1970

Abraham Markosian v. Vulcan Steel Corporation And J. Dean Gerstner : Respondent's Brief

IN THE

SUPRE

STATE

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vs.

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TABLE OF CONTENTS

CASES CITED

AUTHORITIES CITED

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

VULCAN STEEL CORPORATION,
Plaintiff-Respondent,
vs.
ABRAHAM MARKOSIAN,
Defendant-Appellant,
ABRAHAM MARKOSIAN,
Plaintiff-Appellant,
vs.
VULCAN STEEL CORPORATION and
J. DEAN GERSTNER,
Defendants-Respondents,
ABRAHAM MARKOSIAN,
Plaintiff-Appellant,
vs.
VULCAN STEEL CORPORATION and
J. DEAN GERSTNER,
Defendants-Respondents.

Case No.
12118

RESPONDENTS' BRIEF

STATEMENT OF THE CASE

This action is a consolidation of three lawsuits involving the rights and obligations of Vulcan Steel Corporation and its two shareholders J. Dean Gerstner and Abraham Markosian.

DISPOSITION IN LOWER COURT

On April 29, 1970, the Third Judicial District Court

entire time and efforts to the affairs of the Corporation for a period of five years (R. 170).

A clause, subparagraph 3 (c) in the Agreement provided for mandatory repurchase of stock by the Corporation in the event of "termination of employment by Corporation", which reads as follows (R. 172):

> "(c) Mandatory Obligation to Purchase Stock Offered.
>
> At the termination of the employment by Corporation of Markosian or Gerstner for any reason, it shall be mandatory for Corporation to purchase all of the stock of Markosian, Gerstner, or any stockholder or transferee giving written notice as herein provided of his or her intention to dispose of his or her stock . . ."

In early January, 1968, Markosian decided to leave Vulcan Steel Corporation and to organize another steel company in competition with Vulcan (R. 142). Thereafter, he secretly and without notice to Vulcan deposited to Vulcan's account the sum of $20,000.00, constituting the outstanding balance of his subscription obligation which he had previously refused to pay (R. 142). After this action Markosian formally terminated his employment with Vulcan Steel Corporation on January 23rd, 1968, and demanded that the Corporation repurchase the shares of stock owned by him in the Corporation pursuant to subparagraph 3 (c). The repurchase price under this clause contained a formula increasing depreciated value to fair market value and a payment for good will evaluated at 2½ times the average profits for the previous five years (R. 172).

in and for Salt Lake County, State of Utah, entered an order granting respondent Vulcan Steel a partial Summary Judgment thereby permitting liquidation and dissolution of the Corporation in lieu of mandatory repurchase of the stock of Markosian by Vulcan.

RELIEF SOUGHT ON APPEAL

Respondents seek to affirm the lower court's Order of Partial Summary Judgment.

STATEMENT OF FACTS

The Statement of Facts made by appellant is substantially correct but fails to include certain facts significant to this interlocutory appeal.

In the spring of 1965, J. Dean Gerstner and Abraham Markosian commenced negotiations to organize a steel fabricating business utilizing a steel plant, machinery, equipment and steel inventories owned by several Gerstner family corporations. On April 12, 1965, Markosian and Gerstner executed an Agreement finalizing their negotiations wherein Gerstner received 51% of the stock of the Corporation and Markosian subscribed to 49% of the stock. Markosian paid for half of his stock within a short period of its due date, but failed to pay the final $20,000.00 on April 1, 1966 as required by the Agreement.

The Agreement provided that Gerstner would be president and treasurer of the Corporation and that Markosian would be vice president, general manager and secretary (R. 169). The Agreement also required Markosian to devote his

> *business.* In that connection, we again wish to repeat our demand that an independent certified public accountant audit the accounts and records of the Corporation so that the assets and liabilities of the Corporation will be properly stated in the event of a redemption pursuant the terms of said Agreement or a *liquidation because of Mr. Gerstner also giving notice of his desire to have the parties vote their stock for liquidation and dissolution of the Corporation.* This independent audit should enable the parties to agree upon the assets and liabilities of the Corporation without further legal action." (Exhibit A, Emphasis added.)

