

KAY B. CHANG ET AL., PLAINTIFFS AND APPELLEES, VS. ROYAL EXCHANGE ASSURANCE CORPORATION OF LONDON, DEFENDANT AND APPELLANT.

G. R No. 3567. August 20, 1907

Ponente: WILLARD, J.

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WILLARD, J.:

The arbitration clause in the fire policy in question in this case is in part as follows:

"If a disagreement should at any time arise between the corporation and the assured * * * in respect of any loss or damage alleged to have been caused by fire, every such disagreement, when it may occur (unless the corporation shall deny liability by reason of fraud or breach of any of the conditions, or because the claimant has by some other means waived his rights under the policy), shall be referred to the arbitration of some person to be selected by agreement of both parties * * * And by virtue of these presents it is hereby expressly declared to be a condition of this policy and an essential element of the contract between the corporation and the insured that unless the corporation shall demand exemption from liability by reason of fraud, breach of conditions, or waiver, as stated, the assured, or claimant, shall have no right to commence suit or other proceedings before any court whatever upon this policy until the amount of the loss or damage shall have been referred, investigated, and determined as above provided, and then only for the amount awarded, and the obtaining of such an award shall be a condition precedent to the institution of any suit upon this policy and to the liability and obligation of the corporation to pay or satisfy any claim or demand based upon this policy."

The conditions contained in this clause of the policy are valid, and no action can be maintained by the assured unless an award has been made or sought, or unless the company has denied liability on some of the grounds stated therein. (*Hamilton vs. Liverpool, London and Globe Insurance Company*, 136 U. S., 242.) The duty of asking a submission to arbitration does not rest exclusively upon the company. If it takes no action in that respect it is the duty of the assured to do so, and to ask that arbitrators be appointed for the purpose of determining the amount of the loss, in accordance with the provisions of this policy. The company may, however, by its conduct, waive the provisions of this clause relating to arbitration. In fact, this is expressly stated in the policy itself, as will be seen from the quotation above made, and the principal question in this case is whether there has been such waiver or not.

Simple silence of the company is not sufficient. If it remains passive, it is the duty of the assured to take affirmative action to secure arbitration. Neither will the failure of the company to return proofs of loss, or its failure to point out defects therein, amount to a waiver of the arbitration clause. These acts may amount to a waiver of the clause requiring the furnishing of proofs of loss, but such an action can not constitute proof that the company has refused to pay the policy because the defendant has failed to comply with the terms and conditions thereof.

It is claimed, however, by the plaintiffs and appellees, that affirmative action was taken by the company indicating its purpose not to pay anything to the insured.

The property insured, consisting of a stock of goods, was entirely destroyed by fire on the 11th day of March, 1905. On the same day the plaintiffs notified the agent of the defendant of the loss and within fifteen days thereafter presented to the company a detailed statement of the articles which had been destroyed and of their value. Plaintiffs were notified by the company that this proof was insufficient and that they must obtain the sworn certificates of two merchants to the truth of their statement. This was done within a few days. Plaintiffs were again notified that their proof was insufficient. Various interviews were had between the agent of the defendant and the plaintiff Chang and the plaintiffs' lawyer between the latter part of March and the 21st of June, 1905. During this time the plaintiffs furnished additional evidence relating to the justice of their claim and were told that their proofs were still insufficient. No indication was made by the company's agent as to what other proofs should be furnished, he offering, however, at one of the interviews to settle the claim for 3,000 pesos. This offer was refused by the plaintiffs. In the final interview on June 21, between the company's agent and the counsel for the plaintiffs, the former said .

"I can not go on with your case, Mr. Sleeper; I have not enough proof.

"Q. What did Mr. Sleeper state?

"A. I think, so far as I can remember, that he, said he wanted to bring the matter to a basis, but I would not say so to the court.'

This action was commenced on the 24th of June, 1905. The plaintiffs at no time requested the appointment of arbitrators. After the suit had been commenced, and on the same day, the defendant requested in writing that arbitrators be appointed in accordance with the terms of the policy. This was the first communication in writing which the defendant made to the plaintiffs after the loss.

Under all the circumstances in the case, we think that the statement made by the company's agent on the 21st day of June amounted to a denial of liability on the ground that proper proofs of loss had not been presented and that, therefore, there had been a failure of the assured to comply with one of the terms of the policy. The delay of the company in taking any affirmative action between the 11th day of March and the 21st day of June; its repeated statements that the proofs were insufficient without indicating in any way what other proofs should be furnished, and its final statement that it. could go no further with the case, was sufficient evidence to show that it did not intend to pay. This view is somewhat confirmed by what took place afterwards before the arbitrators, both of whom were appointed by the defendant in accordance with the terms of the policy. At the first meeting of these arbitrators the defendant objected to any award being made upon the ground that the proof of loss which had been furnished was sworn to before a notary public and not before the municipal judge, as required by the provisions of the Code of Commerce.

