Aguon v. Continental Micronesia, Inc., 16 ROP 284 (Tr. Div. 2010)

SWINGLY AGUON,
Plaintiff,

v.

CONTINENTAL MICRONESIA, INC.,
Defendant.

CIVIL ACTION NO. 09-129

Supreme Court, Trial Division
Republic of Palau

Decided: April 27, 2010

ARTHUR NGIRAKLSONG, Chief Justice.

Mr. Swingly Aguon, Plaintiff, and Continental Micronesia, Inc., Defendant, had a business dealing from June 1, 2001 to May 31, 2002. Plaintiff provided ground transportation services to Defendant's flight crew on layover flights between the Palau International Airport and designated hotels. (Plaintiff's exhibit 1.) The p.285 parties completed their respective obligations under that contract satisfactorily.

The parties entered into a second transportation contract on February 13, 2008 for the term of February 13, 2008 to March 1, 2011. (Plaintiff's exhibit 2.) This lawsuit is based on an alleged breach of that second contract ("the contract").

For the first six months of the contract, Plaintiff provided the same transportation services and Defendant paid the same price, $20.00 per person, on the same terms as those in the first contract. However, in a letter dated July 18, 2008 (Plaintiff's exhibit 4), Defendant informed Plaintiff that it had acquired a van and "effective July 25, 2008 Continental will no longer utilize Swingly crew transportation service on a regular basis. However, we plan to continue to engage Swingly for ad hoc transportation services should operational requirements dictate." Defendant thereafter stopped using Plaintiff's services completely.[1] For obvious economic reasons, Plaintiff was forced to sell the vehicle he used to provide transportation services under this contract. Plaintiff filed this lawsuit on May 29, 2009 for breach of contract and asked for the full contract price.

Although the services and prices between the first contract and the first six months of the

[1]Defendant stopped using Plaintiff's transportation services on July 25, 2008. After 18 months of not using Plaintiff's transportation services, after Plaintiff's transportation business has gone under because there was no business and after Plaintiff had filed this lawsuit, Defendant once in February 2010 asked Plaintiff to provide transportation services to its flight crew because its van was at repair shop. The Court views this February 2010 "request" of Defendant as a tactical act to show its legal position that the contract has not been terminated.

second contract are the same, there are differences in the language of the two contracts. The title of the contract is "Adhoc Ground Transportation Agreement" whereas the initial contract was titled "Transportation Services Agreement." Section 1 of the contract states that Plaintiff agrees to provide "Adhoc Ground Transportation Services" to and from the airport and designated hotels "when requested." The words "ad hoc" and "when requested" were absent from the first contract. The contract fails to provide for termination of the contract, again in contrast with the first contract. Defendant drafted the contract.

Plaintiff's position is that Defendant breached the contract when it ceased using Plaintiff's services on July 25, 2008. Therefore, according to Plaintiff, he is entitled to the full contract price or damages that would put him in as good a position as he would have been had Defendant continued to utilize his regular transportation services under the contract. Plaintiff seeks a total of $35,760.00 in damages based on the number of layover flights and crews in 2008, 2009 and 2010 at $20.00 per personnel. Defendant's counsel, although dismissive of Plaintiff's damages calculations, failed to rebut the accuracy of these calculations and presented no contradictory evidence regarding calculation of damages.

Plaintiff argues that the contract must be read in light of the first contract and the regular p.286 continued performance of the parties to the contract for the first six months of the contract term. Plaintiff quotes the definition of "ad hoc" as "[f]or the specific purpose, case, or a situation at hand and for no other." The American Heritage Dictionary of the English Language, Fourth Ed. (2009). Plaintiff argues that this meaning of "ad hoc" does not absolve Defendant from using services of Plaintiff under the contract. Plaintiff contends that the phrase "when requested," when read in light of the earlier contract and the initial performance under the contract, was used in the contract because layover flight schedules are not always predictable and may be subject to change.

Defendant argues that, given the unambiguous language in the contract, it is the Court's duty to apply the plain meaning of the contract terms. Under that approach, Defendant contends that "when requested" simply means whenever Defendant requested transportation service—be it one request a month or no request at all for the remainder of the contract term.

Plaintiff rebuts by stating that Defendant's interpretation of the phrase "when requested" would destroy the "consideration of the mutual covenants" in the contract and thus render the entire contract illusory.

DISCUSSION

Mr. Mantanona, counsel for Defendant, argued that the phrase "when requested" placed no requirement or limitation on the number of requests for transportation services. When the Court inquired whether it could mean no request at all for the entire term of the contract, Mr. Mantanona replied "yes." The Court finds this interpretation of "when requested" troubling.

This reading would permit Defendant to enter into the contract, causing Plaintiff to take all the necessary steps to perform—purchasing a van, hiring employees, taking out insurance

policies—but then allow Defendant to claim the contract is still valid even if it never "requests" Plaintiff's services during the entirety of the contract term. The contract must be read to avoid such an absurd result.

