

1992

# William J. Searles v. Dayna Communications, INC. : Response to Petition for Rehearing

Utah Court of Appeals

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UTAH COURT OF APPEALS  
BRIEF

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DOCKET NO. 920285

IN THE UTAH STATE COURT OF APPEALS

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WILLIAM J. SEARLES,	:	
Plaintiff-Appellant,	:	
vs.	:	
DAYNA COMMUNICATIONS, INC.	:	
a Utah corporation,	:	Case No. 920285-CA
Defendant-Appellee.	:	Priority No. (15)

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RESPONSE TO PETITION FOR REHEARING

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Petition for Rehearing from the decision of the Utah Court of Appeals, filed November 15, 1993, affirming the trial court's decision to dismiss plaintiff's action.

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**FILED**  
Utah Court of Appeals

DEC 23 1993

  
Mary T. Noonan  
Clerk of the Court

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### ARGUMENT

Through his Petition for Rehearing, Searles claims that this Court improperly failed to consider the issue of impossibility of performance in reaching its decision to affirm the dismissal of Searles' case. Searles does not, however, explain how this issue affects the Court's analysis of the case or the Court's decision to affirm the trial court. Searles has not established that the trial court erred in any of its rulings or that the case should be remanded for further proceedings.

The issue of impossibility of performance is moot because Searles failed to present the issue to the trial court. Even if Searles had presented the issue to the trial court and preserved the issue for appeal, the defense of impossibility of performance is inapplicable in the present case.

I. Searles Failed to Preserve the Issue of Impossibility of Performance for Appeal.

The issue of impossibility of performance was raised for the first time in this case in response to a hypothetical question from the bench during oral argument on appeal. At trial, Searles did not assert or argue the contractual defense of impossibility of performance. It is well established that the court will not consider a new argument for the first time on appeal. See, e.g., Wurst v. Department of Employment Security, 818 P.2d 1036, 1039 (Ct. App. Utah 1991); Progressive

Acquisitions, Inc. v. Lytle, 806 P.2d 239, 242 (Ct. App. Utah 1991).

Searles' Petition for Rehearing appears to be based upon a statement in this Court's Memorandum Decision that Searles "failed to plead impossibility of performance at trial." (Petition, p.6). Searles argues that he was not required by the Utah Rules of Civil Procedure to file a written response to certain defenses asserted by Dayna in its Answer and, therefore, was not required to "plead" impossibility in the trial court.

Searles misses the point. Issues or matters not presented to the trial court may not be raised for the first time on appeal. Wurst v. Department of Employment Security, 818 P.2d 1036, 1039 (Ct. App. Utah 1991) ("It is well-settled that the court will not address an issue raised for the first time on appeal."); Progressive Acquisitions, Inc. v. Lytle, 806 P.2d 239, 242 (Ct. App. Utah 1991) ("It is axiomatic that matters not presented to the trial court may not be raised for the first time on appeal."). Searles is not precluded from arguing impossibility of performance on appeal because he did not include the defense in a written pleading. Rather, Searles is so precluded because the entire issue of impossibility was not presented to the trial court. Because the trial court never considered or ruled on the issue of impossibility of performance, this Court is without jurisdiction to consider the argument on appeal.

Although his precise theory is unclear, Searles appears to argue that he was not required to present the issue of impossibility to the trial court because he was "saving" this argument for use in rebuttal. As the plaintiff, Searles had the burden of proving his case of breach of contract by a preponderance of the evidence. In his own brief, Searles admits that "the party who has the affirmative burden of proof is required to produce the first evidence on an issue, and at that time should produce all his evidence in chief." (Petition, p.7).

To prevail on his breach of contract claim, Searles was required to establish the existence of the contract, the terms of the contract, his performance of these terms, and breach by Dayna. Searles failed to carry his burden of proof.

At the conclusion of Searles' presentation of the evidence, the trial court granted Dayna's motion for involuntary dismissal finding that Searles had failed to prove his case. The court ruled as follows:

Count I, the literal contract claim. There's been a failure to produce any evidence that the defendant violated any terms and conditions of the contract in terminating the defendant. Defendant, according to the evidence, construed in a light most favorable for the plaintiff, was terminated for cause.

