Osteen v. Johnson

473 P.2d 184 (Colo. Ct. App. 1970)

Dufford, Judge.

. . .

This was an action for breach of an oral contract. Trial was to the court, which found that the plaintiffs had paid the sum of $2,500. In exchange, the defendant had agreed to "promote" the plaintiff's daughter, Linda Osteen, as a singer and composer of country-western music. More specifically, it was found that the defendant had agreed to advertise Linda through various mailings for a period of one year; to arrange and furnish the facilities necessary for Linda to record several songs; to prepare two records from the songs recorded; to press and mail copies of one of the records to disc jockeys throughout the country; and, if the first record met with any success, to press and mail out copies of the second record.

The trial court further found that the defendant did arrange for several recording sessions, at which Linda recorded four songs. A record was prepared of two of the songs, and 1,000 copies of the record were then pressed. Of the pressed records, 340 copies were mailed to disc jockeys, 200 were sent to the plaintiffs, and the remainder were retained by the defendant. Various mailings were made to advertise Linda; flyers were sent to disc jockeys throughout the country; and Linda's professional name was advertised in trade magazines. The record sent out received a favorable review and a high rating in a trade magazine.

Upon such findings the trial court concluded that the defendant had substantially performed the agreement. However, a judgment was entered in favor of the plaintiffs in the sum of $1.00 and cost on the basis that the defendant had wrongfully caused the name of another party to appear on the label of the record as co-author of a song which had been written solely by Linda. The trial court also ordered the defendant to deliver to the plaintiffs certain master tapes and records in the defendant's possession.

RIGHT OF RESTITUTION

Although plaintiffs' reasons are not clearly defined, they argue here that the award of damages is inadequate, and that the trial court erred in concluding that the defendant had substantially performed the agreement. However, no evidence was presented during the trial of the matter upon which an award of other than nominal damages could be based.

In our opinion, the remedy which plaintiffs proved and upon which they can rely is that of restitution. . . . This remedy is available where there has been a contract breach of vital importance, variously defined as a substantial breach or a breach which goes to the essence of the contract. . . .

BREACH OF CONTRACT

The essential question here then becomes whether any breach on the part of the defendant is substantial enough to justify the remedy of restitution. Plaintiffs argue that the defendant breached the contract in the following ways: First, the defendant did not promote Linda for a period of one year as agreed; secondly, the defendant wrongfully caused the name of another party to appear on the label as co-author of the song which had been composed solely by Linda; and thirdly, the defendant, failed to press and mail out copies of the second record as agreed.

The first argument is not supported by the record. Plaintiff's brought the action within the one-year period for which the contract was to run. There was no evidence that during this period the defendant had not continued to promote Linda through the use of mailings and advertisements. Quite obviously the mere fact that the one-year period had not ended prior to the commencement of the action does not justify the conclusion that the defendant had breached the agreement. Plaintiffs' second argument overlooks the testimony offered on behalf of the defendant that listing the other party as co-author of the song would make it more likely that the record would be played by disc jockeys.

The plaintiffs' third argument does, however, have merit. It is clear from the record and the findings of the trial court that the first record had met with some success. It is also clear that copies of the second record were neither pressed nor mailed out. In our opinion the failure of the defendant to press and mail out copies of the second record after the first had achieved some success constituted a substantial breach of the contract and, therefore, justifies the remedy of restitution. . . . Both parties agree that the essence of their contract was to publicize Linda as a singer of western songs and to make her name and talent known to the public. Defendant admitted and asserted that the primary method of achieving this end was to have records pressed and mailed to disc jockeys.

. . .

DETERMINING DAMAGES

It is clear that the defendant did partially perform the contract, and under applicable law, should be allowed compensation for the reasonable value of his services. . . .

It shall, therefore, be the ultimate order of this court that prior to restoring to the plaintiffs the $2,500 paid by them to the defendant further proceedings be held during which the trial court shall determine the reasonable value of the services which the defendant rendered on plaintiff' behalf.

The judgment is reversed, and this case is remanded with directions that a new trial be held to determine the one issue of the amount to which the plaintiffs are entitled by way of restitution. Such amount shall be the $2,500 paid by plaintiffs to defendant less the reasonable value of the services which the defendant performed on behalf of plaintiffs.

COYTE and PIERCE, JJ., concur.