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James Korobas v. James A. Henderson : Brief of Appellant

Utah Supreme Court

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In the Supreme Court of the State of Utah

JAMES KOROBAS,

Plaintiff and Appellant,

vs.

JAMES A. HENDERSON,

Defendant and Respondent.

Case
No. 8636

APPELLANT'S BRIEF

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APPELLANT'S BRIEF

STATEMENT OF FACTS

The action below was for breach of a construction contract. Plaintiff has appealed from a judgment of no cause of action dated and entered January 14, 1957 (R. 60).

No proof was adduced at the trial; this appeal is based primarily upon the pleadings and rulings of the Court made at a pre-trial conference and a *pro forma* trial.

On March 25, 1952 the appellant and respondent entered into a written contract by the terms of which the respondent entered into a written contract by the terms of which the respondent was to construct for appellant a building at Eighth East and Third South Streets in Salt Lake City, Utah (R. 1, par. 2; R. 10, par. 2). It was to be a store building consisting of four storerooms, built according to the plans and specifications prepared by a named engineer (R. 4, par. 1). The contract price was \$29,600.00 (R. 6, Par. 17), subject to change if prices charged by sub-contractors were changed (R. 36, 65).

The complaint enumerated defects in workmanship and variations in the plans of the building as finally completed by the respondent (R. 2). The first defense was that final payment had been made by the appellant to the respondent on December 5, 1952, and that this payment constituted acceptance of the building and conclusion of the contract (R. 8). The same defense included a contention that by the terms of paragraph 23 (R. 6) the appellant's sole remedy for faulty workmanship and materials was "stopping the job or taking possession of the work or supplying satisfactory materials or workmen as the job progressed." The defense alluded to paragraph 15 (R. 5) of the contract but did not contend that the terms of that paragraph barred the present action.

On November 2, 1956, a pre-trial conference was held before Hon. A. H. Ellett, Judge of the Third Judicial District Court (R. 32). At that conference the action against one of the original defendants, General Casualty Company of America, was dismissed (R. 53), and the dismissal is not at issue in this appeal. However, the court also concluded that the action of

appellant against respondent was barred by the provisions of Paragraph 15 of the contract and that appellant could not recover, as a matter of law, for any defects except those which were latent at the time of final payment (R. 39, 45). The court also decided, as a matter of law, which defects were latent (R. 39-43). A trial was conducted on November 29, 1956 (R. 48), at which time the respondent tendered to appellant the amount of \$137.60 as payment for the items listed in Paragraph 4.A.7 and 4.A.9 of the complaint (R. 48). The appellant accepted the tender, but without waiving any rights as to any other injuries (R. 49). The court having indicated that recovery for all patent defects was barred by Paragraph 15, and that it would sustain objections to any evidence relating to patent defects (R. 51), the appellant rested his case (R. 50).

Paragraph 25 of the contract (R. 7) provided for recovery of costs and a reasonable attorney's fee expended by a party in enforcement of the contract.

STATEMENT OF POINTS

1. The Court's interpretation of Paragraph 15 of the contract as prohibiting recovery for patent defects was erroneous.
2. The Court erred in ruling as a matter of law that certain defects were patent and others latent.
3. The Court erred in failing to award to plaintiff a reasonable attorney's fee for enforcement of the contract.

ARGUMENT

THE COURT'S INTERPRETATION OF PARAGRAPH 15 OF THE CONTRACT AS PROHIBITING RECOVERY FOR PATENT DEFECTS WAS ERRONEOUS.

It is elementary that a cause of action for damages arises upon breach of a contract, and that the obligation to pay damages is law-imposed. 12 Am. Jur., Contracts, § 388; 9 Am. Jur., Building and Construction Contracts, § 116. The action in the present case was not directly involved with conditions, whether precedent or subsequent, but was an action for failure to perform as promised.

The Court below held that notwithstanding the breach the plaintiff could not recover his damages. The ruling was based upon a construction of Paragraph 15 of the contract (R. 5, 59), which provides:

"If either party to this Contract shall suffer damage in any manner because of any wrongful act or neglect of the other party or of anyone employed by him, then he shall be reimbursed by the other party for such damage. Claims under this clause shall be made in writing to the party liable within a reasonable time at the first observance of such damage and not later than the time of final payment, except as expressly stipulated otherwise in the case of faulty work or materials, and shall be adjusted by agreement or arbitration."

The trial court construed the above paragraph as being a general non-claim provision functioning to prohibit claims not only for wrongful acts and neglects but for failure to perform the work required by the contract or for performing it otherwise than as required by the contract. The paragraph

does not purport to be that broad. A breakdown of the provision shows the court's construction to have been erroneous.

