VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 484-6-19 Cncv

Vermont Agency of Transportation vs. Timberlake Associates, LLC, *et al.*

DECISION ON REMAND

This case returns, on remand from the Supreme Court, for the determination of whether the actions of Respondents R.L. Vallee, Inc. ("Vallee") and Crystal Clear Hospitality, LLC ("CCH") following this court's Judgment of Condemnation constitute "acceptance and use" of payments tendered by the State of Vermont Agency of Transportation ("AOT"), all pursuant 19 V.S.A. § 506(c). At a status conference held on July 28, 2022, the parties agreed that this question could be determined on cross-motions. Subsequently, AOT filed a motion for summary judgment, which both Vallee and CCH have opposed without filing motions of their own. The court grants the motion.

The material facts are not in dispute. On February 14, 2022, the Court issued its Findings of Fact, Conclusions of Law, and Order, determining that AOT had met its burden of demonstrating the necessity for takings proposed in connection with a project for reconstruction of the interchange between Interstate 89 and U.S. Routes 2/7 in Colchester, Vermont. It followed this determination with a Judgment of Condemnation, entered on February 25, 2022. The Judgment provided,

> Title to the land and rights described in the Appendix to this judgment will be transferred to [AOT] after [AOT], in accordance with 19 V.S.A. § 506, has recorded this judgment in the land records of the Town of Colchester, tendered or deposited payment of [AOT's] offer of just compensation, and notified the owners of the recording and payment.

The Judgment further provided,

> In accordance with 19 V.S.A. § 506(c), except in the case of agreed compensation, an owner's acceptance and use of VTrans' payment of its offer of just compensation does not affect his or her right to contest or appeal damages under 19 V.S.A. §§ 511–513, but shall bar the owner's right to contest necessity and public purpose.

On March 17, 2022, AOT sent Vallee a $750 check. The check was sent under cover of a letter that referenced Transportation Project Colchester HES NH 5600(14)—the same reference as in the

court's Judgment of Condemnation. The letter stated, "Enclosed is State of Vermont check No. 0000627193 dated 03/14/2022, in the amount of $750.00, issued in compliance with a Condemnation Order dated 02/25/2022." Vallee deposited the check into its operating account on April 12, 2022. On June 17, 2022, Vallee transferred $750 to an escrow account with the law firm of Downs Rachlin Martin, PLLC. On July 6, 2022, R.L. Vallee sent AOT a check for $750 from a Downs Rachlin Martin trust account along with a cover letter. On July 19, 2022, AOT sent a letter to Downs Rachlin Martin returning the check.

With respect to CCH, on April 19, 2022, AOT sent Hampton Inn/ Hilton Co., which is owned by Crystal Clear Hospitality, LLC, a check in the amount of $56,788.05. It sent a second check, in the amount of $26,411.95, on April 20, 2022. Both checks were sent under cover of letters that referenced Transportation Project Colchester HES NH 5600(14) and stated that the checks were "issued in compliance with a Condemnation Order dated 02/25/2022." CCH deposited these checks on April 28 and May 2, 2022.

The question thus presented is whether the actions of Vallee and CCH qualify as "acceptance and use" of AOT's payments, within the meaning of 19 V.S.A. § 506(c). That section provides: "Except in the case of agreed compensation, an owner's acceptance and use of a payment under this section does not affect his or her right to contest or appeal damages under sections 511-513 of this chapter but shall bar the owner's right to contest necessity and public purpose." In their motion papers, Vallee and CCH make much of the conjunctive requirement of the statute: before there can be a bar of the right to contest necessity and public purpose, there must be both "acceptance" and "use" of a payment. They essentially concede "acceptance," but contest "use." While they are right that the statute requires two distinct actions, their interpretations of the actions required miss the mark.

The applicable "rules of statutory interpretation are well-settled and familiar. Our goal is to implement the Legislature's intent and '[t]he definitive source of legislative intent is the statutory language, by which we are bound unless it is uncertain or unclear.' " *State v. Stell*, 2007 VT 106, ¶ 12, 182 Vt. 368 (citation omitted). The starting point for this exercise is the language of the statute. "If the intent of the Legislature is apparent on the face of the statute because the plain language of the statute is clear and unambiguous, we implement the statute according to that plain language." *Flint v. Dep't of Labor*, 2017 VT 89, ¶ 5, 205 Vt. 558. "The Legislature is presumed to have intended the plain, ordinary meaning of the adopted statutory language. Accordingly, words not defined within a statute are given their plain and ordinary meaning, which may be obtained by consulting dictionary

definitions." *Toensing v. Attorney* General, 2019 VT 30, ¶ 7, 210 Vt. 74 (internal quotations and citations omitted).

Of particular import to this case, the court must "presume that the Legislature chooses statutory language intentionally, so different words carry different meanings." *Baldauf v. Vermont State Treasurer*, 2021 VT 29, ¶ 19, 215 Vt. 18. The Supreme Court has made clear, however, that "[w]e will not interpret a single word or phrase in isolation from the entire statutory scheme. Instead, we read and construe together subsections of a statute that were drafted as part of an overall statutory scheme." *Id.* (internal quotations and citations omitted).

