

St. Thomas v Clark

2010 NY Slip Op 30046(U)

January 11, 2010

Supreme Court, Wayne County

Docket Number: 63346/2007

Judge: John B. Nesbitt

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STATE OF NEW YORK
SUPREME COURT COUNTY OF WAYNE

GARY ST. THOMAS AND DAVID VANHANEHAN,
INDIVIDUALLY AND D/B/A ST. THOMAS &
VANHANEHAN LOGGING AND EXCAVATING,

Plaintiffs

-vs-

Index No. 63346

CRAIG S. CLARK,

Defendant

2007

CRAIG S. CLARK,

Third-Party Plaintiff

-vs-

FUTURE FOREST CONSULTING, INC. and
COREY FIGUEIREDO, INDIVIDUALLY,

Third-Party Defendants.

APPEARANCES: DEVALK, POWER & LAIR, P.C.
(Richard L. DeValk, Esq., of counsel)
Attorneys for Plaintiffs

WARREN WELCH, ESQ. LLC
(Warren Welch, Esq., of counsel)
Attorney for Defendant and Third-Party Plaintiff

CROUCHER AND JONES
(Walter W. Jones, Esq., of counsel)
Attorney for Third-Party Defendants

MEMORANDUM - DECISION

John B. Nesbitt, J.

All parties move for some form of relief under the summary judgment provisions of CPLR 3212. These actions arise out of two contracts entered into in the spring of 2007. The first contract dated April 2, 2007, styled "Management Agreement," identifies the contracting parties as Craig S.

Clark, denominated as “Owner,” and Future Forest Consulting, Inc., denominated as “Consultant.”¹ The second contract dated May 7, 2007, styled “Timber Sale Agreement,” identifies the contracting parties as Craig Clark, denominated as “Seller, ” and St. Thomas and VanHanehan Logging, denominated as “Buyer.”²

Craig Clark is the first named party in both contracts.³ Together with his wife, Clark owns and resides upon approximately 106 acres in the Town of Naples, Ontario County, known as 8921 Eelpot Road, 77 acres of which are shown on the County Real Property Tax Maps as Parcel #202.00-1-18.100.⁴ The second party to Management Agreement is Future Forest Consulting, Inc., whose principal is Corey Figueiredo.⁵ The Management Agreement memorializes the terms of Clark’s engagement of Future Forest to perform and superintend certain tasks regarding the harvest and sale of timber from Clark’s 77 acre parcel. Those tasks were essentially three-fold. First, Future Forrest and Clark were to mark the timber to be harvested (logged) and removed; second, Future Forrest, was to invite bidders to harvest and purchase the marked timber, through a prospectus, advertisement, and receipt of seal bids with specified surety deposit; and, thirdly, after contract award and execution thereof, Future Forrest was to supervise the logging operation for contract compliance, including cleanup. This last category of responsibility for Future Forest included

¹ See Exhibit A annexed to Affidavit of Corey Figueiredo, sworn to October 27, 2009, following Notice of Motion to Dismiss Pleadings and for Summary Judgment similarly dated, submitted by Third-Party Defendants, Future Forest Consulting, Inc., and Cory Figueiredo.

² See Exhibit E annexed to Affidavit of Richard L. DeValk, sworn to October 14, 2009 (hereinafter “DeValk Affidavit”), following Notice of Motion for Summary Judgment similarly dated, submitted by Plaintiffs, Gary St. Thomas and David VanHanehan, individually and doing business as St. Thomas & VanHanehan Logging and Excavating.

³ Craig Clark appears in these actions as Defendant and Third-Party Plaintiff, and is hereinafter referred to as “Clark” or “defendant.”

⁴ See Deposition Testimony of Clark (June 5, 2008), attached as Exhibit J to DeValk Affidavit, *supra* note 2, at p. 56-58 and Exhibit D annexed to Affidavit of Clark, sworn to October 30, 2009 (May 3, 2007 letter from Naples CEO Mueller to Figueiredo).

