1983

L. P. Bentley and Clarice B. Bentley v. Lowell E. Potter : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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

BRIEF OF RESPONDENTS

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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TABLE OF CONTENTS

STATUTES CITED

CASES CITED

OTHER SOURCES CITED

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NATURE OF THE CASE

This action was brought in the Third District Court for Salt Lake County for breach of a mining lease. The plaintiff-respondent sought payment for damages to the leased premises and judgment for monies due under the lease. The plaintiff-respondent also sought judgment for money due on the sale of a truck. The defendant-appellant later counterclaimed for misrepresentation and for conversion of a trailer.

DISPOSITION IN THE LOWER COURT

The matter was heard by the Honorable Homer F. Wilkinson without a jury. The Court denied the defendant-appellant's Counter Claim for misrepresentation, ordered the plaintiff-respondents to return the trailer and granted the plaintiff-respondents judgment in the sum of $19,375.46 for the various damages claimed.

RELIEF SOUGHT ON APPEAL

The plaintiff-respondents seek modification of the judgment to correct errors in the determination of the date of termination of the lease and also in the method of determining damages. In all other respects the Plaintiff-respondents seek affirmance of the Court's judgment and findings.

STATEMENT OF FACTS

On May 1, 1978 these parties entered into a mining lease. The lease required in its relevant parts for the lessee (defendant-appellant) to make payment of minimum annual royalties, to complete the annual assessment work as required by

federal law, and to properly care for and operate the leased premises during mining and to return the premises in good condition upon completion of mining. (Plaintiff's Exhibit "1").

The defendant-appellant entered into possession of the leased premises, cleared overburden from a portion of the ore (T-20, T-172) and thereafter failed to do any further work, (T-18) failed to make payment of the minimum royalty, (T-16) and failed to complete the annual assessment work (T-18, T-19). In addition, the overburden that was removed was left on top of the ore and in the access roadway without further removal to a site proper for the placement of the overburden so as to permit future mining (T-24). Such placement of the overburden was improper and damaging to the leased premises (T-100-104, T-109).

The plaintiff-respondents made numerous demands that the assessment work be done, that the minimum royalty be paid and that the overburden be removed (T-26). On August 10, 1979, the plaintiff-respondent caused a letter from his attorney to be delivered to the defendant-appellant demanding correction of the placement of the overburden and completion of assessment work. (T-23 Exhibit "2"). On December 4, 1979, after the defendant-appellant had failed to respond to the demand in any way (T-23), the plaintiff-respondents commenced suit seeking damages for breach of covenants under the lease and for money due on the sale of a dump truck. (See Pleadings P. 3 and T-32).

On March 5, 1980, after the defendant-appellant had still failed to cure the breach of the lease (T-33), the plaintiff-respondent caused a Notice of Termination of the lease to be delivered to the defendant-appellant and to his attorney. (Plaintiff's Exhibit 13).

The court in its Findings of Fact and Memorandum Decision found that there was an enforceable lease supported by consideration and that there was a breach thereof by the defendant-appellant in failing to make minimum royalty payments, in failing to do annual assessment work and in failing to take proper care of the leased premises. The court found that the lease required 60 days notice prior to termination and that the notice dated August 10, 1979, was such notice as required. The court further found that the commencement of suit on December 4, 1978, was in effect a termination of the lease and not the letter of termination dated March 5, 1980. The court further found that the defendant had personally assumed the liability for the balance of $1000.00 due for a dump truck sold by plaintiff-respondents to defendant-appellant's corporation.

In determining damages the court ruled that the lease was terminated on December 4, 1979. The court found that the defendant owed $2500.00 for minimum royalty payments from December 1, 1978 to November 30, 1979 and a prorata amount of $27.44 for December 1, 1979 to December 4, 1979; that the defendant owed assessment work in the amount of $5000.00 for May

1, 1978 to April 30, 1979 which work was accomplished but that the defendant-appellant owed $848.02, as a prorated amount for the period May 1, 1979 to December 4, 1979. The court found that the damages attributable to the defendant-appellant for improper placement of the overburden was $15,000.00, although the total damages to the leased premises were $25,000.00.

