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COMMENTS

ARE ATTACHMENTS ON CONTRACTS LIMITED TO THOSE FOR THE DIRECT PAYMENT OF MONEY?

By JACK D. FUDGE*

IN *Noxon Construction Co. v. Wallace Process Piping Co.*,¹ the California District Court of Appeal affirmed an order of the Superior Court of Los Angeles denying a motion to dissolve an attachment secured by the plaintiff under Subdivision 1, Section 537, Code of Civil Procedure.² The plaintiff was a general contractor of the United States for the construction of a building at Vandenberg Air Force Base, Lompoc, California. As general contractor, the plaintiff had entered into a subcontract with the defendant whereby the defendant was to furnish, at his own expense, all labor, material and proper supervision necessary to install all mechanical works as specified in the contract. In addition, the defendant was to perform all work free from mechanics' liens and, if requested, was to furnish a waiver of lien from every person furnishing labor or materials to the defendant for any work done or materials furnished. In the event any liens or claims of lien were asserted, the defendant was to indemnify the plaintiff for any obligation or liability he might suffer from the assertion of such lien. Finally, should the defendant fail to perform the work as specified, the plaintiff could at his election have the work completed and the defendant agreed to pay any excess over and above the price specified. For his performance, the defendant was to receive \$156,400 to be paid in monthly installments with a lump sum payment upon completion to the plaintiff's satisfaction.

In an action for breach of contract the plaintiff alleged that the defendant failed to complete the work as specified and that the cost of

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¹ 191 Cal. App. 2d 651, 13 Cal. Rptr. 26 (1961).

² CAL. CODE CIV. PROC. § 537: "The plaintiff, at the time of issuing the summons, or at any time afterward may have the property of the defendant attached, as security for the satisfaction of any judgment that may be recovered, unless the defendant gives security to pay such judgment, as in this chapter provided, in the following cases:

1. In an action upon a contract, express or implied, for the direct payment of money, where the contract is made or is payable in this State and is not secured by any mortgages, deed of trust or lien upon real or personal property, or any pledge of personal property, or, if originally so secured, such security has . . . become valueless. . . ."

completion was \$3,000. The plaintiff further alleged that the defendant failed to perform the work free from mechanics' liens; but that on the contrary, numerous liens and claims of lien had been asserted for which the plaintiff claimed damages of \$19,966.02.

A writ of attachment was issued upon the basis of the complaint. The defendant resisted the writ arguing that the complaint did not state facts showing a breach of contract for the "direct payment of money" as required by the code, and therefore attachment was not proper. The crux of the defendant's argument hinged upon the judicial interpretation of the phrase, "direct payment of money," enacted in Subdivision 1 of Section 537 of the Code of Civil Procedure.³

The court, in ruling on the defendant's motion, saw fit to consider only the alleged failure properly to complete the work called for and deemed it unnecessary to consider the failure to perform the work free from mechanics' liens on the grounds that the motion was to set the attachment aside in its entirety.⁴ However, in so ruling, the court seems to have failed to give consideration to Section 540 of the Code of Civil Procedure, requiring that the amount of the writ must be stated in conformity with the complaint.⁵ This section must be read in conjunction with Section 538 of the Code of Civil Procedure⁶ requiring the plaintiff to submit an affidavit showing the amount of indebtedness which is supported by an attachable cause of action. In *Finch v. McVean* the court construed this section to require that:⁷

The clerk before issuing the writ must see that the affidavit complies with the provisions of the statute and the indebtedness therein stated, and so qualified, is supported by the statement in the complaint of an attachable cause of action for the direct payment of money in an amount equal to or greater than the amount stated in the affidavit.

³ *Ibid.*

⁴ 191 Cal. App. 2d at 656-57, 13 Cal. Rptr. at 30: "Although the line which divides the cases in which an attachment will or will not lie is obviously difficult to draw with certainty, at least one breach alleged therein falls well within the limits expressed by the above cited cases. With respect to the alleged failure to complete. . . . Since this claim provides a basis for attachment there is no need to consider the others, because the motion denied by the trial court sought to set aside the attachment in its entirety. . . ."

⁵ CAL. CODE CIV. PROC. § 540: "The writ must be directed to the sheriff, or a constable or marshal of any county in which property of such defendant may be . . . or so much of the property of such defendant as may be sufficient to satisfy the plaintiff's demand against such defendant, the amount of which must be stated in conformity with the complaint. . . ."

