

**TOTEM MARINE TUG & BARGE v. ALYESKA PIPELINE
SERVICE CO.**

**Alaska Supreme Court
584 P.2d 15 (Ak. 1978)**

BOOCHEVER, C. J., and RABINOWITZ, CONNOR, BURKE AND MATTHEWS, JJ.

BURKE, J.

This appeal arises from the superior court's granting of summary judgment in favor of defendants-appellees Alyeska Pipeline Services, et al., in a contract action brought by plaintiffs-appellants Totem Marine Tug & Barge, Inc., Pacific, Inc., and Richard Stair.

The following summary of events is derived from the materials submitted in the summary judgment proceedings below.

Totem is a closely held Alaska corporation which began operations in March of 1975. Richard Stair, at all times relevant to this case, was vice-president of Totem. In June of 1975, Totem entered into a contract with Alyeska under which Totem was to transport pipeline construction materials from Houston, Texas, to a designated port in southern Alaska, with the possibility of one or two cargo stops along the way. In order to carry out this contract, which was Totem's first, Totem chartered a barge (The "Marine Flasher") and an ocean-going tug (the "Kirt Chouest"). These charters and other initial operations costs were made possible by loans to Totem from Richard Stair individually and Pacific, Inc., a corporation of which Stair was principal stockholder and officer, as well as by guarantees by Stair and Pacific.

By the terms of the contract, Totem was to have completed performance by approximately August 15, 1975. From the start, however, there were numerous problems which impeded Totem's performance of the contract. For example, according to Totem, Alyeska represented that approximately 1,800 to 2,100 tons of regular uncoated pipe were to be loaded in Houston, and that perhaps another 6,000 to 7,000 tons of materials would be put on the barge at later stops along the west coast. Upon the arrival of the tug and barge in Houston, however, Totem found that about 6,700 to 7,200 tons of coated pipe, steel beams and valves, haphazardly and improperly piled, were in the yard to be loaded. This situation called for remodeling of the barge and extra cranes and stevedores, and resulted in the loading taking thirty days rather than the three days which Totem had anticipated it would take to load 2,000 tons. The lengthy loading period was also caused in part by Alyeska's delay in assuring Totem that it would pay for the additional expenses, bad weather and other administrative problems.

The difficulties continued after the tug and barge left Houston. It soon became apparent that the vessels were travelling more slowly than anticipated because of the extra load. In response to Alyeska's complaints and with its verbal consent, on August 13, 1975, Totem chartered a second tug, the "N. Joseph Guidry." When the "Guidry" reached the Panama Canal, however, Alyeska had not yet furnished the written amendment to the parties' contract. Afraid that Alyeska would not agree to cover the cost of the second tug, Stair notified the "Guidry" not to go through the

Canal. After some discussions in which Alyeska complained of the delays and accused Totem of lying about the horsepower of the first tug, Alyeska executed the amendment on August 21, 1975.

By this time the "Guidry" had lost its preferred passage through the Canal and had to wait two or three additional days before it could go through. Upon finally meeting, the three vessels encountered the tail of a hurricane which lasted for about eight or nine days and which substantially impeded their progress.

The three vessels finally arrived in the vicinity of San Pedro, California, where Totem planned to change crews and refuel. On Alyeska's orders, however, the vessels instead pulled into port at Long Beach, California. At this point, Alyeska's agents commenced off-loading the barge, without Totem's consent, without the necessary load survey, and without a marine survey, the absence of which voided Totem's insurance. After much wrangling and some concessions by Alyeska, the freight was off-loaded. Thereafter, on or about September 14, 1975, Alyeska terminated the contract. The termination was affirmed a few days later at a meeting at which Alyeska officials refused to give a reason for the termination.

