

June 2014

Arbitration--Effective Method of Settling Disputes

Philip V. Manning Jr.

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his individual account is not obliged to make inquiries as to the trustee's authority in this respect but is held free from liability until such act or acts of the trustee give actual notice to the bank of the misappropriation of the funds when it must then inquire as to the disposition being made of the trust funds, or for its failure so to inquire, it will be held liable to the trust estate.

KATHLEEN M. KANE.

ARBITRATION—EFFECTIVE METHOD OF SETTLING DISPUTES.

The legal term "arbitration" has been defined as the investigation and determination of a matter or matters of difference between contending parties, by one or more unofficial persons, chosen by the parties and called arbitrators or referees.¹ Mutual promises are a sufficient consideration for agreements to arbitrate.² It is essential that a controversy exist, for in the absence of such, an attempted arbitration would be no more than an idle gesture.³

Arbitration as a form of settlement of controversies is an ancient practice existing at the common law⁴ and finding statutory sanction in this state in the early part of the 19th century.⁵ Under the common law rules an agreement to arbitrate was legal in New York and damages were recoverable for a breach thereof⁶ but specific performance of the promise would not be enforced;⁷ nor could the agreement be pleaded in bar of an action.⁸

At the present time arbitration in New York State is well provided for and regulated by statutes which govern both the principles

¹ 1 WORCESTER, DICTIONARY, 3 Bla. Com. 16; BLACK, LAW DICT. (2d ed. 1910); BOUVIER (Baldwin's Student's ed. 1928); Garr v. Gomez, 9 Wend. 649, 661 (N. Y. 1832); Matter of Berkowitz v. Arbib & Houlberg, 230 N. Y. 261, 270, 130 N. E. 288, 290 (1921).

² Curtis v. Gokey, 68 N. Y. 300 (1877); Wood v. Tunnickliff, 74 N. Y. 38 (1878); Green-Shrier Co. v. State Realty & Mortgage Co., 199 N. Y. 65, 92 N. E. 98 (1910).

³ N. Y. ARBITRATION LAW, L. 1920, c. 275, art. 2, §2; Toledo S. S. Co. v. Zenith Transp. Co., 184 Fed. 391, 404 (1911); Matter of Checker Cab Mfg. Corp. v. Heller, 241 N. Y. 148, 149 N. E. 333 (1925); Webster v. Van Allen, 217 App. Div. 219, 216 N. Y. Supp. 552 (4th Dept. 1926).

⁴ N. Y. Lumber & Woodworking Co. v. Schneider, 15 Daly 15 (N. Y. 1888); Titus v. Scantling, 4 Blackf. 89 (Ind. 1835); Miller v. Brumbaugh, 7 Kan. 343 (1871).

⁵ 2 REV. STAT., pt. 3, c. 8, tit. 14, §§1-25, pp. 541-545 (1829); Matter of Webster v. Van Allen, *supra* note 3 at 221, N. Y. Supp. at 554.

⁶ Haggert v. Morgan, 5 N. Y. 422 (1851).

⁷ *Ibid.* People *ex rel.* Union Ins. Co. v. Nash, 111 N. Y. 310, 18 N. E. 630 (1888); Finucane v. Bd. of Education, 190 N. Y. 76, 82 N. E. 630 (1907); Marchant v. Mead-Morrison Mfg. Co., 252 N. Y. 284, 293, 169 N. E. 386, 389 (1929).

⁸ *Supra* note 6; Finucane v. Bd. of Education, *ibid.*

and the procedure.⁹ Specific performance of arbitration agreements was made compellable by the statute,¹⁰ but only as to matters contained within the terms of the agreement.¹¹ If the arbitrators keep within their jurisdiction, their award is not subject to judicial review¹² but is conclusive¹³ and enforceable.¹⁴ However, an order for the specific performance of an agreement to arbitrate is not part of the arbitration but is reviewable as a separate controversy.¹⁵

In general arbitration agreements may be classified under three types:¹⁶ 1. Where in the absence or regardless of any statutory provision the parties to any controversy submit the decision thereof to mutually chosen arbitrators;¹⁷ 2. Where by statute authority is given to parties to a controversy not in court to submit the same to arbitrators and, by agreement, have the submission entered as a rule of court, and the award enforced, or, on motion entered as the judgment of a designated court;¹⁸ 3. Where a court in which a controversy is pending sends it for determination, by consent of the parties, to arbitrators chosen by the parties or selected by the court.¹⁹

