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96 Md. 534, 54 A. 106

Court of Appeals of Maryland.
MAYOR, ETC., OF **CITY** OF **BALTIMORE**
v.
SCHAUB BROS.
Feb. 11, 1903.

Appeal from Baltimore city court; J. Upshur Dennis, Judge.

Action by Schaub Bros., use of Benjamin H. Read, against the mayor and city council of Baltimore. Judgment for plaintiffs. Defendant appeals. Affirmed.

Jones, J., dissenting.

West Headnotes

Contracts 95 ⚿285(2)
95k285(2) Most Cited Cases
Plaintiff's contract to furnish a city coal for a certain period, provided that monthly payment should be made and based on analysis of the coal, that at the end of the month the city chemist would make an analysis and plaintiff's bill would be adjusted in accordance therewith, that if the analysis showed that the shipments were not within the specifications then when the next shipment was received an analysis would be made, and if that coal was not within the specifications the shipment would be rejected, and that the water engineer was to interpret the conditions of the contract and the accompanying specifications, and in case of dispute his decision was to be final. Held, that the question whether the city was in default because of such nonpayment was not a dispute as to the meaning of a provision, or clause of the contract, so as to be for the determination of the water engineer.

Sales 343 ⚿99
343k99 Most Cited Cases
Plaintiffs' contract to furnish a city coal for a certain period provided for monthly payments, to be made on the basis of analysis of the coal; that at the end of the month, from the shipments during the month, the city chemist would make an analysis, and plaintiffs' bill would be adjusted in accordance therewith; that, if the analysis showed that the shipments were not within the specifications, then when the next shipment was received an analysis would be made, and if the coal was not within the specifications the shipment would be rejected; and that the water engineer was to interpret the conditions of the contract and the accompanying specifications, and in case of dispute his decision was to be final. Held, that monthly payments were of the essence of the contract, and, not being made, authorized plaintiffs to terminate the contract; and this though the city chemist had not made an analysis, whatever the reason therefor, and though he used due diligence.

Argued before McSHERRY, C.J., and FOWLER, BOYD, PAGE, PEARCE, SCHMUCKER, and JONES, JJ.

Wm. Pinkney Whyte and Olin Bryan, for appellant.
Frederick C. Cook, for appellees.

PEARCE, J.
On June 18, 1901, the plaintiffs, dealers in coal, entered into a written agreement with the defendant to supply certain departments of the city government, including the school board, with coal up to April 15, 1902, to be delivered at such times, and in such manner, as provided in specifications forming part of the agreement. This contract has been complied with by both parties, except as to the coal required for the school board. The approximate quantity required for the school board, as stated in the blue print attached to the specifications, was 6,290 tons, of which two-thirds was to be delivered during July and August, and one-third as needed; but the school board reserved the right to order less than the

estimated quantity, if less was needed. The plaintiffs made the first delivery July 16, 1901, and continued to make deliveries up to August 29, 1901, aggregating 2,101 tons, when they refused to make further deliveries, alleging that the defendant had broken the contract by failing to make payment as provided, and had thereby discharged the plaintiffs from further liability under the contract, and this suit was brought October 28, 1901, to recover for the coal delivered, amounting to $11,062.35. The defendant admitted the correctness of the statement of coal delivered, and that it was indebted to the plaintiffs in the sum of $5,326.42, but filed a plea of set-off, alleging that the plaintiffs had broken the contract by refusing to make further deliveries, and that they were indebted to defendant in the sum of $5,735.93 "for actual damage caused by the failure of the plaintiffs to fulfill and carry out said contract, as shown by the statement attached to this plea, and prayed to be taken as a part thereof." Issues were properly joined on the pleadings, and the case went to trial before Judge Dennis, sitting as a jury. The amount admitted to be due was paid before the actual trial, and a verdict was rendered for the plaintiffs for $6,175.46, being the full amount claimed after deducting the payment made. The only exception taken was to the rulings upon the ***107** prayers, and the only question thus presented is whether the defendant is entitled to the set-off claimed.

