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Rocket Mining Corporation, A Utah Corporation,
and Pioneer Carissa Gold Mines, Inc., A Wyoming
Corporation v. Rulan J. Gill and Angelo M. Billis :
Petition For Rehearing

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IN THE SUPREME COURT OF THE STATE OF UTAH

UNIVERSITY OF UTAH

ROCKET MINING CORPORATION, a Utah corporation, and PIONEER CARISSA GOLD MINES, INC., a Wyoming corporation,

Plaintiffs and Respondents,

vs.

RULAN J. GILL and ANGELO M. BILLIS,

Defendants and Appellants.

AUG 25 1966

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Case No.
10467

PETITION FOR REHEARING

Appeal from Summary Judgment of the Third District Court,
Salt Lake County, State of Utah
Hon. Aldon J. Anderson, Judge

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Defendants and Appellants.

PETITION FOR REHEARING

PRELIMINARY STATEMENT

This was an appeal from the Summary Judgment granted on one count only, which count sought to recover salaries paid to the appellants, Rulon J. Gill and Angelo M. Billis for employment services rendered Rocket Mining Corporation in the year 1957. Summary Judgment was granted against each of these appellants

in the amount of the salary paid him, together accrued interest on the basis that the payment of salaries by the plaintiff corporation was ultra because of a provision in the offering circular of R. Mining Corporation which provided as follows:

“No salaries or other compensation shall be paid directly or indirectly to officers, directors or promoters of issuer other than Secretary-Treasurer, who will receive \$75.00 per month until issuers' mining operations are on a pay basis.”

The undisputed facts, for purposes of the Motion Summary Judgment, were that substantial profits were realized by the corporation from the sale by it of mineral claims prior to the payment of these salaries. The court, however, narrowly construed the above provision and held that because such profits did not accrue until the mining and shipping of ore, that the salary in dictation was not satisfied and the salary payments were *ultra vires*.

GROUND FOR REHEARING

It is submitted that the opinion of this Court deprives appellants of their constitutional right to hearing and of their property without due process of law, and further denies them equal protection under the law by reason of its failure to review the Summary Judgment against them. The Court in its opinion submitted the following specific errors:

1. In treating this case as one "tried to the Court" when, in actuality, there has never been a trial and the Summary Judgment appealed from was a Summary Judgment on one narrow issue based on undisputed facts.

2. In reviewing and relying upon the "protracted record", which record was not designated or involved in the sole issue on appeal, but was designated by respondents in their abortive cross appeal involving issues not as yet heard and disposed of and in basing its opinion on a review of such record, rather than restricting itself to the undisputed facts relied on by the Court for Summary Judgment.

3. In overlooking or ignoring *all* of appellants' points and contentions and the governing legal principles recited in support thereof.

4. In stating that appellants mainly relied in their appeal "on the great amount of work that they did to support their salary claims" and that "such does not absolve them from their promise not to take salaries before profits", when this issue was actually whether or not the corporation was estopped from suing on a presumably ultra vires contract, after it has accepted the benefit therefrom.

5. In the juxtaposition and omission of facts, so that it was made to appear that appellants' salaries were paid from capital rather than earned profits realized from the company's operations.

BRIEF STATEMENT OF FACTS

A public offering was authorized for the sale of Rocket Mining Company stock in the year 1955. The corporation obtained some \$30,000.00 as a result of this public offering. The restrictive provision regarding salaries set forth in the preliminary statement was recited in the offering circular under a paragraph therein entitled "Use of Proceeds" which set forth the proposed use of the anticipated proceeds from the public offering. No part of the funds realized from the public offering were paid to the defendants as salary or in any other manner and such funds were used to acquire and develop various properties and mining interests for the company.

Appellant Gill, President of Rocket Mining Company, became a full time employee of the company in March of 1956 and continued such employment until 1958. Appellant Billis commenced full time employment with the company in the Summer of 1956 and also continued such employment until 1958, acting as General Manager during the year 1957. In the Fall of 1956 appellants, without cost to the company, acquired for the company a lease-hold interest in a group of mining claims known as the "Rim Group", in the Gas Hills Mining District of Wyoming. Appellant Gill again without cost to the company, had a drilling program undertaken on these claims which blocked out a substantial amount of valuable ore.