Following termination of the contract, Totem submitted termination invoices to Alyeska and began pressing the latter for payment. The invoices came to something between \$260,000 and \$300,000. An official from Alyeska told Totem that they would look over the invoices but that they were not sure when payment would be made - perhaps in a day or perhaps in six to eight months. Totem was in urgent need of cash as the invoices represented debts which the company had incurred on 10-30 day payment schedules. Totem's creditors were demanding payment and according to Stair, without immediate cash, Totem would go bankrupt. Totem then turned over the collection to its attorney, Roy Bell, directing him to advise Alyeska of Totem's financial straits. Thereafter, Bell met with Alyeska officials in Seattle, and after some negotiations, Totem received a settlement offer from Alyeska for \$97,500. On November 6, 1975, Totem, through its president Stair, signed an agreement releasing Alyeska from all claims by Totem in exchange for \$97,500.

On March 26, 1976, Totem, Richard Stair, and Pacific filed a complaint against Alyeska, which was subsequently amended. In the amended complaint, the plaintiffs sought to rescind the settlement and release on the ground of economic duress and to recover the balance allegedly due on the original contract. In addition, they alleged that Alyeska had wrongfully terminated the contract and sought miscellaneous other compensatory and punitive damages.

Before filing an answer, Alyeska moved for summary judgment against the plaintiffs on the ground that Totem had executed a binding release of all claims against Alyeska and that as a matter of law, Totem could not prevail on its claim of economic duress. In opposition, plaintiffs contended that the purported release was executed under duress in that Alyeska wrongfully terminated the contract; that Alyeska knew that Totem was faced with large debts and impending bankruptcy; that Alyeska withheld funds admittedly owed knowing the effect this would have on plaintiffs and that plaintiffs had no alternative but to involuntarily accept the \$97,500 in order to avoid bankruptcy. Plaintiffs maintained that they had thus raised genuine issues of material fact such that trial was necessary, and that Alyeska was not entitled to judgment as a matter of law. Alyeska disputed the plaintiffs' assertions.

On November 30, 1976, the superior court granted the defendant's motion for summary judgment. This appeal followed. ...

II

As was noted above, a court's initial task in deciding motions for summary judgment is to determine whether there exist genuine issues of material fact. In order to decide whether such issues exist in this case, we must examine the doctrine allowing avoidance of a release on grounds of economic duress.

This court has not yet decided a case involving a claim of economic duress or what is also called business compulsion. At early common law, a contract could be avoided on the ground of duress only if a party could show that the agreement was entered into for fear of loss of life or limb, mayhem or imprisonment. 13 *Williston on Contracts*, § 1601 at 649 (3d ed. Jaeger 1970). The threat had to be such as to overcome the will of a person of ordinary firmness and courage. *Id.*, § 1602 at 656. Subsequently, however, the concept has been broadened to include myriad forms of economic coercion which force a person to involuntarily enter into a particular transaction. The test has come to be whether the will of the person induced by the threat was overcome rather than that of a reasonably firm person. *Id.*, § 1602 at 657.

At the outset it is helpful to acknowledge the various policy considerations which are involved in cases involving economic duress. Typically, those claiming such coercion are attempting to avoid the consequences of a modification of an original contract or of a settlement and release agreement. On the one hand, courts are reluctant to set aside agreements because of the notion of freedom of contract and because of the desirability of having private dispute resolutions be final. On the other hand, there is an increasing recognition of the law's role in correcting inequitable or unequal exchanges between parties of disproportionate bargaining power and a greater willingness to not enforce agreements which were entered into under coercive circumstances.

There are various statements of what constitutes economic duress, but as noted by one commentator, "The history of generalization in this field offers no great encouragement for those who seek to summarize results in any single formula." Dawson, *Economic Duress - An Essay in Perspective*, 45 Mich. L. Rev. 253, 289 (1947). Section 492(b) of the *Restatement of Contracts* defines duress as:

any wrongful threat of one person by words or other conduct that induces another to enter into a transaction under the influence of such fear as precludes him from exercising free will and judgment, if the threat was intended or should reasonably have been expected to operate as an inducement.

Professor Williston states the basic elements of economic duress in the following manner:

1. The party alleging economic duress must show that he has been the victim of a wrongful or unlawful act or threat, and

2. Such act or threat must be one which deprives the victim of his unfettered will.¹³ *Williston on Contracts*, § 1617 at 704 [footnotes omitted].

