

1958

W. P. Rogers and Magna Mining Co. v. United Western Minerals Co. : Reply Brief of Defendant and Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Gustin, Richards & Mattsson; Attorneys for Defendant and Appellant;

Recommended Citation

Reply Brief, *Rogers v. United Western Minerals Co.*, No. 8787 (Utah Supreme Court, 1958).
https://digitalcommons.law.byu.edu/uofu_sc1/3007

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

JUN 6 - 1958

Clerk, Supreme Court, Utah

Case No. 8787

**IN THE SUPREME COURT
of the
STATE OF UTAH**

W. P. ROGERS and MAGNA MIN-
ING COMPANY, a New Mexico
Corporation,

Plaintiffs and Respondents,

— vs. —

UNITED WESTERN MINERALS
COMPANY, a Delaware Corporation,

Defendant and Appellant.

UNIVERSITY UTAH
DEC 19 1958
LAW LIBRARY

**REPLY BRIEF OF DEFENDANT
AND APPELLANT**

Appeal from the District Court of the Sixth Judicial
District, in and for the County of Garfield,
State of Utah

HONORABLE JOHN L. SEVY, JR., *Judge*

GUSTIN, RICHARDS

& MATTSSON

Attorneys for Defendant

and Appellant

INDEX

ARGUMENT	Page
Appellant's Points 1, 2, 3 and 4.....	1-8
Appellant's Point 5.....	9

TEXT

12 Am. Jur. 787.....	3
----------------------	---

IN THE SUPREME COURT of the STATE OF UTAH

W. P. ROGERS and MAGNA MIN-
ING COMPANY, a New Mexico
Corporation,

Plaintiffs and Respondents,

— vs. —

UNITED WESTERN MINERALS
COMPANY, a Delaware Corporation,

Defendant and Appellant.

Case No.
8787

REPLY BRIEF OF DEFENDANT AND APPELLANT

APPELLANT'S POINTS 1, 2, 3 and 4

The Statement of Facts set forth in the original Brief filed herein by Defendant and Appellant, hereinafter referred to as Appellant, has been accepted by Plaintiffs and Respondents in their Brief as being "substantially accurate to the extent it has gone." Plaintiffs and Respondents, hereinafter referred to as Respondents, added to the Statement of Facts only one item, that being a certain letter (R. 29) referred to by Plaintiffs and Respondents in their Brief and set forth in the Appendix

thereto as Exhibit I. We are indebted to Respondents for including this particular letter in their Brief. If any doubt existed at any time or in the minds of any persons as to the meaning of the parties in connection with the August 4, 1955 Agreement (Exhibit "A" in the Appendix to Appellant's original Brief), that doubt was utterly and completely removed by the parties themselves when they drafted, agreed to, executed and approved the said letter from which we quote the following excerpts:

"... The terms of the Agreement, dated August 4, 1955, call for the following consideration payable by United Western Minerals Company, in addition to the amount of \$125,000 to be paid out of 15% of the gross mineral production from the Coleman Canyon Group of claims."

"The consideration of the Coleman Canyon Group, in addition to the above mentioned payment out of mineral production, is \$15,000 in cash and \$15,000 in cash or common stock of our company, valued at \$1.00 per share."

"... The date for the beginning of payments out of gross mineral production, provided for in clause 3 of the Agreement of August 4, 1955, will be postponed until April 4, 1956."

"Kindly signify your approval of the foregoing terms for payment of the consideration payable under the Agreement of August 4, 1955, by signing the endorsement at the foot of this letter."

This letter on the stationery of the Defendant was signed by its President, Alva A. Simpson, Jr., and was approved in writing by both Plaintiffs, W. P. Rogers and Magna Mining Company. It shows clearly that the \$125,000 amount was to be paid out of 15% of the gross mineral production, and that any obligation to pay that

amount was dependent on mineral production which in turn was dependent on the presence of ore in commercial quantities. No mention of any kind was made of a monthly minimum payment requirement regardless of mineral production or which would indicate by any stretch of the imagination that a minimum payment was required even though ores and minerals could not be produced from the claims in commercial quantities.

