5-9-1968

Aranci v. North Weld County Water Dist.

NO. 23193

IN THE

SUPREME COURT

OF THE

STATE OF COLORADO

ANTHONY P. ARANCI, Plaintiff in Error, vs. NORTH WELD COUNTY WATER DISTRICT, a Statutory Water District, Defendant in Error, and NORTHERN COLORADO WATER CONSERVANCY DISTRICT, Intervenor.	Error to the District Court in and for the County of Larimer State of Colorado FILED IN THE SUPREME COURT OF THE STATE OF COLORADO MAY - 9 1968 HONORABLE J. ROBERT MILLER Judge

BRIEF OF PLAINTIFF IN ERROR

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May, 1968.

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BRIEF OF PLAINTIFF IN ERROR

The parties will be referred to herein as they appeared in the trial court, with Plaintiff in Error as Defendant, and Defendant in Error as Plaintiff. The Northern Colorado Water Conservancy District will be referred to herein as Intervenor.

PLEADINGS

Plaintiff filed its Complaint requesting equitable relief (ff. 3-6). In its complaint, Plaintiff prayed that "an injunction

be issued requiring Defendant to execute said application for transfer of water." alleging in its complaint "plaintiff has no plain, speedy or other adequate remedy at law."

Defendant answered through other counsel generally denying the allegations of Plaintiff's Complaint (ff. 18-20).

Later, the Plaintiff filed a Complaint joining certain third party defendants (ff. 24-37). In this third party complaint, Plaintiff prayed for judgment over against third party defendant, Dorothy K. Cimiyotti, requesting that either she be "directed to deliver and transfer to Plaintiff certain water, or in the alternative, that she be liable in damages in the amount of Thirty-Five Thousand Dollars ($35,000.00)." An answer was filed by this third party defendant, and also a counter-claim (ff. 42-56). In this answer the Defendant set up numerous defenses and a counter-claim for vexatious litigation. Defendant joined other parties who were later dismissed.

Next, Intervenor filed its Motion to Intervene and was permitted to do so. The Complaint in Intervention (ff. 79-93) prays generally that any order of court be in compliance with Intervenor's rules and regulations, and with its approval.

The matter was set for trial and on the date of the trial, September 15, 1966, Plaintiff moved to dismiss its Complaint against third party defendant, Dorothy K. Cimiyotti, with prejudice at that time. The Court ordered said motion granted (f. 103). At that time, Plaintiff was also granted a request for postponement of the trial and ten days to amend its pleading.

Plaintiff then filed a Supplemental Complaint (ff. 105-107). Later Plaintiff filed what was denominated as Amended and Supplemental Complaint (ff. 109-122). This complaint contained two claims for relief. First, Plaintiff asked for mixed legal and equitable relief as follows: (1) a decree in the nature of a quiet title, (2) trespass damages, (3) exemplary damages and a mandatory injunction requiring Defendant to execute an application. Under its second claim for relief, the District had a strictly legal claim for compensatory damages and exemplary damages.

Defendant then filed its Answer to this Amended and Supplemental Complaint (ff. 126-132). By his answer, the Defendant generally denied the pertinent allegations of the Amended and Supplemental Complaint, and alleged five affirmative defenses, being Res Judicata, Statute of Frauds, Estoppel, Failure to Mitigate, Laches and a Motion to dismiss the

complaint for failure to state facts upon which relief could be granted.

The parties again appeared for trial on June 5, 1967. At this time Plaintiff orally dismissed any claim for monetary damages against the Defendant and elected to "choose its equitable remedy." (f. 198) This motion was granted and the matter proceeded to trial "on the grounds of equitable remedy" only. (f. 199)

STATEMENT OF THE CASE

The facts in this case are so important that Plaintiff in Error believes that these items must be set forth with some detail.

