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Contracts, Bills and Notes, and Sales

W. Brantley Harvey Jr.

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W. BRANTLEY HARVEY, JR.*

I. CONTRACTS

In *Hood v. Gordy Homes, Inc.*,[1] the action arose out of a contract wherein the defendant agreed to pay to the plaintiff for services rendered one-half of all dividends and profits received from a subsidiary corporation until the sum of $25,000.00 was paid. The U. S. Court of Appeals, Fourth Circuit, affirmed the dismissal of the suit by the District Court, holding that the contract required payment from a particular fund and therefore did not create an absolute liability and that since the defendant had derived no funds from the subsidiary corporation, the plaintiff had no cause of action.

In reaching this conclusion, the court recognized that if there had been a pre-existing debt which the defendant had subsequently agreed to pay upon the contingency of the dividends being received, then the debt would become payable within a reasonable time, even if the contingency had not occurred. In the subject case, the services of the plaintiff were performed contemporaneously with the contract and the payment was to be conditional as set forth in the contract, and since the condition had not occurred, the District Court properly dismissed the suit.

The Supreme Court sustained the demurrer of the defendant in *Reid v. George Washington Life Ins. Co.*,[2] wherein the plaintiff, an eighty year old lady, sought damages for fraud of defendant's agent in representing to her that health and hospital insurance policy covered doctors' calls and ambulance service when in fact it did not.

It was reasoned that even if the statements were made there was no actionable fraud because the complaint showed on its face that the plaintiff had held the policy for about seven years and had ample opportunity to learn the truth as to what the policy contained. This case drives home the point

*Member of firm, Harvey and Harvey, Beaufort, S. C.

1. 267 F. 2d 882 (4th Cir. 1959).
2. 234 S. C. 599, 109 S. E. 2d 577 (1959).

that the facts showing fraud must be pleaded and that in order to overcome the rule "that ordinarily one who holds a written instrument can ascertain the truth of the contents," it is necessary to allege and prove that the plaintiff was not able to avoid the deception due to his or her ignorance, illiteracy, incapacity or other reason.

The case of *Jones v. Cooper*[3] was an action by a purchaser of hot dog vending machines for actual and punitive damages against the seller for fraud and deceit arising out of the contract. The case adds nothing new to the well established law on the subject, but contains a good review of the nine elements that a plaintiff must prove to establish fraud, and the degree of proof necessary. The Court reversed the judgment of the lower court and ordered judgment entered for defendant upon the grounds that the alleged fraudulent misrepresentations were merely "puffing" or "sales talk," related to future matters, and that the truth could have been ascertained from the written agreement which plaintiff signed, and which merged all prior negotiations.

Turbeville v. Gordon[4] was an action brought by a builder against the owner of real estate to recover for balance due on the construction of a home. The case was previously before the Supreme Court as reported in 223 S. C. 75, 103 S. E. 2d 521 (1958)[5] wherein the demurrer of the defendant was overruled. In the instant case, the circuit court had granted the defendant's motion to dismiss the complaint on the grounds that it was barred by the Statute of Frauds in that the claim was founded upon the defendant's oral promise to pay on behalf of her daughter and son-in-law the debt owed for the construction. The Supreme Court reversed the lower court's order and remanded the case, stating that the complaint alleged a debt of the defendant and that her contention that this was an oral promise to pay the debts of others had been rejected by the Supreme Court in the earlier appeal and this was now the law of the case.

The Court pointed out that the only method by which a builder may enforce his lien upon a building is through the statutory proceeding relating to mechanic's liens, but that an action upon the contract could be maintained by the builder as

3. 234 S. C. 477, 109 S. E. 2d 5 (1959).
4. 236 S. C. 57, 113 S. E. 2d 68 (1960).
5. See generally Wyche, *Contracts, Bills and Notes, and Sales*, 12 S. C. L. Q. 22 (1959).

if he had no lien. The action here was on the contract rather than on the theory of a mechanic's lien and for that reason the court sustained the dismissal of the plaintiff's claim for the reasonable value of the use of the property by the defendant after its completion.

South Carolina Fin. Corp. v. West Side Fin. Co.[6] arose out of the purchase of the defendant's small loan company by the plaintiff and a written agreement that the defendant would not engage in a competing small loan business for three years within a radius of 25 miles of the business sold. As a part of the consideration, the plaintiff gave to the defendant a note which contained the provision that any loss sustained or legal expenses incurred as a result of the breach of the agreement would be deducted therefrom. The Supreme Court upheld an injunction against the defendant's subsequent competing operation and the award of damages to the plaintiff after offset of the amount of the note.

