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Contracts

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CONTRACTS

I. Implied Terms

Commercial Credit Corp. v. Nelson Motors, Inc.[1] held that in a suit on a guaranty by the guarantee, a defense that the guarantee, in the light of the attendant circumstances and the prior dealings between the parties, had an implied obligation to employ reasonable and normal diligence in collecting from the principals, should not be stricken as sham and frivolous.

The suit was brought by the plaintiff financial institution in an attempt to recover for an alleged breach of contract by the defendant automobile merchant. Pursuant to earlier contracts between the parties, the defendant had discounted to the plaintiff security instruments representing credit extended to car buyers. In addition to the discount, the plaintiff withheld a certain amount for each car covered by the instruments to serve as a reserve fund to protect the plaintiff from loss due to forfeiture or repossession.

After operating under this type of contract for a number of years, the parties entered into an additional contract whereby the plaintiff was to pay to the defendant all of the reserve account over ten thousand dollars in consideration of the defendant's promise to repurchase any cars repossessed by the plaintiff under the security instruments. The parties agreed that this contract made the defendant an absolute guarantor of the obligations on the instruments.

In this action the plaintiff alleged that the defendant had breached the contract by refusing to repurchase certain cars. The defendant answered saying that it was under no duty to repurchase because (1) Commercial had not paid over to the defendant the amount of the reserves in excess of ten thousand dollars, and (2) Commercial had not fulfilled its obligation to use reasonable and normal diligence in collecting the balances due on the automobiles. The defendant also counterclaimed for the loss it alleged it sustained from the plaintiff's failure to properly protect the accumulated reserve fund by reasonably trying to collect the accounts.

The plaintiff moved to strike as sham and frivolous the counterclaim and the defense dealing with the plaintiff's alleged failure to use reasonable and normal diligence in collecting the

1. 247 S.C. 360, 147 S.E.2d 481 (1966).

accounts. The plaintiff's motion was specifically based on the fact that the contract made no mention of such obligation on the part of the plaintiff and generally, on the rule that an absolute guarantor is not discharged by lack of diligence on the guarantee's part in attempting to collect.[2] In granting the plaintiff's motion to strike, the circuit court indicated that the parol evidence rule prevented any construction of the contract. Thus the contract must have been considered as one of absolute rather than conditional guaranty.

The South Carolina Supreme Court reversed the ruling of the circuit court, and in so doing held that the law can imply a term of reasonably and normal diligence in collecting. In support of its decision the court quoted several authorities of which the following is representative:

> A contract includes not only what is expressly stated but also what is necessarily to be implied from the language used and external facts, such as the surrounding circumstances; and terms which may clearly be implied from a consideration of the entire contract are as much a part thereof as though plainly written on its face.
>
> In the absence of an express provision therefor, the law will imply an agreement by the parties to a contract to do and perform those things that according to reason and justice they should do in order to carry out the purpose for which the contract was made.[3]

In deciding that the defense and counterclaim in this particular case were not sham and frivolous and that it was at least "fairly arguable that Commercial was impliedly obligated to pursue the collection of the accounts with reasonable and customary diligence,"[4] the court was perhaps primarily impressed by the facts that the parties had dealt with each other over quite a long period of time and that the long-term experience of the defendant had been that the plaintiff regularly made diligent efforts to collect accounts.

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2. Providence Mach. Co. v. Browning, 68 S.C. 1, 46 S.E. 550 (1903); 38 C.J.S. *Guaranty* § 61 (1943). "The guaranty of the defendants herein being absolute, it is well settled by the authorities of this State . . . that they are liable to suit without first suing the principal debtor." Georgian Co. v. Britton, 141 S.C. 136, 141 S.E. 217, 218 (1927) (dictum).

3. 17A C.J.S. *Contracts* § 328 (1963).

4. Commercial Credit Corp. v. Nelson Motors, Inc., 247 S.C. 360, 369, 147 S.E.2d 481, 485 (1966).

South Carolina has long recognized the prerogative of the court to find contract terms by implication[5] and to admit parol evidence for this purpose.[6] This case does, however, represent an extension of the application of this rule to the guaranty fact situation.

II. SPECIFIC PERFORMANCE OF AN ORAL CONTRACT TO DEVISE

In *Footman v. Sweat*[7] The South Carolina Supreme Court followed prior cases[8] in holding that (1) proof of the existence of the contract in an action for specific performance of an oral contract to devise "must be definite, clear, certain and convincing";[9] and (2) the Statute of Frauds[10] is not a bar to specific performance of an oral contract to devise real estate when, as here, the party contracting with the testatrix has performed his part of the agreement. In this case the contracting party had cared for the testatrix until her death.[11]

III. ACTION BASED ON FRAUD AND MISREPRESENTATION

In *Willard v. Chrysler Corp.*[12] the South Carolina Supreme Court continued acceptance of the well-established rule that although generally one cannot predicate a fraud action on unfulfilled promises or statements as to future events, an exception is recognized in the case of a promise made without the intention of performance.[13] In this case the court said that the plaintiff, a purchaser of a Chrysler automobile, had stated such a cause of action for fraud against the defendant manufacturer by alleging, along with his loss, (1) that because of statistical data in its possession tending to indicate defective design of the particular component involved, Chrysler had entered into

5. *E.g.*, Soulios v. Mills Novelty Co., 198 S.C. 355, 17 S.E.2d 869 (1941); Chatfield-Woods Co. v. Harley, 124 S.C. 280, 117 S.E. 539 (1923); Buist Co. v. Lancaster Mercantile Co., 68 S.C. 523, 47 S.E. 978 (1904).