⁵ Future Forest Consulting, Inc. and Corey Figueiredo appear in these actions as Third-Party defendants and are hereinafter referred to as “Future Forest” and “Figueiredo,” respectively, or collectively as “third-party defendants.”

instruction that it ensure “sustainable harvest, including cull tree removal, and crop tree release.”⁶ Future Forest performed the first two contractual tasks resulting in acceptance of the bid of St. Thomas and VanHanehan Logging and Excavating (S&V Logging).⁷ The written agreement ensuing from the contract award to S&V Logging dated May 7, 2007, entitled Timber Sale Agreement reflected a total purchase price of \$13,800.00, \$2,070.00 by May 1, 2007, payable to Future Forest, \$5,865.00 payable to Clark by May 25, 2007, and another \$5,865.00 payable to Clark before any harvesting activities. The contract did not prescribe a schedule of when the harvesting was to occur, stating only that “[a]ll products will be removed on or before June 30th 2008 ...”⁸

Pursuant to and simultaneously with signing the Timber Sale Agreement, S&V Logging issued a check to Future Forest for the initial deposit on May 7, 2009, negotiated on May 9th.⁹ That again pursuant to the Timber Sale Agreement, S&V Logging issued a check to Clark in the amount of \$5,865.00 on May 25th, which VanHanehan attempted to deliver to Clark’s home on two occasions unsuccessfully, finding no one home to receive it.¹⁰ VanHanehan then mailed the check

⁶ Figueiredo explains that these are terms denoting certain forest management practices; to wit, “[s]ustainable harvest is harvesting of trees on a sustainable basis [, c]ulture removal is removal of defective, unhealthy trees and crop tree release is releasing trees for enhanced regeneration potential.” See Exhibit K annexed Figueiredo Affidavit, *supra* note 1, at p. 17.

⁷ VanHanehan Logging and Excavating is a partnership involving Gary St. Thomas and David VanHanehan, who appear in these actions individually and on behalf of the partnership, as plaintiffs. The partnership will herein be referred to as S&V Logging, and individual plaintiffs by their respective surnames.

⁸ The contract further stated that after this June 30, 2008 outside completion date, “[a]ll said products remaining on said premises ... will revert to SELLER and any and all payments which have been made will be retained by SELLER as liquidated damages for such non-removal.”

⁹ See DeValk Affidavit, *supra* note 2, at ¶6 and Exhibit H.

¹⁰ *Id.* and Exhibit G (check copy) and Exhibit F (deposition transcript) at p. 15, lines 10-12. Clark responds on this point that,

“To the best of my knowledge, I was never contacted by David VanHanehan regarding payment prior to receiving payment prior to receiving [his] letter on June 6, 2007. He stated in his testimony that he attempted to deliver the check on several occasions. However, he never left a card, note or telephone number at my home and I never received a telephone message at my home asking me to contact him.

to Clark by letter postmarked June 5th, which was received by Clark the next day.¹¹

On the day that Clark received the check - June 6th - he wrote and mailed a letter to S&V Logging enclosing the check, the letter stating:

To Whom It May Concern:

On May 24, 2007, I called Corey Figueiredo, President of Future Forest Consulting Inc. The purpose of this call was to inform Corey that the current schedule for harvesting of trees on our property is not feasible at this time.

If you were not aware of this change, I apologize for the inconvenience. I am returning your check at this time.¹²

The reference to “current schedule” reflected the parties’ original understanding that the harvesting of timber pursuant to the Timber Sale Agreement was to start as soon as practicable after S&V Logging had completed a logging contract “down the road from Craig [Clark].”¹³

Prior to S&V Logging receiving this letter and check from Clark, they had apparently completed the nearby project and were mobilizing to commence the Clark project. Unbeknown to the loggers, Clark had second thoughts about proceeding with the contract, and “for a variety of reasons” did not want the logging to begin because “the time was not right.”¹⁴ One reason for Clark’s change of mind centered upon his wife’s displeasure about the effect of the logging upon the animal habitat.¹⁵ Another reason was Clark’s desire to cut a different exit route for the loggers from that contemplated at the time of the contract, and that would have to wait until Clark’s busy season

See Clark Affidavit, supra note 4, at ¶9.

¹¹ See Exhibit B attached to Clark Affidavit, supra note 4.

¹² See Exhibit C attached to Clark Affidavit, supra note 4.

¹³ See Exhibit F attached to DeValk Affidavit, supra note 2, at p.3 ¶10 (VanHanehan Deposition p.42, Clark Deposition p.15).

¹⁴ See Clark Affidavit, supra note 4, at ¶6.

