

1982

Melvin J. Staker v. Huntington Cleveland Irrigation Co. : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

MELVIN J. STAKER,	:	
	:	
Plaintiff and	:	
Respondent,	:	
	:	
vs.	:	Case No. 18203
	:	
HUNTINGTON CLEVELAND	:	
IRRIGATION COMPANY,	:	
a Utah corporation,	:	
	:	
Defendant and	:	
Appellant.	:	

BRIEF OF RESPONDENT

Appeal from the Judgment of the
Seventh Judicial District Court for Emery County
Honorable Boyd Bunnell, Judge

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JUN 23 1982

Clerk, Supreme Court, Utah

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MELVIN J. STAKER,

Plaintiff and
Respondent,

vs.

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HUNTINGTON CLEVELAND
IRRIGATION COMPANY,
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Defendant and
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MELVIN J. STAKER,
Plaintiff-
Respondent,

MELVIN J. STAKER,

Plaintiff-
Respondent,

VS.

HUNTINGTON CLEVELAND
IRRIGATION COMPANY,
a Utah corporation,

Defendant-
Appellant.

BRIEF OF RESPONDENT

No. 18203

STATEMENT OF KIND OF CASE

Plaintiff brought suit against Defendant Irrigation Company to recover overpayments made by Plaintiff to Defendant on water in the Joe's Valley project constructed under the Bureau of Reclamation.

DISPOSITION IN THE LOWER COURT

The lower Court found the facts in favor of the Plaintiff, awarding Plaintiff judgment in the principal amount of \$5,031.50, together with interest in the amount of \$3,283.00 and costs in the sum of \$29.70, for a total judgment of \$8,344.25.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks an affirmance of the lower Court's decision.

STATEMENT OF FACTS

Defendant's recitation of the facts deals almost exclusively with procedural matters. For purposes of clarity and response, the following factual summary is in two parts.

A. SUBSTANTIVE FACTS.¹ In March of 1966, the Defendant solicited its shareholders, including the Plaintiff, to subscribe for Joe's Valley project water, and stated in the invitation to the stockholders that a \$1.00 per acre foot charge would be made for each acre foot subscribed to or for.

Pursuant to such invitation, Plaintiff subscribed for 2,500 acre feet and made payment in the sum of \$2,500.00 to the Defendant company. Defendant did not readily find subscribers for all water for which its shareholders were eligible, and accordingly it invited additional subscriptions from those who had already subscribed, including Plaintiff. As a result, Plaintiff subscribed for an additional 500 acre feet, making a total of 3,000 acre feet, and paid an additional \$500.00 to the Defendant Company.

During the years 1967, 1968 and 1969, the Defendant irrigation company sent billings to the Plaintiff for 3,000 acre feet of project water at the rate of \$1.55 per acre foot. In its billings to Plaintiff and other shareholders,

¹ The facts as recited were, for the most part, expressly found by the District Court (R. 41) and are not in dispute on appeal. Where recited facts were not included in the Court's written findings, specific reference is made to the trial transcript.

Defendant indicated that there would be adjustments in the water actually received by the shareholders, and that the Irrigation Company would reimburse the stockholders for any overpayment for water not received. Plaintiff paid as per the billings.

In due course, Plaintiff's participation in the project water was cut first from 3,000 acre feet to 2,200 acre feet, and then cut a second time to 1,900 acre feet and a third time to 1,890 acre feet. The project water thus cut back from the shareholders, notably Plaintiff,² was transferred to Utah Power and Light along with other project water for use in its power generating facilities in Emery County. In 1975, and pursuant to agreement, the Power Company paid to the Irrigation Company \$5.00 for each acre foot of project water released or relinquished to it by the Irrigation Company or its stockholders. This money, by agreement, was to reimburse the Irrigation Company and its stockholders for preparing their lands and enlarging their canals and ditches in order to be able to use the project water. The money employed by the Irrigation Company had come from the stockholder assessments and subscription fees referred to above.

Sometime during 1975 the money received by the

² Only a few of Defendant's shareholders were affected by the cutbacks, and according to the testimony the impact on Plaintiff was over three times as great as on anyone else (R. 97 and 98).

Irrigation Company from Utah Power and Light was used by the Irrigation Company to satisfy a debt it had with the Emery County Water Conservancy District,³ and none of it was used to reimburse shareholders for the subscription fee and the assessments paid on the project water which they were obliged to relinquish.