In February, 1955, O. D. and Dorothy Cimiyotti petitioned the Northern Colorado Water Conservancy District for an allotment of water to real estate owned by them in Weld County. This petition was granted. (f. 207) The petitioners agreed by this application to a number of things which are dispositive of this action. Among other things, they agreed that "said water is to be attached to, used upon and transferable with said lands by deed," and they further agreed "to be bound by the provisions of the Water Conservancy Act of Colorado and the rules and regulations of the Board of Directors of said District."

Based upon this petition, an allotment of three hundred fifty (350) acre feet of water was made to the lands described in the petition (f. 609).

On July 26, 1962, the third party defendant, Dorothy K. Cimiyotti, signed an agreement with the Steering Committee of the then proposed North Weld County Water District to sell this allotment. The agreement is attached as Exhibit "A" to Plaintiff's original complaint (ff. 7-9). This agreement provided basically for the sale by Dorothy K. Cimiyotti of her right to the beneficial use of three hundred fifty (350) acre feet of water allotted to her farm property in Weld County, Colorado. This agreement was prepared by the attorney for the District and provided for a down payment with "the balance upon the transfer of said water allotment by the Northern Colorado Water Conservancy District." (f. 610)

After Dorothy K. Cimiyotti had so agreed with the proposed District, she then entered into an "Agreement to Purchase Real Estate" with the defendant, Anthony P. Aranci. This contract was received in evidence as Plaintiff's Exhibit "E" (f. 613). The "water" sold pursuant to Exhibit "A" was allotted by Intervenor to the real estate sold by Mrs. Cimiyotti to Defendant Aranci.

On December 31, 1962, the District had been formed and paid the balance of the purchase price to Mrs. Cimiyotti. At that time the District requested and was furnished with a quit claim deed which was attached as Exhibit "B" to Plaintiff's original complaint (f. 611). No request for an application to transfer the allotment was ever made of Mrs. Cimiyotti (f. 270). A transfer request was never presented to the Intervenor and approval for the transfer was never made (f. 411). It is agreed by all parties that the rules and regulations of the Northern Colorado Water Conservancy District applied to the transfer, and the parties so stipulated (ff. 405-411 and ff. 422-423). To complete the transfer as contemplated would have required not only a reallotment but a reclassification of the water. The granting or denial of such is within the sole discretion of the Board of Directors of Intervenor. This was received in evidence as Plaintiff's Exhibit "K" (f. 619).

On January 25, 1963, the Defendant closed his agreement with Mrs. Cimiyotti and paid her the balance of the purchase price according to the terms of his agreement with her. The Abstract of Title was examined by David B. Emmert and his opinion showed the water allotment (f. 625). A copy of the closing statement, warranty deed and other items were received in evidence (ff. 614-615).

The allotment of the beneficial use of the three hundred fifty (350) acre feet of water was transferred on the records of the Northern Colorado Water Conservancy District according to its rules and regulations by the warranty deed to the defendant, Anthony P. Aranci. (f. 454) Later the District realized, through its attorney, that they had not properly closed the transaction with Mrs. Cimiyotti. The District, through its attorney, then made demand upon the defendant, Aranci, to sign application forms for transfer and reallocation of water. This, of course, he refused to do; contending that he had purchased the land and water (f. 408). Subsequently, the lawsuit was filed. Various pleadings were filed in the case as has been noted above. However, the case was eventually tried on the basis of "the grounds of equitable remedy before the court." (f. 199) The Plaintiff put on absolutely no evidence showing that it had no adequate remedy at law. The Plaintiff dismissed its third party complaint with prejudice against the defendant, Dorothy K. Cimiyotti. (f. 103)

The Court entered its Findings of Fact, Conclusions of Law and Decree on August 11, 1967. The Court further found "that plaintiff, North Weld County Water District, has no adequate remedy at law." Judgment was entered thereon on the same date (ff. 163) and from this entry of

judgment the Defendant appealed after denial of his Motion for New Trial or in the Alternative for Judgment of Dismissal Notwithstanding the Verdict. This Motion for New Trial charged the Trial Court with error as follows: (ff. 164-173)

I. That the Findings of Fact, Conclusions of Law and Decree were contrary to the law and evidence.

II. That the Court erred as a matter of law in finding that the Defendant had notice of a prior sale since there was no clear and convincing proof thereof as required.