"Settlements of disputes by arbitration are no longer deemed contrary to public policy. Contracts to that end are now declared valid, enforceable and irrevocable save upon grounds as exist at law or in equity for the revocation of any contract."²⁰ The challenge that the arbitration statute is unconstitutional in certain respects has

⁹ N. Y. ARBITRATION LAW, L. 1920, c. 275, Cons. Laws, c. 72, arts. 1-4; N. Y. C. P. A. §§1448-1465, 1469; N. Y. CITY MUN. CT. CODE, L. 1915, c. 279, amended to 1931, §6, subd. 6.

¹⁰ N. Y. ARBITRATION LAW, *ibid.* art. 2, §3; *Red Cross Line v. Atlantic Fruit Co.*, 264 U. S. 109, 118, 119, 44 Sup. Ct. 274, 275 (1924); *Matter of Berkowitz v. Arbib & Houlberg*, *supra* note 1 at 269, N. E. at 289; *Matter of Fletcher*, 237 N. Y. 440, 445, 143 N. E. 248, 249 (1924); *Wenger & Co. v. Propper S. H. Mills*, 239 N. Y. 199, 146 N. E. 203 (1924); *Matter of Kelley*, 240 N. Y. 74, 78, 147 N. E. 363, 364 (1925).

¹¹ *Matter of Kelley*, *ibid.*

¹² *Perkins v. Giles*, 50 N. Y. 228 (1872); *Fudickar v. Guardian Mutual Life Ins. Co.*, 62 N. Y. 392 (1875).

¹³ *Perkins v. Giles*; *Fudickar v. Guardian Mutual Life Ins. Co.*, both *ibid.*; *Hoffman v. De Graaf*, 109 N. Y. 638, 16 N. E. 357 (1888); *Masury v. Whiton*, 111 N. Y. 679, 18 N. E. 638 (1888); *Sweet v. Morrison*, 116 N. Y. 19, 22 N. E. 276 (1889); *Matter of Wilkins*, 169 N. Y. 494, 62 N. E. 575 (1902).

¹⁴ N. Y. ARBITRATION LAW, *supra* note 9, as amended 1927, art. 2, §4A; N. Y. C. P. A. §§1455, 1456, 1461, 1463.

¹⁵ *Marchant v. Mead-Morrison Mfg. Co.*, 252 N. Y. 284, 169 N. E. 386 (1929).

¹⁶ *Miller v. Brumbaugh*, *supra* note 4 at 352, 353 (1871).

¹⁷ *Wenger & Co. v. Propper S. H. Mills*, *supra* note 10; *Newburger v. Lubell*, 257 N. Y. 383, 178 N. E. 669 (1931).

¹⁸ N. Y. ARBITRATION LAW, *supra* note 9, art. 2, §2; N. Y. C. P. A. §§1448, 1449.

¹⁹ N. Y. CITY MUN. CT. CODE, *supra* note 9.

²⁰ N. Y. ARBITRATION LAW, *supra* note 9, art. 2, §2; *Matter of Berkowitz v. Arbib & Houlberg*, *supra* note 1; *Zimmerman v. Cohen*, 236 N. Y. 15, 139 N. E. 764 (1923); *Gilbert v. Burnstine*, 255 N. Y. 348, 353, 174 N. E. 706, 707 (1931).

been repelled.²¹ It has been held that the filing of a mechanic's lien prior to seeking settlement pursuant to an agreement to arbitrate constituted a waiver of the right to arbitrate²² but that principle was not found applicable where the lien was filed pending a determination of a controversy by arbitration.²³ The principles promulgated by those decisions are now subordinated to §35 of the NEW YORK STATE LIEN LAW.²⁴

In a recent New York case²⁵ the parties to certain transactions had agreed in writing that any controversy which might arise as to their account should be determined by arbitration. The defendant became substantially indebted to the plaintiffs to an amount which was allegedly confirmed and approved by the defendant. Upon request of the plaintiffs, the defendant failed to advise whether he claimed a controversy existed. Fearful lest an action at law be deemed a waiver of their right to arbitration under the contract or lest a petition for the appointment of arbitrators might be met with a claim that no controversy existed, the plaintiffs demanded judgment declaring no controversy existed and for the amount claimed. In the alternative the plaintiffs asked that if a controversy existed that it be submitted to the arbitrators according to the agreement. The Court of Appeals affirmed the dismissal of the complaint and gave judgment for the defendant.

