

THE GOVERNMENT OF THE PHILIPPINE ISLANDS, PLAINTIFF AND APPELLEE, VS. MYER HARRIS, HUGO ROSEBURG, AND S. M. BERGER, DEFENDANTS AND APPELLANTS.

G.R. No. 11024. November 28, 1917

Ponente: STREET, J.

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STREET, J.:

This action was instituted by the plaintiff against the defendants in the Court of First Instance of the city of Manila for the recovery of damages for an alleged breach of contract. From a judgment in favor of the plaintiff the defendants have appealed.

The contract sued upon was entered into by and between the plaintiff and defendant Myer Harris. The other two defendants Roseburg and Berger are interested only as sureties of Myer Harris.

The defendant answered denying the alleged breach of contract, and further by way of counterclaim alleged certain breaches of the contract on the part of plaintiff and asked for damages.

Briefly, the terms of the contract provided that the defendant should superintend and conduct the "Service Halls" at Baguio for the Government during the season of 1913, for the term beginning February 1 and ending June 30, 1913, under certain conditions. The plaintiff on its part agreed to furnish in part the Service Building with furniture, kitchen utensils, and other things specified more particularly in the contract. A circular proposal, with specifications, terms, conditions, stipulations, representations of facts, and regulations as proposed by the plaintiff, are attached to the contract and expressly made a part thereof.

The specification relative to the furnishing of the Service Halls is as follows:

"The Service Halls will be furnished to the contractor by the Government free of charge together with a complete equipment of kitchen utensils with which the Government Mess was operated last year, tableware, linen, and furniture according to inventory, which will be made a part of this contract. The contractor will be responsible for preservation of the building and all equipment shown on said inventory, and shall return same in as good condition as when delivered, reasonable wear and tear excepted. Light and water will be furnished to the contractor free of charge. Distilled water and ice may be obtained from the Quarter-master, Camp John Hay, at a reasonable rate.

"The contractor shall be held liable for the cost of any articles lost, stolen or damaged, and shall exercise every care and precaution to avoid possible destruction of the building and other property by fire. A chemical engine will be furnished the contractor free of charge."

The breach alleged in the complaint is that when the term of the contract expired the defendant Myer Harris failed to return sundry articles of equipment which had been delivered to him, and which were specified in the inventory attached to the complaint. These articles consisted almost entirely of tableware, table linen, and fragile utensils for dining hall and kitchen. This ware had also been in use during the prior season of 1912. It is admitted that the

defendant offered to return to the plaintiff the fragments of the articles that had been broken while in his hands but they were rejected.

The first question for consideration is whether or not the articles mentioned in the inventory marked Exhibit B, and entitled "Equipment shortage of Myer Harris," were in fact delivered to him by the Government at the time he took charge of the Service Halls. Upon this point we find that the Government has submitted as a part of its case, in an agreed statement of facts, an affidavit made by said Harris in which he states the circumstances under which the property was taken over by him. From this it appears that the contract for running the Service Halls was awarded to him a very short while before he was required to open the same for use. He was therefore forced to take over all the equipment with great haste and upon the inventories submitted by the Government, there being insufficient time for a proper or thorough check. On the other hand when the property was returned to the Government the comparison with the inventories was carefully made. The statement in question then adds, "It is believed that the shortage noted is greater than it would have been had it (the property) been returned in the same manner it was received."

Whatever is believed by the parties to a stipulated statement of facts should also be believed by the court, in the absence of a showing of manifest error; and we are therefore inclined to suspect that at least some of the items in this inventory of missing articles were not delivered to the defendant. It will be noted, however, that the statement in question is vague and indefinite; and we cannot accept it as sufficient to overcome the evidence found in the inventories which were made out when the property was taken over by Harris.

The next question arises upon the interpretation of certain provisions contained in the specifications already quoted relative to the furnishing of the Service Halls. It is there declared that the contractor will be required to return all equipment in as good condition as when delivered, "reasonable wear and tear excepted." The term "reasonable wear and tear" embodies, in our opinion, not only the idea of deterioration from wear in use but also the idea of accidental injury incident to the reasonable use of a thing for the purpose for which it was designed. In Webster's International Dictionary the term "wear and tear" is defined as "the loss by wearing, as of machinery in use; the loss or injury to which anything is subjected by use, accident, etc." In the New Standard Dictionary the same term is defined as "loss by service, exposure, decay, or injury incident to the ordinary use of a thing." Both of these definitions embrace the idea of accidental loss or injury; and it is apparent that the term is not limited to the simple idea of deterioration from use. In fact, the expression in its most literal sense evidently embraces both the ideas of deterioration and accidental damage. The word "wear" if used alone would cover fully the idea of abrasion, erosion and deterioration as incident to use; and the word "tear" evidently adds the idea of the tearing, rending, or breaking of a thing which may be of fragile or breakable character.

