

10-1-1960

Contracts—Enforceability of a Legal Contract Performed in an Illegal Manner

Buffalo Law Review

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Recommended Citation

Buffalo Law Review, *Contracts—Enforceability of a Legal Contract Performed in an Illegal Manner*, 10 Buff. L. Rev. 124 (1960).
Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol10/iss1/41>

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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).

intrinsically illegal,³⁴ or where the contract was procured by the commission of a crime,³⁵ recovery may not be had even if the contract is executed.

The weight of authority in this country also denies the recovery on a contract, valid on its face, where it appears the plaintiff has resorted to gravely immoral and illegal conduct in accomplishing its performance.³⁶ However, the law in New York State did not follow this majority rule. Thus a contract which was valid on its face, and which the parties contemplated being performed in a legal manner, would not become invalid by the fact that illegal acts were committed in its performance.³⁷

The Court of Appeals in the recent decision of *McConnell v. Commonwealth Pictures Corp.*³⁸ rejects this distinction between contracts valid on their face but performed by illegal means and contracts invalid on their face and endorses the majority rule. This case concerned an action by an agent against his principal for an accounting under a contract calling for compensation to the agent upon his procurement of a certain motion picture distribution contract. The Appellate Division affirmed the order of the Special Term striking out two defenses in the answer.³⁹ The defenses in question alleged that the agent, in procuring this distribution contract, bribed a representative of the producer, contrary to Section 439 of the Penal Law which makes it a crime to give gratuities without the knowledge of the principal or employer, with an intent to influence an employee's action. The principal did not disaffirm the contract and continued to receive the benefits therefrom. The Court of Appeals, with two judges dissenting, reversed the Appellate Division and held that the alleged illegality in performing the contract would be a sufficient defense. The Court recognized that this was a distinct step beyond the old principle in that they were barring recovery under a contract which in itself was entirely legal. The holding did not go so far as to deny recovery on a contract in itself legal but performed in a manner in which minor wrongdoings are committed. The illegality, in order to deny recovery, must be in the form of commercial bribery or similar conduct and the illegality must play a dominant or central part in the plaintiff's whole course of conduct in performance of the contract. In this

34. *Stone v. Freeman*, 298 N.Y. 268, 82 N.E.2d 571 (1948).

35. *Sirkin v. Fourteenth Street Store*, 124 App. Div. 384, 108 N.Y. Supp. 830 (1st Dep't 1908).

36. 6 Williston, *Contracts* § 1761 (rev. ed. 1948):

Not the illegality of the contract, but the illegality of the plaintiff's conduct either in entering into or in performing the contract is the true ground for denying recovery.

It is true that not every illegal act in performing a contract will vitiate recovery. . . . But if the performance actually rendered is something in itself forbidden by law, the fact that the bargain was in such general terms as to cover either the illegal performance or a lawful performance will surely not justify recovery on the bargain if the illegality is serious or more than an incidental part of the performance.

37. *Chesebrough v. Conover*, 140 N.Y. 382, 35 N.E. 633 (1893); *Dunham v. Hastings Pavement Co.*, 56 App. Div. 244, 67 N.Y. Supp. 632 (1st Dep't 1900).

38. 7 N.Y.2d 465, 199 N.Y.S.2d 483 (1960).

39. 7 App. Div. 2d 905, 182 N.Y.S.2d 631 (1st Dep't 1959).

case the bribery alleged was found to be of a serious nature and also played a central role in the performance of the contract.

This rule, as formulated by the Court of Appeals, while supported by public policy and the majority of other states, is of such a nebulous character that increased litigation in this area would seem probable. Questions such as how "serious" or how "illegal" need the acts be to deny recovery on a valid contract need be answered in each case. Also the question as to when the illegal act is "direct" or only peripheral need be decided in view of the different facts of each case. Perhaps the size of the windfall resulting to the defendant will have some bearing on whether the illegal act is serious or direct enough to vitiate the contract.

CORPORATIONS

SUITS BY INDIVIDUAL CREDITORS UNDER SECTION 59 OF STOCK CORPORATION LAW

The principal issue raised in *American Broadcasting-Paramount Theater Inc. v. Frye*¹, was whether under New York Stock Corporation Law Section 59², a single creditor was a real party in interest and could bring the action in his own name or whether a class action had to be maintained.

The Appellate Division affirmed the judgment of the trial court directing a verdict in favor of the plaintiff,³ a creditor of the corporation whose officers and directors, defendants here, had made loans to one of them in his capacity as a stockholder in violation of Section 59.

In construing Section 59, the courts have held that the liability is in the nature of a penalty,⁴ and that an individual creditor can enforce it in his own name for his own benefit.⁵

The defendants, relying on *National Bank of Auburn v. Dillingham*,⁶

1. 8 N.Y.2d 232, 203 N.Y.S.2d 850 (1960).

2. Liability of directors for loans to stockholders. No loans of moneys shall be made by any stock corporation, except a moneyed corporation, or by any officer thereof out of its funds to any stockholder therein, nor shall any such corporation or officer discount any note or other evidence of debt, or receive the same in payment of any installment or any part thereof due or to become due on any stock in such corporation, or receive or discount any note, or other evidence of debt, to enable any stockholder to withdraw any part of the money paid in by him on his stock. In case of the violation of any provision of this section, the officers or directors making such loan, or assenting thereto, or receiving or discounting such notes or other evidences of debt, shall, jointly and severally, be personally liable to the extent of such loan and interest, for all the debts of the corporation contracted before the repayment of the sum loaned, and to the full amount of the notes or other evidences of debt so received or discounted, with interest from the time such liability accrued.

3. 9 A.D.2d 735, 193 N.Y.S.2d 441 (1st Dep't 1959).

4. *Billings v. Track*, 30 Hun 314 (1st Dep't 1883).

5. *Wyle v. Gould*, 22 Misc. 2d 935, 110 N.Y.S.2d 113 (Sup. Ct. 1951); *Walters v. Spalt*, 22 Misc. 2d 937, 80 N.Y.S.2d 681 (Sup. Ct. 1948).

6. 147 N.Y. 603, 42 N.E. 338 (1895).