1984

Chad A. Spor, Ray Spor, Paul C. Spor, Spor Brothers Motor Company, A Utah Corporation; And Spors Incorporated, A Utah Corporation, And Gold Spor Mining Company, A Wyoming Corporation : Appellants' Reply Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

CHAD A. SPOR, RAY SPOR, PAUL C. SPOR, SPOR BROTHERS MOTOR COMPANY, a Utah corporation; and SPORS INCORPORATED, a Utah corporation, and GOLD SPOR MINING COMPANY, a Wyoming corporation,	:	
Plaintiffs/Respondents,	:	
-vs.-	:	Case No. 19403
CRESTED BUTTE SILVER MINING INCORPORATED, a Colorado corporation,	:	APPELLANT'S REPLY BRIEF
Defendant and Third-Party Plaintiff/Appellant,	:	
-vs.-	:	
CANDELARIA METALS, INCORPORATED, a Nevada corporation,	:	
Third-Party Defendant/ Respondent.	:	

Appeal from Summary Judgment of the Fourth Judicial District in and for the County of Millard, State of Utah, The Honorable David Sam

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INTRODUCTION

The appellant, Crested Butte Silver Mining Incorporated, hereby submits its brief in reply to respondents' brief in the above-entitled appeal.

Appellant will not attempt to replow ground already covered in its brief-in-chief, but will specifically respond to those statements in respondents' brief not in conformity with the facts, focusing on the issues of 1) whether the parties reached an accord and satisfaction, and if so, 2) whether it was vitiated by the fraudulent omissions and concealments of respondents. Crested Butte's position is that there are material issues of fact remaining in dispute regarding whether or not there was an accord and satisfaction; and, if an accord and satisfaction was reached, whether it is voidable for fraud and breach of fiduciary duty by respondents Chad, Ray and Paul Spor (hereinafter "Spors").

ARGUMENT

Upon review of respondents' brief, it is apparent that the essence of respondents' argument is that even though the Spors failed to issue any stock whatsoever to plaintiff, that the Spors were officers of both Gold Spor and Candelaria, to whom they planned to sell all of the assets of Gold Spor in controvention of the pre-incorporation agreement, and though they may have manipulated the corporation so as to eject Crested Butte's representatives from the board of directors and deliberately concealed the existence and the substance of the bargain already struck with Candelaria, that Crested

Butte's acceptance of early repayment of the loan, which was a liquidated debt owed by Gold Spor Mining Company, precludes Crested Butte from asserting its other rights under the pre-incorporation contract. This position is bankrupt and should not be allowed to stand.

POINT I

THERE IS A FACTUAL DISPUTE AS TO WHETHER OR NOT AN ACCORD WAS EVER REACHED BETWEEN THE SPORS AND CRESTED BUTTE.

As the Court will recall, upon receipt of a notice of a meeting of the board of directors of Gold Spor Mining, Inc. (attached as Exhibit 1 to defendant's memorandum in opposition to plaintiffs' motion for summary judgment, R. 259), which was to be held on August 18, 1980, Harold Herron and Max Evans, Crested Butte's representatives on Gold Spor's Board, were indisposed and unable to attend the meeting. John Larson, Crested Butte's chairman, and D. P. Svilar, its corporate counsel, flew to Salt Lake City to attend the August 18 meeting only to be barred from the board meeting and the contemporaneous shareholders' meeting.

At that time, discussions were had between Messrs. Larson and Svilar, representing Crested Butte, and Chad Spor and his counsel, Richard Lawrence. The substance of these discussions is in clear dispute. Subsequently, Mr. Lawrence sent a check with a cover letter of September 15, 1980 to Crested Butte, declaring the Spors' intention to repay the $125,000.00 loan in full on or before April 1, 19 (Exhibit P-19).

On October 6, 1980, Mr. Evans wrote back to Mr. Lawrence stating that the tender was rejected as not being in conformance with the discussions in Salt Lake City. However, Mr. Evans did offer to meet with the Spors to work out the parties' differences. (Exhibit P-20). Despite this, Mr. Lawrence wrote back stating that the Spors would continue to pay. (Exhibit P-23).

On page 8 of respondents' brief, respondents' state that Crested Butte apparently did not disagree with Mr. Lawrence's view of the "agreement" allegedly reached at the August 18, 1980 meeting as set forth in his letter of October 13, 1980 (P-21). Such is not the case. In a letter of October 17, 1980 (P-22), Mr. Evans wrote Mr. Lawrence, making it elaborately clear that Crested Butte was insisting on immediate repayment of the loan or performance of the pre-incorporation contract on the part of the Spors by issuing a promissory note for the loan and stock to secure it. On pages 10 and 11 of their brief, respondents attempt to characterize appellant's view of the August 18, 1980 meeting, (viz., that immediate repayment of the loan was a pre-condition of settlement), as an invention concocted in the course of litigation. As Mr. Evans' October 17, 1980 letter (P-22) clearly shows, this was Crested Butte's position and understanding from the beginning.

While the tenders were being made by the Spors from October 1980 through June 1981, the Spors were clearly on notice that Crested Butte did not and did not intend to waive any of its rights under the pre-incorporation contract.

