

1957

James E. Reed v. Hepburn T. Armstrong : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
of the

STATE OF UTAH

FILED

MAR 29 1957

Clerk, Supreme Court, Utah

JAMES E. REED,

Plaintiff and Appellant,

vs.

Case No. 8612

HEPBURN T. ARMSTRONG,

Defendant and Respondent.

BRIEF OF APPELLANT

GEORGE E. BRIDWELL

Attorney for Appellant

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IN THE SUPREME COURT
of the
STATE OF UTAH

JAMES E. REED,

Plaintiff and Appellant,

vs.

HEPBURN T. ARMSTRONG,

Defendant and Respondent.

Case No. 8612

BRIEF OF APPELLANT

I.

STATEMENT OF FACTS

In the Spring of 1954, plaintiff was called upon by defendant to assist him in the financing of a corporate venture to be known as Wyoming Uranium Corporation (Tr. 6 nd 7).

On the 14th day of July 1954, the parties entered into a written agreement in words and figures as follows: (Plaintiff's Exhibit No. 1, Tr. 8 and Tr. 41, lines 16 to 26.)

“For and in consideration of the sum of Two Thousand Dollars (\$2,000.00), receipt for which is acknowledged I hereby covenant and agree to perform the following for order of James E. Reed:

“(a) To immediately utilize One Thousand Dollars (\$1,000.00) to obtain A.E.C. certification of certain mining (uranium and allied minerals) claims owned by me in the State of Wyoming, description appended hereto, it being expressly understood and agreed that in the event legislation is passed making A.E.C. certification unnecessary, then and in that event said One Thousand Dollars (\$1,000.00) shall be forthwith returned by me.

“(b) To procure the formation of a corporate entity to exploit and develop said mining claims, it being presently intended that said corporation shall bear the name of WYOMING URANIUM CORPORATION, and to issue to James E. Reed, or order, One Hundred Thirty-Four Thousand shares of the common capital stock of said corporation as soon as is possible after formation, except that in the event that a return of half of the money herein mentioned is returned by me in accord with A, above, within ten days from the date hereof said stock issue shall be in the total amount of Sixty-Seven Thousand (67,000) shares only. This agreement is based on the assumption of a public offering of stock at .03 per share.

“I further covenant and agree that I shall diligently and with dispatch procure the formation of said corporate entity, and in the event that said corporation is not formed by me or someone on my behalf within a reasonable time, I agree that the same James E. Reed or his designees

shall be entitled to have a lien upon said property to the full extent of any moneys remaining unpaid, together with reasonable fees and expenses that may be incurred in perfecting the lien hereby accorded, and I further agree that I will in no way encumber said property until this obligation is discharged, and I agree to pay all costs of enforcement, together with a reasonable Attorney's fee.

Dated this 14th day of July 1954.

(s) H. T. Armstrong

STATE OF UTAH }
COUNTY OF SALT LAKE } ss :

"On the 14th day of July, 1954, there personally appeared before me H. T. ARMSTRONG, who duly acknowledged to me that he executed the foregoing document, and that the same was done as his free act and deed and under no threat or coercion of any kind.

(s) Mas Yano, *Notary Public*"

Pursuant to the terms of the above agreement, plaintiff-appellant delivered to defendant \$2,000.00; \$1,000.00 was paid directly to defendant and \$1,000.00 was immediately mailed to the Atomic Energy Commission (Tr. 8, Lines 18 to 29). It is to be noted that Line 18 on

Page 8 of the transcript mis-states the date of receipt of the referred to \$2,000.00. The date is, and should read, July 14th.

On the 29th day of July 1954, defendant asked plaintiff for additional money and received from plaintiff on said day \$1,500.00, by check, plaintiff's Exhibit No. 2 (Tr. 8, Line 30; Tr. 9, Lines 1 to 28 and Tr. 42, Lines 1 to 30.)

Upon the reverse side of said \$1,500.00 check, issued to and cashed by defendant is:

"Payment of \$1,500.00 or part thereof as needed for 100,000 shares of stock in proposed Wyoming Uranium Company, enlarges agreement of 7/14/54.

