1970

U-Beva Mines v. Toledo Mining Co., Formerly American Mining Co. : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

U-BEVA MINES,
a Corporation,
Plaintiff-Appellant,

vs.

TOLEDO MINING CO.,
formerly AMERICAN
MINING CO., a Corporation,
Defendant-Respondent.

Case No.
11960

BRIEF OF APPELLANT

Appeal from the Third District Court
of Salt Lake County, State of Utah.
Honorable Stewart M. Hanson, Presiding

McCULLOUGH & McCULLOUGH
LELAND S. McCULLOUGH
304 East First South
Salt Lake City, Utah 84111
Attorneys for
Plaintiff and Appellant

PUGSLEY, HAYES, WATKISS,
CAMPBELL and COWLEY
JAMES P. COWLEY
400 El Paso Natural Gas Building
Salt Lake City, Utah 84111
Attorneys for Defendant and Respondent

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IN THE SUPREME COURT OF THE STATE OF UTAH

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BRIEF OF APPELLANT

STATEMENT OF THE KIND OF CASE

This is an action brought by appellant to declare terminated and null and void, a lease agreement between appellant and respondent, and to recover damages from respondent for its wrongful dumping of waste on appellant's ground.

DISPOSITION IN THE LOWER COURT

The case was tried to the court. From a judgment, no cause of action, for respondent, appellant appeals.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the judgment, and that this court adjudicate that said lease agreement

is terminated, null and void, and assessment of damages in favor of appellant.

STATEMENT OF FACT

On July 1, 1963, appellant and respondent entered into "a mining lease and option" Exhibit 1-p(b). Subsequent to entering into said agreement the respondent entered into possession of the property in question and commenced paying a minimum monthly rental of $100.00 per month, and until the notification by appellant to respondent of the 1967 delinquent taxes, the respondent paid the real property taxes each year as they came due.

On December 13, 1967, appellant by registered letter notified respondent of the delinquent property taxes for the year 1967, which respondent was required to pay pursuant to the lease agreement. See Lease Agreement, Exhibit 1-p (b), also appellant's letter of December 13, 1967, Exhibit 1-p (d). On December 18, 1967, the respondent, through its controller H. John Ricks, acknowledged receipt of said Exhibit 1-p (d) with respect to the taxes. See Exhibit 1-p (e). Again by letter dated February 21, 1968 (Exhibit 1-p (f)) respondent was again advised of the delinquent taxes and was specifically advised, "as you know, this is sufficient cause for cancellation of your rights to this mining property." The respondent after receipt of said letter failed to pay said taxes. On the 29th of February, 1968, by letter (Exhibit 1-p (g)) respondent was notified of

the termination of any rights of the respondent under the lease agreement for failure to pay the taxes.

There is no dispute that respondent did not pay said taxes pursuant to the lease agreement; and pursuant to the letter of the appellant dated February 21, 1968 (Exhibit 1-p (f)) it was necessary that the appellant pay said taxes.

Mr. James P. Cowley, counsel for respondent, in a letter dated February 29, 1968, and mailed to appellant, tendered a check for the full amount of the taxes, penalty and interest. Exhibit 1-p (b). The letter of Mr. Cowley was mailed the same date that appellant notified respondent of its option to terminate the lease by reason of the failure of the respondent to cure said defect, to-wit, payment of the real property taxes within the 60-day period. In fact, 77 days had expired since the respondent was first notified to pay the taxes. (December 19, 1967 — February 29,1968).

The leased premises are adjacent to other mining claims of the respondent in the same area. The claims of appellant occupy an area of approximately 250 acres. R. 86. There was introduced in evidence Exhibit 7-p and Exhibit 6-p, which show the area of the leased property, and specifically Exhibit 6-p shows waste dump "A" and waste dump "B" and show the waste material that has been deposited upon the leased premises. It was stipulated between the parties that the area occupied by these dumps located

on the appellant's property constitutes an area of approximately 11½ acres. R. 107.

