Marquette Law Review

Volume 10
Issue 2 *February 1926*

Article 1

Specific Performance of Contracts for Delivery of Personal Property

William J. Morgan

Marquette Law Review

VOL. 10 FEBRUARY, 1926 No. 2

SPECIFIC PERFORMANCE OF CONTRACTS FOR DELIVERY OF PERSONAL PROPERTY

WILLIAM J. MORGAN*

IT IS the writer's purpose to discuss here the remedy of specific performance of contracts calling for the delivery of ordinary kinds of personal property such as wood, clay, vegetables, and so forth, and not unique articles such as heirlooms, objects of art, controlling stock in a corporation, and so forth, the specific delivery of unique personality being required almost as a matter of course.

The discussion following seeks to demonstrate that a rather common expression of courts and even text writers: "That equity will not decree the specific performance of a contract for the delivery of personal property, which is not unique (such as heirlooms, and so forth)" is a misstatement of a rule of law, and that whether the remedy of specific performance can be successfully invoked has no relation to the character of the property involved.

That delivery of personal property in specie will be required in proper cases as readily as the conveyance of real property will be decreed.

The true test is of course the adequacy of the remedy at law. The misconception of the rule doubtless arises from the fact that in the majority of cases damages are adequate compensation for breach of a contract for the delivery of personal property.

Whether damages are adequate, however, depends upon the circumstances of the case rather than in the nature of the property, except in the case of those classes of property previously mentioned as calling for specific delivery almost as a matter of course.

The New Jersey court has admirably stated the true rule in the following language:

Courts of equity decree this specific performance of contracts not upon any distinction between realty and personalty, but because

* Professor at Marquette University School of Law and former Attorney-General, State of Wisconsin.

damages at law may not in the particular case afford a complete remedy. Thus a court of equity decrees performance of a contract for land not because of the real nature of the land but because damages at law, which must be calculated upon the general money value of the land, may not be a complete remedy to the purchaser to whom the land may have a peculiar and special value. Our court of equity will not generally decree performance of a contract for the sale of stock or goods, not because of their personal nature, but because damages at law, calculated upon the market price of the stock or goods, are as complete a remedy to the purchaser as the delivery of the stock or goods contracted for inasmuch as with the damages he may purchase the same quantity of the like stock or goods.[1]

It must be borne in mind that the mere existence of a remedy at law does not preclude equity from decreeing specific performance of a contract that has been breached. The remedy at law must be adequate to foreclose the right to specific performance. To be adequate the remedy must be clear, efficient and commensurate with the right. Thus where the owner of a contract for the purchase of real estate had agreed to convey it to a third party, the Michigan court said: "If it were conceded that equity would not enforce specifically a contract for the purchase of land, where damages would afford an adequate remedy, we should nevertheless be justified in enforcing this, because of the contract obligations which have grown out of it."

Thus with the concession that damages would otherwise be adequate the foregoing case illustrates how a circumstance (the agreement to reconvey) makes the legal remedy entirely inadequate and incommensurate with the right to a conveyance, for the purchaser himself being liable for damages to the person to whom he has agreed to convey has no assurance that a jury in that case will not award greater damages than he may recover if he were relegated to a suit at law for damages.

Where a company engaged in making tomato catsup and canning tomatoes contracted for the grower's crop of tomatoes, the New Jersey court decreed specific performance of the grower's contract to deliver the tomatoes. In ordering the decree the court said:

The fundamental principles which guide a court of equity in decreeing the specific performance of contracts are essentially the same whether the contracts relate to realty or to personalty. . . . . No inherent difference between real estate and personal property controls the exercise of the jurisdiction. Where no adequate remedy at law exists, specific performance of a contract touching the sale of personal property will be decreed with the same freedom as in the case of a contract for the sale of land. . . . . In our own state contracts for the sale of chattels have been frequently enforced and the inadequacy of the remedy at law, based on the characteristic features of the contract or peculiar

[1] *Cutting v. Dana*, 25 N.J. Eq. 265 (271).