(s) Hepburn T. Armstrong"

Shortly after August 30, 1955, the \$1,000.00 that had been sent to the Atomic Energy Commission was returned to plaintiff-appellant (Tr. 10, Lines 12 to 20).

The Wyoming Uranium Corporation was, in fact, formed. There was a successful underwriting and plaintiff-appellant received from defendant 166,666 shares of stock of Wyoming Uranium Corporation.

It was and is the position of plaintiff-appellant that plaintiff's Exhibit No. 1 entitled plaintiff to 134,000 shares of said stock, and that plaintiff's Exhibit No. 2, entitles plaintiff to an additional 100,000 shares of said stock. Upon subtracting the 166,666 shares received from the 234,000 shares plaintiff claims entitlement to, plaintiff claims the value of 67,334 shares (Tr. 3).

The parties stipulated that a valid demand was thus made by plaintiff for the 67,334 shares (Tr. 5, Lines 1, 2, and 3).

It was further stipulated that the open market value of the Wyoming shares, on April 23, 1956, date of demand and refusal, was 19½ cents per share (Tr. 5, Lines 28 to 30 and Tr. 6, Lines 8 to 11).

Thus defendant concedes demand, refusal to deliver and value. Defendant of course contends that he had fully performed and plaintiff is entitled to nothing.

Trial was had before the Honorable Maurice Harding, upon plaintiff's amended Complaint, plaintiff thus praying for damages of \$13,130.13 plus interest at 6% from April 23, 1956, and a reasonable Attorney's fee of not more than \$3,500.00.

The Trial Court found the issues against plaintiff upon the basis:

(1) That the Paragraph B of the parties July 14, 1954 agreement, plaintiff's Exhibit No. 1, constitutes a penalty and is therefore unenforceable (Tr. 61), and

(2) That the Contract dated April 14, 1955, was modified by parol agreement of the parties and so plaintiff had already received all he was entitled to receive (Tr. 61).

Throughout the proceeding, plaintiff objected to oral testimony used by defendant and pertaining to plaintiff's Exhibits No. 1 and No. 2, but all said objections were

overruled by the Trial Judge (Tr. 15, 16, 17, 18, 33, 34, 35, 36, 37, 39, and 40).

And in response to a motion by plaintiff to strike all testimony concerning defendant's and plaintiff's negotiations pertaining to the written agreements of July 14, 1954 and July 29, 1954, plaintiff's Exhibits No. 1 and No. 2 (Tr. 55, Line 29 to Tr. 56, Line 3), the Trial Judge stated:

Tr. 56, lines 4 to 6: "The evidence prior to July 14 may be stricken pertaining to the negotiations, but the evidence subsequent to then may remain."

It is from the judgment of no cause of action that this appeal is taken.

II.

POINTS RELIED UPON

I. The Trial Court erred in its ruling that Clause B. of plaintiff's Exhibit No. 1 constitutes a penalty and is unenforceable.

II. The Trial Court erred in its admission of parol evidence to vary the terms of written contracts, plaintiff's Exhibits No. 1 and No. 2.

III. The Trial Court erred in permitting defendant to reduce his contractual obligation without consideration.

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN ITS RULING THAT CLAUSE B OF PLAINTIFF'S EXHIBIT NO. 1 CONSTITUTES A PENALTY AND IS UNENFORCABLE.

It is the position of plaintiff in this regard that the following language of the document that the Trial Judge held to be a forfeiture and unenforceable is not a provision for forfeiture.

Plaintiff's Exhibit No. 1

"For and in consideration of the sum of Two Thousand Dollars (\$2,000.00) receipt of which is acknowledged, I hereby covenant and agree to perform the following for the order of James E. Reed:"

A. This part of the agreement provides that defendant is to use \$1,000.00 to obtain A.E.C. certification, and if such becomes no longer requisite, to return \$1,000.00 to plaintiff.

The applicable part of provision B of plaintiff's Exhibit No. 1, provides:

" . . . to issue to James E. Reed, or order, 134,000 shares of the common capital stock of said Corporation . . . except if a return of one-half of the money herein mentioned is returned by me in accord with A, above, within ten (10) days from the date hereof said stock issue shall be in the total amount of Sixty-Seven Thousand (67,000) shares only."

