12-26-1989

Atchison v. City of Englewood

DAY, J.

NO. 23352

IN THE
SUPREME COURT
OF THE
STATE OF COLORADO

ALFRED P. ATCHISON and IDA MAE ATCHISON, Plaintiffs in Error, v. THE CITY OF ENGLEWOOD, a Municipal Corporation, and MARTIN-MARIETTA CORPORATION, a Maryland Corporation, Defendants in Error.	Error to the District Court of the County of Jefferson State of Colorado HONORABLE GEORGE G. PRIEST Judge

PETITION FOR REHEARING

EN BANC OPINION BY JUSTICE GROVES

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December, 1969.

NO. 23352

IN THE SUPREME COURT OF THE STATE OF COLORADO

ALFRED P. ATCHISON and IDA MAE ATCHISON,	)	Error to the District Court of the
Plaintiffs in Error,	)	County of Jefferson
v.	)	State of Colorado
THE CITY OF ENGLEWOOD, a Municipal Corporation, and MARTIN-MARIETTA CORPORATION, a Maryland Corporation,	)	HONORABLE GEORGE G. PRIEST
Defendants in Error.	)	Judge

PETITION FOR REHEARING

The decision was en banc and the opinion was by Judge Groves.

This presentation of plaintiffs' position generally follows the format of:

A. References to separate specific points in the opinion plaintiffs consider as erroneous or points which should have been decided.

B. References to the portions in the record and briefs in support of plaintiffs' positions which were overlooked or misapprehended.

C. Summation of plaintiffs' views.

Unless otherwise noted, all underscoring herein is supplied.

I.

A. The following two points are so interrelated that they are considered jointly:

1. On page 1 of the opinion the purpose of the action is limited to:

> ". . . determination with respect to plaintiffs' pre-emptive right to re-purchase certain lands."

2. And on page 17 the opinion concluded:

> "Plaintiffs argue that, even if the pre-emptive right is violative of the rule against perpetuities, they are entitled to relief in the form of rescission. This entirely new theory and form of relief was presented nearly a year after the case was at issue here. Until then the plaintiffs sought solely to have a determination that their pre-emptive right was enforceable. Considering all the circumstances, we think the presentation of this request for rescission came too late, and we now sustain the defendant's objection to that effect."

B. The foregoing position expressed in the opinion overlooked or misapprehended the following portions of the records and briefs:

1. The allegation in the complaint that:

(a) ". . . a controversy has arisen between the plaintiffs and the defendants relative to the legal rights and duties under the agreement between the plaintiffs and the City and the lease and option between the City and the Corporation, in that the defendants claim that under the provisions of their lease and option, which is subsequent to the agreement of the City with the plaintiffs, that the City has a sole and exclusive right to sell said premises, with the water rights, to the Corporation and that the City is under no obligation to offer to sell the premises to the plaintiffs herein upon the same terms and conditions as the defendants are now negotiating." (f. 18)

(b) The complaint prays for at least four separate remedies:

(1) "That a declaratory judgment be rendered and entered declaring and adjudicating the respective rights and duties of the plaintiffs

and the defendants under the agreements and resolutions hereinbefore described;

(ii) "And further declaring that the defendant City has no right to attempt to dispose of said premises without first complying with provisions of its agreement to give the plaintiff 60 days notice in writing within which plaintiffs can exercise the same option . . ."

(iii) And "declaring the rights, if any, of the defendant Corporation to be subordinate to the rights of the plaintiffs."

(iv) ". . . and for such other, further and different relief as to the Court may seem meet and proper." (f. 20)

2. An amendment to the complaint was submitted by plaintiffs on October 13, 1967, after judgment had been entered on July 21, 1967. For the first time in the record this amendment expresses readiness to purchase and requested that the City tender performance pursuant to the terms of the agreements between the City and plaintiffs (f. 145).

