

2005

High Valley Water Company v. Silver Creek Investors : Reply Brief

Utah Court of Appeals

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Edwin C. Barnes; Steven E. Clyde; Wendy Bowden Crowther; Clyde Snow Sessions & Swenson; Attorneys for Appellant.

David C. Wright; Mabey & Wright; Attorneys for Appellee.

Recommended Citation

Reply Brief, *High Valley Water Company v. Silver Creek Investors*, No. 20050233 (Utah Court of Appeals, 2005).
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FILED
UTAH APPELLATE COURTS
SEP 28 2005

IN THE UTAH COURT OF APPEALS

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Appellate Case No. 20050233-CA

APPELLANT’S REPLY BRIEF

Edwin C. Barnes (0217)
Steven E. Clyde (0686)
Wendy Bowden Crowther (8842)
Attorneys for Petitioner/Appellant
CLYDE SNOW SESSIONS & SWENSON
201 South Main, 13th Floor
Salt Lake City, Utah 84111
Telephone: (801) 322-2516

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STATEMENT OF ISSUES PRESENTED BY APPELLEE'S BRIEF

1. Whether Silver Creek Investors' ("SCI") written option to purchase 56 acre-feet of water from High Valley Water Company ("High Valley"), remains an executory contract.
2. Whether High Valley breached the contract in 1987 or by 1994.
3. Whether SCI should be estopped from claiming its continuing rights under the Option.

ARGUMENT

I. THE OPTION AGREEMENT REMAINS EXECUTORY

High Valley argues that the Option portion of the parties agreement is not executory and was breached despite the fact the parties retain outstanding obligations to one another. As High Valley properly noted, SCI established at trial that the Option was properly and fully exercised in 1987. (R. 321¶¶ 19, 23, 30, 31). However, High Valley overlooks the fact that exercise of the Option created obligations upon the parties that have yet to be performed. As explained more fully in the Brief of Appellant, the Option portion of the agreement between the parties can only close or terminate following the State Engineer's disposition of the change application requesting the change of use from High Valley to SCI and the change application contemplated by the agreement which can only be filed by High Valley. (R.0085-86).

High Valley argues that performance of the Option is not contingent on State Engineer approval of the change application. However, that argument is contrary to the

specific language of the Option which states:

Upon approval of the application, the parties shall cause the said sum on deposition with Silver King Bank to be paid and disbursed to High Valley and Atkinson shall pay to High Valley an amount in addition thereto as necessary to pay the entire amount of the purchase price in accordance with sub-paragraph “3C(2)” above as of the date such payment is made (herein “the Closing Date”) whereupon the transaction shall be deemed closed. ([sic] If there is a surplus in said account as of the Closing Date, the surplus shall be disbursed to Atkinson. *In the event the application is denied*, then upon issuance of the final order of denial all amounts on deposit with Silver King Bank shall be disbursed to Atkinson where-upon all rights and obligations of the parties pursuant to paragraph “3C” shall terminate and be of no further force or effect.

(R. 0085-86) (emphasis added). It is clear that the Option portion of the Agreement can only close or terminate based upon the ultimate determination of the State Engineer. Only upon “approval of the application” can the parties complete the transaction or, conversely, only “upon issuance of the final order of denial” will the obligations of the parties terminate. The filing of the application by High Valley is, of course, a logical prerequisite to approval or denial of the application.

High Valley confusingly argues that the Option was not contingent upon the State Engineer’s determination and that High Valley’s obligations to SCI under the Option *would have been complete* had High Valley filed the change application and transferred the water. (Brief of Appellee p. 27-28). Even if High Valley were correct, and the Option did not specifically require the approval of the State Engineer to trigger the opportunity to close the transaction. High Valley did not file the change application and did not transfer the water to SCI. Therefore, even under High Valley’s reading of the

Option, High Valley's obligations to SCI remain outstanding and the Option remains executory until High Valley's obligations are performed.