It was stipulated that Exhibit 5-p be introduced in evidence, which is a statement from Mr. John A. Bradshaw, project engineer for Gibbons & Reed Co., which shows the cost of removing these dumps "A" and "B" from the land of the appellant to the land of the respondent. Said Exhibit 5-p also sets forth the quantity of material which would have to be moved, the distance it would have to be moved, and the cost of removing the same. Mr. Bradshaw's exhibit sets forth a total cost of $437,700.00 to restore the appellant's property to its original condition. Exhibit 5-p, R. 85.

It was stipulated between the parties that the lease agreement calls for minimum payments of $100.00 per month, and that said payments had been paid each month since the commencement of the lease until February of 1968, after which time the checks for said payment were not cashed by the appellant but were tendered to it. R. 90, 91.

Mr. Ken McGriffin testified on behalf of the appellant to the effect that he has a degree in earth physics from the University of California, Los Angeles, 1950; that his present relationship to the appellant is that of president and director. R. 91.

Mr. McGriffin also testified that at the time the mining lease and option of July 1, 1963, was entered into that the appellant did not own any other assets

other than the assets which were a part of said mining lease and option. R. 92.

Mr. McGriffin also testified that he had examined dump "A" and dump "B" as set forth on Exhibits 6-p and 7-p. R. 92. That the land of the appellant had been depreciated in value by reason of the dumping of said waste by respondent on appellant's land. R. 93. Further, Mr. McGriffin testified that the dumping of waste from the land of the respondent to dumps "A" and "B", the land of the appellant, is contrary to good mining practice. R. 93. The appellant's land is primarily mining land and that by dumping waste material on portions of it you are covering the surface, and should ore ever be found beneath the dumps, this amount of waste would have to be moved to get to the ore. R. 94. That the land here in question and the adjacent land of the respondent is subject to open-pit mining, and that the operation which is on the property of the respondent known as the Bwana Pit, which is shown on Exhibit 6-p, is an open-pit operation. R.94. Mr. McGriffin testified in his opinion that where a mining company leases property for the purposes of dumping large amounts of waste on the leased ground, that said fact should be specifically stated in the lease agreement, otherwise it would be unethical to do such a thing. R. 95, 96, 97. Mr. McGriffin also testified that there was plenty of room on the property owned and under the control of the respondent upon which this waste

material could have been placed at the time it was removed from their open-pit mining operation. R. 98.

Mr. McGriffin testified that prior to the institution of the present lawsuit by the appellant that to his knowledge no notice was ever given to respondent by appellant of appellant's objection to the respondent using the appellant's property for the purpose of dumping these waste materials. R. 101. However, Mr. McGriffin also testified that he was at one time employed as a consulting geologist by a Mr. Bogdanich, who at the time was the major stockholder of respondent, and he was aware of material being removed from the open-pit operation of respondent and being placed in dumps "A" and "B". However, at said time he had no knowlege as to who was the owner of the land, other than respondent, upon which said waste was being dumped. R. 101. Mr. McGriffin also testified that the dumps in question were created to his knowledge in the years 1960 to 1963 or 1964. R. 102.

Mr. Ralph Tuck testified on behalf of the appellant to the effect that he has a PhD degree from the University of Oregon in Geology; that he is an independent consulting mining geologist and had been such for approximately 11 years. Prior to that time he had been in charge of western exploration for U.S. Smelting & Refining Co. for approximately 21 years. R. 103, 104. Dr. Tuck testified that ordinarily the waste and overburden from open-pit operation is placed on the company's own property, or if land is

leased or rented for that purpose, the owner of the land is specifically advised that waste or overburden is going to be placed upon the land. R. 104. Dr. Tuck testified that the placing of waste upon the ground, such as in dumps "A" and "B", is detrimental in that it conceals the surface so that surface examination cannot be made and it is more difficult to explore in the case of drilling to go through waste rock, and certainly more expensive, and if anything is found, then it is necessary to remove the waste material. R. 105. Dr. Tuck also testified that in his opinion it is good mining practice to advise a land owner when land is going to be used for the particular purpose of dumping waste and overburden. R. 105.