In its well reasoned opinion, the Supreme Court held (1) that the covenant not to compete was not detrimental to public interest, since, even though it reduced by one the number of small loan lenders in the area, there still remained 26 companies to serve the public and additional licenses could be granted if community need was shown; (2) the covenant was ancillary to the sale of the business since it was the clear intent of the agreement that plaintiff acquire the entire small loan business of the defendant even though transfer of good will was not specifically mentioned in the agreement and certain other minor assets were retained by the defendant seller; (3) the covenant was reasonably limited as to time and territory since borrowers on the company's books resided throughout the territory encompassed by the 25 mile radius; and (4) the covenant was supported by valuable consideration even though the note given as part of the consideration was totally offset by damages awarded the plaintiff. Having found that the four requirements of a covenant not to compete had been met, the Court correctly sustained it.

The authority of a real estate agent or broker to bind the property owner he represents by a contract of sale to a prospective purchaser was at issue in *Gallant v. Todd.*[7] The Supreme Court of South Carolina affirmed the circuit court's

6. 236 S. C. 109, 113 S. E. 2d 329 (1960).
7. 235 S. C. 428, 111 S. E. 2d 779 (1960).

sustaining of the defendant owner's demurrer to the plaintiff purchaser's action for specific performance of a contract for the sale of land made by the real estate broker. The agreement stated that the agents would get the commission if the property was sold "by them or by anyone else" and the Court held that this clearly showed the intention that the owner retained the right to sell. The agreement also provided that the agent would get a commission on "$60,000.00 or price accepted for said property", thereby leaving open for further negotiations the final sales price. Based on these points the agreement failed to distinctly and clearly authorize the agent to enter into a contract of sale binding on the owner. The agreement authorized the agent to find a purchaser for the property and entitled him to a commission for that service, but it gave him no right to bind the owner. The Court tried to distinguish the present case from the case of *Wharton v. Tolbert,* 84 S. C. 197, 65 S. E. 1056 (1909), wherein such a contract was upheld by differentiating between the language used in the agreement. However, the language is very similar and this appears to be somewhat of a pulling back from the position of the Court in the *Wharton* case.

The point for the practicing attorney, of course, is that if it is the desire or intent of the seller to give the agent the right to enter a binding contract of sale on his behalf, it should be very clearly and specifically stated in the agreement.

In *Graves v. Garvin*[8], an action brought by a storage company against one of its customers for foreclosure of the customer's mortgage, the customer asserted a counterclaim for set-off of goods stored with the company. The chief question on appeal was the admissibility in evidence of certain account books of the plaintiff which were made up or compiled from slips or memoranda made at the time of the transaction; which books the court held were the first permanent records and therefore "books of original entry". Of interest on the question of contracts was the Court's finding that the inventory receipts given by the plaintiff warehouseman when the defendant deposited the goods with him, were not warehouse receipts since they failed to meet certain of the requirements of the Georgia Warehouse Act. Not being warehouse receipts,

8. 272 F. 2d 924 (4th Cir. 1959).

the receipts are not to be construed as contracts and parol evidence is admissible to vary their terms.

II. BILLS AND NOTES

Bank of Fort Mill v. Lawyers Title Ins. Corp.[9] arose out of the payment of a check by the bank whereon the endorsement had been forged. The forgery occurred in a loan closing in which Lawyers Title Insurance Company had insured the title to the real estate and they paid the maker of the check and took an assignment for all claims or causes of action. Lawyers Title then brought action to recover from the Bank of Fort Mill for the wrongful payment of the check upon which the endorsement had been forged. The United States Court of Appeals, Fourth Circuit, reversed the lower court's judgment for the plaintiff, holding since it had paid the maker of the check in full and that claim had been extinguished that this action was based on subrogation and not on the assignment of a legal claim. Subrogation is an equitable doctrine and will be enforced according to the dictates of equity and good conscience and independently of contract provisions. Although the bank's liability to the maker of the check mistakenly paid on a forgery is absolute, as to the surety there is a balancing of the equities and since the bank was innocent of any negligence in the transaction the plaintiff here was not allowed to recover on the theory of subrogation.

9. 268 F. 2d 313 (4th Cir. 1959).