situation and needs of the parties, have been the principal grounds of relief.[2] I think it clear that the present case falls well within the principles defined by the cases already cited from our own state. . . . . It seems immaterial whether the entire acreage is contracted for to insure the full pack, or whether a more limited acreage is contracted for and an estimated available open market depended upon for the balance of the pack. In either case a refusal of the parties who contract to supply a given acreage to comply with their contracts leaves the factory helpless, except to whatever extent an uncertain market may perchance supply the deficiency. . . . . The very existence of such contracts proclaims their necessity to the economic management of the factory. . . . . The business and its needs are extraordinary in that the maintenance of all of the conditions prearranged to secure the pack are a necessity to insure the successful operation of the plant. . . . . The objection that to specifically perform the contract personal services are required will not divest the court of its powers to preserve the benefits of the contract. Defendant may be restrained from selling the crop to others, and, if necessary, a receiver can be appointed to harvest the crop.[3]

The New York Court granted specific performance of a contract for the delivery of pulpwood for reasons stated as follows:

It is apparent that the plaintiff's remedy at law is inadequate. Any attempt to prove damages that might result to the plaintiff by the nonperformance on the part of the defendant would encounter insuperable difficulties, as the contract extends over a term of ten years and at the election of the plaintiff may cover a period of ten years more. The market price of pulp wood, the cost of transportation and the rate of wages, all essential in determining damages, would be unknown quantities in a problem involving so long a period. Furthermore the contingencies contemplated by the contract of the destruction in whole or any part of the timber by fire or the taking of all or some portion of the land by the state in the exercise of the right of eminent domain, prevent an actual computation of damages in the future.[4]

It is sometimes said that specific performance will not be decreed where a contract is not mutual. This mutuality of course refers to mutuality of remedy but it does not mean that the remedy of each party must be identical. Plaintiff may be entitled to specific performance although the only remedy of defendant in case of plaintiff's breach would be damages but where either party in the event of breach has a remedy, there is sufficient mutuality to justify a decree for specific performance, if the plaintiff's remedy at law is inadequate.

---

[2] *Furman v. Clark,* 11 N.J. Eq 306; *Cutting v. Dana,* 25 N.J. Eq. 265, 271; *Rothholz v. Schwartz,* 46 N.J. Eq. 477, 481, 19 Atl. 312; *Gannon v. Toole,* (N.J. Ch.) 32 Atl. 702; *Hurd v. Groch,* (N.J. Ch.) 51 Atl. 278; *Duffy v. Kelly,* 55 N.J. Eq. 627, 629, 37 Atl. 597; *Law v. Smith,* 59 Atl. 327, 68 N.J. Eq. 81.

[3] *Curtice Bros. Co. v. Catts et. al.* (N.J. Ct. of Chancery) 66 Atl. Rep. 935.

[4] *St. Regis Paper Co. v. Santa Clara Lbr. Co.,* (N.Y.) 65 N.E. 967.

A consideration of the cases cited suggests that before an action is started for damages for breach of contract for the delivery of personal property, the appropriateness of such remedy should be carefully analyzed and where the aggrieved party's rights cannot be thus adequately protected, circumstances will be disclosed that justify invoking the remedy of specific performance.

The writer has in mind a personal experience well illustrating this situation. In 1889 the White Marble Lime Company entered into a contract with a lumber company by the terms of which the lumber company agreed to deliver at the lime company's kilns all slabs and edgings produced by the lumber company to the extent of the lime company's requirements with a reservation of such wood as the lumber company required for its own fuel. This contract was for twenty years and was renewed for a like period to expire in 1929. The price agreed upon was sixty-five cents per cord. In 1917 and 1918 the price of this class of fuel rose as high as $4.00 and $5.00 a cord in the vicinity of the lime company's plant. The lumber company ceased making deliveries and it was at once apparent that if an action were brought for damages, proof of the extent of damages would be exceedingly difficult for the lumber company did not measure its production of slabs and edgings, neither did it measure its own consumption thereof for fuel. While the difficulty of proof of damages may be a practical objection to a suit at law, it is not such a legal objection as will entitle the suitor to specific performance. The circumstances of the case, however, were such as to justify an application for a decree of specific performance as will appear from the language of the court hereinafter quoted. To a bill filed for specific performance an answer was filed interposing the following defenses among others: That the contract was uncertain, was void for want of mutuality, that plaintiff had an adequate remedy at law, and that a decree for specific performance would be impractical because it would require the constant supervision of the court, and that specific performance is refused where the rights of innocent third parties have intervened.

