

1959

W. E. Bueche v. Charles E. Conner Co. : Appellants' Reply Brief

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *Bueche v. Charles E. Conner Co.*, No. 8710 (Utah Supreme Court, 1959).
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In the Supreme Court
of the
State of Utah

FILED
JAN 8 - 1960

Appeal No. 8710.

Clerk, Supreme Court, Utah

W. E. BUECHE,
Respondent,
vs.

CHARLES E. CONNER COMPANY, WIL-
LIAM J. CONNER, and CHARLES E.
CONNER,
Appellants.

Appeal from
District Court,
Grand County, Utah.

—
Honorable
L. Leland Larson,
Presiding.

APPELLANTS' REPLY BRIEF.

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In the Supreme Court of the State of Utah

Appeal No. 8710.

W. E. BUECHE, <i>Respondent,</i> <i>vs.</i>	}	Appeal from District Court, Grand County, Utah.
CHARLES E. CONNER COMPANY, WIL- LIAM J. CONNER, and CHARLES E. CONNER, <i>Appellants.</i>		Honorable L. Leland Larson, Presiding.

APPELLANTS' REPLY BRIEF.

Foreword.

The defendants-appellants find it necessary to reply to the plaintiff's-Respondent's brief because of many inaccuracies therein, because of summary generalizations therein which are misleading because of their generality, and because plaintiff discloses a fundamental agreement with defendants quite contrary to the Court's Findings and Judgment.

The Memorandum Agreement quoted in plaintiff's brief contains several typographical errors of omissions, repetitions and misplaced lines of type. This is represented as being "Exhibit 1". However "Exhibit 1" is a list of disbursements (Tr. 38). The Agreement is made a part of the pleadings.

That Defendants Were Entitled to Judgment at the Close of Plaintiff's Prima Facie Case Is Not Disputed.

As stated in Defendants'-Appellants' main brief, pages 18-22, plaintiff at the time he rested his prima facie case had completely failed to sustain the allegations of his complaint. Motion for Judgment was made by defendants, denied by the Court, renewed at the close of all the evidence and again denied. Plaintiff rested his prima facie case at Transcript p. 160.

It is interesting therefore to note that in the plaintiff's brief substantially all references to the transcript, or to Exhibits said to support plaintiff's case, first occur *after* plaintiff had rested (Tr. p. 160).

We have searched plaintiff's brief carefully. It makes 103 references to transcript pages. Of these references by plaintiff, only 26 of the transcript pages referred to relate to what occurred before plaintiff rested his case.

Not any of these pages tend to support the plaintiff's burden. They do support the defense.

Plaintiff cited Tr. 33 as showing the defendants' expenses of a trip to Salt Lake City (which fact is true), but no reference to such a trip appears on that page.

He cites Tr. 59 as showing that William J. Conner worked on the Lile and New Castle claims "in the late fall and winter of 1955, and the early part of 1956". Yet that page shows that the witness there questioned was Charles E. Conner, who expressly testified, "I don't believe I could answer that. I wasn't here when the work began." The page reference in no way supports plaintiff's statement.

Pages 65-81 are cited by plaintiff as showing various items of expenses paid by defendants. Such items of course support the defendants' contentions.

Page 88 is cited as showing that Charles E. Conner

“upon one occasion helped move a few trees out of the roadway.” That fact is true. If it is intended to represent that this was all that Charles E. Conner did, then it is not true. Apparently such is the intended representation of plaintiff’s brief (p. 16), although it ignores the undisputed testimony adduced by the plaintiff (Tr. 92, 93) that Charles E. Conner was very busily engaged, and at the instigation of plaintiff himself, throughout 1955 and 1956 in endeavoring to work out prospective mergers, and incorporation, supervising the work in the mountains, attending to paper work and endeavoring, *with Mr. Bueche the plaintiff*, to raise funds to carry on the work. His six trips to Moab during this time were certainly not “for a grand vacation” as plaintiff’s brief (p. 22) puts it, (but again without the support of anything except counsel’s imagination) but were necessary business trips which plaintiff himself urged (Tr. 149, 151 and Pl. Ex. 9 and 10). As Mr. Fowler, plaintiff’s witness, testified, trips were made by Mr. Conner from Chicago to Miners Basin and Moab, and Mr. Bueche himself came on one occasion, and Mr. Fowler traveled to Chicago and met with Mr. Conner and Mr. Bueche “for the purpose of trying to complete the arrangement of merging these properties” (Tr. 149). Mr. Fowler was plaintiff’s witness. He was not called by defendants. We do not disagree that Mr. Charles E. Conner helped remove some trees from the road in Bachelor’s Basin. (It was “trees” at Transcript 88, and was “a few trees” at plaintiff’s Brief p. 9. However, as counsel became more enthused and careless, it becomes “a tree” at his brief, p. 16). The simple fact is that Mr. Charles E. Conner did a great deal of work, and in the best of faith as the Court found, to bring about success of the project.

