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Contracts—Effect of Specific Disclaimer on Introduction of Evidence of Fraud

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on the ground that the rule is intended as a disability to the plaintiff, and not a protection to the defendant.¹⁰ If the instant case is viewed in this manner, the outcome hinges on whether the whole plan or merely the Gamoja-Corti transfer is characterized as the illegal transaction. The plaintiff must rely on the assignment or it has no claim at all. This assignment would seem to be an essential part of the illegal transaction and, if the second statement of the rule is applied, the result reached by the minority would seem correct.

EFFECT OF SPECIFIC DISCLAIMER ON INTRODUCTION OF EVIDENCE OF FRAUD

In *Danann Realty Corp. v. Harris*¹¹ the Court repeated its adherence to the basic tenet that "... a general merger clause is ineffective to exclude parol evidence to show fraud in inducing the contract . . . ,"¹² but the plaintiff buyer in this instance had, as did the plaintiff in *Cohen v. Cohen*,¹³ specifically disclaimed reliance on representations not embodied in the contract.

The trial courts' order, reversed by the Appellate Division in a memorandum opinion which refused to extend the holding in *Cohen*,¹⁴ was reinstated by the Court of Appeals' decision that it would be impossible for the plaintiff to prove reliance since the specific disclaimer of reliance on enumerated representations destroyed the allegation in the complaint that he had in fact relied. This was especially so since the plaintiff had means available to him "... of knowing, by the exercise of ordinary intelligence, the truth, or the real quality of the subject of the representation. . . ."¹⁵

In *Cohen*, as in the instant case, the dissenting opinion urged that since fraud vitiates every contract, and since the law recognizes the ineffectiveness of a general merger clause to preclude proof of fraud, there should be no distinction made between a general and specific disclaimer since the former includes the latter, and fraud is fraud.¹⁶

Contrary to the dissent,¹⁷ the majority holding properly considered a conflicting principle that required maintaining a contract's effectiveness as an instrument of agreement.¹⁸ As the court indicated in *Ernst Iron Works v.*

10. Carr v. Hoy, 2 N.Y.2d 185, 158 N.Y.S.2d 572 (1957).

11. 5 N.Y.2d 317, 184 N.Y.S.2d 599 (1959).

12. Bridger v. Goldsmith, 143 N.Y. 424, 38 N.E. 458 (1894); Jackson v. State of New York, 210 App. Div. 115, 205 N.Y.S. 658, *aff'd* 241 N.Y. 563, 150 N.E. 556 (1925); A general merger clause is a general provision in the contract to the effect that the entire understanding of the parties is included in the agreement. See: *The Merger Clause and Its Application to Fraud*, 6 BROOKLYN LAW REVIEW 446 (1937), 3 Williston, *Contracts* §§ 811, 811A (Rev. Ed., 1936).

13. 1 A.D.2d 586, 151 N.Y.S.2d 949, *aff'd* 3 N.Y.2d 813, 166 N.Y.S.2d 10 (1957). In this case, a contract designed to settle pending marital litigation, provided that the husband had made no representations concerning reconciliation, and the wife's later attempt to bring suit alleging misrepresentation of the husband's intent on reconciliation was rejected by the court.

14. *Danann Realty Corp. v. Harris*, 6 A.D.2d 674, 174 N.Y.S.2d 219 (1st Dep't 1958).

15. *Supra* note 11 at 322, 184 N.Y.S.2d 599, 603 (1959).

16. *Supra* note 11 at 325, 184 N.Y.S.2d 599, 607 (1959).

17. Justice Fuld dissenting.

18. *Supra* note 11 at 323, 184 N.Y.S.2d 599, 604 (1959).

Duralith Corp.,¹⁹ where the plaintiff attempted to show reliance on the misrepresentation of the defendants' agent, even though the contract expressly provided, and plaintiff knew, that the agent lacked authority to make the representation, that where a person has read and understood the disclaimer of representation clause, he is bound by it. The disclaimer, when specific, has then been deemed sufficient to constitute notice, and a subsequent change of mind will not alter its effect.

A contrary decision by the court would have deprived the parties of their freedom to determine, through negotiations, at the most suitable time, the terms of their contract, for if the language used here was not capable of preventing a party from claiming reliance, then no language could.²⁰

PREREQUISITE THIRD-PARTY APPROVAL

It is recognized in New York that in every contract there exists an implied covenant of good faith and fair dealing.²¹ It also appears that in contracts made expressly subject to the approval of a third party there is an implied duty upon the promisor to exercise reasonable efforts in seeking that approval. Prior to *Weisner v. 791 Park Avenue Corp.*²² there appear to be no New York cases dealing with the amount of effort necessary to meet this requirement.

In the *Wiesner* case, a lessee, member of a co-operative apartment house, contracted to assign her lease to plaintiff, subject to the approval of the corporate owner. According to the corporation's by-laws such approval could be obtained in three ways: (1) by a resolution of the board of directors, (2) by written consent of a majority of the directors, (3) or, by written consent of two-thirds of the shareholders. At a meeting of the board of directors the requested approval was refused and the lessee notified the plaintiff of its election to treat the contract as null and void. Plaintiff brought an action for specific performance and moved for an injunction *pendente lite*. Before such an injunction can issue plaintiff must establish a cause of action.

The Appellate Division was of the opinion that there was a cause of action,²³ holding that there was a question as to whether or not the lessee had used reasonable efforts in seeking the required approval. It based its holding largely on the fact that the lessee had not, until the action was before the Appellate Division, sought to obtain the written consent of two-thirds of the

19. 270 N.Y. 165, 200 N.E. 683 (1936).

20. The plaintiff buyer brought suit alleging misrepresentations concerning operation expenses, and the contract proclaimed, "The Seller has not made and does not make any representations as to the physical condition, rents, leases, expenses, operation . . . except as herein specifically set forth, and the Purchaser hereby expressly acknowledges that no such representations have been made . . . and that the same [the contract] is entered into after full investigation, neither party relying upon any statement or representation, not embodied in the contract, made by the other."

21. *Kirke La Shelle Co. v. Armstrong Co.*, 263 N.Y. 79, 57 N.E. 174 (1939).

22. 6 N.Y.2d 426, 190 N.Y.S.2d 70 (1959).

23. 7 A.D.2d 75, 180 N.Y.S.2d 734 (1st Dep't 1959).