1982

Jack Horgan v. Industrial Design et al : Brief of Appellant

Utah Supreme Court

Henry S. Nygaard; Beaslin, Nygaard, Coke & Vincent; Attorney for Appellant;
William L. Crawford; Parsons, Behle & Latimer; Attorney for Respondents;

IN THE SUPREME COURT OF THE

STATE OF UTAH

JACK HORGAN,	:	
Plaintiff-Appellant,	:	
vs.	:	Case No. 18104
INDUSTRIAL DESIGN, a Utah Corporation, ABE W. MATHEWS ENGINEERING CORPORATION, a Minnesota Corporation,	:	
Defendants-Respondents.	:	

BRIEF OF APPELLANT

Appeal from the Judgment of
The Third Judicial District Court of
Salt Lake County, State of Utah
The Honorable G. Hal Taylor, Judge

Henry S. Nygaard
BEASLIN, NYGAARD, COKE & VINCENT
1100 Boston Building
Salt Lake City, Utah 84111
Attorney for Appellant,
Jack Horgan

William L. Crawford
PARSONS, BEHLE & LATIMER
79 South State Street
Post Office Box 11898
Salt Lake City, Utah 84147
Attorney for Respondents,
Industrial Design and Abe
W. Mathews Engineering
Corporation

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BRIEF OF APPELLANT

STATEMENT OF THE CASE

This is an action to recover financial loss the Plaintiff suffered as a result of moving from Minnesota to Utah in the course of his employment. The parties will be designated as they appeared below.

DISPOSITION IN THE LOWER COURT

The Defendants' Motion for Summary Judgment against the Plaintiff was granted no cause of action on the 8th day of October, 1981.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks a reversal of the Judgment of the lower Court and have said matter remanded to the District Court for a trial on the merits.

QUESTION ON APPEAL

1. Whether the trial court abused its discretion in granting Defendants' Motion for Summary Judgment?

2. Whether the Defendants made misrepresentations upon which the Plaintiff's relied causing him to suffer financial damages?

3. Whether the mutual release the Plaintiff executed was done so under duress and therefore invalid?

STATEMENT OF FACTS

The Plaintiff, Horgan was employed by the Defendant, Abe W. Mathews from October, 1957 until June 30, 1978. (Horgan deposition page 5, line 5) During this period of time, Horgan was appointed to many executive positions including Chief Engineer, Executive Vice President, Vice President of Sales, and member of the Board of Directors. As an employee, he purchased shares in the Company.

In 1976, Mathews Engineering purchased Industrial Design, a Utah Corporation. At the date of acquisition, Industrial Design was operating at a loss. (Horgan deposition pages 12-13) In October, 1976, several of the officers of Mathews including Abe Mathews, Jack DeLuca, Jack Horgan, and M.V. Davidson, met for the purpose of discussing the financial problems of Industrial Design. Horgan said he was willing to help. (Horgan deposition, page 13) A short time later in October, 1976, DeLuca (President of Mathews) said to Horgan,

> "It is an opportunity for a stock option with Industrial Design, also bonuses and eventual presidency of Industrial Design."

At this time, Abe Mathews said,

> "I would also have an opportunity at a stock option with Industrial Design, special bonuses and other benefits befitting a President of a Corporation." (Horgan deposition, page 20)

At the Board of Director's meeting of Mathews in December, 1976, Horgan's move to Salt Lake City was approved including moving expenses. (Horgan deposition, page 14) At that time, Abe Mathews, Chairman of the Board, promised Horgan the eventual presidency of Industrial Design. (Horgan deposition, page 18).

On February 22nd or 23rd, 1978, Mathews held a Board of Directors meeting at Salt Lake City. At that time, DeLuca, Davidson, and Horgan was present. Stock options were decided as follows: Horgan, 10%; Davidson, 10%; Penomello, 5%; Millsaps, 5%; Hunter, 5%; DeLuca, 10%; treasury stock, 4%. Mathews Engineering was to retain the remaining 51%. (Horgan deposition, page 16)

Horgan relied upon these representations. On page 20 of his deposition, he testified,

> "I, as a person, was very comfortable in Hibbing, Minnesota. I was working for a good company. I had a good salary and other benefits, plus a home with low interest rates and alot of good friends. I would not have accepted a transfer like this without some benefits."

Horgan was promised special bonuses that would enable him to pay for the stock options under a similar plan he then

enjoyed with Mathews Engineering. (Horgan deposition, page 21).