In January of 1958, the interest of Rocket Mining

in these Rim Group claims was sold for the sum of \$130,000.00, which from the facts as they must be determined in this review, constituted a net profit in such amount to the company. Following this sale of the claims the salary payments in question were made with appellant Gill receiving \$9,000.00 and appellant Billis \$8,400.00. These sums represented monthly salary payments for the year 1957 in the amount of \$750.00 per month for Gill and \$700.00 per month for Billis, which had been authorized by the corporate board of directors in December of 1956.

DISCUSSION OF THE GROUNDS FOR REHEARING

I. THE COURT ERRED IN TREATING A SUMMARY JUDGMENT AS ONE MADE ON FULL HEARING AND SUPPLYING FINDINGS WHERE NONE WERE MADE BY THE TRIAL COURT, IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE STATE AND FEDERAL CONSTITUTIONS.

Because of the extensive pleadings, amendments and discovery proceedings in this matter which were designated by respondent in its cross appeal, the Court erred in assuming that this was a "case tried to the Court" and in supplying facts not found by the trial Court, not tested in a hearing, and not within the scope of the cause of action on appeal. The following excerpt from the Court's opinion is one example of this error:

“One cannot read the record in this case, or the briefs or hear the oral argument, without concluding that the promoters, facing a dire venture, induced a controlled board of directors to bail them out at least partially, by voting the salaries mentioned. This, of course, came naturally, - - but at the expense of unsuspecting and un-notified stockholders, and we think the trial court sensed this and decided that these salaries should be returned to the plaintiff as being in keeping with the pact made with the Securities Commission.”

These “findings” were not made by the trial court and defendants did not have the opportunity of disputing them, since the trial court considered only the effect of the language of the offering circular in a suit by the corporation for the return of salaries paid.

Admittedly, the record is voluminous for a case in which neither the parties nor the cause of action have really been defined, but it is voluminous by reason of the extensive charges, amendments, and discovery procedures of the plaintiff in the action. Defendants have not yet had the opportunity to present their evidence to show that no stockholder has been deceived or defrauded by the payment of salaries to the promoters responsible for all value presently within the corporation.

In order to affirm the Summary Judgment the Court must conclude that (1) the statement of the offering circular was violated; and (2) did create without a showing of further facts, a right of action in the

poration; and (3) that the corporation was not estopped by its receipt of benefits; and (4) that the suit is not barred by limitations. *Duc process and equal protection of the law can only thus be satisfied.*

Defendants-appellants contend that the corporation was, as a matter of law, making profit on mining operations at the time the salaries were paid (so that the condition of the contract was met); that the corporation had no right of action under the Utah Uniform Securities Act, Utah Code Annotated 1953, 61-1-22, and that under the concept that the statement conditioned the employment contract, Utah law is clear that the corporation is estopped from accepting the benefits of the contract and bringing suit upon the breach of a condition.

These matters were briefed in appellants' original brief, but not discussed or even specifically mentioned in the Court's opinion.

Remarkably similar to the posture of this case is that of *Fountain v. Filson*, 336 U.S. 681, 69 S. Ct. 745, 93 L. Ed. 971 (1939): *Filson* claimed that Mrs. *Fountain* held property subject to a resulting trust in his favor. Mrs. *Fountain* claimed that New Jersey law would not permit the imposition of a resulting trust under the circumstances and was awarded summary judgment. On appeal, the Court of Appeal agreed with the trial court that New Jersey law negated the concept of a resulting trust, but examined depositions taken in contemplation of suit and concluded that they

showed the existence of a personal obligation for the claimed amount and remanded the case with instructions to enter that personal judgment against Mrs. Fountain.

The U.S. Supreme Court reversed, stating:

“ . . . Summary Judgment may be granted under Rule 56, only if there is no dispute as to any material fact. There was no occasion in the trial court for Mrs. Fountain to dispute the fact material to a claim that a personal obligation existed since the only claim considered by the court on her motion for summary judgment was the claim that there was a resulting trust. When the Court of Appeals concluded that the trial court should have considered a claim for personal judgment it was error for it to deprive Mrs. Fountain of an opportunity to dispute the fact material to that claim by ordering summary judgment against her.”

