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Bidder's Right to Return of Deposit from City After Bidder's Refusal to Enter into Written Contract Because of a Material Mistake in the Bid - Baltimore v. DeLluca-Davis Co.

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Bidder's Right To Return Of Deposit From City After Bidder's Refusal To Enter Into Written Contract Because Of A Material Mistake In The Bid

Baltimore v. DeLuca-Davis Co.[1]

Plaintiff, DeLuca-Davis Construction Co., Inc., submitted a bid for certain construction work to be done for the city of Baltimore. In accordance with Section 38 of the Baltimore City Charter it submitted with its bid a certified check for $50,000. After all the bids were opened and announced by the Board of Estimates, plaintiff realized that it had made a mistake, and it so notified the municipal authorities before they had taken any action on the bids. Plaintiff, at the trial, showed that it had made a clerical error in transferring one particular estimated cost item from its "detailed work sheet" to the "summary work sheet". (Cost of unclassified excavation was erroneously set down as $3.34 per yard instead of $13.34 per yard.)

[1] 210 Md. 518, 124 A. 2d 557 (1956).

This mistake resulted in the bid being about $600,000 lower than it would otherwise have been. The bid submitted was $1,796,064.25. Plaintiff asked that it be allowed to correct its bid or that the bid be withdrawn and the deposited check be returned. The City refused these requests, contending that the aforementioned section of the Baltimore City Charter required them to refuse. That section provides that:

> "Bids when filed shall be irrevocable. . . . To all such bids there shall be attached a certified check of the bidder . . . and the bidder who has the contract awarded to him, and who fails to execute promptly and properly the required contract and bond shall forfeit said check. The said check shall be taken and considered as liquidated damages, and not as a penalty, for failure of said bidder to execute said contract and bond. Upon the execution of said contract and bond by the successful bidder, the said check will be returned to him."

Plaintiff asked relief in equity and the Circuit Court of Baltimore City granted reformation of his bid. On appeal, *held* reversed, that plaintiff was entitled to a rescission of his bid, not reformation, and that he was entitled to the return of his deposit.

There are two main subject areas of interest in this case. The first one is the Court's decision to grant relief to the bidder notwithstanding the provisions of Section 38 of the Baltimore City Charter. The second concerns the Court's choice of the form of relief to be granted, *i.e.*, rescission instead of reformation.

Willson v. The Mayor and City Council of Baltimore[2] concerned the plight of a bidder whose bid was accepted but couldn't enter into the written contract because he was unable to find a surety as was required as a condition precedent to entering into the contract. There was no relevant statute at the time (1896), but the wording on the bidding form required a certified check to accompany each bid and stated, "if the successful bidders enter into contract with bond without delay, their checks will be returned to them as will those of the unsuccessful bidders".[3] The bidder sued at law for the return of his deposit. The Court ruled that he was entitled to recover it. It observed that there was no provision expressly requiring that the check be forfeited in case of failure to enter into the con-

[2] 83 Md. 203, 34 A. 774 (1896).
[3] *Ibid*, 209.

tract, that retention of the deposit was nowhere described as liquidated damages, and that the tendency of the courts was to regard such provisions as in the nature of penalties and therefore as limiting the City to the retention of an amount that was equal to the actual damages sustained by the breach.[4] The City suffered no actual damages, since it re-advertised for bids and obtained and accepted one that was lower than plaintiff's. It should be noted that in this case the Court showed a strong disinclination to allow a forfeiture even though the bidder had no legally justifiable reason for failure to enter into the contract.

In the interim period between this case and the next one, a provision was added to the Baltimore City Charter, identical in every important respect to the present provisions of Section 38 of the Baltimore City Charter.[5] This legislation expressly required a forfeiture of the whole check in case of failure to enter into a written contract, and the forfeiture was stated to be liquidated damages and not a penalty. It also made all bids irrevocable.

In 1914, in *Mayor and City Council of Baltimore v. Robinson Construction Company*,[6] a bidder who had made a clerical error in compiling the amount of his bid and who refused to enter into the contract that was awarded to him by the City, sued at law for the return of his deposit. The newly operative statutory provisions were held to bar recovery of the deposit.[7] There appears in the opinion, how-

[4] *Ibid*, 212 *et seq.* The Court said:

"Now, it will be observed that the contract between the appellant and the appellee, evidenced by the bid filed and accepted, has not a word in it descriptive of the five hundred-dollar deposit as either liquidated damages or a penalty. It is clear, therefore, that the parties themselves have not by any term or provision of the agreement declared that the deposit shall be one or the other, . . . and it is equally clear that there is nothing in the subject-matter of the agreement which imperatively requires that the deposit be characterized as liquidated damages, especially as the decided inclination of the Courts in doubtful cases even is to treat the stipulated sum as merely a penalty. Indeed there is no explicit forfeiture of the deposit at all. . . . though it is palpably implied that so much of it as will be a just compensation for any loss that may result to the city . . . was, . . . designed by the parties to be applied by the city to its reimbursement."

[5] Sec. 15 of the Baltimore City Charter as amended by Chapter 163 of the Acts of 1908, p. 589.