By this letter the parties themselves not only interpreted their contract but they placed their interpretation in writing. We agree with Respondents as set forth on page 2 of their Brief that the interpretation of a contract given by the parties themselves is the best evidence of their intent. 12 Am. Jur. 787 discusses the interpretation of contracts by the parties thereto and uses this language:

“In the determination of the meaning of an indefinite or ambiguous contract, the interpretation placed upon the contract by the parties themselves is to be considered by the court and is entitled to great, if not controlling, influence in ascertaining their understanding of its terms. In fact the courts will generally follow such practical interpretation of a doubtful contract. It is to be assumed that parties to a contract know best what was meant by its terms and are the least likely to be mistaken as to its intention; that each party is alert to protect his own interests and to insist on his rights; and that whatever is done by the parties during the period of the performance of the contract is done under its terms as they understood and intended it should be. Parties are far less likely to have been mistaken as to the meaning of their contract during the period when they are in harmony and practical interpretation

reflects that meaning than when subsequent differences have impelled them to resort to law and one of them then seeks an interpretation at variance with their practical interpretation of its provisions. Where the language of a contract is uncertain and the parties thereto, by their subsequent acts and conduct, have shown that they construed it alike and within the purview of the constructions permitted as possible by such language, the courts will ordinarily follow such adopted construction as the correct one. It has even been said that the practical interpretation of the ambiguous terms of a contract will be adopted, although the language used may more strongly suggest another interpretation.”

We feel that the agreement itself is unambiguous and clear and that when it is read in its entirety and is analyzed pursuant to established rules of logic and reason and from a grammatical standpoint, and when consideration is duly given to the language used by the parties themselves, there can be no doubt that the obligation to pay the \$125,000 amount depended entirely on the existence of a situation under which “ore or minerals can be produced therefrom in commercial quantities.”

However, if any ambiguity existed in the contract, the same was resolved by the parties when they approved the wording and language of the November 2, 1955, letter referred to above.

To give to the contract the interpretation contended for by Respondents in their Brief requires not an interpretation of the contract but a revision thereof. Such construction requires that no effect or consideration be given to the following clause contained in sub-paragraph (c)

of paragraph 2 of the Agreement: “shall be paid for out of 15% of the gross mineral production from said group of claims,” and to eliminate from the contract or give no effect to the following words and provisions from paragraph 3 thereof: “. . . so long as ore or minerals can be produced therefrom in commercial quantities . . .” and “. . . in lieu of production.” In other words, instead of having said paragraph read as it now does, it is necessary that the contract be modified to exclude part of the provisions or to give no consideration to them so that in the guise of contruing the contract the same is actually re-written to read as follows:

“As to the payment of the purchase price . . . there shall be no actual payment due to Sellers by Buyer for six months after the date of this Agreement; however, the obligation shall accrue . . . even though the payment is delayed until six months after the date of this Agreement. Thereafter, payment shall be made monthly . . . ;provided, however, that Buyer . . . shall pay Sellers the sum of \$500 each and every month . . . The sum of \$500.00 per month so paid shall be credited upon the unpaid balance of the purchase price.”

Where we have indicated a succession of periods in the above paragraph, it is to show that certain words and provisions used by the parties and which must be given due meaning and consideration have been eliminated, since the construction placed on the contract by the Plaintiffs and Respondents and by the lower Court requires such elimination.

Again in paragraph 10 of the Agreement it is provided that payments are to be made out of production

or in the sum of \$500.00 per month if Defendant fails to operate and mine the claims "as hereinabove provided," which ties the duty of payment to production and to the availability of ore and minerals in commercial quantities.

When we come to the letter of November 2, 1955, above referred to, again it is clear that the construction contended for by Plaintiffs and Respondents requires not an interpretation of the letter but a revision thereof and an elimination therefrom of very pertinent parts and provisions. Furthermore, the construction of the next to the last paragraph of the November 2, 1955, letter is determined by the same considerations as the construction of clause 3 of the original Agreement.

