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CASE LAW INDEX TO DEFENDANT'S TRIAL MEMORANDUM
VINTAGE CAPITAL MANAGEMENT, LLC, ET AL. V. ARI SCHOTTENSTEIN
CASE NO.: 2010 CA 017823-O

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(Cite as: 721 F.Supp. 472)

C

United States District Court,
S.D. New York.

ADLER & SHAYKIN, a New York partnership,
Plaintiff and Counterclaim Defendant,
v.
Linda J. WACHNER, Defendant and Counterclaim Plaintiff.

No. 87 Civ. 6938 (JMW).
Dec. 12, 1988.

Partnership brought action for the return of a portion of defendant's distribution from plaintiff's settlement with a third party, which distribution was paid to defendant under a written agreement. The parties cross-moved for summary judgment. The District Court, Walker, J., held that parol evidence of an alleged oral agreement concerning defendant's distribution was inadmissible.

Defendant's motion granted.

West Headnotes

[1] Evidence 157 397(2)

157 Evidence
157XI Parol or Extrinsic Evidence Affecting Writings
157XI(A) Contradicting, Varying, or Adding to Terms of Written Instrument
157k397 Contracts in General
157k397(2) k. Completeness of Writing and Presumption in Relation Thereto; Integration. Most Cited Cases

If parties have reduced their agreement to integrated writing, parol evidence rule operates to exclude evidence of all prior or contemporaneous negotiations or agreements offered to contradict or modify terms of their writing.

[2] Evidence 157 397(2)

157 Evidence
157XI Parol or Extrinsic Evidence Affecting Writings
157XI(A) Contradicting, Varying, or Adding to Terms of Written Instrument
157k397 Contracts in General
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Party relying on parol evidence rule to bar admission of evidence must first show that agreement is integrated, which is to say, that writing completely and accurately embodies all of mutual rights and obligations of parties; under New York law, contract which appears complete on its face is integrated agreement as matter of law.

[3] Evidence 157 397(2)

157 Evidence
157XI Parol or Extrinsic Evidence Affecting Writings
157XI(A) Contradicting, Varying, or Adding to Terms of Written Instrument
157k397 Contracts in General
157k397(2) k. Completeness of Writing and Presumption in Relation Thereto; Integration. Most Cited Cases

Under New York contract law, in absence of merger clause, court must determine whether or not there is integration by reading writing in light of surrounding circumstances, and by determining whether or not agreement was one which parties would ordinarily be expected to embody in the writing.

[4] Evidence 157 442(1)

157 Evidence
157XI Parol or Extrinsic Evidence Affecting Writings
157XI(C) Separate or Subsequent Oral Agreement
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lateral Agreements
157k442 Completeness of Writing
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Parol evidence rule operated to exclude evidence of alleged oral agreement by defendant to return portion of her distribution from settlement amount in case plaintiff had to pay more to its limited partners; parties intended agreement to contain mutual promises of parties with respect to settlement amount, and thus it was valid integrated agreement.

[5] Evidence 157 442(1)

157 Evidence
157XI Parol or Extrinsic Evidence Affecting Writings
157XI(C) Separate or Subsequent Oral Agreement
157k440 Prior and Contemporaneous Collateral Agreements
157k442 Completeness of Writing
157k442(1) k. In General. Most Cited Cases

Even if agreement is integrated, parol evidence may come in if alleged agreement is collateral, that is, one which is separate, independent, and complete, although relating to same object.

[6] Evidence 157 441(1)

157 Evidence
157XI Parol or Extrinsic Evidence Affecting Writings
157XI(C) Separate or Subsequent Oral Agreement
157k440 Prior and Contemporaneous Collateral Agreements
157k441 In General
157k441(1) k. In General. Most Cited Cases

Evidence in support of allegedly collateral agreement will be allowed only if agreement is in form a collateral one, agreement does not contradict excess or implied provisions of written contract, and agreement is one that parties would not ordinarily be expected to embody in writing, i.e., oral agreement must not be so clearly connected with principal transaction as to be part and parcel of it.

[7] Evidence 157 441(1)

157 Evidence
157XI Parol or Extrinsic Evidence Affecting Writings
157XI(C) Separate or Subsequent Oral Agreement
157k440 Prior and Contemporaneous Collateral Agreements
157k441 In General
157k441(1) k. In General. Most Cited Cases

Alleged oral agreement that defendant would return portion of her distribution from settlement agreement in case plaintiff had to pay more to its limited partners was not collateral to contract between defendant and plaintiff which addressed defendant's share of settlement; thus, parol evidence pertaining to alleged oral agreement was inadmissible.

[8] Evidence 157 448

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184I Deception Constituting Fraud, and Liability Therefor
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205H Implied and Constructive Contracts
205HI Nature and Grounds of Obligation
205HI(D) Effect of Express Contract
205Hk55 k. In General. Most Cited Cases

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***474** Russell E. Brooks, Milbank, Tweed, Hadley & McCloy, New York City, for defendant.

Joseph S. Allerhand, Weil, Gotshal & Manges, New York City, for plaintiff.

OPINION AND ORDER

WALKER, District Judge:

Currently before the Court are cross motions for summary judgment made pursuant to Rule 56 of the Federal Rules of Civil Procedure. For the reasons set forth below, the Court grants defendant's motion. As a result, the Court need not address the Amended Counterclaims.[FN1]

FN1. Wachner's Counterclaims are pleaded in the alternative. The Court's disposition of her motion for summary judgment renders them moot.

BACKGROUND

This case revolves around a series of agreements entered into by the parties: the plaintiff, Adler & Shaykin ("A & S"), a New York partnership between Frederick Adler and Leonard Shaykin that manages a leveraged buyout fund, the purpose of which is to acquire equity in a series of leveraged acquisitions; and the defendant, Linda Wachner, now a Los Angeles executive who was first employed by A & S in December of 1984. Wachner has moved for summary judgment and thus has the burden of establishing that no genuine dispute exists as to any material fact. *See, e.g., Beyah v. Coughlin,* 789 F.2d 986, 989 (2d Cir.1986). Moreover, "[a]mbiguities or inferences to be drawn from the facts must be viewed in a light most favorable to the party opposing the summary judgment motion." *Project Release v. Prevost,* 722 F.2d 960, 968 (2d Cir.1983).

Wachner and A & S entered into their first agreement ("the Retention Agreement") on December 14, 1984. By the terms of the Retention Agreement, Wachner was to identify potential acquisitions for A & S in the beauty market and then head the acquired company. A & S formed the Beauty Acquisition Corporation ("BAC") for that purpose. After several months, BAC agreed to buy Revlon's beauty and fragrances business ("the BAC Transac-

tion"). However, by December of 1985, Wachner's Retention Agreement with A & S had expired; the BAC Transaction had collapsed due to Pantry Pride's acquisition of Revlon; and A & S faced a drawn out litigation against Revlon. The Retention Agreement between the parties had no provision that would entitle Wachner to any share of whatever break-up fees or damages A & S might eventually recover from Revlon. As a result, Wachner and Adler negotiated an agreement dated December 12, 1985 ("the 1985 Agreement"). That agreement addressed various distribution possibilities of any break-up fee received from Revlon.[FN2]

FN2. Paragraph Three of the 1985 Agreement contained four subparagraphs that addressed the break-up fee:

a) First shall be deducted all expenses ...

b) Then shall be deducted any amounts due to the Banks and Equitable [A & S's lenders, who, as events turned out, were paid a separate break-up fee of $21.3 million by Revlon on October 27, 1986. This provision and the separate break-up fee to the lenders in part form the basis for Wachner's counterclaims. *See* below.]

c) Then of the first $20,000,000 breakup fee or settlement paid, you shall be entitled to 25% of the net profits before allocution to limited partners.

d) Then of amounts in excess of such gross $20,000,000, you shall be entitled to 15% of the net profits computed after deduction of any payments made to limited partners.

After several months of litigation, on December 2, 1986, Revlon paid a $23.7 million break-up fee ("the Settlement Amount") to A & S pursuant to the Settlement Agreement negotiated by the parties. A letter agreement between A & S and Wachner, dated December 5, 1986 ("the 1986 Agreement"), addressed her share of that fee. The 1986 Agreement runs a little longer than two full, single-spaced typewritten pages. Following an introductory paragraph that refers its readers to the 1985 Agreement as well as other relevant ***475** agreements, the 1986 Agreement provides: "In view of the settlement provided in the Settlement Agreement, it is agreed as follows ..." The agreement between A & S and Wachner provides that, in consideration of $2.785 million to Wachner, she would release A & S and related entities from all actions and future demands regarding the Settlement Agreement. The 1986 Agreement also outlined in detail, with several formulae, an agreement between the parties that called for them to share whatever future taxes might be assessed against the Settlement Amount.

According to A & S, at the time of the 1986 Agreement, the parties entered into a separate oral "understanding." Wachner disputes this claim, but for the purposes of her motion for summary judgment, the Court accepts A & S's recitation of the facts. The terms of this "understanding" were that

> we [A & S] would pay her [Wachner] the amount she was entitled to receive under the formula we had worked out ($2,785,000), based, however, on the planned distribution of $4,600,000 to the Limited Partners [from the aborted BAC Transaction]. In light of the fact that the Limited Partners were objecting to that distribution and might ultimately succeed in causing A & S to increase it, Wachner and I [Adler] further agreed that her share would be recalculated if and when we had to increase the payment to the Limited Partners and she would repay the difference.

Adler Aff. ¶ 15. Adler agreed to pay Wachner her share before a final determination of what the Limited Partners would get because Wachner "needed money. She owed a lot of money to the banks, money on which she was paying interest." Adler Dep. at 23-24. Adler and Wachner were also longtime friends. Wachner and Shaykin, however,

were not on friendly terms. Indeed, he described how at times he had to withdraw from negotiations with Wachner over the 1985 Agreement because the negotiations had become "so acrimonious." Shaykin Dep. at 129. The two engaged in at least one "heated discussion." *Id.* at 56.

Because of his friendship with Wachner, Adler did not feel it was necessary to memorialize his further understanding with Wachner that she might return a portion of her share of the Settlement Amount. He and Wachner had a series of conversations during which she never questioned her obligation to return a portion of the money, but rather only questioned the amount. Wachner told Adler that she wanted to be kept advised of A & S's continued dealings with its Limited Partners. In her own words, she wanted "to see and understand any givebacks" to the "Limited Partners" and "wanted to be a part of it." Wachner Dep. at 144.

Furthermore, Adler felt it was unwise to raise the possibility of additional payments to A & S's limited partners "in a writing [ ] the Limited Partners had every right to view": "Such a provision would have fueled the dispute between A & S and the Limited Partners concerning how much the Limited Partners were to receive." Pl.'s Mem. in Opp. at 19-20.

As it turned out, on April 23, 1987, A & S paid its Limited Partners roughly $9.94 million, not $4.6 million. From the papers submitted, it remains unclear why A & S increased the distribution to its Limited Partners. At the hearing before this Court, A & S admitted that it has a continuing relationship with its Limited Partners, upon whom it expects to rely in future transactions. A & S offered nothing to contradict Wachner's assertion that A & S increased the payment to the Limited Partners in order to insure a continued harmonious and productive business relationship. Based upon the actual distribution, A & S notified Wachner that she owed an additional $810,375. By May of 1987, Shaykin, on behalf of A & S, forwarded to Wachner a "new Agreement prepared for the purpose of superceding [sic] [the 1986 Agreement]."

This May 1987 Agreement is virtually identical to the 1986 Agreement except for the fact that it takes into consideration Wachner's alleged oral agreement to return a portion of her distribution from the Settlement Amount in case A & S had to ***476** pay more to its Limited Partners. As a result, it provides for Wachner to return $810,375 to A & S. The May 1987 Agreement states: "Except as expressly set forth herein, the 1986 Letter will remain in full force and effect (including but not limited to the release and tax indemnification provisions thereof)." The May 1987 Agreement, like all the previous agreements between the parties, did not contain a merger or integration clause.

Some time after the parties entered into the 1986 Agreement, Wachner repaid a $50,000 loan to A & S. The loan was originally made to cover expenses Wachner had incurred while working in New York for A & S on the proposed BAC Transaction.

A & S brought this action to recover that $810,375. Relying on the 1986 Agreement and the parol evidence rule, Wachner moved for summary judgment and, in the alternative, asserted as counterclaims her right to an additional $1.97 million, based upon what she argues is the correct calculation-given the formulae in the 1985 Agreement-of her share of the Settlement Amount. In addition to opposing Wachner's motion, A & S cross-moved for summary judgment on Wachner's amended counterclaims based on Wachner's release in the 1986 Agreement. After a careful reading of the parties' papers, depositions and affidavits; and after oral argument, the Court grants summary judgment for Wachner. Her counterclaims are thus moot.

DISCUSSION

A. The Parol Evidence Rule:

1. Integration:

[1] Where the parties have reduced their agree-

ment to an integrated writing, the parol evidence rule operates to exclude evidence of all prior or contemporaneous negotiations or agreements offered to contradict or modify the terms of their writing. *See, e.g., Marine Midland Bank-Southern v. Thurlow,* 53 N.Y.2d 381, 387, 442 N.Y.S.2d 417, 419-420, 425 N.E.2d 805, 807-08 (1981). ("Although at times this rule may seem to be unjust, 'on the whole it works for good' by allowing a party to a written contract to protect himself from 'perjury, infirmity of memory or the death of witnesses.' ") (citations omitted). *See also Meinrath v. Singer,* 482 F.Supp. 457, 460 (S.D.N.Y.1979) ("One of the oldest and most settled principles of New York law is that a party may not offer proof of prior oral statements to alter or refute the clear meaning of unambiguous terms of written, integrated contracts to which assent has voluntarily been given") (Weinfeld, J.) (footnote omitted), *aff'd* without op., 697 F.2d 293 (2d Cir.1982).

[2] The party relying on the rule to bar the admission of evidence must first show that the agreement is integrated, which is to say, that the writing completely and accurately embodies all of the mutual rights and obligations of the parties. *See, e.g., Lee v. Joseph E. Seagram & Sons, Inc.,* 413 F.Supp. 693 (S.D.N.Y.1976), *affirmed,* 552 F.2d 447 (2d Cir.1977), *Mitchill v. Lath,* 247 N.Y. 377, 160 N.E. 646 (1928). And "under New York law a contract which appears complete on its face is an integrated agreement as a matter of law." *Battery S.S. Corp. v. Refineria Panama, S.A.,* 513 F.2d 735, 738 n. 3 (2d Cir.1975), *Happy Dack Trading Co., Ltd. v. Agro-Industries, Inc.,* 602 F.Supp. 986, 991 (S.D.N.Y.1984).

[3] However, under New York law, in the absence of a merger clause, "the court must determine whether or not there is an integration 'by reading the writing in the light of surrounding circumstances, and by determining whether or not the agreement was one which the parties would ordinarily be expected to embody in the writing.' " *Braten v. Bankers Trust Co.,* 60 N.Y.2d 155, 162, 468 N.Y.S.2d 861, 864, 456 N.E.2d 802, 805 (1983). The New York Court of Appeals long ago provided a guideline for this determination:

> If upon inspection and study of the writing, read, it may be, in the light of surrounding circumstances in order [to determine] to its proper understanding and interpretation, it appears to contain the engagements of the parties, and to define ***477** the object and measure the extent of such engagement, it constitutes the contract between them, and is presumed to contain the whole of that contract.

Eighmie v. Taylor, 98 N.Y. 288 (1885), *Lee v. Joseph E. Seagram & Sons, Inc.,* 413 F.Supp. at 701 (citation omitted).

Factors New York courts consider include: whether the document in question refers to the oral agreement, or whether the alleged oral agreement between the parties "is the sort of complex arrangement which is customarily reduced to writing" *Manufacturers Hanover Trust Company v. Margolis,* 115 A.D.2d 406, 407-8, 496 N.Y.S.2d 36, 37 (1st Dep't 1985); whether the parties were represented by experienced counsel when they entered into the agreement, *Pecorella v. Greater Buffalo Press, Inc.,* 84 A.D.2d 950, 446 N.Y.S.2d 709 (4th Dep't 1981); whether the parties and their counsel negotiated during a lengthy period, resulting in a specially drawn out and executed agreement, and whether the condition at issue is fundamental, *Braten v. Bankers Trust Co.,* 60 N.Y.2d at 162, 468 N.Y.S.2d at 864, 456 N.E.2d at 805 (1983); if the contract, which does not include the standard integration clause, nonetheless contains wording like " '[i]n consideration of the mutual promises herein contained, it is agreed and covenanted as follows," and ends by stating that 'the foregoing correctly sets forth your understanding of our Agreement' ", *Lee v. Joseph E. Seagram & Sons,* 413 F.Supp. at 701.

[4] Having examined both the document itself and the circumstances surrounding it, the Court concludes that the parties intended the 1986 Agree-

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ment to contain the mutual promises of the parties with respect to the Settlement Amount. It thus is a valid integrated agreement and the Court will exclude evidence of prior or contemporaneous negotiations or agreements which would vary or be inconsistent with its terms, as would the alleged oral understanding between Adler and Wachner. The Court bases its decision on several grounds.

The document itself supports the Court's conclusion. Although the 1986 Agreement contains no merger clause, it does contain the words: "In view of the settlement provided in the Settlement Agreement, it is agreed as follows ...", and "Please confirm your agreement with the foregoing by signing and returning a copy of this letter ..." The words indicate an intention to address fully the issue of the Settlement Amount, and to be bound by the terms of the agreement. In addition, the superseding agreement proposed by A & S is virtually identical to the 1986 Agreement (with the exception of providing for Wachner's repayment of $810,375). The superseding agreement also contains a provision that explains, "Except as expressly set forth herein, the 1986 Letter will remain in full force and effect (*including but not limited to the release and tax indemnification provisions thereof*)." (emphasis added) The emphasized portion undercuts A & S's contention before this Court that the 1986 Agreement "merely contained two substantive provisions: a one-way release from Wachner to A & S in consideration of the payment of $2,785,000 and a 'tax indemnification' from Wachner to A & S in the event of an adverse tax ruling ..." Pl.'s Mem. at 16.

The presence of a one-way rather than a mutual release does not alter this Court's conclusion that the 1986 Agreement was integrated. The Court's own calculations, based on the formulae provided in the 1985 Agreement that govern potential break-up fees, convinces it that A & S had good reason to seek a release from Wachner. Simply put-and without passing judgment on this point-based on the 1985 Agreement, her share of the break-up fee arguably could have been significantly higher than the $2.785 million provided for in the 1986 Agreement.[FN3] There was no reason for Wachner to seek a release from A & S. The 1986 Agreement clearly addresses, and was clearly meant to address, a straightforward***478** transaction: in consideration for Wachner's release, A & S paid her $2.785 million.

> FN3. Indeed, Wachner's Counterclaims before this Court suggest just the sort of litigation one imagines A & S intended to avoid by securing her release.

Furthermore, the parties were represented and aided by experienced counsel in drafting the agreement at issue. *See* Shaykin Dep. at 67; 19; 135-36. The complex tax indemnification provision in the 1986 Agreement reveals their ability to address a potential recalculation of Wachner's share of the Settlement Amount when the parties so desired. Regardless of whether the oral agreement was made-and, for the purposes of this motion, the Court assumes that it was-the Court concludes that it remains just the sort of complex arrangement customarily reduced to writing and which the parties would ordinarily be expected to embody in the writing. *See Braten, supra; Manufacturer's Hanover Trust, supra.* It stretches credulity too far to believe that, after more than a year of work, Wachner would grant A & S what amounts to unlimited discretion to reduce the one thing she had to show for her work: $2.785 million. The surrounding circumstances convince the Court that the oral agreement was "so clearly connected with the principal transaction as to be part and parcel of it." *Mitchill v. Lath,* 247 N.Y. at 381, 160 N.E. 646.

The Court is unconvinced by A & S's contention that the parties had an ongoing relationship that was "never governed by the strict terms of contractual provisions." Pl. Mem. in Opp. at 3. That relationship, A & S alleges, is best illustrated by the $50,000 loan, made without an underlying written contract. The loan, however, concerned an entirely separate aspect of the parties' relationship and had nothing to do with the subject matter of the 1986

Agreement: Wachner's share of the Settlement Amount and her release of A & S from any future claims. As far as that subject is concerned, the 1986 Agreement remains integrated. Similarly, Wachner's continued interest in A & S's dealings with its Limited Partners does not alter the Court's analysis. For more than a year, she had worked on the proposed BAC Transaction with A & S. She and Adler were longtime friends. Her desire to "see and understand any givebacks" and "to be a part of it," Wachner Dep. at 144, is not sufficient to change the Court's conclusion that the 1986 Agreement was integrated.

2. Whether the Agreement was Collateral:

[5][6] Under certain circumstances, parol evidence may be admitted even if an agreement *is* integrated. First, parol evidence may come in if the alleged agreement is collateral, that is, "one which is 'separate, independent and complete ... although relating to the same object.' " *Lee v. Joseph E. Seagram & Sons, Inc.,* 413 F.Supp. at 701; *aff'd* 552 F.2d 447 (2d Cir.1977). Only where three conditions are met will the Court allow evidence in support of an allegedly collateral agreement. *Id.* The New York rule in this area was established early on in the leading case of *Mitchill v. Lath,* 247 N.Y. 377, 160 N.E. 646 (1928):

> [B]efore such an oral agreement as the present is received to vary the written contract at least three conditions must exist, (1) the agreement must in form be a collateral one; (2) it must not contradict express or implied provisions of the written contract; (3) it must be one that parties would not ordinarily be expected to embody in the writing ... [The oral agreement] must not be so clearly connected with the principal transaction as to be part and parcel of it.
>
> 247 N.Y. at 380-81, 160 N.E. 646.

[7] The alleged oral understanding at issue here is not collateral. As noted above, it is "part and parcel" of the underlying agreement, precisely the sort of provision "the parties would ordinarily be expected to embody in the writing." *See* discussion, *supra.* Moreover, A & S's explanations of the provision's absence are unconvincing. First, Adler's friendship with Wachner did not prevent him from having her execute at least three highly specific contracts. His friendship did not prevent him from explaining with precise formulae Wachner's exact share of any future taxes that might be levied against the Settlement Amount. A & S's reliance on ***479** *Lee v. Joseph E. Seagram & Sons,* 552 F.2d 447 (2d Cir.1977), is misplaced. In that case, the Second Circuit allowed parol evidence in part because "there was a close relationship of confidence and friendhsip over *[thirty] years* between two old men [who were the parties to the alleged agreement at issue]". *Id.* at 452 (emphasis added). The Court does not believe that such a unique and longstanding relationship is currently before it. Moreover, the friendship between the parties in *Lee* was only one of several factors the court relied on in its determination to accept parol evidence. *Id.* And, as noted above, Adler's friendship with Wachner represents only half the story; Wachner's relationship with Shaykin was, by the parties' own testimony, not friendly.

Adler's fear of the Limited Partners is similarly unconvincing. Simply put, he and Wachner could have agreed that she would return a portion of her distribution *without* explicitly alerting the Limited Partners to this possibility. For instance, the 1986 Agreement could have provided that Wachner's distribution was "contingent on a planned distribution of $4.6 million to the Limited Partners," or it could have included a boilerplate conclusion that "this Agreement remains subject to a final accounting pursuant to the formulae contained in the 1985 Agreement." It did neither.

A & S's reliance on *Hicks v. Bush,* 10 N.Y.2d 488, 225 N.Y.S.2d 34, 180 N.E.2d 425 (1962) is also unpersuasive. In that case, the oral agreement in question was "the sort of condition which parties would not be inclined to incorporate into a written agreement intended for public consumption." *Id.* at

493, 225 N.Y.S.2d 34, 180 N.E.2d 425. The 1986 Agreement was *not* intended for "public consumption." And even if it *were* seen by A & S's Limited Partners, there is no reason why it would have to undermine A & S's interests. As noted above, it would not have been difficult to draft a contractual clause that at once both guaranteed that Wachner would return a portion of her payment in the event the Limited Partners received a greater share, and explained that A & S itself did not believe the Limited Partners were entitled to a greater share.

Finally, in the Court's judgment, the alleged oral understanding squarely contradicts the unambiguous terms of the 1986 Agreement.

3. Ambiguity:

[8] Even if an agreement is integrated, parol evidence may be admitted if the underlying contract is ambiguous. *See, e.g., Ralli v. Tavern on the Green,* 566 F.Supp. 329, 331 (S.D.N.Y.1983) ("Where the language employed in a contract is ambiguous or equivocal, the parties may submit parol evidence concerning the facts and surrounding the making of the agreement in order to demonstrate the intent of the parties"); *Schering Corp. v. Home Insurance Co.,* 712 F.2d 4, 9 (2d Cir.1983) ("where contract language is susceptible of at least two fairly reasonable meanings, the parties have a right to present extrinsic evidence of their intent at the time of contracting"). As both sides agree, the traditional view is that the search for ambiguity must be conducted within the four corners of the writing. *See, e.g., Western Union Telegraph Co. v. American Communications Ass'n,* 299 N.Y. 177, 86 N.E.2d 162 (1949).

Under this analysis, it is self-evident that the 1986 Agreement is not ambiguous. There are no words or phrases that appear "susceptible of at least two fairly reasonable meanings." As discussed at length above, the fact that the agreement contains only a one-way release does not create any ambiguity.

4. Fraud:

[9][10][11] "The parol evidence rule has no application in a suit brought to *rescind* a contract on the ground of fraud." *Sabo v. Delman,* 3 N.Y.2d 155, 161, 164 N.Y.S.2d 714, 717, 143 N.E.2d 906, 908 (1957) (emphasis in original). Under New York law, "to plead a prima facie case of fraud the plaintiff must allege representation of a material existing fact, falsity, scienter, deception and injury." ***480***Lanzi v. Brooks,* 54 A.D.2d 1057, 1058, 388 N.Y.S.2d 946, 947 (3d Dep't 1976), *aff'd,* 43 N.Y.2d 778, 402 N.Y.S.2d 384, 373 N.E.2d 278 (1977); *Reno v. Bull,* 226 N.Y. 546, 550, 124 N.E. 144 (1919). "In short, a contractual promise made with the undisclosed intention not to perform it constitutes fraud and, despite the so-called merger clause, the plaintiff is free to prove that he was induced by false and fraudulent misrepresentations ..." *Sabo, supra,* 3 N.Y.2d at 162, 164 N.Y.S.2d at 718, 143 N.E.2d at 909.

However, Judge Weinfeld has explained what the fraud exception is *not* intended to reach:

> Although proof of fraud can vitiate an agreement, such proof may only be offered to show 'the intention of the parties that the *entire contract* was to be a nullity, not as here that only certain provisions of the agreement were to be enforced.' Here the plaintiff is not claiming that no agreement existed ... [H]e is not seeking rescission, but enforcement of the contract, albeit upon terms ... markedly different from those in the writing ... Here the plaintiff seeks materially to alter, by introducing prior parol evidence, a single unambiguously expressed item-the terms of compensation-in a comprehensive contract that includes [a merger clause]. To allow him to do so would be to eviscerate the parol evidence rule ...

Meinrath, supra at 460-61 (emphasis in original; footnotes omitted). In *Meinrath,* Judge Weinfeld thus rejected "plaintiff's attempt to avoid the strictures of the parol evidence rule by alleging fraudulent inducement." *Id.*

Judge Weinfeld's opinion in *Meinrath* is dis-

positive here. The Court will not allow the plaintiff to introduce parol evidence to alter the unambiguous terms of an integrated agreement.[FN4]

> FN4. Moreover, it appears that this claim fails for a pleading defect. Plaintiff did not amend its Complaint to assert a claim of fraud. Indeed, the circumstances surrounding fraud must be pleaded with particularity. *See* Rule 9(b), Federal Rules of Civil Procedure.

B. The Remaining Counts:

A & S's action sounds primarily in contract. However, it has also alleged three additional counts: unjust enrichment, conversion and money had and received. Each of the additional counts represents an attempt to get through the back door a claim this Court will not allow through the front.

1. Unjust Enrichment and Quasi Contract:

[12] The Court's decision on these issues turns on whether or not it concludes as a matter of law that the 1986 Agreement defined fully the relationship between the parties as far as the Settlement Amount was concerned. Since the Court has so found, a recent New York Court of Appeals case controls the present dispute. In *Clark-Fitzpatrick Inc. v. Long Island Rail Road Co.,* 70 N.Y.2d 382, 521 N.Y.S.2d 653, 516 N.E.2d 190 (1987), a unanimous court explained that "the existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter." The court continued:

> A 'quasi contract' only applies in the absence of an express agreement, and is not really a contract at all, but rather a legal obligation imposed in order to prevent a party's unjust enrichment ...' Briefly stated, a quasi-contractual relationship is one imposed by law *where there has been no agreement or expression of assent, by word or act, on the part of either party involved.* It is impermissible, however, to seek damages in an action sounding in quasi contract where the suing party has fully performed on a valid written agreement, the existence of which is undisputed, and the scope of which clearly covers the dispute between the parties.

Clark-Fitzpatrick, supra at 388-89, 521 N.Y.S.2d 653, 516 N.E.2d 190 (citations omitted; emphasis in original).

2. Conversion:

The Court has determined as a matter of law that Wachner had an absolute right based on an integrated agreement to the ***481** $2.785 million she received. Thus, no claim for conversion will lie. *See, e.g., Hinkle Iron Co. v. Kohn,* 184 A.D. 181, 183-84, 171 N.Y.S. 537 (1st Dep't), *reversed on other grounds,* 229 N.Y. 179, 128 N.E. 113 (1918) *Cf. Clark-Fitzpatrick, Inc., supra.* The result would be no different even if the oral understanding were allowed to vary the unambiguous terms of the integrated agreement. *See Hinkle Iron, supra* at 183-4, 171 N.Y.S. 537 ("The failure to pay it over was simply a breach of contract, and the plaintiff cannot, by changing the form of the action, change the nature of the defendant's obligation and convert into a tort that which the law deems a simple breach of an agreement ...").

3. Money Had and Received:

The Court finds no colorable grounds for this equitable remedy.

> In an action for money had and received, the [movant] 'must show that it is against good conscience for [his adversary] to keep the money.' ... [Such an action] is founded upon equitable principles aimed at achieving justice.

Federal Insurance Co. v. Groveland State Bank, 37 N.Y.2d 252, 258, 372 N.Y.S.2d 18, 21, 333 N.E.2d 334, 336 (1975). No material triable issue exists on this score. The alleged oral understanding between Adler and Wachner, which the Court assumes existed, does not dictate a contrary result. The parties are sophisticated businesspeople whose relationship was governed by detailed con-

tracts. In fact, equity dictates that the parties honor their freely negotiated and integrated agreement of December 5, 1986.

CONCLUSION

For the reasons set forth above, defendant's motion for summary judgment is granted.

SO ORDERED.

S.D.N.Y.,1988.
Adler & Shaykin v. Wachner
721 F.Supp. 472

END OF DOCUMENT

70 A.D.3d 423
(Cite as: 70 A.D.3d 423, 894 N.Y.S.2d 47)

H

Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce
70 A.D.3d 423, 894 N.Y.S.2d 47
NY,2010.

70 A.D.3d 423, 894 N.Y.S.2d 47, 2010 WL 375162, 2010 N.Y. Slip Op. 00786

Amcan Holdings, Inc., et al., Appellants-Respondents
v
Canadian Imperial Bank of Commerce, Respondent-Appellant, et al., Defendants.
Supreme Court, Appellate Division, First Department, New York

February 4, 2010

CITE TITLE AS: Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce

HEADNOTES

Parties
Standing

***424**
Contracts
Formation of Contract

Action for breach of contract based on defendants' failure to close loan was dismissed because contract was never formed; parties negotiated "Draft Summary of Terms and Conditions" (draft summary) outlining proposed terms of two credit lines and "Summary of Terms and Conditions" (summary), both of which clearly stated that credit facilities would "only be established upon completion of definitive loan documentation" containing not only terms and conditions in draft summary and summary but also such "other terms and conditions . . . as [bank] may reasonable require"; although summary was detailed in its terms, it was clearly dependent on future definitive credit agreement; at no point did parties explicitly state that they intended to be bound by summary pending final credit agreement, nor did they waive finalization of such agreement.

Scolaro, Shulman, Cohen, Fetter & Burstein, P.C., Syracuse (Chaim J. Jaffe of counsel), for appellants-respondents.
Skadden, Arps, Slate, Meagher & Flom LLP, New York (Scott D. Musoff of counsel), for respondent-appellant.
Order, Supreme Court, New York County (Helen E. Freedman, J.), entered June 17, 2008, which granted defendants' motion to dismiss the complaint to the extent of dismissing all causes of action against defendants Canadian Imperial Holdings, CIBC World Markets, and CIBC, Inc., and the cause of action for breach of the implied covenant of good faith and fair dealing against defendant Canadian Imperial Bank of Commerce (CIBC), unanimously modified, on the law, the remaining causes of action against CIBC dismissed, and otherwise affirmed, with costs against plaintiffs.

Plaintiff companies are all controlled by one Richard Gray, who, in 2001, approached CIBC to obtain financing for the acquisition of a company called CWD Windows Division (CWD Division), as well as refinancing for the existing debt of Amcan and another company owned by Amcan, B.F. Rich Co. (BF Rich). Gray also sought funding for the continuing operations of CWD Division and BF Rich. More specifically, plaintiffs sought a commitment from CIBC to furnish two separate lines of credit: (1) a revolving credit line to provide working capital, and (2) a nonrevolving term loan.

The parties negotiated a "Draft Summary of Terms and Conditions" (draft summary), outlining the proposed terms of the two credit lines. After additional negotiations, the parties executed a writing entitled "Summary of Terms and Conditions" (summary). Both documents contained a highlighted box at the top of the first page with the following language:

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"The Credit Facilities will only be established upon completion of definitive loan documentation, including a credit agreement . . . which will contain the terms and conditions set out in this Summary in addition to such other representations . . . and other terms and conditions . . . as CIBC may reasonably require."

The summary itself contained specifics on a number of items, including, inter alia, detailed descriptions of the credit lines, the amount of funding to be provided under each, amortization and interest rates, fees, security, a proposed closing date and definitions of key ****2** terms. The borrower was listed as CWD Division and BF Rich. ***425**

Under the subheading "Fees," the summary provided for a $500,000 fee to CIBC, payable as follows: $50,000 payable on acceptance of the draft summary, $150,000 payable upon acceptance of this committed offer and $300,000 payable upon the closing of this transaction. It is undisputed that plaintiffs paid the first two installments, which were not refunded by defendants when the deal was terminated.

Under the subheading "Conditions Precedent" were included what was "[u]sual and customary for transactions of this type," such as—for "Initial Funding," the "[e]xecution and delivery of an acceptable formal loan agreement and security . . . documentation, which embodies the terms and conditions contained in this Summary."

Although there is a dispute over what happened next, it appears that prior to the execution of the final loan documents and credit agreement, CIBC discovered Gray had failed to disclose that certain entities he controlled, including Amcan, were subject to a preliminary injunction issued by New York County Supreme Court on October 21, 1996, which prohibited Amcan from assigning BF Rich shares as security for the loan, a condition precedent to closing the deal. Additionally, defendants claim plaintiffs failed to disclose that Gray had been held in contempt for violating the injunction, which contempt was upheld twice on appeal. Plaintiffs argue that defendants were aware of Gray's prior actions but proceeded with the deal in spite of that knowledge. CIBC broke off negotiations and the deal was never consummated.

Six years later, plaintiffs commenced this action, asserting causes of action for breach of contract based on defendants' failure to close the loan, breach of defendants' obligation of good faith and fair dealing, and fraud. Defendants moved to dismiss the complaint pursuant to CPLR 3211 (a) (1) and (7). Defendants argued that the summary was not a binding agreement, but a mere agreement to agree, and that they did not act arbitrarily in breaking off negotiations after learning about the preliminary injunction and contempt orders. Defendants further argued that assuming arguendo that the summary was a binding agreement, plaintiffs failed to state a cause of action because they did not identify provisions of the summary defendants had allegedly breached. Finally, defendants argued that Chariot Management lacked standing to sue, as it was neither a party to, nor a third-party beneficiary of, the summary.

The motion was granted to dismiss against all defendants other than CIBC, holding that they were not parties to any agreement. The court also dismissed plaintiffs' cause of action ***426** against CIBC for breach of good faith and fair dealing, holding this claim duplicative of the breach-of-contract cause of action. In addition, it denied the motion to dismiss the cause of action against CIBC for breach of contract, finding that the circumstances presented at this preliminary stage of the proceedings did not permit a determination as to whether the summary was a binding agreement or merely an agreement to agree. The court also held that the portion of the motion to dismiss, for lack of standing, plaintiff Chariot Management's cause of action for breach of contract was premature.

The claim that defendants breached the implied covenant of good faith and fair dealing was properly dismissed as duplicative of the breach-

of-contract claim, as both claims arise from the same facts (*Logan Advisors, LLC v Patriarch Partners, LLC*, 63 AD3d 440, 443 [2009]) and seek the identical damages for each alleged breach (*see Deer Park Enters., LLC v Ail Sys., Inc.*, 57 AD3d 711, 712 [2008]).

The causes of action asserted by Chariot Management against all defendants should have been dismissed for lack of standing. The documents belie plaintiffs' allegation that Chariot ****3** Management—which was not identified as a "Borrower," or listed as a signatory to either the summary or the draft credit agreement—was an intended third-party beneficiary of the summary (*see LaSalle Natl. Bank v Ernst & Young*, 285 AD2d 101, 108-109 [2001]).

"In determining whether a contract exists, the inquiry centers upon the parties' intent to be bound, i.e., whether there was a 'meeting of the minds' regarding the material terms of the transaction" (*Central Fed. Sav. v National Westminster Bank, U.S.A.*, 176 AD2d 131, 132 [1991]). Generally, where the parties anticipate that a signed writing is required, there is no contract until one is delivered (*see Scheck v Francis*, 26 NY2d 466, 470-471 [1970]).

Here, both the draft summary and summary documents clearly state the credit facilities "will only be established upon completion of definitive loan documentation," which would contain not only the terms and conditions in those documents but also such "other terms and conditions . . . as CIBC may reasonably require." Although the summary was detailed in its terms, it was clearly dependent on a future definitive agreement, including a credit agreement. At no point did the parties explicitly state that they intended to be bound by the summary pending the final credit agreement, nor did they waive the finalization of such agreement (*see Prospect St. Ventures I, LLC v Eclipsys Solutions Corp.*, 23 AD3d 213 [2005];*see also Hollinger Digital v LookSmart, Ltd.*, 267 AD2d 77 [1999]).***427**

The parties disagree on whether the draft summary and summary fall into a type I (fully negotiated) or type II (terms still to be negotiated) preliminary agreement, commonly used in federal cases addressing the issue of whether a particular document is an enforceable agreement or merely an agreement to agree (*see Teachers Ins. & Annuity Assn. of Am. v Tribune Co.*, 670 F Supp 491, 498 [SD NY 1987]). However, our Court of Appeals recently rejected the federal type I/type II classifications as too rigid, holding that in determining whether the document in a given case is an enforceable contract or an agreement to agree, the question should be asked in terms of "whether the agreement contemplated the negotiation of later agreements and if the consummation of those agreements was a precondition to a party's performance" (*IDT Corp. v Tyco Group, S.A.R.L.*, 13 NY3d 209, 213 n 2 [2009]).

Here, the summary made a number of references to future definitive documentation, starting with the box on page one of the summary. The fact that the summary was extensive and contained specific information regarding many of the terms to be contained in the ultimate loan documents and credit agreements does not change the fact that defendants clearly expressed an intent not to be bound until those documents were actually executed. As a result, the motion to dismiss the complaint should have been granted in its entirety with respect to CIBC.****4**

Based on the foregoing, there is no need to address the remaining issues raised by the parties on the appeal and cross appeal. Concur—Mazzarelli, J.P., Sweeny, Catterson, Acosta and Abdus-Salaam, JJ. **[Prior Case History: 20 Misc 3d 1104(A), 2008 NY Slip Op 51218(U).]**

NY,2010.
Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce
70 A.D.3d 423, 894 N.Y.S.2d 476022010 WL 3751629992010 N.Y. Slip Op. 007864603, 894 N.Y.S.2d 476022010 WL 3751629992010 N.Y.

70 A.D.3d 423
(Cite as: 70 A.D.3d 423, 894 N.Y.S.2d 47)

Slip Op. 007864603, 894 N.Y.S.2d 476022010 WL 3751629992010 N.Y. Slip Op. 007864603

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33 A.D.3d 639, 821 N.Y.S.2d 900, 2006 N.Y. Slip Op. 07304
(Cite as: 33 A.D.3d 639, 821 N.Y.S.2d 900)

H

Supreme Court, Appellate Division, Second Department, New York.
ATLAS REFRIGERATION–AIR CONDITIONING, INC., respondent,
v.
Salvatore LO PINTO, Jr., appellant.

Oct. 10, 2006.

Goldberg Rimberg & Friedlander, PLLC, New York, N.Y. (Israel Goldberg of counsel) for appellant.

Jaffe, Ross & Light, LLP, New York, N.Y. (Edward Jaffe and Robert A. Bruno of counsel), for respondent.

***639** In an action to foreclose a mechanic's lien, to recover damages for breach of contract, and to recover in quantum meruit for services rendered, the defendant appeals from a judgment of the Supreme Court, Kings County (Jacobson, J.), dated November 4, 2004, which, after a nonjury trial, is in favor of the plaintiff and against him in the principal sum of $120,000, with interest from June 30, 1997, in the sum of $75,150, plus costs and disbursements in the sum of $1,280, for the total sum of $196,430.

ORDERED that the judgment is modified, on the law and in the exercise of discretion, by deleting from the first decretal paragraph thereof the words "with interest from June 30, 1997, in the amount of $75,150.00" and "making a total of $196,430.00," and substituting therefor the words "with interest from October 15, 1999," as so modified, the judgment is affirmed, with costs to the respondent, and the matter is remitted ***640** to the Supreme Court, Kings County, for the recalculation of prejudgment interest in accordance herewith and for the entry of an appropriate amended judgment accordingly.

In order to establish a claim in quantum meruit, a claimant must establish (1) the performance of the services in good faith, (2) the acceptance of the services by the person to whom they were rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services (*see Ross v. DeLorenzo,* 28 A.D.3d 631, 813 N.Y.S.2d 756; *Tesser v. Allboro Equip. Co.,* 302 A.D.2d 589, 590, 756 N.Y.S.2d 253; *Matter of Alu,* 302 A.D.2d 520, 755 N.Y.S.2d 289; *Geraldi v. Melamid,* 212 A.D.2d 575, 576, 622 N.Y.S.2d 742; ****901***Moors v. Hall,* 143 A.D.2d 336, 337–338, 532 N.Y.S.2d 412; *Umscheid v. Simnacher,* 106 A.D.2d 380, 382–383, 482 N.Y.S.2d 295). Here, the plaintiff adduced evidence at trial to establish all four elements.

The Supreme Court providently exercised its discretion in granting the plaintiff's application, made after it rested, to reopen its prima facie case to present specific evidence (*see* CPLR 4011; *Morgan v. Pascal,* 274 A.D.2d 561, 712 N.Y.S.2d 48; *Lagana v. French,* 145 A.D.2d 541, 542, 536 N.Y.S.2d 95).

The Supreme Court further properly dismissed the defendant's counterclaim alleging willful exaggeration of a mechanic's lien. The mechanic's lien in this case was declared null and void by the Supreme Court because it had not been timely filed pursuant to Lien Law § 10. "The Legislature intended the remedy in Lien Law § 39–a to be available only where the lien was valid in all other respects and was declared void by reason of willful exaggeration after a trial of the foreclosure action" (*Guzman v. Estate of Fluker,* 226 A.D.2d 676, 678, 641 N.Y.S.2d 721).

However, the Supreme Court should have awarded prejudgment interest from October 15, 1999, the date of the plaintiff's demand for payment, which was "the earliest ascertainable date the cause of action existed" (CPLR 5001 [b]; *see Romito v. Panzarino,* 11 A.D.3d 444, 782 N.Y.S.2d 759; *Bowne & Co. v. Scileppi,* 99 A.D.2d 440, 441,

470 N.Y.S.2d 618).

SCHMIDT, J.P., SANTUCCI, SKELOS and COVELLO, JJ., concur.

N.Y.A.D. 2 Dept. 2006.
Atlas Refrigeration-Air Conditioning, Inc. v. Lo Pinto
33 A.D.3d 639, 821 N.Y.S.2d 900, 2006 N.Y. Slip Op. 07304

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513 F.2d 735, 1975 A.M.C. 842
(Cite as: 513 F.2d 735)

United States Court of Appeals,
Second Circuit.
BATTERY STEAMSHIP CORP., Plaintiff-Appellant,
v.
REFINERIA PANAMA, S. A. and United States of America, Defendants-Appellees.

No. 342, Docket 73-2710.
Argued Feb. 19, 1975.
Decided April 7, 1975.

The owner of a steamship under charter to the United States brought action against the United States, on provisions of a time charter and its amendments, to recover for damage resulting from collision. The shipowner's motion to strike the government's affirmative defense of waiver and release was denied, and summary judgment in favor of the government was granted by the United States District Court for the Southern District of New York, Charles M. Metzner, J. The shipowner appealed. The Court of Appeals, Robert P. Anderson, Circuit Judge, held that since the contract which was the subject of the litigation was a time charter and its amendments related to a particular vessel, the principles of maritime contract law governed the question of applicability of the parol evidence rule. Under admiralty law, the question whether the parties intended the amended time charter to integrate their entire agreement concerning potential liability for damages to the vessel and, if they did so intend, whether the writing could be reformed on the ground that it failed to reflect their agreement accurately because of some mutual mistake or accident on their part were factual issues precluding summary judgment.

Reversed and remanded for further proceedings.

West Headnotes

[1] Evidence 157 397(2)

157 Evidence
157XI Parol or Extrinsic Evidence Affecting Writings
157XI(A) Contradicting, Varying, or Adding to Terms of Written Instrument
157k397 Contracts in General
157k397(2) k. Completeness of Writing and Presumption in Relation Thereto; Integration. Most Cited Cases

Evidence 157 455

157 Evidence
157XI Parol or Extrinsic Evidence Affecting Writings
157XI(D) Construction or Application of Language of Written Instrument
157k454 Meaning of Words, Phrases, Signs, or Abbreviations
157k455 k. In General. Most Cited Cases

Under New York law, contract which appears complete on its face is an integrated agreement as a matter of law, and parol evidence is not admissible as bearing on interpretation.

[2] Evidence 157 397(2)

157 Evidence
157XI Parol or Extrinsic Evidence Affecting Writings
157XI(A) Contradicting, Varying, or Adding to Terms of Written Instrument
157k397 Contracts in General
157k397(2) k. Completeness of Writing and Presumption in Relation Thereto; Integration. Most Cited Cases

Under law of most jurisdictions, question whether contract is integrated agreement is question of fact on which all evidence may be considered.

[3] Shipping 354 34

513 F.2d 735, 1975 A.M.C. 842
(Cite as: 513 F.2d 735)

354 Shipping
354III Charters
354k34 k. What Law Governs. Most Cited Cases

Where contract which was subject of litigation was time charter and its amendments related to particular vessel, principles of maritime contract law governed question of applicability of parol evidence rule.

[4] Evidence 157 397(2)

157 Evidence
157XI Parol or Extrinsic Evidence Affecting Writings
157XI(A) Contradicting, Varying, or Adding to Terms of Written Instrument
157k397 Contracts in General
157k397(2) k. Completeness of Writing and Presumption in Relation Thereto; Integration. Most Cited Cases

Where writing appears complete on its face, such appearance is some evidence of intent but does not establish as matter of law that agreement is integrated.

[5] Contracts 95 147(2)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k147 Intention of Parties
95k147(2) k. Language of Contract. Most Cited Cases

That writing contains words which seem clear on their face does not alone establish that it accurately reflects agreement of parties.

[6] Evidence 157 397(2)

157 Evidence
157XI Parol or Extrinsic Evidence Affecting Writings
157XI(A) Contradicting, Varying, or Adding to Terms of Written Instrument
157k397 Contracts in General
157k397(2) k. Completeness of Writing and Presumption in Relation Thereto; Integration. Most Cited Cases

Evidence 157 428

157 Evidence
157XI Parol or Extrinsic Evidence Affecting Writings
157XI(B) Invalidating Written Instrument
157k428 k. Grounds for Admission of Extrinsic Evidence. Most Cited Cases

Reformation of Instruments 328 44

328 Reformation of Instruments
328II Proceedings and Relief
328k42 Evidence
328k44 k. Admissibility. Most Cited Cases

Parol evidence rule renders legally inoperative only evidence of prior understandings and negotiations which contradicts unambiguous meaning of writing which completely and accurately integrates agreement of parties; on issues whether contract is void, voidable or reformable and whether or not parties assented to particular writing as complete and accurate integration of their contract, parol evidence rule is not applicable.

[7] Federal Civil Procedure 170A 2512

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases
170Ak2512 k. Shipping and Seamen, Cases Involving. Most Cited Cases

Under admiralty law, question whether parties intended amended time charter to integrate their entire agreement concerning potential liability for damages to vessel and, if they did so intend, whether writing could be reformed on ground that it failed to reflect their agreement accurately because of some mutual mistake or accident on their part were factual issues precluding summary judgment

513 F.2d 735, 1975 A.M.C. 842
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in action based upon charter party provisions. Fed.Rules Civ.Proc. rule 56(c), 28 U.S.C.A.

[8] Contracts 95 ⚿54(1)

95 Contracts
95I Requisites and Validity
95I(D) Consideration
95k54 Sufficiency in General
95k54(1) k. In General. Most Cited Cases

Evidence 157 ⚿397(2)

157 Evidence
157XI Parol or Extrinsic Evidence Affecting Writings
157XI(A) Contradicting, Varying, or Adding to Terms of Written Instrument
157k397 Contracts in General
157k397(2) k. Completeness of Writing and Presumption in Relation Thereto; Integration. Most Cited Cases

Relative value of promise and of consideration given for it is not of judicial concern and does not affect enforceability of contract or any of its provisions, but this does not preclude introduction of evidence of substantial disparity of consideration as bearing on issues of integration and mutuality of mistake.

[9] Shipping 354 ⚿34

354 Shipping
354III Charters
354k34 k. What Law Governs. Most Cited Cases

Where contract which was subject of litigation was time charter and amendments related to particular vessel, principles of maritime contract law were applicable to any determination whether extrinsic evidence could be considered to clarify, rather than to contradict, meaning of writing.

***736** Robert J. Giuffra, New York City (Dougherty, Ryan, Mahoney, Pellegrino & Giuffra and Arthur Ian Miltz, New York City, on the brief), for plaintiff-appellant.

***737** Terence Gargan, Admiralty and Shipping Section, New York, Dept. of Justice (Carla A. Hills, Asst. Atty. Gen., Paul J. Curran, U. S. Atty., S.D.N.Y., and Gilbert S. Fleischer, Atty. in Charge, Admiralty and Shipping Section, New York, on the brief), for defendants-appellees.

Before ANDERSON, MULLIGAN and VAN GRAAFEILAND, Circuit Judges.

ROBERT P. ANDERSON, Circuit Judge:

The SS Elwell, owned by the appellant, Battery Steamship Corp., and under time charter to the appellee, Military Sea Transport Service (MSTS), an agency of the United States, was damaged on June 25, 1967, when an oil carrier owned and operated by Refineria Panama, S. A. (Refineria), struck the Elwell while attempting to refuel her in Colon Bay, Republic of Panama. Within a day of the accident, Battery Steamship notified MSTS, which had ordered and paid for the refueling operation, that the collision had occurred and that MSTS was liable under the terms of the charter party for the resulting damage.

The time charter was amended on three separate occasions, following the above described events. By the terms of the third amendment, dated August 7, 1968, Battery Steamship agreed, inter alia,[FN1] to "waive all damage claims except those based on damage reports submitted with (its) letter dated 5 August 1968." None of the damage reports, or the letter itself, included or mentioned the damage resulting from the collision in Colon Bay.

FN1. Amendment 3, in pertinent part, provided:

"1. Upon termination of the contract period, the vessel shall be redelivered on arrival Pilot Station Puget Sound or equivalent distance to Pilot Station Columbia River, (owner's) option, vice U. S. Gulf . . .

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> 2. The Government shall pay the (owner) $11,500 in consideration for the change in redelivery.
>
> 3. Repatriation of the crew shall be for the (owner's) account.
>
> 4. The (owner) waives all damage claims except those based on damage reports submitted with (the) letter dated 5 August 1968.
>
> 5. The (owner) waives redelivery notices.
>
> 6. No off-hire survey will be conducted except notation of fuel on board on arrival at redelivery point.
>
> 7. Prior to proceeding to the redelivery point, the Government shall remove all sheathing, if any, and broom sweep at Inchon, Korea, and upon completion thereof, the vessel shall proceed promptly to the redelivery area."

After the charter had expired, however, Battery Steamship sought reimbursement for the damage which arose out of the June 25, 1967 incident, but MSTS refused to pay the claim. Thereafter Battery Steamship brought this action in admiralty in June 1969 against the United States to recover $47,595. In August 1971 Battery Steamship amended its complaint to include Refineria as a party defendant, but the suit against Refineria was dismissed as time barred.

The Government filed a motion for summary judgment, contending that Battery Steamship had contractually waived its claim, and that MSTS was not liable, in any event, under the terms of the charter party for damages caused by the negligence of independent contractors during refueling operations.

Battery Steamship argued that summary judgment was inappropriate because there was a genuine issue of fact concerning the meaning of the waiver and the intent of the parties. Thereafter affidavits were submitted by both sides which showed that, during the negotiation of the third charter amendment, it had been assumed that the release would apply only to the claims for incidental damages unreported by the Master as of August 5, 1968.[FN2] Battery ***738** Steamship also filed a cross-motion for partial summary judgment asking that the affirmative defense, based upon the release, be stricken on the ground that there was insufficient consideration to support a waiver of the claims arising out of the Colon Bay incident.

> FN2. For example, Mr. A. Dan Klyver, who negotiated Amendment 3 on behalf of Battery Steamship, stated:
>
> "It was (my) understanding from (my) discussions with (the representatives of MSTS) that the waiver provision set forth in Amendment No. 3 was only intended to cover unreported damages of an incidental nature which were never reported by the Master . . . and which damages are normally found on an off-hire survey. (Amendment 3 included an agreement to waive an off-hire survey.)"
>
> Mr. Norton M. Crockett, the Government representative, stated:
>
> "Q. At the time you had the discussions with Mr. Klyver, was it your intention that all claims which were unreported would be waived . . . by the owner? A. Right.
>
> Q. But if that claim had been reported by the owner, that would be part of this? A. Right.
>
> Q. Part of the claim? A. Right. If it was being processed, it would be considered.
>
> Q. As what would it be considered, as . . . a claim? A. Right."

The district court, however, held that the ori-

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ginal charter and its various amendments constituted an integrated agreement which, by its clear terms, released the United States from potential liability for damages not reported in the letter of August 5, 1968. It also concluded that the affidavits did not disclose a material issue of fact in spite of the fact that portions of the evidentiary material contradicted the unambiguous meaning of the writing, because such portions were barred by the parol evidence rule. It therefore entered summary judgment in favor of the Government. The cross-motion for partial summary judgment was denied on the ground that the release, when viewed in the context of the other provisions of the amendment, was supported by a consideration. No ruling was made on the alternative defense that MSTS was not liable in any event under the terms of the charter party for the negligence of independent contractors.

Summary judgment may properly be granted when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c) F.R.Civ.P.; Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 467, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962); Schwartz v. Associated Musicians of Greater New York, Local 802, 340 F.2d 228, 232 (2d Cir. 1964). Inferences to be drawn from the underlying facts set forth in the supporting evidentiary material "must be viewed in the light most favorable to the party opposing the motion." United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176 (1962). In the present case, because there have been submitted by both parties affidavits which show that there is, in fact, a dispute as to the actual meaning of the release, the central issue on appeal is whether the parol evidence rule barred this testimony from consideration by the district court.

[1][2] The parol evidence rule is generally defined as follows:

"When two parties have made a contract and have expressed it in a writing to which they have both assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing." (Footnote omitted.) 3 A. Corbin, Contracts, s 573, at 357 (1960).

Although the federal and all state jurisdictions apparently accept this classic statement of the parol evidence rule, they do not all agree upon its interpretation and application.[FN3] A preliminary question, therefore, is what law applies.

> FN3. We note, for example, that under New York law a contract which appears complete on its face is an integrated agreement as a matter of law. Higgs v. De Maziroff, 263 N.Y. 473, 189 N.E. 555 (1934). This conflicts with the law applicable in most jurisdictions, which is that integration is a question of fact on which all evidence may be considered. See, Corbin, The Parol Evidence Rule, 53 Yale L.J. 603 (1944).

[3] In the present case it is abundantly clear that the principles of maritime contract law govern. The contract, which is the subject of the litigation, is a time charter and its amendments relate to a particular vessel. Its terms "pertain***739** directly to and (are) necessary for commerce or navigation upon navigable waters," 7A J. Moore, Federal Practice P .230(2), at 2761 (1972). From no point of view can the application of the parol evidence rule to a maritime contract be regarded as "peculiarly a matter of state and local concern," Kossick v. United Fruit Co., 365 U.S. 731, 741, 81 S.Ct. 886, 893, 6 L.Ed.2d 56 (1961). See also Hellenic Lines Limited v. Gulf Oil Corporation, 340 F.2d 398, 402 (2 Cir. 1965). It has long been recognized that a special need exists for uniformity in the rules governing the application of such matters as the Statute of Frauds in maritime contracts, Union Fish Co. v. Erickson, 248 U.S. 308, 39 S.Ct. 112, 63 L.Ed. 261 (1919), and like considerations apply to the parol evidence rule.

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"Where states have sought to enter the field (of admiralty) by statute their efforts usually have been thwarted as infringements of a field reserved to Congress and the federal courts by the Constitution and as interferences with the uniformity requirements of the maritime law. . . . And in the field of maritime contracts generally, the cases are clear that in most situations federal, and not state, principles apply to determine the respective rights and duties of the parties." A/S J. Ludwig Mowinckels R. v. Commercial Stevedoring Co., 256 F.2d 227, 230 (2 Cir. 1958).

The trial court ruled that the parol evidence rule barred consideration of the statements contained in the affidavits because the language of P 4 was "clear and unambiguous on its face" and the charter and its three amendments constituted an integrated contract.

But, the statements contained in the affidavits, see footnote 2 ante, viewed in the light most favorable to appellant, raise two questions which should have been decided before the district court even reached the issue upon which it ultimately rested its decision, i. e., whether the parties intended the amended time charter to integrate their entire agreement concerning potential liability for damages to the vessel; and if they did so intend, whether the writing could be reformed on the ground that it failed to reflect their agreement accurately because of some mutual mistake or accident on their part.

[4][5] Both issues are factual. "An agreement is integrated where the parties thereto adopt a writing or writings as the final and complete expression of the agreement." Restatement, Contracts, s 228 (1932).

" . . . It is an essential of an integration that the parties shall have manifested assent not merely to the provisions of their agreement, but to the writing or writings in question as a final statement of their intentions as to the matters contained therein. If such assent is manifested the writing may be a letter, telegram or other informal document. That a document was or was not adopted as an integration may be proved by any relevant evidence." Restatement, supra, s 228, Comment a.

See also Hellenic Lines, Ltd. v. United States of America and Commodity Credit Corp., 512 F.2d 1196 (2 Cir. 1975). Although the writing may appear complete on its face, such appearance is some evidence of intent but does not establish as a matter of law that the agreement is integrated. 3 A. Corbin, Contracts, s 573 at 360 (1960); 9 Wigmore, Evidence (3rd ed. 1940), s 2430(2) at 98; Peter Kiewit Sons' Co. v. Summit Construction Co., 422 F.2d 242, 270 (8 Cir. 1969); J. I. Case Threshing Mach. Co. v. Buick Motor Co., 39 F.2d 305 (8 Cir. 1930); United States Navigation Co. v. Black Diamond Lines, 124 F.2d 508 (2 Cir.), cert. denied, 315 U.S. 816, 62 S.Ct. 805, 86 L.Ed. 1214 (1942). And, that a writing contains words which seem clear on their face does not, by itself, establish that it accurately reflects the agreement of the parties.

[6] The parol evidence rule, moreover, renders legally inoperative only evidence of prior understandings and negotiations which contradicts the unambiguous meaning of a writing which completely***740** and accurately integrates the agreement of the parties. On the issues of whether a contract is void, voidable or reformable because of illegality, fraud, mistake or any other reason and whether or not parties assented to a particular writing as the complete and accurate "integration" of their contract,

" . . . there is no 'parol evidence rule' to be applied. On these issues, no relevant evidence, whether parol or otherwise, is excluded. No written document is sufficient, standing alone, to determine any one of them, however, long and detailed it may be, however formal, and however many may be the seals and signatures and assertions. No one of these issues can be determined by mere inspection of the written document." 3 A. Corbin, Contracts, s 573, at 360.

[7][8][9] Because there was evidence before it

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which properly established issues as to material facts, we hold that the district court erred in granting summary judgment to the United States.[FN4] We, therefore, reverse and remand for further proceedings.[FN5]

FN4. The appellant's cross-motion for partial summary judgment, in which it sought to have the affirmative defense of release stricken on the ground of lack of consideration, was denied by the district court. It properly held that, viewed in light of the other provisions of Amendment 3, the release was supported by sufficient consideration to make it enforceable, because MSTS had assumed new obligations under Amendment 3, see footnote 1, ante, which concededly had some value. See, Restatement, Contracts, ss 77, 81 (1932); 1 Corbin, Contracts, s 127. Appellant argues however, that the value of the Government's new promises was relatively insignificant compared to the $47,595 claim which appellant allegedly released. The relative value of a promise and of the consideration given for it, however, is not of judicial concern and does not affect the enforceability of a contract or any of its provisions. Warner-Lambert Pharm. Co. v. John J. Reynolds, Inc., 178 F.Supp. 655 (S.D.N.Y.1959), aff'd, 280 F.2d 197 (2 Cir. 1960). This is not to say, however, that evidence of substantial disparity of consideration could not be considered on the issues of integration and mutuality of mistake.

FN5. Because we remand to the district court for it to decide the issues of integration and mutuality of mistake, we need not now decide whether it correctly ruled on the issue which it held dispositive, whether the "extrinsic evidence" could be considered for the purpose of clarifying (rather than contradicting) the meaning of the writing. We emphasize, however, that federal maritime law will apply on this question, should it again arise in the district court. Lucie v. Kleen-Leen, Inc., 499 F.2d 220, 221 (7 Cir. 1974), contains, in the opinion of this court, the proper statement of the law on this issue.

"We cannot accede to the . . . assertion that no extrinsic evidence reflecting on the parties' intentions should be considered. It is well-established that the test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether the instrument appears to be plain and unambiguous, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible. A rule that limits the determination of the meaning of a written contract to its four-corners, merely because the court deems it clear and unambiguous, is a rule that ignores the intention of the parties or presumes a degree of verbal precision and crystallization presently unattainable by our language."

