FRANKLIN PROPERTIES COMPANY VS. LAUFFER INDUSTRIES, ET AL., C.P. Franklin County Branch, No. AD 1986-60

Damages - Leaking Roof - Indemnity

1. The plaintiff may recover the amount necessary for completing the work to be performed under the contract, calculated at the time of the breach, even if the amount is greater than the value of the contract.

2. In order to recover indemnity where there has been a voluntary payment, it must appear that the party asked to pay must be legally liable and compelled to satisfy the claim.

Jay H. Gingrich, Esq., Attorney for Plaintiff
William A. Adams, Esq., Attorney for Defendant Lauffer
Jared L. Hock, Esq., Attorney for Defendants Garland and Chevron
James D. Flower, Jr., Esq., Attorney for Brechbill & Helman

OPINION

WALKER, J., May 12, 1988:

This matter is currently before the court on the briefs of the parties concerning the legal issues to be resolved before trial as set forth in the pre-trial order of November 9, 1987, and the supplemental pre-trial order of November 16, 1987. These issues will be individually set forth and discussed below.

The facts of this case are as follows. The plaintiff, Franklin Properties Company, is the owner of the South Gate Mall in Chambersburg, Pennsylvania. Some time prior to the spring of 1982, the plaintiff had been experiencing leaks in the roof of its shopping mall. In the spring of 1982, the plaintiff contracted with defendant, Lauffer Industries, to apply a Chevron Industrial Membrance (CIM) to the roof over the three store area with the worst leaks, stores 15, 16, and 17. The CIM was supplied to defendant, Luaffer Indistries, by defendant, Garland Petroleum Company, Inc., and manufactured by defendant, Chevron U.S.A., Inc. The total cost of the roofing work was $7,500, of which $5,510 was for labor and the remainder was for materials.

Lauffer Industries appears to have commenced application of the CIM during the early summer of 1982. During the time while the CIM was being applied to the roof above the three stores, defendant, Brechbill & Helman Construction Co., Inc. was putting a mansard front (facade) over stores 1 through 17. From the

pleadings it appears as if defendant, Lauffer, covered the front portion of its job with plastic to keep rain from the exposed edge of its work. However, the plastic became punctured and during a rainstorm in early July, 1982, water seeped throught the punctured plastic covering, under the CIM, and into stores 15 through 17.

Subsequent to leak, one of the mall tenants, Book'N Card Mall, Inc., instituted a law suit for damages to its store from the leak. The defendants in this law suit were: Franklin Properties Co., Brechbill & Helman, Construction Co., Inc., Garland Petroleum Co., Inc., Lauffer Industries, and W. Paul Settles & Associates, Inc. The defendants int he Book'N Card case are substantially the same parties as in the present case.

On May 2, 1984, Book'N Card released the defendants from any liability arising from the roof leak of early July, 1982. The consideration for the release was $7,750 of which $1,000 was paid by Franklin Properties. However, when agreeing to settle the claim, the parties stated that this was a doubtful and disputed claim, and no party admitted any liability.

Also in 1984, the plaintiff paid A & D Roofers of Goshen, Ohio, $13,860 to re-roof the area above stores 15, 16 and 17 where the CIM was applied. On February 28, 1986, Franklin Properties filed the present law suit which claims that the defendants have breached their contract(s) with Franklin Properties, and also claims damages in the amount of the $13,860. For the breach of an oral contract, the statute of limitations is four years. 42 Pa. C.S.A. §5525(3). The statute of limitations for the breach of a written contract action is six years. 52 Pa. C.S.A. §5527(2). There is a four year limitation of actions for tort (negligence) actions. 42 Pa. C.S.A. §5524.

ISSUE ONE

Can the various defendants be held liable for damages in excess of their original respective contracts with plaintiff?

The law in Pennsylvania is well settled that the general measure of damages in a breach of contract action is that the "aggrieved party should be placed as nearly as possible in the same position he would have occupied had there been no breach." *Harman v. Chambers,* 358 Pa. 516, 521, 57 A.2d 842, 845 (1948). The aggrieved party is entitled to recover whatever damages he has suffered, including damages that would naturally and ordinarily

result from the breach. *Taylor v. Kaufhold,* 368 Pa. 538, 546, 84 A.2d 347, 351 (1951).

In a case concerning the breach of a contract for the repair and construction of an addition to a home, the Superior Court held that it was not error for the trial judge to instruct the jury that it may return a verdict for the amount of the costs necessary to complete the work. *Brourman v. Bova,* 198 Pa. Super. 279, 182 A.2d 245 (1962). Implicit in this holding is that a jury award granting the amount of the costs necessary for completion would be valid, even if the amount of the award was greater than the amount of the original contract.

