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## Contracts—Failure to Furnish Sample as Breach of Contract

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congressional intention was, whether the Congress intended to pre-empt the entire field. The court may look to see if the federal regulations is so ". . . pervasive as to make reasonable the inference that Congress left no room for the states to supplement it,"<sup>68</sup> or whether the legislation touches a field in which the federal interest is so dominant.<sup>69</sup>

Defendants, in the action, argued that the Federal Housing Authority, an administrative agency of the United States, administering the National Housing Act, was the watchdog to protect the tenants in such a project. Thus, it was argued, that the statutory scheme demonstrated that Congress intended to have the F.H.A. supervise the project, completely control it and protect the tenant and thus pre-empt the field.

The Court, in upholding the jurisdiction of the New York courts in this case, pointed to the functions given the administrator by the National Housing Act and ruled that it was: ". . . no duty of his to exercise benevolent supervision over real estate developers."<sup>70</sup> The administrator is but a negotiator and agent for the Government to protect the Treasury by approving only financially sound mortgage risks and to protect veterans and other tenants from being victimized by exorbitant rents as long as F.H.A. loans were on the property. The administrator is not a judge and not a guardian of tenants. Congressional intention was not to have the administrator as a judge for there was no Federal forum provided for in the Act in which equitable issues of this nature could be decided.

## CONTRACTS

### Failure To Furnish Sample As Breach Of Contract

Where a sale is made subject to the buyer's satisfaction his approval becomes a condition precedent to his obligation to accept the merchandise.<sup>1</sup> The power to withhold approval is absolute where the object of the contract is to "gratify taste, serve personal convenience, or satisfy individual preference."<sup>2</sup> However commercial contracts in this state, where the suitability of the goods is a matter of "mechanical fitness, utility, or marketability," are subject to the rule

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68. *Rice v. Santa Fe Elevator Corporation*, 331 U.S. 218, 230 (1947).

69. *Pennsylvania v. Nelson*, 350 U.S. 497 (1956).

70. *Northridge Cooperative v. 32nd Avenue Construction Corporation*, 2 N.Y.2d 514, 533, 161 N.Y.S.2d 404, 416 (1957).

1. *Doll v. Noble*, 116 N.Y. 230, 22 N.E. 406 (1889); *Duplex Safety Boiler Co. v. Garden*, 101 N.Y. 387, 4 N.E. 749 (1886); *Atlas Shoe Co. v. Lewis*, 202 App. Div. 244, 195 N.Y. Supp. 618 (3rd Dep't 1922).

2. *Duplex Safety Boiler Co. v. Garden*, *supra* note 1.

that the contract imposes upon the buyer the requirement only that "a reasonable man . . . be satisfied with the performance."<sup>3</sup>

*Alper Blouse Company v. E. E. Connor and Co. Inc.*,<sup>4</sup> was an action to recover the purchase price paid for cloth which plaintiff refused to accept because of allegedly defective quality. The buyer, relinquishing his privilege to return them, entered into an agreement whereby the seller was to take back the goods, refinish them, and submit a new sample for approval. The buyer never approved the submitted sample which was not of the refinished goods. Nevertheless, the seller delivered the goods.

The Appellate Division<sup>5</sup> held that there was sufficient evidence that the sample was of such quality that the buyer should have approved and "the bulk was of better quality and more suitable for the purpose intended than the sample." The Court of Appeals, in reinstating the trial court's judgment for plaintiff, held that failure to furnish a sample of the actual goods was a breach of the agreement. An approved sample being a condition precedent to buyer's obligation to accept the shipment,<sup>6</sup> the case is disposed of at this point in plaintiff's favor. Further issue heard by the lower courts as to the better quality or suitability of the bulk was irrelevant.

However, as an alternative ground of decision, the Court pointed out that even with an approved sample, there is an implied warranty that the bulk shall correspond therewith in quality.<sup>7</sup> The seller assumes the burden of not only establishing a satisfactory sample,<sup>8</sup> but also showing that the bulk of the goods shipped corresponded to the sample.<sup>9</sup> The buyer cannot be compelled to accept goods which do not correspond to the sample.<sup>10</sup> In dictum this Court affirms its earlier holding that the fact that the bulk is better suited for the purpose is not the proper test, but rather the goods must "actually match" the sample.<sup>11</sup>

This apparently presents an anomaly. In commercial contracts the buyer

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3. *Duplex Safety Boiler Co. v. Garden*, *supra* note 1; *Hammel v. Stern*, 21 App. Div. 544, 48 N.Y. Supp. 528 (1st Dep't 1897), *aff'd* 164 N.Y. 603, 58 N.E. 1088 (1900); 1 RESTATEMENT, CONTRACTS §265 (1932).

