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Mower v. Bohmke

Utah Supreme Court

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IN THE SUPREME COURT

of the
STATE OF UTAH **FILED**
SEP 30 1958

V-I OIL COMPANY,
a corporation,

Respondent,

vs.

ANCHOR PETROLEUM
COMPANY,

Petitioner.

Clerk, Supreme Court, Utah

Case No. 8878

BRIEF OF RESPONDENT ON
INTERMEDIATE APPEAL

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STATEMENT OF FACTS

We accept petitioner's statement of the case and facts with the following:

For several years the plaintiff had been engaged in the business of selling gasoline and other petroleum products, both wholesale and retail. This did not include L.P. gas. The date the contract was entered into, plaintiff did not have a sales organization for handling this product, and neither did it have any customers. Both its sales organization and its market had to be developed. This was fully

known to the defendant (Dep. 30-31). In fact, the defendant has agreed to and was assisting plaintiff to find a manager to handle this phase of its business (Dep. 31-35).

The contract (R 3-5) was forwarded unsigned to the plaintiff for its signing, provided it met with its approval (Exhibit 2). Prior to plaintiff's signing it, however, plaintiff's manager talked with defendant by telephone, explaining it could not meet the minimum requirements, because of not having any customers and a sales organization, and he was advised that this was of no importance and that it would furnish him with the material he needed (Dep 10-11). Following this conversation, the plaintiff signed the contract, returning it on September 6, 1954 to defendant at Long Beach, California, with a letter which stated:

Gentlemen:

Enclosed find contract executed which you forwarded September 1, 1954.

It appears that we are going to be a little slow in starting, but I am sure we will use the total commitment in the next year.

The defendant signed and returned the contract to the plaintiff, who received it on September 10, (Dep. 9). A third of the month of September had passed. The plaintiff purchased no products in September. However, in October, it purchased 11,995

gallons. In November, prior to defendants letter of cancellation, it purchased 6,546 gallons. After the delivery of the cancellation notice, plaintiff purchased and defendant delivered 13,053 gallons, or a total of 19,599 gallons in the month of November. (R. 20-21).

The aforementioned deliveries of L.P. gas were made without protest or objection. The only objection raised by defendant was to plaintiff's sales practice in reducing the retail price to its customers. To this, defendant bitterly objected, because of the protest of plaintiff's competitors (Dep. 13-15 & 27, 36-40).

After the contract was returned by defendant to plaintiff, defendant on more than one occasion advised plaintiff that the gallonage figures were of no significance and that it would always supply him with what products he needed (Dep. 10-11).

On December 3, 1954, the plaintiff (by registered mail) advised the defendant that it did not agree with the cancellation of the contract and that it expected the defendant to continue to furnish it with the products covered by the agreement (Exhibit 6). This the defendant refused to do (Dep. 36-40).

ARGUMENT

POINT I.

PLAINTIFF'S LETTER OF TRANSMITTAL WAS A COUNTER OFFER WHICH WAS ACCEPTED BY THE DEFENDANT.

We agree with defendant that a conditional acceptance, one that imposes new terms or conditions is a rejection of the original offer, and constitutes a counter offer, which must be accepted.

The contract was transmitted to the plaintiff unsigned, by letter, for its consideration (Exhibit 2). The plaintiff, in view of it not having a L.P. gas sales organization, nor a present market for the product, recognized that it could not meet the monthly minimum requirement of 20,000 gallons per month, and so qualified its acceptance, after a telephone conversation, by its letter of transmittal (R. 6, Exhibit 3), stating:

“It appears that we are going to be a little slow in starting, but I am sure we will use the total commitment in the next year.”

This was a rejection of the defendants offer, as it introduced a new condition, that is — it eliminated the minimum requirement of 20,000 gallons per month with the provision, however, that it would purchase 240,000 gallons during the year. This was assented to by the defendant when it signed and returned the contract to the plaintiff without objection.

