1967

M & S Construction & Engineering Company v. Clearfield State Bank and Vern M. Smith, et al.. : Petition For Rehearing and Brief In Support Thereof

IN THE SUPREME COURT OF THE STATE OF UTAH

M&S CONSTRUCTION AND ENGINEERING COMPANY,
Plaintiff-Appellant,

vs.

CLEARFIELD STATE BANK,
Defendant-Respondent,

VERN M. SMITH, et al,
Additional Defendants-Appellants.

Case No. 10708

Petition for Rehearing And Brief in Support Thereof

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TABLE OF CONTENTS

Cases Cited

Statutes and Texts Cited

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Petition for Rehearing

Plaintiff - Appellant and Additional Defendants - Appellants respectfully petition the Court for a Rehearing in the above entitled cause as the Court holding that the Statute of Frauds question should have been submitted to the jury is clearly erroneous.

Dated this 25th day of April, 1967.

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Brief in Support of Petition for Rehearing

Although the parties have submitted extensive Briefs to the Court in this case, including much material concerning the Statute of Frauds question, very little was said by either party pertinent to the question of whether or not the Statute of Frauds issue should have been submitted to the jury, this having been considered as a rather peripheral point. It now seems advisable for the Court to permit the parties to address themselves to that specific question prior to making a final determination of this case, which is contrary to the vast weight of judicial and academic authority.

At the trial of this matter, the jury specifically found in its Answer to Special Interrogatories (R-87) that the Bank had agreed with M&S to finance it on the Lost Creek Dam Project and the essential terms of such agreement are set forth in the record (R-87). This was the contract between the parties as found by the trier of the facts.

If the terms of a contract, whether oral or written, are established by proper evidence, it is for the Court to declare the legal effect of such contract and not to submit that question to the jury, 53 Am. Jur. 224, Trial Section 266; *Verdi* v. *Helper State Bank,* 57 Utah 502, 196 P. 225, 15 ALR 641; *Manti City Savings Bank* v. *Peterson,* 33 Utah 209, 93 P. 566, 126 Am.St.Rep. 817. In *Verdi*

v. *Helper State Bank*, supra, this Court said at page 228 of the Pacific Reporter:

> "It is manifest that the Court erred in submitting proposition "a" to the jury. In doing that the Court required the jury to do what clearly the law requires of the Court. The legal effect of written instruments is necessarily a question of law, and hence is one that must be determined by the Court. To that rule there is no exception, not even in cases where the facts respecting the terms of the written instruments are in dispute, which arise sometimes where the written instruments have been lost."

Although there is no written instrument involved in the present case, the jury did find the existence of a parole agreement which was set forth in writing in Answer to Interrogatory No. 1, and the rule of law should be the same as in the Verdi case.

The cases cited in footnote 7 of this Court's Opinion filed April 6, 1967 in this case are distinguishable and it is respectfully submitted that they are not controlling or relevant to the case at bar. *San Francisco Brewing Co.* v. *Bowman*, 52 C.2d 607, 343 P.2d 1, involved a jury question as to the duration of an oral contract, and whether or not such duration would exceed one year. In that case it was, therefor, necessary for a jury to determine what the terms of the contract were, but not the legal effect of the contract once the terms were determined. The authorities previously cited in Appellant's Brief conclusively show that it is solely to the terms of the agreement itself that the Court must look in determining whether or not the one year provision of the

Statute of Frauds is violated and not what the parties expected or intended or even what, in fact, did occur.

The case of *Sugar* v. *Miller*, 6 U.2d 433, 315 P.2d 862, involved a different section of the Statute of Frauds, wherein it was determined that there was a jury question as to whether or not a promise was original or collateral, and it is respectfully submitted that such case is not pertinent to the case at bar.

When the terms of the contract have been established, as they were in this case by the jury in Answer to Special Interrogatories, it then becomes a question of law for the Court to determine what the legal effect of such contract is and to apply the Statute of Frauds in view of the terms of such contract, without respect to the intentions of the parties or what was expected under the terms of such contract or what, in fact, occurred. In other words, if the terms of the agreement itself do not prohibit performance within one year, the agreement is not barred by the Statute of Frauds, notwithstanding that the performance thereof may in fact take more than one year or that the parties intended it to take more than one year. 37 CJS 588, Frauds, Statute of, Section 50; *Warner* v. *Texas & Pacific R. R. Company*, 164 US 418, 41 L.Ed. 495, 17 S.Ct. 147 (the leading case on the subject); *Zion's Service Corp.* v. *Danielson*, 12 U.2d 369, 366 P.2d 982; 49 Am. Jur., Statute of Frauds, Section 23-37; Browne on Statute of Frauds, 5th Ed., Section 500 et.seq.; 25 RCL Section 452 et.seq.; 129 ALR 534, Annotation; Restatement of Contracts, Section 198 Comment b.

Appellant agrees with this Court wherein it was stated in the Opinion filed April 6, 1967 that: "It seems to us that 'as and when required' is not much different than 'as long as he needed it' in the leading case of *Warner* v. *Texas & Pacific R. R. Company*, and that 'until final payment' in the contract executed by M & S with Steenberg, strangers to the loan agreement, is itself somewhat of a stranger to 'as and when required' and is not necessarily included in or obliterative of the contract under attack, *whose terms alone must be viewed and interpreted*. Mr. Corbin, eminent authority on the subject, seems to agree and succinctly states the principles applicable to the facts of this case. Practically all of the case law agrees. Our own Utah authority, though challenged by the bank, seems to espouse the same principles." (Emphasis added.)

If the Court is to follow these authorities together with *Zion's Service Corporation* v. *Danielson*, supra, and *Commercial Security Bank* v. *Hodson*, 15 U.2d 388, 393 P.2d 482, wherein the Court stated: "The exact length of time that this loan should last is not specified, but there is nothing in the evidence which indicates that the loan should not terminate in less than a year," it must necessarily and inexorably follow that when the terms of an agreement have been established, as in this case by Answer to Special Interrogatories, the Court must look solely to the terms of that agreement itself, and not to extrinsic evidence to make a determination as to the effect of the Statute of Frauds, and if the terms of such agreement do not specifically *negate the possibility of performance within one year*, the authorities are in

virtually unanimous agreement that such contract is not barred by the Statute of Frauds.

It is therefore respectfully requested that the Court grant a rehearing to determine whether or not the terms of the agreement found by the jury, specifically negate the possibility of performance within one year; and to make a final determination upon appeal as to whether or not the Statute of Frauds is a bar to recovery of damages for breach of such contract by the Respondent Bank and to determine the status of Appellant's second cause of action which was also made a part of this appeal.

Respectfully submitted,

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