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Contracts—Effect of Third Party Beneficiaries' Refusal to Permit Performance

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the policy, including felonies. It would have been possible for the defendant to have avoided liability, by merely inserting into the policy a clause to the effect that it would not be liable for damages which occur during the commission of a felony. Certainly this would not have been, nor will the instant decision in the future place a heavy burden on insurers, who have almost complete control over the conditions upon which they will issue insurance, and accept liability.

EFFECT OF THIRD PARTY BENEFICIARIES' REFUSAL TO PERMIT PERFORMANCE

In *Yorktown Homes Inc. v. County of Westchester,*[25] plaintiff, a builder and seller of homes, brought suit against defendant County Health Department to recover $10,000 which plaintiff had deposited with the department to guarantee performance of work under a contract with defendant to correct violations of the Westchester Sanitary Code. The violations concerned the drainage of surface water and the operation of septic tanks in plaintiff's development. Plaintiff's theory is not that he has fully completed the terms of the agreement but that performance had been made impossible by the refusals of the homeowners, who are third-party beneficiaries of the agreement, to permit him on their lands. The trial court felt that the case presented questions of fact for the jury as to whether plaintiff made reasonable efforts to get the consents of the homeowners, and if so, whether their refusals made performance impossible. The jury answered these questions in the negative, and thereafter, judgment was entered on the verdict for the defendant. The Appellate Division unanimously affirmed the judgment.[26] The Court of Appeals affirmed,[27] holding that the trial judge correctly presented the case to the jury, and that the verdict was justified by the proof.

There appears to be no dispute on either side as to plaintiff's claim that the homeowners were third-party beneficiaries of his contract with defendant. Nor does there appear to be any dispute as to the rule of law relied on by plaintiff, that when a third-party beneficiary refuses to accept the tendered benefits, the promisor is excused from performances.[28]

In *Patterson v. Meyerhofer,* it was held that ". . . there is an implied understanding on the part of each party [to a contract] that he will not intentionally and purposely do anything to prevent the other party from carrying out the agreement on his part."[29] The majority, for purposes of this case, assumed that the rule of *Patterson v. Meyerhofer* applied to hindrance by one who is not a party to the contract but a third-party beneficiary.[30] Although there is no mention of a third-party in the *Patterson* case, the Court

25. 7 N.Y.2d 321, 197 N.Y.S.2d 156 (1960).
26. 7 A.D.2d 649, 181 N.Y.S.2d 184 (2d Dep't 1958).
27. Supra note 25.
28. 4 Corbin, Contracts 237 (1951).
29. 204 N.Y. 96, 100, 97 N.E. 472, 473 (1912).
30. Ibid.

here is nonetheless applying the principle of the case by extending the duty of a party to the contract to one who is not a party but a third-party beneficiary; to wit, the duty of not making performance impossible lest the promisor be discharged.

The soundness of such a rule is unquestionable. If the promisor is amenable to suit on the contract by a third-party beneficiary of that contract,[31] there appears to be no reason for not also extending to him the benefit of a discharge of his obligations under the contract when a third-party beneficiary renders performance impossible.

Although the dissent did not dispute the rule urged by plaintiff and adopted by the majority, they did differ with the majority as to the substantive manner in which it should be presented to the jury for application. They felt that it was sufficient for the application of the rule if the jury found that the property owners, as primary beneficiaries, refused consent. The majority, however, felt it was correct to allow the jury to consider questions of fact as to whether plaintiff had made reasonable efforts to get consents of the homeowners, and, if so, whether their refusals made performance impossible, before applying the rule tendered by plaintiff, i.e., when a third-party beneficiary refuses to accept the tendered benefits, the promisor is excused from performance.

The position taken by the dissent, therefore, appears to be that plaintiff had no duty to make reasonable efforts to get the consents of the homeowners, and, that it is enough to discharge him of his obligations if the homeowners refused their consent. This position appears comparable to one taken by the court in *Dolan v. Rodgers*,[32] under a different but well-recognized principle of contractual law, viz., when, in contracting, two parties contemplate that permission of a third-party is necessary for the fulfillment of a contract, and, subsequently, that permission is denied, both are discharged on the contract. The condition is considered an implied part of the contract. It is clear that the majority did not consider the homeowner's consents as an implied condition of the contract since they take the position that it was the plaintiff's obligation to procure these easements. Thus the refusal of the homeowners did not relieve plaintiff of his obligation to perform.

Enforcibility of a Legal Contract Performed in an Illegal Manner

It is a familiar maxim of the common law that no one should be permitted to profit by his own fraud, or take advantage of his own wrong, or to found any claim upon his own iniquity.[33] Consistent with this policy a person who is a party to an illegal contract, may not ask a court of law to help him carry out his illegal object. It is thus clear that where a contract sued upon is

31. Lawrence v. Fox, 20 N.Y. 268 (1859).
32. 149 N.Y. 489, 44 N.E. 167 (1896).
33. Carr v. Hoy, 2 N.Y.2d 185, 158 N.Y.S.2d 572 (1957); Riggs v. Palmer, 115 N.Y. 506, 22 N.E. 188 (1889).