PENNSY SUPPLY, INC. v. AMERICAN ASH RECYCLING CORP. OF PENNSYLVANIA

Pennsylvania Superior Court
2006 Pa. Super. 54, 895 A.2d 595 (2006)

JOYCE, ORIE MELVIN and TAMILIA, JJ.

ORIE MELVIN, J.

Appellant, Pennsy Supply, Inc. ("Pennsy"), appeals from the grant of preliminary objections in the nature of a demurrer in favor of Appellee, American Ash Recycling Corp. of Pennsylvania ("American Ash"). We reverse and remand for further proceedings.

The trial court summarized the allegations of the complaint as follows:

> The instant case arises out of a construction project for Northern York High School (Project) owned by Northern York County School District (District) in York County, Pennsylvania. The District entered into a construction contract for the Project with a general contractor, Lobar, Inc. (Lobar). Lobar, in turn, subcontracted the paving of driveways and a parking lot to [Pennsy].
>
> The contract between Lobar and the District included Project Specifications for paving work which required Lobar, through its subcontractor Pennsy, to use certain base aggregates. The Project Specifications permitted substitution of the aggregates with an alternate material known as Treated Ash Aggregate (TAA) or AggRite.
>
> The Project Specifications included a 'notice to bidders' of the availability of AggRite at no cost from [American Ash], a supplier of AggRite. The Project Specifications also included a letter to the Project architect from American Ash confirming the availability of a certain amount of free AggRite on a first come, first served basis.
>
> Pennsy contacted American Ash and informed American Ash that it would require approximately 11,000 tons of AggRite for the Project. Pennsy subsequently picked up the AggRite from American Ash and used it for the paving work, in accordance with the Project Specifications.
>
> Pennsy completed the paving work in December 2001. The pavement ultimately developed extensive cracking in February 2002. The District notified ...Lobar[] as to the defects and Lobar in turn directed Pennsy to remedy the defective work. Pennsy performed the remedial work during summer 2003 at no cost to the District.
>
> The scope and cost of the remedial work included the removal and appropriate disposal of the AggRite, which is classified as a hazardous waste

> material by the Pennsylvania Department of Environmental Protection. Pennsy requested American Ash to arrange for the removal and disposal of the AggRite; however, American Ash did not do so. Pennsy provided notice to American Ash of its intention to recover costs.

Trial Court Opinion, 5/27/05, at 1-3 (footnote omitted). Pennsy also alleged that the remedial work cost it $ 251,940.20 to perform and that it expended an additional $ 133,777.48 to dispose of the AggRite it removed. Compl. PP26, 29.

On November 18, 2004, Pennsy filed a five-count complaint against American Ash alleging breach of contract (Count I); breach of implied warranty of merchantability (Count II); breach of express warranty of merchantability (Count III); breach of warranty of fitness for a particular purpose (Count IV); and promissory estoppel (Count V). American Ash filed demurrers to all five counts. Pennsy responded and also sought leave to amend should any demurrer be sustained. The trial court sustained the demurrers by order and opinion dated May 25, 2005 and dismissed the complaint. This appeal followed.

Pennsy raises three questions for our review:

> (1) Whether the trial court erred in not accepting as true ... [the] Complaint allegations that (a) [American Ash] promotes the use of its AggRite material, which is classified as hazardous waste, in order to avoid the high cost of disposing [of] the material itself; and (b) [American Ash] incurred a benefit from Pennsy's use of the material in the form of avoidance of the costs of said disposal sufficient to ground contract and warranty claims.
>
> (2) Whether Pennsy's relief of [American Ash's] legal obligation to dispose of a material classified as hazardous waste, such that [American Ash] avoided the costs of disposal thereof at a hazardous waste site, is sufficient consideration to ground contract and warranty claims.
>
> (3) Whether the trial court misconstrued the well-pled facts of the Complaint in dismissing Pennsy's promissory estoppel claim because Pennsy, according to the court, did not receive [American Ash's] product specifications until after the paving was completed, which was not pled and is not factual.

Appellant's Brief at 3.

"Preliminary objections in the nature of a demurrer test the legal sufficiency of the complaint." *Hospodar v. Schick*, 2005 PA Super 319, 885 A.2d 986, 988 (Pa. Super. 2005).

