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Contracts

CONTRACTS

DURESS

Kunkel v. Red River National Bank in Clarksville[1] involved the question of whether Kunkel was acting under duress when he executed a contract of settlement under the pressure of a civil suit then pending against him, the litigation having been instituted in good faith. The Court of Civil Appeals held that it was not duress to institute or threaten to institute civil suits when the party believes in good faith that he is enforcing a legal right.

Kunkel, the plaintiff in the present action, some years before had been adjudged bankrupt and had received his discharge. The defendant Bank, was one of his creditors who had received an insignificant dividend. Some ten years after the discharge in bankruptcy the legislature passed a special act authorizing the Commissioners Court of Red River County to issue warrants for funds that had been advanced by Kunkel to the county prior to the bankrupty proceedings. The bank then filed suit in a United States District Court alleging that the warrants about to be issued were part of the bankrupt estate and prayed for a re-opening of the bankruptcy proceedings. Kunkel then entered into a settlement agreement with the bank under which the bank, for valid consideration, assigned all right, title and interest in its claim filed in the federal court to Kunkel.

Meantime, other creditors had intervened in the reopening proceedings and on appeal it was held that the warrants were no part of the bankrupt estate. Thereafter, Kunkel sued the bank alleging that the contract of settlement was made under duress. The jury found that Kunkel was acting under duress when he made the agreement; that the duress was the result of the pending action in the federal district court; and that the bank instituted the suit in

[1] 202 S. W. (2d) 962 (Tex. Civ. App. 1947) *writ of error refused.*

good faith. The court held as above indicated and that the parties were bound for all purposes.

Duress, as defined by our courts, is a constraint or danger, threatened or impending, sufficient to overcome the mind of a person of ordinary firmness.[2] As recognized by Texas decisions three elements must be present: (1) there must be coercion which destroys the victims volition;[3] (2) this loss of volition must go to the validity of assent;[4] and (3) the party against whom the duress is claimed must have acted in bad faith or made an unlawful demand.[5] A contract consummated when the foregoing elements are present is voidable at the election of the injured party.[6]

In the principal case the bank, believing that it had a valid claim against the plaintiff, attempted to re-open the bankruptcy proceedings. The institution of the suit was found by the jury to have been in good faith; therefore, the third element necessary to constitute legal duress was missing.

The action of the Court of Civil Appeals in finding no duress is in accord with the settled principle that what constitutes duress is a question of law. Whether the facts necessary to constitute duress are present is for the jury to determine.[7]

Clearly under the facts of the principal case, with special note to the plaintiffs own testimony,[8] the necessary elements of duress

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[2] Landa v. Obert, 78 Tex. 33, 14 S. W. 297 (1890); Turner v. Robertson, 224 S. W. 252, 254 (Tex. Civ. App. 1920) Quoting 13 C. J. 396 § 310 (1917).

[3] Metro Goldwyn Mayer Distributing Corporation v. Cooke, 56 S. W. (2d) 489 (Tex. Civ. App. 1933); Dairy Co-Operative Association v. Brandes Creamery, 147 Or. 488, 30 P. (2d) 338 (1934).

[4] Richardson v. City National Bank of Olney, 61 S. W. (2d) 137 (Tex. Civ. App. 1933) *writ of error dismissed.*

[5] Hall v. Odiorne, 14 S. W. (2d) 870 (Tex. Civ. App. 1929) *writ of error dismissed.*

[6] Hall v. Odiorne, 14 S. W. (2d) 870 (Tex. Civ. App. 1929) *writ of error dismissed.*

[7] Kansas City M. & O. Ry. Co. v. Graham & Price, 145 S. W. 632 (Tex. Civ. App. 1912); Coleman *et al* v. Coleman *et al*, 293 S. W. 695 (Tex. Civ. App. 1927) *writ of error refused.*

[8] ". . . that nobody connected with the bank forced him to sign the agreement; that he did so after much consideration and upon the advice of his attorneys then representing him, and others, that due to his age and poverty, it would probably be the only way that he could ever realize the benefits of the proceeds due him; than he was then nearly seventy-five years of age, flat broke and had no money to fight it, and it looked like it

were not present. It was admitted by Kunkel that "nobody at the bank forced him to sign the agreement." He also admitted that he signed the agreement "after much consideration." It has been said that if a person enters into a contract after deliberation it ordinarily cannot be the foundation of an action for duress.[9] The case is made stronger in that Kunkel was given advice by his attorneys and friends. As to his being poverty stricken it has been said in Texas that mere pecuniary distress cannot be the basis of an action for duress.[10] His age was a consideration,[11] but there was no evidence to show that he was not of sound mind, or otherwise in good health. From the foregoing it seems obvious that there was no legally sufficient coercion which would have enabled a jury to have found duress.[12]

Another question in the case, raised only by implication and not discussed by the court, is whether a compromise and settlement of a claim, honestly and not unreasonably asserted, is sufficient consideration to support a contract, when in fact no cause of action existed.

