Boston College Law Review

Volume 1
Issue 1 *Number 1*

Article 21

10-1-1959

Subcontracts—Part Performance—Damages.—Albre Marble and Tile Co., Inc. v. John Bowen Co., Inc.

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UCC, §9-202 which states: "Each provision of this Article with regard to rights, obligations and remedies applies whether title to collateral is in the secured party or in the debtor."[18] Under the UCC, therefore, the court should not concern itself with the question as to who originally had title and what were the consequences of an "admission of title" in the debtor due to the choice of remedies by the creditor.

In discussing the doctrine of inconsistent remedies the Court states at page 736, "The Pennsylvania Courts have emphasized that distinct remedies may be used concurrently or alternately if they are consistent in purpose and kind; they must be inconsistent and not merely cumulative in order for the selection of one to operate as a bar to the pursuit of the other." This conclusion is of questionable validity as applied to the clearly indicated intention of the legislature in adopting § 9-501(1); the intention being that the remedies contained therein are additional and not substitutional. If it were intended that such concurrent remedies should not be cumulative but alternative due to some theoretical inconsistency existing between them when applied to certain secured agreements the legislature would have undoubtedly so indicated. Resistance to change is a human trait which often finds its way into the courts and often, either consciously or unconsciously, influences the courts' interpretation of statutes which clearly indicate an intention to alter existing law. Such influence is manifest in the Court's acceptance of that part of the lower court's decision which holds that, § 9-501(1) notwithstanding, the doctrine of inconsistent remedies is still applicable to "bailment lease" and conditional sale arrangements.[19]

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Subcontracts—Part Performance—Damages.—***Albre Marble and Tile Co., Inc. v. John Bowen Co., Inc.***[1]—A subcontractor brought an action against a prime contractor in which there were counts for breach of contract and quantum meruit. The defendant had previously contracted with the Commonwealth of Massachusetts for construction of a hospital. In a prior case[2] the Supreme Judicial Court of Massachusetts had held that contract invalid because Bowen Co. had violated Mass. G. L. (Ter. Ed.) c.149, § 44A-44D by including in its bid smaller sums for the work of certain subcontractors than the sums specified in their subbids. The plaintiff subsequently brought this action in the Superior Court. That court

[18] See also Comment appurtenant to this section.

[19] Massachusetts and Kentucky, in adopting the UCC in 1957 and 1958 respectively, have adopted the 1957 version which appears to have solved any problem of ambiguity in § 9-501(1). The 1957 version of § 9-501(1) reads as follows: "When a debtor is in default under a security agreement, a secured party has the remedies provided by this Part, *which are cumulative. In addition* he may reduce his claim to judgment, foreclose the security interest by any available judicial procedure, *or both* . . . " (emphasis added). See also the 1957 version which has added § 9-501(5) which defines the meaning of "foreclose" as used in § 9-501(1).

[1] 1959 Mass. Adv. Sh. 147, 155 N.E.2d 437.

[2] Gifford v. Commissioner of Public Health, 328 Mass. 608, 105 N.E.2d 476 (1952).

granted the defendant's motion for summary judgment on all counts. The plaintiff excepted and appealed. HELD: Upheld on breach of contract counts; reversed and remanded on quantum meruit counts. The plaintiff is entitled to recover for the value of his expenditures made pursuant to the specific contract provisions requiring the furnishing of samples and drawings for the approval of the defendant. No recovery is permissible for expenses incurred by the plaintiff prior to the execution of the contract in anticipation thereof.

It is established law that where the defendant has received part performance under the contract, the fact that the value of this partial performance has been destroyed by the very circumstances which make full performance impossible will not preclude recovery.[3] Where a supervening act not chargeable to either party has rendered performance of a building contract impossible and the part performance of one party exceeds that of the other; the tendency has been to allow recovery for the fair value of work done in the actual performance of the contract and to deny recovery for expenditures made merely in reliance upon the contract or in preparing to perform under it. As a variant and limitation of the general principle, the Massachusetts court has adopted the rule that where impossibility of performance occurs, the plaintiff can recover only for labor and materials "wrought into" the structure. In *Young-v. Chicopee*[4] recovery was allowed for lumber which the plaintiff contractor had actually used in building a bridge destroyed by fire before completion, but denied for lumber which he had purchased in reliance on the contract and transported to the construction scene but had not yet incorporated into the structure. However, the court in other litigation has recognized that certain types of performance by their very nature cannot be "wrought into" a structure. In *Angus v. Scully*[5] recovery for the value of services rendered by house movers was allowed although the house was destroyed midway in the moving.

In allowing quantum meruit recovery in the present case even though the tile and marble samples and the drawings had not been "wrought into" the structure, the court considered two facts to be of great significance. First, this is a case in which the defendant, whether or not he deliberately submitted his bids for the prime contract in violation of law, at least had a greater involvement in the impossibility than did the plaintiff. Logic thus compels a recognition of greater weight in the plaintiff's claim than in those cases where the supervening act is an "act of God" not chargeable to either party. Secondly, the contract clause requiring the plaintiff to submit samples and drawings for approval had the effect of placing the plaintiff's preparatory efforts under the supervision of the defendant and removing them from the sole discretion and control of his subcontractor. While the court felt that these peculiar facts justified its holding in this case, it refused to lay down the broader principle that in every case recovery may be had for obligations reasonably incurred in preparation for

[3] Williston, Contracts § 1977 (Rev. ed. 1936).
[4] 186 Mass. 518, 72 N.E. 63 (1904).
[5] 176 Mass. 357, 57 N.E. 674, 49 A.L.R. 562 (1900).

performance of a contract where further performance is rendered impossible without fault by either party. The court was unwilling to extend the "wrought in" rule of *Young v. Chicopee*[6] to a case where the contractor's involvement in creating the impossibility was greater than that of the subcontractor seeking quantum meruit recovery. The basis of the decision is broadened by the court's analogy of this case to *Angus v. Scully*[7] in that the services performed (furnishing samples and drawings for approval) were not of a type that could be "wrought into" the structure. The reference to the type of services, however, is of a parenthetical nature, and it appears that the court would be ready to follow its decision in the present case in any subsequent case involving the same material facts, even if the services performed comprised the preparation of materials designed to be physically incorporated into the structure. Considered in its broader aspect and with a view to its logical implications, this decision shows that, while the general rule of denial of reliance expenditures in impossibility situations remains in force, the Massachusetts court is willing to relax the rule and allow recovery where special facts accentuate the justice of the plaintiff's claim.

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[6] Supra note 4.
[7] Supra note 5.