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Measure of Damages for Breach of an Alternative Contract - Zalis v. Walter

MEASURE OF DAMAGES FOR BREACH OF AN ALTERNATIVE CONTRACT.

Zalis v. Walter[1]

The evidence in this case, as summarized by the Court of Appeals, was about as follows. The plaintiff entered into an agreement with the defendant in 1924 by which the plaintiff was to install his sewing machines in the defendant's building. The plaintiff was to work for the defendant and to keep the machines in repair. Whenever the relationship was severed, the machines were to be returned to the plaintiff in the same condition as when put in the building or the defendant was to pay a fair market price for them. The plaintiff stopped working for the defendant on February 8th or 9th, 1939. In conversation on February 15th, 1939, the plaintiff offered to save further disagreement by taking $1,500 for his machines. This was refused by the defendant who offered $1,000, which was refused. There was no suggestion of a demand for, or an offer of the return of the machines.

The plaintiff was suing under a declaration containing the common counts and a special count to the effect that the plaintiff sold and delivered to the defendant a lot of sewing machines on or about the 15th of February 1939, alleging the specific value of the machines at $3,367.50, which the defendant had failed to pay. There was a bill of particulars identifying the machines as set forth in an earlier written schedule and giving credit for several sold at an earlier date. The defendant pleaded the general issue. At the trial, a verdict for the plaintiff for $3,000 was returned by the jury. The case was appealed upon certain objections to the evidence and the denial of all of the defendant's prayers including a variance prayer, proper in form, which insisted that the evidence did not support the declaration. The Court of Appeals reversed without a new trial, ruling that the evidence did not support the contract alleged in the declaration and that the variance prayer should have been granted and the case withheld from the jury.

The Court of Appeals indicated that the evidence might have supported under appropriate pleadings a recovery of damages for breach of an alternative contract. In doing this, the Court approved for the first time the rule of

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[1] 180 Md. 120, 23 A. (2d) 26 (1941).

damages for breach of alternative contract and cast some doubt upon the ground of an earlier decision which had shied off from the application of the rule. The Court quoted with approval from the Restatement of Contracts: "The damages for breach of an alternative contract are determined in accordance with that one of the alternatives that is chosen by the party having an election, or in case of a breach without an election, in accordance with the alternative that will result in the smallest recovery."[2]

The theory of the authorities applying this rule that the measure of damages is the value of the alternative least onerous to the promisor is that such alternative is the one the promisor would have been most likely to perform had he not defaulted; and that it is not proper for the court to rewrite contracts for the parties, as would in effect result if the right to elect were shifted from the promisor to the promisee upon the promisor's failure to perform unless so provided in the contract.[3]

A minority group of cases follows the theory that the measure of damages should be based on that alternative selected by the promisee, after the promisor's default.[4] It is argued in support of this theory that the promisor, being at fault, should not be heard to complain that he is made to perform the most onerous of several alternative acts. It is because of the promisor's breach of such agreement that the promisee has suffered an unprovided for loss and it is not unfair for him to receive more than he otherwise would.[5] This measure of damages seems to

[2] RESTATEMENT, CONTRACTS (1932) Sec. 344. See 5 WILLISTON, CONTRACTS (1937) Sec. 1407; 17 C. J. S. 935; Branhill Realty Co. v. Montgomery Ward & Co., 60 F. (2d) 922 (C. C. A. 2nd, 1932); Prudential Ins. Co. of America v. Faulkner, 68 F. (2d) 676 (C. C. A. 10th, 1934); W. J. Holliday & Co. v. Highland Iron & Steel Co., 43 Ind. App. 342, 87 N. E. 249 (1909); Franklin Sugar Ref. Co. v. Howell, 274 Pa. 190, 118 A. 109 (1922); In Re People, by Beha, 255 N. Y. 428, 175 N. E. 118 (1931).

[3] *Ibid.* Also, Pennsylvania Re-treading Tire Co. v. Goldberg, 305 Ill. 54, 137 N. E. 81 (1922), noted (1923) 32 Yale L. J. 618; Phillips v. Cornelius, 28 S. 871 (Miss., 1900), criticized (1901) 14 Harv. L. Rev. 613.

