

Contract--Accord and Satisfaction--Executory Accord (Atterbury, et al. v. James F. Walsh Paper Corporation, et al., 261 App. Div. 529 (1st Dep't 1941))

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The courts of today realize that milk is a public utility¹²—that it is affected with a public interest—and that being so, it is forced to submit to public control by the exercise of the police power.¹³ The ordinance in question¹⁴ cannot be attacked on the ground that it fosters monopoly; that is its purpose.¹⁵ The power to turn industries into monopolies—controlled by the state—is a social and economic device by which the industry is kept under constant supervision and the welfare of the public protected. Of course, no person may be granted a monopoly as a favor or reward, but where there is reasonable ground for the legislative conclusion that effective service can only be obtained by curtailing the right to enter the business, that is consistent with the due process clause of the Federal and State Constitutions.¹⁶

This, then, is the meaning of the *Stracquadanio* decision. Here we find the historical trend of state control of public callings extended—strangely enough by an operative limitation.¹⁷ The trend, if extended to its logical conclusion, might bring us to a day when a milk dealer who sells to all comers indiscriminately may be held liable for a refusal to sell milk, if he has it for sale, to any comer with the price,¹⁸ which is the final test for a public utility.¹⁹

K. S. S.

CONTRACT—ACCORD AND SATISFACTION—EXECUTORY ACCORD.—The plaintiff corporation installed a machine in the defendants' premises for experimental purposes in December, 1939, and in May, 1940 the defendants demanded \$6,786.82 for materials furnished in connection with the machine and for the use of the facilities of the

¹² In *Nebbia v. New York*, 291 U. S. 502, 54 Sup. Ct. 505 (1934), the Court said: "We might as well say at once that the dairy industry is not, in the accepted sense of the phrase, a public utility." The fact remains, however, that not only in the *Nebbia* case but also in subsequent decisions, the milk industry is treated as a public utility. *E.g.*, note 13, *infra*.

¹³ *Stracquadanio v. Department of Health of City of New York*, 285 N. Y. 93, 32 N. E. (2d) 806 (1941), wherein the court says, "The distribution of milk is a business affected with a public interest—a phrase which has been defined as '*** the equivalent of subject to the exercise of the police power.'"

¹⁴ Regulation of the Board of Health, 3-a, subd. 3-b(3).

¹⁵ The opinions presented in this paragraph are those of Justice Brandeis in his dissent to the opinion in *New State Ice Co. v. Liebmann*, 285 U. S. 262, 52 Sup. Ct. 371 (1932). In his opinion Justice Brandeis struck out boldly at the notion that the police power of the state cannot be utilized as a means of creating a monopoly where the social and economic conditions of the state warrant the exercise of such power. It is significant to note that Justice Stone, now Chief Justice, concurred in the dissent.

¹⁶ *New State Ice Co. v. Liebmann*, 285 U. S. 262, 52 Sup. Ct. 371 (1932).

¹⁷ Wigmore, *Nova Methodus Discendae Docendaeque Jurisprudendae* (1917) 30 HARV. L. REV. 812, 823, 824.

¹⁸ See EDGAR AND EDGAR, WORKBOOK ON BAILMENTS, INNKEEPERS AND CARRIERS (1941) 181, for historical background of public utilities.

¹⁹ N. Y. TRANSPORTATION CORPORATIONS LAW § 12.

defendant corporation. The defendants brought suit on this demand, and during the pendency of the action, a settlement was reached, as evidenced by a letter from the plaintiffs' attorney to the defendants' attorney. There was no other writing. Such settlement allowed the plaintiff corporation to remove the machine and pay the defendant corporation the sum of \$500.00 within twenty-four hours after removal. The terms of this agreement were not carried out and the defendants continued to prosecute the original action, whereupon the plaintiffs brought the present action, after setting up the foregoing facts, praying for specific performance of the agreement and asking that the defendants be enjoined from pursuing their original action. The Special Term denied the defendants' motion to dismiss the complaint while finding that the agreement was a superseding contract,¹ taking the place of the original contract relating to the installation of the machinery, and therefore enforceable. The Special Term granted the plaintiffs specific performance and enjoined the defendants' from prosecuting their action. On appeal, *held*, order reversed, and defendants' motion to dismiss the complaint granted. The agreement upon which the plaintiffs base their claim is an executory accord and not a superseding contract, because until the future performances, as provided for by the agreement, were completed, there was no accord between the parties. Therefore such agreement is not valid as within Section 33-a, subdivisions 2 and 3 of the Personal Property Law,² which requires executory accords to be in writing and signed by the party against whom it is sought to be enforced in order to be valid. *Atterbury, et al. v. James F. Walsh Paper Corporation, et al.*, 261 App. Div. 529, 26 N. Y. S. (2d) 43 (1st Dep't, 1941).