III. That the Court erred in granting the Plaintiff equitable remedy because Plaintiff's proof failed in the following respects, to-wit:

a. Plaintiff did not show that it had no remedy at law.

b. Plaintiff failed to show any privity between the parties to the trial.

c. There was no showing or evidence that even if the Defendant followed the court order that the District would in its discretion grant the reallocation and reclassification required to complete

the original agreement between Aranci and Cimiyotti.

d. Plaintiff failed to prove its title to the water, and in fact, by its choice of equitable remedy, precluded itself from proving title or quieting title, since this is strictly a legal action.

e. That Plaintiff was barred from bringing this action against Defendant Aranci since it closed the transaction between itself and Dorothy K. Cimiyotti, and then dismissed any claim against Dorothy K. Cimiyotti with prejudice during the course of the trial. The motion went on to charge error as follows:

a. The Plaintiff is not entitled to recover because of its own negligence in closing the transaction in the manner that it did.

b. Plaintiff had estopped itself by accepting a quit claim deed and praying the balance of purchase price without first requiring a "transfer of the allotment."

c. That the Court granted the Plaintiff legal relief of conversion, whereas the Plaintiff abandoned all legal remedies and chose to proceed "on its equitable remedy before the Court."

d. That the Court erred in actually finding that the Defendant "has no legal or equitable property right to said water allotment." since it was uncontradicted that the Defendant Aranci is the owner of the allotment of record, and again the Court could only so decree on the basis of a legal remedy, which the Plaintiff abandoned.

e. That the Court further erred in finding that the Plaintiff is the rightful owner of the water allotment since the Plaintiff can only become the owner of the water allotment subject to favorable granting of an application for transfer, reallocation and reclassification. There are other items upon which the Defendant relied in his Motion for New Trial and they will be touched briefly upon in the Summary of Argument, but will not be set out in detail herein since any one of the foregoing items require a reversal of the Trial Court's decision and a dismissal of the complaint.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECREE

On August 11, 1967, the Trial Court entered its Findings of Fact, Conclusions of Law and Decree. On that date judgment was entered in accordance therewith (f. 163)

From the entry of this judgment the defendant, Anthony P. Aranci, has appealed to this Court.

The Findings of Fact, Conclusions of Law and Decree are as follows:

"O. D. and DOROTHY K. CIMIYOTTI were allottees of 350 acre foot units of water of the Northern Colorado Water Conservancy District on February 24, 1955, as evidenced by Plaintiff's Exhibit A. DOROTHY K. CIMIYOTTI is the surviving joint tenant of this water right.

On July 26, 1962, DOROTHY K. CIMIYOTTI executed a contract entitled "Memorandum of Agreement" with the steering committee of the then proposed NORTH WELD COUNTY WATER DISTRICT for the sale of the Northern Colorado Water Conservancy District allotment to the NORTH WELD COUNTY WATER DISTRICT. The agreed purchase price of this water right was $10,500.00, and DOROTHY K. CIMIYOTTI received $350.00 upon signing the contract. These facts are evidenced by Plaintiff's Exhibit B and the testimony of DOROTHY K. CIMIYOTTI.

On December 31, 1962, DOROTHY K. CIMIYOTTI signed and delivered a quit claim deed to the Northern Colorado Water conservancy District water right to the NORTH WELD COUNTY WATER DISTRICT

and received the balance of the purchase price of $10,500.00. These facts are evidenced by the testimony of DOROTHY K. CIMIYOTTI and Plaintiff's Exhibit C.

On December 19, 1962, DOROTHY K. CIMIYOTTI executed a contract of sale of her farm in Weld County to sell the same to Defendant, ANTHONY P. ARANCI. The court finds the evidence to be clear and convincing that ANTHONY P. ARANCI had complete notice and knowledge of the prior sale of the Northern Colorado Water Conservancy District water allotment by Dorothy K. Cimiyotti prior to the time the contract of sale of the farm was executed. These facts are clearly evidenced by the testimony of LOUIS E. WARNER, GRACE M. WARNER, DOROTHY K. CIMIYOTTI, CHARLES CIMIYOTTI, and TOM COLLINS, and Plaintiff's Exhibit E, I, L, M, N and O.