Many courts state the test somewhat differently, eliminating use of the vague term "free will," but retaining the same basic idea. Under this standard, duress exists where: (1) one party involuntarily accepted the terms of another, (2) circumstances permitted no other alternative, and (3) such circumstances were the result of coercive acts of the other party. *Undersea Engineering & Construction Co. v. International Telephone & Telegraph Corp.*, 429 F.2d 543, 550 (9th Cir. 1970); *Urban Plumbing and Heating Co. v. United States*, 408 F.2d 382, 389, 187 Ct. Cl. 15 (1969); *W. R. Grimshaw Co. v. Nevil C. Withrow Co.*, 248 F.2d 896, 904 (8th Cir. 1957); *Fruhauf Southwest Garment Co. v. United States*, 111 F. Supp. 945, 951, 126 Ct. Cl. 51 (1953). The third element is further explained as follows:

In order to substantiate the allegation of economic duress or business compulsion, the plaintiff must go beyond the mere showing of reluctance to accept and of financial embarrassment. There must be a showing of acts on the part of the defendant which produced these two factors. The assertion of duress must be proven by evidence that the duress resulted from defendant's wrongful and oppressive conduct and not by the plaintiff's necessities.

W. R. Grimshaw Co., *supra*, 111 F. Supp. at 904.

As the above indicates, one essential element of economic duress is that the plaintiff show that the other party by wrongful acts or threats, intentionally caused him to involuntarily enter into a particular transaction. Courts have not attempted to define exactly what constitutes a wrongful or coercive act, as wrongfulness depends on the particular facts in each case. This requirement may be satisfied where the alleged wrongdoer's conduct is criminal or tortious but an act or threat may also be considered wrongful if it is wrongful in the moral sense. *Restatement of Contracts*, § 492, comment (g); *Gerber v. First National Bank of Lincolnwood*, 30 Ill. App. 3d 776, 332 N.E.2d 615, 618 (1975); *Fowler v. Mumford*, 48 Del. (9 Terry) 282, 102 A.2d 535, 538 (Del. Supr. 1954).

In many cases, a threat to breach a contract or to withhold payment of an admitted debt has constituted a wrongful act. *Hartsville Oil Mill v. United States*, 271 U.S. 43, 49, 46 S. Ct. 389, 391, 70 L. Ed. 822, 827 (1926); *Austin Instrument, Inc. v. Loral Corp.*, 29 N.Y.2d 124, 324 N.Y.S.2d 22, 272 N.E.2d 533, 535 (1971); *Capps v. Georgia-Pacific Corporation*, 253 Or. 248, 453 P.2d 935 (1969); *see also* 13 *Williston*, *supra*, § 1616A at 701. Implicit in such cases is the additional requirement that the threat to breach the contract or withhold payment be done in bad faith. *See Louisville Title Insurance Co. v. Surety Title & Guaranty Co.*, 60 Cal. App. 3d 781, 132 Cal. Rptr. 63, 76, 79 (1976); *Restatement (Second) of Contracts*, § 318 comment (e).

Economic duress does not exist, however, merely because a person has been the victim of a wrongful act; in addition, the victim must have no choice but to agree to the other party's terms or face serious financial hardship. Thus, in order to avoid a contract, a party must also show that he had no reasonable alternative to agreeing to the other party's terms, or, as it is often stated, that he had no adequate remedy if the threat were to be carried out. *First National Bank of Cincinnati v. Pepper*, 454 F.2d 626, 632-33 (2d Cir. 1972); *Austin Instrument*, *supra*, 324 N.Y.S.2d at 25, 272 N.E.2d at 535; *Capps*, *supra*; *Ross Systems v. Linden Dari-Delite, Inc.*, 35 N.J. 329, 173 A.2d 258,