The \$1,000.00, though returned, was not returned within ten (10) days as above specified.

By the terms of the agreement of July 14, 1954, defendant agreed to and was absolutely obligated to

(a) Return the Thousand Dollars in question, if not required for governmental purposes, and

(b) Issue 140,000 shares of stock to plaintiff.

Plaintiff wishes to stress the importance of this precept that immediately upon execution, defendant was required to return one-half of the money as well as issue 134,000 shares.

Part B. of the agreement is not a penalty in any degree, the provision for cutting the shares in half if one-half of the Two Thousand Dollars was returned in ten (10) days, which it was not, being merely a condition subsequent that never came to pass.

A penalty or forfeiture has uniformly been held to be a punishment for failure to do something specified:

Stennick vs. J. K. Lumber Company, 161 P. 97 (Oregon):

“In contracts and in civil matters the term penalty imparts a clause by which the obligor agrees to pay a certain sum of money if he shall FAIL or NEGLECT to perform a contract.” (Emphasis supplied.)

McCutcheon vs. Ennon Oil Co., 135 So. E. 238 (W. Va.):

“A forfeiture is the loss of an estate in consequence of doing or omission of some act.”

In the case at bar, defendant absolutely and unequivocally agreed to convey 134,000 shares of stock regardless of any contingency. The plaintiff merely agreed

to relinquish one-half of those shares upon the happening of a condition subsequent. That condition never occurred. Defendant lost nothing by forfeiture, penalty or otherwise. He had already conveyed away 134,000 shares.

The condition subsequent that would entitle defendant to receive back 67,000 shares was beyond the control of either party. Defendant had nothing to perform, and no control over the condition and both parties knew of this and contracted in relation to it.

It is respectfully urged that the legal relationship established was not for penalty. It may have been otherwise, if defendant had agreed to convey 67,000 shares, only, plus an additional 67,000 shares if he did not return the money in ten (10) days. Such is not the case and the agreement clearly shows such was not the intent.

POINT II.

THE TRIAL COURT ERRED IN ITS ADMISSION OF PAROLE EVIDENCE TO SHOW VARIANCE FROM THE TERMS OF A WRITTEN CONTRACT.

Plaintiff contends that it is the law of the land that contracts, not contrary to public policy, should be enforced as written and that parole evidence to vary unambiguous writings may not be considered.

In the case at bar there are two agreements, neither being vague nor ambiguous.

The first agreement is dated July 14, 1954, whereby defendant absolutely obligated himself to deliver 134,000 shares of stock to plaintiff. The second agreement, for an additional \$1,500.00 absolutely obligated defendant to

convey an additional 100,000 shares to plaintiff, the express words being "... enlarges agreement of 7/14/54."

The Trial Judge held that the parties modified these agreements, orally (See Tr. 61).

The following authorities abundantly support the proposition that oral modification or evidence thereof is improper if applied to clear writings to vary them:

IX. Wigmore on Evidence, Third Edition, Page 76:

"When a jural act is embodied in a single memorial, all other utterances of the parties on that topic are legally immaterial for the purpose of determining what are the terms of their act."

"This is not a rule of evidence, because it has nothing to do with the probative value of one fact as persuading us of the probable existence of another fact."

"It is a rule of substantive law, because it deals with the question where and in what sources and materials are to be found the terms of a jural act."

"Where two parties enter into an agreement, and reduce it to writing, that writing determines the terms of the bargain."

It is urged that the Trial Court erred in holding the ten (10) day period for return of \$1,000.00 was enlarged by oral agreement to a reasonable time, Tr. 61, because such a finding is proscribed by substantive law.

In the case of *Verdi vs. Helper State Bank*, 196 P. 225 (Utah), a dispute arose concerning the amount of inter-

est to be paid on a bank deposit. The plaintiff sought to show by parol evidence that the written certificate of deposit was modified. Justice Frick, in the opinion of the case stated that while it might be held there was enough evidence to go to the jury as to whether or not the conduct of the parties indicated that a higher interest rate was intended, he said such submission would be reversible error. At Page 229, 196 Pacific, it is stated:

“It is axiomatic that where an express contract exists, one may not be implied.”

