Frigaliment Importing Co. v. B. N. S. Int'l Sales Corp.

United States District Court for the Southern District of New York

December 27, 1960

No Number in Original

Reporter

190 F. Supp. 116; 1960 U.S. Dist. LEXIS 3162

FRIGALIMENT IMPORTING CO., Ltd., Plaintiff, v. B.N.S. INTERNATIONAL SALES CORP., Defendant

Counsel: [**1] Riggs, Ferris & Geer, New York City (John P. Hale, New York City, of counsel), for plaintiff.

Sereni, Herzfeld & Rubin, New York City (Herbert Rubin, Walter Herzfeld, New York City, of counsel), for defendant.

Opinion by: FRIENDLY

Opinion

[*117] The issue is, what is chicken? Plaintiff says 'chicken' means a young chicken, suitable for broiling and frying. Defendant says 'chicken' means any bird of that genus that meets contract specifications on weight and quality, including what it calls 'stewing chicken' and plaintiff pejoratively terms 'fowl'. Dictionaries give both meanings, as well as some others not relevant here. To support its, plaintiff sends a number of volleys over the net; defendant essays to return them and adds a few serves of its own. Assuming that both parties were acting in good faith, the case nicely illustrates Holmes' remark 'that the making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs -- not on the parties' having meant the same thing but on their having said the same thing.' The Path of the Law, in Collected Legal Papers, p. 178. I have concluded that plaintiff has not [**2] sustained its burden of persuasion that the contract used 'chicken' in the narrower sense.

The action is for breach of the warranty that goods sold shall correspond to the description, New York Personal Property Law, McKinney's Consol. Laws, c. 41, § 95. Two contracts are in suit. In the first, dated May 2, 1957, defendant, a New York sales corporation, confirmed the sale to plaintiff, a Swiss corporation, of

'US Fresh Frozen Chicken, Grade A, Government Inspected, Eviscerated 2 1/2-3 lbs. and 1 1/2-2 lbs. each all chicken individually wrapped in cryovac, packed in secured fiber cartons or wooden boxes, suitable for export

75,000 lbs. 2 1/2-3 lbs....	@$ 33.00
25,000 lbs. 1 1/2-2 lbs....	@$ 36.50
per 100 lbs. FAS New York	

scheduled May 10, 1957 pursuant to instructions from Penson & Co., New York.' [1]

The second contract, also dated May 2, 1957, was identical save that only 50,000 lbs. of the heavier 'chicken' were called for, the price of the smaller birds was $ 37 per 100 lbs., and shipment was scheduled for May 30. The initial shipment under the first contract was short but the balance was shipped on May 17. When the initial shipment arrived in Switzerland, [**3] plaintiff found, on May 28, that the 2 1/2-3 lbs. birds were not young chicken suitable for broiling and frying but stewing chicken or 'fowl'; indeed, many of the cartons and bags plainly so indicated. Protests ensued. Nevertheless, shipment under the second contract was made on May 29, the 2 1/2-3 lbs. birds again being stewing chicken. Defendant stopped the transportation of these at Rotterdam.

This action followed. Plaintiff says that, notwithstanding that its acceptance was in Switzerland, New York law controls [*118] under the principle of Rubin v. irving Trust Co., 1953, 305 N.Y. 288, 305, 113 N.E.2d 424, 431; defendant does not dispute this, and relies on New York decisions. I shall follow the apparent agreement of the parties as to the applicable law.

[1] The Court notes the contract provision whereby any disputes are to be settled by arbitration by the New York Produce Exchange; it treats the parties' failure to avail themselves of this remedy as an agreement eliminating that clause of the contract.

Since the word 'chicken' standing alone is ambiguous, I turn first to see whether the contract itself offers any aid to its interpretation. Plaintiff says the 1 1/2-2 lbs. birds necessarily had to be young chicken since the older birds do not come in that size, hence the 2 1/2-3 lbs. birds must likewise be young. This is unpersuasive -- a contract for 'apples' of two different sizes could be filled with different **[**4]** kinds of apples even though only one species came in both sizes. Defendant notes that the contract called not simply for chicken but for 'US Fresh Frozen Chicken, Grade A, Government Inspected.' It says the contract thereby incorporated by reference the Department of Agriculture's regulations, which favor its interpretation; I shall return to this after reviewing plaintiff's other contentions.