II. BREACH DID NOT OCCUR IN 1987 OR IN 1994

The parties agree that the statute of limitations begins to run only when a cause of action accrues and that a cause of action on a contract accrues only upon breach of the contract. *Butcher v. Gilroy*, 744 P.2d 311, 313 (Utah App. 1987); *Upland Industry Corporation v. Pacific Robinson Co.*, 684 P.2d 638, 643 (Utah 1984). High Valley incorrectly argues however that its failure to promptly complete its obligations under the Option amounted to a repudiation or anticipatory breach in either 1987 when the Option was exercised, or in 1994 when the parties met to discuss completion of the Option.

High Valley first argues that Option required it to act immediately upon notice of exercise and payment of the initial deposit and therefore High Valley breached when it did not perform immediately following exercise of the Option on December 31, 1987. (Brief of Appellee p. 18, 25). Alternatively, High Valley argues that it repudiated, and therefore breached, the Option no later than March 1994 when the parties met to discuss the status of the Option. (Brief of Appellee p. 19-22, 26).

It is improper for High Valley to set up its own delay in performance as an excuse to its continuing obligation to perform. *Kasarsky v. Merit Systems Protection Board*, 296 F. 3d 1331, 1338-1339 (Fed. Cir. 2002) ("agency should not be excused from performance simply because it failed to perform."). Furthermore, because the Option did

not contain a time certain for High Valley to perform its obligations after exercise of the Option, breach cannot have occurred until SCI chose to treat High Valley's claimed repudiation as a breach. *Kasarsky*, 296 F.3d at 1336 (citing *Roehm v. Horst*, 178 U.S. 1, 13 (1900)).

Because the Option did not contain a specific time for performance of High Valley's obligations after SCI's exercise of the Option, there is no basis for High Valley's argument that its failure to immediately file the required change application amounted to a breach as of December 31, 1987. (R. 0085-86). In fact, because SCI did not have an immediate need for the water subject to the Option, High Valley did not request, and did not expect, the change application to be filed immediately after the exercise of the Option.

Likewise SCI did not specifically demand performance of High Valley's obligations, or accept High Valley's claimed repudiation of the Option as a breach, in 1994. SCI's development plans did not require water at that time and SCI chose to let the water remain at use during that period. When confronted with an anticipatory repudiation, such as that now asserted by High Valley, the performing party "can immediately treat the anticipatory repudiation as a breach, or can continue to treat the contract as operable and urge performance without waiving any right to sue for repudiation." *Kasco Services Corporation v. Benson*. 831 P.2d 86, 89 (Utah 1992)(citing *United California Bank v. Prudential Ins. Co. of America*, 140 Ariz. 238, 281, 681 P.2d 390, 433 (Ct. App. 1983); *University Club v. Invesco Holding Corp.*, 29 Utah 2d 1, 3, 504

P.2d 29, 30 (1972)). Moreover, “[a] party that has received a definite repudiation from the breaching party to a contract should not be penalized for its efforts to encourage the breaching party to perform its end of the bargain.” *Id.* quoting *Breuer-Harrison, Inc. v. Combe*, 799 P.2d 716, 725 (Utah Ct. App. 1990). Admittedly, there was correspondence exchanged and a meeting held among the parties in 1994 where the status of the Option was discussed, and even disputed, however, the 1994 discussions did not amount to a breach of the Option.

Indeed, the correspondence exchanged prior to the March 1994 meeting shows that there remained confusion among the parties as to whether or not the Option had in fact been exercised. In a letter dated January 6, 1994, written to Summit County, High Valley’s then attorney stated the opinion that the Option “was not exercised as contemplated by the agreement and is no longer valid.” (R. 346 Ex. P-14). Because High Valley was of the mistaken opinion in 1994 that the Option had not been exercised, its failure to perform its obligations at, or prior to, that time cannot be considered repudiation of the Option.¹ Even following the 1994 meeting, uncertainty remained regarding the status of the Option. (R. 346 at pp. 58-60). However, it is clear that SCI did not choose to treat High Valley’s 1994 statements as a breach. SCI continued to expect High Valley to transfer the water and to file the change application when SCI

¹ As noted, this belief was incorrect. The trial court found that the option was in fact exercised.

ultimately had need of the water. SCI's need for the water did arise in 1999. At that time, SCI again approached High Valley to discuss the steps necessary to complete the transfer of the water right. (R. 00346 Ex. P-29). It was only at this point that High Valley made it clear that it did not intend to fulfill its obligations to SCI under the Option.

