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Contracts: Promissory Estoppel

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RECENT DECISIONS

Contractors: Promissory Estoppel—The plaintiff, a general contractor, was preparing a bid for a school construction project. According to the custom of the trade, he received bids by telephone from numerous subcontractors for various parts of the construction project, among which was a bid from the defendant for the paving work. Since the defendant's bid of \$7,131 was the lowest received for the paving work, the plaintiff used it in computing his general bid, which he then submitted along with the required ten per cent bidder's bond and the name of the defendant as subcontractor for the paving. The plaintiff was awarded the general contract, and the next day he went to the defendant's office to accept the paving bid. Before he did so, however, the defendant told him that an error had been made in the bid. When the defendant refused to do the job for less than \$15,000, the plaintiff sued and recovered the difference between the defendant's original bid and the cost of engaging another firm to do the work. The Supreme Court of California, in *Drennan v. Star Paving Co.*,¹ affirmed the judgment, on the grounds that the plaintiff's detrimental reliance made the defendant's bid irrevocable. In holding that the defendant's attempted revocation was ineffective, the court presented an unusual application of the doctrine of promissory estoppel, as expressed in Section 90 of the Restatement of Contracts.² Noting that Section 90 has been applied in numerous California cases involving commercial transactions,³ the court reasoned that this section is analogous to Section 45 of the Restatement of Contracts,⁴ and comment (b) thereunder.⁵ It held that, since an offer for a unilateral contract includes an implied subsidiary promise not to revoke the offer if part of the requested performance is given. "Reasonable reliance resulting in a foreseeable prejudicial change of position affords a compelling basis also for implying a subsidiary promise not to

¹ 51 Cal. 2d 409, 333 P. 2d 757 (1958).

² "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by the enforcement of the promise." RESTATEMENT, CONTRACTS, §90 (1932).

³ *Edmonds v. County of Los Angeles*, 40 Cal. 2d 642, 255 P. 2d 772 (1953); *Frebank Co. v. White*, 152 Cal. App. 2d 522, 313 P. 2d 633 (1957); *Wade v. Markwell & Co.*, 118 Cal. App. 2d 410, 258 P. 2d 497 (1953); *West v. Hunt Foods Co.*, 101 Cal. App. 2d 597, 225 P. 2d 978 (1950); *Hunter v. Sparling*, 87 Cal. App. 2d 711, 197 P. 2d 807 (1948); see 18 Cal. Jur. 2d 407-408; 5 Stan. L. Rev. 783 (1953).

⁴ "If an offer for a unilateral contract is made, and part of the consideration requested in the offer is given or tendered by the offeree in response thereto, the offeror is bound by a contract, the duty of immediate performance of which is conditional on the full consideration being given or tendered within the time stated in the offer, or, if no time is stated therein, within a reasonable time." RESTATEMENT, CONTRACTS, §45 (1932).

⁵ "The main offer includes as a subsidiary promise, necessarily implied, that if

revoke an offer for a bilateral contract."⁶ Even though the defendant's bid was an offer for a bilateral contract, and the plaintiff had not accepted it before the attempted withdrawal, the defendant nevertheless should have foreseen the substantial possibility that his bid would be the lowest received, and that the plaintiff would therefore include it in his own bid. When the plaintiff was awarded the general contract, he incurred a prejudicial change of position in reliance upon the defendant's bid, and therefore the court held that injustice could be avoided only by enforcing the implied subsidiary promise not to revoke the bid.

The *Drennan* decision is directly contrary to the decision reached in an earlier federal case, *James Baird Co. v. Gimbel Bros.*,⁷ which involved a similar fact situation. In that case the defendant, after having offered to sell linoleum to the plaintiff contractor at a stated price "for prompt acceptance after the general contract has been awarded" to the plaintiff, withdrew his bid after the plaintiff had submitted a general bid which included the linoleum prices quoted by the defendant.⁸

The two cases are in substantial agreement in that they both reject the theory that the plaintiff's use of the subcontractor's bid would itself constitute an acceptance of the offer, thereby creating a bilateral contract, or that the defendant had offered the plaintiff an irrevocable option in exchange for the use of his figures in computing the general bid. It was evident in both cases that the subcontractor had not bargained merely for the use of his bid, but rather he had contemplated the normal communication of an acceptance by the plaintiff. On the question of the application of promissory estoppel, however, the two decisions present contrasting viewpoints. In the *James Baird Co.* case, Judge Learned Hand, speaking for the Second Circuit, expressly rejects the possibility of applying the doctrine where the offeror has proposed a bargain or exchange, *i.e.*, expected a promise or a specified act in return for his offer. Thus, he would apparently limit the doctrine to the enforcement of donative promises.⁹ This view has been

part of the requested performance is given, the offeror will not revoke his offer, and that if tender is made it will be accepted. Part performance or tender may thus furnish consideration for the subsidiary promise. Moreover, merely acting in justifiable reliance on any offer may in some cases serve as sufficient reason for making a promise binding (see section 90). RESTATEMENT, CONTRACTS, §45, comment b (1932).

