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New York Practice--Reargument Permitted on Tenant's Alleged Waiver of Landlord's Compliance with Covenant (56-70 58th St. Holding Corp. v. Fedders-Quigan Corp., 6 N.Y.2d 878 (1959))

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NEW YORK PRACTICE—REARGUMENT PERMITTED ON TENANT'S ALLEGED WAIVER OF LANDLORD'S COMPLIANCE WITH COVENANT.—On March 1, 1953, plaintiff-corporation leased certain premises to defendant-corporation and agreed to obtain a requisite certificate of occupancy from the City of New York. The lease provided that defendant would be permitted to vacate if plaintiff, after having exhausted all remedies, was unable to obtain the certificate. Almost fourteen months after the signing of the lease, defendant gave plaintiff written notice that if the certificate of occupancy was not forthcoming by June 30, 1954, it would consider the lease terminated. The certificate was not obtained until July 8. On June 30, defendant vacated and refused to pay further rent. The Court *held* that the issuance of the certificate was merely delayed and not refused. The concurring opinion of Judge Fuld was based solely on the ground that defendant waived its right to demand timely compliance with plaintiff's promise to obtain the certificate by giving written notice.[1] A motion for leave to reargue the question of the defendant's waiver of demand for timely compliance with the plaintiff's covenant concerning the certificate was granted. *56-70 58th St. Holding Corp. v. Fedders-Quigan Corp.*, 6 N.Y.2d 878, 160 N.E.2d 124, 188 N.Y.S.2d 995, *aff'd*, 6 N.Y.2d — (1959).

It is difficult to determine exactly why the Court of Appeals granted reargument in this case.

> A motion for reargument is generally an act of desperation; it is a psychological device for raising hopes which are almost invariably doomed to defeat. The percentage of cases in which a motion for reargument has been granted in the Court of Appeals is very low—unquestionably, less than one out of one hundred.[2]

Whether a motion for reargument should be granted is left to the discretion of the court which rendered the decision on which reargument is desired.[3] Reargument will be granted where it can be shown that the court *overlooked* or *misapprehended* some principle of law that could be controlling in the case.[4] Where it can be shown that great public interest is involved in the problem, the court

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[1] 56-70 58th St. Holding Corp. v. Fedders-Quigan Corp., 5 N.Y.2d 557, 159 N.E.2d 150, 186 N.Y.S.2d 583 (1959).

[2] COHEN & KARGER, POWERS OF THE NEW YORK COURT OF APPEALS § 186, at 694 (rev. ed. 1952).

[3] Ellis v. Central Hanover Bank & Trust Co., 198 Misc. 912, 102 N.Y.S.2d 337 (Sup. Ct. 1951); People v. Kelley, 178 N.Y.S.2d 809 (Ct. Gen. Sess. 1958).

[4] N.Y. CT. APP. RULE XX. See, *e.g.*, Hamilton Park Builders Corp. v. Rogers, 4 Misc. 2d 269, 156 N.Y.S.2d 891 (Sup. Ct. 1956) (overlooked); Nicholas v. Drew, 21 Hun 109 (Sup. Ct. 1880); People v. Dellamura, 28 N.Y.S.2d 584 (Kings County Ct. 1941) (misapprehended); Matter of Crane, 81 Hun 96, 30 N.Y. Supp. 616 (Sup. Ct. 1894). See generally COHEN & KARGER, *op. cit. supra* note 2, § 186.

will also entertain this motion.[5] Supervening and inconsistent United States Supreme Court decisions,[6] as well as occasions where the majority of the New York Court of Appeals does not agree in a given case heard by only six judges,[7] will justify the granting of a motion to reargue. Previously, it had been thought that this motion would not lie in a case that had already been remitted by the Court of Appeals to a lower court, and subsequently acted upon by the lower court. Today it is generally accepted that the Court of Appeals can recall a remittitur from the lower court at any time for the purpose of reargument.[8]

