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Sales--Breach of Warranty that Article Is New and Unused--Rescission--Damages (Donovan v. Aeolian Co., 270 N.Y. 267 (1936))

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able with notice of the nature and extent of the agent's powers.[2] Obviously a principal is not liable for his agent's deceitful representations when the circumstances are such that the person dealing with the agent is not entitled to rely on the misrepresentations.[3] The third person may obtain actual notice of the agent's limitations from the contract that he signs,[4] as in the instant case, or he may obtain constructive notice from facts that would put him on inquiry.[5] In either event, he cannot gain rights against the principal by an act of the agent which exceeds the known limitations [6] and the court so held. Since the reason for holding a principal whose agent has acted beyond his actual authority is to encourage business transactions through agents by protecting third persons, it is only just to protect the principal when the third person has notice that the agent is acting beyond his limitations.[7] The Court of Appeals recognized the validity of the plaintiff's contention that one cannot protect himself from liability for fraud by inserting a blanket clause in his contract, but left open the question, whether or not parol evidence of a corporation's agent's statements may be introduced in an action for fraud against the corporation where such statements are at variance with specific provisions in a printed contract. Other jurisdictions have held that parol evidence may be introduced to show the agent's fraudulent misrepresentations notwithstanding the fact that it directly contradicts the written contract,[8] but an exception is made where the party seeking to claim reliance on the agent's fraud has notice of the limitations of the agent's authority to make the representations.[9]

M. R. W.

SALES—BREACH OF WARRANTY THAT ARTICLE IS NEW AND UNUSED—RESCISSION—DAMAGES.—Defendant, a manufacturer and dealer in pianos, sold a piano to the plaintiff, who believed it to be new and unused. Two years later, the plaintiff discovered that prior to its

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[2] Miller v. Bartnet, 158 App. Div. 862, 144 N. Y. Supp. 40 (2d Dept. 1913); Beck v. Donahue, 27 Misc. 230, 57 N. Y. Supp. 741 (1899); Deyo v. Hudson, 225 N. Y. 602, 122 N. E. 635 (1919); Dudley v. Perkins, 235 N. Y. 448, 139 N. E. 570 (1923).

[3] Deyo v. Hudson, 225 N. Y. 602, 612, 122 N. E. 635 (1919); Wen Kroy Realty Co. Inc. v. Public Nat. Bank, 260 N. Y. 84, 183 N. E. 73 (1932).

[4] Waldorf v. Simpson, 15 App. Div. 297, 44 N. Y. Supp. 921 (3d Dept. 1897).

[5] Jacoby & Co. v. Payson, 85 Hun 367, 32 N. Y. Supp. 1032 (1895); Hernandez v. Brookdale Mills, 194 App. Div. 369, 185 N. Y. Supp. 485 (1st Dept. 1920); Daly v. Behrens, 118 Misc. 465, 194 N. Y. Supp. 581 (1922).

[6] Martin v. Universal Life Ins. Co., 85 N. Y. 278 (1881).

[7] TIFFANY, AGENCY (2d ed. 1924) § 19.

[8] Stroman v. Atlas Ref. Corp., 112 Neb. 187, 19 N. W. 26 (1924); Gridley v. Tilson, 202 Cal. 748, 262 Pac. 322 (1928).

[9] Gridley v. Tilson, 202 Cal. 748, 262 Pac. 322 (1928).

sale the piano had been five years old, used, and partially rebuilt. From a judgment granting rescission to plaintiff, defendant appeals, contending that there was no warranty that the piano was new and unused, and that even if such warranty had been given, plaintiff's notice of her election to rescind was not given within a reasonable time. *Held,* judgment reversed and new trial granted. Plaintiff's proper action is a suit for damages for breach of warranty, since rescission would indemnify her far in excess of the damages she suffered. *Donovan* v. *Aeolian Co.,* 270 N. Y. 267, 200 N. E. 815 (1936).

Certain warranties of quality are implied under the statute in every sale or contract of sale, without the necessary averment and proof that the seller actually made said promise or representation.[1] But the statute does not specifically include any implied warranty of newness. The case at bar, therefore, presents the novel question whether in the absence of such statutory provision, the common law will imply the necessary warranty upon which a recovery may be predicated. The general rule at common law is that a seller's silence will not constitute a fraud.[2] But where the seller has actual or constructive notice that the buyer is acting under a misapprehension as to a material fact, the law will deem his fraudulent concealment equivalent to an affirmative misrepresentation.[3] In such circumstances it is not incumbent upon the buyer to inquire whether the article is new or used.[4] The seller's failure to disclose its true identity is, therefore, tantamount to an express warranty, and amounts to actionable fraud.[5]

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[1] N. Y. PERSONAL PROP. LAW §§ 95, 96, 97; THE UNIFORM SALES ACT §§ 14, 15.