In the case of *The Phoenix Insurance Company vs. Stocks* (149 111., 319) the company wrote two letters to the insured, in the first of which they said:

"The circumstances under which this fire occurred are such that we do not feel justified in extending to you any measure of grace, in considering your claim, which you may not fairly demand under the terms of the policy. There is at least one fact that looks very peculiar, and until our minds are relieved of the doubts which we have come to receive in regard to the integrity of this loss, we shall offer you no benefits that you may not demand under a strict construction of the policy."

In the other letter the company said:

"Replying to your letter of August 23d, received this morning, we beg to say that our views of this matter have been fully expressed in our previous correspondence, and have nothing at this time to add."

The court said (p. 334):

"The mere silence of the company would not amount to a waiver of its right to insist upon the condition [as to arbitration], but when it placed its determination upon the grounds stated in the correspondence, which were such as could not be submitted to arbitration under the provisions of the policy, it must be held to have waived the condition requiring arbitration (*German Ins. Co. vs. Gueck*, 130 Ill., 345), and especially is this so where the assured would be misled to their prejudice into bringing suit upon the policy without first having obtained an award. The company was not bound to speak at all, but when asked in effect, what its determination was, if it answered, good faith required that it should disclose the true ground of its defense."

It is apparent in the case at bar that the counsel for the plaintiffs sought the interview of June 21 for the express purpose of finding out what the decision of the company was, and after receiving the answer which has been heretofore quoted, the plaintiffs were fully justified in bringing the action at once, without seeking any arbitration.

Judgment was entered in the court below in favor of the plaintiffs for the sum of 5,265 pesos and 25 centavos, with interest from the 24th of June, 1905, and costs. It is claimed by the appellant that the finding of the court below as to the amount of the loss is not justified by the evidence. A great many witnesses were presented by each side, but the only persons who had any real knowledge as to the amount of stock in the store at the time of the fire, and as to its value, were the plaintiff Chang and his clerk. They testified that it was worth more than 10,000 pesos, the amount named in the policy. No one of the witnesses for the defendant fixed the value of the stock then on hand at more than 500 pesos. The arbitrators appointed by the defendant found that the value was 2,106 pesos. The defendant's agent testified that during the negotiations he offered to settle for 3,000 pesos. That the plaintiff (Chang) was carrying on a business of some importance was proved at the trial by the introduction of the records of the customs in Cebu, by which it appeared that between the month of July, 1904, and February, 1905, he had imported through the custom-house goods which with the duty added were of the value of 4,758 dollars and 48 cents, money of the United States, and the plaintiff, Chang, testified that he had on hand at the time of the fire a large amount of property, products of the country, which were not imported through the customs.

In view of all the evidence in the case, we can not say that it preponderates against the finding of the judge below as to the amount of the loss.

The judgment of the court below is hereby affirmed, with the costs of this instance against the appellant.

Torres, Johnson, and Tracey, JJ., concur.

DISSENTING

ARELLANO, C. J.:

All the steps taken by Kay B. Chang and his attorney, in order to reach an extrajudicial agreement and avoid a litigation with the "Royal Exchange Assurance Corporation of London," were of a private nature, or, as it is stated in the judgment appealed from, "trying to reach an agreement and settlement of the loss." (Bill of exceptions, p. 15.)

The representative of the insurance company having replied to the attorney of the insured, "I can not go on with your case, Mr. Sleeper; I have not enough proof," the bringing of an action became imperative. The proper procedure will be found in the provisions of articles 404 to 411 of the Code of Commerce, among which attention is called to article 405, which reads:

"The insured must prove the loss suffered, proving the existence of the goods before the fire occurred"—to article 406 which provides that—

"The appraisalment of the damage cause by the fire shall be made by experts in the manner established in the policy, * * * "—

and to article 407, according to which—

"The experts shall decide:

"(1) The causes of the fire.

"(2) The true value Of the goods insured * * *.

"(3) The value of the same goods after the fire, and everything else which may be submitted to their judgment."

