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Article 22

Specific Performance--Contract by Railroad to Erect Station--Sufficiency of Defenses of Lack of Necessity--Hardship (City of New York v. N.Y. Central Railroad Co., 275 N.Y. 287 (1937))

St. John's Law Review

imminently dangerous.[13] Further, it should be noted that *such liability is not predicated upon any theory of contract or warranty.*[14] Indeed such an idea was expressly repudiated in New York, where, speaking of the liability of makers of dangerous instruments to third persons the court said: "This is not upon the ground of warranty express or implied, but because the vendor owes to the public a duty not to expose human life to danger by negligently and carelessly putting upon the market an article as harmless, which is in fact dangerous." [15] Judicial protest against any doctrine extending the right of persons to sue *ex contractu* in such cases is not wanting.[16]

As far as third persons are concerned, warranties are of significance only insofar as their breach constitutes negligence.[17] In any case of breach of warranty therefor, there can be no recovery by a third person where the breach alone is relied upon. Where a third person was injured because of a defect in a vacuum cleaner which constituted a breach of warranty to the purchaser, recovery was denied.[18] It would seem from the above that in the case of a chattel inherently dangerous, no negligence appearing, a person injured because of a defect, amounting to a breach of warranty to the purchaser, cannot recover. Also, that in the case of a chattel not within the "dangerous instrumentality" rule, where there is a defect amounting to a breach of warranty, negligence is immaterial.[19] There can be no recovery *ex delicto* or *ex contractu.*

A. W.

SPECIFIC PERFORMANCE—CONTRACT BY RAILROAD TO ERECT STATION—SUFFICIENCY OF DEFENSES OF LACK OF NECESSITY—HARDSHIP.—In 1905 the legislature authorized the city of New York to grant to the defendants the right to use certain underground areas for track and station facilities; plans therefor to be subject to approval

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[13] See note 11, *supra.*

[14] "If to the element of danger, there is added knowledge they will be used by persons other than the purchaser, and used without new test, then, *irrespective of contract,* the manufacturer of this instrument of danger is under a duty to make it carefully." [Italics ours.] Cardozo, J., in McPherson v. Buick Motor Co., 217 N. Y. 382, 389, 111 N. E. 1050, 1053 (1916).

[15] Favo v. Remington Arms Co., 67 App. Div. 414, 73 N. Y. Supp. 788 (3d Dept. 1901); see National Savings Bank v. Ward, 100 U. S. 195, 204, 25 L. ed. 621, 624 (1879).

[16] See National Savings Bank v. Ward, 100 U. S. 195, 25 L. ed. 621; Davidson v. Nichols, 11 Allen 514 (Mass. 1866).

[17] Cunningham v. C. R. Pease House Furnishing Co., 74 N. H. 435, 69 Atl. 120 (1908) *semble.*

[18] Galvin v. Lynch, 137 Misc. 126, 241 N. Y. Supp. 479 (1930).

[19] The result, in the instant case, would seem to indicate that even shoes might be included in the "dangerous instrumentality" rule. See Note (1938) 12 ST. JOHN'S L. REV. 281.

of the Board of Estimate and Apportionment.[1] Prior to 1917 plans were submitted and approved and a contract entered into whereby, among other things, the defendant agreed to erect a station. In an action for specific performance brought by the city in 1935, the railroad company defends on grounds that a change of traffic conditions in neighborhood of proposed station renders its construction unnecessary and, in fact, detrimental to service and public interests; that due to lack of adequate funds specific performance will impose a great hardship on defendant, with no corresponding benefit to plaintiff; and that subsequent legislation has rendered the contract unenforceable. *Held,* judgment for defendant. Where conditions have so changed in the interval as to render performance unduly burdensome or impossible and public convenience and necessity no longer demand compliance, a court of equity will refuse to grant specific performance. *City of New York* v. *N. Y. Central Railroad Co.,* 275 N. Y. 287, 9 N. E. (2d) 931 (1937).

It is a cardinal rule that in an action to specifically enforce a contract the one seeking enforcement must act promptly.[2] Unexplained delay is evidence of waiver and acquiescence in non-performance.[3] During the interval between the time the right to enforce arises and the time of bringing suit, the situation of the parties may change radically. Whether specific performance will be granted or withheld is a matter entirely within the court's discretion,[4] and if the change of circumstances would impose a hardship and injustice on defendant, this form of relief may be denied; especially when the action is accompanied by unreasonable delay. This result may follow, although the action is brought within the period allowed by the Statute of Limitations.[5] The rule has been ably stated by Judge Dansforth and substantially followed by a series of decisions.[6] So, in railroad cases,

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[1] N. Y. LAWS (1909) c. 558.

[2] Delavan v. Duncan, 49 N. Y. 485, 488 (1872). In FRY, SPECIFIC PERFORMANCE (6th ed. 1921) § 1102 the author says: "The doctrine of the court thus established, therefore, is that laches on the part of the plaintiff either in executing his part of the contract or in applying to the court, will debar him from relief."