¹⁵ See Exhibit F to DeValk Affidavit, supra note 2, at p. 60 (Clark Deposition)([“My wife] said that she wasn’t happy that we were going into the woods when all the animals were having their babies. She’s real big on that.”)

as a painter was over.¹⁶ Lastly, Clark had heard that logging in the Spring was not optimal, because “the trees were in a growth period and their bark was soft and that trees could be damaged that weren’t going to be cut.”¹⁷

The matter came to a disagreeable confrontation on June 11th, when S&V Logging had moved some equipment onto Clark’s property and were readying to begin. Harsh words were exchanged. Clark told the loggers to remove their equipment and, in not uncertain terms, they were not to proceed with the contract. VanHanehan told Clark that to delay the contract would cost Clark \$2,000.00, ostensibly because of the cost of demobilizing and remobilizing their equipment, and other losses attributable to not being able to essentially continue operations by shifting to a new site on the same road.¹⁸ Apparently the discussion never went beyond this point. VanHanehan was adamant about beginning as soon as practicable, and Clark was equally clear, telling VanHanehan that “he [Clark] didn’t want him on his property and he wanted to cancel the contract,”¹⁹ According to Figueiredo, who came to the site during discussions for the purpose of laying out the work,” Clark had called him a couple of weeks before to explore the options “if he wanted to get out of the contract,” and “delaying execution of the contract” was not one of the options Clark discussed.²⁰

The June 11th confrontation ended the parties’ relationship and this litigation ensued. The legal issue here is rather simple. The plaintiffs were ready, willing, and able to perform the contract. They had complied with the contract as of June 11th, and upon issuance of the Town permit and making final payment, they were mobilized to proceed in accordance with the contract. It is clear that Clark was not going to allow them to proceed in any event at that time, or possibly any time. The Restatement of Contracts states that a contract repudiation giving immediate rise to breach of contract occurs when a contractually obligated party makes “[a] positive statement to the promisee

¹⁶ Id. at 59.

¹⁷ Id.

¹⁸ See Figueiredo Deposition p 42.

¹⁹ Id at p.34. See also p.32 to 33 (“Craig [Clark] didn’t want them on his property [and he] didn’t want to have his trees cut.”)

²⁰ Id. at 30.

... indicating that the promisor will ... not perform his contractual duties.”²¹ The same facts often are characterized as an anticipatory breach of contract:

“According to the general view prevailing now in nearly all American jurisdictions, where there has been an anticipatory breach of a contract by one party thereto the other party may treat the entire contract as broken and may sue immediately for the breach. An anticipatory breach of contract is one committed before the time has come when there is a present duty of performance, and is the outcome of words or acts evincing an intention to refuse performance in the future. Such a breach precedes the time prescribed for performance or at least the time of when tender of performance has been proffered.”²²

The action of Clark under any view of the facts as revealed in the record can only be viewed as a contract repudiation and anticipatory breach thereof if it can be said that Clark did not have the right to refuse plaintiffs’ performance until a time convenient for him. The contract, however, did not give Clark the right to dictate the time of performance, except its outside completion date of June 30, 2008. The contract gave plaintiffs the unfettered right to commence logging in accordance with the contract as soon as the contractual conditions precedent were complied with. The Defendant refused the initial payment, and repudiated the contract before the second payment was due, i.e. commencement of work. The Town permit was not an express nor even an implied condition to plaintiffs’ contractual rights. However, in any event, the record shows that defendant’s agent had taken the steps to secure the permit and reasonably expected the same within a day or two of the June 11th meeting.

The Court does not make light of the reasons behind the defendant’s decision not to proceed with the contract. However, the horse was already out of the barn when he rethought the matter. Accordingly, the motion of the plaintiffs is granted on the issue of liability and trial directed on the issue of damages. Further, the third-party complaint against Figueiredo is dismissed. No cognizable breach of contract action or breach of agency or fiduciary duty is plead or prima facially evident from the record. All other motions are denied.

²¹ See Restatement, Contracts §318, quoted in Calamari, Contracts §176.

²² See 17 Am. Jur. 2d §448.

The attorneys for the prevailing parties shall submit one proposed order in accordance with this decision upon notice to, or approved as to form, by the defendant's counsel.

Dated: January 11, 2010
Lyons, New York



JOHN B. NESBITT
Acting Supreme Court Justice

STATE SUPREME AND COUNTY COURT

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