⁶ CAL. CODE CIV. PROC. § 538 which provides: "The clerk of the court . . . must issue the writ of attachment upon receiving an affidavit by or on behalf of the plaintiff showing: 1. The facts specified in Section 537 which entitle him to the writ. 2. The amount of the indebtedness claimed over and above all legal setoffs or counterclaims, or the amount claimed as damages. . . ."

⁷ 6 Cal. App. 272, 275, 91 Pac. 1019, 1020 (1907).

It may readily be seen that the complaint is controlling and that the writ of attachment must be supported by an attachable cause of action as specified in the complaint, regardless of the amount appearing in the affidavit.⁸ Therefore, if the writ of attachment is issued for an amount shown in the affidavit which is not supported by an attachable cause of action, the writ would be issued for an amount greater than the attachable indebtedness stated in the affidavit. However, it is well established law in this jurisdiction that a writ will not issue for an amount greater than the attachable indebtedness stated in the affidavit.⁹ A violation of this rule of law requires a dissolution of the attachment.¹⁰ A motion to dissolve the attachment would put in issue whether the amount stated in the affidavit was supported by an attachable cause. This in turn would require a ruling that all causes of action upon which the affidavit was based, were for the direct payment of money. In view of this, it would appear that the court was bound to rule on the question of whether the defendant's agreement to indemnify against liability arising on the asserted liens was a contract for the "direct payment of money." The court being apparently thus bound, the effect of allowing the attachment on the facts presented would be to render an affirmative holding by inference as to this issue. A close analysis of the cases cited by the court in the instant case, however, would appear to give ample justification and authority for the extension of the code to cover this area.

Judicial Development of "Direct Payment of Money"

One of the earlier landmark decisions, relied upon in all cases cited by the court, was *Hathaway v. Davis*.¹¹ This action was on a contract of surety to secure damages awarded on appeal. The court in allowing an attachment against the surety stated it was not the legislative intent

⁸ ". . . under this section [Code of Civil Procedure Section 537] he [plaintiff] may unite with a cause of action upon a contract for the direct payment of money another cause of action arising out of contract, wherein the damages for its breach are unliquidated, and for which he is not entitled to a writ of attachment. . . . [I]f he would have a writ of attachment upon the cause of action for which it is authorized by section 537, the amount for which he could make the affidavit required by section 538 would be the amount for which the writ should issue and which should be stated therein. . . . He [plaintiff] did not become entitled to a writ for this portion of the amount claimed from the defendant by uniting in his complaint another cause of action for which he might have been entitled to a writ." *Baldwin v. Napa etc. Wine Co.*, 137 Cal. 646, 649-50, 70 Pac. 732, 733-34 (1902).

⁹ *Barceloux v. Dow*, 174 Cal. App. 2d 170, 344 P.2d 41 (1959).

¹⁰ *Baldwin v. Napa etc. Wine Co.*, 137 Cal. 646, 70 Pac. 732 (1902); *De Leonis v. Etchepare*, 120 Cal. 407, 52 Pac. 718 (1898); *Murillo v. Toole*, 47 Cal. App. 2d 725, 118 P.2d 895 (1941); *Rosenberg v. Bullard*, 127 Cal. App. 315, 15 P.2d 870 (1932); *Finch v. McVean*, 6 Cal. App. 272, 91 Pac. 1019 (1907).

¹¹ 33 Cal. 161 (1867).

to exclude collateral contracts of indorsers, guarantors, and sureties,¹² but by the phrase, "direct payment of money," meant to limit attachment to contracts where the amount to be paid was fixed by the contract. It should be noted that nothing was decided regarding damages arising on a contract.

The issue of damages arose shortly thereafter in *Dunn v. Mackey*.¹³ In an action for damages for breach of contract, an attachment was allowed wherein the defendant bound himself to pay a specific amount of money fixed by the contract, as required by *Hathaway v. Davis*. The court, in sustaining the attachment, held that while the specific amount recoverable as damages was dependent upon evidence to be introduced at trial, it would not deny an attachment where the damages could be ascertained with reasonable certainty.¹⁴

The next significant expansion of these interpretations occurred in 1921 in *Greenbaum v. Smith*.¹⁵ In this action for damages a carrier was allowed to maintain an attachment on a contract to transport goods wherein the specific amount payable was not stated in the contract. In arriving at this conclusion, the court merely expanded the rule of *Hathaway v. Davis* and combined it with the rule of *Dunn v. Mackey*. While the specific amount payable upon performance was not fixed by the contract, the court held that this would not bar an attachment wherein it is ascertainable with reasonable certainty. This same reasoning, it will be remembered, was applied to allow attachment on an action for damages.

