South Carolina Law Review

Volume 20 | Issue 4 Article 2

1968

Contracts

Manton M. Grier

CONTRACTS

I. THE TWILIGHT ZONE BETWEEN TORT AND CONTRACT

Since the last survey issue, several cases have been decided in that grey area of the law where contract and tort principles overlap. Many cases of this type have been primarily concerned with the distinction between nonfeasance and misfeasance, it being generally held that there is no liability in tort for nonfeasance; that is, when the defendant has refused to perform his contractual obligations, the plaintiff's remedy lies in contract, but when the defendant performs his obligations poorly, whether contractually obligated or not, the plaintiff's action lies in tort. *State Farm Mutual Automobile Insurance Co. v. Arnold*[1] was such a case.

In this case the plaintiff insurance company had refused to defend a lawsuit filed against Arnold, one of their automobile liability policyholders, and brought an action seeking a declaratory judgment of non-coverage. The defendant counterclaimed setting up two causes of action. The first alleged the insurer's failure to settle and its refusal to defend, and the second alleged willfulness and negligence in failing to defend or settle the suit. The plaintiff moved to strike the defendant's second cause of action along with certain other portions of the defendant's counterclaim. The court granted the plaintiff's motion in part and struck the defendant's second cause of action pointing out that under the law of South Carolina the two actions are mutually exclusive.[2] The first action is essentially one for breach of contract[3] in wrongfully refusing to defend the insured as required by the terms of the policy. The second action is in tort[4] and arises either when the insurer assumes the defense negligently or unreasonably refuses to settle the suit within the liability limits of the policy. Here the plaintiff had denied coverage from the start, and having never attempted to defend the insured it could not be held liable in tort for a negligent defense.[5]

1. 276 F. Supp. 765 (D.S.C. 1967).
2. *See* Miles v. State Farm Mut. Auto. Ins. Co., 238 S.C. 374, 380-85, 120 S.E.2d 217, 220-22 (1961).
3. *Id.*
4. *See* Miles v. State Farm Mut. Auto. Ins. Co., 238 S.C. 374, 380-85, 120 S.E.2d 217, 220-22 (1961); Tyger River Pine Co. v. Maryland Cas. Co., 163 S.C. 229, 161 S.E.2d 491 (1931).
5. It is of course possible to join a contract and a tort action. It is impossible, however, to defend and refuse to defend at the same time. Thus, the two actions here, one in contract and one in tort, are mutually exclusive.

One exception to the rule of no liability in tort for nonfeasance occurs when the defendant misrepresents his intention to perform his obligations under a contract entered into with the plaintiff.[6] The plaintiff in *Davis v. Upton*[7] seemingly proceeded under such a theory in an attempt to recover a down payment which he made on a house to be constructed by one of the co-defendants.[8] The plaintiff was told by the defendants when the contract was signed that his deposit would be refunded if he was unable to obtain a mortgage. Subsequently the plaintiff's application for a mortgage was turned down but his deposit was not returned, and he brought this suit. The trial judge granted the defendant's motion for a nonsuit on the ground that there was no evidence of fraud and deceit to support a jury verdict in favor of the plaintiff.[9] On appeal, the supreme court said that "there [was] no evidence in the record from which it could be inferred that the statement made by [the respondant's[10] agent] was knowingly false and made by him with the intention of refusing to refund the deposit made by appellant if a loan could not be obtained."[11] Thus the court reasoned that the plaintiff having proved no more than a breach of contract could not be allowed to recover on a theory of fraud and deceit since "a mere breach of contract does not constitute fraud."[12]

The issue of fraud was touched on lightly in *Morrison v. Chrysler Corp.*[13] There the plaintiff purchased an automobile equipped with a specially adapted racing engine from one of the defendant's local dealers. The car subsequently proved

6. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 637 (3d ed. 1964).
7. 250 S.C. 288, 157 S.E.2d 567 (1967).
8. Three defendants were involved: Upton, agent for Suburban Builders, Suburban Builders, and United Mortgagee Servicing Corporation. A default judgment was entered against Upton and Suburban Builders, who did not answer the complaint.
9. The elements of fraud are difficult to prove. Here the plaintiff would have to prove that the defendant made a material representation intending that the plaintiff act thereon, that the defendant knew that the representation was false when he made it, that the plaintiff did not know the statement was false, that the plaintiff relied on the statement, that the plaintiff was justified in his reliance, and that the plaintiff suffered damage as a result of his reliance. Jones v. Cooper, 234 S.C. 477, 482, 109 S.E.2d 5, 7 (1959).
10. United Mortgagee Servicing Corporation.
11. 250 S.C. 288, 292, 157 S.E.2d 567, 569 (1967).
12. *Id.* The court's statement here is in line with the case of Jones v. Cooper, 234 S.C. 477, 487-88, 109 S.E.2d 5, 10-11 (1959), which was cited by the court.
13. 270 F. Supp. 107 (D.S.C. 1967).

to be defective[14] and was repaired by the dealer in accordance with the terms of the Chrysler passenger car warranty which limited the defendant's obligations "to repairing or, at its option, replacing any part or parts of vehicle that prove to be defective . . . ."[15] These repairs, which included replacement of the engine, resulted in a certain amount of inconvenience to the plaintiff. He was, however, provided with another automobile to use while his was being repaired. Subsequently, the plaintiff brought an action in the United States District Court seeking to recover damages on a theory of breach of warranty and fraud. The plaintiff's theory of fraud was apparently based on his contention that the defendant sold the automobile knowing that it would not be able to carry out its obligations under the warranty.[16] The court, however, found that the warranty had not been breached and dismissed the plaintiff's allegation of fraud stating that "[t]here exists here no false representation of Chrysler as to its product."[17] Moreover, the court stated that Chrysler's failure to repair the car with the speed to which the plaintiff felt himself entitled did not entitle the plaintiff to damages under a theory of fraud.

II. BREACH OF WARRANTY

As noted above, the court in the *Morrison* case found that the defendant had not breached its passenger car warranty. The court stated that when the manufacturer's obligations under the warranty are limited to the repair or replacement of defective parts, the buyer must show a refusal or failure by the manufacturer to repair or replace a defective part before an action of breach of warranty can be maintained. Moreover, the court concluded that inconvenience is not an element of damages in an action for breach of warranty.[18]

---

14. The last repair job included replacement of the engine which had blown and took approximately six weeks. Prior to this six week period the plaintiff's car was in the repair shop for twelve days.

15. 270 F. Supp. 107, 108 (D.S.C. 1967).

16. It was shown that the defendant's dealers were not familiar with the high performance hemi-head engine, such as was involved here, and that they were inexperienced with respect to the maintenance and repair of such engines. The plaintiff's allegation that the car was a used one and not new was not discussed by the court.

17. 270 F. Supp. 107, 110 (D.S.C. 1967).

18. Damages for injury to person or property proximately resulting from a breach of warranty are now governed by S.C. CODE ANN. § 10.2-715 (Supp. 1966).

In the case of *Frasher v. Cofer*[19] the South Carolina Supreme Court held that there is no implied warranty of fitness in the sale of real estate and that this rule extends to the premises conveyed as well as the vendor's title. The plaintiff vendee sought to recover for money spent in repairing a defective furnace in a house recently purchased from the defendant vendor. The supreme court discussed briefly the majority and minority positions[20] with respect to implied warranty in the sale of real estate and concluded that the plaintiff's complaint stated no cause of action under either rule.