On January 25, 1963, DOROTHY K. CIMIYOTTI signed and delivered her warranty deed to her Weld County farm to ANTHONY P. ARANCI. The Court finds the evidence to be clear and convincing that prior to the signing and delivery of the deed, ANTHONY P. ARANCI again had notice of the sale of the Northern Colorado Water Conservancy District allotment. These facts are evidenced by the testimony of DOROTHY K. CIMIYOTTI, LOUIS E. WARNER, and Plaintiff's Exhibits F and G.

The Court finds that it is necessary for ANTHONY P. ARANCI to sign a transfer application form to complete the transfer of the Northern Colorado Water Conservancy District allotment to the NORTH WELD COUNTY WATER DISTRICT as evidenced by the rules and regulations of the Northern Colorado Water Conservancy District, Plaintiff's Exhibit K.

The Court further finds and holds that ANTHONY P. ARANCI has wrongfully converted the Northern Colorado Water Conservancy District water allotment to his use and benefit; that ANTHONY P. ARANCI has no legal or equitable property right in said water allotment; that the NORTH WELD COUNTY WATER DISTRICT is the rightful owner of said water allotment; that the conversion of the use of said water allotment by ANTHONY P. ARANCI is a continuing and irreparable wrong to the NORTH WELD COUNTY WATER DISTRICT; that Plaintiff, NORTH WELD COUNTY WATER DISTRICT, has no adequate remedy at law; that the property interest of the Plaintiff, NORTH WELD COUNTY WATER DISTRICT, is of a nature that under the law of the State of Colorado, equitable relief is the appropriate and proper remedy and that equitable relief should be granted to the Plaintiff, NORTH WELD COUNTY WATER DISTRICT.

The Court further finds and holds that the notice to ANTHONY P. ARANCI of the NORTH WELD COUNTY WATER DISTRICT'S prior ownership of the Northern Colorado Water Conservancy District water allotment and the intention of DOROTHY K. CIMIYOTTI not to transfer the same water to ANTHONY P. ARANCI in the sale of the farm are the main elements of this case; that the Plaintiff has sustained its burden of proof of such notice by clear and convincing evidence; that money damages is not an adequate remedy at law for the Plaintiff; that privity between ANTHONY P. ARANCI and the NORTH WELD COUNTY WATER DISTRICT is not necessary in order for the Court to grant equitable relief to Plaintiff; that in order for Plaintiff, NORTH WELD COUNTY WATER DISTRICT, to obtain relief in this case it is necessary for ANTHONY P. ARANCI to sign the appropriate transfer application form of the Northern Colorado Water Conservancy District in order for the Board of that District to exercise its discretion in determining whether or not water allotment shall be transferred; that it is not necessary for Plaintiff to establish its property interest in the water allotment in a prior legal action where the evidence is clear and convincing that the Plaintiff is in fact the owner of the property right in the water allotment; that actual notice is equally sufficient as constructive notice of record.

The Court further finds for Plaintiff and against the Defendant on all issues raised by the pleadings and raised during the trial of this matter, and that the affirmative defenses of Defendant, ANTHONY P. ARANCI, of res judicata, statute of frauds, mitigation of damages, and laches are without merit in this case and have no support in the evidence.