⁶ *Drennan v. Star Paving Co.*, *supra*, note 1, at 760.

⁷ 64 F. 2d 344 (2d Cir. 1933).

⁸ Although the situation differs from that of the *Drennan* case in that the subcontractor withdrew his bid before the general contract had been awarded to the plaintiff, and therefore the plaintiff in turn could presumably withdraw his bid, the element of detrimental reliance would still exist, because if the plaintiff withdrew his bid he would probably forfeit his deposit and in addition lose a profitable contract.

⁹ Judge Hand stated that the doctrine of promissory estoppel "is to be chiefly found in those cases where persons subscribe to a venture, usually charitable, and are held to their promises after it has been completed." Although recog-

criticised by some writers.¹⁰ However, Professor Corbin, in his treatise on contracts, has expressed approval of Judge Hand's decision apparently on the theory that the defendant could not be expected to foresee that the plaintiff would rely on his bid.¹¹

While the court in the *Drennan* case held that the defendant should have foreseen the plaintiff's reliance, a more difficult problem is whether or not such reliance was reasonable, since there are several legal devices by which he could have bound the subcontractor to hold his offer open until after the general contract had been awarded. For example, he could have entered a bilateral contract with the defendant, conditional upon the general contract being awarded to the plaintiff.¹² He might also have obtained an irrevocable option from the defendant, the consideration for which might have been the use of the defendant's bid, or he might have required the defendant to put up a performance bond. It does not seem that such binding devices would be feasible, however, in the usual contractor-subcontractor relationship, with its informal bidding procedures, and with the large number of bids that are received by the general contractor.¹³

Another gauge by which the reasonableness of the plaintiff's reliance was determined was the attitude of the plaintiff after he had been awarded the general contract. He could not delay his acceptance of the subcontractor's offer, causing the burden of changes in the

nizing that it has been applied much more broadly as generalized in section 90 of the Restatement of Contracts, he held that "it does not apply to the case at bar. Offers are ordinarily made in exchange for a consideration . . . In such cases they propose bargains; they presuppose that each promise or performance is the inducement to the other. . . . There is no room in such a situation for the doctrine of promissory estoppel." *James Baird Co. v. Gimbel Bros.*, *supra*, note 7, at 346.

¹⁰ 20 Va. L. Rev. 214 (1933); 28 Ill. L. Rev. 419 (1933); 1 WILLISTON, CONTRACTS, §139 (Rev. ed. 1936) states: "There would seem, however, compelling reasons of justice for enforcing promises, where injustice cannot otherwise be avoided, where they have led the promisee to incur any substantial detriment on the faith of them, not only when the promisor intended, but also when he should reasonably have expected such detriment would be incurred, though he did not request it as an exchange for his promise."

¹¹ "One who submits a bid for supplying materials requests and has reason to foresee an acceptance . . . but usually he should not be held to foresee that the offeree would make a contract with a third person at a price that is determined by the terms of the bid, before the bid itself has been accepted and without notifying the bidder that his bid is going to be so used. Even if he knows that his bid will be used on some larger contract, it should still be revocable by notice given while the offeree's bid on the larger contract is still revocable at will." 1 CORBIN, CONTRACTS, §51 (1959).

¹² This type of agreement was suggested by Judge Hand in *James Baird Co. v. Gimbel Bros.*, *supra*, note 7, at 345; see also *Frederick Raff Co. v. Murphy*, 110 Conn. 234, 147 Atl. 709 (1929).

¹³ *e.g.*, in *Drennan v. Star Paving Co.*, *supra*, note 1, the plaintiff received between 50 and 75 bids by telephone, all on the final day of bidding. For an informative survey of bidding procedures followed by contractors and subcontractors in the state of Indiana, see Schultz, *The Firm Offer Puzzle: A Study of Business Practice in the Construction Industry*, 19 U. of Chi. L. Rev. 237 (1952).

market price to fall upon the subcontractor, or attempt to "shop around" for a lower bid than the one he had used, or attempt to reopen bargaining with the subcontractor and at the same time claim a continuing right to accept the original offer.¹⁴ The fact that the plaintiff was required to include in his own bid the names of subcontractors who were to perform one-half of one per cent or more of the construction work, one of which was the defendant, would seem to be some indication, at least, that the plaintiff would be bound to accept the defendant's bid.

