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Contracts—Suit for Real Estate Commissions Under Expired Contracts

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be reformed to include oral agreements only when the parties intended the terms of the oral agreement to be written into the written contract but failed to do so because of mutual mistake or unilateral mistake plus fraud⁸ and does not apply to those oral agreements which were not intended to be written into the contract.⁹ As the dissent pointed out in the instant case, the plaintiff, as he himself alleged, was authoritatively informed by the defendant that the oral agreement would *not* be incorporated in the written agreement but would merely be entered in the company records and hence the majority decision seems to go well beyond the traditional holdings regarding the remedy of reformation.

Apparently the effect of the Court's decision is to extend reformation, on grounds of policy considerations, to plaintiffs who, but for the fraudulent inducement of the other party, *would have had* the intention to incorporate the terms in the written contract rather than restricting it to persons who actually entertained such an intention.

Suit for Real Estate Commissions Under Expired Contracts

Plaintiff broker sued defendant lessee on a management contract which provided in part that plaintiff was entitled to commissions on any sublease consummated after termination of the agreement if authorized negotiations looking toward that sublease were pending when the contract was terminated.⁹

After two years of authorized negotiations with the state of New York for a new sublease of space then occupied by the state, defendant notified the state and plaintiff that it would require possession of the premises upon expiration of the existing lease. Notwithstanding this notice, plaintiff continued to carry on negotiations with the state. A short time later, defendant rejected plaintiff's proposals for a new lease and, in accordance with the terms of the contract, defendant notified plaintiff that it elected to terminate the agreement.

When the state failed to vacate, defendant commenced proceedings in three courts.¹⁰ Two years later, with the state still in possession, a settlement of the dispute was effected in the form of a new lease which was much more advantageous to defendant than anything proposed by plaintiff. Plaintiff claims its commission on this new lease.

8. 5 WILLISTON, CONTRACTS §1549 (Rev. ed. 1937); *Lewitt & Co. v. Jewelers' Safety Fund Soc.*, 249 N.Y. 217, 164 N.E. 29 (1928).

9. *Ibid.* Also see *Greene v. Smith*, 160 N.Y. 533, 55 N.E. 210 (1899).

9. *Douglas Real Estate Management Corp. v. Montgomery Ward & Co.*, 4 N.Y.2d 33, 171 N.Y.S.2d 852 (1958).

10. Montgomery Ward asked injunctive relief in the County Court, filed notice of intention to file claim in the Court of Claims, and brought an action under Article 15 of the Real Property Law in the Supreme Court.

The questions presented for the determination of the court were whether defendant's acts effectively terminated authorized negotiations before the contract was ended, and if so, whether these acts and the termination of the contract itself were in good faith.

Even if it could not show performance of the contract, plaintiff could recover under *Sibbald v. Bethlehem Iron Co.*¹¹ if it showed that performance was prevented by the acts of defendant taken ". . . in bad faith and as a mere device to escape payment of the broker's commission." The theory of that case was that a principal's right to revoke his agent's authority to conclude negotiations approaching success, should be limited to situations where the revocation was prompted *fairly* by a view of the principal's interests.¹²

In finding for plaintiff, the Official Referee concluded that negotiations were pending when the contract ended and that plaintiff had performed all of its terms.

By a 3 to 2 vote, the Appellate Division reversed and dismissed the complaint. The majority held that defendant's notice requiring possession, terminated all authorized negotiations. The court felt that the expense and delay accompanying defendant's proceedings against the state negated the theory that defendant's purpose was to deprive plaintiff of its commissions or to drive a hard bargain with the state. The majority viewed the new lease as a good faith settlement of the controversy, the practical effect of which was to offer defendant a greater expectation of the state's yielding possession at an earlier date than would the continued prosecution of the litigation.

Pointing to the fact that a judgment in the Supreme Court action could not be enforced by execution against the state,¹³ the dissent called defendant's prosecution of that action ". . . simply another phase of the large and nebulous term 'negotiations' on the part of the appellant." The dissenters viewed defendant's acts as attempts to improve its bargaining position rather than sincere efforts to gain possession of the premises.

In affirming 4 to 3, the Court of Appeals split along the same lines. The Court found no authorized negotiations pending when the contract ended and no bad faith on the part of defendant. The dissenting judges voted to reverse for the reasons stated in the dissenting opinion of the Appellant Division.

The inability of either court to approach unanimity in this case does not reflect disagreement on the principles of law involved. Rather, the divergent

11. 83 N.Y. 378 (1881).

12. *Ibid.*

13. N. Y. CIV. PRAC. ACT §659.

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opinions suggest the inability of the parties to establish conclusively the motivating factors behind defendant's acts.

Suit against Stockholder by Creditor of Corporation — Per Curiam

The stockholder of a corporation told the president orally that if the corporation would engage in an advertising campaign, he would personally reimburse it. The Court dismissed this action by the advertising agency inasmuch as the agency was "at best an incidental beneficiary rather than a third-party creditor beneficiary."¹⁴ However, the defendant's defense of the Statute of Frauds was rejected since the promise was not made to the plaintiff but to a third person.¹⁵

Contracts in Restraint of Trade — Per Curiam

In *Paramount Pad Co. v. Baumrind*,¹⁶ the Court, in a per curiam opinion, held that a contract with a former employee which not only prohibited him from soliciting or divulging the names of plaintiff's customers, but also required him to obtain plaintiff's written permission before accepting any position in the shoulder pad industry, imposed an unreasonable restraint, going beyond plaintiff's legitimate interests. Therefore, the contract was void¹⁷ and an action was properly dismissed which was based upon its breach and inducement of its breach.

CORPORATIONS

Stockholders' Derivative Actions

In *Tropper v. Bysse*¹ the appellant, who owned less than two-tenths of one per cent of the stock of the Camden Forge Company,² brought a derivative stockholder's action in its behalf, naming as defendants Camden and a parent corporation which held more than 98% of Camden's stock. An order was entered pursuant to section 61(b) of the General Corporation Law requiring appellant to post security for expenses which Camden might incur in the action.

Section 61(b) requires a stockholder bringing a derivative action to post security for reasonable expenses, including attorney's fees, which security inures

14. *Tomaso, Feitner and Lane, Inc. v. Brown*, 4 N.Y.2d 391, 175 N.Y.S.2d 73 (1958).

15. 2 WILLISTON, CONTRACTS §460 (1936).

16. 4 N.Y.2d 393, 175 N.Y.S.2d 809 (1958).

17. N. Y. GENERAL BUSINESS LAW §340.

1. 4 N.Y.2d 397, 175 N.Y.S.2d 811 (1958).

2. Plaintiff-appellant owned 200 shares of Camden's common stock, the total market value of which was approximately one thousand dollars.