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Craig Caldwell and Robert E. Convington dba Caldwell and Covington v. Anschutz Drilling Company, Inc. : Brief of Appellants

Utah Supreme Court

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Young, Thatcher & Glasmann; John C. Beaslin; Holme, Roberts, More & Owen; Attorneys for Respondent;

IN THE SUPREME COURT
of the
STATE OF UTAH

CRAIG CALDWELL and ROBERT E. COVINGTON, dba CALDWELL AND COVINGTON,

Plaintiffs and Appellants,

vs.

ANSCHUTZ DRILLING COMPANY, INC., a corporation,

Defendant and Respondent.

No. 9587

BRIEF OF APPELLANTS

Appeal from the Judgment of the Fourth Judicial District Court for Uintah County, Hon. Joseph E. Nelson, Judge.

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STATEMENT OF THE KIND OF CASE

This is an action wherein plaintiffs seek a decree of specific performance requiring defendant to assign and deliver certain oil and gas leases to the plaintiffs or in the alternative, if the same cannot be done, to require defendant to pay damages for breach of contract.

DISPOSITION IN LOWER COURT

The case was tried to a jury. At the conclusion of plaintiff's evidence and after a stipulation by the defendant, the trial court granted defendant's motion to dismiss.

RELIEF SOUGHT ON APPEAL

Plaintiffs seek reversal of the judgment of dismissal and a new trial.

STATEMENT OF FACTS

Plaintiffs respectfully advise the Court that the record filed with the above-entitled Court by the Clerk of Uintah County is not numbered by page and it will be, therefore, necessary to refer to pleadings and other documents by their designation and not by page number.

Plaintiffs and defendant corporation are engaged separately in exploration for oil and gas, together with buying and selling oil and gas leases. On February 16, 1961, the plaintiffs telephoned the defendant corporation in Denver, Colorado, and talked with H. O. Lynch, its president, stating that they would be willing to pay a certain price per acre for certain oil and gas leases held by the defendant, and requested the defendant to prepare a contract of sale incorporating therein the proposed terms of sale and to forward the same to plaintiffs' office in Vernal, Utah, for execution. The contract of sale was prepared by the defendant and signed. It was then mailed to plaintiffs' office in Vernal, Utah, on February 17, 1961. (Defendant's Answer and Affidavit of H. O. Lynch).

Paragraph nine of the contract stated:

> "This contract must be executed by buyer and the earnest money and executed copy of this contract received by seller on or before February 23, 1961, or this contract is null and void, and the seller and buyer is relieved of any obligations hereunder."
>
> (Plaintiffs' Exhibit No. 3)

Paragraph four of the contract required that upon execution of the contract that buyer deliver seller a certified check in the amount of one-fourth of the purchase price. (Plaintiffs' Exhibit No. 3).

On the 22nd day of February, 1961, one of the plaintiffs telephoned the defendant in Denver, Colorado, and talked with its president, H. O. Lynch, concerning the time limitation set forth in the contract and informed Lynch that because of the holiday occurring on this date, they would be unable to obtain a certified check and forward the same to defendant in Denver within the time required in the contract. Lynch then told plaintiffs that paragraph No. 9 need not be complied with as long as it was understood that a deal had been made (Tr. 101).

The defendant maintains that a time extension was given the plaintiffs but only to the 24th day of February, 1961. (See defendant's Answer to plaintiffs' Complaint).

The plaintiffs, in reliance upon the conversation with Lynch, contacted A. M. Alloway, their attorney in Denver, Colorado, and asked if he would execute the contract with the defendant in Denver at its office (Tr. 11). At approximatley 2:50 p.m. on the 24th day of February, 1961, Alloway received

the contract by mail from plaintiffs with written authority to sign the same on their behalf. Alloway then went to defendant's office to discuss execution of the contract and to suggest some proposed minor changes in the contract (Tr. 51, 52, 53). At this time, Alloway talked to Lynch and was told that defendant would not accept any of the suggested changes made by Alloway (Tr. 54). Alloway then told Lynch that he would execute the contract for the planitiffs in its present form and tendered his personal check to Lynch in the amount required as earnest money in the agreement. Lynch then stated that he would not accept a personal check and demanded that the check be certified. (Tr. 56, Plaintiffs' Exhibit No. 7). Alloway then asked Lynch if he would accept cash but was told that cash was not acceptable (Tr. 59). Lynch also said that the defendant had received a better offer for the leases (Tr. 57).

Alloway immediately went to the bank in a nearby building and was informed by the bank that no checks could be certified nor could cashiers' checks be issued after the hour of 3:00 p.m. (Tr. 57, 58). He then returned to defendant's office and was told by Mr. Wakefield, another officer of defendant corporation, that Lynch had gone home. Alloway explained his inability to get his check certified because of the late hour and requested Wakefield to accept the check. Wakefield refused to do this (Tr. 58, 59).

The following morning, Alloway telephoned Lynch and offered a check for the full purchase price stated in the contract but Lynch refused to accept the same (Tr. 61).

POINT URGED FOR REVERSAL

THAT THE COURT BELOW ERRED IN DIRECTING A VERDICT IN FAVOR OF THE DEFENDANT AND AGAINST THE PLAINTIFFS AND SHOULD HAVE GRANTED PLAINTIFFS' MOTION FOR A NEW TRIAL.

ARGUMENT

THAT THE COURT BELOW ERRED IN DIRECTING A VERDICT IN FAVOR OF THE DEFENDANT AND AGAINST THE PLAINTIFFS AND SHOULD HAVE GRANTED PLAINTIFFS' MOTION FOR A NEW TRIAL.

