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Right of a Defaulting Building Contractor to Recover in Maryland upon the Contract or in Quasi Contract - Evergreen Amusement Corp. v. Milstead

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Right Of A Defaulting Building Contractor To Recover In Maryland Upon The Contract Or In Quasi Contract

Evergreen Amusement Corp. v. Milstead[1]

The appellee, a contractor, brought suit to recover the balance due on a written contract for the clearing and grading of the site of a threatre plus certain extras, less the cost of completing a part of the work and damages for the delay.

[1] 206 Md. 610, 112 A. 2d 901 (1955).

Under the terms of the contract appellee agreed to supply necessary materials, clear the land, grade the site, construct a drainage ditch and install 200 feet of pipe. The feature of the case with which this note is herein concerned is that relating to the non-performance by the appellee of a part of the contract namely, failure to construct a drainage ditch and install 200 feet of pipe. Appellant claimed that because of this non-performance, the appellee should not be allowed any recovery. The court, nevertheless, held (1) that there was substantial performance in that the construction of the drainage ditch and installation of pipe involved work costing only $1,000 in a $13,000 job; (2) that the drainage ditch and pipe were not essential for the functioning of the threatre; (3) that the appellee's breach was not wilful.

The court in reaching this conclusion said:

> " 'It is a general rule that a party who has deliberately and wilfully breached a contract cannot recover thereunder for part performance. . . . However, some courts have allowed recovery on the basis of *quantum meruit* or quasi contract.' The hardship of the rule requiring strict performance when applied to a contractor who, in good faith, has substantially performed compared to the inequitable advantage that it gives to an owner who receives and retains the benefit of the contractor's labor and material, has led to a qualification that the contract price, less allowance to owner for deviations may be recovered."[2]

The court in restating the law applicable to the rights of a defaulting plaintiff might have provided lower courts with a more sure guide for the future if it had clearly distinguished cases in which: (1) The plaintiff is seeking to recover upon the contract for substantial performance, (2) The plaintiff is seeking to recover in *quantum meruit* for partial performance, or, (3) The plaintiff has wilfully breached the contract thereby precluding any recovery whatsoever. A failure to make such a distinction by the court may result in an erroneous application of accepted principles, in the use of the wrong measure of damages, and create needless uncertainty.

By making such a distinction, the Maryland law may be stated as follows: (1) Recovery *"upon the contract"* will be allowed a contractor who in good faith endeavors to perform his contract in full and who succeeds in performing it

[2] *Ibid*, 621.

substantially though not in strict compliance with its requirements. The defendant in such a case is allowed compensation for the defects in performance.[3] (2) Recovery *in quasi-contract* will be allowed a contractor who in good faith performs part of a contract if his failure to complete is due to a legal excuse or if the defendant has received and accepted the benefits of the plaintiff's labor.[4] (3) No recovery will be allowed a contractor who has wilfully breached the contract, either upon the contract or upon a quasi-contractual remedy.[5]

Once the distinctions have been made there arises the problem of the proper application of these doctrines to the particular circumstances confronting the court. As in so many areas of the law, the problem here is not one of definition but of application. If plaintiff is attempting to recover on his contract, he must show that his performance has been at least "substantial",[6] but the question which arises is: how much must the plaintiff do before his performance qualifies as substantial? The courts have developed various tests to guide them in deciding whether there has been substantial performance. One of the most widely used of such tests is *the ratio between* that left *unperformed and the total performance promised.*[7] This ratio seems to be illustrated in the case of *Robinson Construction Co. v. Barry.*[8] The court there allowed recovery upon a contract calling for the installation of 1700 feet of radiation, treating the failure of the plaintiff to install 76 to 154 feet of such radiation of minor character not going to the essence of the contract. Another test relied upon in substantial performance

[3] Hammaker v. Schleigh, 157 Md. 652, 147 A. 790 (1929). See also: WOODWARD, QUASI CONTRACTS (1913), Sec. 175.

[4] Robinson Con. Co. v. Barry, 135 Md. 275, 108 A. 688 (1919).

[5] Helmer v. Geis, 149 Md. 86, 131 A. 34 (1925).