As counsel must know, unless he considers his profession an avocation, it is not only the axman who “works”.

Plaintiff next refers to Tr. 98 to show that \$608.00 was paid by defendants for work of a bulldozer. We agree.

Plaintiff refers to Tr. 100 as showing that “approximately 3500 feet of roadway was bulldozed upon the mountainside which took 76 hours”. Plaintiff’s brief is again carelessly incorrect. The witness at that point, Mr. Stocks, testified that he was at the location “about two weeks” and that the road which was built was “about around two miles” (Tr. 99). Two miles is 10,560 feet, slightly more than three times as great as plaintiff’s careless generalization. Mr. Stocks testified (Tr. 100) that *he* worked 76 hours on the road (which is very nearly two 40-hour weeks) but that Mr. William Conner was also working with him, and, asked whether there were “any other workmen there”, he also named Mr. Fowler (Tr. 100).

When plaintiff’s brief says (citing but not quoting the record) that “approximately 3500 feet of roadway was bulldozed upon the mountainside which took 76 hours”,—and it turns out that the actual figures were three times that amount of footage and about three times as many work hours, we believe that brief ought not to be accepted in its recitation of fact.

Plaintiff’s brief next refers to Tr. 123 and 124 in support of the statement that Mr. William Conner and Mr. Fuller in 1956 at Bachelor Basin “did shovel dirt for a few hours to clear out a portal.” This statement, however, as it appears in the transcript is:

“—we cleaned out the tunnel so it would be possible for Mr. Mateer to go in in case he came back.”

Again, the enthusiasm of plaintiff is unrestrained by the record.

Plaintiff’s brief next refers to Tr. 137, 138 and 139 as showing that Mr. William Conner moved to Miners Basin on June 5, 1955 with the trailer in which he lived and with that we do not disagree. He had, however, been there on a number of trips earlier in 1955 as plaintiff concedes.

Plaintiff says that in the spring of 1955 "the old mine portal and tunnel were in a dangerous condition", with which we also agree. He goes on to say, however, that—

"as of the latter part of 1956, said tunnel was still in dangerous condition in that posts and caps had rotted to the point of being nothing but pulp wood (Tr. 139)."

This latter statement is unsupported by the record citation. The witness at this point, Mr. Fowler, could not testify as to the condition of the *tunnel*. He stated that he believed it was dangerous and "I wouldn't go in". Obviously, therefore, Mr. Fowler could not testify as to the condition of the tunnel for by his own admission he never looked at it in 1956. Plaintiff's brief, however, seems perfectly willing to overlook this fact and to tell the Court as a fact something which the witness could not say.

The Plaintiff refers to Tr. 144 as showing that Fowler was paid \$150.00. However, plaintiff fails to state that this very page shows that Mr. Fowler was paid by defendants "for work done in connection with their claims" the sum of \$150.00 cash and "a round trip ticket"—"to Chicago" (Tr. 144). Surely plaintiff does not want to represent only half-truths to the Court.

The final portion of the transcript before plaintiff rested his case is Tr. 148-152. This plaintiff refers to as showing that "All of the meetings" etc. referred to in our brief occurred "in the summer of 1955, not early in 1956, as defendants would like one to believe."

But Tr. 146, 147 without doubt discusses a meeting between Fowler and Bueche in October, 1956. It is quite true that discussions of merger *with Fowler* occurred in 1955, when Mr. Charles Conner was present. What Mr. Bueche and Mr. Fowler discussed in October, 1956, we do not know. However, the defendants "would like one to

believe" only the truth in this case. The truth is that the defendants actively worked on the project here involved not only up to October 24, 1956, when this action was filed, but long thereafter. Work did not cease in November, 1955, unless one conceives of "work" only as chopping ice on top of the LaSal Mountains.

The fact is that active work in connection with the project and in which *Mr. Bueche participated* continued through a large part of 1956.

As Mr. Bueche himself testified (Tr. 357), there was a meeting in January, 1956 between Mr. Bueche, Mr. Conner and Mr. Horton, the subject of which was "raising additional capital".