III. SCI IS NOT ESTOPPED FROM CLAIMING ITS CONTINUING RIGHTS UNDER THE OPTION

Although the issue was not addressed by the trial court, High Valley asks the Court to adopt the equitable remedy of estoppel and deny SCI its rights under the Option. (Brief of Appellee p. 35-36). However, "[i]t is generally accepted that he who seeks equity must do equity." *Horton v. Horton*, 695 P.2d 102, 107 (Utah 1984). "[A] party seeking equity must do so with clean hands." *LHIW v. DeLorean*, 753 P.2d 961, 963 (Utah 1988). High Valley, having continued to delay performance of its obligations under the Option cannot now claim to have clean hands and raise the equitable defense of estoppel to justify its own nonperformance. High Valley disingenuously claims that because SCI has not paid for water service, High Valley believed that the Option had not been exercised. (Brief of Appellee p. 35). However, the trial court found that SCI properly provided written notice of its exercise of the Option and made the required initial deposit of funds with Silver King Bank. Moreover, by its own terms the Option required payment "of any unpaid balance due and owing High Valley pursuant to paragraph "3E" for water service to Atkinson from August 1, 1987 to and including the closing date." (R. 0085). Clearly, payment for water service payment was not contemplated to occur when the Option was

exercised in December 1987, but was ultimately intended to be completed upon closing of the Option – an event that has yet to occur. Moreover, High Valley did not bill SCI for water service at any time since August 1, 1987. (R. 346 at p. 178).

High Valley further argues that SCI's failure to protest the Exchange Application High Valley filed which included the water subject to the Option should be a basis for estoppel. Once again this argument is disingenuous. The Exchange Application referenced was filed in 1991 jointly by High Valley and Atkinson Special Service District and its filing, in part, was to effectuate other parts of the Agreement between the parties. (R. 346 Ex. P-22). Indeed, when it filed the 1991 Exchange Application with the Utah State Engineer, High Valley included a copy of the Agreement (including the Option) as an exhibit. (R. 346 Ex. P-22). There was no reason for SCI to protest the 1991 Exchange Application because it was filed in furtherance of the Agreement between the parties. It allowed a stronger water system and furthered High Valley's ability to complete the transfer of the water to SCI. (R. 346 at p. 173).

In fact, High Valley should itself be estopped from asserting any claim inconsistent with the sale of the water to SCI. High Valley's own actions suggest an acceptance of SCI's claim to the water. In particular, High Valley allowed SCI to file a temporary change application on the water subject to the Option. (R. 346 Ex. P-7). If High Valley truly believed the Option had not been exercised, it would have undoubtedly protested SCI's temporary change application. High Valley also acquiesced when SCI pledged its

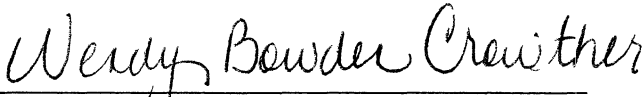
interest in the water subject to the Option to Summit County as security toward certain improvements. The mere fact that High Valley improperly chose to rely upon the use of the water it had already sold to SCI is no basis to estop, or otherwise deny, SCI's claim.

CONCLUSION

For the reasons set forth herein, together with those set forth in the Brief of Appellant, SCI respectfully asks the Court to reverse the district court's determination, finding that the Option remains valid and binding upon the parties and that High Valley must complete performance of its obligations under the Option.

Respectfully submitted this 28th day of September, 2005.

CLYDE SNOW SESSION & SWENSON



Edwin C. Barnes
Steven E. Clyde
Wendy Bowden Crowther
Attorneys for Appellant Silver Creek Investors

CERTIFICATE OF SERVICE

I hereby certify that I caused two true and correct copies of the foregoing

APPELLANT'S REPLY BRIEF to be mailed, postage prepaid, to the following this 28th

day of September, 2005:

Mr. David C. Wright, Esq.
Mabey & Wright, LLC
265 East 100 South, Suite 300
Salt Lake City, Utah 84111

Kimberly J. Dahos