

Contracts--Anticipatory Repudiation--Not Applicable to Contracts for Payment of Money Only (Indian River Corp. v. Mfg. Trust, 253 App. Div. 549 (1st Dept. 1938))

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that courts of equity will not grant relief to either party when such party is seeking to protect a right operating against public policy.¹⁸ Therefore, it cannot be said that the petitioner conducted himself properly in reference to the suit, and so he was barred from relief.

A. E. M.

CONTRACTS — ANTICIPATORY REPUDIATION — NOT APPLICABLE TO CONTRACTS FOR PAYMENT OF MONEY ONLY.—Plaintiff corporation had given to the defendant trustees a mortgage which provided that if plaintiff was not in default, the trustees would release from the mortgage lien any lands sold by the plaintiff, on payment to them of a stipulated percentage of the purchase price. The plaintiff, having contracted to sell a certain parcel of land covered by the mortgage, requested the trustees to execute the necessary release. Previous to this contract of sale, the plaintiff had notified the trustees that it had decided not to pay an installment of interest which was due at a future date. Consequently, the trustees refused to execute the release, averring that they had treated plaintiff's threatened default as an anticipatory breach, and, therefore, they were no longer bound to perform the contract according to its original tenor. In an action to compel the defendant to execute the release, *held*, for plaintiff. The doctrine of anticipatory repudiation does not apply to contracts for the payment of money only, in installments or otherwise. *Indian River Corp. v. Mfg. Trust*, 253 App. Div. 549, 2 N. Y. Supp. (2d) 860 (1st Dept. 1938).

This case is in accord with previous decisions in New York¹ and in other jurisdictions.² The courts of this state undoubtedly recog-

and security the police power may be exercised in the manner against which the protagonist of this motion lodges complaint."

¹⁸ See note 15, *supra*.

¹ *McReady v. Lindenborn*, 172 N. Y. 400, 65 N. E. 208 (1902); *Kelly v. Security Mutual Life Ins. Co.*, 186 N. Y. 16, 78 N. E. 584 (1906); *Werner v. Werner*, 169 App. Div. 9, 154 N. Y. Supp. 570 (1st Dept. 1915); *Bauchle v. Bauchle*, 185 App. Div. 590, 173 N. Y. Supp. 292 (1st Dept. 1918); *Curov Realty Corp. v. Powell*, 246 App. Div. 832, 284 N. Y. Supp. 846 (2d Dept. 1936).

² *Kewan v. John Hancock Mut. Life Ins. Co.*, 1 F. Supp. 719 (W. D. Mo. 1932); *Manufacturer's Furniture Co. v. Cantrell*, 172 Ark. 642, 290 S. W. 353 (1927); *Fidelity & Deposit Co. v. Brown*, 230 Ky. 534, 20 S. W. (2d) 284 (1929); see *Alger-Fowler Co. v. Tracy*, 98 Minn. 432, 437, 107 N. W. 1124, 1126 (1906).

nize the right to treat³ an anticipatory repudiation⁴ of an executory contract as a breach in three classes of contracts, namely: (1) contracts to marry;⁵ (2) contracts for personal services; and (3) contracts for the manufacture or sale of goods.⁶ It has been said that this doctrine, when applied at all, is applied with great caution, and that in New York it has been recognized only in those three classes enumerated above.⁷ But the doctrine has also been applied to an agreement to hire a boat,⁸ to arbitration agreements,⁹ and probably to

³ The mere fact that one party to a contract, before the time for performance, unqualifiedly announces to the other his intention not to perform, assuming the case to be one where the doctrine of anticipatory repudiation applies, does not in itself constitute a breach of contract, but merely gives the innocent party an *option* to treat it as an immediate breach, or to ignore the repudiation until the time for performance. As was said in *Frost v. Knight*, 7 Exch. 111 (1872): "The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance; but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it." Accord: *Howard v. Daly*, 61 N. Y. 362 (1875); *In re Vaughan's Estate*, 156 Misc. 577, 282 N. Y. Supp. 214 (1935), *aff'd*, 248 App. Div. 730, 289 N. Y. Supp. 825 (2d Dept. 1936).

⁴ The renunciation, in order to amount to an anticipatory repudiation, must be absolute and unequivocal and clearly indicate a permanent intention to repudiate. *National Contracting Co. v. Hudson River Water Power Co.*, 110 App. Div. 133, 97 N. Y. Supp. 92 (1st Dept. 1905); see 13 C. J. (1917) p. 654, § 727; *RESTATEMENT, CONTRACTS* (1933) § 318 N. Y. Annot.