After learning of the payment to the Conservancy District, Plaintiff discussed the promised refund with Defendant's president and was assured, "You definitely are going to get your money." (Tr. 36) Plaintiff relied on this assurance (Tr. 37), as well as other assurances from the Defendant's president, up until the latter was replaced in that position (Tr. 38). These conversations were within the time frame contemplated by the applicable statute of limitations.⁴ About two years after the change in Irrigation Company officials, Plaintiff, for the first time, was advised by the new president that he would not be paid (Tr. 39).⁵ Plaintiff filed this action on March 29, 1979.

³ By making payment to the Conservancy District when it did, the Defendant Irrigation Company apparently received a reduction in the amount of its debt (Tr. 37).

⁴ There were conversations in the latter part of 1975 (Tr. 37) and later (Tr. 38).

⁵ Mr. James Staker, who was a member of Defendant's board of directors during all relevant times, learned of the decision not to reimburse Plaintiff after leaving the board in 1978 (Tr. 92).

B. PROCEDURAL FACTS. The statement of procedural facts contained in Defendant's brief is technically accurate, but incomplete and creates misimpressions.

Defendant's procedural factual synopsis seeks to take advantage of an absence in the record of information concerning matters which were never before at issue.

For example, Defendant asserts that notices of trial setting were mailed to E. J. Skeen rather than Thomas O. Parker. Counsel asserts that Thomas O. Parker was in Egypt. The record does reflect that E. J. Skeen has the same mailing address as Parker, but since the issue was not raised in the trial Court, there is no explanation in the record as to why the trial Court sent the mailings to Skeen. It is reasonable to assume that if such issue had been raised, the trial Court could have made a record thereon.

Defendant's counsel asserts that he was retained two days before trial, though in the absence of a motion for a continuance or some objection to the trial going forward there is no record which addresses the matter of prior contacts between Mr. Litizzette, Mr. Parker, Mr. Skeen and Plaintiff's counsel, nor of their various contacts with the Court or with the Defendant. Such facts were not broached at the time of trial for the reason that Defendant's counsel made no issue of the notice of trial setting nor of the shortness of time in which he had been involved.

If the issues noted would have been raised then the trial Court could have addressed the same, and the record could have been more complete thereon. Defendant's effort to take advantage of them at this stage does not seem appropriate.

ARUGMENT

POINT I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION
IN DENYING DEFENDANT'S MOTION MADE ON THE DAY
OF TRIAL TO AMEND THE ANSWER TO ALLOW THE
STATUTE OF LIMITATIONS DEFENSE

Under Rule 12(h) Utah Rules of Civil Procedure, the Defendant waives defenses not presented in his answer. That section is applicable to the defense of the statute of limitations. Tygesen v. Magna Water Company, 13 Utah 2d 397, 375 Pac. 456 (1962).

In denying the Defendant's motion to amend, filed the morning of trial, the trial Court observed,

This case has been set, I believe, twice before. And, in other words, it was filed clear back in March of 1979; the exact dates and amounts claimed are set forth in particularity in the complaint. So that if the Defendants wanted to take advantage of the statute of limitations, they had plenty of opportunity to do so. Then the Plaintiff would have had the opportunity at least, to approach his case from the stand point of when did his cause of action arise and this sort of thing. We think it unfair to present it at this late date. . . . [Tr. 143]
[Emphasis added.]

The Court's finding of "unfairness" is amply supported. At the beginning of the trial, Plaintiff's counsel advised the Court as follows,

. . .[A]nd in addition we have not prepared to address that issue because it has never been raised. And we simple have not undertaken to prepare the case if put in this posture. We advised through responses through the interrogatories early on exactly what our position was, specifically every document that we would introduce. And it's never been raised and here we are. The first indication I ever had was yesterday afternoon. So we're simply not ready to try that and I think it would prejudice our position. [Tr. 8]

Under Rule 15(a) Utah Rules of Civil Procedure, leave to amend should be freely given "when justice so requires." In those cases where the Court has granted leave to amend, there appears uniformly to have been a finding that no prejudice resulted to the other party. See, e.g., Evans et al. v. Houtz et al., 57 Utah 216, 193 Pac. 858 (1920); Shay v. Union Pac. R. Co., 47 Utah 252, 153 Pac. 31 (1915); Benson v. Railroad, 35 Utah 241, 99 Pac. 1072 (1909).

In addition to the finding of "unfairness", the exercise of discretion by the trial court is supported by the following findings appearing at page 45 of the record:

22. That Plaintiff pleaded his case with specificity, setting forth not only his theory but also particular dates and the payments made for which he claimed reimbursement.

23. That further, in response to discovery procedures employed by Defendant, Plaintiff responded with specificity, setting forth the exact nature of his claim and the exact documents on which he intended to rely, including the date of those documents.

24. That Plaintiff further offered to make all documents on which he intended to rely available to Defendant for inspection and photocopying.

