

David & Susan Semas

13-52337-btb

Metalast Surface Technology v. Semas- Adv. 14-05036

Unofficial Transcript of Conference Call held February 19, 2015 with Judge Zive

Appearances: Stephen Harris representing David and Susan Semas, only S. Harris on phone; Janet Chubb representing Metalast Surface and Meilings, only J. Chubb on phone

Judge Zive- You people asked for a telephone conference, I have no idea why.

Judge Zive: I have read the Motion for an Order approving compromise, I've read the response, Declarations from Peter M....M. Meiling, Ted M. and the response to 267, **which candidly stunned me**, and I've read minutes that were taken at the time of the hearing, as well as a draft of a transcript transcribed from the audio disc and have reviewed my notes of the negotiations that took place on January 27th.

Chubb: Alright, thank you your Honor. You retain jurisdiction for enforcement of the settlement agreement. There is a dispute about enforcement because we do not believe that there was a meeting of the minds and that the Meilings understood that they were agreeing to stop the use of the name Metalast on their products, as well as in their business name and I think that is at the crux of this matter, it occurs to me and I understand your honor, that you believe that was the product name, and I confess, I thought that's what it was but the real key is whether the Meilings thought that was what they were agreeing to...

Zive: That is not the law, that is not the law in the state of Nevada as I understand it. The law in Nevada is that there is an objective theory of contracts, not a subjective theory, and I have read the settlement that has been brought before Judge Beesley. It is practically verbatim from what occurred and it is absolutely accurate, and I know because I have read it again and I'll just read it- trademark regarding the name Metalast, there was dispute regarding ownership and that dispute has been resolved as follows: Metalast Surface Technology through the Meilings will continue to use the mark for 90 days following entry of the order approving the settlement agreement. At the end of that 90 day period, Metalast Surface Technology, the Meilings and any other entity in which the Meilings have an interest, will no longer be able to use the name Metalast in any fashion or manner. I can't imagine any more inclusive terms. Following the 90 days, the mark will be owned by Mr. and Mrs. Semas or any entity in which they choose to transfer the mark. And then we went through the rest of it, and in fact, Ms. Meiling had a question regarding use of the word "metal" and we talked about that at the end, so for her to take the position that she didn't understand, I just....I find it to be incredible.

Chubb: Your Honor, I had the question about metal in the use of their name and she had a question about the name change and that being protected which I think supports our position that that's what she thought was happening, it was the name change in the business.

Zive: No. That would be inconsistent. I remember during the negotiations that Mr. Semas told me that he thought they would have a problem changing the name and not being able to use the name regarding certain spats and government contracts that they had and I raised that concern with your clients in my chambers, and I think that's when, according to my notes, I scratched out the 60 days and

made it 90 days and wrote it will get new name and not use the trademark, and would inform, it takes 90 days to make the transition and inform people of the change. But at any rate, I don't why that's in front of me. That's up to Judge Beesley whether or not he's going to approve the settlement. 9019 is generally, if not solely, the opportunity for any other party in interest to object to the settlement on the basis that it doesn't satisfy the test as determined by the United States Supreme Court, as applied in the Ninth Circuit through the AMC Properties and Winston cases, so what do you want me to do today? You've got to ___ in front of Judge Beesley. He'll make the determination of whether or not there was an agreement, not me. I'll be glad to interpret. I know what I think, but I'm not here to resolve a matter that's pending in front of Judge Beesley.

Chubb: Okay well, if you were convinced that they did not understand this and that perhaps you and I are wrong about what they understood, and we got a lie detector test, would that have any effect on your findings?

Zive: No. Mr Harris?

Harris: Yes sir.

Zive: Do you have the same recollection I have, of your client raising that issue regarding the use of the trademark and the name and how that might affect relationships and contracts with governmental entities? I think the Navy was...

Harris: Yes, I do have that recollection your Honor, and in fact I remember that it was the Meilings' suggestion in not using the trademark Metalast going forward.

Zive: Well that's correct.

Chubb: Well I am just saying that we didn't talk about the uses of Metalast on the product to my recollection your Honor in chambers or anywhere else, and that isn't what they understood or would have agreed to. Why would they say we're going to change everything and then have to negotiate over the use of the Metalast word on their products, when get into an arrangement with Mr. Semas again, when the reason they wanted to come to a settlement was to get out of that arrangement and not deal with the Semas anymore. It doesn't make any sense that they would do it.

