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BenjamIn Vs. Hillard

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Court : US Supreme Court

Decided On : 1859

Appeal No. : 64 U.S. 149

Appellant : Benjamin

Respondent : Hillard

Judgement :

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Benjamin v. Hillard

64 U.S. (23 How.) 149

ERROR TO THE CIRCUIT COURT OF THE UNITED

STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

SYLLABUS

Where there was a contract for furnishing a steam engine, the following guaranty was made:

"For value received, I hereby guaranty the performance of the within contract, on the part of Hopkins & Leach, and in case of nonperformance thereof to refund to Messrs. Hillard & Mordecai all sums of money they may pay or advance thereon, with interest from the time the same is paid."

This contract is not in the alternative, but consists of two terms -- one, that the principals shall perform their engagement, not merely by the delivery of some machinery, but of such machinery as the contract includes; the other that if there be a nonperformance, whether excusable or not, the money advanced on the contract shall be secured to the plaintiffs to the extent to which the principals are liable.

An acquiescence of both parties in the prolongation of the time within which the contract was to be fulfilled will not operate to discharge the guarantor. There was no change in the essential features of the contract, and if the parties choose mutually to accommodate each other so as better to arrive at their end, the surety cannot complain.

So where the machinery delivered was imperfect and the two contracting parties had exchanged receipts, but the imperfection was afterwards discovered and the recipients of the machinery had to expend money upon it, the guarantor is responsible for it.

The defects in the machinery were latent, and could only be ascertained by its use. The settlement between the parties did not embrace the subject to which the warranty applied nor contain any release or extinguishment of the covenants concerning it.

The damages to be found should be such as would enable the plaintiffs to supply the deficiency, and the jury were not required to assume the contract price as the full value of such machinery.

Hillard & Mordecai, the plaintiffs below, of Wilkes Barre, in Pennsylvania, made a contract with Hopkins & Leach, of Elmira, New York, dated September 11, 1847, under seal. Benjamin guaranteed the performance of this contract as follows:

"For value received, I hereby guaranty the performance of the within contract on the part of Hopkins & Leach, and in case of nonperformance thereof, to refund to Messrs. Hillard & Mordecai all sums of money they may pay or advance thereon, with interest from the time the same is paid."

The action was brought upon this guaranty, which resulted in a verdict for the plaintiffs, damages six thousand dollars, and $1,869.15 costs. A motion was made for a nonsuit, which was overruled. The particulars of the case are stated in the opinion of the Court.

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MR. JUSTICE CAMPBELL delivered the opinion of the Court.

In September, 1847, Hillard & Mordecai employed the firm of Hopkins & Leach to make at Elmira, in New York, and deliver to them at Wilkes Barre, Pennsylvania, a steam engine, and apparatus necessary to put the same in complete operation, of the best materials and in the most substantial and workmanlike manner, according to specifications, and warranted to be of sufficient capacity and strength to drive six run of stones, and the gearing and machinery necessary for flouring and gristing purposes. Also, to make and deliver the cast-iron, wrought-iron, steel, and composition work for driving six run of stones, and the machinery attached, of the best materials and workmanship. These they were to erect and put up on a foundation prepared by Hillard & Mordecai, who were to afford the proper aid for that purpose. The machinery was to be completed and delivered at Wilkes Barre upon the first safe and navigable rise in the water of the River Chemung in the ensuing spring, and Hopkins & Leach were to give a responsible individual for security for the money paid on the contract, and for its fulfillment Hillard & Mordecai agreed to pay two thousand dollars the first of December, 1847; two thousand dollars the first of February, 1848; and the remainder upon the completion of the work, for which payments they were to be allowed interest. Before the first payment, the defendant subscribed an agreement, endorsed on the contract, as follows:

"For value received, I hereby guaranty the performance of the within contract on the part of Hopkins & Leach, and in case of nonperformance thereof

to refund to Messrs. Hillard & Mordecai and sums of money they may pay or advance thereon, with interest from the time the same is paid."

