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Scott Timber Company v. United States

John Newman

john.newman@umontana.edu

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***Scott Timber Company v. United States*, 692 F.3d 1365 (Fed. Cir. 2012).**

John Newman

ABSTRACT

The United States Court of Appeals for the Federal Circuit interpreted contractual language in favor of the United States Forest Service (“USFS”) in this case concerning Pacific Northwest timber harvest contracts. The contracts at issue contained provisions authorizing USFS to suspend harvest if ordered to do so by a court; when USFS exercised the provision, Scott Timber sued for breach. On appeal of the Court of Federal Claims ruling in Scott’s favor, the court held: USFS did not breach the implied duty of good faith and fair dealing; a settlement agreement from a separate but related lawsuit served to bind USFS similarly to a court order; the USFS did not unreasonably delay its response to that settlement agreement; and, that Scott was not damaged by the suspensions at issue. The Federal Circuit Court thus reversed the lower court and found in favor of USFS.

INTRODUCTION

In *Scott Timber Company v. United States*, the United States Court of Appeals for the Federal Circuit resolved disputes concerning three timber contracts in favor of the USFS.¹ The contracts at issue covered plots in Oregon’s Umpqua National Forest that were eventually subject to separate federal litigation. Provisions in the contracts between USFS and successful bidder Scott Timber Company (“Scott”) authorized the agency to suspend harvest under limited circumstances. When USFS suspended the harvests in order to comply with a prior settlement agreement, Scott sued for breach. On appeal of the Court of Federal Claims ruling in Scott’s favor, the court held: USFS did not breach the implied duty of good faith and fair dealing; a settlement agreement from a separate but related lawsuit served to bind USFS similarly to a court order; the USFS did not unreasonably delay its response to that settlement

¹ 692 F.3d 1368 (Fed. Cir. 2012).

agreement; and, that Scott was not damaged by the suspensions at issue. The Federal Circuit Court thus reversed the lower court and found in favor of USFS.

FACTUAL AND PROCEDURAL HISTORY

This case arises out of a timber contract dispute between USFS and Scott.² The brand of contract at issue permits a party to harvest a specific amount of timber from a given geographic plot within a designated timeframe.³ The plots at issue here, the Pigout, Jigsaw, and Whitebird plots, are located in southwest Oregon's Umpqua National Forest.⁴ At the time the plots were auctioned, USFS notified participants that the plots were the subject of litigation and, consequently, harvesting delays were possible.⁵ USFS awarded contracts for the plots to Scott in July 1999 for harvesting to occur between 2000 and 2003.⁶ In each of the contracts, USFS reserved the right to delay harvesting in part to avert "environmental degradation or resource damage" or to comply with any appropriately-issued court orders.⁷ Scott's sole remedy upon such occurrences was limited to contract term adjustment and recoupment of expenses related to any operational delays.⁸ Expenses, according to the contracts, did not include "lost profits, attorney's fees, replacement cost of timber, or any other anticipatory losses suffered."⁹

During the same period in 1999, Oregon Natural Resources Council sued USFS alleging the agency's failure to adequately survey for certain species of wildlife within the plan area, pursuant to the 1994 Northwest Forest Plan.¹⁰ The area affected by this suit encompassed the Pigout, Jigsaw, and Whitebird plots, though none were directly implicated at that time.¹¹ In August 1999 the district court

² 692 F.3d at 1368.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ 692 F.3d at 1368.

⁸ *Id.* at 1369.

⁹ *Id.*

¹⁰ *Id.* (citing *Oregon Natural Resources Council Action v. United States Forest Service*, 59 F.Supp.2d 1085 (W.D. Wash. 1999)).