[6] At early common law the doctrine of substantial performance was unknown due to the fact that promises were treated as independent, each party to the agreement having a right to sue the other for non-performance without first alleging his own performance or tender of performance unless one promise was expressly made conditional on the other; Pordage v. Cole, I Wms. Saund. 319, 85 Eng. Rep. 449 (1669). With the passage of time, however, the mutual dependency of promises came to be recognized and enforced; Kingston v. Preston, 2 Doug. 689 (1773). It is at this point that the doctrine of substantial performance first made its appearance in the courts. In the leading case of Boone v. Erye, 1 H. Bl. 273, 273, 126 Eng. Rep. 160, 160 (1777), the court in allowing recovery stated:

> ". . . where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other. But where they go only to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent."

[7] 3 CORBIN, CONTRACTS (1951), Secs. 705-706.

[8] *Supra*, n. 4.

cases is the *ratio of cost of completion and curing of defects in performance to the total contract price.* The higher the ratio of the cost of completion to the total contract price, the less likely that the performance rendered is substantial performance.[9] This ratio appears to have been applied in the *Evergreen Amusement Corp.* case[10] where in a contract having a cost of $13,000, the plaintiff's performance was considered substantial, although it would require another $1,000 to complete the job. In *Hammaker v. Schleigh,*[11] a contract calling for the remodeling of defendant's building at a cost of $23,000 was said to be substantially performed, even though $500 worth of work remained to be done.

While these ratios may be helpful, a great majority of the cases present problems which require the court to evaluate such intangibles as the character of performance promised, the purposes and ends it was expected to serve on behalf of the defendant, and the extent to which the plaintiff's non-performance has defeated those purposes and ends.[12] In *Presbyterian Church v. Hoopes Co.,*[13] the court said a prayer based upon the theory that, absent an acceptance, there should be no recovery upon the contract to a plaintiff whose performance was not only at variance with the terms of the contract, but had defeated the purpose for which the defendant had contracted, should have been granted. The defendant had specified that the stone to be used in building a parsonage was to be of a gray color, in order that the parsonage would match the adjoining church in color. The stone used by the plaintiff, however, was "streaked, speckled, spotted, and of a variegated and unsightly appearance".[14]

Any attempt by the courts to lay down a hard and fast rule or formula to determine when there has been substantial performance would amount to price conjecture; for as Corbin in his treatise on Contracts puts it:

> "When we use the term 'substantial performance of a promissory duty', we always mean something less than full and exact performance of that duty.
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> . . . . . .
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> ". . . what amounts to 'substantial performance' . . . is always a question of fact, a matter of degree, a ques-

[9] *Loc. Cit., supra,* n. 7.
[10] *Supra,* n. 1.
[11] *Supra,* n. 3.
[12] *Loc. Cit., supra,* n. 7.
[13] 66 Md. 598, 8 A. 752 (1887).
[14] *Ibid,* 602.

> tion that must be determined relatively to all the other complex factors that exist in every instance."[15]

Assuming the plaintiff has not substantially performed may he, nevertheless, recover in quasi-contract for his part performance? The answer to this question has given the courts a great deal of difficulty. According to Williston:

> "A satisfactory solution is not easy, for two fundamental legal policies seem here to come in conflict. On the one hand, it seems a violation of the terms of the contract to allow a plaintiff in default to recover — to allow a party to stop when he pleases and sell his part performance at a value fixed by the jury to the defendant who has agreed only to pay for full performance. On the other hand, to deny recovery often gives the defendant more than fair compensation for the injury he has sustained and imposes a forfeiture on the plaintiff."[16]

The decisions handed down by the Maryland courts clearly reflect this conflict. If the plaintiff has not fully or substantially performed, his remedies *no longer exist upon the contract itself;* his recovery, if any, must be founded upon one of the common counts in assumpsit, in particular, the count for work and labor.[17] The basic rule laid down by the courts is that where the plaintiff has performed part of an executory contract and then wilfully and without legal excuse refuses to perform the rest of it, he cannot recover in general or special assumpsit.[18] The courts, however, have in many instances believed the application of this rule to be too harsh and have grafted various expections on to it. One of the most common exceptions by the courts is discussed in the *Robinson Construction Co.* case.[19] Here, the court held that if the plaintiff performed in good faith, although not in the manner prescribed by the contract, and the defendant sanctioned or accepted the work, he could recover under the count *for work and labor* for the reasonable value of the work done and accepted, the defendant having a right to recoup for damages caused by the

[15] CORBIN, *op. cit., supra,* n. 7, P. S. 765, 767.