Mr. Cowley on cross-examination of Dr. Tuck stated:

"Q. Doctor, would it change your opinion on anything anywhere any, if the lease provided — had the following language in it: 'That the lessee shall also have the right to take possession and to use and to operate the land and the entire surface and sub-surface of any and all of the said mining claims as lessee may deem necessary and convenient in connection with its exploration, development and mining (under ground or open pit) operation on adjoining properties?' "

"A. In order to render an opinion on that, and I am really not in a position to render an opinion on the contract — I have not read it — but that specific clause, yes. If the intent, however, is to obtain this prop-

erty for the purpose of exploration and development of that property that is a different thing, and if it was used, I would say, for the deposit of waste it would be a *subterfuge.*" R. 105, 106.

Dr. Tuck further testified:

". . . that in all major companies, or small, on mining operations he states specifically what the land is going to be used for". R. 106.

ARGUMENT

POINT I.

RESPONDENT FAILED AND REFUSED TO PAY THE TAXES ON THE LEASED PROPERTY, AS REQUIRED BY THE LEASE AGREEMENT, AND PLAINTIFF, PURSUANT TO THE TERMS OF THE LEASE AGREEMENT, TERMINATED ALL INTEREST OF THE RESPONDENT UNDER THE TERMS OF SAID LEASE AGREEMENT. THE LOWER COURT ERRED IN NOT ADJUDICATING THAT SAID LEASE AGREEMENT WAS NULL AND VOID.

On July 1, 1963, appellant and respondent entered into a "mining lease and option" (Exhibit 1-p).

On December 13, 1967, plaintiff, by registered letter, notified defendant of the delinquent property taxes for the year 1967, which defendant was required to pay pursuant to the lease agreement. (See lease agreement, Exhibit 1-p (b), also appellant's letter of December 13, 1967, Exhibit 1-p (d). On December 18, 1967, defendant, through its controller, H. John Ricks, acknowledged receipt of said Exhibit

with respect to the taxes. (See Exhibit 1-p (e). Again by letter dated February 21, 1968, (Exhibit 1-p (f) respondent was again advised of the delinquent taxes, and was specifically advised, "As you should know, this is sufficient cause for cancellation of your rights to this mining property." The defendant, after receipt of said letter, failed to pay said taxes. On the 29th of February, 1968, by letter (Exhibit 1-p (g) respondent was notified of the termination of any rights of the respondent under the lease agreement for failure to pay the taxes. There is no dispute that the defendant did not pay said taxes pursuant to the lease agreement, and pursuant to the letter of the plaintiff dated February 21, 1968, (Exhibit 1-p (f) it was necessary that the plaintiff pay said taxes.

Paragraph 9 of the lease agreement (Exhibit 1-p (b) provides:

> "Lessee agrees to pay all taxes levied or assessed upon all lessee's machinery, equipment and property, or service improvements, placed upon or which are appurtenant to the demised premises. *Taxes hereafter levied or assessed either against the said mining premises or the ore produced therefrom*, including taxes assessed by reason of net annual proceeds and occupation, or other taxes imposed by governmental agencies, *shall be apportioned* on a pro-rata basis as between lessee and lessor depending on the net smelter return to be applied as set out in paragraph 2 hereof, *and lessee shall pay the same*, and be entitled to deduct any such taxes charged by lessee and so payable by lessor from the minimum month-

ly payments or net smelter returns payable hereunder, and neither lessor or lessee shall be liable in any way for any other tax exercised, levied, or assessment upon or against the other."

Paragraph 15 of the lease agreement (Exhibit 1-p (b) provides:

> "For any breach of any covenant or agreement herein specified to be kept and performed by lessee, lessor may terminate this agreement 60 days after delivering to lessee a written notice of lessor's intention to terminate the same, which written notice sets forth the breach of covenant or agreement being complained of, provided however, that if lessee is thus in default as claimed by the lessor, lessee may, within 60 days following the receipt of said notice, avoid such termination and cure said default by performing the covenant or agreement breached. *If such default has not been cured within said 60-day period, said termination shall thereupon become effective at the option of the lessor, and all of lessee's rights hereunder shall be forfeited* except the right of lessee or its agents to remove its property and equipment from said demised premises as hereinabove provided."

In accordance with said provision, plaintiff notified the defendant of the breach of the lease agreement by failure to pay taxes; the defendant did not, within the 60-day provision, cure said defect and breach; whereupon the plaintiff, at its option, by letter dated February 29, 1968, terminated all rights of the defendant under said lease agreement.