A compromise, by definition, is a settlement of a doubtful or disputed claim existing between two or more parties.[13] Consideration is a necessary element and in its absence the agreement will not be enforced.[14] In such cases it is settled that no cause of action need actually exist. It is sufficient if the parties actually believe

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was the only way I could get anything out of it, and I signed it unwillingly and under protest." 202 S. W. (2d) 962, 963 (Tex. Civ. App. 1947).

[9] Turner v. Robertson, 224 S. W. 252 (Tex. Civ. App. 1920) Quoting 13 C. J. 396 § 310 (1917).

[10] *Ibid.*

[11] Perkins v. Adams, 43 S. W. 529 (Tex. Civ. App. 1897).

[12] See principal case in Civil Procedure Section, this issue.

[13] Smith *et. al.* v. Cantrel *et. al*, 50 S. W. 1081 (Tex. Civ. App. 1899) *writ of error refused*; Townsend, Townsend and Co. v. South Plains Monument Co., 257 S. W. 648 (Tex. Civ. App. 1924); City of Longview v. Capps, 123 S. W. 160 (Tex. Civ. App. 1909).

[14] Cameron v. Thurmond, 56 Tex. 22 (1881); Simmons Hardware Co. v. Adams, 147 S. W. 1196 (Tex. Civ. App. 1912); Parsons v. Fern Glen Oil Co., 241 S. W. 1079 (Tex. Civ. App. 1922).

that it exists.[15] If the parties act in good faith, and if there is neither fraud nor coercion present, they are bound for all purposes.[16]

CONSTRUCTION AND INTERPRETATION

An interesting and difficult problem of construction and interpretation arose in *Citizen's National Bank v. Ross Construction Co*.[17] The defendant, a general contractor of the Federal Government, wrote a letter to the plaintiff bank stating that it had been requested by its subcontractor to inform the bank that any payments due the subcontractor from the contractor should be made payable jointly to the subcontractor and the bank.[18] The bank, in reliance on the letter, loaned money to the subcontractor. Subsequently, the subcontractor became indebted to a materialman and refused to pay, so the contractor, in accordance with its agreement with the Federal Government and as required by federal statute,[19] paid the debt. The bank sued the contractor contending that the letter was the equivalent of a promise, either express or implied, to pay the bank the full amount of the contracts between the contractor and subcontractor. The bank also contended in the alternative that if no contract had been made, that, nevertheless, the defendant contractor would be liable on promissory estoppel. The Texas Supreme Court held that the general contractor had made no promise, either express or implied, to pay the bank the full amount of the contracts and was therefore not liable to the bank.

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[15] Little v. Allen, 56 Tex. 133 (1882); Peoples Ice Co. v. Glenn, 8 S. W. (2d) 735 (Tex. Civ. App. 1928).

[16] Ferguson v. Ragland *et ux*, 243 S. W. 721 (Tex. Civ. App. 1922), *writ of error refused*.

[17] Citizens National Bank at Brownwood v. Ross Construction Company, ... Tex. ...., 206 S. W. (2d) 593 (1947).

[18] The letter written by the contractor to the bank stated:

"This is to notify you of our recently executed contracts with Campbell Electric Company, for electrical wiring of buildings in connection with our contract for Naval Air Facility at Durant, Oklahoma, and our contract for Naval Air Facility at Conroe, Texas. The total amount of the two contracts is $22,354.66.

"Mr. Campbell has requested that we give you this letter with instruction that *all payments to him under these contracts* are to be made payable jointly to Citizens National Bank, Brownwood, and the Campbell Electric Company." *Id.* at 594.

[19] 49 STAT. 793, 794 (1935), 40 U. S. C. A. 270a, § 270b (1943).

The court in a careful construction of the letter pointed out that it did not bind the contractor in any respect, for it did not state that the contractor would honor the instructions of the subcontractor. It was a mere acknowledgment by the contractor of the contracts between it and the subcontractor and the instructions given by the subcontractor. Since there was no promise; there was no breach.

The court relied on another case,[20] decided by the Federal Circuit Court of Appeals in 1935. In that case the debtor, a pipe line company, wrote the plaintiff bank advising the bank that a third party was entitled to money under a contract with the pipe line company. The court, in that case, concluded that no direct promise had been made and none could be inferred from the wording of the letter.[21] The bank, relying on the letter, loaned money, but the court held that the bank could not recover from the pipe line company, which had paid the amounts in settlement of laborer's liens owed by the third party.

In the principal case, the bank also contended that even though there was no express promise there was, implicit in the wording of the letter, a promise to pay the full amount to the subcontractor and the bank jointly. The court declined to decide whether a promise could be inferred, thus failing to decide whether or not a novation had been effected. The court stated that even if an implied promise had been made, still there was no breach. Since the materialman had a paramount right to the balance which remained due on the subcontracts, there was nothing due the subcontractor and consequently neither the bank nor the subcontractor was entitled to anything under the contracts.

In so holding, the court treated the bank as having no better right than it would have had, if it had been a mere assignee from

[20] First State Bank of Jacksonville, Texas v. Pure Van Pipe Line Company, 77 F. (2d) 820 (C. C. A. 5th 1935).

