1982

L. P. Bentley and Clarice B. Bentley v. Lowell E. Potter : Appellant Lowell E. Potter's Brief

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

L. P. BENTLEY and CLARICE E. BENTLEY,	)	
Plaintiff, Respondents	)	
VS.	)	
	)	Case No. 18241
LOWELL E. POTTER,	)	
Defendant, Appellant,	)	

APPELLANT LOWELL E. POTTER'S BRIEF

APPEAL FROM THE JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT
FOR SALT LAKE COUNTY, STATE OF UTAH
HONORABLE HOMER F. WILKINSON JUDGE

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NATURE OF THE CASE

This is an action which was commenced in the the Third Judicial District Court, based upon the alleged breach of a Mining Lease executed between the parties on the 11th day of May, 1978, and for the sum of one thousand dollars ($1,000.00) as a result of the Plaintiff-Respondent having sold a truck to Mining and Energy Leasing corporation. Defendant-Appellant counterclaimed for assessment work which had been performed, and for the value of a trailer taken by the Plaintiff-Respondent.

DISPOSITION IN THE LOWER COURT

The case was tried before the Honorable Homer F. Wilkinson on the 13th day of October, 1981. On the 18th day of December, 1981, the court entered a memorandum decision stating that Plaintiff-Respondent was entitled to a total judgment against the Defendant-Appellant for $19,375.46 and that Defendant-Appellant was entitled to a credit against said amount of $5,120.00; thereby granting Judgment to the Plaintiff-Respondent in the sum of $14,255.46.

On the 11th day of January, 1982 the court entered Findings of Fact and Conclusions of Law, and a Judgment against the Plaintiff-Respondent in the sum of $19,375.46.

RELIEF SOUGHT ON APPEAL

Defendant-Appellant seeks a reversal of the lower courts Judgment and an order stating that Plaintiff-Respondent has no standing for the bringing of an action against Defendant-Appellant, and that the contract in question was void or voidable.

STATEMENT OF FACTS

On May 11, 1978 Plaintiff-Respondent and Defendant-Appellant entered into a Mining Lease and Option; whereupon Plaintiff-Respondent was the Lessor and Defendant-Appellant

was the Lessee (Exhibit 1). Section I of said Lease Agreement at page 2 indicated:

> "The rights hereby granted include the lodes, veins, beds, dumps, and other occurances of the lease minerals within the boundry of the lease premises." (emphasis added).

However Plaintiff-Respondent never had an interest in the lode claims and only attempted to perfect the placer claims (Exhibit 14). Plaintiff-Respondent acknowledged that he was aware of the difference between a lode and placer claim. (Transcript page 46 lines 19 through 25, page 48 and 49 lines 21 through 25 and 1 through 17).

Section VIII of the Lease at page 6 (Exhibit 1), in connection with termination of the Lease Agreement, requires the Lessor to tender notice to the Lessee, and states:

> ". . . if such default continues for a period of 60 days after written notice of such default has been given by the lessor's to the lessee then in such event this lease shall be terminable."

Plaintiff-Respondent acknowledged that he never made demand for payment under said Lease Agreement (Transcript page 16, lines 19 through 21) and that the methods employed in doing the assessment work, and exploration on the property in question were acceptable to the Plaintiff-Respondent (Page 38, lines 16 through 25, and page 39 lines 1 through 5), and at the first time Plaintiff-Respondent indicated that there should be a termination of the Lease Agreement in question, or that the work was improper was on March 5, 1980 (Transcript page 65 lines 10 through 18), which was after the date suit had been filed by Plaintiff-Respondent.

That Plaintiff-Respondent initiated suit against the Defendant-Appellant on November 29, 1979, and a Summons and Complaint was served upon the Defendant-Appellant on December 14, 1979, and that on March 5, 1980 Plaintiff-Respondent filed a Notice of Termination (Exhibit 13).