Prior to the passage of Sections 33-a and b³ of the Personal

¹ "A superseding contract is a new and superior contract superseding and extinguishing the contract or contracts upon which the original action was based. * * * It relates to matters of differences and controversies other than, as well as, those involved in the original action." *Moers v. Moers*, 229 N. Y. 294, 128 N. E. 202 (1920).

² N. Y. PERS. PROP. LAW § 33-a, subd. 2: "An executory accord, hereafter made, shall not be denied effect as a defense or as the basis of an action or counterclaim by reason of the fact that the satisfaction or discharge of the claim, cause of action, contract, obligation, lease, mortgage or other security interest which is the subject of the accord was to occur at a time after the making of the accord, provided the promise of the party against whom it is sought to enforce the accord is in writing and signed by such party."

N. Y. PERS. PROP. LAW § 33-a, subd. 3: "If an executory accord is not performed according to its terms by one party, the other party shall be entitled either to assert his rights under the claim, cause of action, contract, obligation, lease, mortgage or other security interest which is the subject of the accord, or to assert his rights under the accord."

³ N. Y. PERS. PROP. LAW § 33-b: "An offer in writing, hereafter made, signed by the offeror, to accept a performance therein designated in satisfaction or discharge in whole or in part of any claim, cause of action, contract, obligation, or lease, or any mortgage or other security interest in personal or real property, followed by tender of such performance by the offeree before revocation of the offer, shall not be denied effect as a defense or as the basis of an

Property Law, the principles of which govern the ruling of this case, the common-law rule prevailed in New York and in most other states that an accord was not binding upon the parties until it was executed⁴ and an executory accord, therefore, did not discharge the original obligation and was not a valid defense to an action on the original obligation.⁵ The rule also was that a tender of satisfaction under the executory accord did not make the accord executed and did not discharge the original obligation unless such tender was accepted.⁶ Such a ruling was based upon sound principles as it would be unfair to a creditor to discharge his original cause of action by an executory accord which might never be executed and would, in effect, only reduce the obligation of the debtor. However, it was also unfair to the debtor if, after making an executory agreement, the creditor could, without delay, sue upon the original cause of action in utter disregard to the accord. Because of this there was a disagreement among the decisions of the states; some holding rigidly with the common law, while others, looking at the equitable side of the controversy, held the accord to discharge the original action and to preclude suit.⁷ This controversy was settled in New York when, in 1937, the legislature amended Section 33 of the Personal Property Law by passing Sections 33-a and b. This change in the law gave force to an executory accord, providing such accord was in writing and signed by the party against whom it was sought to be enforced, and also gave effect to a tender of satisfaction by the debtor so as to make an accord in writing, signed by the creditor, a good defense to a suit on the original cause of action even though the tender was not accepted by the creditor. The Restatement also leaned towards the equitable side of the controversy,⁸ but it did not go so far as the New York legislature. In the present case, the executory accord was only signed by the plaintiffs' attorney and not by the defendants or the defendants' attorney and the plaintiffs could not therefore hold the defendants to

action or counterclaim by reason of the fact that such tender was not accepted by the offeror."

⁴ *Kromer v. Heim*, 75 N. Y. 574 (1879); *Bandman v. Finn*, 185 N. Y. 508, 78 N. E. 175, 12 L. R. A. (N. S.) 1134 and note (1906); *Hearn v. Kiehl*, 38 Pa. St. 147, 80 Am. Dec. 472 (1861).