C.A.N.Y. 1975.
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Supreme Court of Florida.
BLACKHAWK HEATING & PLUMBING CO., INC., an Illinois corporation, and Andrew Machata, Petitioners,
v.
DATA LEASE FINANCIAL CORP., a Florida corporation, Respondent.

No. 45003.
Oct. 24, 1974.
Rehearing Denied Nov. 22, 1974.

Action was brought for specific performance of agreement whereby optionee, lending its credit to optionor so that it could acquire 80% Of bank's stock, would be entitled to acquire a 25% Interest in optionor's bank stock. The Circuit Court, Palm Beach County, James C. Downey, J., denied specific performance and the optionor appealed. The District Court of Appeal, Fourth District, 287 So.2d 118, affirmed and the optionor petitioned for certiorari. The Supreme Court, Adkins, C.J., held that under the circumstances the term 'cash-flow benefit' in which optionee was to share proportionately in calculation of payments due on exercise of option was not so indefinite as to render agreement unenforceable, and the failure of parties to agree on amount of money to be paid upon exercise of option, especially under circumstances, did not preclude option from being properly exercised.

Decision of Court of Appeals quashed and cause remanded with directions.

Overton, J., filed a dissenting opinion.

West Headnotes

[1] Contracts 95 170(1)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k170 Construction by Parties
95k170(1) k. In General. Most Cited Cases

Where terms of written agreement are in any respect doubtful, if contract contains no provisions on a given point or if it fails to define with certainty duties of parties with respect to particular matter and parties to it have by their own conduct placed a construction upon it which is reasonable, such construction will be adopted by court.

[2] Banks and Banking 52 40

52 Banks and Banking
52II Banking Corporations and Associations
52II(B) Capital, Stock, and Dividends
52k40 k. Transfer of Stock. Most Cited Cases

Where loan of credit by optionee was a valuable consideration and option agreement provided that any cash flow benefit, derived by optionor from acquisition of bank stock was to be shared proportionately with optionee in calculation of any payment due on exercise of option to purchase 25% of bank stock, fact that each possible cash benefit was not listed with particularity would not destroy agreement and term "cash-flow benefit" was construed to have a meaning consistent with apparent objectives of parties to contract; circumstances showed that optionee should have 25% of profit derived by optionor's stock ownership.

[3] Contracts 95 15

95 Contracts
95I Requisites and Validity
95I(B) Parties, Proposals, and Acceptance
95k15 k. Necessity of Assent. Most Cited Cases

Making of contract depends not on the agreement of two minds in one intention but on agreement of two sets of external signs; contract depends not on parties having meant the same thing but on their having said the same thing.

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[4] Contracts 95 ⚿147(1)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k147 Intention of Parties
95k147(1) k. In General. Most Cited Cases

Contracts 95 ⚿169

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k169 k. Extrinsic Circumstances. Most Cited Cases

In construction of written contract it is duty of court, as near as may be, to place itself in situation of parties, and from consideration surrounding circumstances, the occasion and apparent object of parties to determine meaning and intent of language employed.

[5] Contracts 95 ⚿39

95 Contracts
95I Requisites and Validity
95I(C) Formal Requisites
95k39 k. Incomplete Instruments. Most Cited Cases

Even though all details are not definitely fixed, agreement may be binding if parties agree on essential terms and seriously understand and intend agreement to be binding; subsequent differences as to construction do not affect validity of contract or indicate that minds of parties did not meet with respect thereto.

[6] Contracts 95 ⚿9(1)

95 Contracts
95I Requisites and Validity
95I(A) Nature and Essentials in General
95k9 Certainty as to Subject-Matter
95k9(1) k. In General. Most Cited Cases

Courts should be extremely hesitant to hold contract void for indefiniteness, particularly where one party has performed under contract and has allowed other party to obtain benefit of his performance.

[7] Contracts 95 ⚿9(1)

95 Contracts
95I Requisites and Validity
95I(A) Nature and Essentials in General
95k9 Certainty as to Subject-Matter
95k9(1) k. In General. Most Cited Cases

If parties provide a practicable, objective method for determining price or compensation, not leaving it to the future will of parties themselves, there is no such indefiniteness or uncertainty as will prevent agreement from being an enforceable contract.

[8] Contracts 95 ⚿16.5

95 Contracts
95I Requisites and Validity
95I(B) Parties, Proposals, and Acceptance
95k16.5 k. Options; Rights of First Refusal. Most Cited Cases
(Formerly 95k16)

Existence of dispute as to the amount of money to be paid on exercise of an option does not vitiate an otherwise valid exercise of option, particularly where calculation of both total price and amount due at closing involves highly complex accounting computations.

[9] Banks and Banking 52 ⚿40

52 Banks and Banking
52II Banking Corporations and Associations
52II(B) Capital, Stock, and Dividends
52k40 k. Transfer of Stock. Most Cited Cases

Where agreement by which optionee was entitled to acquire a 25% interest in optionor's 80% interest in bank stock provided that any cash flow benefits derived by optionor as consequence of holding bank stock should inure proportionately to

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optionee in calculation of payments due, and optionor upon being informed of desire to exercise option did not allow a review of books and records whereby cash flow benefits arising from agreement could be determined, it could not be held that the option had not been properly exercised because of the existence of dispute as to amount of money to be paid on exercise of option.

***405** Jos. D. Farish, Jr. and F. Kendall Slinkman, of Farish & Farish, West Palm Beach, for petitioners.

Marshall M. Criser and Robert T. Scott, of Gunster, Yoakley, Criser, Stewart & Hersey, Palm Beach, for respondent.

ADKINS, Chief Justice.

By petition for certiorari, we have for review a decision of the District Court of Appeal, Fourth District (Blackhawk Heating & Plumbing Co. v. Data Lease Financial Corp., 287 So.2d 118 (Fla.App.4th, 1973), which allegedly conflicts with prior decisions of this Court and the District Courts of Appeal on the same point of law. Fla.Const., art. V, s 3(b)(3), F.S.A.

For clarity, the petitioners, plaintiffs in the trial court, are referred to as 'Blackhawk and Machata'; the respondent, defendant below, is referred to as 'Data Lease.'

In September, 1969, Data Lease entered into an agreement with the 'Cohen group' to purchase 870,000 shares of the common stock of Miami National Bank for a purchase price of $10,440,000. Under the terms of the purchase, Data Lease was obligated to pay $2,160,000 by July 1, 1970, but found it impossible to meet this immediate cash obligation.

Talmo, President of Data Lease, sought the assistance of Machata in borrowing $2,000,000. Machata proposed that he purchase 25 per cent of Data Lease's 870,000 shares of stock, but, at Talmo's request, this proposal was abandoned for tax reasons. Talmo proposed that Data Lease pay $1,500,000 to the Cohen group and secure the release of 200,000 shares in the bank which Data Lease agreed to pledge against the new $2,000,000 note. The remaining $500,000 of the $2,000,000 loan (except $40,000 in loan expense advanced by Machata) would be used by Data Lease as it saw fit in its own corporate activity. The Central States, Southeast and Southwest Areas' Pension Fund agreed to the proposal, in view of the credit rating of Blackhawk and Machata.

The initial proposition that Machata would immediately purchase 25 per cent of Data Lease's position in the bank was discarded at Talmo's suggestion that Machata's***406** initial participation be in the form of an option to purchase, because so long as Data Lease maintained an 80 per cent ownership of the bank stock, Data Lease would qualify to file a consolidated tax return with the bank. 26 U.S.C. 1501 et seq.

Data Lease had accumulated operating losses of $3,760,000 over a period of three years prior to the proposed stock purchase. Control of the bank would permit Data Lease, by separate agreement with the bank, to obtain payments from the bank of approximately 95 per cent of the money that the bank would otherwise have paid to the Internal Revenue Service but for the aspect of consolidated tax reporting. These payments are referred to as 'upstream' tax payments. The parties could foresee immediate financial benefit to Data Lease by use of the upstream tax payments.

On May 18, 1970, Machata, Talmo and others went to Chicago and executed the option agreement which gave rise to this litigation. On the same day as the execution of the option agreement, a $2,000,000 loan was made by the Pension Fund. Under the terms of this loan, Blackhawk, Machata and Data Lease were co-obligors to the Pension Fund in the amount of $2,000,000. The promissory note was secured by a pledge agreement of the 200,000 shares of bank stock released by the Cohen group. Machata guaranteed the loan personally.

$1,500,000 of the $2,000,000 loan was paid directly to the Cohen group as partial payment for release of $200,000 shares of bank stock which was to go to Blackhawk upon exercise of the option. $40,000 of the loan was paid to Machata as reimbursement for money advanced by him personally, relative to initial loan costs. The balance, $460,000, went directly to Data Lease to be used as it saw fit.

Under the option agreement Blackhawk could purchase 217,500 shares (or 25 per cent of the 870,000 shares) from Data Lease. The purchase price was to be computed upon a rather complex mathematical formula set forth in the agreement.

The portion of the option agreement primarily involved in this litigation reads as follows:

6(b) 'Any cash flow benefit, including any tax benefits, derived by Data as a consequence of its holding, hypothecation, assignment, pledge, etc., of MNB Stock shall inure proportionately to Blackhawk in calculation of any payments due between the parties.'

Blackhawk, by lending its credit to Data Lease, not only rescued Data Lease from financial problems with reference to its purchase of the bank stock, but actually placed Data Lease in a position where, as an 80 per cent stockholder in the bank, Data Lease could derive substantial income as a result of the stock ownership. So long as Data Lease continued to retain an 80 per cent interest in the bank, it could avail itself of the advantage of consolidating its tax returns with the bank. Data Lease did so avail itself and obtained substantial benefit as a result thereof.

On January 25, 1971, within the option period, Blackhawk notified Data Lease in writing that it was exercising its option to purchase the shares of stock, taking the position that sufficient 'cash-flow benefits' had been derived so that the option could be exercised. Blackhawk's position was that the 'cash-flow benefits' received by Data Lease more than offset the cash items due Data Lease on exercise of the option. Blackhawk requested a review of the books of the bank and Data Lease so that a final closing statement could be prepared and the correct calculation made. Data Lease refused to honor the option agreement and Blackhawk brought this suit for specific performance. Data Lease defended on the ground that the term 'cash-flow benefit' was vague and indefinite, so that the agreement was void and unenforceable. Also, Data Lease contended the option was not properly exercised.

***407** A Special Master was appointed and his report demonstrates that the income of Data Lease and its subsidiary corporations increased after the $2,000,000 loan. For example, for the period from July 1, 1970, through June 30, 1971, the direct or indirect increase in net income to Data Lease as a result of its performance of management services was $185,790, and for the period July 1, 1971, through June 30, 1972, the direct or indirect increase in net income to Data Lease for such services was $104,559. The amount of 'upstream' tax payments to February 28, 1971, the date of the option exercise, was stipulated to be $617,179.87. Tax payments received by Data Lease from the bank for the period under review by the Special Master would directly increase the net income of Data Lease in the amount of $1,264,966.30. It is apparent from the record that Data Lease and its subsidiary corporation received many financial benefits, while Blackhawk received nothing.

The trial court held that the above-quoted paragraph 6(b) of the option agreement was an essential part thereof, and that it was so vague, indefinite and uncertain as to render the entire agreement insufficient to justify specific performance. In addition, the Court held that even if the contract was not enforceable for the abovementioned reasons, Blackhawk failed to properly exercise the option. Upon appeal, the District Court of Appeal affirmed the judgment of the trial court.

[1] In the case of Shouse v. Doane, 39 Fla. 95, 21 So. 807 (1897), the following rule of contract interpretation was recognized by this Court:

'Where the terms of a written agreement are in any respect doubtful or uncertain, or if the contract contains no provisions on a given point, or if it fails to define with certainty the duties of the parties with respect to a particular matter or in a given emergency, and the parties to it have, by their own conduct, placed a construction upon it which is reasonable, such construction will be adopted by the court, upon the principle that it is the duty of the court to give effect to the intention of the parties where it is not wholly at variance with the correct legal interpretation of the terms of the contract.' (p. 810)

[2][3][4] The loan of credit by Blackhawk and Machata was a valuable consideration (see 17 C.J.S. Contracts, s 81) and financial benefits flowed to Data Lease as a result of this loan of credit. The parties intended that Blackhawk and Machata should receive a credit amounting to 25 per cent of these cash benefits derived by data Lease. The only question is a determination of the amount of the cash benefits which were attributable to the loan of credit by Blackhawk. The fact that each possible cash benefit which might ensue was not listed with particularity should not destroy the agreement of the parties. The term 'cash-flow benefit' should be construed in such a manner as to give the phrase a meaning consistent with the apparent object of the parties in entering into the contract. As stated by this Court in Gendzier v. Bielecki, 97 So.2d 604 (Fla.1957),

'The making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs-not on the parties having meant the same thing but on their having said the same thing.' (p. 608)

Also, in St. Lucie County Bank & Trust Co. v. Aylin, 94 Fla. 528, 114 So. 438 (1927), this Court said:

'In the construction of written contracts it is the duty of the court, as near as may be, to place itself in the situation of the parties, and from a consideration of the surrounding circumstances, the occasion, and apparent object of the parties, to determine the meaning and intent of the language employed.' (p. 441)

***408** The circumstances surrounding the negotiations and the object of the parties demonstrate that Blackhawk should have 25 per cent of the profit derived from Data Lease's ownership of the bank stock. The burden was upon the Court to make this determination after an examination of the books and records of Data Lease and its subsidiary corporations.

The decision of the District Court of Appeal in affirming the judgment dismissing the suit for specific performance was in conflict with the above decisions, and we have jurisdiction.

Data Lease relies upon Truly Nolen, Inc. v. Atlas Moving and Storage Warehouse, Inc., 125 So.2d 903 (Fla.App.3d, 1961), writ discharged 137 So.2d 568 (Fla.1962), which holds that if an agreement is so vague and uncertain in the specifications of the subject matter that the Court cannot identify that subject matter or determine its quality, quantity or price, it will be unenforceable. This case involved 'a latent ambiguity in the meaning of an essential word,' which was not reconciled by construction of the parties. In the instant case, the agreement and the conduct of the parties clearly establishes the meaning of the term 'cash-flow benefit.' At the time of the final hearing, the trial court had before it the findings of the Special Master which defined with particularity the financial effects growing out of the option agreement. The duty of the trial court was to relate the findings of the Special Master to the established Florida law in the construction of contracts and determine the amount, if any, required for the exercise of the option.

Although it has been held that there can be no contract where the offeror, using ambiguous language, reasonably means one thing and the offeree reasonably understands differently, it has been held, however,

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'(T)hat the fact that an executed written contract contains within itself difficulties of construction about which the parties disagree does not enable the parties to contend that the minds of the parties never met, since by signing the writing the parties bind themselves to such interpretation as the court may place upon the words and symbols employed by them.' 17 Am.Jur.2d, Contracts, s 22, at 359.

[5] Even though all the details are not definitely fixed, an agreement may be binding if the parties agree on the essential terms and seriously understand and intend the agreement to be binding on them. A subsequent difference as to the construction of the contract does not affect the validity of the contract or indicate the minds of the parties did not meet with respect thereto. 17 C.J.S. Contracts s 31.

The aforementioned rule of law has been codified with respect to sales, with the adoption in Florida of the Uniform Commercial Code. Fla.Stat. s 672.2-204, F.S.A. However, the statute relates to a contract for the sale of goods.

'(1) A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.

'(2) An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.

'(3) Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.' (Emphasis supplied.)

[6] The courts should be extremely hesitant in holding a contract void for indefiniteness, particularly where one party has performed under the contract and allowed the other party to obtain the benefit of his performance.

***409** In exchange for signing the $2,000,000 note in connection with the new loan from the Pension Fund, Blackhawk was to eventually acquire 25 per cent of Data Lease's 80 per cent interest in the Miami National Bank. This was the agreement and the intent of all the parties.

The term 'cash-flow benefit' was intended to include the income derived by Data Lease from its continued holding of the bank stock, for, by use of the option agreement instead of the straight sale of stock to Blackhawk, Data Lease was able to gain financially. Blackhawk should participate.

[7] As Professor Corbin stated in his treatise, Corbin on Contracts, Vol. 1 (1963), s 97, at 424:

'If the parties provide a practicable, objective method for determining this price or compensation, not leaving it to the future will of the parties themselves, there is no such indefiniteness or uncertainty as will prevent the agreement from being an enforceable contract.'

The contract should not be held void for uncertainty unless there is no other way out. As was stated by Justice Cardozo in Heyman Cohen & Sons, Inc. v. M. Lurie Woolen Co., Inc., 232 N.Y. 112, 133 N.E. 370, 371, 'Indefiniteness must reach the point where construction becomes futile.'

Again turning to Professor Corbin, he states at s 95, page 400:

'If the parties have concluded a transaction in which it appears they intent to make a contract, the court should not frustrate their intention if it is possible to reach a fair and just result, even though this requires a choice among conflicting meanings and the filling of some gaps that the parties have left.'

Williston on Contracts, (3rd Edition, 1968), Vol. 11, s 1424, page 813, states:

'The law does not favor, but leans against the destruction of contracts because of uncertainty; and it will, if feasible, so construe agreements as to

carry into effect the reasonable intentions of the parties if that can be ascertained.'

Professor Corbin again states at s 95, page 396:

'In considering expressions of agreement, the court must not hold the parties to some impossible, or ideal, or unusual standard. It must take language as it is and people as they are. All agreements have some degree of indefiniteness and some degree of uncertainty.'

Professor Williston states at page 819:

'It seems probable that the difficulty regarding uncertainty has been overemphasized; Certainly, it should not be allowed to hamper or restrict equitable relief further than necessity requires.' (Emphasis supplied.)

In Stone v. Barnes-Jackson Co., Inc., 129 Fla. 816, 176 So. 767 (1937), this Court held that specific performance could be granted on an oral contract to execute a lease 'in the usual form customarily used in Miami.'

The option agreement in the case Sub judice was not so uncertain in its terms as to require dismissal of the specific performance suit.

[8][9] The trial court also held that the option was not properly exercised in that cash payments were not made upon the exercise of the option. Where a dispute exists as to the amount of money to be paid on the exercise of an option, such a dispute does not vitiate an otherwise perfectly valid exercise of the option, particularly where, as here, the calculation of both the total price and the amount due at closing involved highly complex accounting computations. See MacArthur v. North Palm Beach Utilities, Inc., 202 So.2d 181 (Fla.1967). Where there is a valid dispute, the holder of the option is not obligated to pay the price demanded by the optionor or risk losing his option. To hold otherwise ***410** would be to give every optionor a sword to hold over the head of every optionee.

In addition, it appears that Data Lease was making performance impossible in refusing to allow a review of its books and records. There was no way for Blackhawk to know the exact amount to be paid upon the exercise of the option. As stated in Sharp v. Williams, 141 Fla. 1, 192 So. 476, 480 (1939):

"When a party stipulates that another shall do a certain thing, he thereby impliedly promises that he will himself do nothing which will hinder or obstruct that other in doing that thing' (Gay v. Blanchard, 32 La.Ann. 497, quoted with approval in Patterson v. Meyerhofer, 204 N.Y. 96, 97 N.E. 472); and indeed if the situation is such that the cooperation of one party is an essential prerequisite to performance by the other, there is not only a condition implied in fact qualifying the promise of the latter, but also an implied promise by the former to give the necessary cooperation.'

See also Melvin v. West, 107 So.2d 156, 160 (Fla.App.2d, 1958).

The trial court erred in holding that the option was not properly exercised.

This case was before the equity side of the trial court, and the gross inequity of Data Lease's position is most apparent. It has gained financially after Blackhawk rescued it from financial disaster. At the same time Blackhawk has received nothing except a $2,000,000 debt. The effect of the District Court of Appeal's decision is to allow the defendant, Data Lease, to inequitably obtain the benefit of $2,000,000 of plaintiffs' financial credit and at the same time bar the plaintiffs from their rights under the contract.

The decision of the District Court of Appeal is quashed and this cause is remanded to the District Court of Appeal with instructions to further remand same to the trial court for the purpose of determining the rights of the parties under the contract.

It is so ordered.

ERVIN, McCAIN and DEKLE, JJ., concur.
OVERTON, J., dissents with opinion.

OVERTON, Justice (dissenting).

It is my opinion that there is no conflict on the same point of law to justify this Court taking jurisdiction of this cause.

On the merits, it is my opinion that the holding of the trial court and the unanimous affirmance by the Fourth District Court of Appeal should be sustained and the petitioner relegated to its remedy at law.

The petitioner has sought specific performance of a unique and involved stock option agreement. It is uncontroverted, and the trial court so found, that the petitioner, Blackhawk, in exercising its option to purchase the subject stock, failed to furnish the respondent, Data Lease, with the cash payment, assumption agreement, or promissory note, but, in lieu thereof, demanded instruments for execution and deductions from the purchase price. These deductions were claimed under the provisions of paragraph 6(b) of the agreement, which provided as follows:

'Any cash flow benefit, including any tax benefits, derived by Data as a consequence of its holding, hypothecation, assignment, pledge, etc. of MNB Stock shall inure proportionately to Blackhawk in the calculation of any payments due between the parties.'

In considering the applicability of this paragraph to the asserted deductions claimed by petitioner-Blackhawk, the trial court said:

'. . . The parties were under pressure from the above-mentioned fund ***411** to close the loan that day, and though they discussed the 'cash flow benefits' idea, no one seemed certain just what was included therein. In any event, paragraph 6(b) was written into the agreement with the idea that it would be more clearly defined and elaborated upon later.

'The evidence shows that the parties were never subsequently able to agree upon the meaning of those terms. The terms 'cash flow benefits', have no fixed meaning in accounting circles, and the parol evidence adduced fails to demonstrate the intention of the parties with the clarity necessary to justify specific performance.'

The petitioner-Blackhawk, in asserting its demands under this 'cash flow theory,' claimed a reduction of its purchase price by the amount of all future interest required to be paid upon loans it was assuming. The trial judge characterized this demand as:

'. . . (P)erhaps the most unusual of its demands was its insistence upon reducing its purchase price to defendant by the amount of all future interest which it would be required to pay under the agreement on the outstanding loans, a percentage of which it was assuming.'

The contention that future interest was a deductible item under the cash flow theory never surfaced until notice to exercise the option was given. In these proceedings the petitioner, Blackhawk, presented evidence that it would not exercise the option if this deduction were not allowed.

It is my opinion that the findings of fact made by the trial judge are fully justified by the evidence and his conclusions of law have a solid foundation in the law of specific performance existing in this state.

The majority opinion, holding in essence that equity should intervene to rewrite the contract in order to make sure that Data Lease is not unjustly enriched, sets a new precedent in the field of specific performance.

I would discharge the writ and affirm the trial court and the District Court of Appeal.

Fla. 1974.
Blackhawk Heating & Plumbing Co., Inc. v. Data Lease Financial Corp.

302 So.2d 404
(Cite as: 302 So.2d 404)

302 So.2d 404

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176 A.D.2d 131
(Cite as: 176 A.D.2d 131, 574 N.Y.S.2d 18)

C

Central Fed. Sav. v National Westminster Bank, U.S.A.
176 A.D.2d 131, 574 N.Y.S.2d 18
N.Y.A.D.,1991.

176 A.D.2d 131, 574 N.Y.S.2d 18, 1991 WL 179568

Central Federal Savings, F.S.B., Appellant,
v.
National Westminster Bank, U.S.A., Respondent.
Supreme Court, Appellate Division, First Department, New York

(September 12, 1991)

CITE TITLE AS: Central Fed. Sav. v National Westminster Bank, U.S.A.

Order, Supreme Court, New York County (Herman Cahn, J.), entered June 27, 1990, which granted the motion by defendant National Westminster Bank, U.S.A. (hereinafter "NatWest") for reargument and renewal of its prior motion for summary judgment pursuant to CPLR 3212, and recalled its prior order dated September 15, 1989, and granted defendant's motion for summary judgment dismissing the plaintiff's complaint in its entirety, unanimously affirmed, with costs.

Plaintiff commenced this action to recover $35,000,000 in ***132** damages based on defendant NatWest's breach of an alleged contract to purchase one of the plaintiff's branch offices located at 1388 Third Avenue in Manhattan. The contract allegedly arose out of an exchange of letters between the parties, wherein defendant offered to purchase the subject branch office for $950,000, subject to "agreement on all terms and conditions relating to the proposed acquisition, to our satisfaction with all legal matters, and to the approval of our Board of Directors."

Defendant moved for summary judgment, which was denied upon the court's conclusion that there was an issue of fact with respect to whether the letters exchanged by the parties regarding the proposed sale constituted a completed contract. On its motion for reargument and renewal, NatWest stated that in preparation for discovery it discovered an internal document entitled "The Recommendation to the Board of Directors to Purchase the Branch of Central Federal F.S.B.", which allegedly evinced that no agreement on an essential term had ever been reached.

Initially, we find that the IAS court did not abuse its discretion in granting reargument and renewal. We note that insofar as the court granted renewal, the internal document recently "discovered" by NatWest was properly considered.

In determining whether a contract exists, the inquiry centers upon the parties' intent to be bound, i.e., whether there was a "meeting of the minds" regarding the material terms of the transaction. *(Martin Delicatessen v Schumacher,* 52 NY2d 105.) The issue is generally one of law, properly determined on a motion for summary judgment *(Consolidated Edison Co. v General Elec. Co.,* 161 AD2d 428, 429-430).

The letters upon which plaintiff claims that a contract exists do not evidence the required meeting of the minds on all material terms. NatWest's offer was contingent upon agreement as to certain material terms, as well as approval by its Board of Directors. The various affidavits submitted by the parties show that there was no agreement on the essential term concerning payment for the assumption by the purchasing bank of Central Federal's deposit liabilities, which directly bore on the price paid for the branch. In addition to this crucial term, it is clear that there were numerous other details to be worked out which involve regulatory approval. All of this is borne out by the fact that the draft agreement sent to NatWest by Central Federal was over 30 pages long.

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(Cite as: 176 A.D.2d 131, 574 N.Y.S.2d 18)

Thus, this situation cannot be viewed as one in which the ***133** parties had only to formalize an agreement already reached *(see, Matter of Municipal Consultants & Publishers v Town of Ramapo,* 47 NY2d 144). The letters which were exchanged did not indicate a present intent to be bound, but rather an intent to negotiate the essential terms of the binding agreement *(Aces Mechanical Corp. v Cohen Bros. Realty & Constr. Corp.,* 136 AD2d 503). Essential terms such as ultimate price were left open. Clearly, there was no "meeting of the minds" to support the existence of an enforceable contract.

Concur--Carro, J. P., Wallach, Kupferman and Smith, JJ.

N.Y.A.D.,1991.
Central Fed. Sav. F.S.B. v National Westminster Bank, U.S.A.
176 A.D.2d 131, 574 N.Y.S.2d 186021991 WL 179568999, 574 N.Y.S.2d 186021991 WL 179568999

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639 F.2d 250, 115 L.R.R.M. (BNA) 5100
(Cite as: 639 F.2d 250)

H

United States Court of Appeals,
Fifth Circuit.
Unit A
George B. DICKINSON, Plaintiff-Appellant,
v.
AUTO CENTER MANUFACTURING CO., John W. McLeod, et al., Defendants-Appellees.

No. 80-1483
Summary Calendar.
March 12, 1981.

Former employee brought action against corporation and its president for breach of contract and fraud. Following remand, 594 F.2d 523, the United States District Court for the Southern District of Texas, Ross N. Sterling, J., ordered that plaintiff take nothing, and plaintiff appealed. The Court of Appeals held that evidence on issue of whether there was sufficient consideration for the alleged employment contract was sufficient for jury, and plaintiff was entitled to charge instructing jury on what constituted consideration under state law.

Affirmed in part; reversed in part.

West Headnotes

[1] Contracts 95 51

95 Contracts
95I Requisites and Validity
95I(D) Consideration
95k49 Nature and Elements
95k51 k. Benefit to promisor. Most Cited Cases

Contracts 95 52

95 Contracts
95I Requisites and Validity
95I(D) Consideration
95k49 Nature and Elements
95k52 k. Detriment to promisee. Most Cited Cases

In Florida, the primary element of consideration essential to formation of a contract is satisfied by any act of plaintiff from which defendant derives benefit, or by any labor, detriment, or inconvenience sustained by a plaintiff at either defendant's express or implied consent; the detriment which may be found to constitute adequate consideration for a promise need not be an actual loss to the promisor and may be based on either the express or implied consent of the promisee.

[2] Corporations and Business Organizations 101 1384(1)

101 Corporations and Business Organizations
101V Capital and Stock
101V(C) Issuance of Stock
101k1379 Consideration
101k1384 Services
101k1384(1) k. In general. Most Cited Cases
(Formerly 101k116)

Inasmuch as plaintiff's employment was a continuing contract terminable at will of either employer or plaintiff, plaintiff's continued employment and continued guarantees for the financing of employer could, if credited, constitute sufficient consideration for the promise of employer to issue stock to plaintiff.

[3] Labor and Employment 231H 873

231H Labor and Employment
231HVIII Adverse Employment Action
231HVIII(B) Actions
231Hk873 k. Questions of law or fact. Most Cited Cases
(Formerly 255k43 Master and Servant)

Labor and Employment 231H 874

231H Labor and Employment
231HVIII Adverse Employment Action

639 F.2d 250, 115 L.R.R.M. (BNA) 5100
(Cite as: 639 F.2d 250)

231HVIII(B) Actions
231Hk874 k. Instructions. Most Cited Cases
(Formerly 255k44 Master and Servant)

In action brought by former employee against employer to recover for breach of oral employment contract and fraud, evidence on issue of whether there was sufficient consideration for the alleged employment contract was sufficient for jury, and plaintiff was entitled to charge instructing jury on what constituted consideration under state law.

***251** Jack W. Hayden, Houston, Tex., Hubbard, Thurman, Turner, Tucker & Glaser, John R. Feather, Dallas, Tex., for plaintiff-appellant.

Butler, Binion, Rice, Cook & Knapp, Norman Riedmueller, Houston, Tex., Wolfe, Kirschenbau, Caruso & Mosley, Joe Teague Caruso, Cocoa Beach, Fla., for defendants-appellees.

Appeal from the United States District Court for the Southern District of Texas.

Before BROWN, POLITZ and TATE, Circuit Judges.

PER CURIAM:

Plaintiff, George B. Dickinson, appeals District Court's judgment ordering he take nothing and taxing all costs to him in this action for breach of an oral employment contract and fraud against defendants, Auto Center Manufacturing Co. (Auto Center) and its president, John W. McLeod, after jury trial on remand, Dickinson v. Auto Center Manufacturing Co., 594 F.2d 523, 530 (5th Cir. 1979). In this second appeal, Dickinson alleges District Court erred in failing to (i) apply the law of the case by submitting to the jury the issue of consideration and (ii) enter judgment on the jury's verdict in conformity with this Court's prior opinion. Concluding District Court failed to properly instruct the jury on the issue of consideration, we reverse and remand again for new trial.

I.

We will not set forth the facts fully as they are recorded in our prior opinion. Rather, we will refer to them only as is necessary to discuss the issues before us on this appeal.

In the prior opinion this Court held the May 1972 oral agreement between the parties constituted an oral contract, but was within the Texas Statute of Frauds, thus precluding Dickinson from recovery. 594 F.2d at 528. With respect to the March 27, 1973 agreement, however, the panel concluded Dickinson sufficiently proved a contract existed, id.,[FN1] and also established defendants breached the agreement. Id. at 529.[FN2] Based on Dickinson's production of substantial evidence on each element of his claim defendants breached the oral contract made on March 27, 1973, this Court determined reasonable persons could conclude Dickinson was entitled to recover the value of twenty-five percent of Auto Center stock and remanded for "a new trial on the issue of defendants' liability for breaching the March 27, 1973 oral agreement." Id. at 530.

FN1. The panel specifically stated:

> Although the evidence on the terms of the oral contract was conflicting, both John McLeod and Dickinson testified that some sort of an agreement was reached on March 27, 1973. Dickinson thus sufficiently proved that a contract existed.
>
> 594 F.2d at 528.

FN2. In making this determination, this Court resolved Dickinson produced substantial evidence on each element of his claim.

> Dickinson produced substantial evidence on each element of his claim that defendants breached the oral contract made on March 27, 1973.

594 F.2d at 529.

On remand, District Court determined the case would be submitted to the jury on three special interrogatories to determine (i) existence of a contract, (ii) fair market value of 2,500 shares of Auto Center stock, ***252** and (iii) consideration for the contract.[FN3] Although interrogatory One instructed the parties on the requisites for determination of existence of a contract and interrogatory Two included a definition of "fair market value," [FN4] District Court failed to apprise the jury what constitutes consideration under Florida law.

FN3. The special interrogatories and jury answers were:

SPECIAL INTERROGATORY NO. 1 :

Do you find from a preponderance of the evidence that George B. Dickinson and John W. McLeod and Auto Center Manufacturing Company entered into an oral contract on March 27, 1973 under the terms of which 2,500 shares or 25% of the stock of Auto Center Manufacturing Company would be issued to George B. Dickinson immediately in exchange for $25,000 to be paid by George B. Dickinson on September 30, 1973, with funds to be provided to him by Auto Center Manufacturing Company?

ANSWER: We do.

SPECIAL INTERROGATORY NO. 2 :

What do you find from a preponderance of the evidence was the fair market value of 2,500 shares or 25% of the stock of Auto Center Manufacturing Co. on or about March 27, 1973?

ANSWER: $694,666.00

SPECIAL INTERROGATORY NO. 3 :

Do you find from a preponderance of the evidence that George B. Dickinson obligated himself in any way, other than to continue his existing employment with Auto Center Manufacturing Company, or gave up anything of value, no matter how slight, to the benefit of John W. McLeod or Auto Center Manufacturing Company to supply the $25,000 to be paid by George B. Dickinson for the stock on September 30, 1973?

ANSWER: We do not.

FN4. With regard to interrogatories One and Two, District Court issued these instructions:

INSTRUCTION: In order to answer Special Interrogatory No. 1 'We do' you must find from a preponderance of the evidence that there was a meeting of the minds of the parties as to the terms of the agreement, by that is meant that the parties agreed to the same thing at the same time and intended to be bound by the agreement without reducing it to writing.

If you have answered Special Interrogatory No. 1 'We do' and only in that event you will answer Special Interrogatory Nos. 2 and 3.

INSTRUCTION: In connection with Special Interrogatory No. 2, you are instructed that 'fair market value' means what a willing buyer would pay and what a willing seller would accept, neither being under any obligation or compulsion either to buy or sell, and both with full knowledge of all pertinent facts.

Dickinson objected to this lack of instruction on interrogatory number Three, requesting the jury

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be instructed a promise to do some act or to refrain from some act is sufficient to support a contract. District Court overruled the objection, rejected this request, and submitted the interrogatories to the jury as originally proposed. The jury found (i) the parties entered into an oral contract on March 27, 1973, (ii) the fair market value of twenty-five percent of Auto Center stock equals $694,666, but that (iii) Dickinson did not obligate himself in any way, other than to continue his existing employment with Auto Center or give up anything to the benefit of John McLeod or Auto Center in return for the obligation of Auto Center to supply Dickinson $25,000 to pay for 2,500 shares of stock. Based on these responses, District Court entered judgment on March 27, 1980, ordering Dickinson take nothing and the action be dismissed on the merits. Without abandoning his earlier objections to the inadequacy of the charge on consideration, Dickinson moved to alter or amend this judgment, arguing submission or nonsubmission of the issue of consideration was error because it had been resolved by the prior appeal and was the law of the case. District Court similarly overruled this motion and Dickinson brings this appeal.

II.

Dickinson argues since the first panel found a contract existed there no longer remained any issue or question regarding the existence or nonexistence of consideration for the contract. Instead, he contends the only issues remaining after the prior appeal were (i) the exact terms of the contract, (ii) whether the parties' agreement was intended to be mutually binding without its reduction to writing and (iii) the damages he suffered as a result of Auto Center's breach of the contract. Therefore, Dickinson asserts once the jury determined under interrogatory number One an agreement existed although not reduced to writing***253** and the fair market value of the stock in accordance with interrogatory number Two, submission of the question on consideration by interrogatory number Three was meaningless and improper.

In response, Auto Center points out the first panel decision involved only the review of a directed verdict. Auto Center contends this Court's previous opinion did not deprive the parties of a trial on the merits before a jury and District Court properly submitted the issue of consideration under interrogatory number Three.

Accepting generally this proposition, the question becomes one of Florida law and the adequacy of the District Judge's jury instructions on the controlling Florida principles. Unfortunately, neither of the briefs for the combatants even discussed any Florida cases, much less their analysis and application. Consequently this Court requested supplemental briefs on seven inquiries. [FN5]

FN5. 1. The Florida law with respect to consideration and failure of consideration with factual discussion as applied to this case.

2. Whether pleadings, presented the defense of failure of consideration. See F.R.Civ.P. 8(c). If not, what is consequence?

3. In view of answers to Interrogataries 1 and 2, what issue is present under Florida law with respect to consideration or failure thereof?

4. Did the charge submitted by District Court adequately instruct the jury with regard to consideration or failure thereof so as to enable the jury to make answers to the interrogotories? See F.R.Civ.P. 49(a).

5. Did Interrogotary Three adequately submit to the jury the issue of consideration under Florida law?

6. Were any or all of the foregoing issues regarding consideration tried by consent of the parties? See F.R.Civ.P. 15(b).

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7. What evidence of consideration is present in this case?

[1] Based on the supplemental responses it is clear that in Florida the primary element of consideration essential to formation of a contract, see, e. g., Frissel v. Nichols, 94 Fla. 403, 114 So. 431 (1927), is satisfied when any act of a plaintiff from which a defendant derives benefit, or by any labor, detriment, or inconvenience sustained by a plaintiff at either defendant's express or implied consent is present. Tampa Northern R. R. Co. v. City of Tampa, 104 Fla. 481, 485, 140 So. 311, 313 (1932). Moreover, the detriment which may be found to constitute adequate consideration for a promise need not be an actual loss to the promisor and may be based on either the express or implied consent of the promisee.

The Florida Courts' application of these principles have been broad and have often been utilized to interpret employment contracts. Indeed, particularly where employment was a continuing contract terminable at the will of either the employer or employee, the Florida Courts have held continued employment constitutes adequate consideration to support a contract. Tasty Box Lunch Co. v. Kennedy, 121 So.2d 52, 54 (Fla.App.1960).

[2] Inasmuch as Dickinson's employment was a continuing contract terminable at the will of either Auto Center or himself, his continued employment and continued guaranties for the financing of Auto Center could, if credited, constitute sufficient consideration for the promise of McLeod and Auto Center to issue stock to him. Additionally, although our review of the pleadings indicates this may have been tried during the first trial by implied consent of the parties, the pleadings disclose Auto Center merely denied generally Dickinson's allegations. It did not plead the affirmative defense of failure of consideration as required by F.R.Civ.P. 8(c).

[3] Although the substantially uncontradicted evidence of Dickinson's continued employment and the continued guarantees for financing of Auto Center come close to establishing consideration as a matter of law, we conclude that in light of the confusion existing, traced in part to some unintended ambiguities in our first decision, we should remand this case for determination of the issue of consideration under Florida law.[FN6] This Court affirms the jury findings as ***254** to interrogatories One and Two so the remand will be limited to the existence or nonexistence of consideration under Florida law.

FN6. This requires, of course, adequate full instruction on the controlling Florida law. The District Court's effort in phrasing interrogatory Three, see note 1, supra, unaccompanied by an explanatory general charge, was wholly deficient in substance as well as in form. See, e. g., Jackson v. King, 223 F.2d 714, 717-18 (5th Cir. 1955) .

In doing so we once again emphasize that we are not necessarily mandating a full fledge jury trial on this issue. The District Court may well have to conclude on motion for summary judgment, motion for directed verdict at the conclusion of Dickinson's case, or renewed by like motion at the conclusion of all the evidence or on motion for judgment n. o. v., that consideration is established as a matter of law. See Carss v. Outboard Marine, 252 F.2d 690, 693 (5th Cir. 1958).

AFFIRMED IN PART; REVERSED IN PART.

C.A.Tex., 1981.
Dickinson v. Auto Center Mfg. Co.
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53 Sickels 288
(Cite as: 53 Sickels 288)

Eighmie v Taylor
53 Sickels 288
N.Y. 1885.

53 Sickels 288, 98 N.Y. 288, 1885 WL 10558

JEREMIAH EIGHMIE, Respondent,
v.
EDGAR B. TAYLOR, Administrator, etc., Appellant.
Court of Appeals of New York.

Argued January 30, 1885.
Decided March 3, 1885.

CITE TITLE AS: Eighmie v Taylor

While the rule prohibiting oral evidence varying the terms of a written contract does not apply to separate independent collateral undertakings, or where the original contract was verbal, and a part only reduced to writing, yet where it appears by an inspection of a written contract, read, it may be, in the light of surrounding circumstances in order to its proper understanding and interpretation that it was intended to express the whole contract, it will be conclusively presumed so to do, and oral evidence may not be resorted to to prove that there was a stipulation or an undertaking necessarily connected with, and one of the elements of the contract, but not contained therein.

A warranty as to the present quality and condition of property sold is connected with, and belongs to a contract of sale as one of its elements.

In an action brought to recover damages for breach of an alleged warranty it appeared that C., defendant's intestate, contracted to sell to plaintiff a one-half interest in a lease of certain oil lands, in the tools and fixtures used in working the wells on the land, and in the oil stored on the land, for $6,000, and to receive in payment a mortgage for that amount. C. executed and delivered to plaintiff a conveyance, by the terms of which he sold and assigned his interest in said property, and plaintiff assumed and agreed to perform all the conditions of the lease, to release C. from all liability therefrom, and to assume any and all debts or liabilities of any nature whatsoever existing against C. by reason of his interest in the lease or in working the well. The deed closed with a declaration, stating its 'intent' to be that C. should convey to plaintiff 'all his right and interest in and to said lease, business and fixtures,' and that plaintiff in accepting the same should release C. 'of and from all liability arising therefrom, he himself assuming the same.' Plaintiff assigned to C. the morgage which secured $6,000 and interest, with guaranty of payment, and plaintiff also executed to C. an agreement to refund to E. the interest which had then accrued, upon its payment by the mortgagor. *Held,* that taking the writings together they showed a full, definite and completed agreement of bargain and sale, and must be conclusively presumed to contain the whole contract; and that, therefore, evidence was improperly received of an oral warranty on the part of E. that the oil wells were yielding at the time a specified quantity of oil, and also sufficient gas to furnish fuel for the works; that the oil was then worth a specified sum per barrel; that the machinery and fixtures were new and of improved patterns, and that the debts did not exceed $1,000.

Unger v. Jacobs (7 Hun, 220),*Morgan v. Smith* (Id. 244),*Witbeck v. Waine* (16 N. Y. 532),*Rozier v. B., N. Y. & P. R. R. Co.* (15 N. Y. Weekly Dig. 99), *B. F. Ins. Co. v. Burger* (10 Hun, 56),*Wheeler v. Billings* (38 N. Y. 263),*Chapin v. Dobson* (78 Id. 74),*Jeffery v. Walton* (1 Stark. 213). *Batterman v. Pierce* (3 Hill, 171),*Erskine v. Adeane* (L. R., 8 Ch. App. 756), *Morgan v. Griffith* (L. R., 6 Exch. 70), distinguished.

98 N.Y. 288 (1885)

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, entered upon an order made May 31, 1884, which affirmed a judgment in favor of plaintiff, entered upon a verdict.

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(Cite as: 53 Sickels 288)

This action was brought against defendant, as administrator of the estate of James Collingwood, deceased, to recover damages for a breach of a warranty alleged to have been made by Collingwood on sale of an interest in certain property described in a conveyance thereof, executed by said Collingwood to plaintiff, of the body of which the following is a copy:

'This indenture, made and entered into this 28th day of December, 1872, between James Collingwood, of the city of Poughkeepsie, county of Dutchess, and State of New York, of the first part, and Jeremiah Eighmie, of Roselle, New Jersey, of the second part, witnesseth, that the party of first part, for and in consideration of the sum of six thousand dollars to him in hand paid, the receipt of which is hereby acknowledged, has sold, and by these presents does hereby sell, assign, transfer and set over unto said party of the second part, his executors, administrators and assigns, all his undivided one-half interest in a certain lease known as lease No. two hundred and seven (207), situate in Triumph tract, Deerfield township, Warren county, State of Pennsylvania, and upon which is located the Collingwood wells, Nos. 1 and 2, and all the personal property, tools, fixtures, etc., thereon, situate and belonging to the same, and all the oil now stored on said tract, which said first party owns or in which he has an interest.

And the party of the second part in accepting said conveyance, and in consideration thereof, hereby covenants and agrees to, and with said party of the first part, his heirs, executors or administrators, to assume and perform all the covenants and conditions contained in said lease, and to release said first party of and from any and all liabilities therefrom, and to assume any and all debts or liabilities of any nature whatsoever now existing against said first party by reason of his said interest in said lease, or in working said wells, whether such liability or debt be against said first party singly, or against the firm of Collingwood & Co., of which he is a member.

It being the intent of this instrument, the said Collingwood, in consideration of said sum of money before mentioned, shall convey to said Eighmie all his right and interest in and to said lease, business and fixtures, and that said Eighmie, in accepting the same, shall release said Collingwood of and from all liability arising therefrom, he himself assuming the same.'

Simultaneously with the execution of this conveyance, plaintiff executed to Collingwood, in payment of the consideration, an assignment of a bond and mortgage, for the sum of $6,000 with interest, with a guaranty of payment, and Collingwood executed to plaintiff an agreement to pay plaintiff the interest which had accrued at the time of the assignment as soon as collected.

Plaintiff alleged and was permitted to prove on the trial under objection and exception, that Collingwood, in the negotiations for the sale, represented and warranted that the wells were yielding at least sixteen barrels of oil per day, and gas or water to supply the engines working them with all necessary fuel, that the oil was then worth $4 per barrel, that the machinery, tools and fixtures were of the latest and most improved patterns, new and in good condition, and that the debts and liabilities did not exceed $1,000, all of which representations and warranties were untrue.

Samuel Hand for appellant. All statements and warranties made by Collingwood to Eighmie, or by Eighmie to Collingwood, are merged in the three written instruments executed at the consummation of the sale. As these instruments contain no words of representation or warranty, no parol proof can be given showing such statements or warranties, to enlarge or vary the writing. (*Juillard v. Chaffee,* 92 N. Y. 534;*Mumford v. McPherson,* 1 Johns. 413;*Bayard v. Malcolm,* Id. 452;*Niles v. Culver,* 8 Barb. 205;*Filkins v. Whyland,* 24 N. Y. 339;*Foot v. Bentley,* 44 Id. 166;*Speckels v. Saxe,* 1 E. D. S. 204; *Wilson v. Deen,* 74 N. Y. 531, 538;*Green v. Collins,* 86 Id. 254;*Van Vliet v. McLean,* 23 Hun, 207.) Writings in the nature of contracts may not be

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altered or enlarged by parol. (*Randall v. Rhodes,* 1 Curt. [U. S.] 90; *Sennett v. Johnston,*9 Penn. St. 335; *Wilson v. Deen,* 74 N. Y. 532;*Naumberg v. Young,* 44 N. J. L. 331;*Hei v. Heller,* 53 Wis. 415.) Every thing relating to the subject handled in the writing must in the absence of fraud or mistake appear in the paper or it will not be a part of the agreement. (*Juillard v. Chaffee,* 92 N. Y. 529.) The court erred in allowing the witness Barber to testify as to the flowing condition of the wells on the leased property in August and September, 1873, nine months after the sale. (*Sunderlin v. Wyman,* 1 T. & C. 17;*Flanagan v. Maddin,* 81 N. Y. 623.) This action being on contract for breach of ***292** warranty and not for fraud or deceit, the same rule would apply as to the damages for breach as for that of title or against incumbrances, viz.: the difference between the price paid and the actual value of the property, in any event not to exceed the price paid and interest for six years. (*Dimmick v. Lockwood,* 10 Wend. 155;*Krumn v. Beach,* 96 N. Y. 406 .) The court erred in charging the jury that they might compute interest on the damages from the time of breach, in 1872, down to the trial. (*White v. Miller,* 78 N. Y. 393;*Little v. Banks,* 85 Id. 258;71 Id. 134.) The court erred in admitting proof that the debts assumed and paid by Eighmie were greater than they had been stated by Collingwood. (*McKnight v. Dunlop,* 1 Seld. 537; *Brooks v. Christopher,* 5 Duer, 216;*Lathrop v. Bramhall,* 64 N. Y. 366; *Peck v. York,* 47 Barb. 131;*Sharpe v. Freeman,* 45 N. Y. 807.)

I. H. Maynard for respondent. The trial court properly held that the plaintiff might prove a parol warranty of the capacity, condition and productiveness of the wells, and that if such warranty was established to the satisfaction of the jury, and damage resulted, the plaintiff was entitled to recover. (*Chapin v. Dobson,* 78 N. Y. 74;*Juillard v. Chaffee,* 92 Id. 529;*Remington v. Palmer,* 62 Id. 33;*Hope v. Baler,* 58 Id. 380;*S. C.,* 9 Sup. Ct. 458;*Van Brunt v. Day,* 81 N. Y. 251;*Dempsey v. Kip,* 61 Id. 162;*Unger v. Jacobs,* 7 Hun, 220;*Schenectady v. Queen,* 15 Hun, 551;*Cassidy v. Begoden,* 38 Sup. Ct. 180; *Lewis v. Seabury,* 74 N. Y. 409;*Lanphire v. Slaughter,* 61 How. Pr. 36;*Fisher v. Abeel,* 66 Barb. 381;*Wheeler v. Billings,* 38 N. Y. 263;*Rexford v. Brunnell,* 1 Id. 396;*Bingham v. Wederwax,* Id. 509; *Rosier v. B., etc., R. R. Co.,* 15 Weekly Dig. 99;*Batterman v. Pierce,* 3 Hill, 171.) Where there is an agreement of purchase, and a written transfer of the property purchased is made in accordance therewith, it is always competent to prove by parol an independent and antecedent or contemporaneous promise or agreement of the vendor which induced the purchase and entered into and formed a part of the consideration therefor. ***293** (*Rozier v. B., N. Y. & P. R. R. Co.,* 15 Weekly Dig. 99;*Witbeck v. Waine,* 16 N. Y. 532;*Wheeler v. Billings,* 38 Id. 263;*Unger v. Jacobs,* 7 Hun, 220;*Morgan v. Smith,* Id. 244;*Brewster's F. Ins. Co. v. Berger,* 10 Id. 56; *Adams v. Hull,* 2 Denio, 306;*Carter v. Hamilton,* Seld. Notes, 80; *Murray v. Smith,* 1 Duer, 412.) A party or person interested in the event of an action may testify to a conversation which he overheard between the deceased and a third person, and in which he did not participate. (*Cary v. White,* 59 N. Y. 326;*Hildebrant v. Crawford,* 65 Id. 107;*Head v. Teter,* 10 Hun, 548;*Nichols v. Van Valkenburg,* 15 Id. 230;*Holcomb v. Holcomb,* 20 Id. 159;*Marsh v. Gilbert,* 2 Redf. 465;*Gross v. Welwood,* 9 Rep. 587; *Simmons v. Sisson,* 26 N. Y. 264;*Lobdell v. Lobdell,* 36 Id. 327.) The acts and declarations of the agent, while engaged in the transaction of the business of his employment and relating directly thereto, are admissible as part of the *res gestæ.*(1 Greenl. on Ev. [4th ed.], § 113, p. 129 *et seq.; Low v. Hart,* 90 N. Y. 457;*Chapman v. Erie R. Co.,* 55 Id. 583;*Hunter v. R. I. & M. Co.,* 20 Barb. 493;*Nelson v. L. I. R. R. Co.,* 7 Hun, 142.) The statements of Collingwood in regard to the market-price or value of the oil constituted a warranty, if the jury found that they were so intended. (*Harris v. Osburn,* 6 Weekly Dig. 442;*Folon v. Preston,* 12 Id. 13;*Carley v. Wilkins,* 6 Barb. 557;*Brown v. Tuttle,* 66 Id. 169.) There was abundant proof upon which to submit to the jury the question of the warranty. (*Duffy v. Mason,* 8 Cow. 25;*Whitney v. Sutton,* 10 Wend. 412;*Carey v. Wilkins,* 6 Barb. 557;*Holman v. Doyd,* 12 Id. 336;*Rogers v. Ackerman,* 22 Id.

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134;*Wilbur v. Cartright,* 44 Id. 536;*Hawkins v. Pemberton,* 51 N. Y. 198.) The court properly charged the jury that, if they found for the plaintiff, they might, in determining the amount of damages, in their discretion add interest by way of damages, if they saw fit to do it. (*Home Ins. Co. v. Penn. R. R. Co.,* 11 Hun, 182;*Hodge v. N. Y. C. & H. R. R. R. Co.,* 27 Id. 394;*Black v. Camden & Amboy,* 45 Barb. 40;*Walrath v. Redfield,* 18 N. Y. 457;*Parrot v. Knickerbocker Ice Co.,* 46 Id. 361;***294***Mairs v. Manhattan R. E. Ass'n,* 89 Id. 498; 2 Pars. on Cont. [ed. of 1855] 382; Sedg. on Dam. [4th ed.] 446.)

FINCH, J.

Some of the exceptions to the rule which forbids parol evidence varying the terms of a written contract have been recently considered in this court. (*Chapin v. Dobson,* 78 N. Y. 74.) It was then said that the rule does not apply where the original contract was verbal and entire, and a part only was reduced to writing, and that it has no application to collateral undertakings. What was meant by the first of these two exceptions is apparent from the reasoning of the opinion and the authorities brought to its support. It was said of the instrument then in question that there was nothing upon its face to show that it was intended to express the whole contract between the parties, the inference being, as was declared in an earlier case, that where a contract does indicate such intention and design, and is one consummated by the writing, the presumption of law arises that the written instrument contains the whole of the agreement, and that where there is such formal contract of bargain and sale executed in writing there can be no question but that the parties intended the writing as a repository of the agreement itself. (*Filkins v. Whyland,* 24 N. Y. 338 .) This first exception to the general rule is capable, if too broadly and loosely interpreted, of working the utter destruction of the rule. (1 Greenl. on Ev., § 284, a.) For if we may go outside of the instrument to prove that there was a stipulation not contained in it, and so that only part of the contract was put in writing, and then, because of that fact, enforce the oral stipulation, there will be little of value left in the rule itself. The writings which are protected from the effect of contemporaneous oral stipulations are those containing the terms of a contract between the parties, and designed to be the repository and evidence of their final intentions. If upon inspection and study of the writing, read, it may be, in the light of surrounding circumstances in order to its proper understanding and interpretation, it appears to contain the engagements of the parties, and to define the object ***295** and measure the extent of such engagement, it constitutes the contract between them, and is presumed to contain the whole of that contract. The case of *Filkins v. Whyland (supra)* illustrates this construction of the exception. Whether the writing was in effect and in design the contract of the parties, or a mere receipt for purchase-price was the question discussed and decided. And upon the paper itself, read in the light of the surrounding circumstances, the court said it was defective as a contract, but complete as an acknowledgment of payment, and added: ‘That can hardly be named a written contract which contains no contract stipulations.‘

The primary inquiry in the present case, therefore, respects the character of the writings executed by the parties. They consist of a deed by which Collingwood sold and assigned to Eighmie his one undivided half of a described lease of oil lands, together with the personal property, tools and fixtures, and all the oil stored on said tract which Collingwood owned, or in which he had an interest. The deed bound Eighmie, by its acceptance, to assume and perform all the covenants and conditions of the lease, and to release Collingwood from all liability therefrom, and to assume any and all debts or liabilities of any nature whatsoever existing against Collingwood by reason of his interest in the lease or in working the wells, and whether the liability ran against him as an individual or the firm of Collingwood & Co. The deed closed with a declaration, stating its ‘intent‘ to be that ‘Collingwood, in consideration of said sum of money before mentioned, shall convey to said Eighmie all his right and interest in and to said lease, business and fixtures, and that said Eighmie, in accepting the same,

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shall release said Collingwood of and from all liability arising therefrom, he himself assuming the same.' The consideration named in this deed was $6,000, and the payment of that led to the second paper between the parties, which was an assignment by Eighmie to Collingwood of a mortgage for that amount, the payment of which the assignor guaranteed. But since there was some accrued interest upon the mortgage, which Collingwood as assignee would receive in excess of the $6,000, ***296** a third paper was prepared and executed, by which he agreed to refund such earned interest to Eighmie upon its receipt from the mortgagor. Of course these three papers are to be read together, and treated as a single instrument, and so read, it is impossible to construe them as any thing else than the deliberate contract of the parties for the sale and purchase of the oil lease and fixtures. They contain a definite agreement of bargain and sale, they specify the consideration, they describe the subject, they contain mutual covenants for the protection of each party, and leave nothing of a complete, perfect and consummated agreement to be supplied. On their face no element is wanting of an entire contract, exhausting the final intentions of both parties. It is, therefore, such a paper as falls within the protection of the rule, and must be conclusively presumed to contain the whole contract as made. The effort to add to or graft upon it a parol warranty by Collingwood that the oil wells upon the lease were yielding sixteen barrels per day, and sufficient gas to furnish fuel for the works; that the oil was then worth $4 per barrel, and the machinery and fixtures were new and of improved pattern; and that the debts did not exceed $1,000, cannot be sustained upon the ground that the papers contained but a part of the contract, and were so intended and designed. One who read the writing with a full knowledge of the extrinsic facts that Collingwood owned one-half of the lease, subject to liabilities to the lessor, and had been engaged in operating the wells, and so had provided tools and fixtures and incurred debts in prosecuting the enterprise; that Eighmie owned a $6,000 mortgage, which he deemed good, and that the parties had negotiated for an exchange of one-half of the oil lease for the mortgage would see in the papers the contract and its consummation; a sufficient statement of all its essential details; a complete and perfected agreement.

He would find no defect or omission; no uncertainty in subject-matter or in terms; nothing which indicated some missing detail essential to be settled or supplied. Such a paper falls within the rule of protection and not within the exception. Where the writing does not purport to disclose the contract, ***297** or cover it; where, in view of its language read in connection with the attendant facts it seems not designed as a written statement of an agreement, but merely as an execution of some part or detail of an unexpressed contract; where it purports only to state one side of an agreement merely and is the act of one of the parties only, in the performance of his promise; in these and the like cases the exception may properly apply, and the oral agreement be shown. Of this character were the cases relied upon by the respondent. (*Unger v. Jacobs,* 7 Hun, 220;*Morgan v. Smith,* Id. 244;*Witbeck v. Waine,* 16 N. Y. 532;*Rozier v. Buffalo, N. Y. & Phila. R. R. Co,* 15 Weekly Dig. 99;*Brewers' Fire Ins. Co. v. Burger,* 10 Hun, 56;*Wheeler v. Billings,* 38 N. Y. 263.) But the present, as we have said, was not such a case. The papers covered both sides of an entire contract; were designed to signify and to execute its terms; were adequate for that purpose; and so, could not be varied or affected by parol evidence adding new stipulations.

It is further insisted, however, that the second exception to the rule is applicable, and that a recovery upon the parol warranty may be sustained on the ground that it constituted a separate collateral agreement, independent of the writing, and not at all in conflict with it. The argument at this point is rested chiefly upon the case of *Chapin v. Dobson (supra),* which is claimed to be decisive. That case did sustain a parol warranty in the face of a written agreement of sale, but that warranty was not as to the then present quality or condition of the thing sold but as to what it would accomplish in the fu-

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ture, after the completed and executed sale, the terms of which it did not seek to touch or modify. The opinion of DANFORTH, J., brings out this distinction with a clearness which it is not easy to mistake. He says 'it is one thing to agree to sell or furnish machines of a specific kind, as of such a patent, or of a particular designation, and another thing to undertake that they shall operate in a particular manner or with a certain effect, or, as in this case, that they shall do the buyer's work satisfactorily.' The guaranty sustained, it is thus apparent, was founded upon a future contingency, which assumed the completed***298** contract as executed and to remain unchanged. Indeed, the agreement was, in the specified emergency, to take the machines back. If the case be near the border line in the application of the exception to the facts, there can be no question as to the soundness of the doctrine asserted. The authorities cited in the opinion abundantly illustrate the distinction which was thus stated and applied. The first and oldest of them all (*Jeffery v. Walton,* 1 Stark. 213) was a case of the hire of a horse, evidenced by a memorandum in writing showing the hiring, its term and the consideration. It appeared that at the time it was also orally agreed that injuries from the horse shying should be at the risk of the hirer. Lord ELLENBOROUGH termed this oral stipulation a 'suppletory' agreement; that is, not an element or detail of a contract of hiring, but a stipulation which assumed that agreement precisely as indicated by the writing, but dealt with a possible contingency in the future, as to which a separate or suppletory agreement was made. In another case the action was upon a note given for wood on plaintiff's land, and the defense was permission that it might remain after the sale and a guaranty against fire while so remaining, established orally. (*Batterman v. Pierce,* 3 Hill, 171.) Here again there was a collateral agreement, in no manner affecting the terms of the sale of the wood, but presupposing that sale, perfected and carried out as agreed, and respecting a future contingency and newly constituted relations of the parties. The cases of *Erskine v. Adeane* (L. R., 8 Ch. App. 756) and *Morgan v. Griffith* (L. R., 6 Exch. 70) showed written leases, but parol agreements on the part of the landlords to reduce or destroy the game, and these agreements, relating not to the terms of the leases, but to the new relations of the parties in the future to be established by the leases, were described in *Johnson v. Oppenheim* (55 N. Y. 280, 293) 'as independent of and strictly collateral to the contracts of letting.' In *Adams v. Hull* (2 Den. 306, 311), cited by the respondent, the court said of the evidence offered in relation to the written covenants: 'It left them untouched. The offer, in fact, assumed their validity and that they had been fulfilled.' ***299** Some of the cases in which the parol evidence has been admitted are justified upon the further ground that it related wholly to the consideration and tended to show or explain what it in truth was. We are thus prepared to consider the final inquiry, whether the warranty proved by parol constituted a separate collateral agreement, or an element and detail of the original contract itself. It is obvious at a glance that the covenants related to the then present quality or condition of the thing sold, and not to contingencies or results to arise after the execution of the contract and in the future. If the warranty had been that the wells on the leased land would continue for a fixed period to yield as much oil as they were then yielding, or a certain definite quantity at the end of such period, the agreement would have been much nearer those which have been referred to. The warranty did not assume the unchanged validity of the contract of sale as expressed in the written terms, but added conditions which imperiled that validity and struck at the identity of the thing sold. How closely a warranty of present quality and condition is connected with the contract of sale and belongs to it, as one of its elements, becomes apparent in the law of agency. A general authority to sell is held to be an authority to warrant the quality or condition of the article sold, though no such express authority is given. It is one of the natural terms or conditions of the contract authorized, and so much so that it requires no separate or distinct grant of power. Here the lease with wells upon the land, yielding but four barrels of oil per day, and gas insufficient for the machinery, was what the writing in fact transferred.