The first hinges on an exchange of cablegrams which preceded execution of the formal contracts. The negotiations leading up to the contracts were conducted in New York between defendant's secretary, Ernest R. Bauer, and a Mr. Stovicek, who was in New York for the Czechoslovak government at the World Trade Fair. A few days after meeting bauer at the fair, Stovicek telephoned and inquired whether defendant would be interested in exporting poultry to Switzerland. Bauer then met with Stovicek, who showed him a cable from plaintiff dated April 26, 1957, announcing that they 'are buyer' of 25,000 lbs. of chicken 2 1/2-3 lbs. weight, Cryovac packed, grade A Government inspected, at a price up to 33 cents per pound, for shipment on May 10, to be confirmed by the following morning, and were interested **[**5]** in further offerings. After testing the market for price, Bauer accepted, and Stovicek sent a confirmation that evening. Plaintiff stresses that, although these and subsequent cables between plaintiff and defendant, which laid the basis for the additional quantities under the first and for all of the second contract, were predominantly in German, they used the English word 'chicken'; it claims this was done because it understood 'chicken' meant young chicken whereas the German word, 'Huhn,' included both 'Brathuhn' (broilers) and 'Suppenhuhn' (stewing chicken), and that defendant, whose officers were thoroughly conversant with German, should have realized this. Whatever force this argument might otherwise have is largely drained away by Bauer's testimony that he asked Stovicek what kind of chickens were wanted, received the answer 'any kind of chickens,' and then, in German, asked whether the cable meant 'Huhn' and received an affirmative response. Plaintiff attacks this as contrary to what Bauer testified on his deposition in March, 1959, and also on the ground that Stovicek had no authority to interpret the meaning of the cable. The first contention would be persuasive if sustained **[**6]** by the record, since Bauer was free at the trial from the threat of contradiction by Stovicek as he was not at the time of the deposition; however, review of the deposition does not convince me of the claimed inconsistency. As to the second contention, it may well be that Stovicek lacked authority to commit plaintiff for prices or delivery dates other than those specified in the cable; but plaintiff cannot at the same time rely on its cable to Stovicek as its dictionary to the meaning of the contract and repudiate the interpretation given the dictionary by the man in whose hands it was put. See Restatement of the Law of Agency, 2d, § 145; 2 Mecham, Agency § 1781 (2d ed. 1914); Park v. Moorman Mfg. co., 1952, 121 Utah 339, 241 P.2d 914, 919, 40 A.L.R.2d 273; Henderson v. Jimmerson, Tex.Civ.App.1950, 234 S.W.2d 710, 717-718. Plaintiff's reliance on the fact that the contract forms contain the words 'through the intermediary of: ', with the blank not filled, as negating agency, is wholly unpersuasive; **[*119]** the purpose of this clause was to permit filling in the name of an intermediary to whom a commission would be payable, not to blot out what had been the fact.

Plaintiff's **[**7]** next contention is that there was a definite trade usage that 'chicken' meant 'young chicken.' Defendant showed that it was only beginning in the poultry trade in 1957, thereby bringing itself within the principle that 'when one of the parties is not a member of the trade or other circle, his acceptance of the standard must be made to appear' by proving either that he had actual knowledge of the usage or that the usage is 'so generally known in the community that his actual individual knowledge of it may be inferred.' 9 Wigmore, Evidence (3d ed. § 1940) 2464. Here there was no proof of actual knowledge of the alleged usage; indeed, it is quite plain that defendant's belief was to the contrary. In order to meet the alternative requirement, the law of New York demands a showing that 'the usage is of so long continuance, so well established, so notorious, so universal and so reasonable in itself, as that the presumption is violent that the parties contracted with reference to it, and made it a part of their agreement.' Walls v. Bailey, 1872, 49 N.Y. 464, 472-473.

Plaintiff endeavored to establish such a usage by the testimony of three witnesses and certain other evidence. Strasser, **[**8]** resident buyer in New York for a large chain of Swiss cooperatives, testified that 'on chicken I would definitely understand a broiler.' However, the force of this testimony was considerably weakened by

the fact that in his own transactions the witness, a careful businessman, protected himself by using 'broiler' when that was what he wanted and 'fowl' when he wished older birds. Indeed, there are some indications, dating back to a remark of Lord Mansfield, Edie v. East India Co., 2 Burr. 1216, 1222 (1761), that no credit should be given 'witnesses to usage, who could not adduce instances in verification.' 7 Wigmore, Evidence (3d ed. 1940), § 1954; see McDonald v. Acker, Merrall & Condit Co., 2d Dept.1920, 192 App.Div. 123, 126, 182 N.Y.S. 607. While Wigmore thinks this goes too far, a witness' consistent failure to rely on the alleged usage deprives his opinion testimony of much of its effect. Niesielowski, an officer of one of the companies that had furnished the stewing chicken to defendant, testified that 'chicken' meant 'the male species of the poultry industry. That could be a broiler, a fryer or a roaster', but not a stewing chicken; however, he also testified that upon receiving **[**9]** defendant's inquiry for 'chickens', he asked whether the desire was for 'fowl or frying chickens' and, in fact, supplied fowl, although taking the precaution of asking defendant, a day or two after plaintiff's acceptance of the contracts in suit, to change its confirmation of its order from 'chickens,' as defendant had originally prepared it, to 'stewing chickens.' Dates, an employee of Urner-Barry Company, which publishes a daily market report on the poultry trade, gave it as his view that the trade meaning of 'chicken' was 'broilers and fryers.' In addition to this opinion testimony, plaintiff relied on the fact that the Urner-Barry service, the Journal of Commerce, and Weinberg Bros. & Co. of Chicago, a large supplier of poultry, published quotations in a manner which, in one way or another, distinguish between 'chicken,' comprising broilers, fryers and certain other categories, and 'fowl,' which, Bauer acknowledged, included stewing chickens. This material would be impressive if there were nothing to the contrary. However, there was, as will now be seen.

Defendant's witness Weininger, who operates a chicken eviscerating plant in New Jersey, testified 'Chicken is everything except **[**10]** a goose, a duck, and a turkey. Everything is a chicken, but then you have to say, you have to specify which category you want or that you are talking about.' Its witness Fox said that in the trade 'chicken' would encompass all the various classifications. Sadina, who conducts a food inspection **[*120]** service, testified that he would consider any bird coming within the classes of 'chicken' in the Department of Agriculture's regulations to be a chicken. The specifications approved by the General Services Administration include fowl as well as broilers and fryers under the classification 'chickens.' Statistics of the Institute of American Poultry Industries use the phrases 'Young chickens' and 'Mature chickens,' under the general heading 'Total chickens.' and the Department of Agriculture's daily and weekly price reports avoid use of the word 'chicken' without specification.

