[MS-0494.010-005.016]

ORIGINAL

FILED
NORTH COUNTY BRANCH
FEB 8 1978
ROBERT D. ZUMWALT
CLERK

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

WILLIAM HENRY and LARRY CAIRNCROSS, Plaintiffs, vs. VISTA GROWERS, INC., a corporation; ENVIRONMENTAL NURSERIES, INC., a corporation, H. HUNNICUTT, and JOHN DOES I through XV, inclusive, Defendants.	NO. N 6351)
HARVEY HUNNICUTT, et al., Cross-Complainants, vs. WILLIAM HENRY, et al., Cross-Defendants.	MEMORANDUM OF INTENDED DECISION No. N 8302)
VISTA GROWERS, INC., et al., Plaintiffs, vs. WILLIAM HENRY, et al., Defendants.	

ANSWER NO. 20

The aforesaid matters on June 17, 1977 came on for hearing in the North County Branch of the Superior Court, and at that time the Court ordered a judicial hearing with reference to the settlement agreement of the parties hereto which was consummated on February 23, 1977. The Court further ordered at said time that the trial and hearing of said matters, N 6351 and N 8302, were to take place at the same time before the same Judge. Said order further provided that the judicial hearing and trial shall be decided by the trial Judge who also should determine the appropriate issues, the order of proof, the order of trial of issues and ultimately, the conclusions of law.

The aforesaid matters came on for trial and hearing on December 5, 1977 in Department C of the aforementioned Court. William Henry and Larry Cairncross herein and hereafter referred to as plaintiffs are seeking money damages.

Vista Growers, Inc. and Environmental Nurseries, Inc. are herein and hereafter referred to as defendants and are seeking relief as follows:

(a) First cause of action, relief from enforceability of said settlement agreement;

(b) Second cause of action, judgment that plaintiffs be ordered to specifically perform and recovery of loss of profits;

(c) Third cause of action, attorney's fees; and

(d) Fourth cause of action, all costs and damages as a result of plaintiffs' breach.

The issues to be resolved by the Court are as follows:

1. What was the settlement agreement of February 23, 1973?

2. Was there breach by the defendants and if so, was it material or minor?

3. Was there breach by plaintiffs and if so, was it material, minor or excused?

4. What are the damages of the respective parties.

1. WHAT WAS THE SETTLEMENT AGREEMENT OF THE PARTIES?

Numerous exhibits and oral evidence was received by the Court relative to said agreement. Exhibit 1-B was received as evidence of the agreement of the parties, and in addition thereto, parole evidence relative to said agreement was offered:

(1) To show the entire agreement of the parties was not reduced to writing as per Exhibit 1-B, and/or

(2) To show what was the agreement of the parties, and/or

(3) To show the meaning of certain terms, words, etc. of said agreement.

Parole evidence is admissible to show that the parties to a transaction did not reduce all of the terms of the agreement to writing, that is whether or not the agreement is integrated. Masterson v. Sine (1968) 68 Cal. 2d 222, 65 Cal.Rptr. 545, Brawthen v. H. & R. Block, Inc. (1972) 28 Cal.App.3d 131, 104 Cal.Rptr. 486, Jefferson's California Evidence Benchbook § 32.2.

Parole evidence is admissible to show the intended agreement of the parties, i.e., to explain or interpret the meaning of the agreement and its terms. Moss Development Co. v. Geary (1974) 41 Cal.App. 3d 1, 115 Cal.Rptr. 736, P.G. & E. v. G. W. Thomas Drayage & Riggins

Co. (1968) 69 Cal. 2d 39, 69 Cal.Rptr. 561, Jefferson's California Evidence Benchbook § 32. Therefore, the parole evidence, both oral and written, offered at the time of trial is admissible to allow the Court to determine what was the agreement of the parties which was entered into on February 22, 1977.

The Court finds that the parties agreed that the overall settlement figure would be $43,750.00.

