

1964

J. W. Edgar and Evelyn Edgar v. Combined Production Associates, Ltd. : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH D

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J. W. EDGAR, a/k/a JIM EDGAR
and EVELYN EDGAR, his wife,
Plaintiffs and Respondents,

vs.

COMBINED PRODUCTION AS-
SOCIATES, LTD., a Utah Corpo-
ration,
Defendant and Appellant.

Clerk Supreme Court, Utah

Civil No.
10159

BRIEF OF APPELLANT

Appeal from a Judgment of the District Court of
Salt Lake County
Honorable A. H. Ellett, Judge

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UNIVERSITY OF UTAH

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IN THE SUPREME COURT OF THE STATE OF UTAH

J. W. EDGAR, a/k/a JIM EDGAR
and EVELYN EDGAR, his wife,

Plaintiffs and Respondents,

vs.

COMBINED PRODUCTION AS-
SOCIATES, LTD., a Utah Corpo-
ration,

Defendant and Appellant.

Civil No.
10159

BRIEF OF APPELLANT

STATEMENT OF THE KIND OF CASE

This is an action for specific performance of an alleged contract between the plaintiffs and the defendant, involving the sale of three unpatented mining claims .

DISPOSITION OF LOWER COURT

This case was tried to the court at a pre-trial hearing. From the summary judgment for the plaintiffs, defendant appeals.

RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the judgment in favor of the plaintiffs and seeks judgment in its favor as a matter of law, or that failing, a trial.

STATEMENT OF FACTS

The plaintiffs brought this action to enforce the document attached to plaintiffs' complaint and designated as Exhibit "A", to wit:

"Dec. 9 - 1962. Dear Jim Edgar & Evelyn Edgar: In consideration of your signing that document titled Amendment to Mining Lease & Options, I will return you the \$9000 note of Combined Production Associates personally endorsed, due on June 15th, 1963 ——— and at that time you are to assign me your Blue Star interest as evidenced by your contract. /s/ Combined Production Associates, Ltd., A. B. Thomas - Pres.

"The position of Blue Star, Blue Star No. 1 & Blue Star No. 2 - accepted by W. E. Edgar, Willas L. Edgar & M. M. Edgar - is acceptable to Combined Production Associates for the purpose of the contract on the ground titled "Amendment to Lease & Options". /s/ Combined Production Associates, A. B. Thomas - Pres." (R. 2A).

It appears from the pleadings, the answer to interrogatories and from the statements made at the pre-trial hearing, that the mining claims in this suit, together with a number of other claims owned by other parties, were originally leased to M M & S Exploration Com-

pany in June, 1959, and the lease was assigned to the defendant.

The majority of the claims are owned by a family known as the Edgars, and a dispute arose among them as to the location of the various claims in reference to an ore body. Each owner "floated" his claim so that each claimed the ownership of the mining claim upon which the ore body was located. This dispute resulted in a typical western claim-jumping fight, where threats of force and violence and an exhibition of guns and threats to use the same were demonstrated against the lessee.

To settle the status of these claims, an amendment to this lease was drawn and circulated among the owners for their signatures. The amended agreement provided, "Whereas certain confusion exists in the location of the respective groups of claims which cloud the title to said claims, . . . it is the desire of all parties to execute a lease . . . which will effectively protect said title." Article XII provided:

XII

COVENANT AS TO ADVERSE CLAIMS AND STATUS OF TITLE

PARCEL I:

The parties hereto acknowledge that a dispute has arisen between the First Parties and the Second Parties as to the location of the claims described in Parcel I, which affects the ownership of Parcel II. Prior to 45 days from date

hereof, First Parties and Second Parties agree to settle their differences and designate in writing and by plat the agreed locations of the claims described in Parcel I. As of such date, First Parties and Second Parties covenant that the persons then designated by them will be the sole owners of the mining claims set forth in Parcel I, subject only to the following:

The paramount title of the United States and any cloud on the title which may have been created by Third Parties.

PARCEL II:

As of the date designated in Parcel I, the First Parties and Second Parties shall designate in writing and by plat the agreed locations of the claims described in Parcel II. As of such date, First and Second Parties covenant that the persons designated by them will be the sole owners of the mining claims set forth in Parcel II, subject only to the following:

The paramount title of the United States and any cloud on the title which may have been created by Third Parties. (R. 9).

At the time defendant approached the plaintiffs for their signatures on the amended lease, all the parties to the amended lease signed the lease and a plat showing the location of the claims in which each lessor had an interest with the exception of Travis Edgar and his wife. After a discussion between the plaintiffs and A. B. Thomas, president of the defendant company, the plaintiffs agreed to sell their interest in the claims for \$10,000.00, and the defendant agreed to buy these claims

for said sum, if the amended lease and plat was signed by Travis Edgar and his wife. The memorandum Exhibit "A" supra was signed and the defendant delivered a check for \$1,000.00 to the plaintiffs, with the understanding that it would not be cashed until Travis Edgar and his wife had signed the amended lease and plat. (Plat R. 10). These discussions between the plaintiffs and the president of the defendant company took place in Apache Junction, Arizona. Mr. Thomas returned to Salt Lake City and sent one Robert Morris, a resident of Elko, Nevada, to see Travis Edgar and his wife, who resided at Albuquerque, New Mexico, to sign the amended lease and plat.