It should be noted that the contract was signed at Idaho Falls, Idaho by the plaintiff, sent to the defendant at Long Beach, California on September 6th and returned signed by the defendant to the plaintiff, who received it on September 10. The contract was effective retroactive as of September 1 — the month was then one-third over.

We agree with the authorities cited by the petitioner under its Point I, pages 7-9, as to the law pertaining to the offers and counter offers, and we refer the court thereto.

In addition to the authorities cited by the petitioner, we call the court's attention to the case of *American Lumber & Mfg. Co. vs. Atlantic Mill & Lumber Co.* (290 Fed. 632, 635), which says:

“Where one makes an offer and assents to an acceptance which is not responsive to the proposal, a contract is made and he is, of course, bound by it”

An expressed assent to new terms and conditions attached to the acceptance of an offer is not necessary in order to make such terms and conditions a part of the contract. Any conduct on the part of the original offerer showing his assent to the modification of any terms and conditions of the contract is sufficient to make such modification a part of the contract. 135 ALR 822.

The defendant signed the contract and returned

it to the plaintiff without comment as to the terms imposed by the letter. However, he thereafter proceeded to deliver the products in line with the terms imposed by the letter, namely: without objection, no material was purchased or delivered in the month of September; in the month of October, 11,995 gallons were purchased, and this was delivered without objection, and in the month of November, prior to the notification of cancellation, the defendant delivered 6,546 gallons. During this period, while the defendant objected to the plaintiff's price practices, it made no objection to its failure to purchase what it now claims the minimum of 20,000 a month. The first and only objection was by the letter of November 19.

In the case of *American Lumber & Mfg. Co. vs. Atlantic Mill & Lumber Co.* (290 Fed. 632, 3rd. Cir. Supra) the defendant ordered on one of its forms 40 cars of yellow pine lumber, setting forth its specifications, terms of payment, shipment to be made within a given time and to be consigned to the defendant in the care of rail carrier at Cape Charles, Virginia. Plaintiff accepted in writing, stating that payment was to be "Cash less 2%, named the price f.o.b. and concluded with a statement that defendant's order is accepted according to the conditions as outlined. Lumber was shipped in part. Defendant then refused further shipment, stating there was no contract because the plaintiff

had failed to accept its counter offer. The court held that, by its actions, the defendant had accepted the counter offer by the ordering and acceptance of the lumber. The court said:

“If the defendants written compliance were all there was in the case to indicate the meeting of the minds, there would be substance in the defendant’s contention, for it is elementary law that to make a valid contract, the meeting of the minds of the parties must meet on the same terms in the same sense. But the meeting of the minds of contracting parties may occur — and be shown — not by words alone, but by conduct. Such conduct may be that of either party, or, indeed, both parties. In this case, however, the conduct was that of the defendant, raising the questions (or as we regard it) whether the contracts sued upon were in existence, not because of the plaintiff’s conditional compliance with the defendant’s offer, but because of the defendant’s assent to the conditions imposed by the plaintiff in acceptance of the defendant’s offers. Where one makes an offer and assents to an acceptance which is not responsive to the proposal, a contract is made and he is, of course, bound by it. The offerer’s assent to new terms imposed by the offeree in his acceptance may be inferred from the fact that the parties therefrom proceeded to conduct business under the conditional acceptance.

See the following cases: *Everett vs. Emmons Coal Mining Co.* (289 Fed. 686—6th Cir.), *Boston Lumber Co. vs. Pendleton Bros.* 129 A. 782, Comm. *Vaughom Sand Stone Inc. vs. Morris April & Bros.* 7 A. 2nd 868.

POINT II.

ASSUMING THAT THE DEFENDANT'S INTERPRETATION OF THE CONTRACT IS CORRECT, PLAINTIFF, NEVERTHELESS, WAS NOT IN DEFAULT AS THE DEFENDANT HAD WAIVED THE PROVISIONS AS TO MINIMUM MONTHLY REQUIREMENTS.

