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Contracts—Statute of Frauds

Maynard Schaus

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Generally, silence cannot be construed as acceptance of an offer,[13] for "assent" which is purely mental is too ambiguous.[14] The offeror has no power to force the offeree to act in order to reject the offer.[15] The general rule is that delay by an insurer in acting upon an application for insurance in itself is not to be construed as an acceptance of the offer.[16] But the silent retention of a renewal policy by an insured will operate as acceptance where previous dealings are shown.[17] Likewise, unreasonable delay in notifying an applicant of rejection of a solicited policy will bind the insurer.[18] Evidence of usage in a particular trade is admissible with other circumstances to show an assent from silence.[19] The burden of proof is on the party who asserts the existence of the policy.[20]

The plaintiff in the instant case simply failed to show facts sufficient to bring his case within the exceptions to the general rule.

Statute of Frauds

An oral agreement may be valid as such, yet unenforceable because by its terms it cannot be fully performed within one year from its making.[21] In *Nat Nal Service Stations v. Wolf*,[22] the action was for money due upon an oral contract which provided that so long as the plaintiff purchased his requirements of gasoline through the defendant, plaintiff would be paid a certain rebate. The defendant set up the Statute of Frauds in answer and moved for summary judgment. The Court of Appeals, three judges dissenting, held that the agreement did not fall within the scope of

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13. *Lee v. Woodward*, 259 N. Y. 149, 181 N. E. 81 (1932).

14. *Mactier v. Frith*, 6 Wend. 103, 119 (N. Y. 1830); *White v. Corlies*, 46 N. Y. 467 (1871); 1 CORBIN, *op. cit.* § 72 (1951).

15. *More v. N. Y. B. F. Ins. Co.*, 130 N. Y. 537, 547, 29 N. E. 757, 759 (1892).

16. *More v. N. Y. B. F. Ins. Co., supra* n. 15; VANCE, INSURANCE § 64 (1930).

17. *National Union Fire Ins. Co. v. Ehrlich*, 122 Misc. 682, 203 N. Y. Supp. 434 (Sup. Ct. 1924).

18. *Thompson v. Postal Life Ins. Co.*, 226 N. Y. 363, 123 N. E. 750 (1919).

19. *Rose Inn Corp. v. National Union Fire Ins. Co.*, 258 N. Y. 51, 179 N. E. 256 (1930).

20. *Lavine v. Indemnity Ins. Co.*, 260 N. Y. 399, 410, 183 N. E. 897, 900 (1933).

21. N. Y. PERS. PROP. LAW § 31 (1.): "Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking; (1.) By its terms is not to be performed within one year from the making thereof . . ." "Year" is defined in GENERAL CONSTRUCTION LAW § 58.

22. 304 N. Y. 332, 107 N. E. 2d 473 (1952).

the one year section since it was a contract "at will," with the right in either party to avoid performance indefinitely or to terminate the relationship by notice. The court upheld the complaint on the ground that the suit was actually on a series of executed contracts. The dissent limited its review to the question whether the agreement as alleged fell within the Statute. It found that by the terms of the contract performance on the part of the defendant was to extend beyond one year, and that he was powerless to bring the agreement to an end within that time.[23]

Will part performance of an oral contract take it outside the operation of the one year section? The majority rule is that if either party to a bilateral contract cannot perform his promise within one year, then the whole agreement is within the Statute so long as it remains bilateral.[24] But where the oral agreement at its inception is unilateral,[25] or has become unilateral by reason of full performance on one side,[26] the section does not apply even though the performance of the remaining promise may require over one year.[27] This is known as the "part performance rule," New York, in the minority, requires that full performance within a year be possible by both sides, whether the contract is bilateral or unilateral.[28] Thus, in New York, the fact that one side has fully performed is irrelevant to the enquiry whether the oral agreement is within the year section.