NOW THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED as follows:

The Defendant, ANTHONY P. ARANCI, shall sign the appropriate transfer application form as required by the Northern Colorado Water Conservancy District for the transfer of the 350 acre-foot allotment to the North Weld County Water District within ten (10) days after the said transfer application form has been submitted by NORTH WELD COUNTY WATER DISTRICT to the Defendant, ANTHONY P. ARANCI. In the event ANTHONY P. ARANCI fails or refuses to sign the transfer within said ten (10) day period, then, in that event, the Court hereby appoints the Clerk of this Court to sign said transfer on behalf of ANTHONY P. ARANCI." (ff. 150-162)

SUMMARY OF ARGUMENT

I. PLAINTIFF IS NOT ENTITLED TO EQUITABLE RELIEF WITHOUT PROVING THERE WAS NO ADEQUATE REMEDY AT LAW.

To vest equitable jurisdiction the moving party must prove that there is no adequate remedy at law. Plaintiff did not put on one shred of evidence in this regard. Defendant proved (uncontradicted) that Plaintiff could have purchased all of Intervenor's water allotment that it desired. Clearly a money judgment would make Plaintiff whole if Plaintiff was entitled to recover. As such, an adequate remedy at law was available and Plaintiff is not entitled to equitable relief.

The Trial Court also found that there was a wrongful conversion. The Court again errs by giving a legal remedy when the Plaintiff elected to pursue only equitable relief. The Court also ordered the Defendant to sign a transfer of application which would be an affirmative act or a mandatory injunction and certainly makes a stronger case for requiring Plaintiff to prove that it had no adequate remedy at law.

II. PLAINTIFF IS ESTOPPED FROM CLAIMING EQUITABLE RELIEF FROM DEFENDANT AFTER DISMISSING WITH PREJUDICE ITS COMPLAINT AGAINST THIRD PARTY DEFENDANT, MRS. CIMIYOTTI.

Defendant Aranci never had any dealings with Plaintiff. Defendant purchased some real property from third party defendant, Mrs. Cimiyotti. Mrs. Cimiyotti sold the water allotment off of this real property to Plaintiff. By dismissing with prejudice its claim against Mrs. Cimiyotti there was no privity between the parties in this action. Such a dismissal would be Res Judicata since the very basis of Plaintiff's claim regarding the water was the water agreement between Plaintiff and third party defendant, Mrs. Cimiyotti.

III. PLAINTIFF CANNOT TRY TITLE BY SEEKING EQUITABLE RELIEF ONLY.

It is basic that determination of title or quieting title is a legal remedy. Colorado law is clear that equity cannot be used to try title. Even the legal action of trying title must fail because Plaintiff cannot show title in itself. Plaintiff never had the water allotment transferred to it, or even applied for it. The District closed its water agreement with Cimiyotti by quit claim deed which was not recorded. Defendant is the allottee of record. The ownership may be only changed through a discretionary act of Intervenor.

IV. PLAINTIFF HAS FAILED TO COMPLY WITH INTERVENOR'S ADMINISTRATIVE CONDITIONS PRECEDENT RELATING TO THE TRANSFER OF A WATER ALLOTMENT; THEREFORE, NO JUDICIAL DETERMINATION BY TRIAL COURT COULD BE DISPOSITIVE OF THIS ACTION AND THE JUDGMENT REACHED.

Equity will not do a hollow thing. Even if the Court's order was carried out and the Defendant Aranci did sign the transfer application, there is nothing which would bind the Intervenor to complete the reallocation and reclassification. The only person who had an obligation to apply was Mrs. Cimiyotti. Her obligation to do so was foreclosed by the acceptance of the quit claim deed by the Plaintiff and subsequently by dismissing its claim against her with prejudice. The judgment is void for lack of certainty and is not conclusive of the issues.

ARGUMENT

Any one of the assigned errors requires reversal of the Trial Court decision.

I. PLAINTIFF IS NOT ENTITLED TO EQUITABLE RELIEF WITHOUT PROVING THERE WAS NO ADEQUATE REMEDY AT LAW.

The Plaintiff elected to pursue an un-named equitable remedy against the

Defendant. The Court decreed a mandatory injunction (f. 161). This requires the Plaintiff to prove that it had no adequate remedy at law. Nothing is more basic to equity. 43 C.J.S., Injunctions, §25, p. 454. Am Jur 2d, Equity, §86-87, pp. 607-611.

