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Equity--Alleged Misrepresentation Concerning Continued Availability of Customers Held Sufficient to Cause Temporary Injuction to Issue (Saslow v. Novick, 19 Misc.2d 712 (Sup. Ct. 1959))

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Here the Court has for the first time explicitly and clearly upheld the power of the Grand Jury to compel witnesses to fill out questionnaires dealing with financial status. Of necessity, a policy decision such as this should be limited to the facts from which it arose, namely simple financial questionnaires.[20] Since it may be dangerous to permit extension of this rule, the courts should be wary of recognizing arbitrary exceptions.[21]

EQUITY — ALLEGED MISREPRESENTATION CONCERNING CONTINUED AVAILABILITY OF CUSTOMERS HELD SUFFICIENT TO CAUSE TEMPORARY INJUNCTION TO ISSUE.—Plaintiffs-vendees alleged fraud on the part of the vendor on the sale of a candy store. Vendor represented the proximity of a subway station as a primary asset of the store, but failed to disclosed current efforts of the Transit Authority to demolish that station. Vendees also alleged that the vendor stated during negotiations that there was no reason to believe that the business from the subway station would not continue for the duration of the current lease. On a motion to enjoin transfer of negotiable instruments and funds given as the purchase price, the Court on reargument, *held* that an injunction pendente lite be granted in view of the allegation that the defendant uttered a misleading statement as to extrinsic facts, affecting the value of the store, upon which purchasers might have had a right to rely. *Saslow v. Novick,* 19 Misc.2d 712, 191 N.Y.S.2d 645 (Sup. Ct. 1959).

To obtain an injunction pendente lite it is incumbent upon plaintiff to demonstrate, among other things, a reasonable likelihood of attaining ultimate relief upon trial of his cause.[1] Therefore, in the

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[20] In this regard the questions in such a questionnaire should be characterized as "clear, simple, direct and unambiguous. They should be phrased so that a person of average intelligence may determine exactly what information is sought by each question, without the introduction of possible confusion by somewhat similar or overlapping queries in other parts of the questionnaire." People v. Workman, 308 N.Y. 668, 670, 124 N.E.2d 314, 315 (1954) (per curiam).

[21] In the concurring opinion Judge Burke states: "Since the Grand Jury has the power to investigate corruption, bribery and other crimes committed in the Department of Buildings, the grant of express statutory authority to the Grand Jury imports the existence of implied powers reasonably essential to the *investigation* and *uncovering* of crime and corruption." A principle as broad as this might result in undue extension of Grand Jury power. People *ex rel.* Sillifant v. City of New York, 6 N.Y.2d 487, 491, 160 N.E.2d 890, 892, 190 N.Y.S.2d 641, 644 (1959) (concurring opinion).

[1] Wormser v. Brown, 149 N.Y. 163, 43 N.E. 524 (1896); Village of Mamaroneck v. Lichtie, 72 N.Y.S.2d 686 (Sup. Ct. 1947). "A temporary injunction will be granted only where the movant has established a clear legal right to such relief and where the denial of such relief would result in

instant case, the success of the plaintiff's motion depended on the showing of a valid cause of action in fraud.[2]

While fraud or deceit is a concept not amenable to precise definition, it is described as anything short of a warranty which produces in the mind of another a false impression conducive to action.[3] Few jurisdictions are in precise accord regarding the enumeration of elements essential to an action in deceit, yet all appear to produce substantially similar portraits of the wrong. New York is content to enumerate only representation, falsity, scienter, deception and injury.[4]

To be fraudulent, the representation complained of ordinarily must relate to some past or existing material fact as distinguished from opinion or prediction.[5] Erroneous estimates involving personal judgment, if they be so expressed and can be interpreted reasonably as such, offer no grounds for redress.[6] Whether a representation be one of fact or of opinion must be determined by a jury [7] weighing the attending circumstances of each case.[8]

There are several important exceptions to the rule that misstatements of opinion are not actionable.[9] Among them, and of special pertinence to this case,[10] is the rule that opinions as to the value of property sold cannot be misrepresentations *unless* they relate to ex-

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irreparable and irremedial damage. A restraining order is never granted if the ultimate relief sought by the movant is doubtful . . . or where immediate trial is possible." *Id.* at 687.

[2] See Saslow v. Novick, 19 Misc.2d 712, 191 N.Y.S.2d 645, (Sup. Ct. 1959).

