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V-1 Oil Co. v. Anchor Petroleum Co. : Reply Brief of Petitioner Intermediate Appeal

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED

DEC 6 - 1958

Clerk, Supreme Court, Utah

V-1 OIL COMPANY,
a corporation

Petitioner,

vs.

Case No. 8878

ANCHOR PETROLEUM
COMPANY,

Respondent.

REPLY BRIEF OF PETITIONER ON
INTERMEDIATE APPEAL

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V-1 OIL COMPANY,
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} Case No. 8878

REPLY BRIEF OF PETITIONER ON
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THE ISSUE HERE GOES SOLELY TO THE LAW;
THE FACTS ARE NOT AT ISSUE.

The issue your petitioner brings to this Court is whether the parties are, under the law of contract, bound by the terms of their written agreement or may the respondent modify the terms thereof by:

I. A letter of transmittal accompanying the return of the executed contract of even date.

II. Conversation and telephonic communications had *prior* to the execution by respondent of the writing.

III. Parol evidence as to matters outside the writing.

IV. A denial that the writing expresses the agreement made all in the absence of an allegation of fraud or mistake; and

V. Disaffirmance of his signed agreement to take advantage of his own default through use of the above evidentiary matter which your petitioner claims inadmissible.

These are *issues of law* which your petitioner relied upon in the Court below for summary judgment; once disposed of as a matter of law there remains no issue of fact to be decided.

Respondent's brief merely reiterates his argument to the Court below that his proffered exhibits and parol evidence constituted facts to be determined by a trier of the facts. That was not the question there nor is it the question here. The question is, is such evidence admissible under the law of contracts?

In this reply brief we may probably be most helpful to the Court by examining and briefly commenting upon the authorities upon which respondent relies.

Respondent argues:

POINT I.

PLAINTIFF'S LETTER OF TRANSMITTAL WAS A COUNTER OFFER WHICH WAS AC- CEPTED BY THE DEFENDANT.

The question is not what does the letter say, but is the letter admissible in evidence? Respondent's cited authorities do not go to the issue, they are:

American Lumber and Mfg. Co. v. Atlantic Mill and Lumber Co., 290 Fed. 632, 635

In this case the defendant [purchaser] directed the plaintiff to cancel all unfinished orders; on the plaintiff's [seller's] refusal to do so, *the defendant [purchaser] declined to accept and pay for further shipments*. Defense was based upon the contention that the plaintiff's acceptances of the defendant's orders were conditional and were for that reason counter orders and as such were rejections of the original orders, leaving the minds of the parties wholly apart. It was found from the evidence in this case that there was a "conditional acceptance" because of the offeror's assent to new terms imposed by the offeree in his acceptance — connected with plaintiff's [seller's] "acceptance" there were new matters not touched upon in the defendant's [purchaser's] order. The new matters were specific and material and in writing, which placed the purchaser upon notice that the order was "accepted" subject

to such conditions. The Court merely held that in such case the "offeror's assent to new terms imposed by the offeree in his acceptance may be inferred from the fact that the parties thereafter proceeded to conduct business under the conditional acceptance." Under such facts the result of the decision was that the "purchaser" having adhered to the "seller's" conditional acceptance was bound to perform.

Comment: In the case at bar, the "seller" rescinds because of the "purchaser" defaulting in performance; the petitioner [seller] here by his acceptance of the contract did not impose conditions of acceptance upon the original contract and the respondent [purchaser] cannot demand continued performance by reason of his own default.

Everett v. Emmons Coal Mining Co., 289 Fed. 686.

Comment: This is again a case where the seller accepted a written order by a written acceptance containing conditions, i.e.:

If the conditions upon which we accept your order, as shown on the back hereof, are not satisfactory, please advise us at once, and we will cancel order; otherwise shipment will be made subject to these conditions.

And, the buyer admitted receipt of such acceptance before shipments were made, and without

objection thereafter received shipments. The Court held that the order and acceptance, *with the conditions contained therein*, constituted the contract of sale.

Boston Lumber Co. v. Pendleton Bros., 129 A. 782. This case adheres to the rule expressed in the American Lumber and Manufacturing case, *supra*, and gives no solace to respondent here because it is again a suit for breach of contract to purchase.

Comment: For the purpose of the controversy here, it can be said that this case holds only that: Where a buyer, in confirming a telephonic acceptance of a seller's offer, asked that certain changes be made to the order and seller replied and enclosed sales slip stating the terms of the bargain, and the buyer thereafter gave shipping instructions, that the sales slip was binding as against a contention that the contract was previously complete.

Vaughan's Seed Store, Inc. v. Morris April & Bros., 7 A. 2d 868. In this case the Court wrote, in part:

The complaint is in two counts. The first sets up a debt due from the defendant on a book account; the second count demanded the sum claimed on the book account, for goods sold and delivered "under an agreement between the parties that a reasonable price" for the goods purchased — a shipment of onions — would be paid by the defendant.

The defense was that the goods were not

up to the warranty under which they were sold in that they were not marketable, were "defective in quality" and "were not standard."