⁵ Since the abolition of actions for breach of promise in New York (N. Y. CIV. PRAC. ACT § 61a-i), the application of the doctrine of anticipatory repudiation to this class of contracts, of course, has disappeared.

⁶ *Burtis v. Thompson*, 42 N. Y. 246 (1870); *Howard v. Daly*, 61 N. Y. 362 (1875); *Windmüller v. Pope*, 107 N. Y. 674, 14 N. E. 436 (1887); see *Kelly v. Security Mutual Life Ins. Co.*, 186 N. Y. 16, 19, 78 N. E. 584, 585 (1906).

The doctrine is based on one of the necessary implied terms of every executory contract, that the parties shall continue to be ready and willing to perform, the violation of which, by not being willing to perform, is regarded as the breach. *CLARK, CONTRACTS* (4th ed. 1931) 614.

⁷ *Kelly v. Security Mutual Life Ins. Co.*, 186 N. Y. 16, 19, 78 N. E. 584, 585 (1906); *Booth v. Milliken*, 127 App. Div. 522, 11 N. Y. Supp. 791 (1st Dept. 1908), *aff'd on other grounds*, 194 N. Y. 553, 87 N. E. 115 (1909); *Adenaw v. Piffard*, 202 N. Y. 122, 129, 95 N. E. 555, 557 (1911); *Ga Nun v. Palmer*, 202 N. Y. 483, 493, 96 N. E. 99, 101 (1911); instant case at 551.

In some jurisdictions, the doctrine of anticipatory repudiation has been rejected in its entirety. *Daniels v. Newton*, 114 Mass. 530 (1874); *Terrell v. Anderson*, 244 Mass. 273, 138 N. E. 569 (1923); *Carstens v. McDonald*, 38 Neb. 853, 57 N. W. 757 (1894); *King v. Waterman*, 55 Neb. 324, 75 N. W. 830 (1898).

⁸ *Donovan v. Sheridan*, 4 Misc. 433, 24 N. Y. Supp. 116 (1893).

⁹ *Union Ins. Co. v. Central Trust Co.*, 157 N. Y. 633, 52 N. E. 671 (1899), where it was held that an immediate action for damages could be maintained against the defendant, who, before the time for performance, by revoking the submission, rendered it impossible for him to carry out the arbitration agreement.

repudiations of contracts to devise or bequeath property so as to enable the promisee to maintain an action for damages during the life of the promisor.¹⁰

But since the doctrine is said to be limited to executory contracts¹¹ and somewhat arbitrarily to have no application to unilateral contracts,¹² the courts have steadfastly refused to apply this doctrine to unilateral contracts for the payment of money only.¹³ Thus, in the instant case, since the only outstanding obligation under the bond of the mortgage was the plaintiff's promise to pay money, there could be

¹⁰ *Adenaw v. Piffard*, 137 App. Div. 470, 121 N. Y. Supp. 825 (4th Dept. 1910), *reversed on other grounds*, 202 N. Y. 122, 95 N. E. 555 (1911), where the question is expressly left undecided, the court refusing to pass on it; see *Ga Nun v. Palmer*, 202 N. Y. 483, 490, 96 N. E. 99, 101 (1911), where the court discusses the cases on anticipatory repudiation, apparently acquiescing in its application, but then at page 493, states that whether it is applicable or not, it leaves undetermined; 2 CLARK, *NEW YORK LAW OF CONTRACTS* (1922) 1477; *Notes* (1912) 36 L. R. A. (n. s.) 922, (1930) 66 A. L. R. 1439.

It would seem that there could also be an anticipatory breach of a contract to rent a theatre, *Bernstein v. Meech*, 130 N. Y. 354, 29 N. E. 255 (1891), and of a contract to sell land, *In re Vaughan's Estate*, 156 Misc. 577, 282 N. Y. Supp. 214 (1935), *aff'd*, 284 App. Div. 730, 289 N. Y. Supp. 825 (2d Dept. 1936), the courts deciding both cases on the ground that the plaintiffs had not manifested their election to treat the repudiation as an anticipatory breach. See *Brakarsh v. Brown*, 162 Misc. 412, 294 N. Y. Supp. 848 (1936), where the court dismissed an action for an anticipatory breach of a contract to sell land, on the ground that there was no allegation in the complaint of an unqualified repudiation of the contract by the defendant; but the court intimated that had the pleading been proper, the action would lie.

¹¹ 13 C. J. (1917) p. 655, § 728; *RESTATEMENT, CONTRACTS* (1932) § 318, subd. (3); 12 AM. JUR. (1938) p. 973.