As noted on page 15 of appellant's brief, the limited endorsement on the back of the March 30, 1981 check in the amount of $50,339.49 merely stated that with that and previously tendered ch the loan under Article III of the pre-incorporation contract was re paid in full. The Spors' transmission of the separate release document along with that check represents nothing more than an attempt to "finesse" release of other claims Crested Butte had made clear that it was not and would not release, and which were, as testified to by Chad Spor, entirely separate obligations under the pre-incorporation contract. (Chad Spor Depo. at 26-27).

The Spors' manipulative use of prepayment of the loan is obvious; they were attempting to force Crested Butte to choose between taking the money, which was clearly owed to it, and foregoing its other rights, e.g., insisting on its rights to one-half of the Gold Spor stock. The $125,000 loan was unevidenced and unsecured by the Spors who were already in breach of the pre-incorporation contract and in all probability would never be repaid by the obligor, a small under-capitalized "family" corporation, if Crested Butte did not submit to the leverage which the Spors were applying. The injustice of such a technique is manifest and should be shocking to the conscience of equity.

On page 21 of their brief, respondents assert that appellant is estopped from claiming an interest in Gold Spor, since Gold Spor and Candelaria "relied" upon a full settlement with appellant thro

repayment of the loan. This assertion is false. The record shows that on April 22, 1980, before the May 5 and August 18 board of directors meetings, and before any alleged agreement to rescind the pre-incorporation contract had been reached, the Spors were already receiving royalty checks from Candelaria for lease of the corporate assets of Gold Spor. (R. 310). How could Gold Spor, in dealing with Candelaria, have relied upon an alleged settlement with Crested Butte which had not yet been negotiated? Further, an estoppel will not lie in that it was not possible for Candelaria or Gold Spor to have been innocently injured since Paul Spor was a vice president of both companies simultaneously. Certainly, the issue of Paul Spor's breach of fiduciary duty to Gold Spor and to his fellow directors of Gold Spor, Messrs. Herron and Evans, the representatives of Crested Butte, presents a material issue of fact.

On page 28 of respondents' brief, the contention is made for the first time that no representatives of Crested Butte were ever elected to the Board of Gold Spor and that the only persons who have ever been directors of Gold Spor are the Spors themselves. Thus, apparently, respondents argue that it would have been impossible to have "frozen" Crested Butte out of the Board of Gold Spor. This contention, too, is patently specious. The pre-incorporation agreement clearly requires two representatives of Crested Butte to be on Gold Spor's Board. The fact that, as respondents point out, Gold Spor's articles of incorporation name only Chad, Ray and Paul Spor as directors is hardly surprising; the articles were adopted at the May 5,

1980 meeting, notice of which was sent to Mr. Herron and Mr. Evans on May 2, and received in Riverton, Wyoming, the day of the meeting. Of course, respondents do not explain why, if Mr. Herron and Mr. Evans were never on the board of directors, notice of the board of directors meeting was sent to them and why the minutes of the August 18, 1980 board meeting refer to Mr. Evans and Mr. Herron as "the two directors not present." (See, Exhibit "A" attached hereto, produced in response to defendant's first set of requests for production of documents to plaintiffs.)

Although whether or not either party breached the pre-incorporation contract is clearly a question of fact and, therefore, not pivotal in this appeal, appellant wishes to set the record straight regarding respondents' allegations on page 1 of respondents' brief regarding the peanut mill and the heavy media plant. Contrary to respondents' view of the facts, Crested Butte did transfer the peanut mill to the Spors, although the mill was never moved to Utah by the Spors, for reasons which are in dispute. The Spors visited the peanut mill and found it to be suitable for the purposes of Gold Spor Mining Company and there is no dispute that the Spors had the responsibility for moving the mill to Millard County, Utah. However, this was not done prior to the onset of the winter snows which prevented transportation of the mill.

As to the heavy media plant, it is also undisputed that it was the Spors' obligation to locate a suitable plant, which they new

did. Although the Spors finally expressed the intention to assemble a useable plant from component parts, and even transmitted a list of such parts to Crested Butte, no request for funds of Crested Butte was ever made. When Crested Butte itself located what it considered to be a suitable plant and recommended it to the Spors, the Spors refused to even consider its acquisition. (See, brief of appellant, at 3-4).

POINT II

THERE IS A FACTUAL DISPUTE AS TO WHETHER OR NOT ANY ACCORD WAS VITIATED BY THE FRAUDULENT CONDUCT OF THE SPORS.

The previously discussed issue of whether an accord and satisfaction was reached by the parties through the tender of repayment of the loan is actually irrelevant to the determination of respondents' motion for summary judgment below, since any such agreement was vitiated by respondents' material omissions and concealments, and respondents are, therefore, estopped to assert an accord and satisfaction. These acts and omissions of respondents, which constitute fraud, are discussed at length in Points II and III of Appellant's Brief.