The provisions of the contract material to the consideration of the case are as follows: Payments: "Payments will be made once a month by each department for all the coal delivered to that department by the contractor during the previous month, and will be made on the basis of what the coal shows on analysis." Provision is made for taking samples of coal for analysis from each shipment made to any department during the month. "At the end of the month all the samples thus accumulated will be thoroughly mixed, and a quart preserving jar will be filled with the mixture, labeled, and sent to the city chemist. The city chemist will, at the end of each month, thoroughly mix the contents of all these jars, and from that mixture take three quart jars for analysis, and will send to each department the result of his analysis of any one of these three jars, and the department will then adjust the contractor's bill, adding or deducting a given percentage of gain or loss upon given percentages of ash shown in the coal." Rejections: "If the analysis shows that the shipments of coal made by any contractor during the month do not come within the specifications, *** then when the next shipment made by the contractor of the same class of coal is received an analysis will be made of a sample of this coal at once, and if that analysis shows that the coal does not come within the specifications, that shipment will be rejected, and must be removed at once, at the contractor's expense." Water engineer to interpret contract: "The contractors agree that the water engineer is to interpret the terms and conditions of this agreement, and the specifications accompanying; and, in event of any dispute as to the meaning of any of the provisions and clauses of same, the decision of the water engineer is to be final."

The testimony in the case may be summarized thus: Lewis W. Schaub, one of the plaintiffs, testified that after the first month's delivery he took a statement to Mr. Owens, supervisor of school buildings, who had the matter in charge, and who went over the bill with him and corrected it; that he told Mr. Owens he would like to have the money, as the contract was taken at a low figure, and they needed the money, and that Mr. Owens told him they should have it as soon as possible; that they continued delivering through August, and that during that month he went to Mr. Owens more than once, and told him they must have the money, as their shippers had made an agreement with them according to their own specifications with the defendant, and if they did

not pay the shippers accordingly they would not ship any more coal; that they went again to urge payment, and were told the analysis had not been sent in, and that he replied, "You have to look out for that yourself; we have only to deliver the coal;" that they went again in September, and were told there was nothing for them, and that he then went to see the shippers, who replied, "We can't put up with that, we must have money," whereupon, on September 3d, they sent to the school board the letter of that date set out in the evidence, stating that both Mr. Owens and Mr. McGill had told them they were unable to pay them, because no analysis had been received from the city chemist, and that they would not be paid until such analysis was received, also stating that they had called on Prof. Lehman, the city chemist, in reference to the matter, and that he told them that with an extra force he could not furnish the analysis required by the school board by Christmas; that it was apparent the defendant was unable to keep its part of the agreement, and, having failed to do so, they must refuse to ship it any more coal. This witness further testified that he told Mr. Quick, the water engineer, that they had trouble about the payment, and needed money, and that he said they would do the best they could, but could not say he asked Mr. Quick whether they had to wait for payment until an analysis was made; also that his brother, Francis J. Schaub, was with him when he talked with Mr. Quick, and that his brother did most of the talking at that time. Francis J. Schaub, testifying for the plaintiffs, said he was a member of the bar, and attorney for the plaintiffs, and confirmed Lewis W. Schaub in detail. He said the plaintiffs understood that defendant had the month of August to make the analysis for July, and they so told Mr. Owens, when they presented the July bill, but asked him to hurry Prof. Lehman up, and he said he would; also that he went to see Prof. Lehman, who said he would do the best he could, but that the way the school board wanted the analyses he could not get them through by Christmas, even with six assistants; also that he had seen Mr. Quick, and asked him if he could not hurry it up, and he said he had nothing to do with it; that after the letter of September 3d there was a meeting at the mayor's office, when Mr. Quick and Mr. Owens were present, and Mayor Hayes, and an effort was made to arrange for delivering the residue of the coal under the contract, and he agreed to this for the plaintiffs if defendant would take the coal by the manifest weight, and Mayor Hayes thought this was reasonable, but Mr. Owens thought this would not be just to the other dealers, and no agreement was reached. He also said that Mr. Owens phoned him after this interview to ship the coal, and he went to see Gov. Whyte about it, and Gov. Whyte said, "Get an order in writing before delivering any more coal; if you ship that coal on Mr. Owens' say so, it will get you in trouble;" that Mr. Owens, at his request, on the 7th of September, phoned him the analysis, but said nothing ***108** about payment, and that if he had they would have been glad to accept it. Prof. Lehman, who also testified for the plaintiffs, confirmed the testimony of the two Schaubs. He says that he furnished no analysis to the school board until September 6th; that he was called some time in September to the mayor's office, by the mayor himself, to explain why there was delay in the coal analyses, and subsequently, on the same day, received instructions how to furnish the analyses to the school board, and they were then furnished to Mr. Owens on September 6th, but before that he was not informed that analyses in detail were not required, and understood that a separate analysis was required from every school; that before receiving the instructions in September he did tell the plaintiffs he could not furnish the analyses, with the force at his command, before Christmas, but after receiving Mr. Owens' instructions on the day of the meeting at the mayor's office he could easily furnish them in the required time of one month; that he was not furnished with a copy of this contract until after September 6th, and only

