1973

Thomas J. Peck & Sons, Inc. v. Lee Rock Products, Inc. : Respondent's Brief

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

THOMAS J. PECK & SONS, INC., a Utah corporation,
Plaintiff and Appellant,

vs.

EE ROCK PRODUCTS, INC., a Utah corporation,
Defendant and Respondent.

Case No. 13167

RESPONDENT'S BRIEF

Appeal from the Judgment of the Fourth Judicial District Court, Utah County, Hon. Maurice Harding, District Judge

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STATEMENT OF THE NATURE OF THE CASE

The defendant agrees with the plaintiff's statement with the exception that there is a claim against the plaintiff for damages arising out of the wrongful issuance of the injunction.

DISPOSITION IN THE LOWER COURT

Defendant agrees with the plaintiff's statement.

RELIEF SOUGHT ON APPEAL

Defendant seeks to reverse the Court's finding that the lease agreement with the added option is unenforce-

able and indivisible; to have the added option adjudged severable surplusage; and to have the laese agreement adjudged enforceable and binding. The defendant seeks in the alternative to affirm the Court's finding that the defendant is a tenant by estoppel or tenancy implied by law. Defendant also seeks to affirm the Court's finding that the injunction was wrongfully issued and defendant further seeks to have the matter referred back to the Trial Court to take the plaintiff's evidence and testimony, if any, countering the defendant's proof of damages.

STATEMENT OF THE FACTS

Plaintiff's statement of the facts is generally correct and defendant would correct the statement of facts only in the following respect.

The cause continued to be argued through November 16, 1972, on which day the defendant made a motion to amend the pleadings. The last amendment had not been prepared at that time and counsel for plaintiff stated defendant could take whatever time was needed to amend the pleadings (R. 374, 388). The amendment was prepared and filed on November 28, 1972, before the court entered its Interlocutory Judgment and Decree on December 6, 1972.

The amendment was permitted based on Utah Rules of Civil Procedure 15(b). The court felt that the defendant has proved to be a tenant and was not a trespasser even if the lease agreement was not enforceable under a

theory of estoppel (R. 343, 344, 372). The amendment was, therefore, allowed so that the pleadings would conform to the proven facts. The court found that a tenancy implied by law or by estoppel existed.

To support the court's determination of tenancy by estoppel the court considered two principal factors: (1) the parties in this action entered into a lease agreement which they recognized and operated under (R. 113); and (2) the defendant was invited onto the premises by the owner-plaintiff under color of a lease under which defendent operated a business. The plaintiff itself bought some of the material that was produced from its own land by the defendant (R. 344).

ARGUMENT

POINT I.

THE LEASE AGREEMENT ENTERED BETWEEN THE PLAINTIFF AND THE DEFENDANT IS A VALID AND SUBSISTING LEASE AND DOES NOT FAIL FOR LACK OF MUTUALITY OR CONSIDERATION.

"The element of mutuality is not wanting in a contract expressly assented to by both parties, with consideration on both sides." *Pittsburg, C. C. & L. R. Co.* v. *Cox*, 55 Ohio St. 497, 45 N. E. 641.

Both parties expressly assented to the terms of the lease agreement by signing said lease. The lease itself

recited the consideration given which was "the mutual covenants of each of the parties hereto". The terms and covenants of the lease agreement were definite and certain as to time and requirements so that damages in event of a breach could easily be determined by the court (Exhibit No. 3).

The validity of the lease agreement by itself has not been challenged by either party to the action. The court's Interlocutory Judgment and Decree of December 6, 1972, stated that the lease agreement with the added option was voidable only because the court held that the added option was unenforceable and that the two writings in a single document were to be considered one indivisible instrument.

