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Contracts—Divisibility

James Lindsay

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Divisibility

Whether a contract is divisible or not is normally a question of the intention of the parties.[17] One method of ascertaining the meaning and construction of a written contract is to look at the conduct of the parties under it.[18] As Judge Lehman said in *DeGraff & Palmer v. Mayper:*[19] "Since, however, the interpretation of the contract depends in the last analysis upon the intention of the parties, if these parties have themselves placed a clear interpretation upon it by *their acts,* we are bound to follow their own interpretation."[20] (Emphasis supplied.)

Rentways, Inc. v. O'Neill Milk & Cream Co., Inc.[21] involved a rental contract for six trucks "for a period of three (3) years to commence on the date the contracted trucks are put into the service of the lessee." The undisputed evidence showed that the parties intended all six trucks to be delivered within ninety days from the date the contract was signed. However, there was no delivery until four and a half months later; then only four of the six trucks were delivered, and it was not until about five months later that the last two trucks were delivered. The defendant continued to use the trucks for three years from the date upon which it received delivery of the first four trucks. Plaintiff took the view that the contract did not terminate until three years from the date that the last of the six trucks was delivered, and continued to bill the defendant.

The trial court held that the contract was not divisible and adopted plaintiff's view. The Appellate Division modified,[22] concluding that the agreement was divisible and therefore the earlier date controlled for four trucks while the later date controlled for two trucks.

The Court of Appeals, in a 4-2 decision, supported the Appellate Division and strongly rejected any attempt to resolve the issue of interpretation by resort to any fixed rule of divisibility or entirety.[23] It found the plaintiff caused the litigation by failing to deliver all of the six trucks within the ninety-day period contemplated by the parties. Therefore, the court was opposed to the construction

17. 3 WILLISTON, CONTRACTS § 860a-62 (rev. ed. 1936). "In the case of a contract naturally and accurately severable (such as a contract for the sale of a bill of goods at certain prices for each article), courts are inclined to hold the contract severable, and to grant a recovery for that portion of the goods actually delivered, less damages for the non-delivery of any portion not delivered. Under all ordinary circumstances this course will result in *exact justice.*" (Emphasis supplied.) *Id.* § 862.

18. *Seymour v. Warren,* 179 N. Y. 1, 71 N. E. 260 (1904).

19. 65 Misc. 185, 119 N. Y. Supp. 657 (1909).

20. *Id.* at 188, 119 N. Y. Supp. at 659.

21. 308 N. Y. 342, 126 N. E. 2d 271 (1955).

22. 282 App. Div. 924, 125 N. Y. S. 2d 282 (1st Dep't 1953).

23. See 3 CORBIN CONTRACTS §§ 694-95 (1st ed. 1950); see, also, 3 WILLISTON, *op. cit. supra* note 1, § 861 at 2413-15.

urged by the plaintiff, since this would enable the plaintiff to profit by its own breach by arbitrarily extending the term of the contract through the device of delaying the delivery of one or more of the trucks.

To reach the desired result, the court found that the parties intended the rental term to be one of three years, and not one of indefinite duration depending upon the timeliness of plaintiff's performance. While the commencement date was seen as ambiguous, the "crucial" provision that the duration of the rental term be three years was seen as clear and unequivocal. A cardinal principle governing the construction of contracts is that the entire contract must be considered, and, as between possible interpretations of an ambigous term, that will be chosen which best accords with the sense of the remainder of the contract.[24] "That interpretation is favored which will make every part of a contract effective."[25] The court found that plaintiff's reading of the contract would read out the three year duration provision. "Its 'every part' may here be made 'effective' only by construing the lease term as commencing separately for each truck or group of trucks on the date of its delivery."[26]

Another well-settled maxim was used in rejecting plaintiff's interpretation. "Where there is ambiguity in the terms of a contract prepared by one of the parties, 'it is consistent with both reason and justice that any fair doubt as to the meaning of its own words should be resolved against' the party."[27]

Substituted for any fixed rule of divisibility or entirety was the intent of the parties as seen from the fact that the contract fixed different rental rates for each truck, and that the parties themselves treated the contract as immediately effective upon the delivery of the first group.[28]

