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Contracts—Prerequisite Third Party Approval

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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).

shareholders.[24]

The Court of Appeals reversed.[25] It was satisfied that neither the law nor the terms of the contract obligated the defendant to persuade the corporation to approve the assignment. It also said that there was no question of the right of the corporation to exclude the plaintiff, since this action was not based upon a New York statute which prohibits discrimination in co-operative housing.[26]

This case indicates that the duty to use reasonable efforts in seeking approval in third-party approval contracts may be minimal in New York if such appears to be the parties' intention. Moreover, the effect of this case is limited by its procedural setting. The instant case arose on a motion for a temporary injunction, which would issue only if the plaintiff established a cause of action for specific performance. Even if there was no reasonable effort on the part of the lessee to seek approval, the Court could not issue the injunction, because plaintiff's remedy would be an action at law for damages. Even by court order an assignment would be ineffectual if the corporation did not approve. In light of this procedural setting, and because the tenor of the contract indicated that no obligation to seek approval was intended, this decision is of minor importance.

STAY OF LEGAL PROCEEDINGS WHERE CONTRACT CALLS FOR ARBITRATION

Section 1450 of the Civil Practice Act[27] provides that the court, upon application of one of the parties, shall order parties to proceed to arbitration if their contract is established and has provided for that remedy.

Where the contract provides for arbitration the courts relegate to the exclusive jurisdiction of arbitration all acts of the parties subsequent to the making of the contract,[28] even if the contract was terminated before its completion by breach[29] or otherwise.[30] No waiver of the right to arbitrate occurs when a party moves for dismissal of a court action brought by the other party,[31] unless the party assents to the court's jurisdiction and fails to assert

24. The Appellate Division considered an attempt by the defendant to seek approval by this method, while the case was before it, as immaterial since the issues were formed at trial.

25. *Supra* note 22.

26. See, for example N.Y. CIVIL RIGHTS LAW § 18-a(2), which provides: "The practice of discrimination because of race, color, religion, national origin or ancestry in any publicly assisted housing accommodations is hereby declared to be against public policy."

27. N.Y. CIV. PRAC. ACT § 1450 provides: A party aggrieved by failure . . . of another to perform under a contract . . . providing for arbitration . . . may petition . . . for an order directing that such arbitration proceed in manner provided for in such contract. . . . Upon being satisfied that there is no substantial issue as to the making of the contract . . . or the failure to comply therewith, the court hearing such application shall make an order directing the parties to proceed to arbitration in accordance with the terms of the contract.

28. In re Lipman, 289 N.Y. 76, 43 N.E.2d 817 (1942).

29. In re Potoker, 2 N.Y.2d 553, 161 N.Y.S.2d 609 (1957).

30. Arbitration between Baker and Bd. of Educ., 309 N.Y. 551, 132 N.E.2d 837 (1956).

31. Haupt v. Rose, 265 N.Y. 108, 191 N.E. 853 (1934).