TAB 6

LEXSEE 1991 U.S. DIST. LEXIS 18171

THE CIT GROUP/EQUIPMENT FINANCING, INC. Plaintiff, v. BRUCE TAYLOR, SR. Defendant

No. C-91-1848 SBA (PJH)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

1991 U.S. Dist. LEXIS 18171

December 16, 1991, Decided
December 16, 1991, Filed

JUDGES: [*1] HAMILTON

OPINION BY: PHYLLIS J. HAMILTON

OPINION

ORDER RE: SUMMARY JUDGMENT

The plaintiff's motion for summary judgment was heard on November 22, 1991. Ms. Kimberly A. Fanady appeared for the plaintiff. Mr. Jerome E. Matthews appeared for the defendant.

I. BACKGROUND.

The plaintiff, The CIT Group ("CIT"), leased a log loader to Blue Lake Forest Products, Inc. ("Blue Lake"). The defendant, Bruce Taylor ("Taylor"), provided a written guaranty of Blue Lake's obligations under the lease.

After execution of the lease, a federal judge issued an injunction on logging to protect the spotted owl. The injunction affected 66,000 acres of timberland, an area providing much of Blue Lake's source of timber. Soon after, Blue Lake found it necessary to file Chapter 11 bankruptcy, defaulting on its lease obligations. CIT turned to Taylor's guaranty to collect the amount owed under the lease.

In answer to CIT's complaint based on the guaranty, Taylor pleaded six affirmative defenses: 1) Failure to state a claim; 2) Waiver and Estoppel; 3) Failure to mitigate; 4) Frustration; 5) Impracticability; and 6) Excuse of performance under supervening operation of law. These affirmative defenses form the basis of Taylor's [*2] opposition to the present motion for summary judgment; he does not dispute the existence of the guaranty.

Taylor's defenses fall into two categories. The defenses of failure to state a claim, waiver, frustration, impracticability, and supervening operation of law would, if proven, excuse Taylor from all liability. The defenses of estoppel and failure to mitigate dispute the amount of damages Taylor owes if found liable under the guaranty.

This Court finds that Taylor's defenses to liability fail and that summary judgment in favor of CIT is appropriate as to Taylor's liability under the guaranty. However, Taylor has raised a genuine issue of material fact as to the amount of damages; summary judgment is denied on the issue of damages.

II. STANDARD FOR GRANTING SUMMARY JUDGMENT.

A court may grant a motion for summary judgment when there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c).* In determining whether a genuine issue exists, a court must determine, ". . . whether the evidence presents a sufficient disagreement to require submission to a jury. . . ." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-252 (1986)*. [*3] The substantive law underlying the complaint or the defense dictates which facts are material. *Id. at 248*. If a court determines that a genuine issue of material fact does not exist, then it may apply the law to the undisputed facts and rule on the summary judgment as a matter of law. A court may grant summary judgment on the issue of liability and reserve the issue of damages for trial. *Fed. R. Civ. P. 56(c).*

III. CIT'S CLAIM.

No factual dispute exists with respect to CIT's claim. Blue Lake leased the log loader from CIT. Taylor guaranteed the lease against default by Blue Lake. A default occurred when Blue Lake filed for bankruptcy and failed to make payments on the lease. As a matter of law, and without taking Taylor's affirmative defenses into consideration, this Court finds that Taylor is liable under the guaranty.

IV. TAYLOR'S AFFIRMATIVE DEFENSES.

The success of CIT's summary judgment motion depends upon the validity of Taylor's defenses. In ruling on the applicability of Taylor's defenses, this Court is required to believe Taylor's evidence and draw all inferences in his favor. *Anderson, 477 U.S. at 255*. Each defense [*4] will be examined individually to determine whether it prevents summary judgment from being granted.

A. *Failure to state a claim.*

Although a failure to state a claim is most often asserted as a motion to dismiss, Taylor appears to be relying upon this failure as a defense to the summary judgment. Taylor argues that CIT will have failed to state a claim upon which relief may be granted if he is excused from liability based on his other defenses. (Opposition, Nov. 13, 1991, p.1 fn.1) This argument misses the point of a defense based upon a failure to state a claim. If Taylor's other defenses carry the day, then the summary judgment, and ultimately the complaint, will be defeated.