3. Plaintiffs' motion for new trial was filed July 28, 1967, calling attention to possible relief in the form of rescission, among others, to-wit:

> "11. The Court erred in granting summary judgment and in considering only the rule against perpetuities as the facts admitted in the record warranted relief for:
>
> a. Specific performance,
> b. Rescission,
> c. Reformation based upon:
>
> 1. Mistake of law,
> 2. Mistake of fact,
> 3. Mutual mistake.
>
> d. Fraud, if it should be determined that the City took the benefit of the January 3, 1949 agreement and intentionally gave an unenforceable contract instead of the 'consideration' plaintiffs were supposed to receive.
>
> e. Damages,
> f. Unjust enrichment, or
> g. Failure of consideration."
> (ff. 199-200)

4. Also other remedies, including rescission, are discussed in plaintiffs' briefs three times.

(1) " . . . in not considering whether relief was warranted for specific performance, rescission, reformation, fraud, damages, unjust enrichment or failure of consideration." (brief, p. 11)

(2) "The Court failed to consider that the issues of fact might require reformation on the basis of mutual mistake of fact or that other defenses or remedies might be available to plaintiffs by way of reply to defendants' answers." (brief, p. 64)

(3) "Moreover, it is not necessary for the court to decide that the remedy of mutual mistake is in fact present. Dependent upon an answer other remedies stated in the motion for new trial might be appropriate, i.e., damages."

"It is enough that the possibility exists. Justice McWilliams in the School District case said:

'In short, if for no other reason than the inability to thus determine the issue of waiver or estoppel in a motion to dismiss or alternately, for a summary judgment, the trial court committed error in dismissing the complaint.'" (brief, pp. 66-67)

5. Examination of the briefs discloses that counsel for plaintiffs and the City refer to Section 394 of the Restatement of the Law of Real Property but neither refer to Section 394f from the 1948 Supplement. The failure to include this subsection was an oversight on the part of plaintiffs' counsel, who considered it their duty under Canon 22 of Professional Ethics to inform the Court of that provision. As soon as the oversight was discovered plaintiffs filed the motion in the Supreme Court to file a supplemental pleading and submitted a supplementary brief in support thereof. Plaintiffs' actions were required to fully acquaint this Court with applicable law not presented by any counsel previously; and, both defendants, having ample time, filed extensive answers.

No new theory nor form of relief was advanced. Rescission, as well as many other possible remedies, were before the Court from the commencement of the action.

Attention is redirected to the Pure Oil Company case cited in support of 394f, especially to the facts that the action was for specific performance, the Rule against Perpetuities was invoked, and that relief was granted. That court's further pertinent observations follow our prior quotations:

"Where the contract is entire, the whole contract stands or falls

> together. (citing cases) If the defendants would avoid the option and call this equity, then they must do equity by surrendering the property then acquired at the time of the transaction. (citing cases) It will not do to affirm the contract in part and repudiate it in part. This was the conclusion of the referee which the trial court upheld.
>
> "The correct result seems to have been reached in the court below. It will not be disturbed."

Plaintiffs' position that the pre-emptive right was an "integral" part of the transaction is fully supported in Mr. Atchison's deposition and the January agreement that,

> "WHEREAS, in connection with the purchase of said land and water rights by the City and as part of the consideration of the sale thereof by the Atchisons, the Mayor of the City by resolution of its City Council duly adopted on the 14th day of December, 1948, was duly authorized and empowered to execute this agreement on behalf of the City and the Clerk of the City was authorized and empowered to attest the same." (f. 160)

C. In summary, it clearly appears that while the City was still owner of the property, and as soon as it became known that the corporation had an option, plaintiffs initiated an action seeking to have their rights recognized and declared. At no time did plaintiffs restrict themselves or the court to a determination of the pre-emptive right to repurchase; but, on the contrary, they have at all times advanced their rights for many remedies. Included were many rights which would not mature until after the property was transferred.

Moreover, no new theory nor form of relief was presented belatedly. On the contrary, all forms of relief were before the Court at all times. The only purpose of the supplemental brief was to fully acquaint this Court with applicable law which was overlooked by plaintiffs and not produced by defendants.

II.

A. The Court in holding that the case was a proper one for the exercise of summary judgment overlooked ambiguities, and material issues of fact.