At the close of the case the court said that there was in fact an agreement between the parties and that the defendant's order was subject to certain conditions imposed by the plaintiff which the defendant accepted and that those conditions expressly excluded warranty of any kind and, further, that objection to the goods on the buyer's part would not be entertained unless made within five days of receipt of the goods; that the defendant admitted that no complaint of any kind was made until after the five day period had passed, whereupon the court directed the jury to find in favor of the plaintiff and against the defendant for the amount of the bill. * * *

The defendant, in its opening to the jury, frankly admitted that it was indebted to the plaintiff for some amount but that it objected to paying the whole claim because the goods were of inferior quality. But, in our view, the written acceptance of the defendant's order by the plaintiff and the conditions embodied therein are binding on the defendant. The acceptance was sent the defendant by the plaintiff on Nov. 28, 1936. The goods were shipped F.O.B. Chicago early in February and arrived here on Feb. 9, 1937. No complaint was made by the buyer until Feb. 15, which was the sixth day after the goods arrived. * * *

The Appellate Court sustained the lower court in directing a verdict in favor of the plaintiff.

Comment: Another case in which the purchaser was held to be bound by a provision in the acceptance.

All of these authorities present fact situations converse to the case brought to this Court by your petitioner.

135 ALR 822. On page 5 of respondent's brief, the following declaration appears:

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.

This annotation upon which respondent relies goes on to state:

It has been held that mere silence on the part of the offerer will not constitute an acceptance by him of added or altered conditions or terms attached to the offeree's acceptance of the original offer, in the absence of an agreement that silence shall have such effect, where there is no duty on the part of the original offerer to reject such conditions or terms.

Comment: In the case at bar it is admitted that there was no reply to respondent's letter of September 6, 1954 — the contended for "counter offer". Silence alone will not constitute an accep-

tance of added or altered terms attached to the offeree's acceptance of the original offer, there being no duty on the part of your petitioner, the original offerer, to reject such conditions or terms.

Respondent's 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.

Yours Truly Biscuit Co. v. Chas. H. Lilly Co.,
253 P. 817:

The plaintiff corporation placed its order with the defendant corporation on January 28, 1924, for 2,000 barrels of flour, at a specified price, to be delivered "as wanted by April 1, 1924."

The order was accepted, and thereafter prior to April 1 delivery was taken under the contract of 240 barrels. *After the expiration of the time provided for in the contract, the plaintiff continued to order, and the defendant to deliver under the contract, additional flour up until August 25, 1924, at which time a total of 654 barrels had been delivered.* On September 8, the plaintiff ordered additional flour under the contract, and was advised that the contract had been canceled for failure to accept delivery within the time provided in the contract. The plaintiff refused to recognize the cancellation of the contract, and made demand for the balance of the flour under it,

to wit, 1,235 barrels, which was refused. * * *

The Court held that by continuing deliveries after April 1st [the expiration of the time provided in the contract] up until August 25th, the seller waived the provision of the contract as to time of delivery.

Comment: This case is not helpful to respondent here for two reasons, (a) this petitioner did not sleep on his rights, and (b) there is no issue here as to prolonged deliveries after the expiration of the time provided in the contract.

Commerce Casualty Co. v. Campbell, 188 S.E. 363.

Comment: This case holds that an insurer by accepting monthly premiums three weeks after their due date for more than 30 consecutive months effected a waiver of the provision of the policy relating to the payment of premiums; that a provision against waiver in the policy of insurance could itself be waived.

Jordan v. Madsen, 252 P. 570, 69 U. 112. Case stands for the proposition:

* * * *that where a party to a contract, when the other is not in default, manifests in unequivocal language his intention not to perform the contract unless it is modified he thereby breaches the contract and becomes liable therefor; * * **

Comment: In this case the party *not in de-*

fault complained of the contracting party who had repudiated his obligation and refused to meet the condition, thus breaching his obligation before the time fixed for performance with the resultant immediate right of action arising in the party *not in default*. This result is so firmly grounded upon reason and justice as to render authorities superfluous; when one declares that he will not be bound by his contract the attendant result in law is obvious. The facts in the case at bar are not such — the plaintiff and respondent was not “excused of performance” at time of notice or at any time until after notice that because of respondent’s breach that petitioner elected to rescind.

12 Am. Jur., Sec. 392, p. 970; 17 C.J.S., p. 973, Sec. 472. Citing these authorities, respondent argues: (Brief, p. 11).

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. * * *

Petitioner has no quarrel with these authorities or with the proposition for which they stand, i.e.:

Strictly an “anticipatory breach” of a contract is one committed before the time has come when there is a present duty of performance, and it is the outcome of words or acts evincing an intention to refuse performance in the future. Where a party bound by an exe-

cutory contract repudiates his obligation before the time for performance, the promisee has, according to the great weight of authority, an option to treat the contract as ended so far as further performance is concerned, and to maintain an action at once for the damages occasioned by such anticipatory breach.