(R. 396). Similarly, the trial court dismissed Searles' second cause of action ruling as follows: "As to the second count,



good faith and fair dealing, there is no evidence before the Court that there was any unfair dealing or that there was any bad faith by the defendant." (R. 396-97).

Simply stated, the trial court found that Searles had failed to establish a prima facie case of breach of contract or breach of the implied covenant of good faith and fair dealing. The trial court found it unnecessary to hear the evidence of Dayna because Searles failed to carry his burden of proof. If Searles had additional evidence or legal argument to support his claims, he should have presented that evidence in his case in chief.

The trial court gave Searles full opportunity to present his case. As described more fully in Dayna's principal brief, counsel for Dayna objected to the introduction of any evidence by Searles that was offered to vary or contradict the terms of the written employment agreement. (Appellee's Brief, pp.19-21). Counsel for Searles insisted that the evidence was not offered to vary the terms of the agreement, but only as foundation and as evidence of whether or not Dayna acted in good faith. Searles had every opportunity to present the issue of impossibility but failed to do so as demonstrated by the following exchange:

MR. PERKINS: I move for the admission  
of 7-P.

MS. LEITH: I would object to the admission for any purpose other than to go to the issue of good faith.

THE COURT: Do you have any other purposes for offering it?

MR. PERKINS: Well, we have been talking very narrowly about the issue of good faith, your Honor. I think there's also -- there are also issues that have related to good faith but that are involving implied conditions to the employment contract. I believe that it can be shown that the company, by implication, said that "We're going to provide additional personnel, promotional money, money to hire new people, and we're going to have product ready to be sold and delivered to enable the sales force to be able to meet the quota goals."

THE COURT: All right. I'll take that to mean it's not being offered to vary the term of the contract and with that limitation in mind -- what is it, 7?

MR. PERKINS: Yes.

THE COURT: 7 is received.

(R. 319-20) (emphasis supplied).

Thus, Searles had every opportunity to argue that his contractual obligations were excused or modified by the defense of impossibility of performance. The trial court specifically asked counsel for Searles if his evidence was offered for any purpose other than to go to the issue of good faith. Even after this direct invitation from the trial court to present any additional legal theories, Searles failed to argue the defense of impossibility of performance.

II. The Doctrine of Impossibility of Performance is Inapplicable to the Present Case.

Even if Searles had asserted impossibility of performance at trial and preserved the issue for appeal, Searles could not prevail on his claim against Dayna. Impossibility is a contractual defense to liability and may not be asserted by a party seeking to enforce the agreement.

The defense of impossibility recently has been described by this Court as follows:

Under the contractual defense of impossibility, an obligation is deemed discharged if an unforeseen event occurs after formation of the contract and without fault of the obligated party, which event makes performance of the obligation impossible or highly impracticable. The rationale for this rule is founded on principles of assent and basic equity. Parties are ordinarily thought to have made certain assumptions in visualizing their agreement, and those assumptions comprise part of the basis and extent of their assent. The impossibility defense serves to prevent enforcement where those assumptions, and hence, the parties assent, prove to be faulty.

Western Properties v. Southern Utah Aviation, Inc., 776 P.2d 657, 658 (Ct. App. Utah 1989) (footnotes omitted).<sup>1</sup>

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<sup>1</sup> This analysis is consistent with prior pronouncements of the Supreme Court of Utah. See, e.g., Holmgren v. Utah-Idaho Sugar Co., 582 P.2d 856, 861 (Utah 1978) ("The doctrine of impossibility of performance is one by which a party may be relieved of performing an obligation under a contract where supervening events, unforeseeable at the time the contract is made, render performance of the contract impossible.") (footnote omitted).

Thus, the defense of impossibility serves to prevent enforcement of a contract. Even if the defense of impossibility were applicable in this case, both Searles and Dayna would be excused from performance. While Searles would not be required to meet the sales quota, Dayna would not be required to pay Searles as if he had met the sales quota. "A party to a contract may not obtain an advantage from the fact that he is unable to perform." Barker v. Francis, 741 P.2d 548, 553 (Ct. App. Utah 1987); accord Huck v. Hayes, 560 P.2d 1124, 1126 (Utah 1977).