Mr. Bueche further testified as to a meeting in May, 1956, not relative to any account, concerning the work to be done and attempts to raise money (Tr. 362). At the end of that conference, Mr. Bueche, according to his own testimony, said:

"I am not going to talk to you again if you don't get something done so the geologists get up in the tunnel." (Tr. 365).

Mr. Bueche further testified that he was subsequently advised by a letter in 1956 (Tr. 364.)

"that the tunnel was cleared and I could send up geologists on my own again if I wished."

This testimony by Mr. Bueche fully supports the testimony by Mr. William Conner that he and Mr. Fuller in 1956

"cleaned out the tunnel so it would be possible for Mr. Mateer to go in in case he came back" (Tr. 123, 124).

We respectfully submit that there is no evidence in the record which could support a judgment for the plaintiff when he rested his case (Tr. 160). Plaintiff's brief fully

sustains this contention and the only portions of the transcript which he refers to, before Tr. 160, either support the defendants' contentions and disprove the allegations of the complaint or they are carelessly and erroneously represented for plaintiff's purposes.

The defendants' Motion to dismiss the complaint when plaintiff rested should have been granted. Failure to grant the Motion is reversible error.

Plaintiff's Point IV That a Party May Treat the Other's Breach of an Agreement as an Offer to Rescind Is Neither Sound in Law Nor Pertinent in Fact as Stated by Plaintiff.

Under his Point IV, plaintiff contends that where one party to an agreement has breached the agreement or defaulted, the other party may treat such conduct as an offer to rescind "and acquiesce in the desire so manifested to abandon the contract".

The portion enclosed in quotation marks in the preceding paragraph is plaintiff's words. We do not understand them.

There was never at any time a breach or default by the Conners, and if there was, it was waived by plaintiff.

Certainly if one party is in default or has committed a breach such that the other party may treat it as an offer to rescind (if that be sound law, which we doubt), the latter party surely must promptly and clearly accept that offer to rescind, communicating the acceptance to the party said to be offering to rescind. Any other course would be unjust and contrary to the most basic law.

The trial judge apparently thought that the defendants were in default in November, 1955 simply because Mr. William Conner had come down from Miners Basin to Moab and away from those mining claims at that time.

But no one could live and work at the top of the LaSal mountains in the winter and not even plaintiff regarded that as a breach. Actually, Mr. Conner worked in the low levels all winter.

Both the Court and plaintiff's counsel apparently regard the fact that jeeps, trailers, tools, etc. had to be purchased and were purchased for the project was in some way a misuse of the Bueche money. The Court awarded "rental value" for such items up to November, 1955, although it is undisputed that they were used for the project right up to the date of trial.

Yet, the plaintiff Mr. Bueche regarded these items as property of the project and not wrongfully purchased out of project funds.

In June, 1955, if he did not know so before as other proofs seem clearly to establish, Mr. Bueche knew that the "trailer, Jeep and other vehicles and equipment were up in the mountains" in use on the project (Tr. 351). That he knew they were purchased from project funds in which he had an interest was evidenced by the fact that he himself insisted that such equipment be brought down from the mountains to Moab "during the winter" (Tr. 352).

It seems ridiculous to contend that purchase of such equipment was not properly made out of project funds, and then to have Mr. Bueche giving insistent instructions as to their care. If they were not project property, what business did Bueche have in saying where it should be kept?

Furthermore, Mr. Bueche testified that he knew "between June, 1955 and August, 1955 that the trailer was purchased with my money" and that he "accepted that" (Tr. 352).

That such equipment was to be purchased and was necessary was known when the agreement was made. It was

the very reason why \$10,000.00 was needed at that time and why the parties contemplated the need for additional money in the near future.

There can be no doubt that Bueche knew that such equipment had to be purchased and that in any event he “accepted” that situation in June, 1955.

There is no possible ground therefore for the Court not to regard the expenditures for those items as perfectly proper, and as property of the venture. There is no basis whatsoever for allowing to defendants merely the “rental value” thereof.

Nearly \$6,000.00 therefore was invested in such necessary tools and equipment for the project right at its start. This was fully known to Bueche. In November, 1955, there remained some \$750.00 in an Oak Park, Illinois bank and \$2,500.00 in the Moab bank. The tools and equipment were still in existence of course at that time. Actually, the expenditures for food, gas, etc. had been very low. How then can anyone reasonably say that the project money was exhausted and therefore the project abandoned in November, 1955? Such an argument does not make sense.

The important thing, however, regardless of the argument, is that Mr. Bueche did not regard the contract as breached or terminated as late as May, 1956 (Tr. 362) nor even at the time of trial (Tr. 366).