[16] 5 WILLISTON, CONTRACTS (Rev. ed., 1937), 4118.

[17] 1 POE, PLEADING & PRACTICE, (Tiffany's Ed., 1925), Sec. 101. In Maryland the court for work and labor is also applicable to a situation in which plaintiff has fully performed and all that remains is payment of money. See Denmead v. Coburn, 15 Md. 29 (1860); and Lohmuller Bldg. Co. v. Barrett, 146 Md. 617, 127 A. 482 (1925).

[18] North Bros. & Strauss v. Mallory, 94 Md. 305, 51 A. 89 (1902); Heinse v. Howard, 153 Md. 380, 138 A. 250, 255 (1927).

[19] 135 Md. 275, 278, 108 A. 688 (1919).

deviation. The court went on to add that this acceptance may not only arise through the defendant's acquiescence, but by implication, as when "the other party has stood by and seen him prosecute the work without objection, and been benefited by his labor and materials . . ."[20]

In several instances, however, the Maryland court has been more influenced by the legal policy of not allowing a plaintiff in default to recover, that is, to stop when he pleases and sell his performance to the defendant, then it has been by the fear of imposing a forfeiture upon him. In the *Presbyterian Church* case,[21] the court in discussing the possibility of plaintiff recovering in *quantum meruit* said:

> "But he (the defendant) is not obligated to accept anything else in place of that which he has contracted for; and if he does not waive his right, the other party to the contract cannot recover against him without performing all the stipulations on his part."[22]

In *Pope v. King*,[23] the court went so far as to say that the use of a building by the defendant will of itself not amount to acceptance if such use is "under circumstances which negative the intention of the owner to accept the work . . ."[24] In both the *Presbyterian Church* and *Pope* cases, the court had first to consider whether plaintiff could recover upon the contract, *i.e.*, was there substantial performance? Upon finding that performance was not substantial, the court then considered the plaintiffs' right to recover in quasi-contract. Because the court could find no acceptance on the part of the defendant or legal excuse for plaintiffs' failure to complete, the plaintiff was denied recovery, even though he was not a wilful defaulter. The phrase without legal excuse is often used by the courts when denying recovery to a plaintiff who has only partly performed. By applying the affirmative of the phrase, a plaintiff may recover for part performance (assuming no acceptance by the defendant) if his failure to complete is due to a legal excuse. Legal excuse has been held to mean rescission of the contract by the parties, prevention by act of defendant,[25] and

[20] *Ibid*, 279.
[21] *Supra*, n. 13.
[22] *Ibid*, 603. Parenthetical material supplied. See also North Bros. & Strauss v. Mallory, *supra*, n. 18, which adopted substantially the same view.
[23] 108 Md. 37, 69 A. 417 (1908). (Builder failed to obtain an architect's certificate which was an express condition precedent.)
[24] *Ibid*, 46.
[25] Denmead v. Coburn, *supra*, n. 17; Hammaker v. Schleigh, 157 Md. 652, 147 A. 790 (1929).

impossibility by act of God or of law.[26] Thus, while the law is such that there can be no recovery for part performance in Maryland unless the plaintiffs' failure to perform is due to a legal excuse, the courts in order to avoid a forfeiture may imply an acceptance when there is a subsequent retention of the fruits of plaintiffs' labor by the defendant, thereby imposing upon such defendant a quasi-contractual liability.

The final question to be answered involves the intention of the defaulting plaintiff, *i.e.*, does the wilfulness of the plaintiff bar any and all recovery upon the contract or in quasi-contract? The rule stated in Maryland is that a builder who wilfully and without legal excuse abandons the work after a part performance can recover nothing for what he has done.[27] The actual effect of this rule is hard to determine even when the cases referring to it are examined. In many cases it appears to be merely dictum in that judgment is given to the plaintiff either in quasi-contract or upon the contract. In others, while the courts state that the plaintiff being wilful cannot recover, the plaintiff's performance is such that he would be entitled to no recovery had he performed in good faith. Nevertheless, because the doctrine of wilfulness precludes a plaintiff from recovering in all instances in which it is present and because of its constant recital by the courts, it is worthy of consideration and exploitation in each case, either by the defendant or the plaintiff.