Defendant advances several other points which it claims affirmatively support its construction. Primary among these is the regulation of the Department of Agriculture, 7 C.F.R. § 70.300-70.370, entitled, 'Grading and Inspection of Poultry and Edible Products Thereof.' and in particular 70.301 which recited:

[11]** *Chickens.* The following are the various classes of chickens:

(a) Broiler or fryer . . .

(b) Roaster . . .

(c) Capon . . .

(d) Stag . . .

(e) Hen or stewing chicken or fowl . . .

(f) Cock or old rooster . . .

Defendant argues, as previously noted, that the contract incorporated these regulations by reference. Plaintiff answers that the contract provision related simply to grade and Government inspection and did not incorporate the Government definition of 'chicken,' and also that the definition in the Regulations is ignored in the trade. However, the latter contention was contradicted by Weininger and Sadina; and there is force in defendant's argument that the contract made the regulations a dictionary, particularly since the reference to Government grading was already in plaintiff's initial cable to Stovicek.

Defendant makes a further argument based on the impossibility of its obtaining broilers and fryers at the 33 cents price offered by plaintiff for the 2 1/2-3 lbs. birds. There is no substantial dispute that, in late April, 1957, the price for 2 1/2-3 lbs. broilers was between 35 and 37 cents per pound, and that when defendant entered into the **[**12]** contracts, it was well aware of this and intended to fill them by supplying fowl in these weights. It claims that plaintiff must likewise have known the market since plaintiff had reserved shipping space on April 23, three days before plaintiff's cable to Stovicek,

or, at least, that Stovicek was chargeable with such knowledge. It is scarcely an answer to say, as plaintiff does in its brief, that the 33 cents price offered by the 2 1/2-3 lbs. 'chickens' was closer to the prevailing 35 cents price for broilers than to the 30 cents at which defendant procured fowl. Plaintiff must have expected defendant to make some profit -- certainly it could not have expected defendant deliberately to incur a loss.

Finally, defendant relies on conduct by the plaintiff after the first shipment had been received. On May 28 plaintiff sent two cables complaining that the larger birds in the first shipment constituted 'fowl.' Defendant answered with a cable refusing to recognize plaintiff's objection and announcing 'We have today ready for shipment 50,000 lbs. chicken 2 1/2-3 lbs. 25,000 lbs. broilers 1 1/2-2 lbs.,' these being the goods procured for shipment under the second contract, and asked **[**13]** immediate answer 'whether we are to ship this merchandise to you and whether you will accept the merchandise.' After several other cable exchanges, plaintiff replied on May 29 'Confirm again that merchandise is to be shipped since resold by us if not enough pursuant to contract chickens are shipped the missing quantity is to be shipped within ten days stop we resold to our customers pursuant to your contract chickens grade A you have to deliver us said merchandise we again state that we shall make you fully responsible for all resulting costs.' [2] Defendant argues **[*121]** that if plaintiff was sincere in thinking it was entitled to young chickens, plaintiff would not have allowed the shipment under the second contract to go forward, since the distinction between broilers and chickens drawn in defendant's cablegram must have made it clear that the larger birds would not be broilers. However, plaintiff answers that the cables show plaintiff was insisting on delivery of young chickens and that defendant shipped old ones at its peril. Defendant's point would be highly relevant on another disputed issue -- whether if liability were established, the measure of damages should be **[**14]** the difference in market value of broilers and stewing chicken in New York or the larger difference in Europe, but I cannot give it weight on the issue of interpretation. Defendant points out also that plaintiff proceeded to deliver some of the larger birds in Europe, describing them as 'poulets'; defendant argues that it was only when plaintiff's customers complained about this that plaintiff developed the idea that 'chicken' meant 'young chicken.' There is little force in this in view of plaintiff's immediate and consistent protests.

When all the evidence is reviewed, it is clear that defendant believed it could comply with the contracts by delivering stewing chicken in the 2 1/2-3 lbs. size. Defendant's subjective intent would not be significant if this did not coincide with an objective meaning of 'chicken.' Here it did coincide with one of the dictionary meanings, with the definition in the Department of Agriculture Regulations to which the contract made at least oblique reference, with at least some usage in the trade, with the realities of the market, and with what plaintiff's spokesman had said. Plaintiff asserts it to be equally plain that plaintiff's own subjective intent **[**15]** was to obtain broilers and fryers; the only evidence against this is the material as to market prices and this may not have been sufficiently brought home. In any event it is unnecessary to determine that issue. For plaintiff has the burden of showing that 'chicken' was used in the narrower rather than in the broader sense, and this it has not sustained.

This opinion constitutes the Court's findings of fact and conclusions of law. Judgment shall be entered dismissing the complaint with costs.

---

[2] These cables were in German; 'chicken', 'broilers' and, on some occasions, 'fowl,' were in English.

Thomas v. United States Soccer Fed'n

Supreme Court of New York, Appellate Division, Second Department

January 21, 1997, Submitted ; February 24, 1997, Decided

96-02325

Reporter

236 A.D.2d 600; 653 N.Y.S.2d 958; 1997 N.Y. App. Div. LEXIS 1557

Octavio Thomas, Respondent, v. United States Soccer Federation, Inc., et al., Appellants.

Prior History: **[***1]** In an action to recover damages for personal injuries, the defendants appeal from an order of the Supreme Court, Kings County (Yoswein, J.), dated October 2, 1995, which denied their motion for summary judgment dismissing the complaint.