The plaintiff-respondent does not contest the $15,000.00 figure but does contest the prorationing of assessment work liability and the prorationing of the minimum royalty.

ARGUMENT

POINT I

SEPARATE ACTIONS MAY BE BROUGHT FOR SEPARATE AND DISTINCT BREACHES OF A DIVISIBLE CONTRACT AND AT THE TIME OF THE BREACH WITHOUT TERMINATION OF THE CONTRACT.

-A-

The law is well established under generally accepted principles of contract law that

> "Where a parties' performance is several or is divisible into separate and distinct acts, so that the contract is subject to separate and distinct breaches, recovery for the breach of one separate and independent provision will not preclude a subsequent suit for a distinct breach of a different condition" 1 Am Jur 2d, Actions Sections 135, and 137 at p. 652.

Also, if certain covenants are susceptible of more than one breach, then there may be as many causes of action as there are breaches . See 1 Am Jur 2d Actions Sections 138 and 140. Also see Corbin on Contracts Section 956. The rule has been applied to a covenant to make repairs in a lease, See Beach v. Crain, 2 N.Y. 86 (1845); and also has been held to provide for successive actions for breach of a covenant to pay royalties. See Fifield v. Biesanz, 209 N.W. 259, 167 Minn. 399 (1926).

The corollary to these rules is that "A cause of action in contract accrues at the time of the breach or failure to do the thing agreed". See 1 Am Jur 2d Actions Section 89, also Corbin on Contracts, Section 948. Thus, for example, a contractor may sue for installments accruing under the terms of an entire building contract as they become due and need not wait until the building is complete, Milske v. Steiner Mantel Co., 103 Md 235, 63 A. 471 (1906); or a party may sue under a covenant to repair before termination of the lease, Corbett v. Derman Shoe Company, 155 N.E. 2d 423 (1959).

In Corbett there were two covenants: One to repair and one to redeliver in good condition. The suit for failure to repair was commenced prior to termination of the lease which happened three years later. The court held that there was a separate cause of action for breach of the covenant to repair and that the covenant of redelivery did not preclude such an action prior to termination.

Thus on the facts before this court the plaintiff-respondent had the right to bring a cause of action for the failure to complete the assessment work for 1978, and another for failure to do the assessment work for 1979, and still another for failure to operate in a workmanlike manner. All of the above are separate an divisible covenants of the lease which are also susceptible of continuing or multiple breaches.

This case is different from those where the party seeks prospective damages or an action based on antincipatory breach requiring a repudiation of the contract. Accordingly, although there is authority for the proposition that suit upon a covenant to return the premises in a condition similar to that at time of entry cannot be brought until the end of the term, such authority is not applicable to this case as it was originally brought. The lease was not repudiated as was the plaintiff-respondents' right.

Under the facts before the court the plaintiff-respondent sought repayment for assessment work done, and correction of certain activities that were believed to be in violation of the covenant to proceed in a workmanlike manner. Thus, the commencement of the law suit was not a termination of the lease. The plaintiff-respondent hoped the defendant-appellant would cure the default and continue to operate the leased premises. It was not until the breach continued and the plaintiff-respondent chose for additional reasons to terminate the lease on March 5, 1980, that the

obligations of the defendant-appellant ceased. It was subsequently to this notice that the complaint was amended to seek damages for minimum royalties due and for failure to return the premises in proper condition. (See Pleadings P. 34).

Thus, it was improper for the Court to rule that December 4, 1979, the date of commencement of suit, was the date of termination of the lease rather than March 5, 1980, the date of Notice of Termination.

POINT II

THE COURT'S DETERMINATION OF DAMAGES WAS IMPROPERLY PRORATED FOR PARTIAL YEARS

-A-

The lease provided at Section III B. Minimum Royalty as follows:

> The lessee, beginning on the 1st day of December, 1978,and on the 1st day of December of each and every year thereafter, so long as this lease shall remain in force and effect shall pay to the lessors an annual minimum royalty as follows; to-wit: $2,500.00 for each of the twelve month periods ending November 30, 1979 and November 30, 1980 and $5000 for each successive twelve (12) month period thereafter. (Emphasis added)
>
> .....