The Court further finds that the agreement provides that the defendants are to pay $5,000.00 of the $43,750.00 by allowing plaintiffs to select $5,000.00 worth of nursery supplies, i.e., nonplant materials, from a list of such supplies to be supplied to plaintiffs by defendants (Exhibit 1-B). Said list was to contain a list of said supplies, which total value was to exceed $5,000.00, i.e. in order for plaintiffs to select they must have a list of more than $5,000.00 worth of plant materials to select from.

The balance of the total amount that defendants agreed to pay plaintiffs, $38,750.00 ($43,750.00 minus $5,000.00), was to be paid in nine installments. On March 20, 1977, defendants were to pay plaintiffs 20% of $38,750.00 and 10% of $38,750.00 on the 20th day of each month for the next eight months. The agreement further provides that the method of payment shall be by plant materials valued by an objective method of valuation as set forth in the evidence, which were to be selected by plaintiffs from lists of plant materials to be supplied by the defendants. The total value of said materials on said list was not to exceed $80,000.00.

This arrangement was based on discussions of the parties wherein

it was disclosed that the defendants had a cash flow problem and that the plaintiffs could use said plant materials and nursery supplies in their business.

In more particular, the Court finds that the agreement provides that on March 28, 1977, defendants were to make available to plaintiffs plants in the two inch, four inch and six inch category, the total value of plants the defendants would make available to make selection from to equal $16,000.00 ($80,000.00 x 20%) and plaintiffs could select plants valued up to $7,750.00.

The agreement also called for the minimum value of $600.00 in each category and also a minimum of varieties in each of the categories that is, five varieties in the two inch category and ten varieties in the four inch category and ten varieties in the six inch category, and the same to be valued as follows: two inch category, $3,000.00 (5 x $600.00); four inch category, $6,000.00 (10 x $600.00); and six inch category, $6,000.00 (10 x $600.00). Therefore, defendants were to make available to plaintiffs to select plant materials of total value on March 28, 1977 in the sum of $15,000.00.

In each of the months that followed defendants were to make available $8,000.00 worth of plant materials from which they were to select $3,875.00. There was to be a minimum of $400.00 value in each variety and five varieties in the two inch category, ten varieties in the four inch category and ten varieties in the six inch category. Therefore, in the two inch category, $2,000.00 (5 x $400.00) and the four inch category, $4,000.00 (10 x $400.00) and in the six inch catetory, $4,000.00 (10 x $400.00). Total value of all the varieties

is $10,000.00.

The $80,000.00 figure which represented a total amount value and minimum which defendants were to make available in order for plaintiffs to select from was a figure that was not carefully worked out but was arrived at in great haste and are therefore two areas of contradiction which result therefrom.

(1) That on the initial selection of March 28, 1977, the total value as per category and varieties that defendants would have to make available totals $15,000.00, whereas 20% of $80.000.00 is $16,000.00 and;

(2) That each of the eight installments were in the total value that defendants were to submit equals $10,000.00 as per varieties and categories, but 10% of $80,000.00 equals $8,000.00.

This is a minor conflict. The court finds that defendants are obligated to submit a list equal to the lessor of the two figures at the date of each installment, the intent of the parties being that plaintiffs should be allowed to select.

2. DID DEFENDANTS BREACH THEIR AGREEMENT?

This is a contract which calls for payments to be made by installments, that is, $5,000.00 of nonplant material on or about April 7, 1975, $7,750.00 of plant material on March 28, 1977, and eight installments of $3,875.00, each on the 28th of each month beginning April 28, 1977 and defendants were to provide materials of a value greater than the amount of payments due on each date so that plaintiffs could select therefrom up to the amount of the payment due.

On March 7, 1977 (Exhibit 2) defendants did make available to

plaintiffs nonplant material but failed to make available to plaintiffs more than $5,000.00 worth of nursery supplies, therefore, defendants failed to make available to plaintiffs their contract right to select. Hence defendants breached the agreement.