[3] Fernandina Shipbuilding & Dry Dock Co. v. Peters, 283 Fed. 621 (S.D. Fla. 1922).

[4] Karscher v. Dewald, 246 App. Div. 21, 284 N.Y. Supp. 213 (1st Dep't 1935); People v. Federated Radio Corp., 216 App. Div. 250, 214 N.Y. Supp. 670 (2d Dep't 1926) (per curiam), *aff'd*, 244 N.Y. 33, 154 N.E. 655 (1926). Compare J. I. Case Co. v. Bird, 51 Idaho 725, 11 P.2d 966 (1932), where the court indicates nine essential elements, but where no substantive distinction appears between fraud in Idaho and fraud in New York.

[5] Holt v. Quaker State Oil Ref. Co., 67 F.2d 170, 171 (4th Cir. 1933); Shields v. New York Oil Burner Co., 262 App. Div. 854 (2d Dep't 1941) (memorandum decision).

[6] Irvlor Realty Corp. v. 62-114 Imlay St. Corp., 151 N.Y.S.2d 191 (Sup. Ct. 1956), *aff'd*, 7 App. Div.2d 645, 180 N.Y.S.2d 202 (2d Dep't 1958; See Yaswen v. Pollack, 155 Misc. 475, 280 N.Y. Supp. 512 (N.Y. Munic. Ct. 1934).

[7] See Gray v. Richmond Bicycle Co., 167 N.Y. 348, 60 N.E. 663 (1901).

[8] Seeman Bros., Inc. v. Osaka Shosen Kaisha, 16 F2d 265, 266 (2d Cir. 1926); Bareham & McFarland, Inc. v. Kane, 228 App. Div. 396, 240 N.Y. Supp. 123 (4th Dep't 1930).

[9] See Haserot v. Keller, 67 Cal. App. 659, 228 Pac. 383 (1924).

[10] Saslow v. Novick, 19 Misc. 2d 712, 191 N.Y.S.2d 645 (Sup. Ct. 1959). The court granted the injunction sought by the plaintiff on the ground that the defendant's statement that there was no reason to assume that the added business from the subway station would not continue for the duration of the present lease "would, if true, be the sort of misleading statement as to extrinsic facts, affecting the value of the store, upon which the plaintiff might have had a right to rely. . . ." *Id.* at 714, 191 N.Y.S.2d at 649.

trinsic circumstances affecting the value of such property.[11] Opinions designed and expressed in an effort to conceal or misstate material facts [12] or forestall inquiry [13] may also be fraud.

The rationale for denying as actionable a fraud [14] based on predictions is that the hearer has no right to rely on the statements.[15] But, again, qualifications and exceptions have arisen.[16] Significant among such exceptions is the prediction fraudulently calculated to misstate or conceal a material fact,[17] or forestall inquiry by the hearer.[18]

However, mere silence upon a material fact is not generally subject to the charge of fraud.[19] Nevertheless, the law distinguishes between non-actionable silence and culpable concealment.[20] To render silence a concealment or active suppression, there must have been something which produced in the defendant a duty to speak,[21] whether it was the presence of a fiduciary relationship [22] or other attendant circumstances.[23] The real problem seems to arise in determining what circumstances demand disclosure since no attempt is made to define in any but general terms the occasions that create a duty to speak.[24] The obligation to communicate pertinent facts may arise in

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[11] Simar v. Canaday, 53 N.Y. 298 (1873). The court, commenting on whether certain assertions made by the defendant were matters of opinion, said "if they were such, no liability is created by the utterance of them; but all statements as to value of property sold are not such. They may be, under certain circumstances, affirmations of fact. . . . [W]here they are fraudulently made of particulars in relation to the estate which the vendee has not equal means of knowing, and where he is induced to forebear inquiries which he would otherwise have made, and damage ensues, the party guilty of the fraud will be liable for the damages sustained." *Id.* at 306-07. See Hubbell v. Meigs, 50 N.Y. 480 (1872).

[12] See Coleman v. Night Commander Lighting Co., 218 Ala. 196, 118 So. 377 (1928); Rapochi v. Continental Ins. Co., 121 Pa. Super. 538, 184 Atl. 308 (1936).

[13] Gray v. Richmond Bicycle Co., 167 N.Y. 348, 60 N.E. 663 (1901).

[14] See Eade v. Reich, 120 Cal. App. 32, 7 P.2d 1043 (1932); Moran v. Holmes Mfg. Co., 99 Conn. 180, 121 Atl. 346 (1923).

