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Action on Fraudulent Promise Not Barred by Statute of Frauds

In *Channel Master Corp. v. Aluminium Limited Sales, Inc.*,[76] a deceit action by a processor against a supplier of aluminum, the alleged misrepresentations were (1) a representation that defendant's capacity and commitments were such as to enable it to sell to plaintiff a dependable supply during the next five years, whereas in truth defendant's capacity for years to come was already committed to other customers, and (2) a representation that it was defendant's intention to supply plaintiff a certain amount of ingot per month for five years, whereas defendant's actual intent was to sell to plaintiff only such amount as those customers to whom defendant was committed should choose to forego. The complaint also alleged the requisite scienter, deception, and injury.[77] It is well settled that a misrepresentation of present intent can constitute fraud.[78] Defendant, however, attacked the sufficiency of the complaint on two grounds: (1) that the alleged representations were mere expressions of expectancy and thus did not constitute statements of presently existing facts; and (2) that no cause of action could be based upon an oral promise unenforcible under the Statute of Frauds.[79]

The Court of Appeals sustained the sufficiency of the complaint as against both of defendant's contentions but split 4-3 over the first of these. The majority held the representations to constitute "a specific affirmation of an arrangement under which something is to occur, when the party knows perfectly well that no such things is to occur"[80] and thus to fall within the scope of previous holdings. The dissent, on the other hand, while not disagreeing with the principles laid down by the majority, gave the alleged representations a stricter interpretation and found them to be mere statements of expectancy, relating to matters not within defendant's control, and thus not to justify plaintiff's reliance. In view of the widespread use of the concept of present capacity for future production, the definiteness of the alleged representations, and the principle that unfounded pretence of knowledge may constitute fraud,[81] the majority holding seems well within precedent.

The Court's holding that the Statute of Frauds does not bar a fraud action based upon an unenforcible promise made with intent not to perform was not questioned by the dissent but seems to be a reversal of at least the direction

76. 4 N.Y.2d 403, 176 N.Y.S.2d 259 (1958).
77. For the requisite elements of an action in fraud see *Brackett v. Griswold*, 112 N.Y. 454, 20 N.E. 376 (1889).
78. A. S. Rampell, Inc. v. Hyster Co., 3 N.Y.2d 369, 383, 165 N.Y.S.2d 475, 487 (1957).
79. N. Y. PERSONAL PROPERTY LAW §31(1).
80. Ritzwoller v. Lurie, 225 N.Y. 464, 468, 122 N.E. 634, 635 (1919).
81. Ultramares Corp. v. Touche, 255 N.Y. 170, 174 N.E. 441 (1931); Hadcock v. Osmer, 153 N.Y. 604, 47 N.E. 923 (1897).

of previous New York cases. The possibility of distinguishing the present situation from the authority of *Dung v. Parker*[82] and *Subirana v. Munds*,[83] two cases often cited to the effect that a fraud action may not be maintained where the promise is unenforcible under the Statute, seems foreclosed by a recent Court of Appeals case[84] which affirmed without opinion a Special Term holding that under those cases *(Dung v. Parker* and *Subirana v. Munds)* the Statute of Frauds barred an action in fraud based upon a fraudulent promise to sell real estate, notwithstanding allegations of all the requisites of a fraud action.

The Court in the present case depended mainly upon a conceptional distinction between contract and tort theory. It quoted from two cases[85] dealing with the problems of whether certain promises, made with intent not to perform, constituted misrepresentations of existing facts and whether defendant owed any duty to plaintiff. It also quoted from Harper and James, in *The Law of Torts,* stating that the fraud cause of action is entirely "independent of contractual relations between the parties."[86] But this language of Harper and James dealt with the development of the independence of the deceit action from warranty theory. And Harper and James are directly opposed to allowing such an action in fraud where the Statute of Frauds bars a contract action.[87] The other authorities relied upon by the Court are the Restatement,[88] and Prosser,[89] both of which directly support the holding.