Mr. Thomas sent the following telegram to the plaintiffs:

"Thanks for everything. Morris leaves this afternoon for Albuquerque. Check and note will be good the minute Travis signs, which should be tomorrow. Will work hard for a pay out to you long before June 15th." (R. 11).

Morris was caught in a snow storm in New Mexico and did not return to Salt Lake City with the documents, but went by bus to his home in Elko. He notified Mr. Thomas that Travis Edgar had signed, but he neglected to state that Travis Edgar and his wife had refused to sign the plat. Mr. Thomas, believing that both documents had been signed by Travis Edgar and his wife, sent plaintiffs the following telegram:

"Travis has signed. Deposit check, note will reach you in few days." (R. 12).

A few days later, Mr. Thomas learned from Mr. Morris that the plat had not been signed. Mr. Thomas telephoned this information to the plaintiffs, who, in the meantime, had cashed the \$1,000.00 check, and requested the return of the money. The plaintiffs refused to refund the money, claiming it as a payment for the trouble they had gone to in this matter and for trips they had made to the property.

The plaintiffs filed their complaint in this action and at a pre-trial hearing the court entered a summary judgment against the defendant for the sum of \$9,000.00, plus interest and costs. The plaintiffs had promised to insert in the findings and judgment that upon payment of this sum, the defendant would be entitled to a deed of the claims owned by the plaintiffs. (R. 33-4). This was not done and an ordinary judgment for damages has been entered against the defendant for the sum of \$9,738.70, although the action was based upon a contract for the sale of three mining claims.

ARGUMENT

POINT I. THE COURT ERRED IN GRANTING THE SUMMARY JUDGMENT AGAINST THE DEFENDANT.

The contract upon which this suit is based, to wit, Exhibit "A", without oral evidence is ambiguous, uncertain and unintelligent and, therefore, unenforceable.

Assuming that Exhibit "A" is a binding obligation between the plaintiffs and the defendant, the performance of said contract was contingent upon the signing of the amended lease and plat by Travis Edgar and his wife. The second paragraph of Exhibit "A" states: "The position of the Blue Star, Blue Star No. 1 and Blue Star No. 2 accepted by W. E. Edgar, Willis L. Edgar and J. M. Edgar is acceptable to Combined Production Associates" This language indicates that the defendant was concerned about the location of the three mining claims. The telegram attached to the pleadings, Exhibit 2, clearly indicates that the purchase of the claims was based upon securing the signatures of Travis Edgar and his wife. When Thomas sent the telegram, Exhibit 2, to the plaintiffs and stated: "Morris leaves this afternoon for Albuquerque. Check and note will be good the minute signed, which should be tomorrow . . .", and on December 15, 1962, another telegram was sent to the plaintiffs, Exhibit 3, which stated: "'Travis has signed. Deposit check. Note will reach you within a few days," indicates that there was no deal until the signatures of Travis Edgar and his wife were secured. The check was cashed on December 19, 1962. The plaintiffs clearly understood after they had signed the amendment to the lease that it was necessary that the various owners of the claims settle their differences within 45 days after the signing of said amendment. This is supported by Article XII, which, among other things, states: "That prior to 45 days from date hereof, First Parties and Second Parties

agree to settle their differences and designate in writing and by plat the agreed locations of the claims . . . ". This agreement has never been fulfilled by the owners of the claims, nor have all of the owners of the claims signed the plat agreeing to the location of the claims.

That it was the understanding and the intention of the parties that Exhibit "B" was not a binding agreement until Travis Edgar had signed the plat is admitted by the plaintiffs in their answer to interrogatories. Defendants propounded the following interrogatory:

"5. Is it not a fact that the alleged contract Exhibit "A" attached to your complaint was contingent upon all the owners of the Blue Star claims settling within 45 days their differences and designate in writing and by plat the agreed locations of the Blue Star claims?" (R. 6).

Answer:

"5. In answer to No. 5—No. It was contingent only upon Travis Edgar approving the plat, locating the mining claims. Later on, Defendant, Thomas, represented in his telegram (a copy of which has been attached as an Exhibit to Plaintiffs' Answer to Request for More Definite Statement), that Travis Edgar had signed." (R. 10).

We do not believe that any reasonable person would agree to pay \$10,000.00 for three unpatented mining claims without knowing where they were located. The defendant did not have an opportunity to present to the Judge at the pre-trial conference the facts and circumstances surrounding this agreement, nor was it

allowed to present any oral testimony to explain Exhibit "A" and the intention of the parties concerning the same.

As the evidence now stands, the summary judgment for the plaintiffs cannot stand and the same should be set aside and judgment of dismissal should be entered in favor of the defendant.

POINT 2. THAT PLAINTIFFS' CAUSE OF ACTION IS BARRED BY THE STATUTE OF FRAUDS AND UNENFORCEABLE FOR LACK OF MUTUALITY.