The lease agreement was affirmed by the plaintiff when plaintiff's attorney sent a letter on March 17, 1972, (Exhibit No. 1), in which reference was made to the lease agreement and to the added option. Said letter clearly indicated that the plaintiff intended to require performance by the defendant both as to the added option agreement and "the original lease agreement". The court also recognized that the letter affirmed the agreement when it said:

> "They entered into an agreement, but I think it was voidable. Not void but voidable. And either side had a right to rescind it. The plaintiff chose to affirm it in his letter on March 17th" (R. 343).

It has not been disputed that the letter of March 17th affirmed the lease agreement.

The defendant, therefore, contends that if the added option agreement is severable, then the lease agreement itself is valid and enforceable. Defndant's argument that the added option was in fact severable from the lease agreement follows under Point II.

POINT II.

THE ADDED OPTION IS SEVERABLE SURPLUSAGE TO THE LEASE AGREEMENT ENTERED BETWEEN THE PLAINTIFF AND THE DEFENDANT.

Factors and tests for determining character of contracts and the question of whether a contract is entire or divisible is discussed in 17 Am. Jur., 2d on page 760, which states:

> "Thus, the best test is said to be whether all of the things, as a whole, are of the essence of the contract; that is, if it appears that the purpose is to take the whole or none, the contract is entire; otherwise, it is severable. Another test supported by a number of authorities is that a contract is entire when, by its terms, nature, and purpose, it contemplates that each and all of its parts are interdependent and common to one another and to the consideration, and is severable, when, in its nature and purpose, it is susceptible of divisions and apportionment, and has

> two or more parts in respect to matters or things contemplated and embraced by the contract which are not necessarily dependent upon each other. Still another test that has been suggested is the possibility or impossibility of a certain apportionment of benefits, according to the compensation in the contract, in case of part performance only."

If the tests indicated above are applicable, then there would be no rational basis for considering the added option to be a part of the lease. Clearly, the lease agreement by itself can stand alone. The added option is not of essence to the contract and therefore, there is no apparent reason for taking both the agreement and the added option or neither of them. Also, the terms of the agreement and the added option do not contemplate that each and all of the parts of each are interdependent and common to one another and to the considerations given for each. Certainly, it would be absurd to hold that there could not be an apportionment of benefits according to the provisions stated in the lease agreement in case the added option was not exercised. The considerations under the lease agreement are separate from those in the added option and damages in event of breach of either the agreement or the added option would be determined independent of the terms of the other.

The action at bar involves both a contract for the lease of real property and an added option to purchase "equipment and business" located on the real property. These are two contracts of an independent nature. Even

where the two agreements relate solely to the real property such as a lease of real property with an agreement to sell, case law has held that such contracts are severable. *Knapp* v. *Strauss*, 227 Mo. App. 822, 58 S. W. 2d 805, held that a contract for a lease, also containing a contract of sale to the lessee, was severable.

The argument that the plaintiff wanted and bargained for the added option agreement is not inconsistent with severability. A demand that there be two agreements instead of one does not infer that there is to be an independent relationship in the operation of the separate agreements. Obviously enforcement of the terms of one need not refer to the terms of the other.

Plaintiff's letter of March 17, 1972, (Pl. Exhibit No. 1), referred to the separate agreements. Plaintiff indicated an intention to exercise the "added option" and later alleged that there had been a breach under "the original lease agreement". Plaintiff's letter shows that plaintiff recognized the separate agreements and the separate rights under each agreement.

Any intent expressed on the part of the plaintiff that the two agreements were to be indivisible and should stand or fall together is not apparent from the terms of the two agreements or from what was said by the parties at the time the agreements were signed. The plaintiff bargained for two agreements and that is what it got.

The lease agreement did not refer to the added option and the added option did not refer to the lease agree-

ment. The added option should be construed to be divisible from the lease agreement.