The notification and the letters set forth as Exhibits are uncontroverted evidence that the defendant has breached the lease agreement, and said lease agreement has been terminated and is no longer a valid document, and the court should so adjudicate.

The court in its memorandum decision dated December 9, 1969, stated:

> "1. The lease should not be declared terminated because of defendant's failure to make a timely and direct payment of real property taxes. Tender was made. The plaintiff had sufficient funds from payments on the lease with which to pay said taxes, and which could have been taxed against the defendant."

The tender here referred to by the court consisted of a letter dated February 29, 1968, written by James P. Cowley, counsel for respondent, in which he tendered a check for the taxes, penalty and interest, Exhibit 1-p (b). It is interesting to note that said letter of Mr. Cowley was mailed the same day that appellant notified respondent of its option to terminate the lease, by reason of the failure of respondent to cure said defect within the 60 day period. In fact, 77 days had expired since respondent was first notified to pay the taxes. (December 19, 1967 — February 29, 1968).

Further, respondent, subsequent to the trial, attempted for the first time since the lease agreement was instituted, to claim that it had a credit built up for taxes, which could be applied to the delinquent

taxes which the defendant failed to pay. The lease agreement specifically provides, ". . . Taxes hereinafter levied . . . shall be apportioned . . . *and Lessee shall pay the same,* and be entitled to deduct any such taxes charged by Lessee and so payable by Lessor from the minimum monthly payments or net smelter returns payable hereunder . . ." The wording of the lease is clear and unambiguous to the effect that it is the obligation of the Lessee to pay the taxes. Whether or not Lessee is entitled to deduct a proportionate share of said tax "from the minimum monthly payments or net smelter returns payable hereunder" is of no consequence since the respondent failed to comply with the provision for the payment of taxes in the first instance.

Further, there is no evidence in the record to indicate that the respondent has any accrued credit for payment of taxes. This issue was never asserted by the respondent at the trial, and is not an issue before this court at the present time.

It is interesting to note, however, in connection therewith, that paragraph 2 of the lease agreement, Exhibit 1-p, sub-paragraph (b), specifically provides that any payment of actual royalties in excess of the minimum monthly royalty shall only be credited toward any further rentals and/or royalty becoming due *during the current calendar year, but such minimum monthly royalty payment shall not be credited or accumulated to apply towards rentals or other royalties due subsequent to the then calendar year.* It is

obvious from the construction of the lease and the acquiescence of defendant that it was never intended that there should be any tax credit accumulated.

Respondent, in its memorandum to the trial court (see copy in the record), spent considerable time in attempting to claim an unconscionable forfeiture by appellant under the lease agreement. Here again, the respondent never asserted, nor is there anything in the pleadings, to indicate that there is an issue of forfeiture involved in this case. The lease agreement specifically provides that if the taxes are not paid the appellant has the right to terminate the lease. The minimum monthly rental which the respondent has been paying specifically gives the Lessee, respondent, the right to take possession of the premises, to explore, mine and develop, and to do and perform any and all types of work thereon, etc. The court should keep in mind that this lease agreement has been in effect since July 1, 1963. The respondent has never paid anything more than the minimum monthly rental payment.

If the respondent is claiming that there is an unconscionable forfeiture, then certainly it should have, at the trial of this action, demonstrated what its actual damages had been as compared to the gain of the appellant. The only evidence with respect to damages at the trial of this action were the damages suffered by the appellant in the sum of $437,700.00 for the wrongful use of the premises by the respondent contrary to the lease agreement and contrary to the ex-

pert testimony of both Dr. Ralph Tuck and Mr. Ken McGriffin. The respondent produced no evidence or testimony which would controvert or contradict the testimony of either of these two expert witnesses.

