PEALE v. MARIAN COAL CO.

(Circuit Court of the United States, M. D. Pennsylvania, 1911. 190 Fed. 376.)

In Equity. Suit by John W. Peale against the Marian Coal Company. Decree for complainant.

WITMER, District Judge.[18] The plaintiff, by bill in equity, here seeks relief for an alleged breach of the defendant's agreement to deliver to him coal from its washery at the Holden Culm Dump, which it undertook to do, in return for money advanced by the plaintiff to lift defendant's obligations and to enable it to make necessary improvements and developments for the successful operation of its washery.

The complaint sets forth:

That on the 11th day of April, 1907, a contract was entered into, between the plaintiff and the defendant. * * *

That pursuant to the terms of said contract the complainant advanced, by way of loan, to the defendant a large sum of money, to wit, $37,364.27, exclusive of interest. That upon the amount so advanced there has been repaid the sum of $12,781.77, leaving due and unpaid on said account, January 28, 1909, the sum of $24,582.50.

That the defendant is engaged in the business of carrying on a coal washery operation in the borough of Taylor, county of Lackawanna, Pa., where it prepares for market coal from the Holden Culm Dump, located along the Delaware, Lackawanna & Western Railroad. That, pursuant of the contract between the complainant and the defendant, the latter proceeded to ship coal to the former on the 17th day of May, 1907, and from that time until the 13th day of October, 1908, it did ship coal to the complainant and receive from him payment therefor in accordance with said contract. That on the day last mentioned the defendant ceased to ship its coal to the complainant, as it had undertaken to do by virtue of its contract, and until henceforth had utterly failed to ship to the complainant the product of its washery, or any part thereof, without excuse or just cause, although having often been requested to do so, resulting in great damage to the complainant.

That the defendant has since been operating said washery and preparing and shipping coal to market from the said culm dump through other agents or parties than the plaintiff, and that such culm bank is not exhausted. That there are yet remaining many thousand tons of coal in said dump, and that large quantities are being added thereto daily by deposits from the Delaware, Lackawanna & Western Railroad Company in connection with the operation of the said Holden Colliery. That it is impossible to anticipate the length of time which will be required to exhaust the said dump, or the amount of coal which may be ultimately taken therefrom, for the reason that the length of time will largely depend upon the extent of the operations which may

[18] Parts of the opinion are omitted.

be conducted at the said washery and the amount of the output, and because it is altogether conjectural and uncertain what amount of materials may be deposited in the future upon the said dump by the Delaware, Lackawanna & Western Company in connection with the operation of the Holden Colliery. That the complainant has already suffered large damages, and will continue in the future to suffer to an extent which it is impossible now to determine. Wherefore he is remediless in the premises at law and prays for relief in this court, to wit:

(a) For damages for the coal diverted, and for discovery of the amount as the basis for determining them.

(b) For a decree requiring the defendant to repay the balance of the sum advanced by the plaintiff to the complainant.

(c) For specific performance of said contract.

(d) For an injunction restraining the defendant from shipping coal to other persons than the complainant.

(e) For general relief.

The defendant admits the execution of the contract in suit and the loan of $35,000 by the plaintiff to it on account of which it insists the plaintiff has received a credit of the sum of $17,000, and that it (the defendant) is entitled to a further credit of $1,988.21 for 24,647 tons of coal delivered to the plaintiff and sold by him without defendant's consent at various prices below the minimum stipulated in said contract.

The answer furthermore sets forth that by reason of the plaintiff's violations of the terms of said contract he has prevented the defendant from further attempting to comply with the same. * * *

This therefore requires a partial analysis of the contract to determine its nature, and the duties and obligations of the several parties thereunder. * * *

Under its provisions the plaintiff agrees to advance to the defendant moneys to the amount of $35,000 for its benefit, to release its obligations, and to enlarge and improve its plant so as to operate it to better advantage. In consideration of such advance, the defendant agreed "to deliver to the party of the first part (the plaintiff) or his assigns the entire output of the culm bank and washery above referred to, not only until the payment of the moneys to be advanced, with interest, but also until the entire exhaustion of said culm bank, including materials hereafter deposited thereon by the Delaware, Lackawanna & Western Railway Company, or its successors or assigns, in connection with the operation of the Holden Colliery."

It is further agreed "to prepare all the coal to be delivered to the party of the first part (the plaintiff) as to the sizes, the percentage of impurities, and the merchantability and appearance, according to the standard of the Delaware, Lackawanna & Western Railroad, prevailing in the region where the said washery is situated," and that the respective sizes of the coal shipped from said washery should conform

to the standard, and be made over meshes corresponding in size to the meshes used by the said railway company in the Lackawanna region. * * *

The defendant demurs and contends that the plaintiff can by a recovery of damages have a complete or adequate remedy at law, and is therefore not entitled to relief here. The admission of this doctrine and its application to such cases as the one under consideration would practically divest courts of equity of all jurisdiction to compel specific performance of real contracts.