III. IMPLIED CONTRACTS

Two cases involving implied contracts also arose during the past year. The case of *Singleton v. Collins*[21] was an action by an attorney to recover fees for services rendered to the defendants, a father and his son, in connection with two separate actions against the son's former wife. The father contended that he did not employ the plaintiff and both defendants contested the reasonable value of the services rendered. The cause was referred to a special referee who, on the facts, found that the father did engage the services of the plaintiff and assessed the reasonable value of the plaintiff's services at $4,500. From a decision of the trial court affirming the referee's findings of fact, the defendants appealed. In affirming the decision of the trial court, the supreme court stated:

> An attorney has a right to be paid for professional services rendered, and where there is no express contract, the law will imply one. Whether the services were rendered, and their value, are matters of fact to be decided

19. 160 S.E.2d 560 (S.C. 1968).

20. The majority of jurisdictions follow the doctrine of caveat emptor with respect to sales of realty. A few states, however, hold that when a recent purchaser of new residential property is injured by defects of which the builder-vendor knew or should have known, but of which the vendee was unaware and had no reason to know, the vendor-builder will be liable. In the present case the house was not a new one and the vendee had not built the house. Thus the plaintiff stated no cause of action under the minority holding. Although South Carolina sides with the majority, the court stated that when failure to disclose defects was tantamount to fraud, the vendor would be held liable. The court indicated that such a result would be consistent with the early cases of Mitchell v. Pinckney, 13 S.C. 203 (1879) and Lessly v. Bowie, 27 S.C. 193, 3 S.E. 199 (1887), which excepted fraud from the operation of the rule of no implied warranty in the sale of realty.

21. 161 S.E.2d 246 (S.C. 1968).

> by the jury, or here by the court below, and no appeal lies therefrom if the findings of fact are supported by any competent evidence. *Gradon v. Stokes*, 24 S.C. 483.[22]

In *Braswell v. Heart of Spartanburg Motel*[23] the plaintiff sought to recover the reasonable value of his services in pretreating the defendant's motel for termite control. The trial court directed a verdict in favor of the plaintiff; however, the supreme court reversed holding that this was error since conflicting testimony was presented on the question of whether the defendant requested the plaintiff to perform the services.

The *Braswell* case also involved the question of whether the plaintiff's allegation in his complaint that he performed the services at the request of the defendant operated to limit his claim to one involving express contract. The court concluded that it did not and indicated that if the plaintiff could prove facts giving rise to an implied contract he would be entitled to recover the fair value of the work performed for the defendant.

IV. CONSTRUCTION OF CONTRACTS

The question of ambiguity was presented in the case of *Carolina Ceramics, Inc. v. Carolina Pipeline Co.*[24] The plaintiff brought suit to recover for alleged overpayment made under a contract of sale with the defendant, a supplier of natural gas. At the time the contract was signed, the defendant had not yet obtained a source of supply, but was in the process of negotiating with two companies. Under the contract the price of the gas paid by the plaintiff was to be geared to the defendant's sources of supply by the following escalator clause:

> In the event that the Commodity Charge for gas as purchased by Seller from Transcontinental Gas Pipeline Company is increased above or decreased below 24.0 cents per MCF, or the Commodity Charge for gas as purchased by Seller from the Southern Natural Gas Company is increased above or decreased below 18.5 cents per MCF, the amount of such increases or decreases

22. *Id.* at 247.
23. 159 S.E.2d 848 (S.C. 1968).
24. 161 S.E.2d 179 (S.C. 1968).

> shall be added to or subtracted from, as the case may be, the price of gas to Buyer as set forth herein.[25]

Subsequently, the defendant completed the necessary arrangements with one of the above mentioned suppliers and began performing its obligations under the contract with the plaintiff. Approximately three and one half years later the defendant began receiving gas from its second source and at that time it began supplying gas to plaintiff exclusively from the new source. Since the commodity charge for the new source of supply had increased approximately five cents per MCF over the contract period, the price paid by the plaintiff for gas under the contract was increased a like amount by operation of the escalator clause. In his complaint the plaintiff contended that the defendant's original source of supply had not increased in price and thus that the additional charge had not been warranted by the contract of sale. The trial judge concluded that the terms of the escalator clause were clear and unambiguous and held that the additional charge "was fully justified and clearly anticipated by the escalation clause."[26] The South Carolina Supreme Court reversed and remanded the case for a new trial saying that the escalator clause was ambiguous because, among other things, it did not specify the source of supply which would be used to compute the price of the gas. The court indicated that the intent of the parties should be ascertained at a new trial.