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The warranty required wells yielding a larger amount both of oil and gas. The written contract was thus changed in its legal effect. As it stood it contemplated a sale without reference to the quality or condition of the wells, and whatever that quality or condition might in fact be. As modified by the parol evidence it becomes a sale of the lease with wells yielding a certain amount of both oil and gas. The case as it stands cannot be distinguished from *Mumford v. McPherson* (1 Johns. 413) and *Bayard v. Malcolm* (Id. 467). The first ***300** of these cases was an effort to show, in face of a written bill of sale, a parol warranty that the ship was copper-fastened. In the second there was a written contract for the sale of a newspaper with representations as to its circulation, its advertising business and its expenses. KENT, J., said of these representations, treated as warranties, that they could not be proved by parol since they varied the written contract.

We cannot sustain the present judgment without enlarging the admissibility of parol evidence to an extent sufficient to substantially destroy the usefulness and protection of a written instrument. While there is often difficulty upon the facts in drawing the lines of distinction, we think it sufficiently clear that in the present case the parol warranty was not admissible.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur.
Judgment reversed.

N.Y. 1885.
JEREMIAH EIGHMIE, Respondent, v. EDGAR B. TAYLOR, Administrator, etc., Appellant.
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Supreme Court, Appellate Division, First Department, New York.
EXCEL GRAPHICS TECHNOLOGIES, INC., Plaintiff–Respondent,
v.
CFG/AGSCB 75 NINTH AVENUE, L.L.C., Defendant–Appellant.

Nov. 18, 2003.

Commercial tenant brought action against landlord, seeking declaration of waiver as to lease requirement of landlord's prior written consent to subletting. The Supreme Court, New York County, Marcy Friedman, J., granted tenant's motion for injunction and denied landlord's motion to dismiss. Landlord appealed. The Supreme Court, Appellate Division, Sullivan, J., held that: landlord's acceptance of rent with knowledge of tenant's breach of lease requirement did not constitute waiver of that requirement.

Reversed.

West Headnotes

[1] Pretrial Procedure 307A 679

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)6 Proceedings and Effect
307Ak679 k. Construction of pleadings. Most Cited Cases

While a complaint is to be liberally construed in favor of plaintiff on a motion to dismiss, the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence. McKinney's CPLR 3211(a), par. 1.

[2] Contracts 95 143(1)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k143 Application to Contracts in General
95k143(1) k. In general. Most Cited Cases

A written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms.

[3] Contracts 95 143.5

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k143.5 k. Construction as a whole. Most Cited Cases

Courts are obliged to interpret a contract so as to give meaning to all of its terms.

[4] Estoppel 156 52.10(2)

156 Estoppel
156III Equitable Estoppel
156III(A) Nature and Essentials in General
156k52.10 Waiver Distinguished
156k52.10(2) k. Nature and elements of waiver. Most Cited Cases

"Waiver" is the voluntary abandonment or relinquishment of a known right.

[5] Landlord and Tenant 233 112(1)

233 Landlord and Tenant
233IV Terms for Years
233IV(F) Termination
233k112 Waiver of Forfeiture
233k112(1) k. In general. Most Cited Cases

Parties to a commercial lease may mutually agree that conduct, which might otherwise give rise to an inference of waiver, shall not be deemed a waiver of specific bargained for provisions of a lease.

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[6] Landlord and Tenant 233 76(3)

233 Landlord and Tenant
233IV Terms for Years
233IV(B) Assignment and Subletting
233k76 Covenants, Conditions, and Restrictions as to Assignment or Subletting
233k76(3) k. Consent of lessor, or waiver of condition. Most Cited Cases

Commercial landlord's acceptance of rent with knowledge of tenant's breach of lease requirement of landlord's prior written consent to subletting did not constitute waiver of that requirement, in light of clear and unambiguous general nonwaiver clauses in commercial lease, providing that landlord's failure to insist upon strict performance of any one of the lease obligations and landlord's receipt of rent with knowledge of a breach of a lease obligation could not be construed as waiver.

****100 *66** Sharyn A. Tritto, of counsel (Steve Mongiaracina, on the brief, Penn Proefriedt Schwarzfeld & Schwartz, attorneys) for plaintiff-respondent.

Menachem J. Kastner, of counsel (Todd V. Lamb and Jolie Ann DeSaro Calella, on the brief, Fischbein Badillo Wagner Harding, attorneys) for defendant-appellant.

PETER TOM, J.P., JOSEPH P. SULLIVAN, ERNST H. ROSENBERGER, LUIS A. GONZALEZ, JJ.

SULLIVAN, J.

In this action by a commercial tenant seeking a declaration of waiver as to a lease requirement of prior written consent to subletting, the landlord appeals from the grant of the tenant's application for a *Yellowstone* injunction tolling the time to cure the alleged lease violation of subletting without consent and the denial of its cross motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7).

Defendant is the landlord of a building known as the Chelsea Market, located at 75 Ninth Avenue in New York City, a portion of the third floor of which (the premises) is rented to plaintiff, a commercial tenant. Pursuant to a written lease dated December 1, 1991, defendant's predecessor, Manark Associates, originally leased a portion of the building's ground floor to plaintiff's predecessor, Trade Color Offset Corp. Subsequently, on June 5, 1995, by written agreement between Manark, as landlord, and A & D Danitoni, Inc., another predecessor of plaintiff, as tenant, that lease was amended to allow Danitoni to relinquish possession of the ground floor leased premises and take possession of the premises.

The lease provides, clearly and unambiguously, that the tenant is forbidden from subletting the premises, or any portion thereof, without the landlord's prior written consent, which shall not unreasonably ****101** be withheld. Should the tenant wish to sublet all or any portion of the premises, the tenant is required to send its request in writing to the landlord and include with such request the name of the proposed subtenant (or its principals, if the tenant is other than an individual), the nature of its business, information as to its financial responsibility and standing and such other information as the landlord might reasonably require.

The receipt of a written request for permission to sublet triggers certain rights of the landlord under the lease. In the event ***67** the request is for permission to sublet the entire premises, the landlord has the right to terminate the lease and recapture possession of the premises as of the proposed date of the commencement of the sublease. In determining the reasonableness of the landlord's rejection of the request, the relevant factors under Article 9.05 of the lease, are, among other things, the restrictions contained in the leases of other tenants in the building, the financial condition of the proposed subtenant, the effect the proposed subtenant's occupancy on the “operation and maintenance” of the building and whether the proposed sublease is at a rental rate less than the market rate for other space

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in the building. Essentially, Article 9.05 affords the landlord control over who occupies the building, the purpose for which its building is used and whether the financial terms of the subleases conflict with other rentals in the building.

In addition to the rights triggered by a request for permission to sublet, the lease affords certain other protections to the landlord in the event of either an approved sublet or failure to obtain prior written consent to sublet, each of which is intended to preclude the possibility of an unintended waiver by the landlord. For example, the landlord's consent to one subtenant does not relieve the obligation to obtain prior written consent as to future sublets (Article 9.01), and the listing of the subtenant's name on the door or building directory shall not be deemed a consent (Article 9.07). The lease also contains general non-waiver clauses providing that the landlord's acceptance of rent with knowledge of any breach of the lease is not to be deemed a waiver of such breach (Article 29.02[b]) and that the landlord's failure to insist on the strict performance of a lease obligation shall not be construed as a waiver (Article 29.01).[FN1] A merger clause requires that any waiver of a lease provision be in writing signed ***68** by the party against whom enforcement of the waiver is sought (*id.*).

FN1. Article 29.01 states:

> The failure of Landlord to insist in any one or more instances upon the strict performance of any one or more of the obligations of this lease, or to exercise any election herein contained, shall not be construed as a waiver or relinquishment for the future of the performance of such one or more obligations of this lease or of the right to exercise such election, but the same shall continue and remain in full force and effect with respect to any subsequent breach, act or omission. No agreement hereinafter made between Landlord and Tenant shall be effective to change, modify, waive, release, discharge, terminate or effect an abandonment of this lease, in whole or in part, unless such executory agreement is in writing, refers expressly to this lease and is signed by the party against whom enforcement of the change, modification, waiver, release, discharge or termination or effectuation of the abandonment is sought.

During a deposition on July 16, 2002 in a related action between the same parties, plaintiff's treasurer admitted that eight entities were occupying or subletting the premises. It is undisputed that plaintiff put the subtenants into possession without defendant's prior written consent and that ****102** plaintiff is collecting rent and profiting from the alleged illegal subtenancies. Indeed, plaintiff admits that it has a "sweetheart" lease and that its rent is "significantly" lower than market value. After plaintiff's treasurer testified, by written notice dated July 18, 2002, defendant served a default notice stating that plaintiff was in violation of the lease by virtue of the subletting without prior written consent.

In response to the default notice, plaintiff commenced this action seeking a declaration that defendant, through its conduct, waived the prior written consent requirement of the lease. Simultaneously therewith, it sought a *Yellowstone* injunction against termination of the lease. Admitting that it had placed the subtenants in possession without defendant's prior written consent, plaintiff cited, in support of its claim of waiver, that defendant consented to the subletting, that the subtenants' names are listed on the building directory and that defendant accepted rent from plaintiff with knowledge of the subtenancies.

Defendant opposed the motion for *Yellowstone* relief and cross-moved to dismiss the complaint based upon documentary evidence (CPLR 3211 [a][1]). Specifically, defendant argued that the two factors relied upon by plaintiff to support its waiver claim were negated by the express, clear and un-

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equivocal lease language, which specifically provided that neither the listing of subtenants on the building directory nor the acceptance of rent with knowledge of the tenant's breach of the lease constituted a waiver. In the alternative, defendant argued that plaintiff was not entitled to *Yellowstone* relief because subletting without the landlord's prior written consent is incurable as a matter of law. In opposition to the dismissal motion, plaintiff cited the two grounds asserted in support of its claim of waiver as well as defendant's course of conduct in never insisting on written requests to sublet. Responding to defendant's argument that its breach in subletting without prior written consent was incurable,***69** plaintiff asserted that if it were unsuccessful in proving a waiver it was prepared to commence summary proceedings to terminate the subtenancies.

Rejecting the argument that subletting without consent is incurable, Supreme Court granted a *Yellowstone* injunction, conditioned solely on plaintiff's continued payment of rent, and, finding issues of fact as to whether defendant's knowledge, acquiescence or active involvement in the subletting constituted a waiver of the lease prohibition, denied defendant's cross motion to dismiss. The complaint should have been dismissed.

[1][2][3] Pursuant to CPLR 3211(a)(1), where the "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law," dismissal is warranted (*Leon v. Martinez,* 84 N.Y.2d 83, 88, 614 N.Y.S.2d 972, 638 N.E.2d 511). It bears noting that "[w]hile a complaint is to be liberally construed in favor of plaintiff on a [CPLR] 3211 motion to dismiss, the Court is not required to accept factual allegations that are plainly contradicted by the documentary evidence" (*Robinson v. Robinson,* 303 A.D.2d 234, 235, 757 N.Y.S.2d 13). A written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms (*R/S Assoc. v. New York Job Dev. Auth.,* 98 N.Y.2d 29, 32, 744 N.Y.S.2d 358, 771 N.E.2d 240). Courts "are obliged to interpret a contract so as to give meaning to all of its terms" (*Mionis v. Bank Julius Baer & Co., Ltd.,* 301 A.D.2d 104, 109, 749 N.Y.S.2d 497). Here, the lease provisions unambiguously and unequivocally negate the two essential facts asserted by plaintiff ****103** in support of its claim of waiver as alleged in the complaint.

[4][5] Waiver is the voluntary abandonment or relinquishment of a known right (*Jefpaul Garage Corp. v. Presbyterian Hosp.,* 61 N.Y.2d 442, 446, 474 N.Y.S.2d 458, 462 N.E.2d 1176). There, like here, the tenant argued that, by accepting rent with knowledge of the tenant's violations and without terminating the lease, the landlord had waived the lease violations as a matter of law. As here, the lease contained a nonwaiver and merger clause that provided: "The receipt by Landlord of rent with knowledge of the breach of any covenant of this lease shall not be deemed a waiver of such breach and no provision of this lease shall be deemed to have been waived by Landlord unless such waiver be in writing signed by the Landlord (*id.*)." The court held that tenant's waiver argument was barred by the clause, stating, "Its language is clear and unambiguous. The parties having mutually assented to its terms, the clause should be enforced to preclude a finding of waiver of the conditions precedent to renewal" (*id.*). Thus, it is ***70** clear that the parties to a commercial lease may mutually agree that conduct, which might otherwise give rise to an inference of waiver, shall not be deemed a waiver of specific bargained for provisions of a lease (*see Monarch Information Services v. 161 William Associates,* 103 A.D.2d 703, 477 N.Y.S.2d 650).

[6] Here, the lease specifically provides that the listing on the building directory of the names of the subtenants whose sublets have not received the landlord's prior written consent shall not be deemed consent to the sublet. In addition, the lease specifically provides that the landlord's acceptance of rent with knowledge of the tenant's breach of the lease shall not be deemed a waiver of such breach. Thus, Supreme Court erred in disregarding the clear, un-

1 A.D.3d 65, 767 N.Y.S.2d 99, 2003 N.Y. Slip Op. 18419
(Cite as: 1 A.D.3d 65, 767 N.Y.S.2d 99)

ambiguous terms of this negotiated lease; its determination "effectively render[ed] meaningless a part of the contract" (*Helmsley–Spear, Inc. v. New York Blood Center, Inc.,* 257 A.D.2d 64, 69, 687 N.Y.S.2d 353; *see A & J Corp. III VW v. II, L.P.,* 303 A.D.2d 430, 756 N.Y.S.2d 603), i.e., Articles 9.07 and 29.02(b) of the lease, and failed "to give meaning to all of its terms" (*Mionis v. Bank Julius Baer & Co., Ltd., supra* at 109, 749 N.Y.S.2d 497).

In addition to the pertinent specific non-waiver clause involved, Article 9.07 (the listing of any name other than that of the tenant on the doors of the demised premises or the building directory), the lease contains two general non-waiver clauses: Article 29.01 (the landlord's failure to insist on strict performance of a lease obligation/no oral modification) and Article 29.02(b) (the landlord's receipt of rent with knowledge of a breach of a lease obligation). Since each of plaintiff's factual arguments in support of its waiver claim is negated by the express language of the lease, the cross motion to dismiss based on documentary evidence should have been granted. Supreme Court's reliance on *Simon & Son Upholstery, Inc. v. 601 West Assocs., LLC,* 268 A.D.2d 359, 702 N.Y.S.2d 256 is misplaced. In that case, the prior landlord's "active involvement" in approving alterations made to the premises so that it could be used as a photography studio (a prohibited use under the lease), in providing the tenant with parking for the studio, in accepting rent from the photography tenant and using the studio in connection with a sales brochure for the building, all wholly inconsistent with the express terms of the lease, were held to be sufficient to "indic[ate] that the reasonable expectations of both parties under the original lease were supplanted by subsequent actions" (*id.* at 360, 702 N.Y.S.2d 256). In this case, however, ****104** there is no similar "active involvement" on the part of defendant indicating an agreement to modify the lease.

***71** Since plaintiff had no case on the purely legal issue of waiver of the lease prohibition against subletting, Supreme Court also erred in granting a *Yellowstone* injunction where there is no issue for future determination.

Accordingly, the order of the Supreme Court, New York County (Marcy Friedman, J.), entered on or about October 28, 2002, which granted plaintiff's motion for a *Yellowstone* injunction and denied defendant's cross motion to dismiss the complaint, should be reversed, on the law, with costs and disbursements, the cross motion granted, the motion dismissed as academic and the *Yellowstone* injunction vacated, effective 10 days after service of a copy of this order with notice of entry. The Clerk is directed to enter judgment in favor of defendant dismissing the complaint.

Order, Supreme Court, New York County (Marcy Friedman, J.), entered on or about October 28, 2002, reversed, on the law, with costs and disbursements, defendant's cross motion to dismiss the complaint granted, plaintiff's motion dismissed as academic and the *Yellowstone* injunction vacated, effective 10 days after service of a copy of this order with notice of entry. The Clerk is directed to enter judgment in favor of defendant dismissing the complaint.

All concur.

N.Y.A.D. 1 Dept.,2003.
Excel Graphics Technologies, Inc. v. CFG/AGSCB 75 Ninth Ave., L.L.C.
1 A.D.3d 65, 767 N.Y.S.2d 99, 2003 N.Y. Slip Op. 18419

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43 A.D.3d 860
(Cite as: 43 A.D.3d 860, 841 N.Y.S.2d 673)

C

Franklin Apt. Assoc., Inc. v Westbrook Tenants Corp.
43 A.D.3d 860, 841 N.Y.S.2d 673
NY,2007.

43 A.D.3d 860, 841 N.Y.S.2d 673, 2007 WL 2670092, 2007 N.Y. Slip Op. 06630

Franklin Apartment Associates, Inc., Respondent
v
Westbrook Tenants Corp., Appellant.
Supreme Court, Appellate Division, Second Department, New York

September 11, 2007

CITE TITLE AS: Franklin Apt. Assoc., Inc. v Westbrook Tenants Corp.

HEADNOTE

Condominiums and Cooperatives
Proprietary Lease
Responsibility for Repair

Defendant was responsible for repair of plumbing items known as “shower bodies”—giving practical interpretation to language of leases and parties' reasonable expectations, repair of shower bodies was responsibility of defendant, either as part of “pipes or conduits within the walls” that were part of “standard building equipment,” or as maintenance and repair not otherwise delegated to plaintiff.

Downing & Peck, P.C., New York, N.Y. (John M. Downing, Jr., of counsel), for appellant.
Lehrman, Kronick & Lehrman, LLP, White Plains, N.Y. (Mark A. Guterman of counsel), for respondent.

In an action for a judgment declaring that the defendant is responsible for the repair of certain items of plumbing known as “shower bodies,” for an injunction compelling the defendant to repair the “shower bodies,” and to recover damages for injury to property, the defendant appeals from an order of the Supreme Court, Westchester County (Jamieson, J.), dated September 26, 2006, which granted the plaintiff's motion, in effect, for summary judgment declaring that the defendant is responsible for ***861** the repair of the “shower bodies” and for summary judgment dismissing the affirmative defenses, and denied its cross motion, in effect, for summary judgment declaring that it was not responsible for the repair of the “shower bodies” and for summary judgment dismissing the plaintiff's claims for injunctive relief and to recover damages for injury to property.

Ordered that the order is affirmed, with costs, and the matter is remitted to the Supreme Court, Westchester County, for the entry of an interlocutory judgment declaring that the defendant is responsible for the repair of the “shower bodies” and thereafter for an assessment of damages and entry of a final judgment.

The plaintiff is a holder of stock and proprietary leases appurtenant to several apartments in a building owned by the defendant cooperative corporation. Leaks developed in the bathrooms of several apartments. Specifically, the leaks developed in items of plumbing known as “shower bodies.” The parties could not agree on who was responsible for the repairs. The plaintiff ****2** commenced this action, inter alia, seeking a judgment declaring that the defendant was responsible for the repairs under the terms of the appurtenant leases. The plaintiff moved, in effect, for summary judgment declaring that the defendant was responsible for the repairs and for summary judgment dismissing the defendant's affirmative defenses. The defendant cross-moved, in effect, for summary judgment declaring that it was not responsible for the repairs and for summary judgment dismissing the plaintiff's claims for injunctive relief and to recover damages for injury to property. In support of the motion and the cross motion, both parties offered differing interpretations of the relevant provisions of the leases.

43 A.D.3d 860
(Cite as: 43 A.D.3d 860, 841 N.Y.S.2d 673)

The Supreme Court granted the plaintiff's motion and denied the defendant's cross motion. We affirm.

"The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent" (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). When the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving practical interpretation to the language employed and the parties' reasonable expectations (*id.*;*see Correnti v Allstate Props., LLC*, 38 AD3d 588, 590 [2007]). The construction and interpretation of an unambiguous written contract is an issue of law within the province of the court (*see Katina, Inc. v Famiglietti* , 306 AD2d 440, 441 [2003]).

Here, paragraph 2 of the leases provides that "[t]he Lessor [the defendant] shall at its expense keep in good repair the building including all of the apartments, the sidewalks and ***862** courts surrounding the same, and its equipment and apparatus except those portions the maintenance and repair of which are expressly stated to be the responsibility of the Lessee [the plaintiff] pursuant to Paragraph 18 hereof." In relevant part, paragraph 18 provides: "[t]he Lessee . . . shall be solely responsible for the maintenance, repair, and replacement of plumbing, gas and heating fixtures and equipment and such refrigerators, dishwashers, removable and through-the-wall air conditioners, washing machines, ranges and other appliances, as may be in the apartment. Plumbing, gas and heating fixtures as used herein shall include exposed gas, steam and water pipes attached to fixtures, appliances and equipment and the fixtures, appliances and equipment to which they are attached, and any special pipes or equipment which the Lessee may install within the wall or ceiling, or under the floor, but shall not include gas, steam or other pipes or conduits within the walls, ceiling or floors or heating equipment which is part of the standard building equipment."

The defendant argues that the shower bodies are plumbing "fixtures" or "equipment" within the meaning of paragraph 18. The terms are not defined in the leases. However, giving a practical interpretation to the language of the leases and the parties' reasonable expectations, repair of the shower bodies is the responsibility of the defendant, either as part of the "pipes or conduits within the walls" that are part of the "standard building equipment," or as maintenance and repair not otherwise delegated to the plaintiff.

The parties agree that the shower bodies are used, inter alia, to control the mix of hot and cold water to the shower and/or bathtub. However, this does not appear wholly accurate. Rather, based on the affidavits, installation instructions, and parts lists submitted by the parties, the part identified as the shower body is a T-shaped metal casing in which such mixing occurs. The installation instructions reveal that the shower body is located behind the finished walls, and is attached to the framing and either screwed or soldered onto the water supply lines. (Here, the shower ****3** bodies were installed as part of the original plumbing.) Thus, unlike various other parts of the shower/bathtub unit, such as the shower head, pressure balance cartridge, safetemp control cartridge, and handles, the shower bodies are affixed to the building and its water supply lines, and cannot be accessed by tenants without opening the walls. We agree with the Supreme Court that the leases evince an intent to draw a general distinction between pipes, conduits, and other items within the walls, ceiling, and floors, and those without, with responsi ***863** bility for the former resting with the defendant (*see e.g. Machado v Clinton Hous. Dev. Co., Inc.*, 20 AD3d 307 [2005]). Further, such an interpretation would give effect to the reasonable expectations of the parties. In general, a tenant would not reasonably expect to be liable for repairs that require the opening of walls, ceilings, or floors. Rather, in general, such repairs implicate issues affecting the structural integrity or the permanent features or systems of a building, and the parties to the lease would reasonably expect these repairs to be made by the landlord. In sum, responsibility for the repair of the

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shower bodies was properly placed with the defendant (*cf. Machado v Clinton Hous. Dev. Co., Inc., supra*).

The defendant's remaining contentions are without merit.

Since this is, in part, a declaratory judgment action, we remit the matter to the Supreme Court, Westchester County, for the entry of an interlocutory judgment declaring that the defendant is responsible for the repair of the shower bodies (*see Lanza v Wagner*, 11 NY2d 317, 334 [1962],*appeal dismissed*371 US 74 [1962],*cert denied*371 US 901 [1962]), and thereafter for an assessment of damages and entry of a final judgment. Crane, J.P., Ritter, Dillon and Carni, JJ., concur.

NY,2007.
Franklin Apt. Assoc., Inc. v Westbrook Tenants Corp.
43 A.D.3d 860, 841 N.Y.S.2d 6736022007 WL 26700929992007 N.Y. Slip Op. 066304603, 841 N.Y.S.2d 6736022007 WL 26700929992007 N.Y. Slip Op. 066304603, 841 N.Y.S.2d 6736022007 WL 26700929992007 N.Y. Slip Op. 066304603

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Westlaw
114 So. 431
94 Fla. 403, 114 So. 431
(Cite as: 94 Fla. 403, 114 So. 431)

Supreme Court of Florida.
FRISSELL et ux.
v.
NICHOLS et al.

Aug. 1, 1927.
Rehearing Denied Oct. 13, 1927.

En Banc.

Suit by W. H. Nichols and others against Glen C. Frissell and wife to compel a conveyance of land. From an order overruling a demurrer to the complaint, defendants appeal.

Reversed, with directions.

West Headnotes

[2] Vendor and Purchaser 400 ⚷18(.5)

400 Vendor and Purchaser
400I Requisites and Validity of Contract
400k18 Options, Preemptive Rights, and Exercise Thereof
400k18(.5) k. In General. Most Cited Cases
(Formerly 400k18)

"Option to sell" is standing offer, for which money is paid, to sell to designated person within prescribed time on designated terms, including agreement to keep proposition open for stated period.

[4] Landlord and Tenant 233 ⚷74

233 Landlord and Tenant
233IV Terms for Years
233IV(B) Assignment and Subletting
233k74 k. Assignability and Agreements to Assign Leases and Contracts. Most Cited Cases

Unless stipulated to contrary, right to assign is incidental to and runs with lease.

[6] Contracts 95 ⚷311

95 Contracts
95V Performance or Breach
95k311 k. Discharge by Death of Party. Most Cited Cases

Parties may make any contract personal one, regardless of subject-matter.

[8] Contracts 95 ⚷311

95 Contracts
95V Performance or Breach
95k311 k. Discharge by Death of Party. Most Cited Cases

Demarcation between purely personal contracts ended by party's death and those which personal representative can complete can only be determined in many cases from circumstances.

[9] Contracts 95 ⚷311

95 Contracts
95V Performance or Breach
95k311 k. Discharge by Death of Party. Most Cited Cases

Law presumes that party contracting intends to bind personal representatives unless contract is in some way personal to him, or unless language shows such presumption is not reasonable.

[11] Landlord and Tenant 233 ⚷92(1)

233 Landlord and Tenant
233IV Terms for Years
233IV(E) Options to Purchase or Sell
233k92 Option to Purchase Premises
233k92(1) k. In General. Most Cited Cases

Option in lease to purchase property leased *held* terminated by death of one lessee, in view of personal element required.

Contracts 95 ⚷50

95 Contracts
95I Requisites and Validity
95I(D) Consideration
95k49 Nature and Elements
95k50 k. In General. Most Cited Cases

Consideration is primary element moving execution of contract.

Contracts 95 311

95 Contracts
95V Performance or Breach
95k311 k. Discharge by Death of Party. Most Cited Cases

Contracts by authors to write books, by attorneys to render services, by physicians to cure diseases, by teachers to instruct, by masters to teach apprentices, and those involving purchaser's personal credit are dissolved on death of either party.

Contracts 95 311

95 Contracts
95V Performance or Breach
95k311 k. Discharge by Death of Party. Most Cited Cases

Executory contracts of strictly personal nature are ended by contractor's death.

Contracts 95 311

95 Contracts
95V Performance or Breach
95k311 k. Discharge by Death of Party. Most Cited Cases

Strictly personal executory contracts are executed with implied condition that either party's death shall dissolve them.

Contracts 95 311

95 Contracts
95V Performance or Breach
95k311 k. Discharge by Death of Party. Most Cited Cases

Parties' intention, expressed in contract, to make it personal one effects same object as where law implies such intention from subject-matter.

Vendor and Purchaser 400 16(1)

400 Vendor and Purchaser
400I Requisites and Validity of Contract
400k16 Offer to Sell, and Acceptance Thereof
400k16(1) k. In General. Most Cited Cases

Offer to sell is not based on valuable consideration and prior to acceptance may be withdrawn at pleasure of offerer.

Vendor and Purchaser 400 16(1)

400 Vendor and Purchaser
400I Requisites and Validity of Contract
400k16 Offer to Sell, and Acceptance Thereof
400k16(1) k. In General. Most Cited Cases

Offer to sell merely contemplates proffer, proposal, presentation, or exhibition of something for acceptance or rejection.

Vendor and Purchaser 400 16(1)

400 Vendor and Purchaser
400I Requisites and Validity of Contract
400k16 Offer to Sell, and Acceptance Thereof
400k16(1) k. In General. Most Cited Cases

Offer to sell, accepted, becomes contract binding on both parties.

Vendor and Purchaser 400 18(1)

400 Vendor and Purchaser
400I Requisites and Validity of Contract
400k18 Options, Preemptive Rights, and Exercise Thereof
400k18(1) k. Requisites and Validity. Most Cited Cases

Though it requires mutual assent, option confers no rights unless it carries elements necessary to

enforceable contract.

Vendor and Purchaser 400 18(3)

400 Vendor and Purchaser
400I Requisites and Validity of Contract
400k18 Options, Preemptive Rights, and Exercise Thereof
400k18(3) k. Exercise. Most Cited Cases
Option to sell, accepted, becomes contract binding on both parties.

Syllabus by the Court

Though it requires mutual assent, option confers no rights unless it carries elements necessary to enforceable contract; offer or option to sell, accepted, becomes contract binding on both parties. Though a contract so far as mutual assent is concerned, an option confers no rights unless it carries the elements necessary to an enforceable contract. 6 R. C. L. 603. When an offer or option to sell is accepted, it becomes a contract for sale binding on both parties thereto.

Unless stipulated to contrary, right to assign is incidental to and runs with lease. Unless stipulated to the contrary, the right to assign is incidental to and runs with a lease.

'Executory contracts of strictly personal nature' are ended by contractor's death; strictly personal executory contracts are executed with implied condition that either party's death shall dissolve them; contracts by authors to write books, by attorneys to render services, by physicians to cure diseases, by teachers to instruct, by masters to teach apprentices, and those involving purchaser's personal credit are dissolved on death of either party. 'Executory contracts of a strictly personal nature' are determined by the death of the contractor. Such contracts are executed with the implied condition that the death of either party shall dissolve them. Contracts of authors to write books, of attorneys to render professional services, of physicians to cure particular diseases, of teachers to instruct pupils, of masters to teach apprentices, and contracts involving the personal credit of the purchaser are among those included in this list.

Parties may make any contract personal one, regardless of subject-matter; parties' intention, expressed in contract, to make it personal one effects same object as where law implies such intention from subject-matter. It is competent for the parties to make any contract a personal one, no matter what the subject-matter. If the intention is manifested by the parties in express terms in the contract itself, it effects the same object as where the law implies the intention from the subject-matter.

The rule seems to be that, if the contract with a deceased person is executory and the personal representative can fairly and fully execute it as well as the deceased himself could have done, he may do so and enforce the contract. On the other hand, the personal representative can be required to complete such a contract, and if he fails to do so he may be compelled to pay damages out of the assets in his hand.

Demarcation between purely personal contracts ended by party's death and those which personal representative can complete can only be determined in many cases from circumstances. On the whole, it may be said that the line of demarcation between contracts that are purely personal in their nature and determined by the death of the party who has the nonassignable right, or upon whom rests a nondelegable duty under the contract, on the one hand, and contracts which the personal representative could complete as well as the deceased could have done, on the other hand, is not clearly defined and can only be determined in many instances by an inspection of the facts and circumstances in the particular case.

Law presumes that party contracting intends to bind personal representatives unless contract is in some way personal to him, or unless language shows such presumption is not reasonable. The law indulges the presumption that one making a contract intends to bind his executors and administrat-

ors unless the contract is in some way personal to the testator, or unless the language of the contract is such that a presumption of this kind could not be reasonably indulged.

Consideration is primary element moving execution of contract. Consideration is the primary element moving the execution of a contract.

Option in lease to purchase property leased held terminated by death of one lessee, in view of personal element required. Option in lease for lessees to purchase property, in view of provisions requiring notes secured by mortgage to be executed and signed by lienees and their wives, *held* terminated by death of one lessee.

****432 *405** Appeal from Circuit Court, Dade County; A. J. Rose, Judge. Heffernan & Hoffman, Brown & Stokes, and Loftin, Stokes & Calkins, all of Miami, for appellants.

Mitchell D. Price, Robert J. Boone, and Price, Price, Neeley & Kehoe, all of Miami, for appellees.

TERRELL, J.

On December 15, 1919, Glen C. Frissell joined by his wife, Myrtilla Frissell, of Dade county, Fla., executed a lease to Phillip Ullendorff and W. H. Nichols of the said county and state The lease was for a term of 5 years, beginning January 1, 1920, covered certain real estate in Miami, Fla., and contained a provision for purchase by the lessees reading as follows:

'And the said lessors, in the execution of this instrument, and in consideration of the payment of the rent and the performance of the covenants on behalf of the lessees as hereinabove recited, have by these presents, granted, bargained, sold, conveyed, and assigned, and do hereby grant, bargain, sell, convey, and assign, unto the said Phillip Ullendorff and W. H. Nichols an option or right to buy the above-described****433** property at any time on or before January 1, 1925, for a total consideration of $40,000; said consideration to be paid as follows, to wit: $5,000 to be paid in cash at the time of the delivery of deed; the remaining $35,000 to be secured by a mortgage to be signed by the said Phillip Ullendorff and the said W. H. Nichols, joined by their respective wives, if any, Said mortgage to secure seven promissory notes in the sum of $5,000 each; said notes to be written upon the usual bank form and to bear interest***406** from date at the rate of 8 per cent., payable semiannually, and to provide for reasonable attorney's fees if collected by suit or by an attorney; said notes to fall due in the following order, to wit:

'Note No. 1, one year after date;

'Note No. 2, two years after date;

'Note No. 3, three years after date;

'Note No. 4, four years after date;

'Note No. 5, five years after date;

'Note No. 6, six years after date;

'Note No. 7, seven years after date.

'The mortgage to be executed by the lessees herein as aforesaid, to secure said sum of $35,000, shall be on the usual form, and shall be a first mortgage lien upon the above-described property, and shall provide for the carrying of $10,000 insurance upon said property, the premiums of which are to be paid by the mortgagors.'

Subsequent to the execution of the foregoing lease, Phillip Ullendorff died, leaving a last will and testament in which he bequeathed his entire estate, including his interest in said lease, to the Biscayne Trust Company, as trustee, with full power to manage and dispose of same. After the death of Phillip Ullendorff his widow married Claude P. Gossett, one of the appellees herein. Prior to his death, W. H. Nichols and Phillip Ullendorff conveyed the said lease to Nichols-Ullendorff Realty Company, a corporation owned and controlled by the said Nichols and Ullendorff.

On December 9, 1924, the Nichols-Ullendorff Realty Company through its attorney advised Glen C. Frissell that it was ready to exercise the option to purchase in the lease as herein quoted, and was willing to do so by paying the $5,000 cash and executing their notes for $35,000 as ***407** per terms of the option, or it would pay the entire $40,000 in cash. Other attempts were made prior to January 1, 1925, the expiration date of the lease, to secure compliance with the terms of the purchase provision therein, but all were rejected.

On January 12, 1925, appellees here, complainants below, filed their bill in the circuit court of Dade county, praying that Glen C. Frissell and his wife, Myrtilla Frissell, be required to convey the fee-simple title to the lands described in said lease to W. H. Nichols and Biscayne Trust Company, as executor and trustee for Phillip Ullendorff and Jennie Gossett, and that they be required to accept in exchange for said deed $5,000 in cash and the notes of said W. H. Nichols and Biscayne Trust Company for all deferred payments in the form and amounts as already tendered by them therefor.

There was a demurrer to the bill of complaint, which was overruled May 6, 1925, and appeal was taken from that order.

Appellants contend here that the provision for purchase as here quoted is strictly personal to Ullendorff and Nichols, and that by reason of the death of Ullendorff it is unenforceable because the notes and mortgage cannot now be executed as per terms of the purchase provision in the lease. Appellees contend that the lease as a whole is assignable, including the provision for purchase, and that consequently it can be enforced against Frissell by Nichols and Ullendorff or their representatives. The demurrer then may be said to raise the sole question of whether or not the provision in the lease for purchase was strictly personal to Ullendorff and Nichols.

[2] An offer to sell merely contemplates the proffer, proposal, presentation, or exhibition of something to another for acceptance or rejection. It is not based on a valuable consideration, and prior to acceptance it may be withdrawn ***408** at the pleasure of the one making it. An option to sell is a privilege existing in one person for which he has paid money. It gives him a right to purchase as per terms designated therein. An option to sell is also defined as a standing offer to sell to a designated person within a prescribed time on designated terms, including an agreement to keep the proposition open for acceptance for the period stated. An option therefore embraces two distinct elements: (1) The contract to sell which is incompleted till accepted; (2) the agreement to give the optionee a certain time within which to exercise his option. Though a contract so far as mutual assent is concerned, an option confers no rights unless it carries the elements necessary to an enforceable contract. 6 R. C. L. 603. When an offer or option to sell is accepted, it becomes a contract for sale binding on both parties thereto.

[4] ****434** In the case at bar we have a lease in which was embraced an option or right to purchase any time prior to the expiration of the lease. The terms of the lease unquestionably make it assignable; in fact, we understand the law to be that, unless stipulated to the contrary, the right to assign is incidental to and runs with a lease. Robinson v. Perry & Martin, 21 Ga. 183, 68 Am. Dec. 455; Simms v. Lide, 94 Ga. 553, 21 S. E. 220; Simmons v. Zimmerman, 144 Cal. 256, 79 P. 451, 1 Ann. Cas. 850; Connor v. Withers, 49 S. W. 309, 20 Ky. Law Rep. 1326; James on Option Contracts, §§ 606 and 607; 2 Thompson on Real Property, art. 1297. The lease here involved was assigned, but was subsequently reassigned to the trustee of Ullendorff's estate so that question becomes immaterial to this discussion.

In the instant case the option or right to purchase, among other things, names a consideration of $40,000, of which $5,000 must be paid in cash, and the balance of $35,000 to be evidenced by seven promissory notes of $5,000 each, due in one,

two, three, four, five, six, and ***409** seven years, bearing 8 per cent. interest, secured by a first mortgage on the property, and signed by Phillip Ullendorff and W. H. Nichols joined by their respective wives. Were such provisions sufficient to make the option or right to purchase personal to the lessees and unenforceable by reason of the death of Ullendorff, said option not having been exercised prior to his death?

Executory contracts of a strictly personal nature are determined by the death of the contractor. Such contracts are executed with the implied condition that the death of either party shall dissolve them. Contracts of authors to write books, of attorneys to render professional services, of physicians to cure particular diseases, of teachers to instruct pupils, of masters to teach apprentices, and contracts involving the personal credit of the purchaser are among those included in this list. Chamberlain v. Dunlop, 126 N. Y. 45, 26 N. E. 966, 22 Am. St. Rep. 807, note 812, and cases cited. Drummond v. Crane, 159 Mass. 577, 35 N. E. 90, 23 L. R. A. 707, and note, 38 Am. St. Rep. 460; 3 Elliott on Contracts, par. 1907; 27 R. C. L. § 39.

[6] It is competent for the parties to make any contract a personal one no matter what the subject-matter. If the intention is manifested by the parties in express terms in the contract itself, it effects the same object as where the law implies the intention from the subject-matter. Accordingly where by express terms the parties have excluded the idea of a substituted performance, no question upon the subject-matter of the contract can arise. The death of either party in such a case terminates the contract as it would a contract construed from its subject-matter as a personal one. 3 Elliott on Contracts, par. 1907, and cases cited.

[8] The rule seems to be that, if the contract with a deceased person is executory and the personal representative can fairly and fully execute it as well as the deceased himself ***410** could have done, he may do so and enforce the contract. On the other hand, the personal representative can be required to complete such a contract, and if he fails to do so, he may be compelled to pay damages out of the assets in his hand. On the whole, it may be said that the line of demarcation between contracts that are purely personal in their nature and determined by the death of the party who has the nonassignable right, or upon whom rests a nondelegable duty under the contract, on the one hand, and contracts which the personal representative could complete as well as the deceased could have done, on the other hand, is not clearly defined and can only be determined in many instances by an inspection of the facts and circumstances in the particular case. Chamberlain v. Dunlop, supra.

[9] The law indulges the presumption that one making a contract intends to bind his executors and administrators unless the contract is in some way personal to the testator, or unless the language of the contract is such that a presumption of this kind could not be reasonably indulged. Chamberlain v. Dunlop, supra.

[11] Consideration is the primary element moving the execution of a contract. One disposing of a valuable property, as in the instant case, has a right to select those with whom he will deal and to impose any reasonable restrictions with reference to performance that he may see fit. A contract to sell at any time within five years is not out of the ordinary, but when the lienor in such a contract specifically requires that the seven notes evidencing the deferred payments, together with the mortgage securing the same, shall be executed and signed by the lienees and their wives, he must have had some reason personal to himself for imposing such a requirement, and, in the absence of any showing to the contrary, we must so hold.

Such specifications would on their face exclude the idea of a substituted performance and by reason of the death of ***411** Ullendorff would terminate the contract, so the decree of the chancellor is reversed with directions to sustain the demurrer.

Reversed.

ELLIS, C. J., and WHITFIELD, STRUM, and BUFORD, JJ., concur.
BROWN, J., disqualified.

Fla. 1927
Frissell v. Nichols
94 Fla. 403, 114 So. 431

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(Cite as: 86 A.D.3d 406, 926 N.Y.S.2d 494)

C

Supreme Court, Appellate Division, First Department, New York.
GEORGIA MALONE & COMPANY, INC., Plaintiff–Appellant,
v.
RALPH RIEDER, et al., Defendants–Respondents, CenterRock Realty, LLC, Defendant.

July 7, 2011.

Background: Licensed real estate brokerage and consulting firm filed action alleging breach of contract, breach of confidentiality, quantum meruit, and unjust enrichment to recover real estate brokerage commissions. The Supreme Court, New York County, Eileen Bransten, J., dismissed unjust enrichment claim. Plaintiff appealed.

Holdings: The Supreme Court, Appellate Division, held that:
(1) corporate officer for real estate company could not be held liable for breach of confidentiality agreement with firm;
(2) firm sufficiently pleaded that there was direct contact and relationship with officer of real estate company that could have caused reliance or inducement; and
(3) firm could not recover in quantum meruit individually against officer of real estate company.

Affirmed as modified.

Acosta, J., filed opinion dissenting in part.

West Headnotes

[1] Corporations and Business Organizations 101 1960

101 Corporations and Business Organizations
101VII Directors, Officers, and Agents
101VII(E) Liability for Corporate Debts and Acts
101k1959 Contracts and Guaranties
101k1960 k. In general. Most Cited Cases

Corporate officer for real estate company could not be held liable for breach of confidentiality agreement with licensed real estate brokerage and consulting firm, where officer had been listed only as "contact" and corporation had been listed as "company" on signature block of agreement which specifically stated that it was between "[corporate officer] of [real estate company]" and firm and officer only signed contract once.

[2] Corporations and Business Organizations 101 1960

101 Corporations and Business Organizations
101VII Directors, Officers, and Agents
101VII(E) Liability for Corporate Debts and Acts
101k1959 Contracts and Guaranties
101k1960 k. In general. Most Cited Cases

Officers or agents of a company are not personally liable on a contract if they do not purport to bind themselves individually.

[3] Corporations and Business Organizations 101 1962(1)

101 Corporations and Business Organizations
101VII Directors, Officers, and Agents
101VII(E) Liability for Corporate Debts and Acts
101k1959 Contracts and Guaranties
101k1962 Guaranty of Corporate Contracts, Debts, and Obligations
101k1962(1) k. In general. Most Cited Cases

The general practice when an officer or agent of a company wishes to be personally bound is to sign the contract twice, rather than once.

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[4] Implied and Constructive Contracts 205H 81

205H Implied and Constructive Contracts
205HII Actions
205HII(B) Pleading
205Hk81 k. Declaration, complaint, or petition. Most Cited Cases

Licensed real estate brokerage and consulting firm sufficiently pleaded that there was direct contact and relationship with officer of real estate company that could have caused reliance or inducement, as required for unjust enrichment claim, on allegations that one officer personally affirmed his, company's, and other officer's interest in completing real estate transaction and assured firm that it would receive its commission, even if deal was not completed, and, based on those assurances, firm continued to collect and provide those officers and company with confidential information.

[5] Implied and Constructive Contracts 205H 3

205H Implied and Constructive Contracts
205HI Nature and Grounds of Obligation
205HI(A) In General
205Hk2 Constructive or Quasi Contracts
205Hk3 k. Unjust enrichment. Most Cited Cases

Unjust enrichment is a quasi-contract theory of recovery, and is an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned.

[6] Implied and Constructive Contracts 205H 3

205H Implied and Constructive Contracts
205HI Nature and Grounds of Obligation
205HI(A) In General
205Hk2 Constructive or Quasi Contracts
205Hk3 k. Unjust enrichment. Most Cited Cases

A plaintiff claiming unjust enrichment must show that the other party was enriched, at plaintiff's expense, and that it is against equity and good conscience to permit the other party to retain what is sought to be recovered; although privity is not required for an unjust enrichment claim, a claim will not be supported unless there is a connection or relationship between the parties that could have caused reliance or inducement on the plaintiff's part.

[7] Corporations and Business Organizations 101 1958

101 Corporations and Business Organizations
101VII Directors, Officers, and Agents
101VII(E) Liability for Corporate Debts and Acts
101k1956 Nature and Grounds in General
101k1958 k. Acting in corporate capacity as opposed to acting in personal capacity. Most Cited Cases

Licensed real estate brokerage and consulting firm could not recover in quantum meruit individually against officer of real estate company, since services performed by firm had not been requested by officer or performed on his individual behalf.

[8] Implied and Constructive Contracts 205H 30

205H Implied and Constructive Contracts
205HI Nature and Grounds of Obligation
205HI(C) Services Rendered
205Hk30 k. Work and labor in general; quantum meruit. Most Cited Cases

In order to establish a quantum meruit claim, a plaintiff must show the performance of services in good faith, acceptance of the services by the person to whom they are rendered, an expectation of compensation therefor, and the reasonable value of the services.

****495** Adam Leitman Bailey, P.C., New York (Jeffrey R. Metz of counsel), for appellant.

Lichter Gliedman Offenkrantz PC, New York (Ronald J. Offenkrantz of counsel), for Ralph Rieder,

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Elie Rieder, Kenneth Gliedman and Fieldstone Properties, LLC, respondents.

Westerman Ball Ederer Miller & Sharfstein, LLP, Uniondale (Michael J. Gelfand of counsel), for Rosewood Realty Group, Inc., and Aaron Jungreis, respondents.

SAXE, J.P., FRIEDMAN, CATTERSON, ACOSTA, RICHTER, JJ.

***406** Order, Supreme Court, New York County (Eileen Bransten, J.), entered July 27, 2009, which, to the extent appealed from, as limited by the briefs, in an action to recover real estate brokerage commissions, dismissed the complaint as against defendant-respondent Ralph Rieder, and the unjust enrichment claim as against all of the defendants-respondents, modified, on the law, to reinstate the unjust enrichment claim as against Ralph Rieder and Elie Rieder, and otherwise affirmed, without costs. Order, same court and Justice, entered June 10, 2010, which, insofar as appealed from, denied plaintiff's motion to renew, affirmed, without costs.

Plaintiff Georgia Malone & Company, Inc. (MaloneCo) is a licensed real estate brokerage and consulting firm that provides its clients with information with respect to the purchase and sale of properties not yet on the market. MaloneCo and defendant CenterRock Realty, LLC, by its managing member, Ralph Rieder (Ralph), entered into a Confidentiality Agreement in November 2007. That agreement pertained to CenterRock's potential purchase of a group of buildings in midtown Manhattan and required CenterRock to treat all information provided to it by MaloneCo as confidential. In addition, the agreement also required CenterRock to pay MaloneCo a commission fee of 1.25% of the sale price of the property. The agreement was signed by "Ralph Rieder of CenterRock Realty LLC" and MaloneCo. The purchaser is defined as "CenterRock Co" and its affiliates, and the signature line denotes CenterRock Realty as the "company," with Ralph Rieder as the "contact name."

****496** After the agreement was signed, MaloneCo provided CenterRock, Ralph, Elie Rieder (Elie), an officer of CenterRock, and defendant-respondent Kenneth Gliedman, an attorney for CenterRock, with confidential information concerning financial projections, due diligence materials, and other information and advice relating to all aspects of the subject property and potential transaction. In December 2007, CenterRock entered into a contract of sale with the property owners to purchase the property for $70,000,000. CenterRock had a 25–day period to perform due diligence investigations, during which time it could terminate the deal without penalty. The property owners agreed to extend the due diligence period an additional 21 days, to January 25, 2008. During the due diligence period, MaloneCo ***407** continued to collect, create and provide CenterRock, Ralph, and Elie with confidential information regarding the property. On January 25, 2008, the final day of the due diligence period, CenterRock terminated the transaction.

MaloneCo alleges that it provided valuable, confidential information to CenterRock, Ralph, and Elie, who then sold the information to defendants-respondents Rosewood Realty Group Inc., a fellow brokerage firm, and Aaron Jungreis, a broker at Rosewood, for $150,000. MaloneCo further contends that from about November 2007 through January 2008, Ralph continually affirmed CenterRock's interest in completing the transaction. The complaint specifically alleges that Ralph sent an e-mail to MaloneCo stating that he and Elie were working together to complete the transaction. However, during this time Ralph allegedly delayed the negotiations and tender of the down payment in order to provide himself, CenterRock, and Elie with more time to secure an equity partner to participate in the transaction. It is further alleged that shortly after CenterRock terminated the contract, Elie sold MaloneCo's confidential information to Rosewood

and Jungreis.

MaloneCo also contends that Rosewood and Jungreis then provided this information to its client, who in turn purchased the property resulting in a sizeable commission for Rosewood and Jungreis. FN1 According to the complaint, Ralph and Elie benefitted, separate and apart from any benefit to CenterRock, by profiting from the ultimate sale of the property, in addition to the $150,000 received for selling the confidential information. MaloneCo further alleges that Gliedman was the attorney for both CenterRock and the ultimate purchaser of the subject property, with his only benefit being collection of his fees. Defendant-respondent Fieldstone Properties, LLC (FSP), a corporation in which Ralph and Elie are officers, also is alleged to have unjustly benefitted from MaloneCo's work product.

FN1. The complaint does not allege that Rosewood and Jungreis knew that MaloneCo had not been compensated by CenterRock or the Rieders.

MaloneCo commenced this action alleging breach of contract, breach of confidentiality, quantum meruit, and unjust enrichment against Ralph Rieder individually, and unjust enrichment against the remaining defendants-respondents. Defendants-respondents moved to dismiss the complaint for failure to state a cause of action and the court granted the motions in their entirety.

[1][2][3] The motion court properly dismissed the contract claims ***408** against Ralph, individually. FN2 It is well established that ****497** officers or agents of a company are not personally liable on a contract if they do not purport to bind themselves individually (*PNC Capital Recovery v. Mechanical Parking Sys.,* 283 A.D.2d 268, 270, 726 N.Y.S.2d 394 [2001] *lv. dismissed* 96 N.Y.2d 937, 733 N.Y.S.2d 376, 759 N.E.2d 375 [2001], *appeal dismissed* 98 N.Y.2d 763, 751 N.Y.S.2d 846, 781 N.E.2d 911 [2002]; *see also Salzman Sign Co. v. Beck,* 10 N.Y.2d 63, 67, 217 N.Y.S.2d 55, 176 N.E.2d 74 [1961]). Ralph is listed only as the "contact" and CenterRock is listed as the "company" on the signature block of the agreement. The agreement specifically states it is between "Ralph Rieder of CenterRock" and MaloneCo. Indeed, Ralph only signed the contract once, rather than signing twice, which is the general practice when an individual wishes to be personally bound (*Salzman Sign Co.,* 10 N.Y.2d at 67, 217 N.Y.S.2d 55, 176 N.E.2d 74).

FN2. The motion court denied CenterRock's motion to dismiss in its entirety and CenterRock is not a party to this appeal.

[4][5][6] The unjust enrichment claim against Ralph and Elie, in their individual capacities, should not have been dismissed. Unjust enrichment is a quasi-contract theory of recovery, and "is an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned" (*IDT Corp. v. Morgan Stanley Dean Witter & Co.,* 12 N.Y.3d 132, 142, 879 N.Y.S.2d 355, 907 N.E.2d 268 [2009]). The plaintiff must show that the other party was enriched, at plaintiff's expense, and that "it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered" (*Mandarin Trading Ltd. v. Wildenstein,* 16 N.Y.3d 173, 182, 919 N.Y.S.2d 465, 944 N.E.2d 1104 [2011] [internal quotation marks and citation omitted]). Further, although privity is not required for an unjust enrichment claim (*Sperry v. Crompton Corp.,* 8 N.Y.3d 204, 215, 831 N.Y.S.2d 760, 863 N.E.2d 1012 [2007]), a claim will not be supported unless there is a connection or relationship between the parties that could have caused reliance or inducement on the plaintiff's part (*Mandarin Trading,* 16 N.Y.3d at 182, 919 N.Y.S.2d 465, 944 N.E.2d 1104).

Prior cases from this Court and the other Departments have held that an unjust enrichment claim can only be sustained if the services were performed at the defendant's behest (*Ehrlich v. Froehlich,* 72 A.D.3d 1010, 1011, 903 N.Y.S.2d 400 [2010]; *Seneca Pipe & Paving Co., Inc. v.*

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South Seneca Cent. School Dist., 63 A.D.3d 1556, 880 N.Y.S.2d 807 [2009]; *Joan Hansen & Co. v. Everlast World's Boxing Headquarters Corp.,* 296 A.D.2d 103, 108, 744 N.Y.S.2d 384 [2002]; *Kagan v. K–Tel Entertainment,* 172 A.D.2d 375, 376, 568 N.Y.S.2d 756 [1991]). The Court of Appeals in *Mandarin Trading* held that the plaintiff was unable to establish an unjust enrichment claim where the "pleadings failed to indicate a relationship between the parties that could have caused reliance or inducement" (*Mandarin Trading,* 16 N.Y.3d at 182, 919 N.Y.S.2d 465, 944 N.E.2d 1104). The Court did not discuss the "behest" language in ***409** *Kagan* and its progeny. However, there was no reason for the Court to do so because there was no claim of a contract between the plaintiff and the defendant, nor was there a claim of any direct contact such that the plaintiff could have acted at the defendant's behest. In any event, even under the language of *Mandarin Trading,* the unjust enrichment claim survives against Elie and Ralph.

MaloneCo contends that Ralph personally affirmed his, CenterRock's, and Elie's interest in completing the transaction and assured MaloneCo that it would receive its commission, even if the deal was not completed. Based on these assurances, MaloneCo continued to collect and provide ****498** Ralph, Elie, and CenterRock with the confidential information. Thus, MaloneCo has sufficiently pleaded that there was direct contact and a relationship with Ralph and Elie that could have caused reliance or inducement (*cf. Mandarin Trading,* 16 N.Y.3d at 182–183, 919 N.Y.S.2d 465, 944 N.E.2d 1104).

In contrast, no such allegations exist as to FSP, Gliedman, Rosewood, and Jungreis. MaloneCo dealt solely with CenterRock, Ralph, and Elie. It is not enough, as the dissent suggests, that CenterRock, Ralph, and Elie had a connection with the remaining defendants-respondents. MaloneCo does not allege that it relied upon any statements or actions of FSP, Gliedman, Rosewood or Jungreis, that those defendants acted in any way to induce MaloneCo to provide the confidential information, in the first instance, to CenterRock, Ralph, and Elie, or even that those defendants knew MaloneCo had not been paid. It also is not sufficient, as the dissent contends, to merely show that FSP, Gliedman, Rosewood and Jungreis were aware of MaloneCo's existence. A mere awareness standard would result in liability for anyone who simply knew of the plaintiff's existence. Similarly, the dissent also incorrectly contends that an unjust enrichment claim can exist solely because defendants may have profited, in one form or another, from plaintiff's work. Such a broad reading improperly expands the claim of unjust enrichment, absent any contention that defendants induced plaintiff to do the work. It is this lack of reliance or inducement that is fatal to the unjust enrichment claim against the third parties, and not merely the lack of behest language, as the dissent suggests in its opening paragraph.

Contrary to the dissent's suggestion, we see no contradiction between our holding and the language of the Court of Appeals in *Mandarin Trading,* nor do we see any internal inconsistency in the Court of Appeals' opinion. That case noted that an unjust enrichment claim was deficient without an allegation of a relationship that caused reliance or inducement. The brief reference***410** to one party's "awareness" of the other party's existence in *Mandarin Trading* was used simply to highlight the fact that, in that case, the two parties had no connection whatsoever and thus their relationship was "too attenuated." It was not intended, as the dissent suggests, to create an entirely new pleading rule, overruling existing Appellate Division precedent. The dissent's response to *Kagan* and its progeny is to announce that those cases were overruled by the Court of Appeals in *Sperry* and *Mandarin Trading.* The holding in *Sperry* stated that privity is not required (8 N.Y.3d at 215, 831 N.Y.S.2d 760, 863 N.E.2d 1012), a principle which is not in dispute here. However, the dissent fails to adequately explain why the Court of Appeals, in either case, would have overruled controlling precedent from

this Department, as well as the other Departments, without a clear indication that it was doing so [FN3].

> FN3. The dissent's contention that we are requiring the Court of Appeals to name every case it is overturning is a misreading of this majority opinion. It is worth noting that neither the briefs filed in the Court of Appeals in *Mandarin Trading,* nor the opinion itself focuses on the precedents we are citing here, and thus we adhere to our position that *Mandarin Trading* did not necessarily overrule those cases. In any event, the difference between our view and that of the dissent turns on the interpretation of a few sentences in *Mandarin Trading,* which ultimately resulted in dismissal of the unjust enrichment claim.

Finally, the dissent continues to maintain, despite the clear language to the contrary in this opinion, that we are requiring privity. Requiring plaintiff to plead facts from which it can be inferred that there ****499** was a relationship that involved reliance or inducement is not the same as requiring privity. We are not, as the dissent contends, applying too high a standard for a CPLR 3211 motion. Nor are we requiring plaintiff to plead the minutiae of its unjust enrichment claim. Rather, we are properly requiring MaloneCo to plead facts that are within its knowledge, and from which a relationship that caused reliance or inducement could be inferred.

[7][8] To the extent that MaloneCo asserts an action in quantum meruit against Ralph individually, it was properly dismissed. In order to establish a quantum meruit claim, plaintiff must show "the performance of services in good faith, acceptance of the services by the person to whom they are rendered, an expectation of compensation therefor, and the reasonable value of the services" (*Freedman v. Pearlman,* 271 A.D.2d 301, 304 [2000]). Here, there is no allegation that the services performed by MaloneCo were requested by Ralph or performed on his individual behalf.

Denial of MaloneCo's motion to renew also was proper as it ***411** did not submit any new material demonstrating Ralph Rieder's intent to be personally bound under the contract (*see* CPLR 2221 [e][2]).

All concur except SAXE, J.P. and ACOSTA, J. who dissent in part in a memorandum by ACOSTA, J. as follows:

ACOSTA, J. (dissenting in part).

I respectfully dissent because I believe that my colleagues are in error and ignore clear Court of Appeals precedent in upholding the dismissal of the unjust enrichment claims against FSP, Gliedman, Rosewood and Jungreis. Specifically, while the majority would require that plaintiff plead that the property be provided in the first instance at the behest of the defendants, I believe that it was sufficient that plaintiff alleged that defendants *knew* at all times that they were using information that had been wrongfully obtained by the individuals that sold it to them.

It is well established that to successfully plead unjust enrichment "[a] plaintiff must show that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered" (*Mandarin Trading Ltd. v. Wildenstein,* 16 N.Y.3d 173, 182, 919 N.Y.S.2d 465, 944 N.E.2d 1104 [2011] [internal quotation marks omitted]; *see also Wiener v. Lazard Freres & Co.,* 241 A.D.2d 114, 119, 672 N.Y.S.2d 8 [1998] ["[a] cause of action for unjust enrichment is stated where plaintiffs have properly asserted that a benefit was bestowed ... by plaintiffs and that defendants will obtain such benefit without adequately compensating plaintiffs therefor"] [internal quotation marks omitted]). A claim for unjust enrichment "is undoubtedly equitable and depends upon *broad* considerations of equity and justice" (*Paramount Film Distrib. Corp. v. State of New York,* 30 N.Y.2d 415, 421, 334 N.Y.S.2d 388, 285 N.E.2d 695 [1972], *cert. denied* 414 U.S. 829, 94 S.Ct. 57, 38 L.Ed.2d 64 [1973] [emphasis ad-

ded]).[FN1] It is "[d]uty, and not ****500** a promise or agreement or intention of the person sought to be charged, [that] defines it" (*Bradkin,* 26 N.Y.2d at 197, 309 N.Y.S.2d 192, 257 N.E.2d 643, quoting *Miller v. Schloss,* 218 N.Y. 400, 407, 113 N.E. 337 [1916]). Where a plaintiff's property is wrongfully misappropriated by a third party and given to a defendant, the defendant who receives the misappropriated property has a duty to return it to the plaintiff and ***412** may be compelled on equitable grounds to compensate the plaintiff (*see Carriafielio–Diehl & Assoc., Inc. v. D & M Elec. Contr.,* Inc., 12 A.D.3d 478, 479, 784 N.Y.S.2d 617 [2004]; *Wolf v. National Council of Young Israel,* 264 A.D.2d 416, 417, 694 N.Y.S.2d 424 [1999]; *Nakamura v. Fujii,* 253 A.D.2d 387, 390, 677 N.Y.S.2d 113 [1998]; *Cohn v. Rothman–Goodman Mgt. Corp.,* 155 A.D.2d 579, 581, 547 N.Y.S.2d 881 [1989]). In order to adequately plead an unjust enrichment claim there must be allegations of a connection between the plaintiff and the defendant that is not too attenuated; that is, the parties must have something akin to specific knowledge of one another's existence (*see Mandarin Trading,* 16 N.Y.3d at 182, 919 N.Y.S.2d 465, 944 N.E.2d 1104 ["Although privity is not required for an unjust enrichment claim, a claim will not be supported if the connection between the parties is too attenuated"], citing *Sperry v. Crompton Corp.,* 8 N.Y.3d 204, 215, 831 N.Y.S.2d 760, 863 N.E.2d 1012 [2007]; *see also* 26 Lord, Williston on Contracts § 68:5 [4th ed.] [noting that one of the elements of an unjust enrichment claim is "an *appreciation* or *knowledge* by the defendant of the benefit"] [emphasis added]).

FN1. As the Court of Appeals has explained:

> "A *quasi* or constructive contract rests upon the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another. In truth it is not a contract or promise at all. It is an obligation which the law creates, in the absence of any agreement, when and because *the acts of* the parties or *others* have placed in the possession of one person money, or its equivalent, under such circumstances that in equity and good conscience he ought not to retain it, and which ex aequo et bono belongs to another." *Bradkin v. Leverton,* 26 N.Y.2d 192, 197, 309 N.Y.S.2d 192, 257 N.E.2d 643 [1970] [quoting *Miller v. Schloss,* 218 N.Y. 400, 407, 113 N.E. 337 [1916] [emphasis added].

