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Arbitration—Arbitration Proceedings Involving Public Entity

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resolve them. Further, the grant of specific performance in such a situation is contrary to at least two well-established principles of Equity; namely, that the court will not grant such awards when they will prove to be futile, oppressive or inequitable[35] (defendant cannot get the mortgage financing and will not be able to comply without it), nor will specific performance be granted in contracts requiring continuous supervision over a long period of time[36] (plaintiff estimates that the project will take nine months to a year to complete). Finally, the question may be raised as to whether the award is "mutual, final, and definite" as is required by Section 1462. Plaintiff's store represents one-half the total cost of the project, and consequently, if defendant is compelled only to build one-half of the shopping center, it would appear that the award is open to some question on the basis of its finality.

Taking into consideration the necessity of preserving the sanctity of arbitration awards, this writer feels that the Court, in its desire to avoid trampling upon the intent of the Legislature and to a lesser extent, in its quest to insure a comity of decision, has sacrificed the sound and time-tested rules by which decrees of specific performance may be Judged good or bad. An opposite decision here could have meant that the court had found the decision of the arbitrators offensive in one of the respects set out in subdivision four, and, if this was the interpretation, no damage would be done the arbitration process. An opposite decision would not have signified a withdrawal from the position taken in the *Ruppert* and *Staklinski* cases. In those cases the question before the Court was whether the best interests of the litigants would be served by affirmance of the award. Here, the Court must also consider its own continuing interest in the proceedings.

If the line of decision from *Ruppert* to *Staklinski*, and now, to *Grayson*, indicates the development of a new dichotomy in the law, one may ask if it is necessary. If the purpose of arbitration is speedy justice, does this mean the court must tolerate gross inconsistencies between its own conception of justice and the intuitions of laymen in order to insure the efficacy of arbitration? This question is left unresolved in the present case.

ARBITRATION PROCEEDINGS INVOLVING PUBLIC ENTITY

Section 3813 of the Education Law provides that "No action or special proceeding . . . shall be prosecuted or maintained against any school district . . . unless it shall appear . . . that a written verified claim . . . was presented within three months after the accrual of such claim."

The issues presented in *Board of Education v. Heckler Electric Co.*[37] were: (1) whether this statute applied to the commencement of arbitration

35. In re Feuer Transportation, 295 N.Y. 87, 65 N.E.2d 178 (1946).
36. Standard Fashion Co. v. Siegel-Copper Co., 157 N.Y. 60, 51 N.E. 408 (1898).
37. 7 N.Y.2d 476, 199 N.Y.S.2d 649 (1960).

proceedings which had been provided for by contract, and (2) whether this question should have been decided by the court or by the arbitrators.

In the instant case a construction contract between The Board of Education and subcontractor Heckler contained an arbitration clause. Heckler made a demand for submission to arbitration. The Board of Education moved for a stay of arbitration which was denied at Special Term. On appeal to the Appellate Division the motion was granted,[38] the Court assigning as the primary ground for its decision Heckler's failure to give notice as required by Section 3813 of the Education Law.

The Court of Appeals held that compliance with Section 3813 was a condition precedent to arbitration and that whether this condition was satisfied or not was for the court rather than the arbitrators to decide.[39]

In order to determine that Section 3813 was applicable in the instant case, the Court first had to decide whether arbitration fell within the classification of "special proceeding". In 1923, the Appellate Division, in *In re Interocean Mercantile Corporation*,[40] reviewed the law, and found that non-statutory arbitration was not a special proceeding under Section 308 of the Civil Practice Act permitting the taking of testimony by deposition. Subsequent to, and as a result of this case, Section 1459 of the Civil Practice Act was passed which provided that "arbitration of a controversy under a contract . . . shall be deemed a special proceeding". Thereafter several cases interpreting Section 1459 of the Civil Practice Act have held that arbitration is a special proceeding,[41] but none of these cases involved the question of whether arbitration is a special proceeding within the meaning of Section 3813 of the Education Law. Implicit in the holding of the Court in the instant case (that compliance with Section 3813 of the Education Law is a condition precedent to arbitration) must be the decision that Section 1459 of the Civil Practice Act makes arbitration a special proceeding within the meaning of Section 3813 of the Education Law.