Vulcan agreed to have such an audit performed provided both parties would mutually share in the expense of such an audit. Markosian refused and Vulcan proceeded with the preparation of the accounting documents by a former accountant for the firm.

Immediately after such notice, litigation was commenced by Vulcan, Gerstner and Markosian in three separate actions involving many complex issues of alleged wrongdoings by both parties. The actions were consolidated. Markosian moved for partial summary judgment to interpret the mandatory repurchase provision of subparagraph 3 (c) which was granted by the lower court. On appeal, this Court, in its 3-2 decision, held the repurchase provisions applicable even when termination of employment was voluntary.

Within 30 days after the Supreme Court's decision, Vulcan served notice on Markosian of its intention to invoke the alternate provisions of subparagraph 3 (e) pro-

Vulcan attempted to return to Markosian his untimely subscription payment of $20,000.00 but this was refused. Concurrent with this action, Vulcan notified Markosian that it would not repurchase the shares of stock owned by Markosian in the Corporation contending that the mandatory repurchase provision of subparagraph 3 (c) contemplated repurchase only when the termination of the employment was by the Corporation and not a voluntary termination. At that time, Vulcan also advised Markosian that in the event the Court determined that subparagraph 3 (c) required repurchase by the Corporation of Markosian's stock, Vulcan would invoke the alternate provisions of subparagraph 3 (e), "Dual Notice", providing for liquidation and dissolution of the Corporation:

> "(e) Dual Notice.
>
> In the event both Markosian and Gerstner wish to terminate their employment by Corporation and desire to have Corporation purchase their stock, the parties hereto agree to vote their stock for liquidation and dissolution of Corporation."

Within three weeks after Markosian's voluntary termination, an attorney representing Markosian acknowledged that Vulcan had indicated its intention to liquidate the corporation in the event the Court determined the mandatory repurchase provisions applicable. In his letter of February 13, 1968 Mr. Markosian's attorney stated as follows (R. 299):

> *"You have indicated that Mr. Gerstner is considering liquidation of the Corporation pursuant to the provisions of the Agreement entered into by Mr. Markosian and Mr. Gerstner at the inception of this*

quiesced if not elected to have the Corporation dissolved under the "Dual Notice" provision of the contract.

The final Order signed by the Court granting Markosian's Motion for the appointment of a Receiver did so pursuant to Rule 66 (h) o fthe Utah Rules of Civil Procedure which authorizes the appointment of a Receiver for liquidation of the Corporation (R. 338). Vulcan then moved the Court for partial summary judgment to liquidate and dissolve the Corporation in accordance with subparagraph 3 (e) "Dual Notice" in lieu of the mandatory repurchase provisions of subparagraph 3 (c) (R. 333). The Court, in its Order granting respondent Vulcan's Motion for Partial Summary Judgment, ordered the liquidation and dissolution of the Corporation in lieu of the mandatory repurchase provisions of the Agreement. From this order appellant Markosian appeals. Respondents Vulcan Steel Corporation and J. Dean Gerstner seek to have the Order of the lower Court affirmed.

ARGUMENT

POINT I.

THE SUPREME COURT IN ITS PRIOR DECISION DID NOT CONSIDER OR HAVE BEFORE IT THE ISSUE OF "DUAL NOTICE".

Appellant Markosian, in Point I of his brief, incorrectly argues that the lower Court's Order of April 29, 1970 providing for liquidation and dissolution disregards the mandate of the Supreme Court. This Court in its opinion did not comment upon alternate provisions of the Agree-

viding for liquidation of the Corporation (R. 299, Exhibit "B"). It had repeatedly advised Markosian of this intended action (Appellant's prior Brief, p. 13). Markosian responded by filing a Motion with the Court for the appointment of a Receiver for the Corporation (R. 291). Vulcan also moved to amend its Complaint praying for liquidation and dissolution of the Corporation in accordance with the provisions of subparagraph 3 (e) (R. 296).