Before *Sperry,* there was a split of authority in New York regarding the extent to which parties needed to be in privity with one another to state a claim for unjust enrichment (*see e.g.* N.Y. PJI 4:2, Comment ["There is a split of authority as to whether privity is required in a claim seeking damages for unjust enrichment."]; *Bildstein v. MasterCard Intl., Inc.,* 2005 WL 1324972, *5, 2005 U.S. Dist. LEXIS 10763, *15 [S.D.N.Y.2005] ["Whether New York law imposes a nexus requirement to state a claim for unjust enrichment is unsettled."]). For example, one case in this Department essentially discarded the privity requirement (*see e.g. Cox v. Microsoft Corp.,* 8 A.D.3d 39, 40, 778 N.Y.S.2d 147 [2004]), while another line of cases in this Department held that the parties needed to be in direct privity with one another to plead unjust enrichment (*see e.g. Joan Hansen & Co. v. Everlast World's Boxing Headquarters Corp.,* 296 A.D.2d 103, 108, 744 N.Y.S.2d 384 [2002], quoting *Kagan v. K–Tel Entertainment,* 172 A.D.2d 375, 376, 568 N.Y.S.2d 756 [1991]).[FN2] In *Sperry* and *Mandarin Trading,* I believe that the Court of Appeals resolved this split and staked out a middle ground between the two different schools of thought. Indeed, after *Sperry* and *Mandarin Trading,* a party is now allowed to bring a claim for unjust enrichment under a loosened privity standard. Where a party bringing such a claim pleads that the other party had knowledge or awareness of its existence, the claim should not be dismissed for lack of privity.

FN2. There was also a division among the federal courts applying New York Law in diversity actions, as noted in *Bildstein* (2005 WL 1324972, *5, 2005 U.S. Dist LEXIS 10763, *15).

In *Sperry,* the Second Department affirmed Supreme Court's ***413** decision dismissing Sperry's claim for unjust enrichment ****501** on the ground that plaintiff was not in privity with the defendants (26 A.D.3d at 489, 810 N.Y.S.2d 498). In so doing, the Second Department noted its disagreement with this Department's decision in *Cox v. Microsoft Corp.,* 8 A.D.3d 39, 40, 778 N.Y.S.2d 147 [2004]. It also cited, inter alia, this Department's decision in *Kagan,* 172 A.D.2d at 376, 568 N.Y.S.2d 756 to support its narrow view of privity (26 A.D.3d at 489, 810 N.Y.S.2d 498). Notably, some of the cases cited by the Second Department in *Sperry* adopted the element being advanced by the majority here-namely, that services be performed at the defendant's "behest" (*see e.g. Outrigger Constr. Co. v. Bank Leumi Trust Co. of N.Y.,* 240 A.D.2d 382, 384, 658 N.Y.S.2d 394 [1997] *lv. denied* 91 N.Y.2d 807, 669 N.Y.S.2d 260, 692 N.E.2d 129 [1998]). The Court of Appeals affirmed the Second Department's decision; however, the Court "agree[d] with Sperry that a plaintiff need not be in privity with the defendant to state a claim for unjust enrichment" (*Sperry,* 8 N.Y.3d at 215, 831 N.Y.S.2d 760, 863 N.E.2d 1012).[FN3] In light of the fact that the Court of Appeals saw fit to lay out an alternative rationale from the one articulated by the Second Department and that the Court did not adopt the "behest" requirement in the various opinions cited by the Second Department's opinion, I believe that the Court of Appeals has overruled the line of cases adding the "behest" requirement as an element of unjust enrichment (*see e.g. Joan Hansen & Co.,* 296 A.D.2d at 108, 744 N.Y.S.2d 384, quoting *Kagan,* 172 A.D.2d at 376, 568 N.Y.S.2d 756 [1991]).[FN4] I also believe that *Cox,* 8 A.D.3d 39, 778 N.Y.S.2d 147 is no longer good law.

FN3. The majority's claim that the Court of Appeals in *Mandarin Trading* did not discuss the "behest" requirement in *Kagan* because the requirement did not apply in that case is perplexing. Of course, such language would have had direct application in that case. It could certainly have been used as the basis for denying the plaintiff's claim. The Court of Appeals could well have adopted the general rule articulated by the majority and applied it to the facts in *Mandarin.* Yet, the Court chose not to do so. I believe that the Court of Appeals unwillingness to apply the "behest" requirement in *Mandarin Trading* and *Sperry* is more consistent with my view-that the "behest" requirement is no longer good law-than with the majority's position. In short, if the Court believed that the "behest" language was good law, it would have said so, even if it chose not to apply it.

FN4. The majority justifies its defense of *Kagan* on the ground that the Court of Appeals did not give a "clear indication that it was [overruling controlling precedent from this Department]." We believe, however, that Judge Jones' opinion was crystal clear in rejecting the behest requirement. The Court of Appeals does not have to name every case that it is overturning; it merely has to articulate a new rule that is logically inconsistent with this Court's prior precedent.

Contrary to the majority's position, to plead unjust enrichment, there is no requirement that the property be provided in ***414** the first instance at the behest of the defendant[FN5] (*see* ****502***Monex Fin. Servs., Ltd. v. Dynamic Currency Conversion, Inc.,* 62 A.D.3d 675, 676, 878 N.Y.S.2d 432 [2009] ["[T]he complaint sufficiently pleaded a cause of action sounding in unjust enrichment. The latter cause of action did not plead a quantum meruit theory; therefore, the plaintiffs were not required to

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plead that they performed services for the defendants"] [citations omitted]; [FN6] *Aetna Cas. & Sur. Co. v. LFO Constr. Corp.,* 207 A.D.2d 274, 277, 615 N.Y.S.2d 389 [1994] ["The unjust enrichment claim does not require that the party enriched take an active role in obtaining the benefit."]; *see also T.D. Bank, N.A. v. JP Morgan Chase Bank, N.A,* 2010 WL 4038826, *5, 2010 U.S. Dist. LEXIS 109471, *19–20 [E.D N.Y.2010] [The claims for restitution asserted by Chase require proof of no other, independent relationship between the parties ... Accordingly, Chase's failure to allege privity or direct dealings between itself and Kahan does not defeat its claims for ... unjust enrichment."]; *Manufacturers Hanover Trust Co. v. Chemical Bank,* 160 A.D.2d 113, 117, 559 N.Y.S.2d 704 [1990], *lv. denied* 77 N.Y.2d 803, 568 N.Y.S.2d 15, 569 N.E.2d 874 [1991] [noting that "[i]t does not matter whether the benefit is directly or indirectly conveyed" in addressing an unjust enrichment claim where the parties had direct contact with one another]; *Dreieck Finanz AG v. Sun,* 1989 WL 96626, *4, 1989 U.S. Dist. LEXIS 9623, *13 [S.D N.Y.1989] [in applying New York law to ***415** adjudicate an attachment claim based on an unjust enrichment theory where some of the parties knew of each other, the District Court noted, "[n]or is it necessary for plaintiff and defendant to have had direct dealings with one another."]).[FN7] It was sufficient that plaintiff alleged that defendants *knew* at all times that they were using for their own benefit information that had been wrongfully obtained by the very individuals that sold it to them at a significant [FN8] discount (*Mandarin Trading,* 16 N.Y.3d at 182, 919 N.Y.S.2d 465, 944 N.E.2d 1104 ["Mandarin's unjust enrichment claim fails for the same deficiency as its other claims—the lack of allegations that would indicate a relationship between the parties, *or at least an awareness* by Wildenstein of Mandarin's existence."] [emphasis added]; *Davenport v. Walker,* 132 App.Div. 96, 116 N.Y.S. 411 [1909]; [FN9] *see also* ****503***Mason v. Prendergast,* 120 N.Y. 536, 24 N.E. 806 [1890] [holding that where a person that has a specific fund belonging to another, "who is entitled thereto on demand, delivers the money, without the consent of the owner, to a third person, and the latter refuses to pay it over on demand, an action ... is maintainable against him, and for the purpose of relief it is not necessary to join as plaintiff the one who made the delivery."]; ***416***RenerGlobe, Inc. v. Northeast Biofuels, LLC,* 24 Misc.3d 1212[A], 2009 N.Y. Slip Op. 51430 [U], 2009 WL 1929090 [2009] [upholding a complaint alleging that the new owners of a facility received valuable permits and contracts as a result of the plaintiff's work on behalf of the previous owner, and that it would be unjust and inequitable for the new owner and operators of the facility to retain such services and benefits without compensating the plaintiff]). The language in *Mandarin* that "the pleadings failed to indicate a relationship between the parties that could have caused reliance or inducement" focused on the nature of the enrichment conferred upon the defendant, that is, the "equity" of the enrichment (16 N.Y.3d at 182, 919 N.Y.S.2d 465, 944 N.E.2d 1104). That language did not address the necessary nexus between the parties.[FN10] The majority's interpretation of the "reliance" or "inducement" language in *Mandarin* essentially transforms the language in the preceding paragraph, establishing "awareness" as a sufficient basis to state a cause of action (*id.*), into mere surplusage.[FN11] ****504** Judge Jones's opinion should not be read to include purposeless phrases that serve as nothing more than mere ornamentation. Moreover, I do not believe that the Court of Appeals was so careless as to write what would amount to, under the majority's interpretation, an internally inconsistent opinion.[FN12] Accordingly, I reject the majority's use of the "reliance" or "inducement" language in *Mandarin* to reintroduce what amounts to a direct privity requirement to plead a cause of action for unjust enrichment.

FN5. A cause of action for unjust enrichment has traditionally been understood to reach situations beyond the scope of a claim brought for quantum meruit. Unsurprisingly, the case cited by *Kagan* in support of the "behest" element was an action

for quantum meruit (*see Citrin v. Columbia Broadcasting Sys.,* 29 A.D.2d 740, 286 N.Y.S.2d 706 [1968]). The majority's insistence on limiting unjust enrichment claims to those where the benefit was conferred at the behest of the defendant, after the Court of Appeals did away with that requirement in *Sperry,* virtually collapses the distinction between claims for quantum meruit and those for unjust enrichment. Troublingly, by limiting the scope of unjust enrichment to such a significant degree, the majority would preclude a party from recovering for, inter alia, a mistake. In so doing, the majority runs roughshod over well-established principles of American law, the origins of which can be traced to Roman times (*see* Corbin, *Quasi–Contractual Obligations,* 21 Yale L. J. 533, 543 [1912] ["Where money is paid under the mistaken belief that it was due, when in fact nothing was due, an action will lie to recover it. This was true also under the Roman law and it is true under all the civil codes based on the Roman law."] [footnotes omitted]). Moreover, the majority is adding an element to the unjust enrichment cause of action that 1) is nowhere to be found in the Court of Appeals precedents and 2) cannot be reconciled with existing precedent (*see Mandarin Trading,* 16 N.Y.3d at 182, 919 N.Y.S.2d 465, 944 N.E.2d 1104 [articulating three elements of an unjust enrichment claim, none of which included a requirement that the benefit be conferred at the defendant's "behest"]).

FN6. Notably, in arriving at the same conclusion that I have reached respecting the relationship between quantum meruit and unjust enrichment, the Second Department rejected Supreme Court's application of *Kagan* in an action for unjust enrichment (62 A.D.3d at 676, 878 N.Y.S.2d 432).

FN7. The facts of this case are more fully elaborated in *Dreieck Finanz AG v. Sun,* 1990 WL 11537, 1990 U.S. Dist LEXIS 1438 [S.D.N.Y.1990].

FN8. The majority maintains that my standard would "expand[ ] the claim of unjust enrichment." On the contrary, the majority's reading would narrow the claim in a way that countless federal and state courts have rejected (*see* 26 Lord, Williston on Contracts § 68:5 [4th ed.]).

FN9. In *Davenport,* the plaintiff John S. Davenport, as receiver of the Bank of Staten Island, brought an unjust enrichment action against defendants Norman S. Walker, Jr., and another, doing business as Walker Bros. The complaint alleged that Ahlmann, the cashier of the Bank of Staten Island, drew a cashier's check upon the bank and delivered it to the defendants, who received it in part-payment of his indebtedness (132 App.Div. at 98, 116 N.Y.S. 411). Ahlmann lacked the bank's approval to take such action. The complaint further alleged that defendants accepted the check that Alhman tendered "with notice and knowledge that the said funds were the funds of the said bank" (*id.* [internal quotation marks omitted]). The Court allowed the action to proceed, holding:

> "It may be conceded, in view of Ahlmann's relations to the bank, that the mere fact that the check was a cashier's check would not be sufficient to put the defendants upon notice that funds of the bank were being used to pay his individual debt. But this complaint alleges further that at the time that the defendants applied this $40,000 in part payment of Ahlmann's indebtedness to them they accepted such part payment *'with notice and knowledge that the said funds*

> *were the funds of the said bank.'* ... If the defendants *knew* that Ahlmann was paying his debts with the bank funds, equity and good conscience would forbid them to retain the same. Under this allegation the plaintiff is not limited to any inference that may be drawn from the form of the check, but may prove full and complete notice and knowledge, actual or constructive, that the money which defendants received was money of the bank which Ahlmann had no right to use" (*id.* at 413–414, 116 N.Y.S. 411 [emphasis added and citations omitted]).

FN10. Indeed, the Court of Appeals language in *Mandarin* echoes the language of this Court's majority opinion in *Mandarin,* 65 A.D.3d 448, 884 N.Y.S.2d 47 [2009], *affd.* 16 N.Y.3d 173, 919 N.Y.S.2d 465, 944 N.E.2d 1104 [2011]. Notably, the majority quoted *Paramount Film Distrib. Corp.,* 30 N.Y.2d at 421, 334 N.Y.S.2d 388, 285 N.E.2d 695, for the proposition that "[t]he essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered" (*Mandarin Trading,* 65 A.D.3d at 451, 884 N.Y.S.2d 47). I believe that the majority's link between the lack of reliance and inducement on the part of Mandarin and the "equity" requirement of an unjust enrichment claim supports my view that the language respecting "reliance or inducement" in the Court of Appeals opinion was similarly tied to the "equity" requirement-and not the "privity" requirement, as the majority maintains.

FN11. Frankly, I fail to understand how such a requirement could be met without also requiring that the parties have a direct relationship with one another-something the Court of Appeals has said in *Mandarin* is unnecessary. To wit, the interaction that is required to cause a person to rely upon another person or induce a person to take some action necessitates more than mere awareness of the other parties' existence.

FN12. That is, I do not believe that Judge Jones's opinion suffers from any internal inconsistency. Rather, I believe that the majority interprets his opinion in a way that makes it internally inconsistent.

Here, plaintiff factually and pointedly alleges, in the absence of discovery, that defendants misappropriated its confidential ***417** information and benefitted from its property. Specifically, it alleges that it had provided valuable, confidential information to CenterRock and Ralph Rieder, and that Rieder and his affiliated defendants wrongfully sold the information to defendants Rosewood and Jungreis, who in turn used it to obtain a sizeable commission. Plaintiff further alleges in its complaint that "defendants Rieder, CenterRock, Elie, Gliedman, FSP, Rosewood and Jungreis *knew at all times* that [plaintiff] had performed the aforementioned work, labor and services and had supplied the aforesaid information with the expectation that [plaintiff] would be compensated therefore in the event that an agreement was reached to purchase the Property" (emphasis added).[FN13] Because defendants allegedly knew of the benefit that plaintiff conferred upon them, the connection between the parties is not too attenuated (*cf. Mandarin,* 16 N.Y.3d at 182, 919 N.Y.S.2d 465, 944 N.E.2d 1104). Indeed, unlike in *Mandarin Trading*, the parties here were not total strangers to one another. Assuming the truth of plaintiff's assertions as we must on a motion to dismiss (*see Fischbach & Moore v. Howell Co.,* 240 A.D.2d 157, 658 N.Y.S.2d 859 [1997]), defendants should not be able to profit from what they allegedly knew to be the wrongful dissemination of plaintiff's confidential proprietary information, while plaintiff receives nothing for its work and valuable work product

FN14 (*cf. Joan Briton,* 36 A.D.2d at 466, 321 N.Y.S.2d 195 ["The defendant deRham was not merely the innocent recipient of an unsolicited gift. It is indicated that she was intimately involved in every stage of the arrangements, and having benefited there from, ought without any doubt also ****505** be liable to the plaintiff for what she received."]).FN15

FN13. The majority seemingly misunderstands the nature of plaintiff's claim, as plaintiff has alleged more than it was on the unfortunate end of a business deal that may have involved some unsavory parties.

FN14. The contract between CenterRock and MaloneCo obligates the former to pay the latter a commission of 1.25% of the purchase price of a building procured using MaloneCo's information. Rosewood and Jungreis are alleged to have received MaloneCo's Confidential Information for $150,000. Accepting the alleged ultimate purchase price of $68,500,000 as true, MaloneCo would have been paid $856,250 for its information had it contracted directly with Rosewood and Jungreis. This represents a benefit (i.e., a discount) of $706,250 to Rosewood and Jungreis for MaloneCo's information. Such a windfall to defendants who knowingly acquired misappropriated property should not be given legal sanction (*see Joan Briton, Inc. v. Streuber,* 36 A.D.2d 464, 466, 321 N.Y.S.2d 195 [1971], *affd.* 30 N.Y.2d 551, 330 N.Y.S.2d 612, 281 N.E.2d 555 [1972] ["A windfall creates a chilling effect"]).

FN15. There was a dissent at the Appellate Division in *Joan Briton.* Notably, the dissent did not disagree with the majority position respecting privity (*see* 36 A.D.2d at 467 ["if the defendant has obtained [a benefit] from a third person which should have gone to the plaintiff, it may be recovered on this theory"]), which is consistent with the view articulated in this dissent. Rather, the dissent's disagreement with the majority was related to the wrongfulness of the plaintiff's actions (*id.* at 466–467 ["There is not even a contention, much less a suggestion, that this defendant knew or had reason to suspect that [the co-defendant] would not pay according to his undertaking. Nor is there any suggestion that she would have undertaken or could afford the project absent his agreement to be responsible."]). Here, the complaint alleges that the various parties took actions that they knew would ultimately deprive MaloneCo of the benefit of its hard-earned commission. Such actions are wrongful.

***418** Saying that these allegations are "conclusory" does not make it so, particularly in the context of a glaring misappropriation of plaintiff's property. The majority wants to raise the CPLR 3211 bar by requiring, in the absence of discovery, that plaintiff not simply allege its claim, but support it with evidence as well. At this stage of the action, however, the information that would satisfy the majority is generally within the knowledge of the defendants alleged to have misappropriated the property. Accordingly, it is extremely unfair and improper, in the context of a CPLR 3211 motion, where "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Leon v. Martinez,* 84 N.Y.2d 83, 87–88, 614 N.Y.S.2d 972, 638 N.E.2d 511 [1994], quoting *Guggenheimer v. Ginzburg,* 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 372 N.E.2d 17 [1977]), to require that plaintiff plead the minutiae of the unjust enrichment claim (*see Suffolk County Water Authority v. Dow Chem. Co.,* 30 Misc.3d 1202[A], 2010 N.Y. Slip Op. 52243[U], *4, 2010 WL 5187722 [2010] ["While much of what [plaintiff] has stated may need to be demonstrated with specific information ... such will be done through the discovery process.... However, as set forth, the complaint places the movants on notice of the conduct ... with which it charges them; it gives notice

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of the manner in which some of the evidence exists; it sets forth the method by which the harm ... assertedly occurred; and it sets forth its basis for ... damages. This does not mean such can be proved; however, it is sufficient to satisfy the requirements of CPLR § 3211(a)(7)"]; *see also* CPLR 3211[d]). Plaintiff should be entitled to seek recovery for the unjust enrichment of those who knowingly and wrongfully misappropriated its property as well as those who benefitted from property that they knew came into their hands as a result of the wrongful action of a third party.[FN16]

> FN16. Contrary to the majority's assertion, the standard I am proposing would not "result in liability for anyone who simply knew of the plaintiff's existence." My standard would only result in liability when a party was enriched and had awareness that the other party was conferring a benefit upon it that in equity and good conscience it could not retain.

Finally, I believe there are strong prudential reasons for rejecting the majority's attempt to reintroduce a heightened ***419** privity requirement (*cf.* Perillo, *Restitution in a Contractual Context,* 73 Colum. L. Rev. 1208, 1211 [1973] [describing privity as an "unintelligible" requirement "in a context where liability may be thrust upon the defendant by a stranger"]). As such, plaintiff's fourth cause of action should be reinstated. If plaintiff prevails, it should be entitled to obtain restitution for the full amount (i.e., $750,000) that it alleges it ****506** would have received had the parties not misappropriated its property.

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Ronnie Greenfield et al., Respondents,
v.
Philles Records, Inc., et al., Appellants, et al., Defendants.
Court of Appeals of New York

Argued September 5, 2002;
Decided October 17, 2002

CITE TITLE AS: Greenfield v Philles Records

SUMMARY

Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered November 13, 2001, which affirmed a judgment of the Supreme Court (Paula Omansky, J.), entered in New York County, following a nonjury trial, awarding plaintiffs damages in the principal amount of $2,971,272.96, and ordering defendants to account to plaintiffs for any exploitation of the Ronettes' master recordings from June 15, 1998 to June 14, 2000 and for any future exploitation of those recordings.

Greenfield v Philles Records, 288 AD2d 59, modified.

HEADNOTES

Copyrights--Musical Performances--Failure of Artist to Retain Rights

(1) In the absence of an explicit contractual reservation of rights by performing artists, the artists' transfer of full ownership rights to the master recordings of their musical performances carries with it the unconditional right of the producer to redistribute those performances in any technological format. A contract's silence on synchronization (i.e., the use of new recording technologies and licensing of master recordings for use in movie and television productions) and on domestic licensing of recordings to third parties for production and distribution in the United States, does not create an ambiguity which opens the door to the admissibility of extrinsic evidence to determine the intent of the parties. Inasmuch as there is no ambiguity in the parties' contract, defendant producers are entitled to exercise complete ownership rights, subject to payment of applicable royalties owing to plaintiffs. The unconditional transfer of ownership right to a work of art includes the right to use the work in any manner, unless those rights are specifically limited by the terms of the contract.

Copyrights--Musical Performances--Ownership of Master Recordings--Exploitation of Future Technologies

(2) In a dispute between recording artists and their producer over the latter's rights to synchronization (i.e., the use of new recording technologies and licensing of master recordings for use in movie and television productions) and to domestic licensing of recordings to third parties for production and distribution in the United States, the breadth of the ownership provision granting the producer, who concededly owns the master recordings of the artists' performances, the "right to make phonograph records ... or other reproductions of the performances embodied in such recordings by any ***563** method now or thereafter known, and to sell and deal in the same," is not limited by the agreement's introductory paragraph stating that the producers' purpose for purchasing the artists' performances was to make "phonograph records and/or tape recordings and other similar devices." When read in conjunction with the ownership provision, "other similar devices" encompasses defendants' right to reproduce the performances by any current or future

technological methods.

Copyrights--Musical Performances--Ownership of Master Recordings--Exploitation of Future Technologies
(3) In a dispute between recording artists and their producer over the latter's right to exploit technologies which were unknown when their agreement was signed, the royalty schedule contained in the agreement does not restrict the scope of the producer's ownership rights of the master recordings of the artists' performances. The royalty schedule provides compensation rights to plaintiffs; it does not inhibit defendants' ability to use the master recordings. Accordingly, the parties' agreement, "read as a whole to determine its purpose and intent," is susceptible to only one reasonable interpretation: defendants are authorized to license the performances for use in visual media, such as movies and television commercials or broadcasts, and for domestic release by third parties in audio formats.

Copyrights--Musical Performances--Failure of Artist to Retain Rights
(4) In resolving a dispute between recording artists and their producer over the extent of the latter's right in his ownership of the master recordings of the artists' performances, *Caldwell v ABKCO Music & Records* (269 AD2d 206 [2000]), which cites a federal case for the proposition that "[r]ights not specifically granted by an artist in an agreement are reserved to the artist and the owner of such property, absent the clearest language, is not free to do with it whatever the owner wishes," is not to be followed.

Release--Scope of Release--California Law
(5) In a dispute between a recording artist and her producer/ex-husband, the artist is not barred from sharing in certain royalties because she executed a general release in connection with her divorce from the producer. California law is applicable to the analysis of the scope of the release because that is the state where the release was executed and the divorce was finalized. In contrast to the "four corners" rule that New York has long applied, California courts preliminarily consider all credible evidence of the parties' intent in addition to the language of the contract. During proceedings in New York, Supreme Court determined that the extrinsic evidence supported the artist's allegation that her right to compensation under the recording contract was not an intended subject of the release. That finding of fact, affirmed by the Appellate Division, is supported by the record, and there is no reason to reverse the Appellate Division's interpretation of California law.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Copyright and Literary Property §§ 16, 70-74, 91, 93-96, 160; Divorce and Separation §§ 1122, 1128, 1184; Release §§ 28-33.***564**

Carmody-Wait 2d, Spousal Support, Counsel Fees, Child Support, and Property Distribution in Matrimonial Actions §§ 118:145, 118:218.

NY Jur 2d, Compromise, Accord, and Release §§ 73, 79, 80, 82, 88; Domestic Relations §§ 2469, 2496, 2509, 2518, 2699; Literary and Artistic Property §§ 6-9, 11, 21, 28, 31, 32.

ANNOTATION REFERENCES

See ALR Index under Copyright and Literary Property; Discharge or Release; Divorce and Separation.

POINTS OF COUNSEL

Pryor Cashman Sherman & Flynn LLP, New York City (*Andrew H. Bart* and *David C. Rose* of counsel), for appellants.
I. The decision ignores controlling New York Property Law and improperly creates a subclass of property to be governed by judicially created ad hoc "rules." (*Allen v Trustees of Great Neck Free Church,* 265 NY 570;*Pushman v New York Graphic Socy.,* 287 NY 302;*Burnett v Warner Bros. Pictures,* 113 AD2d 710;*Brady v Smith,* 181 NY 178; *Matter of Rieger,* 60 AD2d 299, 44 NY2d 643;*Minc v Chase Natl. Bank of City of N.Y.,* 263 App Div 141;*Village of E. Rochester v Rochester Gas &*

Elec. Corp., 262 App Div 556, 289 NY 391;*Tysen v Cedar Grove Beach Corp.,* 196 App Div 684;*Matter of 24-52 44th St., Long Is. City,* 176 Misc 249; *Crimi v Rutgers Presbyt. Church in City of N.Y.,* 194 Misc 570.)II. In order to award respondents damages on a theory of unjust enrichment, the courts below jettisoned New York rules of contract interpretation. (*Surge Licensing v Copyright Promotions,* 258 AD2d 257;*Unisys Corp. v Hercules Inc.,* 224 AD2d 365;*Aviv Constr. v Antiquarium, Ltd.,* 259 AD2d 445;*Brooklyn Navy Yard Cogeneration Partners v PMNC,* 277 AD2d 271;*Breed v Insurance Co. of N. Am.,* 46 NY2d 351;*Chimart Assoc. v Paul,* 66 NY2d 570;*W.W.W. Assoc. v Giancontieri,* 77 NY2d 157;*Caldwell v ABKCO Music & Records,* 269 AD2d 206;*Thomas v Gusto Records,* 939 F2d 395;*Best Brands Beverage v Falstaff Brewing Corp.,* 842 F2d 578.)III. The courts below ignored controlling California law in order to relieve Greenfield from the effect of the release. (*McCray v Casual Corner,* 812 F Supp 1046;*Dobler v Story,* 268 F2d 274;*Alexander Sec. v Mendez,* 511 US 1150.)IV. New York Civil Rights Law § 51 confirms that respondents may not recover any damages based on the theory of unjust enrichment. (*Maxwell v N.W. Ayer, Inc.,* 159 Misc 2d 454;***565** *Oliveira v Frito-Lay, Inc.,* 251 F3d 56;*Grodin v Liberty Cable,* 244 AD2d 153;*Hampton v Guare,* 195 AD2d 366, 82 NY2d 659;*Bunnell v Keystone Varnish Co.,* 254 App Div 885.)V. The trial court abused its discretion by sua sponte amending the pleadings after the conclusion of trial. (*Trepuk v Frank,* 104 AD2d 780;*Cowper Co. v Buffalo Hotel Dev. Venture,* 99 AD2d 19;*Rodgers v Roulette Records,* 677 F Supp 731;*Felix v Lettre,* 204 AD2d 679;*Ramsey v Owens,* 159 AD2d 930;*Olden v Bolton,* 137 AD2d 878;*Murray v City of New York,* 43 NY2d 400;*Dittmar Explosives v A.E. Ottaviano, Inc.,* 20 NY2d 498;*Wiener v Lazard Freres & Co.,* 241 AD2d 114;*Collins Tuttle & Co. v Leucadia, Inc.,* 153 AD2d 526.)VI. The trial court could not award damages based on Wolinsky's calculations since his testimony was inconsistent with his calculations. (*Rushford v Facteau,* 280 AD2d 787; *Greenfield v Greenfield,* 234 AD2d 60;*Matter of City of New York [Esam Holding Corp.],* 222 App Div 554, 250 NY 588.)

Edwards & Angell LLP, New York City (*Ira G. Greenberg* and *Idelle R. Abrams* of counsel), and *Peltz & Walker* (*Alexander Peltz* of counsel) for respondents.

I. The Appellate Division correctly affirmed the award of damages on account of Philles' licensing the Ronettes' master recordings for synchronization. (*Lynes v Townsend,* 33 NY 558;*Matter of Charles,* 3 AD2d 119;*Matter of Rieger,* 60 AD2d 299;*Brady v Smith,* 181 NY 178;*Matter of Smith,* 90 AD2d 905, 60 NY2d 864;*Loch Sheldrake Assoc. v Evans,* 306 NY 297;*Stock v Mann,* 129 Misc 201;*Pushman v New York Graphic Socy.,* 287 NY 302;*Kramer v Newman,* 749 F Supp 542;*New Era Elec. Range Co. v Serrell,* 252 NY 107.)II. The Appellate Division correctly affirmed the award of damages on account of Philles' licensing the Ronettes' master recordings for manufacture. (*De Winter & Co. v B.N.S. Intl. Sales Corp.,* 16 AD2d 763;*Kasen v Morrell,* 6 AD2d 816;*Federal Express Corp. v Pan Am. World Airways,* 623 F2d 1297;*Thomas v Gusto Records,* 939 F2d 395;*Reape v New York News,* 122 AD2d 29.)III. The Appellate Division correctly held that the release that Ms. Greenfield executed in obtaining a divorce from Mr. Spector did not preclude her recovery. (*67 Wall St. Co. v Franklin Natl. Bank,* 37 NY2d 245;*Matter of Wallace v 600 Partners Co.,* 86 NY2d 543;*B & R Children's Overalls Co. v New York Job Dev. Auth.,* 257 AD2d 368.)

Owen & Davis P.C., New York City (*Henry G. Burnett* and *Mark D. Bradford* of counsel), and *Berliner Corcoran & Rowe, L.L.P.,* Washington, D.C. (*Jay A. Rosenthal* of counsel), for Recording ***566** Artists' Coalition, amicus curiae.

I. The Appellate Division correctly affirmed the trial court's decision that the 1963 recording agreement did not authorize Spector to license master recordings to unaffiliated third parties in ways not specified in the contract. (*Caldwell v ABKCO Music & Records,* 269 AD2d 206;*Thomas v Gusto Records,* 939 F2d 395, 502 US 984.)II. The Appellate Division correctly affirmed the trial court's award to compensatory damages in the amount of 50% of

licensing revenues in accordance with industry custom and practice. (*Thomas v Gusto Records,* 939 F2d 395;*Caldwell v ABKCO Music & Records,* 269 AD2d 206.)

O'Melveny & Myers LLP, New York City (*Dale M. Cendali, Diana M. Torres* and *Olivier A. Taillieu* of counsel), *Matthew J. Oppenheim,* Washington, D.C., *Steven Marks, Stanley Pierre-Louis* and *Gary Greenstein* for Recording Industry Association of America, amicus curiae.

The Appellate Division incorrectly interpreted an unambiguous grant of rights. (*Caldwell v ABKCO Music & Records,* 269 AD2d 206;*Warner Bros. Pictures v Columbia Broadcasting Sys.,* 216 F2d 945;*Thomas v Gusto Records,* 939 F2d 395;*Burnett v Warner Bros. Pictures,* 113 AD2d 710;*Pushman v New York Graphic Socy.,* 287 NY 302;*Frohman v Fitch,* 164 App Div 231;*Bartsch v Metro-Goldwyn-Mayer, Inc.,* 391 F2d 150;*Boosey & Hawkes Music Publs., Ltd. v Walt Disney Co.,* 145 F3d 481.)

OPINION OF THE COURT

Graffeo, J.

In this contract dispute between a singing group and their record producer, we must determine whether the artists' transfer of full ownership rights to the master recordings of musical performances carried with it the unconditional right of the producer to redistribute those performances in any technological format. In the absence of an explicit contractual reservation of rights by the artists, we conclude that it did.

In the early 1960s, Veronica Bennett (now known as Ronnie Greenfield), her sister Estelle Bennett and their cousin Nedra Talley, formed a singing group known as "The Ronettes." They met defendant Phil Spector, a music producer and composer, in 1963 and signed a five-year "personal services" music recording contract (the Ronettes agreement) with Spector's production company, defendant Philles Records, Inc. The plaintiffs agreed to perform exclusively for Philles Records and in exchange, Philles Records acquired an ownership right to the recordings ***567** of the Ronettes' musical performances.[FN1] The agreement also set forth a royalty schedule to compensate plaintiffs for their services. After signing with Philles Records, plaintiffs received a single collective cash advance of approximately $15,000.

FN1 Defendants acknowledge that the agreement did not restrict the ability of the Ronettes to earn income from concert performances and appearances on television or in movies, or to sell the reproduction rights to those performances.

The Ronettes recorded several dozen songs for Philles Records, including "Be My Baby," which sold over a million copies and topped the music charts. Despite their popularity, the group disbanded in 1967 and Philles Records eventually went out of business. Other than their initial advance, plaintiffs received no royalty payments from Philles Records.

Beyond their professional relationship, however, was the story of the personal relationship between Spector and plaintiff Ronnie Greenfield. They married in 1968 but separated after a few years. Greenfield initiated a divorce proceeding against Spector in California and a settlement was reached in 1974. As part of that agreement, Spector and Greenfield executed mutual general releases that purported to resolve all past and future claims and obligations that existed between them, as well as between Greenfield and Spector's companies.

Defendants subsequently began to capitalize on a resurgence of public interest in 1960s music by making use of new recording technologies and licensing master recordings of the Ronettes' vocal performances for use in movie and television productions, a process known in entertainment industry parlance as "synchronization." The most notable example was defendants' licensing of "Be My Baby" in 1987 for use in the motion picture "Dirty Dancing." Defendants also licensed master recordings to third parties for production and distribution

in the United States (referred to as domestic redistribution), and sold compilation albums containing performances by the Ronettes. While defendants earned considerable compensation from such licensing and sales, no royalties were paid to any of the plaintiffs.

As a result, plaintiffs commenced this breach of contract action in 1987, alleging that the 1963 agreement did not provide Philles Records with the right to license the master recordings for synchronization and domestic redistribution, and demanded royalties from the sales of compilation albums. Although defendants initially denied the existence of a contract, in 1992 ***568** they stipulated that an unexecuted copy of the contract would determine the parties' rights. Defendants thereafter argued that the agreement granted them absolute ownership rights to the master recordings and permitted the use of the recordings in any format, subject only to royalty rights. Following extensive pretrial proceedings (160 AD2d 458;243 AD2d 353;248 AD2d 212), Supreme Court ruled in plaintiffs' favor and awarded approximately $3 million in damages and interest.

The Appellate Division affirmed, concluding that defendants' actions were not authorized by the agreement with plaintiffs because the contract did not specifically transfer the right to issue synchronization and third-party domestic distribution licenses. Permitting plaintiffs to assert a claim for unjust enrichment, the Court found that plaintiffs were entitled to the music recording industry's standard 50% royalty rate for income derived from synchronization and third-party licensing. We granted leave to appeal.

We are asked on this appeal to determine whether defendants, as the owners of the master recordings of plaintiffs' vocal performances, acquired the contractual right to issue licenses to third parties to use the recordings in connection with television, movies and domestic audio distribution.[FN2] The agreement between the parties consists of a two-page document, which apparently was widely used in the 1960s by music producers signing new artists. Plaintiffs executed the contract without the benefit of counsel. The parties' immediate objective was to record and market the Ronettes' vocal performances and "mak[e] therefrom phonograph records and/or tape recordings and other similar devices (excluding transcriptions)."[FN3] The ownership rights provision of the contract provides:

"All recordings made hereunder and all records and reproductions made therefrom together with the performances embodied therein, shall be entirely [Philles'] property, free of any claims whatsoever by you or any person deriving any rights of interest from you. Without limitation of the foregoing, [Philles] shall have the right to make phonograph records, tape recordings or other reproductions of ***569** the performances embodied in such recordings by any method now or hereafter known, and to sell and deal in the same under any trade mark or trade names or labels designated by us, or we may at our election refrain therefrom."

FN2 Whether defendants were allowed to use the Ronettes' performances on compilation albums and the amount of compensation that Supreme Court awarded for that use have not been raised on appeal.

FN3 "Transcriptions" were large discs used for reproducing musical performances for radio broadcasts.

Plaintiffs concede that the contract unambiguously gives defendants unconditional ownership rights to the master recordings, but contend that the agreement does not bestow the right to exploit those recordings in new markets or mediums since the document is silent on those topics. Defendants counter that the absence of specific references to synchronization and domestic licensing is irrelevant. They argue that where a contract grants full ownership rights to a musical performance or composition, the only restrictions upon the owner's right to use that property are those explicitly enumerated by the grantor/artist.

Despite the technological innovations that continue to revolutionize the recording industry, long-settled common-law contract rules still govern the interpretation of agreements between artists and their record producers.[FN4] The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent (*see Slatt v Slatt,* 64 NY2d 966, 967,*rearg denied*65 NY2d 785 [1985]). "The best evidence of what parties to a written agreement intend is what they say in their writing" (*Slamow v Del Col,* 79 NY2d 1016, 1018 [1992]). Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms (*see e.g. R/S Assoc. v New York Job Dev. Auth.,* 98 NY2d 29, 32,*rearg denied*98 NY2d 693 [2002];*W.W.W. Assoc. v Giancontieri,* 77 NY2d 157, 162 [1990]).

FN4 The dynamics of recording contracts were altered with the extension of federal statutory copyright protections to sound recordings in 1971. All the master recordings involved in this dispute predate that copyright statute.

Extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous, which is an issue of law for the courts to decide (*see W.W.W. Assoc. v Giancontieri, supra* at 162). A contract is unambiguous if the language it uses has "a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion" (*Breed v Insurance Co. of N. Am.,* 46 NY2d 351, 355 [1978],*rearg denied*46 NY2d 940 [1979]). Thus, if the agreement ***570** on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity (*see e.g. Teichman v Community Hosp. of W. Suffolk,* 87 NY2d 514, 520 [1996];*First Natl. Stores v Yellowstone Shopping Ctr.,* 21 NY2d 630, 638,*rearg denied*22 NY2d 827 [1968]).

(1) The pivotal issue in this case is whether defendants are prohibited from using the master recordings for synchronization, and whatever future formats evolve from new technologies, in the absence of explicit contract language authorizing such uses. Stated another way, does the contract's silence on synchronization and domestic licensing create an ambiguity which opens the door to the admissibility of extrinsic evidence to determine the intent of the parties? We conclude that it does not and, because there is no ambiguity in the terms of the Ronettes agreement, defendants are entitled to exercise complete ownership rights, subject to payment of applicable royalties due plaintiffs.

New York has well-established precedent on the issue of whether a grantor retains any rights to artistic property once it is unconditionally transferred. In *Pushman v New York Graphic Socy.*(287 NY 302 [1942]), for example, this Court considered whether the common law permitted an artist who unconditionally sold a painting to enjoin the owner from making reproductions of the artwork. Citing numerous authorities for the proposition that the unconditional sale of a work of art transfers all property rights to the buyer, we held that the defendants could reproduce the painting because "an artist must, if he wishes to retain or protect the reproduction right, make some reservation of that right when he sells the painting" (*id.* at 308). A broad grant of ownership rights, coupled with the absence of a reservation clause, was similarly dispositive in *Burnett v Warner Bros. Pictures* (67 NY2d 912 [1986], *affg*113 AD2d 710). In that case, the plaintiffs had assigned all of their rights in a play that was later adapted into a movie, "Casablanca," and subsequently led to the defendant's spinoff television series. We affirmed the Appellate Division's conclusion that if "the plaintiff intended to retain certain rights, specific clauses to that effect should have been included in the agreement" because the parties' contract assigned "all imaginable rights" to Warner Brothers (113 AD2d at 712-713).

In analogous contexts, other courts have recognized that broad contractual provisions, similar to those in

the Ronettes agreement, convey virtually unfettered reproduction rights to ***571** license holders in the absence of specific exceptions to the contrary. In *Boosey & Hawkes Music Publs., Ltd. v Walt Disney Co.* (145 F3d 481 [2d Cir 1998]), the plaintiff granted distribution rights in foreign countries to Igor Stravinsky's musical composition "The Rite of Spring," including the "right, license, privilege and authority to record [the composition] in any manner, medium or form" (*id.* at 484) for use in the motion picture "Fantasia" to the Walt Disney Company. After Disney reproduced the song in videocassette and laser disc versions for foreign distribution, the plaintiff sought breach of contract damages on the basis that the agreement did not explicitly provide for distribution in new technological mediums.

The United States Court of Appeals for the Second Circuit reiterated its precedent that "'licensee[s] may properly pursue any uses which may reasonably be said to fall within the medium as described in the license'" (*id.* at 486, quoting *Bartsch v Metro-Goldwyn-Mayer, Inc.,* 391 F2d 150, 155 [2d Cir], *cert denied*393 US 826 [1968]). As applied to the facts of *Boosey,* the Second Circuit concluded that the broad language employed in the contract granted Disney the authority to use the musical composition in the videocassette version of the movie in the absence of any contractual indication otherwise.[FN5] Thus, the language of the contract was the controlling factor in interpreting the agreement:

"If the contract is more reasonably read to convey one meaning, the party benefitted by that reading should be able to rely on it; the party seeking exception or deviation from the meaning reasonably conveyed by the words of the contract should bear the burden of negotiating for language that would express the limitation or deviation" (145 F3d at 487).

FN5*See also Batiste v Island Records Inc.,* 179 F3d 217, 223 (5th Cir 1999) (grant of unconditional rights to a musical composition included the licensing of a record containing a digital sample of the song), *cert denied*528 US 1076 (2000); *Maljack Prods., Inc. v GoodTimes Home Video Corp.,* 81 F3d 881, 885 (9th Cir 1996) (unconditional grant of motion picture music rights included right to synchronize music in videocassette format); *Ingram v Bowers,* 57 F2d 65, 65 (2d Cir 1932) (artist failed to reserve any property interest in recordings of his musical performances); *Chambers v Time Warner, Inc.,* 123 F Supp 2d 198, 200-201 (SD NY 2000) (agreements permitted the conversion of master recordings to digital format), *vacated on other grounds*282 F3d 147 (2d Cir 2002).***572**

We agree with these prevalent rules of contract construction--the unconditional transfer of ownership rights to a work of art includes the right to use the work in any manner (*see generally Pushman,* 287 NY at 308) unless those rights are specifically limited by the terms of the contract (*see Burnett,* 67 NY2d 912;*Boosey & Hawkes Music Publs.,* 145 F3d at 486-487;*see generally, Hellman v Samuel Goldwyn Prods.,* 26 NY2d 175 [1970]). However, if a contract grants less than full ownership or specifies only certain rights to use the property, then other, unenumerated rights may be retained by the grantor (*see e.g., Warner Bros. Pictures v Columbia Broadcasting Sys.,* 216 F2d 945, 948 [9th Cir 1954], *cert denied*348 US 971 [1955];*see generally Cohen v Paramount Pictures Corp.,* 845 F2d 851 [9th Cir 1988]).

(2)(3) In this case, plaintiffs concede that defendants own the master recordings. Notably, the agreement explicitly refers to defendants' "right to make phonograph records, tape recordings or *other reproductions* of the performances embodied in such recordings by *any method now or hereafter known,* and to sell and deal in the same" (emphasis added). Plaintiffs contend that the breadth of the ownership provision is limited by the agreement's introductory

paragraph, which states that defendants' purpose for purchasing plaintiffs' performances was to make "phonograph records and/or tape recordings and other similar devices." However, when read in conjunction with the ownership provision, a reasonable meaning emerges--the phrase "other similar devices" refers to defendants' right to reproduce the performances by any current or future technological methods. We also reject plaintiffs' assertion that the royalty schedule restricts the scope of defendants' ownership rights. That section of the agreement provides compensation rights to plaintiffs; it does not inhibit defendants' ability to use the master recordings. We therefore hold that the Ronettes agreement, "read as a whole to determine its purpose and intent" (*W.W.W. Assoc. v Giancontieri,* 77 NY2d at 162), is susceptible to only one reasonable interpretation--defendants are authorized to license the performances for use in visual media, such as movies and television commercials or broadcasts, and for domestic release by third parties in audio formats.

Plaintiffs' reliance upon *Thomas v Gusto Records, Inc.* (939 F2d 395 [6th Cir], *cert denied*502 US 984 [1991]) is misplaced. In *Thomas,* the United States Court of Appeals for the Sixth Circuit purportedly applied New York law and held that the ***573** parties' agreements were ambiguous regarding the artists' right to royalties from domestic licensing because the contracts were silent on the issue. The dispute in *Thomas*--whether the contract's compensation clause entitled the plaintiffs to royalties from the issuance of domestic licenses--is not the same as the question posed in this case, which concerns the scope of owners' rights to use their property. Furthermore, *Thomas*' suggestion that the failure of a contract to address certain categories of royalties allows a court to look beyond the four corners of the document to discern the parties' true intent conflicts with our established precedent that silence does not equate to contractual ambiguity (*see e.g. Reiss v Financial Performance Corp.,* 97 NY2d 195, 199 [2001];*Trustees of Freeholders & Commonalty of Town of Southampton v Jessup,* 173 NY 84, 90 [1903] ["an ambiguity never arises out of what was not written at all, but only out of what was written so blindly and imperfectly that its meaning is doubtful"]).

(4) It follows that *Caldwell v ABKCO Music & Records* (269 AD2d 206 [2000]), which cites *Thomas* for the proposition that "[r]ights not specifically granted by an artist in an agreement are reserved to the artist and the owner of such property, absent the clearest language, is not free to do with it whatever the owner wishes" (269 AD2d at 207), is not to be followed. Nor does *Warner Bros. Pictures v Columbia Broadcasting Sys.* (216 F2d 945) lead us to a different conclusion since the agreement in that case did not purport to confer full ownership rights--it was restricted to only certain aspects of the "Maltese Falcon" story.

We realize that our conclusion here effectively prevents plaintiffs from sharing in the profits that defendants have received from synchronization licensing. However sympathetic plaintiffs' plight, we cannot resolve the case on that ground under the guise of contract construction. Our guiding principle must be to neutrally apply the rules of contract interpretation because only in this way can we ensure stability in the law and provide guidance to parties weighing the risks and advantages of entering a binding agreement.

Defendants acknowledge that the royalty schedule for domestic sales encompasses the sale of records, compact discs and other audio reproductions by entities holding domestic third-party distribution licenses from Philles Records. In light of that concession, we remit this case to Supreme Court to recalculate plaintiffs' damages for royalties due on all such sales. Damages should be determined pursuant to the applicable ***574** schedule incorporated in the agreement rather than based on industry standards.

(5) Defendants further claim that Greenfield is barred from sharing in those royalties because she executed a general release in connection with her divorce from Spector. We look to California law to

analyze the scope of Greenfield's release because that is the state where the release was executed and the divorce was finalized. In contrast to the "four corners" rule that New York has long applied (*see e.g. Kass v Kass,* 91 NY2d 554, 566 [1998];*Benedict v Cowden,* 49 NY 396 [1872]), California courts preliminarily consider all credible evidence of the parties' intent in addition to the language of the contract--"[t]he test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible" (*Pacific Gas & Elec. Co. v G.W. Thomas Drayage & Rigging Co.,* 69 Cal 2d 33, 37, 442 P2d 641, 644 [1968]).

During proceedings in New York, Supreme Court determined that the extrinsic evidence supported Greenfield's allegation that her right to compensation under the 1963 recording contract was not an intended subject of the release. That finding of fact, affirmed by the Appellate Division, is supported by the record. We find no reason to reverse the Appellate Division's interpretation of California law (*see e.g. Rudman v Cowles Communications,* 30 NY2d 1, 10 [1972]). Plaintiff Greenfield is therefore entitled to her share of any damages assessed against defendants.

We have reviewed the parties' remaining contentions; they are either academic or meritless.

Accordingly, the order of the Appellate Division should be modified, without costs, and the case remitted to Supreme Court for further proceedings in accordance with this opinion and, as so modified, affirmed.

Judges Levine, Ciparick, Wesley and Rosenblatt concur; Chief Judge Kaye and Judge Smith taking no part.
Order modified, etc.***575**

N.Y. 2002.
GREENFIELD v PHILLES RECORDS
98 N.Y.2d 562, 780 N.E.2d 166578750 N.Y.S.2d 5656022002 WL 313195379992002 N.Y. Slip Op. 073244603, 780 N.E.2d 166578750 N.Y.S.2d 5656022002 WL 313195379992002 N.Y. Slip Op. 073244603, 780 N.E.2d 166578750 N.Y.S.2d 5656022002 WL 313195379992002 N.Y. Slip Op. 073244603, 780 N.E.2d 166578750 N.Y.S.2d 5656022002 WL 313195379992002 N.Y. Slip Op. 073244603

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(Cite as: 874 So.2d 1)

H

District Court of Appeal of Florida,
Fifth District.
HUNTINGTON ON THE GREEN CONDOMINIUM, etc., Appellant/Cross-Appellee,
v.
LEMON TREE I-CONDOMINIUM, etc., Appellee/Cross-Appellant.

No. 5D02-899.
Jan. 9, 2004.
Rehearing Denied June 1, 2004.

Background: Homeowners' association brought action against condominium association, seeking declaration of its rights pursuant to settlement that associations made with developer regarding restrictions on proposed development abutting associations' properties. The Circuit Court, Orange County, Walter Komanski, J., found that homeowners' association was not entitled to any of the settlement proceeds. Homeowners' association appealed.

Holding: The District Court of Appeal, Thompson, J., held that homeowners' association was entitled to one-half of settlement proceeds remaining after deducting expenses and distributing specified sum to condominium association.

Reversed and remanded with instructions.

West Headnotes

[1] Contracts 95 ⚿164

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k164 k. Construing Instruments Together. Most Cited Cases

When interpreting distribution agreement between homeowners' association, condominium association, and other groups concerning division of proceeds from settlement with developer concerning proposed development abutting associations' properties, District Court of Appeal would consult settlement agreement for enlightenment on distribution agreement; settlement and distribution agreements were part and parcel of same agreement, and distribution agreement was entered to "consummate" settlement agreement.

[2] Contracts 95 ⚿164

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k164 k. Construing Instruments Together. Most Cited Cases

Where two contracts are part and parcel of same general transaction, they may, under some circumstances, be interpreted together.

[3] Contracts 95 ⚿147(3)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k147 Intention of Parties
95k147(3) k. Construing Whole Contract Together. Most Cited Cases

Contract should be considered as a whole in determining intention of parties to instrument.

[4] Contracts 95 ⚿143(4)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k143 Application to Contracts in General
95k143(4) k. Subject, Object, or Purpose as Affecting Construction. Most Cited Cases

Contracts 95 ⚿169

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction

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95k169 k. Extrinsic Circumstances. Most Cited Cases

Conditions and circumstances surrounding parties to contract and object or objects to be obtained when contract was executed should be considered when interpreting contract.

[5] Contracts 95 147(1)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k147 Intention of Parties
95k147(1) k. In General. Most Cited Cases

Contracts 95 169

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k169 k. Extrinsic Circumstances. Most Cited Cases

Courts interpreting contracts should place themselves, as near as possible, in exact situation of parties to instrument when executed, so as to determine intention of parties, objects to be accomplished, obligations created, time of performance, duration, mutuality, and other essential features.

[6] Contracts 95 162

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k162 k. Conflicting Clauses in General. Most Cited Cases

If clauses in contract appear to be repugnant to each other, they must be given such interpretation and construction as will reconcile them if possible.

[7] Contracts 95 154

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k151 Language of Instrument
95k154 k. Reasonableness of Construction. Most Cited Cases

If one interpretation of contract would lead to absurd conclusion, then such interpretation should be abandoned and one adopted which would accord with reason and probability.

[8] Contracts 95 154

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k151 Language of Instrument
95k154 k. Reasonableness of Construction. Most Cited Cases

If language of contract is contradictory, obscure, or ambiguous or where its meaning is doubtful so that it is susceptible of two constructions, one of which makes it fair, customary, and such as a prudent man would naturally execute, while the other interpretation would make it inequitable, unnatural, or such as a reasonable man would not be likely to enter into, then courts will approve reasonable, logical, and rational interpretation.

[9] Compromise and Settlement 89 15(1)

89 Compromise and Settlement
89I In General
89k14 Operation and Effect
89k15 In General
89k15(1) k. In General. Most Cited Cases

Under distribution agreement, which related to settlement that homeowners' association, condominium association, and other groups reached with developer concerning developer's proposed nearby development, homeowners' association was entitled to one-half of settlement proceeds remaining after deducting expenses and distributing specified sum to condominium association for anticipated cost of building buffer wall, although distribution agreement allowed condominium association to invade homeowners' association's share of remaining proceeds if condominium's proposed wall exceeded specified sum; condominium's failure to

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build buffer wall resulted in it not being entitled to receive more than one-half of remaining settlement funds.

***2** Robyn M. Severs and Robert L. Taylor of Taylor and Carls, P.A., Maitland, for Appellant/Cross-Appellee.

John A. Leklem of John A. Leklem, P.A., Orlando, for Appellee/Cross-Appellant.

THOMPSON, J.

Huntington on the Green Homeowner's Association ("Huntington") appeals a final judgment in favor of Lemon Tree Condominium I Association ("Lemon Tree"). We reverse and remand for entry of judgment in favor of Huntington. FN1

> FN1. The issues on cross appeal are without merit.

The Huntington property and the Lemon Tree property both abut a development known as Alhambra. When Alhambra's developer decided to build additional residential units on its property, Huntington and Lemon Tree, along with area civic associations, joined forces to stop the addition to the development. The groups Huntington, Lemon Tree, and the civic associations, were not successful in stopping the addition, but they did extract concessions from Alhambra's developer. During settlement negotiations, the developer agreed, among other things, to give the county a green space and to build a buffer wall between its property and the Huntington property-obtaining a buffer wall had been Huntington's main concern. There were other requirements for the developer involving streetscapes and traffic, and the county had various obligations to the developer.

During the mediation, the county refused to accept the open space. This refusal left the groups unexpectedly considering money as part of the settlement. According to one witness, "no one was prepared to have this money coming at us." The groups and the developer drafted a non-binding settlement outline providing that the developer would pay the groups a lump sum of $155,000. In addition, the developer agreed to build a "6' non-wood, solid wall with stucco veneer" along Huntington's boundary. The developer also agreed to pay Lemon Tree $37,700, which was the developer's estimate of what it would cost Lemon Tree to build a buffer wall. The $37,700 was to be put in escrow and used by Lemon Tree to build a wall on its border with the developer's property. Two years after a time certain, any portion of the $37,700 not used was to be returned ***3** to the developer. Lemon Tree would not accept the escrow requirement and the two-year time limit, so those provisions were deleted from the nonbinding settlement outline. In addition, the $37,700 originally slated for escrow was added to the $155,000 lump sum settlement amount, for a total lump sum amount of $192,700. Among other things, the final agreement required the developer to pay the groups a lump sum of $192,700 and to build a wall for Huntington.

This appeal involves the distribution of the $192,700 paid to the groups by the developer. In anticipation of receiving the settlement funds, the groups executed a separate, handwritten agreement to "consummate the settlement agreement" reached with the developer and to distribute the settlement fund. Before it was amended, the distribution agreement stated that the lump sum payment was to be $155,000. From that sum, the groups' attorney was to be paid $65,000, and the mediator's fee (about $1,200) was to be paid. Next, two umbrella civic organizations were to receive $7,000 each so that they could repay those who had donated to the cause, and to give the organizations a little extra. The remainder of the $155,000, which was $75,000, was to be divided equally between Huntington and Lemon Tree, except that Huntington's half share of the $75,000 was to be adjusted downward if Lemon Tree incurred additional costs to build its wall.

An addendum to the distribution agreement took into account the change to the settlement

reached with the developer. The ultimate settlement with the developer was for the developer to make a lump sum payment of $192,700 instead of paying a lump sum of $155,000 and putting $37,700 in escrow for Lemon Tree. The addendum stated that the total settlement amount was $192,700, rather than $155,000, and that the additional $37,700 would be deducted from the $192,700 and paid to Lemon Tree. After deducting for the $37,700 and the amounts for the attorney, the mediator, and the two umbrella groups, the balance of the $192,700 would have been approximately $75,000 to be shared equally by Huntington and Lemon Tree, unless it cost Lemon Tree more than $37,700 to build its wall.

The groups had opened a bank account, in the name of Citizens for Compliance, for accepting donations to the cause. Pursuant to the settlement agreement, the developer remitted the settlement money to Citizens for Compliance. The two people in charge of the account disbursed Lemon Tree the $37,700, plus all but a few hundred dollars of the $75,000, apparently based on a bid Lemon Tree obtained and submitted to the persons in charge of the account. One of the two people in charge of the account testified at trial and testified that she remembered that Lemon Tree was supposed to have obtained contractors' bids for building the wall. The records of Citizens for Compliance contained three bids for the wall, in the amounts of $112,000, $111,000, and $103,000, and its three-page document entitled “Settlement Payment” showed that the disbursement to Lemon Tree was based on the highest of the three bids. The person in charge of the account did not know why the records contained three bids for Lemon Tree's wall or who decided how much Lemon Tree would be disbursed. The estimates all showed that Lemon Tree's border was 1,500 feet long, but the trial court found that it was 1,100 feet long. The representatives of Lemon Tree who testified did not know who decided that the border was 1,500 feet long.

A year after the money was disbursed to Lemon Tree, Huntington wrote Lemon Tree stating that it had been made clear ***4** during the mediation and the discussions among the groups that Lemon Tree intended to move with dispatch to have the wall built. Huntington pointed out that Lemon Tree had not shown any sign that it intended to build a wall, and said that if Lemon Tree's plans had changed, Huntington would like its share of the $75,000 balance of the settlement funds. This and another overture Huntington made to Lemon Tree were unavailing, so Huntington sued for a declaration of its rights to half the balance of $75,000.

Huntington's position was that Lemon Tree was entitled to the first $37,700 of the settlement funds, and that only if Lemon Tree needed more than that for the wall, was it entitled to take the excess from Huntington's share. Huntington argued that since Lemon Tree never attempted to build a wall, Lemon Tree did not *need* any additional funds to complete a wall, so it was not entitled to any more than $37,700, plus half the $75,000. On the other hand, Lemon Tree contended that the distribution agreement did not require it to build a wall, and that it should be allowed to invade Huntington's half share for the greater costs it would have incurred if it had attempted to build a wall. Lemon Tree also argued that it should be allowed to invade the $75,000 for the entire cost of its wall. Huntington agreed that Lemon Tree was not required to build a wall, but contended that Lemon Tree could invade Huntington's share of the $75,000 only if Lemon Tree actually built a wall and actually incurred actual costs in excess of the first $37,700.

In the main, the trial court agreed with Lemon Tree. It decided that Lemon Tree could invade Huntington's half share even though it did not build a wall. The court decided that the value of a wall for Lemon Tree should be the average of the three bids found in the records, but reduced in light of the court's finding that the border was only 1,100 feet long. The court also decided that under the distribution agreement, Lemon Tree was entitled to the $37,700 free and clear, so to speak, and that it was

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also entitled to so much of the $75,000 as it would have taken for Lemon Tree to build a wall 1,100 feet long. The court found that it would have cost Lemon Tree $81,209.87 to build a wall. Since $81,209.87 is greater than $75,000, Huntington took nothing.

[1][2] We agree with Huntington that the court misinterpreted the distribution agreement. The intent of the parties to the contract should govern the construction of a contract, and to determine the intent of the parties, a court should consider the language in the contract, the subject matter of the contract, and the object and purpose of the contract. *American Home Assur. Co. v. Larkin General Hosp., Ltd.,* 593 So.2d 195 (Fla.1992). In addition, where two contracts are part and parcel of the same general transaction, they may under some circumstances be interpreted together. *J.M. Montgomery Roofing Co. v. Fred Howland, Inc.,* 98 So.2d 484, 486 (Fla.1957). Here, where the settlement agreement with the developer and the distribution agreement among the groups were part and parcel of the same agreement, and where the distribution agreement was entered to "consummate" the settlement agreement, we consult the settlement agreement for enlightenment on the distribution agreement.

[3][4][5][6][7][8] The following rules of construction also assist a court in determining the intent of the parties:

> (1) the contract should be considered as a whole in determining the intention of the parties to the instrument; (2) the conditions and circumstances surrounding the parties to the instrument and the object or objects to be obtained when ***5** the contract was executed should be considered; (3) courts should place themselves, as near as possible, in the exact situation of the parties to the instrument, when executed, so as to determine the intention of the parties, objects to be accomplished, obligations created, time of performance, duration, mutuality, and other essential features; (4) if clauses in a contract appear to be repugnant to each other, they must be given such an interpretation and construction as will reconcile them if possible; if one interpretation would lead to an absurd conclusion, then such interpretation should be abandoned and the one adopted which would accord with reason and probability; (5) if the language of a contract is contradictory, obscure or ambiguous or where its meaning is doubtful so that it is susceptible of two constructions, one of which makes it fair, customary, and such as a prudent man would naturally execute, while the other interpretation would make it inequitable, unnatural, or such as a reasonable man would not be likely to enter into, then the courts will approve the reasonable, logical and rationable [sic] interpretation.
>
> *Triple E Development Co. v. Floridagold Citrus Corp.,* 51 So.2d 435, 438-39 (Fla.1951).

[9] First, the court erred in ignoring the $37,700 when computing the amount by which Lemon Tree could invade Huntington's half share of the $75,000. The agreement with the developer originally provided that $37,700 would go into escrow for Lemon Tree's use in building a wall. The escrow requirement was deleted and the $37,700 was added to the settlement amount of $155,000, for a total of $192,700. Similarly, the distribution agreement among the groups provided that what was the escrow money of $37,700 would be added to the $155,000, subtracted from the resulting $192,700, and given to Lemon Tree. The balance remaining after deducting the $37,700 and the amounts for the attorney, the mediator, and the umbrella groups would be shared equally by Huntington and Lemon Tree unless there were "additional costs" to Lemon Tree to build a wall. The "additional costs" were any costs over and above the $37,700. The goal was parity between Huntington and Lemon Tree, and since Huntington was getting a wall, Lemon Tree deserved a wall. In computing how much of the $75,000 to which Lemon Tree was entitled, the court should not have ignored the $37,700, because the $37,700 was set aside for Lemon Tree's use in building a wall. Furthermore,

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the goal of parity would not be achieved by giving Lemon Tree $37,700 and a wall.