received a lot of samples, without any directions as to how they were to be treated, and that he wrote Mr. Schaub August 2, 1901, no analysis would be made until all the coal from one district was furnished, and then it would be for all the business of that district. He said, on cross-examination, that he was never directed to analyze the July coal without waiting for the August coal, though the plaintiffs told him they were depending upon the analysis for their payment, and were anxious to have the analysis made before August 31st, as they feared trouble with their shippers if they did not receive payment from the school board. Robert L. Windsor, a clerk for Lynah & Read, from whom plaintiffs purchased their coal, testified for plaintiffs that the specifications furnished by the defendant with the contract in this case were shown to Lynah & Read, and were the basis of their contract with plaintiffs as to payments; that is, all coal was to be settled for in the month succeeding that in which it was shipped. This closed plaintiffs' case, and Benjamin B. Owens was the first witness for defendant. His testimony did not materially contradict any of the plaintiffs' testimony. He admitted that about August 1st the plaintiffs brought in the bill for July deliveries, which was adjusted, and he told them that as soon as he got the analysis the bill would be paid; that they continued delivering through August, and frequently urged payment for July, and his reply always was that as soon as the analysis was received payment would be made; that after August 29th they stopped deliveries without telling why, and that they had not yet told why, though he admitted receipt from the school board of plaintiffs' letter of September 3d. He also said that the plaintiffs had only delivered about 2,000 out of 6,000 tons, though the contract required the delivery of two-thirds during July and August; but he admitted the correctness of plaintiffs' statement that, as no coal was ordered until July 16th, they were given until September 16th to furnish the two-thirds, as an offset to the two weeks in July. He also admitted that he gave no instructions to Prof. Lehman as to the method of analysis prior to the meeting in the mayor's office, and added that he had never since given any such instructions, and that Prof. Lehman was mistaken in his testimony on this point. He also proved the purchase of coal from other parties for the school board after plaintiffs ceased delivering, and that the increased cost was the amount claimed by way of set-off. Alfred M. Quick, for defendant, then testified that he was the water engineer; that the plaintiffs did complain to him of inconvenience to them by the delay in the analysis, but that they did not apply to him for any interpretation of the contract. Upon this testimony the prayers were offered, which will be set out by the reporter in the statement of the case.

The contention of the plaintiffs is that the monthly payments provided for were meant and understood by the parties to be of the essence of the contract, and, the defendant having failed to fulfill this stipulation, that the plaintiffs had a right to put an end to the contract. The contention of the defendant is that the analysis of the city chemist is an absolute condition precedent to payment, and that the failure of the chemist to make the analysis within the time limited for payment enlarged the time for payment; and also that the question whether the city was in default by reason of nonpayment by September 1st for the July deliveries was a question to be submitted to and determined by the city engineer, and consequently that the plaintiffs had no right to put an end to the contract, and defendant was entitled to set off damages arising from its breach.