The question of whether a contract is entire or severable is generally one of intention to be determined from the language which the parties have used and also the subject matter of the agreement. *Durrant* v. *Snyder*, 151 P. 2d 776, 782; *Leach* v. *LaGuardia*, 163 Colo. 225, 429 P. 2d 623; *Waddell* v. *White*, 51 Ariz. 526, 78 P. 2d 490. It should be noted that two of the above cases were relied upon by plaintiff in its memorandum to the trial court. Indeed all of the cases cited by plaintiff were decided on the basis of the intent of the parties. The courts simply determined that the intent of the parties was such that the contract provisions were severable or not severable. In *Coppedge* v. *Leiser*, 229 P. 2d 977, the Idaho Supreme Court held:

> "The primary criteria for determining the question of severability is the intention of the parties as determined by a fair construction of the terms and provisions of the contract itself by the subject matter to which it has reference and by the circumstances of the particular transaction giving rise to the question."

In *Moore* v. *Moore*, 334 Penn. 324, 25 A. 2d 130, 139 A. L. R. 1225, the court, again, held the question of intent was paramount. It also contained an interesting quotation which applies to the fact situation in this case. In *Moore*, the husband drafted a hand-written addendum to a pre-nuptial agreement providing that he would receive

a $10,000.00 settlement in lieu of any courtesy rights he may have or may have had under Pennsylvania law. He attempted to have the court construe this hand-written addendum as severable so that he could obtain both the $10,000.00 and his share of the wife's estate under the intestate laws of Pennsylvania. The court correctly refused to hold that the addendum was severable stating,

> "It must be borne in mind that the addendum was written by the respondent and this being so, construction must be strongly against him." 25 A. 2d 130, 131.

In the case at hand, plaintiff was the author of the provision which was added to the lease agreement and defendant urges that the same construction which was applied by the Peennsylvania court in the *Moore* case be applied here. That is, that any construction of the added option in this case, be strongly against the plaintiff. See also: *Hayden* v. *Collins*, 90 Utah 238, 63 P. 2d 223 (1936); *Swinney* v. *Continental Building Company*, 240 Mo. 611, 102 S. W. 2d 111; and *Benchly* v. *Durkee Famous Foods*, 128 Cal. App. 604, 17 P. 2d 1020 (1933), in which the courts have determined that the intent of the parties was that the provisions in dispute were severable.

In *Dunford* v. *United of Omaha*, (1973) 95 Idaho 282, 506 P. 2d 1355, the court said that the appellant had correctly asserted the general rule that "a contract which is ambiguous or doubtful in its terms should be construed most strongly against the party preparing it." The plain-

tiff selected the language of the "added option" and wrote it at the bottom of the lease agreement.

A recent Utah case in the case of a scrivener-lessor has held that: "Scrivener-lessor becomes accountable for his words, which he used in lease, in case of doubt." *Sine* v. *Rudy*, 493 P. 2d 299, 27 U. 2d 67 (1972).

POINT III.

DEFENDANT'S POSSESSION AND USE OF PLAINTIFF'S LAND WAS UNDER A VALID ENFORCEABLE LEASE OR AN ENFORCEABLE TENANCY IMPLIED BY LAW AND THE ISSUANCE OF THE PRELIMINARY INJUNCTION BY THE FOURTH DISTRICT COURT ON THE 6TH DAY OF JUNE, 1972, WAS WRONGFUL AND THE INJUNCTION WAS PROPERLY DISSOLVED.

"The authorities generally agree that entry and occupation and payment of rent under an *invalid* and *unenforceable lease*, as in the case of a lease invalid because of non-compliance with a statute of frauds, result in a legal relation of landlord and tenant between the owner and the occupant of the land. The tenancy is not created by the invalid lease, but is *implied by the law* from the occupancy of the premises or from the occupancy and the payment and receipt of the rent therefor. In such a case it would be unjust and fraudulent to permit the landlord, after agreeing that the tenant might enter and occupy his premises

on condition of paying him rent, and after the latter enters and complies therewith, then to treat the tenant as a trespasser. The lease in such a case may be voided at the option of the parties, or either of them, but if they both see fit to engage in the execution of its terms, and act under it, *they may thereby establish such a relation between themselves as the law will recognize and enforce.*" 49 Am. Jur. 2d page 89. (Emphasis added.)

