Batsakis v. Demotsis

Texas Court of Civil Appeals
226 S.W.2d 673 (1949)

McGill, Justice.

This is an appeal from a judgment of the 57th judicial District Court of Bexar County. Appellant was plaintiff and appellee was defendant in the trial court. The parties will be so designated.

Plaintiff sued defendant to recover $2,000 with interest at the rate of 8% per annum from April 2, 1942, alleged to be due on the following instrument, being a translation from the original, which is written in the Greek language:

> Peiraeus
> April 2, 1942
>
> Mr. George Batsakis
> Konstantinou Diadohou #7
> Peiraeus
>
> Mr. Batsakis:
>
> I state by my present (letter) that I received today from you the amount of two thousand dollars ($2,000.00) of United States of America money, which I borrowed from you for the support of my family during these difficult days and because it is impossible for me to transfer dollars of my own from America.
>
> The above amount I accept with the expressed promise that I will return to you again in American dollars either at the end of the present war or even before in the event that you might be able to find a way to collect them (dollars) from my representative in America to whom I shall write and give him an order relative to this.
>
> You understand until the final execution (payment) to the above amount an eight per cent interest will be added and paid together with the principal.
>
> I thank you and I remain yours with respects.
>
> The recipient,
>
> (Signed) *Eugenia The. Demotsis.*

Trial to the court without the intervention of a jury resulted in a judgment in favor of plaintiff for $750.00 principal, and interest at the rate of 8% per annum from April 2, 1942 to the date of judgment, totaling $1163.83, with interest thereon at the rate of 8% per annum until paid. Plaintiff has perfected his appeal.

The court sustained certain special exceptions of plaintiff to defendant's first amended original answer on which the case was tried, and struck therefrom paragraphs II, III and V. Defendant excepted to such action of the court, but has not cross-assigned error here. The answer, stripped of such paragraphs, consisted of a general denial contained in paragraph I thereof, and of paragraph IV, which is as follows:

> IV. That under the circumstances alleged in Paragraph II of this answer, the consideration upon which said written instrument sued upon by plaintiff herein is founded, is wanting and has failed to the extent of $1975.00, and defendant pleads specially under the verification hereinafter made the want and failure of consideration stated, and now tenders, as defendant has heretofore tendered to plaintiff, $25.00 as

> the value of the loan of money received by defendant from plaintiff, together with interest thereon.
>
> Further, in connection with this plea of want and failure of consideration defendant alleges that she at no time received from plaintiff himself or from anyone for plaintiff any money or thing of value other than, as hereinbefore alleged, the original loan of 500,000 drachmae. That at the time of the loan by plaintiff to defendant of said 500,000 drachmae the value of 500,000 drachmae in the Kingdom of Greece in dollars of money of the United States of America, was $25.00, and also at said time the value of 500,000 drachmae of Greek money in the United States of America in dollars was $25.00 of money of the United States of America. The plea of want and failure of consideration is verified by defendant as follows.

The allegations in paragraph II which were stricken, referred to in paragraph IV, were that the instrument sued on was signed and delivered in the Kingdom of Greece on or about April 2, 1942, at which time both plaintiff and defendant were residents of and residing in the Kingdom of Greece, and

> [Defendant] avers that on or about April 2, 1942 she owned money and property and had credit in the United States of America, but was then and there in the Kingdom of Greece in straitened financial circumstances due to the conditions produced by World War II and could not make use of her money and property and credit existing in the United States of America. That in the circumstances the plaintiff agreed to and did lend to defendant the sum of 500,000 drachmae, which at that time, on or about April 2, 1942, had the value of $25.00 in money of the United States of America. That the said plaintiff, knowing defendant's financial distress and desire to return to the United States of America, exacted of her the written instrument plaintiff sues upon, which was a promise by her to pay to him the sum of $2,000.00 of United States of America money.

Plaintiff specially excepted to paragraph IV because the allegations thereof were insufficient to allege either want of consideration or failure of consideration, in that it affirmatively appears therefrom that defendant received what was agreed to be delivered to her, and that plaintiff breached no agreement. The court overruled this exception, and such action is assigned as error. Error is also assigned because of the court's failure to enter judgment for the whole unpaid balance of the principal of the instrument with interest as therein provided.

Defendant testified that she did receive 500,000 drachmas from plaintiff. It is not clear whether she received all the 500,000 drachmas or only a portion of them before she signed the instrument in question. Her testimony clearly shows that the understanding of the parties was that plaintiff would give her the 500,000 drachmas if she would sign the instrument. She testified:

> *Q.* . . . who suggested the figure of $2,000.00?
> *A.* That was how he asked me from the beginning. He said he will give me five hundred thousand drachmas provided I signed that I would pay him $2,000.00 American money.