We are of opinion that the contention of the plaintiffs is correct, and that neither position of the defendant can be maintained. We cannot distinguish this case from that of McGrath v. Gegner, 77 Md. 331, 26 Atl. 502, 39 Am.St.Rep. 415, which we regard as conclusive of this controversy. There the plaintiff agreed to buy of

the defendant all the oyster shells made during the season, and to pay on the first day of each week for the shells delivered during the previous week. After the delivery of a large quantity the defendant notified the plaintiff that the contract was at an end, on account of his failure to make the weekly payments, and refused to deliver any more shells. Judge Robinson, speaking for the full bench, said: "We cannot suppose for a moment that the defendant meant to give an indefinite credit to the plaintiff, nor even a credit until all the shells were delivered or taken away. On the contrary, looking to the terms of the contract,***109** it seems to us it was the intention of the parties that the weekly payments by the plaintiff should constitute an essential part of the contract. In other words, it was of the essence of the contract." In Withers v. Reynolds, 2 Barn. & Adol. 882, where the defendant agreed to supply the plaintiff with straw to be delivered on plaintiff's premises, at the rate of three loads in a fortnight, during a specified time, and the plaintiff agreed to pay 30 shillings for each load so delivered, it was held that according to the true construction of the contract each load was to be paid for on delivery, and that on the plaintiff's refusal to pay for the straw as delivered the defendant was not bound to deliver any more. And in Curtis v. Gibney, 59 Md. 131, treating the contract as an agreement on the part of the defendant to consign 10,000 bushels of barley to the plaintiffs, the shipments to be made at different times, and payment to be made on receipt of each shipment, Bartol, C. J., said: "It is equally clear that, upon his failure to remit to the appellant the proceeds in his hands arising from the sale of the barley according to the terms of the contract with the appellant, the latter was not bound to make further consignments to him."

In the case before us a careful examination of the contract we think will leave no question as to the intention of the parties, and their conduct will confirm the construction placed upon the contract. It is not reasonable to suppose that the plaintiffs would enter into a contract, the fulfillment of which on their part would require the use of so large an amount of money, without some corresponding obligation on the part of the defendant to reimburse them during the progress of the fulfillment. In order to provide for payments to be made by them, it was essential that they should know when they could demand payments to be made to them, and accordingly the proof shows that they bound themselves to pay their shippers, Lynah & Read, in the same manner that the city was bound to them. It is thus made clear that they attached importance and value to this stipulation for time of payment, as observed in Bowes v. Shand, 2 App.Cas. 455.

Again, we think it is plain that the parties contemplated an early monthly analysis, in order to prevent the hardship upon the plaintiffs of full delivery for a succeeding month, with the possibility of its rejection and consequent removal at their expense; for it is expressly provided that, if the analysis for any month shows that the coal does not conform to the specifications, when the next shipment is received an analysis will be made at once, and if that analysis shows the coal does not conform to the specifications that shipment will be rejected, and must be removed at the contractor's expense. For these and other reasons of like character we do not think the analysis can be regarded as an absolute condition precedent to payment, and we find nothing in the cases of Gill & McMahon v. Vogeler, 52 Md. 663, and Lynn v. B. & O.R.R., 60 Md. 411, 45 Am.Rep. 741, in conflict with our conclusion, the distinction between both those cases and the present being obvious when examined. Nor do we think that the question whether the city was in default by reason of nonpayment for the July deliveries by September 1st constituted any "dispute," within the meaning of the contract, as to the "meaning of any of the provisions or clauses of the same." Questions as to the size,

kind, or quantity of the coal delivered, as to the points of delivery, the correctness of weights or analysis, or other kindred questions, would seem to be within the scope of this provision, but not the ultimate legal right of the parties to the enforcement or the termination of the contract. It follows from what we have said that the plaintiffs' first prayer, which embraces and clearly states all the facts necessary to warrant a verdict in their favor upon the principle announced and adopted in McGrath v. Gegner, was correctly granted, and that the defendant's first and fourth prayers, which required the liability of defendant to be submitted to the water engineer, were properly rejected. Defendant's second prayer was properly rejected because it declared analysis of the coal to be a condition precedent to payment, and also because it made plaintiffs' right to recover depend upon the finding that the analysis was delayed for the purpose of delaying payment, whereas the failure to make analysis within the prescribed time was sufficient, without regard to the reason of the failure. In like manner, defendant's third prayer was properly rejected because the contract in prescribing a specific period for making analysis excludes any question of due diligence. The fifth prayer of defendant was defective in submitting to the court sitting as a jury the question whether the defendant's failure to perform its contract, if found as a fact, was sufficient in law to justify the plaintiffs in rescinding the contract on their part. Finding no error in the rulings of the learned judge, the judgment will be affirmed.