At the time of argument on the Motion for the appointment of the Receiver the attorneys for Markosian stipulated that Vulcan's pleadings might be amended to rely upon the provisions of subparagraph 3 (e) without concurring that Gerstner had the right to rely upon such a provision. At the hearing, Markosian failed to establish any grounds for the appointment of a Receiver contained in subparagraph (a) of Rule 66 of the Utah Rules of Civil Procedure (R. 399). Vulcan resisted the appointment of a Receiver unless the same were to be appointed in accordance with subparagraph (h) of Rule 66 which provides for the appointment of a Receiver on dissolution and liquidation of the corporation. This position was taken on the basis that subparagraph 3 (e) of the Agreement providng for "Dual Notice" concerning dissolution was consistent with such action. The issue was clearly presented to Markosian to either withdraw his motion for an appointment of a Receiver or to accept the appointment of a Receiver pursuant to the provisions of "Dual Notice" and dissolution of the Corporation (R. 401). Markosian chose to continue to request the Court to appoint a Receiver and by so doing ac-

Court limited its decision to the interpretation of subparagraph 3 (c) of the Agreement and held that Markosian, as a minority stockholder, would not be required to leave his investment in a Corporation with which he was no longer associated. Applying the provisions of subparagraph 3 (e) of the Agreement entitled "Dual Notice", the same objective can be accomplished on a fair and equitable basis for both parties and does not permit Markosian to profit from his own wrongdoings.

POINT II.

THE TRIAL COURT ORDER OF APRIL 29, 1970 CORRECTLY INTERPRETS THE AGREEMENT.

Markosian, in his brief on pages 6, 7 acknowledges that Gerstner and Vulcan have consistently, during the interlocutory appeals and at the time of the voluntary initial termination of employment by Markosian, taken the position that the provisions of subparagraph 3 (e) providing for "Dual Notice" may be invoked if the Supreme Court construed the Agreement to require the Corporation to repurchase Markosian's stock. This position was acknowledged in the letter of Markosian's counsel dated February 13, 1968 (R. 299); stated in Vulcan's first petition for intermediate appeal (R. 213); in the memorandum supporting the petition for interlocutory appeal (R. 222); and in Appellant's Brief in the prior appeal (Appellant's Brief, p. 13).

Within 30 days after the Supreme Court interpreted

ment, and this point is in direct conflict with the argument by Markosian at the time of that prior hearing. In the prior appeal, Markosian stated the issues before the Court in his brief as follows (Respondent's Brief, pp. 1-2):

> "The sole issue raised by Vulcan's appeal from the District court's Order of partial summary judgment dated February 24, 1969, is whether the district court was correct in ruling that the agreement of April 12, 1965, imposed upon Vulcan a duty to redeem Mr. Markosian's shares of the capital stock of Vulcan."

It is clear from the foregoing as well as the entire decision of the Supreme Court in its 3-2 decision that the sole issue before the Court was the interpretation of subparagraph 3 (c) of the Agreement and that this Court merely upheld the trial court's ruling that as a matter of law subparagraph 3 (c) of the subject Agreement provided that Markosian could have his stock repurchased even though he voluntarily terminated his employment with the Company. This Court, in its decision, initially stated:

> *"The sole issue before this Court* is whether the trial court properly interpreted subparagraph 3 (c) of an Agreement between J. Dean Gerstner and Abraham Markosian, which was adopted and ratified by Vulcan Steel Corporation." (Emphasis added.) (R. 285, 23 Utah 2d 287, 462 P. 2d 166.)

The issue of "Dual Notice" now before the Court was not an issue in the prior appeal although Markosian was put on ample notice that this action would be ultimately taken in the event the Court determined Vulcan had not correctly interpreted subparagraph 3 (c). The Supreme