What does full performance mean? According to the New York rule, performance "is simply carrying out the contract by doing what it requires or permits."[29] Thus, if the oral contract expressly permits one[30] or both [31] of the parties to bring their

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23. 304 N. Y. at 339, 107 N. E. 2d at 478: "Regardless of whether, or when, plaintiff gave, or defendants accepted, any orders for gasoline, plaintiff's right to give such orders and defendants' obligation to pay the agreed amount, by the terms of that treaty, continue for an indefinite time. There was nothing that either party could do, within a year, or within any other agreed-upon period, to bring the arrangement to an end."

24. 2 WILLISTON, *op. cit.* § 498; RESTATEMENT, CONTRACTS § 198 (1932); 2 CORBIN, *op. cit.* § 456.

25. 2 CORBIN, *op. cit.* § 456.

26. 2 CORBIN, *op. cit.* § 457.

27. 2 CORBIN, *op. cit.* § 457, 458.

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

29. (Italics added) Blake v. Voigt, 134 N. Y. 69, 72, 31 N. E. 256, 259 (1892).

30. *Spector Co. v. Serutin Co.*, 60 N. Y. S. 2d 212 (Sup. Ct. 1946).

31 *Blake v. Voigt, supra* n. 29.

relationship to an end within a year, it is not within the Statute. So also, where the agreement is subject to an expressed contingency which may happen and end the contract within a year,[32] or where the promise is in the alternative and either promise could be performed within a year,[33] the Statute is inapplicable. Every other termination of the agreement, unless expressly permitted, is a destruction or breach of the contract but not performance.

Where the duty to perform may be avoided beyond one year, as when contingent upon the acts of a third party, the Statute still applies since the avoidance of performance is not performance.[34] Even where the possibility to avoid performance is in the control of the defendant, it is not considered equivalent to an expressed option to terminate.[35] It may not be exercised arbitrarily.[36] The fact that the defendant in the instant case could avoid performance by not accepting orders appears to be irrelevant. The promises in the *Cohen*[37] and *Martocci*[38] cases which were held to be within the Statute are not materially different from the promise of the defendant in the instant case. However, the court divided over the question of the *kind* of contract involved. The majority found that the parties never bound themselves to anything while the dissent was of the opinion that the parties had bound themselves for an indefinite time.

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32. *International Ferry Co. v. American Fidelity Co.*, 207 N. Y. 350, 101 N. E. 160 (1913).

33. 2 WILLISTON, *op. cit.* § 498.

34. *Martocci v. Greater New York Brewery Inc.*, *supra* n. 28. The promise of the defendant was to pay the plaintiff a certain commission on all sales made by the defendant to a third party. The court stated: "The mere cessation of orders from Lorillard to defendant would not alter the contractual relationship between the parties; it would not constitute performance; plaintiff would still be in possession of his contractual right, though it may have no monetary value, immediately or ever." 301 N. Y. at 63, 92 N. E. 2d at 887.

35. *Cohen v. Bartgis Bros. Co.*, *supra* n. 28. The promise of the defendant was to pay the plaintiff a commission at anytime on all orders *placed* by a third party. The defendant could not continually refuse to accept orders and thus avoid performance forever. The court stated: "Unlike contracts which require the performance of a single act which may or may not be executed within a year, the contract here requires the defendant, for an unlimited period of time, to pay commissions on orders accepted from Resolute Paper Products Corp. and, therefore, is impossible of performance within a year." 264 App. Div. at 261, 35 N. Y. S. 2d at 208.

36. *Warren C. & M. Co. v. Holbrook*, 118 N. Y. 586, 23 N. E. 908 (1890); *cf. Hedeman v. Fairbanks, Morse & Co.*, 286 N. Y. 240, 250, 36 N. E. 2d 129, 133 (1941); *Taylor v. E. M. S. Co.*, 124 N. Y. 184, 187, 26 N. E. 314, 316 (1891); 1 CORBIN, *op. cit.* §§ 150, 162, 165.

37. *Supra* n. 35.

38. *Supra* n. 34.