This Court recently so held in Hercules Equipment Company v. Smith, 138 Colo. 458, 335 P2d 255 (1959). In this case a stranger to the case was granted an injunction by the trial court. The Court stated that the plaintiff

> "sought equitable relief, a restraining order, and the trial court granted the relief requested and went a step farther and entered a mandatory injunction directing Geer to deliver the automobile to the wife--all of this when there was available to the wife a speedy, complete and adequate remedy at law--an action in replevin. There is neither allegation nor proof that such remedy was not available to plaintiff.
>
> The rule that an injunction will not be granted where the remedy at law for the injury complained of is full, adequate and complete, discussed in the C.J.S. title Injunction §25, also 32 C.J. p. 57 note 34, is

> generally applied to suits for an injunction against a levy or sale under an execution; if there is an adequate remedy at law an injunction will not be granted, while if there is not an adequate remedy at law an injunction will ordinarily be granted. If the remedy at law is doubtful and obscure, an injunction will be granted. 33 C.J.S. Executions §151, pp. 349, 350.
>
> The general rule that an injunction will not be granted where there is an adequate remedy at law has been applied where there was an adequate remedy by ejectment, replevin, trespass, * * *. (Emphasis supplied.) 43 C.J.S. Injunctions §25, p. 454."

Plaintiff presented absolutely nothing to prove it was without an adequate remedy at all. Plaintiff must allege and prove that it had no adequate legal remedy. Hercules Equipment Company vs. Smith, supra.

Defendant went further and actually proved that Plaintiff, if entitled to recover, could purchase other allotments and be made completely whole by a money judgment. An allotment of Intervenor's water is not unique. There has existed for years a market for the same. Defendant's proof was uncontradicted that any amount of water could be purchased on the

open market (ff. 515-520). The Court held that Defendant had "wrongfully converted the Northern Colorado Water Conservancy District allotment to his use and benefit." (f. 157) If this finding was correct, then it is a legal claim to be compensated by money damages. 28 Am Jur 53, Injunctions, §38. Also see 37 Dicta, pp. 24-25.

The only way that Plaintiff could have recovered would be to prove that Defendant Aranci held title to this water allotment because of a resulting or constructive trust. Defendant submits that this would be foreclosed because of lack of privity, Res Adjudicata, Estoppel in pais, or Estoppel by deed and available only to Mrs. Cimiyotti.

However, this Court in a most analagous fact situation holds against Plaintiff as well. In Gruenwald vs. Mason, 139 Colo. 1, 375 P2d 879 (1959), Mr. Justice Moore stated

"Question to be Determined

> Where an owner of an interest in land conveys the same by deed to a grantee named therein, demanding or receiving no consideration therefor, and such conveyance was not procured by fraud, duress, undue influence or as the result of any inducement whatever by the grantee, and no fiduciary relationship existed

> between the parties; where no promise or agreement was made concerning the use to be made by the grantee of the land conveyed to him; can the grantor, in an action to partition the land and re-establish her former interest therein, prevail on the sole ground that she did not intend to divest herself of title but intended solely that it should be held by the grantee in trust for her use and benefit?
>
> [1] The question is answered in the negative."

The Court went on to hold that the conditions to have a resulting or constructive trust were not proved.

> II. PLAINTIFF IS ESTOPPED FROM CLAIMING EQUITABLE RELIEF FROM DEFENDANT AFTER DISMISSING WITH PREJUDICE ITS COMPLAINT AGAINST THIRD PARTY DEFENDANT, MRS. CIMIYOTTI.

If Plaintiff had followed the terms of its own contract with Mrs. Cimiyotti, this dispute could not have occurred. The agreement between Mrs. Cimiyotti and Plaintiff provided that the balance of the purchase price be paid "upon the transfer of said water allotment to first

parties (District) * * *. Second parties (Cimiyotti) shall take all steps necessary to effectuate said transfer with the Northern Colorado Water Conservancy District." (f. 610)

Despite this, the balance of the purchase price was paid over in exchange for a quit claim deed (f. 611). This deed was not even recorded. A transfer application was never requested of Mrs. Cimiyotti, nor was one ever presented to Intervenor (f. 411). The water allotment is transferrable by deed pursuant to the original petition for allotment (f. 609) and by Intervenor's rules and regulations (f. 619). Otherwise the allotment may be transferred only with consent of Intervenor. 1963 C.R.S. 150-5-19(4) provides "At its discretion, the board may accept or reject the said petitions."

