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Contracts—Arbitration

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vailing . . . that any property right, not necessarily personal, is assignable, is overcome by agreement of the contracting parties . . .” Thus, the rule that parties may prohibit the assignment of contract rights by mutual agreement has long been recognized in dictum in New York,⁴⁶ and where the prohibition is for the sole benefit of the obligor the assignment has been held void.⁴⁷ The tendency, however, has been to treat the clause as relating to the delegation of performance alone,⁴⁸ unless the assignee has actual notice of the restriction.⁴⁹ Clear and unequivocal language is required to lead to the conclusion that the rights are not assignable.⁵⁰ The general rule is recognized by the Restatement.⁵¹

The court in the instant case found the terms of the restrictive clause sufficiently clear to indicate an intent that any assignment of rights was ineffectual and void. A new section to the Uniform Commercial Code⁵² is intended to deny effect to any agreement prohibiting the assignment of accounts and contract rights (including sums due and to become due) under contracts of sale, construction and the like. It would overrule the present case.

Arbitration

Arbitration agreements are often inexpensive and expeditious means for settling future disputes between parties to a contract. In *Alpert v. Admiration Knitware*,⁵³ the plaintiff (buyer) petitioned for an order directing the defendant (seller) to submit to arbitration issues alleged to be in controversy. Beside containing an arbitration clause,⁵⁴ the contract provided that if in the sole

46. *Devlin v. Mayor of New York*, 63 N. Y. 8 (1875).

47. *Fortunato v. Patton*, 147 N. Y. 277, 281 (1895).

48. 2 WILLISTON, *op. cit.* § 442.

49. *Snyder v. City of New York*, 74 App. Div. 421, 77 N. Y. Supp. 637 (1st Dep't 1902).

50. *State Bank v. Central Mercantile Bank*, 248 N. Y. 428, 435, 162 N. E. 475, 477 (1928).

51. RESTATEMENT, *op. cit.* § 151: "A right may be the subject of effective assignment unless . . . (c) the assignment is prohibited by the contract creating the right."

52. UNIFORM COMMERCIAL CODE-SECURED TRANSACTIONS § 9-318 (1952): "(4) A term prohibiting assignment of an account or contract right is ineffectual." Section 151 of the RESTATEMENT, *supra* n. 51, mentions nothing indicating that agreements making wages non-assignable are any different from agreements making other rights non-assignable. Section 9-318 (4) of the COMMERCIAL CODE would make ineffectual any agreement prohibiting the assignment of rights even as against an assignee with actual notice.

53. 304 N. Y. 1, 105 N. E. 2d 561 (1952).

54. The arbitration clause provided that: "All other controversies arising out of or relating to this contract, or breach thereof, shall be settled by arbitration . . ." 304 N. Y. at 5, 105 N. E. 2d at 563.

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opinion of the defendant the plaintiff's financial responsibility was unsatisfactory, cash payments in advance of deliveries might be required, and upon plaintiff's failure to make such advances, the defendant might terminate the contract. The defendant gave written notice to the plaintiff demanding such payments and stating that failure to comply within eight days would be deemed abandonment. The plaintiff failed to comply. The Appellate Division (3-2) held⁵⁵ that there was an arbitrable issue whether the parties intended the defendant's right of termination to be absolute or conditioned upon a showing of good faith. However, the Court of Appeals, (6-1) held that the unequivocal language gave the defendant an absolute power of termination and that the record clearly showed that the contract was no longer in existence, and that therefore no issue remained for arbitration.

A proceeding to enforce arbitration presupposes the existence of a valid agreement to arbitrate at the time the remedy is sought.⁵⁶ But whether the defense that the agreement has been terminated prior to the petition for arbitration is in itself an issue included within the arbitration clause is not free from difficulty. Upon petition for an order directing arbitration, only two issues are within the jurisdiction of the court:⁵⁷ (1) the making of the agreement to arbitrate, (2) the failure to comply therewith. All other disputes, if within the scope of the arbitration clause⁵⁸ must proceed to arbitration, including both questions of law and fact.⁵⁹ Whether the particular dispute falls within the scope of the arbitration clause depends upon the intention of the parties as expressed therein.⁶⁰ However, the mere assertion of a dispute may be so frivolous and contrary to the plain meaning of the words of the agreement that the court will refuse to order the parties to proceed to arbitration, even though the alleged dispute may fall within the literal language of the arbitration clause.⁶¹

55. 278 App. Div. 841, 104 N. Y. S. 2d 309 (2nd Dep't 1951).