The contract upon which plaintiffs' cause of action is based has never been signed by the plaintiffs. There is no evidence of any kind, oral or written, in the records that plaintiffs, at the time of the delivery of Exhibit "A" by Thomas to them, were legally bound to perform on their part. In other words, there is a lack of mutuality and specific performance should not be granted where the vendor is not bound by the contract.

Plaintiffs' action is barred by the Statute of Frauds because the contract was not signed by the plaintiffs, the parties making the sale.

Mining claims are deemed to be real estate and subject to statute of frauds; 37 C.J.S. para. 83, p. 588.

In 25-5-3, U.C.A. 1953, relating to leases and contracts for interest in lands, it is provided:

“Every contract for the leasing for a longer period than one year, or for the sale, of any lands, or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, is in writing subscribed by the party by whom the lease or sale is to be made, or by his lawful agent thereunto authorized in writing.”

In 37 C.J.S., page 699, it is stated:

“In a number of jurisdictions the statute relating to contracts for the sale of land expressly requires the signing by, and only by, the party making the sale.”

A vendor who has not signed a contract or a memorandum or the contract of sale cannot enforce the contract against the purchaser; *Clark vs. Holman*, 170 N.W. 23; *Ducett vs. Wolf*, 45 N.W. 829; *Maynard vs. Brown*, 2 N.W. 30. The above are Michigan cases.

The rule is also held in Kentucky, see *Klatch vs. Simpson*, 34 S.W. 2d 95; *Smith vs. Ballou*, 277 S.W. 286.

The rule is also supported in Tennessee; *Ashley vs. Preston*, 39 S.W. 2d., 279.

In 49 Am. Jur. 383, it is stated:

“In some instances, the statutes require leases or contracts for the sale of an interest in land to be signed by the party by whom the lease or sale is made, leaving the contract so signed binding on the lessee or purchaser, although not signed by him, but not binding on either party unless signed by the vendor.”

In *Bailey vs. Leishman*, 32 Utah 128, 89 Pac. 78, a suit was on the contract for the sale of seed signed by sellers. The court in its application of the statutes of fraud, states:

"The requirement to subscribe or sign the memorandum is purely statutory and our statute requires that the party to be charged only need subscribe. This, it has often been held, applies to the vendor in case of sale. The weight of authority is clearly to this effect."

In *Moen vs. Minzel*, Idaho, 313 Pac. 2nd 1079, upholds the rule that the contract to be enforceable must be signed by the vendor.

In *Steel vs. Duntley*, 1 Pac. 2d 999, California, the appellant complained that the contract was not signed by the vendee and was within the statute of frauds. The court stated:

"This is not the requirement of the law. The party to be charged is the only one who must sign, and in the situation before us, that is the vendor who did sign."

POINT 3. THAT PLAINTIFFS FAILED TO TENDER A DEED TO THE CLAIMS OR SHOW OWNERSHIP OF THE CLAIMS AT THE TIME OF THE HEARING.

An action to recover the purchase price is a substitute for a bill to enforce specific performance for the sale of the land. There is no evidence that the plaintiffs owned the mining claims at the time of the pre-trial

hearing, either by abstract of title or by oral testimony. No deed or conveyance to said claims has been tendered or offered. The judgment against the defendant did not provide therein that upon payment of the judgment defendant would be entitled to conveyance of the mining claims. If defendant pays the judgment, it gets no interest or ownership in these claims. Under the present proceedings, the plaintiffs can recover judgment for \$9,738.70 and still keep the claims.

In 92 C.J.S., page 449, it is stated:

“An action at law by the vendor for the unpaid purchase price of an executory contract of sale is in effect an action for specific performance of the contract, and should therefore be governed by the same equitable principles.”

In 92 C.J.S., page 457, it is stated:

“Where the covenants as to the payment of the purchase price or a portion thereof, and as to the conveyance of the title, are mutual and dependent, the vendor cannot maintain an action for the purchase price without first conveying or tendering a deed, or offering to do so, or, in jurisdictions where that is a sufficient tender, allege a readiness and willingness to perform, as discussed *infra* 481; and if the purchaser dies during the continuance of such contract the tender must be made to his heirs. Thus, a delivery or tender of a deed must be made as a condition to the right to recover purchase money due where the conveyance and payment are to be made at the same time, as where the vendor agrees to convey on payment of the purchase price or a

portion thereof. Where the vendor binds himself to make a deed when the purchaser requires it, and after the whole of the purchase money falls due the purchaser offers to pay it, and demands a deed, the vendor cannot maintain an action for the money without having tendered a proper conveyance."

In *Stevens vs. Irwin*, 231 Pacific, 783, it is stated:

"The rule seems to be that a vendor under an executory contract of sale may maintain an action for the purchase price, but where his suit is for all of the balance of the purchase price he must offer to perform the obligations imposed upon him by tendering and bringing into court a deed of conveyance to the property, because the vendor is not entitled to have both the land and a judgment for the purchase price."

CONCLUSION

In conclusion Appellant submits that the lower court erred in entering a summary judgment in favor of the plaintiffs and the judgment of the trial court should be reversed and the case dismissed.

Respectfully submitted,

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