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CONTRACTS

CHARLES H. RANDALL, JR.*

In *Gainey v. Coker's Pedigreed Seed Co.*, 227 S.C. 200, 87 S.E. 2d 486 (1955), the Supreme Court held that the remedy of compensation afforded by the South Carolina Workmen's Compensation Law[1] is exclusive, and that therefore an agreement to forbear presenting a claim for compensation under that Law is not a valid consideration to support a contract to recompense an employee for an injury. The complaint asking damages for breach of contract alleged that plaintiff suffered injuries in early 1947 while in the employ of defendant, and as a result thereof was entitled to payment of compensation under the Workmen's Compensation Law. Agents of the defendant thereafter induced plaintiff to forbear presenting his claim for compensation, and promised him in lieu of such benefits that he would be retained in the employ of defendant at his then salary, $195 per month, until he reached sixty-five years of age or died. Plaintiff did not make a claim for compensation, and the one-year period of limitations set by the Law expired.[2] On September 1, 1951, defendant refused to provide plaintiff with further work, thus allegedly breaching the contract. Damages in the amount of $20,000 were asked.[3]

Defendant demurred to the complaint, stating as grounds that the court had no jurisdiction in that the Workmen's Compensation Law gives exclusive jurisdiction to the South Carolina Industrial Commission.[4] J. Woodrow Lewis, Circuit Judge, overruled the demurrer, stating,[5] "I find that the plaintiff is not bringing an action for injuries sustained, but bases his consideration for the contract of employment upon his forbearance to file a claim. There is

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1. CODE OF LAWS OF SOUTH CAROLINA, 1952 §§ 72-1 to 72-504.
2. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 72-303 provides:
   The right to compensation under this Title shall be forever barred unless a claim is filed with the Commission within one year after the accident, and, if death results from the accident, unless a claim be filed with the Commission within one year thereafter.
3. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 72-151 *et seq.* set out amounts of compensation payable under the Law; § 72-160 provides: "The total compensation payable under this Title shall in no case exceed eight thousand dollars." Lump-sum payment is unusual, § 72-181; the usual method of compensation is a weekly sum not exceeding $35 or 60% of the worker's regular weekly wages. In cases of total disability, payment continues during disability for a maximum of 500 weeks. § 72-151 as amended.
4. 227 S.C. 202, 87 S.E. 2d 488; Transcript of Record, pp. 5-6.
5. 227 S.C. 203, 87 S.E. 2d 488; Transcript of Record, pp. 6-7.

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no question raised as to the principle that forbearance to sue is valid consideration for a contract." The Supreme Court, in an opinion by Chief Justice Baker, reversed, holding that to enforce the contract would violate the terms and the policy of the Workmen's Compensation Law.

After brushing aside objection to the form of the demurrer,[6] the opinion disposes of the possibility that to deny recovery on the contract would be to entirely deny justice to the plaintiff, because the Statute of Limitations had run on any right to make a claim before the Industrial Commission under the Act. The court pointed out, citing *Young v. Sonoco Products Company,* 210 S.C. 146, 41 S.E. 2d 860 (1947), that if the conduct of defendant's agents was such as to mislead or deceive claimant, whether intentionally or not, and induced him to withhold or postpone filing his claim until more than a year had elapsed, that the defendant may then be estopped from presenting the statutory limitation as a defense. The Chief Justice next moved persuasively to a consideration of the legislative intent as evinced by the terms of the Law, and concluded that to permit recovery would defeat the statute, saying, "The contract is not enforceable since neither the employer nor employee had the right to enter into an agreement which evaded or avoided the terms and conditions of the Compensation Act."[7] The decision is eminently sound.[8]

6. Discussed below in footnote 8.

7. 227 S.C. 206, 87 S.E. 2d 489. The Court did not cite cases from other jurisdictions cited by counsel. Accord with the instant case, and cited by defendant, Woolsey v. Panhandle, 131 Tex. 449, 116 S.W. 2d 675 (1938); Bair v. Susquehanna Collieries, 335 Pa. 266, 6 A. 2d 779 (1939). *Contra,* cited by plaintiff, Oklahoma Portland Cement Co. v. Pollick, 181 Okla. 266, 73 P. 2d 427 (1937).

