St. John's Law Review

Volume 34
Issue 2 *Volume 34, May 1960, Number 2*

Article 8

May 2013

Arbitration--Equity--Board's Order of Employee's Reinstatement Against Employer's Wishes Held Valid (Matter of Staklinski (Pyramid Elec. Co.), 6 N.Y.2d 159 (1959))

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of possible change and the Commission is bound by the original requirements it has promulgated.

The *Abramson* decision [38] has not, however, been clarified by *Hymes* and remains inconsistent with the decision in that case. Although the Appellate Division cited *Abramson* as its authority in upholding the act of the Commission,[39] the Court of Appeals in reversing the Appellate Division failed even to mention the case. In light of the *Hymes* decision the *Abramson* case might well be restricted to its facts in the future.

The decision of the Court in the *Hymes* case does not violate the accepted rule of administrative law that courts will not generally review discretionary acts of the agency. The reasoning of the Court of Appeals indicates, and rightly so, that this is not a case of discretion but rather of agency noncompliance with one of its own rules. While much can be said for the refusal of the judiciary to question the wisdom of discretionary acts of the agency, courts should not be reluctant to review those decisions where what is involved is not an exercise of discretion but rather the application of its own rules and regulations. Judicial review is imperative in such cases to guarantee the continuance of individual rights.

ARBITRATION — EQUITY — BOARD'S ORDER OF EMPLOYEE'S REINSTATEMENT AGAINST EMPLOYER'S WISHES HELD VALID. — Appellant, a foreign corporation, entered into an eleven-year contract employing respondent in a highly responsible position. The contract provided that if respondent should be permanently disabled, he would receive reduced compensation for three years. It was further provided that any controversy arising out of the contract should be settled by arbitration in accordance with the American Arbitration Association Rules, which authorize specific performance of a contract. The board of directors determined that respondent was permanently disabled and that his services should be terminated. He disputed this finding and the controversy was submitted for arbitration. The Court of Appeals *held* that the arbitrators' award ordering petitioner's reinstatement was final and would be confirmed. *Matter of Staklinski (Pyramid Elec. Co.)*, 6 N.Y.2d 159, 160 N.E.2d 78, 188 N.Y.S.2d 541 (1959).

"Arbitration is intended to effect a summary and extrajudicial

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[38] See text accompanying note 27 *supra*.

[39] See Hymes v. Schechter, 7 App. Div.2d 294, 296, 182 N.Y.S.2d 726, 728, (1st Dep't 1959).

settlement of controversies between parties." [1] It is deemed a special proceeding, the jurisdiction of which is in the court specified in the contract or the submission, and in the absence of any specification, in the supreme court of the county in which one of the parties resides or is doing business, or in which the arbitration is held.[2] Any party may apply to that court within one year for an order confirming the award, which must be granted unless the award is vacated, modified or corrected for one of the reasons prescribed in sections 1458, 1462 or 1462-a of the Civil Practice Act.[3]

Under these statutes it has been held that an injunction will be confirmed even though there is a statute forbidding courts from issuing a similar injunction.[4] However, one of the grounds provided to vacate an award is that "the arbitrators, or other persons making the award exceeded their powers. . . ." [5] Courts have from time to time refused to uphold awards which were illegal [6] or violative of a well defined public policy.[7] In the present case the Court found "no controlling public policy which voids an arbitration agreement like this one. . . ." [8]

Whether or not there is such a public policy consideration, either in the nature of equity jurisprudence or in the law of corporations, is the basic question raised in this case. If such a consideration exists, there is authority for the vacating or the modification of the arbitrator's award.

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[1] PRASHKER, NEW YORK PRACTICE 959 (4th ed. 1959).

[2] N.Y. CIV. PRAC. ACT § 1459.

[3] Matter of Wilkins, 169 N.Y. 494, 62 N.E. 575 (1902); Matter of Weiner Co. (Freund Co.), 2 App. Div.2d 341, 155 N.Y.S.2d 802 (1st Dep't 1956), *aff'd*, 3 N.Y.2d 806, 144 N.E.2d 647, 166 N.Y.S.2d 7 (1957).

[4] Matter of Ruppert (Egelhofer), 3 N.Y.2d 576, 148 N.E.2d 129, 170 N.Y.S.2d 785 (1958).

[5] N.Y. CIV. PRAC. ACT § 1462(4).

[6] Matter of Western Union Tel. Co. (Am. Communications Ass'n, CIO), 299 N.Y. 177, 86 N.E.2d 162 (1949), where the court refused to affirm an award ordering reinstatement of telegraph employees who were refusing to handle "hot" or "struck" messages. The grounds of decision were: first, that the collective bargaining agreement was unambiguous in forbidding work stoppages and in denying to the arbitrator the power to change any of its terms, hence in finding that the contract had to be read in the light of trade practices the arbitrators exceeded their powers; second, the action of the employees was illegal; and third, that the company was under a legal duty to handle all messages, which duty it could not be expected to perform if it was required to retain in its service employees who refused to handle certain messages.