A failure to state a claim is a defect in the pleadings. It occurs when the plaintiff alleges facts that when taken as true would not entitle the plaintiff to relief. *See De La Cruz v. Tormey, 582 F.2d 45, 48 (9th Cir. 1978)*. Here, Taylor admits the existence of the guaranty and the breach of that guaranty. Taken together, these facts state a claim upon which relief may be granted. Accordingly, Taylor's defense of failure to state a claim does not prevent summary judgment [*5] from being granted.

B. *Waiver*

Waiver is the intentional relinquishment of a known right. *Guild Wineries & Distilleries v. Land Dynamics, 103 Cal.App.3d 966, 977 (1980)*. For waiver to apply in this action, CIT would have had to relinquish its right to hold Taylor liable under the guaranty.

Taylor has failed to raise a genuine issue of fact concerning an alleged waiver by CIT of its rights under the guaranty. Two declarations by CIT employees who dealt with Taylor deny that a waiver ever occurred. (Boyle Declaration, P4; Offord Declaration, P8.) In his declaration, Taylor states that Mr. Offord said he would try to facilitate Taylor's release from the guaranty if Taylor secured a good price for the log loader. (Taylor Declaration, P11.) This evidence does not prove that a waiver occurred, only that a waiver might have been discussed. Accepting Taylor's declaration as true, Taylor still has not established that CIT intentionally relinquished its rights under the guaranty. As a result, Taylor's defense of waiver does not prevent the granting of the motion for summary judgment.

C. *Frustration*

The doctrine of frustration relieves a promisor from [*6] a contract when an unforeseeable event almost totally destroys the value of performance by the promisor. *Lloyd v. Murphy, 25 Cal.2d 48, 54 (1944)*; *Federal Leasing Consultants, Inc. v. Mitchell Lipsett Co., 85 Cal.App.3d Supp. 44, 47 (1978)*. Taylor argues that the injunction against logging reduced Blue Lake's supply of timber, in turn frustrating the purpose for leasing the log loader: stacking logs at heights of 35-40 feet. Without a full supply of timber, logs did not need to be stacked at such height; thus the log loader was useless.

There does not appear to be a factual dispute on this issue, but even if the facts are as alleged by Taylor, the defense of frustration does not relieve him from liability

under the guaranty. The cases cited by Taylor are factually dissimilar, and the equities of the situation dictate that Taylor bear the risk.

In *Federal Leasing*, the defendant leased an electronic burglar alarm. The alarm operated on radio frequencies that interfered with government transmissions. After a federal court enjoined the use of the burglar alarm, the state court found that the lease had been frustrated.

Similarly, in [*7] *20 th Century Lites, Inc. v. Goodman, 64 Cal.App.2d Supp. 938 (1944)*, a government regulation prohibited the use of outside neon or lighting equipment between the hours of sunset and sunrise. The defendant had leased a neon sign from the plaintiff before the regulation was enacted. The court held that the government regulation frustrated the purpose of the lease and relieved both parties of further obligation.

Here, the injunction does not forbid use of the log loader. Instead, the log loader is indirectly affected by the reduced amount of timber. Because the injunction did not directly affect the use of the log loader, *Federal Leasing* and *20th Century Lites* do not control.

Laws or governmental acts that make performance of a contract less profitable do not give rise to frustration. *Lloyd, 25 Cal.2d at 55*; *see Waegemann v. Montgomery Ward & Co., Inc., 713 F.2d 452, 455 (9th Cir. 1983)*. Here, the injunction against logging has made the leasing of the log loader less profitable than if the injunction had not been issued.

Furthermore, the equities of the situation require placing the risk of an evaporation of [*8] supply on Taylor. *See Lloyd, 25 Cal.2d at 53-54* (explaining that the applicability of frustration depends on the equities of the case). The two parties entered into a written agreement. CIT had no way of influencing Taylor's supply of timber. Taylor made the decision to guarantee the lease of the log loader, protecting CIT from circumstances that would not allow Blue Lake to make payments under the lease. That guaranty served as an inducement for CIT to lease to Blue Lake. A reduction in supply affecting Blue Lake's operations might have been just the sort of danger against which CIT was protecting itself when it required the guaranty. From an equitable viewpoint, CIT should not be made to bear the loss incurred from Blue Lake's inability to secure a sufficient supply of timber.