As a matter of fact it appears impossible to anticipate the length of time required to exhaust the dump, or to estimate the amount of coal that may ultimately be taken therefrom, because it will largely depend upon the extent of the operation which may be conducted at the washery and the amount of the output, and because it is altogether conjectural and uncertain what amount of materials may be deposited in the future upon the dump of the Delaware, Lackawanna & Western Railroad Company in connection with the operation of the Holden Colliery, and therefore the plaintiff's damages are not susceptible of liquidation.

"That the plaintiff could maintain an action at law for damages, for breach of the contract, there is no doubt; but it is a well-settled rule that, although the action at law will lie, yet if there is an utter uncertainty in any calculation of damages for the breach of the covenants, and the measure of the damages is largely conjectural, equity will intervene because of the inadequacy of the remedy, and enforce performance of it by injunction. Palmer v. Graham, 1 Pars. Eq. Cas. (Pa.) 476; Wilkinson v. Colley, 164 Pa. 43 [30 Atl. 286, 26 L. R. A. 114]."

It is evident, furthermore, that in order to recover damages by remedy at law it would be necessary to resort to a multiplicity of suits. The plaintiff might bring suit monthly to recover damages for loss of profits for the preceding month, or he might resort to annual suits. He could not recover in any one suit for all of the damages, because it would be impossible to ascertain or to show what the damages would amount to in any one suit, for reasons which are clearly obvious. He could not wait until the entire dump should have become exhausted, because it might be that by that time a substantial part of his claim might be barred by the statute of limitations. Furthermore, no plaintiff is required to wait after a breach of contract has occurred, and unless one action can be brought in which adequate relief could be obtained equity will always take jurisdiction. Bank of Kentucky v. Schuylkill Bank, 1 Pars. Eq. Cas. (Pa.) 180; 16 Cyc. 60, 63.

Many authorities upon this general proposition might be cited; but the court is satisfied, as argued by counsel for plaintiff, that this question was settled by this court, Judge Archbald presiding, in the initial stage of the case upon demurrer. In his opinion he said:

"As to the further ground of demurrer, that the plaintiff has a complete remedy at law by action for damages, it is sufficient to say that the bill seeks the specific performance of the defendant's agreement, to deliver coal from

their washery at the Holden Culm Dump, which they undertook to do in return for the money advanced by the plaintiff to make the necessary developments. For this it is evident that damages for a breach of the contract would not be at all adequate. Nor is this disturbed because the plaintiff, in the same connection, asks damages for the coal so far diverted, and calls for a discovery of the amount as the basis for determining them. Equity, having taken jurisdiction, will dispose, if possible, of the whole of the controversy, and the plaintiff is entitled to be made good for the commissions which he has lost as a part of it."

Moreover, it is now, in any event, too late to take objection to the jurisdiction of the court. As stated by Justice Brewer in Brown v. Lake Superior Iron Co., 134 U. S. 530, 536, 10 Sup. Ct. 604, 606 (33 L. Ed. 1021), adopting the language in earlier cases:

"* * * If the objection of want of jurisdiction in equity is not taken in proper time, namely, before the defendant enters into his defense at large, the court having the general jurisdiction will exercise it; and in a note (in 1 Dan. Ch. Prac. [4th Am. Ed.] p. 550) many cases are cited to establish that, 'if a defendant in a suit in equity answers and submits to the jurisdiction of the court, it is too late for him to object that the plaintiff had a plain and adequate remedy at law. This objection should be taken at the earliest opportunity.'"

Attention is also called to the language of the same learned justice in Hollins v. Brierfield Coal & Coke Co., 160 U. S. 371, 380, 381, 14 Sup. Ct. 127, 37 L. Ed. 1113.

Regarding the remedy provided for in the contract, it is sufficient to note that, while it might afford redress for the failure to repay the plaintiff's loan, it gives none for the loss of his commissions. Furthermore, this court, having obtained jurisdiction, will retain such for the purpose of administering complete relief and doing justice with respect to the subject-matter.

It is therefore adjudged and decreed:

First. That the defendant be ordered and directed to specifically perform its contract with the plaintiff by delivering to the plaintiff from the date of this decree the output of its washery.

Second. That the defendant be enjoined by perpetual injunction from delivering any of the output of the washery and the Holden Dump to any one other than the plaintiff.

Third. That the defendant be and it is hereby required to account to the plaintiff for all moneys advanced by the plaintiff to it under the contract, which has not already been repaid, together with interest thereon, and that the defendant be required to account to the plaintiff for all damages sustained by the plaintiff by reason of the defendant's breach of contract.

Fourth. That J. Fred Schaffer, Esq., be appointed a special examiner to state an account between the parties and report the same to the court.[19]

[19] The modern rule as to the right of specific performance in installment contracts is stated by Lord Atkinson in Dominion Coal Co., Limited, v. Dominion Iron & Steel Co., Limited, and National Trust Co., Limited, [1909] A. C. 293, 299, 311. In this case there was contract for the delivery of coal to be used in the manufacture of steel. The deliveries were to be by install-