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New Jersey Court of Errors and Appeals

Board of Education of the City of Wildwood, *Plaintiff-Appellant,* *vs.* Richman Construction Company and Massachusetts Bonding and Insurance Company, *Defendants-Respondents.*	*On Appeal from Supreme Court.*

Brief for Respondent, Massachusetts Bonding and Insurance Company.

Statement of Case.

There is only one question actually before the Court on this appeal, and that is whether the Trial Court properly struck from the record on the motion of defendant certain evidence. Plaintiff's counsel having argued the matter in his brief as though the error lay in the direction of a non-suit, and since this method of approach seems to us to obscure the issue somewhat, we will restate the case briefly.

Plaintiff contracted with the defendant Richman Construction Company for the erection of a school building for the sum of $64,698. The contract is the customary uniform contract and is found in the case on page 7.

Defendant Massachusetts Bonding and Insurance Company, jointly with its co-defendant, entered into a bond of indemnity to plaintiff in the penal sum of $32,340, which is found in the case on pages 14-18.

On the face of the record, it appears that defendant Richman Construction Company failed to perform its contract and that that contract was terminated by notice. At the time of such termination, defendant Richman Construction Company had received $34,556.40, leaving a balance in the hands of plaintiff under the contract of $30,141.60. The defendant Massachusetts Bonding and Insurance Company failed to exercise its privilege of completing the work. Thereupon plaintiff advertised for bids and let a new contract to Goslin & Pfeiffer in the sum of $42,850.

Plaintiff then, and before the work was even begun under the new contract, brought suit against the defendants for the sum of $12,708.40, being the difference between the balance on hand under the original contract and the price at which the new contractors had undertaken to complete the work.

This all being set out in the complaint, the defendant set up various matters of defense, of which only one is material on this appeal. In paragraph 11 of the answer (Case, p. 22, ll. 29-32) it answered: "This defendant * * * asserts that it is not liable in the amount demanded or in any amount to the plaintiff and says that *the plaintiff has suffered no loss.*" Paragraph 12, page 22, lines 38-40, reads: "Defendant denies that the plaintiff is entitled to damage and states *that the defendant has suffered no loss.*"

Then as a second and final defense there was set up the following (Case, p. 23, ll. 30-35):

> "Second Defense. Defendant asserts that the plaintiff cannot recover in this action *because it has paid no moneys in excess of the amount which it has on hand to com-*

plete the contract, and has only incurred an obligation for any such excess."

With the pleadings in this state, plaintiff sought to introduce the contract with Goslin & Pfeiffer for the completion of the work and various minutes and evidence relating to this contract, *as the sole evidence of the amount of its damages.* Defendant's counsel objected and the evidence was admitted, subject to his objection (Case, p. 37, l. 30) as one link in the plaintiff's chain. Finally (Case, p. 60, l. 30), the Court, finding that the one link was the whole chain, suggested hearing counsel at length on the question as to the admissibility of the evidence and, after argument (Case, p. 92, ll. 20-34) struck out all "evidence pertaining to the making of this new contract * * * and the new contract itself and all evidence relating to the making." Counsel for the plaintiff, conceding that there was no evidence of loss on the part of the plaintiff in the record, then rested (Case, p. 93, l. 25). The Trial Court of its own motion directed a non-suit. It appears, therefore, that the only question is upon the striking out of the evidence and that no error occurred in the granting of a non-suit on the face of the record.

Point I.

The evidence objected to was properly stricken from the case.

The sole right of action of the plaintiff is that which it had at the time of bringing suit. That, by its pleadings, was alleged to be the making of the contract with Goslin & Pfeiffer which, as appears in the record, was made the day before suit was filed. The objection of defendant to the materiality of the contract as the sole basis

for an action against it was raised flatly upon the pleadings as above cited, and was re-raised the moment the contract, or any of the proceedings relating to its making, were sought to be introduced in evidence. We are not concerned, as counsel for the plaintiff misapprehends, with the architect's certificate or the want of one. We are concerned solely with the question as to whether the making of a new contract to complete the work definitely and finally fixes plaintiff's damages and defendant's liability.

That this cannot be the case must be entirely clear when it is considered that Article V reads as follows:

> "Art. V. Should the contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being certified by the architect, the owner shall be at liberty, after three days' written notice to the contractor, to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the contractor under this contract; and if the architect shall certify that such refusal, neglect or failure is sufficient ground for such action, the owner shall also be at liberty to terminate the employment of the contractor for the said work and to enter upon the premises and take possession, for the purpose of completing the work included under this contract, of all materials, tools and appliances thereon, and to employ any other person or persons to finish the work,

> and to provide the materials therefor; and in case of such discontinuance of the employment of the contractor they shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the owner in finishing the work, such excess shall be paid by the owner to the contractor; but if such expense shall exceed such unpaid balance, the contractor shall pay the difference to the owner. The expense incurred by the owner as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default, shall be audited and certified by the architect, whose certificate thereof shall be conclusive upon the parties."