Zive: They were going to not use the name Metalast in any manner or fashion after 90 days, and that's how they severed their relationship. They got the patents, that was taken care of early in the settlement conference. Semas gets the trademarks after your clients have the ability to use the name for about...for 90 days from that date the settlement might be approved by Judge Beesley. That's the divorce, then that's what I understood. And it was real clear because Mr. Semas looked at me and said I don't know how they think they're going to do that and I know I brought up Semas' concern with your clients and then I gave them every opportunity before I went on the record, when I was on the record and if they had any questions whatsoever, they were given every opportunity to raise those and since now there seems to be some concern that the settlement conference wasn't conducted properly or everything wasn't explained, I...fine. Tell Judge Beesley.

Chubb: I feel equally responsible for any misunderstanding.

Zive: I don't feel responsible at all. Let me make that clear. In fact, I offered for them to leave chambers on several occasions, let them speak to whomever they wanted to speak. Can you really do this? Will this work for you? I know those are questions that I asked and I know there were discussions

between Mr. and Mrs. Meiling in regarding that, if they misunderstood, then why don't...if they had any questions about the use, they had a chance before we went on the record...I don't know what more I could have done for your clients. I really don't. And when I use language that they can't use the mark or name for 90 days, at the end of that period, their company, them and any other entities will no longer be able to use the name Metalast in any fashion or manner, I don't, what do I have to do?

Chubb: Well okay, on the record, you know at the beginning, you usually say you don't have to settle and all that stuff, it didn't go quite that way, and then at the beginning I understood that if there were any corrections (Zive interrupts), excuse me let me finish please, if there were any corrections that the lawyers could make them at the hearing. It doesn't say that and they didn't understand that. They thought they were going to get a document and look at that and the concerns that were raised by your use of "in any manner whatsoever" could be raised then. I'm just telling you that's what they understood.

Zive: Well I don't know how they could possibly have that understanding when I said the agreement was enforceable at that time, at that hearing and that it would only be enforceable for third parties once Judge Beesley had, if he did approve it. So that makes even less sense to me because I know I told them **no buyer remorse**, no changing the terms, if you have any questions, uhh...I just don't know what more I can do. And looking at the unofficial transcript, I asked, "Do you have any questions of me?" And Ms. Meiling said, "Yes, when you related to release, I would like the release to include whatever new name we use as well. The new name for the company." I said, "Of course, thank you. We want as broad as possible, that's why I said entities." And then I asked Mr. Meiling the same questions I asked Mrs. Meiling, they all understood it and I asked them both, do you understand...uhhh...this is what I asked Mrs. Meiling, "You were present both before and after we were on the record when I explained I would enforce the agreement because I consider it to be binding as of this times, between the parties. So to say they expected to get something in writing later is absolute nonsense.

And then I go on, of course subject to the approval by Judge Beesley but as between the parties, it would be binding now. And that I would enforce it, if necessary. So if in fact they didn't understand and they failed to tell me, uhhh fine. To me, it goes to their credibility. But fine, and then I asked Mr. Meiling exactly the same thing and told him exactly the same thing, and also you heard the Court me say that I would enforce the terms of agreement because I consider it to be binding as of this time. "Mr. Meiling?" "Yes" (Said Mr. Meiling). Do you have any questions (Zive)? "No" (Mr. Meiling). And then when I read this: *"The Meilings believe they agreed to change the company name to eliminate the term Metalast. The change is relatively minimal to be done in just 90 days and compensated with a relatively small claim \$258,000. But the settlement motion calls for sweeping changes."*

When I read that and its written by lawyers who were present...no. *"Now, maybe there is a way to reconcile it because I still think resolution is at everyone's best interest but there aren't any sweeping changes."* I'm sorry. I have determined based on those representations that I am simply going to remove myself from conducting any further settlement conferences for Kaempfer Crowell. Not going to do it anymore. I know what I did and I know that I had talked with those in chambers and I told them that they could go forward, and they understood the costs, we talked about that at length, so you know I don't know what else I can do for folks other than this, and then to be told when I read a proposal that is verbatim what was put on the record, that is has sweeping changes, is like Alice in Wonderland to me. It's that simple.

Chubb: Well, I will say this is the most expensive case I've ever been involved in based on what you just said, and I am truthfully sorry that your taking that position.