8. I would say that technically Judge Lewis was correct in the Court below in his assertion that the demurrer did not raise these questions. CODE OF LAWS OF SOUTH CAROLINA, 1952 §§ 10-642, 10-643 are applicable. If I may restate Judge Lewis' position without doing him injustice, he felt that the demurrer raised only an objection to the jurisdiction of the court over the subject matter of the action; to raise the question of forbearance to sue, the demurrer should have stated that the complaint failed to state facts sufficient to constitute a cause of action. The court is asked to take jurisdiction of an alleged cause of action in contract, not of a claim under the Workmen's Compensation Law; of course it has jurisdiction of contract actions. The decision of the Supreme Court, properly stated, is that no cause of action in contract exists, the legislature having by statute forbidden it. This problem is one which arises seldom in State practice, but fairly often in Federal practice. The Fair v. Kohler Die & Specialty Co., 228 U.S. 22 (1913); Bell v. Hood, 327 U.S. 678 (1946); MOORE, COMMENTARY ON THE U. S. JUDICIAL CODE (1949), p. 144. However, it would seem that the Chief Justice's liberal reading of the demurrer is in the instant case preferable to the technical reading by Judge Lewis. If the demurrer were over-ruled on this narrow ground, the defendant could raise the question of failure to state a cause of action at any time before judgment. Thus a saving of time and effort results from an earlier decision on the merits. Further, it is obvious that the defendant takes the position that the Workmen's Compensation Law provides the exclusive remedy; the plaintiff's attack on the demurrer was dilatory.

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Ordinarily, forbearance to sue is sufficient consideration to support a contract,[9] but this rule must give way where it would defeat a clearly expressed legislative intent.

Green v. Camlin, 229 S.C. 129, 92 S.E. 2d 125 (1956), involved an alleged breach of contract for failure to deliver a franchise. Defendant Camlin, doing business as Camlin Motors, had entered an agreement in 1947 with Tucker Corporation, a Delaware corporation formed to manufacture automobiles, whereby Camlin was given an exclusive agency to sell Tucker autos in Georgetown and Conway, South Carolina. This agreement provided, among other terms, that it was assignable only with the written consent of Tucker Corporation. On September 15, 1948, for a consideration of $2,500, plaintiff John Green agreed to buy from Camlin his right to sell Tucker automobiles in Conway, and on such date he paid to Camlin $1,250 and received a receipt which acknowledged "cash payment on the Tucker franchaise [sic] for Conway." The balance was paid on October 6, 1948, and a receipt then issued to plaintiffs John and Walter Green which stated that "Balance of $1,250.00 on Tucker franchise paid in full for franchise in Conway, S. C. . . ." Subsequently thereto, the plaintiffs filed their application for the Conway franchise with Darling Motors, Inc., of Charlotte, N. C., the Tucker distributor for North and South Carolina, and the application was forwarded to the Tucker Corporation. Necessary financial statements and other papers were completed by the Greens and filed with the distributor, who approved them and sent them on to Tucker for its approval. Camlin relinquished his selling rights to Tucker automobiles in Conway, but no franchise was ever issued by Tucker Corporation to the Greens, nor did Tucker Corporation ever approve in writing of the assignment. Tucker Corporation was thereafter declared bankrupt and its assets taken over by a receiver, and all its records frozen.

Plaintiffs sued for a return of the purchase price on the theory that since no franchise had been delivered, the contract had been breached. The Supreme Court so held, Mr. Justice Moss saying:[10]

> It is apparent from the receipts above quoted that the parties contemplated the contract to be completed when the respondents received the right to sell Tucker automobiles in Conway, South Carolina. He was aware that no part of his agreement with Tucker Corporation could be assigned without the written

9. Counsel cited Hutton v. Edgerton & Richards, 6 S.C. 485 (1875) for this fundamental proposition. Respondent's brief, p. 3.
10. 92 S.E. 2d 127.

> consent of Tucker Corporation. This written consent was never obtained and hence the respondents never received the right or franchise to sell Tucker automobiles in Conway, South Carolina. The failure to obtain the sales agency or franchise right to sell Tucker automobiles at Conway, South Carolina, constituted a breach of the contract between the appellant and respondents and entitled the respondents to recover the consideration paid therefor.

The court further pointed out that the sales agency involved a relationship of personal credit and confidence, and hence was not assignable without the consent of the Corporation.

The decision would appear to be sound. All parties appeared to have acted in good faith throughout the contract negotiations and thereafter. The subject of the contract failed; the only question was as to who would be left holding the empty bag. The contract was one for the sale of a franchise; hence the question was, who had an enforceable franchise when the company went bust? The assignee would have had an enforceable franchise only if, first, he had received from Tucker Corporation a duly executed franchise; or, second, if Tucker, pursuant to the franchise agreement with Camlin, had sent the latter written consent to assign to Green. Neither of these events having occurred, the Greens had no enforceable franchise.