There is no dispute that a lease agreement was made between the parties; the purpose of the agreement was for mining sand, gravel and other minerals; the defendant entered into possession of the property under terms of the lease agreement; and the defendant and plaintiff both oprated under the lease agreement until the dispute which precipitated the present action arose.

Even conceding, for purposes of argument, that the lease agreement was invalid or unenforceable, the fact that the defendant entered the plaintiff's land under color of a lease is undisputed. The entry of the defendant was not, therefore, wrongful and a tenancy existed; that tenancy being implied by law.

The character of the tenancy of the defendant, if the lease for a term of five years is invalid, must of necessity be a tenancy at least from year to year. 49 Am. Jur. 2d, pages 90, 91, 92, 93, and 94. There is abundant authority that if the invalid or unenforceable lease is one for a term of years then the actual lease implied at law is at least one from year to year. Defendant strongly argues that

even if the lease agreement was not valid, that a minimum tenancy from year to year was created and it could logically be argued that the lease is for a reasonable time which would in this instance probably be five years.

> "In case of an entry under an invalid lease, the law implies, as a general rule, *a tenancy upon the same terms as those of the invalid lease.* It is a reasonable inference in such case, from the circumstances, that the parties intended a tenancy on the terms of the original lease, and the law implies a new lease corresponding therewith, so far, at least, as it is not in conflict with a statute." 49 Am. Jur. 2d, page 96. (Emphasis added.)

The above argument demonstrates that a valid tenancy existed upon the same terms as the lease agreement for a reasonable time such as five years. Since the defendant was lawfully on the premises acting within the terms of the lease, the injunction issued on the 6th day of June, 1972, was wrongful in that it prevented the defendant from doing what it legally had a right to do, to-wit: "excavate, remove, and carry away large quantities of sand, gravel, fill and topsoil from land owned by the plaintiff. . . ."

The court recognized that the injunction was wrongful when it stated:

> "The plaintiff is not a trespasser — or the defendant's not a trespasser on the premises. We should never have granted that Injunction. I'm sorry now that we did, because that places the

plaintiff in jeopardy again. That will have to be dissolved" (R. 344).

The court properly dissolved the wrongfully issued injunction. The court's basis for dissolving the injunction was not only "based upon a lease by estoppel" as indicated by plaintiff's brief on page 7, but also on the basis that the lease is valid on its face. In response to Mr. Bullock's question, the record states:

"MR. BULLOCK: . . . For the interest of my client will the Court say on what basis that this Injunction is being dissolved?

THE COURT: On one of two bases: either that the written lease is still good, or that there is a tenancy by virtue of being invited on the premises by the plaintiff and setting up his equipment and proceeding to operate with their knowledge and consent and even further requesting material from the pit by him as if they were under a lease" (R. 347).

Plaintiff's contention that "the removal of gravel, minerals or other materials is the basis for injunctive relief" (Appellant's brief, p. 13) and plaintiff's further inference that defendant was an unlawful trespasser making unlawful excavation which justified a showing of irreparable injury (Appellant's brief, p. 14) is not consistent with the record.

Plaintiff's own quotation of 54 Am. Jur., 2d §230, (Appellant's brief, p. 13) also states on page 408:

"Equity will, in a proper case and in conformity

> with the established principles and considerations governing injunctions, restrain acts causing injury to mines or mining rights, *except where there is an adequate remedy at law by way of an action for damages*, or other relief, or where it would be inequitable or unjust to grant the writ." (Emphasis added.)

The plaintiff has not shown that its remedy at law is not adequate. The money value of removed material from the plaintiff's property was agreed to in the lease agreement itself and is a showing that the plaintiff would be satisfied by money or a money judgment.

Clearly, the defendant was not a trespasser on the plaintiff's land nor has the plaintiff made a showing that there was irreparable damages. The record clearly states:

> "MR. HOWARD: Let me say something to that. And may I suggest, third, your Honor, that there's been no showing of irreparable damage.
>
> THE COURT: That's right. There has been no showing" (R. 347).

