Buffalo Law Review

Volume 5 | Number 1 Article 33

10-1-1955

Contracts—Terms of the Contract

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strued so as to reach an absurd and unenforcible result.[40] Therefore it was necessary to assume that the parties intended the contract to be concurrent with the copyright term.

The dissent argues that the interpretation placed on the contract by the majority, while unquestionably a more just construction, was construed "so as to make [it] mean what the courts think [it] should have said in the first place."[41] They preferred to adopt the principle that a person making a poor contract is nevertheless bound by that contract even though it works an injustice. They felt that as a practical matter neither party considered at the time of the contract that the songs would still be popular thirty years later, and therefore neither had worded the contract to provide for such a situation. But the contract, as it was written by the parties, provided for royalties on each copy published, and in the absence of a limiting term must be applied as long as the defendant continues to publish the music.

Probably the dissent is quite correct in its method of contract interpretation. The consideration which Shubert offered was the right of original publication, simultaneous with the presentation of "Maytime," and the copyright was left to the publisher to be his protection from other publications. The parties intended the consideration of the defendant to be a royalty of five cents a copy for each copy, whenever published. But the protection of the public interest against undue restraint on musical and literary compositions after the statutory protection, comparable to the principles applied in patent law,[42] make this contract a violation of public policy, and therefore the result reached by the majority seems justifiable.

Terms Of The Contract

In *20 East 74th Street v. Minskoff*,[43] plaintiff, a corporate owner of a co-operative apartment house, sought damages from defendants, the promoters and developers of the co-operative, for failure to complete the building according to contract. The contract included a provision that the occurrence of three specified events would be considered by all the parties as "conclusive proof that the building has been fully completed in accordance with the provisions of this agreement." All three events, it was agreed, had occurred. The principal problem was whether, in spite of this contract provision and the occurrence of the three events, the defendants could be held liable on the theory that the conclusive presumption of

40. *Cf. Surace v. Danna*, 248 N. Y. 18, 16 N. E. 315 (1928).
41. 308 N. Y. at 378, 126 N. E. at 290.
42. *Supra*, note 39.
43. 308 N. Y. 407, 126 N. E. 2d 532 (1955).

completion had a limited application. The court held this provision was "prompted by a desire to avoid a multiplicity of controversies with the purchasers of apartments concerning whether the building had been, in fact, completed." Hence, in absence of fraud or mistake "the presumption of completion was intended by the parties to be conclusive for *all* of the purposes of the agreement."

When the terms of a written contract are unambiguous the courts will construe it based on the intention of the parties as gathered from the instrument itself.[44] When by the terms of a contract a specific criterion is established to determine what constitutes performance, that criterion will be adopted by the courts in the absence of fraud or mistake.[45] Furthermore, the criterion will control for all purposes of the agreement, in the absence of language in the contract to the contrary.[46]

One other point was considered briefly in this case. Plaintiff tried to enforce an oral agreement made subsequent to the written contract to accomplish its purpose. The written contract contained a provision made in accordance with Personal Property Law Sec. 33-C subd. 1[47]. This provision states that "no change or modification of the terms and conditions of this agreement shall be binding upon the Sellers unless the same shall be in writing, signed by Sam Minskoff on behalf of the Sellers." In the light of this clause and the lack of consideration for the oral promises, the court felt plaintiff had no enforceable right under an

oral agreement.

44. *Heller and Henretig Inc. v. 3620 168th St. Inc.*, 302 N. Y. 326, 98 N. E. 2d 458 (1951); *Brinard v. New York Central Railroad Co.*, 242 N. Y. 125, 151 N. E. 152 (1926); *Hartigan v. Casualty Co.*, 227 N. Y. 175, 124 N. E. 789 (1919).

45. *Wyckoff v. Meyers*, 44 N. Y. 143 (1876).

46. See note 1 *supra*, pg. 415.

47. New York Personal Property Law Sec. 33-c Subd. 1 states: "A written agreement or other written instrument which contains a provision to the effect that it cannot be changed orally, cannot be changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom enforcement of the change is sought or by his agent."