The result reached by the Court seems desirable and unopposed to the policy of the Statute of Frauds. The merely conceptual difference between contract and tort theory would not justify a disregard of the Statute, but the difference in the substantive requirements for relief might. The policy of the Statute includes protection against false claims, protection against claims based upon ambiguous and frivolous promises, and insurance of seriousness on the part of the promisor. How do the stricter requirements of the fraud action meet this policy? The interest in insuring seriousness is clearly met. The intent required for recovery in fraud is not only a consciousness on the part of the defendant of the falsity of his representations, but also consciousness that plaintiff will rely thereon.[90] There-

82. 52 N.Y. 494 (1873). See *Rice v. Manley,* 66 N.Y. 82 (1876), and *Burgdorfer v. Thielmann,* 153 Or. 354, 55 P.2d 1122 (1936), which attempt to limit the broad language of *Dung v. Parker.*

83. 282 N.Y. 726, 26 N.E.2d 828 (1940). See *Automatic Truck Loader Corp. v. City of New York,* 57 N.Y.S.2d 295 (Sup.Ct. 1945), which attempts to limit and distinguish *Dung v. Parker, supra* note 82, and *Subirana v. Munds* from a situation like the present.

84. Redlark Realty Corp. v. Minkin, 306 N.Y. 762, 118 N.E.2d 362 (1954).

85. Sabo v. Delman, 3 N.Y.2d 155, 164 N.Y.S.2d 714 (1957); Deyo v. Hudson, 225 N.Y. 602, 122 N.E. 635 (1919).

86. 1 HARPER AND JAMES, THE LAW OF TORTS 527.

87. *Id.* at 573.

88. 3 RESTATEMENT, TORTS §525, §530, comment *b* (1934).

89. PROSSER, TORTS 565 (2d ed. 1955).

90. Brackett v. Griswold, *supra* note 77; Hadcock v. Osmer, *supra* note 81.

fore the defendant cannot be held liable if his promise was not meant to be taken seriously.

The interest in protecting against false claims is not so clearly satisfied. The cliche that the Statute of Frauds should not be allowed to shield the perpetration of a fraud is of little use because the Statute was enacted not for the purpose of barring justified claims but out of a fear that justified claims could not be distinguished from unjustified claims. The question is whether they can be more easily distinguished in fraud than in contract actions. Two peculiarities of the fraud action would seem to present a satisfactory answer to this question. In the first place the plaintiff must prove that the intent of defendant, at the time of the promise, was not to perform.[91] This intent cannot be inferred from a mere breach of the promise.[92] Thus, proof of actual conduct manifesting such an intent would be required, and this manifestation, in order to justify reliance, would have had to occur upon a different occasion from the making of the promise. Such manifestation would usually amount to something other than mere statements to plaintiff subsequent to plaintiff's reliance; such a defendant would not be likely to tell plaintiff that he had never intended to perform his promise. Thus, independent proof of the requisite intent would tend to establish the existence of the promise. The second distinguishing feature of a fraud action for these purposes is the measure of damages. New York follows the "out of pocket" rather than the "benefit of the bargain" rule in awarding damages in fraud actions. The principle of indemnity is controlling.[93] The incentive to fabricate false claims is greatly reduced because plaintiff can gain nothing; he can only be restored to his position at the time of the alleged promise. Since the Statute of Frauds is deemed a harsh and arbitrary measure and the courts have tended to restrict its application, these substantive differences from the contract action seem adequately to justify the Court's refusal to apply the Statute to a fraud action like the present.

Unfair Business Competition

Plaintiff corporation was engaged in a business in which by contract with individual householders, it sent out crews of men to perform ordinary house-cleaning chores in an assembly-line manner. Defendants were several of its employees who had quit and formed a competing business for which they solicited customers of plaintiff. Plaintiff in this action asked that they be restrained from engaging in the same business as plaintiff, from soliciting its customers, and for

91. Adams v. Clark, 239 N.Y. 403, 146 N.E. 642 (1925).
92. *Ibid.*
93. Sager v. Friedman, 270 N.Y. 472, 1 N.E. 2d 971 (1936); Foster v. Di Paolo, 236 N.Y. 132, 140 N.E. 220 (1923); Reno v. Bull, 226 N.Y. 546, 124 N.E. 144 (1919); *but cf.* Hotaling v. Leach & Co., 247 N.Y. 84, 159 N.E. 870 (1928).