6. *Ibid.*

7. 247 S.C. 172, 146 S.E.2d 624 (1966).

8. McLauchlin v. Gressette, 224 S.C. 296, 79 S.E.2d 149 (1953); Kerr v. Kennedy, 105 S.C. 496, 90 S.E. 177 (1916).

9. 247 S.C. 172, 177, 146 S.E.2d 624, 627 (1966).

10. S.C. CODE ANN. § 11-101 (1962).

11. See Survey of Wills and Trusts in this issue for discussion of the will in this case.

12. 248 S.C. 42, 148 S.E.2d 867 (1966).

13. *E.g.*, Thomas & Howard Co. v. Fowler, 225 S.C. 354, 82 S.E.2d 454 (1954).

a warranty with knowledge of the particular latent defect in its product; and (2) that Chrysler "entered into the warranty providing that any obligation thereunder 'shall be performed by any Chrysler Motors Corporation Authorized Dealer,' when it knew that the defect was such as could not be remedied by the dealer."[14]

In *Robert E. Lee & Co. v. Commission of Pub. Works*,[15] the South Carolina Supreme Court held that a contractor for a public construction project had a right to rely on positive representations made by the defendant Commission as to subsoil conditions despite the clauses in the contract disclaiming liability for inaccurate information. The plaintiff contractor, successful bidder on a pipe-line construction project, sought damages for increased construction costs which he claimed resulted from the defendant's failure to reveal fully the subsoil condition and water levels existing along the pipeline route.

Prior to the acceptance of bids on the project, the defendant Commission made test-hole borings along the proposed route and obtained information therefrom as to subsoil classification and location of ground water. The plaintiff asserted, and the defendant admitted, that the information so obtained differed from the information given on the plans which the defendant submitted to the plaintiff for bidding purposes. The defendant contended, however, that the following "special condition" of the contract barred the plaintiff's claim:

> The Owner has made auger borings along the pipe line route to determine the character of the subsurface materials. The location and logs of these test holes are shown on the plans. While all test holes were sunk with reasonable care and in accordance with good practice, it is to be understood that there is no expressed or implied guarantee as to the accuracy of the information given nor of the interpretation thereof. Each bidder must form his own opinion of the character of the materials to be excavated, or which will be encountered, from an inspection of the ground, place his own interpretation upon the information given on the test hole logs, and make such other investigations as he may desire.[16]

14. 248 S.C. 42, 47, 148 S.E.2d 867, 869 (1966).
15. 248 S.C. 84, 149 S.E.2d 55 (1966).
16. *Id.* at 88-89, 149 S.E.2d at 57.

The defendant also relied on the statement required of each bidder affirming his examination of the plans, specifications, conditions and to location of the proposed pipe line and that he was acquainted with and fully understood "the nature and extent of the excavations to be made and the general character and condition of the materials to be removed therefrom...."[17]

The South Carolina Supreme Court decided that the Commission's statement that it had made test-hole borings and that the findings of such borings were shown on the plans, amounted to a representation that the information revealed by the borings was thereby accurately and fully disclosed. The court further said that "the contractor was entitled to rely upon that representation; and the owner's responsibility under it was not overcome by the disclaimer clauses. . . ."[18]

In finding for the contractor, the court relied heavily on the case of *Hollerbach v. United States:*

> If the government wished to leave the matter open to the independent investigation of the claimants, it might easily have omitted the specification as to the character of the filling back of the dam. In its positive assertion of the nature of this much of the work it made a representation upon which the claimants had a right to rely without an investigation to prove its falsity.[19]

Although apparently there are no South Carolina cases in point, the decision in *Robert E. Lee & Co.* appears to be in line with the general law on the subject:

> The general rule may be deduced from the decisions that where plans or specifications lead a public contractor reasonably to believe that conditions indicated therein exist, and may be relied upon in making his bid, he will be entitled to compensation for extra work or expense made necessary by conditions being other than as so represented .... The rule just stated is especially applicable where the representation as to conditions is positive, in which case the right of the contractor is not affected by general language of the contract to the effect that he is expected to investigate facts for himself.[20]

17. *Id.* at 90, 149 S.E.2d at 58.
18. *Id.* at 90, 149 S.E.2d at 58.
19. 233 U.S. 165, 172 (1914).
20. Annot., 76 A.L.R. 268, 269-70 (1932).

IV. LEGISLATION

A misdemeanor is created by Act No. 981,[21] recently enacted in this State, for knowingly using dual contracts[22] for the purpose of sale or purchase of real property.

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21. S.C. Acts & J. Res. 1966, p. 2284.

22. Dual contracts are defined in the act as "two contracts concerning the same parcel of real property, one of which states the true and actual purchase price and one of which states a purchase price in excess of the true and actual purchase price and is used as an inducement for mortgage investors to make a loan commitment on such real property in reliance upon the stated inflated value."