Applying these rules to 19 V.S.A. § 506(c) leads to the conclusion that there was both "acceptance" and "use" of AOT's payments to Vallee and CCH. Neither term is defined. Thus, the court looks to dictionary definitions. Merriam-Webster's online dictionary defines "acceptance" as "the act of accepting something or someone"; perhaps more to the present point, it also defines "acceptance" as "the act of accepting a time draft or bill of exchange for payment when due according to the specified terms." *Acceptance*, MERRIAM-WEBSTER DICTIONARY ONLINE, HTTPS://WWW.MERRIAM-WEBSTER.COM/DICTIONARY/ACCEPTANCE (accessed February 10, 2023). It defines "use" as "the act or practice of employing something" or "the privilege or benefit of using something"; again, perhaps more to the present point, the definition includes "the legal enjoyment of property that consists in its employment, occupation, exercise, or practice." *Use*, *ID.*, HTTPS://WWW.MERRIAM-WEBSTER.COM/DICTIONARY/USE (accessed February 10, 2023).

The court's interpretation of these terms is further informed by its reading of the entire statutory scheme. Broadly speaking, chapter 5 of Title 19 sets forth the process for condemnation of property for highway projects. Section 501 sets forth definitions, none of which are at issue here. Section 502 confers authority upon AOT, and requires a public hearing before it initiates condemnation proceedings. Section 503 sets forth further steps, including a determination of necessity, offer of condemnation, negotiation, and notice, that AOT must take before initiating condemnation proceedings. Section 504 governs procedure for the initiation of a condemnation proceeding. Section 505 governs the condemnation proceeding, pursuant to which the court entered the judgment referenced above. Section 506—the provision at issue here—addresses post-judgment procedure, including the requirement AOT "tender to the property owner, or deposit with the court, the amount of the offer of just compensation prepared under subsection 503(b) of this chapter or any other amount agreed to by the owner." 19 V.S.A. § 506(a)(1)(B). Sections 511–13 then address the procedure for resolving disputes over the value of property taken.

In very broad strokes, the procedure these provisions set up, in a contested case such as this, is straightforward. If AOT prevails on its claim of necessity, it must record the judgment and tender the amount it has determined to be just compensation for the property, per § 506(a)(1); title then vests in the State, per § 506(b). The property owner is free to reject the tender, *see* § 506(a)(2); it may also accept the tender, without prejudice to its right to contest the amount tendered, *see* § 506(c). If there is both "acceptance" and "use," however, the property owner is precluded from any further contest of necessity. *Id.*

Applying this framework to the facts of this case leads inexorably to the conclusion that Valle's and CCH's actions following constituted both "acceptance" and "use" of payments from AOT. It is undisputed that following the entry of this court's Judgment of Condemnation, AOT tendered compensation checks, as required by both § 506(a)(1)(B) and the Judgment. The checks, and particularly AOT's cover letters, made clear that they were tendered in compliance with the Judgment. Equally clearly, both Vallee and CCH made "acceptance" of the checks; not only did they not return the checks or otherwise reject or object to the tender, but they promptly deposited them in their bank accounts. By no reasonable interpretation can this be anything other than "the act of accepting a time draft or bill of exchange for payment when due according to the specified terms."

Indeed, Vallee and CCH do not seriously dispute their "acceptance" of AOT's checks. Rather, they argue that they accepted the checks by depositing them in their bank accounts. They argue instead that they did not "use" the funds represented by the checks, because they are still in the bank. This assertion fails for a simple reason. While Vallee and CCH acknowledge repeatedly that what the statute requires is "acceptance" and "use"—both nouns—their argument that their deposits did not constitute "use" are based on their interpretation of "use" as a verb. *See, e.g.,* Respondents' Joint Opp. to Amended Mot. for Summ. J., 2 ("whether Vallee 'used' the $750 is moot"), 3 ("the mere act of 'accepting' or 'depositing' a check does not constitute 'using' the funds"; "Vallee and CCH submitted uncontroverted sworn testimony that they did not use the State's funds"), 5 ("THE MERE ACT OF 'ACCEPTING' OR 'DEPOSITING' A CHECK IS NOT THE SAME AS 'USING' THE FUNDS"), 6 ("a landowner who is considering challenging necessity and/or public purpose would not use the funds before getting clarity on what to do with the funds in the event they file such a challenge"). Indeed, their argument on this point concludes, "In sum, the State's AMSJ should be denied because, as a matter of fact and law, the mere act of 'accepting' or 'depositing' a check is not the same as 'using' the funds." *Id.* at 9.

While this may appear a subtle point of grammar, it is nevertheless critical. While "depositing" a check may not be "using" the funds it represents—at least in a fine, sophistical sense—it most assuredly is a "use" of the payment. Once the payment clears, the issuer no longer has "the privilege or benefit of using" the funds; their "legal enjoyment" has passed irrevocably to the owner of the bank account.