[4] Washoma Petroleum Co. v. Eason Oil Co., 49 P. (2nd) 709 (Okla., 1935); Virginia Export Coal Co. v. Rowland Land Co., 100 W. Va. 559, 131 S. E. 253 (1926); Kramer v. Ewing, 10 Okla. 357 (1904); Coles v. Peck, 96 Ind. 333 (1884); Corbin v. Fairbanks, Barlow & Co., 56 Vt. 538 (1884); Patchin v. Swift, 21 Vt. 292 (1849); 5 WILLISTON, CONTRACTS (1937) 392, Sec. 1407.

[5] Professor Williston says that this is an erroneous rule laid down in a few cases relying on a passage from Coke's Littleton relating to grants rather than to contracts. "The feoffee by his act and wrong may lose his election and give the same to the feoffor. As if one infeoffe another of the two acres, to have and to hold the one for life and the other in taile, and he before election maketh a feoffment of both; in this case, the feoffor shall enter into which of them he will, for the act and wrong of the foeffee." 5 WILLISTON, CONTRACTS (1937) Sec. 1407, n. 14.

be of the punitive type instead of the compensatory type which is generally followed. The general purpose of the rule of damages as laid down for breach of contract is to place the promisee in as good a position as he would have been in if the contract had been performed. Williston says, "In fixing the amount of damages, the general purpose of the law is, and should be, to give compensation, that is, to put the plaintiff in as good a position as he would have been in had the defendant kept his contract."[6]

Where the promise is to do one or the other of certain acts in the alternative, the promisor is bound to perform in one of the methods specified, and having the election, he can be charged with a breach only when he refuses to perform either.[7] Thus only on the exercise of the right of election as to which alternative is to be performed does the obligation become absolute and determinable.[8] Until the alternative is chosen, the contract is indefinite by its terms in so far as the promisee is concerned. He has expressly entered into this type of contract whereby the promisor has a right to chose that performance which will be the least burdensome to him at the time of performance. Since both parties may agree to any terms of a contract which is not illegal or against public policy, the promisee cannot complain that he may not know which alternative will be performed at the time the contract was made. This results from his own agreement to be satisfied by performance of the promisor's choice when it falls due.

Since the alternative contract gives the promisor the right to choose that performance which is the least burdensome to him when performance is due, the right to elect which of the alternatives should be chosen as the alternative to be considered breached, and as the obligation from which the measure of damages be calculated, should not pass to the promisee. The parties do not agree that when there is a total failure of performance the promisee should specify the alternative breached. The maximum legal right that belongs to the promisee is to have the

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[6] WILLISTON, CONTRACTS (1937) Sec. 1338; RESTATEMENT, CONTRACTS (1932) Sec. 329.

[7] Brocton Olympia Realty Co. v. Lee, 266 Mass. 550, 165 N. E. 873, 876 (1929); Salant v. Fox, 271 F. 449 (C. C. A. 3rd, 1921); 13 C. J. 629-30, Contracts, Sec. 697.

[8] Noyes and another v. Cooper, 5 Leigh 186 (Va., 1834); Blake v. Paramount Pictures, 22 Fed. Supp. 249 (D. C. S. D. Cal., 1938); Standard Appliance Co. v. Standard Equipment Co., 296 F. 456 (C. C. A. 6th, 1924); Automatic Sprinkler Corp. of America v. Greenspan Bros. Co., 108 N. J. L. 115, 156 A. 425 (1931); 13 C. J. 629-30, Contracts, Sec. 697.

alternative performed which would be chosen by the promisor if he did perform, which in all probability would be that one least onerous to him. From this the courts should presume that the alternative breached where there is a total failure of performance is that alternative which will result in the smallest amount of damages recoverable by the promisee. This would be in accordance with the intention of the parties at the time the contract was made and would merely put the promisee in the very same position as if the contract had been performed. For the Court to do otherwise would have the effect of rewriting the contract of the parties in disregard of their intention when the contract was entered into. The promisor should have the right to come into court and insist that the damages be limited so as to conform with the intent of the parties and the terms of the contract, inasmuch as the rights of the promisee under the contract are so limited.

Maryland, in the dicta in *Zalis v. Walter*,[9] adopts the view of the Restatement of Contracts and that followed by the majority of the courts, namely, that where there is a breach of an alternative contract, in the absence of a stipulation to the contrary, the right to elect does not pass to the promisee but remains with the promisor, and that the measure of damages is based on that alternative which the promisor would have chosen had he performed the alternative which is the least burdensome to him.