On March 28, 1977, defendants submitted a list (Exhibit 2, page 2) wherein they made available to plaintiffs plants in the categories of two inch, four inch and six inch but failed to make available a total value in at least of $15,000.00 wherein plaintiffs could make a selection from all categories so that they might obtain a variety. In addition thereto, those varieties of plants made available by defendants from March 28 for the most part were ivy. That too meant plaintiffs were unable to obtain a broader range of varieties of plants. Hence here too, defendants have breached.

2 A. WAS THE BREACH OF DEFENDANTS MINOR OR MATERIAL?

Defendants performance was a series of promises to be performed on specific dates in the future and the breach of said defendants were at the offset of defendants performance.

Whether a partial breach is material depends upon the importance or seriousness thereof and the probability of the injured party getting substantial performance. Even a slight breach at the outset of the performance may justify termination. Associated Lathing Etc. Co. v. Louis C. Dunn (1955) 135 Cal.App.2d 40, 286 P.2d 825.

The evidence in the case at Bar discloses that plaintiffs were setting up their own business and defendants knew same and the plaintiffs were willing to accept the nonplant materials and the plant materials to facilitate their beginning their business. Plaintiffs

were also desirous of beginning to start an inventory for their business and this defendants well knew. Plaintiffs and defendants were also aware that plaintiffs needed a well rounded variety of plants and materials for said inventory.

Therefore, the Court finds that the two aforementioned breaches, that is defendants failure to provide a list in excess of $5,000.00 reference nursery supplies and a well rounded list for plant supplies on March 28 were material breaches.

Where a promissor partially breaches and accompanied by or followed by a repudiation, the promisee may treat such partial breach as total. Goldmin. & Water Co. v. Swinerton (1943) 23 Cal.App.2d 19, 142 P.2d 22. The defendants herein submitted a list which was similar to that list of March 20, 1977 which did not comply with said agreement. Said action on the defendants part would amount to a repudiation. That is, that they did not intend to comply with the terms of the agreement on April 20, 1977.

Therefore, plaintiffs herein may treat defendants breach as total and plaintiffs have the election to terminate said agreement. Coughlin v. Blair (1953) 41 Cal.App.2d 587, 262 P.2d 305, Sackett v. Spindler (1967) 248 Cal.App.2d 220, 56 Cal.Rptr. 437.

3. WAS THERE BREACH BY PLAINTIFFS AND IF SO, WAS IT EXCUSED, MINOR OR MATERIAL?

Because of the foregoing findings, that is defendants breaches are material and total, any breach on the part of the plaintiffs herein will be excused and defendants will not be entitled to any damages caused thereby.

4. WHAT DAMAGES ARE PLAINTIFFS ENTITLED TO?

Due to the defendants breaches and repudiation as above set forth, plaintiffs are entitled to recovery from said defendants the settlement figure sum of $43,750.00 with interest.

Therefore, judgment shall be entered accordingly.

DATED: 2/8/78

Earl B. Gilliam

JUDGE OF THE SUPERIOR COURT

EARL B. GILLIAM

ORIGINAL

Superior Court of the State of California
FOR THE COUNTY OF SAN DIEGO

Case No. N6351 N8302

FILED
NORTH COUNTY BRANCH
FEB 9 1978
ROBERT D. ZUMWALT
CLERK

I HEREBY CERTIFY:

I am not a party to the cause referred to herein.

On the date as shown below, at San Diego, California, I placed a true copy of

MEMORANDUM OF INTENDED DECISION

the original/a copy of which is attached hereto, in a separate envelope addressed to each addressee as listed below and each envelope was then sealed and deposited in the mail with the postage fully prepaid:

William T. Fitzgerald, Esq.
McInnis, Fitzgerald, Rees
& Sharkey
1010 Second Avenue, Suite 1301
San Diego, California 92101

Lee Sacks, Esq.
Glasser and Sacks
230 Newport Center Drive
Suite 200
Newport Beach, California 92660

Dated FEB 9 1978

Robert D. Zumwalt
Clerk of the Superior Court

By Lillian M. Tusa
Deputy
LILLIAN M. TUSA

CLERK'S CERTIFICATE OF SERVICE BY MAIL (C.C.P. 1013a(3).

Form 286 Co. Clk. (1-71)