Assuming that defendant's interpretation of the contract was correct, that no new conditions was imposed by plaintiffs' letter, the plaintiff was not in default for the defendant, by its failure to object to the plaintiff's failure to purchase any products during the month of September and its delivery to the plaintiff of 11,995 gallons in October, waived the breach, if any, for such months, and in the month of November, plaintiff substantially performed the contract as to such minimum requirements by purchasing 19,599 gallons. The first and only objection for failure to purchase was by the letter of termination of the contract on November 19, to which termination the plaintiff took exception.

The Supreme Court of Washington, in an analogous situation, in the case of *Yours Truly Biscuit Co. vs. Chas. H. Lilly Co.* (253 Pac. 817) held a waiver where the plaintiff corporation, although placing its order with the defendant corporation on January 28, 1924, for 2000 barrels of flour at a specified price to be delivered as wanted by April 1, 1924, only took 240 barrels by April 1, and after the expiration of the time provided in the contract

the plaintiff continued to order and the defendant delivered additional flour up until August 25, 1924, at which time 654 barrels had been delivered. The plaintiff ordered again on September 8 and was advised the contract had been canceled for failure to accept delivery of flour according to the terms of the contract. The plaintiff as here refused to recognize the cancellation. In this case, the court said:

“Since the third ground is decisive of the rights of the parties, and we are disposed to hold that the assignment is well taken, we shall discuss only that question. There is no dispute in the record that all deliveries of flour after April 1, were made under the contract, for each invoice bears upon its face a statement so showing. Now, where a contract has a provision fixing a time for performance, and the party who has the right to enforce the provision fails to do so, but continues the contract past the date of expiration by accepting and filling orders thereunder, can such party at any time he so elects cancel instantaneously the contract? The authorities answer this question in the negative, and the basis of the holdings seems to be that, where one by his conduct has caused the other to believe that he has waived a provision which was placed there for his benefit, and considers the contract in full force and effect, common honesty between men requires that, if he subsequently desires to enforce the provision, reasonable time must be given the other party to comply with the terms of the contract. The rule is tersely stated in 24 R. C. L. p. 284, as follows:

“Through the right of one party to terminate the contract for the default of the other party is recognized, still he has the right to treat the contract as continuing, the right to terminate being given for his benefit; and it seems to be generally recognized that, if he wishes to exercise this right, he must give reasonable notice of his election to do so to the party in default, else he will be deemed to have waived his right of termination on account of such past breaches.”

The defendant not only delivered the material, without objection, as aforementioned, but on several occasions in addition thereto advised the plaintiff that the requirements, both as to minimum and maximum gallonage were of no significance and that it could disregard them. (Dep. 10-11). What more need there be to constitute a waiver?

The purchase by the defendant in November of 19,599 gallons was a substantial performance of the contract and, where there is a substantial performance, it gives no right of cancellation. (12 Am. Jur., Sec. 343, Page 900).

In any event, the defendant did not give the plaintiff notice that it expected it thereafter to comply with the minimum gallonage requirements, if any existed, but on the contrary, served him with notice of cancellation of the contract. Irrespective of whether during the month of November, the plaintiff purchased 20,000 or 40,000 gallons from

the defendant, it said it would not thereafter deliver to the plaintiff any additional products.

Plaintiff contends that, at the very least, defendant's acceptance of defective installments during the months of September and October would justify to a reasonable person that performance of that character was satisfactory. (See Washington case, *Yours Truly Biscuit Co. vs. Chas. H. Lilly Co.* Supra). Also see Re-statement of Contract, Sec. 300, which is quoted at page 18 of Petitioner's Brief.

The Supreme Court of Georgia in *Commerce Casualty Company vs. Campbell* (188 S. E. 363) held that a provision against waiver may itself be waived. It said:

“A provision against waiver may itself be waived.”

It should be kept in mind that the defendant did not notify the plaintiff at any time that it expected it to comply with the provisions of the contract as to minimum requirements. It merely gave notice of cancellation.