Disposition: ORDERED that the order is reversed, on the law, with costs, the defendants' motion for summary judgment is granted, and the complaint is dismissed.

Counsel: Connors & Connors, P.C., Staten Island, N.Y. (John P. Connors, Jr., and Robert J. Pfuhler of counsel), for appellants.

Cheriff & Cheriff, New York, N.Y. (Kenneth S. Fink and Bruce J. Cheriff of counsel; Adam Stone on the brief), for respondent.

Judges: Bracken, J. P., Santucci, Krausman and McGinity, JJ., concur.

Opinion

[*601] **[**959]** Ordered that the order is reversed, on the law, with costs, the defendants' motion for summary judgment is granted, and the complaint is dismissed.

On the evening of June 18, 1992, the plaintiff Octavio Thomas was injured while participating in a game sponsored by the Cosmopolitan Soccer League (hereinafter Cosmopolitan). According to the plaintiff, the events leading to his injury were precipitated when the opposing team kicked the ball out of **[***2]** bounds. As the plaintiff picked up the ball and prepared to throw it back onto the playing field, he was suddenly attacked by an unidentified member of the opposing team, who punched him twice in the face. When the plaintiff hit his assailant back, 20 to 30 spectators allegedly ran onto the playing field, and some of these individuals jumped on top of the plaintiff. While the spectators and opposing team members held the plaintiff down, the player who had originally attacked him bit off the plaintiff's ear.

The plaintiff subsequently commenced this action against Cosmopolitan, the Eastern New York State Senior Soccer Association, Inc., and the United States Soccer Federation, Inc., alleging that the defendants had negligently failed to provide a properly trained referee to officiate at the game, and failed to maintain a safe playing environment for participants in the league-sponsored game. Following discovery, the defendants moved for summary judgment dismissing the complaint, contending that their alleged negligence was not the proximate cause of the plaintiff's injuries. The Supreme Court thereafter denied the defendants' motion, and the defendants now appeal.

Contrary **[***3]** to the conclusion reached by the Supreme Court, we find that the defendants' motion for summary judgment should be granted. In order to establish a prima facie case of negligence, the plaintiff must show that the defendants' negligence was a " 'substantial cause of the events which produced the injury' " (*Kush v City of Buffalo,* 59 NY2d 26, 32-33, quoting *Derdiarian v Felix Constr. Corp.,* 51 NY2d 308, 315). However, the concept of proximate cause is an elusive one which cannot be precisely defined because it "stems from policy considerations that serve to place manageable limits upon the liability that flows from negligent conduct" (*Derdiarian v Felix Constr. Corp., supra,* at 314) Moreover, where, as here, an intentional or criminal act of a third person intervenes **[*602]** between the defendant's conduct and **[**960]** the plaintiff's injury, liability will turn upon whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence (*see, Derdiarian v Felix Constr. Corp., supra,* at 315).

Applying these principals to the essentially undisputed facts set forth by the parties, we find that the defendants' **[***4]** alleged negligence was not the proximate cause of the plaintiff's injuries. Significantly, the plaintiff's deposition testimony reveals that there was no prior

history of acrimony between the plaintiff's team and the opposing team, and that the attack on the plaintiff occurred suddenly and without warning (*see, Elba v Billie's 1890 Saloon,* 227 AD2d 438; *Scotti v W.M. Amusements,* 226 AD2d 522). In addition, the plaintiff admitted at his deposition that neither team had any problems with the acting referee's rulings prior to the time the plaintiff was attacked, and there is no indication that the presence of a trained referee could have prevented the assault upon the plaintiff. Under these circumstances, the plaintiff's injuries were not the foreseeable consequence of the defendants' alleged failure to provide adequate security or a properly trained referee (*see, Derdiarian v Felix Constr. Corp., supra*).

Bracken, J. P., Santucci, Krausman and McGinity, JJ., concur.

Peevyhouse v. Garland Coal & Mining Co.

Supreme Court of Oklahoma

March 26, 1963

No. 39588

Reporter
382 P.2d 109; 1963 Okla. LEXIS 390

Willie PEEVYHOUSE and Lucille Peevyhouse, Plaintiffs in Error, v. GARLAND COAL & MINING COMPANY, Defendant in Error

Subsequent History: [**1] Second Rehearing Denied May 28, 1963.

Prior History: Original Opinion of December 11, 1962, Reported at 382 P.2d 109.

Opinion by: JACKSON; JACKSON

Opinion

[*116] SUPPLEMENTAL OPINION ON REHEARING

JACKSON, Justice. In a Petition for Rehearing, plaintiffs Peevyhouse have raised certain questions not presented in the original briefs on appeal.

[*117] They insist that the trial court excluded evidence as to the total value of the premises concerned, and, in effect, that they have not had their 'day in court'. This argument arises by reason of the fact that their farm consists not merely of the 60 acres covered by the coal mining lease, but includes other lands as well.

Plaintiffs originally pleaded two causes of action against the defendant mining company. The first one was for damages for breach of contract; the second one was for damages to the water well and home of plaintiffs, because of the use of excessively large charges of dynamite or blasting powder in close proximity to the home and well.