Judgment affirmed, with costs above and below.

JONES, J.

I respectfully dissent from the views of the majority of the court upon a vital point in this case, and will briefly state my reasons therefor. The facts and the evidence in the case are sufficiently stated in the majority opinion to make it unnecessary to do more here than to refer to such part of the evidence as will make intelligible the grounds of my dissent. The pleadings in the case put in issue the right of the appellant to recoup from the claim of the appellees, in suit, damages sustained by the appellant by reason of the refusal of the appellees to carry out the contract which the appellees offered in evidence as the basis ***110** of suit. The only ruling of the court below which the record brings up for review is that upon the prayers submitted by the respective parties. The prayer which was offered by the appellees and granted by the court asserted the proposition that if the court (which was sitting as a jury) should find that this contract was entered into between the parties to the suit, and the other facts therein set out, and should then further find that "the city chemist did not make the analyses of the coal furnished to the school board during the month of July, 1901, until September 6, 1901, its verdict must be for the plaintiffs (appellees) for the amount of coal bills for the months of July and August, yet remaining due and unpaid to the plaintiffs by the defendant, together with interest in the discretion of the court on the amount so found to be due and unpaid from October 1, 1901." The nature of the evidence offered by the appellees under the pleadings, and this instruction based thereon, in effect, make this case a suit upon the contract by the appellees in which they are not confined to a recovery of such damages as they might be able to show they had sustained from a breach of the contract without fault on their part, but are enabled to treat the contract as not existing, as respects the appellant and its rights thereunder, and to secure to themselves all the fruits thereof, as far as it had been performed, without requiring them to show that they had performed, or were ready, able, and willing to perform, the contract in its several requirements on their part. This ignores important evidence in the case affecting the rights and obligations of the parties to the contract. The gravamen of the instruction granted at the instance of the appellees, and the ground upon which they based their rescission of the contract, consisted in

the failure of the appellant to pay "for the coal by them furnished" to the appellant for account of the school board "during the month of July, 1901, at any time in the month of August, 1901, and up to and until September 3, 1901." The contract provided that payments should be "made once a month by each department for all coal delivered to that department by the contract during the previous month," and should "be made on the basis of what the coal" showed "on analysis." The provision for an analysis of the coal was an important one to the city, not so much in fixing the exact price of coal delivered, but in protecting the city against having supplied to it coal of inferior quality. The city, of course, could only act through its agents, and no agent would have been justified in making payment for coal delivered until furnished with the analysis stipulated for in the contract. The appellees, of course, knew this, or must be held to have known it. It was the duty of the city, however, to have the analysis in every case furnished within reasonable time. and so that payments could be made for coal in accordance with the stipulation in the contract in that regard. Now, as to the analysis of the coal here in question, the testimony shows that the city chemist, in answer to a letter addressed to him by the appellees, wrote them on the 2d of August, 1901, "it will be some time before the coal delivered to the schools will be ready. There will only be one analysis for each district from each shipper, and the samples which I now have will be kept until all the coal to the schools is delivered, when I shall mix the samples and furnish the school board with the analysis. I will consider it a favor if you will kindly let me know when all the coal which you are delivering to the several schools under your contract has been delivered."