The transaction amounted to a sale by plaintiff of the 500,000 drachmas in consideration of the execution of the instrument sued on, by defendant. It is not contended that the drachmas had no value. Indeed, the judgment indicates that the trial court placed a value of $750.00 on them or on the other consideration which plaintiff gave defendant for the instrument if he

believed plaintiff's testimony. Therefore the plea of want of consideration was unavailing. A plea of want of consideration amounts to a contention that the instrument never became a valid obligation in the first place. National Bank of Commerce v. Williams, 125 Tex. 619, 84 S.W.2d 691.

Mere inadequacy of consideration will not void a contract. 10 Tex. Jur., Contracts, Sec. 89, p.150; Chastain v. Texas Christian Missionary Society, Tex. Civ. App., 78 S.W.2d 728, loc. cit. 731(3), Wr. Ref.

Nor was the plea of failure of consideration availing. Defendant got exactly what she contracted for according to her own testimony. The court should have rendered judgment in favor of plaintiff against defendant for the principal sum of $2,000.00 evidenced by the instrument sued on, with interest as therein provided. . . . As so reformed, the judgment is affirmed.

Reformed and affirmed.

Notes and Questions

1. *Adequacy of consideration.* Closely allied to the view of consideration as reflecting the exchange element of a transaction is the rule that, in ascertaining the presence of consideration, the courts will not "weigh" the consideration, or insist on a "fair" or "even" exchange. In his treatise, Williston put it thus: "It is an 'elementary principle that the law will not enter into an inquiry as to the adequacy of the consideration.' This rule is almost as old as the law of consideration itself." Williston on Contracts §115; see also Restatement (Second) §79 (no requirement of "equivalence in the values exchanged"). Comment *e* to §79 points out, however, that "gross inadequacy of consideration may be relevant'' to the application of other issues, such as fraud, mistake, lack of capacity, duress or undue influence. Although the first Restatement had no such explicit caveat, it is possible that courts nevertheless frequently "policed" bargains of this sort by finding a complete lack of consideration where in fact bargained-for consideration was present but was "grossly inadequate." Recall Newman & Snell's State Bank v. Hunter, discussed in Note 6 following the *Pennsy Supply* case, above, in which a widow's promise to pay her late husband's debts was not enforced. Present-day courts faced with a grossly unfair bargain coupled with other factors tending toward excuse are probably more likely to rely on other doctrines, as suggested by Comment *e* to Restatement (Second) §79, rather than on a lack of consideration. Cf. Howard v. Diolosa, 574 A.2d 995 (N.J. Super. Ct. 1990), *cert. denied,* 585 A.2d 409 (N.J. 1990) (sellers permitted to avoid sale of their home for grossly unfair price to purchaser who promised to lease it back to them on vague terms pursuant to lease that was never executed; no finding of fraud, mistake or undue influence, but transaction was unconscionable and the product of disproportionate bargaining power).

2. *Exploring the* ***Batsakis*** *case.* The trial court judge who decided the *Batsakis* case apparently concluded that the 500,000 drachmas that the defendant received from the plaintiff were then worth $750 in American money. Would the appellate court's disposition of the case have been any different if the trial court had accepted defendant's contention that the Greek money she received was worth only 25 American dollars? If you as trial judge had heard

and believed the defendant's story, would you have had any reluctance to enforce her promise to the plaintiff? Are there any legal theories other than lack of consideration that might have been invoked in her behalf? Consider the following facts:

In the spring of 1941, German, Italian, and Bulgarian forces invaded and occupied Greece, taking control of food and medical supplies. The Allies imposed a naval blockade that restricted supplies to Greece throughout the winter of 1941-1942, and the Germans systematically looted the country; the result was a devastating famine that killed many thousands of Greeks during that period, possibly as many as 40,000 in the Athens-Piraeus area alone. Rampant inflation during the same period drove the price of bread from 70 drachmas to 2,350. See generally Mark Mazower, Inside Hitler's Greece 23-41, 65-67 (1993). Against this backdrop, how should one evaluate the *Batsakis* case? Are these circumstances relevant, and if so, how?

3. *Change in the law's concern for fairness.* Some analysts, particularly those associated with the Critical Legal Studies movement, have seen in the ascendancy of the bargain theory of consideration a movement on the law's part away from an earlier willingness to police the "fairness" of bargains, and toward a view of contract particularly adaptable to commercial speculation in commodities and securities, where the parties determine the contract price of the commodity in question based on their appraisal of the market. The following excerpt is from a 1974 article by Professor Morton Horwitz, perhaps the leading proponent of this thesis.

