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Agency—Agent Liable for Unauthorized Representations Though Principal Not Liable by Virtue of Disclaimer Clause

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removal from the office, work a forfeiture of the right to the salary of the office during the period of suspension.[11]

There are specific provisions of the Code relating to the Police Department, empowering the Commissioner to suspend members of the police force "without pay, pending the trial of charges . . . [but if] any member so suspended shall not be convicted by the commissioner of the charges so preferred, he shall be entitled to full pay from the date of suspension."[12] The Commissioner also is granted disciplinary power to impose a forfeiture of no more than thirty days' salary or suspension for an unlimited period.[13]

Brenner v. City of New York was a suit by members of the New York City Police Department to recover salary ranging from $4,330 to $6,230 withheld during the period of suspension following conviction by the commissions of the charges preferred and pending court trials which resulted in acquittals.[14] The Court of Appeals held that suspension during this period was a proper exercise of the Commissioner's disciplinary powers, implying that the officer is relieved of duty during the interval. Suspensions, as a disciplinary measure not being limited by the Code, present a different question from suspensions pending trial. Thus, subsequent acquittal in this instance does not give a right to salary during the interim.

Three judges dissenting argued that the disciplinary powers of the Commissioner did not authorize a forfeiture of more than thirty days' salary and that plaintiffs' recovery would only be barred if, as provided by the Code,[15] they had been removed from the police force. Suspension as a disciplinary measure would not of itself, without removal from the force, permit forfeiture in excess of the thirty day fine.

Bd.

AGENCY

AGENT LIABLE FOR UNAUTHORIZED REPRESENTATIONS THOUGH PRINCIPAL NOT LIABLE BY VIRTUE OF DISCLAIMER CLAUSE

Disclaimer provisions in contracts of sale have not been granted favorable disposition by the courts. In the majority of these contracts, the provision has been a dictated term of the contract resulting from a disparity of bargaining position between the parties. Consequently, such contracts have been held to be contracts of adhesion. However, where the disclaimer provision is a negotiated part of the contract, the courts will enforce it but will not allow the

11. People ex rel. Flynn v. Woods, 218 N.Y. 124, 112 N.E. 915 (1916); Wardlaw v. Mayor, etc., New York, 137 N.Y. 194, 33 N.E. 140 (1893).
12. New York City Admin. Code § 434a-20.0.
13. New York City Admin. Code § 434a-14.0.
14. 9 N.Y.2d 447, 214 N.Y.S.2d 444 (1961).
15. Supra note 13.

vendor to contract away his liability for fraud occurring in the inducement to the contract.

In 1959, the Court of Appeals decided *Danann Realty Corp. v. Harris* in favor of the vendor.[1] In that case there was a specific disclaimer and merger provision which provided that the vendee was to take the property as is, and that no representations made by either the vendor or his agent as to the physical condition or services of the building, unless made specifically part of the contract, were to be relied upon. The Court held that where the alleged representations of the vendor were of the same class as those specifically disclaimed in the contract, the necessary element of reliance upon these representations is destroyed. Decisions which are in accord with this case similarly conclude that the specific disclaimer is inconsistent with the allegation of reliance.[2] The same result has occurred when the vendee is trying to hold the vendor vicariously liable for his agent's misrepresentation.[3] These cases do not overrule the decision in *Sabo v. Delman*, where it was held that a general or omnibus merger clause is ineffective to exclude parol evidence to show fraud in the inducement.[4] The disclaimer is only effective when the alleged representations, that is their subject matter, are those specifically disclaimed in the written agreement.

The question presented in *Wittenberg v. Robinov* is whether the effect of a disclaimer and merger provision, meeting all of the requirements of the *Danann* case, will also accrue to the benefit of vendor's agent when an action to recover damages for fraud is brought against him.[5]

The contract here in question provided that the vendee had inspected the building and agreed to take the premises "as is." It also provided "that the seller has made no representations as to the physical condition or services" of the building, and that neither party is relying upon any representations of the other, which are not embodied in the contract of sale. The Special Term granted defendants' motion for judgment on the pleadings since the merger clause precluded proof of fraudulent representations. The Appellate Division reversed the judgment on the grounds that there was a serious question as to whether the alleged misrepresentations about the operating expenses of the building were those disclaimed by the somewhat general language of the disclaimer clause.[6]

A widely split Court of Appeals decided that the specific disclaimer and merger precluded proof of reliance upon the representations in so far as the

1. 5 N.Y.2d 317, 184 N.Y.S.2d 599 (1959).
2. Cohen v. Cohen, 1 A.D.2d 586, 151 N.Y.S.2d 949 (1st Dep't 1956), aff'd, 3 N.Y.2d 813, 166 N.Y.S.2d 10 (1957); Sylvester v. Bernstein, 283 App. Div. 333, 127 N.Y.S.2d 746 (1st Dep't 1954); Kreshover v. Berger, 135 App. Div. 27, 119 N.Y. Supp. 737 (1st Dep't 1909).
3. Ernst Iron Works v. Duralith Corp., 270 N.Y. 165, 200 N.E. 683 (1936).
4. 3 N.Y.2d 155, 164 N.Y.S.2d 714 (1957).
5. 9 N.Y.2d 261, 213 N.Y.S.2d 430 (1961).
6. 9 A.D.2d 290, 193 N.Y.S.2d 847 (1st Dep't 1959).

suit against the vendor was concerned, but that the clause did not benefit the agent, as he still would be liable for his unauthorized representations, irrespective of his principal's liability. Judge Fuld, in a concurring opinion, joined with the majority as he felt himself bound by the decision in the *Danann* case, but noted that he had dissented in that case. Judge Von Voorhis, in a strong dissent, stated that without reliance there can be no action against the agent, irrespective of how fraudulent his representations may have been, and that if there could not have been any reliance existing in regard to a suit against the principal-vendor, there can, similarly, be no reliance in an action against his agent. In other words, this disclaimer would be inconsistent with reliance in either action.

The majority decision states an unrealistic application of the *Danann* case and thereby prevents the logical extention of its principles from applying in a suit against the agent. The majority says that to negate reliance is only a concise way of saying that as to the seller, no representations ever existed. The representations of either the agent or his principal exist, no matter how fraudulent, irrespective of reliance. Similarly the clause declares that any representations of the agent are unauthorized, not that they are non-existent. The disclaimer negates reliance, not the representations.

To say as the majority does that an agent is liable for his fraudulent representations is not enough. They do not give rise to a cause of action unless there is reliance upon them which results in his injury.[7] Herein lies the real issue of the case: whether there may be reliance upon an agent's representations when in the merger clause the vendee agreed not to rely upon any representations other than those embodied in the contract.

How may the Court say that the clauses are effective to negate reliance on an agent's representations in an action to hold the principal vicariously liable, and then say that there may be reliance as to those same representations in an action against the agent? The argued distinction being only that the agent was not a party to the contract seems to be totally unrealistic. The fact that the agent is not such a party to the contract is not determinative of whether or not there was reliance by the vendee upon the representations of the agent. Two unfortunate results follow from this decision: one being the Court's de facto approval of 'reliance' even where the vendee has knowledge that the agent is unauthorized to make the representations and, secondly, the making of reliance a shallow and empty requirement under these circumstances.

R. A. O.

7. Sager v. Friedman, 270 N.Y. 472, 1 N.E.2d 971 (1936).