[15] Farmers Union Co-op. Royalty Co. v. Southward, 183 Okla. 402, 82 P.2d 819 (1938).

[16] See Lloyd v. Smith, 150 Va. 132, 142 S.E. 363 (1928).

[17] Russ Lumber & Mill Co. v. Muscupiabe Land & Water Co., 120 Cal. 521, 52 Pac. 995 (1898).

[18] See Collinson v. Jeffries, 21 Tex. Civ. App. 653, 54 S.W. 28 (1899).

[19] Amend v. Hurley, 293 N.Y. 587, 59 N.E.2d 416 (1944).

[20] Stewart v. Wyoming Cattle Ranche Co., 128 U.S. 383 (1888).

[21] Magee v. Manhattan Life Ins. Co., 92 U.S. 93 (1875) (dictum).

[22] Hicks v. Wallace, 190 Ky. 287, 227 S.W. 293 (1921).

[23] Racine Fuel Co. v. Rawlins, 377 Ill. 375, 36 N.E.2d 710 (1941). See generally RESTATEMENT, TORTS §§ 550-52 (1938).

[24] See Hadley v. Clinton County Importing Co., 13 Ohio St. 502, 82 Am. Dec. 454 (1862). See also Fecheimer v. Baum, 37 Fed. 167 (1889). It is well recognized that whether a duty to speak exists is determined by all the circumstances of the case. *Id.* at 177.

many ways; among them, and particularly noteworthy in considering the main case, is the situation wherein a party says or does something which for want of further explanation is false and deceptive.[25]

Manifestly, the number of forms and varieties under which a deception may be perpetrated is as limitless as the imagination and cunning of mankind. It is well, therefore, that definitions be broad and flexible lest a type of fraud not within the purview of the definition be devised. Thus, no rule can be thought absolute. Nevertheless, categories, or theories, of deceit have evolved. The difficulty arises when given circumstances which are not readily applied to the categories or rules are encountered. In many areas the courts are apparently guided by conscience, but with an eye to precedent, policy and whatever other elements they deem pertinent.[26]

The instant case, as is later indicated, may reasonably be placed under several categories of fraud. This presents a problem difficult enough. But in addition, there is present in this seemingly fraudulent transaction the sometimes excusing circumstances that the alleged concealment was of a fact on public record, that the parties dealt at arms length (a fact which generally excuses non-disclosure), and that the final decision of the Transit Authority had not been, nor in the future could be, influenced in any way by either party. Finally, research reveals no compelling precedent with regard to the degree of bad faith indicated under the *Saslow* facts. The decision in this case indicates an extension of the existing area of actionable fraud in the categories of non-disclosure and false statements as to extrinsic facts.

The present decision was rendered in part upon the authority of *Greenberg v. Glickman*[27] and *Schroeder v. Schroeder*.[28] Both these cases were cited in support of the proposition that defendant Novick was under a duty to disclose the fact that the Transit Authority was making an attempt to dismantle the subway station adjacent to the candy store in question. Yet, while the words used in these cases at first blush seem to apply to the present case,[29] the

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[25] Burton v. Maupin, 281 S.W. 83, 90 (Mo. 1926); Hadley v. Clinton County Importing Co., note 24 *supra*.

[26] For a detailed treatment of the "shadow areas" of fraud, including fraudulent concealment, see Goldfarb, *Fraud and Nondisclosure in the Vendor-Purchaser Relation*, 8 W. RES. L. REV. 5 (1956).

[27] 50 N.Y.S.2d 489 (Sup. Ct.), *modified mem.*, 268 App. Div. 882, 51 N.Y.S.2d 96 (2d Dep't 1944).

[28] 269 App. Div. 405, 56 N.Y.S.2d 36 (4th Dep't 1945) (per curiam).

[29] Schroeder v. Schroeder, 269 App. Div. 405, 56 N.Y.S.2d 36 (4th Dep't 1945) (per curiam). "[W]hen one of the parties, pending negotiations for a contract, has held out to the other the existence of a certain set of facts material to the subject of the contract, and knows that the other party is acting upon the inducement of their existence, and while they are pending knows that a change has occurred of which the other party is ignorant, good faith and common honesty require him to correct the misapprehension which he has created." *Id.* at 408, 56 N.Y.S.2d at 38.

circumstances that inspired them involve a form of fraud distinctly more severe than is here presented.