Finally, the element of mistake was considered by the court in determining whether the plaintiff's reliance was reasonable. There is practically universal agreement that where an offeree knows or has reason to know that a material mistake has been made by the offeror, the offeree cannot take advantage of such mistake, and attempt to bind the offer to a contract.¹⁵ In the *Drennan* case the plaintiff had no reason to suspect that the defendant had made a mistake, since there was usually a variance of as much as 160 per cent between the highest and lowest bids for paving work in that particular locality.¹⁶ Therefore the defendant's unilateral mistake was not a ground for revocation of the bid.

It appears that the only other reported decision in which a general contractor was able to recover on the theory of promissory estoppel from a subcontractor who had refused to perform after the general contractor had relied on his bid, was *Northwestern Engineering Co. v. Ellerman*,¹⁷ cited by the court in the *Drennan* case. In the *Northwestern* case, however, the plaintiff entered into a detailed written agreement with the defendant, whereby the defendant promised to do the sewer construction work at a specified price in the event that the plaintiff was awarded a general contract for the construction of an airbase. Although the South Dakota Supreme Court agreed with the trial court that the written agreement itself failed for lack of consideration, since the plaintiff was not bound to submit a bid on the airbase project, nevertheless the plaintiff did in fact submit a bid, relying on

¹⁴ *Drennan v. Star Paving Co.*, *supra*, note 1, at 760; *R. J. Daum Construction Co. v. Child*, 122 Utah 194, 247 P. 2d 817 (1952).

¹⁵ WILLISTON, CONTRACTS, §94 (Rev. Ed. 1936); 3 CORBIN, CONTRACTS, §610 (1950); *Robert Gordon, Inc. v. Ingersoll-Rand, Inc.*, 117 F. 2d 654 (7th Cir. 1941). In the last cited case the plaintiff was unable to recover damages from a manufacturer who had quoted a price of \$26,450 for one air conditioning unit. The plaintiff, claiming that the quoted price was for two units, included the figure in his own bid for the installation of air conditioning equipment in the University of Chicago. The court, although it made the general statement that the fact that a transaction is commercial in nature should not preclude the application of promissory estoppel, held that the plaintiff should have realized that the quoted price was for one unit.

¹⁶ *Drennan v. Star Paving Co.*, *supra*, note 1.

¹⁷ 69 S.D. 397, 10 N.W. 2d 879 (1943), reversed on other grounds, 71 S.D. 236, 23 N.W. 2d 273 (1946).

defendant's figures, and was awarded the contract before the defendant's attempted withdrawal. Under these circumstances, the court said:

Obviously it would seem unjust and unfair, after appellant was declared the successful bidder, and imposed with all the obligations of such, to allow respondents to retract their promise and permit the effect of such retraction to fall upon the appellant.¹⁸

It should be noted that the South Dakota court did not imply a subsidiary promise to hold the bid open, as did the California court, requiring the plaintiff to accept the offer within a reasonable time after the general contract had been awarded. Instead, Section 90 of the Restatement of Contracts was applied directly to the subcontractor's bid, making it a "binding promise," presumably without requiring the plaintiff to tender an acceptance in order to create an enforceable contract. It would seem that in this respect the *Drennan* decision is more equitable to the subcontractor, since the plaintiff cannot "shop around" for a lower bid after the general award, and take the defendant's offer only if he finds that he can do no better elsewhere. Here the defendant's promise is "binding" only in the sense that it cannot be withdrawn until the plaintiff has had a reasonable opportunity to accept the bid. Promissory estoppel is thus applied to the implied promise to hold the bid open, and not to the bid itself.

In view of the apparently weaker bargaining position of the subcontractor, the effect of the *Drennan* decision would seem to put him at an even greater disadvantage, were it not for the fact that he can avoid being bound by merely reserving the right to revoke his bid at any time before the general contractor has accepted it. The court was able to imply the subsidiary promise to hold the bid offer open only because the defendant had failed to reserve that right. As long as he can withdraw with impunity, either when the general contractor does not promptly tender an acceptance after the general award, or in any event if he indicates unequivocally that his bid will be subject to withdrawal at any time before acceptance, the subcontractor need not fear that the effect of the *Drennan* decision is to tie his hands as soon as the general contractor relies on his bid. With these safeguards for the subcontractor, the decision is an equitable one, and helps to clarify the legal implications involved in general contractor-subcontractor bidding procedures.

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¹⁸ *Id.* at 883.