It is to be noted in passing that as soon as the promisor has made an election as to which alternative he will perform,[10] the obligation to perform that alternative becomes final[11] and the measure of damages for the breach is based upon the chosen alternative.[12]

In an earlier Maryland case, *Wheeling Steel & Iron Co. v. Williams*,[13] the plaintiff company, in reply to an inquiry from the defendant, offered to sell one hundred tons of tack plate rolled into four different gauges at designated prices for the different sizes. The defendant replied: "Enter our order for one hundred tons tack plate at price

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[9] *Supra, circa* n. 2.

[10] RESTATEMENT, CONTRACTS (1932) Sec. 344; Cocklin v. Home Mut. Ins. Assn., 204 Iowa 4, 222 N. W. 368 (1928); Paro v. St. Martin, 180 Mass. 29, 61 N. E. 268 (1901); Morrell v. Irving F. Ins. Co., 33 N. Y. 429 (1865); Dimmick v. Banning Cooper & Co., 256 Pa. 295, 100 A. 871 (1917).

[11] RESTATEMENT, CONTRACTS (1932) Sec. 325(b).

[12] Welsh v. Welsh's Estate, 148 Minn. 235, 181 N. W. 356 (1921), noted (1921) 7 Cornell L. Q. 51; Pearson v. William's Adm'rs, 24 Wend. 244 (N. Y., 1840); Russell v. Wright, 23 S. D. 338, 121 N. W. 842 (1909); 5 WILLISTON, CONTRACTS (1937) Sec. 1407.

[13] 97 Md. 305, 55 A. 373 (1903).

quoted, specifications to follow." To this plaintiff replied: "We have . . . entered your order for 100 tons of tack plate at prices quoted by us . . ." The defendant refused to give any directions as to the sizes required. The Court held that the plaintiff could not recover because no definite and complete contract had been made since the defendant reserved the right to designate subsequently what particular sizes of tack plate he would take. It was reasoned that the words of the acceptance, "specifications to follow", left something essential for future action to be designated by the purchaser and therefore constituted a new and independent offer requiring an acceptance by the vendor.[14]

The offer of the plaintiff designated four different gauges at different prices from which the defendant could chose. Two of the gauges were priced at $2.72 per hundred pounds and two at $2.80 per hundred pounds. The Court, after deciding that the contract was void said:

> "The test of this (indefiniteness) lies in considering what would have been the measure of damages in a suit instituted by the vendor against the vendee for breach of the alleged contract. Would the vendor have been entitled to recover the difference between the contract price and the market price of the whole one hundred tons, reckoned on the basis of $2.80 per hundred pounds; or on the basis of $2.72 per hundred pounds or on some other basis founded on an arbitrary apportionment of the whole number of tons amongst the four different gauges? And would not the difficulty of fixing a correct measure of damage have sensibly increased if the market price of the four gauges had fallen in an unequal ration and in different rates of percentage? What quantity of each gauge could a Court or jury declare that the vendee ought to have specified? If either Court or jury had undertaken such a task it would have supplied a term of the contract which the parties themselves failed to incorporate, and manifestly such a proceeding would have been unwarranted."[15]

The Court seemed to think it was impossible to estimate the damages in an alternative contract and so, to avoid

[14] For a discussion of the problem as to a contract of sale which calls for a definite quantity but leaves the quality, grade, or assortment optional with one of the parties, as subject to objection of indefiniteness, see Note (1937) 106 A. L. R. 1284.

[15] Wheeling Steel Co. v. Evans, 97 Md. 305, 312, 55 A. 373 (1903).

that difficulty, it proceeded to hold—in what seems a questionable decision—that there was no contract at all.[16] Under the majority rule discussed above, and approved in *Zalis v. Walter*,[17] the measure of damages could have been calculated on the basis of a contract calling for one hundred pounds of tack at $2.72 as that was the alternative least burdensome to the defendant and all the contract called for as far as the plaintiff was concerned.

The approval of this majority rule of damages for breach of an alternative contract in *Zalis v. Walter*[18] would seem to indicate that the Court of Appeals would not hesitate now to apply it in an appropriate case.

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[16] The facts of the case reviewed in the text *supra, circa* n. 12 would seem to be sufficient to have supported a holding that there was a contract. The reasoning of the court overlooked the fact that the letter of the plaintiff indicating an entry of the defendant's order, with the election open, might have concluded a good alternative contract.

[17] *Supra, circa* notes 1 and 2.

[18] *Ibid.*