It is the contention of Horgan that at the time he moved to Salt Lake City, Industrial Design was losing money. After he arrived and began working with the Company, it began showing a profit. The former major shareholder and continuing President of Industrial Design was James Robb. Robb did not trust or get along with Horgan, the Mathews' Company man. Therefore, Horgan was involuntarily terminated by letter effective June 30, 1978.

After many years of faithful service, it was a shock to be terminated by Mathews. Although Mathews felt it was being fair with Horgan, he received only benefits which all terminated employees received such a termination pay. See Vance Davidson Affidavit dated October 5, 1981 wherein he stated in Paragraph 7,

> " In May, 1979, I resigned from my relationship with Mathews. At the time, I received similar benefits as did Jack Horgan where he was terminated. Furthermore, when Jack Gorman, Bill Arndt and Fletcher were terminated, it is my understanding that they were basically given the same termination compensation that I and Jack Horgan received."

In paragraph 8 of the Jack Horgan Affidavit dated October 5, 1981, Horgan states:

> "8. All of the payments made under the Termination Agreement did not compensate me for the benefits that I was promised, such as moving expenses, stock options, and bonuses in the event there was a profit."

A Mutual Release, dated August 2, 1978 terminating Horgan's employment was executed by the parties. The document was prepared by counsel for Mathews and hurriedly executed by

Horgan after he met counsel and President DeLuca at the Salt Lake Airport.

Earlier, a letter dated July 24, 1978 had been mailed by DeLuca to Horgan. In the letter, the following statements were made:

> "Further, it has come to my attention that you are contemplating legal action against AWMECO. With regret, I am withholding payment of the termination pay until we have resolved the matter of 77 shares."

Horgan was intimidated. He has a seriously handicapped son, who is not insurable. Under all of these strained circumstances, Horgan executed the Mutual Release and even wrote a letter of appreciation.

ARGUMENT

THE TRIAL COURT ERRED IN GRANTING DEFENDANTS MOTION FOR SUMMARY JUDGMENT ON THE GROUNDS THAT THERE ARE GENUINE ISSUES OF FACT AND LAW

The basic question raised by the Plaintiff on appeal were not addressed by the Trial Court. The Summary Judgment was granted on the grounds that the Plaintiff had executed the Mutual Release and had sent a letter a short time later indicating the settlement of termination was fair. On its face, this decision does seem reasonable and fair.

However, the circumstances surrounding the termination were not properly considered by the Court. Defendants contend that the Plaintiff voluntarily quit rather than accept a transfer back to Hibbing, Minnesota and that the oral employment agreement

and transfer to Salt Lake City was indefinite as to its terms so Plaintiff could be discharged at any time for any reason.

The Supreme Court has consistently held that even one sworn statement under oath creates an issue of fact. The Court in Barnes vs. Sohio National Resource Company, 627 P2d 56, stated:

> "It is not the purpose of the Summary Judgment procedure to judge the credibility of the averments of parties, or witnesses, or the weight of evidence", and "it only takes one sworn statement under oath to dispute the averments on the other side of the controversy and create an issue of fact."

Furthermore, the Barnes case held that in determining whether or not there is a genuine issue of law or fact, the surrounding facts may be considered:

> "A Court, in determining the true purpose and character of a document that purports to be a deed, must consider such facts surrounding the transaction as the intention of the parties and the purposes to be accomplished; the existence of continuing obligation on the grantor's part to pay the debt allegedly secured by the deed; the adequacy of the consideration compared with the value of the property; the contemporaneous and subsequent acts of the parties; the relationship of the parties; the party responsible for taxes and improvements; and the form of the written documentation of the transaction."

In the instant case, Horgan and Davidson have both executed Affidavits in behalf of the Plaintiff's contentions that he moved to Salt Lake City because of representations upon which he relied to his detriment.

Jack Horgan, in his Affidavit in paragraph three declared as follows:

"3. That in October and December, 1976 and February, 1977, I met with Jack DeLuca, Abe Mathews and Davidson concerning the possibility of my moving to Salt Lake. In particular, Mathews and DeLuca specifically promised that I would receive equivalent pay and benefits if I moved to Salt Lake, including:

a. Presidency of Industrial Design when James Robb resigned or retired;

b. A stock option for 10% of the outstanding stock in Industrial Design;

c. Special bonuses to pay for the stock if the company were profitable;

d. My costs of moving would be paid, including any loss sustained as the result of the sale of my home in Minnesota and the purchase of a new home in Salt Lake;

e. The normal fringe benefits benefiting the president of a company.