By this language it appears that the liability of the contractor, and by the same token of the surety, is to pay to the owner the amount by which the expense incurred by the owner in *finishing the work* shall exceed the unpaid balance under the first contract. It therefore must follow that the owner cannot recover *his expense though he might recover damages* if he does not finish and, consequently, may not recover until he has finished. It requires no argument to support the proposition that if the owner could recover, upon the mere making of a contract to complete, the full amount by which the new contract exceeds the old balance, he might recover far more than his actual expense. In this case, for example, the Goslin & Pfeiffer contract, as is customary, contains a covenant for the alteration of the work and for allowance by

the contractor to the owner in the event of such alteration, if the result is to reduce the cost. If the city of Wildwood, therefore, could recover upon the mere making of the Goslin & Pfeiffer contract, it might very well, by subsequent amendment of that contract, reduce the actual cost of completion below the figure it had recovered as damages.

The Goslin & Pfeiffer contract also contains a clause limiting the time for the completion of the work to the first day of July, 1917. It might so happen that the contractors would not have the building completed by that date, and in lieu of termination might consent to a reduction of their compensation for an extension in their time for completion. Catastrophe might ensue, such as fire or windstorm, destroying the whole building before the Goslin & Pfeiffer contract was complete, either with or without insurance recovery on the part of the city. Or the city might determine to revise the whole method of construction of the building, with the consent of the new contractor, in such a manner as to make the cost of completion a factor upon which the parties had never figured. The new contract might be completely abrogated by consent of the city and the contractor and a new contract let at an eventual saving. Or some shift might come in the position of the new contractor Goslin & Pfeiffer, coupled with a simultaneous reduction in the cost of building, which would make it advantageous and desirable for both that the new contract be abrogated and the surety thereon released and a new letting had, resulting in saving to the city. Certainly, so long as any of these contingencies existed the city could not attempt to hold the contractor upon its mere entrance into an obligation cancelable or amend-

able in any of its term or provisions. An exact parallel would be found if A, having gone surety to B for C's debt, attempted to bring suit against C upon giving B a promissory note for the amount of the debt. In the very case before the Court, after the default of the Richman Construction Company, if the defendant Massachusetts Bonding and Insurance Company had promised the City of Wildwood to pay it $14,000, but had not actually made payment, surely no Court would have permitted the Massachusetts Bonding and Insurance Company to maintain its suit against the Richman Construction Company to recover back the payment it had promised but not yet made.

The only bearing that the presentation, or lack thereof, of an architect's certificate has upon the pending case is that the provision of the contract calling for such a certificate was manifestly inserted therein to guard against the various contingencies above suggested. Article V of the contract requires, in the event of the termination of the contract by notice, that "the expense incurred by the owner as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default shall be audited and certified by the architect, whose certificate thereon shall be conclusive upon the parties." It is unnecessary to do more than state that the requirement that the architect should audit implies an examination by the architect of financial transactions, and that the placing upon the architect of the duty of certifying implies an examination by a chosen agent of both parties for the purpose of determining whether the work for which the money found by the audit to have been paid has been paid for the furnishing of materials and com-

pleting the work specified in the original contract. It therefore follows beyond question that the contract never contemplated that the contractor or his surety should be liable instantly upon the entrance by the owner into a new obligation, but only upon his actual expenditure of money resulting in the completion of the work called for under the contract.

In the case before the Court, this view is further emphasized by the language of the bond. Article Second of the bond (case, p. 16, ll. 23-28) reads as follows :

> "That no claim, suit or action by reason of any default shall be brought against the principal or surety after the expiration of six months next succeeding to the date specified for the completion of said contract, nor shall any recovery be had *for damages accruing after that period.*"

It was conceded for the plaintiff at the trial that the work under the Goslin & Pfeiffer contract had not been completed on the date of trial in July, 1917, eight months after the suit was brought. The original contract called for the completion of the work before August 1st, 1916. This date was alleged in the complaint to have been extended to November 25th, 1916. Even if so extended, the six months' period referred to in the bond would have expired on May 25th, 1917, and the language relieving the surety from any damage "accruing" after the six months' period would relieve it automatically from the burden of any expense to the owner after that date. Consequently, the concession by plaintiff that the work had not been completed on May 25th, instantly necessitated the rejection of the contract from evidence, since to admit it in evidence as proof of the amount of the plaintiff's

claim would have subjected the defendant to the possibility of being held liable for damages accruing after May 25th.

On page 30 of the case, lines 25-31, the following colloquy occurred:

> "*The Court.* And is this action predicated upon such payment or is it predicated upon the liability only?
>
> *Mr. Starr.* It is predicated upon the liability incurred in the words of the contract."