In summary, the *Evergreen* case, while failing to make these distinctions, was decided properly.[28] Since plaintiff's performance was held to be substantial, he was entitled to recover upon the contract less damages for incomplete performance. On the other hand, had plaintiff's performance been treated not as substantial, but only as partial, his remedy would be only in quasi-contract. In this situation, the court would then have to see if there was a legal excuse for not completing the drainage and installation work, or whether the defendant had sanctioned or accepted plaintiff's partial performance. Furthermore, this case sheds no light on the effect of wilfulness on plaintiff's right to recover because the performance was substantial and the

[26] McLaughlin v. Reinhart, 54 Md. 71, 80 (1880).

[27] Gill & Vogler, 52 Md. 663 (1879).

[28] For a discussion of whether the case could have been considered on grounds that the contract was divisible, see Heinse v. Howard, *supra*, n. 18, and Jenks v. Clay Products Co., 138 Md. 551, 115 A. 123 (1921). If the contract is divisible, the plaintiff may recover upon the contract for his performance; whereas in cases where the contract is not divisible his remedy, if any, for part performance would be restricted to quasi-contract.

plaintiff was held not to have acted in bad faith. Whether a Maryland court would deny recovery to a plaintiff who has substantially performed but acted in bad faith as yet has not been decided. The court's opinion, however, may be slightly misleading in that it suggested the possibility of a *quantum meruit* recovery by a wilfully defaulting plaintiff. Such is not a possibility under the law as it stands in Maryland today. Furthermore, a recovery in *quantum meruit* for part performance is separate and distinct from recovery upon the contract for substantial performance although the court in its opinion failed to distinguish the two. Such a distinction may be absolutely necessary for a proper determination of rights, liabilities and remedies in many cases.

As an illustration of the necessity of such a distinction in a later case, *Baltimore Luggage Company v. Ligon,* 118 A. 2d 665 (Md., 1955), a contract involved the excavating and removal of earth for a parking lot. A dispute arose as to the interpretation of the contract, and the jury held that the Luggage Company's version was the correct one. The contractor completely performed the contract as he interpreted it, but refused to complete as to the Luggage Company's version claiming that to do so would render him a trespasser on another's property. The trial court submitted several issues to the jury: (1) Did the contractor fully complete the contract? The jury answered no; (2) Did the contractor do any extra work, and if so, its value? The jury answered yes, and that the extra value was $377.00; (3) What was the value of excavation actually done by the contractor? Jury answered $3,185.32 less payment of $2,389 or $796.32 still due; (4) Did any acts of the Luggage Company delay work on the contract? The jury answered, no.

The trial court entered a judgment for contractor for $1,048 which was $796.00 plus $377.00 for extra work, the trial court reflecting in its judgment the jury's apparent finding that contractor was justified in refusing to perform an illegal act. The Court of Appeals affirmed the judgment stating that a plaintiff may recover in *quantum meruit* for his part performance when his failure to complete is due to impossibility by act of law.

While the case was decided in accord with prior Maryland cases, nevertheless, the trial court in giving its instructions to the jury failed to distinguish between recovery upon the contract and recovery in *quantum meruit.* Nor did it inform the jury concerning the significance of prevention or impossibility of performance by the contractor. The jury should have been asked to determine whether

there was substantial performance entitling the contractor to recovery upon the contract; or if they found his performance not substantial whether the contractor could recover for part performance under *quantum meruit*. In the latter instance the jury would have to find that the contractor's performance was either accepted by the Luggage Company or rendered impossible by act of God or law. The verdict returned by the jury failed to disclose upon what grounds plaintiff was allowed to recover, thereby giving rise to speculation concerning the measure of damages. If the contractor has not performed according to the contract, his remedy is restricted to *quantum meruit* with damages based upon reasonable value and not contract price. Such a distinction can have a substantial effect upon amount of recovery and, therefore, should be made in each case in order that the recovery allowed is in accord with the remedy afforded.

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