that assertion, but if such is true Markosian must accept his share of responsibility therefor. Not only did Markosian breach his managerial contract when he terminated his employment after less than 3 years of a 5 year contract, but he also went into competition against Vulcan Steel, bid contracts to former customers of Vulcan, hired away employees of Vulcan and removed dies from Vulcan's plant. This conduct should not be rewarded by permitting him to now force the Corporation to repurchase his stock at a premium by paying for goodwill computed at 2½ times the yearly average profits; and, if the Corporation is not in a position to make such redemption then to require Gerstner, the majority stockholder, to personally pay the higher premium to this defaulting party, as asserted in Markosian's brief now before the Court (See Appellant's Brief, p. 10 and 11). The dissolution of the corporation, as sought by Markosian in requesting the Court to have a Receiver appointed, permits both of the participants to receive their proportionate share of the assets of the Company as provided for in subparagraph 3 (e) entitled "Dual Notice". Issues have been raised by the pleadings concerning the wrongdoing of both parties so that when this case is finally tried, the Court can determine the culpability of the respective parties and make any adjustment in the distribution necessitated by such findings. If a trial on the merits establishes that Gerstner has wrongfully lost profits and depleted corporate assets after Markosian's voluntary termination, Gerstner will be required to respond for his actions in damages. If, on the other hand, the trial court finds that the Corporation lost profits and had its capital

subparagraph 3 (c), Vulcan and Gerstner served formal written notice on Markosian of their intention to invoke the provisions of subparagraph 3 (e) for liquidation and dissolution of the Corporation (R. 299, Exhibit "B"). Vulcan and Gerstner did not exercise clause 3 (e) at the time of Markosian's voluntary termination because they justifiably believed Markosian had no rights under the mandatory repurchase provisions since his termination of employment was voluntary. Such belief was not unreasonable nor unfounded since two members of this Court upheld such position in their dissenting opinion. Nevertheless, Markosian was put on notice that liquidation and dissolution would be considered if the Court so held. In his brief, Gerstner stated:

> "If the present interpretation of the Agreement is sustained requiring a mandatory repurchase of Markosian stock at a premium, thus permitting the respondent to profit from his own wrong, Gerstner hereby serves notice that he may be required to invoke the provisions of subparagraph 3 (e) requiring a liquidation and dissolution of the corporation and distribution to the parties of their respective interests. Such undesirable procedure would at least permit both of the parties to be treated on the same basis and receive such value as rightfully belongs to both parties rather than permitting a wrongdoer to receive a premium at the expense of the innocent remaining party."

Markosian contends that "Vulcan has changed from a healthy prosperous going business (R. 310) into an emaciated entity in deep distress" and therefore liquidation and dissolution is untimely and inequitable. Not agreeing with

depleted as a result of Markosian's wrongful actions and breach of his employment contract, he will be required to respond in damages. These remedies are available against both parties individually, irrespective of liquidation and dissolution of the Corporation. Therefore, the allegation that the capital of the Corporation has been depleted has no relevance to whether the Court should permit liquidation and dissolution of the Corporation since remedies for that allegation will survive this interlocutory appeal and await trial. On the other hand, if this Order is reversed and the Corporation is liquidated under the receivership initiated by Markosian, Vulcan and Gerstner would be required to repurchase the stock of Markosian at a premium without being able to recoup such expenditures from a going business. Markosian should not have the right to put Vulcan out of business at the same time being paid on the basis of a going business, i.e., payment for good will and appreciated assets.

It should be noted at this juncture that Markosian, in the prior appeal on mandatory repurchase, drew the Court's attention to the danger of a minority shareholder being "locked in" a closed corporation. The true intent of Markosian can be now more clearly demonstrated when he secretly deposited to the account of the Corporation the balance of his overdue subscription obligation of $20,000.00 and at the same time demanded repurchase with a premium by the Corporation. His motives could not be those of one who, as a minority shareholder was "locked in" to a closed corporation. Rather, the motives were those of one seeking

to enjoy a profit at the expense of Vulcan and Gerstner. Our courts should not be a party to such practices by condoning such conduct and permitting a defaulting party to profit therefrom. The order of liquidation and dissolution in accordance with subparagraph 3 (e) of the Agreement will grant to Markosian the remedy he sought in the prior appeal in that he will no longer be "locked in" but will share in the liquidated assets of the Corporation. The determination of the trial court that "Dual Notice" is an available alternate remedy is not inconsistent with the prior Supreme Court decision and is best calculated to equitably disassociate the parties.

POINT III.

MARKOSIAN, NOT GERSTNER, IS BARRED BY HIS OWN CONDUCT FROM THE POSITION HE NOW ASSERTS.