There are decisions holding that failure to give notice as required by Section 3813 bars both contract and tort actions in a court of law.[42] There are also decisions holding that if a time limitation is provided for in the arbitration contract itself, failure to give notice within that time limitation is a bar to arbitration.[43] In the instant case, the Court held that even though there was no time limitation in the arbitration contract itself, Section 3813 provided a time limitation. Thus compliance with the statute is an additional obligation implicit in the arbitration contract.

38. 8 A.D.2d 940, 190 N.Y.S.2d 942 (2d Dep't 1959).
39. Supra note 37.
40. 204 App. Div. 284, 197 N.Y. Supp. 706 (1st Dep't 1923).
41. Hosiery Mfrs. Corp. v. Goldston, 238 N.Y. 22, 143 N.E. 779 (1924); In re Interocean Mercantile Corp., 207 App. Div. 164, 201 N.Y. Supp. 753 (1st Dep't 1923).
42. Kinner v. Board of Education, 6 A.D.2d 204, 175 N.Y.S.2d 707 (4th Dep't 1958); In re Brown, 303 N.Y. 484, 104 N.E.2d 866 (1952).
43. In re Ketchum, 20 Misc. 2d 736, 70 N.Y.S.2d 476 (Sup. Ct. 1947).

As to the question of whether the court or the arbitrators should decide the applicability of Section 3813 of the Education Law, there is no direct precedent. There is a line of cases containing dicta to the effect that all issues arising subsequent to the making of the contract should be decided by the arbitrators, and that the only issues a court may consider is the making of a valid contract or the failure to comply with it.[44] In these cases the courts, desirous of upholding the intention of the parties, reason that since the parties provided for arbitration they must have wanted all issues to be decided by the arbitrators. However, in the instant case the Court apparently felt that this dicta did not apply, because the question of notice is a pre-requisite to the jurisdiction of the arbitrators.

CIVIL PROCEDURE

FOR PURPOSES OF CIVIL PRACTICE ACT § 21 A WRONGFUL DEATH ACTION "EXISTS" AT TIME OF ACCIDENT.

A wrongful death action was commenced on July 14, 1958, arising from an automobile accident that occurred on March 6, 1955, allegedly due to the negligence of defendant's intestate, who received fatal injuries and died on the day of the accident. Three days later, on March 9, 1955, the defendant's intestate was followed in death by plaintiff's intestate. The Appellate Division[1] affirmed the lower court's order granting plaintiff's motion to strike out the defense of the Statute of Limitations. Although the wrongful death action had not yet accrued at the time of the wrongdoer's death, the Court of Appeals, in *Gibson v. Meehan*,[2] affirmed the Appellate Division and held that the provisions of Section 21 of the Civil Practice Act,[3] which suspends the applicable Statute of Limitations for a period of 18 months when "a person against whom a cause of action exists" dies, applied so as to toll the two year statute.

The courts of New York have found no difficulty in applying Section 21 in those cases where the wrongdoer had died after the respective claim had once accrued.[4] However, they have previously refused to apply it in cases

44. In re Terminal Auxiliar Maritima, 6 N.Y.2d 294, 189 N.Y.S.2d 655 (1959); In re Paloma, 3 N.Y.2d 572, 170 N.Y.S.2d 509 (1958); In re Lipman, 289 N.Y. 76, 43 N.E.2d 817 (1942); In re Tuttman, 274 App. Div. 395, 83 N.Y.S.2d 651 (1st Dep't 1948).

1. 7 A.D.2d 986, 183 N.Y.S.2d 988 (1st Dep't 1959).
2. 7 N.Y.2d 93, 195 N.Y.S.2d 649 (1959).
3. N.Y. Civ. Prac. Act § 21:
Effect of death of person liable: The term of 18 months after the death within this state of a person against whom a cause of action exists, or of a person who shall have died within 60 days after an attempt shall have been made to commence an action against him pursuant to the provision of this article, is not a part of the time limited for the commencement of an action against his executor or administrator.
4. Butler v. Price, 271 App. Div. 359, 65 N.Y.S.2d 688 (4th Dep't 1946); In re McGowan's Estate, 174 Misc. 928, 22 N.Y.S.2d 224 (Surr. Ct. 1940).