Buffalo Law Review

Volume 7 | Number 1 Article 36

10-1-1957

Contracts—Rescission—Fraud in the Inception

Edwin Yeager

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Recommended Citation

Edwin Yeager, *Contracts—Rescission—Fraud in the Inception*, 7 Buff. L. Rev. 99 (1957).
Available at: https://digitalcommons.law.buffalo.edu/buffalolawreview/vol7/iss1/36

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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).

that they were false. The Court of Appeals reversed the Appellate Division,[50] and held (5-2) that the complaint stated a cause of action in recission.

The two dissenting justices felt that the defendant's obligation was contractual in nature, and did "not sound in fraud." The majority, on the other hand, relied on precedents[51] and pointed out that it had been alleged that a promise of performance was made with knowledge on the part of the promisor that he would not act.

Defendant also relied on a statement in the assignment agreement that verbal understandings not therein specified would not bind either party. In dismissing this the Court pointed out that if effect were given to such clauses, an action for recission based on fraud would never lie if the defendant simply had the foresight to absolve himself by including such a clause in his contracts.[52]

Thus, in the instant case the Court reaffirmed their recognition of the principle that the state of a man's mind is a fact capable of misrepresentation.[53]

Per Curiam

Specific Performance — Inadequacy of Money Damages—In *Monclova v. Arnett*,[54] the Court of Appeals preserved an action for specific performance where the relief by way of quantum meruit recovery would be grossly inadequate. The cause of action was also preserved even though the ability of plaintiff to actually receive the benefit of his contract was subject to administrative determination.[55]

Carrier Liability—For Full Value of Goods Lost—In *Emily Shops v. Interstate Truck Line*,[56] a shipper was allowed to recover the full value of his goods where he paid more than the usual freight charges corresponding in filed tariffs to full value of goods, and where he did not mention the true value of the goods. The Court compared a similar decision[57] in which recovery was allowed although plaintiff did not pay any freight charges, and had not declared the true value of his goods.

Premature Suit—In *Lenmar Construction Co. v. New York Housing Authority*,[58]

50. 286 App. Div. 238, 142 N.Y.S.2d 223 (1st Dep't 1955).
51. Adams v. Gillig, *supra* note 48; Ritzwaller v. Lurie, 225 N.Y. 467, 122 N.E. 634 (1919).
52. Ernst Iron Works v. Duralith Corp., 270 N.Y. 165, 200 N.E. 683 (1936).
53. Edington v. Fitzmaurice, 29 Ch. D. 359 (1882).
54. 3 N.Y.2d 33, 163 N.Y.S.2d 652 (1957).
55. N.Y. ALCOHOLIC BEVERAGE CONTROL LAW §§109, 114.
56. 2 N.Y.2d 405, 161 N.Y.S.2d 46 (1957).
57. Loeb v. Friedman's Express, 187 Misc. 89, 94, 65 N.Y.S.2d 450, 454 (Sup. Ct. 1946), *aff'd* 296 N.Y. 1029, 73 N.E.2d 906 (1947).
58. 2 N.Y.2d 628, 162 N.Y.S.2d 25 (1957).