For these reasons, this Court finds that the doctrine of frustration does not apply to the facts as alleged by Taylor. Frustration does not prevent summary judgment from being granted on the issue of Taylor's liability.

D. *Impracticability.*

Impracticability is a separate defense to contractual liability that is frequently incorrectly interchanged with frustration. Taylor [*9] makes this mistake. While it appears that Taylor has used the "impracticability" title to characterize his frustration defense, this Court will analyze the defense of impracticability to ensure that it has not made the same mistake in appellation.

A contract becomes impracticable when its performance becomes excessively and unreasonably difficult or expensive. *Schmeltzer v. Gregory, 266 Cal.App.2d 420, 424 (1968)*; 1 Witkin, *Summary of Cal. Law*, "Contracts", § 786, p.709 (9th ed. 1987). In *Mineral Park Land Co. v. Howard, 172 Cal. 289 (1916)*, the defendant entered into a requirements contract with the plaintiff. The contract provided that the defendant was to use gravel from the plaintiff's property to aid the defendant's construction of a bridge. However, to fulfill its requirements, the defendant would have had to use gravel that was found below the water level. Using this wet gravel would have increased the defendant's cost by ten or twelve times. The court found that this unforeseen expense was both excessive and unreasonable, making the performance of the contract impracticable.

Mineral Park Land Co. and other impracticability [*10] cases support the proposition that the impracticability defense largely pertains to the performance of a physical act. *See Kennedy v. Reece, 225 Cal.App.2d 717 (1964)*; *Ellison v. City of San Buenaventura, 48 Cal.App.3d 952 (1975)*. Under these cases, the leasing arrangement between CIT and Blue Lake did not become impracticable. The monthly payments did not increase. The physical act of sending the lease payments certainly did not become unreasonably difficult. As CIT correctly notes, the fact that the lease became less profitable does not make payments under the lease impracticable. (CIT's Memorandum Supporting Summary Judgment, Sept. 23, 1991, p.8.) The impracticability defense does not apply to the facts of this case. Consequently, the performance of the lease by Blue Lake did not become impracticable. Summary judgment is not prevented by this defense.

E. *Supervening operation of law.*

Taylor's counsel conceded at the hearing that this affirmative defense really pertained to the frustration defense. According to counsel, the supervening injunction served to frustrate the lease. This argument has already been rejected under [*11] the frustration defense.

Supervening operation of law could serve to free a party from contractual obligation. If a law is passed that makes performance under the contract illegal, then performance would be excused. *Cal.Civ.Code § 1511(1).* However, no supervening law made the use of a log loader illegal. Therefore, supervening operation of law fails as a defense.

F. *Estoppel.*

Equitable estoppel prevents the injustice that may occur when a person, by his action or inaction, causes another person to act to his detriment. *Adams v. Johns-Manville Corp., 876 F.2d 702, 706-707 (9th Cir. 1989).* The doctrine requires, ". . . (1) a representation or concealment of material facts (2) made with knowledge, actual or virtual, of the facts (3) to a party ignorant, actually or permissibly, of the truth (4) with the intention, actual or virtual, that the latter act upon it; and (5) *the party must have been induced to act upon it. Hill v. Kaiser Aetna, 130 Cal.App.3d 188, 195 (1982)* (emphasis in original), *quoting*, 11 Witkin, *Summary of Cal. Law*, "Equity," § 177, p.859 (9th ed. 1990).

Taylor argues representations made on behalf of [*12] CIT caused him to incur more liability under the guaranty than he would have without the representations. This defense attacks the amount of damages that Taylor owes under the guaranty. According to Taylor, the representations were made in the context of discussions concerning the restructuring of Blue Lake's lease. CIT argues that evidence of such discussions is not admissible under *Fed. R. Evid. 408,* [1] the rule excluding settlement negotiations to prove the validity of or liability under a claim. CIT also argues that such discussions merely constitute an unenforceable agreement to agree.

1 *Fed. R. Evid. 408* provides in part:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible.