With respect to cases on forfeiture, it is respectfully submitted that this Court as early as September, 1923, in the case of *Malmberg, et al, vs. Baugh*, 62 Utah 302, page 331, became one of the leading authorities, quoted by most courts of general jurisdiction, with respect to the law of forfeitures. See also Utah Law Review, Volume 3, page 30, with respect to an article entitled, "Forfeitures under Real Estate Installment Contracts in Utah." See also *Young vs. Hansen*, 117 Utah 591, a case decided in 1950, and also *Perkins et al, vs. Spencer*, 121 Utah 468, which cover the elements of forfeiture of contracts in the State of Utah. Nowhere in any of these decisions or any subsequent decisions of this court does the court indicate or determine that a seller under a contract or a lessor under a lease agreement, such as here, does not have the right to terminate the lease agreement where a direct violation of the terms of said contract or lease agreement occurs. The court always starts from the position that the default having been made by the defendant, the determination is then whether or not the forfeiture is unreasonable and would grant to the plaintiff an "exorbitant recovery" or "impose a hard and arbitrary penalty on the defendant." See Justice Crokett's statement in

this regard in the case of *Spencer vs. Perkins*, 121 Utah 468.

Here again, the respondent never raised any issue as to damages suffered by the defendant which could be termed a penalty. The only damages suffered in the instant case were suffered by the appellant, and which damages were explicitly proven by appellant in the sum of $437,700.00.

In other words, the respondent cannot, with impunity, say, "I can violate the terms of the lease agreement, and even though I do, you have no right to terminate the lease." The lease has been terminated by the appellant, and the only element now to be considered by the court, if, in fact, such an element exists, pertains to the consequences following such termination. The minimum monthly payment, even though it could conceivably be applied toward the purchase of the property in the event respondent elects to exercise the option agreement and purchase the property, is certainly no compensation to appellant for the total damages suffered by appellant. The evidence permits of no other conclusions.

POINT II.

IT IS CONTRARY TO THE LEASE AGREEMENT, AND CONTRARY TO GOOD MINING PRACTICE, FOR RESPONDENT TO USE THE SURFACE OF THE LEASED PREMISES FOR THE PURPOSE OF DUMPING WASTE THEREON FROM ITS MINING OPERATIONS FROM ADJOINING LAND. THE LOWER COURT

ERRED IN FAILING TO ASSESS AGAINST RESPONDENT THE UNCONTROVERTED DAMAGES PROVEN BY APPELLANT.

Paragraph 1 of the lease in question allows the lessee ". . . the right to take possession and to use and operate the land and the entire surface and subsurface of any and all of the said mining claims as lessee may deem necessary and convenient in connection with its exploration, development in mining (underground or open pit) operations on adjoining property."

Paragraph 3 states that the "lessee shall conduct all operations on the leased premises in the manner necessary to good, minerlike, and economical mining, so as to develop and take out leased deposits or with due regard to the development of the leased deposits, *to the preservation of the workability of the workings of the leased premises.* Nothing herein, however, shall be construed as in any way limiting the rights of lessee granted pursuant to paragraph 1 hereof."

The testimony of Dr. Ralph Tuck, a consulting geologist for the past eleven years, and for twenty-one years prior to that in charge of Western Exploration for the United States Mining and Smelting Company, was to the effect that such a lease provision would be a *subterfuge* if it were intended to cover the alleged dumping of waste upon a lessor's property. In Dr. Tuck's opinion, if leased property is to be used for such purposes this fact should be made known, without question, to the lessor and fully set forth in

the lease agreement. The dumping of waste upon a lessor's property in the manner carried on by defendant is contrary to good minerlike practices and destroys the value of the leased premises. See R. 103-106.

Further, pursuant to the testimony of Mr. Ken McGriffin, who holds a degree in earth physics from the University of California at Los Angeles, and a consulting geologist since then, the dumping of the waste by the defendant upon the plaintiff's property is contrary to good minerlike practices and has destroyed the value of the leased premises, and has caused damages which will necessitate the removal of said waste. Further, the damages suffered by the plaintiff by reason of the dumping of waste upon the property of the appellant amounts to the sum of $437,700.00 to-wit: the cost of removing said waste. See Exhibit 5-p. The waste in question could have been readily dumped upon the respondent's own land. (R. 95-99) The respondent produced no witnesses or testimony contrary to the testimony of Dr. Tuck or Mr. Ken McGriffin, or contrary to the information contained in Exhibit 5-p, and therefor such evidence is uncontroverted, and appellant should be awarded judgment against defendant for damages in the sum of $437,700.00.