Certificates of deposit, of course, are subject to the same rules as other written contracts, as is stated at 196 P. 227:

“It will be observed here that the certificate in question was, under the law, a negotiable instrument. At all events it must be treated as an instrument in writing which evidenced a transaction between the parties and hence must be considered in the light of the same rules of law and evidence as other written instruments.”

Vuquist vs. Bonscher, 227 P. 2nd. 83 (Ida.):

“Courts may not interpret an agreement so as to relieve one of the parties from the terms which he voluntarily consented to, or interpret the agreement to mean something that it does not say, or interpolate into the the agreement something it does not contain.”

In the case at bar, plaintiff befriended the defendant who, having voluntarily made a bargain, now seeks to abrogate it. The importance of the money

advanced to defendant may be seen by noting that the agreement of July 14, 1954, gave plaintiff a lien on all of the property of defendant to assure performance.

Clark vs. Tidewater Oil Co., 220 P. 2nd 628 (Calif.):

“Construction of a written contract containing no ambiguity or uncertainty in its terms must be derived SOLELY from the language therein.” (Emphasis supplied.)

Certainly and without ambiguity defendant agreed, without condition, to convey 234,000 shares, which he did not do.

Popplewell vs. Jones, 211 P. 2nd 283 (Okla.):

“In arriving at the intention of the parties to a contract, the language used therein, if it is clear and explicit and does not involve an absurdity, governs the interpretation.”

The language in the case at bar involves no absurdity nor obscure meanings.

Guerin vs. Kirst, 192 P. 2nd 120 (Calif.):

“Making a new contract for litigants or re-writing clear terms to which they have freely pledged their faith is not a just or proper application of judicial function.”

Both parties freely and clearly pledged their faith and the trial Court should not have “rewritten” the contract.

East Millcreek Water Co. vs. Salt Lake City, 159 P. 2nd 863 (Utah):

“The Court is required to construe the contract made by the parties rather than to make a contract for the parties.”

Seavey Hop vs. Pollock, 147 P. 2nd 389, (Colo):

“In construing a contract the Court must declare the meaning of what is written and not what was intended to be written.”

Anderson vs. Great Eastern Casualty Co., 168 P. 966, (Utah):

“Where the parties make a clear and certain contract, the Courts cannot do otherwise than apply and enforce its precise terms, regardless of whether they think the contract a good one.”

It is suggested that in the event that Wyoming Uranium Company had failed that the agreements here in controversy would be bad ones from the standpoint of the plaintiff. However, since it succeeded, the agreement becomes bad for defendant only because plaintiff could then benefit from his bargain, which defendant attempts to repudiate because what he once promised of little value is now valuable.

Plaintiff is entitled to the precise enforcement of his bargain.

Paggi vs. Sklins, 179 P. 739 (Utah):

“Where a written agreement expresses the intent of the parties in plain and unambiguous language, it is the duty of the Court to give effect

to that language, unless the party executing the agreement was induced to do so by fraud or misrepresentation.”

There is no such suggestion of fraud in these pleadings or in the evidence. Defendant merely refuses because the very venture financed by plaintiff became a success and the rights defendant bargained away are now valuable and he wants them back.

Murphy vs. Salt Lake City, 236 P. 680 (Utah):

“Contracts are prepared and entered into for the convenience and protection of the parties and Courts are bound to enforce them in accordance with intention as it is manifested by the language used by the parties to the contract.”

If the decision of the Trial Judge is allowed to stand, plaintiff will have received no protection whatever, and clearly expressed intent would have to be wholly ignored.

All of the books are replete with statements of the same fundamental precepts, supra *Richards Irrigation Co. vs. Westview*, 80 P 2nd. 958 (Utah); *Middleton vs. Evans*, 45 P. 2nd. 570 (Utah); *Tanner vs. Title Insurance Co.*, 129 P. 2nd. 383 (Calif.).

The intention of the parties was that plaintiff's immediate and absolute right to 134,000 shares of stock would be effected if, but only if, \$1,000.00 was returned in ten (10) days, or by July 25, 1954.

It is urged to be fundamental that if time specified in any agreement becomes important that the Courts will set a reasonable time if none is specified.