¹¹ *Id.*

determined USFS had indeed failed to adequately conduct wildlife surveys in the area and eventually issued injunctions encompassing the three contracts at issue here. Pursuant to the injunction, USFS suspended Scott's planned harvest on August 31, 1999.¹²

Pursuant to a settlement agreement with the *Oregon Natural* plaintiffs, USFS began protected species surveys in the Umpqua in September 1999.¹³ The agency completed surveys in the Jigsaw and Whitebird plots in 2000 but, due to additional litigation regarding environmental impact disclosure and analysis, USFS maintained the harvest suspension through early 2001.¹⁴ Following dismissal of the secondary litigation and affirmance on appeal, USFS removed the harvest suspensions in June 2003.¹⁵ USFS completed surveys in the Pigout plot in August 2001 and lifted the suspension in June 2002.¹⁶ Thereafter, Scott harvested the full contractual volumes between 2004 and 2008.¹⁷

Following the harvests, Scott filed a breach of contract suit against USFS in June 2005.¹⁸ The United States Court of Federal Claims held USFS liable based on the agency's: (1) breach of the covenant of good faith and fair dealing for neglecting to apprise Scott of the three plots' litigation status, and (2) unreasonable delay in performing wildlife studies in the plots pursuant to the *Oregon Natural* settlement agreement.¹⁹ The court determined USFS could have completed the surveys earlier than actually completed, and that the agency's continued suspension of the contracts due to the impact analysis litigation was unreasonable.²⁰ Based on its interpretation that the contracts at issue required Scott to process harvested timber, the court then awarded the company \$6.7 million as a pass-through claim on behalf of its processing subcontractor, Roseburg Forest Products ("Roseburg"), for the latter's

¹² 692 F.3d. at 1370.

¹³ *Id.*

¹⁴ *Id.* at 1370.

¹⁵ *Id.* (see *Headwaters, Inc. v. United States Bureau of Land Management*, 65 Fed.Appx. 636 (9th Cir. 2003)).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ 692 F.3d at 1370.

¹⁹ *Id.* at 1370-1371. (citing *Scott Timber, Inc. v. United States*, 86 Fed. Cl. 102 (Fed. Cl. 2009)).

²⁰ *Id.* at 1371.

lost profits.²¹ Further, the court awarded Scott \$28,742 in lost profits and \$129,599 in costs incurred to purchase equivalent timbers in the suspended harvest years of 2000 and 2001.²² The court reduced the replacement cost award for profits made on other contracts in 2007 and 2008, but not on the plots at issue during those years.²³ USFS appealed to the Federal Court of Appeals.²⁴

ANALYSIS

On appeal, the Federal Circuit examined the following four issues: (1) whether USFS breached the implied duty of good faith and fair dealing by its failure to notify Scott of the at-risk nature of contracts on the three plots at issue; (2) whether the *Oregon Natural* settlement agreement was a “court order” sufficient to trigger the suspension provision included in each contract; (3) whether USFS unreasonably delayed completing the surveys required by the settlement agreement; and, (4) whether USFS was liable for the delay in lifting the suspensions required by the settlement agreement following completion of the surveys in the Jigsaw and Whitebird plots.

As to the first issue, the court reversed the Court of Federal Claims and held USFS did not breach the implied covenant of good faith and fair dealing because there were no contracts in place at the time Scott alleges the breach occurred.²⁵ Scott cited USFS’s failure to specifically notify it of the at-risk litigational status of the Pigout, Jigsaw, and Whitebird plots prior to auction.²⁶ However, the court noted that USFS and Scott were not under contract at that time, and thus any notification failure could not manifest a breach of the implied duty.²⁷ The court took care to note that pre-formation actions could speak to USFS’s execution of the duty once performance begins, but held that such circumstances did not exist here.²⁸ Finally, the court dispensed with Scott’s attempt on appeal to sustain the lower court’s

²¹ 692 F.3d at 1371.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 1372.

²⁶ 692 F.3d at 1372.