The Trial Court recognized this in its own findings (f. 159). Yet the Trial Court decrees a hollow thing ordering Defendant Aranci "to sign the appropriate transfer application form of the Northern Colorado Water Conservancy District in order for the Board of that District to exercise its discretion in determining whether or not water allotment shall be transferred;" This finding, order and decree should not be permitted to stand because it is not dispositive of the issues of the case.

The Plaintiff is now estopped. "A complainant cannot resort to the injunctive powers of equity to relieve him of the very action to which he consented or which he has invoked, invited, or encouraged." 28 Am Jur 561, Injunctions, §65.

Colorado law is well settled that one may not recover damage for an injury which he might by reasonable precaution or exerti• have avoided. Valley Development vs. Weeks 147 Colo. 491, 364 P2d 730 (1961). Also see the third and fourth defenses contained in the answer of Mrs. Cimiyotti to Plaintiff's third complaint versus her (ff. 44-47).

In order for the Plaintiff to prevail against Aranci, it must show some privity with Aranci and/or duty owed to it by Aranci. There is absolutely no dispute between Cimiyotti and Aranci. The Plaintiff can have no right against Aranci except as Cimiyotti might owe to it. Plaintiff chose to finally dismiss its action with prejudice against Cimiyotti. This final judgment of this Court cannot be attacked collaterally, which in effect, is what the Plaintiff is attempting to do. The case of Taylor vs. Peterson, 133 Colo. 218, 293 P2d 297 (1956) is particularly analogous in this situation. In that case the Plaintiff asked to reform a transaction between two other parties.

The Colorado Supreme Court held that since Plaintiff was a stranger to the previous transaction that equity could not so act on behalf of a stranger to the transaction. Mrs. Cimiyotti is an indispensable party to this lawsuit. (indispensable party rule discussed in Game & Fish Commission vs. Feast, 157 Colo. 303, 402 P2d 169 (1965).) This dismissal with prejudice by Plaintiff of its claim against Mrs. Cimiyotti is Res Adjudicata as to any claim by Plaintiff against Defendant Aranci.

III. PLAINTIFF CANNOT TRY TITLE BY SEEKING EQUITABLE RELIEF ONLY.

The Trial Court found "that it is not necessary for Plaintiff to establish its property interest in the water allotment in a prior legal action where the evidence is clear and convincing that the Plaintiff is in fact the owner of the property right in the water allotment," (f. 159). If the Plaintiff is the "Owner" why do we have a lawsuit? In fact, the best Plaintiff ever had was a contractual right through Mrs. Cimiyotti. If Mrs. Cimiyotti had defaulted on her agreement certainly the District would not have been entitled to a decree of specific performance. Radetsky vs. Palmer, 70 Colo. 146, 199 P. 490 (1921). 49 Am Jur 21, Specific Performance, §12. It foreclosed itself from asserting this right by dismissing its complaint against

her. Certainly the title is clearly disputed and painfully in issue.

The law is completely clear and established that equity will not try title to real or personal property. What we call the type of property right involved here makes no difference. Before Plaintiff can proceed to obtain the requested injunctive relief, they must have established their title to this right by a legal quiet title action, or have exhausted their legal remedies such as ejectment or trespass. All cases and treatises support the Defendant's position in this regard. The Colorado cases are as follows: Byron vs. York Investment, 133 Colo. 448, 296 P2d 742 (1956); 60 A.L.R. 2d, 342 paragraph 8; Fastenau vs. Engle, 129 Colo. 440, 270 P2d 1019 (1954); Anderson vs. Turner, 133 Colo. 453, 296 P2d 1044 (1956); Barrios vs. Pleasant Valley, 91 Colo. 563, 17 P2d 301 (1932); Blanchard vs. Holland, 106 Colo. 147, 103 P2d 19 (1940); Loomis vs. Webster, 109 Colo. 107, 122 P2d 248 (1942); Modrell vs. Cruz, 100 Colo. 415, 67 P2d 1036 (1937) C.J.S. Injunctions, §9; also C.J.S. Equity, §29, 28 Am Jur §75, page 572; Am Jur Waters §269; Am Jur 2d, Equity, §120.