In the instant case, the sole question determined by the trial court and validly presented for review to the Supreme Court was whether the acceptance of shares by the defendants was a breach of their employment contract with the corporation.

The Supreme Court's opinion, based on a review of plaintiff's other charges and discovery proceedings, ignores the trial court's holding, the defendants' arguments on the law, and their precarious position in the case, yet having had an opportunity to present their case, apparently finds them to be evilly motivated.

II. THE COURT ERRED IN FAILING TO CONSIDER THE CASE MADE AND THE LEGAL ARGUMENTS PRESENTED AND THEREBY DENIED APPELLANTS EQUAL PROTECTION OF THE LAW.

If, on the final record, the trial court, at last having had the opportunity to judge the credibility of the witnesses and hear the defense testimony, concluded that the "promoters" raided the corporate treasury "at the expense of unsuspecting and un-notified stockholders", the case before the court would be quite different.

As it now stands, defendants have been denied their right to be heard and have been refused their right to a review of the summary judgment ruling below on an issue of law and ultimate fact.

The elements of two, or perhaps three, causes of action have become intermingled here so that the lawsuit has become directionless, and it is defendants' belief that this confusion motivated the rendition of the partial summary judgment by the trial court, so that the issues could be clarified.

Pioneer Carissa Gold Mines, Inc., sold property to Rocket Mining Corporation, and, as a result, became a substantial shareholder. Then, it is alleged by plaintiff, the two companies were merged. No claim is asserted at this juncture by Pioneer Carissa as a shareholder under the Uniform Securities Act or as a fraud action, although that company appears as an additional plaintiff.

The summary judgment made no determination of fraud or over-reaching and no evidence has been introduced concerning these charges contained in the accounts. The only issue determined by the trial court was that Rocket Mining Company had a right to return of the salaries upon the assumption that the statement of the offering circular became a condition to the employment contract between plaintiff corporation and defendants, and was breached.

The employment contracts with the appellants were fully performed by them and were profitable to the corporation. Under Utah law in such a situation "neither party can maintain an action to set aside the transaction or to recover what has been parted with" (See appellants' brief, page 18). Furthermore, there was no breach of this condition because the salaries paid to appellants came from profits of the company's mining operations and not from the capital investment of shareholders. (See appellants' brief, pages 11 through 14).

This court's conclusion that the great amount of work appellants performed did not support their salary claims because such work did not "absolve them from their promise not to take salaries before profits", clearly reveals the Court's failure to understand the material facts and begs the questions raised in this appeal. These questions are whether the substantial profits realized by the company prior to the payment of salaries satisfied the requirement of the offering circular.

and whether by acceptance of this work and benefit, the corporation was estopped to bring this action?

The key phrase interdicting the salary payments was that no salaries would be paid "until issuer's mining operations were on a paying basis." The facts were undisputed for purposes of this summary judgment that the corporation's operations were on a paying basis from the sale of its interest in the Rim Group of claims, after drilling and developing an ore body on such claims.

The decision of the trial court was simply that such drilling, development and sale of the ore in place through the sale of the mining claims did not constitute a "mining operation" as contemplated by the prospectus. The trial court indicated that in its view, the actual digging and shipping of ore at a profit to the corporation was required. Whether this crucial determination was correct was one of the main issues in this appeal, which was totally ignored by the Court in its decision.

CONCLUSION

It is respectfully submitted that the present opinion of this Court is based on a misconception of what transpired in the Court below, together with a misunderstanding and misapplication of the facts involved while totally ignoring the appellants' legal contentions, which are substantially supported by established law of this jurisdiction. It must be acknowledged that on the

surface this case simply seems to be one where plaintiffs are apparently representing the investors public and seeking to restore corporate funds lost by certain officers. An easy and seemingly appropriate decision is to require such officers to return such funds. Such a decision, however, does not come to grips with the circumstances and controlling legal principles presented in this appeal, nor the facts of defense to be presented on trial.

This decision, if allowed to stand, deprives appellants of due process of law and the equal protection of law. It is therefore earnestly and respectfully requested that this Petition for Rehearing be granted and that the Court reconsider its opinion and vacate the outstanding summary judgment.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that in my judgment the foregoing petition for rehearing is well founded and that it is not interposed for delay.

Attorney for Defendants-Appellants

DAVID K. WATKISS