56. *Matter of Kramer & Uchitelle*, 288 N. Y. 467, 471, 42 N. E. 2d 493, 495 (1942); *Finsilver, Still & Moss v. Goldberg M. & Co.*, 253 N. Y. 382, 171 N. E. 579 (1930).

57. N. Y. C. P. A. § 1449.

58. *Matter of Eagar Const. Corp. v. Ward Foundation Corp.*, 255 App. Div. 291, 7 N. Y. S. 2d 450 (1st Dep't 1938).

59. *Matter of Wenger & Co. v. Propffer S. H. Mills*, 239 N. Y. 199, 146 N. E. 203 (1924).

60. *Matter of Aqua Mfg. Co., Inc. (Warshaw & Sons, Inc.)*, 179 Misc. 949, 40 N. Y. S. 2d 564, *aff'd without opinion*, 266 App. Div. 718, 41 N. Y. S. 2d 935, *appeal denied*, 266 App. Div. 767, 42 N. Y. S. 2d 917 (1943). Compare *Matter of Kramer & Uchitelle*, *supra* n. 56 with *Matter of Lipman v. Haenser Shellac Co.*, 289 N. Y. 76, 43 N. E. 2d 817 (1942). See, *Application of Minkin*, 279 App. Div. 226, 108 N. Y. S. 2d 945 (2nd Dep't 1951).

61. *Matter of International Ass'n. of Machinists, (Culler-Hammer, Inc.)*, 275 App. Div. 917, 67 N. Y. S. 2d 317, *aff'd*, 297 N. Y. 519, 74 N. E. 2d 464 (1947).

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Thus, whether or no a bona fide dispute exists is a question of law for the courts.⁶²

Jurisdiction of the court to determine whether a dispute is frivolous or not is not provided for in section 1449 of the Civil Practice Act. The language of the arbitration clause in the instant case would seem broad enough to include such issues.

Interpretation

In *Moeller v. Associated Hospital Service*⁶³ the plaintiff sought to recover for hospital expenses under a "Blue Cross" hospital insurance policy issued by the defendant. The policy expressly excluded for coverage hospital service "provided for under any compensation law . . ." The plaintiff had been injured in the course of employment, and his hospital bills were paid by his employer's compensation carrier. Thereafter, the plaintiff began suit against the third party tort-feasor which resulted in a settlement. The compensation carrier enforced its lien upon the settlement for the amount paid upon plaintiff's compensation claim.⁶⁴

The present action was submitted to the Appellate Division upon an agreed statement of facts. The plaintiff contends that his hospital expenses were not within the meaning of the exclusion clause of the policy. The Appellate Division allowed recovery upon the ground that when the compensation carrier was reimbursed, it no longer provided hospital service under the compensation statutes, since by reimbursement the services were actually "provided" by someone else.⁶⁵ The Court of Appeals, three judges dissenting, found that the hospital services were provided for by the Workmen's Compensation Law since the "plaintiff never lost the protection of the Statute with respect to hospital services."⁶⁶ The majority also found that any other construction

62. *Matter of General Elec. Co. (United Elec. Radio & Mach. Workers)*, 300 N. Y. 262, 90 N. E. 2d 181 (1949).

63. 304 N. Y. 73, 106 N. E. 2d 16 (1952).

64. N. Y. WORKMEN'S COMP. LAW §29 (1). This section gives the carrier a lien on the proceeds of any settlement to the extent of the amount of compensation provided and goes on to state that any recovery shall be deemed for the benefit of the carrier.

65. 278 App. Div. 723, 103 N. Y. S. 2d 116 (3rd Dep't 1951).

66. The court stated: "If he did not prevail in the third-party action, he nevertheless retained the benefits of the hospital expenses furnished by the employer's insurance carrier; if he did prevail, he likewise retained these benefits, but the third-party wrongdoer, *not plaintiff*, had to reimburse the carrier. While plaintiff was entitled to sue for these expenses, it was on behalf of the carrier, and the law gave the carrier a lien therefor. He could never recover these medical expenses for himself; they belonged under the statute to the carrier." 304 N. Y. at 75, 106 N. E. 2d at 17.