SUPREME COURT OF VERMONT

Bourdeau Bros., Inc. v. Boissonneault Family Farm, Inc.

2020 VT 35 · No. 2019-166 · Decided May 8, 2020

SUMMARY

The Vermont Supreme Court held that whether an attorney's-fees provision in invoices materially alters a sales contract between merchants under 9A V.S.A. § 2-207 is a fact-specific question requiring consideration of the circumstances of the transaction. The court remanded for findings on whether the grain supplier was entitled to attorney's fees, while affirming the damages calculation, dismissal of the farm's water-use counterclaim, and personal liability of Jay Boissonneault.

CASE DETAILS

COURT	Supreme Court of Vermont
WRITING FOR THE COURT	Cohen, J.; Reiber, C.J.; Robinson, J.; Eaton, J.; Carroll, J.
JURISDICTION	Vermont
DECIDED	May 8, 2020
DOCKET	2019-166
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Both parties appealed from a bench-trial judgment in a collection action. The grain supplier challenged the denial of attorney's fees; defendants cross-appealed the damages calculation, dismissal of their water-use counterclaim, and finding of personal liability against Jay Boissonneault.
STANDARD OF REVIEW	The court reviewed factual findings in the light most favorable to the prevailing party and affirmed findings supported by credible evidence. Conclusions of law were upheld when reasonably supported by the findings, while interpretation of 9A V.S.A. § 2-207 was reviewed without deference.
PRECEDENTIAL VALUE	Published Vermont Supreme Court opinion; precedential.
PARTIES	Bourdeau Bros., Inc. v. Boissonneault Family Farm, Inc., Jay Boissonneault

TOPICS

uniform commercial code | contract interpretation | commercial litigation | appellate procedure | remedies

PRACTICE AREAS

contracts | uniform commercial code | commercial litigation | appellate procedure | remedies

QUESTIONS PRESENTED

1. Whether an attorney's-fee provision included in invoices became part of the parties' contract under 9A V.S.A. § 2-207.
2. Whether the attorney's-fee provision materially altered the parties' sales contract as a matter of law or whether material alteration presented a factual question.
3. Whether the trial court improperly calculated damages by including amounts relating to grain purchased in 2014.
4. Whether defendants were entitled to recover damages for water removed by plaintiff from a pond on leased farmland.
5. Whether Jay Boissonneault was personally liable for the company's grain debt.

HOLDINGS

1. The parties were merchants for purposes of the UCC, and § 2-207(2)(b) applied to the agreement for the purchase of grain.
2. Whether an additional term, including an attorney's-fee provision, materially alters a sales contract between merchants under § 2-207(2)(b) is a question of fact determined from the circumstances of the particular case.
3. Because consent to an additional term is presumed when no timely objection is made, the party opposing inclusion bears the burden of demonstrating surprise or hardship sufficient to establish a material alteration.
4. The damages calculation was proper because the amount owed for 2014 grain had been paid in January 2015 and was not included in the award.
5. Defendants were not legally entitled to damages for water removed from the pond because their lease did not give them exclusive control over the water and the landowner had authorized plaintiff's use.
6. The court would not disturb the finding of Jay Boissonneault's personal liability because he invited the alleged error by asserting below that he, rather than the corporation, was responsible for the grain orders.

KEY QUOTATIONS

> *"Accordingly, we hold that the test for a material alteration under 9A V.S.A. § 2- 207 is whether the additional term would result in surprise or hardship to the non-assenting party."* (¶ 11)

> *"We adopt the majority approach and hold that the question of whether additional terms, including attorney's fees provisions, materially alter a sales contract between merchants under § 2-207(2)(b) is a question of fact to be determined under the circumstances of the particular case."* (¶ 15)

> *“The invited error doctrine holds that an action induced by an appellant cannot ordinarily be a ground of error.”* (¶ 18)

FACTUAL BACKGROUND

Bourdeau Bros. supplied grain to Jay Boissonneault and Boissonneault Family Farm, Inc. under an oral agreement beginning in 2012. Each delivery was accompanied by an invoice containing finance-charge and attorney's-fee language; defendants paid the invoiced amounts until they stopped paying in 2015. The trial court found defendants owed $27,564.97 for grain delivered in 2015, dismissed defendants' counterclaim concerning water taken from a pond, and held Jay Boissonneault personally liable.