The Honorable Homer F. Wilkinson, a judge of the Third Judicial District Court in and for Salt Lake County, State of Utah, found that the August 10, 1979 letter (Exhibit 2) was a notice of default pursuant to the lease agreement (Paragraph 5 of the Findings of Fact), and that the filing of the legal action on the 29th day of November, 1979 was written notice of termination of the Lease sufficient to grant standing to the Plaintiff-Respondent for the bringing of an action. The Plaintiff-Respondent was awarded judgment against the Defendant-Appellant based on a termination and damages under the Lease.

At the time of the placement of the overburden complained of by Plaintiff-Respondent it appears that Plaintiff-Respondent was aware of the placement of the overburden and made regular trips throughout the area (Transcript page 54 line 20 and 21, page 176 lines 18 through 20, page 177 lines 23 through 25, page 182 lines 17 through 18 pages 174, 176, 177, and 182), and the court found pursuant to paragraph 13 of the findings of fact that Plaintiff-Respondent was present during the placement of the overburden.

The Plaintiff-Respondent acknowledged (Transcript page 71 and 72) that prior to an execution of the lease in

question with the Defendant-Appellant that a former co-owner of the claims, a Mr. Tony Fisher was removed from the claims, and a new co-owner Mrs. Clarice E. Bentley was placed upon the claims in question without the filing of any notification to the B.L.M..

Plaintiff-Respondent sold a truck for a total purchase price of $5,000.00 to Mining and Energy Leasing Corporation, a Utah corporation (Exhibit 15, transcript pages 81 through 84), and that there was a balance due and owing as a result of said sale in the sum of $1,000.00.

ARGUMENT

POINT I

THE LEASE AGREEMENT CANNOT BE IN DEFAULT UNTIL WRITTEN NOTICE HAS BEEN GIVEN, PURSUANT TO THE TERMS OF THE LEASE; AND PLAINTIFF-RESPONDENT HAS NO STANDING TO SUE UNTIL SAID NOTICE HAS BEEN GIVEN.

The Lease Agreement in question, under Section VIII, Termination, at page 6 states:

> "If, at any time, the Lessee shall be in default in the performance of any of the terms and conditions of this Lease on the part of the Lessee to be performed, . . . and if such default continues for a period of 60 days after written notice of

such default has been given by the Lessor to the Lessee, then, and in such event, this Lease shall be terminable. Such termination shall be effective as of the date of the Lessors' written notice to the Lessee terminating the same." (emphasis added).

In the action presently before the court it appears undisputed that Plaintiff-Respondent made no demand upon Defendant-Appellant for performance of the Lease in question, or notified the Defendant-Appellant that the lease was in default, (Transcript page 16 lines 19 and 20, and page 65 lines 14 through 18). The purported default or termination of the Lease pursuant to the August 10, 1979 letter (Exhibit 2), is in actuality not a notice of a default of the Lease, and is contrary to the provisions of the Lease by the granting of ten days notice which is contrary to the provisions of Section VIII of the Lease Agreement. A perusal of the record in question will indicate that the Complaint was signed by the Plaintiff-Respondent's attorney on November 29, 1979 and was served upon the Defendant-Appellant on December 14, 1979. It is also undisputed from the record, and the testimony of the Plaintiff-Respondent that the first notice of default or termination tendered to the Defendant-Appellant, was tendered by Plaintiff-Respondents attorney after suit had been filed, and was tendered on March 5, 1980, (Transcript page 65 lines 14-18).

It is clear from the Complaint and Amended Complaints on file herein that Plaintiff-Respondent is alleging a breach of the Lease Agreement in question and is stating that Defendant-Appellant failed to comply with the terms of

the Lease after a termination thereof. However, the parties have specifically agreed in the Lease Agreement that Defendant-Appellant should have the opportunity of correcting any default for a period of 60 days after written notice of default has been given, and Defendant-Appellant was never given the opportunity to cure said alleged default.

The law in connection with contracts seems clear that if a contract provides for notice that said notice must be given before performance or damages under the contract can be enforced. This proposition is clearly set out in 17 Am Jur 2d Section 356 at page 794 which states:

> "A contract specifically requiring a notice calling for, or a demand for, performance cannot be enforced unless a notice or demand provided for has either been given or waived."

also in 17 Am Jur 2d Section 357 at page 796 it states

> "There can be no recovery on a contract specifically providing for notice or demand unless the notice or demand was given in accordance with the terms of the contract.".