In reply to some of the statements made by Plaintiffs and Respondents in their Brief, we agree that while the parties were not conscious at the time of executing the Agreement of "highly academic requirements of logic and grammar," they still meant what they said and they still intended that the statements they made and the provisions they incorporated were to be given a reasonable and logical construction and that the various words, explanations and statements made by them were to be considered and not ignored.

Furthermore, contrary to the statements made in Respondent's Brief, Appellants did not have an unqualified obligation to produce but had an obligation to produce only so long as ore or minerals could be produced in commercial quantities or if they failed to do so, then to pay a minimum monthly payment. The parties so

stated and they had a reason for so stating. Again, contrary to the statement made in Respondents' Brief, the language is not that Appellant shall "pay \$500.00 per month in lieu of mining and producing said claims," but the language as actually quoted from the contract itself and not from Respondents' distorted interpretation thereof is that "buyer shall have the obligation of either continuously mining and operating said claims so long as ore or minerals can be produced therefrom in commercial quantities, or if it fails to do so, shall pay Sellers the sum of \$500.00 each and every month in lieu of production."

We agree that the parties contemplated a situation where ore might be present or might not be present and so they provided for a sale price of \$155,000.00, \$30,000.00 of which was to be paid in any event and the balance of which, namely, \$125,000 was to be paid "out of 15% of the gross mineral production from said group of claims." The Buyer assumed all the risks with respect to part of the total amount, that is, \$30,000.00, but as to the balance the parties stated that it was to be paid only out of gross mineral production, which would depend on the availability of ores and minerals on the claims. If such ores and minerals existed, then the Buyer was given an option to continuously mine and operate the claims so long as ores or minerals could be produced in commercial quantities or to pay a minimum of \$500.00 per month in lieu thereof. Since the payment of this \$125,000.00 was to be out of production there was not an unqualified obligation to produce since this cannot be reconciled with the reali-

ties of the situation, for it is obviously impossible to produce ore if there is no ore present.

Therefore, the parties themselves agreed that if ores existed and could be produced in commercial quantities, the \$125,000 amount was payable out of production except that, if for any reason Buyer did not want to continuously mine and operate or for any reason failed to do so (ore being available), then it was required to pay \$500.00 monthly in lieu of production. What could be more realistic and practical?

If the parties had intended an absolute obligation on the part of Appellant to pay the \$125,000.00 amount, they would have provided to that effect and would have set forth required periodic instalment payments without any reference to production or availability of commercial ores. Instead, the whole obligation was to pay out of production or to pay minimum monthly payments if Buyer failed to produce so long as ores and minerals could be produced in commercial quantities.

Appellant has not taken the position "that should it not see fit to make the property productive, the unpaid purchase price would be forgiven," as stated in Respondents' Brief, P. 9. Instead, it has contended that the obligation to pay the \$125,000 amount depended upon the existence on the claims of ore and minerals which could be produced in commercial quantities. The Lower Court failed to require Respondents to prove that such situation existed and also refused to permit Appellant to show that the exploratory program undertaken by it disproved the existence of a commercial ore body.

Appellant has paid \$30,000.00 consideration for the Coleman Canyon claims, which payment was not made contingent on production. It has paid a great sum of money in exploratory work, development, roads, etc. The Respondents are now endeavoring to make it pay for something which is absolutely worthless and on which no ore body exists in commercial quantities and which would enable Appellant to make the payments which the parties themselves made dependent on the existence of ores or minerals producible from the claims in commercial quantities.

APPELLANT'S POINT 5

Appellant respectfully submits that Respondents' Brief does not answer the arguments stated in Appellant's Brief on Point 5. Respondents Amended Complaint was not further amended at either the trial or pre-trial. There is no question of inconsistent remedies being asked. Instead the pleadings asked one remedy and were not amended. The election was thereby made. By its Pre-Trial Order and Judgment the Lower Court gave Respondents a remedy not mentioned in their pleadings, but which was also inconsistent with the remedy they elected in their pleadings to pursue.

Respectfully Submitted,

GUSTIN, RICHARDS
& MATTSSON

*Attorneys for Defendant
and Appellant*