Davidson corroborates these facts. In his Affidavit in paragraph 5, he states under oath:

> " I was present with DeLuca, Penoncello and Horgan in October, 1976 at the Androy Hotel for lunch. At that time, Jack DeLuca talked about the importance of creating a close relationship with Industrial Design. Mr. DeLuca suggested that it may be important to have some Mathews Engineering Company employees move to Salt Lake to assist in resolving problems of Industrial Design. Jack Horgan at that time expressed an interest in going to Salt Lake. During the next several weeks, there were a number of conversations in Hibbing, Minnesota, in which Jack DeLuca indicated to Jack Horgan, while I was present, that if Horgan moved to Salt Lake, Horgan could expect to succeed Mr. Robb as

President, and that there would be stock options and bonuses if the company could become profitable."

These sworn statements are in direct conflict with the Defendants positions that there were no definite representations upon which the Plaintiff could have relied.

With respect to the issue of execution of the Mutual Release, Horgan in his Affidavit in paragraph 7 states:

> " At the time of my termination, the legal documents were prepared by Mr. Tom Crosby, attorney for Mathews. DeLuca became very angry when he felt I would retain an attorney. I did not have a job, and my handicapped son was preparing for major surgery. Consequently, I needed the company's assistance and in particular, the company insurance. I therefore signed the release and agreed to the termination terms. If I had not been under such duress, I would not have signed the release at that time. My handicapped son did in fact have the major surgery performed upon him in the fall of 1979."

The statements in the Affidavit of Horgan are consistent with his deposition.

On page 16 of the Horgan deposition, the following statements are made:

QUESTION: Go ahead and give me what your recollection is.

ANSWER: The stock option would be offered to the following key employees: Jack Horgan, 10 percent; Vance Davidson, 10 percent; Frank Millsaps, 5 percent; Bill Hunter, 5 percent; Jack DeLuca, 10 percent; George Penoncello, 5 percent; and the other 4 percent would remain in a treasury position.

QUESTION: How much percent?

ANSWER: 4 percent. That adds up to 49 percent.

QUESTION: You said Horgan, 10 percent, Davidson, 10 percent; Millsaps, 5 percent; Hunter, 5 percent; DeLuca, 10 percent; Penoncello, 5 percent; and 4 percent would be 49 percent?

ANSWER: Yes

QUESTION: 4 percent was to go to whom, now?

ANSWER: Treasury. It was not committed.

QUESTION: And the other 51 percent was owned by Abe W. Mathews, correct?

ANSWER: That is correct.

QUESTION: Now, at this meeting in February when this was being discussed, wasn't that all that it really was, was a mere discussion where you were kicking around this idea?

ANSWER: I would agree with that. However, I operated totally in good faith in this company. I couldn't believe if something like that was spoken of Jack, that Jack wouldn't follow up. He always had before.

Other representations upon which Horgan relied in moving to Salt Lake were as follows:

1. Horgan was promised presidency of Industrial Design. (Horgan deposition, page 18, lines 20 to 25)

QUESTION: Tell me specifically what you were promised with regard to your coming out here instead of what the general discussions were.

ANSWER: I was promised eventual presidency of Industrial Design.

QUESTION: Who made that promise to you?

ANSWER: Abe Mathews.

Continuing on page 20 at line 8 of the Horgan deposition:

ANSWER: He said I would become President when Mr. Robb decided to retire. I would also have an opportunity at a stock option with Industrial Design, special bonuses and other benefits befitting a president of a company.

QUESTION: Are you saying, then, your opportunity for the stock option was in conjunction with you becoming president of the company?

ANSWER: I don't know how I would even properly answer that. They were talked about as a form of benefits or as an inducement. Can I add something to that?

QUESTION: Sure.

ANSWER: I, as a person, was very comfortable in Hibbing, Minnesota. I was working for a good company. I had a good salary and other benefits, plus a home with low interest rates and a lot of good friends. I would not have accepted a transfer like this without some benefits.

2. Horgan was promised bonuses. (Horgan deposition, page 21, lines 2 to 16)

ANSWER: The stock options would be paid for by a spe-

cial bonus offered to key employees. The similar plan that I had at Mathews Engineering.

QUESTION: Are you saying that you would receive a special bonus and you would use that money to purchase stock?

ANSWER: That is correct.

QUESTION: Was there any discussion about the price that you would pay when you did purchase this stock?

ANSWER: The price was to follow the same plan that we had at Mathews Engineering, wherein a price would be fixed at today's rate, and if the company grew and made money, you would still purchase it at this same fixed rate over a period of years.

The other primary issue in dispute involves the execution of the Mutual Release. The Plaintiff argues that he signed the document under a cloud of intimidation and coercion.

In his deposition, Horgan testified on page 71, line 7 through page 72, lines 1 to 12:

QUESTION: (By Mr. Crawford) Is that a true and correct copy, as far as you can determine, of the original of the release?

