TEXAS, S. F. & N. RY. V. SAXTON, 1893-NMSC-031, 7 N.M. 302, 34 P. 532 (S. Ct. 1893)

TEXAS, SANTA FE & NORTHERN RAILWAY COMPANY, Plaintiff in Error,
vs.
LIONEL D. SAXTON et al., Defendants in Error

No. 524

SUPREME COURT OF NEW MEXICO

1893-NMSC-031, 7 N.M. 302, 34 P. 532

September 30, 1893

Error, from a Judgment in Favor of Plaintiffs, to the First Judicial District Court, Santa Fe County.

The facts are stated in the opinion of the court.

COUNSEL

Francis Downs for plaintiff in error.

Edward L. Bartlett for defendants in error.

The granting or overruling of a motion for continance is a matter resting in the sound discretion of the trial court, even in murder cases. Territory v. Kelly, 2 N.M. 292-301; Bish. Crim. Proc., sec. 951, and cases cited; Thomas v. McCormick, 1 N.M. 371. See, also, sec. 2048, Comp. Laws.

The prevention by one party of the performance of a contract is equivalent to its completion by the other when he is ready to perform. Baca v. Barrier, 2 N.M. 131-136.

In both contracts are certain conditions precedent, existing on the part of the plaintiff in error, which it never complied with nor attempted to comply with, and which the defendants in error were notified by the executive officer of the defendant company, its chief engineer, it could not comply with. Dermott v. Jones, 2 Wall. 1-9; Same v. Same, 23 How. (U.S.) 220, 226-235.

JUDGES

Freeman, J. O'Brien, C. J., concurs.

AUTHOR: FREEMAN

OPINION

*{*303}* **{1}** This cause is now before the court for the third time, and invokes the application of the maxim, "interest rei publicae ut sit finis litium." The original petition was filed in the district court for the county of Santa Fe on the twenty-eighth day of January, 1884. It was a suit brought by the defendants in error to recover of plaintiff in error the sum of $ 25,000, alleged to be due for work and labor performed under two certain contracts therein set out and nominated as "Contract A" and "Contract B." A plea in abatement having been interposed, and issue joined thereon, a jury was waived, and the court found the issues in favor of the plaintiffs, and gave judgment, refusing defendants' offer to plead over, and refusing also to impanel a jury to assess the damage. Without proof as to the amount of the plaintiffs' damage, the court peremptorily rendered judgment in their favor for $ 25,000, the amount claimed in their petition. On appeal to this court the judgment was reversed, and the cause remanded. 3 N.M. 443, 6 P. 206. On the second trial in the court below the plaintiffs *{*304}* (the defendants in error here) offered in evidence the two contracts sued on. The court excluded them, however, on the ground that the action was in assumpsit, and the contracts, being under seal, could not be read in support of that form of action. Judgment was therefore rendered in favor of defendant (the plaintiff in error here). On appeal to this court, however, it was held that, as the contracts were sealed by the private seal of the agent of the corporation, they were not specialties, and could, therefore, be received in evidence, and the judgment of the court below was, thereupon, reversed, and the cause again remanded. 4 N.M. 378, 16 P. 851. On the call of the cause on the third trial in the court below the defendant (the plaintiff in error here) moved the court for a continuance, the principal grounds assigned being that the attorney making the motion had been but recently employed; that the original attorneys in the cause "have either removed from the territory or have withdrawn from the case," and that the affiant was not familiar with the facts in the case, and had been misled by the attorneys for the plaintiffs, etc. The motion for continuance was overruled, and this action of the court is assigned for error. This was not, under the circumstances of this case, an error of which this court can take notice. It is now well settled that this court will not reverse the action of the court below in granting or refusing a motion for continuance, unless it appears that the court has abused its discretion. Thomas v. McCormick, 1 N.M. 369. The facts of this case fail to show that the discretion of the court was not properly exercised.

{2} The second assignment of error is that the court erred in permitting the introduction of the contracts between the company and L. D. Saxton, this being a suit in which the said Saxton and one Edward F. Browne are co-plaintiffs, and there being nothing in *{*305}* the contracts to show that Browne had any interest therein. This question was discussed and determined by this court in the case cited in 4 N.M. 378 at 383, wherein the court, after showing that Browne had an interest in the contracts, and that under the statutes of this territory (Comp. Laws, secs. 1884, 1888) suits are to be brought in the name of the real parties in interest, held that the joinder of Saxton and Browne as plaintiffs was proper. 4 N.M. 378 at 383.

{3} The third assignment of error relates to the refusal of the court to admit as evidence the record of the proceeding of said court in another case wherein the defendants in error procured a decree against the plaintiff in error on a bill filed to enforce their mechanics' lien. There was no error in this. The former was an action under the statute to enforce their mechanics' lien, while the pending suit is to recover damages sustained by reason of having been prevented from completing their contract.

{4} As to the fourth and fifth assignments of error, neither of them is well taken. The proof shows that the defendants in error did not voluntarily abandon the work; and, as to the evidence of Irwin, that plaintiff in error notified defendants in error to prepare to commence work, under contract B, at a certain time, it is to be observed, in the first place, that it was offered and received without objection as to this particular. The whole deposition was objected to on the ground that the contracts were not with Browne and Saxton, but with Saxton alone, which objection, as we have seen, had already been disposed of. An objectionable question and answer contained in a deposition can not be reached by general objection to the deposition itself. Aside from the fact, however, that this particular evidence *{*306}* was not objected to when offered, it does not clearly appear that it was irrelevant or incompetent. This evidence was not offered to change the terms of the written contract, but to show the reason why the defendants did not complete their undertaking. Under the terms of contract B, they were to commence the work provided for in that contract on or about the first day of August, 1882. The testimony objected to is that of Irwin, the engineer for the defendant corporation, who says that he notified Browne, late in July or early in August, 1882, that arrangements had been made by the company to commence the work; but he proceeds to state that the company failed to make the necessary arrangements, and this is given as the reason that Browne did not begin the work. There is no apparent error in the record, and the judgment will have to be affirmed, and it is so ordered.