SACKETT v. SPINDLER

California Court of Appeal
248 Cal. App. 2d 220, 56 Cal. Rptr. 435 (1967)

MOLINARI, P. J. SIMS, J., and BRAY, J., concurred.

MOLINARI, P. J.

Plaintiff and cross-defendant, Sheldon Sackett, appeals from the judgment of the trial court determining that he take nothing on his complaint for money had and received and further awarding defendant and cross-complainant, Paul Spindler, $ 34,575.74 plus interest on his cross-complaint against Sackett for breach of contract. Sackett's contentions on appeal are as follows: (1) the evidence reveals no "actionable breach" on his part; (2) damages were incorrectly computed; (3) certain evidence was improperly excluded; (4) the trial court's findings as to mitigation of damages by Spindler are not supported by the evidence; and (5) the trial court erred in awarding interest to Spindler.

The Record

As of July 8, 1961 Spindler was the owner of a majority of the shares of S & S Newspapers, a corporation which, since April 1, 1959, had owned and operated a newspaper in Santa Clara known as the Santa Clara Journal. In addition, Spindler, as president of S & S Newspapers, served as publisher, editor, and general manager of the Journal. On July 8, 1961 Spindler entered into a written agreement with Sackett whereby the latter agreed to purchase 6,316 shares of stock in S & S Newspapers, this number representing the total number of shares outstanding. The contract provided for a total purchase price of $ 85,000 payable as follows: $ 6,000 on or before July 10, $ 20,000 on or before July 14, and $ 59,000 on or before August 15. In addition the agreement obligated Sackett to pay interest at the rate of 6 percent on any unpaid balance. And finally, the contract provided for delivery of the full amount of stock to Sackett free of encumbrances when he made his final payment under the contract.

Sackett paid the initial $ 6,000 installment on time and made an additional $ 19,800 payment on July 21. On August 10 Sackett gave Spindler a check for the $ 59,200 balance due under the contract; however, due to the fact that the account on which this check was drawn contained insufficient funds to cover the check, the check was never paid. Meanwhile, however, Spindler had acquired the stock owned by the minority shareholders of S & S Newspapers, had endorsed the stock certificates, and had given all but 454 shares to Sackett's attorneys to hold in escrow until Sackett had paid Spindler the $ 59,200 balance due under the contract. However, on September 1, after the $ 59,200 check had not cleared, Spindler reclaimed the stock certificates held by Sackett's attorney.

Thereafter, on September 12 Spindler received a telegram from Sackett to the effect that the latter "had secured payments our transaction and was ready, willing and eager to transfer them" and that Sackett's new attorney would contact Spindler's attorney. In response to this telegram Spindler, by return telegram, gave Sackett the name of Spindler's attorney. Subsequently, Sackett's attorney contacted Spindler's attorney and arranged a meeting to discuss Sackett's performance of

the contract. At this meeting, which was held on September 19 at the office of Sackett's attorney, in response to Sackett's representation that he would be able to pay Spindler the balance due under the contract by September 22, Spindler served Sackett with a notice to the effect that unless the latter paid the $ 59,200 balance due under the contract plus interest by that date, Spindler would not consider completing the sale and would assess damages for Sackett's breach of the agreement. Also discussed at this meeting was the newspaper's urgent need for working capital. Pursuant to this discussion Sackett on the same date paid Spindler $ 3,944.26 as an advance for working capital. However, Sackett failed to make any further payments or to communicate with Spindler by September 22, and on that date the latter, by letter addressed to Sackett, again extended the time for Sackett's performance until September 29. Again Sackett failed to tender the amount owing under the contract or to contact Spindler by that date, the next communication between the parties occurring on October 4 in the form of a telegram by which Sackett advised Spindler that Sackett's assets were now free as a result of the fact that his wife's petition to impress a receivership on his assets had been dismissed by the trial court in which divorce proceedings between Sackett and his wife were pending; that he was "ready, eager and willing to proceed to . . . consummate all details of our previously settled sale and purchase"; and that the decision of the trial court dismissing his wife's petition for receivership "will clear way shortly for full financing any unpaid balance." Accordingly, Sackett, in this telegram, urged Spindler to have his attorney contact Sackett's attorney "regarding any unfinished details." In response to this telegram Spindler's attorney, on October 5, wrote a letter to Sackett's attorney stating that as a result of Sackett's delay in performing the contract and his unwillingness to consummate the agreement, "there will be no sale and purchase of the stock. . . . "Following this letter Sackett's attorney, on October 6, telephoned Spindler's attorney and offered to pay the balance due under the contract over a period of time through a "liquidating trust." This proposal was rejected by Spindler's attorney, who, however, informed Sackett's attorney at that time that Spindler was still willing to consummate the sale of the stock provided Sackett would pay the balance in cash or its equivalent. No tender or offer of cash or its equivalent was made and Sackett thereafter failed to communicate with Spindler until shortly before the commencement of this action.

