ROCKINGHAM COUNTY v. LUTEN BRIDGE CO.

United States Court of Appeals for the Fourth Circuit
35 F.2d 301 (4th Cir. 1929)

Before PARKER, Circuit Judge, and McCLINTIC and SOPER, District Judges.

PARKER, Circuit Judge. This was an action at law instituted in the court below by the Luten Bridge Company, as plaintiff, to recover of Rockingham county, North Carolina, an amount alleged to be due under a contract for the construction of a bridge. The county admits the execution and breach of the contract, but contends that notice of cancellation was given the bridge company before the erection of the bridge was commenced, and that it is liable only for the damages which the company would have sustained, if it had abandoned construction at that time. The judge below refused to strike out an answer filed by certain members of the board of commissioners of the county, admitting liability in accordance with the prayer of the complaint, allowed this pleading to be introduced in evidence as the answer of the county, excluded evidence offered by the county in support of its contentions as to notice of cancellation and damages, and instructed a verdict for plaintiff for the full amount of its claim. From the judgment on this verdict the county has appealed.

The facts out of which the case arises, as shown by the affidavits and offers of proof appearing in the record, are as follows: On January 7, 1924, the board of commissioners of Rockingham county voted to award to plaintiff a contract for the construction of the bridge in controversy. Three of the five commissioners favored the awarding of the contract and two opposed it. Much feeling was engendered over the matter, with the result that on February 11, 1924, W. K. Pruitt, one of the commissioners who had voted in the affirmative, sent his resignation to the clerk of the superior court of the county. … [Neither he nor the other two proponents of the bridge attended any further meetings of the board. The two members who had voted against the bridge, together with a member appointed to replace Pruitt, undertook to act as the board.]

At [a later meeting of the board], a regularly advertised called meeting held on February 21st, a resolution was unanimously adopted declaring that the contract for the building of the bridge was not legal and valid, and directing the clerk of the board to notify plaintiff that it refused to recognize same as a valid contract, and that plaintiff should proceed no further thereunder. This resolution also rescinded action of the board theretofore taken looking to the construction of a hard-surfaced road, in which the bridge was to be a mere connecting link. The clerk duly sent a certified copy of this resolution to plaintiff.

At the regular monthly meeting of the board on March 3d, a resolution was passed directing that plaintiff be notified that any work done on the bridge would be done by it at its own risk and hazard, that the board was of the opinion that the contract for the construction of the bridge was not valid and legal, and that, even if the board were mistaken as to this, it did not desire to construct the bridge, and would contest payment for same if constructed. A copy of this resolution was also sent to plaintiff. At the regular monthly meeting on April 7th, a resolution was passed, reciting that the board had been informed that one of its members was privately insisting that the bridge be constructed. It repudiated this action on the part of the member and gave notice that it would not be recognized. At the September meeting, a resolution was passed to the effect that the board would pay no bills presented by plaintiff or any one connected with the bridge. At the time of the

passage of the first resolution, very little work toward the construction of the bridge had been done, it being estimated that the total cost of labor done and material on the ground was around $ 1,900; but, notwithstanding the repudiation of the contract by the county, the bridge company continued with the work of construction.

On November 24, 1924, plaintiff instituted this action against Rockingham county, and against … its board of commissioners. Complaint was filed, setting forth the execution of the contract and the doing of work by plaintiff thereunder, and alleging that for work done up until November 3, 1924, the county was indebted in the sum of $ 18,301.07. …

At the trial, … the contract was introduced, and proof was made of the value under the terms of the contract of the work done up to November 3, 1924. The county elicited on cross-examination proof as to the state of the work at the time of the passage of the resolutions to which we have referred. It then offered these resolutions in evidence, together with evidence as to the resignation of Pruitt, the acceptance of his resignation, and the appointment of [his successor] Hampton; but all of this evidence was excluded, and the jury was instructed to return a verdict for plaintiff for the full amount of its claim. …

As the county now admits the execution and validity of the contract, and the breach on its part, the ultimate question in the case is one as to the measure of plaintiff's recovery, and the exceptions must be considered with this in mind. …

Coming, then, to the third question--i. e., as to the measure of plaintiff's recovery--we do not think that, after the county had given notice, while the contract was still executory, that it did not desire the bridge built and would not pay for it, plaintiff could proceed to build it and recover the contract price. It is true that the county had no right to rescind the contract, and the notice given plaintiff amounted to a breach on its part; but, after plaintiff had received notice of the breach, it was its duty to do nothing to increase the damages flowing therefrom. If A enters into a binding contract to build a house for B, B, of course, has no right to rescind the contract without A's consent. But if, before the house is built, he decides that he does not want it, and notifies A to that effect, A has no right to proceed with the building and thus pile up damages. His remedy is to treat the contract as broken when he receives the notice, and sue for the recovery of such damages, as he may have sustained from the breach, including any profit which he would have realized upon performance, as well as any other losses which may have resulted to him. In the case at bar, the county decided not to build the road of which the bridge was to be a part, and did not build it. The bridge, built in the midst of the forest, is of no value to the county because of this change of circumstances. When, therefore, the county gave notice to the plaintiff that it would not proceed with the project, plaintiff should have desisted from further work. It had no right thus to pile up damages by proceeding with the erection of a useless bridge.