The plaintiff having proved that the lease was valid is entitled to enforcement according to its terms. The payments were due December 1, 1978 and December 1, 1979 for $2500.00 each year following. The court awarded only $27.44 for the second year. Plaintiff-respondent makes two alternative exceptions to this finding.

1) The payments should not be prorated. By the clear unequivical language of the lease the payment was due December 1, 1979. The defendant-appellant testified at trial that this was his understanding of the lease terms (T-190). The payment would be offset by actual production if any but in no other way. The plaintiff had no obligation to prorate the amount when the breach and termination were totally the result of the defendant-appellant's non-performance.

2) The date of termination was not the date of suit but rather March 5, 1980 and thus if the payment should be prorated it should be prorated from December 1, 1979 to March 5, 1980. See the discussion of date of termination under Point I.

-B-

The assessment work was also prorated from May 1, 1979 to December 4, 1979.

The lease provides at Section VII "The lessee agrees to do and perform all of the annual assessment work required by law

in order to maintain each and all of the unpatented mining claims". (Emphasis added). The amount required to be done was found by the court to be $100.00 per year per claim for 14 claims. This was in accordance with the subsequent portion of Section VII which states "Such annual assessment work shall comply with the provisions of all Statutes, including the provision that not less than $100.00 per year be expended for the benefit of each claim." The year referred to by the lease was the federal mining law year not the lease year. This amount should not have been prorated.

Under federal law, assessment work must be completed before August 31st of the year. The failure to complete the work as of December 4, 1979, was failure under the federal law for the entire year, since the plaintiffs had to have the work done by that time and recorded by December 31, 1979 to preserve his right to the claims. The assessment work was not properly prorated for a partial year from May 1 to December 4 since the lease year has no relation to the federal law.

In addition the plaintiff-respondents again assert that the lease was terminated as of March 5, 1980 rather than December 4, 1979 and that if prorationing was proper the date should have been until the later date.

No evidence was introduced at trial that the parties intention or interpretation of these paragraphs for determination of damages was consistant with the interpretation imposed by the Court. The lease language is clear and unambiguous on these points. It was improper for the court to impose upon the parties its own terms for prorationing. Damages should be determined according to the clear language of the lease without modification.

POINT III

PLAINTIFF-RESPONDENT MADE NO WARRANTIES AS TO TITLE AND DEFENDANT-APPELLANT WAS NOT DAMAGED BY ANY FAILURE OF TITLE.

The defendant-appellant's basic excuse for non-performance at trial was an alleged "failure of title". The defendant-appellant was never definite as to when this concern about title arose but at one point testified that it was about the 90 days preceding the amendment of the lawsuit in the fall of 1980. (T-180)

Failure of title was not asserted in response to the letter of August 10, 1979 or as a defense in the Answer filed January 17, 1980. It was not until December 19, 1980 when the

Answer was first amended that it was first asserted that only two of the fourteen claims were not properly filed with the B.L.M. On December 24, 1980, the Answer was amended again and it was then asserted that the claims were improperly filed as placer rather that lode claims.

It was shown at trial that the defendant-appellant himself had hired an individual to file the lode claims over the claims of the plaintiff-respondent in October of 1980 one year after the commencement of the law suit. (T-204)

-A-

The owner of an unpatented claim is entitled to mine, remove and sell all valuable mineral deposits within his claim boundaries that are not subject to extralateral rights of adjacent claim owners. The claimant is also entitled to such surface rights as are necessary for mining operations. Fee title remains with the Federal government until patent issues. The right of a claimant is an exclusive possessory interest in the claim which can be sold, leased, mortgaged or inherited without infringing the paramount title of the Untied States. See generally, J. Maley Handbook of Mineral Law, Second Edition 1979 p. 203.

The defendant-appellant admitted he was never excluded from the claims and that his right to possession was never challenged. (T-196-197)

A claim is a right exclusive to other occupation for mining of the same mineral. The lease recognized these factors by providing under Article XII Title to Leased Premises.

