

Construction of Inconsistent Provisions in a Bond and Mortgage

Henry Welling

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

This Note is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

In order to render an oral contract falling within the scope of the Statute of Frauds enforceable by action, the memorandum thereof must state the contract with such certainty that its essential terms can be known from the memorandum itself without recourse to parol proof to supply them. Accordingly, if an oral contract falling within the scope of the Statute of Frauds has terms not stated in the memorandum, or stated by mutual mistake incorrectly therein, or if the memorandum contains a reference to such terms, or imports their existence by fair inference, without clearly stating them, the case falls within the Statute of Frauds. Under these circumstances, a court of law will not allow parol testimony to prove the agreement because there is no agreement in the contemplation of the law, nor will equity with its broad dispensing powers substitute under the guise of reformation a writing which never existed.⁴⁴

GEORGE LANDESMAN.

CONSTRUCTION OF INCONSISTENT PROVISIONS IN A BOND
AND MORTGAGE.

The Bench at a Special Term in Westchester County recently expressed itself, "I know the case. The Bar is talking about it and when the Bar talks of a case it is important."¹ Last April the New York Bar was talking of *Adler v. Berkowitz and Gast*.²

On June 28, 1927, Philip Gast *et ux* Rose conveyed the mortgaged premises to the defendant Berkowitz. By the terms of the mortgage an installment of principal and interest was due on July 25, 1928. In addition the mortgage provided that all of the principal was to become due and payable if that installment was not paid within *twenty days*. The bond which Philip Gast *et ux* had signed expressed itself differently—by its terms all of the principal became immediately due and payable if the installment was not paid within *thirty days*, and such acceleration was *at the option of the mortgagee*. Berkowitz paid the installment of July 25, 1928, twenty-six days after its due date, and Adler, the mortgagee, accepted it. For a subsequent default the mortgagee sued to foreclose and joined Rose Gast as a party liable upon her bond for any deficiency. The defendant Gast contended and the Appellate Division held (1) that the terms of the mortgage were controlling, (2) that by its terms, as soon as the twentieth day had passed *ipso facto et eo instanti* all of the principal of the mortgage became due, and (3) that by accepting the installment after the twentieth day the mort-

⁴⁴ *Mead v. White*, *supra* note 38.

¹ Mr. Justice Morschauer.

² 254 N. Y. 433, 173 N. E. 574, *mod'f'g* 229 App. Div. 245, 240 N. Y. Supp. 597 (2nd Dept. 1930).

gagee had granted Berkowitz an extension of the time of payment which released Gast to the extent of the value of the land at the time of the extension. The Court of Appeals subsequently reversed the Appellate Division on the first two rulings³ but did not find it necessary to pass upon the third.

It is ancient learning that a contract of suretyship is always to be strictly construed.⁴ Thus it has been held that any variation of the terms of the undertaking made by the creditor with the principal without the consent of the surety releases the latter.⁵ It has also been held in the law of mortgages that where a grantee makes a valid assumption of a subsisting mortgage he becomes as between himself and his grantor the principal debtor and the grantor becomes the surety for the payment of the debt.⁶ Similarly, where the grantee takes property subject to a subsisting mortgage a relationship arises between him and his grantor which is *quasi* that of principal and surety.⁷

It is said that a surety should not be held to an undertaking which is not his; that he can say to the creditor who by agreement with the principal debtor has varied the terms of the contract "*Hæc verba non sunt mea.*" But it can readily be seen that such a justification for the release of the surety is not always tenable as where one becomes a surety by operation of law, in which case it is not an expressly assumed undertaking. Here his justification for the discharge may be that the creditor has impaired his rights of subrogation, whereby he may recover from the principal debtor when he has discharged the latter's debt.

The mortgagee who by a valid agreement made with his grantee who has assumed the mortgage extends the time of payment has

³ On the authority of *Rothschild v. Rio Grand*, 84 Hun 103, 32 N. Y. Supp. 37, *aff'd* 164 N. Y. 594, 58 N. E. 1092 (1900).