Turner v. Carey, 227 S.C. 298, 87 S.E. 2d 871 (1955), involved an unusual application of the principle that when a seller makes fraudulent misrepresentations in inducing a buyer to purchase property, the buyer has an election of remedies: he may affirm the transaction, retain the property and bring an action at law for damages for fraud and deceit, or he may rescind the sale and recover the purchase price.[11] Carey sold to Turner a house and lot near Spartanburg, for $11,000, allegedly making false representations as to the condition of the house. Turner assumed a mortgage for $6,000 held by Citizens and Southern National Bank (Bank's mortgage), gave a second mortgage to Carey for $2,000 (Carey mortgage) and paid

11. PROSSER, HANDBOOK ON THE LAW OF TORTS (1941), 701-719. The author lists eight possible options open to the party to whom a misrepresentation is made: (1) a tort action of deceit; (2) a tort action for negligent misrepresentation; (3) a contract action for breach of warranty; (4) a suit in equity for relief, as by way of rescission; (5) a restitution action at law; (6) raising the defense of misrepresentation to an action by the seller for the balance of the purchase price, on the theory of rescission of the sale; (7) raising the defense of misrepresentation in a similar action on the theory of affirmance of the sale and recoupment; (8) in some situations, an estoppel.

the balance of $3,000 in cash. Turner entered into possession, later discovered the alleged defects and complained to Carey, who did not remedy the defects to Turner's satisfaction. Thereupon, on advice of counsel, Turner ceased making payments on both mortgages, and in January, 1950, he began the instant action against Carey. The complaint stated this action in terms of *rescission,* asking that plaintiff recover all amounts paid on the purchase price plus expenditures made on the premises and punitive damages. Plaintiff declared that he was ready and willing to reconvey the premises to Carey, and asked also that the Carey mortgage be cancelled, and that he be relieved of his assumption of the Bank's mortgage.

In May, 1950, the Bank brought an action to foreclose its mortgage, making both Turner and Carey parties defendant. Carey answered setting up his mortgage and asking that it too be foreclosed and judgment be given against Turner for the amount due.[12] A decree of foreclosure was entered, to which all parties consented, and the property was sold. Carey in this decree was awarded judgment against Turner for $1,117.40, representing the balance of his unpaid mortgage plus interest and attorney's fees. The foreclosure sale, bid in by Carey's son, brought only enough to satisfy the Bank's mortgage, costs and taxes. Carey thus at this point held a deficiency judgment for $1,117.40.

The *Turner* action was then tried, and resulted in a judgment for Turner for $4,265. On the damages question, the trial Judge, Circuit Judge J. Woodrow Lewis, charged the jury as follows:[13]

> The measure of actual damages would be the difference between the value of the house as it actually was and the value it would have been had it been constructed as represented. The difference between those two values, if any, would be the amount of actual damages that the plaintiff would be entitled to recover.

The charge to the jury made no mention of the deficiency judgment held by Carey. At the conclusion of the charge, the jury was temporarily excused as required,[14] and counsel given opportunity to express objection to the charge, or to ask further instructions. No such requests were made. The jury thereupon entered its verdict for $4,265. Counsel for Turner then asked the court to inquire of the jury whether it had taken into consideration in its verdict the outstanding

12. A motion to consolidate the foreclosure action with the rescission action was denied.
13. 87 S.E. 2d 873.
14. CODE OF LAWS OF SOUTH CAROLINA, 1952, as amended, § 10-1210, Cumulative Supplement.

deficiency judgment. This the court denied, but upon further motion of counsel it ordered that the verdict "vitiated" the whole transaction of sale of the house, and that therefore the deficiency judgment was void. This determination by the trial Judge was reversed by the Supreme Court, in an opinion by Mr. Justice Oxner. The court held that although the complaint stated a cause of action on the theory of *rescission,* the case was tried on the theory of *deceit,* apparently because, at the time of the trial, the property had been sold in the foreclosure sale, and hence could no longer be returned to the seller. The court pointed out that the instructions to the jury on actual damages, quoted above, clearly indicate that the jury was instructed as for an action in fraud and deceit. An action based on fraud and deceit is an affirmation of the contract, and hence the court correctly held that the deficiency judgment was still in force.

Two contract cases were decided during the year by the United States Court of Appeals for the Fourth Circuit, on appeals from District Court decisions in South Carolina. Jurisdiction in each was based on diversity. In *Julius Kayser & Co. v. Textron, Inc.,* 228 F. 2d 783 (4th Cir., 1956),[15] the question was whether the parties had reached a binding contract, or were still in the negotiation stage and did not intend to be bound until they had executed a formal written instrument. Kayser held a lease for 15 years on a new plant at Liberty, South Carolina, and entered negotiations to assign its lease to Textron. The parties reached agreement on the amount of rent to be paid, and agreed that the assignment would be effective on April 1, 1954, at which date rent would commence. These terms were reached at a meeting held in New York between Raymond C. Kramer, Chairman of the Board of Kayser, and Royal Little, Chairman of Textron's Board of Directors. A "memorandum of purported agreement" was sent by Kramer to South Carolina counsel, containing among other terms the provision, "Textron is to have the right to earlier occupancy than April 1st by paying Kayser a pro rata part of the total annual lease and taxes for any month or fraction thereof." However, Kramer understood the term "earlier occupancy" to mean occupancy for any purpose, including re-wiring, installation of machinery or alterations; while Little understood that it meant only occupancy for actual manufacturing operations. In oral negotiations prior thereto the negotiating officials had used the words "use" and "operations" with the same confusion of meaning. Later discussions conducted by counsel with the parties failed to