25. That the evidence introduced at trial, and on which Plaintiff relied, consisted of the precise documents which it had outlined in its response to Defendant's discovery.

The Court relied on the case of Goeltz v. Continental Bank and Trust Co., 5 Utah 2d 204, 299 P.2d 832 (1956), which deals specifically with a delinquent motion to amend to include the statute of limitations. That case sheds light on the phrase, "when justice so requires."⁶ The Court said,

Statutes of limitations as statutes of repose have a useful function in our law system. Sometimes they prevent the prosecution of a stale claim after proof of the facts are unavailable, and in such a case the interests of justice would require that leave to amend be freely granted. In other cases such defense merely prevents a recovery of a just claim. . . . Here defendant seeks leave to amend after all the evidence is in, even though all the facts upon which this defense is based have been fully known by the bank, since the original certificates were deposited with it in March of 1947 and no new evidence was discovered during the trial which made this defense available where it had not been available under the facts known by the bank in the first instance. [at 207.] [Emphasis added.]

The court in Goeltz went on to address Rule 15(b) Utah Rules of Civil Procedure, which allows amendments, "when the presentation of the merits of the action will be subverted thereby." In a comment alluding to both 15(a) and 15(b), the Supreme Court said,

⁶ As heretofore noted, amendments are to be freely allowed "when justice so requires." [Rule 15 (a) Utah Rules of Civil Procedure]

The facts which were determinative of that question were known to defendant from the inception of plaintiff's claim and were fully pleaded in defendant's answer. Defendant's only failure in pleading was to assert the statute of limitations as a defense to plaintiff's claim, and that is the only amendment which it asked leave to make. . . .These rules require that leave to amend be freely given when justice so requires or when the presentation of the merits of the action will be subverted. As we have already seen, justice does not require this amendment, nor does the presentation of the merits of the action so require it, for to defeat a claim by the bar of the statute of limitations is not a determination of a case on its merits. [at 208.] [Emphasis added.]

In the case before the Court, the trial Court found that the statute of limitations didn't vary the substantive matters of the case (Tr. 143). There was no problem with "staleness", and Plaintiff's evidence was clear and succinct. There was an indication of a defense witness not being able to remember some detail after the expiration of time covered by the case, but the Court found such detail was not "really material", and not such as "would materially alter the decision of the Court." (Tr. 144.)

The burden on Defendant-Appellant in this Court is a stiff one. The applicable standard governing trial court discretion was set forth by this Court in Searle v. Searle, 522 P.2d 697 (Utah, 1974) in which it was said,

The actions of the trial court are indulged with a presumption of validity, and the burden is upon appellant to prove such a serious inequity as to manifest a clear abuse of discretion. [at 700.]

To the degree that the Court's exercise of discretion is dependant on findings, the following is applicable,

. . .[T]his court is constrained to look at the whole of the evidence in the light favorable to the trial court's findings, including any fair inferences to be drawn from the evidence and all of the circumstances shown. The trial court's findings shall not be disturbed unless the evidence is such that all reasonable minds would be persuaded to the contrary. [Hanover Ltd. v. Fields, 568 P.2d 751 (Utah, 1977), at 753.]

It should be noted that the failure to plead the statute of limitations may not have been inadvertent or unintentional, since there is evidence in the record which would support a position that Plaintiff's cause of action did not arise until the money received from Utah Power and Light was misapplied by the Irrigation Company. Up until then, Plaintiff had every reason to expect that he would be fully reimbursed out of this money. Even after such misapplication by the Defendant, it continued to assure Plaintiff that he would be paid. On this ground Defendant's original counsel may well have determined that there was a sound basis for avoiding a strict application of the statute of limitations.

Since the proposed amendment would have required proof of matters not contemplated by Plaintiff in its preparation, and since there was a complete absence of any surprises in Plaintiff's evidence, and no proof problems relating to "staleness", and since the trial resulted in an "adjudication on the merits", it was fitting and proper and well within the

Court's discretion to deny the proposed amendment, and, in fact, to have allowed it could have "prevented recovery of a just claim," and could have hindered rather than fostered a fair and just conclusion. An amendment which will not further the interests of justice should not be allowed. See Bradford v. Alvey and Sons, 621 P.2d 1240 (Utah, 1980).⁷

POINT II

THE DEFENDANT CANNOT CLAIM IMPROPER NOTICE OF TRIAL WHEN SUCH ISSUE WAS NOT RAISED IN THE TRIAL COURT

As noted in the factual summary, the record is skimpy regarding the procedure employed in giving notice of trial. That is so because the issue was not raised in the trial Court.