¹² By an examination of the cases, it will be noted that no reason is assigned for this limitation; in fact, courts of other jurisdictions have expressed their view that this limitation is purely arbitrary. See *Moore v. Security Trust and Life Ins. Co.*, 168 Fed. 496, 505 (C. C. A. 8th, 1909), where Judge Van Devanter in a dissenting opinion said: "I perceive no reason for believing that the plaintiffs, by reason of having performed their part of the contract, are in a less favorable position than if the contract was still executory as to them"; *Equitable Trust Co. v. Western Pacific R. R.*, 224 Fed. 485 (D. C. 1917); *O'Neil v. Supreme Council*, 70 N. J. L. 410, 57 Atl. 463 (1904). Professor Williston's justification is as follows: "* * * when the only requirement of the contract is the promisor's future performance, it more obviously is unjust to hold him liable to an action immediately, than where performances are to be rendered by both parties. In the latter case, waiting until the agreed time has its effect on the whole agreed exchange; in the former case, allowing the promisee immediate recovery is nothing but a direct bonus to the promisee beyond what he was promised and a direct penalty to the promisor." 5 WILLISTON (Rev. ed. 1937) 3734.

See 12 AM. JUR. (1938) 973 and *Note* (1936) 105 A. L. R. 460, for a criticism and discussion of the rule that the doctrine of anticipatory repudiation does not apply to unilateral contracts.

¹³ See *Howard v. Daly*, 61 N. Y. at 377 (1875), where the court, speaking of the doctrine of anticipatory repudiation, said: "* * * it would scarcely be extended to mere promises to pay money, or other cases of that nature, where there are no mutual stipulations"; *Kevan v. John Hancock Mut. Life Ins. Co.*, 1 F. Supp. 719 (W. D. Mo. 1932); 13 C. J. (1917) p. 655, § 728; 12 AM. JUR. (1938) 873.

no default thereon until the actual time for payment arose. Previous to this case, the doctrine had been held as not applicable to the payment of benefits under a contract of insurance, so as to subject the insurance company, on its repudiation of the policy, to liability for entire damages for breach of the contract;¹⁴ nor to an anticipatory repudiation by the maker of a promissory note, so as to make him liable thereon before the actual time of payment.¹⁵

However, if the contract, wherein the question of anticipatory repudiation arises, is not solely for the payment of money, the doctrine still applies. Accordingly, where the defendant contracted to market a razor patented by the plaintiff and to pay him a stipulated royalty in yearly installments, it was held that the defendant's anticipatory repudiation subjected him to liability for the entire damages sustained, on the ground that the contract was not one for the payment of money only, but for the marketing of a patented razor as well.¹⁶

Moreover, even though the contract is one where the promisee is only to pay money, if the performance remains mutually executory, the doctrine should still apply.¹⁷

L. J. G.

¹⁴ Kelly v. Security Mutual Life Ins. Co., 186 N. Y. 16, 79 N. E. 584 (1906), where an insurance company's act in wrongfully declaring the insured's policy void was held not to give the insured an action for anticipatory breach, the contract being one for the payment of money only; but that his proper remedy was in equity; cf. Federal Life Ins. Co. v. Rascoe, discussed in note 16, *infra*.

¹⁵ Burtis v. Thompson, 42 N. Y. 246, 250 (1870); cf. Hall v. Nassau Consumers Ice Co., 260 N. Y. 417, 183 N. E. 903 (1933).

The doctrine has been also held not applicable to unilateral contracts to pay money in installments for support or during the life of a promisee. Werner v. Werner, 169 App. Div. 9, 154 N. Y. Supp. 570 (1st Dept. 1915); Bauchle v. Bauchle, 185 App. Div. 590, 173 N. Y. Supp. 292 (1st Dept. 1918); Edelman v. Wechsler, 245 App. Div. 748, 280 N. Y. Supp. 259 (2d Dept. 1935). See Villani v. National City Bank, 143 Misc. 416, 256 N. Y. Supp. 602 (1932), where a bank, before the time for payment, refused to recognize plaintiff's bank account, and it was held that an action for anticipatory breach was not proper.

¹⁶ Baer v. Durham Duplex Razor Co., 228 App. Div. 350, 239 N. Y. Supp. 353 (1st Dept. 1930), *aff'd*, 254 N. Y. 570, 173 N. E. 870 (1930). The Appellate Division, at page 353, said: "The defendant further claims that there could be no recovery, after the defendant's repudiation of the contract, for the entire damages sustained by the breach, that the contract was one for the payment of money only, and that the doctrine of anticipatory breach is not applicable. * * * This is not a contract solely for the payment of money. * * * Here the defendant did not engage to make specific payments in installments, but to market the razor. The plaintiff may well have been damaged by the defendant's refusal to proceed far more than the amount of the minimum royalties, though these minimum royalties constituted all the damages he could prove." Cf. Tannebaum v. Federal Match Co., 189 N. Y. 75, 81 N. E. 565 (1907).

