St. John's Law Review

Volume 29
Number 1 *Volume 29, December 1954, Number 1*

Article 9

May 2013

Agency–Default of Agent-Guarantors and of Purchaser–Effect of New Contract on Commissions (Clark v. Ashbach & Sons, Inc., 64 N.W.2d 517 (Minn. 1954))

St. John's Law Review

AGENCY—DEFAULT OF AGENT-GUARANTORS AND OF PURCHASER—EFFECT OF NEW CONTRACT ON COMMISSIONS.—Defendant-vendor and his selling agents agreed that the latter would receive their commissions when the vendor received final payments on a conditional sales contract, payments thereon guaranteed by the agents. Five weeks after the vendee failed to make the final payments, the vendor, without notice to the agents, entered into new contracts with the vendee, extending time for payment. After payments were completed—almost two years after the original due date—plaintiff, assignee of selling agents, sued to recover the commissions. The defendant contended that the agents' failure to pay on default was such a material breach of the agency-guaranty contract that they forfeited the commissions. The Court *held* that the substitution of new contracts and final payment thereon terminated liability on the guaranty and entitled the agents to the commissions. *Clark v. Ashbach & Sons, Inc.*, 64 N.W.2d 517 (Minn. 1954).

Ordinarily, the broker or selling agent, upon production of a customer ready, willing and able to accept the terms stipulated by the broker's principal, is entitled to his commission, regardless of whether or not the transaction is eventually completed.[1] Consequently, any subsequent modification of those terms [2] or cancellation [3] of the contract by the principal and third party will not affect the broker's rights which have already accrued. However, the principal may desire that his agent share the risk of default by the customer and may make the payment of the commission dependent on some condition precedent,[4] such as, on the sale being consummated,[5] or on payment being received.[6] Under such an agreement the broker's rights are not

[1] Barnard v. Monnot, 1 Abb. App. Dec. 108 (N.Y. 1866); Nagl v. Small, 159 Iowa 387, 138 N.W. 849 (1912); Gransbury v. Saterbak, 116 Minn. 339, 133 N.W. 851 (1911).

[2] Wolfgang v. Naumann, 199 Iowa 585, 202 N.W. 216 (1925); Sotham v. Kern, 221 Mich. 5, 190 N.W. 744 (1922); McDermott v. Fairmont Gas & Light Co., 88 W. Va. 692, 108 S.E. 264 (1921).

[3] Richmond-Carcia Oil Co. v. Coates, 17 F.2d 262 (5th Cir. 1927); Vining v. Mo-La Oil Co., 312 Mo. 30, 278 S.W. 747 (1925).

[4] However, ". . . an agreement should not be so construed unless such a result is clearly intended." Colvin v. Post Mortgage & Land Co., 225 N.Y. 510, 516, 122 N.E. 454, 455 (1919).

[5] See, *e.g.*, Dermody v. New Jersey Realties, Inc., 101 N.J.L. 334, 128 Atl. 265 (1925); Realty Investments, Inc. v. Harris, 166 Pa. Super. 211, 70 A.2d 427 (1950).

[6] See, *e.g.*, Cheatham v. Yarbrough, 90 Tenn. 77, 15 S.W. 1076 (1890);

defeated if the principal hinders or prevents performance by the customer, for the principal is then deemed to have waived performance of the condition.[7]

While the principal may not disregard the broker's rights, he is not prevented from attempting to protect his own interests.[8] Thus, if commissions are dependent on some condition precedent, a modification of the terms of the contract between the principal and third party, if justifiable, will not of itself entitle the broker to his commissions. Accordingly, where the change made more probable the performance of the condition by a third party previously unwilling or unable to perform, recovery has been dependent on performance of the contract as modified;[9] if performed, the broker may recover;[10] non-performance of the condition, however, may be a complete bar.[11] Even the *cancellation* of a contract by a principal because of the third party's default, followed by a new contract for substantially the same performance, has been treated as a *modification* of the original contract, continuing the broker's rights in the contract as revised.[12] Cancellation under those circumstances would not constitute an act of prevention,[13] nor would it bar recovery by the broker if the prerequisite performance were completed according to the revised contract.[14]

In the instant case the agents' commissions were conditioned on final payments by the third party vendee. Thus, from a purely brokerage point of view, the question would be whether the agents' right to commissions was transferred to the new contracts between the vendor and the vendee, with commissions payable on their performance,[15] or whether the making of the new contracts was an unjus-

---

Pederson v. North Yakima & East Selah Irr. Co., 63 Wash. 636, 116 Pac. 279 (1911).