PROCEDURAL HISTORY

Bourdeau Bros. sued for unpaid grain bills and later added Jay and Cathy Boissonneault and Boissonneault Family Farm, Inc. as defendants. After a two-day bench trial, the trial court dismissed the claims against Cathy Boissonneault, awarded Bourdeau Bros. $27,564.97 including interest, denied attorney's fees, dismissed defendants' counterclaim for water-related damages, and found Jay Boissonneault personally liable. The Vermont Supreme Court remanded solely for further findings concerning attorney's fees and otherwise affirmed.

DISPOSITION

```
reversed_and_remanded
```

REMAND INSTRUCTIONS

Remand for the trial court to make factual findings and reconsider whether Bourdeau Bros. is entitled to attorney's fees under the invoice provision. The judgment is otherwise affirmed.

CASES CITED

- Rubin v. Sterling Enterprises, Inc., 164 Vt. 582, 588, 674 A.2d 782, 786 (1996)
- Lofts Essex, LLC v. Strategis Floor & Decor Inc., 2019 VT 82, ¶ 17, __ Vt. __, 224 A.3d 116
- Highgate Assocs., Ltd. v. Merryfield, 157 Vt. 313, 315-16, 597 A.2d 1280, 1281-82 (1991)
- DJ Painting, Inc. v. Baraw Enters., Inc., 172 Vt. 239, 246, 776 A.2d 413, 419 (2001)
- In re Treetop Dev. Co. Act 250 Dev., 2016 VT 20, ¶ 9, 201 Vt. 532, 143 A.3d 1086
- Aube v. O'Brien, 140 Vt. 1, 4, 433 A.2d 298, 300 (1981)
- In re Montagne, 431 B.R. 94, 113 (Bankr. D. Vt. 2010)
- Am. Ins. Co. v. El Paso Pipe & Supply Co., 978 F.2d 1185, 1190-91 (10th Cir. 1992)
- Luedtke Eng'g Co. v. Ind. Limestone Co., 740 F.2d 598, 600 (7th Cir. 1984)
- St. Charles Cable TV, Inc. v. Eagle Comtronics, Inc., 687 F. Supp. 820, 827 (S.D.N.Y. 1988)
- Palmer G. Lewis Co. v. ARCO Chem. Co., 904 P.2d 1221, 1229 (Alaska 1995)
- C9 Ventures v. SVC-W., L.P., 136 Cal. Rptr. 3d 550, 568 (Cal. Ct. App. 2012)
- Oakley Fertilizer, Inc. v. Cont'l Ins. Co., 276 S.W.3d 342, 348 (Mo. Ct. App. 2009)

- Stanley-Bostitch, Inc. v. Regenerative Envtl. Equip. Co., 786 A.2d 1063, 1066 (R.I. 2001)
- Comark Merch., Inc. v. Highland Grp., Inc., 932 F.2d 1196, 1201-03 & n.8 (7th Cir. 1991)
- Bayway Ref. Co. v. Oxygenated Mktg. & Trading A.G., 215 F.3d 219, 223 (2d Cir. 2000)
- 2 N & D Fashions, Inc. v. DHJ Indus., Inc., 548 F.2d 722, 726 (8th Cir. 1976)
- Coosemans Specialties, Inc. v. Gargiulo, 485 F.3d 701, 708 (2d Cir. 2007)
- Parker v. Parker, 2012 VT 20, ¶ 13, 191 Vt. 222, 45 A.3d 48
- A.E. Robinson Oil Co. v. Cty. Forest Prods., Inc., 2012 ME 29, ¶ 10 n.3, 40 A.3d 20
- Johnson Tire Serv., Inc. v. Thorn, Inc., 613 P.2d 521, 523 (Utah 1980)
- Herzog Oil Field Serv., Inc. v. Otto Torpedo Co., 570 A.2d 549, 551-52 (Pa. Super. Ct. 1990)
- Rocheux Int'l of N.J., Inc. v. U.S. Merchs. Fin. Grp., Inc., 741 F. Supp. 2d 651, 686 (D.N.J. 2010)
- Univ. of Vt. & State Agric. Coll. v. Ward, 104 Vt. 239, 158 A. 773, 784 (1932)
- State v. Longe, 170 Vt. 35, 44 n.1, 743 A.2d 569, 575 n.1 (1999)