The court further erred in allowing Lemon Tree more than half the $75,000. The focus of the distribution agreement is not on monetary damages, but on a wall for Huntington and a wall for Lemon Tree. It is evident that the "object to be accomplished" was to place Lemon Tree on an equal footing with Huntington; Huntington's wall would remove the indignity of the new development from its vista, and Lemon Tree deserved as much. That the focus was on an actual wall for Lemon Tree is evinced by the provision that Lemon Tree could invade Huntington's half share of the $75,000 if its wall cost more than $37,700. To put it another way, under the distribution agreement, the amount to be shared by Lemon Tree and Huntington could not be computed until Lemon Tree met its first objective-obtaining a wall. The agreement does not state what should happen if Lemon Tree did not build a wall, but Lemon Tree cannot have it both ways. It cannot, on the one hand, be entitled to an actual wall even if it means invading Huntington's share of ***6** the $75,000, and, on the other hand, be entitled to invade Huntington's share based on the cost of a hypothetical wall.

The intent of the parties was to obtain an actual wall for Lemon Tree and to distribute the $75,000 depending on the extent to which, if at all, the actual cost of the wall exceeded $37,700. Under the distribution agreement, half of the $75,000 was to be distributed to Huntington "with the condition that the amount payable to Huntington on the Green is to be adjusted for any additional costs to Lemon Tree I of a wall on the Alhambra Lemon Tree I property line." Because Lemon Tree elected not to build a wall, it did not incur "any additional costs" to build a wall, and, that being so, it was not entitled to more than half the $75,000. We therefore reverse the final judgment and remand with instructions to enter judgment for Huntington for one half the approximately $75,000, or to be precise, $74,812.92. If, as it appears, Huntington was disbursed a few hundred dollars, that amount will be deducted.

REVERSED and REMANDED, with instructions.

SAWAYA, C.J., and PLEUS, J., concur.

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(Cite as: 52 N.Y.2d 105, 417 N.E.2d 541, 436 N.Y.S.2d 247)

Court of Appeals of New York.
JOSEPH MARTIN, JR., DELICATESSEN, INC., Appellant-Respondent,
v.
Henry D. SCHUMACHER, Respondent-Appellant.

Jan. 20, 1981.

Tenant brought action to compel landlord to renew lease, and landlord responded by bringing holdover proceeding to regain possession. The Supreme Court, Special Term, Suffolk County, George J. Aspland, J., entered summary judgment in favor of the landlord and dismissed the tenant's complaint, and the Supreme Court entered further order denying tenant's motion for removal and consolidation of landlord's action against it from the district court to the Supreme Court, and the tenant appealed. The Supreme Court, Appellate Division, 70 A.D.2d 1, 419 N.Y.S.2d 558, reversed. Cross appeals were taken. The Court of Appeals, Fuchsberg, J., held that the agreement to agree on a future rental was unenforceable for uncertainty since it contained no methodology for determining the rent, but, rather, its unrevealing, unamplified language spoke to no more than "annual rentals to be agreed upon" and the words left no room for legal construction or resolution of ambiguity.

Order of Appellate Division reversed.

Meyer, J., concurred in the result with a memorandum.

Jasen, J., dissented in part in a memorandum.

West Headnotes

[1] Contracts 95 1

95 Contracts
95I Requisites and Validity
95I(A) Nature and Essentials in General
95k1 k. Nature and Grounds of Contractual Obligation. Most Cited Cases

Unless otherwise mandated by law, contract is private "ordering" in which party binds himself to do, or not to do, particular thing.

[2] Contracts 95 15

95 Contracts
95I Requisites and Validity
95I(B) Parties, Proposals, and Acceptance
95k15 k. Necessity of Assent. Most Cited Cases

Before one may secure redress in court because another has failed to honor promise, it must appear that promisee assented to obligation in question.

[3] Contracts 95 9(1)

95 Contracts
95I Requisites and Validity
95I(A) Nature and Essentials in General
95k9 Certainty as to Subject-Matter
95k9(1) k. In General. Most Cited Cases

Before power of law can be invoked to enforce promise, it must be sufficiently certain and specific so that what was promised can be ascertained.

[4] Contracts 95 25

95 Contracts
95I Requisites and Validity
95I(B) Parties, Proposals, and Acceptance
95k25 k. Agreement to Make Contract in Future. Most Cited Cases

Mere agreement to agree, in which material term is left for future negotiations, is unenforceable.

[5] Landlord and Tenant 233 83(1)

233 Landlord and Tenant
233IV Terms for Years
233IV(D) Extensions and Renewals

233k83 Covenants for Renewal in General
233k83(1) k. In General. Most Cited Cases

Lease renewal clause which spoke to no more than "annual rents to be agreed upon" was not enforceable in that words provided no methodology for determining rent, left no room for legal construction or resolution of ambiguity, neither tenant nor landlord was bound to any formula and there was not so much as hint at commitment to be bound by "fair market rental value" which tenant's expert reported or "reasonable rent."

***106 ***248 **542** Edward Flower, Staten Island, for appellant-respondent.

***107** David S. J. Rubin, Babylon, for respondent-appellant.

OPINION OF THE COURT

***108** FUCHSBERG, Judge.

This case raises an issue fundamental to the law of contracts. It calls upon us to review a decision of the Appellate Division, 70 A.D.2d 1, 419 N.Y.S.2d 558 which held that a realty lease's provision that the rent for a renewal period was "to be agreed upon" may be enforceable.

The pertinent factual and procedural contexts in which the case reaches this court are uncomplicated. In 1973, the appellant, as landlord, leased a retail store to the respondent for a five-year term at a rent graduated upwards from $500 per month for the first year to $650 for the fifth. The renewal clause stated that "(t)he Tenant may renew this lease for an additional period of five years at annual rentals to be agreed upon; Tenant shall give Landlord thirty (30) days written notice, to be mailed certified mail, return receipt requested, of the intention to exercise such right". It is not disputed that the tenant gave timely notice of its desire to renew or that, once the landlord made it clear that he would do so only at a rental starting at $900 a month, the tenant engaged an appraiser who opined that a fair market rental value would be $545.41.

The tenant thereupon commenced an action for specific performance in Supreme ****543** Court, Suffolk County, to compel the landlord to extend the lease for the additional term at the appraiser's figure or such other sum as the court would decide was reasonable. For his part, the landlord in due course brought a holdover proceeding in the local District Court to evict the tenant. On the landlord's motion for summary judgment, the Supreme Court, holding that a bald agreement to agree on a future rental was unenforceable for uncertainty as a matter of law, dismissed the tenant's complaint. Concordantly, it denied as moot the tenant's motion to remove the District Court case to the Supreme Court and to consolidate the two suits.

It was on appeal by the tenant from these orders that the Appellate Division, *****249** expressly overruling an established line of cases in the process, reinstated the tenant's complaint and granted consolidation. In so doing, it reasoned that "a renewal clause in a lease providing for future agreement on the rent to be paid during the renewal term is enforceable if it is established that the parties' intent was not to ***109** terminate in the event of a failure to agree". It went on to provide that, if the tenant met that burden, the trial court could proceed to set a "reasonable rent". One of the Justices, concurring, would have eliminated the first step and required the trial court to proceed directly to the fixation of the rent. Each party now appeals by leave of the Appellate Division pursuant to CPLR 5602 (subd. (b), par. 1). The tenant seeks only a modification adopting the concurrer's position. The question formally certified to us by the Appellate Division is simply whether its order was properly made. Since we conclude that the disposition at the Supreme Court was the correct one, our answer must be in the negative.

[1][2] We begin our analysis with the basic observation that, unless otherwise mandated by law (e. g., residential emergency rent control statutes), a contract is a private "ordering" in which a party binds himself to do, or not to do, a particular thing (

Fletcher v. Peck, 6 Cranch (10 U.S.) 87, 136; 3 L.Ed. 162. Hart and Sachs, Legal Process, 147-148 (1958)). This liberty is no right at all if it is not accompanied by freedom not to contract. The corollary is that, before one may secure redress in our courts because another has failed to honor a promise, it must appear that the promisee assented to the obligation in question.

[3] It also follows that, before the power of law can be invoked to enforce a promise, it must be sufficiently certain and specific so that what was promised can be ascertained. Otherwise, a court, in intervening, would be imposing its own conception of what the parties should or might have undertaken, rather than confining itself to the implementation of a bargain to which they have mutually committed themselves. Thus, definiteness as to material matters is of the very essence in contract law. Impenetrable vagueness and uncertainty will not do (1 Corbin, Contracts, s 95, p. 394; 6 Encyclopedia of New York Law, Contracts, s 301; Restatement, Contracts 2d, s 32, Comment a).

[4] Dictated by these principles, it is rightfully well settled in the common law of contracts in this State that a mere agreement to agree, in which a material term is left for future negotiations, is unenforceable (***110**Willmott v. Giarraputo, 5 N.Y.2d 250, 253, 184 N.Y.S.2d 97, 157 N.E.2d 282; Sourwine v. Truscott, 17 Hun. 432, 434).[FN*] This is especially true of the amount to be paid for the sale or lease of real property (see ****544**Forma v. Moran, 273 App.Div. 818, 76 N.Y.S.2d 232; Huber v. Ruby, 187 Misc. 967, 969, 65 N.Y.S.2d 462, app. dsmd 271 App.Div. 927, 67 N.Y.S.2d 710, see, generally, 58 A.L.R. 3d 500, Validity and Enforceability of Provision for Renewal of Lease at Rental to be Fixed by Subsequent Agreement of the Parties). The rule applies all the more, and not the less, when, as here, the extraordinary remedy of specific performance is sought (11 Williston, Contracts (Jaeger 3d ed.), s 1424; Pomeroy, Equity Jurisprudence, s 1405).

FN* Other States which are in accord include: Arkansas (Lutterloh v. Patterson, 211 Ark. 814, 202 S.W.2d 767); Maine (Metcalf Auto Co. v. Norton, 119 Me. 103, 109 A. 384); Missouri (State ex rel. Johnson v. Blair, 351 Mo. 1072, 174 S.W.2d 851); North Carolina (Young v. Sweet, 266 N.C. 623, 146 S.E.2d 669); Oregon (Karamanos v. Hamm, 267 Or. 1, 513 P.2d 761); and Rhode Island (Vartabedian v. Peerless Wrench Co., 46 R.I. 472, 129 A. 239). But see: Alaska (Hammond v. Ringstad, 10 Alaska 543); Arizona (Hall v. Weatherford, 32 Ariz. 370, 259 P. 282); California (Chaney v. Schneider, 92 Cal.App.2d 88, 206 P.2d 669); Ohio (Moss v. Olson, 148 Ohio St. 625, 76 N.E.2d 875); and Tennessee (Playmate Clubs v. Country Clubs, 62 Tenn.App. 383, 462 S.W.2d 890).

[5] This is not to say that the requirement for definiteness in the case before us now could only have been met by explicit expression of the rent to be paid. The concern is with substance, not form. It certainly would have sufficed, for instance, if a methodology for determining the rent was to be found within the four corners of ****250** the lease, for a rent so arrived at would have been the end product of agreement between the parties themselves. Nor would the agreement have failed for indefiniteness because it invited recourse to an objective extrinsic event, condition or standard on which the amount was made to depend. All of these, inter alia, would have come within the embrace of the maxim that what can be made certain is certain (9 Coke, 47a). (Cf. Backer Mgt. Corp. v. Acme Quilting Co., 46 N.Y.2d 211, 219, 413 N.Y.S.2d 135, 385 N.E.2d 1062 (escalation of rent keyed to building employees' future wage increases); City of Hope v. Fisk Bldg. Assoc., 63 A.D.2d 946, 406 N.Y.S.2d 472 (rental increase to be adjusted for upward movement in US Consumer Price Index); see, generally, 87 A.L.R. 3d 986; Lease Provisions Providing for Rent Adjustment Based on Event or Formula Outside Control of

Parties.)

But the renewal clause here in fact contains no such ingredients.***111** Its unrevealing, unamplified language speaks to no more than "annual rentals to be agreed upon". Its simple words leave no room for legal construction or resolution of ambiguity. Neither tenant nor landlord is bound to any formula. There is not so much as a hint at a commitment to be bound by the "fair market rental value" which the tenant's expert reported or the "reasonable rent" the Appellate Division would impose, much less any definition of either. Nowhere is there an inkling that either of the parties directly or indirectly assented, upon accepting the clause, to subordinate the figure on which it ultimately would insist, to one fixed judicially, as the Appellate Division decreed be done, or, for that matter, by an arbitrator or other third party.

Finally, in this context, we note that the tenant's reliance on May Metropolitan Corp. v. May Oil Burner Corp., 290 N.Y. 260, 49 N.E.2d 13 is misplaced. There the parties had executed a franchise agreement for the sale of oil burners. The contract provided for annual renewal, at which time each year's sales quota was "to be mutually agreed upon". In holding that the defendant's motion for summary judgment should have been denied, the court indicated that the plaintiff should be given an opportunity to establish that a series of annual renewals had ripened into a course of dealing from which it might be possible to give meaning to an otherwise uncertain term. This decision, in the more fluid sales setting in which it occurred, may be seen as a precursor to the subsequently enacted Uniform Commercial Code's treatment of open terms in contracts for the sale of goods (see Uniform Commercial Code, s 1-205, subd. (1); s 2-204, subd. (3); see, also, Restatement, Contracts 2d, s 249). As the tenant candidly concedes, the code, by its very terms, is limited to the sale of goods. The May case is therefore not applicable to real estate contracts. Stability is a hallmark of the law controlling such transactions (see Heyert v. Orange & Rockland Utilities, 17 N.Y.2d 352, 362, 271 N.Y.S.2d 201, 218 N.E.2d 263).

For all these reasons, the order of the Appellate Division should be reversed, with costs, and the orders of the Supreme Court, Suffolk County, reinstated. The certified question, therefore, should be answered in the negative. As to the ***112** plaintiff's appeal, since that party was not aggrieved by the order of the Appellate Division, the appeal should be dismissed (CPLR 5511), without costs.

****545** MEYER, Judge (concurring).

While I concur in the result because the facts of this case do not fit the rule of May Metropolitan Corp. v. May Oil Burner Corp. 290 N.Y. 260, 49 N.E.2d 13, I cannot concur in the majority's rejection of that case as necessarily inapplicable to litigation concerning leases. That the setting of that case was commercial and that its principle is now incorporated in a statute (the Uniform Commercial Code) which by its terms is not applicable to real estate is irrelevant to the question whether the principle can be applied in real estate cases.

As we recognized in *****251**Farrell Lines v. City of New York, 30 N.Y.2d 76, 82, 330 N.Y.S.2d 358, 281 N.E.2d 162, quoting from A. Z. A. Realty Corp. v. Harrigan's Cafe, 113 Misc. 141, 147, 185 N.Y.S. 212: "An agreement of lease possesses no peculiar sanctity requiring the application of rules of construction different from those applicable to an ordinary contract." To the extent that the majority opinion can be read as holding that no course of dealing between the parties to a lease could make a clause providing for renewal at a rental "to be agreed upon" enforceable I do not concur.

JASEN, Judge (dissenting in part).

While I recognize that the traditional rule is that a provision for renewal of a lease must be "certain" in order to render it binding and enforceable, in my view the better rule would be that if the tenant can establish its entitlement to renewal under the lease, the mere presence of a provision calling for renewal at "rentals to be agreed upon" should

not prevent judicial intervention to fix rent at a reasonable rate in order to avoid a forfeiture. Therefore, I would affirm the order of the Appellate Division for the reasons stated in the opinion of Justice LEON D. LAZER at the Appellate Division.

COOKE, C. J., and GABRIELLI, JONES and WACHTLER, JJ., concur with FUCHSBERG, J.
MEYER, J., concurs in a memorandum.
JASEN, J., dissents in part and on defendant's appeal votes to affirm in a memorandum.

On defendant's appeal: Order reversed, with costs, the ***113** orders of Supreme Court, Suffolk County, reinstated and the question certified answered in the negative.

On plaintiff's appeal: Appeal dismissed, without costs.

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Not Reported in F.Supp.2d, 2007 WL 4292034 (S.D.N.Y.)
(Cite as: 2007 WL 4292034 (S.D.N.Y.))

Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.
Daniel JUNK, Plaintiff,
v.
AON CORP., Aon Service Corporation, and Aon Consulting, Inc., Defendants.

No. 07 Civ. 4640(LMM)(GWG).
Dec. 3, 2007.

MEMORANDUM AND ORDER

McKENNA, District Judge.

***1** Plaintiff Daniel Junk ("Plaintiff") is a former employee of Aon Corporation and its subsidiaries Aon Service Corporation and Aon Consulting, Inc. (collectively, "Aon" or "Defendants"), who now brings suit against Defendants asserting (1) Breach of Contract, (2) Fraudulent Inducement, and (3) Promissory Fraud claims. Defendants move to dismiss Plaintiff's complaint under Federal Rule of Civil Procedure 12(b)(6), citing Plaintiff's failure to state claims upon which relief can be granted. For the reasons set forth below, Defendants' motion to dismiss is GRANTED in part, and DENIED in part.

1.

Defendant Aon Corporation is incorporated in Delaware with a principal place of business in New York; its subsidiaries, Defendants Aon Service Corporation and Aon Consulting, Inc., are incorporated in Illinois and New York, respectively, with their principal places of business in New York. (Plaintiff's Complaint ("Compl.") ¶¶ 3, 4, 6.) In October 2006, Plaintiff, a South Carolina resident, relocated to New York City in order to begin his employment with Aon. (*Id.* ¶¶ 1, 28.) A graduate of New York Law School, Plaintiff held various executive and managerial positions for electronic discovery software [FN1] and service providers prior to working for Aon, and had acquired substantial experience in electronic discovery-related matters. [FN2] (*Id.* ¶¶ 10, 11.) According to the complaint, Plaintiff was persuaded to travel to New York City and meet with Aon's management "based on AON's [sic] product and software development representations" that were proffered by Jerry Barbanel, an executive vice president of Aon. (*Id.* ¶¶ 20, 22.) The representations allegedly made by Barbanel gave Plaintiff the impression that Aon was in the final developmental stage for its "complete end-to-end e-discovery system" that would be completed in either "three weeks" or within "the next three months." (*Id.* ¶ 24.) Plaintiff also alleges that Barbanel promised, both in their October 2006 meeting and in subsequent phone conversations, that if he "accept[ed] employment with AON [sic], [Plaintiff] would have a guaranteed position at least until AON [sic] rolled out its end-to-end proprietary software solution and obtained the dominant market leading position in e-discovery software solutions." (*Id.* ¶ 27.) According to Plaintiff, this promise was made conditional upon his agreement to sell his home in South Carolina and move to New York "within a year after starting with AON [sic]." (*Id.*)

FN1. In his complaint, Plaintiff defines electronic discovery software as software capable of "retriev[ing], preserve[ing], document [ing], and produc[ing] electronic communications, records and files." (Compl.¶ 10.)

FN2. The recently amended Federal Rule of Civil Procedure 26(f)(3) classifies electronic discovery as the "disclosure or discovery of electronically stored information, including the form or forms in which it should be produced ..."

Plaintiff asserts that he relied upon these representations in deciding to accept employment with Aon, relinquish his current position with Renew Data Corporation, and sell his home in South Carolina. (*Id.* ¶¶ 28, 29.) Additionally, he now contends

that the representations he relied upon were fraudulent, and that they were known by Defendants to be fraudulent at the time they were made. (*Id.* ¶¶ 26, 30.) Plaintiff also alleges that at the time his employment with Aon began: the company had not yet commenced their development of the e-discovery software; the allocation of funds for such development had not yet been approved; in lieu of its own software, Aon was marketing a repackaged version of "File Control," an already established e-discovery tool [FN3]; and Barbanel frequently "instructed Plaintiff and other AON [sic] employees to lie to customers ... and never to admit that [the] software was simply rebranded third-party applications." (*Id.* ¶ 30.)

FN3. Plaintiff also alleges in ¶ 33 of his complaint, that Defendants had not yet obtained the license necessary to utilize "File Control" at the time of his employment with Aon. (*Id.*)

***2** According to his complaint, Plaintiff grew increasingly concerned about these alleged misrepresentations and expressed his discomfort to Jerry Barbanel on several occasions. (*Id.* ¶¶ 32, 35.) In March and April of 2007, Plaintiff spoke to several members of Aon's management, informing them of the misrepresentations that Barbanel encouraged him (and his colleagues) to relay to customers, shareholders, and the public; he also articulated that his uneasiness was due in large part to the fact that development of Aon's software had yet to even begin. (*Id.* ¶¶ 36, 38.) Subsequent to these conversations, an email from Anne Kemp, a colleague of Plaintiff s, was sent to Aon's top executive management as well as to members of Defendants' human resources team. (*Id.* ¶ 39.) The correspondence, which was also copied to Plaintiff, detailed "the fraudulent activities and misrepresentations of Jerry Barbanel and his management staff." (*Id.*) The following day, Plaintiff was contacted by another member of Aon's management who informed Plaintiff that Barbanel was aware of the Kemp email and stating that "there would be no investigation." (*Id.* ¶ 41.) Two days after the Kemp email was sent, Plaintiff received his notice of termination. (*Id.* ¶ 42.) Plaintiff now alleges and seeks compensation from Defendants for: (1) Breach of Contract, (2) Fraudulent Inducement, and (3) Promissory Fraud. Defendants move to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

2.

Under Rule 12(b)(6) a complaint will be dismissed if there is a "failure to state a claim upon which relief can be granted." Fed.R.Civ.P. 12(b)(6). The Court must read the complaint generously, accepting the truth of and drawing all reasonable inferences from well-pleaded factual allegations. *See York v. Ass'n of Bar of City of New York,* 286 F.3d 122, 125 (2d Cir.2002); *see also Mills v. Polar Molecular Corp.,* 12 F.3d 1170, 1174 (2d Cir.1993). A court should dismiss a complaint only "if 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " *Valmonte v. Bane,* 18 F.3d 992, 998 (2d Cir.1994) (quoting *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957)); *see also Jenkins v. McKeithen,* 395 U.S. 411, 422 (1969) (citation omitted). "To survive dismissal, the plaintiff must provide the grounds upon which his claim rests through factual allegations sufficient 'to raise a right to relief above the speculative level.' " *Atsi Communications, Inc. v. Shaar Fund Ltd.,* 493 F.3d 87 (2d Cir.2007) (quoting *Bell Atl. Corp. v. Twombly,* 127 S.Ct. 1955, 1965 (2007)).

3.

Defendants move to dismiss Plaintiff's causes of action for breach of contract based upon his termination "prior to the development and rollout of AON's [sic] proprietary end-to-end software solutions." (Compl.¶ 45.) Plaintiff contends that his termination constitutes a breach of the employment agreement between himself and Defendants, as well as a breach of Defendants' stated policies and procedures regarding the "reporting of wrongful activities and procedures," which Plaintiff argues was

also a contract between himself and Defendants. (*Id.* ¶¶ 45, 50, 52 .) First, the Court will consider Plaintiff's claim that Defendants' breached the terms of their employment agreement.

3a.

***3** Relevant case law dictates that an at-will employee, i.e., one whose employment can be terminated at any time, cannot maintain a claim for breach of contract. *Chimarev v. TD Waterhouse Investor Services, Inc.,* 280 F.Supp.2d 208, 216 (S.D.N.Y.2003) (citations omitted).; *see also Minton v. Lenox Hill Hosp.,* 160 F.Supp.2d 687, 699 (S.D.N.Y.2001) (an at-will employee cannot maintain a breach of contract claim). Such an employee confirms his or her at-will status by signing an employment agreement "which explicitly indicate[s] that the terms of his employment were at-will." *Chimarev,* 280 F.Supp.2d 208 at 216.

Additionally, even without a signed agreement affirming at-will employment, New York law states that an indefinite period of employment "is presumed to be a hiring at will that may be freely terminated by either party at any time for any reason or even for no reason." *Lobosco v. New York Telephone Company/NYNEX,* 96 N.Y.2d 312, 316 (N.Y.2001) (citation omitted). Courts have only found exceptions where a Plaintiff can show that there was reliance upon an "express *written* policy limiting the right of discharge." *Id.* (emphasis added).

In the instant litigation Plaintiff signed an employment offer letter from Defendants on November 9, 2006. (*See* Galletti Aff., Ex. B.) The offer letter reads in pertinent part:

> Nothing in this letter is intended or should be construed as a contract of guarantee of indefinite employment. Employment with Aon Consulting is for no specified period and constitutes at-will employment. As a result, you are free to resign at any time, for any reason or for no reason. Similarly, the Company is free to conclude its employment relationship with you at any time, for any reason or for no reason.
>
> (*Id.*)

By signing this letter, Plaintiff agreed to the terms therein-including his status as an at-will employee of Defendants. Further, even without this offer letter, in the absence of a written agreement specifying the length of employment, Plaintiff is presumed to be an at-will employee who may be terminated at any time. *See Chimarev, supra,* at 216.

Here, Plaintiff does not rely upon a written agreement. Instead, he cites an alleged oral agreement that he would be guaranteed employment with Defendants "at least until AON [sic] rolled out its end-to-end proprietary software solution and obtained the dominant market leading position in e-discovery software solutions." (Compl.¶ 27.) This reliance is problematic primarily because oral assurances are insufficient to alter an employee's at-will status. *See Cucchi v. NYC Off-Track Betting Corp.,* 818 F.Supp. 647, 652 (S.D.N.Y.1993); *Sabetay v. Sterling Drug, Inc.,* 69 N.Y.2d 329 (N.Y.1987).

Moreover, the offer letter signed by Plaintiff contained a merger clause [FN4] stating that "this letter *supercedes any prior representations or agreements* between you and Aon Consulting, *whether written or oral."* (Galletti Aff., Ex. B (emphasis added).) By signing the offer letter, Plaintiff explicitly agreed to forfeit any prior oral agreement between himself and Defendants.

> FN4. Plaintiff argues that any reference to the merger clause and other "extraneous documents" is "beyond the scope of the instant application." (Pl. Opp. Brief 7.) This argument, however, is unsubstantiated as the merger clause is contained within the employment agreement, precisely the document upon which Plaintiff's breach of contract claim is based, and is therefore integral to the present case.

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> Along these lines, the Second Circuit noted that "when a plaintiff chooses not to attach to the complaint or incorporate by reference a [document] upon which it solely relies and which is integral to the complaint," the court may nevertheless take the document into consideration in deciding the defendant's motion to dismiss, without converting the proceeding to one for summary judgment." *International Audiotext Network, Inc. v. American Tel. and Tel. Co.,* 62 F.3d 69, 72 (2nd Cir.1995). "When determining the sufficiency of plaintiffs' claim for Rule 12(b)(6) purposes, consideration [includes] ... documents either in plaintiffs' possession or of which plaintiffs had knowledge and relied on in bringing suit," even if they are not attached to complaint. *Brass v. American Film Technologies, Inc.,* 987 F.2d 142, 150 (2d Cir.1993).

***4** Finally, the parol evidence rule expressly forbids any consideration of "evidence of a contemporaneous or prior oral agreement that modifies or contradicts the terms of an integrated written agreement. A 'contract which appears complete on its face is an integrated agreement as a matter of law.' " *Kempf v. Mitsui Plastics, Inc.,* 1996 WL 673812, *7 (S.D.N.Y.1996) (citations omitted). The offer letter signed by Plaintiff and outlining the terms of his employment with Aon, appears complete on its face and therefore constitutes an integrated agreement between the parties. As such, any prior oral agreement between them is effectively barred in accordance with the parol evidence rule.

In light of the foregoing, Defendants' motion to dismiss Plaintiff's breach of contract claim, based upon the employment agreement between the parties, is hereby granted.

3b.

Next, the Court will examine Plaintiff's claim that his termination breached Defendants' stated employment policies. In bringing this claim, Plaintiff relies upon the whistleblower language in Aon's "Code of Business Conduct": "Aon strictly prohibits retaliating against someone for making a good faith report of an ethical or legal concern. In many instances retaliation is against the law." (Galletti Aff., Ex. E at 5.) Plaintiff asserts that his termination as an Aon employee was in direct retaliation for his reporting of Jerry Barbanel's alleged ethical violations and, additionally, for his refusal to engage in similar behavior. (Compl.¶ 53.) He further contends that this retaliation was a violation of Aon's stated policy language, that this language constituted a contract between himself and Defendants, and that his termination is therefore tantamount to a breach of contract on the part of Defendants. (*See* Galletti Aff., Ex. E at 5.; Compl. ¶¶ 52, 53.)

New York law specifies that a plaintiff may maintain a breach of contract claim by demonstrating that a company policy exists that *expressly* limits an employer's right to terminate an at-will employee.

'An employee may recover ... by establishing that the employer made the employee aware of its express written policy limiting its right of discharge and that the employee detrimentally relied on that policy in accepting the employment.' *De Petris v. Union Settlement Assoc.,* 633 N.Y.S.2d 274, 276(1995). Where the employee can prove each of these elements-the existence of an 'express written policy' and detrimental reliance upon that policy-'the employee in effect has a contract claim against the employer.' *Id.* We have explained that under New York law, 'in determining whether [the presumption of employment at will] is overcome, the trier of the facts will have to consider the totality of the circumstances, including the writings, the situation, the course of conduct of the parties and their objectives.' *Jones v. Dunkirk Radiator Corp.,* 21 F.3d 18, 22 (2d Cir.1994).

Marfia v. T.C. Ziraat Bankasi, 147 F.3d 83, 87-88 (2d Cir.1998). A whistleblower provision

does serve to limit an employee's at-will status. *See Brady v. Calyon Securities (USA),* 406 F.Supp .2d 307, 317 (S.D.N.Y.2005). In determining whether such a limit is sufficient to overcome the presumption of at-will status, the existence of any disclaimer language can be controlling. In *Baron v. Port Authority of New York and New Jersey, the Second Circuit* determined that:

> ***5** [T]he disclaimers at the front of both the Port Authority Guidebook and the PAIs expressly and specifically disavow any intent on the Port Authority's part to accept contractual limitations on its rights as an at-will employer ... These disclaimers plainly convey the Port Authority's intention that the provisions in the Guidebook and PAIs are non-binding. No understanding by the plaintiffs to the contrary would have been objectively reasonable.
>
> 271 F.3d 81, 85-86 (2d Cir.2001).

Lobosco v. New York Telephone Company/ NYNEX, 96 N.Y.2d 312, 316 (N.Y.2001), is a New York Court of Appeals decision that is directly on point. In that case, the plaintiff brought a breach of contract claim against his employer, citing his reliance upon a provision in the employee manual and asserting that this language created a contractual obligation, thereby altering his employee at-will status. The Court of Appeals explicitly disagreed with the plaintiff's argument, particularly because of the existence of disclaimer language:

> Routinely issued employee manuals, handbooks and policy statements should not lightly be converted into binding employment agreements ... It would subject employers who have developed written policies to liability for breach of employment contracts upon the mere allegation of reliance on a particular provision. Clearly that cannot be, especially in light of conspicuous disclaiming language. An employee seeking to rely on a provision arguably creating a promise must also be held to reliance on the disclaimer.
>
> *Id.* at 317.

In the present case, Plaintiff relies upon the whistleblower language in Aon's "Code of Business Conduct." In so doing, he must also rely upon any disclaimer language contained within the same. The "Code of Business Conduct" expressly forbids the creation of any contractual obligation, based upon the language of the Code itself: "[I]t is very important to note that this Code is not a contract of employment and does not create any contractual rights between Aon and any employees." (Galletti Aff., Ex. E at 3.) Plaintiff's reliance upon the whistleblower provision cannot be considered objectively reasonable, particularly because of the disclaimer within the same document that clearly expresses Defendants' intention that it not be taken as a binding, contractual agreement.

In light of the foregoing, Defendants' motion to dismiss Plaintiff's breach of contract claim, based upon the whistleblower provision in Aon's "Code of Business Conduct," is hereby granted.

4.

Plaintiff also brings a claim of fraudulent inducement against Defendants. In his complaint, Plaintiff specifies that he "detrimentally relied on Defendants' fraudulent statements and misrepresentations and has lost commissions ... [and his] nationally renowned reputation and standing within the e-discovery market place has been damaged and impaired ..." (Compl.¶ 57.)

4a.

Defendants argue that Plaintiff's claim cannot be sustained because it is merged within Plaintiff's breach of contract claim and thereby barred. (Defs.' Br. 14-15.) "As a general rule, 'no cause of action for fraud is stated or exists where the only fraud charged relates to a breach of the employment contract.' However, as plaintiff points out, New York courts allow a litigant simultaneously to maintain a fraud and a breach of employment contract claim provided he either: '(i) demonstrate[s] a legal duty separate from the duty to perform under the con-

tract ... or (ii) demonstrate[s] a fraudulent misrepresentation collateral or extraneous to the contract.' " *Alter v. Bogoricin,* 1997 WL 691332, *9 (S.D.N.Y. November 6, 1997) (citations omitted). By definition, a collateral agreement "is one that is extraneous to the terms of the contract." *Id.* The Second Circuit held in *Stewart v. Jackson & Nash,* that "the plaintiff had stated a claim for fraud because the alleged fraud went to the inducement of the contract, not its breach. There, [...] the false representations related not to the firm's intent to perform under an employment contract, but to opportunities beyond the scope of the contract that induced the plaintiff to enter into the contract." *Saleemi v. Pencom Systems Inc.,* 2000 WL 640647, *5 (S.D.N.Y. May 17, 2000) (citing *Stewart v. Jackson & Nash,* 976 F.2d 86, 88-89 (2d Cir.1992).

***6** The facts of the *Stewart* case are directly on point with those of the instant litigation. Here too, Plaintiff's fraudulent inducement claim refers to representations made regarding the development of Defendants' software, and alleges that these statements induced him to sign an employment contract. Plaintiff's claim does not relate to the terms of the contract itself, and as such, is considered "collateral" and survives this initial inquiry .[FN5]

FN5. Contrary to Defendants' argument, the existence of a merger clause is not, on its face, a bar to Plaintiff's claim. (*See* Defs.' Br. 15.) In order to be an outright bar to a fraudulent inducement claim, the merger clause must specify *which* oral representations it intends to bar liability for. (*See Hakker v. Stratus Computer, Inc.,* 1996 WL 434565, *4 (S.D.N.Y. August 2, 1996) ; *see also Wurtsbaugh v. Banc of America Securities LLC,* 2006 WL 1683416 (S.D.N.Y. June 20, 2006). General merger clauses, such as the one referenced in the present case, do not in and of themselves bar these claims.

Also, Plaintiff relies upon statements of present fact and not future promises or puffery, as Defendants claim. (*See* Defs.' Br. 16-19.) The statements relied upon by Plaintiff bear striking similarity to the statements relied upon in *Stewart* (wording in both refers to work reportedly in progress or currently in the process of being completed, and not to future activities), and therefore, is likewise sustainable. (*See Stewart* at 89.)

4b.

Defendants contend that Plaintiff failed to adequately allege his fraudulent inducement claim, both under New York law, and under the heightened pleading requirement established under Federal Rule of Civil Procedure 9(b). The Court finds that Plaintiff met his burden with respect to both the federal and state law requirements.

Under New York law a plaintiff must successfully allege "(1) a knowingly false representation of a material fact and (2) detrimental reliance thereon. The false representation can be either a misrepresentation or the material omission of a fact. Reliance means 'reasonable' reliance." *Wurtsbaugh v. Banc of America Securities LLC,* 2006 WL 1683416, *6 (S.D.N.Y. June 20, 2006) (citation omitted). Plaintiff successfully meets this burden within Paragraphs 24, 25, 27, and 29 of his complaint. He provides specific statements made by Barbanel, alleges that Defendants knew that these statements were false, acknowledges reliance upon these statements, and indicates how this reliance proved detrimental to his career. (*See* Compl. ¶¶ 24, 25, 27, 29.) Plaintiff has adequately alleged a fraudulent inducement claim under New York law.

The Federal Rules require that "[t]o satisfy Rule 9(b), a complaint must '(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent.' " *Hirsch v. Columbia University, College of Physicians and Surgeons,* 293 F.Supp.2d 372, 381 (S.D.N.Y.2003) (quoting *Mills v. Polar Molecular Corp.,* 12 F.3d 1170, 1175

(2d Cir.1993)). In addition to specifying the statements made, Plaintiff identified the speaker as Jerry Barbanel of Aon and provided that the statements were made in Aon's New York office in October of 2006. (Compl.¶ 23.) He goes on to allege that the statements were fraudulent because, *inter alia,* Defendants had not yet commenced the development of the e-discovery software and because they were selling instead, a repackaged version of an already existing software package. (Compl.¶ 30.) This Court finds that Plaintiff has adequately alleged his fraudulent inducement claim with respect to Federal Rule 9(b), as well.

4c.

Defendants also argue that Plaintiff will be unable to establish that his reliance upon the oral representations made by Jerry Barbanel was reasonable. (*See* Defs.' Br. 21-22.) "In the appropriate circumstances, a claim of fraud may be dismissed on the pleadings because as a matter of law a plaintiff will not be able to establish that reliance on the alleged representation was reasonable ." *Wurtsbaugh v. Banc of America Securities LLC,* 2006 WL 1683416, *6 (S.D.N.Y. June 20, 2006).

***7** For various reasons, New York courts are typically reluctant to consider a plaintiff's reliance upon oral communications reasonable.

> When plaintiffs are sophisticated parties and the statement or omission relates to a business transaction that has been formalized in a contract, New York courts are generally reluctant to find reliance on oral communications to be reasonable. This reluctance stems from the view that "a party will not be heard to complain that he has been defrauded when it is his own evident lack of due care which is responsible for his predicament."

Id. (quoting *Emergent Capital Inv. Mgmt. LLC v. Stonepath Group, Inc.,* 343 F.3d 189, 195 (2d Cir.2003)).

Further, though not an outright bar to such a claim, the existence of a merger clause does increase a court's reluctance to determine that a plaintiff reasonably relied on an oral representation. "[T]he Merger Clause reflects the parties' intention to make the Agreement comprehensive, and further undermines as a matter of law the reasonableness of plaintiffs' asserted reliance on oral representations." *Wurtsbaugh* at *7 (quoting *Harsco Corp. v. Segui,* 91 F.3d 337, 343 (2d Cir.1996)); *see also Montchal v. Northeast Savings Bank,* 243 A.D.2d 452 (N.Y.App.Div.1997) ("the purported vague and speculative assurances allegedly made by a representative of the defendant are patently insufficient to sustain the cause of action sounding in fraudulent inducement, especially in view of the plaintiff's written disclaimer of reliance upon any oral representations or promises regarding the conditions of his employment").

In spite of the fact that Plaintiff successfully alleged his fraudulent inducement claim against Defendants, based upon New York case law, he would be unable to establish that he reasonably relied upon the oral representations made by Jerry Barbanel. Plaintiff, by his own admission, is an attorney, and therefore is considered a sophisticated party within the eyes of this Court. (Compl.¶ 10.) As a sophisticated party he entered into a formal agreement with Defendants. What is more, the existence of the merger clause communicates an intention among the parties that the employment contract was to be controlling, and Plaintiff is deemed to have signed the document with this intent. As such, Plaintiff's claim must be dismissed.

In light of the foregoing, Defendants' motion to dismiss Plaintiff's fraudulent inducement claim is hereby granted.

5.

Plaintiff brings a promissory fraud claim against Defendants. (Compl.¶¶ 59-63.) Under New York law, "in order to state a claim for promissory fraud, it must be alleged that the 'promisor, at the time of making certain representations, lacked any intention to perform them.' " *Clarence Beverage,*

Inc. v. BRL Hardy (USA), Inc., 2000 WL 210205, *3 (W.D.N.Y. February 8, 2000) (citation omitted). In order to survive a motion to dismiss, a plaintiff must set out *specific facts* in his complaint demonstrating that defendants never intended to make good on any of the promises made. *See L-3 Communications Corp. v. OSI Systems, Inc.,* 2004 WL 42276, *4 (S.D.N.Y. January 8, 2004); *see also Leve v. Franklin Capital Corp.,* 2003 WL 446807, *5 (S.D.N.Y. February 25, 2003) ("The amended complaint sufficiently alleges promissory fraud, as it alleges that defendants fraudulently promised to pay a total purchase price of $4.5 million when they had no intention of performing the promise."). In *Clarence Beverage, Inc. v. BRL Hardy (USA), Inc.,* the District Court noted that "[i]t [is] worth repeating here that, when considering a motion to dismiss, all factual allegations contained in the Amended Complaint are presumed to be true and such will only be dismissed if it appears beyond doubt that no set of facts in support of Clarence's claim will entitle it to relief. The facts alleging promissory fraud satisfy this liberal standard." 2000 WL 210205 at *3.

***8** In the present case, the Court finds that Plaintiff does sufficiently satisfy this liberal standard, based upon a review of the allegations made in his complaint. First, Plaintiff cites the following representations made by Jerry Barbanel in October of 2006:(i) "Right now we [Defendants] have the best developers working on and completing our complete end-to-end e-discovery solutions"; (ii) "We [Defendants] are in the final stages of developing and completing a complete end-to-end proprietary e-discovery system ranging from data extraction to viewing to production"; (iii) "The proprietary software technology that we are developing right now will turn the industry on its ear and offer a completely integrated proprietary solution. Within the next three months we will have the only true end-to-end solution in the industry"; and finally, after Plaintiff expressed concern regarding the delay in development, "No. no. no. I have guys working on it as we speak and it will be done in three weeks." (Compl.¶ 24.) Next, Plaintiff alleges that each one of these representations "were false and known by Jerry Barbanel to be false at the time they were made." (*Id.* ¶ 25.)

Further, Plaintiff provides specific facts within his complaint establishing that Defendants had no intention of actually following through with the statements made by Barbanel. These facts are that: Defendants "had not yet commenced the development and programming of the proprietary software systems represented by Jerry Barbanel"; Defendants "had not yet even approved the allocation of funds and resources for the development and completion of [Defendants'] own proprietary e-discovery software solutions"; "At conferences and roll-out parties, [Defendants'] executives misrepresented to current and prospective customers that [Defendants] developed proprietary e-discovery software when, in fact, the software being offered was rebranded software already commonly available and utilized within the industry"; "In many instances Jerry Barbanel instructed Plaintiff and other employees to lie to customers about the proprietary nature of [Defendants'] software and never admit that [Defendants'] software was simply rebranded third-party applications"; and "at the time of offering [Defendants'] E Docs (a rebranded copy of File Control) Jerry Barbanel and [Defendants] had yet to secure the required license to even utilize File Control." (*Id.* ¶¶ 30, 33.)

By alleging that Defendants *knowingly* made false representations to Plaintiff, and by alleging specific facts which, if true, demonstrate repeatedly unethical and dishonest conduct on the part of Defendants (including the sale of a product created by another entity under its own name, while making no effort to give that entity credit or to create its own e-discovery product), Plaintiff has sufficiently met the liberal standard necessary to survive a motion to dismiss.

In light of the foregoing, Defendants' motion to dismiss Plaintiff's promissory fraud claim is hereby denied.

6.

***9** Based upon the foregoing analysis, Defendants' motion to dismiss is GRANTED IN PART AND DENIED IN PART. It is GRANTED with respect to Plaintiff's Breach of Contract and Fraudulent Inducement claims; it is DENIED with respect to Plaintiff's Promissory Fraud claim.

SO ORDERED.

S.D.N.Y.,2007.
Junk v. Aon Corp.
Not Reported in F.Supp.2d, 2007 WL 4292034 (S.D.N.Y.)

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Not Reported in F.Supp., 1996 WL 673812 (S.D.N.Y.)
(Cite as: 1996 WL 673812 (S.D.N.Y.))

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Only the Westlaw citation is currently available.

United States District Court, S.D. New York.
Edith M. KEMPF, Plaintiff,
v.
MITSUI PLASTICS, INC., a wholly-owned subsidiary of Mitsui & Co. (U.S.A.), Inc., and Mitsui & Co. (U.S.A.), Inc., Defendants.

No. 96 Civ. 1106 (HB).
Nov. 20, 1996.

C. Jeffrey Thut, Waukegan, IL, Robert J. Trizna and Michael Lee, Chicago, IL, Richard J. Flanagan, New York City, for plaintiff.

Ronald M. Green and Patricia Murphy, New York City, for defendant.

OPINION AND ORDER

BAER, District Judge:

***1** Plaintiff Edith Kempf brings this action claiming employment discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., and breach of contract. Currently before the Court is the defendants' motion to dismiss the complaint or, in the alternative, for partial summary judgment. For the reasons discussed below, the Court will treat the motion as one for partial summary judgment. The motion is granted in part and denied in part.

BACKGROUND

Plaintiff is employed as a travelling salesperson who works out of her home near Chicago and services customers in approximately ten states in the midwest. She claims that she is employed by both defendant Mitsui Plastics, Inc. ("MPI") and its parent company, defendant Mitsui & Co. (U.S.A.), Inc. ("Mitsui U.S.A."). The defendants, however, argue that she is employed solely by MPI. Plaintiff's relationship with the defendants began in July 1989 when she entered into a three-month agency agreement with MPI. Towards the expiration of this agency agreement, plaintiff negotiated with MPI to become regional sales manager in Chicago. Plaintiff alleges in her complaint that she was offered lifetime employment and adds in her affidavit that she was also promised she could only be terminated for good cause. Plaintiff also claims that she was promised the role of director of an independent Chicago office and that she would report directly to the president of MPI. In her complaint, plaintiff alleges that an independent Chicago office would be established as soon as the annual gross profits from the Chicago office exceeded $260,000. In her affidavit, however, plaintiff states that the office was to be established as soon as the Chicago office achieved annual sales of $1,000,000.

On October 26, 1989, MPI sent plaintiff a letter announcing her employment and stating her title, compensation, start date and benefits. The letter does not allude to lifetime employment or the creation of an independent Chicago office. Plaintiff claims in her affidavit that she called MPI to inquire about the missing terms and was assured that they were standard and would be honored. Under plaintiff's compensation agreement for April 1992 to March 1993, MPI was to pay plaintiff a salary of $72,000 per year and a commission of 5% of the gross profit from all sales by the Chicago office. Her compensation agreement for the period April 1993 to March 1995 provides for payment of a salary of $84,000 per year and a commission of 1.5% of gross sales above $1,100,000. Plaintiff claims that the commissions were to be calculated based on all sales within the Chicago territory, while defendants allege that the contract only applies to sales made by her out of the Chicago office.

On April 17, 1995, plaintiff filed a complaint with the Equal Employment Opportunity Commission ("EEOC") alleging that defendants discriminated against her based on her sex. Plaintiff received a Right to Sue Letter from the EEOC on or about April 28, 1995. Plaintiff then brought this action in

the Northern District of Illinois on July 15, 1995. On defendants' motion, the case was transferred to this Court pursuant to 28 U.S.C. § 1404(a). *See Kempf v. Mitsui Plastics, Inc.,* No. 95 C 4258, 1996 WL 31179 (N.D. Ill. Jan. 25, 1996).

***2** Plaintiff's complaint alleges six causes of action. The first four claim violations of Title VII, while the last two allege breach of contract. Although each of the four Title VII causes of action are labelled "sexual discrimination" and allege that the claimed disparate treatment was "based solely on Plaintiff's sex," in a summary paragraph in the complaint plaintiff alleges that she was discriminated against on the basis of her sex and race. Plaintiff is a female Caucasian.

In her first cause of action, plaintiff claims that defendants discriminated against her by granting male sales personnel more favorable pricing terms at which they could sell the same products. Her second cause of action alleges that defendants refused to permit her to sell products to plastics distributors, while male sales personnel could sell to distributors. Plaintiff's third cause of action claims that defendants permitted male sales personnel to make sales within her territory without her consent, while she was prohibited from making sales outside of her territory. Next, plaintiff contends that defendants paid similarly-situated Japanese male employees significantly higher compensation. As for breach of contract, plaintiff claims that defendants breached their oral agreement to establish an independent Chicago office and that defendants failed properly to account for and pay the commissions due her under her salary agreements.

Defendants have moved to dismiss the complaint or, in the alternative, for partial summary judgment. Defendant Mitsui U.S.A. moves to dismiss the Title VII claims against it because it is not plaintiff's employer. Mitsui U.S.A. also seeks dismissal of the contract claims against it because it was not a party to any contract with plaintiff. Both defendants move to dismiss the Title VII claims to the extent they allege race discrimination and the fourth cause of action alleging salary discrimination because these claims were not raised in plaintiff's EEOC charge. Finally, both defendants move to dismiss the contract claims for failure to state a claim.

DISCUSSION

As noted, defendants' motion is styled as one to dismiss or in the alternative for partial summary judgment. Both parties have submitted affidavits in support of their positions and plaintiff was clearly on notice that the motion could be treated as one for summary judgment. I find it appropriate to consider the extra-pleading materials and review the motion under the standard appropriate for summary judgment.

Summary judgment is appropriate where there are no disputed issues of material facts and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242 (1986); *Tomka v. Seiler Corp.,* 66 F.3d 1295, 1313 (2nd Cir. 1995). The "party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] ... which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). Once "a properly supported motion for summary judgment is made, the adverse party 'must set forth specific facts showing that there is genuine issue for trial.'" *Anderson,* 477 U.S. at 250. In determining whether there is a genuine issue of material fact, the court must resolve all ambiguities and draw all factual inferences in favor of the non-moving party. *Tomka,* 66 F.3d at 1304.

I. The Title VII Claims Against Mitsui U.S.A.

***3** Mitsui U.S.A. seeks dismissal of the Title VII claims against it because it was not plaintiff's employer within the statutory definition. Plaintiff disputes this, claiming that she was employed by both MPI and Mitsui U.S.A.

In determining whether a parent and a subsidi-

Not Reported in F.Supp., 1996 WL 673812 (S.D.N.Y.)
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ary are a single employer, courts consider whether there is sufficient evidence of "'(1) interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control.'" *Cook v. Arrowsmith Shelburne, Inc.,* 69 F.3d 1235, 1240 (2d Cir. 1995) (quoting *Garcia v. Elf Atochem North America,* 28 F.3d 446, 450 (5th Cir. 1994)). The central focus of the inquiry, though, is on the second factor, centralized control of labor relations. *Id.* at 1241.

Plaintiff's affidavit states several facts that are relevant to this determination and also seeks a continuance of the motion pending further discovery. Plaintiff claims that discovery would establish several facts that would create a material question as to whether the defendants should be considered a single employer. Although plaintiff herself may have been partly responsible for her lack of discovery, *see* Murphy Aff. Sworn to on May 13, 1996, at ¶¶ 5-6, discovery was still in its early stages when this motion was filed. In an abundance of caution, some further discovery will be granted. Although discovery is now closed, the record is unclear as to whether the parties have conducted discovery on this issue. Plaintiff may take a maximum of three depositions, of no more than one day each, and make a limited document request. If this additional discovery is unnecessary, the parties are, of course, under no obligation to pursue it. Any further applications on this issue must be submitted fully briefed within 30 days from the date of this Opinion and Order. Should any of the above not be perfectly clear, the parties may have a telephone conference with the Court on Wednesday, November 20, 1996 at 11:00 a.m.

II. The Contract Claims Against Mitsui U.S.A.

Next, Mitsui U.S.A. argues that it cannot be held liable for the alleged breach of the employment agreements between plaintiff and MPI. In opposition, plaintiff argues that Mitsui U.S.A. can be held liable for its subsidiary's contracts because it so dominated MPI that MPI's corporate veil should be pierced.[FN1]

FN1. As an initial matter, the parties have briefed this issue on the assumption that New York law applies. Since there is no dispute between the parties, and they have not briefed the law of any other jurisdiction, I will apply New York law. I note, however, that the parties' assumption is probably incorrect. As this case was originally filed in the Northern District of Illinois and transferred pursuant to 28 U.S.C. § 1404(a), this Court must apply Illinois choice of law rules because they would have been applied by the transferor court. *Ferens v. John Deere Co.,* 494 U.S. 516 (1990); *Klaxon v. Stentor Electric Mfg. Co.,* 313 U.S. 487 (1941). Under Illinois choice of law rules, efforts to pierce MPI's corporate veil are governed by the law of the state of incorporation, here Delaware. *See, e.g., Stromberg Metal Works, Inc. v. Press Mechanical, Inc.,* 77 F.3d 928, 933 (7th Cir. 1996).

Under New York law, a corporate veil may be pierced "either when there is fraud or when the corporation has been used as an alter ego." *Itel Containers Int'l Corp. v. Atlanttrafik Express Serv. Ltd.,* 909 F.2d 698, 703 (2d Cir. 1990); *see also Bridgestone/Firestone, Inc. v. Recovery Credit Services, Inc.,* No. 95-7759, 1996 WL 593511 (2d Cir. Oct. 17, 1996); *Carte Blanche (Singapore) Pte., Ltd. v. Diners Club Int'l, Inc.,* 2 F.3d 24 (2d Cir. 1993); *Wm. Passalacqua Builders, Inc. v. Resnick Dev. South, Inc.,* 933 F.2d 131 (2d Cir. 1991). Here, plaintiff does not claim that MPI's separate corporate existence was used for fraudulent purposes; rather, plaintiff alleges that MPI is the alter ego of Mitsui U.S.A.

***4** In *Wm. Passalacqua Builders,* the court of appeals set forth ten factors for courts to consider as relevant to whether a corporation was sufficiently dominated to disregard the corporate form:

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> (1) the absence of the formalities and paraphernalia that are part and parcel of the corporate existence, i.e., issuance of stock, election of directors, keeping of corporate records and the like, (2) inadequate capitalization, (3) whether funds are put in and taken out of the corporation for personal rather than corporate purposes, (4) overlap in ownership, officers, directors, and personnel, (5) common office space, address and telephone numbers of corporate entities, (6) the amount of business discretion displayed by the allegedly dominated corporation, (7) whether the related corporations deal with the dominated corporation at arms length, (8) whether the corporations are treated as independent profit centers, (9) the payment or guarantee of debts of the dominated corporation by other corporations in the group, and (10) whether the corporation in question had property that was used by other of the corporations as if it were its own.

Wm. Passalacqua Builders, 933 F.2d at 139. Plaintiff has failed to create a genuine issue as to the independent corporate existence of MPI. Her complaint is devoid of any allegations relevant to this question. Plaintiff's memorandum and affidavit claim conclusorily that MPI was the alter ego of Mitsui. The only relevant factor which plaintiff addresses, however, is the amount of business discretion that MPI had. Even drawing all inferences in plaintiff's favor, these allegations by themselves are insufficient to pierce the corporate veil. Plaintiff also asks for additional discovery. Unlike the Title VII issue, however, plaintiff has provided no information as to what specifically further discovery would uncover that could create an issue of fact as to piercing MPI's corporate veil.

Drawing all inferences in plaintiff's favor, I conclude that she has failed to raise a genuine issue as to Mitsui U.S.A.'s liability for the alleged breach of plaintiff's contracts with MPI. Accordingly, summary judgment is granted against plaintiff's fifth and sixth causes of action against Mitsui U.S.A.

III. The Race Discrimination and Disparate Salary Claims Under Title VII

Both defendants seek dismissal of plaintiff's Title VII claims to the extent they allege race discrimination and plaintiff's fourth cause of action for disparate salary. Defendants argue that these claims were not raised in plaintiff's EEOC charge and therefore the Court lacks jurisdiction to hear them. In response, plaintiff argues that these claims are reasonably related to her administrative complaint.

Under Title VII, a district court only has jurisdiction to hear claims that were either raised in an EEOC charge or that are reasonably related to the conduct discussed in the administrative charge. *Butts v. City of New York Dep't of Housing,* 990 F.2d 1397, 1401-02 (2d Cir. 1993). The type of reasonably related conduct that is relevant here is essentially an allowance of loose pleading. Courts may hear claims that were not raised in the EEOC charge but which "would fall within the 'scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination."' *Id.* at 1402 (quoting *Smith v. American President Lines, Ltd.,* 571 F.2d 102, 107 n.10 (2d Cir. 1978)). A new allegation will be considered reasonably related where it is based on the same type of discrimination. *See Commer v. City of New York,* No. 93 Civ. 7408 (HB), 1996 WL 374149 (S.D.N.Y. July 3, 1996); *Peterson v. Insurance Co. of North America,* 884 F. Supp. 107 (S.D.N.Y. 1995); *Staples v. Avis Rent-a-Car Sys.,* 537 F. Supp. 1215 (W.D.N.Y. 1982).

***5** As to her claims of race discrimination, plaintiff notes that her EEOC complaint included the following charge:

> 3. I believe that I have been discriminated against on the basis of my sex in the terms and conditions of my employment and promotion opportunities because:
>
> ....
>
> e. I have not been allowed to oversee the independent operations of the Chicago sales office,

> despite promises to me at hire that once the Chicago office reached a certain level of gross profit, it would become independent. The Chicago office reached the gross profit level two years ago and, as of this date, I have not been allowed to assume the role as head of an independent sales office. All of the other offices are run by male Japanese nationals who report directly to the President. As a result of this treatment, I am being continually denied a promotion and bonus pay.

Plaintiff contends that by mentioning that other offices are run by "male Japanese nationals" her race discrimination claim could reasonably have been expected to be investigated. It is undisputed, however, that plaintiff only marked the box for sex discrimination on the charge form and left the race box empty. I conclude that plaintiff's race discrimination claims are not reasonably related to her administrative charge because they allege a different type of discrimination than that claimed before the EEOC. The mere mention of Japanese nationals is insufficient, especially where the paragraph in which it is mentioned begins with a charge of sex discrimination only. *See Clements v. St. Vincent's Hospital and Medical Ctr.,* 919 F. Supp. 161, 163 (S.D.N.Y. 1996) (dismissing sex discrimination claim where EEOC charge only alleged race discrimination). *Dennis v. Pan American World Airways, Inc.,* 746 F. Supp. 288, 291 (E.D.N.Y. 1990), is analogous. There, the court dismissed an age discrimination claim where the plaintiff's EEOC charge had only alleged race discrimination. Dennis's administrative charge that she was forced into early retirement was insufficient to support an age discrimination claim. The court held that "[m]erely breathing the phrase 'early retirement' does not alert the EEOC that it should investigate a possibility of age discrimination." *Id.* Accordingly, plaintiff's race discrimination claims, to the extent that they were stated in the complaint, are dismissed.

Plaintiff's disparate salary claim, however, will not be dismissed. Her fourth cause of action is based on sex discrimination, the same type of discrimination raised in the EEOC charge. Further, plaintiff repeatedly mentioned her pay and commissions in the EEOC charge. Although the disparate pay claim was not included, it is reasonable to assume that an administrative investigation would have reached the disparate pay issue.

IV. Breach of Contract for Failure to Establish an Independent Office

Plaintiff's fifth cause of action claims that defendants' breached their oral promise to create an independent Chicago office when the office achieved either a specified gross profit or total sales level. The Court has already dismissed this claim as to Mitsui U.S.A. I will address this issue as to both defendants and consider this an alternative grounds for the dismissal as to Mitsui U.S.A.

***6** Defendants base their argument on several grounds. They claim that this cause of action fails because plaintiff was an at-will employee and thus has no contract claim, her claim is barred by the parol evidence rule and the statute of frauds, it is too vague, and plaintiff has made inconsistent allegations in her complaint and affidavit. Since defendants' motion must be granted on each of the first two grounds, I need not reach the final three.

As an initial matter, the parties dispute which law governs plaintiff's contract claims. Plaintiff contends Illinois law governs, while defendants rely on New York law. Both parties look to New York choice of law principles. As discussed above, however, as a transferee court, I must follow Illinois choice of law rules.

In transferring this action to this Court, Judge Norgle found that Illinois courts would apply New York law. Contrary to plaintiff's argument, Judge Norgle did not rely solely on the choice of law clause in the agency agreement. The court held that the sum of the relevant factors "weigh in favor of New York state law." *Kempf,* 1996 WL 31179, at *3. This ruling constitutes the law of the case and

will not be disturbed.

A. At-Will Employee Status

Defendants argue that plaintiff is an at-will employee. Therefore, the oral promise to establish an independent office is unenforceable because the employment relationship may be terminated or modified at any time. Plaintiff responds that the oral promise of lifetime employment which can only be terminated for good cause renders her an employee for a fixed term, not at-will.

Under New York law, "absent an agreement establishing a fixed duration, an employment relationship is presumed to be a hiring at will, terminable at any time by either party." *Sabetay v. Sterling Drug, Inc.,* 514 N.Y.S.2d 209, 211 (N.Y. 1987); *see also Wanamaker v. Columbian Rope Co.,* 907 F. Supp. 522, 538 (N.D.N.Y. 1995); *Cucchi v. New York City Off-Track Betting Corp.,* 818 F. Supp. 647, 649 (S.D.N.Y. 1993). An at-will employment relationship does not create an employment contract. *Cucchi,* 818 F. Supp. at 650. Oral assurances that an employee will only be terminated for cause do not, by themselves, overcome the presumption that the relationship is at-will. *Wanamaker,* 907 F. Supp. at 539; *Cucchi,* 818 F. Supp. at 652-53. The terms of an at-will employee's employment may be modified at any time. The employee's only option is to terminate the relationship; by continuing to remain as an employee, the employee will be deemed to have ratified the new relationship. *Bottini v. Lewis & Judge & Co.,* 621 N.Y.S.2d 753 (3d Dep't 1995).

These principles require that plaintiff's fifth cause of action be dismissed. Plaintiff's employment relationship is presumed to be at-will. Her new allegation in her affidavit that she was told she could only be terminated for good cause does not change her at-will employee status. In addition, plaintiff's reliance on *Ohanian v. Avis Rent A Car System, Inc.,* 779 F.2d 101 (2d Cir. 1985), is misplaced. *See Cucchi,* 818 F. Supp. at 652-53; *see also Wanamaker,* 907 F. Supp. at 539. Therefore, if there ever was a promise to create an independent Chicago office, defendants were free to modify the relationship and remove this employment term. By remaining with the defendants past the time when this obligation allegedly accrued, plaintiff has ratified the new arrangement and may not seek judicial enforcement of the original oral promise.

B. Parol Evidence Rule

***7** The parol evidence rule acts to exclude evidence of a contemporaneous or prior oral agreement that modifies or contradicts the terms of an integrated written agreement. *Stroll v. Epstein,* 818 F. Supp. 640, 645 (S.D.N.Y. 1993), *aff'd,* 9 F.3d 1537 (2d Cir. 1993); *Frishberg v. Esprit de Corp. Inc.,* 778 F. Supp. 793, 802 (S.D.N.Y. 1991), *aff'd,* 969 F.2d 1042 (2d Cir. 1992). To be considered integrated, the contract must completely embody the rights and obligations of the parties. *Stroll,* 818 F. Supp. at 645. A "contract which appears complete on its face is an integrated agreement as a matter of law." *Stroll,* 818 F. Supp. at 645. Defendants argue that the October 26, 1989 letter to plaintiff constitutes a fully integrated writing and plaintiff's alleged promise to establish a Chicago office is barred by the parol evidence rule.