We submit that the Court was clearly wrong in stating that after November, 1955 the parties “had no business relations of any kind—except concerning an accounting—” (Tr. 369).

That the Court was in error on this point of fact appears without possible doubt from the transcript. The plaintiff, Mr. Bueche, was discussing a meeting in May, 1956, with Mr. Charles Conner. The following occurred:

“The Court: What the court is trying to find out
 * * * is if you had any business transactions after

November 1955 with these gentlemen, except to try to find out about this account?

The Witness: I was. * * * I was talking with Mr. Conner up to May of 1956. * * *

The Court: When you talked with him in May, was that about your account?

A. No.” (Tr. 362, 363.)

The witness then explained the nature of the meeting and discussions of what was to be done, and his demand that they “get something done so the geologists get up in the tunnel” (Tr. 363).

The plaintiff, pressed by the Court, twice expressly denied that all was over in November, 1955 except for an accounting. This error by the Court is expressly contrary to the evidence and cannot be sustained.

There was no termination or breach of the contract in November, 1955 amounting to an offer to rescind and if there was, Bueche did not accept it.

What then is the next breach or default by defendants? The failure to report an account? The trial judge erroneously thought there had been a failure from November 1955 to March 1956 to render an account. If that was the basis for a charge of default, when did it occur? Certainly not in November, 1955. The full records were shown to plaintiff in January, 1956 and again in March, 1956 and again in June, 1956. Never at any time did plaintiff give any notice that he regarded a failure to give an account an offer to rescind which he accepted. Nor did plaintiff ever give notice that there was a breach by failure to give an account until this action was filed many months after a full account had been made.

But Mr. Bueche did not regard the contract as breached or abandoned and he did not act in any way to accept “an offer to rescind”. Quite the contrary.

Mr. Bueche was firmly of the belief that the tunnel on

the claims recorded in 1954 was rich in uranium. The Connors did not believe this to be true, much as they would have liked it to be true. Mr. Bueche did not have the right to direct where prospecting should be done. Nevertheless, by his own words, he told the Connors in May, 1956 (Tr. 365):

“I am not going to talk to you again if you don’t get something done so the geologists get up in the tunnel.”

So the Connors cleaned out the tunnel.

Did those words by Bueche in May, 1956 indicate an acceptance of an offer to rescind? Did those words by Bueche indicate that he stood upon a default terminating the contract in November, 1955?

Most certainly those words by Bueche indicated that in May, 1956 he still considered the contract in full force and effect and that unless the Connors cleaned out the tunnel he was going to be angry.

If there ever had been ground to terminate the agreement in November, 1955 or in the spring of 1956, Mr. Bueche not only did not exercise it but, by his words and conduct, waived it.

What act occurred after May, 1956 that was a breach of the contract by defendants? None whatsoever!

Plaintiff’s counsel contends that there having been a breach by defendants (undefined) that such amounted to an offer by defendants to rescind. If that theory were sound, it would of course have to be followed by an acceptance of the so-called offer. But an acceptance of such an offer would have to be promptly made and communicated to the offeror. When and what was the acceptance?

In 1956, further prospecting and work on the claims, even on the tunnel, was performed by the Connors. Work on the tunnel was done in furtherance of Mr. Bueche’s express wishes and demands. As Mr. Bueche further said:

“I wanted to get that geologist in that tunnel further, and really try to find out if there was something there.” (Tr. 364.)

Mr. William Conner, as was confirmed by two witnesses, was up on the claims prospecting and working on the road and on the tunnel with extra labor many times in 1956. He prospected many other places within the area specified in the contract in 1956. The Court allowed nothing for such work whatsoever.

Near the close of the trial, Mr. Bueche made it perfectly clear that he had not accepted any offer to rescind ever made by defendants or brought about by operation of law (even assuming the possibility thereof in this case, which is clearly erroneous). He was asked as to the contract:

“Q. Well you neither repudiate it or say that it is over or agree that the contract is terminated or anything of that nature, do you?

A. I never said anything like that.” (Tr. 365.)

“Q. As far as you are concerned, until you get that \$10,000 back you still participate in the contract and are entitled to any benefits that could come out of it.

A. I assume so.” (Tr. 366.)

Mr. Bueche never accepted any offer to rescind of any kind,—not even at the close of the trial.

Conclusion.

Plaintiff's brief is replete with errors of fact. Its argument is unsound in law. It failed utterly to prove the allegations of the complaint. The complaint should be dismissed and an order should be entered reversing the judgment and directing entry of an order dismissing the complaint with costs to defendants.

Respectfully submitted,

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