ANSWER: That is correct.

QUESTION: Signed by you?

ANSWER: Yes.

QUESTION: Where was it signed by you?

ANSWER: I met Jack and Tom Crosby in the airport.

QUESTION: Was it signed here in Salt Lake City?

ANSWER: Yes.

QUESTION: How did you receive it? Was it mailed to in advance, or did they give it to you at the time they saw y

ANSWER: It was hand carried by both Mr. Crosby and DeLuca.

QUESTION: So the first time you saw this agreement when you signed it in their presence?

ANSWER: That is correct.

QUESTION: Did you read through it?

ANSWER: I don't believe I did very clearly. I felt was, at the time, under duress. I wanted to get it over with

QUESTION: Well, you understand, didn't you, that it a release against all claims against Mathews?

ANSWER: To the best of my knowledge, yes, but I was under duress.

QUESTION: What duress were you under?

ANSWER: Under duress is being involved with a compa all these years and being let go.

QUESTION: Emotional duress?

ANSWER: Emotional duress, yes. To this day, I stil think about it.

Horgan received a letter dated July 24, 1978 from De which caused him considerable concern. The letter reads:

Dear Jack,

I am waiting for your reply to my letter of June 27, 1978, whereby, you are to advise the terms of payment on your (77) shares.

Further, it has come to my attention that you are contemplating legal action against AWMECO.

With regret, I am withholding payment of the termination pay until we have resolved this matter of (77) shares.

Very truly yours,

ABE W. MATHEWS ENGINEERING COMPANY

Jack H. DeLuca
President

In the context of all of the other happenings, it is easy to understand why Horgan was fearful of securing legal counsel.

Horgan, at this point, felt he had no alternative other than to sign the Release. In his deposition at page 87 beginning with line 15, he testifies:

THE WITNESS: I received that letter. I was shocked when I got it. I received that letter, yes.

QUESTION: (By Mr. Nygaard) What reaction, if any, did you have to that particular letter?

ANSWER: I was surprised that Jack would write me a letter like this. I decided, at that point, that I would follow the rules of termination as set by Mathews. I would not engage any legal counsel, but I did, so I talked with Jack on the phone concerning the same thing. I might add, when I discussed it with him, he was quite nasty.

In order for the Court to affirm the lower Court's Summary Judgment, this Court must be fully satisfied that

assuming all of the facts as alleged by the Plaintiff are true, he still could not prevail.

In the case of McBride vs. Jones, 615 P2d 431, at page 432, the Court declared:

> "A Motion for Summary Dismissal can properly be granted only when even assuming the facts as asserted by the party moved against to be true, he could not prevail. . . . . However, since the party moved against is denied the opportunity of presenting his evidence and his contentions, it is and should be the policy of the Courts to act on such Motions whose cause might have merit is not deprived of the right to access to the Courts for the enforcement of rights to redress of wrongs."

The Court must review all of the pleadings, documents and averments in a light most favorable to the Plaintiff.

The Court has held in Larson vs. Wycoff, 624 P2d 1151, at page 1153:

> "Because Summary Judgment is a harsh remedy which deprives a person of a full trial of his case, this Court will review the facts in a light most favorable to the party against whom Summary Judgment was granted."

In Grow vs. Marwick Development, Inc., 621 P2d 1249, at page 1252, the Court states:

> "It is a well-settled principle of law that Summary Judgment can only be granted when there is no dispute as to a material fact. The purpose of Summary Judgment is to save the expense and time of the parties and the Court, and if the party being ruled against could not prevail when the facts are looked at most favorably for his position, then Summary Judgment should be granted. If there is a question of fact raised by the pleadings or Affidavits, the Court is precluded from granting Summary Judgment."

CONCLUSION

The pleadings, documents, and depositions demonstrate

the existence of material issues of facts in this case. This contention is especially true in light of all the surrounding circumstances. After twenty years of loyal service to his company without any indication of strife or misunderstanding, why should the Plaintiff suddenly be terminated?

RESPECTFULLY SUBMITTED this 2 day of February, 1982.

BEASLIN, NYGAARD, COKE & VINCENT

Henry S. Nygaard
Attorney for Appellant,
Jack Horgan

CERTIFICATE OF MAILING

I hereby certify that two true and correct copies of the foregoing Brief of Appellant were mailed, postage prepaid, this 1 day of February, 1982 addressed to the following:

Mr. William L. Crawford
PARSONS, BEHLE & LATIMER
Attorneys at Law
79 South State Street
Post Office Box 11898
Salt Lake City, Utah 84147

Henry S. Nygaard