

University of Colorado Law School

Colorado Law Scholarly Commons

Colorado Supreme Court Records and Briefs Collection

1-2-1986

Canton Oil Corp. v. District Court of Second Judicial Dist.

Follow this and additional works at: <https://scholar.law.colorado.edu/colorado-supreme-court-briefs>

Recommended Citation

"Canton Oil Corp. v. District Court of Second Judicial Dist." (1986). *Colorado Supreme Court Records and Briefs Collection*. 2085.

<https://scholar.law.colorado.edu/colorado-supreme-court-briefs/2085>

This Brief is brought to you for free and open access by Colorado Law Scholarly Commons. It has been accepted for inclusion in Colorado Supreme Court Records and Briefs Collection by an authorized administrator of Colorado Law Scholarly Commons. For more information, please contact rebecca.ciota@colorado.edu.

SUPREME COURT, STATE OF COLORADO

Case No. 85 SA 446

ORIGINAL PROCEEDING, DISTRICT COURT CASE NO. 83 CV 8078

RESPONSE TO ORDER TO SHOW CAUSE

FILED IN THE
SUPREME COURT
OF THE STATE OF COLORADO

CANTON OIL CORP., a Delaware corporation

JAN 2 1986

Petitioner,

Mac V. Danford, Clerk

vs.

THE DISTRICT COURT IN AND FOR THE SECOND JUDICIAL DISTRICT
and the HONORABLE SANDRA I. ROTHENBERG, a judge thereof,

Respondent.

Pursuant to the Order to Show Cause issued by this Court on December 12, 1985, Theleen and Partners, Ltd. ("TAP"), a defendant and cross-claimant in the action below, respectfully requests the Court to make its rule in this case absolute. TAP further requests this Court to extend to TAP any relief granted to Canton Oil Corp. ("Canton"), or in the alternative to consolidate this Petition with Theleen and Partners, Ltd. vs. The District Court in and for the Second Judicial District, and the Honorable Sandra I. Rothenberg, a Petition for Relief in the Nature of Prohibition, which has been filed before this Court.

INTRODUCTION

On December 6, 1985, Canton Oil Corp. ("Canton") filed an original proceeding pursuant to C.R.C.P. Rule 21 in the form of a Petition for Relief in the Nature of Prohibition. On December 12, 1985, this Court issued an Order to Show Cause with Stay in that case.

Both TAP and Canton received judgments in the lower Court action against the Nordic/Seahawk defendants. In its order dated November 25, 1985, based on the oral order of October 10, 1985, the Respondent set aside the judgments of both TAP and Canton based on the motion by the Nordic/Seahawk defendants under Rule 60(b)(5). Both Canton and TAP raised identical procedural and substantive objections to the proceedings. The issues and legal grounds asserted by Canton in its Petition are identical to those raised by TAP in its Petition for Relief in the Nature of Prohibition. Further, a substantial injustice would result if the Respondent's order is reversed with respect to Canton but allowed to stand against TAP. Therefore, in the interest of justice and equity TAP respectfully requests this Court to afford it the same relief granted to Canton in this proceeding, or in the alternative to consolidate this Petition with TAP's Petition for Relief in the Nature of Prohibition filed with this Court.

II. NATURE OF LOWER COURT ACTION

Plaintiff Canton filed claims against numerous parties in the action captioned Canton Oil Corp. vs. Nordic Petroleums, Inc., et al., Civil Action No. 83 CV 8078, District Court, City and County of Denver, Colorado. TAP was named as a defendant by Canton and asserted cross-claims against the Nordic/Seahawk defendants based on violations of

the Colorado Securities Act of 1981, fraudulent misrepresentation, fraudulent concealment and negligent misrepresentation. On February 28, 1985, after a six week trial, the jury awarded judgment in TAP's favor and against Nordic Petroleums, Inc., Oene "Owen" Miedema, and Seahawk Oil Corporation for actual damages in the amount of \$1,300,000.00 against each defendant and exemplary damages of \$750,000.00 against each defendant on three separate claims. Judgment was entered on TAP's verdict on February 28, 1985.

Respondent granted a sixty day extension from February 28, 1985 in which to file post-trial motions. The Nordic/Seahawk defendants timely filed a Motion for Post-Trial Relief Pursuant to Rule 59 on April 26, 1985, alleging juror misconduct among other grounds. (The Trial Court found all grounds except the alleged juror misconduct to be without merit. Transcript, p.3.) After the filing of responses by TAP and Canton, the Respondent scheduled a hearing on the Motion for August 21, 1985. That hearing date was re-scheduled at the Respondent's initiative to October 10, 1985. On September 16, 1985, TAP filed a Motion to Vacate the Hearing and Vacate Post Judgment Stay, and as grounds cited C.R.C.P. Rule 59(j). Rule 59(j) provides in part: "The court shall determine any post trial motion within 60 days of the date of the filing of the motion....Any post

trial motion that has not been decided with the 60 day determination period shall, without further action by the court, be deemed denied for all purposes including Rule 4(a) of the Colorado Appellate Rules and the time for appeal shall commence as of that date." TAP argued that because the Motion for Post Trial Relief filed by the Nordic/Seahawk defendants was denied as a matter of law by operation of Rule 59(j) on June 26, 1985, the hearing on October 10, 1985, should be vacated and the stay lifted with respect to TAP.