In order to properly review the proceedings and points of law involved, plaintiffs will treat defendant's motion and the trial Court's order of dismissal as one for a directed verdict as the evidence was heard by the Court sitting with a jury.

Plaintiffs' evidence adduced at the trial, coupled with the pleadings and stipulation of the defendant, clearly shows that there was a waiver by defendant of the terms of paragraph nine of the contract in question.

There was a dispute between the parties concerning the extent of the waiver admittedly granted by defendant. This issue, being one of fact, should have been submitted to the jury. Counsel for defendant also made the following stipulation at the trial and at the conclusion of plaintiffs' evidence: "We offer to stipulate that if Mr. Craig Caldwell, one of the plaintiffs herein, were present and called as a witness, he would testify in substance and effect as follows:

> "On February 22, 1961, I contacted Mr. Lynch by telephone and informed him that because of the holiday of February 22, 1961, that I could not deliver a certified check in the amount of $3,487.89, as earnest money and as provided in paragraph 4 of said contract. Mr. Lynch informed me that *the deal was made* and that I need not be concerned about the time element specified in paragraph 9 of said contract" (Tr. 101).

It is plaintiffs' contention that defendant should have given them a reasonable time in which to obtain a certified check to be presented as earnest money as they had accepted defendant's offer. The authorities agree with this view. See 1 Williston on Contracts, 3rd Edition, (1957) at page 171, Section 53, wherein the author states:

> "Not infrequently an offeror who has imposed a limit of time in his offer does not care to insist upon it and by further negotiations may indicate a continued willingness to stand by the terms of his offer. Any such manifestation of continued willingness in effect is a new offer which may be accepted and if accepted will ripen into a contract."

Plaintiffs respectfully submit that defendant, after receiving a better offer for the leases, did everything possible to avoid the contract and deliberately connived to thwart payment of the earnest money. The only possible reason for requiring a certified check would be to guarantee payment. When certification could not be obtained, cash should certainly suffice. Defendant should not be permitted to mislead the plaintiffs in an effort to avoid receiving payment. See Schaeffer vs. Coldren, 237 Penn. 77, 85 Atlantic 98, wherein the Supreme Court of Pennsylvania said:

> "One party to a contract may not, by agreeing to a modification of the terms of payment, mislead the other and then, when too late to make other arrangements, refuse to accept the terms agreed on and defeat the right to exercise its option."

This Court went on to say in substance that a seller is estopped to deny a tender of payment where, by the seller's own acts, it was made virtually impossible for the buyer to meet the terms.

It is plaintiffs' contention that the defendant, by orally waiving paragraph 9 of the contract, led the plaintiffs to believe that they had a reasonable time in which to obtain a certified check and deliver the same to the defendant.

Plaintiffs did suggest minor changes in the contract which were refused by defendant but plaintiffs did not withdraw their acceptance; nor did their suggestions constitute a rejection of defendant's offer. In support of this position, we respectfully cite 1 Williston on Contracts, 3rd Edition (1957) at page 261, Section 79, wherein is stated:

> "Frequently an offeree, while making a positive acceptance of the offer, also makes a request or suggestion that some addition or modification be made. So long as it is clear that the meaning of the acceptance is positively and unequivocably to accept the offer whether such request is granted or not, a contract is formed."

In support of this proposition the author cites cases from numerous jurisdictions.

The trial Court, in granting defendant's motion to dismiss, deprived plaintiffs of the jury's determintaion of a material

issue of fact. This Court has said on numerous occasions that in deciding a motion for a directed verdict, the Court must consider the evidence in a light most favorable to the party against whom the motion is directed and should find every controverted fact in his favor. Boskovich vs. Utah Construction Co., 123 Utah 387, 259 P. 2d 885; Finlayson vs. Brady, 121 Utah 204, 240 P. 2d 491; Hewitt vs. The General Tire and Rubber Co., 3 Utah 2d 354, 284 P. 2d 471.

Under our system of jury trials, it is the province of the jury and not the court to determine all questions of fact and to pass upon the credibility of the witnesses as they appear before them and testify. The court determines and decides questions of law and directs its application to the facts, but the jury is to determine the disputed facts of the case from the evidence adduced, in accordance with the instructions given by the court. 53 American Jurisprudence, Paragraph 293, Page 248.

Likewise, a cause should never be withdrawn from the jury unless it appears, as a matter of law, that a recovery cannot be had upon any view of the facts which the evidence reasonably tends to establish. If there is conflicting evidence, and any view that the jury might lawfully take of it will sustain their findings for either party, the facts should not be withdrawn from them. 53 American Jurisprudence, Paragraph 299, page 251.

Applying these principles to the instant case and viewing the evidence in the light most favorable to the plaintiffs, we respectfully submit that the plaintiffs sustained their burden of proof in making a prima facie case and that the trial court erred in directing a verdict in favor of the defendant.

CONCLUSION

Plaintiffs respectfully submit that there was substantial, material evidence presented by which a jury could reasonably have found that defendant waived paragraph 9 of its contract and that plaintiffs thereafter accepted its offer but were deprived of their right to pay the earnest money within a reasonable time. Defendant deliberately calculated to avoid receiving the earnest money payment as it had received a better offer for the leases. The trial Court should have submitted these issues to the jury but erred in granting a directed verdict and refusing plaintiffs a new trial.

Respectfully submitted,

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