Appellant's appeal is based on the simple legal proposition so aptly stated by the Court in Badger & Co. v. Fidelity Bldg. & Loan Ass'n, 94 Utah 97, 75 P.2d 669, 679 (1938):

> "Where the accord and satisfaction relied upon was procured by fraud or misrepresentation or by mutual mistake, it is not binding." (Emphasis supplied).

In the instant case, the Spors, without notice to Crested and without formal action by the board of directors of Gold Spor issued the stock in Gold Spor to themselves and to their relatives before they themselves had performed under the pre-incorporation ment. The Spors gave pro forma notice of board meetings of Gold to Crested Butte's representatives on the board, which notices are inadequate on their face. The Spors barred Messrs. Larson and Sv from the board meetings and refused to relate the substance of the agreement with Candelaria. (Larson depo. at 54-55). Neither Max Evans nor Harold Herron, both directors of Gold Spor, knew anythi about a proposal or contract with Candelaria. Id. at 58. Furthe none of these facts, or the fact that at the time Paul Spor was a vice-president and director of Gold Spor, he was also a vice-pres dent of Candelaria Metals (a clear conflict of interest) came to until after discovery in the instant action was well under way.

As officers and directors of Gold Spor, the Spors had a fi ciary duty of disclosure to Messrs. Evans and Herron and to Creste Butte itself. As fiduciaries, the burden of proof is on the Spor to show that their dealings with Crested Butte were fair and in g faith. See, Branch v. Western Factors, Inc., 28 Utah 2d 361, 50 P.2d 570 (1972); Weatherby v. Weatherby Lumber Co., 492 P.2d 43 1972). The Spors have offered no justification for their bad-fa and deceitful conduct which would have allowed the court to dete as a matter of law that no fraud or misrepresentation occurred i

the inducement of an accord and satisfaction, even if such occurred.

CONCLUSION

Based on the foregoing, it is clear that there remain issues of fact as to whether the parties reached an accord and satisfaction; and if so, was it based on the fraudulent acts of plaintiffs, which must be presented to a trier of fact. Therefore, the judgment of the court below should be vacated and the case remanded for trial on the merits.

DATED this 8th day of March, 1984.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I mailed, postage prepaid, two copies of the foregoing APPELLANT'S REPLY BRIEF to Earl Jay Peck, Esq., NIELSEN & SENIOR, P. O. Box 11808, Salt Lake City, Utah 84147, counsel for Plaintiffs-Respondents; and to Robert H. Wilde, Esq., 2641 South 3270 West, Salt Lake City, Utah 84119, counsel for Third-Party Defendant-Respondent, this 8th day of March, 1984.

Of Appellant's Counsel

MINUTES OF A SPECIAL MEETING OF

THE BOARD OF DIRECTORS OF

GOLD-SPOR MINING COMPANY

A special meeting of the Board of Directors of Gold-Spor Mining Company was held at the offices of SENIOR & SENIOR, 1100 Beneficial Life Tower, 36 South State, Salt Lake City, Utah on August 18, 1980. Present were Chad Spor, Paul Spor and Ray Spor representing a majority of the Board of Directors of the company. Present was Richard J. Lawrence, counsel to the company. Mr. Chad Spor stated that the meeting was held pursuant to written notice which had been sent to all members of the Board of Directors, including the two directors not present, Mr. Max Evans and Mr. Harold F. Herron.

Upon motion duly made, seconded and unanimously carried, the following persons were nominated as officers of the corporation, to serve for the term provided in the Bylaws:

President	Chad A. Spor
Vice President	Paul Spor
Secretary/Treasurer	Ray Spor

No further nominations being made, the nominations were closed and the directors elected the above named nominees by the affirmative vote of all directors of the corporation present at the meeting, to serve for the term provided in the Bylaws.

EXHIBIT "A"

Mr. Chad Spor presented to the meeting a letter to Candelaria Metals, Inc. dated August 4, 1980 and regarding a proposed Mining Lease and Option Agreement with Candelaria Metals regarding all of the mining properties of the corporation in Utah and Nevada. After thorough discussion and upon motion duly made, seconded and unanimously adopted by the directors present at the meeting:

RESOLVED that the officers of the corporation are hereby authorized to lease and sell to Candelaria Metals, Inc. all of the company's mining properties located in Juab County, Utah and Esmeralda County, Nevada on substantially the same terms and conditions as set forth in the letter dated August 4, 1980, and on such other additional terms and conditions as the officers may determine to be in the best interest of the company, and to execute any and all documents which may be necessary or desirable in order to effectuate said transaction, all subject to approval by the shareholders of the corporation.

FURTHER RESOLVED that a meeting of the shareholders of the corporation having voting power to take action upon this resolution is hereby called to be held at the offices of SENIOR & SENIOR, 1100 Beneficial Life Tower, 36 South State, Salt Lake City, Utah, on August 18, 1980, or such future date as may be determined by the Secretary in order to give adequate and proper notice thereof. The Secretary is further authorized and directed to cause notice of said meeting to be mailed to each shareholder, to call the meeting of shareholders above ordered and, if possible, to obtain a waiver of notice thereof.

There being no further business, the meeting was adjourned.

DATED this 18th day of August, 1980.

Ray Spor, Secretary