[*13] Addressing CIT's arguments first, *Rule 408* does not bar the evidence supporting the estoppel defense. The evidence is not being offered to establish liability. Furthermore, the evidence is not being used to place a numerical value on the amount of damages incurred as a result of the breach of the lease. Instead, the evidence is being used to show that more damages than necessary were incurred as a result of CIT's actions. *Rule 408* is meant to protect the free flow of communications between parties by preventing settlement discussion from being used to show how one party values the claim. For instance, an offer of $ 100,000 would not be admissible to show that a party has suffered $ 100,000 in damages. The evidence offered to show estoppel is not subject to that concern. As one commentator notes, "Another category of permissible use involves cases in which the compromise activities result in waiver of or an estoppel to assert some procedural or substantive right." 23 Wright & Graham, *Federal Practice and Procedure: Evidence*, § 5314, p.283 (1980). Although the evidence relates to how much damages CIT incurred, it does not place a numerical value on that claim. It only [*14] suggests that CIT may have incurred more damage than necessary. Consequently, CIT's evidentiary argument fails. [2]

2 Due to the order of briefing for this motion, the evidentiary issue did not arise until CIT's reply. Because this Court finds a factual dispute exists on the damages issue, it would reconsider its decision to admit evidence of settlement negotiations through a fully briefed motion *in limine* at trial.

CIT's "agreement to agree" argument lacks merit also. Taylor has not alleged an enforceable agreement that served as a precursor to a contract reformulation. His argument is simply that CIT caused him to act to his detriment by making statements in the context of compromise negotiations.

Turning to Taylor's argument that estoppel prevents CIT from recovering, this Court finds a genuine issue of material fact on one element of this defense. Taylor argues that he acted, or in this case, failed to take action,

as a result of CIT's representations. (Taylor Opposition, Nov. 13, 1991, p.8:9-10.) CIT [*15] argues that Taylor's actions were in no way changed as a result of possible settlement discussions. (CIT Reply, Nov. 20, 1991, p.6:14-21.) This dispute warrants a denial of summary judgment as to this affirmative defense.

G. *Failure to mitigate.*

A party damaged by a breach of contract must take reasonable steps to mitigate its damages. *999 v. C.I.T. Corp., 776 F.2d 866, 871 (9th Cir. 1985)*; *Davies v. Krasna, 14 Cal.3d 502, 515 (1975).* Taylor has alleged that CIT not only did not attempt to mitigate its damages, but it interfered with his attempt to sell the log loader. (Taylor Declaration, P12.) Conversely, CIT argues that it attempted to mitigate its damages by locating a purchaser for the log loader. (Offord Declaration, P4.) This Court finds that Taylor has established a genuine issue of material fact as to whether CIT took sufficient steps to mitigate its damages. Accordingly, summary judgment is denied on the issue of failure to mitigate.

V. TAYLOR'S MOTION TO STAY SUMMARY JUDGMENT PENDING FURTHER DISCOVERY.

Fed. R. Civ. P. 56(f) allows a court to stay summary judgment to permit a party to conduct discovery necessary to [*16] oppose the summary judgment. To obtain a stay, the party should specifically identify relevant information that he is attempting to discover, and demonstrate that there is some basis for believing the information actually exists. *See VISA Intern. Service v. Bankcard Holders, 784 F.2d 1472, 1475 (9th Cir. 1986).*

Taylor's motion to stay is denied for two reasons. First, Taylor's counsel conceded at the hearing that the only issues needing further discovery were those involving damages. Because summary judgment has not been granted on the issue of damages, Taylor may proceed with discovery on that issue.

Second, even if Taylor's counsel had not made this concession, Taylor has not identified specific information that he needs to counter the liability issue on summary judgment. Instead, he has attached a copy of his request for production of documents, claiming that this specifically identifies the information he needs. Not only does this method lack specificity, but it also fails to provide the Court reason to believe that the requested documents actually exist. Consequently, there is no reason to stay summary judgment while Taylor conducts further discovery.

[*17] VI. CONCLUSION.

For the foregoing reasons, this Court grants summary judgment with respect to Taylor's liability under the guaranty and denies summary judgment on the issue of damages.

This case will now proceed to trial. All dates previously imposed for discovery, pre-trial, and trial remain unchanged.

IT IS SO ORDERED.

Dated: December 16, 1991

PHILLIS J. HAMILTON, UNITED STATES MAGISTRATE JUDGE