The Nordic/Seahawk defendants filed a Memorandum in Opposition to TAP's Motion, arguing that TAP had misinterpreted rule 59(j) because the Respondent had "taken further action" by scheduling and rescheduling the hearing on the Rule 59 motion. On October 2, 1985, the Nordic/Seahawk defendants filed a Motion for Relief pursuant to C.R.C.P. Rule 60(b). As grounds for the Rule 60(b) Motion, the Nordic/Seahawk defendants incorporated their Rule 59 Motion in its entirety and also stated: "As a further and additional basis, C.R.C.P. Rule 60(b) permits the Court to relieve any party for 'any other reason justifying relief from the operation of the judgment' when such relief is requested 'within a reasonable time'." The Nordic/Seahawk defendants specified no grounds justifying such relief, cited no legal authority for the motion and filed no brief in support thereof.

On October 10, 1985, despite objections by TAP and Canton, the Respondent held an evidentiary hearing on the Rule 60(b) Motion. The Respondent took testimony from several jurors and other persons concerning the alleged juror misconduct. Following the hearing, Respondent made oral findings of fact and conclusions of law, and ultimately issued a written order dated November 25, 1985.

The Respondent found that the Rule 59 Motion of the Nordic/Seahawk defendants was denied as a matter of law. (Order, p.4; Transcript, p.7). The Respondent found that a hearing on the Rule 59 Motion was not set because of its own calendar problems and "counsel did not inform the clerk that there was any time problem" (Transcript, p.8). Respondent also stated that "the reason the Rule 59 motion was not heard was probably due to the inaction of the Court in not tickling the motion...." (Transcript, p.9).

The Respondent further found that no portion of Rule 60(b) applied except subsection (b)(5), that the Respondent could and would have granted a new trial under Rule 59, but because of the time bar there was no way to grant the motion except under Rule 60, and therefore based the order upon Rule 60. (Transcript, p.9). Respondent also found that a decent jury would have reached exactly the same result. (Transcript, p.10; See also Transcript, p.2).

In summary, the Respondent granted the Motion under Rule 60(b)(5) on the identical grounds as those which had been deemed denied by an operation of law under Rule 59, and despite the fact that the Court made no findings concerning "exceptional circumstances" as required by Rule 60(b), and made no findings concerning why the Nordic/Seahawk defendants did not simply appeal the denial of the Rule 59 motion.

III. AUTHORITY IN SUPPORT OF TAP'S RESPONSE

TO ORDER TO SHOW CAUSE

In support of its Response to Order to Show Cause, TAP incorporates by this reference the legal argument set forth in Section III of the Petition for Relief in the Nature of Prohibition filed by Canton Oil Corp., on December 6, 1985.

IV. CONCLUSION

The Respondent clearly and indisputably exceeded its jurisdiction and abused its discretion in setting aside the judgment of TAP for the same reasons that Respondent abused its discretion in setting aside the judgement of Canton. Therefore TAP requests this Court to afford to it any and all relief granted to Canton in this action, or in the alternative to consolidate this Petition with that of Theleen and Partners, Ltd., vs. The District Court for the City and County of Denver and The Honorable Sandra I. Rothenberg, a Judge thereof.

Respectfully submitted,

LAW OFFICES OF JOHN M. FRANKS, P.C.

BY: 

John M. Franks, #455

Paul R. Wood, #12578

Curt Todd, #14332

1355 South Colorado Boulevard

Suite 601 - Empire Park

Denver, Colorado 80222

Tele: (303) 757-0777

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing has been placed in the United States Mail, postage prepaid this 2nd day of January, 1986, to the following:

Kathleen Mullen, Esq.
1750 Gilpin Street
Denver, Colorado 80218

Gordon W. Netzorg, Esq.
1410 Grant Street
Suite C-308
Denver, Colorado 80203

Harlan P. Pelz, Esq.
4155 East Jewell
Suite 500
Denver, Colorado 80222

Gregg E. Kay, Esq.
50 South Steele Street
Suite 440
Denver, Colorado 80209

Stuart Kritzer, Esq.
3773 Cherry Creek Drive North
Suite 515
Denver, Colorado 80209

Pete Lucas, Esq.
633 Seventeenth Street
Suite 2900
Denver, Colorado 80202

Martin M. Berliner, Esq.
1700 Lincoln Street-Suite 4700
Denver, Colorado 80202


Shelly Simmons