It was held that an action at law would not be a waiver of the right of arbitration, even if the defendant in his answer contested the debt, but that the parties would then be free to discontinue and obtain the benefit of the agreement. This statement on first impression appears to conflict with the determinations in previous cases.²⁶ In *Zimmerman v. Cohen*²⁷ we find, "The provision to arbitrate can be modified by a subsequent agreement based upon a consideration, or waived or abandoned by the agreement or action of the parties. The arbitration provision of the contract was abandoned or waived. The plaintiffs made their election when they brought their action against

²¹ *Matter of Berkowitz v. Arbib & Houlberg*, *supra* note 1; *Spiritusfabrick Astra v. Sugar Products Co.*, 230 N. Y. 261, 130 N. E. 288 (1921); *Red Cross Line v. Atlantic Fruit Co.*, *supra* note 10; *Finsilver, Still & Moss, Inc. v. Goldberg, Mass & Co., Inc.*, 253 N. Y. 382, 171 N. E. 579 (1930).

²² *Matter of Young v. Crescent Dev. Co.*, 240 N. Y. 244, 148 N. E. 510 (1925).

²³ *Matter of Askowitz*, 229 App. Div. 258, 241 N. Y. Supp. 394 (2d Dept. 1930).

²⁴ N. Y. LIEN LAW §35 (added by L. 1929, c. 515, §2). "The filing of a notice of lien shall not be a waiver of any right of arbitration."

²⁵ *Newburger v. Lubell*, *supra* note 17.

²⁶ *Zimmerman v. Cohen*, *supra* note 20; *Nagy v. Arcas Brass & Iron Co., Inc.*, 242 N. Y. 97, 150 N. E. 614 (1926); *Matter of Bauer*, 206 App. Div. 423 201 N. Y. Supp. 438 (1st Dept. 1923); *Samuels v. Samis*, 124 Misc. 35, 207 N. Y. Supp. 249 (1924); *STURGES, COMMERCIAL ARBITRATIONS AND AWARDS* (1930) c. 2, §19, p. 59, §20, p. 71; c. 3, §36, p. 126. *Contra*: *N. Y. Lumber & Woodworking Co. v. Schneider*, *supra* note 4.

²⁷ *Supra* note 20 at 19, N. E. at 765.

the defendant ignoring the agreement to arbitrate. The defendant made his election when he answered, setting up a counterclaim upon which he asked the court to give judgment against the plaintiffs, gave notice of trial and procured an order for the taking of a deposition in preparation for trial." However, in the current decision the court was careful to qualify the generality of its statement regarding a waiver.²⁸

A waiver is an intentional abandonment or relinquishment of a known right.²⁹ From the very definition itself it follows logically that the mere commencement of an action at law in the absence of notice that a controversy existed would not be a waiver; for the plaintiff thereby proceeds under the belief that no controversy exists. The existence of a controversy is essential in order that a right of arbitration accrue.³⁰ Therefore, if the plaintiff is of the belief that no right of arbitration has accrued to him, he cannot be properly said to waive a right which is not known to him.

It was also pointed out in the case that the plaintiff was not restricted to an action at law but might petition the court that the defendant submit to arbitration³¹ and if the defendant plead that no controversy exists, arbitrators will not be appointed but defendant will be estopped from interposing such a defense thereafter. Obstinate silence on the part of the defendant in answer to the petition would be interpreted as an assent to the appointment of the arbitrators. The decision is most instructive and impressive of the many intricacies arising from the trend toward settlement of disputes by arbitration.