The plain fact is, admittedly, however, that after the first two months and up to the seventeenth day of the third month, respondent had not performed under the contract and was in default of the express terms thereof. We have no fact situation here where your petitioner [defendant] repudiated his obligation *before the time of performance* or at all until *after* respondent's default in performance thereof.

12 Am. Jur., Sec. 343, Page 900.

Comment: Further respondent makes the following statement on page 10 of his brief:

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).

We respectfully draw the Court's attention to the fact that plaintiff and respondent received the cancellation notice on November 19, 1954; that *thereafter* on November 21st and November 22nd, two purchases were made of 6,507 gallons each.

Therefore, 13,014 of the November total purchase of 19,599 gallons were made after petitioner terminated the contract for non-performance of respondent. *The purchase in November of 6,585 prior to notice of cancellation was by no means a substantial performance.*

Respondent's Point III.

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

For this Point III respondent cites:

12 Am. Jur., Sec. 428, page 1006.

Comment: In his Statement of Facts (p. 2,) respondent says:

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,*
* * *

Then, under his Point III, respondent argues as follows:

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).

Respondent thus *admits that the alleged conversation as to quantities took place before the contract was by him executed*; " * * * Following this conversation, the plaintiff [respondent] signed the contract * * *." It is also said in 12 Am. Jur., Sec. 428, p. 1006 — relied upon by respondent — that:

* * * The very purpose of the writing is to render the agreement more certain and to exclude parol evidence of it. * * *

Respondent's 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.

Taylor v. Black, Sivalls & Bryson, 189 F. 2d 213. Summary judgment was set aside in this case upon a finding by the Court of Appeals that a real issue existed as to whether there had actually been an antecedent acceptance of challenged orders [for steel merchandise] upon which plaintiff [salesman] based his claim for commissions.

Chappel v. Goltsman, 186 F. 2d 215.

Comment: The issue here again goes to the propriety of a summary judgment; considering the facts there, that Court wrote:

* * * It seems clear to us that the basis of the court's opinion was not that there were no genuine fact issues, but rather that there were such issues which it proceeded to decide adversely to appellants, although the motion raises questions of intent, unfair competition and perfidious dealings which ought not to have been disposed of by summary judgment and without trial on the merits. * * *

Arnstein v. Porter, 154 F. 2d 464. This case holds that where credibility, including that of the defendant, is crucial, summary judgment becomes improper and a trial indispensable.

Comment: There is no such issue here. Your petitioner relies for summary judgment upon the testimony of plaintiff [respondent] — relying upon the undisputed testimony of the bringer of the action and not upon evidence in dispute at all.

Witlin v. Giacalme, 154 F. 2d 20.

Comment: This case adheres to the rule stated by Professor Moore in his work on Federal Practice Under the New Federal Rules which is in substance that motion for summary judgment will be denied if the opposing papers show a genuine issue of fact.

Such a rule does not meet the issue here in the absence of evidence which would be admissible.

Parmelee v. Chicago Eye Shield Co., 157 F. 2d 582; 168 ALR 1130.

Comment: An action in which the seller attempted recovery for goods sold and delivered and, the buyer responded with six counterclaims which did “* * * not present sham issues, but issues that must be tried, and if they arose out of the transaction or occurrence which is the subject matter of the plaintiff’s claim they are a bar to granting plaintiff’s motion under Rule 54, counterclaims have long been permitted under the various state statutes governing pleadings. * * *” In such case the court held that summary judgment should not issue.

Hawkins v. Frick-Reid Supply Corp., 154 F. 2d 88. Here the court said:

It is not the function of the trial court upon motion for summary judgment to try the issues of fact *if, as here*, a factual question is presented. (Emphasis ours.)

The lower court awarded summary judgment upon the ground that a drill pipe was *machinery* or *machinery parts* and not *material* within the meaning of the invoice clause. The Appellate Court examined the definitions of “material” and “machinery” and wrote:

When we come to apply these definitions to the drill pipe here under consideration, we must walk with a question mark in each hand. It is referred to in the record as a “string of drill pipe.” Certain it is that when it becomes

attached to a line of pipe in a well with a rotary drill it becomes machinery, but apart and before being attached it may be material.
* * *

Toebelman v. Missouri-Kansas Pipe Line Co., 130 F. 2d 1016. Stockholder's derivative suit for misfeasance and accounting of funds spent. Plaintiffs appeal from a summary judgment dismissing the suit. For purposes here the case stands for the proposition that:

It is now well settled that summary judgment may be entered for either party if the pleadings, depositions, admissions on file and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Civil Procedure Rule 56. Stated conversely, a substantial dispute as to a material fact forecloses summary judgment. * * * *Upon a motion for a summary judgment it is no part of the court's function to decide issues of fact but solely to determine whether there is an issue of fact to be tried.* * * * (Emphasis added).

CONCLUSION

Under Rule 56, Utah Rules of Civil Procedure, Summary Judgment will always issue when there are no facts such as would be admissible in evidence. (Rule 56(e)).

Respectfully submitted,

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