However, the Superior Court also held that the damage award must be the amount necessary for completion at the time of the breach. It was error for the trial judge to admit evidence on the amount necessary for completion at the time of the trial, which was some tow years after the breach of the contract had occurred. On remand, testimony was only to be taken on the amount necessary to complete the work at the time of the breach. Another breach of contract case is *Popkin Brothers v. Dunlap,* 130 Pa. Super. 50, 196 A. 586 (1938). *Popkin* held that

> "[A] vendee who is suing for damages for failure to deliver goods of a certain grade may not purchase elsewhere goods of a substantially higher value or better quality than those contracted for and recover from the vendor as damages the difference between the contracted price and the price of the higher grade goods, at least not without proof that the more expensive goods were alone available." *Id.* at 57, 196 A. at 589, *quoted with approval, Schnabel Associates v. T & M Interiors, Inc.,* 352 Pa. Super. 303, 307, 507 A.2d 1241, 1243 (1986).

The plaintiff relies heavily on *Schnabel* to support its contention that recovery of an amount in excess of the original contract price is permissible. An analysis of this case reveals that the plaintiff's reliance upon *Schnabel* is unjustified. In *Schnabel,* the lower court had found the appellants liable for providing defectively manufactured and laminated carpet which was used in an apartment building.

On appeal, two of the issues were whether or not the lower court had "erred in failing to consider the salvage value of the replaced carpet, and in allowing the appellee to replace the defective carpet with a higher quality carpet." *Id.* at 306, 507 A.2d at 1243. To dispose of theifirst issue, the Superior Court referred to the lower court's findings, which expressly stated that the

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Department of State of the Commonwealth of Pennsylvania, at Harrisburg, Pennsylvania, on the 6th day of October, 1988, for the purpose of obtaining a Certificate of Incorporation of a proposed close business corporation to be organized under Section 373 of the Business Corporation Law of the Commonwealth of Pennsylvania, Act of May 5, 1933, P.L. 364, as amended.

The name of the proposed corporation is MIKE PRYOR'S LEGENDS, LTD.

The purposes for which it is organized are: To perform shows with animals, and to engage in and to do any lawful act concerning any lawful business for which businesses may be incorporated under the Business Corporation Law.

William C. Cramer, Esq.
414 Chambersburg Trust Bldg.
Chambersburg, PA 17201

10/21/88

NOTICE IS HEREBY that an application has been made to the Department of State of the Commonwealth of Pennsylvania in Harrisburg, Pennsylvania, on August 19, 1988, by Hoffman Transport, Inc., a foreign corporation, formed under the laws of the State of Maryland, with its principal office located at Route 6, Box 89, Hagerstown, Maryland, 21740, for a Certificate of Authority to do business within the Commonwealth of Pennsylvania under the provisions of the Business Corporation Law of the Commonwealth of Pennsylvania, approved May 5, 1933, as amended. The said business corporation proposed to transact in the Commonwealth of Pennsylvania under the said Certificate of Authority is Hoffman Transport, Inc. The proposed registered office of the said corporation in the Commonwealth of Pennsylvania will be located at 485 Mason Dixon Road, Greencastle, Pennsylvania 17225.

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calculation of the per-yard cost of the replacement carpet included a credit for the salvage value of the defective carpet.

Regarding the second issue, the Superior Court explained how the trial court calculated the amount of the damages. The difference between the cost of the higher quality carpet and the cost of the same quality carpet was subtracted from the actual cost of the replacement. The result of this downward adjustment was to place the purchaser of the defective carpet in only as good a position as if performance had been properly rendered under the original contract. The Superior Court clearly stated that the "difference between the contract price and the price of higher grade goods" was not awarded as damages. *Id.* at 307, 507 A.2d at 1243.

In the case at bar, the plaintiff claims that the contract for the application of the CIM was breached, and is claiming damages in the amount of $13,860. This dollar amount is the amount the plaintiff paid in 1984 for a new roof on the area where the CIM, which is not a new roof, was applied in 1982. The claim for damages is based entirely upon the alleged breach of contract, and is not based upon any activity which would have naturally and ordinarily resulted from the breach (i.e. water damage to the stores). These claims are being handled independently of the case at bar. *See,* No. A.D. 1982-386 (C.P. Franklin) (Book'N Card case).

Under Pennsylvania law, the plaintiff may recover the amount necessary for completing the work to be performed under the contract, calculated at the time of the breach, even if the amount is greater than the value of the contract. The plaintiff, however, is not permitted to recover the difference between the contract price and the price of higher grade goods.

ISSUE TWO

Plaintiff apparently paid the sum of $1,000 as a joint defendant to settle a lawsuit filed by several tenants against himself and several other defendants. Can plaintiff sue for his voluntary payment to settle a suit filed against him in a subsequent action against other defendants?

In order to recover indemnity where there has been a voluntary payment, as pointed out in plaintiff's brief, "it must appear that the party paying was *himself legally liable* and could have been compelled to satisfy the claim." *Tugboat Indian Company v. A/S Ivarans Rederi,* 334 Pa. 15, 21, 5 A.2d 153, 156 (1939) (emphasis in original). The plaintiff finds the necessary legal liability in the

landlord/tenant relationship between it and Book'N Card. *Plaintiff's Brief* at 2. The plaintiff's argument is without merit, as shown by its own admission in the Book'N Card litigation.

The release that the plaintiff signed to settle the Book 'N Card litigation states

> "that this settlement is the compromise of a doubtful and disputed claim and that the payment is not to be construed as an admission of liability on the part of the persons, firms, and corporations hereby released by whom liability is expressly denied." *Release of All Claims, Garland and Chevron's Brief,* Exhibit A at 2.