The first sentence requires "reimbursement" under certain circumstances. "Reimbursement" is not generally used in referring to rights of action for breach of contract; it has been defined as meaning "to pay back" or to "make return or restoration of an equivalent for something paid, expended, or lost" or to "indemnify" Black's Law Dictionary (3rd Ed.) 1520. Damages for breach of contract are not based upon indemnification but upon a difference in the value of the performance promised and that given.

The paragraph requires reimbursement for any "wrongful act or neglect." The word "wrong" has been stated to signify, in its most usual sense, "an injury committed to the person or property of another, or to his relative rights unconnected with contract." Black's Law Dictionary (3rd Ed.) 1862. "Neglect" is ordinarily used in connection with tortious conduct. Although it is true that the parties are probably liable for their wrongful acts or neglects in any event, the sentence broadens the common law liabilities of the parties by making them guarantors of the conduct of persons employed by them.

The first sentence defines the contractual right; in so doing it makes no reference to faulty workmanship or materials. If it stood alone it would be clear that it was not intended to limit the time within which action might be brought for failure to perform the construction work as promised. The second sentence, however, reads as follows:

"Claims under this clause shall be made in writing to the party liable within a reasonable time at the first

observance of such damage and not later than the time of final payment, except as expressly stipulated otherwise in the case of faulty work or materials, and shall be adjusted by agreement or arbitration.” (R. 5.)

The court below must have interpreted this sentence as broadening the meaning of “wrongful act” and “neglect” so as to bring within the operation of those words the type of default referred to in the exception. The clause is somewhat similar to the one involved in *Employers’ Liability Assur. Corp., Ltd., v. Morrow* (6 Cir. 1906), 143 Fed. 750. In that case an insurance contract contained a number of clauses setting out the compensation to be paid for various injuries. One of the clauses contained the following exception:

“Except in the case of a claim consequent on the death of the assured or loss of the sight of both eyes or of the loss of two entire limbs.”

It was argued that this exception made the proviso in which it appeared repugnant to a previous clause. Said the court:

“If this exception had been omitted, the provision could not possibly have applied to the cases mentioned in the exception. The exception did not, therefore, operate to take out of the proviso something which, but for the exception, would have been included. Its presence, therefore, cannot under such circumstances bring within the proviso a claim which would not have been within the proviso if the exception had been omitted. The ordinary office of an exception or proviso is to take special cases out of a general class or to guard against misinterpretation. Experience shows, however, that they quite frequently are introduced from excessive caution, in such cases operating only to bring confusion. There is no general rule requiring that every other claim or subject of the same general class as those

excepted out shall be regarded as embraced in the general words of the contract or law unless the general language of the writing leaves it doubtful whether the matters named in the exception would have otherwise been within the general terms of the law.”

It has been stated that the proper use of a proviso or exception is “to qualify what is already affirmed or except something from inclusion therein, but not to enlarge.” *Solomon v. Neisner Bros., Inc.* (1950), 93 F. Supp. 311, 318; affirmed 187 F.2d 735. Also, that the “ordinary office of an exception or a proviso is to take out of a contract that which otherwise would have been included in it, or to guard against misinterpretation.” 17 C.J.S., Contracts, § 343; *Sears v. Childs* (1941), 35 N.E. 2d 663, 309 Mass. 357.

As construed by the trial court the exception in Paragraph 15 excepted nothing; it broadened the meaning of “wrongful act” or “neglect” to include failure of performance of the contract, or, rather, so much of failure of performance of the contract as was latent at the time of final payment. The court looked at the exception as if it had been thrown into the contract by someone who didn’t know what was coming next, and wanted the clause to avoid repugnancy in event there was a provision somewhere else in the contract relating to “faulty work or materials.” Such an assumption might be legitimate in the case of complicated Government contracts in which typed special provisions are added to printed general provisions; but it is not legitimate where the entire contract is put together as one typed document. At the time of signing the contract the parties must have known that there was no express stipulation elsewhere in the contract governing the time within

which a claim for "faulty work and materials" had to be made. They must have intended the clause to have some effect; and if the only effect intended was to broaden the meaning of "wrongful act" and "neglect" the parties chose a circuitous route indeed. Nor is it reasonable to assume that they were providing for some sort of future stipulation, since they could have amended any part of the contract at any later time.

In accordance with the rules announced by the authorities above cited, we believe Paragraph 15 must be construed as applying only to conduct of the tort type, with the exception added for the purpose of avoiding misinterpretation. That its purpose misfired is no reason to ignore the purpose. By treating the exception only as an exception both the law of semantics and the parties' reasonable exception emerge intact.

The trial court's ruling was made without consideration of any testimony and should not have the weight of a finding of fact. Interpretation and construction of the contract is a question of law in this instance and should be so treated by the court. We recognize, of course, that facts may have a bearing upon the interpretation of the contract, and would have been prepared to show, for instance, that Paragraph 15 is the same as Article 31 of the standard contract used by the American Institute of Architects (See 2 Nichols Encyc. of Legal Forms, Building and Construction Contracts, par. 2.1071, p. 283), that in the A.I.A. contract the paragraph has not been used to apply to faulty workmanship and materials (2 Id. 280, Art. 20); and that the defendant is a man of experience in the construction and contracting business.