If the provision relative to "reasonable wear and tear" had stood alone, the interpretation of this contract would hardly have given rise to this controversy. But it is insisted in this case that the defendants are to be held liable for the shortage under that provision of the stipulation which says that the contractor shall be held liable for the cost of any articles "lost, stolen, or damaged." From this it is argued that the exception as to "reasonable wear and tear" must be taken to refer only to deterioration or abrasion from ordinary use and that it does not include the case where things are accidentally broken or otherwise damaged in course of ordinary use. The proper interpretation, however, in our opinion is that the word "damaged" itself, as used in the provision quoted above, is to be considered qualified by the exception as to reasonable wear and tear, as if the words were "lost, stolen, or damaged otherwise than by reasonable wear and tear." This interpretation gives legal effect to both provisions without deviation from their proper meaning and it is the interpretation which appears to be approved as reasonable by common sense. Experience teaches us that eating establishments, whether of a public or domestic character, cannot be conducted without a certain percentage of breakage and injury to the things used in dining

room and kitchen. Moreover, it is obvious that wear and tear of dishes and glassware does not result from erosion, but only from accidental breaking. No other sort of "wear and tear" upon such articles could possibly have been in the minds of the parties when they executed the contract.

We therefore conclude that the defendants are not liable for breakage or other accidental injury incident to the proper use of the articles listed in the inventory while they were in Harris's hands. Undoubtedly, however, the burden of proof is upon him to show that the damage and shortage was due to causes attributable to reasonable wear and tear. There is evidence in the record showing that the shortage in this case is not excessive beyond the average attributable to ordinary wear and tear in hotels and eating establishments; and we believe that, with the exceptions noted in the last paragraph of this opinion, the defendant has established that said shortage was due to this factor. The things for which we hold him liable were, we believe, lost or stolen; and as to these there is no sufficient proof that the loss was due to ordinary wear and tear.

As to the three grounds of counterclaim set forth in the defendant's answer we are of the opinion that the Court of First Instance committed no error in disallowing the same. The first ground of counterclaim was that the Government had represented that distilled water and ice might be obtained from the United States Quartermaster at Camp John Hay, at a reasonable rate; whereas, soon after the defendant Harris assumed charge of the Service Halls, the Quarter-master ceased supplying him with distilled water and ice, as a consequence of which he was compelled to buy these supplies from the authorities of the city of Baguio at a much higher rate than he had been paying to the Quarter-master. We hold that the statements made by the Government in its proposal to the effect that these articles could be obtained from the Quartermaster was given out as information and was not a term of the contract. It appears that the Government had no control over the action of the Quartermaster of Camp John Hay; and as the withdrawal of this privilege is not chargeable to the Government in this case, it cannot be held liable for the damage that may have resulted to Harris therefrom.

The second ground of counterclaim is that the defendant suffered damage because the number of boarders at the Service Halls fell below the estimated number stated in the Government's circular proposal. We hold that the representation made by the Government as to the probable number of boarders was a mere matter of opinion, and was understood to be in the nature of an estimate. Consequently the Government cannot be held liable for the fact that expectations as to the number of boarders were not fully realized.

The third ground of counterclaim relates to the fact that the period of time during which the Government establishment was kept at Baguio during 1913 was shorter than had been expected. In the proposal of the Government it was stated that the Service Halls should be operated for the period of 5 months, or from February 1 to June 30. It was also stated that subject to changes, the official season was from February 10 to July 1, 1913. It appears in evidence that, in this particular year, some of the Government Bureaus were withdrawn at different times, beginning as early as the last week of May. We are of the opinion that the representation of the Government as to the duration of the season was understood to be given out merely as an estimate and in any event subject to change. Therefore the Government is not liable for any damage that may have resulted to the contractor by reason of the early withdrawal of the Government establishment.

Proceeding to determine the liability of the defendants in conformity with the opinion expressed above, we hold that Harris, upon the proof adduced, is entitled to credit for all the things noted in the inventory of missing articles, except the following: 2 axes (P3.28); 8 blankets (P16.81); 5 counterpanes (P18.35) ; 13 table-cloths (P49.75); 1 mattress (P9.39); 169 napkins (P70.36); 20 pillow cases (P10.81); and 9 sheets (P18.18). The total value of these things, as shown by the inventory is P196.93. The judgment of the court below will be modified, as above indicated, by reducing the amount of the recovery to P196.93, and as thus modified the judgment will be affirmed, without any special adjudication of costs of this instance. So ordered.

Arellano, C. J., Torres, Johnson, Carson, and Araullo, JJ., concur.

MALCOLM, J., dissenting:

I agree with the judgment of the trial judge, the Honorable Simplicio del Rosario. Where the majority decision is in error is, to my mind, in its mistaken construction of two provisions of the contract entered into by the Government of the Philippine Islands as party of the first part, and Myer Harris, as party of the second part, with Hugo Roseburg and S. M. Berger as sureties. One clause provides that "The contractor will be responsible for preservation of the building and all equipment shown on said inventory, and shall return same in as good condition as when delivered, reasonable wear and tear excepted." The interpretation of the well known phrase "reasonable wear and tear excepted," which does not make the lessee guarantee the continued existence of the equipment, would be logical were it not for the words "return same in as good condition as when delivered" and for the additional clause of the contract that "the contractor shall be held liable for the cost of any article lost, stolen,, or damaged." The contract intended to convey that the contractor should return all the equipment; that he was to be liable for the cost of any article lost, stolen, or damaged, but that he was not expected to keep the equipment up to standard because of natural deterioration or other cause. In an English case, the phrase "reasonable wear and tear" was held not to apply to total loss so as to exonerate the covenantor. (*Anglin vs. Henderson*, 21 U. C. Q. B. 27.)

At least, no compromise between the theories of the Government and the lessee is possible. Either the contractor was to return all of the equipment or he was to return only the equipment which was not missing.

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