[7] Matter of Publishers' Ass'n (Newspaper and Mail Deliverers' Union), 280 App. Div. 500, 114 N.Y.S.2d 401 (1st Dep't 1952), in which the court refused to enforce an arbitrator's award of punitive damages for breach of contract. The opinion of the present case in the Supreme Court makes the point that the *Publishers' Ass'n* case was decided before Matter of Ruppert, *supra* note 4, and may be doubtful authority by virtue of that case. See Matter of Hill, 199 Misc. 1035, 104 N.Y.S.2d 755 (Sup. Ct. 1951).

[8] Matter of Staklinski (Pyramid Elec. Co.), 6 N.Y.2d 159, 164, 160 N.E.2d 78, 80, 188 N.Y.S.2d 541, 543 (1959).

"The motion to confirm is equivalent to a suit in equity to carry into effect the terms of the agreement and the arbitration had thereunder." [9] The general rule is that personal service contracts will not be affirmatively enforced in equity.[10] In the law of agency the distinction is made between the right to revoke an agency, which does not exist when there is a contract which would thereby be violated, and the power to revoke which always exists [11] unless some interest, other than the interest in the compensation for the services, is involved.[12]

The opinion of the Appellate Division in the present case suggested that the historic attitude of equity toward contracts of personal service was primarily based on the doctrine of adequacy of remedy at law, and it was cogently argued that this limitation was essentially the result of the history of equity, and not applicable to arbitration proceedings.[13] The same court considered the question of impossibility of enforcement and answered that this question had been met before, and that the only distinctive factors in this case were the greater responsibilities and importance of the plaintiff which did not provide a "sufficiently permissive basis for distinction." [14] However, the dissenting opinion in the Appellate Division points out that with one possible exception, a judgment on the pleadings, the cases relied on by the majority were collective bargaining agreements which are enforceable in courts of equity.[15] They are distinguishable from contracts of personal service, being contracts between groups.

There are reasons which go more to substance than to procedure or expediency which have restrained courts in this area. Many cases have said that to enforce contracts strictly personal in their nature would be intolerable.[16] "If the relation of employer and employé is

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[9] Finsilver, Still & Moss, Inc. v. Goldberg, Maas & Co., 253 N.Y. 382, 392, 171 N.E. 579, 582 (1930).

[10] Seiler v. Fairex, 23 La. Ann. 397 (1871); Stocker v. Brockelbank, 3 Mac. & G. 250, 42 Eng. Rep. 257 (Ch. 1851); *but see* Lumley v. Wagner, 1 DeG.M. & G. 604, 42 Eng. Rep. 687 (Ch. 1852).

[11] 1 MECHEM, AGENCY § 568 (2d ed. 1914).

[12] See *id.* at §§ 569-70.

[13] Matter of Staklinski (Pyramid Elec. Co.), 6 App. Div.2d 565, 569-70, 180 N.Y.S.2d 20, 26-27 (1st Dep't 1958).

[14] *Id.* at 570-71, 180 N.Y.S.2d at 27.

[15] Matter of Staklinski (Pyramid Elec. Co.), *supra* note 13, at 574, 180 N.Y.S.2d at 30-31. See Matter of United Culinary Bar and Grill Employees, Local 923, CIO (Schiffman), 272 App. Div. 491, 71 N.Y.S.2d 160 (1st Dep't 1947), *aff'd*, 299 N.Y. 577, 86 N.E.2d 104 (1949); Matter of Devery (Daniels & Kennedy, Inc.), 266 App. Div. 213, 41 N.Y.S.2d 293 (1st Dep't 1943), *aff'd*, 292 N.Y. 596, 55 N.E.2d 370 (1944); Goldman v. Cohen, 222 App. Div. 631, 227 N.Y. Supp. 311 (1st Dep't 1928); Freydberg Bros., Inc. v. Corey, 177 Misc. 560, 31 N.Y.S.2d 10 (Sup. Ct. 1941), *aff'd*, 263 App. Div. 805, 32 N.Y.S.2d 129 (1st Dep't 1941).

[16] See, *e.g.*, Gossard v. Crosby, 132 Iowa 155, 109 N.W. 483 (1906); Rigby v. Connol, 14 Ch. D. 482 (1880); Johnson v. Shrewsbury & Birmingham Ry., 3 DeG.M. & G. 914, 43 Eng. Rep. 358 (Ch. 1853) (dictum); Pickering

to be of value or profit to either it must be marked by some degree of mutual confidence and satisfaction, and when these are gone and their places usurped by dislike and distrust, it is to the advantage of all concerned that their relation be severed." [17]

A further element which must be considered when a contract of personal service is brought to equity is the issue of involuntary servitude.[18] It is extremely doubtful, under the thirteenth amendment and federal legislation concerning it, that any court has the power to compel specific performance of an employment contract by an employee.[19] It seems, however, that to compel one man to employ another, the court must at the same time reasonably insure that the services will be performed.[20] Discussing the question of peonage, a federal court has said that "the rule . . . is without exception that equity will not compel the actual, affirmative performance by an employé of merely personal services, any more than it will compel an employer to retain in his personal service one who, no matter for what cause, is not acceptable to him for service of that character." [21]