⁴ Brandt, *Suretyship and Guaranty* (3rd ed. 1905), Sec. 106.

⁵ Brandt, *Suretyship and Guaranty*, *supra* note 4, Ch. XV.

⁶ *Calvo v. Davies*, 8 Hun 222, *aff'd* 73 N. Y. 211 (1878); *Fish v. Hayward*, 28 Hun 456 (N. Y. 1882), *aff'd* 93 N. Y. 646 (1883); *Antisdel v. Williamson*, 165 N. Y. 372, 59 N. E. 207 (1901); *Germania Life Ins. Co. v. Casey*, 98 App. Div. 88, 90 N. Y. Supp. 418 (1st Dept. 1904), *aff'd* 184 N. Y. 554, 76 N. E. 1090 (1906); *Wagner v. Brady*, 221 App. Div. 405, 223 N. Y. Supp. 99 (3rd Dept. 1927); *Magnus Beck v. Setel*, 130 Misc. 705, 225 N. Y. Supp. 41 (1927); *American & Eng. Encyc. of Law* (2nd ed. 1896), vol. 20, pp. 997, 998.

⁷ *Murray v. Marshall*, 94 N. Y. 61 (1884); *Metzger v. Nova Realty Co.*, 214 N. Y. 26, 107 N. E. 1027 (1915); *Jester v. Sterling*, 25 Hun 344 (N. Y. 1881); *Feigenbaum v. Hizsnay*, 187 App. Div. 126, 175 N. Y. Supp. 223 (1st Dept. 1919); *Cohen v. Hecht*, 128 App. Div. 511, 112 N. Y. Supp. 809 (1st Dept. 1908); *Mausser v. Kirschenbaum*, 84 Misc. 259, 145 N. Y. Supp. 677 (1914); *In re Pisa*, 5 App. Div. 181, 38 N. Y. Supp. 540 (1st Dept. 1896); *Spencer v. Spencer*, 95 N. Y. 353 (1884); *Wiener v. Boehm*, 126 App. Div. 703, 111 N. Y. Supp. 126 (1st Dept. 1908); *Winslow v. Stoothoff*, 104 App. Div. 28, 93 N. Y. Supp. 335 (2nd Dept. 1905); *Cohen v. Spitzer*, 145 App. Div. 104, 129 N. Y. Supp. 104 (4th Dept. 1911); *aff'd* 207 N. Y. 738, 101 N. E. 1098 (1913); *Neukirch v. McHugh*, 165 App. Div. 406, 150 N. Y. Supp. 1032 (1st Dept. 1904).

put it outside the power of the grantor-mortgagor to pay the debt on its due date and to become then subrogated to the mortgagee's rights against his grantee.⁸ Time often works havoc with men's fortunes. At another time than the present the surety may or may not be equally able to recover from the principal debtor. The law will not inquire into the true extent of the change, if any, in the ability of the debtor to pay (a Herculean task, if we are to believe judgment-creditors' attorneys), but will assume that the change was for the worse, will discharge the mortgagor and limit the mortgagee to his rights against the grantee.

The grantee who does not assume the mortgage debt does not become the principal debtor. The grantor in such case technically remains the principal obligor. Yet the land which has changed hands is a fund which is liable for the payment of the debt. If the grantor pays the debt out of his own funds, he is entitled to be subrogated to the mortgagee's rights against the land. If a binding extension of time has impaired the value of the mortgagee's rights against the land, he is discharged to the extent of such impairment. To that extent the grantor-mortgagor is considered a surety. To that extent he may say, "That was not my undertaking."⁹

