Buffalo Law Review

Volume 7 | Number 1 Article 35

10-1-1957

Contracts—Contract—Measure of Damages

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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 This decision followed an English decision[36] since superceded by statute in that country.[37] The inequities that arose from the holding in *Brownell* were forseen by the New York Law Revision Commission,[38] but the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).

are based on the difference between the value of the defective structure and that of the structure if properly completed.[42] This is the theory of substantial performance coupled with good faith, and is well established in this state.[43] The later rule is applied only where the "cost of completion is grossly and unfairly out of proportion to the good to be obtained."[44] It is necessary to consider whether the defective building is substantially and safely usable, and the amount of cost necessary to bring the structure into conformity with the contract.[45]

The trial court charged the jury that "the fair and reasonable cost to remedy the defect . . . or to get a reasonably usable driveway" was the proper measure of damages. The Appellate Division held it error for the lower court to exclude evidence of "comparative value" rule where the cost to repair would exceed such difference.[46] Reinstating the jury verdict for plaintiff the Court of Appeals restricted the "difference of value" rule to cases of gross disproportion, amounting to economic waste if the general rule were applied.

It appears that the proof in the record did show substantial loss of service of the driveway, and a reasonable possibility of correction and thus an ideal situation for the application of the general rule.

Rescission — Fraud In The Inception

Ordinarily mere promises of action to be taken in the future are not actionable in New York on a misrepresentation theory.[47] However, it is generally accepted in this state that a promise which is made with a preconceived intention of nonperformance amounts to a misrepresentation of fact which may become the basis for an action in recission.[48]

In *Sabo v. Delman,*[49] defendant allegedly represented to plaintiff that he would manufacture and sell certain machinery which plaintiff had patented if the latter would assign the patents to him in return for, among other things, 25% of the profits. The complaint demanded recission of the agreement. It was alleged that plaintiff was induced to sign by defendant's promises to manufacture his product and that these promises were made by the defendant with knowledge

42. Jacob and Youngs v. Kent, 230 N.Y. 239, 129 N.E. 889 (1921).
43. Smith v. Brady, 17 N.Y. 173 (1858); Spence v. Ham, 163 N.Y. 220, 57 N.E. 412 (1900); Jacob and Youngs v. Kent, *supra* note 42.
44. Jacob and Youngs v. Kent, *supra* note 42.
45. High Quality Homes v. Parker, 283 App. Div. 954, 130 N.Y. Supp. 360 (2d Dep't 1954).
46. Bellizzi v. Huntley Estates, 1 A.D.2d 683, 147 N.Y.S.2d 74 (2d Dep't 1955).
47. Adams v. Clark, 239 N.Y. 403, 146 N.E. 462 (1925).
48. See, *eg.* Adams v. Gillig, 199 N.Y. 314, 92 N.E. 670 (1910).
49. 3 N.Y.2d 163, 164 N.Y.S.2d 719 (1957).