Zive: Well, I'm sorry. That's why I make a record. And, whether I'd enforce it, first I have to see what Judge Beesley does and if he believes and he's willing to accept the position, I would certainly reevaluate, as I said, I just don't know what else I can do. And when you say share the responsibility, I don't. I'm sorry.

Chubb: We did not talk about the product, we never talked about the product.

Zive: I know I talked about the product. When we talked about how it could be used with existing specs and relationships with the entities such as the Navy, what else would we be talking about? And I know I had that conversation. I know I did. And I know I had it with Mr. Semas and Mr. Harris confirmed my memory.

Chubb: Well you certainly had it with them, but they can't confirm your memory about what you talked about with us.

Zive: I know I said it. I said are you sure this will work for you? Is that enough time? Mr. Semas says he doubts he can make this work because of the specs and oh no, we're sure we can do it. Okay fine. And my notes reflect that conversation.

Chubb: And I am telling you that is not what they understood and you believe or disbelieve them. I am offering to have their testimony under a lie detector test to prove whether they understood what the "this" we were talking about, can you do "this" in 90 days was about. And it could be dispositive or non-dispositive, and if it were dispositive one way or the other that should resolve it.

Zive: Resolve what?

Chubb: Whether they understood what they were doing. Whether there was a meeting of the minds.

Zive: If I was looking at this under an objective theory....Fine. I'm not going to spend any more time on this. I don't want to argue about it. Now I am being told I'm responsible because your clients didn't understand what they were doing because I didn't start the settlement conference the way you think I should start the settlement conference then I don't know what more they can understand and I am disturbed greatly, that's why we have a 9019 process. If you're asking me, I believe that the terms of the settlement agreement that are in the motion are not only consistent but practically verbatim what was put on the record at the completion of the settlement conference and certainly you can go forward and explain to Judge Beesley exactly as you wish to do. Once again, I don't know what you expect me to do today. To say this wasn't the deal, well it was the deal. I don't know what you want. Mr. Harris, what do you want me to do?

Harris: Do you approve the settlement between the parties? You said its enforceable between the parties, I just want that to continue. And also, your Honor, with all due respect, you know there was a complaint that was filed by the Meilings, that was never served, but there's a complaint on record that raises the Metalast trademark disputes and issues and I don't want to go in confidential settlement letters and such, these issues were raised as part of the mediation, let me just say that. There's enough of this at issue if there were questions, they should've been asked.

Zive: Well, you know...

Harris: It wasn't a hidden issue.

Zive: Very uncomfortable. A lot of time was expended by counsel, by the parties, by the Court. If they needed more time to consider it, to see what the ramifications, it certainly would have been provided. I often do that in settlement conferences, I say okay we will continue it till you get that information. I've had a settlement conference go on for 16 months. I've got one now that's longer than that. So I have consistently for over twenty years have understood that there are occasions when the parties need to be able to think about things or get additional information. I don't think that I've ever been one of those settlement conference judges that hammers people into submission, in fact, just the opposite. So, you know, I'm only willing to say exactly what I said before, that the agreement that I read in the motion, certainly, is the agreement that was placed on the record on January 27th, and if your clients believe that there is an appropriate basis for seeking relief from what they agreed to, based upon misunderstanding or any other terms, that's fine, the motion to approve is in front of Judge Beesley and whether I have any further rule or not might well have to be determined after that point but I don't see...if I thought what was being proposed by Judge Beesley, well being proposed to Judge Beesley, was inconsistent with what was placed on the record, that is when I would probably get actively involved. But right now, I don't have anything in front of me from anybody seeking to enforce an agreement because it may well be unnecessary based on how Judge Beesley rules. I have understood the nature of this status conference today was to determine whether or not the agreement as proposed to Judge Beesley was consistent at my understanding of it and my answer to that is unequivocally yes. I have no idea of what your clients understood other than what they told me and what they placed on the record and they were given the opportunity on several occasions to speak out, to clarify but I guess it's the fault of everybody else.

Chubb: I am not saying it was your fault, I am saying because of the way it happened, they didn't understand, I'm not saying it's your fault.

Zive: No, well it's not your fault either. There's no responsibility. The responsibility for this falls directly upon your clients and that is my belief and these are people that appeared to be intelligent, they were articulate and they were provided every opportunity to ask questions. They will be given their opportunity to present their case before Judge Beesley. I wish everybody the best of luck. Is there anything else?

Harris: No sir.

Chubb: No.

Zive: Thank you all, bye bye.