K & G Constr. Co. v. Harris

164 A.2d 451 (Md. 1960)

Feeling aggrieved by the action of the trial judge of the Circuit Court for Prince George's County, sitting without a jury, in finding a judgment against it in favor of a subcontractor, the appellant, the general contractor on a construction project, appealed.

The principal question presented is: Does a contractor, damaged by a subcontractor's failure to perform a portion of his work in a workmanlike manner, have a right, under the circumstances of this case, to withhold, in partial satisfaction of said damages, an installment payment, which, under the terms of the contract, was due the subcontractor, unless the negligent performance of his work excused its payment?

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          [The relevant sequence of events was as follows:

**July 25**: the subcontractor performed work under the contract during July for which it submitted a requisition by the 25th of July, as required by the contract, for work done prior to the 25th of July, payable under the terms of the contract by the contractor on or before August 10.

**August 9**:   The subcontractor had a bulldozer accident that damaged the seriously damaged a wall that was part of the contractor’s construction project.

**August 10**:  The contractor refused to pay the subcontractor's requisition due on August 10 because the subcontractor had not repaired or paid for bulldozer damage.  The subcontractor regarded the accident and the refusal to repair or pay for the damage as a breach of the subcontractor’s contractual obligation to perform “[a]ll work . . . in a workmanlike manner, and in accordance with the best practices.”

**September 12**:  The subcontractor discontinued working on the project because of the contractor's refusal to pay.

The value of the work completed by the subcontractor on the project for which they had not been paid was $ 1,484.50.  If it had completed the remaining work to be done under the contract, it would have made a profit of $1,340.00 on the remaining uncompleted portion of the contract. It cost the Contractor $450.00 over the contract price to have another excavating contractor complete the remaining work required under the contract.]

It is immediately apparent that our decision turns upon the respective rights and liabilities of the parties under that portion of their contract whereby the subcontractor agreed to do the excavating and earth-moving work in "a workmanlike manner, and in accordance with the best practices," with time being of the essence of the contract, and the contractor agreed to make progress payments therefor on the 10th day of the months following the performance of the work by the subcontractor. The subcontractor contends, of course, that when the contractor failed to make the payment due on August 10, 1958, he breached his contract and thereby released him (the subcontractor) from any further obligation to perform. The contractor, on the other hand, argues that the failure of the subcontractor to perform his work in a workmanlike manner constituted a material breach of the contract, which justified his refusal to make the August 10 payment; and, as there was no breach on his part, the subcontractor had no right to cease performance on September 12, and his refusal to continue work on the project constituted another breach, which rendered him liable to the contractor for damages. The vital question, more tersely stated, remains: Did the contractor have a right, under the circumstances, to refuse to make the progress payment due on August 10, 1958?

. . . Promises are mutually dependent if the parties intend performance by one to be conditioned upon performance by the other, and, if they be mutually dependent, they may be (a) precedent, i.e., a promise that is to be performed before a corresponding promise on the part of the adversary party is to be performed, (b) subsequent, i.e., a corresponding promise that is not to be performed until the other party to the contract has performed a precedent covenant, or (c) concurrent, i.e., promises that are to be performed at the same time by each of the parties, who are respectively bound to perform each.

. . . The modern rule, which seems to be of almost universal application, is that there is a presumption that mutual promises in a contract are dependent and are to be so regarded, whenever possible. . . .

Considering the presumption that promises and counter-promises are dependent and the statement of the case, we have no hesitation in holding that the promise and counter-promise under consideration here were mutually dependent, that is to say, the parties intended performance by one to be conditioned on performance by the other; and the subcontractor's promise was, by the explicit wording of the contract, precedent to the promise of payment, monthly, by the contractor.

In *Shapiro Eng. Corp. v. Francis O. Day Co.*, 215 Md. 373, 380, 137 A. 2d 695, we stated that it is the general rule that where a total price for work is fixed by a contract, the work is not rendered divisible by progress payments. It would, indeed, present an unusual situation if we were to hold that a building contractor, who has obtained someone to do work for him and has agreed to pay each month for the work performed in the previous month, has to continue the monthly payments, irrespective of the degree of skill and care displayed in the performance of work, and his only recourse is by way of suit for ill-performance. If this were the law, it is conceivable, in fact, probable, that many contractors would become insolvent before they were able to complete their contracts. . . .

We hold that when the subcontractor's employee negligently damaged the contractor's wall, this constituted a breach of the subcontractor's promise to perform his work in a "workmanlike manner, and in accordance with the best practices." . . . And there can be little doubt that the breach was material: the damage to the wall amounted to more than double the payment due on August 10. . .

Professor Corbin, [Contracts] in para. 954, states further: “The unexcused failure of a contractor to render a promised performance when it is due is always a breach of contract . . .  Such failure may be of such great importance as to constitute what has been called herein a ‘total’ breach. . . For a failure of performance constituting such a 'total' breach, an action for remedies that are appropriate thereto is at once maintainable. Yet the injured party is not required to bring such an action. He has the option of treating the non-performance as a ‘partial’ breach only.” In permitting the subcontractor to proceed with work on the project after August 9, the contractor, obviously, treated the breach by the subcontractor as a partial one. As the promises were mutually dependent and the subcontractor had made a material breach in his performance, this justified the contractor in refusing to make the August 10 payment; hence, as the contractor was not in default, the subcontractor again breached the contract when he, on September 12, discontinued work on the project, which rendered him liable (by the express terms of the contract) to the contractor for his increased cost in having the excavating done -- a stipulated amount of $450.

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Judgment against the appellant reversed; and judgment entered in favor of the appellant against the appellees for $450, the appellees to pay the costs.