> The most important aspect of the eighteenth century conception of exchange is an equitable limitation on contractual obligation. Under the modern will theory, the extent of contractual obligation depends upon the convergence of individual desires. The equitable theory, by contrast, limited and sometimes denied contractual obligation by reference to the fairness of the underlying exchange. . . .
>
> What we have seen of eighteenth century doctrines suggests that contract law was essentially antagonistic to the interests of commercial classes. The law did not assure a businessman the express value of his bargain, but at most its specific performance. Courts and juries did not honor business agreements on their face, but scrutinized them for the substantive equality of the exchange.
>
> For our purposes, the most important consequence of this hostility was that contract law was insulated from the purposes of commercial transactions. Businessmen settled disputes informally among themselves when they could, referred them to a more formal process of arbitration when they could not, and relied on merchant juries to ameliorate common law rules. And, finally, they endeavored to find legal forms of agreement with which to conduct business transactions free from the equalizing tendencies of courts and juries . . . .

Morton J. Horwitz, The Historical Foundations of Modern Contract Law, 87 Harv. L. Rev. 917, 923, 927 (1974). (This article was later incorporated into Morton J. Horwitz, The Transformation of American Law, 1780-1860 (1977).) Other writers have differed sharply with Horwitz and his colleagues over the extent to which classical contract law did indeed represent a change from past law in this respect. See, e.g., Alfred W. B. Simpson, The Horwitz Thesis and the History of Contracts, 46 U. Chi. L. Rev. 533 (1979). Whether the classical view of consideration did indeed mark a sharp break with the past or merely a change in emphasis, it does appear to be particularly consis-

tent with a society in which the law fully supports a "free market" economy, permitting commercial entities (individuals or corporations) to make whatever agreements of exchange they wish at whatever relative values they can agree to.

Comment: Option Contracts, Consideration, and Limiting the Power to Revoke an Offer

In the first section of this chapter we encountered the fundamental common law rule that an offer is freely revocable unless and until it is accepted by the offeree. This broad power of revocation exists even if the offer itself expressly states that it will not be revoked. See Restatement (Second) §42, Comment *a*. The offeror's power of revocation, however, may be bargained away in exchange for return consideration. Such a contract restricting the power to revoke an offer is an "option contract." See, e.g., Central Puget Sound Regional Transit Auth. v. Eastey, 144 P.3d 322, 326 (Wash. Ct. App. 2006) ("a promise not to revoke an offer, like all promises, requires consideration" to be enforceable). As stated by the court in Steiner v. Thexton, 226 P.3d 359, 365-366 (Cal. 2010), with regard to a land sale transaction:

> "[A]n option based on consideration contemplates two separate [contracts], i.e., the option contract itself, which for something of value gives to the optionee the irrevocable right to buy under specified terms and conditions, and the mutually enforceable agreement to buy and sell into which the option ripens after it is exercised. Manifestly, then, an irrevocable option based on consideration is a contract . . . ." (Torlai v. Lee (1969) 270 Cal.App.2d 854, 858 [76 Cal. Rptr. 239].) Conversely, an option without consideration is not binding on either party until exercised (id. at pp. 858-859); until then, the option " 'is simply a continuing offer which may be revoked at any time.' [Citation.]" (Thomas v. Birch (1918) 178 Cal. 483, 489 [173 P. 1102].)

See also Polk V. BHRGU Avon Properties, LLC, 946 So. 2d 1120 (Fla. Dist. Ct. App. 2006) (purported option contract without consideration is merely continuing offer that may be revoked any time before acceptance and will be terminated by the offeree's rejection or counter-offer).

Recall that the plaintiffs in Normile v. Miller claimed that an option contract was made, but the argument failed both because the court found there was not a promise to keep the offer open and also because there also was a lack of return consideration for the alleged promise not to revoke. In contrast with *Normile,* examples of enforceable option contracts are plentiful. See, e.g., Harley v. Indian Spring Land Co., 3 A.3d 992 (Conn. App. Ct. 2010) (payment of refundable $10,000 "good faith deposit" was consideration to bind option contract to purchase land for $1.2 million; detriment suffered by losing use of deposited money was sufficient consideration); Terraces of Sunset Park, LLC v. Chamberlin, 929 N.E.2d 1161 (Ill. App. Ct. 2010) (payment of nonrefundable $100,000 fee provided consideration for two-year option to purchase land for price of $1,750,000).

Option contracts serve a useful purpose in commercial relations, by permitting one who is considering a contractual transaction to delay committing herself to the contemplated exchange without fearing that such delay will