[2] ANSON, CONTRACTS (Corbin's ed. 1924) 221. But non-disclosure may vitiate a contract *uberrimae fidei;* WILLISTON, CONTRACTS (1924) § 1426.

[3] N. Y. PERSONAL PROP. LAW §§ 93, 96; Nichthauser v. Friedman, 161 N. Y. S. 199 (1916); WHITNEY, LAW OF CONTRACTS (2d ed. 1934) 122.

[4] Grieb v. Cole, 60 Mich. 397, 27 N. W. 579 (1886); Fox v. Boldt, 172 Wis. 333, 179 N. W. 1 (1920) (holding that where the seller is a manufacturer of the goods he sells, which fact is known to the buyer, a warranty that the goods are new is implied, unless the terms of the agreement indicate a contrary intention, or unless the buyer had an opportunity to inspect the goods and his inspection would have disclosed the defect); see 2 WILLISTON, SALES (2d ed. 1924) § 631a. Neither would it avail defendant to plead that he had no cognizance of the defect at the time of the sale for *scienter* is not an essential element in an action for breach of warranty. Even long before the action of *assumpsit* was allowed for the enforcement of a warranty, the gist of the action although one of tort, was the affirmation of the defendant, without the necessary averment and proof that he knew it to be false; Ames', *History of Assumpsit* (1878-79) 2 HARV. L. REV. 1, 8; see Stuart v. Wilkins, 1 Doug. 18 (1778) (the first reported decision to allow the action of *assumpsit* for the enforcement of a warranty.).

[5] N. Y. PERSONAL PROP. LAW § 93; THE UNIFORM SALES ACT § 12; Heath v. Hurd, 124 App. Div. 68, 108 N. Y. Supp. 410 (3d Dept. 1908). Neither is it necessary that defendant have intended to warrant, as long as the natural tendency of his conduct is to induce the buyer to purchase the goods in reliance thereon; see Medina v. Stoughton, 1 Ld. Raym. 593 (K. B. 1700), in which Lord Holt rejected defendant's plea that he thought that the lottery tickets which he sold to plaintiff were his own. The court held that defen-

The issue resolves itself, however, into the question of whether the plaintiff was awarded the proper relief for the wrong she suffered. Whenever a warranty is breached, the buyer may avail himself of two alternative remedies. He may either maintain an action for damages for breach of warranty, or sue for rescission.[6] Here, plaintiff is entitled to indemnification for the fraud perpetrated upon her by defendant, even though two years had elapsed before she gave notice of the breach.[7] But while laches does not absolve defendant from liability for damages, it is, however, fatal to plaintiff's action for rescission, which was deferred beyond all bounds of reasonable time. Plaintiff is, therefore, relegated to the remedy of recovery of damages for the breach of warranty, which will indemnify him sufficiently for his loss.[8]

This decision seems to be at variance with decisions in other jurisdictions, in its strict interpretation of Personal Property Law, Section 150, (3). It has been held that if the delay is a consequence of the non-discovery of the fraud, rescission will not be denied, even though considerable time has elapsed.[9] In *Armstrong* v. *Jackson*,[10] rescission was granted after a lapse of six years, the court citing cases [11] wherein rescission was allowed after a lapse of six, eleven,

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dant's intent, or *scienter*, does not vindicate him in an action for breach of warranty; Cross v. Gardner, 1 Show. 68 (1689).

[6] N. Y. PERSONAL PROP. LAW § 150, 1 (b), (d), 3; THE UNIFORM SALES ACT § 69; Taylor v. Saxe, 134 N. Y. 67, 31 N. E. 258 (1892); see Starr v. Torrey, 22 N. J. L. 190, which holds that plaintiff, in rescinding, is under no duty to return the goods, an offer to return them being sufficient. Before the adoption of The Uniform Sales Act, New York together with other jurisdictions followed the English law, which denied the right of rescission of an executed sale, for breach of a warranty. The rule of *caveat emptor* prevailed. In order to attach liability upon the seller for defective quality, an express representation or warranty, was required; Day v. Pool, 52 N. Y. 416 (1873); Hull v. Caldwell, 38 Dak. 451, 54 N. W. 100 (1893). Such was also the rule in the Roman law; HUNTER, ROMAN LAW 489. But since the adoption of the Sales Act, the prevailing practice is to grant rescission also in executed contracts.