In the case at bar, however, ten (10) days was set as the time within which defendant would benefit by the happening of a condition subsequent.

The parties clearly set ten (10) days and that expressed intention may not be disturbed upon the authority, above cited, that clear contracts should be precisely enforced.

POINT III.

THE TRIAL COURT ERRED IN ALLOWING DEFENDANT TO REDUCE HIS CONTRACTUAL OBLIGATION WITHOUT CONSIDERATION.

For the purposes of argument under this section, plaintiff urges that if parol modification of the agreement of July 14, 1954, and July 29, 1954 is held to be proper (Plaintiff's Exhibits No. 1 and No. 2) then such modification is not enforceable as lacking in consideration.

The following statement, it is urged, is a statement of the law on this subject:

Hames vs. Rust, 136 P. 2nd 350 (Calif.) :

"CONSIDERATION IS REQUIRED FOR MODIFICATION OR SUBSTITUTION OF CONTRACTS" (Emphasis supplied)

Plaintiff, of course, denies there was any modification, aside from arguing as a matter of substantive law that evidence pertaining thereto is improper.

But, assuming such evidence is proper and that the evidence shows a modification, such modification to be

enforceable against this Plaintiff must be for consideration.

There was none.

In this regard, plaintiff realizes the difficulty in the assertion of a negative, but urges that defendant, in his assertion of modification should also be compelled to show consideration. The transcript is devoid of any such showing, except on affirmative admission by defendant that there was none.

The following elicited upon cross-examination of defendant demonstrates plaintiff's position to be clear in this regard.

Commencing at Tr. 43:

“Q. It was after you had taken this check (Plaintiff's Exhibit No. 2) that you have testified, that Mr. Reed agreed the original agreement would be modified to, what was it, 66,000?

A. That is right. The original \$1,000.00 and at a cent and a half is 66,000 shares.

Q. This was after you received this check?

A. Oh, no, that was in our conversation before he gave me the check, and this check, as it says here, it modifies this agreement.

Q. What does it say, read it, will you?

A. Sure.

Q. It says “modifies”—

A. It says “enlarges agreement.”

Q. Of July 14th.?

A. Yes.

Q. That word “enlarges” was on there at the time you cashed it?

A. That is right.

Q. That isn't modification — you don't claim

there has been a change there in the writings on the back of that check, Exhibit 2?

A. No.

Q. You read that before you cashed it?

A. Yes.

Q. Was it already determined Mr. Reed would be the underwriter of this company on this approximate date?

A. Yes.

Q. In other words, if you claim he relinquished some shares July 14, you didn't pay him anything for doing it, did you, you didn't refund then any money to him, did you?

A. Sure, the \$1,000.00 returned from the A.E.C.

Q. Wasn't it to returned under the July 14th agreement?

A. It wasn't used for mineral leases.

Q. What you claimed you gave back to him, he didn't pay you, you gave him back the \$1,000.00?

A. The A.E.C. did. I didn't get it.

Q. You didn't give him anything in addition at that time at all, did you?

A. No.

CONCLUSION

Plaintiff is entitled to the benefit of his bargain, to-wit: the value of 67,334 shares on date of demand and refusal which is conceded to be 19.5 Cents per share, for a total of \$13,130.13, and interest at 6% thereon from April 23, 1956.

It is the duty of the Courts to sustain contracts that are deliberately entered into between parties. The integ-

urity of written agreements, clear and unequivocal, should be held inviolate.

On July 14, 1954, defendant bargained to convey stock to plaintiff in a sum certain. That agreement was enlarged by more writing, upon payment of more money.

Plaintiff risked his capital with the defendant upon precise terms. It is clear that their bargain now has a great value to both parties.

If defendant is permitted to rescind he is unjustly enriched at the expense of plaintiff who made the whole plan capable of success in the first instance by performing his entire obligations under the written agreements in evidence in this case.

Defendant's entire position could be summarized:

“If this thing turns out sour, you lose. If this venture turns out well, you still lose, because I gave you what I consider is enough, anyway.”

Such precept offends good conscience, morality and the substantive law of the land.

Respectfully submitted,

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Received two true copies hereof this.....day of
March, 1957.

J. GRANT IVERSON,
Attorney for Defendant-Respondent