On February 19, 1970, Markosian moved the Court for the appointment of a Receiver after Vulcan and Gerstner had served notice of their intent to liquidate and dissolve the Corporation. At the time of the argument on the Motion for the appointment of a Receiver, Markosian failed to establish a sufficient basis for the appointment of a Receiver under Rule 66 (a) of the Utah Rules of Civil Procedure. Therefore, Vulcan resisted the appointment of a Receiver unless the same were to be appointed pursuant to the provisions of subparagraph (h) of Rule 66, which provides for the appointment of a Receiver to liquidate a corporation. Markosian was then faced with the issue of whether to continue to urge the Court to appoint a Receiver

under such conditions or to withdraw the request for the appointment of a Receiver. This was made clear to counsel for Markosian as follows:

MR. BUSHNELL:

> ". . . and now by their Motion to have a Receiver appointed to conserve and terminate their existing business. It seems to me their very actions are making an election. I will proceed regardless of their statement of position and state we will join in the appointment of a Receiver, but as we review the code it appears the only basis on which the Court has authority to appoint such a receiver is Rule 66, Subparagraph (h) — Appointment of Receiver on Dissolution of Corporation. You tell me if you're relying on any other provision of law, Mr. Patton. On page 746 Subparagraph (a) 5 — Grounds for Appointment. 'A receiver may be appointed by the Court in which an action is pending or has passed to judgment; in cases where a corporation has been dissolved or is insolvent or imminent danger of insolvency or has forfeited its corporate rights.' We submit the document he has now submitted shows this company has not been insolvent. It's not in an insolvent position. That one does not apply. On that basis and pursuant to that authority we would join that Motion for the Appointment of a Receiver, but provide further in the prayer that the receiver only be permitted to do the things as executed in their Motion. The order would have to be enlarged to let the receiver have authority to sell and liquidate the physical assets. Vulcan is under a lease which expires this month. Certain expensive equipment requires monthly payment, funds were necessary to be procured. I think it would be appropriate for both Markosian and Gerstner to make a bid to the

receiver to acquire these assets, and then let the receiver proceed thereafter to do the things that have been suggested by Mr. Patton . . ." (R. 399).

* * * * * *

MR. PATTON:

". . . One other thing I would like to say with regards to the Motion of Appointment of a Receiver. I would think my client would be perfectly happy to have a receiver appointed to wind up the business and all the rest of this, and hold whatever funds may be left pending a determination of this question of law whether or not the dual notice provision applies or we're entitled to redemption measured of this earlier date of January 1968. And if we can agree on that — parties can agree on that it will be to everybody's benefit and, of course, primarily Mr. Markosian's benefit. Whatever is left will be preserved, if he is in fact entitled to a judgment . . ." (R. 401).

* * * * * *

THE COURT:

"In regard to the suggestion and recommendation of Mr. Patton, the receiver be appointed with the authority to proceed with the winding up and dissolution, reserving the other issue as to which procedure you're going to follow, the legal issues — any objections to that?"

MR. BUSHNELL:

"We obpect to it. I don't think it's a matter the Court can rule on. At this point we don't want to be in the position of acquiescing or —"

such action. The principle of estoppel now asserted by Markosian in his brief against Gerstner must apply against him, thus preventing Markosian from repudiating an election to have a Receiver appointed to liquidate the Corporation.

Markosian erroneously argues that Gerstner and Vulcan are estopped from liquidation and dissolution in that they previously exercised an election of remedies. Such is not the case. The rule of election of remedies referred to in 28 Corpus Juris Secundum, § 12, p. 1085 states to the contrary:

> "*Where there is doubt as to right remedy.* Where the victim of a wrong has at his command inconsistent remedies and he is doubtful which is the right one, in the absence of facts creating an equitable estoppel, he may pursue any or all of them until he recovers through one, since the prosecution of a wrong remedy to defeat will estop him from subsequently pursuing the right one. A party is not required to select his procedure at his peril."