Numbered paragraph 2 of plaintiffs' petition alleges that they own and live upon 60 acres of land which are specifically described. *This is the only land described in the petition, and there* [**2] *is no allegation as to the ownership or leasing of any other lands.*

Page 4 of the transcript of evidence reveals that near the beginning of the trial, plaintiff Peevyhouse was asked a question concerning improvements he had made to his property. His answer was 'For one thing I built a new home on the place in 1951, and along about that time I was building a pasture. And I would say *ninety percent of this 120 acres is in good grass.*' (Emphasis supplied.) Mr. Watts, defense counsel, then objected 'to any testimony about the property, other than the 160 acres'. (It is obvious that he means '60' instead of '160'.) Further proceedings were as follows:

'The Court: The objection will be sustained as to any other part. Go ahead.

'Mr. McCornell (attorney for plaintiffs): Comes now the plaintiff and dismisses the second cause of action without prejudice.'

It thus appears that plaintiffs made no complaint as to the court's exclusion of evidence concerning lands other than the 60 acres described in their petition.

Pages 7 and 8 of the transcript show that later during direct examination of Mr. Peevyhouse, the following occurred:

'Q. (By Mr. McConnell) Now, Mr. Peevyhouse, I ask [**3] you to step down here and I ask you if you are familiar with this sketch or drawing?

'A. Yes. I've got about 40 acres here, and here would be 20, and there would be 20 on this sketch. And I've got leased land lying in here, 80 acres.

'Mr. Watts: If your Honor please, I object to anything except the 60 acres involved in this lawsuit.

'The Court: Sustained.

'Q. (By Mr. McConnell) Will you point out to the jury, the boundary line shown of your property?

'A. That blue is where the water is actually standing at the present time. Up until a short time ago this area here came over that far. And this spring all of it would run,

come in here out this way and through here, spreading over this land and all below it. And at the present time this is washed out here.

'Mr. Watts: If your Honor please, I object to that as not the proper measure of damages.

'The Court: The objection will be sustained.'

This testimony of Mr. Peevyhouse is difficult for us to follow, even with the exhibits in the case before us. However, no complaint was made by plaintiffs, or any suggestion that the court was in error in excluding this testimony.

The defendant offered the testimony of five witnesses **[**4]** in the trial court; four of them testified as to 'diminution in value'. They were not cross examined by plaintiffs.

In their motion for new trial, plaintiffs did not complain that they had been prevented from offering evidence as to the diminution in value of their lands; on the **[*118]** contrary, they affirmatively complained of the trial court's action in admitting evidence of the *defendant* on that point.

In the original brief of plaintiffs in error (Peevyhouse) filed in this court there appears the following language at page 4:

'* * * Near the outset of the trial plaintiffs dismissed their second cause of action without prejudice: further, it was stipulated * * *. It was further stipulated that the *only issue remaining in the lawsuit* was the proof and *measure of damages* to which plaintiffs were entitled * * *.' (Emphasis supplied.)

In the answer brief of Garland Coal & Mining Co., at page 3, there appears the following language:

'Defendant offered evidence that the total value of the property involved before the mining operation would be $ 60.00 per acre, and $ 11.00 per acre after the mining operation (60 acres at $ 49.00 per acre is $ 2940.00). Other evidence **[**5]** was that the property was worth $ 5.00 to $ 15.00 per acre after the mining, but before the repairs; and would be worth an increase of $ 2.00 to $ 5.00 per acre after the repairs had been made (60 acres at $ 5.00 per acre is $ 300.00) (Tr. 96-97, 135, 137-138, 138-141, 143-145, 156, 158).'

At page 18 of the same brief there is another statement to the effect that the 'amount of diminution in value of the land' was $ 300.00.

About two months after the answer brief was filed in this court, plaintiffs filed a reply brief. The reply brief makes no reference at all to the language of the answer brief above quoted and *does not deny that the diminution in value shown by the record amounts to 300.00.* On the contrary, it contains the following language at page 5:

'* * * Plaintiffs in error pointed out in their initial brief that this evidence concerning land values was objectionable as being incompetent and refused to cross-examine or offer rebuttal for the reason that they did not choose to waive their objections to the competency of the evidence by disproving defendant in error's allegations as to land values. We strongly urged at the trial below, and still do, that market value **[**6]** of the land has no application * * *.'

Our extended reference to the pleadings, testimony and prior briefs in this case has not been solely for the purpose of showing that plaintiffs failed to complain of the court's rulings. Our purpose, rather, has been to demonstrate the plan and theory upon which plaintiffs tried their case below, and upon which they argued it in the prior briefs on appeal.

The whole record in this case justifies the conclusion that plaintiffs tried their case upon the theory that the 'cost of performance' would be the sole measure of damages and that they would recognize no other. In view of the whole record in this case and the original briefs on appeal, we conclude that they so tried it *with notice* that defendant would contend for the 'diminution in value' rule. The testimony to which they specifically refer in the petition for rehearing shows that the trial court properly excluded defendant's evidence concerning lands other than the 60 acres described in the petition because such evidence was *not within the scope of the pleadings.* At no time did plaintiffs ask permission to amend their petition, either with or without prejudice to trial, so as **[**7]** to describe *all* of the lands they own or lease, and no evidence was admitted which could broaden the scope of the petition.

Plaintiffs' petition described 60 acres of land only; plaintiffs offered no evidence on the question of 'diminution in value' and objected to similar evidence offered by the defendant; their motion for new trial contained no allegation that they had been prevented from offering evidence on this question; in their reply brief they did not controvert the allegation in defendant's answer brief that the record showed a 'diminution **[*119]** in value' of only $ 300.00; and in view of the stipulation

they admittedly made in the trial court, their statement in petition for rehearing that the court's instructions on the measure of damages came as a 'complete surprise' and 'did not afford them the opportunity to prepare and introduce evidence under the 'diminution in value' rule' is not supported by the record.