What is the extent of such release? It is necessary to determine, first, whether at the time of the extension the property was worth either (1) as much as or more than the mortgage debt, or (2) less than the mortgage debt. Then if the grantor is sued as an original obligor for the amount of the debt, in case number one, the mortgagee's recovery would be diminished by the amount by which the present value of the property is less than the amount of the mortgage; in the second case, by the amount by which the present value of the property is less than it was at the time of the extension. If the plaintiff seeks to hold the grantor for a deficiency, he would be released in the first case but could be held in the second, for the difference between the amount of the mortgage and the value of the property at the time of the extension.¹⁰

The extension agreement must be a binding agreement. It must bind the surety as well as the owner of the equity and the creditor. If by its terms the surety's rights are reserved so that he may upon the original due date make payment and put himself in the place of the creditor, it is not binding upon him and it will not have the effect of discharging him from his liability.¹¹ But

⁸ *Supra* note 6.

⁹ "We cannot accurately denominate the grantee a principal debtor, since he owes no debt, and is not personally a debtor at all, and yet, since the land is the primary fund for the payment of the debt, and so his property stands specifically liable to the extent of its value. * * * He stands in the relation of a principal debtor and to the same extent the grantor has the equities of a surety." Finch, *J.*, Murray v. Marshall, 94 N. Y. 611 (1884).

¹⁰ *Supra* note 7.

¹¹ Morgan v. Smith, 70 N. Y. 537 (1877); Calvo v. Davies, *supra* note 6; Nat'l Bank of Newburgh v. Begler, 83 N. Y. 51 (1880); Palmer v. Purdy, 83 N. Y. 144 (1880).

such a reservation to be valid must be made in express terms and cannot be implied.¹²

To be binding there must have been a valid consideration passing from the debtor to the creditor¹³ for

“mere indulgence by a creditor of the principal debtor will not discharge a surety. To work such a discharge there must be an agreement for an extension made without the consent of the surety which precludes the creditor meanwhile from enforcing the debt against the principal.”¹⁴

The law of consideration is the same here as it is in the law of contracts. The performance or promise to perform a subsisting obligation as the payment of interest or of the principal or part of it is not a valid consideration.¹⁵ Yet the law will not inquire into the adequacy of the consideration.¹⁶ The assumption or payment of the debt or part of it by one not obligated to pay,¹⁷ the payment of interest in advance,¹⁸ the payment of part of the principal in advance,¹⁹ the surrender of additional security²⁰ and a contract of insurance with the mortgagee company²¹ were all held to be sufficient to support an extension agreement.

In the Adler case,²² after the Appellate Division had held the mortgage to be controlling and the mortgagee bound to declare all of the debt payable, it still had to find a valid agreement to extend the time of payment. It might have found from the facts that Adler gave for the payment of Berkowitz, who was not personally obligated to pay, a promise to withhold foreclosure. But for all that appears in the decision, it was based upon the mortgagee's failure to prosecute his remedies. As we have already pointed out, a mere failure by the creditor to enforce payment does not release

¹² Calvo v. Davies, *supra* note 6; Metzger v. Nova Realty, *supra* note 7.

¹³ Parmalee v. Thompson, 45 N. Y. 58 (1871); Olmstead v. Latimer, 158 N. Y. 313, 53 N. E. 5 (1899); Nat'l Citizens Bank v. Toplitz, 178 N. Y. 464, 71 N. E. 1 (1904); Wiener v. Boehm, *supra* note 7; Barden v. Sworts, 112 Misc. 384, 183 N. Y. Supp. 184 (1920).

¹⁴ Powers v. Silberstein, 108 N. Y. 169, 15 N. E. 185 (1888).

¹⁵ 1 Williston on Contracts (1920), Sec. 130; Parmalee v. Thompson, 45 N. Y. 58 (1871); Reynolds v. Ward, 5 Wend. 501 (N. Y. 1830); Neukirch v. McHugh, *supra* note 7; Gahn v. Niemcewicz, 11 Wend. 312 (N. Y., 1833).

¹⁶ Haigh v. Brooks, 10 A. & E. 309 ().