[7] N. Y. PERSONAL PROP. LAW § 130; THE UNIFORM SALES ACT § 69. For the requirement of the statute that notice should be given within a reasonable time after the buyer knows, or ought to know, of the breach, does not, however, preclude the plaintiff from recovery where the postponement of notice was due to the default of the defendant. For the plaintiff is not charged with the duty of submitting to an expert to discover a latent defect in an article purported to be flawless. But the requirement of notice within a reasonable time, which Pers. Prop. Law, Section 150, annexes as a condition for rescission, is not qualified by the explanatory clause "after the buyer knows, or ought to know, of the breach." Therein we have no indication as to the period when the reasonable time is to start. This, the legislature left to be determined by all the circumstances of the particular case.

[8] *Cf.* Ketterer v. Bay View Nash Co., 192 Wis. 343, 210 N. W. 670 (1927).

[9] Woonsocket Rubber Co. v. Lowenberg, 17 Wash. 29, 48 Pac. 785 (1897).

[10] (1917) 2 K. B. 822, 830.

[11] Parker v. Ellis (1914) 2 K. B. 139. Furthermore, it is an established rule that the buyer seeking rescission may be excused from placing the seller in *status quo*, where destruction and injury of the goods are a consequence of the seller's fraud, or breach of warranty; N. Y. PERSONAL PROP. LAW § 150;

fourteen, and fifteen years respectively. Why condemn the plaintiff for laches, or for "slumbering upon his rights" when his legal lethargy was superinduced by the clever concoction of the defendant? The learned court denied rescission because awarding the plaintiff the purchase price and interest without diminution for the value of the use of the piano for two years, would work too great a hardship on the defendant. But rescission is an equitable remedy for the benefit of the defrauded, and it would be more equitable to rescind the transaction, rather than to thrust the seven-year-old piano on the unwilling shoulders of the guiltless plaintiff. "A party seeking rescission must put the other party in *status quo* as nearly as possible. But this rule is wholly an equitable one; impossible things which do not tend to accomplish equity in the particular transaction, are not required." [12]

A. F.

STATUTE OF LIMITATIONS—ADEQUATE REMEDIES—EQUITY.—Petitioner, insurance company, issued to defendant, a corporation engaged in repairing vessels, a policy of liability insurance in July, 1924. Defendant requested that the insurance date from June 15, 1924, and fraudulently concealed from petitioners that an accidental injury to a vessel had occurred on June 24, 1924. Defendant on September 24, 1932 made claim under the policy for the above mentioned loss. Actions were begun on November 7, 1932 to reform the policy so as to exclude liability for loss resulting from the accident on the grounds that defendant's failure to disclose facts which it was under a duty to disclose vitiated the policy even if there were no intent to defraud. Defendant's contention that the action was barred by the six-year Statute of Limitations was not sustained by the court which held that the availability of the defense of fraud was not the equivalent of an affirmative remedy in an action at law and thus the case did not fall in the category of concurrent jurisdiction. On appeal, *held,* affirmed. Since the only adequate affirmative remedy lay in equity, the ten and not the six-year Statute of Limitations was applicable. *Hanover Fire Insurance Company* v. *Morse Dry Dock and Repair Company,* 270 N. Y. 86, 200 N. E. 589 (1936), *aff'g,* 244 App. Div. 780, 272 N. Y. Supp. 792 (1st Dept. 1934).

THE UNIFORM SALES ACT § 69; see Lawley v. Park, 138 Fed. 31, 70 (C. C. A. 1st, 1905) (yacht returnable, although seriously injured, due to defective construction material); Rosenthal v. Rambo, 165 Ind. 584, 76 N. E. 404 (1905) (horse returnable even though in a worse condition than when sold, contrary to the provision in the contract, that it may not be returned unless it is in as sound a condition as when sold); Smith v. Hale, 158 Mass. 178, 33 N. E. 493 (1893).

[12] Sloane v. Shiffer, 156 Pa. 59, 64, 27 Atl. 67 (1893).