

Fay Corp. v. Frederick & Nelson Seattle, Inc., 896 F.2d 1227 (9th Cir. 1990)

THE FAY CORPORATION,
PLAINTIFF-APPELLEE/CROSS-APPELLANT,

v.

FREDERICK & NELSON SEATTLE, INC., AND
BAT HOLDINGS I INC.,
DEFENDANTS-APPELLANTS/CROSS-APPELLEES.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted October 4, 1989.

Decided February 28, 1990.

Appeal from the United States District Court for the Western District of Washington.

Before WALLACE, PREGERSON and ALARCON, Circuit Judges.

PER CURIAM:

The parties contest the enforceability of a "gold clause" in a 99-year lease executed in 1929, and the allocation of adjusted rent liability under the clause. Fay Corporation filed a complaint in Washington state court seeking increased rents under the lease and its gold clause. Defendants-Appellants Frederick & Nelson Seattle (F & NS) and BAT Holdings I (BAT I) removed the case to federal court.

The district court efficiently disposed of the convoluted common law and statutory issues in a series of thorough and thoughtful opinions. 646 F. Supp. 946 (W.D.Wash. 1986) recon. denied, 651 F. Supp. 307 (1987), 682 F. Supp. 1116 (W.D.Wash. 1988). The court found the gold clause in the commercial lease to be enforceable. Though Congress had passed legislation in 1933 prohibiting enforcement of contractual terms tying contract value to the gold standard, 48 Stat. 112, 113 (1933) (formerly codified at 31 U.S.C. § 463), Congress determined in 1977 that obligations entered into after 1977 would be enforceable. 31 U.S.C. § 5118(d)(2) (1983). The district court found that the 1982 lease transaction which transferred the leasehold interest from a previous tenant to defendant-appellee BAT I actually constituted a novation. The court concluded that this novation was a new obligation for the purposes of § 5118(d)(2).

In a Solomon like analysis, the court then ruled that the appellee-landlord was entitled to adjusted rents against the appellant-tenant F & NS, but had waived its right to adjusted rents against appellant-tenant BAT I.

We agree with the district court in all respects, with one qualification. We do not believe that the Fay Corporation evinced sufficient intent, under Washington law, to waive its rights against BAT I for increased rents. See *Wagner v. Wagner*, 95 Wn.2d 94, 621 P.2d 1279, 1284 (1980) ("to constitute a waiver, other than by express agreement, there must be unequivocal acts or conduct evincing an intent to waive"). Nevertheless, as we do believe that Fay was estopped from collecting those rents under the district court's alternative estoppel theory, the result remains unchanged. *Board of Regents v. Seattle*, 108 Wn.2d 545, 553, 741 P.2d 11 (1987) ("Silence coupled with knowledge of an adverse claim will estop a party from later asserting an inconsistent claim.").

The district court is therefore AFFIRMED.

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Excerpt from *Fay Corp. v. BAT Holdings I, Inc.*, 646 F. Supp. 946, 948 (W.D.Wash. 1986):

Prior to the Depression era, "gold clauses" in contracts were a popular method of adjusting for inflation. These clauses mandated payment in gold coin, its equivalent, or, with some other wording, tied the dollar amount demanded with the price of gold.

In 1933, a joint resolution of Congress invalidated all gold clauses and provided that "dollar for dollar" payments in United States currency would discharge the obligation. 48 Stat. 112, 113 (1933) (formerly codified at 31 U.S.C.A § 463).[fn2] The following year, the Gold Reserve Act banned private ownership of gold. (Repealed, formerly codified in part at 31 U.S.C.A. §§ 442, 443 (1976).) The holding of gold remained prohibited until 1973, when Congress repealed the 1934 ban on private ownership of gold (87 Stat. 352 (1973), as amended by 88 Stat. 445 (1974), but did not address the 1933 prohibition of gold clauses. This omission was remedied in 1982, when the statute at issue was adopted (31 U.S.C.A. 5118(d)(2)(1983), (hereinafter "section 5118"). The language provided that obligations covered by gold clauses prior to 1977 are, as before, dischargeable dollar for dollar with United States currency. But "an obligation issued after October 27, 1977" is not so limited.

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Excerpt from *Wells Fargo Bank, N.A. v. Bank of America NT & SA*, 32 Cal. App. 4th 424, 428-29, 38 Cal. Rptr. 2d 521 (1995):

Prior to the economic depression of the 1930's, gold clauses were popularly used in contracts as a crude price-indexing mechanism to adjust for inflation. (*Fay Corp. v. BAT Holdings I, Inc.* (W.D.Wash. 1986) 646 F. Supp. 946, 948.) Gold clauses operated by mandating payment in gold coin or its equivalent, or by tying the dollar amount due under a contract (e.g., monthly rent due under a lease) to the price of gold. (*Ibid.*)

In 1933, however, in the midst of the Great Depression, a joint resolution of Congress invalidated all gold clauses and provided that "dollar for dollar" payments in United States currency would discharge any obligation which had required payment in gold. (H.J.Res. No. 192, 73d Cong., 1st Sess. (June 5, 1933) ch. 48, 48 Stat. 112, 113 (formerly codified at 31 U.S.C. § 463).) Also as a monetary reform measure, Congress banned the private ownership of gold from 1934 until the repeal of such legislation in 1973. (*Fay Corp. v. BAT Holdings I, Inc.*, *supra*, 646 F. Supp. at p. 948.) However, Congress did not address the 1933 joint resolution which invalidated gold clauses in contracts until October 28, 1977, when it amended the law to provide that the joint resolution "shall not apply to obligations issued on or after the date of enactment of this section." (Pub.L. No. 95-147 (Oct. 28, 1977) § 4(c), 91 Stat. 1229, former 31 U.S.C. § 463 note; hereinafter referred to as the 1977 amendment.) The current version of this enactment provides as follows: "An obligation issued containing a gold clause or governed by a gold clause is discharged on payment (dollar for dollar) in United States coin or currency that is legal tender at the time of payment. This paragraph does not apply to an obligation issued after October 27, 1977." (Pub.L. No. 97-258 (Sept. 13, 1982) 96 Stat. 985, 31 U.S.C. § 5118(d)(2).) Accordingly, "obligations covered by gold clauses prior to 1977 are, as before, dischargeable dollar for dollar with United States currency. But `an obligation issued after October 27, 1977' is not so limited." (*Fay Corp. v. BAT Holdings I, Inc.*, *supra*, 646 F. Supp. at p. 948, fn. omitted.)

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See also *Trostel v. American Life & Casualty Insurance Co.*, 92 F.3d 736 (8th Cir. 1996), vacated, 519 U.S. 1104, 136 L. Ed. 2d 829, 117 S. Ct. 939 (1997), reinstated, 133 F.3d 679 (8th Cir. 1998).