Counsel for plaintiff has argued the matter in his brief as though the whole case turned upon the production or non-production of an architect's certificate. His contention is that since the complaint alleged the performance of all conditions precedent and the answer merely made general denial and did not specifically plead the non-production of the architect's certificate, defendant is estopped from urging the non-production at the trial. In so doing, he completely mis-conceives our position. Even if we concede, for the purpose of argument, that we are not in a position to avail ourselves of that particular defect in the plaintiff's case, still the question of the admissibility of the contract is not determined against us. We do not say, or need to say, that if the plaintiff had come into court with proof of expenses incurred prior to the bringing of suit we might not have been bound, because of the defect in our pleadings, even though no architect's certificate had been produced. But in the face of our express plea, raising the issue as to whether we could be bound on a mere obligation incurred, we say that whatever other evidence may have been admissible, the contract was not. Our liability could spring only from the expenditure of money, and the architect's certificate provision of the contract is germane to the

controversy in this view of the case only as it illustrates the clear intent of the contract to limit the liability to expenditures capable of audit and certificate.

The case of *American Bonding & Trust Company* v. *Gibson County,* 127 Fed., 671 and 145 Fed., 871, cited by counsel for the defendant below and referred to in plaintiff's brief in this appeal, is, it is true, a case turning entirely upon the production or non-production of the architect's certificate. It is not relied upon by defendant here as a strict precedent, but merely because, by its insistence that the audit and certificate of the architect is an absolute essential to the bringing of the suit, it bears out completely our reasoning that the cause of action arises only upon the payment of moneys the subject of audit.

It seems to us that the counsel for the plaintiff, in order to reverse the ruling of the Judge of the Circuit in striking the contract out of evidence, must convince this Court that suit will lie upon the assumption of an obligation. And before he can produce such a conviction, he must demonstrate that the requirement of the contract that the architect should audit and certify does not imply the existence of expenditures to be audited and work to be examined.

A final argument, which seems to us absolutely to clinch the point we are here making, is found in the language of Article V of the contract. The latter part of the article reads: "And in case of such discontinuance of the employment of the contractor they shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall

exceed the expense incurred by the owner in finishing the work, such excess shall be paid by the owner to the contractor; but if such expense shall exceed such unpaid balance, the contractor shall pay the difference to the owner." Under this language clearly the contractor could not recover from the owner until the work was absolutely complete, and his position would not be changed under such language even if the owner had made the contract to finish the building for a less sum than the balance on hand. In other words, as to the contractor's right of recovery, clearly the words, "Expense incurred by the owner in finishing the work," meant that the contractor's recovery is fixed by the expense incurred by the owner *for* completed work and not the owner's engagements or obligations. In the words in the latter part of the clause, "but if such expense shall exceed such unpaid balance," the words "*such* expense" must refer back to the identical kind of expense which will found an action by the contractor against the owner, namely, the demonstrated cost of the finished structure. The words "at which time" in the clause above cited clearly relate to the time when the building is complete. As is so well shown by Justice Lurton in *American Bonding & Trust Company* v. *Gibson County, supra,* the owner's right under Article V must parallel the contractor's and neither may sue unless the other, with conditions reversed, might do so.

Point II.

The six months' limitation of liability in the bond cannot affect plaintiff's right to recovery.

Plaintiff's counsel throws himself upon the mercy of the Court by stating that if this nonsuit is sustained no other suit will lie, because the bond limits the liability of the defendant to damages accruing within six months after the date fixed in the contract for the completion of the work thereunder. As was pointed out by the Trial Judge at the Circuit (case, p. 34, l. 38, to p. 35, l. 15), this clause is an entirely reasonable one in this particular case. The original contract required the completion of the work "within one hundred and sixty (160) working days from the date of signing of this contract." (Case, p. 10, ll. 12-16.) One hundred and sixty working days are approximately six months. The bond extends the liability, in other words, for an additional period substantially as long as the time fixed in the original contract. Under the disturbed conditions existing in the building trades in the year 1915, the defendant would have been guilty of gross neglect if it had failed to limit its liability to a reasonable period for the completion of the work. Furthermore, the six months' limitation, giving, as it did, a full year for the doing of work which the contract fixed at six months, gave to the city ample time in which to secure the completion and fix the liability of the surety. If the city, either by permitting the original contractor to waste time on the work or by failing to make a new contract with the date of completion fixed within the period which would hold the surety, has lost its right of action it is its own fault and not that of the surety, which merely protected itself against the hazards of rapid advance in the cost of construction.

Point III.