The following annotations from 83 ALR 2d 73 support this position:

> "Where a mineral lease for the removal of coal from two contiguous tracts is granted and the lessee acquires the rights to mine a third

tract which connects the two so leased, the lessee may be enjoined from dumping slate and hauling coal from the third tract on and over the leased tract said the court in *Brasfield vs. Burnell Coal Co.* (1912 180 Ala. 185, 60 Southern 382, holding that the lessee has no right to use the surface in aid of an adjacent mining operation even though such will eventually connect the leased tract. The court further held that the mere fact that this procedure was necessary, practical or economical would not, in the absence of express of implied agreement, authorize it, and no such right could be inferred from the fact that the term of the lease was to extend until all the coal had been mined from both tracts."

"In *Himrod vs. Fort Pit Mining and Milling Co.* (1915) CA 8 Colo. 220 F 80, the plaintiff sought to enjoin the defendant from depositing the waste rock from an adjacent coal mine at the mouth of the tunnel which the defendant held under a lease and deed of perpetual right of way from the plaintiff providing, among specifically enumerated privileges, for the right to use the tunnel in 'working the mines they now own or may hereafter acquire.' In reversing a judgment for the plaintiff and ordering a new trial, the court said that passing by implication with every grant are all those things reasonably necessary to the exercise thereof, and that while the necessity need not be absolute, it may not be a matter of mere convenience, and the requisite degree thereof to permit such depositing of waste rock was a question for the jury. Subsequently, in *Himrod vs Fort Pit Mining and Milling Co.* (1916) CA 8 Colo., 238 F. 746, after retrial, the court ap-

proved jury findings that it was not reasonably necessary for the grantee to dump waste rock on the surface estate even though the tunnel mouth was some 10,000 feet above sea level on a steep slope not adapted to many uses which had long been used by the grantor for dumping similar waste from his own mine."

"And although remanding the matter for additional evidence as to damages, the court in *Pike-Floyd Coal Co. vs. Nunnery* (1929) 232 Ky. 805, 24 SW 2d 614, nonetheless held that the mineral lessee was liable to the surface owner for depositing waste rock from an adjacent mine on the surface of the leased tract, even though the lease contained express permission for 'removal of the products taken out of any other lands.' The court further stated that while the lessee was entitled to make reasonable use of all the rights conferred upon him, the lease contained no provision allowing the lessee to so deposit waste from adjacent mines and concluded that the lessee would be liable for damages occasioned thereby."

POINT III.

THE LEASE AGREEMENT IN QUESTION IS INVALID AS IN VIOLATION OF SECTION 16-10-74, UCA 1953, WHICH PROVIDES THAT STOCKHOLDER APPROVAL MUST BE OBTAINED WHERE A LEASE OF ALL OR SUBSTANTIALLY ALL OF THE ASSETS OF THE CORPORATION IS MADE OUTSIDE THE USUAL COURSE OF BUSINESS OF THE CORPORATION. THE LOWER COURT ERRED IN FAILING TO ADJUDICATE SAID LEASE AGREEMENT NULL AND VOID ON THIS BASIS.

The facts are definitely clear and uncontroverted that the lease agreement in question was never approved or ratified by the stockholders of the appellant corporation. See testimony of Ken McGriffin, president of the appellant corporation. See also Exhibit 1-p (f), letter of February 21, 1968, wherein Mr. McGriffin as president of the appellant corporation notified respondent that the stockholders had voted to reject the approval of the lease agreement by a vote of 2,977,003 votes against to 215,000 votes for approval. See also the testimony of Mr. McGriffin to the effect that the only substantial asset of any value in the corporation was the property which was the subject matter of the lease agreement between plaintiff and defendant. (R. 12, 13) See also the testimony of Mr. Robertson to the same effect. (Dep. 11)

Accordingly, the lease agreement not having been approved by a majority vote of the stockholders of the plaintiff corporation is null and void, and the court should so adjudicate.

Respectfully submitted,

McCULLOUGH & McCULLOUGH
LELAND S. McCULLOUGH
304 East First South
Salt Lake City, Utah 84111

Attorneys for
Plaintiff and Appellant