As is clear from the case presently before the court the parties very specifically contracted for written notice to be given by the Lessor to the Lessee, and that the Lessee had the opportunity of curing said default for a period of 60 days, (Exhibit 1, Section VIII). However, Lessee was not given notice prior to the institution of suit, and suit was unilaterally filed without complaining with the provisions of the Lease Agreement by Plaintiff-Respondent.

The Utah Supreme Court in Bethers -v- Wood, 10 U 2d 313, 352 P 2d 774 (1960) holds at page 775 in interpretating contracts:

> "The correct rule would appear to be that the question is to solved by the intent of the parties as determined by proper construction of their contract.".

It is evident from the contract in question that the parties intended the Lessor to provide written notice to the Lessee, and it is clear from the testimony of the Plaintiff-Respondent, that notice was not given until after the institution of suit, (Transcript page 65 lines 14 through 18).

The Utah Supreme Court in Peterson -v- Intermountain Capital Corporation, 29 U 2d 271, 508 P 2d 536, (1973), recognizance that Defendant-Appellant should be allowed the opportunity to perform pursuant to the terms of the contract, and in quoting Corbin on Contracts at page 538, the court stated:

> "At Section 978 of Corbin on Contracts it is stated:
>
> 'In an action for breach by an unconditional repudiation it is still a condition precedent to the plaintiff's right to a Judgment for damages that he should have the ability to perform all such conditions. If he could not or would not have performed the substantially equivalent for which the defendant's performance was agreed to be exchanged, he is given no remedy in damages for the Defendants nonperformance or repudiation . . .".

This proposition is further substantiated by the Utah Supreme Court in Bastain vs. Cedar Hills Inv. and Land Co. 623 P 2d 818 (1981) wherein the Utah Supreme Courth held that a buyer could not recover damages because of the [illegible]

promise being contingent upon conditions that had not occurred and it is evident from the case before the court that the Lessor did not tender the required written notice pursuant to the Lease Agreement in question. The Supreme Court in so holding reaffirmed Peterson vs. Intermountain Capital Corp. supra.

Willison on Contracts, Third Edition, Section 887B at pages 513, 514, and 515 states:

> "Where notice is required in the contract, the nature of the notice will normally be governed by the terms expressed or implied, of the agreement between the parties . . . In the absence of a conflict with law or public policy, parties may contract how notice shall be given; when they do so contract, the giving of notice by the method agreed upon is sufficient whether it results in actual notice or not.".

In the case before the court it is clear that no notice was given although Section VIII on Termination specifically provides how notice is to be given by the Lessor, and that the Lessee should have 60 days in which to cure any alleged default.

POINT II

PLAINTIFF-RESONDENT DID NOT TENDER CONSIDERATION FOR EXECUTION OF THE LEASE IN QUESTION.

The law of contracts is clear that in order for there to be a binding, valid contract consideration must be given. The Utah Supreme Court clearly recognizes this proposition

of law in General Insurance Company of America -v- Carnicero Dynasty Corporation, 545 P 2d 502 (1976), and states at page 504:

> "Where consideration is lacking there can be no contract. Where consideration fails, there was a contract when the agreement was made, but because of some superviening cause the promised performance fails.".

In the action presently before the court it is clear under page 2 of the Lease and as stated pursuant to the Lease the Lessor is granting the lodes and veins of the property in question. However, the evidence produced at the time of trial shows that Plaintiff-Respondent never had title to the lodes or veins in question but merely filed on the Placer Claims, (Exhibit 14).

Under page 9 of the Lease in question the Lessors are required to record all of the unpatented mining claims subject to the Lease in accordance with appropriate State and Federal statutes and regulations. However, at the time of the trial the evidence clearly showed that the Plaintiff-Respondents had not filed a notice in conjunction with the transfer of interest with the B.L.M. Even as of the date of trial no Notice of transfer of interest was filed, (Transcript page 72 lines 4 through 7), and a Notice of Interest is required to be filed by 43 CFR 3833.3(a) on unpatented mining claims.