> If the Lessors; interest in the mineral rights in the Leased Premises, or in the other necessary rights required to enable the Lessee to operate and develop the Leased Premises in the manner contemplated herein, is less than whole, and the title failure affects the mining operations then being conducted, the production royalties payable hereunder shall be proportionately reduced in accordance with the proportion that the number of acres affected by such title failure bears to the total number of acres included within such claim affected.
>
> The Lessee shall not be deemed to be in default in payment of any production royalties hereunder while the title of the Lessors' is challenged by any third person or while any third person appears of record to have any right, title or interest adverse to the Lessors, if such production royalties are paid to a bank or reputable escrow agent; provided, however, that if such adverse interest affects only a part of the Leased Premises or a part of the interest of the Lessors therein, the foregoing provision shall apply only if the Lessee shall pay to the Lessors such part of the total royalty as is applicable to the land or interest not affected by such adverse claim. If the Lessors hereafter acquire any additional interest or title in the Leased Premises, then this Lease shall cover such additional after acquired interest.
>
> Notwithstanding the foregoing, the minimum royalty payable hereunder shall not be reduced because of any failure of the Lessors' title, unless the Lessee is prevented from mining all of the Leased Premises by order of a court of competent jurisdiction. In that event, the minimum royalty shall be suspended until such order is vacated. The minimum royalty for such

year shall be prorated. (emphasis added)

And again the lease provides at Article I Grant of Lease

> The Lessors hereby grant, lease and let exclusively unto the Lessee, all of their right in and to those certain unpatented placer mining claims (hereinafter [sic] referred to as the "Leased Premises" described in Exhibit "A".

Thus the lessee is expected to mine the land and if there is a defect that affects the ability to mine, then there are to be adjustments, not termination of the lease. But there were no interferences with the defendant's possession.

-B-

Mining claims are located upon a discovery of a valuable mineral. Two types of mineral claims are possible: lode and placer. A lode claim is locatable upon discovery of a vein or lode "of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposits (30 U.S.C. Section 23). A placer claim may be located for "all forms of deposit, excepting veins of quartz or other rock in place" (30 U.S.C. Section 35). Uncommon varieties of building stone may be located with placer-type claims pursuant to the Act of August 4, 1892 (30 U.S.C. Section 161) on lands that are chiefly valuable for building stone. See Maley supra at 203.

Defendant-appellant asserts the claims should be lode claims although the Lease clearly indicates it is a Lease of

placer claims. (See Exhibits to lease Exhibit "A"). Defendant-appellant asserts the material is usable as "chickenfeed" (T-203), and therefore locatable as a lode. This is akin to a lessee claiming that a lead-zinc ore that is usable as a building stone should be filed on as a placer claim rather than as a lode claim and thereby defeat the rights of a lessor to the mineral royalties. The rule is that the primary economic use controls the method of location. See Maley, Supra. The primary economic use and value was established at trial by plaintiff-respondent's expert as an uncommon variety building stone.

In a recent case, United States v. Mamie Vaughn, 56 IBLA 247 (July 24, 1981) the court held Dolomitic marble (which is similar to the aragonite claims of plaintiff-respondent) had a distinct and special value as building stone and was present in marketable quantities and therefore was an uncommon variety and locatable by a placer claim.

-C-

Section 314 of the Federal Land Policy Management Act of 1976 (43 U.S.C. Section 170) required that a claimant of an unpatented claim file a notice of claim with the B.L.M. office by October 22, 1979.

Federal Law (30 U.S.C. Section 28) requires assessment work of not less than $100.00 per claim be performed each year

beginning September 1st of each year and be recorded on or before December 31 of each year.

Prior to issuance of patent the Bureau of Land Management may challenge the validity of a mining claim for a variety of reasons. Proceedings are begun by service of a complaint and administrative proceeding are held within the Department of Interior.

The certified record on exhibit with the court in this case gives the following evidence: (Defendant's Exhibit "14").