⁵ WILLISTON, *CONTRACTS* (Rev. ed.) § 1842; *Stadler v. Ciprian*, 265 Mich. 252, 251 N. W. 404 (1933); *Moers v. Moers*, 229 N. Y. 294, 128 N. E. 202 (1920).

⁶ WILLISTON, *CONTRACTS* (Rev. ed.) § 1843; *Larscy v. Hogan*, 239 N. Y. 298, 146 N. E. 430 (1925); *Reilly v. Barret*, 220 N. Y. 170, 115 N. E. 453 (1917).

⁷ *Buschmann v. McDermott*, 154 App. Div. 515, 139 N. Y. Supp. 314 (1st Dep't 1913); *American Bonding Co. v. Kelly*, 172 App. Div. 437, 158 N. Y. Supp. 812 (1916), *aff'd*, 225 N. Y. 641, 121 N. E. 890 (1919); *Smith v. Smith*, 214 App. Div. 383, 212 N. Y. Supp. 196 (3d Dep't 1925).

⁸ RESTATEMENT § 417(a). The contract of accord "does not discharge the debtor's duty, but suspends the right to enforce it as long as there has been neither a breach of the contract nor a justification for the creditor in changing his position because of its prospective non-performance."

such accord as the common-law ruling prevails unless the accord comes up to the specifications of the statute.

A. S. C.

CONTRACTS—CONTRACTS FOR BENEFIT OF THIRD PARTY—TRUSTS—TESTAMENTARY DISPOSITIONS.—This is a proceeding by an executor to render and settle an account. Decedent made a loan of five hundred dollars, on collateral security, to her executor and his wife, as evidenced by a note and an agreement. The agreement provided that in the event of decedent's death before satisfaction of the debt, the note with the collateral security was to revert to the named son of the executor and his wife. The evidence shows that decedent had previously opened a savings account in her name in trust for said son of the executor and his wife and on the date of the loan had withdrawn five hundred dollars from this account, which was presumably the sum loaned to the executor and his wife the same day. Decedent died before payment of the debt and the executor has purported to indorse and deliver the note, together with the collateral security, to his son without having made any effort to collect the sum due. Decedent's sole legatee objects to said transfer by reason of the admitted failure of the executor to make any effort to collect the debt. *Held*, objections sustained. The transfer of the note and the accompanying collateral security to the son was improper and the executor was guilty of culpable neglect in failing to collect payment on the note from his co-maker, if not from himself, since the co-maker was jointly and severally liable thereon¹ and proof shows resources ample for payment. *In re McCabe's Estate*, 176 Misc. 286, 27 N. Y. S. (2d) 127 (1941).

The accountant's contention that the agreement constituted a contract for the benefit of a third person² and enforceable by such third person³ had no applicability under the present facts.⁴ Contracts made for the benefit of third persons are executed contracts, where the promisee is unable to revoke or control the promisor in the ful-

¹ NEGOTIABLE INSTRUMENTS LAW §§ 55, 110. (*See also, id.* § 36, which reads in part: "* * * (7) Where an instrument containing the words 'I promise to pay' is signed by two or more persons, they are deemed to be jointly and severally liable thereon.")

² 2 WILLISTON, CONTRACTS (Rev. ed. 1936) § 347; WHITNEY, CONTRACTS (3d ed. 1937) § 76.

³ *Seaver v. Ransom*, 224 N. Y. 233, 120 N. E. 639, 2 A. L. R. 1187 (1918); *Litchfield v. Flint*, 104 N. Y. 543, 11 N. E. 58, 5 N. Y. St. Rep. 800 (1887); *Todd v. Weber*, 95 N. Y. 181, 47 Am. Rep. 20 (1884); *Little v. Banks*, 85 N. Y. 258, *aff'g*, 20 Hun 143 (1881); *Barker v. Bradley*, 42 N. Y. 316, 1 Am. Rep. 521 (1870); *Lawrence v. Fox*, 20 N. Y. 268 (1859).

⁴ *McCarthy v. Pieret*, 281 N. Y. 407, 24 N. E. (2d) 102 (1939), *reargument denied*, 282 N. Y. 800, 27 N. E. (2d) 207 (1940).