261 (1961); *Leeper v. Beltrami*, 53 Cal. 2d 195, 1 Cal. Rptr. 12, 19, 347 P.2d 12, 19 (1959); *Tri-State Roofing Company of Uniontown v. Simon*, 187 Pa. Super. 17, 142 A.2d 333, 335-36 (1958). What constitutes a reasonable alternative is a question of fact, depending on the circumstances of each case. An available legal remedy, such as an action for breach of contract, may provide such an alternative. *First National Bank of Cincinnati, supra*; *Austin Instrument, supra*; *Tri-State Roofing, supra*. Where one party wrongfully threatens to withhold goods, services or money from another unless certain demands are met, the availability on the market of similar goods and services or of other sources of funds may also provide an alternative to succumbing to the coercing party's demands. *Austin Instrument, supra*; *Tri-State Roofing, supra*. Generally, it has been said that "the adequacy of the remedy is to be tested by a practical standard which takes into consideration the exigencies of the situation in which the alleged victim finds himself." *Ross Systems*, 173 A.2d at 262. See also *First National Bank of Cincinnati, supra* at 634; Dalzell, *Duress By Economic Pressure I*, 20 N. Carolina L. Rev. 237, 240 (1942).

An available alternative or remedy may not be adequate where the delay involved in pursuing that remedy would cause immediate and irreparable loss to one's economic or business interest. For example, in *Austin Instrument, supra*, and *Gallagher Switchboard Corp. v. Heckler Electric Co.*, 36 Misc.2d 225, 232 N.Y.S.2d 590 (N.Y. Sup. Ct. 1962), duress was found in the following circumstances: A subcontractor threatened to refuse further delivery under a contract unless the contractor agreed to modify the existing contract between the parties. The contractor was unable to obtain the necessary materials elsewhere without delay, and if it did not have the materials promptly, it would have been in default on its main contract with the government. In each case such default would have had grave economic consequences for the contractor and hence it agreed to the modifications. In both, the courts found that the alternatives to agreeing to the modification were inadequate (*i.e.*, suing for breach of contract or obtaining the materials elsewhere) and that modifications therefore were signed under duress and voidable.

Professor Dalzell, in *Duress By Economic Pressure II*, 20 N. Carolina N. Rev. 340, 370 (1942), notes the following with regard to the adequacy of legal remedies where one party refuses to pay a contract claim:

Nowadays, a wait of even a few weeks in collecting on a contract claim is sometimes serious or fatal for an enterprise at a crisis in its history. The business of a creditor in financial straits is at the mercy of an unscrupulous debtor, who need only suggest that if the creditor does not care to settle on the debtor's own hard terms, he can sue. This situation, in which promptness in payment is vastly more important than even approximate justice in the settlement terms, is too common in modern business relations to be ignored by society and the courts.

This view finds support in *Capps v. Georgia Pacific Corporation*, 253 Or. 248, 453 P.2d 935 (1969). There, the plaintiff was owed \$157,000 as a commission for finding a lessee for defendant's property but in exchange for \$5,000, the plaintiff signed a release of his claim against defendant. The plaintiff sued for the balance of the commission, alleging that the release had been executed under duress. His complaint, however, was dismissed. On appeal, the court held that the plaintiff had stated a claim where he alleged that he had accepted the grossly inadequate sum because he was in danger of immediately losing his home by mortgage foreclosure and other

property by foreclosure and repossession if he did not obtain immediate funds from the defendant. One basis for its holding was found in the following quote by a leading commentator in the area of economic duress:

The most that can be claimed [regarding the law of economic duress] is that change has been broadly toward acceptance of a general conclusion - that in the absence of specific countervailing factors of policy or administrative feasibility, restitution is required of any excessive gain that results, in a bargain transaction, from impaired bargaining power, whether the impairment consists of economic necessity, mental or physical disability, or a wide disparity in knowledge or experience.

Dawson, *Economic Duress - An Essay In Perspective*, 45 Mich. L. Rev. 253, 289 (1947).