[7] Realty Investments, Inc. v. Harris, *supra* note 5; Cheatham v. Yarbrough, *supra* note 6; *accord*, Dermody v. New Jersey Realties, Inc., *supra* note 5; Pederson v. North Yakima & East Selah Irr. Co., *supra* note 6; *cf.* Moses v. Bierling, 31 N.Y. 462 (1865).

[8] Seymour v. St. Luke's Hospital, 28 App. Div. 119, 50 N.Y. Supp. 989 (1st Dep't 1898), *appeal dismissed*, 159 N.Y. 524, 53 N.E. 1132 (1899); Dallas Dome Wyoming Oil Fields Co. v. Brooder, 55 Wyo. 109, 97 P.2d 311 (1939).

[9] See Dallas Dome Wyoming Oil Fields Co. v. Brooder, *supra* note 8 (Where a commission was payable pro rata out of purchase price installments, part payment on the modified contract permitted a recovery on that part only.).

[10] *See* Prince v. Selby Smelting & Lead Co., 35 Cal. App. 684, 170 Pac. 1075, 1076 (1917).

[11] McPhail v. Buell, 87 Cal. 115, 25 Pac. 266 (1890); Prince v. Selby Smelting & Lead Co., *supra* note 10; see Bliven v. Lighthouse, 231 N.Y. 64, 131 N.E. 570 (1921).

[12] *See* Dunne v. Colomb, 192 Cal. 740, 221 Pac. 912, 914 (1923).

[13] *Ibid.*

[14] Kane v. Neptune Shipping Ltda., 274 App. Div. 28, 79 N.Y.S.2d 396 (1st Dep't 1948); George C. Lemcke Co. v. Nordby, 117 Wash. 221, 200 Pac. 1103 (1921); *see* Dunne v. Colomb, *supra* note 12, 221 Pac. at 914.

[15] See notes 10 and 11 *supra*.

tifiable act of prevention by the principal; in the latter case, commissions would be due without reference to performance of the subsequent contracts.[16] The Court did not frame this issue clearly, but stated that ". . . the primary contract . . . has been fully executed . . ." and the agents were entitled to commissions *when the ". . . price had been paid in full."* [17] Such language would indicate that the Court was actually treating the new contracts as modifications of the original contract rather than new, independent contracts.

However, interjected into the brokerage question, is the fact that the agents did not perform their guaranty obligation. Nevertheless, the Court, referring to the agent-guarantors' position during the time between the vendee's default and the signing of the new contracts, said that "[t]here was nothing they did or failed to do which would have forfeited the commission." [18] The Court, therefore, did not regard the failure of the agents to perform their guaranty obligation as sufficient to deprive them of commissions. Although the creditor-vendor did not demand that agent-guarantors make payment upon default of the vendee-debtor, non-payment at maturity may give rise to an absolute liability on the part of the guarantors. Usually there is no requirement that the creditor make demand of the guarantor of payment, or that he notify him of the default; [19] non-payment by the guarantor is of itself a breach of the guaranty contract.

Taking the brokerage and guaranty arrangements *together*, the agents' rights to the commissions, or as the Court indicated, their interest in the new contracts, should depend on whether non-payment of their guaranty obligation was a wilful breach of the agency-guaranty contract. Of course, a subsequent payment of the obligation,[20] or an extension of time after maturity of the debt,[21] both of

---

[16] See note 7 *supra*.

[17] Clark v. Ashbach & Sons, Inc., 64 N.W.2d 517, 523 (Minn. 1954) (emphasis added).

[18] *Id.*, 64 N.W.2d at 524.