The Court said:

"We have not experienced too much difficulty in concluding that the right was not personal." (opinion, p. 3)

"The governing document appears to be the January Agreement." (opinion, p. 8)

"To be in strict compliance with the Resolution, the January Agreement should have contained the provisions of paragraph 11 instead of those used in paragraph 3 . . ." (opinion, p. 16)

"It is inconceivable to us that the attorney engaged by the Atchisons to review this document would have come to any other conclusion; and furthermore, even if the provisions of paragraph 11 were intended to be severable and purely personal, we believe that an appropriate modification would have been made." (opinion, p. 8)

The doubts and uncertainties of the Court pertain to material issues of fact, which should have been resolved in plaintiffs' favor.

B. The Court overlooked the law enunciated in Smith v. Mills, 123 Colo. 11, 225 P.2d 483:

"Trial court should exercise great care in granting motions for summary judgment and should not deny a litigant a trial where there is the slightest doubt as to the facts."

> "A summary judgment should never be entered save in those cases where the movant is entitled to such beyond all doubt. The facts conceded should show with such clarity the right to a judgment as to leave no room for controversy or debate." (brief, p. 51)

The Court had some difficulty in arriving at the decision that the pre-emptive right was not personal. The Court was also not certain as to which was the governing document. However, later the Court said that paragraph 3 should not have been used in the January agreement (p. 16).

C. These doubts and uncertainties should not be the basis for the conclusion that the case was a proper one for summary judgment. Also, the Court overlooked the quoted decision that "summary judgment should never be granted save in those cases where the movant is entitled to such beyond all doubt."

The Court also decided by deduction issues of fact (1) when it decided that the provisions of paragraph 11 were not severable from paragraph 13 (plaintiffs' opening brief, p. 41), (2) in holding that the January agreement was probably the governing document, and thus, (3) that merger was also an issue of fact (plaintiffs' reply brief to answer of City of Englewood, p. 6).

Finally, the Court overlooked the law enunciated in Moreland v. Durland Trust Company, 127 Colo. 5, 252 P.2d 98 (brief, pp. 60, 63), where the trial court was called upon to construe an agreement for the purchase of real property which contained a provision for a reservation of a part of the minerals which was later followed by a deed which did not contain the reservation. The trial court concluded that the parties intended to reserve the minerals and entered summary judgment accordingly. In reversing the trial court the Supreme Court said:

> "It will be observed that here the trial court was dealing with a question of intent always difficult and unless confessed usually an issue of fact. Hatfield vs. Barnes, supra. Even from the record as made and without the taking of evidence the intention of the parties at and during the negotiations for sale and purchase of this land is uncertain and subject to argument."

It is noted that in this action the Court determined the "intent" of the parties which was not confessed; but, on the contrary was denied. This practice is denounced in the Moreland case.

III.

A. The Court overlooked the fact that the December agreement, for all practical purposes, expired upon Atchisons' conveyance of the premises to the City. The Council recognized this and provided that concurrently with delivery of the deed the parties shall enter into a <u>further</u> contract (f. 41).

B. & C. However, the following items in the December agreement were matters which would have inured to the benefit of the heirs in the event that both Atchisons died before January 3, 1949, to-wit:

1. Purchase price of $350,000.00;
2. Payment by the City of taxes;
3. Possession of land until March 1, 1950;
4. Use of water;
5. One-half of real estate commission;
6. Payment from Denver for construction of conduit (ff. 35-43).

Attention is directed to paragraph 11 of the December agreement which provides that the further contract was to be entered into concurrently with delivery of the deed to the City by the Atchisons.

IV.

A. That the Court in holding on page 9 that the pre-emptive right was not personal, overlooked the Resolution of the City Council of Englewood.

B. Attention is directed to the omission of any reference to the Resolution on pages 2 to 6, wherein the Court recites certain of the facts of the case and the omission is further evidenced by the lack of any reference to the Resolution on pages 6 through 9 of the opinion, where the Court arrives at the conclusion that the pre-emptive right was not personal. The Resolution provided only that:

> "The Mayor of the City of Englewood be and he hereby is empowered to execute on behalf of said City a contract with Alfred P. Atchison and Ida Mae Atchison in conformity with the provisions of paragraph 11 of the agreement hereinbefore set forth . . ." (f. 47)

Neither paragraph 13 of the December agreement nor paragraph 3 of the January agreement was authorized for inclusion in the January agreement by Resolution. The Court in arriving at the conclusion that the pre-emptive right was not personal, quoted paragraph 13 of the December agreement

and paragraph 3 of the January agreement. The specific direction in the Resolution was totally overlooked.

