Wickham & Burton Coal Co. v. Farmers' Lumber Co.

179 N.W. 417 (1920)

Salinger, J.

I. The counterclaim alleges that about August 18, 1916, defendant, through an agent, entered into an oral agreement “whereby plaintiff agreed to furnish and to deliver to defendant orders given them” for carload shipments of coal from defendant f. o. b. mines, “to be shipped to defendant at such railroad yard stations as defendant might direct, at the price of $1.50 a ton on all orders up to September 1, 1916, and $1.65 a ton on all orders from then to April 1, 1917. ”It is further alleged that “said coal ordered would be and consist” of what was known as plaintiff's Paradise 6 lump, 6x3 egg, or 3 x2 nut coal. It is next alleged that defendant has for several years last past been engaged in owning and operating what is commonly known as a line of lumber yards, located at different railroad station points tributary to Ft. Dodge, where defendant has its principal place of business; that at these several lumber yards, among other merchandise and commodities, the defendant handles coal in carload lots, with purpose of selling the same at retail to its patrons. Then comes an allegation that the agent made oral agreement “that plaintiff would furnish unto defendant coal in carload lots, that defendant would want to purchase from plaintiff” on stated terms, with character of the coal described, and that the oral contract was confirmed by the letter Exhibit 1. It is of date August 21, 1916, and recites that plaintiff is in receipt of a letter from their agent--

“asking us to name you a price [repeating the price and coal description found in the counterclaim]. Although this is a very low price, our agent, Mr. Spalding, has recommended that we quote you this price, and we hereby confirm it. Any orders received between now and September 1st are to be shipped at $1.50. We would like to have a letter from you accepting these prices, and if this is satisfactory will consider same as a contract.”

On August 26, 1916, the defendant responded:

“We have your favor of the 21st accepting our order for coal for shipment to March 31, 1917.”

The basis of the counterclaim, so far as damages are concerned, is the allegation that a stated amount of coal had to be purchased by defendant in the open market at a greater than the contract price, and that therefore there is due the defendant from the plaintiff the sum of $3,090.

The demurrer asserts that the alleged contract is void because there is no consideration between the parties, because it appears affirmatively that the offer was simply an offer on part of plaintiff, which might be accepted by giving an order until such time as it was actually withdrawn or expired by limitation, each order and acceptance of a carload lot constituting a separate and distinct contract, and void because the agreement could not be enforced by the plaintiff on any certain or specified amount of tonnage, or for the payment of any specified tonnage.

II. The demurrer makes, in effect, three assertions: (a) That the arrangement between the parties is void for uncertainty; (b) that it lacks consideration; (c) that it lacks mutuality of obligation. We have given the argument and the citations on the first two propositions full consideration. But we conclude these first two are of no importance if mutuality is wanting.

. . . [W]hile a writing may be so uncertain as not to be enforceable, a perfectly definite writing may still be unenforceable because there is no mutuality of obligation.

And the asserted lack of consideration is bottomed on the claim that mutuality is lacking. Appellant does not deny that a promise may be a consideration for a promise. Its position is that this is so only of an enforceable promise. That is the law. If, from lack of mutuality, the promise is not binding, it cannot form a consideration. . . .

The question of first importance, then, is whether there is a lack of mutuality. In the last analysis the counterclaim is based on the allegation that plaintiff undertook to furnish defendant such described coal “as defendant would want to purchase from plaintiff.” The defendant never “accepted.” Indeed, it is its position that it gave orders, and that plaintiff did the accepting. But concede, for argument's sake, that defendant did accept. What was the acceptance? At the utmost, it was a consent that plaintiff might ship it such coal as defendant “would want to purchase from plaintiff.” What obligation did this fasten upon defendant? It did not bind itself to buy all it could sell. It did not bind itself to buy of plaintiff only. It merely “agreed” to buy what it pleased. It may have been ascertainable how much it would need to buy of some one. But there was no undertaking to buy that much, or, indeed, any specified amount of coal of plaintiff.

The situation is well stated in some of the cases. In Crane v. Crane, 105 Fed. at 872, 45 C. C. A. 96, 99, it is put thus:

“Should the contract under discussion be upheld, the plaintiffs in error would be held to occupy this advantageous situation: If the prices of dock oak lumber rose, they would by that much increase their ratio of profits, and probably come into a situation to outbid competitors, and increase also the quantum of orders; if, on the other hand, prices fell below the range of profits, the orders could be wholly discontinued. On the contrary, the situation of the defendant in error would be this: Should prices fall, it could not compel the plaintiffs in error to give further orders; but, should prices rise, the orders sent in would be compulsory, and the loss measured both by the increase of the ratio of profits and the probable increase of the quantum of orders.”

In American Cotton Oil Co. v. Kirk, 68 Fed. 793, 15 C. C. A. 540, 542, it is said:

“If the market price of oil should fall below the contract price, then, according to their contention as to the terms of the contract, the plaintiffs could purchase their supply of oil elsewhere and at the lower price, resorting to the contract when, and only when, the price stated was lower than the market price, and this without respect to time. Such a contract is one-sided and without mutuality.”

The “contract” on part of appellee is to buy if it pleased, when it pleased, to buy if it thought it advantageous, to buy much, little, or not at all, as it thought best.

A contract of sale is mutual where it contains an agreement to sell on the one side, and an agreement to purchase on the other. But it is not mutual where there is an obligation to sell, but no obligation to purchase, or an obligation to purchase, but no obligation to sell. 13 Corpus Juris, 339.

There is no mutuality or enforceability where the agreement is that, on 60 days' notice, either party might cancel same “for good cause.” Cummer v. Butts, 40 Mich. 322, 29 Am. Rep. 530. A provision that it is understood the purchase of apples commences “as soon as it is deemed advisable by both parties to this contract, when apples can be purchased in sufficient quantities to insure getting a carload in a reasonable length of time, not to exceed three days on fall apples,” lacks mutuality. This because no party is compelled to deem anything advisable, and the courts cannot deem it for them. Woolsey v. Ryan, 59 Kan. 601, 54 Pac. 664.There is such uncertainty as to destroy mutuality where the obligation to take is conditioned upon being “as long as we can make it pay.” Davie v. Lumbermen's Co., 93 Mich. 491, 53 N. W. 625, 24 L. R. A. 357. It is said that, under such an agreement, plaintiffs must be presumed to be the sole judges of whether it would or would not pay them to do the work and of how long they should continue it, and that the defendant has no voice on whether or not plaintiffs could make it pay, and no right to say in what manner they should conduct the work in order to make it pay.

[The decision continues with a number of similar examples.]

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The demurrer should have been sustained.

Reversed.