[19] Bryant Park Bldg., Inc. v. Richmond, 85 N.Y.S.2d 531 (Sup. Ct. 1948); Welch v. Walsh, 177 Mass. 555, 59 N.E. 440 (1901); Sherman, Clay & Co. v. Turner, 164 Wash. 257, 2 P.2d 688 (1931); *see* Matter of Bitker, 251 Wis. 538, 30 N.W.2d 449, 452 (1947); see Mortgage & Contract Co. v. Linenberg, 260 Mich. 142, 244 N.W. 428 (1932) (Five justices concurred that notice to the guarantor of the debtor's default was not necessary to establish liability, but that loss to the guarantor caused by lack of notice would be an affirmative defense in a suit brought for breach of the guaranty agreement. However, three justices indicated in a separate opinion that the guaranty contract was breached only after the guarantor had received notice of default and a demand for payment, and that the guarantor would not be held liable for payments due under an acceleration clause if payments were made on all sums in default at the time of the suit.).

[20] Walker v. McNeal, 134 Okla. 111, 272 Pac. 443 (1928); Tupper v. Hartman, 121 Wash. 142, 208 Pac. 1103 (1922) (alternative holding); see STEARNS, SURETYSHIP § 6.52 (5th ed., Elder, 1951).

[21] Adelman v. Franklin Washington Trust Co., 137 N.J. Eq. 257, 44 A.2d 399 (Ch. 1945); Frick v. Seibel, 233 Mo. App. 200, 118 S.W.2d 497 (1938);

which occurred in the present case, discharges the guarantor's liability for damages. It may be argued that these factors worked to heal the breach of the guaranty obligation. Therefore, the new contract following the cancellation of the original contract, if it be treated as a modification,[22] would not deprive the agent-guarantors of their commissions on performance of the new contracts. Yet such a rule may lead to injustice where the principal, in face of a wilful refusal by the agent-guarantors to pay, prejudicially changes his position.

Although in this case it appears that punctual payment on the conditional sales contract may have been a material consideration for the commissions, nevertheless the Court's decision may be justified because there was nothing expressed in the agency-guaranty contract that punctuality was essential and because there was no proof that the agents refused or otherwise wilfully failed to pay on the guaranty before the new contracts were made.

ARBITRATION—INCORPORATION OF AN ARBITRATION CLAUSE BY REFERENCE DENIED.—Plaintiff moved for an order to stay arbitration proceedings, contending that he had not intended to restrict his remedies to arbitration by the signing of a contract which failed to mention arbitration, but was, by its terms, "subject to the Cotton Yarn Rules of 1938." These Rules provided for arbitration as an exclusive remedy. In reversing the Appellate Division,[1] the Court granted plaintiff's motion, *holding* that the words in the contract did not evince a clear intent to make arbitration the exclusive remedy. *Matter of Riverdale Fabrics Corp.*, 306 N.Y. 288, 118 N.E.2d 104 (1954).

Prior to the enactment of the New York Arbitration Law in 1920,[2] the New York courts applied the common-law rule which denied the remedy of specific enforcement to arbitration contracts.[3] It was the judicial view at that time that disputes regarding contracts should be settled under the auspices of the law courts, and not by arbitration.[4] However, subsequent to 1920, and due, in large measure,

---

see Siedentopf v. Braune, 273 App. Div. 791, 75 N.Y.S.2d 326 (2d Dep't 1947).

[22] See notes 12, 13 and 14 *supra*.

[1] 281 App. Div. 983, 121 N.Y.S.2d 261 (2d Dep't 1953) (On the basis of the Court of Appeals decision in Matter of Level Export Corp., 305 N.Y. 82, 111 N.E.2d 218 (1953), the Appellate Division affirmed the order of the trial court that dismissed the petition and directed that the controversy proceed to arbitration.).

[2] Laws of N.Y. 1920, c. 275. This statute is presently N.Y. CIV. PRAC. ACT, Art. 84, §§ 1448-1469.

[3] Greason v. Keteltas, 17 N.Y. 491 (1858); see Matter of Feuer Transp., Inc., 295 N.Y. 87, 91, 65 N.E.2d 178, 180 (1946).

[4] See Simpson, *Specific Enforcement of Arbitration Contracts*, 83 U. OF PA. L. REV. 160, 162 (1934); Note, 24 ST. JOHN'S L. REV. 254, 255 n.5 (1950).