From the evidence produced at trial Plaintiffs stated that they owned the unpatented mining claims located on

Federal lands prior to October 21, 1976, (Transcript page 9 lines 9 through 13), and therefore Plaintiff-Respondents should have filed all proper documentation with the B.L.M. on or before October 22, 1979, and on the following calandar years thereafter.

The Lease at page 9 also provides:

> "The Lessor shall record each and all of the unpatented mining claims subject to this lease by December 1, 1978 in accordance with the appropriate federal statutes and regulations."

A requirement to file with the B.L.M. is imposed upon the owners of unpatiented mining claims pursuant to 43 CFR 3833.2-1 and it appears that a failure to file an instrument or to comply with the federal regulations in connection with unpatented mining claims voids title to the claims as stated under 43 CFR 3833.4 wherein it states:

> (a) The failure to file an instrument required by Section 3833.1-2 a, b, and 3833.2-1 of this title within the time periods described herein shall be deemed conclusively to be construed as an abandon of the mine claim, mill, or tunnel sight, and it shall be void."(emphasis added).

It therefore appears that because of Plaintiff-Respondents failure to own the interest granted, and because of the failure to perfect the mining claims in question (Exhibit 14), pursuant to the lease and federal regulations, that Plaintiff-Respondents actually had no interest to transfer, therefore there was a complete lack of consideration and a valid contract could not be entered into between the Plaintiff and Defendant.

The perfecting of title of the claims was a condition

precedent to the performance by Defendant-Appellant as discussed in Point I in connection with the Notice requirement. In General Insurance Company of America -v- Carnicero Dynasty Corporation, supra at page 505 the Utah Supreme Court states:

> "However consideration or a substitute thereof must be established as part of Plaintiffs prima facia case in a contract action."

This proposition of law is also supported by the Supreme Court in Bastian vs. Cedar Hills Inv. and Land Co. supra.

In the action presently before the court, because of Plaintiff-Respondents failure to file the proper documentation, there is no interest owned by Plaintiff-Respondents in connection with the mining claims, and the fact that Plaintiff-Respondents attempted to lease out lode and vein claims upon which he never had title is a complete lack of consideration.

POINT III

PLAINTIFF-RESPONDENT HAD KNOWLEDGE OF THE PLACEMENT OF THE OVERBURDEN AND MADE NO ATTEMPT TO HAVE THE SAME REMOVED AND MUST BE ESTOPPED FROM ASSERTING DAMAGES AS A RESULT OF THE PLACEMENT THEREOF.

The Utah Supreme Court in Thompson vs. Jacobsen 463 P 2d 801 (1970) has stated that a fundamental principal of

law is that the Plaintiff has a duty to reasonably mitigate damages. The Utah Supreme Court in University Club vs. Invesco Holding Corporation 504 P 2d 29 (1972) stated:

> "The recognized rule is that where one party definitely indicates that he cannot or will not perform a condition of a contract, the other is not required to uselessly abide time, but may act upon the breached condition. Indeed in appropriate circumstances he ought to do so to mitigate damages."(emphasis added).

In the action presently before the court it is clear that Plaintiff-Respondent was aware of the placement of the overburden and made regular trips throughout the area (Findings of Fact paragraph 13, Transcript page 54 line 20 and 21, page 176 lines 18 through 20, page 177 lines 23 through 25, page 182 lines 17 through 18 pages 174, 176, 177 and 182), and in fact Defendant-Respondent went further and indicated that the methods employed in doing the assement work and exploration on the property in question were acceptable to the Plaintiff-Respondent (page 38 lines 16 through 25, page 39 lines 1 through 5). It appears clear that in the circumstances presently before the court that Plaintiff-Respondent had a duty to mitigate damages but at no time has he attempted to mitigate damages as a result of the placement of the overburden on the mineral properties in question.

