Michigan Law Review

Volume 36 | Issue 7

1938

CONTRACTS - EFFECT OF FAIL URE OF PERFORMANCE IN AN ALEATORY CONTRACT

Michigan Law Review

CONTRACTS — EFFECT OF FAILURE OF PERFORMANCE IN AN ALEATORY CONTRACT — Plaintiff held a note of defendant's husband, long overdue. Defendant promised to guarantee payment of her husband's note, in consideration of plaintiff's promise to lend her money. Thereafter plaintiff, in breach of its promise, refused defendant a loan. Defendant immediately repudiated the contract. Plaintiff sued on the contract to recover the amount of the note with interest. *Held*, the promises were dependent; plaintiff's refusal to make the loan was a material breach of its promise, and excused defendant from further performance under the contract. *People's Trust & Savings Bank v. Wassersteen*, (Wis. 1937) 276 N. W. 330.

The modern tendency undoubtedly is to hold that mutual promises in a bilateral contract are dependent. The reason for this rule is the assumption, usually justifiable, that the parties regard the performances as equivalent and as the agreed exchange for each other.[1] In the case of aleatory contracts, however, quite often the performances mutually promised are not equivalent and it can not be presumed that the parties regarded them as the agreed exchange for each other. This fact would seem to suggest that in this class of contracts the usual rule, that mutual promises in a bilateral contract are dependent, is not always applicable. The performances in an aleatory contract are not the agreed exchange for each other where the promise on one side is subject to a fortuitous condition [2] and the promise on the other side is not, as in the ordinary fire insurance policy; or where both promises are subject to different fortuitous conditions, as in the case of mutual promises of guaranty. In the case of the fire insurance policy, payment of the premiums by the insured is the agreed exchange for the risk of fire damage assumed by the insurance company, not for payment of the face

[1] See 3 WILLISTON, CONTRACTS, rev. ed., § 813 (1936).

[2] A fortuitous condition is an event the happening of which is beyond the control of either party to the contract. "It may be beyond the power of any human being to bring the event to pass; it may be within the control of third persons; it may even be a past event, as the loss of a vessel, provided that the fact is unknown to the parties. The event may be positive or negative—an occurrence or a failure to occur. But the fact that the time or amount of performance is dependent on a fortuitous event does not make a promise aleatory." 1 CONTRACTS RESTATEMENT, § 291, comment a (1932).

value of the policy. In the case of mutual promises of guaranty where the parties guarantee payment of debts of different amounts, it is clear that payment of one debt is not the agreed exchange for payment of the other debt; instead the bargain consists in an exchange of risks. Where it is clear, as it is in these two instances, that the performances mutually promised are not equivalent and are not the agreed exchange for each other, it has been held that the promises are independent,[3] and that material breach by one party of his promise gives the other party a cause of action but does not excuse him from his duty to perform.[4] The reason underlying this rule probably is that to hold the promises dependent where there is such a disparity between the values of the performances would prevent the party in default, if his performance is the less valuable of the two performances, from recovering the difference in value between his performance and the performance of the other party, without an equivalent loss to the other party.[5] In the instant case the court did not consider the aleatory character of the contract. From the facts stated in the opinion, it cannot be determined with any degree of certainty whether or not the parties regarded the performances as the agreed exchange for each other.[6] If the parties regarded defendant's risk that her husband's note might not be paid, and not payment by defendant of her husband's note, as the agreed exchange for plaintiff's promised loan, the promises would be independent under the last mentioned rule.[7] However, it

[3] Where both promises are subject to the same fortuitous condition, the performances are equally certain and presumably the agreed exchange for each other. In that event the promises are dependent, and material breach by one party excuses the other from his duty to perform. Griggs v. Moors, 168 Mass. 354, 47 N. E. 128 (1897).

[4] Christie v. Borelly, 29 L. J. (N. S.) (C. P.) 153 (1860). But see Guy-Pell v. Foster, [1930] 2 Ch. 169, noted 29 MICH. L. REV. 932 (1931).

[5] Similarly, to hold the promises dependent would allow the party not in default, secured after the breach by his right to claim that he is excused if his own performance should fall due or prove the more onerous, to sit by without rescinding and have the right to sue for damages later if it should become certain that he does not have to perform or that his performance is the less onerous. There would be a loss to the party in default; and again, since the party not in default would have been subject to no risk after the breach, there would be no equivalent *loss* to him.

The American Law Institute takes the position that the party not in default, to be relieved in a proper case from a one-sided bargain, should have a right to be discharged from the contract. However, to prevent injustice, it places certain restrictions on the right. The party not in default can be discharged only if he rescinds; and he can rescind only if there has been a material breach of the contract, if he has received no substantial benefit under the contract, and if it has not become more probable than when the contract was made that he will have to perform. 1 CONTRACTS RESTATEMENT, § 293 (1932). It is submitted that this view, though a just one in theory, might not always administer justice in practice. Whether it has become more probable than when the contract was made that the party not in default will have to perform, may in no way be ascertainable.

[6] "The matter does not depend chiefly on form. It is a question of fact whether the promised price was presumably regarded as an exchange for the performance of the other party or as the purchase price of a chance or risk." 3 WILLISTON, CONTRACTS, rev. ed., § 888 (1936).

[7] Defendant rescinded immediately after plaintiff's breach. These facts may

may very well be that the parties regarded payment by defendant of her husband's note as the agreed exchange for plaintiff's loan. If the husband was insolvent when the contract was made and if there was no apparent probability of his paying the note, the parties may have regarded defendant's undertaking as something certain and not as a risk that the note might not be paid. In that event, the promises may properly be regarded as dependent.

present a case where defendant would be discharged from the contract under the view proposed by the American Law Institute. 1 CONTRACTS RESTATEMENT, § 293 (1932). Here was a material breach by plaintiff; defendant had received no substantial benefit under the contract; and there was no greater probability than when the contract was made that defendant would have to perform. If defendant's husband was insolvent when the contract was made, any subsequent change in the husband's circumstances would not likely have taken the direction of increasing the probability that defendant would have to perform.