The contrary view was expressed by Lord Cockburn in Frost v. Knight, L. R. 7 Ex. 111, but, as pointed out by Prof. Williston (Williston on Contracts, vol. 3, p. 2347), it is not in harmony with the decisions in this country.The American rule and the reasons supporting it are well stated by Prof. Williston as follows:

> "There is a line of cases running back to 1845 which holds that, after an absolute repudiation or refusal to perform by one party to a contract, the other party cannot continue to perform and recover damages based on full performance. This rule is only a particular application of the general rule of damages that a plaintiff cannot hold a defendant liable for damages which need not have been incurred; or, as it is often stated, the plaintiff must, so far as he can without loss to himself, mitigate the damages caused by the defendant's wrongful act. The application of this rule to the matter in question is obvious. If a man engages to have work done, and afterwards repudiates his contract before the work has been begun or when it had been only partially done, it is inflicting damage on the defendant without benefit to the plaintiff to allow the latter to insist on proceeding with the contract. The work may be useless to the defendant, and yet he would be forced to pay the full contract price. On the other hand, the plaintiff is interested only in the profit he will make out of the contract. If he receives this it is equally advantageous for him to use his time otherwise."

The leading case on the subject in this country is the New York case of Clark v. Marsiglia, 1 Denio (N. Y.) 317, 43 Am. Dec. 670. In that case defendant had employed plaintiff to paint certain pictures for him, but countermanded the order before the work was finished. Plaintiff, however, went on and completed the work and sued for the contract price. In reversing a judgment for plaintiff, the court said:

> "The plaintiff was allowed to recover as though there had been no countermand of the order; and in this the court erred. The defendant, by requiring the plaintiff to stop work upon the paintings, violated his contract, and thereby incurred a liability to pay such damages as the plaintiff should sustain. Such damages would include a recompense for the labor done and materials used, and such further sum in damages as might, upon legal principles, be assessed for the breach of the contract; but the plaintiff had no right, by obstinately persisting in the work, to make the penalty upon the defendant greater than it would otherwise have been."

And the rule as established by the great weight of authority in America is summed up in the following statement in 6 R. C. L. 1029, which is quoted with approval by the Supreme Court of North Carolina in the recent case of Novelty Advertising Co. v. Farmers' Mut. Tobacco Warehouse Co., 186 N. C. 197, 119 S. E. 196, 198:

> "While a contract is executory a party has the power to stop performance on the other side by an explicit direction to that effect, subjecting himself to such damages as will compensate the other party for being stopped in the performance on his part at that stage in the execution of the contract. The party thus forbidden cannot afterwards go on, and thereby increase the damages, and then recover such damages from the other party. The legal right of either party to violate, abandon, or renounce his contract, on the usual terms of compensation to the other for the damages which the law recognizes and allows, subject to the jurisdiction of equity to decree specific performance in proper cases, is universally recognized and acted upon."

This is in accord with the earlier North Carolina decision of Heiser v. Mears, 120 N. C. 443, 27 S. E. 117, in which it was held that, where a buyer countermands his order for goods to be manufactured for him under an executory contract, before the work is completed, it is notice to the seller that he elects to rescind his contract and submit to the legal measure of damages, and that in such case the seller cannot complete the goods and recover the contract price.See, also, Kingman & Co. v. Western Mfg. Co. (C. C. A. 8th) 92 F. 486; *Davis v. Bronson, 2 N. D. 300, 50 N. W. 836, 16 L. R. A. 655* and note, 33 Am. St. Rep. 783, and note; Richards v. Manitowoc & Northern Traction Co., 140 Wis. 85, 121 N. W. 837, 133 Am. St. Rep. 1063.

We have carefully considered the cases of Roehm v. Horst, 178 U. S. 1, 20 S. Ct. 780, 44 L. Ed. 953, Roller v. George H. Leonard & Co. (C. C. A. 4th) 229 F. 607, and McCoy v. Justices of Harnett County, 53 N. C. 272, upon which plaintiff relies; but we do not think that they are at all in point. Roehm v. Horst merely follows the rule of Hockster v. De La Tour, 2 El. & Bl. 678, to the effect that where one party to any executory contract refuses to perform in advance of the time fixed for performance, the other party, without waiting for the time of performance, may sue at once for damages occasioned by the breach. The same rule is followed in Roller v. Leonard. In McCoy v. Justices of Harnett County the decision was that mandamus to require the justices of a county to pay for a jail would be denied, where it appeared that the contractor in building same departed from the plans and specifications. In the opinions in all of these some language was used which lends support to plaintiff's position, but in none of them was the point involved which is involved here, viz. whether, in application of the rule which requires that the party to a contract who is not in default do nothing to aggravate the damages arising from breach, he should not desist from performance of an executory contract for the erection of a structure when notified of the other party's repudiation, instead of piling up damages by proceeding with the work. As stated above, we think that reason and authority require that this question be answered in the affirmative. It follows that there was error in directing a verdict for plaintiff for the full amount of its claim. The measure of plaintiff's damage, upon its appearing that notice was duly given not to build the bridge, is an amount sufficient to compensate plaintiff for labor and materials expended and expense incurred in the part performance of the contract, prior to its repudiation, plus the profit which would have been realized if it had been carried out in accordance with its terms. See Novelty Advertising Co. v. Farmers' Mut. Tobacco Warehouse Co., supra.

Our conclusion, on the whole case, is that there was error in failing to strike out the answer of Pruitt, Pratt, and McCollum, and in admitting same as evidence against the county, in excluding the testimony offered by the county to which we have referred, and in directing a verdict for plaintiff. The judgment below will accordingly be reversed, and the case remanded for a new trial.

Reversed.