The fourth point in the brief of plaintiff's counsel is that the provisions of Article V of the contract, requiring the architect's certificate, set up a mere rule of evidence and did not impose a condition precedent to the commencement of the action. If this be true, it was not necessary for defendant to plead the failure of plaintiff to produce the architect's certificate in answer to the general averment in the complaint that the plaintiff had performed the conditions precedent to its right to recover. If plaintiff's counsel is correct, therefore, we contend that the ruling of Mr. Justice Lurton, in *American Bonding & Trust Company* v. *Gibson County,* above referred to, is conclusive upon the admissibility of the contract in evidence and upon all the questions in this case, for he there rules, and it seems to us unanswerably, that the provision of Article V, requiring an architect's certificate, makes the production of such a certificate in the absence of fraud the one and only admissible bit of evidence to prove the plaintiff's case. All the cases in this state which reject the proffered defense of a failure to produce the certificate of an architect have done so upon the basis that the production of such a certificate is a condition precedent to the bringing of the action, and that the failure of the plaintiff to plead such a certificate must be immediately raised by the defendant. In this case, defendant's counsel felt that the essential issue was properly raised on the pleadings filed and that, even without further pleadings, defendant might raise the absence of the architect's certificate since defendant believed that in this case such a certificate was evidence rather than a condition precedent. The Trial Judge ruled against this contention on the insistence of counsel for the plaintiff. If

the Court here feels that there is merit in point 4 of plaintiff's brief, we urge that no reversal should be had since it was conceded by plaintiff below that the certificate could not be produced and therefore plaintiff has sustained no substantial injury in being non-suited. For the Court below also erred, in that event, in refusing to rule, at defendant's request, that the architect's certificate was *the only evidence* upon which plaintiff's action could be founded.

Point IV.

Plaintiff's counsel under Point V of the brief attempts to define the phrase "expense incurred!" One definition which he quotes for the word "incur" is "to become liable or subject to * * * as to incur debt." And the synonym discussion uses the phrase "Incur emphasizes the idea of liability." With all of this we heartily concur. But one had not incurred either debt or expense by agreeing to pay another upon another's future performance of an agreed service. The phrase "incurred expenses" and "incurred losses" are of daily use in the business world, especially in connection with fire insurance. Would counsel for the plaintiff contend that an insurance company had "incurred" a loss when it issued its policy or when the house burned? Or a merchant had incurred an expense when he hired a clerk to come the following week or after the clerk had come?

It may be that under preceding headings of the brief we have overstated the rule—certainly we have stated it more strongly than we need sustain—in arguing that "expense incurred" must be regarded as synonymous with "expenses paid." It may very well be that obligations to pay for work done would be "expenses incurred," but obligations to pay for work *to be*

done most certainly would not. The rule we here urge is in full accord with *Hoppaugh* v. *McGrath* and the other cases cited by counsel for plaintiff under Point IV of his brief.

Point V.

Under Point VI, defendant's counsel attempts to construe a passage from the minutes of the Board of Education (case, p. 42, l. 13), as "some evidence" of abandonment of the work by the contractor. The cited evidence reads as follows: "Mr. Clyde S. Adams, the architect, in person certified that the contractor on the High School Building, the Richman Construction Company, had not made an effort within the last week or ten days to proceed with the work and that the Board was entirely within their rights to terminate the contract and to enter and take possession for the purpose of completing the work." This is the only evidence upon which counsel hangs his argument about "abandonment." In the fact of the resolution of the Board (case, p. 42, l. 30, to p. 43, l. 20), terminating the contract under the provisions of Article V and of the pleadings in the case, we respectfully urge that the question of abandonment is not in the case.

Point VI.

In Point VIII, plaintiff's counsel attempts to argue that defendant waived its rights to object to the contract of Goslin & Pfeiffer, because it had notice of plaintiff's intention to enter into such contract. Here again appears the misconception on plaintiff's part of the whole question at issue in this appeal. From defendant's standpoint, it made no difference with whom or under what conditions plaintiff made a new contract. The only thing that made a difference to defend-

ant was how much money was lawfully and properly expended by plaintiff within six months from the date fixed for the completion of the original contract. If the Goslin & Pfeiffer contract had been completed within that period and the plaintiff had then brought its suit alleging its payments to Goslin & Pfeiffer, not because made on the contract between the city and themselves, but because made by it in the completion of the work called for under the original contract, defendant would have been liable for any excess paid out over the original contract price and up to the limit of its bond. If no contract had been made at all with Goslin & Pfeiffer, or with anyone else, and the city had proceeded under its power to complete without reletting, and had brought suit at the end of the six months' period for any excess than expended toward the completion of the work, the defendant would have been liable. It therefore had no standing to object to the contract in question.

Point VII.

The contract with Goslin & Pfeiffer having properly been stricken from the evidence and counsel for the plaintiff having failed to introduce any other evidence of damages (case, p. 92, l. 39, to p. 93, l. 26), although apparently possessing certificates to indicate payments on some account, there was absolutely nothing for the Court to do but order a non-suit.

The judgment of non-suit should be sustained in this case.

Respectfully submitted,

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