In *Schroeder,* the plaintiff agreed to accept, as part of a separation agreement, an insurance policy represented by the defendant to be of a certain value. After the negotiations, but before final settlement, the defendant withdrew the dividends from the policy, and in so doing caused a substantial reduction in its value. The court maintained that the defendant's failure to disclose the fact of the withdrawal of the dividends could be fraudulent concealment.

A comparison between the *Schroeder* and *Saslow* cases discloses no fair analogy. At least two major distinctions appear. First, the defendant in *Schroeder* allegedly had committed positive, physical acts to effect the injury. The non-disclosure therefore constituted a mere portion of his fraudulent scheme. However, in the present case the gravamen of the complaint is non-disclosure under circumstances not brought about by the defendant. Secondly, the fact withheld in the present case, unlike that in *Schroeder,* was a matter of public record and conceded to be so by both parties. It is universally recognized that silence, however damaging, is excused in some cases where the information withheld is a matter discoverable through ordinary diligence.[30]

The *Greenberg* case may similarly be distinguished upon the facts. There the seller of a dwelling house, in response to buyer's question, falsely stated actual facts which were peculiarly within his knowledge as builder of the premises, *viz.,* the reason for dampness in the basement. The court held that defendant's non-disclosure of the fact that the cellar was often flooded was fraudulent. It is difficult to understand how that decision can be considered as authority in the principal case where the defendant's silence was accompanied only by a statement which was at best mere opinion or prediction.[31]

Considerable reliance is also placed upon *Ellis v. Andrews* [32] and *Chrysler v. Canaday* [33] as authority for attaching liability for fraud upon the misrepresentation of extrinsic elements affecting the value of property sold. In *Ellis,* the court discussed the rule with approval but failed to apply it. There the court dismissed the claim before it, commenting in effect, that if the facts alleged had described a situation where false statements as to extrinsic factors affecting value appeared, the action might have been sustained.[34] The court cited *Hubbell v. Meigs* [35] as an example of the rule pertaining to extrinsic facts affecting value. In that case, the defendant's statements,

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[30] See Schumaker v. Mather, 133 N.Y. 590, 30 N.E. 755 (1892).
[31] Saslow v. Novick, 19 Misc.2d 712, 713, 191 N.Y.S.2d 645, 648 (Sup. Ct. 1959).
[32] 56 N.Y. 83 (1874).
[33] 90 N.Y. 272 (1882).
[34] Ellis v. Andrews, *supra,* note 32, at 87.
[35] 50 N.Y. 480 (1872).

made with the intent to induce the purchase of worthless railroad stock, were held sufficient to constitute grounds for fraud. But a consideration of his statements demonstrates that he lied about his relation to the issuing company, about a bogus land grant to the company, about the amount of stock then outstanding and the amount yet to be issued, about the length of time the stock was to be offered, about the progress of the railroad's construction, about the earnings the stock would yield, about the time at which dividends would be paid, about the company's management team and about myriad other items. The defendant was evidently a swindler in earnest. If this case be of the variety of fraud contemplated by the *Ellis* court, can the *Ellis* decision be fairly employed against defendant Novick in the principal case?

In *Chrysler,* the court's own words serve to distinguish it as involving a far more notorious fraud than could be imagined under the facts of the principal case.[36]

Considered in toto then, it would appear that the grant of the injunction in the principal case rests upon authority somewhat less than compelling and upon a theory of fraud none too firm. Perhaps the action would proceed more logically upon allegations that the defendant's statement concerning the business from the subway station was a fraudulent misstatement of his state of mind,[37] or that it constituted a partial disclosure, misleading unless completed,[38] or a non-disclosure coupled with artifice to prevent investigation by plaintiff,[39] or an utterance in the guise of opinion designed to misstate or

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[36] Chrysler v. Canaday, 90 N.Y. 272 (1882). Describing the facts presented, the court declared: "In this case there are facts proven which show artifice and conspiracy from the outset on the part of the defendant to cheat and defraud the plaintiff, who was put in communication with parties who aided in carrying out the deception and putting him under the influence of confederates who acted in collusion and with the palpable purpose to deceive and defraud him. *Id.* at 279.