Beginning during the period scheduled for Sackett's performance of the contract Spindler found it increasingly difficult to operate the paper at a profit, particularly due to the lack of adequate working capital. In an attempt to remedy this situation Spindler obtained a loan of approximately $ 4,000 by mortgaging various items of personal property owned by him. In addition, in November, Spindler sold half of his stock in S & S Newspapers for $ 10,000. Thereafter, in December, in an effort to minimize the cost of operating the newspaper, Spindler converted the paper from a daily to a weekly. Finally, in July 1962 Spindler repurchased for $ 10,000 the stock which he had sold the previous November and sold the full 6,316 shares for $ 22,000, which sale netted Spindler $ 20,680 after payment of brokerage commission.

Breach of Contract

Sackett contends that the evidence reveals no "actionable breach" on his part. The basis of his argument is that despite his failure to tender over half of the purchase price for the stock of S & S Newspapers, his duty to consummate the contract was discharged by Spindler's conduct in two respects, namely, Spindler's "rescission" of the purchase agreement as a result of his

reclamation of the stock certificates from Sackett's attorney on September 1 and Spindler's "repudiation" of the contract on October 5.

To begin with, the undisputed evidence shows that of the $ 85,000 due from Sackett to Spindler under the purchase agreement the total amount which the former paid to the latter up to the time of trial was $ 29,744.26. Moreover, the purchase agreement reveals that Sackett's promise to pay Spindler $ 85,000 was an unconditional one once the respective dates on which the payments were due had arrived. Accordingly, since the trial court found that it was not impossible for Sackett to perform the subject contract either by virtue of his illness and hospitalization or his pending divorce litigation, it is clear that his failure to tender the balance due under the contract constituted a breach of the agreement, a breach being defined as an unjustified or unexcused failure to perform all or any part of what is promised in a contract. (*Rest., Contracts, §§ 312*, 314, pp. 462, 465.) The question remains, therefore, as to whether Sackett's duty to consummate the contract or to respond to Spindler in damages for the former's failure to perform the subject contract was in any way discharged by Spindler's conduct. …

… [W]ith regard to Sackett's claim that Spindler "repudiated" the contract on October 5, it is clear that the letter which Spindler's attorney wrote to Sackett's attorney on that date informing the latter that as a result of the "many delays" on the part of Sackett "there will be no sale and purchase of the [newspaper] stock" constituted notification to Sackett that Spindler considered his own duty of performance under the contract discharged as a result of Sackett's breach of the contract and that Spindler was thereby terminating the contract and substituting his legal remedies for his contractual rights. Such action was justifiable on Spindler's part if, but only if, Sackett's breach could properly be classified as a total, rather than a partial, breach of the contract. (*Rest., Contracts, § 313*, p. 464; 4 Corbin on Contracts, § 946, p. 809.) If, on the other hand, Sackett's breach at that time was not total so that Spindler was not entitled to consider himself discharged under the contract, then Spindler's action would constitute an unlawful repudiation of the contract, which would in turn be a total breach of the contract sufficient to discharge Sackett from any further duty to perform the contract. (6 Corbin on Contracts, § 1253, pp. 7, 13-16.)

Whether a breach of contract is total or partial depends upon its materiality. (*Rest., Contracts, § 317*, p. 471.) In determining the materiality of a failure to fully perform a promise the following factors are to be considered: (1) The extent to which the injured party will obtain the substantial benefit which he could have reasonably anticipated; (2) the extent to which the injured party may be adequately compensated in damages for lack of complete performance; (3) the extent to which the party failing to perform has already partly performed or made preparations for performance; (4) the greater or less hardship on the party failing to perform in terminating the contract; (5) the wilful, negligent, or innocent behavior of the party failing to perform; and (6) the greater or less uncertainty that the party failing to perform will perform the remainder of the contract. (*Rest., Contracts, § 275*, pp. 402-403.) (4b) In the instant case, although Sackett had paid part of the purchase price for the newspaper stock and although his delay in paying the balance due under the contract could probably be compensated for in damages, we are of the opinion that Spindler was justified in terminating the contract on October 5 on the basis that despite Sackett's "offers" to perform and his assurances to Spindler that he would perform, it was extremely uncertain as to whether in fact Sackett intended to complete the contract. In addition, in light of Spindler's numerous requests of Sackett for the balance due under the contract, the latter's failure

to perform could certainly not be characterized as innocent; rather it could be but ascribed to gross negligence or wilful conduct on his part.