²⁷ *Id.*

²⁸ *Id.*

ruling via the superior knowledge doctrine, whereby an agency has a duty to disclose “otherwise unavailable information regarding some novel matter affecting the contract that is vital to its performance.”²⁹ The court held that, even if the lower court based its ruling on the doctrine, its decision would nevertheless fail: USFS warned bidders at auction that harvest on the contracts at issue could be delayed, and the litigation precipitating the delay was a matter of public record.³⁰

Second, the court quickly dispensed with Scott’s notion that the *Oregon Natural* settlement agreement could not have functioned as a “court order” per the contracts’ suspension clauses.³¹ The court affirmed the lower court on this issue and held the agreement served as court order because: (1) the *Oregon Natural* court specifically ordered compliance with the agreement; (2) the district court maintained jurisdiction to impose a court order if USFS failed to complete the surveys; and, (3) the settlement agreement permitted reinstatement of the action in the event of governmental material breach.³² The Federal Circuit thus held the settlement agreement operated as a court order pursuant to the contracts.³³

Third, the court decided whether USFS unreasonably delayed completing the surveys required by the *Oregon Natural* settlement agreement based on a test from its previous decision in *Precision Pine & Timber, Inc. v. United States*.³⁴ In *Precision Pine* the court determined that, because the harvest suspension at issue was authorized by a court-ordered suspension provision, the only dispositive question as to the agency’s propriety was whether its action during the suspension violated the implied duty of good faith and fair dealing.³⁵ The *Precision Pine* court noted that the answer depends on whether USFS’s actions during the suspension were specifically targeted at the contract holder and whether USFS “reappropriat[ed] any benefit guaranteed by the contracts, since the contracts contained

²⁹ *Id.* at 1373.

³⁰ *Id.*

³¹ 692 F.3d at 1374.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 1374-1375 (citing *Precision Pine*, 596 F.3d 817 (Fed. Cir. 2010)).

³⁵ *Id.* at 1374.

no guarantee that performance would proceed uninterrupted.”³⁶ The court answered both questions in the negative, holding no agency action specifically targeted Scott and a contract provision expressly reserved uninterrupted performance.³⁷ The court of appeals reversed the claims court on this issue.³⁸

Finally, the court declined to reach the issue of whether USFS was authorized to continue post-survey contract suspensions, based on additional pending litigation, because the court found Scott suffered no damages.³⁹ First, the court rejected a pass-through claim flowing between Scott and Roseburg because the harvest contracts at issue called only for delivery of cut timber to a processing facility, not processing itself.⁴⁰ Further, even if “*arguendo*” Roseburg was a subcontractor, the court reasoned Scott would have no liability because the only guarantee made to Roseburg in the processing subcontract was Scott’s “best effort” to supply Roseburg with timber to process, which was merely a guarantee of fair dealing.⁴¹ Second, as to the direct damages award, the court held that, though Scott could not harvest the Pigout, Jigsaw, and Whitebird plots until 2004-2008 when the suspensions were lifted, Scott proffered no evidence that the delay in performance actually made these contracts any less profitable.⁴² Further, the breach in question was partial, rather than material and total, because Scott accepted USFS’s performance after the suspensions were lifted.⁴³ Scott was therefore only entitled to recover the “loss it suffered as the result of the delay or other defect in performance that constituted the breach” and not \$129,599 in replacement costs given that replacement was unnecessary in the end.⁴⁴ The court reversed the lower court as to the material breach damages award.⁴⁵

³⁶ 692 F.3d at 1374.

³⁷ *Id.* at 1375.

³⁸ *Id.*

³⁹ *Id.* at 1376.

⁴⁰ *Id.* at 1376-1377.

⁴¹ 692 F.3d at 1377.

⁴² *Id.* at 1378.

⁴³ *Id.* at 1379.

⁴⁴ *Id.*

⁴⁵ *Id.*

CONCLUSION

The court's ruling in *Scott Timber Company v. United States* represents a lucid exercise in contract interpretation, and demonstrates both the effectiveness and fairness written into USFS timber harvest contracts. The provisions authorizing the agency to suspend a harvest were defined by exigent circumstances. Further, the contracts at issue in this case, and discussed in decisions the opinion cited, clearly provided avenues for reimbursement of legitimate out-of-pocket expenses without compelling a contracting party to resort to judicial intervention. Scott Timber's claims failed to meet the standard for disposition via that administrative process, and ultimately that failure foretold the strength of the company's lawsuit. The court's decision in this case underscores the United States government's commitment to balancing economic vitality in the nation's forest with the well-being of forest-dwelling species that make our national forests unique. To contractually facilitate orderly timber harvest subject to specific conditions makes good, broad sense.