[37] Keeler v. Fred T. Ley & Co., 65 F.2d 499 (1st Cir. 1933); Philadelphia Storage Battery Co. v. Kelley-How-Thompson Co., 64 F.2d 834 (8th Cir. 1933); Blakeslee v. Wallace, 45 F.2d 347 (6th Cir. 1930); Commercial Trust Co. v. Burch, 267 Fed. 907 (S.D. Ga. 1920); Bareham & McFarland v. Kane, 228 App. Div. 396, 240 N.Y. Supp. 123 (4th Dep't 1930); Pease & Elliman, Inc. v. Wegeman, 223 App. Div. 682, 229 N.Y. Supp. 398 (1st Dep't 1928). See also Fahnestock v. Clark Henry Corp., 151 Misc. 593, 272 N.Y. Supp. 49 (Sup. Ct. 1934); Jeleniewski v. Eck, 175 Wis. 497, 185 N.W. 540 (1921). "There is much authority for the view that a condition of mind is as much a fact as a condition of the body, although more difficult to prove, and that therefore a misstatement of a man's mind is a misstatement of fact." *Id.* at —, 185 N.W. at 541.

[38] See Equitable Life Ins. Co. v. Halsey, Stuart & Co., 312 U.S. 410 (1941); American Bonding Co. v. Fourth Nat'l Bank, 206 Ala. 639, 91 So. 480 (1921); Long v. Mulford, 17 Ohio St. 484, 93 Am. Dec. 638 (1867); RESTATEMENT, TORTS § 529, comment *a* (1938).

[39] Stewart v. Wyoming Cattle Ranche Co., 128 U.S. 383 (1888); Atwood v. Chapman, 68 Me. 38, 28 Am. Rep. 5 (1872). See RESTATEMENT, TORTS § 550, comment *a* (1938).

conceal a material fact [40] or was a prediction calculated to misstate fact or forestall inquiry.[41] For the Court to sustain the action on the theories advanced would constitute an unnecessary extension of an already vague area of the law.

REAL PROPERTY — UNAUTHORIZED LEGAL PRACTICE — LEGAL ACTIVITY IN CONNECTION WITH TITLE CLOSING BY TITLE INSURANCE CO. HELD NOT UNAUTHORIZED PRACTICE OF LAW.—Defendant, a title insurance company, employed both staff and independent lawyers to draft deeds and trust deeds and to execute instruments necessary for correction of defects in title (although this is primarily the business of the customer, not the company), with the giving of legal advice incidental thereto. It was the contention of plaintiff that all these activities constituted the unauthorized practice of law and should be enjoined. The lower court sustained plaintiff's argument and issued an injunction. The Court of Appeals, while agreeing that defendant's activities constituted a practice of law, *held,* by a divided Court, that they were "all legitimately incidental to the main or principle [*sic*] business" of defendant, and consequently did not constitute the *illegal* practice of law. *Bar Ass'n of Tenn., Inc. v. Union Planters Title Guar. Co.,* — Tenn. App. —, 326 S.W.2d 767, *cert. denied,* — Tenn. App. — (1959).

It is difficult, if not impossible, to precisely define the practice of law.[1] Obviously it is not limited to practice before a court of justice, but includes legal advice, and the preparation of legal instruments, whether or not such matters are pending before a court.[2] Nor are merely incompetent individuals excluded from such practice, but the exclusion extends to lay persons or organizations who practice indirectly through competent lawyers.[3]

Since every state, in one form or another, has enacted legisla-

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[40] Gray v. Richmond Bicycle Co., 167 N.Y. 348, 60 N.E. 663 (1901); Olston v. Oregon Water Power & Ry. Co., 52 Ore. 343, 96 Pac. 1095 (1908).

[41] Von Schrader v. Milton, 96 Cal. App. 192, 273 Pac. 1074 (1929); RESTATEMENT, TORTS § 539 (1938).

[1] Creditors' Serv. Corp. v. Cummings, 57 R.I. 291, 190 Atl. 2, 9 (1937); Rhode Island Bar Ass'n v. Automobile Serv. Ass'n, 55 R.I. 122, 179 Atl. 139, 140 (1935).

[2] Eley v. Miller, 7 Ind. App. 529, 34 N.E. 836, 837-38 (1893); *In re* Duncan, 83 S.C. 186, 65 S.E. 210, 211 (1909).

[3] *E.g., In re* Co-operative Law Co., 198 N.Y. 479, 484, 92 N.E. 15, 16 (1910) (dictum); Wayne v. Murphey-Favre & Co., 56 Idaho 788, 59 P.2d 721, 723 (1936). See also canons 6, 35, and 47 of the Canons of Professional Ethics (dealing with the duties of lawyers towards conflicting interests, intermediaries in the practice of law, and unauthorized practice).