POINT IV

THE JUDGMENT FOR REMOVAL OF THE OLD OVERBURDEN WAS EXCESSIVE.

The court on the trial held on October 13, 1981 granted a Judgment to the Plaintiff for the removal of overburden which had been placed upon suspected deposits of aragonite. However, from the Transcript it appears that the deposits of aragonite uncovered by Defendants exploration could be removed (Transcript 115 lines 19 through 24), but that the reason for not removing said deposits of aragonite which had been uncovered by the Defendant-Appellant was because of a lack of market for the same and the fact that said aragonite is located to far from a metropolitan area (Transcript page 129, 130, 131).

The Utah Supreme Court in Even Odds, Inc. vs. Nielson 448 P 2d 709 (1968) at page 711 stated:

> "Speaking generally about damages, the desired objective is to evaluate any loss suffered by the most direct, practical and accurate method that can be employed."

The Utah Supreme Court in Winters vs. Charles Anthony, Inc. 586 P 2d 453 (1978) held that ordinarily in regards to personal property that the general rule for damages is the fair market value or, if there is no demand for the item, the recovery is based on actual value. The court further stated:

> "The rule is a flexible one that can be modified in the interest of fairness."

In the action presently before the court there is no market for the aragonite in question and the overburden was placed by the Defendant-Appellant, with the knowledge of the Plaintiff-Respondent (Transcript page 174, 176, 177, and 182). It further appears that the placement of the overburden was in the logical place for the same (Transcript page 218). It therefore appears that said overburden was placed at the direction of the Plaintiff-Respondent, and that the placement was based upon an exploration of the properties and not full scaled mining. It therefore appears that the placement of the overburden has not damaged the Plaintiff-Respondent because there is no market for the aragonite uncovered by Defendant-Appellants activities, and that to grant damages as a result of covering up potential deposits of aragonite where there is no market for the aragonite uncovered seems incomprehensible.

POINT V

DEFENDANT-APPELLANT SHOULD NOT BE OBLIGATED TO MAKE PAYMENT ON THE SALE OF A MOTOR VEHICLE SOLD TO MINING AND ENERGY LEASING CORPORATION, A UTAH CORPORATION WITHOUT ACKNOWLEDGING SAID OBLIGATION IN WRITING.

Utah Code Annotated at 25-5-4 states:

> "In the following cases every agreement shall be void unless such agreement, or some note or memorandum thereof, is in writing subscribed by the party to be charged therewith: . . .
>
> (2) every promise to answer for the debt, default or miscarriage of another."

It is clear (Transcript page 84, lines 2 through 23), that the truck in question was being sold to Mining and Energy Leasing Corporation, a Utah corporation and at no time has Defendant-Appellant signed a written document indicating that he would answer for the debts of Mining Energy Leasing Corporation (Transcript page 214 lines 25, page 215 lines 1, 2).

SUMMARY

In summary Defendant-Appellant alleges that Plaintiff-Respondent did not have standing to bring the action because of a failure to comply with the terms of the Contract by giving the required written notice, and that said contract was void or voidable as a result of a lack of consideration pursuant to the terms of the Lease Agreement and therefore unenforcable by the Plaintiff-Respondent. Defendant-Appellant alleges further that the judgment awarded by the District Court, as a result of the placement of the overburden is excessive in that the potential deposits of aragonite allegedly covered by the Defendant-Appellant have

no market value and Plaintiff-Respondent made no attempt to mitigate his damages in connection with the placement of said overburden. Further that Defendant-Appellant should not be responsible for payment of the truck in question as a result of not signing a written agreement stating that he would answer for the debts or liability of another.

RESPECTFULLY SUBMITTED this 22 day of November, 1982.

Gerald M. Conder

GERALD M. CONDER
Attorney for Defendant-Appellant

DELIVERY CERTIFICATE

I hereby certify that two copies of the following Brief were hand delivered to Steven Alder, attorney for the Plaintiff, at Ten Exchange Place, #1000, Salt Lake City Utah 84111, this 22 day of November, 1982.

Gerald M. Conder