In *Frishberg,* a contract was found complete on its face where it included provisions regarding territory, commission rate, drawing accounts, products to be sold, start date, staffing and other special arrangements. Similarly, here, the October 26 letter indicates plaintiff's title, including a geographic specification, her salary, start date and benefits. As such, it is complete on its face. *See* Pl. Rule 3(g) Statement ¶ 24 (admitting that the terms of her employment were set forth in the October 26, 1989 letter).

Plaintiff's argument that the October 26 letter cannot constitute a contract because she did not sign it is unpersuasive because this court has held that a letter confirming a prior oral agreement is a written contract even where it is unsigned by the plaintiff. *See Kashfi v. Phibro-Solomon, Inc.,* 628 F. Supp. 727, 732 (S.D.N.Y. 1986). In addition, the lack of a formal integration clause does not render

the writing incomplete. Finally, plaintiff's argument that she may introduce additional terms so long as they are not inconsistent or contrary to the written agreement misconstrues the parol evidence rule. This rule also bars evidence of oral promises that "modify" or "var[y]" the written agreement. *Stroll,* 818 F. Supp. at 645; *Frishberg,* 778 F. Supp. at 802 .

V. Breach of Contract to Pay Commissions

Finally, defendants contend that plaintiff's sixth cause of action must be dismissed for failure to state a claim and because her allegations contradict the written compensation agreements.

To state a claim for breach of contract, the complaint must allege the existence of a contract, due performance of the contract by the plaintiff, breach of the contract by the defendant, and damages caused by the breach. *Reuben H. Donnelley Corp. v. Mark I Marketing Corp.,* 893 F. Supp. 285, 290 (S.D.N.Y. 1995). It is not necessary, however, specifically to state each element individually because of the notice pleading standard embodied in Fed. R. Civ. P. 8. *Id.* Defendants argue that plaintiff "failed to identify what terms of this supposed contract allegedly were breached or explain how defendants have failed to live up to their end of this alleged bargain." Def. Mem. at 18. Plaintiff has alleged that defendants failed to account for and pay the money due her under her compensation agreements. This sufficiently states a claim. Further, on the current record, factual issues exist as to the merits of plaintiff's sixth cause of action which preclude summary judgment.

CONCLUSION

***8** As discussed above, defendants' motion is granted in part and denied in part. Decision is reserved on the issue of Mitsui U.S.A.'s liability under Title VII pending additional submissions. The fifth and sixth causes of action alleging breach of contract by Mitsui U.S.A. are dismissed. The allegations of race discrimination in violation of Title VII are dismissed, while the fourth cause of action is not. Plaintiff's fifth cause of action is dismissed. Plaintiff's sixth cause of action remains pending against MPI only.

SO ORDERED.

S.D.N.Y.,1996.
Kempf v. Mitsui Plastics, Inc.
Not Reported in F.Supp., 1996 WL 673812 (S.D.N.Y.)

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301 A.D.2d 104, 749 N.Y.S.2d 497, 2002 N.Y. Slip Op. 07730
(Cite as: 301 A.D.2d 104, 749 N.Y.S.2d 497)

Supreme Court, Appellate Division, First Department, New York.
Sabby H. MIONIS, et al., Plaintiffs–Appellants,
v.
BANK JULIUS BAER & CO., LTD., et al., Defendants–Respondents.

Oct. 29, 2002.

Mutual fund investment manager and its founder brought action against bank affiliates to recover for defamation and tortious interference with contract and prospective business relations by accusing manager of money laundering. The Supreme Court, New York County, Richard Lowe, III, J., granted defendants' motion to compel mediation and, if necessary, arbitration. Plaintiffs appealed. The Supreme Court, Appellate Division, Sullivan, J., held that: (1) the claims were not subject to arbitration or mediation, and (2) alleged interrelatedness of non-arbitrable and arbitrable claims, standing alone, was not enough to subject non-signatories to arbitration.

Reversed.

West Headnotes

[1] Alternative Dispute Resolution 25T 112

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk112 k. Contractual or consensual basis. Most Cited Cases
(Formerly 33k1.1 Arbitration)
In the absence of an agreement to do so, parties cannot be forced to arbitrate.

[2] Alternative Dispute Resolution 25T 132

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk131 Requisites and Validity
25Tk132 k. In general. Most Cited Cases
(Formerly 33k6.2 Arbitration)
An agreement to arbitrate requires a clear and unequivocal manifestation of an intention to arbitrate because it involves the surrender of the right to resort to the courts.

[3] Alternative Dispute Resolution 25T 143

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk142 Disputes and Matters Arbitrable Under Agreement
25Tk143 k. In general. Most Cited Cases
(Formerly 33k7.5 Arbitration)
Mutual fund investment manager's agreement to arbitrate any controversy with bank was limited to its representative capacity as the agent of the funds and did not include its general corporate capacity, and, thus, the manager did not agree to arbitrate claims brought in its individual capacity for harm it suffered in that capacity from alleged defamation and tortious interference with contract and prospective business relations; the agreement referred to the manager as “attorney” and defined “attorney” as “agent and attorney-in-fact” for the funds with respect to their accounts at the bank.

[4] Contracts 95 143.5

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k143.5 k. Construction as a whole. Most Cited Cases
Courts are obliged to interpret a contract so as to give meaning to all terms.

[5] Contracts 95 147(1)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k147 Intention of Parties
95k147(1) k. In general. Most Cited Cases

Since a contract is a voluntary undertaking, it should be interpreted to give effect to the parties' reasonable expectations.

[6] Principal and Agent 308 136(2)

308 Principal and Agent
308III Rights and Liabilities as to Third Persons
308III(A) Powers of Agent
308k130 Liabilities Incurred
308k136 Liabilities of Agent
308k136(2) k. Contracts in name of or for benefit of principal. Most Cited Cases

An agent who signs a contract on behalf of a known principal cannot be held to have made a commitment in his or her individual capacity.

[7] Alternative Dispute Resolution 25T 143

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk142 Disputes and Matters Arbitrable Under Agreement
25Tk143 k. In general. Most Cited Cases
(Formerly 33k7.5 Arbitration)

Mutual fund investment manager's claims against bank affiliates for defamation and tortious interference with contract and prospective business relations did not arise out of the banking relationship between the funds and the bank or manager's role as agent of the funds and, therefore, were not subject to agreement to arbitrate any controversy in manager's capacity as a limited agent of the funds with respect to the custodial accounts maintained at the bank; the only controversies that could arise with the manager as an agent related to the terms of the authorization agreement, the funds' general relationship with the bank, or management of the funds' custodial accounts at the bank.

[8] Alternative Dispute Resolution 25T 143

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk142 Disputes and Matters Arbitrable Under Agreement
25Tk143 k. In general. Most Cited Cases
(Formerly 33k7.5 Arbitration)

Mutual fund investment manager's controversy with banking affiliates over alleged defamation and tortious interference with contract and prospective business relations was outside scope of arbitration clause in authorization agreement that terminated before events giving rise to the manager's tort claims.

[9] Alternative Dispute Resolution 25T 143

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk142 Disputes and Matters Arbitrable Under Agreement
25Tk143 k. In general. Most Cited Cases
(Formerly 33k7.5 Arbitration)

A party who agrees to arbitration in its capacity as an agent can neither bring a claim nor have a claim brought against it under the arbitration provision if the claim is not related to the scope of the agency.

[10] Alternative Dispute Resolution 25T 141

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk141 k. Persons affected or bound. Most Cited Cases
(Formerly 33k7.3 Arbitration)

Alleged interrelatedness of non-arbitrable and arbitrable claims, standing alone, was not enough to

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subject non-signatories to arbitration.

[11] Alternative Dispute Resolution 25T 141

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk141 k. Persons affected or bound. Most Cited Cases
(Formerly 33k7.3 Arbitration)

Mutual fund investment manager's allegations of defamation and tortious interference with contract and prospective business relations and the obligations under the authorization agreement with bank affiliates were not so connected as to be inextricably interwoven, and, thus, even if court could compel arbitration of non-arbitrable claims inextricably interwoven with arbitrable claims, non-signatories to the agreement could not be compelled to arbitrate.

****498 *105** William H. Pratt, of counsel (Jennifer M.H. Selendy and Todd S. Schulman, on the brief, Kirkland & Ellis, attorneys) for plaintiffs-appellants.

Adam S. Hakki, of counsel (Danforth Newcomb, on the brief, Shearman & Sterling, attorneys) for defendants-respondents ****499** Bank Julius Baer & Co., Ltd. and Julius Baer Trust Company (Cayman) Ltd.

Jonathan Polkes, of counsel (Isaac Greaney, on the brief, Cadwalader Wickersham & Taft, attorneys) for defendants-respondents Peter Embiricos and Theodore Goneos.

NARDELLI, J.P., MAZZARELLI, SULLIVAN, OSENBERGER and MARLOW, JJ.

SULLIVAN, J.

In this action to recover damages for libel, tortious interference with contract and prospective business relations and intentional infliction of emotional distress arising out of the publication of an allegedly defamatory letter sent by defendants to the Greek Ministry falsely accusing plaintiffs and certain of their customers of being "Greek money-launderers," plaintiffs appeal from the grant of defendants' motion to stay the action and compel mediation and, if necessary, arbitration. Although effectively exonerated by the Greek authorities of any wrongdoing, plaintiffs claim to have been substantially and permanently harmed by the defamation.

Since this appeal turns on a determination of who is bound by the arbitration clause at issue, identification of the parties and an understanding of their relationship is crucial. In August 1997, plaintiff Sabby H. Mionis, a Greek citizen, left his position as an account executive at the investment firm of Donaldson, Lufkin & Jenrette Securities to establish his own investment management business, T.C. Advisors, Ltd., now known as Capital Management Advisors, Ltd. (CMA), a Bahamian corporation and a plaintiff herein. Mionis intended to set up various open-ended mutual funds to provide diversified long-term investment growth with low volatility for his clients, many of whom were Greeks, and to provide investment advice to the funds for a fee based on the size and underlying performance of the funds. Defendant Bank Julius Baer & Co., Ltd. (Bank JB) is a Swiss bank with numerous branches, including one in New York. Defendant Julius Baer Trust Company (Cayman) Ltd. (JB Cayman) is an affiliate that provides services for Bank JB clients. The various Julius Baer (JB) entities are all subsidiaries of a holding company.

***106** In April 1998, Mionis orally agreed with Bank JB to engage various Julius Baer entities for their "Private Label Funds" services. Although these entities offer investment funds of their own, the Private Label Fund services allow Julius Baer to generate revenues by providing third-party investment managers, like T.C. Advisors, with many of the administrative and "back office" services associated with the management of investment funds. This service permits an independent investment ad-

visor, such as T.C. Advisors, to advise and manage a pooled fund of investors' assets in custodial accounts maintained at Bank JB. The absence of written agreements between Mionis, T.C. Advisors and the various Julius Baer entities as to the provision of Private Label Fund services is standard in the industry.

Pursuant to this arrangement, Bank JB established two open-ended mutual funds domiciled in the Cayman Islands, T.C. Investments Ltd. and T.C. Multi–Hedge Ltd., wholly independent limited liability companies organized under the laws of the Cayman Islands, and opened custodial bank accounts for the two funds. JB Cayman served as the administrator, transfer agent and registrar. Directorate, Inc., a fund management company incorporated in the British Virgin Islands and wholly owned by Julius Baer Bank & Trust Co., which, in turn, is a wholly owned subsidiary****500** of Julius Baer Holding Ltd. under the direction of Mionis and T.C. Advisors, managed the funds. Mionis and T.C. Advisors were appointed the investment advisor to the funds and authorized to invest the funds' assets in accordance with the guidelines established for each of the funds in the respective offering memoranda. In investing on behalf of the funds, Mionis would place written orders with Peter Embiricos or Theodore Goneos at Bank JB in New York. The latter was the account supervisor for the fund and reported to Embiricos, who had solicited Mionis's business and oversaw the handling of the account. Neither Embiricos nor Goneos was employed by Bank JB at the time this action was commenced.

Early in the parties' relationship tensions arose between Mionis and Bank JB New York, which preferred to provide its own investment advisory services and secure for itself the investment advisory fees being paid by the funds to Mionis and T.C. Advisors. Indeed, Bank JB New York proposed that Mionis and T.C. Advisors concentrate their efforts in acting solely as marketing agent in attracting new investors in exchange for a commission from Bank JB. Mionis rejected these overtures and, in or about May 2000, after a series of incidents that ***107** caused Mionis to question the quality of service being provided to the funds by the Julius Baer entities, advised Embiricos and Goneos that, effective July 31, 2000, the funds would no longer require the services of Bank JB New York, JB Cayman and Directorate, Inc.

After the termination of the funds' relationship with the Julius Baer entities, officers of the Greek Economic Crime Prosecution Corps conducted a search of Mionis's office and confiscated his business records and computer files. During the investigation, Mionis, a Jew, alleges that he was repeatedly confronted with anti-Semitic comments by the authorities, who focused their investigation on several of his more prominent Jewish clients as supposed “money launderers.” Ultimately, the authorities were unable to find any evidence of money laundering by Mionis or any of his clients and the investigation was closed with the levying of a small fine for “so-called bookkeeping irregularities.” According to Mionis, the adverse publicity caused him to lose clients, including Greece's largest insurance company.

Subsequently, Mionis obtained from the Greek government a copy of the letter that triggered the investigation. Written on a Julius Baer letterhead and bearing the name, although not the signature, of Charles Farrington of JB Cayman, the August 5, 2000 letter stated: “Please find attached a list of Greek money-launderers (tax evasion). All of them have an account with TC Investment in the Cayman Islands.” The letter further recited that the accounts were managed by Mionis, who “could give you more details about attached list.” Attached to the letter was a partial printout of one of the funds' shareholder lists, which included six Greek individual investors, three of whom are alleged to be prominent Jews. The remaining shareholders, three major international corporations, two of which are prestigious Swiss banks and the third a subsidiary of the largest Swiss bank, are alleged to be Julius Baer's largest Swiss competitors.

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Plaintiffs further allege that the letter's money-laundering allegation was malicious since JB Cayman was empowered under Cayman Islands law to require investors to verify both their identity and the source of the monies used to purchase shares in the funds. At no time did the administrator, JB Cayman, or the director, Directorate, Inc., seek to verify either the identity of the investors or the source of the funds ****501** invested. As noted, the two funds opened custodial accounts with Bank JB. The agreements entered into at that time between Bank JB ***108** and the two funds, known as a "Management Authorization for Third Parties" (authorization agreement), designated T.C. Advisors as the funds' "agent and attorney-in-fact (the 'Attorney')," thus enabling it to manage the funds' assets in the accounts. The authorization agreement 1) required Bank JB to permit T.C. Advisors to direct activity in the accounts; 2) made the acts of T.C. Advisors binding on the funds; and 3) held Bank JB harmless for such acts. The agreement specifically defined the scope of T.C. Advisors' authority as "Attorney" for the funds.

The authorization agreement contained an arbitration clause for the resolution of disputes relating to the funds' banking relationship with Bank JB providing as follows:

> If any dispute, controversy or claim arises out of or relates to any business relationship between you [the Fund] and the Bank, including but not limited to any dispute, controversy or claim with regard to this Authorization, the breach thereof or any account or transaction you have with the Bank, and if said dispute, controversy or claim cannot be settled through direct discussions, the parties agree first to endeavor to settle the dispute, controversy or claim in an amicable manner by mediation, before resorting to arbitration as detailed in the Acknowledgements and Agreements—Mediation Arbitration Form given to and signed by you [the Fund]. The Attorney hereby expressly agrees to settle by mediation and Arbitration any controversy between or among Attorney, Attorney's Client, and/or the Bank subject to the rules of the American Arbitration Association.

The agreement was signed by Peter Goulden as director of Directorate, Inc. and by Mionis as Attorney-in-fact. A separate form entitled

"Acknowledgements and Agreements

Mediation Arbitration"

sets forth, essentially, the same clause.

This action was commenced in September 2001. In November, defendants moved to stay the action and compel mediation and, if necessary, arbitration. The IAS court granted the motion, finding that T.C. Advisors entered into a broad and unambiguous agreement to mediate and, if necessary, to arbitrate "any controversy," which, in the absence of limiting language, not present here, would include the instant dispute. The court, citing *Promo-Fone, Inc. v. PCC Mgt. Inc.*, 224 A.D.2d 259, 637 N.Y.S.2d 405, and the fact that the complaint treats Mionis and T.C. Advisors***109** as a single entity, held that Mionis, even though not a signatory to the authorization agreement in his individual capacity, was similarly bound by the arbitration clause because "the issues in the overall dispute are inextricably interwoven." The same reasoning, the court held, applied to defendants JB Cayman, Embiricos and Goneos, who, although not parties to the authorization agreement, engaged in substantially the same wrongful conduct as Bank JB. We reverse.

[1][2][3] It is a fundamental principle of New York law that in the absence of an agreement to do so, parties cannot be forced to arbitrate. (*Matter of Waldron [Goddess],* 61 N.Y.2d 181, 183, 473 N.Y.S.2d 136, 461 N.E.2d 273; *Schubtex, Inc. v. Allen Snyder, Inc.,* 49 N.Y.2d 1, 6, 424 N.Y.S.2d 133, 399 N.E.2d 1154; *Matter of Marlene Inds. Corp. [Carnac Textiles],* 45 N.Y.2d 327, 333, 408 N.Y.S.2d 410, 380 N.E.2d 239.) An agreement to arbitrate requires a clear and unequivocal manifestation of an intention to arbitrate ****502** because it

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involves the "surrender [of] the right to resort to the courts." (*Matter of Waldron, supra,* at 183, 473 N.Y.S.2d 136, 461 N.E.2d 273.) In construing the arbitration clause, the IAS court held that the "plain language" of the authorization agreement "makes clear" that T.C. Advisors entered into a broad agreement to mediate and, if necessary, to arbitrate "any controversy between itself, the Fund and/or Bank JB." In so concluding, the court violated a fundamental principle of contract interpretation by failing to give effect to a defined term in the authorization agreement and ignored settled principles of agency law.

[4][5] Courts are obliged to interpret a contract so as to give meaning to all of its terms. (*Corhill Corp. v. S.D. Plants, Inc.,* 9 N.Y.2d 595, 599, 217 N.Y.S.2d 1, 176 N.E.2d 37; *Trump–Equitable Fifth Ave. Co. v HRH Constr. Corp.,* 106 A.D.2d 242, 244, 485 N.Y.S.2d 65 *affd.* 66 N.Y.2d 779, 497 N.Y.S.2d 369, 488 N.E.2d 115.) The reason is clear. Since a contract is a voluntary undertaking, it should be interpreted to give effect to the parties' reasonable expectations. (*See Sutton v. East Riv. Sav. Bank,* 55 N.Y.2d 550, 555, 450 N.Y.S.2d 460, 435 N.E.2d 1075.)

Contrary to the IAS court's holding, limiting language does appear in the arbitration clause, which, significantly, nowhere refers to T.C. Advisors. Rather, it refers to "Attorney," "Attorney's Client" and the "Bank." "Attorney" is not a mere "synonym" for T.C. Advisors, as defendants argue, but, instead, is identified in the authorization agreement as T.C. Advisors in its capacity as "agent and attorney-in-fact" for the funds with respect to their accounts at Bank JB. The court completely ignored this distinction, substituting T.C. Advisors, individually, for "Attorney" in its quotation of the arbitration provision's relevant clause, stating, "[T.C. Advisors] hereby expressly agrees to settle by mediation and arbitration any controversy ***110** ...," when, in fact, the clause reads, "The Attorney hereby expressly agrees...." That the parties chose to define "Attorney" and to use that term, rather than T.C. Advisors, in the arbitration clause, is a clear manifestation of an intent to bind T.C. Advisors only in its representative capacity as the agent of the funds. Any other reading would impermissibly disregard the clear and unequivocal meaning given to the term by the parties.

[6] Under a well-settled principle of agency law, an agent who signs a contract on behalf of a known principal cannot be held to have made a commitment in his or her individual capacity. (*Shoenthal v. Bernstein,* 276 A.D. 200, 205, 93 N.Y.S.2d 187, *appeal dismissed* 276 A.D. 831, 93 N.Y.S.2d 908.) This principle has been consistently applied in the context of arbitration. (*See e.g. Matter of Metamorphosis Constr. Corp. v. Glekel,* 247 A.D.2d 231, 668 N.Y.S.2d 594; *Matter of Kummerfeld [Sakai],* 186 A.D.2d 90, 588 N.Y.S.2d 154, *lv. dismissed in part, denied in part,* 82 N.Y.2d 682, 601 N.Y.S.2d 570, 619 N.E.2d 648; *Johnston v. Silverman,* 167 A.D.2d 284, 561 N.Y.S.2d 788; *Matter of Jevremov [Crisci],* 129 A.D.2d 174, 517 N.Y.S.2d 496.) Here, the authorization agreement was executed on behalf of T.C. Advisors as an agent of the funds with respect to the custodial accounts. T.C. Advisors' agreement to arbitrate was limited to its capacity as agent of the funds, not in its general corporate capacity. As in the cases cited, T.C. Advisors cannot be bound to arbitrate claims, such as those at issue here, brought in its individual capacity for harm it suffered in that capacity.

[7] The IAS court further found, incorrectly, that the authorization agreement requires arbitration of "any controversy" between T.C. Advisors and Bank JB. The ****503** arbitration clause provides for the arbitration of "any controversy between or among Attorney, Attorney's Client, and/or the Bank." Given the agreement's definition of "Attorney", i.e., T.C. Advisors in its capacity as a limited agent of the funds with respect to the custodial accounts maintained at Bank JB, the only controversies that might arise "between or among Attorney, Attorney's Client, and/or the Bank" are those relating to the terms of the authorization

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agreement, the funds' general relationship with the Bank, or T.C. Advisors' management of the funds' custodial accounts at the Bank. None of T.C. Advisors' claims against Bank JB—defamation and tortious interference with contract and prospective business relations—arise out of the banking relationship between the funds and Bank JB. Nor do its claims arise out of its role as agent of the funds with authority to direct the activity in the bank accounts.

[8][9] Moreover, since T.C. Advisors' agency as "Attorney" for the funds terminated in July 2000 when the funds closed their accounts***111** at Bank JB, this controversy, which arose in November 2000, does not fall within the scope of the arbitration clause. This is not to say, of course, that a contract's arbitration clause cannot survive termination of the contract. The irrefutable facts are that, here, the events giving rise to the claims asserted in the complaint all took place after the termination of the authorization agreement and, furthermore, that these claims are unrelated to the scope of T.C. Advisors' role as "Attorney," as defined by the agreement. A party who agrees to arbitration in its capacity as an agent can neither bring a claim nor have a claim brought against it under the arbitration provision if the claim is not related to the scope of the agency. (*See Hirschfeld Prods. v. Mirvish,* 88 N.Y.2d 1054, 651 N.Y.S.2d 5, 673 N.E.2d 1232.) Here, the claims are clearly outside the scope of T.C. Advisors' agency.

[10] Finally, in holding that four non-signatories to the authorization agreement—Mionis, JB Cayman, Embiricos and Goneos—could be compelled to arbitrate, the IAS court relied upon *PromoFone, Inc. v. PCC Mgt., supra*, 224 A.D.2d 259, 260, 637 N.Y.S.2d 405 for the proposition that where non-arbitrable and arbitrable claims are "inextricably interwoven," a court may compel arbitration of the non-arbitrable as well as the arbitrable claims. The "inextricably interwoven" analysis of *PromoFone,* however, has been explicitly considered and rejected by the Court of Appeals in *TNS Holdings v. MKI Sec. Corp.*, 92 N.Y.2d 335, 340, 680 N.Y.S.2d 891, 703 N.E.2d 749, which held that "interrelatedness, standing alone, is not enough to subject a nonsignatory to arbitration." Thus, the IAS court erred in its reliance on *PromoFone* as a basis for compelling the four non-signatories to arbitrate the claims at issue herein.

[11] Moreover, even if *PromoFone* had not been implicitly overruled, such reliance would still have been misplaced. As already noted, the wrongful conduct alleged in the complaint had nothing to do with the relationship between T.C. Advisors' agency role as investment advisor to the funds under the authorization agreement and Bank JB's custodial duties with respect to the funds' accounts. Even if there were some relationship, it cannot be said that the allegations of wrongdoing and the obligations under the authorization agreement were so connected as to be "inextricably interwoven." (*Cf., Matter of OptiMark Technologies, Inc. v. International Exch. Networks,* 288 A.D.2d 75, 732 N.Y.S.2d 413.)

Accordingly, the order of the Supreme Court, New York County (Richard Lowe, III, J.), entered February 25, 2002, granting****504** defendants' motion to stay the action and compel mediation, and, if necessary, arbitration, should be reversed, on the law, with costs and disbursements, and the motion denied.

***112** Order, Supreme Court, New York County (Richard Lowe, III, J.), entered February 25, 2002, reversed, on the law, with costs and disbursements, and the motion to stay the action and compel mediation denied.

All concur.

N.Y.A.D. 1 Dept.,2002.
Mionis v. Bank Julius Baer & Co., Ltd.
301 A.D.2d 104, 749 N.Y.S.2d 497, 2002 N.Y. Slip Op. 07730

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C

Supreme Court of Florida.
MORGAN WALTON PROPERTIES, INC., et al., Appellants,
v.
INTERNATIONAL CITY BANK & TRUST CO., etc., et al., Appellees.
Joseph F. MORGAN and Johnnie Mae Morgan, Appellants,
v.
INTERNATIONAL CITY BANK & TRUST CO., etc., et al., Appellees.

No. 58879.
Oct. 8, 1981.

On question certified by the United States Court of Appeals for the Fifth Circuit, the Supreme Court, Boyd, J., held that notes executed and payable in Louisiana, secured by mortgages on Florida real property, and providing for interest legal in Louisiana but usurious in Florida were enforceable in Florida courts, where the transactions had a normal and reasonable relation to Louisiana and either the express or constructive intent of parties was that Louisiana law should apply.

Certified question answered and record of cause returned to the United States Court of Appeals for the Fifth Circuit.

West Headnotes

[1] Usury 398 2(3)

398 Usury
398I Usurious Contracts and Transactions
398I(A) Nature and Validity
398k2 What Law Governs
398k2(3) k. Contract Secured by Mortgage or Other Lien. Most Cited Cases

Since notes secured by mortgage on Florida real estate were executed in Louisiana, the place of performance and also the lender's domicile, and borrowers traveled there in search of financing, stipulation in note that Louisiana law should apply would be honored, even if parties' purpose in making it was to avoid Florida's usury law. West's F.S.A. §§ 687.02-687.04, 687.071(2, 7).

[2] Usury 398 2(1)

398 Usury
398I Usurious Contracts and Transactions
398I(A) Nature and Validity
398k2 What Law Governs
398k2(1) k. In General. Most Cited Cases

Where, under law of one state with relation to loan transaction, it is void, while under law of the other state with a relation, interest is forfeited but principal is an enforceable debt, the law construes the parties' intent to be that the latter law should apply, since the law that partly invalidates a transaction is preferred over the law that wholly invalidates it.

[3] Usury 398 2(3)

398 Usury
398I Usurious Contracts and Transactions
398I(A) Nature and Validity
398k2 What Law Governs
398k2(3) k. Contract Secured by Mortgage or Other Lien. Most Cited Cases

Notes executed and payable in Louisiana, secured by mortgages on Florida real property, and providing for interest legal in Louisiana but usurious in Florida were enforceable in Florida courts, where the transactions had a normal and reasonable relation to Louisiana and either the express or constructive intent of parties was that Louisiana law should apply. West's F.S.A. §§ 687.02-687.04, 687.071(2, 7).

***1060** Louis K. Rosenbloum of Levin, Warfield, Middlebrooks, Mabie & Magie, Pensacola, for appellants.

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James M. Weber of Beggs & Lane, Pensacola, for appellees.

BOYD, Justice.

This cause is before the Court for decision of a question certified by the United States Court of Appeals for the Fifth Circuit. International City Bank & Trust Co. v. Morgan Walton Properties, Inc., 612 F.2d 227 (5th Cir. 1980).

Appellee International City Bank and Trust Company, a Louisiana banking corporation, now dissolved, brought two mortgage foreclosure actions in the United States District Court for the Northern District of Florida, one of them (Fifth Circuit case no. 77-3255) against two Florida corporations, a partnership, and several individuals, and the other (Fifth Circuit case no. 77-3256) against two individuals.

In case no. 77-3255, the plaintiff bank sought foreclosure of a mortgage on real property located in Walton County, Florida, given to secure two promissory notes executed and delivered by the corporate defendants in New Orleans on December 29, 1973 and April 25, 1974. The individual defendants guaranteed the notes. In case no. 77-3256, the plaintiff sought foreclosure on a separate Walton County parcel, mortgaged to secure a separate note executed and delivered in New Orleans on January 11, 1974 by Joseph F. and Johnnie Mae Morgan. According to the facts as stated by the Court of Appeals: "The notes in both cases were made payable at International City in New Orleans, and were secured by mortgages on real estate located in Walton County, Florida. The notes in case no. 77-3255 provided they should be construed according to the laws of the State of Louisiana." Id., 612 F.2d at 228.

The Federal Deposit Insurance Corporation was added as a plaintiff in both actions when it acceded to ownership of the bank's assets. The United States District Court consolidated the two cases.

The defendants-appellants raised the defense of usury. They alleged that the bank ***1061** had charged them interest in excess of 25% per annum, which is criminally usurious in Florida and renders the entire obligation unenforceable in Florida courts. s 687.071(2), (7), Fla.Stat. (1973).[FN1] They asserted that the notes and mortgages were unenforceable because they were against public policy in Florida.

> FN1. Interest charged an individual on an obligation less than $500,000 in excess of 10%, or, on an obligation more than $500,000, in excess of 15%, is usurious and in such cases all interest is forfeited but the principal amount of the obligation is enforceable. Interest charged a corporation in excess of 15% is usurious and must be forfeited. ss 687.02, 687.03, 687.04, Fla.Stat. (1973). There are numerous exceptions to these provisions.

On motion of all parties for summary judgment, the district court held that the notes were to be governed by Louisiana law. Finding that in Louisiana there is no limit on the interest that may be charged a corporate borrower, the district court held for the plaintiffs in case no. 77-3255. The bank conceded that the interest charged the individual borrowers in case no. 77-3256 was usurious under Louisiana law and that this required forfeiture of the interest. The Court of Appeals framed the certified question as follows:

Are notes executed and payable in a state other than Florida, secured by a mortgage on Florida real estate, providing for interest legal where made, but usurious under Florida law, unenforceable in Florida courts due to Florida's usury statute, public policy or otherwise, where (a) the interest charged or paid exceeds 25 percent and (b) where the interest charged does not exceed 25 percent, but exceeds the maximum interest rate allowed by law?

612 F.2d at 229.

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The certified question reflects that there has been no finding of fact as to what interest rates the obligations actually carried, since the Court of Appeals wants to know the consequences both in cases of usurious rates of interest and criminally usurious rates of interest. If the loan to the individual borrowers bore interest in excess of 10% but less than 25%, then the interest would be forfeited under Florida law. As noted above, the bank conceded that the loan was usurious under Louisiana law and that the consequence under that law was forfeiture of interest. If the interest was, as alleged by defendants-appellants, in excess of 25%, then the principal amount, still an enforceable obligation in Louisiana (we assume from the facts as stated by the Fifth Circuit), would be unenforceable in Florida.

With regard to the loans to the corporate borrowers, if the interest was more than 15% but less than 25%, then the interest would be forfeited under Florida law. If the interest was more than 25%, then the principal would be unenforceable as well. In Louisiana, there is no limit on the rate of interest that may be charged corporate borrowers.

Therefore, with regard to the individuals, we have a situation where under Florida law, either the debt is unenforceable or the interest must be forfeited, depending on what the interest rate actually was, while under Louisiana law the interest must be forfeited but the principal is enforceable. With regard to the corporate borrowers, under Florida law either the debt is unenforceable or the interest must be forfeited, depending on the actual interest rate. Under Louisiana law principal and interest are enforceable regardless of the interest rate.

Florida's established rule for choice of law governing the validity and interpretation of contracts looks to the law of the place of contracting and the law of the place of performance. E. g., Brown v. Case, 80 Fla. 703, 86 So. 684 (1920); Thompson v. Kyle, 39 Fla. 582, 23 So. 12 (1897); Perry v. Lewis, 6 Fla. 555 (1856).

'The general principle (adopted) by civilized nations is, that the nature, validity, and interpretation of contracts are to be governed by the laws of the country where the contracts are made or are to be performed, but the remedies are to be governed by the laws of the country where the suit is brought, or as it is compendiously expressed, by the lex fori.' 8 Peter's S.C.Rep. 361.

***1062** Perry v. Lewis, 6 Fla. at 560. In Thompson v. Kyle, the Court said:

The authorities are not entirely unanimous on this point, but we think the weight of them, supported by principle, sustains the proposition that a note executed and payable in one State, though secured by a mortgage on lands in another, will be governed as to the rate of interest it shall bear, by the laws of the former ....

39 Fla. at 596-97, 23 So. at 17.

The certified question asks whether Florida's legislation on usurious interest establishes a public policy that prevents the application of the traditional choice of law rules to these contracts executed and to be performed in Louisiana.

Under the traditional Florida choice of law rules for contracts cases, the law of Louisiana would apply, since both the place of execution and the place of performance of the agreements was Louisiana, and the parties expressed no intent that the law of any place other than Louisiana should apply. See Goodman v. Olsen, 305 So.2d 753 (Fla.1974), cert. denied, 423 U.S. 839, 96 S.Ct. 68, 46 L.Ed.2d 58 (1975). This Court has recently observed, however, that the traditional test of place of execution and place of performance "is today of little practical value since these contacts are so easily manipulated in our mobile society." Continental Mortgage Investors v. Sailboat Key, Inc., 395 So.2d 507, 510 (Fla.1981).

In Continental Mortgage Investors v. Sailboat Key, Inc., 354 So.2d 67 (Fla.3d DCA 1977), the district court of appeal held that Florida's usury law was applicable to a financing agreement between a

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Florida corporation and a Massachusetts business trust, even though the contract designated Massachusetts law as controlling, on the grounds that the agreement violated Florida's public policy regarding usurious contracts, Massachusetts had no real connection with the transaction, and the designation of Massachusetts law was a scheme to evade Florida's usury law. Appellants would have us reach similar conclusions regarding this case.

On review of the Continental Mortgage case by this Court, it was held that since (contrary to the conclusion reached by the district court of appeal) Massachusetts had a normal and reasonable relation to the contract, the designation of Massachusetts law would be enforced. The “public policy” against usury, we said, was not so strong as to overcome the policy in favor of giving effect to the expressed intentions of contracting parties, even though as a factual matter the designation may indeed have been motivated by a desire to “evade” Florida's usury law.

Although a few jurisdictions do attach such a public policy to their usury laws, it is generally held that usury laws are not so distinctive a part of a forum's public policy that a court, for public policy reasons, will not look to another jurisdiction's law which is sufficiently connected with the contract and will uphold the contract .... We do not think the mere fact that there exists in Florida a usury statute which prohibits certain interest rates establishes a strong public policy against such conduct in this state where interstate loans are concerned.

....

Finding no real support in our case law for the use of a public policy exception under the circumstances, and in view of the pervasive exceptions to the usury laws and the actual operation of these laws, we are unable, particularly in the commercial setting of this case, to glean any overriding public policy against usury qua usury in a choice of law situation.

Continental Mortgage Investors v. Sailboat Key, Inc., 395 So.2d at 509-10.

[1] Although the fact is not mentioned in the certified question, we observe from the opinion of the Court of Appeals that the notes in case no. 77-3255 contained a stipulation that Louisiana law would apply. Louisiana was not only the place of contracting and the place of performance, but was also the state of the lender's domicile. The borrowers travelled there in search of financing. Since the agreements had a normal and reasonable relation to Louisiana, ***1063** the stipulation of Louisiana law as controlling should be honored, even if the parties' purpose in making it was to avoid the restrictive effects of Florida's usury law. Seeman v. Philadelphia Warehouse Co., 274 U.S. 403, 47 S.Ct. 626, 71 L.Ed. 1123 (1927); Continental Mortgage Investors v. Sailboat Key, Inc., 395 So.2d 507 (Fla.1981).

[2] The note in case no. 77-3256 did not contain a designation of controlling law. In a situation where, under the law of one state with a relation to the transaction, it is void, while under the law of the other state with a relation, the interest is forfeited but principal is an enforceable debt, the law construes the parties' intent to be that the latter law should apply. The law that partly invalidates the transaction is preferred over the law that wholly invalidates it, where both states have a normal and reasonable relation to the transaction. Seeman v. Philadelphia Warehouse Co.; Continental Mortgage Investors v. Sailboat Key, Inc.

[3] In response to the certified question, then, we hold that notes executed and payable in Louisiana, secured by mortgages on Florida real property, providing for interest legal where made but usurious under Florida's statute, are enforceable in Florida courts, since the transactions had a normal and reasonable relation to Louisiana, and either the express or constructive intent of the parties was that Louisiana law should apply.

With this opinion as our answer to the certified

question, we return the record of this cause to the United States Court of Appeals for the Fifth Circuit.

It is so ordered.

SUNDBERG, C. J., and ADKINS, OVERTON, ALDERMAN and McDONALD, JJ., concur.

Fla., 1981.
Morgan Walton Properties, Inc. v. International City Bank & Trust Co.
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H

United States District Court,
S.D. New York.
MUNICIPAL CAPITAL APPRECIATION PARTNERS I, L.P., a limited partnership, and Municipal Capital Appreciation Partners II, L.P., a limited partnership, Plaintiffs,
v.
J. David PAGE, Southport Financial Services, Inc. and Vaughn Bay Construction Inc., Defendants.

No. 00 Civ. 8138(CM)(LMS).
Jan. 16, 2002.

Optionor of put contracts covering several series of unrated municipal bonds sued optionee for breach of contract. On optionor's motion for summary judgment, the District Court, McMahon, J., held that: (1) settlement agreement was integrated with original put contract for two bond series, given lack of merger clause in settlement agreement and interdependence of agreements; (2) integrated contract was ambiguous as to put price of same two series, permitting consideration of parol evidence; (3) settlement agreement was not severable into parts, and thus optionee's breach of two covered transactions justified termination; and (4) remedy for breach was lower of two prices set in settlement agreement, since optionor chose to terminate prior to trigger date for higher price.

Motion granted in part and denied in part.

West Headnotes

[1] Evidence 157 448

157 Evidence
157XI Parol or Extrinsic Evidence Affecting Writings
157XI(D) Construction or Application of Language of Written Instrument
157k448 k. Grounds for Admission of Extrinsic Evidence. Most Cited Cases
Parol evidence rule of New York law bars introduction and consideration of extrinsic evidence of meaning of a complete written agreement, if terms of agreement are clear and unambiguous; if terms of complete written contract are unclear, ambiguous or contradictory, extrinsic evidence may be considered in order to ascertain true meaning of terms.

[2] Evidence 157 384

157 Evidence
157XI Parol or Extrinsic Evidence Affecting Writings
157XI(A) Contradicting, Varying, or Adding to Terms of Written Instrument
157k384 k. Grounds for Exclusion of Extrinsic Evidence. Most Cited Cases
Parol evidence rule of New York law is rule of substantive law, not one of procedure or evidence.

[3] Contracts 95 143(1)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k143 Application to Contracts in General
95k143(1) k. In General. Most Cited Cases

Evidence 157 397(2)

157 Evidence
157XI Parol or Extrinsic Evidence Affecting Writings
157XI(A) Contradicting, Varying, or Adding to Terms of Written Instrument
157k397 Contracts in General
157k397(2) k. Completeness of Writing and Presumption in Relation Thereto; Integration. Most Cited Cases

Evidence 157 448

157 Evidence
157XI Parol or Extrinsic Evidence Affecting Writings
157XI(D) Construction or Application of Lan-

guage of Written Instrument
157k448 k. Grounds for Admission of Extrinsic Evidence. Most Cited Cases

Court applies parol evidence rule of New York law via three-step inquiry: (1) determine whether written contract is an integrated agreement; if it is, (2) determine whether language of written contract is clear or is ambiguous; and (3) if language is clear, apply that clear language.

[4] Evidence 157 397(2)

157 Evidence
157XI Parol or Extrinsic Evidence Affecting Writings
157XI(A) Contradicting, Varying, or Adding to Terms of Written Instrument
157k397 Contracts in General
157k397(2) k. Completeness of Writing and Presumption in Relation Thereto; Integration. Most Cited Cases

Under New York law, contract is integrated agreement as a matter of law under parol evidence rule where contract appears complete on its face, i.e. appears to contain engagements of parties, and to define object and measure extent of such engagement.

[5] Evidence 157 397(2)

157 Evidence
157XI Parol or Extrinsic Evidence Affecting Writings
157XI(A) Contradicting, Varying, or Adding to Terms of Written Instrument
157k397 Contracts in General
157k397(2) k. Completeness of Writing and Presumption in Relation Thereto; Integration. Most Cited Cases

Under New York law, where second contract contains no merger clause question of whether or not there is integration of two contracts under parol evidence rule is determined by reading the writing in light of surrounding circumstances, and by determining whether or not earlier agreement was one which parties would ordinarily be expected to embody in the writing.

[6] Evidence 157 397(6)

157 Evidence
157XI Parol or Extrinsic Evidence Affecting Writings
157XI(A) Contradicting, Varying, or Adding to Terms of Written Instrument
157k397 Contracts in General
157k397(6) k. Compromise or Settlement, and Arbitration. Most Cited Cases

Under New York law, settlement agreement between optionor and optionee of put contract, which included change to date for exercise of put and other modifications to terms, did not embody entire agreement between parties under parol evidence rule, but rather was integrated with original put agreement, where settlement agreement did not contain merger clause, and each paragraph of settlement agreement that addressed subject of put directly referenced and incorporated previous contract's terms and provisions.

[7] Evidence 157 450(8)

157 Evidence
157XI Parol or Extrinsic Evidence Affecting Writings
157XI(D) Construction or Application of Language of Written Instrument
157k449 Nature of Ambiguity or Uncertainty in Instrument
157k450 In General
157k450(8) k. Contracts of Sale. Most Cited Cases

Under New York law, put contract for resale of municipal bonds consisting of original put agreement plus settlement agreement modifying some terms was ambiguous as to put price, permitting consideration of parol evidence, where settlement agreement provided that price would be as stated in earlier agreement, "i.e., 110%" of original purchase price, but original put agreement did not refer to 10% premium.

[8] Contracts 95 171(1)

95 Contracts
95II Construction and Operation

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95II(A) General Rules of Construction
95k171 Entire or Severable Contracts
95k171(1) k. In General. Most Cited Cases

Under New York law, primary factor in determination of whether contract is severable or entire is intent of parties as determined by fair construction of terms and provisions of contract itself, by subject matter to which it refers, and by circumstances existing at time of contracting.

[9] Contracts 95 171(1)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k171 Entire or Severable Contracts
95k171(1) k. In General. Most Cited Cases

Under New York law, contract is not regarded as severable unless: (1) parties' performances can be apportioned unto corresponding pairs of partial performances, and (2) parts of each pair can be treated as agreed equivalents.

[10] Contracts 95 171(1)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k171 Entire or Severable Contracts
95k171(1) k. In General. Most Cited Cases

Contracts 95 261(2)

95 Contracts
95IV Rescission and Abandonment
95k257 Grounds for Rescission by Party
95k261 Failure of Performance or Breach
95k261(2) k. What Breach Will Authorize Rescission in General. Most Cited Cases

Under New York law, put contract was not severable into parts, and thus optionee's material breach of two of six transactions covered in contract justified optionor's termination, where there was no severability clause and parties made various interdependent concessions for no discernible benefit within respective provisions containing concessions.

[11] Contracts 95 312(3)

95 Contracts
95V Performance or Breach
95k312 Acts or Omissions Constituting Breach in General
95k312(3) k. Failure to Make Payments. Most Cited Cases

Under New York law, failure by optionee of put contract to tender payment to optionor on date specified in contract was material breach.

[12] Damages 115 118

115 Damages
115VI Measure of Damages
115VI(C) Breach of Contract
115k118 k. Effect of Provisions of Contract. Most Cited Cases

Under New York law, where put contract established two different prices depending on date of payment, and optionor chose to terminate contract for optionee's breach prior to date that would trigger higher price, damages due from optionee for breach were based on earlier, lower price.

***381** Joseph F. Donley, Nicolle L. Jacoby, Swidler, Berlin, Shereff, Friedman, LLP, New York City, for plaintiffs.

Gerald G. Paul, Christina M. Rackett, Flemming, Zulack & Williamson, LLP, New York City, for defendants.

MEMORANDUM DECISION AND ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

MCMAHON, District Judge.

Municipal Capital Appreciation Partners I, L.P. and Municipal Capital Appreciation Partners II, L.P. (collectively, "plaintiffs" or "MCAP"), bring this diversity action under 28 U.S.C. § 1332 against J. David Page, Southport Financial Services, Inc., and Vaughn Bay Construction, Inc. (collectively, the "Page defendants"). MCAP alleges that the Page defendants are li-

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able for breaching various contracts that required them to purchase municipal bonds issued in connection with several housing projects from MCAP at specified prices. MCAP alleges that the Page Defendants failed to purchase such bonds on the timetable or at the price agreed by the parties, and are jointly and severally liable to MCAP for these breaches.

MCAP moves for summary judgment pursuant to Fed.R.Civ.P. 56(c). MCAP also requests that the case be referred to a Magistrate or special master for a determination of damages.

For the reasons stated below, MCAP's motion for summary judgment is granted in part and denied in part. As not all issues have been determined on motion, reference to a Magistrate is denied as premature.

FACTS PERTINENT TO THE MOTION

MCAP is a limited partnership that invests the contributions of its partners. MCAP invests primarily in securities. It focuses its investments on unrated municipal bonds issued in connection with real estate projects and related financial instruments. Defendant J. David Page is President of Southport Financial Services, Inc., and is in the business of developing and managing real estate projects throughout the United States. Paul Garcia, who passed away on May 27, 2000, was one of Page's partners. Garcia managed the day-to-day operations of the Page defendants' California-based projects, including those at issue in this case.[FN1]

FN1. The estate of the late Mr. Garcia, and his wife, Susan Garcia, were released from all related litigation by agreement of the parties on October 6, 2000, and are not parties to this action.

Between 1998 and the present, MCAP and the Page defendants entered into several agreements involving unrated municipal bonds issued to finance low-income housing projects. Four sets of these bonds are at issue here: the Stockton Terrace Bonds, the Stockton Gardens Bonds, the Susanville Bonds and the Sampson Bonds.[FN2]

FN2. MCAP's Amended Complaint alleges that the Page defendants owed a 4% penalty on the 110% of principal (plus accrued interest) paid on another set of bonds called the Sunset Bonds. The Page defendants recently paid this penalty, and the Sunset Bonds claim was voluntarily dismissed. [Pl. Reply Mem., p. 10].

A. The Stockton Terrace and Stockton Gardens Bonds

(1) Issue and Purchase of the Stockton Bonds

In 1998, J. David Page and Paul Garcia acquired two apartment projects in Stockton,***382** California: the Stockton Terrace and the Stockton Gardens projects. Tax exempt bonds were issued in connection with these projects in the spring of 1998 (the "Stockton Terrace Bonds" and the "Stockton Gardens Bonds," collectively the "Stockton Bonds").

The initial Stockton Bonds transactions generated two sets of documents: (1) the Indentures of Trust between the issuer of the Stockton Bonds, the California Statewide Communities Development Authority (the "Issuer"), and the trustees of the Bonds, U.S. Bank Trust National Association (the "Trustee") (the "Indentures"); and (2) separate but parallel Loan Agreements among the Issuer, the Trustee and a limited partnership formed by Page, Paul Garcia and Sue Garcia (GP Stockton Terrace L.P. or GP Stockton Gardens L.P., respectively) (the "Borrowers") (the "Loan Agreements"). MCAP was not a party to either the Indentures of Trust or the Loan Agreements.

Several provisions of these documents are invoked by the parties in this litigation, and warrant discussion herein.

a. The Indentures

Section 7.01 of the Indentures describe what constitutes an event of default, as follows:

> (a) failure to pay the principal and Accreted Value of or premium (if any) on any Bond when and as the same shall become due and payable, whether at maturity as therein expressed, by proceedings for redemption, by declaration or otherwise;

(b) failure to pay any installment of interest on any Bond when such interest installment shall become due and payable; and

(C) failure by the Issuer or the Borrower to perform or observe any other of the covenants, agreements or conditions on its part in this Indenture, the Loan Agreement or in the Bonds contained, and the continuation of such failure for a period of thirty (30) days after written notice thereof, specifying such default and requiring the same to be remedied, shall have been given to the Issuer and the Borrower by the Trustee, or to the Issuer and the Trustee by the holders of a majority in aggregate principal amount of the Bonds at the time outstanding.

Section 7.01 gives the Trustee the authority to declare an acceleration. If such a declaration is to be made, the Trustee "shall, by notice in writing to the Issuer and the Borrower declare the principal or Accreted Value of all the Bonds then outstanding, and the interest accrued thereon, to be due and payable immediately, and upon any such declaration the same shall become and shall be immediately due and payable, anything in this Indenture or in the Bonds contained to the contrary notwithstanding. Upon any such declaration of acceleration, the Trustee shall fix a date for payment of the Bonds, which date shall be as soon as practicable after such declaration." *Id.*

b. The Loan Agreements

The Loan Agreements also provide conditions under which an Event of Default may occur, as follows:

(b) failure by the Borrower to pay any amounts required to be paid under Section 4.2 hereof at the times specified therein and such failure continues for a period of sixty (60) days from the first date on which such failure occurred;

* * * *

(d) failure by the Borrower to observe and perform the covenants, conditions and agreements on its part required to be observed or performed contained in ***383** Sections 2.4 and the first paragraph of Section 5.4 of this Agreement, unless the Issuer and the Majority Holder shall agree in writing to provide an extension of such time prior to its expiration.

Loan Agreements, Section 7.1(a) and (d). Section 7.2 of the Loan Agreements provides for the remedies available after a default has occurred. One of the possible remedies provides:

Whenever any Event of Default shall have occurred and shall continue, the Issuer and the Trustee may take any one or more of the following remedial steps:

(a) Notwithstanding any other provisions of this Indenture, the Trustee shall upon the occurrence of an Event of Default hereunder, unless the Trustee's obligation to commence foreclosure proceedings under the Deed of Trust is properly waived pursuant to the provisions of Section 7.1 hereof, *declare to be due and payable immediately the unpaid balance of the Loan;* and in the event of such occurrence shall commence foreclosure proceedings under the Deed of Trust.

Loan Agreements, Section 7.2(a) (emphasis added). After an Event of Default has been declared, and remedies under the default sought, the Trustee or the Issuer may discontinue or abandon the default proceedings. If this occurs, Section 7.2 provides:

In case the Trustee or Issuer shall have proceeded to enforce its rights under this Agreement and such proceedings shall have been discontinued or abandoned for any reason or shall have been determined adversely to the Trustee or the Issuer, then, and in every such case, *the Borrower, the Trustee and the Issuer shall be restored respectively to their several positions and rights hereunder, and all rights, remedies and powers of the Borrower, the Trustee and the Issuer shall continue as though no such action had been taken.*

Loan Agreements, Section 7.2 (emphasis added). The Loan Agreements contain no provisions for 10% default premiums on the Stockton Bonds.

(2) MCAP's Purchase of the Stockton Bonds and the Put

Agreements

In the Spring of 1998, MCAP purchased the Stockton Bonds from the Page defendants. On July 20, 1998, following MCAP's purchase of the Stockton Bonds, MCAP and the Page defendants entered into two virtually identical put agreements relating to the Stockton Terrace and Stockton Gardens Bonds. These agreements (the "Put Agreements"), gave MCAP the right to require the Page parties to purchase the Stockton Bonds under specific terms and conditions. Paragraph 2.1 of each Put Agreement provides as follows:

> From and after the Closing Date of the Bonds and until the thirty-fifth (35th) day following the second anniversary of the Closing Date on the Bonds, MCAP shall have the right, in its sole and absolute discretion to sell, upon thirty (30) days prior written demand, to the Guarantors, the Bonds, *at a purchase price equal to the Principal Amount thereof then outstanding and all interest (if any) then due and payable on the bonds* (the "Put") unless prior to such Put Date a "Conversion" (hereinafter defined) shall have occurred. MCAP's Put rights shall be unconditional and shall exist even if the Conversion failed to occur by reason of any of the conditions to Conversion set forth in the Forward Commitment. By their execution of this Agreement, the Guarantors hereby unconditionally, jointly and severally agree to accept the Put, to pay the purchase ***384** price thereof upon proper demand hereunder, and waive all notice, demand, protest, notice of acceptance and any and all similar notices and demands given or required now or hereafter by statute or rule of law, including discharge by reason of any modification by act, omission, or agreement of the terms of the Bonds, Borrower Loan Documents or Forward Commitment. The Guarantors further waive any exemptions of real or personal property from execution or inquisition under any existing or future law in connection with any enforcement of the Put. (Emphasis added.)

The Put Agreements provide for a purchase price "equal to the Principal Amount thereof then outstanding and all interest (if any) then due and payable on the bonds." There is no provision in the Put Agreements concerning payment of a 10% premium or penalty. There is also no provision in the Put Agreement that expressly incorporates the terms of the Indentures or the Loan Agreements.

(3) *The Put*

On June 16, 2000, within the timetable provided for in the Put Agreements, MCAP gave the Page defendants one month's notice of its intent to exercise its rights under the Stockton Bonds Put Agreements. At this time, the Stockton Bonds were in default for failure to pay principal and interest previously due to MCAP.

(4) *The Event of Default*

On June 30, 2000, the Trustee under the Indentures sent a Notice of Event of Default letter on each of the Stockton Bonds to GP Stockton Gardens L.P. and GP Stockton Terrace L.P. (the "Borrowers") These letters were copied to various other persons and companies, including MCAP. In these Notices of Events of Default, the Trustee notified the Borrowers that they had failed to perform covenants under both the Loan Agreements and the Indentures, that these failures constituted "Events of Default" under these documents, and that payments would be accelerated. The letter notices did not invoke Section 7.12 of the Indentures that provides for a mandatory redemption in the event of a default. The letter notices cited specific defaults under both the Loan Agreements and the Indentures.

a. Defaults under the Loan Agreements

The Trustee notified the Borrowers that they (i) failed to make monthly payments on the Bonds to the Trustee as required by Section 4.2(a) of the Loan Agreements, and by Section 5.02(b) of the Indentures, and that such failure had continued for over sixty (60) days; and (ii) failed to "provide evidence of insurance required by the first paragraph of Section 5.4". These failures constituted the occurrence of an "Event of Default" under Sections 7.1(b) and 7.1(d) of the Loan Agreement. Pursuant to Section 7.2(a), the Trustee declared "the unpaid balance of the Loan to be due and payable immediately." The Trustee also notified Borrower of its failure to perform covenants with respect to providing financial statements, budgets and other information. The Trustee demanded that the above fail-

ures and defaults be cured and corrected immediately.

b. Defaults under the Indentures

The Trustee also noted that "the interest payment due on June 15, 2000, on the Bonds was not made timely," and that "constitute[d] an "event of Default" under Section 7.01(b) of the Indenture[s]." Pursuant to Section 7.01 of the Indentures, the Trustee declared the "principal or Accreted Value (as defined in the Indenture) of all outstanding Bonds, and the interest ***385** accrued and unpaid thereon, to be due and payable immediately, and (b) fixe[d] July 10, 2000, as the date for payment of the Bonds."

The Page defendants concede that, "at the time MCAP exercised its rights under the put agreements, the Stockton Bonds were in default." [Page Aff., ¶ 8; *see also* Def. Opp. to Summary Judgment, p. 2.]

(5) *The July 14 Settlement Agreement*

On July 14, 2000, before payment was due on the Stockton Bonds pursuant to the Put (but after payment was due pursuant to the Notices of Events of Default), the parties negotiated a global settlement of six different transactions, including the Stockton Bonds (the "July 14 Agreement"). The July 14 Agreement makes no reference to the existence of any default, acceleration or mandatory redemption under the Loan Agreements or Indentures. In fact, the July 14 Agreement makes no reference at all to either the Indentures or the Loan Agreements.

The July 14 Agreement deferred the date of payment of the put for the Stockton Bonds to August 1, 2000, as follows:

> 4. *Stockton Terrace* CSCDA Multifamily Housing Revenue Bonds
>
> (Stockton Terrace Apartments) 1998 Series T (the "Stockton Terrace Bonds").
>
> a. The Page Parties will pay the Put price for the Stockton Bonds pursuant to the Put Agreement dated as of July 20, 1998 pertaining to the Stockton Terrace Bonds on or prior to August 1, 2000 *at the Put prices stated therein (i.e., 110%),* provided that unless an event of default occurs on or after the date hereof (and excluding the continuance of the defaults detailed in MCAP's letter to the bond trustee on June 19, 2000) no additional late payments or default interest shall be due. (Emphasis added.)

The following section of the July 14 Agreement, which addresses the Stockton Gardens Bonds, contains the identical provisions. No reference was made in the July 14 Agreement to any prior agreement other than the Put Agreements, and no mention was made of the prior Events of Default.

(6) *The August 2000 Default*

The Page defendants failed to pay for the Stockton Bonds on August 1, 2000, as provided for in the July 14 Agreement. On August 18, 2000, MCAP commenced an action against the Page defendants and Paul and Susan Garcia in the Supreme Court for the State of New York, County of New York (Civ. No. 00/603568) for breach of the Put Agreements on the Stockton Bonds (the "New York Action").

(7) *Termination of the July 14 Agreement*

On August 23, 2000, Richard G. Corey, Managing Partner of MCAP, sent a letter to Page, which stated:

> As you know, you signed a settlement agreement on July 14, 2000 with [MCAP] (the "July Agreement"). Your continuing failure, among other things, to purchase the Stockton Gardens and Stockton Terrace Bonds are in flagrant breach of the July Agreement. Unless a new agreement with appropriate protections for MCAP can be promptly entered, MCAP intends to terminate the July Agreement in view of your breaches and pursue claims at law, including through the action recently commenced against you, Sue Garcia and the estate of Paul Garcia in New York.
>
> I am enclosing a proposed form of a restated agreement for your review. Please be advised that unless all relevant parties have executed such a restated***386** agreement on or before Friday, August 25, 2000, MCAP intends to declare a termination of the July Agreement on such date.

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No restated agreement was entered into and no payment was made by the Page defendants by August 25, 2000. On that date, Corey sent a letter to Page declaring "in view of your prior breaches of the Settlement Agreement of July 14, 2000, MCAP is hereby terminating that agreement, and will pursue all available remedies."

(8) *The October 6 Partial Settlement Agreement*

Negotiations toward a settlement of the issues in the New York Action began in September 2000.[FN3] From these negotiations, it became clear that MCAP, relying on the terms of the July 14 Agreement, believed that the Page defendants owed 110% of the principal on both Stockton Bonds. The Page defendants, however, relying on the terms of the June 1998 Put Agreements, contended that they owed only 100% of the principal.

> FN3. Both sides have submitted evidence of letters that passed between their attorneys between the commencement of the New York Action and their first settlement agreement—a July 25, 2000 letter from defendants' counsel to plaintiff's counsel, a July 26, 2000 letter amending the July 25, 2000 letter, and a July 29 letter from defendants' counsel to plaintiff's counsel memorializing a telephone conversation between the two. As J. David Page correctly noted in his affidavit [Page Aff., p. 17 n. 6], the inclusion of these letters on this motion is a violation of Rule 408 of the Federal Rules of Evidence. Statements made in compromise negotiations are inadmissible, *see* Fed.R.Evid. 408, and may not be considered by a trial court on a summary judgment motion, *see* Fed.R.Civ.P. 56. *See also Robbins v. Moore Medical Corp.,* 894 F.Supp. 661, 671 n. 12 (S.D.N.Y.1995). Because these letters contain statements made in compromise negotiations, the Court will not rely on them in its decision on this motion.

On October 6, 2000, the parties entered into a partial settlement agreement that narrowed the scope of their dispute (the "October 6 Agreement"). The October 6 Agreement provided for an immediate transfer of the Stockton Bonds and payment of 100% of the principal by defendants. MCAP expressly preserved its claim for the disputed 10% penalty. This agreement released the Garcia parties from all current and future actions. The parties also stipulated to a discontinuance of the New York Action. MCAP indicated it would commence an action in Federal court against the Page defendants for the breach of the July 14 Agreement, and for breach of the Put Agreements. The October 6 Agreement expressly provided that MCAP intended to assert claims in federal court not only for the 10% difference on the Stockton Bonds, but that MCAP "may also assert ... claims relating to provisions of the Settlement Agreement other than those relating to the [Stockton Bonds]." Pursuant to the October 6 Agreement, the Page defendants did pay 100% of the Stockton Bond principal.

B. The Susanville Bonds and the Sampson Bonds

(1) *The July 14 Settlement Agreement*

MCAP purchased the Susanville Bonds and the Sampson Bonds some time before July 2000. The bonds were issued in connection with housing projects in which Page had ownership interests. The original purchase agreements did not contain a "put" provision. In July 2000, the Susanville and Sampson Bonds became two of the six sets of bonds dealt with in the July 14 Agreement. The parties agreed to a put, modeled on a previous put agreement executed in connection with MCAP's purchase of the Sunset Bonds. The Susanville ***387** and Sampson puts, as provided for in the July 14 Agreement, were virtually identical. The only material difference between the two provisions is that the Sampson Bonds had to be paid sometime before October 31, 2000, or else the Page defendants would be liable, jointly and severally, for all collection and enforcement costs incurred by MCAP, and the Susanville Bonds had to be paid sometime before March 31, 2001, or else the Page defendants would be liable for the collection and enforcement costs. Paragraphs 1(a) and 2(a) of the July 14 Agreement provided that:

> The Page Parties, jointly and severally, agree that MCAP I has given good and valid notice of the exercise a right [sic] to Put the [Sampson/Susanville]

> bonds to them, such Put right deemed given on the terms set forth in the certain Put Agreement made as of June 3, 1998 by and among, *inter alia,* Page and MCAP I pertaining to the CSCDA Multifamily Housing Revenue Bonds (Sunset Manor Apartments) 1998 Series K (the "Sunset Put Agreement"), modified as follows: (i) the Put right shall be exercisable whether or not a "Conversion" shall have occurred (as that term is used in the Sunset Put Agreement), *(ii) the purchase price upon exercise of the Put shall be equal to the sum of all accrued and unpaid interest stated therein (including any applicable late payment charges and default interest rates which may hereafter accrue in the event of a default or late payment(s) thereon) due and owing through and including the date the Put price is paid plus (x) 110% of the Principal Amount thereof then outstanding if the Put price is paid on or after October 1, 2000, or (y) 105% of the Principal Amount thereof then outstanding if the Put price is paid before October 1, 2000, and* (iii) the Page Parties may pay the Put price at any time on or before [October 31, 2000 for the Sampson Bonds/ March 31, 2001 for the Susanville Bonds], *but if paid after [October 31, 2000 for the Sampson Bonds/ March 31, 2001 for the Susanville Bonds], MCAP I shall be further entitled to reimbursement from the Page Parties, jointly* and severally, of all collection and enforcement costs incurred by MCAP, with the Page Parties consenting to jurisdiction and dispute resolution in the U.S. District Court(s) sitting in New York, N.Y.