4. 2 N.Y.2d 281, 159 N.Y.S.2d 481 (1957); See prior proceedings, 309 N.Y. 67, 127 N.E.2d 813 (1955), 5 BUFFALO L. REV. 234 (1956).

5. 1 App. Div.2d 617, 618, 152 N.Y.S.2d 222, 224 (1st Dep't 1956).

6. See cases cited note 1, *supra*.

7. N.Y. PERSONAL PROPERTY LAW §97.

8. *Doll v. Noble*, *supra* note 1; *Bowery Nat. Bank v. Mayor of New York*, 63 N.Y. 336 (1875).

9. *Alper Blouse Co. v. Connor and Co.*, 309 N.Y. 67, 71, 127 N.E.2d 813, 815 (1955); *Rosenstein v. Casein Mfg. Co.*, 50 Misc. 345, 347, 98 N.Y. Supp. 645, 646 (1906).

10. *Henry & Co. v. Talcott*, 175 N.Y. 385, 390, 67 N.E. 617, 618 (1903); *Beirne v. Dodd*, 5 N.Y. 95, 98 (1851); *Hanhart v. Labe Importing Co.*, 4 Misc.2d 256, 157 N.Y. Supp. 897 (1st Dep't 1916).

11. *Alper Blouse Co. v. Connor & Co.*, note 9 *supra*.

has only the requirement of satisfying a "reasonable man" test.<sup>12</sup> The Court here holds that the goods shipped must "actually match" the sample. Thus the seller might satisfy the legal requirements with lower quality than expected in the sample, and in the same instance breach the agreement by supplying better than expected in the delivery of the bulk.

#### Statute Of Frauds — Contract Not To Be Performed Within One Year

In *Zupan v. Blumberg*,<sup>13</sup> the Court of Appeals unanimously held, reversing the Supreme Court<sup>14</sup> and the Appellate Division,<sup>15</sup> that an oral agreement whereby a free lance advertising solicitor was to receive a stated commission on any account which he procured for as long as it was active, was void under the Statute of Frauds since it could not be performed within one year.<sup>16</sup> The plaintiff sued for commissions on orders which he claimed were placed with the defendant by a customer whom he had procured even though the orders were placed more than one year after the oral contract was made.

As a general rule a contract for services must be in writing if it is for an indefinite duration.<sup>17</sup> If the terms of the contract include an event which could terminate the contractual relationship within one year, the mere possibility that the parties' liabilities will endure beyond that time will not bring the contract within the Statute of Frauds.<sup>18</sup>

The lower courts and the respondent felt that this case did not come within the general rule but that it was akin to *Nat Nal Service Station v. Wolf*.<sup>19</sup> In that case the Court held that since neither party was obligated to do anything, there was just a continuing offer to contract and not a contract which would last for an indefinite duration.

However, in the instant case, plaintiff's right to his commission depended solely on the account, which he procured for the defendant, remaining active. It was not necessary for him to do anything further.

Therefore it could not be said that there was a continuing offer to contract within the meaning of the *Nat Nal Service Station* case for by the terms of the contract the plaintiff had fulfilled all of his obligations and the defendant was

12. See note 1 *supra*.

13. 2 N.Y.2d 547, 161 N.Y.S.2d 428 (1957).

14. 142 N.Y.S.2d 702 (1955).

15. 1 A.D.2d 203, 148 N.Y.S.2d 893 (1st Dep't 1956).

16. N.Y. PERSONAL PROPERTY LAW §31.

17. *Choen v. Bartgis Bros. Co.*, 264 App. Div. 260, 35 N.Y.S.2d 206 *aff'd* 289 N.Y. 846, 47 N.E.2d 443 (1943).

18. *Martocci v. Greater New York Brewery*, 301 N.Y. 57, 92 N.E.2d 887 (1950).

19. 304 N.Y. 332, 107 N.E.2d 473 (1952).