This Court held in Anderson vs. Turner supra, that

> "We believe it to be the general rule that an injunction against

> trespass should not be granted unless or until complainant's title is settled, either by admission or legally adjudicated. Injunction could be damaging where the rights of the parties are not clear and certain. Where complainant's right is doubtful or his title is in dispute, a perpetual injunction cannot be obtained until the doubt is removed and the right made certain. 43 C.J.S. Injunctions, §19 c., p. 431."

IV. PLAINTIFF HAS FAILED TO COMPLY WITH INTERVENOR'S ADMINISTRATIVE CONDITIONS PRECEDENT RELATING TO THE TRANSFER OF A WATTER ALLOTMENT; THEREFORE, NO JUDICIAL DETERMINATION BY TRIAL COURT COULD BE DISPOSITIVE OF THIS ACTION AND THE JUDGMENT REACHED.

The Trial Court recognized that Intervenor had discretion to grant or deny a transfer application when tendered (f. 159). Despite this, the Trial Court ordered that Defendant Aranci "shall sign the appropriate transfer application form." (f. 161) The Trial Court did provide in its Findings for the very definite possibility that the application would be denied. This would leave the parties in limbo. The Court decrees a legal quiet title in

an equitable case. It finds the legal remedy of conversion in an equitable case. It renders a decree incapable by itself of final determination of the issues. This judgment must be void for lack of the requisite definiteness and certainty required of any final judgment. Golden Press, Inc. vs. Rylands, 124 Colo. 122, 235 P2d 592 (1951); Cass Company - Contractors vs. Colton, 120 Colo. 593, 279 P2d 415 (1950); Kobilan vs. Dzorius, 71 Colo. 339, 206 P. 790 (1922).

The Court recognized that if notice was a material element, that it must be proven in this type of case by clear and convincing proof. All testimony was in direct dispute except that of David Emmert, the attorney representing Mr. Aranci at the closing (ff. 494-509). Clear evidence or proof is defined by Black's Law Dictionary Fourth Edition, 1959, as

> "Evidence which is positive, precise and explicit, which tends directly to establish the point to which it is adduced and is sufficient to make out a prima facie case. Reynolds vs. Blaisdell, 23 R.I. 16, 49 A. 42."

Webster's New World Dictionary, 1966, defines clear as "obvious, certain, positive." Convincing is defined by the same two dictionaries as

> "Such as is sufficient to establish the proposition in question, beyond hesitation, ambiguity, or reasonable doubt, in an unprejudiced mind. Evans v. Rugee, 57 Wis. 623, 16 N.W. 49; French v. Day, 89 Me. 441, 36 A. 909. See clear."

Black's, supra; and Websters, supra, as "persuading by argument or evidence; causing to feel certain; cogent." The description for the testimony and proof in this case is better described as disputed and contradicted. Defendant does not believe notice is the deciding factor in the case. Plaintiff had to prove notice with clear and convincing proof, which it failed to do; and as such could not prevail in the Trial Court.

CONCLUSION

Plaintiff failed to prove it did not have an adequate remedy at law. This cannot be presumed. Defendant proved Plaintiff did have an adequate remedy at law if entitled to prevail. The Court could not grant legal relief of conversion and quiet title in an equitable action. Plaintiff and Defendant are not in privity; Defendant owes Plaintiff no duty; Plaintiff dismissed its only claim with prejudice and thus cannot prevail. Notice was not proven

with clear and convincing proof. The Defendant respectfully requests a reversal of the Trial Court's decision and a dismissal of Plaintiff's Complaint.

Respectfully submitted,

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