[21] The letter by the debtor to the assignee stated:

"This is to advise that Mr. O. C. Fox has approximately $2900 due him for teaming May 1 to May 15, and approximately $1900 from May 16 to date." *Id.* at 821.

the subcontractor, for the promise, if made in the letter, was expressly limited to any funds due the subcontractor.[22] Of course, a mere assignee takes the rights of the assignor to that which is assigned, subject to the rights of third parties under the contract.[23]

The bank urged estoppel, but the court reasserted the rule that ordinarily an estoppel is based on a misrepresentation of a past or existing fact,[24] which element is not present in this case. The court recognized the doctrine of promissory estoppel, which is based on misrepresentation of future events by a promise,[25] but quite properly held that it had no application here. To recover on the theory of promissory estoppel, which is merely a substitute for consideration (or on ordinary contract principles) the promisee must show some action by the promisor inconsistent with the promise made. Here there was no inconsistent action by the general contractor—no breach of its promise, if made—and therefore no liability.

Where two or more instruments are contemporaneously executed, as one single transaction, they will be construed together as one contract. The Supreme Court in 1947 applied this rule, which has been firmly established in Texas since 1851,[26] to two unique fact situations.

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[22] See note 18 *supra.*

[23] O'Neill Engineering Company v. First National Bank of Paris, 222 S. W. 1091 (Comm. App. 1920); San Antonio National Bank v. Conn, 237 S. W. 353 (Tex. Civ. App. 1922); 2 WILLISTON, CONTRACTS 1244 (Rev. ed. 1936).

[24] 19 AM. JUR., *Estoppel,* § 52 (1936); 31 C. J. S. 80 (1942).

[25] In Morris v. Gaines, 82 Tex. 255, 17 S. W. 538 (1891) the court stated at page 539: "The doctrine is well established that where either party, in reliance upon the verbal promise of the other, has been induced to do or forbear to do any act, and thereby his position has been so changed for the worse that he would be defrauded by a failure to carry out the contract, equity will enforce performance." The following Texas cases announce a similar doctrine, Gardner v. Platt, 68 S. W. (2d) 297 (Tex. Civ. App. 1934); Longbothen v. Ley, 47 S. W. (2d) 1109 (Tex. Civ. App. 1932); See also RESTATEMENT, CONTRACTS § 90 (1932); 1 WILLISTON, CONTRACTS 139 (Rev. ed. 1936).

[26] The rule was first announced in Texas in Howard v. Davis, 6 Tex. 174 (1851), and has been followed by the following cases: Dunlap's Administrator v. Wright, 11 Tex. 597 (1854); Wallis v. Beauchamp, 15 Tex. 303 (1855); Alexander v. Baylor, 20 Tex. 560 (1857); Atcheson v. Hutchinson, 51 Tex. 223 (1879); Johnson v. Haynie, 70 S. W. (2d) 602 (Tex. Civ. App. 1934); Davis v. Volunteer State Life Insurance Co., 135 S. W. (2d) 588 (Tex. Civ. App. 1939); Veal v. Thomason, 138 Tex. 341, 159 S. W. (2d) 472 (1942).

In *Rudes v. Field*,[27] the court construed a contract, whereby a partner sold a half interest in partnership property to her co-partner's son, with an executed deed of the property to the son. The contract, which provided that the boy's mother was to have control of the property, was held to give the mother authority to give a valid lease, binding on her son, a minor, although the deed to him was absolute.

In *Guadalupe-Blanco River Authority v. City of San Antonio*[28] the court construed three instruments together; a sale contract, an indenture between the City of San Antonio and its bond holders, and a lease of part of the plant to Guadalupe-Blanco River Authority. These instruments were so construed to show that the property when bought was encumbered by a lease and that the transaction did not create an encumbrance on city property without the consent and approval of the city voters.

The indenture, in this case, was drawn up several days prior to the other instruments, but all the instruments were delivered at the same time. Execution is something more than the mere drawing up of an instrument and includes delivery of the instrument with the intent that it shall from thenceforth be operative.[29] Delivery is therefore an essential part of the execution of every contract.[30] Therefore since all the instruments were executed at the same time, they were to be construed together as one transaction.

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[27] ..... Tex. ....., 204 S. W. (2d) 5 (1947).

[28] Guadalupe-Blanco River Authority v. City of San Antonio, 145 Tex. 611, 200 S. W. (2d) 989 (1947).

[29] James v. Tubb, 53 S. W. (2d) 106 (Tex. Civ. App. 1932); Morris v. Logan, 273 S. W. 1019 (Tex. Civ. App. 1925); Ligon v. Wharton, 120 S. W. 930 (Tex. Civ. App. 1909).

[30] Alga v. Stubblefield, 174 S. W. (2d) 627 (Tex. Civ. App. 1943); Guaranty Bank & Trust Co. v. Hamacher, 112 S. W. (2d) 343 (Tex. Civ. App. 1938); Unique Illustrating Co. v. Withers, 33 S. W. (2d) 1074 (Tex. Civ. App. 1930); Morris v. Zogan, 273 S. W. 1019 (Tex. Civ. App. 1925); Coal River Collieries v. Eureka Coal & Wood Co., 144 Va. 263, 132 S. E. 337 (1926).