C. Plaintiffs view the omission of any consideration of the Resolution as critical because, in the absence of the Resolution, the intentions of the contracting parties are less open to conjecture. However, the Resolution explicitly directed that the Mayor execute a new contract in conformity with the provisions of paragraph 11. The Resolution was drafted solely by attorneys for the City of Englewood before any dispute arose and it is clear and unambiguous. Moreover, the attorneys for Englewood did not incorporate paragraph 13 in the January agreement and accordingly it must be presumed that they did not intend that it should be used. As stated by the Court, the January agreement to be in strict compliance with the Resolution should have contained the provisions of paragraph 11 of the December agreement (p. 16). Yet, the Court in its opinion relies upon the provisions of paragraph 13 of the December agreement except at one point in the opinion the Court apparently put some reliance on paragraph 3 of the January agreement (p. 6). Later, however, in the opinion, the Court indicates that the January agreement should have been in strict compliance with the Resolution (p. 16).

Since the Resolution was explicit and was drafted by the attorneys for Englewood, it appears that the Court should have found that if the January agreement was to include any right of heirship, that the Resolution not only would, but should, have included a specific reference thereto and not left it to conjecture.

V.

A. That the Court misapprehended the facts in The Texas Company v. Weber, 83 F.2d 807, cert. denied, 299 U.S. 561, 57 S. Ct. 23, 81 L. Ed. 413, in stating:

> "We have held that before us is an inheritable pre-emptive right without limit as to time. It is in no manner connected with any land owned by Mr. and Mrs. Atchison. While they reserved 1/2 of the mineral rights, this interest can be sold at any time; and following a sale there will be no land title interest of record to give any clue as to the identity of the future successors in interests to the pre-emptive right. We feel that at some point in the infinite time at which Englewood might in the future conclude to sell the land, ascertaining and locating the owners of the pre-emptive right

would be an unreasonable task. As a result there would be a sufficiently unreasonable restraint upon the transferability of the property as to justify imposition of the Rule against Perpetuities."

"It is to be noted that in Weber vs. Texas Company, supra, the identity of the owners of interests involved could be ascertained--or at least with some reasonable investigation discovered--from the record title to the mineral rights and royalties. Our conclusion might be different here if the ownership of the pre-emptive right followed the title to designated real property; or if it were restricted to a limited term found to be reasonable . . ." (opinion, pp. 12, 13, 14)

B. & C. In Weber the pre-emptive right was vested at the time the suit was brought in the Texas Company and in this case the pre-emptive right was vested in the Atchisons. Neither the Texas Company nor Atchisons held title to the fee and each was the optionee entitled to notice. Both Texas Company and Atchisons could alienate mineral interests and both could alienate the pre-emptive right without notice and separate and apart from the mineral interest if the Court's conclusion that the right of the Atchisons was not personal is accepted. In each practical

problems arise as to who would be entitled to notice, i.e., who was the owner of the pre-emptive right. The Texas Company might dissolve, pay off debts and distribute assets to stockholders or it might sell the pre-emptive right to a person who might thereafter die. The practical problem of notice would be equally as great as determining the heirs of the Atchisons.

Of course, the ultimate holder of the pre-emptive right who might fail to give either Weber or Englewood notice of ownership of the right would do so at his peril. On the other hand, neither Weber nor Englewood would be without remedy if the owners of the pre-emptive right could not be located. In a quiet title action or in a determination of interests action service could be obtained on unknown persons by publication and a decree entered quieting the title and determining the interests.

The Court's great emphasis on the problem of identifying the persons who might be the owners of the pre-emptive right, i.e., their identity, raises a totally new question. The Rule against Perpetuities heretofore has not concerned itself with the question of the names or identity of the persons who may ultimately receive

the contingent interest. Dean King's illustration in Colorado Practice Methods, Section 2499, cites the following as not violating the Rule against Perpetuities:

> "A conveys blackacre to his son, a bachelor for life, remainder to B's first born son during this life, remainder to C and his heirs."