1. Annual Assessment work was filed for 1980 on September 2, 1980 by Lloyd Bentley (plaintiff-respondent).

2. On September 4, 1979 an evidence of assessment work was filed for the 1979 year ending August 30 by Lloyd Bentley (plaintiff-respondent).

3. A document dated July 24, 1980 was sent to the plaintiff-respondent (care of the defendant-appellant) as Notice of Deficiency for filing the Amended Notice of Location instead of the original instrument of recordation for claims Sno-King No. 1, White Could No. 1, White Queen Nos. 1 and 2, White Dragon Nos. 1 and 2.

4. On July 30, 1979 plaintiff-respondent filed the original Notices of Location for White Queen No. 1 and No. 2.

5. On August 21, 1980 a copy of the original Notice of Location was filed for Sno-King No.1, White Cloud No. 1, White Dragon Nos. 1 and 2.

6. Subsequently all July 24 Deficiency Notices have been marked "satisfied" by the B.L.M. office as indicated on the official copies before the court.

Thus, the official B.L.M. record shows no deficiency, and no pendency of hearing by B.L.M. to challenge the claims. The only challenges are the lode claim filed at the direction of defendant-appellant himself for the same mineral one year after the law suit commenced. As stated previously only uncommon varieties chiefly valuable as building stone may be claimed and only by a placer claim.

In summary, the defendant-appellant's claim of title defect is without any basis in law or fact and is asserted without prior notice as a spurious attempt to deter the plaintiff-respondent's action.

POINT IV

THE COURTS FINDINGS OF FACT AS DETERMINED FROM TESTIMONY OF THE WITNESSES SHOULD NOT BE SET ASIDE SINCE THEY ARE FULLY SUPPORTED BY THE EVIDENCE.

The Findings by the trier of fact are entitled to a presumption of validity and upon appeal all evidence and inferences that can be reasonably drawn therefrom should be viewed in the light most favorable to support the Findings and Judgment of the trial court. Catler v. Bower, 543 P. 2d 1349 (Utah 1975). Briefly considered, the factual questions raised by the defendant-appellant in his brief are responded to as follows:

1. Lack of consideration. The mutual covenants together with the actual taking of possession by the defendant-appellant demonstrates that there was adequate consideration to support the lease agreement. The issue of title has been separately treated under Point IV and shows no lack of title or consideration.

2. Damages resulting from placement of the overburden. The trial court determined that the actual damages were $25,000.00 but were to be reduced to off-set any contribution or failure on the part of the plaintiff-respondent to mitigate the damages. Such determination involving a balancing of a variety

of factors are particularly well suited to the judgment of the trier of fact who has before him all the witnesses and evidence.

The court's findings are clearly supported by evidence including testimony of the plaintiff-respondents and the plaintiff-respondents' expert that the placement was improper, was not consented to and was damaging because of its location over the ore and in the path of the road.

3. Acknowledgment of liability for the dump truck. The defendant continually admitted at his deposition and at trial (T-213,214) that he was personally responsible for the debt owing for the truck.

The admission although verbal is not affected by the Statute of Frauds Section 25-5-4 U.C.A. since this was a finding of the court not an attempt to enforce a verbal promise. If a party seeks enforcement of an agreement that is within the Stature of Fraud, testimony of the oral agreement is not admissible. But, if a party admits to an agreement in Court without objection, then the Stature of Frauds does not bar enforcement of the agreement. W.W. & Co. B. Gardner, Inc. v. Pappas, 24 U. 2d 264, 470 P. 2d 252 (1970). Once admitted the facts were before the court to support the judgment.

SUMMARY

In summary, the judgment should be upheld to the extent that there was a finding of breach of the lease and damages to the plaintiff-respondent resulting therefrom. The amount of the damages should be recomputed. The remainder of the Court's judgment is supported by the facts and the law and should not be reversed.

Submitted this 17th day of Jan 1983

Steven J Allen

I certify that I delivered a ~~copy~~ two (2) copies of the enclosed brief to the Appellant's attorney Gerald M. Conder at 50 West Broadway S.L.C. this 17th day of Jan 1983