At this junction, it would appear that judicial interpretation of "direct payment of money" includes collateral contracts of surety and guaranty, an action for damages for breach of contract, and an action wherein the amount payable is not specifically stated in the contract. This should be qualified, however, to the extent that in each of these

¹² *Id.* at 168: "To read 'direct' as the opposite to 'collateral,' would be to create a distinction of very doubtful foundation and certainly opposed to the general policy of the Act. To so read it would be to exempt all collateral contracts from operation of the Act. Indorsers, guarantors, sureties and all others who undertook to pay or become responsible for the debts of another could not be reached by attachment; and yet there can be no good reason why they should be excepted. We are of the opinion that the legislature intended no such distinction."

¹³ 80 Cal. 104, 22 Pac. 64 (1889).

¹⁴ The rationale of the court appears to be that while no case has been decided directly on an attachment for damages for breach of contract under Code of Civil Procedure section 537(1) there is ample authority for the point that attachment in general will lie for such damages. It cites: *Drake*, *Attachments* sections 13-23; *Wilson v. Wilson*, 8 Gill 192, 50 Am. Dec. 685. Therefore it logically follows that attachment will lie under section 537(1) for damages on a contract for the direct payment of money.

¹⁵ 51 Cal. App. 692, 197 Pac. 675 (1921); 9 CALIF. L. Rev. 336 (1920).

areas the party against whom the attachment has been maintained had bound himself to pay money in the performance of the contract.

The next judicial step combined all three of these statutory interpretations in one action. This was accomplished in 1947 in *Eaton v. Queen*.¹⁶ Here the plaintiff was allowed to maintain an attachment on an action for damages on a warranty, in the sale of a tractor, to pay cost of repairs necessary to make the tractor perform equivalent to a new one. The court, in allowing the attachment, held that the contract sued upon must furnish a standard from which the amount due can be ascertained and that there must exist a basis upon which the damages can be determined by proof.

From this line of decisions it would seem to be a justified expansion to include a contract for indemnity within the purview of section 537 (1) along with contracts of surety and warranty; for it is a contractual relation within the same general category as the latter two and is often referred to synonymously with them.¹⁷

Conclusion

While *Noxon* is significant for expanding the code section to encompass contracts of indemnity, a much more important result could be the destruction of any legal significance the legislature may have intended by the insertion of the phrase, "for the direct payment of money," into the code section.¹⁸

In the instant case, were the clauses calling for payment of cost of completion and indemnity from mechanics' liens eliminated, plaintiff would be denied a writ of attachment on the theory that the defendant's performance called for something other than the "direct payment of money."¹⁹ It is therefore evident that the writ of attachment was dependent upon these clauses. In each instance, however, the clause was basically an expressed statement whereby the defendant agreed to pay the damages for breaches for which he would have been liable on the contract.²⁰ This fact, coupled with the implication of the instant case that a contract of indemnity is for the "direct payment of money," leads to the conclusion that a contract to indemnify for damages occasioned by a breach of contract will support an attachment proceeding. How-

¹⁶ 78 Cal. App. 2d 571, 77 P.2d 997 (1947).

¹⁷ 26 CAL. JUR. 2d *Indemnity* § 4 (1956).

¹⁸ CAL. CODE CIV. PROC. § 537(1).

¹⁹ 1 WITKIN, CALIFORNIA PROCEDURE § 51 (1954) and cases cited. See 8 CALIF. L. REV. 251 (1919).

²⁰ RESTATEMENT, CONTRACTS § 346 (a), (i); 14 CAL. JUR. 2d *Damages* §§ 24, 144 (1954); CAL. CIV. CODE § 3300.

ever, is not this merely stating expressly what the law implies?²¹ Should not the courts, then, discard this distinction and allow an attachment for breach of any contract where the damages are reasonably ascertainable?

Judicial construction of the language, "direct payment of money," has always been uncertain, with the result that its only significance has been that a contract to do something other than pay money would not support an attachment proceeding. Apart from this limitation, the statute has been broadly interpreted.²² In view of the decision in *Noxon v. Wallace*, it would appear that this remaining limitation should no longer be given judicial significance.

²¹ BOUVIER, LAW DICTIONARY (1897) defines damages as: "The indemnity recoverable by a person who has sustained an injury either in his person, property, or relative rights, through the default of another."

²² 1 WITKIN, CALIFORNIA PROCEDURE § 51 at 892 (1954).