As it is seen, the above are the principal precepts on which the insured must rely from the time the underwriter refuses to come to an amicable settlement or extrajudicial agreement. There is no law in force which contains such a provision as that which the judgment appealed from sets forth in the manner of a rule in the following words:

"It is a duty incumbent on said defendant company to return, within a reasonable period of time after the presentation of the claim and proof of the loss, said proof of the loss together with a clear and itemized statement of the reasons why they are not considered sufficient and satisfactory. Noncompliance with this duty, or failure to notify the assured with reasonable time, amounts to a waiver on the part of the insurance company to require the presentation of other proof, and is also equivalent to a denial of the loss or responsibility, and, consequently, under the arbitration clause of said policy, there is nothing left for its submission to arbitration." (Bill of exceptions, pp. 19 and 20.)

The insured complied with the first part of article 404, by informing the underwriter of the fire. Not so with the second part of the same, concerning the statement to be filed with the municipal judge or justice of the peace, in accordance with the proposed change inserted in the preamble (Exposicion de Motivos) of the Code of Commerce of the Philippine Islands (p. 8). Aside from this, since all the steps taken to come to an agreement of a private nature had been ended by the words addressed to Mr. Sleeper, and since a legal suit had already been commenced, nothing contained in the above-quoted precepts bear any relation to the matter in controversy. Instead of presuming on the part of the underwriter an implicit waiver of the stipulation agreed upon under the policy, it was necessary to make a finding of fact or of law, which should explain the manifest neglect of the procedure required by the above-named articles of the Code of Commerce now in force. Unless this neglect is properly justified, the infringement of the general provisions of law on the subject of this litigation becomes self-evident.

Although the requirements of articles 409 and 410 are of an adjective nature (which do not certainly correspond with any of the judicial proceedings of the old Spanish Code of Civil Procedure), those of articles 404 to 408 and 411 are substantive, and constitute the essential elements on which an action for the exercise of the right arising from the insurance contract should be based. This contract being a fire insurance on personal property, factories, or stores, requires, as its—

"First and essential condition, the existence of a real and certain subject-matter, not only at the time of the signing of the same, but likewise at the time of the fire, it being also essential that said subject-matter shall not have suffered, during the stated period, any change or alteration in the nature or place designated in the policy; and this doctrine is based on the very nature of the insurance contract, whose object is the prevention of loss, and not the securing of profit * * * [Preamble (Exposicion de Motivos) of the Code Of Commerce.]

Besides the general provisions of law governing the contract, the policy embodies a special requirement, compulsory for both the insured and the underwriter, in order that the actual loss suffered at the time of the fire might be the basis for the institution of an action arising from the contract. And this is the arbitration agreed upon "as an essential element of the contract between the corporation and the insured, that unless the corporation shall demand exemption from liability by reason of fraud, breach of the conditions, or waiver, as stated (waiver by

claimant), the assured, or claimant, shall have no right to commence suit or other proceedings before any court whatever upon this policy until the amount of the loss or damage shall have been referred, investigated, and determined as above provided, and then only for the amount awarded, and the obtaining of such an award shall be a condition precedent to the institution of any suit upon this policy and to the liability and obligation of the corporation to pay or satisfy any claim or demand based upon this policy," etc.

The compliance with this special provision is compulsory under article 1255 of the Civil Code.

The insured might be excused from submitting his claim to arbitration in case of an express refusal of the underwriter to heed the former's demand to carry out that essential condition of the contract. Yet, the writer of this dissenting opinion does not hold the insured exempt from compliance with this special condition, because of the more or less correct construction which he might give to the action of the underwriter in regard to his claim, neither because of this phrase, "I can not go on with your case, Mr. Sleeper; I have not enough proof," nor because of this other one, "I think, as far as I can remember, that he said he wanted to bring the matter to a basis."

Such is the opinion of the writer in regard to the first question brought before us by the appeal.

With reference to the second question, or the amount in controversy, if the contention that the bringing of the suit without first complying with that condition be right, the writer does not see any reason why the amount of the judgment shall be 5,265 pesos and 25 centavos, and not 10,000 pesos, the sum stipulated in the policy and demanded in the complaint.

Nor is he of the opinion that such obligation, once the subject of a litigation, should consist of the sum awarded by the arbitrators appointed by the underwriter, because the case has never been submitted to arbitration, as stipulated in the insurance contract.

As the judgment appealed from does not specify facts sufficient to justify a decision for the amount adjudged, I am of the opinion that the case should be returned to the trial court, in order that expert witnesses may furnish the evidence mentioned in paragraphs 2 and 3 of article 407 of the Code of Commerce; the proof stated in paragraph 1 of said article not being necessary in view of the fact that both the insured and the underwriter have come to an understanding as to the cause of the fire.

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