Since the Defendant appeared for trial and raised no objection regarding the notice, and did not question the sufficiency thereof nor the propriety of the trial going forward, it is too late to do so at this stage. As was said in Hanover Ltd. v. Fields, supra at 753,

. . .[I]ssues not raised in the pleadings nor presented at trial. . .cannot be considered for the first time on appeal.

POINT III

THE COURT PROPERLY AWARDED INTEREST

In Bjork v. April Industries, Inc., 560 P.2d 315 (Utah, 1977) this Court said,

⁷ While this case involved Rule 15(b) Utah Rules of Civil Procedure, rather than 15(a), the principle is the same.

As to the allowance of interest before judgment, this Court has heretofore spoken, and the law in Utah is clear, viz: where the damage is complete and the amount of the loss is fixed as of a particular time, and that loss can be measured by facts and figures, interest should be allowed from that time and not from the date of the judgment. On the other hand, where damages are incomplete or cannot be calculated with mathematical accuracy, such as in case of personal injury, wrongful death, defamation of character, false imprisonment, etc., the amount of the damage must be ascertained and assessed by the trier of the fact at the trial, and in such cases prejudgment interest is not allowed. [at 317.] [Emphasis added.]

Applying the standard thus enunciated to the facts of this case, the following appears:

In paragraph number eleven of his complaint (R. 2) Plaintiff alleged as follows:

11. That the excess payments made by Plaintiff are as follows, to-wit:

(a) Overpayment on subscription, \$1.00 per acre foot for 1,110 acre feet (3,000 less 1,890), which totals \$1,110.00.

(b) Excess 1967 assessment, \$1.55 on 1,110 acre feet, which totals \$1,720.50.

(c) Excess 1968 assessment, \$1.55 on 1,110 acre feet, which totals \$1,720.50.

(d) Excess 1969 assessment, \$1.55 on 310 acre feet (2,200 acre feet less 1,890 acre feet), which totals \$480.50.

Total amount of the foregoing is FIVE THOUSAND THIRTY-ONE AND 50/100 DOLLARS (\$5,031.50).

There was no factual dispute as to the amounts in question, and the Court awarded Plaintiff judgment for the amount alleged in his complaint. The Court further found that the final adjustment on Plaintiff's project water

occurred during the year 1972, and accordingly the proper refund amounts were fully fixed during that year (R. 44). The Court awarded interest beginning January 1, 1973.

Defendant has recited language from Am. Jur. indicating that interest should be awarded "as a result of the justice of the individual case." 22 Am. Jur. 2d § 179. In this connection, it is pointed out that by January 1, 1973, when interest commenced to run by Court decree, Plaintiff had already been without the use of his money for several years, and further when the Irrigation Company elected to apply the Utah Power and Light money for its own purposes rather than to make refunds to shareholders, it received a direct benefit by negotiating a reduction of the debt it owed to the Emery County Water Conservancy District. (Tr. 37)

What may be considered as relating to "the justice of the individual case" are the facts set forth in the following testimony of Irrigation Company board of directors member Dick Allen, extracted during cross-examination. After acknowledging that the money received from Utah Power and Light had been paid to the Emery County Water Conservancy District, with none going to shareholders, Allen said (Tr. 125):

Q (by Mr. McIff) All right. Did you discuss thereafter that you would try to raise the money and pay the shareholders some other way?

A Well, there was some argument but no firm decisions because the attorney said we signed no contract and so we weren't liable.

Q I see. So his advice was, just not to pay those shareholders based on the fact there was no written contract signed?

A Yes. Nothing in writing to prove it.⁸

Mr. McIff: I see. All right. That's all I have.

In light of Bjork v. April Industries, Inc., supra, plaintiff was likely entitled to interest as a matter of law, though if an award of interest were discretionary with the district judge, then such discretion was well exercised and is entitled to a presumption of validity under the case law heretofore cited.

CONCLUSION

The judgment of the trial Court should be affirmed in all respects, and Plaintiff should be awarded his costs on appeal.

Respectfully submitted this 21st day of June,
1982.


K. L. McIff

⁸ While apparently there were no signed contracts, the promised refunds were proven by three written instruments (Findings number 10-13, R. 42-43), by statements made to Plaintiff by Irrigation Company officials (Findings number 14, R. 43), and by two minute entries from meetings of Defendant's board of directors (Findings number 14, R. 43).

AFFIDAVIT OF MAILING

I hereby certify that I served two copies of the foregoing Brief of Respondent upon Defendant-Appellant's attorney by mailing the same, with first-class postage thereon fully prepaid, on the 22nd day of June, 1982, addressed as follows:

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178 South Main Street
Helper, Utah 84526

Judy Christensen