15. Affirming 132 F. Supp. 49 (W.D. S.C. 1955).

resolve this ambiguity. When the Kayser meaning of "earlier occupancy" was made clear to Little in a later draft of the agreement, Textron refused to accept this term of the assignment, and thereafter decided to abandon the project. The case was tried before Chief Judge Wyche, without a jury. Judge Wyche found that the parties had a misunderstanding and mutual disagreement as to the meaning of the term "earlier occupancy." He held that this term was one to which different meanings could reasonably be given, that this constituted a lack of agreement on a material term of the contract, and that therefore no enforceable contract had been made.[16] The decision was affirmed by the Fourth Circuit in an opinion by District Judge R. Dorsey Watkins.[17]

Southern States Life Insurance Co. v. Foster, 229 F. 2d 77 (4th Cir., 1956), involved the provision of the South Carolina Statute of Frauds relating to an "agreement that is not to be performed within the space of one year from the making thereof."[18] Plaintiffs J. W. and S. V. Foster had written insurance agency contracts with the Southern States company which provided that their compensation would vary above or below the normal commission of 25% of premiums paid, according to the claim loss experience, reviewed each month by the company, on the policies plaintiffs wrote. Should they be discharged without cause, plaintiffs under the contracts would be entitled to receive one-half of their renewal commissions for five years. Plaintiffs were discharged without cause, which the company had a right to do under the contract, and the company thereupon allegedly entered a new contract, orally, with plaintiffs, whereby they were to receive only one-half of the regular commission for five years, but without any diminution or increase for claim loss experience.[19] From September 4, 1952, when the contracts were terminated, through

16. 132 F. Supp. 52 to 56.

17. Both courts treated the question, without discussion, as one of South Carolina law of contracts. This approach would seem to violate Klaxon Co. v. Stentor Electric Co., 313 U.S. 487 (1941). The important negotiations for the agreement took place in New York, especially since the Trial Court found as a fact that the South Carolina attorneys did not have authority to renegotiate items or terms. 132 F. Supp. 52, Findings of Fact, No. 2. Hence, the Federal Court in South Carolina under the Klaxon rule should look to South Carolina conflicts of law to see what law would govern. It may be that the contract stipulated that South Carolina law would govern; it is doubtful that the result would have been different in any event, since the question is one on which the governing principles are generally agreed upon among common law jurisdictions.

18. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 11-101 (5).

19. The consideration passing from the plaintiffs would, of course, be the surrender of the right to added commissions where claim loss experience was less than the normal.

August, 1953, the company paid plaintiffs the half-commissions without deducting or adding any amounts for claim loss experience. In September, 1953, the company discontinued payments, stating that on reckoning the claim loss experience of plaintiffs' assureds, it found that it had overpaid plaintiffs. On the company's denying the validity of the alleged new agreement, plaintiffs sued for damages, claiming breach of contract of the new agreement. The Fourth Circuit, reversing Judge Timmerman in the District Court, held, first, that the monthly checks to plaintiffs and the unsigned supporting statements of account which had accompanied them, lacking as they did any terms of an agreement as alleged, could not be considered such a memorandum in writing as the Statute required; and second, that the doctrine of part performance could not avail the plaintiffs to remove the bar of the Statute of Frauds. That the checks and accompanying data did not satisfy the statutory requirement of a memorandum in writing seems apparent. The case illustrates the limited extent to which the part performance doctrine applies to contracts not to be performed within one year. In the first place, even in land contracts, the part performance doctrine has been held applicable only where plaintiff seeks equitable relief, and not where he seeks damages at law.[20] This rule applies also to contracts not to be performed within a year.[21] In the second place, the facts must be such that the court feels that it would be a "virtual fraud" for defendant to deny performance.[22] As pointed out in the instant case,[23] the facts did not meet that requirement.[24]

20. White v. McKnight, 146 S.C. 59, 143 S.E. 552, 59 A.L.R. 1297 (1928).
21. CORBIN ON CONTRACTS, Vol. 2, § 459 (1950).
22. 229 F. 2d 81.
23. *Id.*
24. As the Court said, *229* F. 2d 79, plaintiff pitched his cause solely on the new agreement. If he had argued that the old agreement was still in full effect, but modified by the new agreement, the result would have been the same. WILLISTON ON CONTRACTS, §§ 591 to 599, esp. § 593.