¹⁷ Metzger v. Nova Realty, *supra* note 7; Jester v. Sterling, 25 Hun 344 (N. Y. 1881); Winslow v. Stoothoff, *supra* note 7.

¹⁸ Germania Life Insurance Co. v. Casey, *supra* note 6; New York Life v. Casey, 178 N. Y. 381, 70 N. E. 916 (1904).

¹⁹ Murray v. Marshall, *supra* note 7.

²⁰ Kane v. Cortesy, 100 N. Y. 132, 2 N. E. 874 (1885).

²¹ Fish v. Hayward, 28 Hun 456 (N. Y. 1882), *aff'd* 93 N. Y. 646 (1883)

²² *Supra* note 2.

the surety.²³ There surely was no consideration for the six-day extension of time. Even an oral promise by Berkowitz, who was not legally liable for the debt, to pay six days late would not be sufficient, for it would be an engagement to pay the debt of another (Gast) and so within the Statute of Frauds.²⁴ We hold no brief for an "Indispensable Consideration," but the law requiring it, we think that law, like equity, ought to follow the law.

HENRY WELLING.

SPECIAL DAMAGES FOR BREACH OF CONTRACT.

Ordinarily the damages recoverable for the breach of a contract are those which have been found, in the light of common experience, to proximately attend such a breach, *i. e.*, general damages.¹ In a common instance, breach of a contract of sale of personalty, the measure of damage is summed up as the difference between the contract price and the market price at the time of breach.² Thus, by reason of a rule of thumb limitation, the damages recoverable are those *usually* rather than those *actually* resulting from a breach. Such is not quite the case with special damages. There the law more nearly attains the ideal of complete compensation by permitting recovery of every item of actual damage proximately and naturally flowing from the breach in view of the unusual circumstances attendant upon the making of the contract, regardless of whether those items are the usual accompaniment of the type of breach involved, or are peculiar to the default under consideration.³ It is settled law that a plaintiff will not be granted this exceptional remedy without bringing himself within certain well defined rules of law governing its application.⁴ The case of Czarnika-Rionda v. Federal Sugar Refining Co.,⁵ recently decided by the Court of Ap-

²³ Powers v. Silberstein, *supra* note 14.

²⁴ N. Y. Personal Property Law, Sec. 31, Subd. 2.

¹ Hadley v. Baxendale, 9 Ex. 341, 23 L. J. Ex. 179, 18 Jur. 358, 26 Eng. L. & Eq. 398 (1854). See 17 C. J. 711.

² Saxe v. Penokee Lumber Co., 159 N. Y. 371, 54 N. E. 14 (1899); 3 Williston on Contracts (1920), Sec. 1383.

³ Howard Supply Co. v. Wells, 176 Fed. 512, 100 (C. C. A. 7th, 1910); Moses v. Antuono, 56 Fla. 499, 47 So. 925 (1908); Griffin v. Colver, 16 N. Y. 489, 69 Am. Dec. 718 (1858); Booth v. Spuyten Duyvil Rolling Mill, 60 N. Y. 487 (1875); Hadley v. Baxendale, *supra* note 1; Clayton & Waller, Ltd. v. Oliver, 99 L. J. K. B. 165, A. C. 209 (1930).

⁴ Globe Refining Co. v. Landa Cottonseed Oil Co., 190 U. S. 540, 47 L. Ed. 1171, 23 Sup. Ct. 754 (1903); Lonergan v. Waldo, 179 Mass. 135, 88 Am. St. 365, 60 N. E. 479 (1901); Devlin v. Mayor, 63 N. Y. 8 (1875); Brauer v. Oceanic Steam Nav. Co., 66 App. Div. 605, 73 N. Y. Supp. 291 (1st Dept. 1901); Cockburn v. Ashland Lumber Co., 54 Wis. 619, 12 N. W. 49 (1882); Cory v. Thames Ironworks & S. B. Co., L. R. 3 Q. B. 181 (1868).

⁵ 255 N. Y. 33, 173 N. E. 913 (1930).