[3] Halstead v. Grinnen, 152 U. S. 416, 14 Sup. Ct. 641 (1894); Nash v. Milford, 33 App. D. C. 142 (1909); McLaurie v. Barnes, 72 Ill. 73 (1874); Eads v. Williams (1854); 4 De G. M. & G. 674, 43 Eng. Reprint 671.

[4] Bruce v. Tilson, 25 N. Y. 202 (1862); Peters v. Delaplaine, 49 N. Y. 362, 367 (1872); Conger v. N. Y. W. S. & B. R. R., 120 N. Y. 29, 23 N. E. 983 (1890); (1914) 28 HARV. L. REV. 110.

[5] Peters v. Delaplaine, 49 N. Y. 362, 367 (1872). For a comprehensive collation of cases see 65 A. L. R. 12 *et seq.*

[6] In Trustees of Columbia College v. Thacher, 87 N. Y. 311 (1882), Dansforth, J., said: "Though a contract was just and fair when made, enforcement in a court of equity will be denied, if subsequent events have made performance by defendant so onerous that enforcement will impose great hardships on him and cause little or no benefit to plaintiff." McClure v. Leaycraft, 183 N. Y. 36, 75 N. E. 961 (1905); Batchelor v. Hinkle, 210 N. Y. 243, 104 N. E. 629 (1914); McCann v. Chasm Power Co., 211 N. Y. 301, 105 N. E. 416 (1914); Forstman v. Joray Holding Co., Inc., 244 N. Y. 22, 154 N. E. 652 (1926); Schefer v. Ball, 53 Misc. 448, 104 N. Y. Supp. 1028 (1907).

a contract which hampers or unreasonably interferes with the service a railway offers to the public or with the erection of stations at other points, will not be enforced as contrary to public policy.[7]

In accordance with the rules enunciated, relief was properly denied in the instant case. The defense of unenforceability, due to an act now requiring permission from the Interstate Commerce Commission [8] by railroads wishing to raise money to build, was held by the court to be merely one of the material facts, constituting change of conditions, but which, standing alone, would not be a sufficient defense to specific performance.

It would be interesting to inquire whether the court would grant specific performance in the absence of an unreasonable delay and change of circumstances of the parties. The general rule has been well settled that contracts for building and construction will not be specifically enforced because of difficulty of supervision.[9] Among the most notable exceptions to the general rule are cases where land to be improved or built on is in defendant's possession,[10] and more recently, landlords' covenants to compel building during the term of lease.[11] New York, holding fast to *Beck* v. *Allison,* has been less liberal than most jurisdictions in granting equitable relief. However, where the public interest is involved, not being able to measure the loss in dollars and cents, the court will suffer the necessary inconvenience and grant relief.[12]

P. M. L.

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[7] Texas & P. R. R. v. Marshall, 136 U. S. 393, 10 Sup. Ct. 846 (1890); Beasley v. Texas etc. R. R., 191 U. S. 492, 24 Sup. Ct. 164 (1903); Conger v. N. Y. W. S. & B. R. R., 120 N. Y. 29, 23 N. E. 983 (1890); Herzog v. Atchinson, T. etc. R. R., 153 Cal. 496, 95 Pac. 898 (1908); Mobile etc. R. R. v. People, 132 Ill. 559, 24 N. E. 643 (1890).

[8] TRANS. ACT (1920) § 20-a. This Act changed the conditions under which any financing may be undertaken and approved and would now require defendants to secure approval of the Interstate Commerce Commission before they can issue the necessary securities for financing a new station.

[9] Beck v. Allison, 56 N. Y. 366 (1874); Crane v. Roach, 29 Cal. App. 584, 156 Pac. 375 (1916); Robinson v. Luther, 134 Iowa 463, 109 N. W. 775 (1906); see POUND, THE PROGRESS OF THE LAW—EQUITY (1919) 33 HARV. L. REV. 420, at 432. But see Doty v. Rensselaer, 194 App. Div. 841, 185 N. Y. Supp. 466 (3d Dept. 1921), approved in (1921) 21 COL. L. REV. 495; *cf.* Jackson v. Normandy Brick Co., 1 Ch. 438 (1899).

[10] Straus v. Estates of Long Beach, 187 App. Div. 876, 176 N. Y. Supp. 447 (2d Dept. 1919).

[11] Jones v. Parker, 168 Mass. 564, 40 N. E. 1044 (1895); N. Y. Central R. R. v. Stoneham, 223 Mass. 258, 123 N. E. 679 (1919).

[12] La Follette v. La Follette Water Co., 252 Fed. 762 (C. C. A. 6th, 1918); Larchmont v. Larchmont Park, 185 App. Div. 330, 173 N. Y. Supp. 32 (2d Dept. 1918); Chambersburg v. Chambersburg etc. R. R., 258 Pa. 57, 101 Atl. 922 (1917).