The proper application of the defense of impossibility is illustrated by the case of Western Properties v. Southern Utah Aviation, Inc., 776 P.2d 657, 658 (Ct. App. Utah 1989). In Western, the plaintiff leased certain vacant land from Cedar City located at the Cedar City Airport. The plaintiff in turn subleased part of the land to the defendants with a covenant that the defendants would construct a maintenance building on the land. At the end of the sublease term, the building was to become the property of the plaintiff.

The defendants applied to Cedar City for site plan approval for the maintenance building, but the plan could not be approved because a master plan for the airport as a whole had not been approved. The defendants defaulted in payment of rent and abandoned the subleased land without ever constructing a maintenance building on the land.

The plaintiff sued for unpaid rent and the value of the building that it was to have received following the term of the sublease. The trial court dismissed the plaintiff's claim for rent and the value of the building.

On appeal, the Court of Appeals of Utah affirmed. The court found that the defendants' obligation to construct the building was discharged because it was impossible to construct the building without the approval of Cedar City. Similarly, the court found that the defendants' obligation to pay rent on the subleased land was discharged by the related doctrine of frustration of purpose. Although the defendants were not precluded from occupying the subleased land, the land was undeveloped and could not be used for the purpose contemplated by the parties. "Without a way of productively using the land, the purpose of the leasehold was effectively frustrated." Id. at 659. Accordingly, the covenant to pay rent was also discharged.

In the present case, both Searles and Dayna contemplated that Searles would reach the sales quota contained in his employment contract. Both parties made certain assumptions concerning the potential demand for Dayna's products and the availability of those products. If it were literally

impossible<sup>2</sup> for Searles to perform, the contract itself would become invalid based upon a lack of assent by the parties. See Western, 776 P.2d at 658.

III. Searles Is Not Entitled to an Award of Attorneys' Fees Because He Is not a Prevailing Party.

Searles argues that he is entitled to attorneys' fees based upon the recent decision of the Supreme Court of Utah in Heslop v. Bank of Utah, 839 P.2d 828 (Utah 1992). Searles ignores the fact that he has not prevailed on any of his claims. Even if Searles had prevailed on appeal, the appropriate remedy would be to remand the case to the trial court for further proceedings. Searles claim for attorneys' fees is entirely without factual or legal support and this Court should not consider it.

CONCLUSION

Searles has failed to carry his burden of establishing that this Court improperly failed to consider the issue of impossibility of performance in its decision to affirm the trial court. Similarly, Searles has failed to show that the trial court erred in any of its rulings or that the case should be remanded for further proceedings. Accordingly, Dayna

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<sup>2</sup>It is important to note that Searles did not establish at trial that it was literally impossible for him to reach the sales quotas contained in the employment agreement.

respectfully urges this Court to DENY the Petition for Rehearing.

DATED this 23rd day of December, 1993.

VAN COTT, BAGLEY, CORNWALL & MCCARTHY

By



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CERTIFICATE OF MAILING

I hereby certify that I caused two true and correct copies of the within and foregoing Response to Petition for Rehearing to be mailed, postage prepaid, this 23rd day of December, 1993, to the following:

D. Kendall Perkins  
124 South 600 East, Suite 300  
Salt Lake City, Utah 84102

A handwritten signature in cursive script, appearing to read "D. Kendall Perkins", is written over a horizontal line.

46560



1 any purpose other than to go to the issue of good faith.

2 THE COURT: Do you have any other purposes for  
3 offering it?

4 MR. PERKINS: Well, we have been talking very  
5 narrowly about the issue of good faith, your Honor. I  
6 think there's also -- there are also issues that have  
7 related to good faith but that are involving implied  
8 conditions to the employment contract. I believe that it  
9 can be shown that the company, by implication, said that  
10 "We're going to provide additional personnel, promotional  
11 money, money to hire new people, and we're going to have  
12 product ready to be sold and delivered to enable the  
13 sales force to be able to meet the quota goals."