Nor, as Vallee and CCH suggest, does this interpretation of "use" in any way elide the concepts of "acceptance" and "use." Rather it is their interpretation, by its exclusive focus on the act of depositing a check, that creates the illusion of elision. What this narrow focus overlooks is the initial response to a tender, *i.e.*, offer, of payment—refusal, as recognized in § 506(a)(2), or acceptance, as recognized in § 506(c). Thus, "acceptance" is the act of receiving a check and taking no action to return or reject it. "Use" follows "acceptance" when the recipient of the tender does something further to enjoy the legal benefit of the funds. The recipient need not spend the funds to have their use; it is sufficient that the recipient and the recipient alone has the privilege or benefit of using them. This unquestionably occurs when the recipient deposits the funds in its bank account.

Vallee and CCH make several additional arguments in opposition to AOT's motions. These arguments may be beyond the limited scope of this remand—"to make additional relevant factual findings and issue an order concerning whether either appellant's actions following the civil division's final judgment constitute 'acceptance and use' of payment pursuant to § 506(c)." Nevertheless, in an abundance of caution the court addresses each briefly.

First, Vallee argues that the question of whether it "used" the funds is moot, because since AOT's initial tender of payment and Vallee's acceptance and deposit of the same, AOT has revalued Vallee's property at a higher amount. This argument, however, cannot overlook the fact that AOT did in fact tender payment and Vallee did in fact accept and deposit that payment. What the argument does overlook is that the question of value remains open, per § 506(c), irrespective of a property owner's response to AOT's tender. Thus, that AOT subsequently revalued the property, either *sua sponte* or in the negotiation and litigation process set forth in §§ 511–13, is entirely irrelevant to the question of whether the property owner's acceptance and use of AOT's payment precludes subsequent contest of necessity.

Next, Vallee and CCH argue that AOT has not met its burden of establishing that they made a knowing, intelligent, and voluntary waiver of their rights to contest necessity and public purpose. This argument fails as a matter of both fact and law. First, their claims of ignorance and confusion defy reason and common sense. Both are charged with knowledge of the law. *See State v. Richards*, 2021

VT 41, ¶ 31 ("the law presumes all individuals know the law and are responsible for noncompliance"). Moreover, this court's Judgment of Condemnation fully advised them of the operation of the very provision of which they now claim ignorance. The cover letters for the checks referred Vallee and CCH to the Judgment of Condemnation. Neither Vallee nor CCH can claim credibly to be a naïf. Both are represented by highly competent counsel who have skillfully raised every argument that could plausibly be made in this case. The suggestion that they were somehow duped into blithely surrendering their statutory and constitutional rights is, frankly, a dog that will not hunt.

Next, Vallee and CCH argue that they have submitted evidence that they did not "use" AOT's funds, because the funds remain in their accounts (or, in Vallee's case, its lawyers' escrow account). This argument is foreclosed by the court's interpretation of "use." Moreover, it would take the court down a rabbit hole, requiring it to determine which of the otherwise fungible funds in a bank account had once been AOT's. Vallee and CCH offer up the "lowest intermediate balance" rule, as described in *Meyer v. Norwest Bank Iowa, Nat'l Ass'n*, 112 F.3d 946, 950-51 (8th Cir. 1997) (citing cases). A review of that case, and of others in which the "rule" has been applied, reveals that none of the contexts in which the rule has been used is apposite to the inquiry Vallee and CCH would have the court undertake here. Vallee and CCH offer no valid reason why the well-established LIFO (last in, first out) or FIFO (first in, first out) inventory valuation methods might not properly be used here. The latter, like the lowest intermediate balance rule, would lead to an absurd result: as long as Vallee maintained a minimum balance of $750, or CCH a minimum balance of $83,200, they would not have "used" a penny of AOT's payment. Conversely, under the former approach, as soon after their deposits as either Vallee or CCH spent a penny, they would have "used" AOT's payment. Frankly, it seems highly unlikely that the Legislature intended any of these exercises.

Finally, Vallee and CCH levy a facial challenge to the constitutionality of §506(c). This, clearly, is well beyond the scope of this remand. Moreover, per V.R.C.P. 24(d), the court's consideration of this question would require that it first notify the Attorney General and allow her intervention, for presentation of evidence and argument. The court declines to undertake this exercise without express direction from the Supreme Court.

ORDER

The court grants AOT's Motion for Summary Judgment. Vallee's and CCH's actions, in first receiving and not rejecting AOT's checks and then depositing them into their accounts, constituted

"acceptance and use" of AOT's payments pursuant to 19 V.S.A. § 506(c). The purpose of this remand now having been met, the clerk will transmit a copy of this decision to the Supreme Court and close the case.

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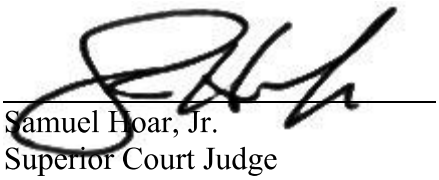

Samuel Hoar, Jr.
Superior Court Judge