We think plaintiffs' present position is that of a plaintiff in any damage suit who has failed to prove his damages -- opposed by a defendant who has proved plaintiff's damages; and that plaintiffs' complaint that the record does not show the total 'diminution **[**8]** in value' to their lands comes too late. It is well settled that a party will not be permitted to change his theory of the case upon appeal. Knox v. Eason Oil Co., 190 Okl. 627, 126 P.2d 247.

Also, plaintiffs' expressed fear that by introducing evidence on the question of 'diminution in value' they would have waived their objection to similar evidence by defendant was not justified. Vogel v. Fisher et al., 203 Okl. 657, 225 P.2d 346; 53 Am.Jur. Trial, Sec. 144.

It is suggested in a brief of amici curiae that our decision in this case has resulted in an impairment of the obligation of the contract of the parties, in violation of Article 1, Section 10, of the Constitution of the United States, and in that connection the only case cited is Sturges v. Crowninshield, 4 Wheat 122, 17 U.S. 1229, 4 L.Ed. 529 (1819). In their brief, amici curiae quote language from the Lawyer's Edition notes of Mr. Stephen K. Williams, in which he summarized the 'points and authorities' of one of the counsel appearing before the U. S. Supreme Court.

Sturges v. Crowninshield was an early case in which the Supreme Court considered the power of a state to enact bankruptcy laws, and the extent, if any, to **[**9]** which such power is limited by Article 1, Section 10 of the Constitution. The contracts concerned consisted of promissory notes executed in March, 1811, and the bankruptcy law under which the promisor claimed a discharge was not enacted until April 3, 1811. In a memorable opinion written by Chief Justice Marshall, the court held that insofar as the bankruptcy law purported to discharge the obligations of contracts executed *before its enactment*, it was unconstitutional and void.

The same situation does not exist here. 23 O.S.1961 §§ 96 and 97, cited in our original opinion, were a part of the Revised Laws of 1910 (R.L.1910) Sections 2889 and 2890) and have been in force in this state, in unchanged form, since that codification was adopted by the legislature in 1911. The lease contract concerned in the case now before us was not executed until 1954.

Nor do we agree that our decision itself (as opposed to the statutes cited therein as controlling) impairs the obligations of the contract concerned. It may be conceded that at one time there was respectable authority for the proposition that the 'contract' clause was violated by a judicial decision which overruled prior decisions, **[**10]** upon the strength of which contract rights had been acquired. In this connection, it should be noted that our decision overrules no prior holdings of this court upon which the contracting parties could be said to have relied. Even if it did,

'* * * it is now definitely and authoritatively settled that such prohibition in federal and state constitutions relate to legislative action and not to judicial decisions. Thus, they do not apply to the decision of a state court, where such decision does not expressly, or by necessary implication, give effect to a subsequent law of the state whereby the obligation of the contract is impaired. * * *' 16 C.J.S. Constitutional Law § 280.

To the same effect, see 12 Am.Jur. Constitutional Law, Sec. 398.

Our decision herein overrules no prior holdings of this court, and it does not give effect to a *subsequent* law of this state. It therefore cannot be said to impair the **[*120]** obligations of the contract of the parties here concerned.

The petition for rehearing is denied.

HALLEY, V. C. J., and WELCH, DAVISON and JOHNSON, JJ., concur.

BLACKBIRD, C. J., and WILLIAMS, IRWIN and BERRY, JJ., dissent.

Dissent by: IRWIN

Mas v. Perry

United States Court of Appeals for the Fifth Circuit

February 22, 1974

No. 73-3008 Summary Calendar*

Reporter
489 F.2d 1396; 1974 U.S. App. LEXIS 9939

Jean Paul MAS and Judy Mas, Plaintiffs-Appellees, v. Oliver H. PERRY, Defendant-Appellant

Prior History: [**1] Appeal from the United States District Court for the Middle District of Louisiana.

Disposition: Affirmed.

Judges: Wisdom, Ainsworth and Clark, Circuit Judges.

Opinion by: AINSWORTH

Opinion

[*1398] AINSWORTH, Circuit Judge:

This case presents questions pertaining to federal diversity jurisdiction under 28 U.S.C. § 1332, which, pursuant to article III, section II of the Constitution, provides for original jurisdiction in federal district courts of all civil actions that are between, *inter alia,* citizens of different States or citizens of a State and citizens of foreign states and in which the amount in controversy is more than $10,000.

Appellees Jean Paul Mas, a citizen of France, and Judy Mas were married at her home in Jackson, Mississippi. Prior to their marriage, Mr. and Mrs. Mas were graduate assistants, pursuing coursework as well as performing teaching duties, for approximately nine months and one year, respectively, at Louisiana State University in Baton Rouge, Louisiana. Shortly after their marriage, they returned to Baton Rouge to resume their duties as graduate assistants at LSU. They remained in Baton Rouge for approximately two more years, [**2] after which they moved to Park Ridge, Illinois. At the time of the trial in this case, it was their intention to return to Baton Rouge while Mr. Mas finished his studies for the degree of Doctor of Philosophy. Mr. and Mrs. Mas were undecided as to where they would reside after that.

Upon their return to Baton Rouge after their marriage, appellees rented an apartment from appellant Oliver H. Perry, a citizen of Louisiana. This appeal arises from a final judgment entered on a jury verdict awarding $5,000 to Mr. Mas and $15,000 to Mrs. Mas for damages incurred by them as a result of the discovery that their bedroom and bathroom contained "two-way" mirrors and that they had been watched through them by the appellant during three of the first four months of their marriage.