POINT IV.

BECAUSE OF THE WRONGFUL ISSUANCE OF THE PRELIMINARY INJUNCTION, THE DEFENDANT HAS BEEN DAMAGED.

If the injunction issued on the 6th day of June, 1972, was wrongful, then the defendant has a right to be compensated for the loss suffered thereby.

Utah Rules of Civil Procedure, Rule 65A (c) provides that:

> "(c) Security. Except as otherwise provided by law, no restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongully enjoined or restrained. . . ."

When the court granted the wrongful injunction on June 6, 1972, the court provided in said "Preliminary Injunction":

> ". . . this injunction shall not become effective until the filing of an undertaking by the plaintiff in due form in the sum of Twenty-Five Thousand Dollars ($25,000.00)" (R. 30).

If the Preliminary Injunction was wrongful, then the defendant is entitled to recover for damages incurred as a result of that injunction and may look to said undertaking to provide the recovery.

POINT V.

CONCEDING FOR THE PURPOSE OF THIS POINT, THAT THE LEASE IS ONE INTEGRATED UNSEVERABLE INSTRUMENT AND IS UNENFORCEABLE BECAUSE OF THE ADDED OPTION, THE COURT PROP-

ERLY HELD THAT THE DEFENDANT WAS A TENANT BY ESTOPPEL FOR THE FOLLOWING REASONS:

A. THE ISSUE OF ESTOPPEL WAS TRIED BY CONSENT OF THE PARTIES AND THE PLEADINGS WERE PROPERLY AMENDED BY LEAVE OF COURT AS PROVIDED UNDER U. R. C. P. RULE 15(b).

Utah Rules of Civil Procedure, Rule 15(b) provides that:

"Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendments of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court shall grant a continuance, if necessary, to enable the objecting party to meet such evidence."

The record will show that the defendant had a right to be on the plaintiff's land under color of lease; that the plaintiff had encouraged the defendant to come on the land; that the defendant relied on an agreement between the parties while coming on the land and expending large sums of money; and that the plaintiff should not be allowed to eject the defendant. The theory of estoppel was proved during the trial and in the pleadings without objection by the plaintiff. The court undisputedly stated that: "THE COURT: There was a tenancy by estoppel" (R. 372, line 4).

When Mr. Bullock argued that the issue of estoppel had not been pleaded, the record showed:

> "MR. BULLOCK: And that we found against them. Now, what rights did they have to be in there that's pleaded anywhere even now?
>
> THE COURT: It may not be pleaded but it's been proved" (R. 372).

The argument by plaintiff that the theory of lease by estoppel was first pleaded 20 days after trial was completed and that plaintiff clearly had no opportunity to meet that issue at trial (Appellant's brief, p. 7), is completely unfounded. The motion to allege an action based on estoppel was made in court while the cause was still being argued. In fact, the case in respect to damages is still pending, the defendant having presented its evidence and the plaintiff having requested time to meet the proof. Mr. Howerd asked at that time to file appropriate pleadings, (R. 374), to conform with the court's holding. When

Mr. Howard said that the pleadings had not been prepared, Mr. Bullock responded. "MR. BULLOCK: Well, be my guest. Take your time" (R. 374).

In response to Mr. Ivins' following question which asked: ". . . Are we this point in time precluded from any additional amendments, your Honor?", the court stated: "THE COURT: No. If you have some you want to make, you're welcome to make them" (R. 374).

Also later when Mr. Bullock asked when Mr. Howard would file his motion the record shows:

> "MR. BULLOCK: When will you get your motion filed, Mr. Howard?
>
> MR. HOWARD: How much time will you give me?
>
> MR. BULLOCK: Take whatever you need" (R. 338).