14 THE COURT: But does that relate to anything  
15 that's an attempt to vary the express terms of the  
16 contract?

17 MR. PERKINS: I don't think it varies the term.  
18 It, again, goes to good faith by implying these things  
19 would be done to enable the sales force to meet quota  
20 and, if not done, it goes to whether or not the  
21 termination clause of the employment agreement was  
22 exercised in good faith or not.

23 THE COURT: All right. I'll take that to mean  
24 it's not being offered to vary the term of the contract,  
25 and with that limitation in mind -- what is it, ??

1 MR. PERKINS: Yes.

2 THE COURT: 7 is received.

3 MS. LEITH: Thank you, your Honor.

4 Q. (By Mr. Perkins) I'll direct your attention to  
5 the third page of that document, which is an  
6 organizational chart dated 9-30-88 in the left-hand upper  
7 corner, and on the right side under Jim Walls, it shows  
8 Western Area Sales Director, W. Searles, and it has four  
9 locations, Los Angeles, San Jose, Dallas and Seattle.  
10 Everywhere but the San Jose entry it shows sales open  
11 fiscal year '89.

12 Now, does that entry mean that it's proposed to  
13 add a sales employee under Mr. Searles in that location?

14 A. Yes.

15 Q. And so at that time there was only P. Sun.  
16 That was someone who was an existing employee?

17 A. Yes, Pam Sun.

18 Q. Now, were these other three locations -- or did  
19 these other three locations ever receive a sales  
20 representative as projected?

21 A. Los Angeles did. I don't believe we ever hired  
22 anybody in Dallas or Seattle. May I note that Seattle  
23 doesn't call for a sales person. It calls for a support  
24 person.

25 Q. What's the difference between sales and

1       either a motion for a protective order by the defendant  
2       or motion to compel by the plaintiff, I ordered that  
3       information concerning other employees be produced so  
4       that Mr. Searles would have the opportunity to put on  
5       evidence that his termination was pretextual. No such  
6       evidence came before me today.

7               With those prefatory matters in mind, I'm going  
8       to grant the motion for the following reasons:

9               Count 1, the literal contract claim. There's  
10       been a failure to produce any evidence that the defendant  
11       violated any terms and conditions of the contract in  
12       terminating the defendant. Defendant, according to the  
13       evidence, construed in a light most favorable for the  
14       plaintiff, was terminated for cause. Cause is defined by  
15       the contract, not by any moral considerations or anything  
16       like that. Cause in this particular contract is  
17       established, in part, by failure to meet quotas.

18              The evidence unequivocally indicates that the  
19       defendant concedes that the quotas were not met.  
20       Therefore, the contract provision on cause could be  
21       invoked, it was invoked, and the termination was had, and  
22       the termination does not constitute a violation of the  
23       contract.

24              As to the second count, good faith and fair  
25       dealing, there is no evidence before the Court that there

1 was any unfair dealing or that there was any bad faith by  
2 the defendant. The evidence does not establish any  
3 requirement of the defendant to provide product, per se.  
4 The covenant of good faith and fair dealing, however,  
5 would prohibit the defendant from failing to provide  
6 product in bad faith. There is no evidence to suggest  
7 that there was bad faith in doing so.

8 There is, however, evidence that would  
9 suggest -- and not to credit it or discredit it, all I'm  
10 saying is there's been a failure of evidence. But there  
11 is evidence to suggest that the failure of providing  
12 product was somewhat natural to this industry in the  
13 sense that that occurs from time to time and that hope  
14 springs eternal, evidently, in this industry, and  
15 frequently prognostications are not met.

16 The conduct generating the failure to provide  
17 product and necessarily the inability of the plaintiff,  
18 through no fault of his, to meet the quotas was due to  
19 inaccurate projections.

20 Now, it would be one thing if these quotas were  
21 set after the signing of the contract or that something  
22 occurred thereafter by the defendant and affirmatively  
23 and in bad faith or unfair interfering with defendant to  
24 meet his quotas. There is no evidence of that in this  
25 case.