The case of *Heaton v. State Farm Mutual Automobile Insurance Co.*[27] involved the construction of an exclusionary clause in an automobile liability insurance policy which excluded from coverage "any accident arising out of the operation of an automobile business." The term automobile business was defined by the policy as "the business of selling, repairing, servicing, storing, or parking . . . automobiles." The insured was a parking lot attendant and the accident occurred while he was moving a customer's automobile. The defendant insurance company denied coverage and refused to defend a suit brought by the owner of the damaged automobile against the insured. Subsequently, the insured and his judgment creditor brought an action to recover the amount of the judgment suffered by the insured. On a mo-

25. *Id.* at 180.
26. *Id.* at 181.
27. 278 F. Supp. 725 (D.S.C. 1968).

tion by the defendant insurance company for summary judgment, the district court held that the accident in question was plainly excluded by the terms of the policy. The court said that even though insurance contracts are to be strictly construed against the insurer, the courts can not rewrite a contract so as to nullify exclusions clearly expressed and that language is to be given its plain, ordinary and popular meaning.

V. SET OFF

In *Gambrell v. Cox*[28] the plaintiff, the receiver of a bankrupt insurance company, brought an accounting to recover the net premiums[29] held by an agency of the bankrupt firm. The agency counterclaimed asserting that certain unearned premiums[30] held by the bankrupt constituted an offset between the parties at the time of receivership. The plaintiff receiver then moved to strike certain portions of the defendant's answer and demurred to the counterclaim. The plaintiff's motion and demurrer were overruled by the trial court, and he appealed. The supreme court affirmed the decision of the lower court in result only, pointing out that the defendant would be required to show that a right to the premiums involved existed in it at the time of insolvency. The court said that normally unearned premiums collected by the agency and paid to the company are owed by the company to the policy holders alone, and not the agency, upon cancellation of the policy. Moreover, the court pointed out that any assignment of claims by policy holders after receivership would be ineffectual since "it is well settled in this jurisdiction that a debtor will not be permitted to set off against his debt a claim or claims assigned to him after the insolvency or receivership of his creditor."[31]

In *Gambrell v. South Carolina National Bank*[32] the plaintiff appealed a decision of the circuit court on the ground that the court erred in sustaining the defendant's alternative plea of offset to his action on a contract for a money judgment.

28. 250 S.C. 228, 157 S.E.2d 233 (1967).
29. The net premiums could be found by substracting commission payments and unearned premiums from the total premiums.
30. Unearned premiums are those already paid to the company on a policy subsequently cancelled before expiration.
31. 250 S.C. 228, 235, 157 S.E.2d 233, 236 (1967).
32. 250 S.C. 380, 158 S.E.2d 200 (1967).

The supreme court held that this question had become moot since the plaintiff left "unchallenged the [lower] court's finding that the defendant was not indebted to the plaintiff under the contract."[33] Thus the court concluded that "there [was] no debt against which an offset could be allowed . . . ."[34]

VI. Option Contract — Limitation of Action

In *Lindler v. Adcock*[35] the plaintiff sought specific performance of a 1949 agreement made with the defendant's intestate. The agreement provided that the surviving party would have an option to purchase the decedent's interest in a common tenancy at the original cost of the property. The issue presented to the court was whether the plaintiff had seasonably accepted the option. The trial court found in favor of the decedent's heirs and the plaintiff appealed. The supreme court determined that the plaintiff had accepted the option, but had done so over nine and one half years after it had ripened. Accordingly, the court held that the plaintiff was guilty of laches such as to bar his right to specific performance. The court emphasized the fact that the property had appreciated considerably since the date of the agreement saying that "[t]he argument . . . that plaintiff should not be permitted to wait until the price is right before accepting the offer has much appeal."[36]

