Buffalo Law Review

Volume 7 | Number 1 Article 34

10-1-1957

Contracts—Application of Fire Insurance Proceeds to Purchase Price

Joel Brownstein

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).

substantial damage to the subject matter of the contract. As a term of the contract, the vendee paid for the premium on the insurance, before the title was to pass to him. After the vendor had received indemnity from the insurance company for this loss, the vendee sought to apply the insurance proceeds to the purchase price remaining unpaid.

The court previously in *Brownell v. Board of Education*[35] decided that a contract of insurance is personal and does not run with the land. This decision followed an English decision[36] since superceded by statute in that country.[37] The inequities that arose from the holding in *Brownell* were forseen by the New York Law Revision Commission,[38] but the legislature did not enact the statute proposed to remedy the situation.

The majority here distinguished the *Brownell* case from the present situation by the showing that in that situation it was the vendor who paid for the insurance and as such the insurance was not part of the *res* bargained for. No inequity arose from that decision as the contract called for delivery of the property in as good a condition as it was in at the time of the contract, and the vendee could deduct the damages from the purchase price. The Court felt that regardless of the legal theory they might adopt, a trust fund rationale[39] or other theory, in this situation the insurance has been taken out for the benefit of both vendor and vendee. The vendee should not have to pay for the insurance premiums and then have to pay the full purchase price for damaged property. Such an inequitable situation should not be allowed to exist, despite the dissent's excellent technical arguments and the legislative failure to amend the law to eliminate this injustice. The flexibility of the courts has eliminated the inequitable result that would occur had the dissenters prevailed.

Contract — Measure Of Damages

In *Bellizzi v. Huntley Estates*[40] a construction contract called for a house with an attached garage substantially at street level. The completed driveway had a steep grade precluding its safe and convenient use.

The general rule in building contracts is that where the defect is one that can be cured without undue expense the owner recovers that amount reasonably required to remedy the defect.[41] If the defect is not so remediable, the damages

35. 239 N.Y. 369, 146 N.E. 630 (1936).
36. Rayner v. Preston, 18 Ch. D. 1 (1881).
37. 15 GEO. V, ch. 20 §47 (1925).
38. 1936 REPORT OF NEW YORK LAW REVISION COMMISSION, 767.
39. See, Persico v. Guernsey, 129 Misc. 190, 220 N.Y. Supp. (Sup. Ct. 1927), *aff'd* 222 App. Div. 719, 225 N.Y. Supp. 890 (4th Dep't 1927).
40. 3 N.Y.2d 112, 164 N.Y.S.2d 395 (1957).
41. McKegney v. Illinois Surety Co., 180 App. Div. 507, 167 N.Y. Supp. 843 (1st Dep't 1917); 5 WILLISTON, CONTRACTS §1363, p. 3825 (rev. ed. 1937).