Reargument will not be permitted where its sole purpose is to circumvent the statute of limitations, nor as a rule, where there is still remedy by appeal.[9] Noncompliance with the formal requirements in requesting reargument can result in its denial.[10] Usually, the courts will not entertain new facts as the grounds for granting a reargument, but will consider only the evidence already introduced.[11] At least one important exception to this rule can be found; new evidence is permitted in capital offenses where the sentence of death has been imposed.[12]

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[5] United States of Mexico v. Schmuck, 293 N.Y. 768, 57 N.E.2d 845 (1944) (memorandum decision). "The general rule that reargument will not be granted in order to afford a party opportunity to submit questions of law which he failed to submit upon the original arguments should not be strictly applied where a sovereign State challenges the validity of its property." *Ibid.* See People v. Regan, 292 N.Y. 109, 54 N.E.2d 508 (1944) (per curiam).

[6] H. P. Hood & Sons v. Dumond, 300 N.Y. 480, 88 N.E.2d 661 (1949) (memorandum decision); Mabee v. White Plains Co., 295 N.Y. 937, 68 N.E.2d 38 (1946) (memorandum decision). See also New York Cent. R.R. v. Beacon Milling Co., 184 Misc. 187, 53 N.Y.S.2d 405 (Sup. Ct. 1945).

[7] See COHEN & KARGER, POWERS OF THE NEW YORK COURT OF APPEALS § 186 (rev. ed. 1952).

[8] COHEN & KARGER, *op. cit. supra* note 7, § 186. See H. P. Hood & Sons v. Dumond, 299 N.Y. 794, 87 N.E.2d 687 (1949) (memorandum decision).

[9] People v. Dellamura, 28 N.Y.S.2d 584 (Kings County Ct. 1941); 1 CARMODY-WAIT, CYCLOPEDIA OF NEW YORK PRACTICE 679-80 (1952).

[10] Ellis v. Central Hanover Bank & Trust Co., 198 Misc. 912, 102 N.Y.S.2d 337 (1951) (denied a motion for reargument brought without permission). See Cook v. Gill, 285 N.Y. 780, 34 N.E.2d 919 (1941) (memorandum decision) (reargument granted after an error in filing was completed).

[11] Lane v. Lane, 14 Misc. 2d 560, 182 N.Y.S.2d 603 (Sup. Ct. 1958). The court in reviewing a motion for reargument, instead granted leave to renew and reconsider. Public Serv. Comm'n v. Grand Cent. Cadillac Renting Corp., 53 N.Y.S.2d 202 (Sup. Ct. 1944), *rev'd on other grounds,* 273 App. Div. 595, 78 N.Y.S.2d 550 (1st Dep't 1944). *Cf.* In the Matter of Estate of Hooker, 173 Misc. 515, 18 N.Y.S.2d 107 (Surr. Ct. 1940).

[12] People v. Regan, 292 N.Y. 109, 54 N.E.2d 32 (1944) (per curiam). Regan was convicted of first degree murder and sentenced to death. The conviction was affirmed by the Court of Appeals. Regan then moved for a new trial in the Court of General Sessions on the ground of newly discovered evidence. The motion was denied. Regan then moved in the Court of Appeals for reargument and for leave to submit new evidence. Motion was granted.

Although the grant of motion for reargument is discretionary with the court, the power cannot be arbitrarily exercised. If a judge grants a motion for reargument upon insufficient grounds, it is error which should and will be corrected by an appellate court whenever the question is properly brought before it for review.[13]

In the instant case the Court granted reargument "on the issue of the tenant's alleged waiver of its right to demand timely compliance by the landlord." [14] By following the normal rules of reargument it is difficult to understand just *why* the motion was granted. Perhaps the Court, in construing the dependency of the covenants, was confused by the two issues of waiver that pervade the case.[15] On the other hand, the Court may have desired merely to reconsider its position.