Plaintiff was not prejudiced by the defendant's amended pleadings on the theory of estoppel. The court showed this lack of prejudice during the trial when it stated:

> "The pleadings are never more important than the cause that's before the court. And if it caused prejudice, yes. But there can be no prejudice in this case because we'll give ample time for any answer . . ." (R. 361).

Plaintiff has not only consented to the trial of the issue of estoppel but plaintiff has also consented to the

amendment of the pleadings to include the theory of estoppel. All motions and pleadings were made prior to a final judgment which was well within the purview of Rule 15(b). Plaintiff's contention that defendant's amendment was made after the completion of the case and did not give fair notice of the claim or give the plaintiff a chance to adduce evidence on such claim is a hollow contention indeed, in view of the record summarized by the Interlocutory Judgment and Decree which states:

> ". . . and the Court having allowed the plaintiff to amend its pleadings and having allowed the defendant to file responsive pleadings, and the Court having received evidence and having heard testimony and having heard argument of counsel, and being fully advised in the premises, . . ." (R. 106).

Plaintiff's objection only to an amendment to conform with the findings of the court and not to the proof of issues involving theories of estoppel did not prevent the issues from being treated in all respects as if they had been raised in the pleadings (U. R. C. P. Rule 15(b)).

B. THE FACTS AND EVIDENCE JUSTIFIED THE APPLICATION OF THE PRINCIPLE OF ESTOPPEL OR LEASE BY IMPLICATION OF LAW.

Defendant's argument under Point III indicates that a lease implied by the law is created where there has been an entry upon land under a lease that is invalid or unen-

forceable. Where such an implied lease is deemed to exist, then it would be unjust and fraudulent to allow the lessor to treat the tenant, who by law has vested rights in the land, as a trespasser.

The defendant took possession of the plaintiff's land by reliance upon the written lease agreement and made improvements on the property. Both parties recognized the lease agreement and operated under the said agreement. The legal detriment suffered by defendant while operating under the lease and placing improvements on the land is undisputed.

The plaintiff's argument that it made no representations which were false (Appellant's brief, p. 9), is not applicable in the present application of equitable estoppel. Here the law itself steps in and says that an enforceable lease is recognized; that a lease implied by law exists and that the plaintiff is estopped to deny it just as the plaintiff would be estopped to deny an express lease that was valid and enforceable at law.

Plaintiff's citation of *Lagoon Company* v. *Utah State Fair Association*, 117 Utah 213, 214 P. 2d 614, (Appellant's brief, p. 11), is claimed by plaintiff to be on "all fours" with the case at hand. This citation, however, describes a case where the issue of estoppel was never pleaded until the appeal to the Utah Supreme Court. The record in the instant case clearly shows that the defendant's pleadings include estoppel. Defendant's motion to amend the pleadings to conform to proof was granted and filed with the court on November 28, 1972. The court

entered its Interlocutory Judgment and Decree on December 6, 1972 (R. 97, 106).

CONCLUSION

The trial court has properly held that the defendant is a tenant of the plaintiff and a lessee under terms and conditions expressed in the lease agreement, but the court erred in finding that the term of the lease is from year to year.

The court also properly held that the injunction issued on the 6th day of June, 1972, was wrongful.

The court erred in finding the added option to be an indivisible part of the lease agreement, thereby causing the agreement per se to be unenforcable and causing the entire instrument including the lease agreement to be voidable.

There is no relation or reference from the added option to the lease agreement or vice versa. The bare assertion that the intention of the plaintiff was that the two agreements should stand or fall together because the plaintiff bargained that there should be both agreements or none is void of substance. The plaintiff caused the added option to be written and could have provided for such a condition or at least some reference to it if such were in fact intended. The plaintiff's own writing should not be construed in its favor where it is void of any inference of the subjective intention of the plaintiff. The two writings on their faces stand alone and are otherwise

capable of performance and enforcement. The fact that both parties intended to have a lease and an option to purchase (R. 311) is not an express or implied intention that the two agreements were to be indivisible.

Respectfully submitted,

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