Also in 28 C. J. S., § 12, p. 1086 it is stated:

> "*Mistake as to legal effect of instrument.* Where a

> "Mistake as to legal effect of instrument. Where a party prosecutes an action at law based upon a misapprehension to the legal effect of a written instrument, and dismisses the action, or where in such case, on prosecution to judgment, it is defeated because of such error, such acts do not constitute an election of remedies so as to preclude a subsequent action to reform the instrument."

It is the general rule that an election can exist only

MR. PATTON:

"I think the question of dual notice was properly invoked. I think that's the subject matter for Motion on Summary Judgment — something probably akin to that. It needs a little more explanation of the facts.

THE COURT:

"Are you agreed it should be decided and wind it up?"

MR. BUSHNELL:

"We're agreed to that" (R. 403).

Markosian elected to continue to urge the Court to appoint a Receiver. The final Order signed by the Court granting Markosian's Motion for the appointment of a Receiver did so pursuant to Rule 66 (h) which authorizes the appointment of a Receiver for liquidation of the Corporation (R. 338). The Court subsequently heard and granted a Motion of Vulcan and Gerstner for partial summary judgment to liquidate and dissolve the Corporation in accordance with subparagraph 3 (e) "Dual Notice" (R. 333). It is clear from the foregoing that the appointment of a Receiver pursuant to the Motion of Markosian was a part and parcel of the Court's granting a Motion for partial summary judgment providing for liquidation of the Corporation pursuant to the provisions for "Dual Notice". Markosian, having initiated the Motion and having continued to urge the Court to appoint a Receiver knowing that this could only be accomplished pursuant to subparagraph (h) of Rule 66 of the Utah Rules of Civil Procedure, is now estopped to contend that the Court was in error in taking

where there is a choice between two or more inconsistent remedies actually existing at the time the election is made. Hence the fact that a party misconceives his right or through mistake attempts to exercise the right or remedy to which he is not entitled or defends an action based upon a remedial right which he erroneously supposes he has and is defeated because of such error does not constitute a conclusive election and does not preclude him from thereafter prosecuting an action based upon an inconsistent remedial right. In the instant case, the refusal of Vulcan Steel to honor the mandatory repurchase clause was not a choice between two inconsistent remedies by Vulcan but only a defense to Markosian's choice of remedies. In the initial appeal, the Court made no determination that the rights granted in the contract for unilateral redemption of stock was mutually exclusive to the clause providing for "Dual Notice" and dissolution. The Utah Supreme Court has spoken on this subject in the case of *Farmers & Merchants Bank* v. *Universal C. I. T. Credit Corp.*, 289 P. 2d 1045, 4 Utah 2d 155, wherein the Court held that the doctrine of election of remedies applies as a bar only where two actions are inconsistent, generally based upon incompatible facts and the doctrine does not operate as an estoppel where two or more remedies are given to redress the same wrong and are consistent, in which event the satisfaction operates as a bar.

Also, in the case of *Commercial Bank of Spanish Fork* v. *Spanish Fork South Irr. Co.*, 153 P. 2d 547, 107 Utah 279, the Court held that under the doctrine of "election of remedies", the fact that a party by mistake invokes a rem-

edy not available to him under the facts will not prevent him from pursuing another remedy which is available.

Since the prior appeal was an interlocutory appeal prior to trial, a different situation is presented than where a party elects to try his case first on one theory and after being defeated seeks to then assert a second theory and a second trial. This case is still pending in the pleading stage and has not been tried. Gerstner, therefore, should be permitted to allege any grounds of relief available to him so that the case will be finally disposed of at the time of trial. Under such facts, it is the general rule that the prior action must have been prosecuted to a final determination in order to bar another concurrent remedy for the same rights (28 C. J. S., § 15, p. 1091).

CONCLUSION

The trial court's interpretation permitting liquidation and dissolution of the Corporation in lieu of the mandatory repurchase provisions of the Agreement is in harmony with the Agreement interpreted as a whole. In addition, it permits both of the parties to be treated on the same basis and receive such value as rightfully belongs to both parties rather than permitting a wrongdoer to have an advantageous and superior position over other parties to the contract and to profit from his own wrongdoing.

Respectfully submitted,

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