. The answers to interrogatories stated that there was no buyer that was obligated to make any purchase.

The borrowers had plenty of time to obtain alternate financing. Even if that had failed, all the borrowers had to do to get the loan from PCA was pledge the stock of Elliott Cox, one of the respondents, in the Moroni Coal Company. (Transcript 102-103) That would have created no burden because Elliott Cox was already personally liable on the note and thus his stock was already indirectly pledged. (Transcript 288) Consequently, it would have been reasonable for the borrowers to have pledged the stock. Having failed to do so and more particularly having failed to obtain alternate financing, the damages must be denied as a matter of law.

The entire argument of the petitioner ignores one other important factor. Rather than get another loan, petitioner went to work with the Moroni Coal Company. That resulted in profits to that Company and he was a 46-47% shareholder. The profits were reinvested in the Company. The appellant was not credited with that benefit to the petitioner, but only with petitioner's salary. Even if PCA was given credit for the profit and even if it was not enough to cover all the petitioner's alleged damages,

petitioner would still not get the difference in damages because the mititation must, as a matter of law, be in the form of an attempt to get another loan before special damages are recoverable. Furthermore, for all we know, the profit to Moroni Coal Company was more than the damages claimed by the petitioner for the alleged breach of loan agreement. (Transcript 139-142) Petitioner wants the profits from two busineses for the same year when he could not have been two places at once.

THERE ARE OTHER REASONS WHY THE DECISION OF THE TRIAL COURT SHOULD HAVE BEEN REVERSED

Even if the Court were to rehear the argument regarding mitigation, the case should still have been reversed because:

1. The loan officer who allegedly authorized the loan had no authority.

2. The damages for lost profit were not within the contemplation of the parties at the time of the contract as required by law.

3. The alleged loan agreement was not in writing as required by the Statute of Frauds.

4. The petitioner failed to prove that he was an average turkey grower or that he ran his business in a way that was comparable to the other growers or that his facility was in any way comparable. Therefore, there is a crucial missing link in the chain of evidence. In other words, there is no connection between the fact that other growers earned a certain profit and that therefore the petitioner would have earned such profit.

5. There was no prior history of successful operation. Again, as a matter of law, this makes the damage award too speculative.

In addition to the above reasons for total reversal, there are other reasons why the trial court errored as follows:

1. Since it is not reasonably certain that the petitioner could have taken delivery of the last 40,000 poults, two-thirds (2/3) of the counterclaim award is speculative.

2. Since it is speculative as to whether the dividend will be available in 1982, the sum of $28,940.40, representing the dividend portion of the counterclaim award, is speculative.

3. Since not all of the expenses were deducted from the claimed profits, the amount of the counterclaim is incorrect and this would require its dismissal entirely because the petitioner has failed to meet his burden of proof.

4. The award must be reduced $4,000.00 because prejudgment interest is improper because it cannot be awarded on a unliquidated amount and because there was no evidence to support the amount calculated by the trial court.

CONCLUSION

The Court has no juridiction over this case because the petition for rehearing was untimely. Even if there is jurisdiction there is nothing new in the petition for rehearing and therefore the matter cannot be reconsidered.

For good reason the law requires mitigation to be in the form of an attempt to obtain alternate financing. This is because that will ordinarily eliminate all damages. The claimed mitigation of the petitioner would only have eliminated a fraction of the claimed damages and was not even done for

the benefit of PCA. The petitioner wants the money from the sale of the turkeys and the benefits to the Moroni Coal Company without crediting PCA with anything. That is what they call mitigation.

There are many other good reasons why the lower court ruling should be reversed. Even if the mitigation argument of the petitioner had any merit, it would not change the result of the case.

Respectfully Submitted

David B. Boyce

David B. Boyce

CERTIFICATE OF MAILING

THIS IS TO CERTIFY that a true and correct copy of the foregoing BREIF IN ANSWER TO PETITION FOR REHEARING was mailed, postage prepaid, on this 15th day of April, 1981, to the following:

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