At the close of the appellees' case at trial, appellant made an oral motion to dismiss for lack of jurisdiction. [1] The motion was denied by the district court. Before this Court, appellant challenges the final judgment below solely on jurisdictional grounds, contending that appellees failed to prove diversity of citizenship among the parties and that the requisite jurisdictional amount is lacking with respect to Mr. [**3] Mas. Finding no merit to these contentions, we affirm. Under section 1332(a)(2), the federal judicial power extends to the claim of Mr. Mas, a citizen of France, against the appellant, a citizen of Louisiana. Since we conclude that Mrs. Mas is a citizen of Mississippi for diversity purposes, the district court also properly had jurisdiction under section 1332(a)(1) of her claim.

It has long been the general rule that complete diversity of parties is [*1399] required in order that diversity jurisdiction obtain; that is, no party on one side may be a citizen of the same State as [**4] any party on the other side. Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 2 L. Ed. 435 (1806); *see* cases cited in 1 W. Barron & A. Holtzoff, Federal Practice and Procedure § 26, at 145 n. 95 (Wright ed. 1960). This determination of one's State citizenship for diversity purposes is controlled by

* Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Company of New York et al., 5 Cir., 1970, 431 F.2d 409, Part I.

[1] The motion was actually made just prior to the testimony of appellees' last witness, but for purposes of the record counsel stipulated and the court approved that the motion would be considered to have been made at the close of appellees' case.

federal law, not by the law of any State. 1 J. Moore, Moore's Federal Practice para. 0.74 [1], at 707.1 (1972). As is the case in other areas of federal jurisdiction, the diverse citizenship among adverse parties must be present at the time the complaint is filed. Mollan v. Torrance, 22 U.S. (9 Wheat.) 537, 539, 6 L. Ed. 154, 155 (1824); Slaughter v. Toye Bros. Yellow Cab Co., 5 Cir., 1966, 359 F.2d 954, 956. Jurisdiction is unaffected by subsequent changes in the citizenship of the parties. Morgan's Heirs v. Morgan, 15 U.S. (2 Wheat.) 290, 297, 4 L. Ed. 242, 244 (1817); Clarke v. Mathewson, 37 U.S. (12 Pet.) 164, 171, 9 L. Ed. 1041, 1044 (1838); Smith v. Sperling, 354 U.S. 91, 93 n. 1, 77 S. Ct. 1112, 1113 n. 1, 1 L. Ed. 2d 1205 (1957). The burden of pleading the diverse citizenship is upon the party **[**5]** invoking federal jurisdiction, *see* Cameron v. Hodges, 127 U.S. 322, 8 S. Ct. 1154, 32 L. Ed. 132 (1888); and if the diversity jurisdiction is properly challenged, that party also bears the burden of proof, McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 56 S. Ct. 780, 80 L. Ed. 1135 (1936); Welsh v. American Surety Co. of New York, 5 Cir., 1951, 186 F.2d 16, 17.

To be a citizen of a State within the meaning of section 1332, a natural person must be both a citizen of the United States, *see* Sun Printing & Publishing Association v. Edwards, 194 U.S. 377, 383, 24 S. Ct. 696, 698, 48 L. Ed. 1027 (1904); U.S.Const. Amend. XIV, § 1, and a domiciliary of that State. *See* Williamson v. Osenton, 232 U.S. 619, 624, 34 S. Ct. 442, 58 L. Ed. 758 (1914); Stine v. Moore, 5 Cir., 1954, 213 F.2d 446, 448. For diversity purposes, citizenship means domicile; mere residence in the State is not sufficient. *See* **[**6]** Wolfe v. Hartford Life & Annuity Ins. Co., 148 U.S. 389, 13 S. Ct. 602, 37 L. Ed. 493 (1893); Stine v. Moore, 5 Cir., 1954, 213 F.2d 446, 448.

A person's domicile is the place of "his true, fixed, and permanent home and principal establishment, and to which he has the intention of returning whenever he is absent therefrom . . . ." Stine v. Moore, 5 Cir., 1954, 213 F.2d 446, 448. A change of domicile may be effected only by a combination of two elements: (a) taking up residence in a different domicile with (b) the intention to remain there. Mitchell v. United States, 88 U.S. (21 Wall.) 350, 22 L. Ed. 584 (1875); Sun Printing & Publishing Association v. Edwards, 194 U.S. 377, 24 S. Ct. 696, 48 L. Ed. 1027 (1904).

It is clear that at the time of her marriage, Mrs. Mas was a domiciliary of the State of Mississippi. While it is generally the case that the domicile of the wife--and, consequently, her State citizenship for purposes of diversity jurisdiction--is deemed to be that of her husband, 1 J. Moore, Moore's Federal Practice **[**7]** para. 0.74 [6--1], at 708.51 (1972), we find no precedent for extending this concept to the situation here, in which the husband is a citizen of a foreign state but resides in the United States. Indeed, such a fiction would work absurd results on the facts before us. If Mr. Mas were considered a domiciliary of France--as he would be since he had lived in Louisiana as a student-teaching assistant prior to filing this suit, *see* Chicago & Northwestern Railway Co. v. Ohle, 117 U.S. 123, 6 S. Ct. 632, 29 L. Ed. 837 (1886); Bell v. Milsak, W.D.La., 1952, 106 F. Supp. 219--then Mrs. Mas would also be deemed a domiciliary, and thus, fictionally at least, a citizen of France. She would not be a citizen of any State and could **[*1400]** not sue in a federal court on that basis; nor could she invoke the alienage jurisdiction to bring her claim in federal court, since she is not an alien. *See* C. Wright, Federal Courts 80 (1970). On the other hand, if Mrs. Mas's domicile were Louisiana, she would become a Louisiana citizen for diversity purposes and could not bring suit with her husband against appellant, also a Louisiana citizen, on the basis of diversity **[**8]** jurisdiction. These are curious results under a rule arising from the theoretical identity of person and interest of the married couple. *See* Linscott v. Linscott, S.D.Iowa, 1951, 98 F. Supp. 802, 804; Juneau v. Juneau, 227 La. 921, 80 So.2d 864, 867 (1954).