It is readily apparent that in the cited illustration it would be impossible at the time the interest is created to determine the identity of the persons who would ultimately be the owners of the fee title. It is obvious that after the bachelor dies and B's first born son dies, C may already be deceased and the determination of the names of his heirs may become quite difficult. Dean King notes C's interest is a vested remainder. If C departs life prior to the termination of the life estates, his interest would descend to his heirs. C conceivably might have many children and those children might have many children and certain of the children or grandchildren might also be deceased at the time the vested remainder becomes a possessory interest. Factually, the identity of the persons under the cited illustration might be equally as difficult to determine when the

time came as the identity of the owners of the Atchisons' pre-emptive right might be difficult to determine.

Considering that the Court early in the opinion stated that a little weight on either side would weigh it down (opinion, p. 3), it appears that the Court's misapprehension of the difficulties should tip the scales in plaintiffs' favor and that the rule in Texas Company v. Weber, supra, should be adopted.

VI.

A. In holding that summary judgment was proper in this case, the Court overlooked that the holding denied due process and equal protection of the law, i.e., the right to assert remedies previously available to litigants under like circumstances.

The Court said:

"The plaintiffs submit that this matter was not in a posture susceptible of determination under a motion for summary judgment, citing familiar authority as to the cautions which should be exercised by a court in connection with a motion for summary judgment. The main thrust of the argument on this point is that there were

> factual issues to be resolved in interpreting the contract and determining the intent of the parties. We are not so persuaded. To us there are no issues of material fact existing here. The documents are not ambiguous and the District Court properly made a determination within the four corners of the document." (opinion, p. 14)

The existence of other remedies and their application to this case was ignored.

B. It was established in School District v. Grant, 156 Colo. 328, 399 P.2d 101, that summary judgment should not be granted to a defendant if the plaintiff might have available recognized remedies which, if proven by proper evidence at the time of trial, would be good defenses to the claims set up in the motion for summary judgment. The plaintiff therein argued that estoppel and waiver might be available by way of reply to the defense that the plaintiffs had not complied with a provision in the contract requiring arbitration prior to the institution of a civil action. Examination of the record on error in the office of State Archives reveals that the remedies of estoppel and waiver were first asserted in that case on oral argument in the Supreme Court. The

assertion of those remedies was not made at the trial court level nor in the motion for new trial nor in the briefs of the plaintiffs. Nonetheless the Court noted the argument and held that estoppel and waiver would be, if proven, defenses to the contention that arbitration was required as a condition precedent to the institution of a civil action. The Court stated that whether such defenses could be proven at the time of trial only time would tell but went on to say that the very possibility that the facts would establish either of the defenses was in itself reason enough to deny summary judgment.

C. Thus, procedurally, prior to this case, a plaintiff whose complaint was subjected to a motion for summary judgment could reply on the case law pertaining to Rule 56, Colorado Rules of Civil Procedure, in particular, School District v. Grant, supra. These plaintiffs proceeded with even greater diligence than plaintiffs in that case. The possibility of the applicability of other remedies was raised by name in the trial court (ff. 199-200). This was followed by an assertion in the opening brief (pp. 11, 64, 66, 67) and closing brief (reply to Englewood, p. 7) and also in the supplemental briefs. That the remedy of rescission or

reformation based on mutual mistake might be applicable is clearly demonstrated by the various documents and by the examination of the deposition of Alfred P. Atchison. On page 67 of the deposition this answer was given:

> "He didn't want to be in the farming business and they would settle the land and he would give me an agreement to buy it.
>
> "Q. But then this was the City's suggestion and not yours, is that right?
> "A. That they give me the agreement to repurchase?
>
> "Q. Yes.
> "A. Yes Sir."

At this point it is recognized that the Court stated that the deposition would be considered for one purpose. The Court said:

> "At this juncture we wish to mention the significant fact that, as conceded by one of plaintiffs' attorneys during oral argument, Mr. and Mrs. Atchison had counsel in connection with this transaction in December, 1948 and January, 1949. The deposition of Mr. Atchison was taken. The District Court in its order granting the motion for summary judgment did

> not refer to the deposition and we consider it only in the following particular. Mr. Atchison stated in effect that all of the documents involved were submitted to and approved by the attorney engaged by him and his wife and that they would not have signed any of them except upon his approval." (p. 7)

It is felt, however, that if the deposition is used for the purpose of drawing unfavorable inferences it should be used for all purposes.