To ascertain why the Court granted reargument, the substantive background of the covenants must be examined. Where there is an express assertion of the intent of the parties, there is little problem discerning whether or not covenants are independent or dependent.[16] Difficulty presents itself, however, in situations where the parties to a contract never thought to express their intentions as to the dependency of respective covenants. The Court might return to the theory held prior to Lord Mansfield's time, that unless the parties to a bilateral agreement expressly set forth their intention to make the covenants independent, mutual dependency would be attributed to them.[17] The modern trend is away from this approach. Today, courts attempt to determine what the intentions of the parties would have been at the time of the issuance of the contract had the parties considered the problem.[18] Certain promises are so patently independent that the ends of justice would not be served by construing them otherwise. The same principle holds true for clearly dependent covenants.[19] In the instant case the three majority members of the

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[13] Danowitz v. Fero, 21 N.Y.S.2d 813 (App. T. 2d Dep't 1940); 1 CARMODY-WAIT, CYCLOPEDIA OF NEW YORK PRACTICE 681 (1952).

[14] 56-70 58th St. Holding Corp. v. Fedders-Quigan Corp., 6 N.Y.2d 878, 160 N.E.2d 124, 188 N.Y.S.2d 995, *aff'd*, 6 N.Y.2d — (1959).

[15] The two issues of waiver with which the case is concerned are: 1. the tenant's alleged waiver to demand timely compliance of landlord's covenant to obtain the certificate by sending to the landlord written notice, and 2. the tenant's alleged waiver to demand compliance by thwarting the efforts of the landlord by the storage of certain combustibles on the premises. 56-70 58th St. Holding Corp. v. Fedders-Quigan Corp., 5 N.Y.2d 557, 159 N.E.2d 150, 186 N.Y.S.2d 583 (1959).

[16] 3 WILLISTON, CONTRACTS § 825 (rev. ed. 1936).

[17] 3 WILLISTON, *op. cit. supra* note 16, § 825 at 2311-13.

[18] *Ibid.*

[19] Jacob & Youngs, Inc. v. Kent, 230 N.Y. 239, 241-42, 129 N.E. 889, 890 (1921) (Cardozo, J.): "Some promises are so plainly independent that they can never by fair construction be conditions of one another. . . . Others are so plainly dependent that they must always be conditions. Others, though dependent and thus conditions when there is departure in point of substance, will be viewed as independent and collateral when the departure is insignificant.

Court felt that the covenant to obtain the certificate was independent of the covenant to pay rent, the right to vacate becoming choate only after the certificate had been refused and not merely delayed.[20]

It can be argued that the giving of written notice was merely the culmination of a year and a half of frustrated attempts to induce the landlord to comply with its covenant to obtain the certificate.[21] Yet, it might be said that the tenant, upon giving written notice, forgave all past noncompliance and insisted merely that the covenant be performed within the time specified in the written notice; that unless the parties to the contract had made time of the essence, a mere delay should not suffice to permit rescission.[22] Public policy favors stability of contracts and seeks avoidance of unnecessary rescissions as well as the concomitant loss of contractual rights.[23]

The majority further said that the tenant "held up" the certificate by storing combustibles on the premises. The lessor had no way of knowing that combustibles were stored because the lease provided only for the storage of goods, and nowhere specified the type of goods to be stored.[24] Despite this fact the tenant introduced evidence tending to show that combustibles had been stored on the premises from the beginning of the lease.[25] Although the majority may be correct in theory, it seems unlikely that the landlord of today would not know the nature and type of goods stored on its rented premises, and if he did not know he should have. The tenant's alleged waiver of timely compliance with the covenant to obtain the certificate is the only issue that could conceivably have confused the Court. Yet, the issue is so well-defined, it seems unlikely that this was the reason for the granting of the motion.[26]

. . . Considerations partly of justice and partly of presumable intention are to tell us whether this or that promise shall be placed in one class or in another." *Ibid.*

[20] 56-70 58th St. Holding Corp. v. Fedders-Quigan Corp., 5 N.Y.2d 557, 563, 159 N.E.2d 150, 155, 186 N.Y.S.2d 583, 589 (1959). Judge Fuld would find that although the covenants were dependent, the tenant had waived his right to demand timely compliance. *Id.* at 566, 159 N.E.2d at 156, 186 N.Y.S.2d at 592 (concurring opinion). *Cf.* Taylor v. Goelet, 208 N.Y. 253, 259, 101 N.E. 867, 868 (1913); Lawson v. Hogan, 93 N.Y. 39 (1883).