VII. Alteration of an Instrument

In *Brown v. Mims*[37] the plaintiff lessor brought an action against his lessee and a third party for a declaratory judgment concerning the validity of a written lease with an option to purchase. Both the circuit court and a special referee found that the defendant lessee had materially altered the lease agreement by drafting an additional page to the original instrument which added a third party to the contract and added additional terms and conditions to the option to purchase.[38] The supreme court affirmed the judgment of the lower court in favor of the plaintiff holding that the material alteration "operated to destroy any rights which [the de-

33. *Id.*
34. *Id.*
35. 250 S.C. 383, 158 S.E.2d 192 (1967).
36. *Id.* at 388, 158 S.E.2d at 195.
37. 159 S.E.2d 247 (S.C. 1968).
38. The defendant had retained all copies of the original instrument.

fendant] had under the executory provisions of the contract."[39] The decision of the court here would seem to be in accord with the general law on the subject.[40]

VIII. DISCHARGE OF CONTRACTS

In South Carolina, rescission for nonperformance is generally justified only when such nonperformance is substantial and fundamental.[41] Recission for delay is usually allowed only when time is of the essence,[42] and when no time for performance is set by the contract, a reasonable time is implied,[43] though time may be made essential by subsequent notice to that effect.[44]

The case of *General Sprinkler Corp. v. Loris Industrial Developers, Inc.*[45] was a reaffirmation of the above mentioned principles. The plaintiff contracted with the defendant to install a sprinkler system in the defendant's building. A special provision of the contract required the plaintiff to obtain fire insurance coverage for the building from an insurance company affiliated with the Associated Factory Mutual Group; however, the contract made no mention of a deadline either for obtaining the insurance[46] or installing the sprinkler system. The plaintiff encountered some difficulty in trying to obtain the desired insurance coverage,[47] but continued to make every reasonable effort toward that end. Approximately two months after the contract had been signed the defendant through its own efforts obtained insurance coverage from one of the Associated Factory Mutual Group, and at that time notified the plaintiff that it had cancelled its contract with them. Three days later the defendant signed a contract

39. *Id.* at 248.
40. *See* 4 AM. JUR. 2d *Alteration of Instruments* § 9 (1962); 3 C.J.S. *Alteration of Instruments* §§ 16, 30(h) (1936). These articles were cited by the court.
41. *E.g.*, Elliot v. Snyder, 246 S.C. 186, 143 S.E.2d 374 (1965); Smith v. First Provident Corp., 245 S.C. 509, 141 S.E.2d 646 (1965).
42. *E.g.*, Davis v. Cardell, 237 S.C. 88, 115 S.E.2d 649 (1960).
43. *Id.*
44. *Id.*
45. 271 F. Supp. 551 (D.S.C. 1967). The case of Jaycee Fish Co. v. Cannarella, 279 F. Supp. 67 (D.S.C. 1968), was decided during the survey period. Because it involved well settled principles of novation it has been reported only in this footnote.
46. The defendant's building was covered by a temporary insurance policy prior to his procurement of coverage with a member of the Factory Mutual Group.
47. The defendant's prospective tenant was considered an undesirable risk.

with another sprinkler systems contractor. The United States District Court, where the plaintiff brought this action to recover damages for breach of contract, concluded that the defendant had been unjustified in rescinding his contract with the plaintiff. The court said that since no time was set for performance by the contract, the plaintiff had a reasonable time in which to perform and this reasonable time had not expired when the defendant attempted to cancel the contract.[48] Moreover, the court stated that the plaintiff, having obtained satisfactory insurance, was not justified in rescinding the contract because of the defendant's failure to obtain similar insurance.

MANTON M. GRIER

48. The plaintiff testified that it would take 30 days to install the sprinkler system. The defendant notified the plaintiff that the contract was cancelled on Nov. 22, 1963, yet the system was not completed until the latter part of January, 1964. Moreover, work on the system could not begin until after the town had completed the construction of a new water tower. The tower was completed during the latter part of December, 1963.