Considering the matter quoted from the deposition in conjunction with the purely personal provisions in the 11th paragraph of the December agreement and the specific and unambiguous direction in the Resolution, it is apparent that a mutual mistake might have been made which would justify either rescission or reformation. Moreover the rule has always been that in construing documents for purposes of summary judgment, the Court is required to resolve all doubts against the moving party. Koon v. Stiffes, 124 Colo. 531, 239 P.2d 310 (brief, p. 51).

Usually remedies are asserted in the complaint or in the answer or in the reply. But in an action where the complaint of the plaintiff is subjected to a motion for summary judgment, the established remedies or defenses were,

prior to this case, to be raised as they were in School District v. Grant, supra.

The oversight of the Court in failing to follow previously established procedure in this case results in a denial of substantive remedies. Under the Fourteenth Amendment of the United States Constitution the plaintiffs are entitled to equal protection of the laws of this State and to due process. Due process is also guaranteed by Section 25, Article II of the Colorado Constitution. Plaintiffs, following School District v. Grant, supra, and other cited cases, asserted that even if the agreement as drafted violated the Rule against Perpetuities, other enumerated and recognized remedies were avilable to the plaintiffs which would preclude summary judgment. That rescission, reformation and other listed remedies are available to all citizens and residents of Colorado is too well established to require citations.

In the opinion, the Supreme Court totally overlooked the assertion that other remedies might be available to the plaintiffs except that the Court did state erroneously that rescission was raised for the first time more than a year after the case was at issue and for that reason held that the tardiness was sufficient cause

for refusal to consider the law cited in the supplemental brief.

The law pertaining to summary judgment has, if this opinion is to stand, been changed in midstream with the result that the plaintiffs have been denied remedies available in the past under the same or less favorable circumstances. Where other litigants were accorded a right to trial with full prior opportunity to assert all their substantive rights in their pleadings, these plaintiffs have been denied even a slight consideration of the possible availability of other remedies. This is a denial of due process under the United States Constitution and the Colorado Constitution. It is also a denial of equal protection of the laws of the State of Colorado.

VII.

A. In drawing inferences in favor of the defendants, the Court overlooked that all favorable inferences permitting countervailing results must be drawn in favor of the party whose pleading is subjected to a motion for summary judgment.

B. The Court noted:

"At this juncture we wish to mention the significant fact that, as conceded

by one of plaintiffs' attorneys during oral argument, Mr. and Mrs. Atchison had counsel in connection with this transaction in December, 1948 and January, 1949. The deposition of Mr. Atchison was taken. The District Court in its order granting the motions for summary judgment did not refer to this deposition and we consider it only in the following particular. Mr. Atchison stated in effect that all documents involved were submitted and approved by the attorneys engaged by him and his wife and that they would not have signed any of them except upon such approval." (opinion, p. 7)

"Counsel called attention to the fact that the December agreement reserved 1/2 of the mineral rights to the Atchisons, their heirs and assigns, and that the phrase their heirs and assigns is not used in paragraph 11. Nevertheless, the December agreement ends with the explicit statement that its terms and provisions inure to the benefit of heirs and assigns and the wording of paragraph 11 is a part of those 'terms and conditions'. It is inconceivable to us that the attorney engaged by the Atchisons to review this document could have come to any other conclusion and furthermore even if the provisions

> of paragraph 11 were intended to be severable and purely personal, we believe that an appropriate modification would have been made in paragraph 13.
>
> "Furthermore, plaintiffs' attorney approved the January agreement and plaintiffs executed it and placed it of record. They are in no position now to complain of its provisions." (p. 16)

C. The Court did not note nor draw any inference from the following undisputed facts from which pertinent and influential inferences should be drawn:

1. That the attorneys for the City of Englewood, Robert Lee and Mark Shivers, drafted the two agreements and the Resolution of the City Council (p. 63 - deposition of Alfred Atchison).

2. That the January agreement did not incorporate the provisions of paragraph 13 of the December agreement (ff. 159-167).