III

Turning to the instant case, we believe that Totem's allegations, if proved, would support a finding that it executed a release of its contract claims against Alyeska under economic duress. Totem has alleged that Alyeska deliberately withheld payment of an acknowledged debt, knowing that Totem had no choice but to accept an inadequate sum in settlement of that debt; that Totem was faced with impending bankruptcy; that Totem was unable to meet its pressing debts other than by accepting the immediate cash payment offered by Alyeska; and that through necessity, Totem thus involuntarily accepted an inadequate settlement offer from Alyeska and executed a release of all claims under the contract. If the release was in fact executed under these circumstances, we think that under the legal principles discussed above that this would constitute the type of wrongful conduct and lack of alternatives that would render the release voidable by Totem on the ground of economic duress. We would add that although Totem need not necessarily prove its allegation that Alyeska's termination of the contract was wrongful in order to sustain a claim of economic duress, the events leading to the termination would be probative as to whether Alyeska exerted any wrongful pressure on Totem and whether Alyeska wrongfully withheld payment from Totem.

One purpose of summary judgment, however, is to pierce the allegations in the pleadings in an effort to determine whether genuine issues of fact exist. As the moving party, Alyeska had the burden of showing that there were no such genuine issues and that it was entitled to judgment as a matter of law. *E.g., Brock v. Rogers and Babler, Inc.*, 536 P.2d 778, 782 (Alaska 1975). Alyeska showed that Totem had executed the release, that Totem had been represented by counsel at the negotiating session leading to the settlement and release and that appellant Stair, who actually signed the release on behalf of Totem, was fully aware of the consequences of such a release. Such evidence, by itself, would have entitled Alyeska to summary judgment in its favor. As a matter of law, there is no doubt that a valid release of all claims arising under a contract will bar any subsequent claims based on that contract.

To avoid summary judgment once the moving party meets its burden, the non-moving party must produce competent evidence showing that there are issues of material fact to be tried. *Id.*

The respondent must set forth specific facts showing that it could produce admissible evidence reasonably tending to dispute the movants evidence or establish an affirmative defense.

Id. The court then must draw all reasonable inferences in favor of the non-moving party and against the movant. *E.g., Clabaugh v. Bottcher*, 545 P.2d 172, 175 n.5 (Alaska 1976).

In entering summary judgment against Totem, the court below reasoned as follows:

The plaintiffs, specifically Mr. Stair, assert the release and settlement should be held for naught because of duress and coercion exerted upon him and his corporation by the defendants' action.

Mr. Stair fails to show that the release and settlement negotiated by his attorneys was involuntary on his part. Mr. Stair did not personally participate in the negotiations which resulted in the release and settlement. No affidavit or other suggestion of evidence has been submitted to demonstrate that upon trial the plaintiffs could sustain their burden of proof required to set aside the release and settlement.

As thus stated, the superior court's decision clearly misstated the standard applicable on motions for summary judgment. A party opposing summary judgment need not establish that he will ultimately prevail at trial. *Gablick v. Wolfe*, 469 P.2d 391, 395 (Alaska 1970). Although we may affirm a trial court's grant of summary judgment if alternative grounds exist for upholding its judgment, *Moore v. State*, 553 P.2d 8, 21 (Alaska 1976), we do not believe that summary judgment was properly granted in this case.

Our examination of the materials presented by Totem in opposition to Alyeska's motion for summary judgment leads us to conclude that Totem has made a sufficient factual showing as to each of the elements of economic duress to withstand that motion. There is no doubt that Alyeska disputes many of the factual allegations made by Totem and drawing all inferences in favor of Totem, we believe that genuine issues of material fact exist in this case such that trial is necessary. Admittedly, Totem's showing was somewhat weak in that, for example, it did not produce the testimony of Roy Bell, the attorney who represented Totem in the negotiations leading to the settlement and release. At trial, it will probably be necessary for Totem to produce this evidence if it is to prevail on its claim of duress. However, a party opposing a motion for summary judgment need not produce all of the evidence it may have at its disposal but need only show that issues of material fact exist. 10 C. Wright and A. Miller, *Federal Practice and Procedure: Civil*, § 2727 at 546 (1973). Therefore, we hold that the superior court erred in granting summary judgment for appellees and remand the case to the superior court for trial in accordance with the legal principles set forth above. ...

REVERSED and REMANDED.