The July 14 Agreement was purportedly terminated on August 25, 2000, after defendants' failure to pay for the Stockton Bonds but well before either the Sampson or Susanville Bonds fell due. On October 24, 2000, MCAP filed its complaint with this Court, as anticipated in the October 6 Agreement. In the Complaint, MCAP petitioned the Court to "direct[ ] defendants to purchase the Sampson, Susanville and Sunset bonds on the agreed contractual terms," even though MCAP had "terminated" the July 14 Agreement two months earlier. J. David Page contends that "[o]nly when [he] received and read MCAP's Complaint in this lawsuit did [he] know for sure that MCAP apparently never really meant to 'terminate' the July 14th Agreement, despite the wording of Mr. Corey's August 25th fax; instead, it meant to specifically enforce the July 14th Agreement with respect to those transactions that had not yet been consummated—the purchases of the Sampson, Sunset and Susanville Bonds." [Page Aff., ¶ 31.]

(2) *The January 18 Settlement Agreement*

Whether the July 14 Agreement was terminated or not, the parties worked towards narrowing their legal disputes. On January 18, 2001, the parties entered into yet another partial settlement agreement ***388** (the "January 18 Agreement"). The January 18 Agreement narrowed the scope of disagreement on three bond issues covered under the July 14 Agreement—the Sampson, Susanville and Sunset Bonds.

In this agreement, the Page defendants agreed to pay 100% of the principal, plus accrued interest, of the Sampson and Susanville Bonds, and preserved its rights to seek the disputed 10% in court. Specifically, the January 14th Agreement provides:

> 10. *Sale of the Sampson Bonds:* On or before February 15, 2001:(1) MCAP shall transfer and deliver against payment to Newman, on behalf of the Page Parties, the Sampson Bonds; and (2) the Page Parties, through Newman, *shall deliver and pay to MCAP 100% of the principal amounts of such bonds, plus all accrued interest.* Upon such payment and delivery of the Sampson Bonds, MCAP shall have no further claims against the Page Parties with respect to the Sampson Bonds and the Sampson Garden Apartments, except as described in paragraph 17 below. The parties agree that 100% of the principal amount of the Sampson Bonds, and all accrued interest, is as follows:

	100% of Principal or Accreted Amount	Accrued Interest Through 2/15/01

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$2,216,676.53

11. *Sale of the Susanville Bonds:* On or before April 30, 2001:(1) MCAP shall transfer and deliver against payment to Newman, on behalf of the Page Parties, the Susanville Bonds; and (2) the Page Parties, through Newman, *shall deliver and pay to MCAP 100% of the principal amounts of such bonds, plus all accrued interest.* Upon such payment and delivery of the Susanville Bonds, MCAP shall have no further

100% of Principal or Accreted Amount	Accrued Interest Through 2/15/01
$2,051,475.40	$29,325.00
$21,323.44	

claims against the Page Parties with respect to the Susanville Bonds and the Susanville Garden Apartments, except as described in paragraph 17A below. The parties agree that 100% of the principal amount of the Susanville Bonds, and all accrued interest, is as follows:

The January 18 Agreement provided for additional interest to be paid by the Page defendants if payments were not made on the Susanville or Sampson Bonds on the dates specified in the agreement. The July 18 Agreement provided that if payment was not made on the specified dates, the Page defendants agreed to pay "in addition to and over and above [100% of the principal and accrued interest] ... an additional interest payment of 4% per annum of the put price. Such additional interest payment shall in all cases be assessed retroactively to January 1, 2001 and continue until MCAP receives from the Page Parties all of the amount specified above ... for the [Sampson and Susanville Bonds], and shall be compounded monthly."

MCAP preserved it's right to seek the disputed 10% penalty in court, as follows:

17. *Preservation of Certain Claims Against the Page Parties (Sampson):* The parties agree and acknowledge that upon consummation and sale of the Sampson Bonds in accordance with paragraph 10, above: *(1) MCAP is still preserving and will be free to assert against the Page Parties in the pending Federal Court Action MCAP's claims that (1) the Page Parties were obligated under the July 14th Settlement Agreement to pay 110% of the principal amounts of the Sampson Bonds, not 100% (the "Sampson 10% Difference"), (b) the Sampson 10% Difference, and any interest lawfully accruing thereon or damages relating thereto, remains due and owing to MCAP, and (c) the Page Parties are liable for MCAP's attorneys' ***389** fees and other enforcement costs relating to the Sampson Bonds; ....* The Page Parties dispute and contest all such claims set forth in section (1) of this paragraph, and preserve all rights to seek a contrary judicial adjudication of such claims. This paragraph 17 shall not be interpreted to release MCAP's claims with respect to bonds other than the Sampson Bonds.

The following paragraph of the January 18 Agreement, which deals with the Susanville Bonds, contains the identical provisions.

(3) *The Breaches Under the January 18 Agreement*

Under the January 18 Agreement, the Page defendants agreed to pay, on specified dates, 100% of the principal plus accrued interest on the Susanville and Sampson bonds. In compliance with the January 18 Agreement, the Page defendants did pay 100% of the principal amount of the Sampson bonds on February 15, 2001. This left the 10% difference plus collection and enforcement costs as the only open issue on the Sampson Bonds.

On April 20, 2001, MCAP advised the Page defendants that they were tendering transfer and delivery of the Susanville Bonds, effective April 30, 2001, in accordance with the January 18 Agreement. The Page defendants did not make payment on April 30, and have failed to make any payments on the Susanville Bonds to

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this day.

C. The Claims in this Action

On March 6, 2001, MCAP filed an Amended Complaint with this Court. The Amended Complaint alleged that the Page defendants were liable for the Stockton Bonds 10% difference, the Sampson and Susanville Bonds 10% difference and all collection and enforcement costs and interest. The Amended Complaint acknowledged that at the date of its filing, the defendants remained obligated to purchase the Susanville Bonds on specified terms on or before April 30, 2001. MCAP alleges that the amounts due to them are as follows:

Bond Issue	Nature of Obligation	Amount
Stockton Bonds	10% Difference	$463,000 (as of August 1, 2000)
Sampson Garden	10% Difference	$221,667.65 (as of Feb. 15, 2001)
Susanville Bonds	100% of Principal plus accrued interest	$2,080,800.40 (as of Apr. 30, 2001)
Susanville Bonds	10% Difference	$205,147.54 (as of Apr. 30, 2001)
Susanville Bonds	4% Penalty	$30,258.17 (as of May 1, 2001)

See Corey Aff., ¶ 28. MCAP asserts that these amounts will increase with contractual accruals or statutory interest between the indicated dates and the date of this Court's judgment.

For the reasons stated below, MCAP's motion for summary judgment is granted in part and denied in part.

***390** DISCUSSION

A. Summary Judgment Standard

Summary judgment may be granted only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322–23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The Court must view the record "in the light most favorable to the non-moving party," *Leberman v. John Blair & Co.,* 880 F.2d 1555, 1559 (2d Cir.1989) (citations omitted), and "resolve all ambiguities and draw all reasonable inferences in favor of the party against whom summary judgment is sought," *Heyman v. Commerce and Indus. Ins. Co.,* 524 F.2d 1317, 1320 (2d Cir.1975) (citations omitted).

Under New York law, to establish a breach of contract a plaintiff must plead and prove the following elements: (i) the existence of a contract; (ii) breach by the other party; and (iii) damages suffered as a result of the breach. *See First Investors Corp. v. Liberty Mut. Ins. Corp.,* 152 F.3d 162 (2d Cir.1998). Summary judgment is appropriate in a breach of contract action where the language of the contract is unambiguous, and reasonable persons could not differ as to its meaning. See *Fulton Cogeneration Assoc. v. Niagara Mohawk Power Corp.,* 84 F.3d 91, 98 (2d Cir.1996). Contract language is unambiguous when it has " 'a definite and precise meaning, unattended by danger of misconception in the purport of the [contract] itself, and concerning which there is no reasonable basis for a difference of opinion.' " *Hunt Ltd. v. Lifschultz Fast Freight, Inc.,* 889 F.2d 1274, 1277 (2d Cir.1989) (quoting *Breed v. Ins. Co. of North America,* 46 N.Y.2d 351, 413 N.Y.S.2d 352, 385 N.E.2d 1280 (1978)).

B. 100% of the Susanville Bonds Principal

This claim is easily disposed of. The Page defendants agreed, on January 18, 2001, to pay "100% of the principal amounts of [the Susanville Bonds], plus all accrued interest" on or before April 30, 2001. Furthermore, if payment was not made by April 30, 2001, the Page defendants agreed to pay "in addition to and over and above [100% of the principal and accrued interest] ... an additional interest payment of 4% per annum of

the put price. Such additional interest payment shall in all cases be assessed retroactively to January 1, 2001 and continue until MCAP receives from the Page Parties all of the amount specified above (in paragraph 11) for the Susanville Bonds, and shall be compounded monthly."

The Page defendants made no payments before April 30, 2001, and have made no payments to this date. They suggest no reason why performance was excused. The terms of the agreement are unambiguous, and the Page defendants have breached these terms. Summary judgment is granted to plaintiffs on the issue of liability. Damages will be assessed at 100% of the principal, plus all accrued interest to the date of the judgment, and additional interest at 4% per annum of the put price, compounded monthly, from January 1, 2001 to the latest judgment.

C. The Stockton Bonds

The Page defendants have paid MCAP 100% of the Stockton Bonds. The parties strongly disagree as to whether 10% of the principal amount of the bonds is still due and owing. In the October 6 Partial Settlement Agreement, MCAP preserved its right to assert its claim for the disputed 10% difference of the Stockton Bonds.

MCAP contends that a 10% penalty, or premium, on each of the Stockton Bonds is ***391** owed because the clear language of the July 14 Agreement provides that "[t]he Page Parties will pay the Put price for the Stockton Bonds pursuant to the Put Agreement dated as of July 20, 1998 pertaining to the Stockton [Terrace and Gardens] Bonds on or prior to August 1, 2000 *at the Put price stated therein (i.e., 110%)* " (emphasis added). MCAP argues that the clarity of this provision of the July 14 Agreement prevents consideration of any parol evidence, and that summary judgment in its favor is appropriate.

In response, the Page defendants contend that the July 14 Agreement directly refers to and incorporates the Put Agreements, and the Put Agreements do not provide for any 10% premium or penalty. Rather, the Put Agreements provide that the price of the bonds is "a purchase price equal to the Principal Amount thereof then outstanding and all interest (if any) then due and payable on the bonds," *see* Put Agreements, ¶ 2.1, *i.e.,* 100% of the principal only. Thus, the reference in the July 14 Agreement to a put price, as stated in the Put Agreement, of 110%, conflicts with the terms of the Put Agreement. Furthermore, defendants argue that neither the Indentures nor the Loan Agreements provide for a 10% premium in the event of a default, at least not in the absence of formal default and foreclosure procedures. Defendants argue that these contradictions create an ambiguity within the contract, that parol evidence is necessary to resolve this ambiguity, and, as a result, summary judgment is inappropriate.

I must review these claims in the light most favorable to the Page defendants. *See Leberman,* 880 F.2d at 1559.

(1) *Parol evidence rule*

The New York Court of Appeals has explained the parol evidence rule as follows:

> A familiar and eminently sensible proposition of law is that, when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms. Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing. That rule imparts stability to commercial transactions by safeguarding against fraudulent claims, perjury, death of witnesses[,] infirmity of memory and the fear that the jury will improperly evaluate the extrinsic evidence.

W.W.W. Assocs., Inc. v. Giancontieri, 77 N.Y.2d 157, 162, 566 N.E.2d 639, 642, 565 N.Y.S.2d 440, 443 (1990) (internal citations omitted).

[1][2] The parol evidence rule bars the introduction and consideration of extrinsic evidence of the meaning of a complete written agreement, if the terms of the agreement are clear and unambiguous. *Id.* at 162–63, 566 N.E.2d at 642, 565 N.Y.S.2d at 443. If the terms of the complete written contract are unclear, ambiguous or contradictory, however, the parol evidence rule permits the consideration of such evidence in order to ascertain

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the true meaning of the terms. *See Wayland Investment Fund, LLC v. Millenium Seacarriers, Inc.,* 111 F.Supp.2d 450, 454 (S.D.N.Y.2000); *see generally Alexander & Alexander Servs., Inc. v. These Certain Underwriters at Lloyd's, London,* 136 F.3d 82, 86 (2d Cir.1998); *Garza v. Marine Transp. Lines, Inc.,* 861 F.2d 23, 26 (2d Cir.1988); *Gambling v. Commissioner of Internal Revenue,* 682 F.2d 296, 300 (2d Cir.1982); 58 N.Y. Jur.2d, Evidence & Witnesses, §§ 490, 515, 753 (1986). The parole evidence rule is a rule of substantive law, and not one of procedure or evidence. *Wayland Investment,* 111 F.Supp.2d at 454; ***392***Woodling v. Garrett Corp.,* 813 F.2d 543, 552 (2d Cir.1987); *Potsdam Cent. Schs. v. Honeywell, Inc.,* 120 A.D.2d 798, 799, 501 N.Y.S.2d 535, 537 (3d Dep't 1986).

[3] In order to apply the parol evidence rule, this Court must employ a three-step inquiry: (1) determine whether the written contract is an integrated agreement; if it is, (2) determine whether the language of the written contract is clear or is ambiguous; and, (3) if the language is clear, apply that clear language. *See Wayland Investment,* 111 F.Supp.2d at 454; *Investors Ins. Co. v. Dorinco Reinsurance, Co.,* 917 F.2d 100, 103–05 (2d Cir.1990); *see also Machine–Outils Henri Line Ltee v. Morey Machinery, Inc.,* No. 94 Civ. 8880, 1996 WL 254863, at *6 (S.D.N.Y. May 14, 1996).

a. Integration

[4] The first step in the application of the parol evidence rule is to determine whether the written contract is integrated. An integrated contract is one which "represents the entire understanding of the parties to the transaction." *Investors Ins. Co.,* 917 F.2d at 104. "[U]nder New York law, a contract which appears complete on its face is an integrated agreement as a matter of law." *Battery Steamship Corp. v. Refineria Panama, S.A.,* 513 F.2d 735, 738 n. 3 (2d Cir.1975) (citing *Higgs v. De Maziroff,* 263 N.Y. 473, 478, 189 N.E. 555, 557 (1934)). If the written document "appears to contain the engagements of the parties, and to define the object and measure the extent of such engagement, [then] it constitutes the contract between them, and is presumed to contain the whole of that contract." *Wayland Investment,* 111 F.Supp.2d at 454 (quoting *Eighmie v. Taylor,* 98 N.Y. 288, 1885 WL 10558 (1885)).

[5] In this action, the Page defendants contend that the July 14 Agreement does not constitute the entire contract between the parties. Defendants note that the July 14 Agreement directly incorporates the 1998 Stockton Put Agreements, and these two contracts, read together, comprise the entire written agreement between the parties. The July 14 Agreement lacks a merger clause. In such an instance, "the court must determine whether or not there is an integration [of the two contracts] by reading the writing in the light of surrounding circumstances, and by determining whether or not the [other] agreement was one which the parties would ordinarily be expected to embody in the writing." *Wayland Investment,* 111 F.Supp.2d at 454 (quoting *Braten v. Bankers Trust Co.,* 60 N.Y.2d 155, 162, 456 N.E.2d 802, 805, 468 N.Y.S.2d 861, 864 (1983) (internal citations omitted)).

[6] After examination of the terms of the July 14 Agreement, I find that the combination of the July 14 Agreement and the Put Agreements comprises the entire integrated agreement. Each paragraph of the July 14 Agreement that addresses a series of bonds directly references and incorporates a previous contract's terms and provisions. Paragraphs 1, 2 and 3 of the July 14 Agreement refer to and modify the terms set forth in the Sunset Put Agreement agreed to by both parties on June 3, 1998. Paragraph 6 refers to the Forbearance Agreement entered into by both parties on June 22, 2000. And Paragraphs 4 and 5, the Stockton Bonds provisions at issue here, refer directly to the July 20, 1998 Put Agreements. The terms of these agreements together reflect the entire written agreement. Incorporation of the Put Agreement is necessary to provide provisions for the calculation of the put price itself, the conditions governing the parties, and various other considerations governing the execution of the Put. I find that the July 14 Agreement and the Put Agreements it incorporates by reference ***393** constitute the integrated agreement of the parties relating to the Stockton Bonds.

b. Interpretation

The second step of the parol evidence inquiry is the determination of whether the language of the written

agreement is clear or ambiguous. *See Wayland Investment,* 111 F.Supp.2d at 455. "Whether or not a writing is ambiguous is a question of law to be resolved by the courts." *W.W.W. Assocs.,* 77 N.Y.2d at 162, 566 N.E.2d at 642, 565 N.Y.S.2d at 443; *see Alexander & Alexander Servs.,* 136 F.3d at 86. An ambiguity arises if "the terms of a contract could suggest 'more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business.' " *Alexander & Alexander Servs.,* 136 F.3d at 86 (quoting *Lightfoot v. Union Carbide Corp.,* 110 F.3d 898, 906 (2d Cir.1997)).

[7] In this instance, the integrated contract contains an ambiguity, as noted above. The July 14 Agreement specifically provides that the put price stated in the Put Agreements is " *i.e.* [that is to say] 110%." The Put Agreements, however, directly contradict the July 14 Agreement by providing that the put price is equal to 100% of the principal plus interest. The terms of the entire written agreement are contradictory and ambiguous, and therefore preclude application of the third and final step of the inquiry, whether there was a breach of the written contract.

"The rule is well settled that the construction of a plain and unambiguous contract is for the court to pass on, and the circumstances extrinsic to the agreement will not be considered when the intention of the parties can be gathered from the instrument itself." *Airco Alloys Division, Airco Inc. v. Niagara Mohawk Power Corporation,* 430 N.Y.S.2d 179, 184, 76 A.D.2d 68, 76–77 (4th Dep't 1980) (citations omitted). *See also Alternative Thinking Systems, Inc. v. Simon & Schuster, Inc.,* 853 F.Supp. 791 (S.D.N.Y.1994); *Marvel Entertainment Group, Inc. v. ARP Films, Inc.,* 684 F.Supp. 818 (S.D.N.Y.1988). It is not within this Court's power to decide the issues of fact presented in this action on a motion for summary judgment. *See Cable Science Corp. v. Rochdale Village, Inc.,* 920 F.2d 147, 151 (2d Cir.1990) ("Nonetheless, in order for a district court to grant summary judgment in [a contract] case, there may not be any genuine issue regarding the inferences to be drawn from the language.").

Summary judgment as to the Stockton Bonds is denied.

D. The Susanville and Sampson Bonds 10% Premium

Plaintiff alleges that the Page defendants owe a 10% premium on the principal amounts of the Susanville and Sampson Bonds, as provided for in the July 14 Agreement. The relevant provision of the July 14 Agreement provides that "the purchase price upon exercise of the Put shall be equal to the sum of all accrued and unpaid interest stated therein (including any applicable late payment charges and default interest rates which may hereafter accrue in the event of a default or late payment(s) thereon) due and owing through and including the date the Put price is paid *plus (x) 110% of the Principal Amount thereof then outstanding if the Put price is paid on or after October 1, 2000, or (y) 105% of the Principal Amount thereof then outstanding if the Put price is paid before October 1, 2000.* (emphasis added)" MCAP asserts that it rightfully terminated the July 14 Agreement because the ***394** Page defendants materially breached the agreement by failing to make multiple payments on the Stockton Bonds, and that the Page defendants now owe it a 10% premium as provided for in the July 14 Agreement.

The Page defendants argue that they owe nothing further under the July 14 Agreement because MCAP wrongfully repudiated the agreement on August 25, 2000. They claim that the July 14 Agreement was a severable contract that could not be terminated based upon the alleged defaults on two of its six divisible parts. In the alternative, the Page defendants argue that the alleged defaults on the Stockton Bonds were not material breaches of the entire agreement, and did not permit termination of the whole agreement. They argue that, despite the premiums provided for in the July 14 Agreement, they should be discharged from all responsibilities under the July 14 Agreement because of MCAP's wrongful termination.

I find that the July 14 Agreement was not severable, and MCAP's termination of the agreement on Au-

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gust 25, 2000 was justified because of defendants' material breach. I conclude, however, that defendants are liable for the 5% difference provided for in the agreement, as the contract was terminated prior to October 1, 2000, the date when the 10% difference would accrue under the agreement.

(1) The July 14 Agreement was not severable

If the July 14 Agreement was a severable, rather than an entire contract, MCAP's termination of the whole contract on August 25, 2000 would have been improper. *See Ripley v. Int'l Rys. Of Cent. America,* 8 N.Y.2d 430, 437–38, 209 N.Y.S.2d 289, 171 N.E.2d 443 (1960) ("If the contract consists of several distinct and independent parts, each of which can be performed without reference to the other, a failure of one of the parties to perform one of the terms does not authorize the other to rescind the whole and refuse to accept performance of the other terms by the party so in default.") (quoting *Bamberger Bros. v. Burrows,* 145 Iowa 441, 451, 124 N.W. 333, 337 (1910)).

[8] There is no precise test for determining whether a contract is severable or entire. *See Unisys Corp. v. Combined Technologies Corp.,* No. 87 Civ. 1449, 1988 WL 78148, at *2 (July 19, 1988 S.D.N.Y.). In making such a determination, the primary factor to consider is the intent of the parties as determined by a fair construction of the terms and provisions of the contract itself, by the subject matter to which it has reference, and by the circumstances existing at the time of contracting. *See Nederlandse, Etc. v. Grand Pre–Stressed Corp.,* 466 F.Supp. 846, 852 (E.D.N.Y.), *aff'd* 614 F.2d 1289 (2d Cir.1979), citing *Rudman v. Cowles Comm., Inc.,* 30 N.Y.2d 1, 14, 330 N.Y.S.2d 33, 42, 280 N.E.2d 867 (1972); *Rogers v. Graves,* 254 A.D. 467, 5 N.Y.S.2d 967, 971 (3d Dep't 1938).

[9] A contract is generally considered to be entire when, by its terms and purposes, it contemplates that all of its parts are interdependent and common to one another. A contract is severable when its nature and purpose are susceptible to division and apportionment. *Id.* Under New York law, "a contract will not be regarded as severable" unless "(1) the parties' performances can be apportioned unto corresponding pairs of partial performances, and (2) the parts of each pair can be treated as agreed equivalents." *Ginett v. Computer Task Group, Inc.,* 962 F.2d 1085, 1091 (2d Cir.1992); *see also* Restatement (Second) of Contracts § 240.

***395** [10] A fair construction of the terms, subject matter and circumstances surrounding the July 14 Agreement show that the agreement was not severable.

A consideration of the circumstances at the time and the subject matter of the agreement supports the conclusion that the July 14 Settlement Agreement was an entire contract. First, there was no severability clause, which militates against a finding of severability. *See F & K Supply, Inc. v. Willowbrook Development Co.,* 288 A.D.2d 713, 732 N.Y.S.2d 734, 738 (3d Dep't 2001). The July 14 Agreement was a settlement agreement, and the parties, in their negotiations, made various interdependent concessions in order to come to a final resolution of their differences. MCAP made concessions to the Page defendants. For instance, MCAP deferred payment on the Stockton Bonds and agreed to forbear from foreclosing on Elden Terrace, another property covered in the July 14 Agreement, for no discernible benefit within those respective provisions. The Page defendants also made various concessions. The Page defendants agreed to create Put Agreements for the Sampson and Susanville bonds, when there were none previously. It is logical that each party would "impair its rights with regard to some bond issues in exchange for promises related to other bond issues." [Pl. Reply Mem., at p. 9.] The terms of the contract are interdependent on each other, and only when taken together comprise an entire contract.

(2) There was a material breach of the July 14 Agreement

[11] Defendants argue that even if the July 14 Agreement was an entire contract, and not a divisible one, the Page defendants' alleged breach with respect to nonpayment of the Stockton Bonds was immaterial. [Def. Mem. In Opp. at 16.] Defendants contend that "Even if the Page parties' performance with respect to the Stockton Bonds were delayed, MCAP would still be able to receive substantially what it had bargained for under the July 14 Agreement," and that therefore

"MCAP ... had no right to terminate the whole agreement." *Id.* Furthermore, defendants allege that MCAP's wrongful repudiation of the entire contract constituted a material breach of the July 14 Agreement, and "thus the Page parties should be discharged from further performance under the [agreement]." *Id.* at 17.

Defendants' failure to pay the over five million dollars owed for the Stockton Bonds on August 1, 2000 did constitute a material breach of the July 14 Agreement. *See Jafari v. Wally Findlay Galleries,* 741 F.Supp. 64, 67 (S.D.N.Y.1990) ("We find that the [buyers] failed to pay the sellers any money ... indeed it is difficult to imagine anything more material," *quoting Schneider v. Dumbarton Developers, Inc.,* 767 F.2d 1007, 1014 (D.C.Cir.1985)). *See also Truglia v. KFC Corp.,* 692 F.Supp. 271, 276 (S.D.N.Y.1988), *aff'd without op.,* 875 F.2d 308 (2d Cir.1989). In light of this material breach of a non-severable contract, MCAP had the right to treat defendants' failure to pay as a total breach, to terminate the entire contract and to sue for damages. *See, e.g., ARP Films, Inc. v. Marvel Entertainment Group, Inc.,* 952 F.2d 643, 649 (2d Cir.1991). "The injured party's claim for damages for total breach takes the place of its remaining substantive rights under the contract. Damages are calculated on the assumption that neither party will render any further performance." 2 Farnsworth on Contracts, Second Edition, § 8.15 at 490 (1998).

a. Remedy

[12] MCAP terminated the July 14 Agreement on August 25, 2000, and damages***396** must be calculated as of that date. *See id.* The July 14 Agreement established two different put prices depending on the date of payment: 105% of the principal amount then outstanding if paid before October 1, 2000, and 110% of the principal amount then outstanding if paid on or after October 1, 2000. MCAP chose to terminate the contract before October 1, 2000, thereby preventing the Page defendants from making its contractual payments before October 1, 2000 at the 105% rate. Damages due by the Page defendants, as of August 25, 2000, equals 105% of the principal amounts then outstanding on the Susanville and Sampson Bonds.

CONCLUSION

MCAP's motion for summary judgment is granted insofar as the Page defendants must pay 105% of the principal of the Susanville Bonds, plus accrued interest and a 4% penalty, and a 5% premium on the 100% principal of the Sampson Bonds already paid by the Page defendants. MCAP's motion for summary judgment for the 10% premium on the Stockton Terrace and Stockton Garden Bonds is denied.

This constitutes the order and decision of the Court.

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C

Supreme Court of Florida.
GEORGE PERRY, PLAINTIFF IN ERROR,
v.
NICHOLAS LEWIS, DEFENDANT IN ERROR.

January Term, 1856.

***1** 1. The general principle adopted by civilized nations is, that the nature, validity and interpretation of contracts, are to be governed by the *lex loci* of the country where the contracts are made or are to be performed; but the remedies are to be governed by the *lex fori.*

2. That portion of the period of prescription which has run under the limitation laws of another State, cannot be united with the time which has elapsed under the laws of this State, so as to complete a statutory bar of the right of action.

3. The rule is that a foreign statute of limitations is inoperative except in cases where it not merely professes to bar the remedy, but goes directly to the extinguishment of the debt, claim, or right.

Writ of Error to the Circuit Court of the Western Circuit for Santa Rosa county.

The facts of the case are contained in the opinion of the court to which reference is made.

West Headnotes

Limitation of Actions 241 135

241 Limitation of Actions
241II Computation of Period of Limitation
241II(H) Commencement of Proceeding; Relation Back
241k135 k. Proceedings in Other State. Most Cited Cases
The period of prescription which has partly run under the laws of another state cannot be united with the time which has elapsed under the laws of the state where the action is brought, so as to bring the cause of action within the statute of limitations of the latter state.

G. S. Hawkins, for Plaintiff in Error.

R. L. Campbell, for Defendant in Error.

PEARSON, J., delivered the opinion of the court.

This is an action of Trover brought to recover the value of a slave lost by Lewis, the plaintiff below, in Sumpter county, Alabama, in July, 1844--sold by one Jones, to Henshaw of Covington county, Alabama, on the 11th November, 1844--by Henshaw again sold to Criglar of Santa Rosa county, Florida, on the 26th June, 1848--and finally sold by Criglar to the present plaintiff in error, Perry, who was the defendant below of the same county and State, on the 26th October, 1849, the plaintiff being ignorant whose possession the slave was in until April, 1851.

Upon demand and refusal of the delivery of the property to plaintiff, action was brought on the 2d June, 1851.

There were several pleas filed by defendant, but the only one relied upon for the defence was the statute of limitations of this State. Upon the trial below, the court was moved to instruct the jury, "That if they were satisfied from the evidence that there was a continued adverse possession of the negro by Henshaw, Criglar and Perry, under their respective bills of sale, part of the time in the State of Alabama, and part of the time in the State of Florida, and that the time during which Henshaw had adverse possession of the negro in Alabama under the sale to him, when connected with the time during which Criglar and Perry successively had adverse possession of him in the State of Florida under the respective sales to them, would, when added together, amount to five years next before the

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commencement of the suit, then the plaintiff ought not to recover." Which instruction the court refused--the defendant excepted, and the jury having found for the plaintiff, and judgment being rendered accordingly, the defendant's counsel appealed and assigns such refusal as error.

***2** The statutory bar of the action of Trover in Alabama is six years--in this State five years. From the foregoing statement it is apparent that the plaintiff was not barred during the possession of Henshaw in the State of Alabama under and by virtue of the statute of limitations of that State; and it is equally manifest that he was not barred under our statute of limitations by the possessions of Criglar and of the defendant Perry, even if connected together, in this State. While it appears that if the possession of Henshaw in the State of Alabama can be tacked to that of Criglar and Perry in this State, the prescription of our statute would be complete.

The questions therefore presented for our consideration are,

1st. Is the doctrine of tacking possessions admissible in an action of Trover?

2d. If such doctrine is admissible will it apply in a case where one of the possessions relied upon occurred in another State?

1. Upon the first question we express no opinion, because the minds of the court are not fully agreed in relation to it, and a majority of the court are of opinion that a proper solution of the second question is decisive of the case. The principles in regard to tacking possession will be considered when they shall necessarily arise before us.

2. Conceding for the purpose of the present argument that the doctrine of tacking does prevail to some extent, we are met by the second question as to whether a statutory bar can be made out by tacking part of the time which the statute of limitation has run under the statute of another State, to another part which has elapsed under the statute of this State. This question is so well settled upon principle and authority that it scarce requires discussion at this day. It was not made or discussed before us, but must necessarily control this case. Our statutes of limitation, by an amendment enacted in 1846, Thomp. Dig., p. 443, § 2, place non-resident plaintiffs upon the "same footing" with resident citizens of the State. Nor is there any special exceptions from the general law of limitation in behalf of defendants, save those contained in the amendments of 1833 and 1835, Thomp. Dig. p. 445, § 1 and 2, by which they are permitted in cases where the cause of action arose abroad to plead the statute of limitations of the foreign state or place where it accrued, provided it would be a good bar in such place. This provision is obviously not applicable to a defendant whose liability arose in this State--nor has the defendant sought to obtain its benefit by pleading the prescription of Alabama. The parties then stand simply upon the footing of two citizens of the State litigating a cause of action arising in the State, within the limit of State prescription. For it is manifest the plaintiff had no cause of action against the defendant Perry, previous to his possession of the negro by purchase from Criglar, on the 26th October, 1849, although a right of action had accrued to him in the State of Alabama, as far back as the 11th November, 1844, against Henshaw, who purchased at that time from Jones. This right of action might have been pursued successfully at any time within the statutory period against Henshaw in the State of Alabama, and if neglected until Henshaw's possession ripened into title by the lapse of time in Alabama, then Henshaw's sale to Criglar, would have conferred title, and in like manner Criglar's conveyance to the defendant Perry would have vested the title in him, of which he might have availed himself under the general issue. 5 Clark & F. Rep. 1, 15, 16, 17; 3 Strob. R. 331; Story's Conflict of Laws, §582; 5 Yerger, p. 1. But Henshaw's possession was less than the statutory limitation of Alabama, and therefore conferred no title upon him. There is then no ground of defence for the defendant but in assuming that the statute of Alabama, having commenced to run against Henshaw, would

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continue to run, notwithstanding intervening disabilities, not only in his favor but in favor of those claiming under him, although citizens of a different State. This is a familiar and sound principle of law in its just application, but it can have no force or effect beyond the jurisdiction of the forum in which it is invoked. It is a principle of the law of prescription, and like that, a part of the *lex fori* and can have no *extra territorial* authority. Judge Story in his work on the Conflict of Laws, sec. 582, says: "It is no answer to say that when once the statute of limitations begins to run, no subsequcnt impediment stops it from continuing to run. That is true in a nation whose laws contain such provisions or inculcate such a doctrine, but no other nation is bound to give effect to such provisions or to such a doctrine.--They are strictly *intra territorial* regulations and interpretations of the *lex fori,* which other nations are not bound to observe or keep." Had the plaintiff sued Henshaw in the courts of Alabama as regulated by her laws, he might have availed himself of this principle in those forums if necessary to his defence, "but it can have no application in the present case, for the plain reason, that those laws can have no obligatory force out of their own jurisdiction."--Justice Wheeler in Hays vs. Cage, 2 Texas Rep., 507. It is a maxim, says Judge Story, (in his work above quoted,) of international law that "whatever force and obligation the laws of one country have in another, depend solely upon the laws and municipal regulations of the latter; that is to say, upon its own proper jurisdiction and polity, and upon its own express or tacit consent." The only authority given to the statute of limitations of Alabama in our courts, is under the laws of 1833 and 1835, before cited, which it has been shown are inapplicable to this case. It has been urged that the principle that the statute of limitations only applies to causes of action subsisting within the State, might give rise to stale demands arising in other States. The argument *ab inconvenienti* is entitled to but little consideration in legal adjudications. We must declare the law as we find it. But we think this very objection was in the view of the Legislature, and designed to be remedied by the two acts of the General Assembly last cited, securing the right to defendants to plead the statute of limitations of other States in all cases where it would prove a bar in those States. Thus at once tacitly admitting that the law was as we state it, and providing a remedy for the further protection of our citizens from stale foreign demands originating without our jurisdiction. "The general principle by civilized nations is, that the nature, validity, and interpretation of contracts are to be governed by the laws of the country where the contracts are made or are to be performed, but the remedies are to be governed by the laws of the country where the suit is brought, or as it is compendiously expressed by the *lex fori.*" 8 Peter's S. C. Rep., 361.

***3** We come then to the final question, whether the period of prescription which has partly run under the laws of another State can be united with the time which has elapsed under the laws of our own State so as to complete a statutory bar. Mr. Justice Story has fully considered this question in his compendious work on the Conflict of Laws, sec. 582, and concludes that it cannot be done except in cases where the foreign statute does not merely profess to bar the remedy, but goes directly to the extinguishment of the ""debt, claim, or right." Chancellor Kent is equally clear and decisive on the question in Ruggles vs. Keeler, 3 Johns. Rep., 261. In Alexander vs. Burnett, 5 Richardson's Law Rep., 189, the Supreme Court of South Carolina have elaborately considered and decided the question in the same way, under circumstances nearly identical with those presented in this case. Town's Executor vs. Bradwell, 1 Stewart & Porter, Ala. Rep. 36, estabishes the same principle. And to the same effect are Gautier vs. Franklin, 1 Texas Rep., 732; Hays vs. Cage, 2 Texas Rep., 501; 1 Caine's Rep., 402; 7 Mass. Rep., 515; 14 Mass. 203; and 13 Missouri Rep., 160. Still further authority might be cited, but we deem the foregoing sufficient to establish the principle upon which this case turns. It is consonant with reason and principles of Justice, that where one of two innocent parties must suffer a loss, it should fall upon him who has been most remiss in

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securing his rights. Such is the result from the application of the rules of law in this case. No degree of diligence or of caution could have protected the plaintiff against the abduction of his slave, either by kidnapping or by his own volition; whereas the defendant was put upon his guard by the principles of the common law, *caveat emptor* being the rule. It was his duty to have enquired into the character of the title which he purchased, and if a doubt arose of its validity, to have secured himself by a sufficient warranty from the vendor; failing in this, he has acted in his own wrong and cannot justly complain of the assertion of the plaintiff's rights.

Let the judgment of the Circuit Court be affirmed with costs.

DUPONT, J., also delivered the following opinion:

I entirely concur in the judgment of affirmation which has just been pronounced in this cause, but do not concur in either the doctrines contained in the opinion of the majority, nor in the reasoning by which those doctrines are sought to be enforced. Without entering into an argument in reference to the correctness of those doctrines, or of their applicability to the facts of this case, I shall content myself with this brief expression of my *dissent,* and proceed at once to give the ground of my conclusion and the views which I entertain of the whole case.

***4** The only question raised or argued before us at the hearing was whether, in an action of *trover,* a defendant, in order to complete the bar of the statute of limitation, shall be allowed to avail himself of the time which may have elapsed from the conversion of the property by his immediate vendor and by those under whom he claims, or whether he shall be confined to the date of his own conversion at the point of time from which the running of the statute shall be calculated. In other words, whether the defendant in possession shall be allowed to add to the period of his possession the time that the property may have been in the adverse possession of those under whom he claims title, so as to make out the full statutory bar of five years.

This is a question of much greater difficulty than it would seem to be at the first blush, involving as it does considerations of paramount importance, bearing upon the protection and enjoyment of personal property, whether considered in reference to the rights of the original owner or to those of the *bona fide* purchaser. It is somewhat strange, that in our examination of the English Reports, we have been unable to find a single case bearing immediately upon the question raised in this case. It is true that there are numerous cases involving the question of a *fraudulent concealment* of the property, and also the further question of the *want of knowledge* by the plaintiff of the particular date of the conversion. But these are questions essentially different from the one under discussion, which is the naked right of the defendant to lap the period of his possession upon that of those under whom he claims, so as to make out the full time required for the statutory bar, and therefore afford no light for its elucidation.

The counsel for the appellant cited at the argument Angel on Limitation, 513, to show that in ejectment several adverse possessions, being in privity one with the other, and all referable to the same entry, might be united or tacked together so as to make up the full time of the statutory bar; and it was contended that in this respect there is no difference between the action of ejectment for the recovery of the possession of land and that of trover for the value of personal property. The doctrine of a continuity of possession, where land is the subject of the suit, seems to be well established in the English courts, and there is but little contrariety of opinion on the subject in our State Courts. The argument of the appellant's counsel is based entirely upon analogy, but I am not satisfied that any analogy really exists. It seems to me that there is a manifest difference in the principles upon which the two actions proceed. In ejectment, the subject-matter of the suit is the possession of the land itself, the damages being usually only nominal, and the action must be brought against a party in the possession of the premises. Possession is a species of *title,* and, as

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such, may be transferred by assignment. When one occupant surrenders the *possession* to another, he surrenders his *liability* to answer for the occupancy, and that other assumes it and with it whatever *benefit* may result therefrom. There would seem, then, to be a propriety in allowing the defendant in ejectment to avail himself of all the rights growing out of and the incidents attaching to the thing assigned, viz: the *entry* of the assignor, and that of those under whom he may claim.

***5** The theory upon which the action of trover proceeds, and the philosophy upon which it is based, is quite different from this. The subject-matter of the suit is not the thing itself, but only the *value* of the thing, and the action may be brought against any one who, at any time, may have been guilty of a wrongful conversion, whether he be in or out of possession at the time of the institution of the suit. It thus appears that "possession" does not enter into the theory of this action. Nothing is predicated thereon. The entire gist of the action is the wrongful *conversion.* Now, a wrongful conversion is a *tort,* and I am aware of no principle upon which a tort can be held to be transferable or assignable. If I be correct in this that a tort is unassignable, (and of this there can be no question,) upon what logical principle can the defendant who is sued avail himself of the benefit growing out of the prior conversion of a former wrong-doer--a benefit growing out of that which was never assigned to him, and which, in fact, is incapable of assignment? Different from the principle governing the assignment of land, when one wrongful possessor of personal property surrenders his possession to another, he does not therewith surrender his *liability,* but he continues to be liable for his own act of conversion, and it would seem, upon just and logical principles, that, as the *liability* continues, any *benefit* growing out of the time of the conversion ought also to remain with him. But the benefit cannot both remain with him and be in another at one and the same time, and yet upon no other hypothesis can the assignee avail himself of the conversion of his assignor. For these reasons I am inclined to the conclusion that the analogy contended for by the counsel for the appellant does not exist.

But it may be said that my argument is based upon technicalities. This is doubtless true to some extent, but it does not therefore weaken it. Technicalities may be legitimately invoked whenever the use of them is intended to subserve a legitimate purpose, viz: the elucidation of truth; and I am greatly in error if any argument upon the distinctive characteristics of the various actions can be framed without in some measure resorting to technicalities.

But, aside from the reasons growing out of the distinctive characters of the two actions, there are considerations of stern justice and enlightened policy, based upon the peculiar nature of the two kinds of property which peremptorily demand that the mode of applying the statute of limitation should be different when sought to be applied to suits in which the one or the other is involved. Land is of a permanent and fixed nature. It has no *locomotion,* nor can it be stolen and secreted or carried away by any one. Its particular location is always presumed to be known to its rightful owner, and if any entry be effected thereon, the act is always open to detection, and the perpetrator of the wrong is unconcealed. If, therefore, a stranger should enter upon land, and after remaining in possession for a time, should convey his possession to a *bona fide* purchaser, and he to another, and so on through any number of assignments, and eventually the mere naked possession shall ripen into a statutory title which shall be paramount to the title of the original and true owner, and thereby deprive him of his property, he ought not to be permitted to complain as against a *bona fide* purchaser in possession; for the injury is the legitimate result of his own wilful negligence. By proper care and vigilance on his part, he may always protect his real property from the unlawful entry of other persons, and even if made, he may readily arrest the operation of the statute by the timely institution of a suit, the party to be sued being always known. As between one so culpably negligent of his rights and one purchasing

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for a full consideration and without notice, when the question of loss arises, there would seem to be no room for doubt. Not so, however, with regard to personal property. It has no fixed or permanent locality--it is the subject of larceny--it may be stolen and carried beyond the reach or knowledge of the rightful owner, and a large and by far the most valuable portion of it in this country is possessed of locomotion, which greatly facilitates its abstraction and concealment. No degree of care or watchfulness is sufficient to protect it from the grasp of the midnight robber, and the utmost vigilance too often fails to detect the perpetrator of the wrong, or to discover the locality of the property until time, with its blighting touch, under the operation of the statute, has deprived the rightful owner of his property.

***6** But there is another argument, equally potent, in support of these views, growing out of the consideration that every purchaser of property may always protect himself from loss arising from a failure of title, either by taking a warranty of title, or by paying for the property less than the market valne and taking upon himself the risk of the title. Should there happen to be a failure of title in the case first instanced, he is fully protected by the covenant of warranty; and if a failure happen in the other case, he is in no worse condition than is every *insurer*. He takes upon himself the risk, and if loss occur, it is but reasonable and right that he, and he only, should bear it. As between such a purchaser (until his title shall have ripened into full maturity by lapse of time,) and the innocent owner, who has been deprived of the possession of his property without any fault or negligence on his part, if loss is to occur to either, it ought to be borne by the former.

It must be noted in this connection, that in thus defining the right of the owner as being paramount to that of the purchaser, the conclusion must be taken with the qualification that he is innocent of any *fault* or *negligence* whereby the purchaser has been induced to receive the title from his vendor. If the owner stands by and permits one who has been guilty of a wrongful conversion of his property to dispose of it to a third party, or if, after he has had knowledge of the act of conversion and of the person to be sued, he neglects within a reasonable time to enforce his right to the property, he will be *estopped* to deny the title of the vendor, and that of the vendee will be protected. Such protection, however, is independent of the bar created by the statute of limitation.

It is proper also to remark, that when the claim of the vendor has ripened into a perfect title by the lapse of the statutory period prescribed, the title of his vendee, or of those claiming under him, will be protected by his possession against the assertion of the claim of the original owner; for then the transfer is a transfer of a valid title--a title conferred by law from the lapse of time, and to have the benefit of it, it is not necessary for the vendee, when sued, to plead the statute, but he may rely upon the title as in ordinary cases.

I have thus far purposely refrained from any reference to the two American cases cited by the appellee, for the reason, that although the conclusion in each fully supports my position, yet the reasoning of the court is so unsatisfactory, that I have preferred to base my argument upon principle rather than to invoke the aid of these precedents.--The conclusion in the case of Beadle vs. Hunter, 3 Strobh. Law Rep's. 331, is based entirely upon what is declared to be the rule in South Carolina in respect to actions of ejectment for the recovery of the possession of lands, viz: that in such cases, two or more possessions shall *not* be linked together, so as to make out the time prescribed by the statute. The argument is founded upon *analogy,* and is therefore in conflict with the view which I have taken of the question. The other case cited of Wells vs. Ragland, 1 Swann R. 501, fully sustains my position in regard to the want of *privity* between two or more, who have each been guilty of a wrongful conversion. But the argument, though strongly presented, is too brief to afford a full view of the reasons upon which it is based. In our re-

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searches among the American reports, we have found one case in which the point under discussion was expressly ruled the other way. I allude to the case of Smith's Adm'rs vs. Newby, 13 Missouri R. 159. The decision in this case is predicated upon what I conceive to be a strained construction of the statute, and therefore inconclusive upon the point.

***7** The particular phraseology of the statute is invoked by the advocates of either side of the question under discussion as an argument in support of their respective hypotheses. By the one, it is insisted that the words of the statute create a general inhibition referable to the right of the plaintiff exclusively, and that it is not at all applicable to the right of the defendant, that the statute begins to run from the first moment when a cause of action in reference to the thing in controversy arises against any one whomsoever, and that its running is not confined to the cause of action counted upon in the particular suit. By the other, it is insisted that the words of the statute limit its operation to the particular cause counted upon, and that it is not allowable to link the possession of the vendor to that of the vendee so as to complete the full statutory period. The advocates of these two hypotheses insist upon applying their respective constructions of the statute to every case, regardless alike of the *nature* of the thing which constitutes the subject-matter of the suit, and the distinctive characteristics of the action to be brought for its recovery. It is to this want of discrimination that we may attribute the wide difference of opinion that exists upon a question of every day occurrence. It is said, however, in some of the reported cases, that to discriminate in the application of the statute as I have intimated, would be to affix to it *qualifications and limitations* never contemplated by the Legislature. This is mere assumption and the result of a want of reflection, for there is nothing better understood in jurisprudence, than that in the application of many of the ordinary principles of law they are subjected to material modifications when applied to the one or the other of the two great classes of estates. If this be so with reference to the ordinary principles of law, why may it not equally obtain in the application to statutes?

The result of this argument is, that in an action of Trover, where the statute of limitation had fully run in favor of the vendor, the sale to the defendant sued confers a *title* to the property in controversy, paramount to that of the original owner, and that the defendant may protect himself by a plea of *title,* and is not put to the plea of the statute. But that where the statutory bar was not complete at the date of the transfer to the defendant, he will not be allowed, under a plea of the statute, to link the period of his possession to that of those under whom he claims, so as to make out the time prescribed by the statute, within which the suit is to be brought.

Applying these conclusions to the case before us, it will be readily perceived that I am of the opinion that the Judge of the Circuit Court did not err in refusing to give the instruction prayed for, which constitutes the only error complained of.

Fla. 1856.
Perry v. Lewis
6 Fla. 555, 1856 WL 1523 (Fla.)

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R/S Assoc. v New York Job Dev. Auth.
98 N.Y.2d 29, 744 N.Y.S.2d 358
N.Y. 2002.

98 N.Y.2d 29, 771 N.E.2d 240, 744 N.Y.S.2d 358, 2002 WL 754667, 2002 N.Y. Slip Op. 03291

R/S Associates et al., Appellants,
v.
New York Job Development Authority, Respondent.
Court of Appeals of New York

Argued March 21, 2002;
Decided April 30, 2002

CITE TITLE AS: R/S Assoc. v New York Job Dev. Auth.

SUMMARY

Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered March 26, 2001, which, to the extent appealed from, affirmed an order of the Supreme Court (Howard Berler, J.), entered in Suffolk County, granting a motion by defendant for summary judgment dismissing the complaint, and dismissing the complaint.

R/S Assoc. v New York Job Dev. Auth., 281 AD2d 608, affirmed.

HEADNOTE

Contracts--Ambiguous Contracts--“Effective Cost of Funds” Not Ambiguous

The term “effective cost of funds” in a loan agreement between plaintiffs and defendant, a public benefit corporation, is not ambiguous and permits defendant to include the cost of defaults by other borrowers in determining the interest it charges to plaintiff. Defendant, which may finance loans to many borrowers through a single long-term bond, must repay the bond when it becomes due. Thus, the “actual” or “effective” cost of the funds loaned by defendant necessarily includes not only the interest it has to pay to bondholders, and the costs of issuing the bond, but also the cost of defaults by borrowers who received loans from bond proceeds. Inasmuch as the term in question is unambiguous, extrinsic and parol evidence may not be considered.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Contracts §§ 336-338.

NY Jur 2d, Contracts §§ 213-215.

ANNOTATION REFERENCES

See ALR Index under Certainty and Definiteness; Contracts.

POINTS OF COUNSEL

Law Offices of Sanford F. Young, P.C., New York City (*Sanford F. Young* and *Jan B. Rothman* of counsel), *Wechsler Harwood Halebian & Feffer LLP* (*John Halebian* and *Frederick W.***30** *Gerkens, III,* of counsel), *Arthur Fisch* and *Roy Jacobs* for appellants.

I. The Job Development Authority's interpretation of the term “effective cost of funds” is contrary to the plain meaning of the term. (*Two Guys from Harrison-N.Y. v S.F.R. Realty Assoc.,* 63 NY2d 396;*Sutton v East Riv. Sav. Bank,* 55 NY2d 550; *Breed v Insurance Co. of N. Am.,* 46 NY2d 351, 940;*Fiore v Fiore,* 46 NY2d 971.)II. Notwithstanding its stated obligation and intent to comply with the IRS regulation, the Job Development Authority's interest computation is inconsistent with that governing regulation. (*Ronnen v Ajax Elec. Motor Corp.,* 88 NY2d 582;*Matter of Di Giacomo v City of New York,* 46 NY2d 894.)III. The Job Development Authority's annual reports confirm that its loan losses are treated just like other administrative expenses, all of which are paid out of the 1 1/2%

spread. IV. Neither the Job Development Authority's self-supporting status, nor its dissatisfaction with the agreement, is a proper basis for construing the contract contrary to the parties' intent at the time the agreement was executed. (*W.W.W. Assoc. v Giancontieri,* 77 NY2d 157;*Fiore v Fiore,* 46 NY2d 971;*B & R Children's Overalls Co. v New York Job Dev. Auth.,* 257 AD2d 368, 93 NY2d 810;*Matter of Wallace v 600 Partners Co.,* 86 NY2d 543;*Collard v Incorporated Vil. of Flower Hill,* 52 NY2d 594; *John Doris, Inc. v Guggenheim Found.,* 209 AD2d 380;*Shoretz v Shoretz,* 186 AD2d 370, 81 NY2d 783.)V. While accepting the Job Development Authority's claims at face value, the courts below completely disregarded R/S' proof that "effective cost of funds" does not include loan losses. (*Williams Press v State of New York,* 37 NY2d 434;*W.W.W. Assoc. v Giancontieri,* 77 NY2d 157;*Putnam Rolling Ladder Co. v Manufacturers Hanover Trust Co.,* 74 NY2d 340;*Matter of Reuters Ltd. v Dow Jones Telerate,* 231 AD2d 337;*Harza Northeast v Lehrer McGovern Bovis,* 255 AD2d 935;*Automation Source Corp. v Korea Exch. Bank,* 249 AD2d 1;*Jacobson v Sassower,* 66 NY2d 991.)

Clifford Chance Rogers & Wells LLP, New York City (*David A. Schulz* and *Mark A. Weissman* of counsel), for respondent.

I. Summary judgment was properly granted under settled principles of contract construction (*B & R Children's Overalls Co. v New York Job Dev. Auth.,* 257 AD2d 368, 93 NY2d 810;*Gutter Furs v Jewelers Protection Servs.,* 79 NY2d 1027;*Manhattan & Queens Fuel Corp. v Village of Rockville Ctr.,* 72 NY2d 824;*GTF Mktg. v Colonial Aluminum Sales,* 66 NY2d 965;*Northville Indus. Corp. v Fort Neck Oil Terms. Corp.,* 64 NY2d 930;*Sloame v Madison Sq. Garden Ctr.,* 43 NY2d 656;***31***Reape v New York News,* 122 AD2d 29;*Greenleaf v Lachman,* 216 AD2d 65;*Christian, Podleska & Van Musschenbroek v Goldman, Sachs & Co.,* 203 AD2d 9;*De Fren v Russell,* 71 AD2d 416.)II. The IRS regulations are not controlling and were not violated. (*B & R Children's Overalls Co. v New York Job Dev. Auth.,* 257 AD2d 368, 93 NY2d 810;*Hudson View II Assoc. v Miller,* 174 Misc 2d 278.)III. There is no factual dispute to bar summary judgment as a matter of law. (*W.W.W. Assoc. v Giancontieri,* 77 NY2d 157;*Bensons Plaza v Great Atl. & Pac. Tea Co.,* 44 NY2d 791;*Empire Props. Corp. v Manufacturers Trust Co.,* 288 NY 242; *Westbury Post Ave. Assoc. v Great Atl. & Pac. Tea Co.,* 46 AD2d 860, 38 NY2d 890;*River View Assoc. v Sheraton Corp. of Am.,* 33 AD2d 187;*Browning-Ferris Indus. of N.Y. v County of Monroe,* 103 AD2d 1040, 64 NY2d 1046;*New York Cent. R.R. Co. v New York, New Haven & Hartford R.R. Co.,* 24 Misc 2d 414;*B & R Children's Overalls Co. v New York Job Dev. Auth.,* 257 AD2d 368;*Mount Vernon Fire Ins. Co. v Creative Hous.,* 88 NY2d 347;*Harza Northeast v Lehrer McGovern Bovis,* 255 AD2d 935.)

OPINION OF THE COURT

Wesley, J.

At issue here is the interpretation of the term "effective cost of funds" in a loan agreement between R/S Associates and the New York Job Development Authority. Because the term is not ambiguous as used in this agreement, we affirm.

The New York Job Development Authority (JDA) is a public benefit corporation created by constitutional amendment in 1961 (L 1961, ch 443, § 2). Its purpose is to "assist, promote, encourage, develop and advance the general prosperity and economic welfare of the people of the state and improve their standard of living" (Public Authorities Law § 1803 [1]). The JDA pursues this goal by providing loans and loan guarantees to help businesses expand or build facilities in New York or acquire equipment for use in this state (*see id.* § 1803 [2]). Borrowers from the JDA generally do not have access to more traditional funding sources.

Unlike a typical commercial lender, the JDA operates as a conduit funding organization. It finances loans through the sale of either taxable or tax-exempt long-term bonds, guaranteed by the State (*see*Public Authorities Law § 1813). The JDA is self-supporting; all of its operating and administrat-

ive expenses--including any loan defaults--are funded through payments made by borrowers.***32**

R/S Associates, a real estate holding company, and Ittco Sales Co., Inc., a manufacturer and distributor of automotive accessories (together R/S), have common ownership. With Ittco Sales Co. as guarantor, R/S Associates sought and obtained a commercial loan from the JDA to purchase land and construct a facility in Ronkonkoma, New York. In 1986, the JDA approved a $332,500 loan to R/S Associates, which closed two years later. The loan was funded, along with other loans to other borrowers, through the issuance of a variable rate, tax-exempt bond in the principal amount of $24,610,000. The loan agreement provided that "the rate to be charged by the JDA may be revised from time to time but will not exceed one and one half (1 1/2%) percent over JDA's effective cost of funds."

After making regular payments on the loan for over adecade, R/S filed a putative class action complaint alleging breach of contract and fraud. R/S claimed that the JDA, in its calculation of the "effective cost of funds" under the loan agreement, improperly included the cost of defaults by other borrowers. In its view, that term includes only the interest rate on the bond sold to finance the loan and the direct costs of issuing that bond, such as the cost of bond counsel, underwriters and letters of credit. R/S sought class certification; the JDA cross-moved for summary judgment dismissing the complaint. R/S then countered with its own motion for partial summary judgment on the issue of liability.

Supreme Court dismissed the complaint. The court held that the JDA properly recovers its operating costs through the interest it charges to borrowers, and that the term "effective cost of funds" includes the interest rate on the bond, the cost of issuance *and* the cost of defaults by other borrowers. The Appellate Division affirmed, noting only that because the term "effective cost of funds" in this agreement is unambiguous "the rules governing the construction of ambiguous contracts were not triggered" (281 AD2d 608, 608). We agree.

We have long adhered to the "sound rule in the construction of contracts, that where the language is clear, unequivocal and unambiguous, the contract is to be interpreted by its own language" (*Springsteen v Samson,* 32 NY 703, 706 [1865] [citing *Rogers v Kneeland,* 10 Wend 218 (1833)]). We recently reaffirmed this principle, noting that "'when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms'" (*Reiss v Financial Performance Corp.,* 97 NY2d 195, 198 [2001] [quoting *W.W.W. Assoc. v Giancontieri,* 77 NY2d 157, 162 (1990)]).***33**

In this loan agreement, the contract term "effective cost of funds" is unambiguous. Under its ordinary usage, the "effective" cost of the funds means the "actual" cost of securing such funds for a specific loan (*see e.g.* 5 Oxford English Dictionary 80 [2d ed 1989] [defining "effective" as "actual" or "existing in fact"]). Regardless of borrower defaults, the JDA's funding mechanism required it to repay the underlying bond when due. Thus, the "actual" or "effective" cost of the funds loaned by the JDA necessarily included the interest it had to pay to bondholders, the cost of issuing the bond *and* the cost of defaults by the borrowers who received loans from bond proceeds. Any other interpretation of this agreement would ignore the import of "effective" in modifying "cost of funds." The "[l]oss engendered by defaulting borrowers is a readily perceivable risk for any lender, which [the JDA] was entitled to consider in calculating the interest rate charged to [R/S]" (*B & R Children's Overalls Co. v New York Job Dev. Auth.,* 257 AD2d 368, 369 [1st Dept], *lv denied* 93 NY2d 810 [1999]).

Because the contract term is unambiguous in this context we need not address R/S' remaining arguments, based on offers of extrinsic evidence. Unless the court finds ambiguity, the rules governing the interpretation of ambiguous contracts do not come into play (*see Matter of Wallace v 600 Partners Co.,* 86 NY2d 543, 548 [1995];*Breed v Insurance*

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Co. of N. Am., 46 NY2d 351, 355 [1978]). Thus, when interpreting an unambiguous contract term "[e]vidence outside the four corners of the document ... is generally inadmissible to add to or vary the writing" (*W.W.W. Assoc.,* 77 NY2d at 162). "'[E]xtrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face'" (*id.* at 163 [quoting *Intercontinental Planning v Daystrom, Inc.,* 24 NY2d 372, 379 (1969)]; *see Reiss,* 97 NY2d at 199).

Accordingly, the order of the Appellate Division should be affirmed, with costs.

Chief Judge Kaye and Judges Smith, Levine, Ciparick, Rosenblatt and Graffeo concur.
Order affirmed, with costs.***34**

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R/S ASSOC. v JOB DEV. AUTH.
98 N.Y.2d 29, 771 N.E.2d 240578744 N.Y.S.2d 3586022002 WL 7546679992002 N.Y. Slip Op. 032914603, 771 N.E.2d 240578744 N.Y.S.2d 3586022002 WL 7546679992002 N.Y. Slip Op. 032914603, 771 N.E.2d 240578744 N.Y.S.2d 3586022002 WL 7546679992002 N.Y. Slip Op. 032914603, 771 N.E.2d 240578744 N.Y.S.2d 3586022002 WL 7546679992002 N.Y. Slip Op. 032914603

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469 So.2d 1384, 20 Fla. L. Weekly 292
(Cite as: 469 So.2d 1384)

Supreme Court of Florida.
Joseph ROBBIE, et al., Petitioners,
v.
CITY OF MIAMI, Respondent.

No. 66039.
May 23, 1985.

Appeal was taken from judgment of the Circuit Court, Dade County, James C. Henderson, J., purporting to enforce settlement agreement between city and professional football organization arising out of contract litigation. The District Court of Appeal, Third District, 454 S.2d 606, reversed and remanded. On application for review, the Supreme Court, McDonald, J., held that essential terms of proposed settlement in litigation concerning how much rent professional football organization allegedly owed city under contract between them which required organization to play annually a number of football games in city-owned stadium, as to which terms there was no disagreement, were that two extra games would be played or $30,000 per unplayed game would be due to city, that organization would increase its public liability insurance and that organization would defend certain third-party claims against city; therefore, disagreement as to amendment to "Act of God" provision did not concern essential term and did not render settlement agreement unenforceable.

Decision of District Court of Appeal quashed with orders to reinstate decision of trial court.

West Headnotes

[1] Contracts 95 ⚿15

95 Contracts
95I Requisites and Validity
95I(B) Parties, Proposals, and Acceptance
95k15 k. Necessity of Assent. Most Cited Cases

Making of a contract depends not on agreement of two minds in one intention but on agreement of two sets of external signs; contract depends not on parties having meant the same thing but having said the same thing.

[2] Contracts 95 ⚿9(1)

95 Contracts
95I Requisites and Validity
95I(A) Nature and Essentials in General
95k9 Certainty as to Subject-Matter
95k9(1) k. In General. Most Cited Cases

Parties to contract do not have to deal with every contingency in order to have enforceable contract.

[3] Compromise and Settlement 89 ⚿11

89 Compromise and Settlement
89I In General
89k10 Construction of Agreement
89k11 k. In General. Most Cited Cases

Settlements are governed by rules for interpretation of contracts.

[4] Compromise and Settlement 89 ⚿3

89 Compromise and Settlement
89I In General
89k1 Nature and Requisites
89k3 k. Subject-Matter. Most Cited Cases

Settlements are highly favored and will be enforced whenever possible.

[5] Compromise and Settlement 89 ⚿7.1

89 Compromise and Settlement
89I In General
89k7 Validity
89k7.1 k. In General. Most Cited Cases
(Formerly 89k7)

Essential terms of proposed settlement in litigation concerning how much rent professional foot-

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ball organization allegedly owed city under contract between them which required organization to play annually a number of football games in city-owned stadium, as to which terms there was no disagreement, were that two extra games would be played or $30,000 per unplayed game would be due to city, that organization would increase its public liability insurance and that organization would defend certain third-party claims against city; therefore, disagreement as to amendment to "Act of God" provision requiring organization to pay $30,000 if act of God caused cancellation of tenth game did not concern essential term and did not render settlement agreement unenforceable.