3. That the Resolution of the City Council was equally as definite and unambiguous as the provisions of paragraph 13 of the December agreement (ff. 21, 22, 23, 45, 46).

Three times the Court noted plaintiffs were represented by counsel and drew unfavorable inferences. Not once was it noted that the City was represented by two attorneys who drafted the instruments. No unfavorable inferences were drawn against the City, but all the inferences were drawn in favor of the City.

The Court states it is "inconceivable" that the plaintiffs' attorneys would have come to any other conclusion (i.e., that paragraph 13 applied to paragraph 11 of the December agreement), but the Court omits at this juncture any consideration of the Resolution of the City Council which was definite and unambiguous, i.e., that the new agreement should be drawn in conformity with paragraph 11 of the December agreement. It is equally inconceivable that the attorneys for the City would have omitted any provision for the use of paragraph 13 when they drafted the Resolution if paragraph 13 was to be incorporated in the new agreement. It is also inconceivable that, if the parties intended paragraph 13 to be a part of the January agreement, the attorneys for the City of Englewood would fail to place such a provision in the January agreement.

Nonetheless, it is difficult to conceive the reason for establishing

the intentions of the parties by speculation (especially when the parties are in such disagreement) when intent is customarily established by evidence adduced in an appropriate trial.

Assuming that the inference drawn by the Court is proper, the countervailing inferences noted above were also entitled to be considered as they would require countervailing results; but, no countervailing inferences were drawn by the Court. In effect, the Court treated the case as one which was tried in the court below where the trier of issues of fact resolved the issues against plaintiffs. Such was not the posture of the case.

The law in this jurisdiction is clearly stated in O'Herron v. State Farm Mutual, 156 Colo. 164, 397 P.2d 227:

> "Where the undisputed evidence permits off-setting inferences, the party against whom a motion for summary judgment is made is entitled to all favorable inferences which may be reasonably drawn from the evidence and if so viewed, reasonable men might reach different conclusions, the motion should be denied." (brief, pp. 52-53)

This law is supported by federal decisions. In Caylor v. Virden (8th Cir. 1955), 217 F.2d 739, it was held that on a motion for summary judgment, the party against whom the motion is made is entitled to all the favorable inferences which may reasonably be drawn from the evidence and if when so viewed reasonable men might reach different conclusions, the motion should be denied. Also, in Winter Park Tel. Co. v. Southern Bell Tel. & Tel. Co. (5th Cir. 1950), 181 F.2d 341:

> "Where the facts and circumstances though in no material dispute as to their actuality, revealed aspects from which inconsistent hypotheses might reasonably be drawn, and as to which the minds of reasonable men might differ, the trial court should not grant summary judgment."

The presence of divergent inferences should have been noted by the trial court and summary judgment should not have been granted.

CONCLUSION

The pre-emptive right should be held valid under the law enunciated in Weber v. Texas, supra, and judgment should be entered for the plaintiffs.

If the Court adheres to the position that the rule in Weber v. Texas, supra, should not be applied, the case should be reversed and remanded as the Court did in School District v. Grant, supra:

> "The judgment is therefore reversed and the cause remanded with directions that the complaint heretofore dismissed be reinstated and the defendants, and each of them, be granted opportunity to file an answer, setting up such affirmative defenses as are deemed advisable. If there be affirmative defenses, then the School District should be afforded opportunity to file a reply thereto and the issues as then posed by the pleadings should be resolved in a manner consonant with the views herein expressed."

By such action questions of fact and ambiguities may be resolved. Further plaintiffs will be afforded the right to plead and prove substantive remedies which were not considered by either the trial court or by the Supreme Court.

Or the reasoning in the Pure Oil Co. case, supra, should be adopted, where the pre-emptive right was not enforced, but other relief was provided.

All circumstances indicate that the original parties intended to make all contracts enforceable, and if questions have been advanced as to enforceability, the parties by agreement would have corrected their mistake. If correction was not made by agreement, appropriate relief was obtainable in a civil action to protect plaintiffs and to prevent unjust enrichment of the City or any other person.

When this action was initiated the City was still owner of the premises, the Corporation had knowledge of plaintiffs' position, and, for all practical purposes, the positions of the parties was the same as they were when the agreements were executed.

Respectfully submitted,

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