[6] 123 Md. 660, 91 A. 682 (1914).

[7] *Ibid*, 663. The Court asks:

"In the face of these provisions can a bidder refusing to execute a contract awarded to him . . . force the return of his deposit? Or once having filed his proposal, can he withdraw it before the bid is accepted and recover his deposit?

"It will be noticed that, in plain terms, the section directs that the bidder shall deposit a certified check to indemnify the city in case he, as the successful bidder, fails to execute the contract and furnish the bond; that bids when filed are irrevocable; . . . It certainly must be

ever, a faint intimation of the possibility of a different result had the action been brought in equity.[8]

The instant case was brought in equity and, as we have seen, the bid was rescinded and the deposit returned. This brings us to the vital question: How did the Court dispose of the statutory provisions of Section 38 which so effectively barred its predecessor in the *Robinson* case from granting relief at law? The court approached the problem first by citing the leading case of *Moffett, Hodgins and Clarke Co. v. Rochester*[9] as holding that under the similar circumstances of that case, "the bid was that of the bidder only in form but in actuality was no bid at all".[10] This is an accurate statement of the "no real bid" rationale which the Supreme Court adopted to explain why the statutory provisions relating to irrevocability of bids and forfeiture of deposits were not operative in that case.[11] The Maryland Court also cited a Washington case[12] as holding that equity would relieve from a statutory forfeiture in the same manner as one provided by ordinary contract.[13]

The Court in the instant case further relied heavily on *State of Connecticut v. F. H. McGraw & Co.*[14] quoting the following statement:

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that there was the intention that these explicit directions should have some force and meaning. We must ascribe a reasonable construction to them or we render the statute a mere nullity."

On page 666, the Court continues:

"This may seem a hardship upon a bidder who has actually made a mistake, but if the statute is to have any effect that must be the result. The statute is an essential part of the proposal and the bidder makes all its terms and conditions an obligation upon himself by submitting a bid."

[8] The last paragraph of the opinion is as follows:

"The case of *Moffett v. Rochester*, 178 U. S. 373, relied upon by the appellee, was upon a bill in equity for a reformation of the proposal and therefore is not authority for the form of action in this case. In fact, all of the cases, cited by the appellee, are cases in equity and in the most of them there was no statute involved." *Ibid*, 666.

[9] 178 U. S. 373 (1900).

[10] *Supra*, n. 1, 530.

[11] *Supra*, n. 9, 386. The Supreme Court quotes with approval the circuit court opinion:

". . . but as was said by the learned Circuit Court:

'The complainant is not endeavoring to withdraw or cancel a bid or bond. The bill proceeds upon the theory that the bid upon which the defendants acted was not the complainant's bid; . . . that the proposal read at the meeting of the board was one which the complainant never intended to make, and that the minds of the parties never met on a contract based thereon'."

The same rationale was adopted by W. F. Martens & Co. v. City of Syracuse, 183 App. Div. 622, 171 N. Y. S. 87 (1918).

[12] Donaldson v. Abraham, 68 Wash. 208, 122 P. 1003 (1912).

[13] 210 Md. 518, 531, 124 A. 2d 557 (1956).

[14] 41 F. Supp. 369 (D. C. Conn., 1941).

> "The proper effect of the requirement that bids remain unrevoked is to assure the State that a bidder will be relieved of his obligation only when it is legally justifiable. That means the State is in the same position as any acceptor when there is a question of rectifying an error."[15]

The "requirement" mentioned in the *McGraw* case was not, however, a statutory requirement because there seemed to have been no statute involved, but only a simple contractual proviso. One of the conditions of bidding was that no bidder could withdraw his bid within forty-five days after the bids were opened, and it is to this proviso the statement refers, not to any statutory provisions. Yet the Maryland Court stated:

> ". . . we agree with the views of the Court in the *McGraw* case, from which we have quoted above, that the proper effects of the charter requirements are to assure the municipality that a bidder will be relieved . . . only when it is legally justifiable. . . ."[16]

The question arises as to whether the Court in the *DeLuca* case was interpreting the legislative intent of the Charter and basing its decision on that intent, or was holding that regardless of the legislative intent, it will enforce the charter provisions only when there are not present in the picture adequate equitable grounds for rescission?[17] If this latter view be adopted, it would appear that the Court

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[15] *Ibid*, 374, quoted by the DeLuca-Davis case, *supra*, n. 13, 532.

[16] *Supra*, n. 13, 535.