This suit was brought on this guaranty by Hillard & Mordecai for the insufficiency of the work done by Hopkins & Leach. On the trial, they adduced testimony to show that the engine and apparatus set up by Hopkins & Leach were not of the best material, nor of substantial and workmanlike construction, and had not strength to drive six run of stones, and in improving them they had sustained expense and loss; that from the middle of December, 1847, till December, 1858, the time when the work was finished, they had advanced fifty-five hundred dollars, and that only a trifling balance existed at that date, which was paid before the work had been tested by use; that afterwards, and in that month, defects were discovered of which Hopkins & Leach had notice. In consequence of which they made efforts to improve their work, but in June, 1849, the plaintiffs procured an examination to be made by three machinists and engineers, whose report upon the imperfection of the machinery was communicated to Hopkins & Leach and to the defendant, and who were required to amend their work. This notice and report were read to the jury, the defendant excepting to their competency. The defendant, after the case of the plaintiff was submitted to the jury, insisted to the court that his contract was merely a guaranty either of the performance of the agreement by Hopkins & Leach by the delivery of the machinery or the refunding of the moneys that might be paid before that event, and that the advances of the plaintiffs being in drafts or notes, and not within the time limited by the contract, the defendant was not liable at all, or if liable, only to the extent of the payment of $4,000, until they had fully performed their contract, and the plaintiffs having fully paid off Hopkins & Leach, and receipts being given, the defendant had a right to consider his guaranty as at an end.

The court overruled a motion to nonsuit the plaintiff and instructed the jury that the defendant was responsible on his contract not only for the nonpayment of the money advanced to Hopkins & Leach in case they failed to make and deliver

the engine and machinery, but also for the full and faithful performance of all of the agreement of Hopkins & Leach. The general rule is to attribute to the obligation of a surety the same extent as that of the principal. Unless from the terms of the contract an intention appears to reduce his liability within more narrow bounds, a restriction will not be imposed by construction contrary to the nature of the engagement. If the terms of his engagement are general and unrestricted and embrace the entire subject, *omnem causam,* his liability will be measured by that of the principal and embrace the same accessories and consequences, *connexorum et dependentium.* It will be presumed that he had in view the guaranty of the obligations his principal had assumed. Poth. on Ob. 404; 3 M. & S., 502; *Boyd v. Moyle,* 2 C.B. 644.

In the case before us, the contract of the surety is not in the alternative, but consists of two terms: one, that the principals shall perform their engagement not merely by the delivery of some machinery, but of such machinery as the contract includes; the other that if there be a nonperformance, whether excusable or not, the money advanced on the contract shall be secured to the plaintiffs to the extent for which their principals are liable.

The defendant, to sustain his defense that the plaintiffs had varied their agreement with Hopkins & Leach, adduced testimony to the effect that the letter had informed them of their inability to complete the work "by the first safe and navigable rise in the river," and that they assented to the delay proposed by them till another rise; that a portion of the work was sent in April, and a portion in June, and a portion in October, and that the plaintiffs were not ready to receive it until October, and it was not erected until December, 1848, at which time a settlement took place, and the plaintiffs paid the small balance then due.

The circuit court instructed the jury that the waiver by the plaintiffs of the punctual delivery of the engine and machinery did not constitute such a change in the contract as to discharge the guarantor. That a mutual alteration of the contract by the principal parties would operate to discharge the

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defendant as a guarantor, but an acquiescence on the part of the plaintiffs in a longer time than was specified in the contract for fulfillment, especially as the time of fulfillment was somewhat indefinite, would not, as matter of law, operate to discharge the defendant, and the court declined to charge the jury

"that if they believed that the performance of the contract was essentially altered or varied, or the time of the delivery of the machinery at Wilkes Barre extended upon good consideration, without the knowledge or consent of the defendant, the plaintiffs were not entitled to recover."