Secondly, such reading of the "when requested" language would also render the contract illusory and unenforceable. Words of promise which by their terms make performance entirely optional with the 'promisor' do not constitute a promise. "Where the apparent assurance of performance is illusory, it is not consideration for a return promise." Restatement (Second) of Contracts § 77 cmt. a (1979).[2]

Given the absurdity of Defendant's reading of the disputed words, the Court finds it is appropriate to refer to the parties' prior course of dealing. Course of dealing is defined as follows:

> (1) A course of dealing is a sequence of previous conduct between the parties to an agreement which is fairly to be regarded as establishing a common basis of understanding p.287 for interpreting their expressions and other conduct.
> (2) Unless otherwise agreed, a course of dealing between the parties gives meaning to or supplements or qualifies their agreement.

Restatement (Second) of Contracts § 223. The prior course of dealing includes the parties' dealings under the first contract which are identical to their dealings under the contract for the first six months. Evidence of a course of dealing between the parties "may determine the meaning of [the] language." Restatement (Second) of Contracts § 223 cmt. b. **[2]** "There is no requirement that an agreement be ambiguous before evidence of a course of dealing can be shown, nor is it required that the course of dealing be consistent with the meaning the agreement would have apart from the course of dealing". *Id.*

The parties' course of dealing in the first six months of the contract is a reliable evidence of the parties' "intent" as to the meaning of the words "when requested". "The parties to an agreement know best what they meant, and their action under it is often the strongest evidence of their meaning." Restatement (Second) of Contracts § 202 cmt. g. The parties' actions are always relevant in "…determining what meanings are reasonably possible as well as in choosing among possible meanings." Restatement (Second) of Contracts § 202 cmt. a.

Actions speak louder than words. Based on the actions of the parties in the first contract and during the first six months of the contract at issue, the Court concludes Plaintiff promised to provide transportation services to Defendant's layover flight crews from and to Palau International Airport and designated hotels. In return, Defendant promised to use Plaintiff's services (and only Plaintiff's services) for the duration of the contract. This agreement precludes Defendant from providing its own transportation services. See Crown Laundry and Dry Cleaners, Inc. v. United States, 29 Fed. Cl. 506, 518 (1993) ("During the contract term, none of these needs was to be serviced by any other contractor or by the government itself." (emphasis

[2]In the absence of local written law, "the restatements of the law…shall be the rules of decision in the courts of the Republic in applicable cases." 1 PNC § 303.

added)). The contract would be rendered illusory and unenforceable by an interpretation that would allow Defendant to procure the contracted-for transportation services from another vendor or provide the services itself, as it has done by purchasing its own van. In interpreting a contract, "it is well settled that a court should construe a contract so as to render it valid and mutually binding." Cardiovascular Servs., Inc. v. West Houston Health Care Group, Inc., No. 01-94-01075-CV, 1995 WL 523615, at *6 (Tex. App. Sept. 7, 1995).

Regarding damages, Defendant failed to even attempt to rebut Plaintiff's calculations and bases of damages.

> Contract damages are ordinarily based on the injured party's expectation interest and are intended to give him the benefit of his bargain by awarding him a sum of money that will, to the extent possible, put him in as good a position as he would have been had the contract been p.288 performed.

Palau Marine Indus. Corp. v. Seid, 9 ROP 173, 177 (2002) (quoting Restatement (Second) of Contracts § 347 cmt. a.)

The Court awards a total of $35,760.00 damages to Plaintiff. Said amount shall earn interest of nine (9) per cent annually beginning on this date or in case of an appeal, from the date this judgment is affirmed by the Appellate Court.

The Court believes that if the contract had a provision permitting unilateral cancellation of the contract (as in the first contract), Defendant would have terminated the contract when it decided to buy a van and provide its own airport transportation services. The Court finds it incredible that Defendant, the drafter of the contract, omitted a termination clause in the contract. It is Defendant who should pay for the adverse consequences of inartful drafting:

> In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds.

Restatement (Second) of Contracts § 206. And so it shall be.

For the reasons set forth in the Court's findings of fact and conclusions of law, IT IS HEREBY ADJUGED, DECREED, AND ORDERED THAT FOLLOWING IS AWARDED:[3]

> 1. The parties had a contract that was supposed to run from February 13, 2008 to March 1, 2011. In it, plaintiff was to provide airport transportation services to defendant's flight crew from and to the Palau International Airport and designated hotels.
>
> 2. The defendant breached the contract when it stopped using plaintiff's airport

[3] The Judgment was originally issued coterminously by a separate Order. It is included at the end of the Decision here only for clarity and completeness.

transportation services on July 25, 2008 and purchased a new van to transport its flight crew in line with the Company's cost cutting measures.

3. Plaintiff is entitled to the full contract price as damages to put him where he would have been had the defendant done its part of the bargain.

4. Plaintiff is awarded the sum of $35,760.00 in damages which shall earn nine (9) per cent interest annually beginning this date or in case of an appeal, from the date this judgment is affirmed by the Appellate Court.