

1-1-1958

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Recommended Citation

Robert Kaiser, *Action for Misrepresentation Barred When Statute of Frauds Denies Recovery on the Contract*, 7 Buff. L. Rev. 332 (1958).
Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol7/iss2/19>

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*Action For Misrepresentation Barred When Statute of Frauds
Denies Recovery on the Contract*

Plaintiff had made an oral contract with defendant's agent for the sale to the plaintiff of certain Georgia real estate, belonging to the defendant. Defendant refused to convey. Conceding that the express contract was not enforceable by virtue of an absence of a writing, GEORGIA CODE §20-401, (*cf.* N.Y. REAL PROPERTY LAW §259) plaintiff brought his action in fraud and deceit to recover damages as a result of his reliance upon the verbal promise. On petitioner's appeal from a summary judgment, *held*, the whole purpose of the statute of frauds is to prevent persons from being harassed by such oral agreements; and held also, the false promise to sell land is no basis for a fraud action under Georgia law. *Cohen v. Pullman Company*, 243 F.2d 725 (5th Cir. 1957).

Generally, a promise made without the intent to perform it is recognized as a basis for a fraud action. *Deyo v. Hudson*, 225 N.Y. 602, 122 N.E. 635 (1919); *Adams v. Gillig*, 199 N.Y. 314, 92 N.E. 670 (1910). Non-performance alone is not sufficient to raise the issue of fraudulent intent. *Adams v. Clark*, 239 N.Y. 403, 146 N.E. 642 (1925); *Levy v. Brusck*, 45 N.Y. 589 (1871). Misrepresentations of the intent to perform constitutes the fraud. *Ritzwollen v. Lurie*, 225 N.Y. 464, 122 N.E. 634 (1919).

There is a conflict of authority as to the right to maintain the tort action when the promise is within the statute of frauds as in the case under discussion: The weight of authority allows the action, one rationale being that proof of the promise goes to establish the fraud and not the contract. This rationale is best expressed in *Burgdorfer v. Thielemann*, 153 Or. 354, 55 P.2d 1122 (1936). A strong minority of jurisdictions, including New York, deny the action. The strongest case here expresses the view that the statute is a bar to any action which is based upon an unenforceable promise. *Dung v. Parker*, 52 N.Y. 494 (1873).

The majority of the jurisdictions permitting the action base their decisions upon the theory that the alleged fraud is an injury to the plaintiff independent of the contract. *Schleifer v. Worcester North Savings Institution*, 306 Mass. 226, 27 N.E. 992 (1940). Opinions here view the action as collateral to the unenforceable contract. *Nanos v. Harrison*, 92 Conn. 529, 117 A. 803 (1922). Such oral testimony, it is said does not go to establish an agreement but goes to prove the fraud. *Burgdorfer v. Thielmann*, *supra*; *Nanos v. Harrison*, *supra*; *Schenley Distillers Corporation v. Renken*, 34 F.Supp. 678 (E.D.S.C. 1940). See also: RESTATEMENT, TORTS §530, comment *b* (1938). Otherwise, the decisions feel that the statute would be an aid in the perpetration of fraud. *Nanos v. Harrison*, *supra*. One jurisdiction which permits the tort action has looked to the gravamen of a plaintiff's action and held the statute a bar when it amounted to damages

RECENT DECISIONS

for breach of contract. *Papanikalos v. Sampson*, 73 Utah 404, 274 Pac. 856 (1929).

A minority bar the action as did the instant case. Authorities here point out that a cause of action on the contract itself is barred by the statute of frauds. *Ossage v. Foley*, 200 Ohio App. 16, 153 N.E. 117 (1923); *Sachs v. Blewett*, 206 Ind. 151, 185 N.E. 856 (1933). Such action by the plaintiff as in the instant case is viewed as an attempt in an indirect manner to obtain damages for breach of the contract. *Canell v. Arcola Housing Corporation*, 65 So.2d 849 (Fla. 1953); *Kiser v. Richardson*, 91 Kan. 812, 139 Pac. 373 (1914); *Cassidy v. Kraft-Phoenix Cheese Corporation*, 285 Mich. 426, 280 N.W. 814 (1938). Decisions here point out that the parties are deemed to know the law; plaintiffs are bound to know that they have no action unless the contract is reduced to writing. *Cassidy v. Kraft-Phoenix Cheese Corporation*, *supra*. Moreover, it is pointed out that the statute is aimed at the prevention of litigation over agreements not reduced to writing that would harass persons and place their property in jeopardy without the conformity to the statute's requirement of certain formalities. *Cohen v. Pullman Company*, *supra*.