"During recent years arbitration has been more and more resorted to for the settlement of business controversies."³² "It has furnished a ready and inexpensive method of disposing of certain types of controversies generally with satisfactory results. It has been freely resorted to by people living in communities remote from frequent courts and by commercial bodies and organizations where a speedy decision by men with a practical knowledge of the subject is desired. Courts in all proper cases should be reluctant to limit the scope of so useful a remedy."³³

The rapid growth of arbitration as an efficient method of settling controversies is reflected in the rules of the courts. Recently the

²⁸ *Supra* note 17 at 386, 387, 178 N. E. at 670, "We see no force in the objection that a waiver or abandonment of the benefits of arbitration could be inferred from the mere commencement of an action in the absence of notice that a controversy existed."

²⁹ *Cowenhoven v. Ball*, 118 N. Y. 231, 23 N. E. 470 (1890); *Draper v. Oswego Co. Fire Relief Assn.*, 190 N. Y. 12, 82 N. E. 755 (1907); *Clark v. West*, 193 N. Y. 349, 86 N. E. 1 (1908); *Alsens A. P. C. Works v. Degnon Cont. Co.*, 222 N. Y. 34, 118 N. E. 210 (1917).

³⁰ *Supra* note 3.

³¹ N. Y. ARBITRATION LAW, *supra* note 9, art. 2, §3.

³² *Matter of Friedman*, 215 App. Div. 130, 136, 213 N. Y. Supp. 369, 375 (1st Dept. 1926).

³³ *Webster v. Van Allen*, *supra* note 3 at 221, N. Y. Supp. at 554 (1926).

Appellate Division, Second Department, added an amendment to the Trial and Special Term Rules of the Supreme Court of Kings County,³⁴ which provides for a method of arbitrating certain matters in the process of litigation. It is suggested that this is a very practical amendment and one which will, if availed of, as its merit warrants, eliminate considerable time, effort and expense to litigants, lawyers and courts alike. It remains for the members of the bar to carry the spirit and purpose of such rules and of arbitration in general into practical effect.

PHILIP V. MANNING, JR.

CONSTRUCTIVE TRUSTS BASED ON FRAUDULENT PROMISES.

Promises made with intent not to perform have been frequently treated by the courts as actual fraud. A court of equity will not, under the guise of a constructive trust, enforce a mere oral promise, void under the statute of frauds. On the other hand, equity will not permit the statute to be made a cloak for fraud, and if one person has obtained title to property of another, or in which another has an interest, by means of an intentionally false and fraudulent verbal promise to hold or dispose of it for a particular purpose, equity will not permit him to retain the property and repudiate the promise.¹ If we consider a case where *A*, having an equity of redemption in land, enters into an oral agreement with *B*, the mortgagee, that *A* will not attend the foreclosure sale, but that *B* will attend and bid in the property and hold it for *A*'s benefit, our problem is whether the courts will enforce *A*'s rights by way of a constructive trust, after *B* so obtains the property and pleads the statute of frauds as a bar to the enforcement of the oral agreement.

³⁴ Amendment to Trial and Special Term Rules, Supreme Court, Kings County, adding new subdivision "f" to Rule 14, in effect April 1, 1932:

"(f) The Justice assigned to Special Term, Part 2, shall on each Monday, Wednesday and Friday, between 11 A. M. and 1 P. M., hear such matters as may be brought before him under the provisions of this subdivision, which matters shall be known as 'Informal Motions.' In any action or proceeding in the second Judicial District in which the attorneys for all parties who have appeared shall appear voluntarily before such Justice for the purpose of obtaining a ruling or a decision, such Justice sitting as the court shall hear the parties informally, without presentation of affidavits, motion papers or proof, and make a ruling or decision thereupon, which, if desired by either party, may be embodied in a court order or judgment to be signed and entered."

¹ *Ryan v. Dox*, 25 Barb. (N. Y.) 440, *rev'd*, 34 N. Y. 307 (1866); *Fletcher v. Manhattan Life Ins. Co.*, 114 Misc. 409, 187 N. Y. Supp. 429 (1921), *aff'd*, 197 App. Div. 484, 189 N. Y. Supp. 453 (1st Dept. 1921); *Henschel v. Mamero*, 120 Ill. 660, 12 N. E. 203 (1887); *Gregory v. Bowsby*, 88 N. W. (Iowa) 822 (1902).