The corporation involved in the present case was formed under the laws of New Jersey.[22] The statute of New Jersey concerning the management and control of a corporation is similar to that of New York. Section 14:7-1 of the New Jersey Revised Statutes provides: "The business of every corporation shall be managed by its board of directors. . . ." [23]

New York's Stock Corporation Law provides that the directors of a corporation can remove an employee, agent or officer at their pleasure.[24] It has been held that this section gives the corporation through its directors the same power to revoke an agency that an

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v. The Bishop of Ely, 2 Younge & Coll. Ch. 249, 63 Eng. Rep. 109 (Ch. 1843). See also Stevens, *Involuntary Servitude by Injunction,* 6 CORNELL L.Q. 235 (1921).

[17] Gossard v. Crosby, *supra* note 16, at —, 109 N.W. at 486.

[18] See Stevens, *supra* note 16.

[19] See Bailey v. Alabama, 219 U.S. 219 (1911); Arthur v. Oakes, 63 Fed. 310 (7th Cir. 1894); Birmingham Trust & Savings Co. v. Atlanta, B. & A. Ry., 271 Fed. 743 (N.D. Ga. 1921); Shaw v. Fisher, 113 S.C. 287, 102 S.E. 325 (1920). For a discussion of the question prior to the thirteenth amendment see The Case of Mary Clark, a Woman of Color, 1 Blackf. 122 (Ind. 1821).

[20] See Weinberger v. Van Hessen, 260 N.Y. 294, 183 N.E. 429 (1932); Ames, *Mutuality in Specific Performance,* 3 COLUM. L. REV. 1, 2-3 (1903). *But cf.* Cook, *The Present Status of the "Lack of Mutuality" Rule,* 35 YALE L.J. 897 (1927).

[21] Arthur v. Oakes, *supra* note 19, at 318.

[22] Matter of Staklinski (Pyramid Elec. Co.), 6 App. Div.2d 565, 571, 180 N.Y.S.2d 20, 28 (1st Dep't 1958) (dissenting opinion).

[23] N.J. REV. STAT. § 14:7-1 (1939). Compare N.Y. GEN. CORP. LAW § 27.

[24] N.Y. STOCK CORP. LAW § 60. Compare New Jersey's statute, N.J. REV. STAT. § 14:7-6 (1939), which seems to have received a construction similar to that given to the New York statute in *In re* A. A. Griffing Iron Co., 63 N.J.L. 168, —, 41 Atl. 931, 934 (1898).

individual principal has, although the corporation's liability for breach of contract endures.[25] It is noteworthy that similar words in the National Banking Act have been construed by the Appellate Division to permit removal of bank officers without subjecting the bank to liability even for damages for breach of contract.[26]

It is well settled that courts of equity will not ordinarily enforce contracts of personal service. This doctrine is based on sound principles, substantive as well as procedural. Further, the public policy of both New York and New Jersey is clear that corporations, particularly when publicly held, be managed by their boards of directors. The intentions of the parties to a contract in this area should be irrelevant in the face of what seems to be a strong public policy. It can be doubted that the arbitration laws were intended to allow circumvention of this public policy by provision of an arbitration clause in a contract of employment. A better solution might have been to send the parties back to arbitration in order to assess damages.[27]

BILLS AND NOTES — MUTUAL RESCISSION OF BANK DRAFT AFTER PAYEE HAS TITLE HELD INVALID.—The purchaser of a bank draft from defendant bank remitted it to his escrow agent with the restrictive condition that it should be held until the merchandise, which he had contracted to buy from the payee, had cleared the United States Customs.[1] In the meanwhile, the payee transferred his interest to the present plaintiff. After a futile request for the draft was made to the escrowee, the plaintiff obtained a Canadian judgment in rem for breach of contract, in pursuance of which the court awarded him the draft. The Court of Appeals held that the defendant drawer bank was liable to payee's successor on the draft even though the payment had been countermanded by a subsequent agreement between the defendant and the remitter. *International Firearms Co. v. Kingston Trust Co.*, 6 N.Y.2d 406, 160 N.E.2d 656, 189 N.Y.S.2d 911 (1959).

A convenient method of transacting a commercial credit venture in which the creditor will be readily satisfied is through the purchase

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[25] *In re* Paramount Publix Corp., 90 F.2d 441 (2d Cir. 1937).

[26] Copeland v. Melrose National Bank, 229 App. Div. 311, 241 N.Y. Supp. 429 (1st Dep't), *aff'd mem.*, 254 N.Y. 632, 173 N.E. 898 (1930).

[27] See Matter of Staklinski (Pyramid Elec. Co.), 6 N.Y.2d 159, 164, 160 N.E.2d 541, 543 (1959) (concurring opinion).

[1] The remitter of the bank draft refused to complete the necessary forms to allow the merchandise to clear through the customs, thereby making it impossible for the payee to deliver the goods.