> When reviewing the dismissal of a complaint based upon preliminary objections in the nature of a demurrer, we treat as true all well-pleaded material, factual averments and all inferences fairly deducible therefrom. Where the preliminary objections will result in the dismissal of the action, the objections may be sustained only in cases that are clear and free from doubt. To be clear and free from doubt

> that dismissal is appropriate, it must appear with certainty that the law would not permit recovery by the plaintiff upon the facts averred. Any doubt should be resolved by a refusal to sustain the objections. Moreover, we review the trial court's decision for an abuse of discretion or an error of law.

Id. In applying this standard to the instant appeal, we deem it easiest to order our discussion by count.

Count I raises a breach of contract claim. "A cause of action for breach of contract must be established by pleading (1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract and (3) resultant damages." *Corestates Bank, N.A. v. Cutillo*, 1999 PA Super 14, 723 A.2d 1053, 1058 (Pa. Super. 1999). While not every term of a contract must be stated in complete detail, every element must be specifically pleaded. *Id*. at 1058. Clarity is particularly important where an oral contract is alleged. *Snaith v. Snaith*, 282 Pa. Super. 450, 422 A.2d 1379, 1382 (Pa. Super. 1980).

Instantly, the trial court determined that "any alleged agreement between the parties is unenforceable for lack of consideration." Trial Court Opinion, 5/27/05, at 5. The trial court also stated "the facts as pleaded do not support an inference that disposal costs were part of any bargaining process or that American Ash offered the AggRite with an intent to avoid disposal costs." *Id*. at 7 (emphasis added). Thus, we understand the trial court to have dismissed Count I for two reasons related to the necessary element of consideration: one, the allegations of the Complaint established that Pennsy had received a conditional gift from American Ash, *see id*. 6, 8, and, two, there were no allegations in the Complaint to show that American Ash's avoidance of disposal costs was part of any bargaining process between the parties. *See id*. at 7.

It is axiomatic that consideration is "an essential element of an enforceable contract." *Stelmack v. Glen Alden Coal Co.*, 339 Pa. 410, 414-415, 14 A.2d 127, 128 (1940). *See also Weavertown Transport Leasing, Inc v. Moran*, 2003 PA Super 385, 834 A.2d 1169, 1172 (Pa. Super. 2003) (stating, "[a] contract is formed when the parties to it (1) reach a mutual understanding, (2) exchange consideration, and (3) delineate the terms of their bargain with sufficient clarity."). "Consideration consists of a benefit to the promisor or a detriment to the promisee." *Weavertown*, 834 A.2d at 1172 (citing *Stelmack)*. "Consideration must actually be bargained for as the exchange for the promise." *Stelmack*, 339 Pa. at 414, 14 A.2d at 129.

> It is not enough, however, that the promisee has suffered a legal detriment at the request of the promisor. The detriment incurred must be the 'quid pro quo', or the 'price' of the promise, and the inducement for which it was made.... If the promisor merely intends to make a gift to the promisee upon the performance of a condition, the promise is gratuitous and the satisfaction of the condition is not consideration for a contract. The distinction between such a conditional gift and a contract is well illustrated in Williston on Contracts, Rev. Ed., Vol. 1, Section 112, where it is said: 'If a benevolent man says to a tramp,-' If you go around the corner to the clothing shop there, you may purchase an overcoat on my credit, 'no reasonable person would understand that the short walk was requested as the consideration for the

> promise, but that in the event of the tramp going to the shop the promisor would make him a gift.'

Weavertown, 834 A.2d at 1172 (quoting *Stelmack*, 339 Pa. at 414, 14 A.2d at 128-29). Whether a contract is supported by consideration presents a question of law. *Davis & Warde, Inc. v. Tripodi*, 420 Pa. Super. 450, 616 A.2d 1384 (Pa. Super. 1992).

The classic formula for the difficult concept of consideration was stated by Justice Oliver Wendell Holmes, Jr. as "the promise must induce the detriment and the detriment must induce the promise." John Edward Murray, Jr., MURRAY ON CONTRACTS § 60 (3d. ed. 1990), at 227 (citing *Wisconsin & Michigan Ry. v. Powers*, 191 U.S. 379, 24 S. Ct. 107, 48 L. Ed. 229 (1903)). As explained by Professor Murray:

> If the promisor made the promise for the purpose of inducing the detriment, the detriment induced the promise. If, however, the promisor made the promise with no particular interest in the detriment that the promisee had to suffer to take advantage of the promised gift or other benefit, the detriment was incidental or conditional to the promisee's receipt of the benefit. Even though the promisee suffered a detriment induced by the promise, the purpose of the promisor was not to have the promisee suffer the detriment because she did not seek that detriment in exchange for her promise.