The plaintiff was not in default, when notified of cancellation of the contract by defendant. This was on “anticipatory breach”, which gave the plaintiff an immediate right of action and excused it of performance on its part. 12 Am. Jur. p. 970, Sec. 392, 17 C.J.S. p. 973, Sec. 472.

This court in *Jordan vs. Madsen et al*, 252 Pac. 570, 69 Utah 112, said:

“It, of course, is well settled that a renunciation or repudiation of a contract by one party before the time fixed for performance constitutes a breach and gives an immediate right of action to the adverse party. 5 Page on Contracts, § 2885; 13 C.J. 651 * * *. The breach here as alleged operated as a discharge of the contract, which gave the plaintiff, who was not in default, the right to ignore the contract as a basis of his rights and to sue as he did in quasi contract to recover reasonable compensation for what he furnished in partial performance of the contract (5 Page on Contract § 3023) — here the value of his old car, alleged to be \$900. The renunciation discharged the plaintiff from further performance. 5 Page, § 2883; 13 C.J. 653.

POINT III.

IN ANY EVENT, THERE WAS A MODIFICATION OF THE TERMS OF THE CONTRACT AS TO MINIMUM AND MAXIMUM REQUIREMENTS.

The contract provided that the minimum and maximum requirements, if any, could be changed by mutual agreement. It said:

“The quantity shall be all of the buyer’s requirements up to a maximum quantity of 40,000 gallons per month and a minimum quantity of 20,000 gallons per month, quantity subject to change by mutual agreement.

We have no quarrel with the authorities cited by the petitioner to the effect that parole evidence is not admissible to vary the terms of a written agreement, however, it fails to recognize that the

provisions of a contract may be modified and that the modification can be shown by parole evidence. 12 Am. Jur. Sec. 428 p. 1006.

Should this court determine that the contract was subject to the minimum requirement and not modified by the letter of acceptance, plaintiff, nevertheless, urges that it was subsequently modified by the defendant's agreeing that the gallonage figures were of no significance and that it would always supply him with quantities needed. (Dep. 10-11).

POINT IV.

A MOTION FOR SUMMARY JUDGMENT MAY NOT BE GRANTED WHERE A GENUINE ISSUE OF FACTS EXISTS AND DOUBT MUST BE RESOLVED AGAINST THE MOVING PARTY.

See the following: Moore's Fed. Practice, 2nd Ed. Vol 6, Sec. 56.04, pages 2028-2034, and Sec. 556.15, pages 2101-2121, 2123-2133. *Traylor vs. Black, Sivalls & Bryson*, 189 F. 2d 213, *Chappel vs. Goltsman*, 186 F 2d 215, *Arnstein vs. Porter*, 154 F. 2d 464, *Whittlin vs. Giacalone*, 154 F. 2d 20; *Parmelee vs. Chicago Eye Shield Co.*, 157 F. 2d, 582; 158 A.L.R. 1130; *Hawkins vs. Frick-Reid Supply Corp.*, 154 F. 2nd 88; *Toeelman vs. Missouri-Kansas Pipe Line Co.*, 130 F. 2d, 1016.

SUMMARY

1. Plaintiff's letter of transmittal constituted a counter offer as it imposed new conditions which were assented to by the defendant, namely, the

monthly minimum requirement was eliminated from the defendant's offer, and this interpretation of the contract was placed upon it by the defendant by its acts, at least it raised a question of fact which can not be resolved on motion for summary judgment.

2. In any event, if the minimum purchase requirements were not eliminated from the contract, the defendant, by its actions, waives such provision or, at least it raises a question of fact that can not be resolved on motion for summary judgment.

3. In any event, the plaintiff and the defendant agreed that the minimum and maximum requirements were to be eliminated from the contract subsequent to its execution and this may be shown by parole evidence.

4. That if there is any question as to whether or not plaintiff's letter of transmittal constituted a counter offer, the contract is then ambiguous and parole evidence is admissible to show the real intent of the parties.

In line with the foregoing, it is respectfully submitted that the court did not err in denying the defendant's motion for summary judgment and its order should be sustained.

Respectfully submitted,

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