¹⁷ Equitable Trust Co. of N. Y. v. Western Pac. Ry., 244 Fed. 488, 501 (S. D. N. Y. 1917); Park v. Maryland Casualty Co., 59 F. (2d) 736 (W. D. Mo. 1932). See Brearton v. Dewitt, 252 N. Y. 495, 170 N. E. 119 (1930), where a complaint alleging that the defendant's testator failed to pay monthly installments under a bilateral contract, wherein, in consideration for the payments, the plaintiff promised to isolate herself from her friends and to submit

CONTRACT — DECEIT — ACCOUNTANT'S LIABILITY TO THIRD PARTIES.—Plaintiff granted a loan to a factor in reliance upon a certified balance sheet prepared by defendant, a firm of accountants. It was contended that defendant, though aware that the balance sheet would be used to obtain credit, failed (1) to verify fictitious accounts fraudulently inserted by the factor and (2) to point out the stagnant condition of, and the inadequate reserves for other accounts. It was further claimed that thirty days later—after the loan had been made—defendant sent an accurate description of the latter condition to the factor but no attempt was made to notify creditors. Plaintiff brought an action for deceit against defendant for misrepresentation as to the solvency of the factor. The Appellate Division affirmed a decision of the trial court which set aside a verdict for plaintiff. Upon appeal, *held*, reversed and new trial granted. A *prima facie* case in deceit was established by evidence of gross negligence from which the jury in the instant case would be authorized to infer fraud. *State Street Trust Co. v. Ernst*, 278 N. Y. 104, 15 N. E. (2d) 416 (1938).

Most of the early actions for deceit, like their modern counterparts, were brought when plaintiff was misled into some business venture by defendant's misrepresentation.¹ Since early common law the elements of the action have remained substantially the same:² a false statement of a material fact,³ knowingly⁴ made, which is intended to⁵ and does induce the deceived to act to his detriment.⁶ Accountants

herself to the direction and control of the defendant for the treatment and cure of certain disease, stated a cause of action, not only for the installment due at the time of the testator's death, but also for entire damages for breach of the contract. The decision can be justified on the ground that since the contract was bilateral, the defendant's anticipatory breach gave the plaintiff an immediate action for entire damages; *cf. Werner v. Werner*, 169 App. Div. 9, 154 N. Y. Supp. 570 (1st Dept. 1915), where the court held that the non-payment of an installment and repudiation by defendant under a unilateral contract, did not entitle plaintiff to sue for damages for breach of the contract, but only to sue for each installment as it fell due. Compare *Federal Life Ins. Co. v. Rascoe*, 12 F. (2d) 693 (C. C. A. 6th, 1926), noted with approval in 36 *YALE L. J.* 263 (where a recovery on an insurance policy which provided for specified weekly payments, was allowed to include all installments, including those not due, on the theory that the contract was not unilateral, but bilateral, since the insured was required to furnish physician's report of her condition every thirty days) with *Kevan v. John Mut. Life Ins. Co.*, 1 F. Supp. 719 (W. D. Mo. 1932).

¹ Bohlen, *Misrepresentation as Deceit, Negligence, or Warranty* (1929) 42 *HARV. L. REV.* 733.

² EDGAR AND EDGAR, *TORTS* (3d ed. 1936) 178-187.

³ *Seneca Wire & Mfg. Co. v. Leach*, 247 N. Y. 1, 159 N. E. 700 (1928); *Moore v. Abbey*, 213 App. Div. 787, 210 N. Y. Supp. 766 (4th Dept. 1925).

⁴ *Reno v. Bull*, 226 N. Y. 546, 124 N. E. 144 (1919); *Rose v. Goodale*, 169 N. Y. Supp. 446 (1918).

⁵ *Habeeb v. Dass*, 111 Misc. 437, 181 N. Y. Supp. 392 (1920), *aff'd*, 196 App. Div. 974, 188 N. Y. Supp. 925 (2d Dept. 1921).

⁶ *Laska v. Harris*, 215 N. Y. 554, 109 N. E. 599 (1915) (defendant's deceit need not be the sole inducing cause); *Mahon v. Equitable Trust Co.*, 181 App. Div. 335, 168 N. Y. Supp. 757 (1st Dept. 1918); EDGAR AND EDGAR, *loc. cit. supra* note 2.