This language clearly shows that the plaintiff believes that it is not legally liable to Book 'N Card and cannot be forced to satisfy the Book 'N Card claim. To avoid paying Book 'N Card any money, the plaintiff should not have brought an action for indemnification; the plaintiff should have refused to sign the settlement agreement.

ISSUE THREE

Plaintiff claims damages for the hiring of technical experts to analyze the problem. Are these legitimate damages or would they be a normal part of hiring a technical expert regarding litigation?

At oral argument on April 8, 1988, plaintiff's counsel agreed to provide the court with itemized expert bills so that the court could determine which of the specific charges were reasonably related to repairing the roof problem, and which charges resulted from anticipation of litigation. The court found this procedure necessary since the expert fees claimed by the plaintiff had not previously been itemized, and appeared to cover a significant period of time, a year or so.

The court indicated that it would allow a claim for recovery of those expert fees that were for services rendered within a reasonable period of time, approximately four (4) seeks, of the early July, 1982 rainstorm which precipitated this lawsuit. Since the plaintiff has failed to provide the court with the expert bills, the court assumes that all expert fees incurred by plaintiff were in anticipation of this litigation. Therefore, plaintiff will not be allowed to recover any of the claimed expert fees.

ISSUE FOUR

Is the plaintiff barred by the Statute of Limitations in this matter?

Defendants, Brechbill & Helman, Garland, and Chevron, contend that plaintiff's claims against them sound in negligence and are barred by the two year statute of limitations. 42 Pa. C.S.A. §5524. Defendant, Lauffer, accepts plaintiff's contention that it is proceeding under breach of contract, and concedes that the statute of limitations does not bar this action.

According to those defendants who contend plaintiff is proceeding under a negligence theory, the plaintiff's claim would be barred under Section 5524(3), which imposes a two year limitation on "An action for the taking, detaining or *injuring personal property*. . ." emphasis added). The injury incurred by plaintiff would be the extra expenditure of funds required to make the roof function properly. *Compare Cohen v. General Electric Co.,* 68 Lanc.L.Rev. 425, 26 Pa. D.&C.3d 18 (1982).

The plaintiff, however, directs the court's attention to *A.J. Aberman, Inc. v. Funk Bldg. Corp.,* 278 Pa. Super. 385, 420 A.2d 594 (1980), in which plaintiff had instituted a lawsuit, based in contract, over a leaky roof. In *Aberman,* which is quite similar to the case at bar, the Superior Court held that the action was barred by the six year statute of limitations for written contracts. *Id.* at 389, 393, 420 A.2d at 596, 598; 42 Pa.C.S.A. §5527. Implicit in the Superior Court's holding is that the action was properly brought in contract, and the action should not have been brought in negligence.

With the information available at this time, all the court can say is that if plaintiff's claims against any or all defendants are based in negligence, then those negligence claims are barred by the statute of limitations. Resolutions of this issue must wait until trial when the court will have the information necessary to determine if the plaintiff is proceeding in negligence or contract.

ISSUE FIVE

Are defendants entitled to discover the contents of plaintiff's tax returns and financial statements to determine the value plaintiff carried the roof area in question on its book?

The scope of discovery is very broad, and although the information sought may not be admissible in evidence the information sought is discoverable if it appears reasonable calculated to lead to the discovery of admissible evidence. Pa.R.C.P. 4003.1. Although the courts in Pennsylvania recognize that any discovery is a burden and results in some expense, discovery will only be prohibited where it would cause "unreasonable . . .

Burden . . . to the deponent or any person or party . . ." Pa.R.C.P. 4011 (b).

The defendants' request is within the broad scope of discovery, and furthermore, the burden upon the plaintiff to comply with the request is not unreasonable. As such, the plaintiff shall comply with the defendants' request for tax returns and financial documents that relate to the roof area in question. This is not to say the the plaintiff must supply the defendants with its complete financial documents. Rather, the plaintiff need only provide the defendants with those portions of tax returns or other financial documents that relate to the value of the roof area in question.

PENNSYLVANIA DEPARTMENT OF LABOR AND INDUSTRY, ETC. VS. REMSBURG, C.P. Franklin County Branch, No. 197-1987

Minimum Wage Act of 1968 - Underpaid Wages - Counterclaim

1. To permit an act which provides a guaranteed minimum wage to be interpreted to allow set-offs or counterclaims by employers would undermine the public purpose of the Act.

2. The Minimum Wage Act is not intended to provide a mechanism to resolve disputes over other alleged obligations which exist between employer and employee.

Richard C. Lengler, Esq., Attorney for Plaintiff
William C. Cramer, Esq., Attorney for Defendant

KAY, J., March 30, 1988:

In this case of first impression in the Commonwealth, the Court is asked to decide whether a defendant in an action brought under the Minimum Wage Act of 1968 ("MWA"), 43 P.S. §333.101 *et seq.* may bring a counterclaim. Although other issues have been raised in this proceeding, the disposition of this matter makes it

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