The agreement of Hopkins & Leach comprised the manufacture of complicated machinery of distinct parts and different degrees of importance, and these were to be transported to a distance, there to be set up in connection with other works about which other persons were employed. That such a contract should not be fulfilled to the letter by either party is not a matter of surprise. The covenants are independent, and there is nothing that indicates that a failure on either part to perform one of these covenants would authorize its dissolution or that the breach could not be compensated in damages.

The evidence does not allow us to conclude that there was any intention to change the object or the means essential to attain the object of the original agreement. In its execution, there were departures from its stipulations, but these seem to have been made on grounds of mutual convenience, and did not increase the risk to the surety. He was fully indemnified by his principals until after the settlement between the plaintiffs and Hopkins & Leach.

It is clear that the mere prolongation of the term of payment of the principal debtor, or of the time for the performance of his duty, will not discharge a surety or

guarantor. There must be another contract substituted for the original contract or some alteration in a point so material as in effect to make a new contract without the surety's consent to produce that result. But when the essential features of the contract and its objects are preserved, and the parties, without objection from the surety and without any legal constraint on themselves, mutually accommodate each other so as better to

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arrive at their end, we can find no ground for the surety to complain. The circuit court presented the question fairly to the jury, and the exceptions to the charge cannot be supported. Trop. de Caution 575; *Beaubien v. Stoney,* Spear So.Ca.Ch. 508; 11 Wend. 312.

The defendant adduced testimony to show that the plaintiffs accepted the engine and machinery; that an account was stated between the plaintiffs and Hopkins & Leach of the work done and money paid, and an acknowledgment of its settlement entered upon it, and signed by the parties; that Hopkins & Leach exhibited this account to the defendant and demanded a return of the securities they had deposited with him for his indemnity, and that they were yielded on the credit given to that acknowledgment. He requested the court to instruct the jury that if they believed that the defendant, relying upon the receipt given by the plaintiffs, settled with Hopkins & Leach and surrendered to them securities he held to indemnity him against the liability he assumed by his guaranty, and such surrender and discharge were made after the settlement between Hopkins & Leach and the plaintiffs and upon the faith of it, the plaintiffs are bound by such settlement and receipt so far as the same relates to the defendant, they having put it in the power of Hopkins & Leach to procure the surrender of such securities for the defendant. This prayer finds its answer in the agreement of Hopkins & Leach and the guaranty of the defendant.

The material of which the machinery was to be composed, and the workmanship and capacity of the manufacture, were warranted. The defects in the machinery were latent, and could only be ascertained by its use. The settlement between the

parties did not embrace the subject to which the warranty applied, nor contain any release or extinguishment of the covenants concerning it. The cause of the present suit is not the same as that included in the stated account or acknowledgment entered upon it.

The present suit originates in the contract between Hopkins & Leach and the plaintiffs. The former could not plead that settlement in bar of a similar suit against them, and consequently

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their guarantor cannot. They have misconceived the import of that settlement without the agency of the plaintiffs, and are not entitled to charge them with the consequent loss.

The circuit court instructed the jury that if they found the engine, boilers, and apparatus for steam power were sufficient to drive six run of stones suitable for grinding, the damages to be found should be such as would enable the plaintiffs to supply the deficiency, and that they were not required to assume the contract price as the full value of such machinery.

The principle thus laid down coincides with that in *Alder v. Keightly,* 15 M. & W 117. "No doubt," say the court in that case,

"all questions of damages are, strictly speaking, for the jury, and however clear and plain may be the rule of law on which the damages are to be found, the act of finding them is for them. But there are certain established rules according to which they ought to find, and here is a clear rule: that the amount that would have been received if the contract had been kept is the measure of damages if the contract is broken."

This rule was reaffirmed in *Hadley v. Baxendale,* 10 Exch. 341. The exception to the introduction of the notice to the defendant and the report accompanying it cannot be sustained. It was proper for the plaintiffs to notify the principals and their surety of the defects in their work and to call upon them to amend it. The report

was not introduced as testimony of the defects, nor can we assume that it was used for that purpose. Upon the whole record, our conclusion is there is no error, and the

Judgment of the circuit court is affirmed.

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