At the pre-trial it was admitted by the plaintiff that the

contract in question was drawn by a scrivener employed by plaintiff (R. 38). Because of this admission the court apparently concluded that the rule of *contra proferentem* justified it in construing the contract "against the plaintiff." It has been stated that the rule is primarily a rule of policy to protect the underdog (3 Corbin on Contracts 154) and that it should not be applied until the court has had "recourse to every aid, rule or canon of construction to ascertain the intention of the parties." *Reese Howell Co. v. Brown* (1916), 48 Utah 142, 158 Pac. 684. As applied in this case, where there was neither underdog nor recourse, the rule becomes merely a device for punishing the inartistic.

This deserves reiteration: This action is for breach of the very performance that was the subject matter of the contract. We are not dealing with a collateral provision the breach of which was technical only. To apply Paragraph 15 as an absolute statute of limitations (and not a reasonable one, at that) is to deprive the plaintiff of the right to get what he paid for. On the other hand, by treating the exception as an exception the defendant is not prejudiced. If the plaintiff accepted the building with knowledge of the defects the defendant has protection in the doctrines of waiver and acquiescence. 9 Am. Jur., Building and Construction Contracts, § 52 et seq.; Restatement of Contracts § 411; 3 Williston on Contracts (Rev. Ed.) § 724. But these doctrines involve factual matter that should not be the basis of a pre-trial ruling.

II.

THE COURT ERRED IN RULING AS A MATTER OF LAW THAT CERTAIN DEFECTS WERE PATENT AND OTHERS LATENT.

In interpreting Paragraph 15 the court distinguished between "patent" and "latent" defects. The contract itself does not intimate that any different treatment was intended for the two types of defects; the distinction was apparently made because of the decision of this court in *Kansas City Wholesale Groc. Co. v. Weber Packing Corp.* (1937), 93 Utah 414, 73 P.2d 1272. That case, however, was concerned with a clause containing an unequivocal non-claim provision; the Court refused to give it validity in the case of patent defects. We submit that the failure to make any distinction in the contract is another reason for construing the clause as not applying to faulty workmanship and materials.

Assuming the clause does apply to faulty workmanship and materials, the Court erred in ruling, as a matter of law, that some defects were patent and others latent. It frequently has been stated that latent defects are those which would not have been discovered by a reasonable inspection. It is our position that the question of what is a "reasonable examination" is a question of fact depending upon the circumstances of the case. We do not believe that there is anything in the "nature" of certain defects which permits us to say that they are patent or latent. The plaintiff should have been permitted to show what the circumstances were and what type of inspection would have been necessary to discover the defects. The *Kansas City Wholesale Grocery* case, *supra*, at page 1275 of the Pacific

Reporter, shows the extent to which circumstances are important in determining whether a defect is patent or latent.

We do not believe that an incorrectly sloping roof—particularly where the slope called for is slight—is any more patent than mold in ketchup.

III.

THE COURT ERRED IN FAILING TO AWARD TO PLAINTIFF A REASONABLE ATTORNEY'S FEE FOR ENFORCEMENT OF THE CONTRACT.

Paragraph 25 of the contract (R. 7) provides:

✓ "Should any party to this Agreement breach any of the terms, conditions and provisions therein contained then in that event the party found guilty of such breach or violation shall pay to the other costs incurred together with a reasonable attorney's fee that may be expended in enforcing the contract."

The court found as a fact (R. 60) that on November 29, 1956, the day of the trial, the defendant tendered and plaintiff accepted \$137.20 as full settlement of two of the claimed defects ruled to have been latent. At the pre-trial it was agreed that reasonable attorney's fee in case of trial was three hundred dollars (R. 47).

The defendant's tender not having been made until the time of trial, the plaintiff was entitled to costs and attorney's fees incurred prior to that time unless counsel's action at the trial may be interpreted as a waiver of any right to costs (R. 49). In any event, there was no waiver of attorney's fee.

Such fee having been shown to be payable it should have been awarded whether asked for in the prayer or not. Rule 54 (c) (1), Utah Rules of Civil Procedure.

CONCLUSION

The contract between plaintiff and defendant was silent as to the time within which claims are required to be made for faulty workmanship or materials. This being so, the only bar is the statute of limitations; and the present action was brought before the statute had run. Although there may be an issue as to acceptance of the building with knowledge of the defects, that is a factual issue upon which the plaintiff is entitled to a trial. It is submitted that the court below committed error; and that by virtue of the error plaintiff was deprived of his day in court. The judgment should be reversed and the case remanded for trial.

Respectfully submitted,

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