[17] It may be appropriate here to review the three possible theories which have appeared in the instant case and which operate to exempt the bidder from the charter provisions which might otherwise operate against him. The first rationale is that no real bid exists in fact. Hence the statutory provisions relating to bids are not applicable. Secondly, there is the theory that equity has the power to relieve against statutory forfeitures. Thirdly, there is the "legislative intent" approach where the court may presume that the legislative intent is to exclude from the province of the charter provisions fact situations in which there is legally justifiable error. Not in the instant case, but advanced in Abner M. Harper v. City of Newburgh, 159 App. Div. 695, 145 N. Y. S. 59, 63 (1913), is a fourth type of reasoning: "But if the court decide that there should be rescission, then there is no legal obligation upon the plaintiff to contract, and it would seem inequitable that the defendant should have liquidated damages for breach of an extinct obligation." A paraphrase of this argument might be: The statutory provisions requiring forfeiture of deposit are provisions requiring liquidated damages for breach of a legal obligation, but if a court of equity declares that no legal obligation exists, how can there be a breach so as to justify the forefeiture of the deposit? This is a nice argument, but it might be considered as arguing in a circle, because the ultimate thing to be decided is whether or not equity should grant rescission.

is asserting the power of equity to relieve from a statutory forfeiture.[18]

There is another element in this case that may have influenced its course. The bidding contractor had a net worth of only $82,000, so that it appeared reasonably certain that it would be impossible for it to enter into the contract if its bid was accepted. Section 38 requires that the City Board of Estimates accept the bid of the "lowest responsible bidder".[19] At the time of decision no bid had yet been accepted, and there was extreme doubt that plaintiff contractor could qualify as a "responsible" bidder because of its inability to secure a performance bond. The Court recognized this factor with the statement:

> "If the Board of Estimates intends to declare DeLuca-Davis not a responsible bidder, no harm is done by a decree rescinding the contract and calling for the return of the deposit. Both of these consequences would follow a determination by the Board that DeLuca-Davis was not responsible. Whether the Board itself throws out DeLuca-Davis' bid or the court does so, the Board can reject all bids and re-advertise, or award the bid to the next lowest bidder who is responsible."[20]

Let us now turn briefly to the second aspect of this case, *i.e.*, the Court's choice of restitution by rescission as the proper mode of relief instead of the right of reformation granted by the lower court. The Court of Appeals states:

> ". . . that a court will never in the name of reformation rewrite a contract or make a contract for the par-

[18] The great weight of authority is against this position. See Clark v. Barnard, 108 U. S. 436, 457 (1883), where the Supreme Court said:

> "Accordingly, where any penalty or forfeiture is imposed by statute upon the doing or omission of a certain act, there courts of equity will not interfere to mitigate the penalty of forfeiture, if incurred, for it would be in contravention of the direct expression of the legislative will."

See 2 POMEROY, EQUITY JURISPRUDENCE (5th Ed., 1941), 311, Sec. 458; 30 C. J. S. Equity, 394, Sec. 56; 19 AM. JUR., Equity, 107, Sec. 99, all in accord. There are, however, a handful of cases *contra*. See Wheeling & E. G. R. Co. v. Town of Triadelphia, 58 W. Va. 487, 52 S. E. 499 (1905); Caine v. Powell, 185 Ore. 322, 202 P. 2d 931 (1949); Loe v. Klein, 191 Ore. 654, 233 P. 2d 209 (1951); Thomas v. Given, 75 Ariz. 68, 251 P. 2d 887 (1952).

[19] Sec. 38 of the Charter of Baltimore City (Flack, 1949), provides:

> "All bids made to the City for supplies or work for any purpose whatever, unless otherwise provided in the Charter, shall be opened by the Board of Estimates, and said Board, after opening said bids, shall award the contract as an entirety to the lowest responsible bidder, . . . or shall reject all bids; . . ."

[20] *Supra*, n. 13, 536.

> ties or act unless there is clear, convincing and satisfying proof of a mutual understanding and bargain that has not been accurately expressed."[21]

The nature of the unilateral mistake in the instant case prevented that original "meeting of the minds" which is essential in all cases where equity can decree reformation. The Court therefore adopts the remedy of rescission.[22] This choice seems particularly appropriate here, because a right of reformation, if granted after all the bids have been opened, would violate the conditions of secrecy which are intended to surround the submission of all such sealed competitive bids. It would seem unfair to the next lowest bidder to reform this bid after knowledge of the contents of the other bids. The Court stated very aptly:

> "To permit to be done what the appellee seeks to do, would not only run entirely counter to the underlying principle of reformation, which is merely to correct a mistake in the expression of what had been mutually agreed upon, but would also completely nullify the purpose and safeguards of the competitive bidding system established by the City Charter."[23]

This case presents the solution to one question that had been previously left unanswered, but typically in the traditional manner of the common law process, it poses a new one to take its place. It establishes that equity will rescind the bid and return the deposit to a bidder on a municipal project who has made a legally excusable mistake in his bid, even in the face of the provisions of Section 38 of the Baltimore City Charter. It poses and leaves unanswered the question as to whether in so doing it has held, in effect, that in Maryland, equity has the power to relieve against statutory forfeitures.

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[21] *Ibid*, 524.

[22] At p. 526, the Court notes:

> "Although reformation requires that the mistake be mutual, rescission may be granted whether the mistake be that of one or both of the parties."

And at p. 527, the Court added:

> "The general rule as to the conditions precedent to rescission for unilateral mistake may be summarized thus: 1, the mistake must be of such grave consequences that to enforce the contract as made or offered would be unconscionable; 2, the mistake must relate to a material feature of the contract; 3, the mistake must not have come about because of a violation of a positive legal duty or from culpable negligence; 4, the other party must be put *in status quo* to the extent that he suffers no serious prejudice except the loss of his bargain."

[23] *Supra*, n. 13, 525.