Id. § 60. C, at 230 (emphasis added). This concept is also well summarized in AMERICAN JURISPRUDENCE:

> As to the distinction between consideration and a condition, it is often difficult to determine whether words of condition in a promise indicate a request for consideration or state a mere condition in a gratuitous promise. An aid, though not a conclusive test, in determining which construction of the promise is more reasonable is an inquiry into whether the occurrence of the condition would benefit the promisor. If so, it is a fair inference that the occurrence was requested as consideration. On the other hand, if the occurrence of the condition is no benefit to the promisor but is merely to enable the promisee to receive a gift, the occurrence of the event on which the promise is conditional, though brought about by the promisee in reliance on the promise, is not properly construed as consideration.

17A AM. JUR. 2d § 104 (2004 & 2005 Supp.) (emphasis added). *See also* Restatement (Second) of Contracts § 71 comment c (noting "the distinction between bargain and gift may be a fine one, depending on the motives manifested by the parties"); *Carlisle v. T & R Excavating, Inc.*, 123 Ohio App. 3d 277, 704 N.E.2d 39 (Ohio App. 1997) (discussing the difference between consideration and a conditional gift and finding no consideration where promisor who promised to do excavating work for preschool being built by ex-wife would receive no benefit from wife's reimbursement of his material costs).

Upon review, we disagree with the trial court that the allegations of the Complaint show only that American Ash made a conditional gift of the AggRite to Pennsy. In paragraphs 8 and 9 of the Complaint, Pennsy alleged:

> American Ash actively promotes the use of AggRite as a building material to be used in base course of paved structures, and provides the material free of charge, in an effort to have others dispose of the material and thereby avoid incurring the disposal costs itself ...American Ash provided the AggRite to Pennsy for use on the Project, which saved American Ash thousands of dollars in disposal costs it otherwise would have incurred.

Compl. PP8, 9. Accepting these allegations as true and using the Holmesian formula for consideration, it is a fair interpretation of the Complaint that American Ash's promise to supply AggRite free of charge induced Pennsy to assume the detriment of collecting and taking title to the material, and critically, that it was this very detriment, whether assumed by Pennsy or some other successful bidder to the paving subcontract, which induced American Ash to make the promise to provide free AggRite for the project. Paragraphs 8-9 of the Complaint simply belie the notion that American Ash offered AggRite as a conditional gift to the successful bidder on the paving subcontract for which American Ash desired and expected nothing in return.

We turn now to whether consideration is lacking because Pennsy did not allege that American Ash's avoidance of disposal costs was part of any bargaining process between the parties. The Complaint does not allege that the parties discussed or even that Pennsy understood at the time it requested or accepted the AggRite that Pennsy's use of the AggRite would allow American Ash to avoid disposal costs.[5] However, we do not believe such is necessary.

> The bargain theory of consideration does not actually require that the parties bargain over the terms of the agreement. ...According to Holmes, an influential advocate of the bargain theory, what is required [for consideration to exist] is that the promise and the consideration be in 'the relation of reciprocal conventional inducement, each for the other.'

E. Allen Farnsworth, FARNSWORTH ON CONTRACTS § 2.6 (1990) (citing O. Holmes, THE COMMON LAW 293-94 (1881)); *see also* Restatement (Second) of Contracts § 71 (defining "bargained for" in terms of the Holmesian formula). Here, as explained above, the Complaint alleges facts which, if proven, would show the promise induced the detriment and the detriment induced the promise. This would be consideration. Accordingly, we reverse the dismissal of Count I.

---

[5] Pennsy's complaint, by placing the allegation in that American Ash promotes AggRite and provides it free of charge, before the allegations in PP9-10 related to formation of the oral contract, is arguably structured to suggest Pennsy did contemplate American Ash's avoidance of disposal costs. We note also that during oral argument on the preliminary objections, Pennsy's counsel represented "it was understood by everybody that this [i.e., avoidance of disposal costs] was what American Ash was getting in return for [providing the AggRite for free]." Transcript of Proceedings, Feb. 1, 2005, at 14-15.

…

For all of the foregoing reasons, we reverse the trial court's order granting the demurrers and dismissing the Complaint and remand for further proceedings. Jurisdiction relinquished.