In discussing these defenses the Michigan Supreme Court said:

(1) We fully agree with the court below upon the subject of adequate remedy at law, and approve of the following language in the opinion: That plaintiff's remedy at law is not adequate is plain. The limited nature and uncertainty of the market, the necessity for going into other markets where competition is keen for a supply, the inconvenience and labor of finding a supply, the disarrangement of plaintiff's business and calculations for the future, the impracticability of determining the damages accurately, and the multiplicity of suits which would be necessary to obtain recompense, render the situation one which

cannot adequately be compensated at law.[5] The questions of the continuing rights of the plaintiff and of the Thomas Berry Chemical Company, and the claim that plaintiff must be deprived of its rights because the rights of an innocent third party have intervened, should be considered. After a careful examination of this record, it appears to us that the defendant Thomas Berry Chemical Company has no superior equities which should deprive the plaintiff of its right to an enforcement of its contract. The defendant Consolidated Lumber Company having agreed to sell and deliver all its softwood slabs and edgings to the plaintiff, if needed, so far as the production of the mill would enable it to do so, and reserving what wood the said defendant might need for its own use, after carrying out that contract for a time, found another and probably more profitable method of disposing of such slabs and edgings under its contract with the defendant Thomas Berry Chemical Company. The plaintiff's contract was first in time, therefore first in right.

The decree of the court below gives the chemical company paramount rights as against the plaintiff. In our opinion it has no such rights; its contract was subsequent to that of the plaintiff's and the plaintiff is entitled to have its contract performed by the Consolidated Lumber Company. It appears that the defendant Consolidated Lumber Company has made two contracts both of which it is obligated to perform, and both of which were made with innocent parties; that with the plaintiff being first in time. If the defendant Consolidated Lumber Company is not complying with both contracts, it is because it has placed itself voluntarily in that predicament, and there is no reason why the plaintiff should not have specific performance of its contract according to its spirit and letter. The contract, when construed in the light of the circumstances existing at the time it was made is not uncertain or ambiguous.[6]

The language of the contract with plaintiff provides that the defendant Consolidated Lumber Company shall furnish slabs and edgings so far as the production of its mill may enable it to do so; not so far as its other subsequent fuel contracts may enable it to do so.

It is urged by plaintiff, and we think rightfully, that the production of the lumber company's mill would enable it to furnish the plaintiff practically all of the softwood slabs and edgings it produced, were it not for the requirements and demands of the Thomas Berry Chemical Company. We approve of the following language of the circuit judge in his opinion: The contract renders plain the obligation of the defendant to dispose of no softwood slabs or edgings, except for the benefit of the plaintiff. The defendant is obligated to use the softwood slabs, other than four-foot, for its own fuel purposes before resorting to the four-foot slabs; and it has no right to sell or dispose of them elsewhere, if, by so doing, it would necessitate the use of four-foot slabs for fuel. The defendant is bound to furnish four-foot slabs and edgings to plaintiff as far as the production of the mill will permit, which requires the use of other waste first.

---

[5] 16 Cyc. 41.

[6] *Ardis v. Grand Rapids, etc., R. Co.*, 200 Mich. 400-411, 167 N.W. 5.

The objections to the specific performance of this contract, as now asked for by the plaintiff, are, in our opinion, theoretical rather than practical. An amendment of the decree appealed from, substantially as indicated by the plaintiff, would not require the supervision of the court, would protect the rights of the plaintiff under the contract, and would be doing substantial justice by carrying out the intention of the parties.

Where an award of money damages is not an adequate remedy for breach of contract to deliver personal property, it would manifestly be a denial of complete justice to a plaintiff aggrieved by such breach to confine him to an action at law for money damages. The purpose of the law is to promote justice and not to work injustice, and while it must be admitted that there is such a thing as a wrong without a remedy, equity certainly will not deny relief to one equitably entitled thereto when a remedy is available.

It would be absurd to deny this principle merely because the wrong suffered grew out of the nondelivery of property which was personal in its character.