The chemist, as a witness, testified that he had had a misconception as to how the analysis for this coal was to be made, but that during August he learned from the proper city officials how it was to be made; that he had "a number" of visits from the appellees or one of them during August to inquire about the analysis, and there was no complaint "about any delay" on his part "in furnishing the analysis"; that he understood, and thought it was understood "by all hands concerned," that "only one analysis should be made for the summer of 1901" (referring, of course, to the analysis of the coal for the school board); that he had an analysis ready by September 6, 1901; and that it took three or four days to make it, as he had a good many analyses from the other departments, and they had to take their turn. A brother of the appellees, an attorney, who represented them in their dealings with the city, as shown by his own and other evidence, testified as follows: "The July payment under the contract which we had with the mayor and city council under date June, 1901, we did not consider due until the 1st of September following." There is other testimony that might be adverted to in this connection; but what has been noticed is sufficient, with the further fact that after the letter of the 2d of August, 1901, the appellees went on delivering coal under the contract, to show that they waived such right as they may have had to rescind the contract because of the analysis not being furnished in August. They treated the contract as still in force, holding the appellant bound by all the terms thereof, and apparently intending on their part to continue its performance, without any notice of an intention to rescind or any act indicating such intention until September 3, 1901. The present suit was brought, and the recovery here sought was based, on the assumption of the contract being a subsisting one up to that date. The appellant was entitled to have these facts submitted to the trying tribunal, and to the legal effect to flow from them if they should be found. Bollman v. Burt, 61 Md. 415; ***111**McGrath v. Gegner, 77 Md. 331, 26 Atl. 502, 39 Am.Rep. 415; Waggaman v. Nutt, 88 Md. 265-276, 41 Atl. 154. On the 3d of September, 1901, upon the theory of a waiver by the appellees of an analysis of coal during August, there were

two reasons why the appellees were not entitled to rescind the contract. To entitle them to call upon the appellant for performance on its part on the penalty of a rescission of the contract, in case of a neglect of strict performance, it was incumbent on them to show that they had fully complied with the agreement on their part (Waggaman v. Nutt, 88 Md. 265, 267, 276, 41 Atl. 154), unless there be some reason appearing which in law is a legal excuse for not performing. The contract here in question contained a stipulation, by reference to an accompanying table, that the appellees should deliver to the appellant for use of the school board something over 6,600 tons of coal, and that two-thirds of this amount should be delivered during the months of July and August. The appellant was not only entitled, by this stipulation, to have this quantity of coal delivered, but also to have coal that would come up to the analysis prescribed and provided for in the contract. It did not gratify the contract to have a part of the coal delivered and coming within the analysis. The contract could only be gratified by having all the coal delivered and all coming up to the analysis. When on the 3d of September, 1901, the appellees attempted to rescind the contract instead of having delivered two-thirds of the coal as required, they had by their own showing delivered less than one-third. How could they complain of the absence of an analysis upon which payment for the coal was to be based when they had failed to deliver the coal of which the contract contemplated the analysis was to be made? There is no excuse attempted to be shown for nonperformance of the contract on their part by the appellees other than that having reference to the absence of an analysis of the July delivery of coal, which has already been considered. But, even if there had have been performance by the appellees of the stipulation of the contract as to the quantity of coal to be delivered, there would still have been no sufficient legal justification for a rescinding of the contract on the 3d of September, 1901. No definite fixed day was prescribed in the contract on or before which the analysis should be made ready. The obligation imposed in this regard, therefore, upon the appellant was to have it ready in a reasonable time, subject, of course, to the provision in the contract as to making payments for coal. What is a reasonable time is a question of law for the court. 2 Parsons on Cont. 661; Ragan v. Gaither, 11 Gill & J. 472; Burroughs v. Langley, 10 Md. 248; Mispelhorn v. Farm. Fire Ins. Co., 53 Md. 473. The proof in the case shows that an analysis of the coal in question was ready within one week from the end of August, and the appellees were so notified. From what appears in evidence, this was not an unreasonable delay of the analysis of the quantity of coal that was to be made the subject of analysis. The instructions granted by the trial court at the instance of the appellees, in ignoring the facts and considerations pertaining to a waiver of analysis of coal delivered in July, and to the right of the appellees to rescind the contract on the 3d of September, 1901, shut out the defense of the appellant raised by its third plea, and which there was evidence tending to support. In this, in my judgment, there was error. I agree with the majority opinion as to the rulings made upon the prayers proposed by the appellant.

Md. 1903.
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