The facts in the instant case are similar to those in *Coughlin* v. *Blair*, 41 Cal.2d 587 [262 P.2d 305]. There the plaintiffs purchased a lot from the defendants, who, in the deposit receipt evidencing the sale, agreed to install utilities and to pave the road to the subject lot within one year from the date of the agreement. On May 30, 1949, the date that performance was due under the contract, the utilities had not been installed nor had the road been paved. During the following year the plaintiffs wrote several letters to the defendants demanding performance. The defendants, however, did not perform their obligations nor did they repudiate the contract. Ultimately, on May 24, 1950, the work still not having been done, the plaintiffs brought an action for general damages based on the difference in value of the property with and without the performance promised in the contract and for special damages. In affirming the judgment of the trial court insofar as it awarded the plaintiffs general damages, the Supreme Court considered whether, in view of the defendants' assertion that they intended to perform their obligations under the contract in the future, the trial court's award of damages to the plaintiffs allowed them a double recovery, that is, both the improvements and damages for failure to secure the improvements. In this context the Supreme Court pointed out that if the defendants' breach was total, the plaintiffs could recover all their damages, past and prospective, in one action and that a judgment for the plaintiffs in such an action would absolve the defendants from any duty to perform the contract. The Supreme Court then proceeded to consider whether the plaintiffs were entitled to treat the defendants' breach as total as of the date of the commencement of the action and concluded that "Although defendants had not expressly repudiated the contract, their conduct clearly justified plaintiffs' belief that performance was either unlikely or would be forthcoming only when it suited defendants' convenience." Under these circumstances it was held that the plaintiffs were not required to endure that uncertainty or to await the defendants' convenience but were justified in treating the defendants' nonperformance as a total breach of the contract. (Pp. 599-600; see also *Gold Min. & Water Co.* v. *Swinerton*, 23 Cal.2d 19, 29-30 [142 P.2d 22]; *Walker* v. *Harbor Business Blocks Co.*, 181 Cal. 773, 780-781 [186 P. 356].)

Similarly, in the instant case although Sackett at no time repudiated the contract and although he frequently expressed willingness to perform, the evidence was such as to warrant the inference that he did not intend to perform the subject contract. Certainly, the state of the record was such as to justify the conclusion either that it was unlikely that Sackett would tender the balance due or that he would do so at his own convenience. Spindler was not required to endure the uncertainty or to await Sackett's convenience and was therefore justified in treating the latter's nonperformance as a total breach of the contract. Accordingly, we conclude that the letter which Spindler's attorney wrote to Sackett's attorney on October 5 did not constitute an unlawful repudiation of the contract on Spindler's part, was therefore not a breach of the contract by him, and thus did not discharge Sackett's duty to perform the contract or, alternatively, to respond to Spindler in damages.

In any event, even if Spindler was not justified in treating Sackett's breach as total as of October 5, the latter's contention that his duty to perform was discharged by Spindler's repudiation of the contract as of that date is untenable. Since Spindler was not obligated to perform his promise at that time due to Sackett's failure to tender the balance due under the contract, Spindler's

repudiation was, at best, anticipatory in nature. Its effect was nullified by Sackett's disregard of it and his treating the contract as still in force as evidenced by his attempt, through his attorney, to arrange an alternative method of financing the balance due under the agreement. (See *Cook* v. *Nordstrand*, 83 Cal.App.2d 188, 195 [188 P.2d 282]; *Rest., Contracts, § 319*, p. 481.) Moreover, Spindler's repudiation was itself retracted by his attorney who, on Spindler's behalf, told Sackett's attorney in the same conversation at which the latter suggested an alternative method of financing that Spindler was still willing to consummate the sale provided Sackett would pay the balance due in cash or its equivalent. Such a retraction constitutes a nullification of the original effectiveness of the repudiation. (*Rest., Contracts, § 319*, p. 481.) …

The judgment is modified by deleting therefrom the award of interest from September 29, 1961 to the date of the entry of judgment. As so modified, the judgment is affirmed. Respondent Spindler to recover costs.