The controlling authority in New York is *Dung v. Parker*, *supra*. It was there held that if proof of a contract, void by the statute, was required to maintain an action there would be no recovery. It has been stated that *Dung v. Parker* stands alone, that it is no longer followed in New York. *Nanos v. Harrison*, *supra*. However, Special Term, relying upon *Dung v. Parker*, recently dismissed upon motion an action based upon facts very similar to those of the instant case. The plaintiff argued upon appeal that the statute of frauds should not be a defense to an action for fraud and that *Dung v. Parker* should be re-evaluated because it was against the weight of authority. The Court of Appeals, in a memorandum opinion, affirmed the lower court's dismissal of the complaint. *Redlark Realty Corporation v. Minkin*, 306 N.Y. 762, 118 N.E.2d 362 (1954). See also: *Automatic Truck Loaders Corporation v. City of New York*, 185 Misc. 649, 57 N.Y.S.2d 295 (Sup. Ct. 1945) and *Subriana v. Mundo*, 282 N.Y. 726, 26 N.E.2d 828 (1940).

The instant case may appear harsh but the court has reached a correct result. Contracting parties should be held to obedience to the statute's provisions; they act at their peril for the statute warns them that no action will lie if the oral promise is broken. Authorities for the majority view hold the defendant to a liability even though the contract is not enforceable and allow a jury to determine whether a fraud has been perpetrated. Such an action, by necessity, requires proof of a promise; the statute has taken this determination away from the jury.

It has been suggested that another purpose of the statute of frauds is to

impress the contracting parties with the solemnity and importance of their undertaking. This purpose is conceded. However, the theory remains that the statute is also aimed at preventing persons from being harassed by such oral agreements as in the present case. Avoidance of the statute should not be permitted by allowing the plaintiff a choice of action by mere selection of a particular legal theory.

Robert Kaiser

Monopolies—Restraint of Trade—Exclusive Automobile Dealerships

Appellant motor corporation appealed from a treble judgment in favor of a former Packard car dealer in Baltimore, Maryland, for alleged violation of the Sherman Anti-Trust Act. 26 STAT. 209 (1890), as amended, 15 U.S.C. §§1, 2 (1952). The basis for the instant suit was an agreement between appellant and Zell Motor Car Company, a retail dealer in the same area, wherein the latter was granted an exclusive franchise to sell appellant's automobiles and the expiring agreement of Webster Motor Car Company, plaintiff below, was to be cancelled. Held (2-1): said agreement did not create an unreasonable restraint of trade or amount to an attempt or conspiracy to monopolize within the meaning of the Sherman Act. *Packard Motor Car Company v. Webster Motor Car Company*, 243 F.2d 418 (D.C. Cir. 1957).

Every contract, combination or conspiracy in restraint of trade or commerce among the several states or with foreign nations is declared illegal under Section 1 of the Sherman Act. 26 STAT. 209 (1890), as amended, 15 U.S.C. §1 (1952). Until 1911 all contracts, combinations and conspiracies were per se illegal. That year the Supreme Court in *Standard Oil Company of N.J. v. United States*, 221 U.S. 1 (1911), articulated the now famous rule of reason. Generally the test of reasonableness of an exclusive dealership agreement is its resultant effect on competition, to wit, competition at the seller and buyer level. *Fargo Glass and Paint Company v. Globe American Corporation* 201 F.2d 534 (7th Cir. 1953), cert. denied, 345 U.S. 942 (1953). The necessary corollary to this section and of equal importance is Section 2 of the Sherman Act which prohibits monopolies or the attempt to monopolize. 26 STAT. 209 (1890), as amended, 15 U.S.C. §2 (1952). It is well settled that the existence of a power to exclude competition when it is desired to do so, provided it is coupled with the purpose or intent to exercise that power, constitutes a violation of this section. *American Tobacco Company v. United States*, 328 U.S. 781, 809, 811, 814 (1946). In conjunction with this principle, it is recognized that if an exclusive dealership agreement be part and parcel of a scheme to monopolize, that is, monopolization in the relevant market, it will fall within the orbit of this prohibition. *Fargo Glass and Paint Company v. Globe American Corporation*, supra; *United States v. E. I. duPont de*