[21] 56-70 58th St. Holding Corp. v. Fedders-Quigan Corp., *supra* note 20, at 568, 159 N.E.2d at 158, 186 N.Y.S.2d at 593 (dissenting opinion). *Cf.* Krausi v. Fife, 120 App. Div. 490, 105 N.Y. Supp. 384 (2d Dep't 1907); Marks v. Dellagio, 56 App. Div. 299, 67 N.Y. Supp. 736 (1st Dep't 1900).

[22] See Lawson v. Hogan, *supra* note 20.

[23] See Simons v. Fried, 302 N.Y. 323, 98 N.E.2d 456 (1951); 379 Madison Ave., Inc. v. Stuyvesant Co., 242 App. Div. 567, 275 N.Y. Supp. 953 (1st Dep't 1934), *aff'd mem.*, 268 N.Y. 576, 198 N.E. 412 (1935).

[24] 56-70 58th St. Holding Corp. v. Fedders-Quiglan Corp., *supra* note 20, at 562, 159 N.E.2d at 154, 186 N.Y.S.2d at 588-89 (1959).

[25] 56-70 58th St. Holding Corp. v. Fedders-Quigan Corp., *supra* note 20, at 560, 159 N.E.2d at 153, 186 N.Y.S.2d at 587 (1959).

[26] See note 15 *supra.*

Perhaps the Court wanted a "second look" at the case and implemented its desire by granting the reargument. Regardless, the rule still stands that reargument will not, and should not, be granted for the unique purpose of permitting the court to change its opinion.[27]

Concededly, if the Court were only taking a "second look," the concept of reargument would seem to take on new meaning. The result of this new concept might be to prolong litigation rather than to seek its termination. The general rule, however, that reargument should not be sought with undue optimism undoubtedly prevails, even though the instant case could easily be read otherwise.[28]

TAXATION — TRANSFERRED PROPERTY HELD INCLUDIBLE IN GROSS ESTATE WHERE GRANTOR RETAINED RIGHT TO INCOME.— Petitioners-executors appealed from a decision of the Tax Court which had approved inclusion in the gross estate of decedent the value of income-producing property conveyed by him to his children some ten years prior to his death. At the time of the conveyance it had been *orally* agreed that the grantor was to retain for life the income from the property. This agreement was carried out. In affirming the decision of the Tax Court, the Court of Appeals for the Third Circuit *held* that decedent actually enjoyed the property until death by receipt of the income irrespective of the enforceability of any right to it under state law. *McNichol's Estate v. Commissioner,* 265 F.2d 667 (3d Cir. 1959).

The case was decided under Section 811(c)(1)(B) of the 1939 Code,[1] presently found in Section 2036 of the 1954 Code, the Court

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[27] 1 CARMODY-WAIT, CYCLOPEDIA OF NEW YORK PRACTICE 681 (1952).

[28] COHEN & KARGER, POWERS OF THE NEW YORK COURT OF APPEALS 696 (rev. ed. 1952).

[1] INT. REV. CODE OF 1939, ch. 3, § 811, 53 Stat. 120 (now INT. REV. CODE OF 1954, § 2036), the pertinent part of which reads:

"§ 811. Gross Estate

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States.

. . . .

(c) Transfers in contemplation of, or taking effect at, death.

(1) General rule.

To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise. . . .

(B) under which he has retained for his life or for any period not