It was urged by the plaintiff that since the case was tried at the trial term by both sides upon the assumption that the contract was entire and indivisible, the Appellate Division had no alternative but to accept either the earlier date or the later date as controlling for the entire contract. The answer: "To say that appellate courts must decide between two constructions proffered by the parties, no matter how erroneous both may be, would be to render automatons of judges, forcing

24. See *e. g., Fleischman v. Furgueson,* 223 N. Y. 235, 119 N. E. 400 (1918); *First Nat. Bank v. Jones,* 219 N. Y. 312, 114 N. E. 349 (1916); 1 RESTATEMENT CONTRACT, § 235 (c).

25. *Fleischman v. Furgueson, supra* note 8 at 239, 119 N. E. at 403.

26. *Rentways, Inc., v. O'Neill Milk & Cream Co., supra* note 5 at 345, 126 N. E. 2d at 273.

27. *Mutual Life Ins. Co. of New York v. Hurni Packing Co.,* 263 U. S. 167, 174 (1923); see *Atterbury v. Bank of Washington Heights,* 241 N. Y. 231, 149 N. E. 841 (1925); *Gillet v. Bank of America,* 160 N. Y. 549, 55 N. E. 292 (1899).

28. Cf. 3 WILLISTON, *op. cit. supra,* note 1, at 2419.

them merely to register their reactions to the arguments of counsel at the trial level."[29] While an appellate court will not consider different theories or new questions if proof might have been offered to refute or overcome them had they been presented at the trial,[30] nevertheless, where the issue involves the meaning of a written contract which is in the record and where each party had full opportunity to adduce all pertinent evidence bearing on its construction, the Appellate Division is not limited to a choice between the opposing constructions contended for at the trial but is privileged to give to the contract a "meaning conceivably . . . different from that which either party justifiably attached to the words."[31]

The dissent took the position that an appellate court should confine itself to the theory mutually agreed upon by the parties.[32] "Trials are held to enable parties to bring to the court for decision disputed questions of fact or law, and parties who fail to avail themselves of the opportunity offered them to present such questions of fact or law to a trial court cannot on appeal present them for court will have an easier time in reaching such an equitable result.

It is fortunate for the defendant that the court was willing to work so vigorously to see that "exact justice" was done. It is suggested, however, that future defendants anticipate a divisible contract as well as an entire contract so that the decision in this court."[33]

Copyright

In an action for royalties under a contract licensing the publication of certain musical compositions, the contract was construed to run only for the statutory length of the copyrights, and judgment was rendered for defendant licensee.[34]

In 1917 plaintiff's assignor, Shubert Theatrical Company, produced a musical entitled "Maytime," adapted from a German play. The American version had a

29. *Rentways, Inc. v. O'Neill Milk & Cream Co., supra* note 5 at 346, 126 N. E. 2d at 274.

30. *Lindlots Realty Corp. v. County of Suffolk,* 278 N. Y. 45, 15 N. E. 2d 393 (1938); *Daley v. Brown,* 167 N. Y. 381, 60 N. E. 752 (1901); *Osgood v. Toole,* 60 N. Y. 475 (1875).

31. 3 WILLISTON, *op. cit. supra,* note 1, at 1743; see *Persky v. Bank of America Nat. Ass'n,* 261 N. Y. 212, 185 N. E. 77 (1933); see also, COHEN AND KARGER, POWERS OF THE NEW YORK COURT OF APPEALS 625-28 (2d ed. 1952).

32. *Daley v. Brown, supra* note 14; 6 CARMODY, NEW YORK PRACTICE § 336, at 255 (2d ed. 1934).

33. *Persky v. Bank of America Nat. Ass'n, supra* note 15 at 218-19, 185 N. E. at 79; see also, *Martin v. Home Bank,* 160 N. Y. 190, 54 N. E. 717 (1899); *Wright v. Wright,* 226 N.Y. 578, 123 N. E. 71 (1919).

34. *April Publications, Inc. v. G. Schirmer, Inc.,* 308 N. Y. 366, 126 N. E. 2d 283 (1955).