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Contracts—Waiver of Nonassignment Clause of Contract

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at the time the contract was executed.[23] The majority opinion did not concern itself with this problem.

A question of mutuality was raised by defendant. It claimed that plaintiff had an arbitrary unilateral power to change the price terms of the Bethlehem-Turner contract by raising its quotations for steel. The Court rejected this claim stating, ". . . this escalation clause provided for increases or decreases in accordance with changes in Bethlehem's *regular prices to all purchasers* . . . ."[24] (Emphasis added). However, the clause (see above) seems to permit a price change anytime ". . . said material prices, labor rates and/or freight rates shall be increased. . . ." It cannot be concluded, on the basis of the wording of the clause, that the parties intended "prices to all purchasers" to be the extrinsic standard by which escalation would be determined.[25] Nevertheless, since the referee found that Bethlehem in fact charged uniform and regular prices to all purchasers of its steel products, including its own fabrication and erection division, such prices provided a method whereby escalation could be determined and thereby satisfied the requirement of mutuality.[26] Moreover, while it was probably assumed by the parties that plaintiff would supply steel of its own making, that did not appear to be a requirement of the contract.[27]

Waiver Of Nonassignment Clause Of Contract

A motion picture made by National Pictures Inc., had been accepted by Twentieth Century-Fox for distribution. There were certain assignments connected with the profits of the picture that Twentieth Century refused to recognize on the grounds of a non-assignment clause in its agreement with National. The assignees requested a declaration of right and Twentieth Century moved for a summary judgment. The problem presented in *Sillman v. Twentieth Century-Fox Film Corp.*,[28] was whether there was sufficient evidence of waiver of the non-assignment clause to present a triable issue.

The Court recognized that funds can be made unassignable by written agreement between the parties[29] but also that this prohibition can be waived.[30] The

23. *Ibid.* at 459.
24. See note 22 *supra.*
25. Raleigh Assoc. v. Henry, 302 N.Y. 467, 473, 99 N.E.2d 287, 291 (1951); Simpson Bros., Inc. v. District of Columbia, 73 F. Supp. 858 (1947).
26. Buggs v. Ford Motor Co., 113 F.2d 618, 620 (7th Cir. 1940); Ken-Rad. Corp. v. R. C. Bohannan, Inc., 80 F.2d 251 (6th Cir. 1935); *Cf.* WILLISTON, LAW CONTRACTS §41 (rev. ed. 1938).
27. Bethlehem Steel Co. v. Turner Construction Co., 283 App. Div. 69, 126 N.Y.S.2d 147 (1st Dep't 1953).
28. 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957).
29. Allhusen v. Caristo Const. Corp., 303 N.Y. 446, 103 N.E.2d 891 (1952).
30. Devlin v. Mayor of City of New York, 63 N.Y. 8 (1875).

majority of the Court in looking at the context of the contract and fact situation found enough to convince themselves that a triable issue was present. In the context of the contract they interpreted the words of the non-assignment clause "shall have the right to withhold" and "shall not be required" to indicate that Twentieth Century had the option to either accept or reject assignments, depending on its own actions. The certain facts that indicate that waiver might be present were that Twentieth Century had examined all the contracts prior to accepting the picture and as a result knew of the assignment but still did not exercise its option to hold National in default within the sixty days allowed by the contract. Also, Twentieth Century's attorney was notified of the assignments by the assignees and he in no way indicated that they would not be carried out. The majority did not believe these facts were conclusive but that they did present a triable issue which precluded granting summary judgment since such relief is predicated upon the clear absence of such an issue.[31]

The dissent took issue with the majority only in respect to the waiver presenting a triable issue in the above fact situation. A waiver is characterized by an intentional relinquishment of a known right[32] and the dissenters did not feel that the evidence presented indicated such a release. They pointed out that neither the actions of the defendant's attorney nor the acceptance of the picture with knowledge of the assignments, necessarily indicated a waiver of the nonassignment clause. The defendant's intent in incorporating this clause in the contract was clearly to avoid disputes among the assignees. Since a waiver would be directly contrary to such intent, the dissent reasoned that there should be a stronger evidence upon which to base a finding of waiver.

It is submitted that, although the dissent's position that no single act of the defendant would constitute a waiver might well be valid, the cumulative effect of the defendant's actions presented a triable issue and thus the granting of a motion for summary judgment was improper.

Application Of Fire Insurance Proceeds To Purchase Price

If a vendee is in possession of certain realty under a contract of sale, and part of the premises is destroyed due to no fault of the vendor, the vendee, absent any agreement to the contrary, must still perform the contract and pay the full purchase price.[33] An exception to this general rule is found in the recent case of *Raplee v. Piper*.[34]

Here, the vendee was in possession under a contract of sale and a fire caused

31. DiMenna & Sons v. City of New York, 301 N.Y. 118, 92 N.E.2d 918 (1950).
32. Werking v. Amity Estates, 2 N.Y.2d 43, 155 N.Y.S.2d 633 (1956).
33. N.Y. REAL PROPERTY LAW §240(a).
34. 3 N.Y.2d 179, 164 N.Y.S.2d 732 (1957).