An American woman is not deemed to have lost her United States citizenship solely by reason of her marriage to an alien. 8 U.S.C. § 1489. Similarly, we conclude that for diversity purposes a woman does not have her domicile or State citizenship changed solely by reason of her marriage to an alien.

Mrs. Mas's Mississippi domicile was disturbed neither by her year in Louisiana prior to her marriage nor as a result of the time she and her husband spent at LSU after their marriage, since for both periods she was a graduate assistant at LSU. *See* Chicago & Northwestern Railway Co. v. Ohle, 117 U.S. 123, 6 S. Ct. 632, 29 L. Ed. 837 (1886). Though she testified that after her marriage she had no intention of returning to her parents' home in Mississippi, Mrs. Mas did not **[**9]** effect a change of domicile since she and Mr. Mas were in Louisiana only as students and lacked the requisite intention to remain there. *See* Hendry v. Masonite Corp., 5 Cir., 1972, 455 F.2d 955, cert. denied, 409 U.S. 1023, 93 S. Ct. 464, 34 L. Ed. 2d 315. Until she acquires a new

domicile, she remains a domiciliary, and thus a citizen, of Mississippi. *See* Mitchell v. United States, 88 U.S. (21 Wall.) 350, 352, 22 L. Ed. 584, 587-588 (1875); Sun Printing & Publishing Association v. Edwards, 194 U.S. 377, 383, 24 S. Ct. 696, 698, 48 L. Ed. 1027 (1904); Welsh v. American Security Co. of New York, 5 Cir., 1951, 186 F.2d 16, 17. [2]

[10]** Appellant also contends that Mr. Mas's claim should have been dismissed for failure to establish the requisite jurisdictional amount for diversity cases of more than $10,000. In their complaint Mr. and Mrs. Mas alleged that they had each been damaged in the amount of $100,000. As we have noted, Mr. Mas ultimately recovered $5,000.

It is well settled that the amount in controversy is determined by the amount claimed by the plaintiff in good faith. KVOS, Inc. v. Associated Press, 299 U.S. 269, 57 S. Ct. 197, 81 L. Ed. 183 (1936); 1 J. Moore, Moore's Federal Practice para. 0.92 [1] (1972). Federal jurisdiction is not lost because a judgment of less than the jurisdictional amount is awarded. Jones v. Landry, 5 Cir., 1967, 387 F.2d 102; C. Wright, Federal Courts 111 (1970). That Mr. Mas recovered only $5,000 is, therefore, not compelling. As the Supreme Court stated in St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 288-290, 58 S. Ct. 586, 590-591, 82 L. Ed. 845:

> The sum claimed by the plaintiff controls if the claim is apparently **[**11]** made in good faith.
>
> It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal. The inability of the plaintiff **[*1401]** to recover an amount adequate to give the court jurisdiction does not show his bad faith or oust the jurisdiction. . . . .
>
> . . . . His good faith in choosing the federal forum is open to challenge not only by resort to the face of his complaint, but by the facts disclosed at trial, and if from either source it is clear that his claim never could have amounted to the sum necessary to give jurisdiction there is no injustice in dismissing the suit.

Having heard the evidence presented at the trial, the district court concluded that the appellees properly met the requirements of section 1332 with respect to jurisdictional amount. Upon examination of the record in this case, we are also satisfied that the requisite amount was in controversy. *See* Jones v. Landry, 5 Cir., 1967, 387 F.2d 102.

Thus the power of the federal district court to entertain the claims of appellees in this case stands on two separate legs of diversity jurisdiction: a claim by an alien against a State citizen; **[**12]** and an action between citizens of different States. We also note, however, the propriety of having the federal district court entertain a spouse's action against a defendant, where the district court already has jurisdiction over a claim, arising from the same transaction, by the other spouse against the same defendant. *See* ALI Study of the Division of Jurisdiction Between State and Federal Courts, pt. I, at 9-10. (Official Draft 1965.) In the case before us, such a result is particularly desirable. The claims of Mr. and Mrs. Mas arise from the same operative facts, and there was almost complete interdependence between their claims with respect to the proof required and the issues raised at trial. Thus, since the district court had jurisdiction of Mr. Mas's action, sound judicial administration militates strongly in favor of federal jurisdiction of Mrs. Mas's claim.

Affirmed.

---

[2] The original complaint in this case was filed within several days of Mr. and Mrs. Mas's realization that they had been watched through the mirrors, quite some time before they moved to Park Ridge, Illinois. Because the district court's jurisdiction is not affected by actions of the parties subsequent to the commencement of the suit, *see* C. Wright, Federal Courts 93 (1970), slip op. at page 3 *supra*, the testimony concerning Mr. and Mrs. Mas's moves after that time is not determinative of the issue of diverse citizenship, though it is of interest insofar as it supports their lack of intent to remain permanently in Louisiana.