***1385** Robert L. Shevin of Sparber, Shevin, Shapo and Heilbronner, Miami, for petitioners.

Lucia A. Dougherty, City Atty., and Gisela Cardonne, Deputy City Atty., Miami, for respondent.

McDONALD, Justice.

We have for review *City of Miami v. Robbie,* 454 So.2d 606 (Fla. 3d DCA 1984), because of conflict with *Blackhawk Heating & Plumbing Co. v. Data Lease Financial Corp.,* 302 So.2d 404 (Fla.1974). We have jurisdiction. Art. V, § 3(b)(3), Fla. Const. We quash the district court's decision.

Due to the professional football players' strike in 1982, the Miami Dolphins did not play the contracted number of games in the city-owned Orange Bowl. The City of Miami sued to collect rent for the games not played and received a summary judgment on the issue of liability. Trial was set to determine the amount of damages, but prior to trial the parties reached a proposed settlement, and the trial was cancelled. Documents were prepared, but a discord arose between the parties as to a provision in the settlement. The parties agreed, basically, that the Dolphins will play an extra game in both 1985 and 1986, but, if either extra game is not played "for any reason" the Dolphins will pay $30,000 per game. The original contract excuses the Dolphins from the rent obligation if any of the nine scheduled games are not played due to an "Act of God."

The Dolphins contend they also need not pay the $30,000 if the tenth game is not played due to an Act of God. The city, in preparing the settlement contract, included an amendment to the Act of God provision that requires the Dolphins to pay the $30,000 if an Act of God causes cancellation of the tenth game. The Dolphins filed suit to enforce the settlement but for the amendment to the Act of God provision. The trial court found an enforceable settlement agreement. The district court reversed, finding the provision in dispute to be an essential element of the settlement agreement and that the parties had reached no *subjective* meeting of the minds as to the agreement's terms.

[1][2] We have consistently held that an objective test is used to determine whether a contract is enforceable. *Blackhawk* (and cases cited therein). As stated in *Blackhawk:*

"The making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs-not on the parties having meant the same thing but on their having said the same thing."

302 So.2d at 407, quoting *Gendzier v. Bielecki,* 97 So.2d 604, 608 (Fla.1957). In addition, parties to a contract do not have to deal with every contingency in order to have an enforceable contract. *See Blackhawk.*

[3][4] Settlements, of course, are governed by the rules for interpretation of contracts. *Dorson v. Dorson,* 393 So.2d 632 (Fla. 4th DCA 1981). Additionally, settlements are highly favored and will be enforced whenever possible. *See Pearson v. Ecological Science Corp.,* 522 F.2d 171 (5th Cir.1975), *cert. denied,* 425 U.S. 912, 96 S.Ct. 1508, 47 L.Ed.2d 762 (1976); *Dorson.*

[5] In the case sub judice the disagreement over the application of the Act of God provision to the tenth game was a mere contingency. It was not, as

the district court below determined, an essential element of the contract. The essential terms ***1386** of the settlement are, as Judge Jorgenson correctly states in his dissent to the district court's decision, that two extra games will be played or $30,000 per unplayed game will be due; the Dolphins will increase their public liability insurance; and the Dolphins will defend certain third party claims against the city. As to these terms there was no disagreement. All the documents prepared and the transcripts of the city commission meeting are in accord on the essential elements. Therefore, under *Blackhawk,* the parties have said the same thing as to the essential elements, and the settlement should be enforced. In the unlikely event that an Act of God prevents the tenth game from being played in 1985 or 1986, the parties can litigate whether the Dolphins are liable for $30,000 a game at that time.

The district court improperly relied on *Gaines v. Nortrust Realty Management, Inc.,* 422 So.2d 1037 (Fla. 3d DCA 1982). In *Gaines* there was absolutely no objective evidence to enable the court to discover the terms of the settlement. In the present case, on the other hand, the court had before it the transcripts of the commission meeting, a lengthy resolution by the commission adopting the settlement and stating its terms, a stipulation and order prepared by the city, releases, and letters acknowledging the settlement. Therefore, we adopt Judge Jorgenson's dissent.

Accordingly, the decision of the district court is quashed with orders to reinstate the decision of the trial court.

It is so ordered.

BOYD, C.J., and ADKINS, OVERTON, ALDERMAN, EHRLICH and SHAW, JJ., concur.

Fla.,1985.
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Shadlich v Rongrant Assoc., LLC
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NY,2009.

66 A.D.3d 759, 887 N.Y.S.2d 228, 2009 WL 3298124, 2009 N.Y. Slip Op. 07394

Emil Shadlich et al., Respondents
v
Rongrant Associates, LLC, Respondent, and Rite Aid of New York, Inc., Appellant.
Supreme Court, Appellate Division, Second Department, New York

October 13, 2009

CITE TITLE AS: Shadlich v Rongrant Assoc., LLC

HEADNOTE

Negligence
Maintenance of Premises

While tenant argued that it had no duty to maintain area where decedent allegedly tripped and fell, relying upon provision in its lease obligating it to maintain "sidewalk" in front of leased premises, provision was ambiguous as to whether tenant had duty to maintain area where decedent tripped and fell; thus, tenant was not entitled to summary judgment. ***760**

Raven & Kolbe, LLP, New York, N.Y. (Michael T. Gleason of counsel), for appellant.
Loccisano & Larkin, Hauppauge, N.Y. (Robert X. Larkin of counsel), for defendant-respondent Rongrant Associates, LLC.
In an action to recover damages for personal injuries, etc., the defendant Rite Aid of New York, Inc., appeals from an order of the Supreme Court, Suffolk County (Rebolini, J.), dated August 18, 2008, which denied its motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against it.

Ordered that the order is affirmed, with costs.

On its motion for summary judgment, the defendant Rite Aid of New York, Inc. (hereinafter Rite Aid), argued that it had no duty to maintain the area where the plaintiff's decedent allegedly tripped and fell, relying upon a provision in its lease with the defendant Rongrant Associates, LLC, obligating it to maintain "the sidewalk" in front of the leased premises. However, that provision is ambiguous as to whether Rite Aid had a duty to maintain the area where the decedent tripped and fell (*see County of Orange v Carrier Corp.,* 57 AD3d 601, 602 [2008]; *Lerer v City of New York,* 301 AD2d 577, 578 [2003]). When the language of a contract is ambiguous, its construction presents a question of fact that may not be resolved by the court on a motion for summary judgment (*see Amusement Bus. Underwriters v American Intl. Group,* 66 NY2d 878, 880 [1985];*County of Orange v Carrier Corp.,* 57 AD3d at 602;*DePasquale v Daniel Realty Assoc.,* 304 AD2d 613 [2003]). Contrary to Rite Aid's contention, the rule that ambiguous language in a contract will be construed against the drafter is not applicable, because the subject lease resulted from negotiations between commercially sophisticated entities (*see Citibank, N.A. v 666 Fifth Ave. Ltd. Partnership,* 2 AD3d 331 [2003];*Coliseum Towers Assoc. v County of Nassau,* 2 AD3d 562, 565 [2003]). Accordingly, Rite Aid failed to make a prima facie showing of entitlement to judgment as a matter of law, and thus, the Supreme Court properly denied Rite Aid's motion for summary judgment without considering the sufficiency of the opposition papers (*see Miller v Bah,* 58 AD3d 815, 816 [2009]). Fisher, J.P., Covello, Angiolillo and Roman, JJ., concur.

NY,2009.
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66 A.D.3d 759, 887 N.Y.S.2d 2286022009 WL 32981249992009 N.Y. Slip Op. 073944603, 887 N.Y.S.2d 2286022009 WL 32981249992009 N.Y.

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945 So.2d 1160, 31 Fla. L. Weekly S840
(Cite as: 945 So.2d 1160)

H

Supreme Court of Florida.
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Petitioner,
v.
Margaret ROACH, et al., Respondents.

No. SC04-2313.
Dec. 14, 2006.

Background: Passengers brought action against driver's automobile insurer to recover underinsured motorist (UIM) benefits under policy executed in another state, even though that state's law would preclude recovery. The Circuit Court, Polk County, Dennis P. Maloney, J., entered summary judgment in favor of insurer. Passengers appealed. On denial of rehearing, the District Court of Appeal, Wallace, J., 892 So.2d 1107, reversed and remanded and certified question of great public importance.

Holding: The Supreme Court, Cantero, J., held that public policy exception to lex loci contractus rule did not apply.

Quashed.

Pariente, J., concurred and filed opinion.

Lewis, C.J., concurred in the result and filed opinion.

West Headnotes

[1] Insurance 217 1088

217 Insurance
217III What Law Governs
217III(A) Choice of Law
217k1086 Choice of Law Rules
217k1088 k. Place of contracting or performance. Most Cited Cases

The rule of "lex loci contractus," as applied to insurance contracts, provides that the law of the jurisdiction where the contract was executed governs the rights and liabilities of the parties in determining an issue of insurance coverage.

[2] Contracts 95 144

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k144 k. What law governs. Most Cited Cases

The public policy exception to lex loci contractus requires both a Florida citizen in need of protection and a paramount Florida public policy.

[3] Insurance 217 1088

217 Insurance
217III What Law Governs
217III(A) Choice of Law
217k1086 Choice of Law Rules
217k1088 k. Place of contracting or performance. Most Cited Cases

Insurance 217 1090

217 Insurance
217III What Law Governs
217III(A) Choice of Law
217k1086 Choice of Law Rules
217k1090 k. Public policy. Most Cited Cases

In the context of insurance contracts, the public policy exception to lex loci contractus requires a Florida citizen in need of protection, a paramount Florida public policy, and reasonable notice to the insurer that the insured is a Florida citizen.

[4] Insurance 217 1127

217 Insurance
217IV Insurance Companies and Related Entities
217IV(A) Domestic Companies in General

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217k1125 Authority to Do Business
217k1127 k. Certificates, licenses or registration. Most Cited Cases

An insurer may only issue policies in a state in which it is licensed and in accordance with that state's law.

[5] Insurance 217 ⚿1090

217 Insurance
217III What Law Governs
217III(A) Choice of Law
217k1086 Choice of Law Rules
217k1090 k. Public policy. Most Cited Cases

The public policy exception displaces the lex loci contractus rule only when the foreign insurer has notice that the insured is not merely a temporary visitor, but a permanent Florida resident.

[6] Insurance 217 ⚿1089

217 Insurance
217III What Law Governs
217III(A) Choice of Law
217k1086 Choice of Law Rules
217k1089 k. Significant relationship test. Most Cited Cases

Florida's significant connection to the insurance coverage is not test for invoking public policy exception to the lex loci contractus rule.

[7] Contracts 95 ⚿144

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k144 k. What law governs. Most Cited Cases

The lex loci contractus rule applies to conflict-of-law issues involving contracts, and the public policy exception to that rule is narrow and does not apply unless it is necessary to protect Florida's own citizens.

[8] Insurance 217 ⚿1091(11)

217 Insurance
217III What Law Governs
217III(A) Choice of Law
217k1086 Choice of Law Rules
217k1091 Particular Applications of Rules
217k1091(9) Automobile Insurance
217k1091(11) k. Uninsured or underinsured motorist coverage. Most Cited Cases

Public policy exception to lex loci contractus rule did not apply to Florida residents' claim for underinsured motorist (UIM) benefits under policy issued in another state to named insureds who were part-time, rather than permanent, residents of Florida.

***1161** Elizabeth K. Russo of Russo Appellate Firm, P.A., Miami, FL and Thomas F. Neal and Stephen J. Jacobs of deBeaubien, Knight, Simmons, Mantzaris and Neal, LLP, Orlando, FL, for Petitioner.

Joel D. Eaton of Podhurst Orseck, P.A., Miami, FL and Weldon Earl Brennan of Wagner, Vaughan and McLaughlin, P.A., Tampa, FL, for Respondent.

Charles W. Hall and Mark D. Tinker of Fowler, White, Boggs and Banker, P.A., St. Petersburg, FL, for Amicus Curiae.

CANTERO, J.

This case requires us to decide which state's law applies when an automobile insurance contract is executed in another state, where the insureds permanently reside, but the insureds spend a substantial amount of time in Florida and the accident occurs here. In *Roach v. State Farm Mutual Automobile Insurance Co.,* 892 So.2d 1107, 1112 (Fla. 2d DCA 2004), the district court of appeal held that Florida's public policy prohibited application of the lex loci contractus rule, which would apply the law of the state where the contract was executed. Instead, the court invalidated an exclusion contained in the policy that, although permitted in the state where the policy was executed, is not permissible

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under Florida law. The court then certified ***1162** a question of great public importance.[FN1] We accepted jurisdiction. *See* art. V, § 3(b)(4), Fla. Const. To clarify the issue presented, we rephrase the question as follows:

> FN1. The district court certified the following question:
>
> > WHEN FLORIDA IS THE FORUM FOR AN ACTION TO OBTAIN UNDERINSURED MOTORIST BENEFITS UNDER AN INSURANCE CONTRACT THAT IS OTHERWISE GOVERNED BY THE LAW OF ANOTHER STATE, MAY AN INSURED INVOKE FLORIDA'S PUBLIC POLICY TO INVALIDATE AN EXCLUSIONARY CLAUSE PROHIBITING THE "STACKING" OF UNDERINSURED MOTORIST BENEFITS WHEN THERE IS A SIGNIFICANT DEGREE OF PERMANENCY IN THE INSURED'S SOJOURN IN FLORIDA AND THE INSURER IS ON REASONABLE NOTICE THAT THE RISK OF THE POLICY IS CENTERED IN FLORIDA AT THE TIME OF THE ACCIDENT THAT OCCURRED IN FLORIDA?
>
> *Id.* at 1113. On review, however, the parties acknowledge that the district court's use of the insurance term "stacking" was inaccurate.

WHERE RESIDENTS OF ANOTHER STATE WHO RESIDE IN FLORIDA FOR SEVERAL MONTHS OF THE YEAR EXECUTE AN INSURANCE CONTRACT IN THAT STATE, MAY THEY INVOKE FLORIDA'S PUBLIC POLICY EXCEPTION TO THE RULE OF LEX LOCI CONTRACTUS TO INVALIDATE AN EXCLUSIONARY CLAUSE IN THE POLICY?

As explained below, we answer the question "no" because the public policy exception to the lex loci rule may only be invoked to protect permanent Florida residents. We quash the district court's decision, which unduly expanded the exception to protect temporary residents.

We begin our opinion by examining the pertinent facts of the case. We then discuss the governing choice-of-law rule and the factors used in determining when the exception applies. Finally, we explain why the exception does not apply in this case.

I. THE FACTS OF THE CASE

The insureds, Ivan and Betty Hodges, lived in their homesteaded residence in Indiana, where they purchased from their local State Farm agent an automobile policy covering their cars. In 1993, the couple purchased a second home in Lake Wales, Florida, and began spending several months there each year, from late November through April. The Roaches, the respondents here, were winter neighbors of the Hodges in Florida. On January 26, 2001, they were passengers in the Hodges' car when it crashed with another car, killing Mrs. Hodges. The Roaches sued Mr. Hodges and the other car's driver. They later settled the personal injury liability claims with Mr. Hodges and with the other driver for their respective policy limits. The Roaches, however, sought underinsured motorist benefits under Mr. Hodges's policy, and so the lawsuit continued against State Farm.

The trial court granted State Farm's motion for summary judgment based on the terms of the policy and Florida's lex loci contractus rule of comity. That rule provides that the law of the place where the contract was executed governs the insurance contract.

On review, the Second District Court of Appeal acknowledged that, under the lex loci rule, Indiana law would apply to the Indiana automobile insurance contract. The court invoked the public policy exception, however, to nullify the policy term that would have prohibited recovery on the underinsured benefits claim and thus apply Florida law allowing recovery. *Id.* at 1112.[FN2]

FN2. Indiana and Florida define underinsurance differently. *Compare* Ind.Code § 27-7-5-4 (West 2003) *with* § 627.727(1), Fla. Stat. (1999). Further, Florida does not allow underinsurance coverage to be reduced by setoff against other coverage, while Indiana law does. *Compare* Ind.Code § 27-7-5-5 (2004) *with* § 627.727(1), Fla. Stat. (1999). Accordingly, compensation was available under Florida law that was not available under Indiana law and the terms of the policy.

***1163** The Second District held that the exception applies Florida law to insurance contracts when Florida has a "significant connection to the insurance coverage and when the insurance company has reasonable notice that the persons and risks covered by the insurance policy are centered in Florida." *Id.* at 1110 (footnote omitted). The court concluded that the Roaches could invoke the public policy exception based on "Florida's connection to the [Hodges'] insurance coverage." *Id.* at 1111. Examining this connection, the district court described the Hodges as winter residents or "snow birds," which the court defined as "those who spend substantially less time in Florida than year-round residents but who reside in our state with a significant degree of permanence." *Id.* at 1111, 1108. Based on the Hodges' ownership of a Florida home, their residence here for "approximately five and one-half months every year" since 1993, and their garaging one of their cars here at the time of the accident, the court found the Hodges had "established a significant degree of permanency" in Florida. *Id.* at 1112. The court remanded the case for consideration of disputed issues of fact, such as whether the insurer had "reasonable notice of Florida's connection" to the Hodges' vehicle. *Id.* at 1111-13. The court also certified the question we address here. *Id.* at 1113.

II. LEX LOCI CONTRACTUS AND THE PUBLIC POLICY EXCEPTION

Before we answer the certified question, we must first review the rule of lex loci contractus, the parameters of its public policy exception, and how the exception has been applied.

A. The Rule of Lex Loci Contractus

For reasons we have previously explained, we apply different choice of law rules to different areas of the law. For example, with respect to torts and statutes of limitation, we have abandoned the rule that the applicable substantive law is the law of the state where the injury occurred-*i.e.,* lex loci delicti-in favor of a flexible test to determine which state has the most significant relationships to the cause of action. *See Bishop v. Fla. Specialty Paint Co.,* 389 So.2d 999, 1001 (Fla.1980) ("[W]e now adopt the 'significant relationships test' as set forth in the Restatement (Second) of Conflict of Laws §§ 145-146 (1971)."); *Bates v. Cook, Inc.,* 509 So.2d 1112, 1114-15 (Fla.1987) ("We are now convinced that just as in the case of other issues of substantive law, the significant relationships test should be used to decide conflicts of law questions concerning the statute of limitations.").

[1] In contrast, in determining which state's law applies to contracts, we have long adhered to the rule of lex loci contractus. That rule, as applied to insurance contracts, provides that the law of the jurisdiction where the contract was executed governs the rights and liabilities of the parties in determining an issue of insurance coverage. *Sturiano v. Brooks,* 523 So.2d 1126, 1129 (Fla.1988). In *Sturiano,* we considered-and rejected-the significant relationships test. *Id.* at 1128-29. In that case, we answered a certified question asking whether the lex loci rule governed the "rights and liabilities of the parties in determining the applicable law on an issue of insurance coverage." *Id.* We discussed ***1164** the significant relationships test, which requires consideration of various contacts between the contract and the states involved-such as the place of contracting and the place of performance-and weighing them to determine the state with the "most significant relationship to the transaction and the parties." *Id.* at 1129 (quoting Restatement (Second) of Conflict of Laws § 188 (1971)).[FN3]

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We acknowledged that "lex loci contractus is an inflexible rule," but concluded that "this inflexibility is necessary to ensure stability in contract arrangements." *Id.* We reasoned that "[w]hen parties come to terms in an agreement, they do so with the implied acknowledgment that the laws of that jurisdiction will control absent some provision to the contrary." *Id.* We concluded that to abandon this principle and permit a party to change or modify contract terms by moving to another state would unnecessarily disrupt the stability of contracts. *Id.* We explained the purpose behind the rule as follows:

> FN3. The Restatement requires the consideration of certain contacts as follows:
>
> (1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6.
>
> (2) In the absence of an effective choice of law by the parties (see § 187), the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
>
> (a) the place of contracting,
>
> (b) the place of negotiation of the contract,
>
> (c) the place of performance,
>
> (d) the location of the subject matter of the contract, and
>
> (e) the domicil, residence, nationality, place of incorporation and place of business of the parties.
>
> These contacts are to be evaluated according to their relative importance with respect to the particular issue.
>
> (3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in §§ 189-199 and 203.
>
> Restatement (Second) of Conflict of Laws § 188 (1971).

In the case of an insurance contract, the parties enter into that contract with the acknowledgment that the laws of that jurisdiction control their actions. In essence, that jurisdiction's laws are incorporated by implication into the agreement. The parties to this contract did not bargain for Florida or any other state's laws to control. We must presume that the parties did bargain for, or at least expected, New York law to apply.
Id. at 1130; *see also Lumbermens Mut. Cas. Co. v. August,* 530 So.2d 293, 295 (Fla.1988) ("[T]he lex loci contractus rule determines the choice of law for interpretation of provisions of uninsured motorists clauses in automobile insurance policies just as it applies to other issues of automobile insurance coverage."). We have never retreated from our adherence to this rule in determining which state's law applies in interpreting contracts.

B. The Public Policy Exception

[2] Florida courts have carved out a narrow exception to the lex loci rule. We long ago held "that the rules of comity may not be departed from, *unless* in certain cases for the purpose of necessary protection of our own citizens, or of enforcing some paramount rule of public policy." *Herron v. Passailaigue,* 92 Fla. 818, 110 So. 539, 542 (1926) (emphasis added); *see also In re Estate of Nicole Santos,* 648 So.2d 277, 281 (Fla. 4th DCA 1995) ("We agree that Florida courts may depart from the rule of comity where necessary to protect its citizens or to enforce some paramount***1165** rules of public policy. However, it has also been held that just because the law differs between Florida and another jurisdiction does not in itself bar application of foreign law."); *Lincoln Nat'l Health & Cas. Ins.*

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Co. v. Mitsubishi Motor Sales of Am., Inc., 666 So.2d 159, 161 (Fla. 5th DCA 1995) ("Under these choice of law rules, the laws of the place in which a contract was made govern matters concerning its execution, interpretation and validity, unless public policy requires the assertion of Florida's paramount interest in protecting its citizens from inequitable insurance contracts."); *Aetna Cas. & Sur. Co. v. Enright,* 258 So.2d 472, 475 (Fla. 3d DCA 1972) ("[A] court may not depart from the rules of comity, except in certain cases, for the purpose of protection of Florida citizens or for the purpose of enforcing some paramount rule of public policy."). This has become known as the public policy exception. It requires *both* a Florida citizen in need of protection *and* a paramount Florida public policy.

[3][4] In the context of insurance contracts, at least, one more requirement also must be met: the insurer must be on reasonable notice that the insured is a Florida citizen. An insurer may only issue policies in a state in which it is licensed and in accordance with that state's law. The requirement of notice informs the insurer of which state's law will govern the policy. Accordingly, in applying the exception, courts consider whether the insured notified the insurer of a permanent change of residence and whether the insured risk is or will be primarily located in Florida. *See New Jersey Mfrs. Ins. Co. v. Woodward,* 456 So.2d 552 (Fla. 3d DCA 1984) (holding that Florida law did not apply to a New Jersey policy because the insurer had notice only of the insured's changed mailing address, not that the insured changed its permanent address to Florida and principally garaged vehicles in Florida); *State Farm Mut. Auto. Ins. Co. v. Davella,* 450 So.2d 1202, 1204 (Fla. 3d DCA 1984) (holding Florida law inapplicable to an out-of-state policy where the insured specifically rejected a Florida policy and informed the insurer that the Florida residence was temporary). Such notice allows an insurer to decline to issue a policy, to withdraw from one, or-if it is licensed in Florida-to issue a policy in Florida and charge the appropriate premium. *See* Michael S. Finch, *Choice-of-Law Problems in Florida Courts: A Retrospective on the Restatement (Second),* 24 Stetson L.Rev. 653, 716 (1995) ("[T]he insurer is entitled to notice of the relocation so that it can renegotiate applicable premiums or, if it so chooses, withdraw from the insurance relationship."); *cf. Tenn. Farmers Mut. Ins. Co. v. Meador,* 467 So.2d 471, 472 (Fla. 5th DCA 1985) (noting that upon receiving notice of the insured's move to a state where the insurer did not operate, the insurer sent notice of its intent not to renew the policy).

C. This Court's Prior Applications of the Rule

We have had three prior opportunities to interpret the lex loci contractus rule and its public policy exception as it applies to insurance policies. Fourteen years before our decision in *Sturiano,* we applied the public policy exception in *Gillen v. United Services Automobile Ass'n,* 300 So.2d 3 (1974). In that case, as in this one, we considered conflicting automobile insurance coverage. The insureds, while residents of New Hampshire, obtained from a New Hampshire insurer separate automobile insurance policies on their two cars. They later moved to Florida and notified the insurer of the move. In Florida, they sold one car and bought another. The out-of-state insurer issued a new policy for the car in Florida. The insurer, however, did ***1166** not alter the existing policy on the insureds' other car. When the insureds were later involved in an accident in Florida, they sought recovery under both policies. The insurer paid under the Florida-issued policy, but refused to pay under the other policy issued in New Hampshire, citing its "other insurance" clause. *Id.* at 4-5.

Despite the insurer's issuance of the policy in New Hampshire, we applied Florida law based on three factors. First, we previously had held that "other insurance" clauses violated Florida public policy. *See Sellers v. U.S. Fid. & Guar. Co.,* 185 So.2d 689 (Fla.1966).[FN4] Second, the insureds moved permanently from New Hampshire. As we noted, they "were in the process of establishing themselves as *permanent residents of this State,* and as such are proper subjects of this Court's protec-

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tion from injustice or injury." *Gillen,* 300 So.2d at 6 (emphasis added). Third, the insureds notified the insurer of the move to Florida, and the insurer issued a policy here. We emphasized that "[t]his c[ould] be seen as an acknowledgment of domiciliary change and would indicate to [the insurer] that coverage under both policies would be shifted to Florida." *Id.* Accordingly, we concluded: "Here, the substantial interest of Florida in protecting its citizens from the use of 'other insurance' clauses rises to a level above New Hampshire's interest in permitting them. Public policy requires this Court to assert Florida's paramount interest in protecting its own from inequitable insurance arrangements." *Id.* at 7.

> FN4. We have never held, for purposes of applying the exception, that *every* out-of-state contractual provision that conflicts with Florida law violates paramount public policy. In fact, we have held that some conflicting laws do *not* violate our public policy. *See Cont'l Mortgage Investors v. Sailboat Key, Inc.,* 395 So.2d 507, 509 (Fla.1981) (stating that "usury laws are not so distinctive a part of a forum's public policy that a court, for public policy reasons, will not look to another jurisdiction's law which is sufficiently connected with a contract and will uphold the contract," and that the Court did not think "the mere fact that there exists in Florida a usury statute which prohibits certain interest rates establishes a strong public policy against such conduct in this state where interstate loans are concerned"). As explained below, however, we need not decide whether the conflicting Indiana law violated Florida's public policy.

Several years after *Gillen,* we decided *Sturiano.* In that case, we not only rejected the most-significant-relationships test, but applied the lex loci rule to facts essentially identical to those here. The insureds were residents of New York who purchased an automobile insurance policy in New York and who each year spent several winter months in Florida. 523 So.2d at 1129. We held that "[u]nder the doctrine of lex loci contractus, it is clear that New York law must apply." *Id.* at 1129.

Finally, ten years after *Sturiano,* we once again applied the lex loci rule to answer a question certified by the Eleventh Circuit Court of Appeals. In *Strochak v. Federal Insurance Co.,* 717 So.2d 453 (Fla.1998), the facts were similar to those in *Gillen.* The insurer had issued a "Masterpiece" policy in 1985 covering a couple's cars and two residences-the primary one in New Jersey and one in Florida. After the husband's death in 1987, his widow bought one of the cars from their business, and in 1989 she moved to Florida. She registered the car in Florida, listing her Florida residence, regularly garaged the car at that address, and obtained a Florida-issued and-delivered policy covering it. In 1990, the insurer issued a new "Masterpiece" policy, adding the Florida car. The policy had a different number than the one issued to her late husband, listed a different named insured***1167** -Mrs. Strochak-and provided different coverage. Moreover, the policy "contained Florida policy terms and Florida signatures" and the insurer issued and delivered the policy to Mrs. Strochak at her Florida residence. *Id.* at 455. In 1992, Mrs. Strochak was involved in an accident in Florida. The insurer contended that Mr. Strochak waived excess uninsured motorists benefits back in 1985 (under the prior policy), and that New Jersey law governed the contract. We concluded, however,

> that the 1990 Masterpiece policy that provided excess liability coverage for the 1984 Lincoln was not the same policy that was issued and delivered in New Jersey in 1985. The 1990 policy was issued and delivered in Florida, renewed in June 1992, and was in effect at the time of the accident. *Under these circumstances, we must presume that the parties to this contract bargained for, or at least expected, Florida law to apply.*

Id. (footnote omitted) (emphasis added). Ac-

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cordingly, we held that the requirement of section 627.727(2), Florida Statutes (Supp.1990), that automobile insurance policies "delivered or issued for delivery in this state" contain uninsured motorist coverage, unless expressly waived by the insured, applied to the 1990 policy. In answer to the federal court's certified question, we held the insurer was required under Florida law to offer excess uninsured motorist benefits in 1990, when it first delivered the new policy covering the car in Florida. 717 So.2d at 455-56. Because *Strochak* involved the application of a Florida statute to a Florida-issued contract covering a Florida-based risk, the case did not involve the policy exception of *Gillen,* but a straightforward application of the lex loci rule of *Sturiano.*

[5] As these cases demonstrate, the public policy exception is intended to be narrow. It displaces the lex loci rule only when the insurer has notice that the insured is not merely a temporary visitor, but a permanent Florida resident. We now turn to the district court's decision applying the public policy exception to this case.

III. THE PENDING CASE AND THE CERTIFIED QUESTION

The district court in this case misstated the test for applying the public policy exception. By using a test we have specifically rejected, the court broadened the public policy exception far beyond its narrow purpose.

[6] The district court erroneously stated that "[t]he public policy exception [to the lex loci contractus rule] is properly invoked *when Florida bears a significant connection to the insurance coverage.* " 892 So.2d at 1110 (footnote omitted) (emphasis added). Applying this test to the named insureds, the court considered various factors, such as the length of their stay in their Florida home every year and that their car was garaged in Florida at the time of the accident. The court concluded that the insureds had a "significant degree of permanency" and that their "continuing permanent contacts with Indiana do not defeat the permanence of their Florida winter residency." *Id.* at 1112. The court held that "when there is a significant degree of permanency in the insured's sojourn in Florida, then the insured may invoke Florida's public policy" to invalidate an exclusionary clause in an out-of-state insurance contract "provided that the insurance company is on reasonable notice that the risk of the policy is centered in Florida at the time of the accident." *Id.*

The district court did acknowledge our decision in *Sturiano* rejecting the most-significant-relationships test. *Id.* at 1110-11 & n. 3. In reaching its holding, however, ***1168** the court nevertheless relied on our discussion of that test in *Gillen* and the apparent application of that test in several district court cases decided before *Sturiano. See Safeco Ins. Co. of Am. v. Ware,* 424 So.2d 907, 908 (Fla. 4th DCA 1982) (affirming the trial court's determination that Florida " 'ha[d] a significant relationship' to the insurance contract at issue"); *Petrik v. N.H. Ins. Co.,* 379 So.2d 1287, 1290 (Fla. 1st DCA 1979) (noting that "[t]he State of Florida had significant contacts with the automobile liability policy which justified an interpretation of it under Florida law"); *Johnson v. Auto-Owners Ins. Co.,* 289 So.2d 748, 749-50 (Fla. 1st DCA 1974) (finding that "Florida had ample contacts with the insured to apply the law of Florida"). Applying a "significant connection" test, the district court analyzed several facts to determine whether Florida bore a significant connection to the insurance coverage. Thus, the court essentially applied the most-significant-relationships test under another name. As a result, even though the Hodges were permanent residents of Indiana, the court focused on their extended but temporary winter stay in Florida and found it "significantly permanent." *See Roach,* 892 So.2d at 1112.

[7] Our decisions in *Gillen, Sturiano,* and *Strochak* make clear both that this state applies the lex loci rule to conflict-of-law issues involving contracts, and that the public policy exception to that rule is narrow and does not apply unless it is neces-

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sary to protect Florida's own citizens. *See Gillen,* 300 So.2d at 7; *Herron,* 110 So. at 542. *Gillen* rested on the fact that the insureds in that case moved to Florida and that they indeed were "establishing themselves as permanent residents." 300 So.2d at 6-7. We emphasized that the insurer had acknowledged the insureds' change of domicile from New Hampshire to Florida and asserted our "substantial interest of Florida in protecting its citizens." *Id.* at 7. Thus, because the insureds were Florida residents and because they notified the insurer of their change of domicile, we determined it necessary to "assert Florida's paramount interest in protecting its own from inequitable insurance arrangements." *Id.* Our decision in *Strochak,* too, was based on the insured's permanent move to Florida and the insurer's issuance of the policy here.

[8] In this case, the Hodges were permanent residents of Indiana with automobile insurance purchased in Indiana from a State Farm agent in Indiana. The difference between the facts in *Gillen* and *Strochak,* on the one hand, and those in *Sturiano* and this case, on the other, is that in *Gillen* and *Strochak* the insureds were permanent residents of Florida, and the insurer knew it. *Cf. Reinish v. Clark,* 765 So.2d 197, 208 (Fla. 1st DCA 2000) (holding that the Florida homestead exemption's limited application to a home constituting the "permanent residence" was not unconstitutional as to nonresidents and stating that "[i]rrespective of the state of residency of their owners, secondary residences do not trigger the same public policy concerns and are not entitled to the same protection as permanent Florida residences"). Because the insureds in this case were not permanent residents of Florida, the public policy exception to the lex loci rule does not apply.

We noted above that the public policy exception to the lex loci rule requires *both* the involvement of a Florida citizen in need of protection *and* the existence of a paramount Florida public policy. Our answer to the certified question, holding that the public policy exception applies only when permanent residents are involved, renders it unnecessary to consider whether the Indiana law regarding recovery of underinsurance claims, which conflicts with ***1169** the corresponding Florida statute, violates a paramount public policy of Florida.

IV. CONCLUSION

The public policy exception to the lex loci contractus rule is narrow. It applies only when necessary to protect "our own citizens," *Herron,* 110 So. at 542, not visitors or even temporary residents, and then only when necessary to promote a paramount public policy of this state. Although Florida welcomes its many visitors, whether for short or extended stays, we cannot rewrite their out-of-state contracts. To do so would throw conflicts-of-law jurisprudence into disarray and destroy the stability in contractual arrangements that the lex loci rule is designed to ensure. We therefore answer the certified question in the negative and quash the decision below.

It is so ordered.

WELLS, ANSTEAD, PARIENTE, QUINCE, and BELL, JJ., concur.
PARIENTE, J., concurs with an opinion.
LEWIS, C.J., concurs in result only with an opinion.

PARIENTE, J., concurring.

If I were to write on a clean slate, I would apply the "significant relationship" test set forth in the Restatement (Second) of Conflict of Laws, section 188 (1971). I thus fully agree with Justice Grimes' concurrence in *Sturiano v. Brooks,* 523 So.2d 1126, 1130 (Fla.1988), in which Justice Overton joined. As Justice Grimes noted, the "rule of lex loci contractus has been roundly criticized as mechanistic and unworkable in practice." *Id.* (Grimes, J., concurring) (footnote omitted). Although not a bright line rule, the "significant relationship" test appears to me to produce the most equitable result.

Absent receding from *Sturiano,* I concur in the majority's decision, including its analysis distinguishing the other cases where we have applied

Florida law to out-of-state automobile insurance contracts. I agree with the majority that the rule of lex loci contractus requires application of the law where the contract was entered. In my view, the majority also accurately explains that the exception to lex loci contractus is a narrow one.

I write separately to point out that the "significant connection" test utilized by the Second District Court of Appeal in this case is probably more expansive than the "significant relationship" test. Further, even assuming we were to apply the Restatement's "significant relationship" test, application of this test would not alter the Court's conclusion that Indiana law governing insurance contracts applies in this case.

The Second District relied on what it termed the "significant connection" test and stated that the "public policy exception is properly invoked when Florida bears a significant connection to the insurance coverage and when the insurance company has reasonable notice that the persons and risks covered by the insurance policy are centered in Florida." *Roach v. State Farm Mut. Auto. Ins. Co.,* 892 So.2d 1107, 1110 (Fla. 2d DCA 2004) (footnote omitted). The Second District determined that this test is satisfied here, provided that State Farm was on reasonable notice that the risk of the insurance policy was centered in Florida. *See id.* at 1112. In making this determination, the Second District reasoned that the Hodges established a significant degree of permanency in Florida, and thus a significant connection to this state, because they owned a home in Florida, resided there for "approximately five and one-half months every year" since 1993, and were garaging ***1170** one of their automobiles in Florida at the time of the accident. *Id.* Under the Second District's "significant connection" test, other factors such as the residency of the insured and the location where the insurance policy was issued are not considered in making a choice of law determination. In this regard, the "significant connection" test is much broader in application than the Restatement's "significant relationship" test, which contains several factors that must be considered in evaluating which state's laws apply.

The Restatement's test requires a court to consider the following factors in making a choice of law determination: (a) the place of contracting; (b) the place of negotiation of the contract; (c) the place of performance; (d) the location of the subject matter of the contract; and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties. *See* Restatement (Second) of Conflict of Laws § 188(2). The Restatement also provides that "[t]hese contacts are to be evaluated according to their relative importance with respect to the particular issue," *id.,* but that "[i]f the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied," except in certain circumstances not relevant here. Restatement (Second) of Conflict of Laws § 188(3).

In this case, application of these factors weighs in favor of Indiana law governing the Hodges' insurance contract. Here, the insurance policy was contracted, negotiated, and subsequently issued to the Hodges in Indiana through State Farm's Indiana insurance agent. In addition, the Hodges are permanent residents of Indiana. Thus, three of the five factors in the "significant relationship" test suggest that Indiana law is appropriate. The two remaining factors, place of performance and location of the subject matter of the contract, do not alter this conclusion. Because an automobile insurance policy typically provides coverage for the automobile(s) listed in the policy regardless of the state in which an accident occurs, in most cases the place of performance cannot be determined with any certainty at the time of contracting. Therefore, this factor has little weight in the choice of law analysis. *See* Restatement (Second) of Conflict of Laws § 188(2) cmt. e (1971) ("On the other hand, the place of performance can bear little weight in the choice of the applicable law when (1) at the time of contracting it is either uncertain or unknown, or when (2) performance by a party is to be divided more or less

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equally among two or more states with different local law rules on the particular issue.").

Although the automobile at issue in this case was located in Florida at the time of the accident, which would weigh in favor of applying Florida law, FN5 this fact is insufficient to support a conclusion that Florida law applies when it is considered together with the other factors. Accordingly, even under the Restatement's "significant relationship" test, Indiana law would apply to the Hodges' insurance policy.

> FN5. *See id.* (stating that where the contract deals with a specific physical thing or affords protection against a localized risk, the "state where the thing or the risk is located will have a natural interest in transactions affecting it").

Although I believe that the "significant relationship" test would better serve in most cases to produce a balanced result, with due regard to both the insured and insurer, under either this test or the rule of lex loci contractus, Indiana law applies. Accordingly, I concur.

LEWIS, C.J., concurring in result only.

I concur in result only based upon my view that the majority opinion applies the ***1171** doctrine of *lex loci contractus* in Florida more rigidly than ever before and more rigidly than necessary to resolve the instant matter. The majority's opinion applying the doctrine of *lex loci contractus* will result in the law of other states controlling matters involving automobile insurance contracts when the contracting parties designed and intended such contracts to insure against risks located in Florida and to be governed by the laws of our State. In my view, the doctrine has not and should not be applied so rigidly in Florida as to provide an avenue for parties to circumvent the application of Florida law when a conflict arises under an automobile insurance contract simply by executing the insurance contract in another state when the subject matter of the contract and the risk being insured against is located in Florida.

In my view, when determining what jurisdiction's law should be applied to a controversy arising under an automobile insurance contract, we have consistently concluded that a court should consider *not only* the place where the contract is executed and delivered *but also* the location of the risk being insured against and the intentions of the parties to the automobile insurance contract to determine what law should be applied to controversies arising under the contract. *See Strochak v. Fed. Ins. Co.,* 717 So.2d 453 (Fla.1998) (discussed in detail below); *Sturiano v. Brooks,* 523 So.2d 1126 (Fla.1988) (concluding that *lex loci contractus* required the application of New York law to an insurance contract executed in New York while also noting that the insureds did not notify the insurance company of their move to Florida each year for the winter months and that the insurance company had no way of knowing about that migration); *Gillen v. United Servs. Auto. Ass'n,* 300 So.2d 3, 6-7 (Fla.1974) (concluding that Florida law should apply to a controversy arising under an automobile insurance contract executed in New Hampshire notwithstanding the doctrine of *lex loci contractus* where the insureds notified the insurance company of their move from New Hampshire to Florida and were in the process of establishing themselves as permanent residents of Florida). My concern with the majority opinion is that it contracts the analysis previously endorsed by this Court by looking *solely* to where the contract was executed to determine what jurisdiction's law should be applied to controversies arising under the particular contract. Of particular concern to me is the outcome that would result when the majority opinion is applied to the actual holdings in our decision in *Strochak v. Federal Insurance Co.,* 717 So.2d 453 (Fla.1998), and the Second District Court of Appeal's decision in *Decker v. Great American Insurance Co.,* 392 So.2d 965 (Fla. 2d DCA 1980). It is my view that these decisions were correctly decided. However, if the analysis endorsed by the majority opinion today were to be applied to these factual scenarios a different, and incorrect, result could attain.

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In *Strochak,* a liability policy covering two residences, the primary residence being listed in New Jersey with the second residence listed in Florida, and three vehicles, none of which was listed as being principally garaged in Florida, was executed and delivered in New Jersey. *See* 717 So.2d at 454. Subsequently, the insured registered one of the vehicles in Florida and obtained a primary automobile insurance policy listing Delray Beach, Florida, as the insured's address. *See id.* However, the initial policy entered into in New Jersey was later renewed and the renewal policy was mailed to the insured's New Jersey address, and the vehicle at issue, which was now principally garaged in Florida, was added to the renewed master ***1172** policy and listed as being garaged in Florida. *See id.* A dispute arose over uninsured motorist benefits after the above-mentioned vehicle was involved in an accident. *See id.* At trial, the federal district court assumed that Florida law applied and entered summary judgment in favor of the insurance company. *See id.* The federal court of appeals agreed but certified a question to this Court regarding section 627.727(2) of the Florida Statutes (Supp.1990). *See id.* On appeal, the insurance company asserted that Florida law should not apply to the matter because the master policy under which the vehicle in question was insured was originally executed in New Jersey, and under the doctrine of *lex loci contractus* the law of the state where the contract was executed should apply. *See id.* at 454. This Court rejected the insurance company's assertion and held that Florida law should apply to the controversy. *See id.* at 455. In so holding, the Court concluded that a rigid interpretation of *lex loci contractus* should *not* be applied because the insurance company was aware of the insured's move and connection with Florida, the master policy in effect at the time the loss in question occurred contained Florida policy terms and Florida signatures and was mailed to the insured's Florida residence, and as a result it must be "presume [d] that the parties to the contract bargained for, or at least expected, Florida law to apply." *Id.* Although in my view this Court reached the correct result in *Strochak,* my concern with the majority's opinion is that under the rigid application of the doctrine of *lex loci contractus* applied by the majority, a contrary and incorrect outcome may result if the majority opinion were to be applied to the certified question of *Strochak.* The majority today actually adopts the rigid application advanced by the dissent in *Strochak.*

The majority provides an expansive discussion of the factual circumstances in *Strochak* as though no conflict of law issue existed, but does not address the specific holding which was produced by the certified question. This Court restated the question to be answered by mixing the concepts of both an existing policy executed in a foreign state with subsequent policy alterations issued and delivered in Florida as follows:

> Whether an excess carrier has a duty to make available the uninsured motorists (UM) coverage required by section 627.727(2), Florida Statutes (Supp.1990), to an insured under *an existing policy* on vehicles which had *never* been registered or principally garaged in Florida when *any* vehicle, covered or subsequently added, first becomes registered or principally garaged in Florida and when the policy is delivered or issued for delivery in Florida.

Strochak, 717 So.2d at 454 (emphasis supplied). The "existing policy" referred to was clearly from a foreign state. This Court answered the restated question in the affirmative, which is the holding that we must consider. This Court concluded its analysis and reasoning in stating:

> The duty to offer excess UM coverage was created in June 1990, when the excess motor vehicle liability policy was first delivered in Florida and included coverage for the 1984 Lincoln. The fact that this new coverage may have been added via a "worksheet" rather than an "application" is a distinction without a difference. *FIC [the insurer] was aware at that point of the location of the risk* and had a duty under the statute to offer Rita Strochak UM coverage in an amount equal to the liability limits of the 1990 Masterpiece *excess*

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policy.

Id. at 455-56 (emphasis supplied) (footnote omitted).

***1173** Similar to my concerns with regard to *Strochak,* application of the majority's decision to the Second District's opinion in *Decker* would result in an erroneous application of a foreign state's law to an automobile insurance contract that was clearly designed and intended to cover risks located in Florida and, therefore, subject to Florida law. In *Decker,* an Atlanta company, the Moore Group, hired Decker, a resident of Florida, as a traveling salesman for the state of Florida. *See* 392 So.2d at 966. Subsequent to hiring Decker, the Moore Group assigned an automobile to him for use in connection with company business in Florida. *See id.* The car was exclusively garaged in Florida. *See id.* Moore Group insured its entire automobile fleet with Great American Automobile Association, the contract of insurance being mailed from Ohio and delivered to Moore Group's place of business in Atlanta, Georgia. *See id.* at 967. After assuming coverage of Moore Group's autos, Great American mailed forty auto insurance cards to the Moore Group consisting of "ten for Florida, twenty for Georgia, and twenty all purpose cards." FN6 *Id.* After being notified that Decker had been injured in an accident in a covered vehicle, Great American notified the Moore Group that it was necessary to elect the statutory minimum uninsured motorist coverage and informed the company of Florida's statutorily required minimums. *See id.* In a declaratory action to determine the rights of the parties under the insurance policy, the trial court determined that Florida law did not apply to the insurance policy because the policy was not delivered or issued in Florida. *See id.* at 966. On appeal the district court reversed, holding that Florida law did in fact apply to the action. *See id.* at 968. Noting the similarities between the facts before it and other cases where an insurance contract had been issued or delivered in another state, and where the insurance company was aware that the insurable risk was located in Florida, the district court held that Florida law governed the case. *See id.* at 969-70. Applying the analysis employed in the majority opinion in the instant matter to the facts of *Decker* could only result in a conclusion that Florida law should not be applied to the controversy-a result which, in my view, would be in error.

> FN6. Although it appears that the district court's math is incorrect, the mere fact that Florida cards were issued by the insurance provider is sufficient to demonstrate my point.

The above decisions make it clear that although an automobile insurance contract may be executed outside the state of Florida, it is entirely plausible that the contracting parties bargained for and intended that Florida law be applied to controversies arising under such contracts when the insurable risk was known to be located in Florida. Although I agree with the ultimate result of the majority opinion based upon the specific facts of the instant matter, I write separately to voice my concern of what appears to be the majority opinion's endorsement of an overly rigid application of the doctrine of *lex loci contractus* in Florida. In my view, the better analysis of what state's law should be applied to an action involving an automobile insurance contract must necessarily involve not only the place where the contract is executed and delivered, but also the location of the risk being insured against along with the intentions of the parties to the contract.

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H

Supreme Court of Florida, Division B.
TAMPA NORTHERN R. CO.
v.
CITY OF tampa.*

FN* For opinion on rehearing, see 141 So. 298.

March 17, 1932.

Suit by the Tampa Northern Railroad Company against the City of Tampa. From an order sustaining a demurrer to the bill of complaint, complainant appeals.

Reversed.

BUFORD, C. J., dissenting.

West Headnotes

[1] Municipal Corporations 268 873

268 Municipal Corporations
268XIII Fiscal Matters
268XIII(A) Power to Incur Indebtedness and Expenditures
268k872 Aid to Corporations, and Subscription to or Purchase of Corporate Stock
268k873 k. In General. Most Cited Cases

Constitutional provision respecting appropriations to corporations *held* inapplicable to city's conveyance of land to railroad to be used for certain purposes. F.S.A.Const. art. 9, § 10.

[2] Municipal Corporations 268 267

268 Municipal Corporations
268IX Public Improvements
268IX(A) Power to Make Improvements or Grant Aid Therefor
268k267 k. Nature and Purposes of Improvements in General. Most Cited Cases

Under statute authorizing city to contract for development of submerged lands for residential purposes, city could contract for their development for commercial purposes (Acts 1899, c. 4882; Sp.Acts 1925, c. 11230; Sp.Acts 1913, cc. 6781, 6782).

[3] Reformation of Instruments 328 8

328 Reformation of Instruments
328I Right of Action and Defenses
328k5 Instruments Which May Be Reformed
328k8 k. Voluntary Conveyances. Most Cited Cases

Conveyance by city of practically worthless land, on condition railroad grantee would use it for terminal and other purposes, *held* not mere "gratuity," precluding reformation; gratuity implying absence of consideration.

[4] Contracts 95 50

95 Contracts
95I Requisites and Validity
95I(D) Consideration
95k49 Nature and Elements
95k50 k. In General. Most Cited Cases

"Consideration" is cause, motive, price, or impelling influence inducing one to enter into contract.

[5] Contracts 95 50

95 Contracts
95I Requisites and Validity
95I(D) Consideration
95k49 Nature and Elements
95k50 k. In General. Most Cited Cases

Contract may be supported by any act of plaintiff from which defendant derives benefit, or by labor, detriment, or inconvenience sustained by plaintiff.

[6] Reformation of Instruments 328 13(3)

328 Reformation of Instruments
328I Right of Action and Defenses
328k10 Matters Subject to Reformation
328k13 Matter of Description
328k13(3) k. Omission of Property. Most Cited Cases

Railroad grantee *held* entitled to reformation of deed from city covering submerged lands which did not convey all lands intended.

482 **311** Appeal from Circuit Court, Hillsborough County; F. M. Robles, judge.*312** Knight, Thompson & Turner, of Tampa, for appellant.

Mabry, Reaves & White, of Tampa, for appellee.

TERRELL, J.

In September, 1927, appellant filed its bill of complaint in the circuit court of Hillsborough county, Fla., praying for the reformation and correction of a deed of conveyance executed on the part of appellee to appellant June 21, 1907. A demurrer to the bill of complaint was sustained and appeal was taken from that order.

It is contended by appellee that the deed and conveyance were gratuitous, that the city was without authority to make it in the first place, and that a court of equity will not reform a gratuitous conveyance.

The record discloses that appellant in June, 1907, acquired title to certain lands in Hillsborough county known locally as 'Hooker's Point'; that said lands were in the form of a peninsula and were bounded on the east, west, and south by the waters of Tampa Bay; that the lands under the waters of Tampa Bay within the limits of the city of Tampa and adjacent to Hooker's Point, being the lands involved in this controversy, were by chapter 4882, Acts of 1899, Laws of Florida, granted to the city ***483** of Tampa; that a question arose between appellant and the city of Tampa as to which one of them owned the submerged lands in Tampa Bay adjacent to Hooker's Point, but that said difference was composed by the city of Tampa agreeing to and passing its Ordinance No. 440 conveying to appellant all interest the city had in and to these certain described submerged lands in Tampa Bay, adjacent to and extending from Hooker's Point, east and south, to the city limits and west to the property of the Tampa Terminal Company on the condition that said property be used within ten years from date of the ordinance for railroad, shipping, warehouse, terminal, commerce, or other purposes permitted by the riparian act of the state of Florida. The record further discoses that on June 21, 1907, deed was executed by the city of Tampa to appellant in compliance with the terms of said ordinance, but that the description in said deed is vague and indefinite, and that while appellant had at all times rested in the assurance that it held title to all the submerged lands owned by the city of Tampa which the said deed and ordinance purported to convey, it (appellant) was advised by the city in August, 1926, that it (the city) claimed title to a portion of said submerged lands and that the said deed and ordinance did not in fact convey all the submerged lands belonging to and lying within the city to the south, east, and west of Hooker's Point.

It is admitted and is shown that at the time the deed was executed, the city intended to convey, and appellant thought it was taking title to, all the submerged lands claimed by the city to the east, west, and south of Hooker's Point. The city now contends that it did not convey to appellant all the submerged lands the deed and ordinance were intended to convey and that it was without authority to convey those lands it did convey.

[1] In support of its contention as to lack of authority to ***484** make the conveyance, the city invokes section 10 of article 9 of the Constitution of Florida; but that contention is foreclosed by the decision of this court in Bailey v. City of Tampa, 92 Fla. 1030, 111 So. 119, where we held section 10 of article 9 inapplicable to a transaction like this.

[2] In State ex rel. Buford v. City of Tampa, 88 Fla. 196, 102 So. 336, by majority opinion, this

court held that chapter 4882, Laws of Florida, Acts of 1899, granted to the city of Tampa in fee simple absolute, all lands owned or held by the state in trust or otherwise lying within the corporate limits of the city, including lands wholly or partially covered by the tide, sawgrass lands and marsh lands, the bottom of Hillsborough Bay, and the bottom of Hillsborough river. Said act also authorized the city of Tampa to enter into contract for the reclamation and development for residential purposes of the said lands together with Grassy Island, Depot Key and the mud flats adjacent thereto having no value for purposes of commerce and navigation. The lands involved in the instant case were covered by this grant, and if the city was authorized to contract for their reclamation and development for residential purposes, by parity of reasoning, it was certainly authorized to contract for their reclamation and development for commercial, shipping, and docking purposes; they being public in their nature and in harmony with municipal functions. In the absence of what we decided in State ex rel. Buford v. City of Tampa, supra, the deed and contract between appellant and the city appear to have been fully ratified and confirmed by chapter 11230, Sp. Acts 1925, Laws of Florida. The power of the city to make the conveyance was therefore plenary. This view is also in harmony with the spirit of chapters 6781 and 6782, Sp. Acts 1913, Laws of Florida.

[3][4][5] The contention that the conveyance complained of was a mere gratuity is also without support. 'Gratuity' implies***485** absence of consideration. Consideration is the inducement to a contract. In other words, it is the cause, motive, price, or impelling influence which induces one to enter into a contract. It may be valuable, as when founded on money or its equivalent; it may be good as when founded on morals or affection; it may be express as when specifically stated, or implied as when inferred by law from the conduct of the parties; it may be continuing ****313** as when consisting of acts performed over a period of time. Other classifications might be enumerated. A contract may be supported by any act of the plaintiff from which the defendant derives a benefit, or it may be supported by any labor, detriment, or inconvenience, however small, sustained by the plaintiff, if such act as performed or inconvenience suffered is by the consent express or implied of defendant.

The record on this point discloses that the lands agreed to be sold amounted to approximately six hundred acres, that they were all low salt-water flats or marshes over which the tide ebbed and flowed and were for all practical purposes worthless. It is shown that appellant has in compliance with its contract filled in said lands and that they are now occupied and being used for terminal, shipping, warehouse, and other commercial purposes, adding many thousands of dollars to the city's taxable values besides reclaiming and making valuable areas which were formerly worthless. It has also improved the city's shipping, port, and commercial facilities, and all was done within the terms of the agreement. It would be difficult to describe a contract better supported from the standpoint of consideration. Haesloop v. City Council of Charleston, 123 S. C. 272, 115 S. E. 596; Roberts v. Northern Pac. R. Co., 158 U. S. 1, 15 S. Ct. 756, 39 L. Ed. 873.

[6] We think, therefore, that the deed brought in question should be reformed in accordance with the prayer of the ***486** bill. Jackson v. Magbee, 21 Fla. 622; Williams v. Bettelini, 69 Fla. 193, 67 So. 857; Battey v. Battey, 92 Fla. 512, 109 So. 584.

The decree of the chancellor is accordingly reversed.

Reversed.

WHITFIELD, P. J., and DAVIS, J., concur.
ELLIS and BROWN, JJ., concur in the opinion and judgment.
BUFORD, C. J., dissents.

Fla. 1932
Tampa Northern R. Co. v. City of Tampa
104 Fla. 481, 140 So. 311

END OF DOCUMENT

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(Cite as: 51 So.2d 435)

C

Supreme Court of Florida, en Banc.
TRIPLE E DEVELOPMENT CO.
v.
FLORIDAGOLD CITRUS CORP.

Feb. 23, 1951.
Rehearing Denied April 7, 1951.

The Triple E Development Company brought suit against Floridagold Citrus Corporation for a decree construing rights of the respective parties under contract for sale of citrus groves by defendant to plaintiff with reference to loss of 162,000 boxes of citrus fruit alleged to have been caused by hurricane after contract had been entered into and before closing of the transaction. An order sustaining motion to dismiss amended bill of complaint was entered by the Circuit Court for Polk County, Don Register, J., and the plaintiff filed a petition for interiocutory certiorari. The Supreme Court, Chapman, J., held that amended bill of complaint was sufficient to state cause of action for decree construing rights of the parties under the contract with reference to loss of citrus fruit caused by the hurricane.

Order dismissing amended bill of complaint quashed.

Terrell and Adams, JJ., dissented.

West Headnotes

[1] Equity 150 363

150 Equity
150VII Dismissal Before Hearing
150k360 Involuntary Dismissal
150k363 k. Motion and Determination Thereof. Most Cited Cases

Truthfulness of well pleaded allegations appearing in bill of complaint when presented to chancellor for ruling on motion to dismiss, as matter of fact, for purpose of disposition or ruling thereon are admitted to be true.

[2] Contracts 95 143.5

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k143.5 k. Construction as a Whole. Most Cited Cases
(Formerly 95k143)

A contract should be considered as a whole in determining intention of parties to the instrument.

[3] Contracts 95 169

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k169 k. Extrinsic Circumstances. Most Cited Cases

In construing contracts, circumstances surrounding parties and objects to be obtained should be considered.

[4] Contracts 95 143(4)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k143 Application to Contracts in General
95k143(4) k. Subject, Object, or Purpose as Affecting Construction. Most Cited Cases
(Formerly 95k143)

In construing a contract, courts should place themselves, as near as possible, in exact situation of parties to the instrument when executed, so as to determine intention of the parties, objects to be accomplished, obligation created, time of performance, duration, mutuality, and other essential features.

[5] Contracts 95 162

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95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k162 k. Conflicting Clauses in General. Most Cited Cases

If clauses in contract appear to be repugnant to each other, they must be given such an interpretation and construction as will reconcile them, if possible, and if one interpretation would lead to an absurd conclusion, then such interpretation should be abandoned and the one adopted which would accord with reason and probability.

[6] Contracts 95 154

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k151 Language of Instrument
95k154 k. Reasonableness of Construction. Most Cited Cases

If contract is contradictory, obscure, or its meaning susceptible of two constructions, one of which makes it fair, customary, and such as prudent man would naturally execute, and other of which makes it inequitable, unnatural, or such as reasonable man would not be likely to enter into, former interpretation must be preferred.

[7] Vendor and Purchaser 400 202

400 Vendor and Purchaser
400V Rights and Liabilities of Parties
400V(A) As to Each Other
400k202 k. Expenses and Losses. Most Cited Cases

Where contract for sale of citrus groves provided that all hazards and risks to all assets should continue in vendor until transaction was closed, and further provided that damage to the property, in order to entitle buyer to relieve itself of obligations of contract, must be material as to substantially reduced value of remaining property, agreement would be construed as intending that buyer should be entitled to compensation for loss of fruit caused by a hurricane after contract was entered into and before transaction was closed only in event the damage was substantial.

[8] Declaratory Judgment 118A 318

118A Declaratory Judgment
118AIII Proceedings
118AIII(D) Pleading
118Ak312 Complaint, Petition or Bill
118Ak318 k. Property, Conveyances and Incumbrances. Most Cited Cases

Amended bill of complaint, which alleged that parties had entered into contract for sale of citrus groves by defendant to plaintiff providing that all hazards and risks to all assets should continue in vendor until transaction was closed, and that a hurricane after contract had been entered into and before closing of transaction destroyed approximately 162,000 boxes of the citrus fruit which were on the trees out of the approximate 500,000 boxes that were on the trees when contract was executed, was sufficient to state cause of action for decree construing rights of the respective parties with reference to the loss of citrus fruit caused by the hurricane.

***436** Chester H. Ferguson, of Macfarlane, and Ferguson, Allison & Kelly, Tampa, for petitioner.

W. H. Hamilton, H. Gunter Stephenson, Jack Straughn, all of Winter Haven, and Mabry, Reaves, Carlton, Anderson, Fields & Ward, Tampa, for respondent.

CHAPMAN, Justice.

On July 25, 1949, the Floridagold Citrus Corporation owned real and personal property (consisting largely of citrus groves) located in Polk, Brevard and Lake Counties and on the aforesaid date executed a contract to sell said property to the Triple E Development Company for the total sum of $2,048,000.00. The sum of $100,000.00 was paid by the Triple E Development Company to the Floridagold Citrus Corporation at the time the contract of sale was executed. The date of closing the

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sale, by the terms of the contract as made by the parties, was October 1, 1949, when the additional sum of $250,000.00 would become due and payable. The balance due on the purchase price of the property was to be evidenced by a single promissory note and secured by real estate and personal property mortgages incumbering all the property transferred. A description of the real and personal property involved is not material or pertinent to a decision of this controversy.

Paragraph 7 of the contract of purchase and sale is viz.:

'All hazards and risks to all assets shall continue those of the party of the first part until the transaction is closed on October 1, 1949, and if there is any substantial damage to the assets, including fruit crop, occasioned through fire, windstorm or other causes prior to the closing, not fully covered by insurance, it shall be optional with the party of the second part to conclude or refuse to conclude the purchase without any liability on its part. Should the damage to the assets aforesaid be occasioned, which is not fully covered by insurance, then at the option of the party of the second part it may, by written notice to the party of the first part, terminate this contract without liability, and upon demand the deposit of $100,000,00 heretofore made shall be immediately refunds to the party of the second part. If the loss or damage is fully covered by insurance, the proceeds of such insurance shall be collected and remitted to the party of the second part as soon after the closing of this sale as is possible. It is understood that damage to said property, in order to entitle the second party to relieve itself from the obligations hereof, must be so material as to substantially reduce the value of the remaining property. As an example, it is conceivable that a hurricane could cause substantial damage to the fruit crop now on the trees and the remaining fruit would still be worth as much, or practically so, market value, as the whole would have been, and it is the intent of the parties that if the remaining undamaged property has a market value substantially equal to the value of the whole had there been no damage, the second party shall be obligated to consummate the purchase.'

The Floridagold Citrus Corporation, on September 30, 1949, addressed a letter to the Triple E Development Company at Dade City, Florida, about alleged hurricane loss or damages to the fruit then on the groves situated in Polk, Brevard and Lake Counties covered by the contract of sale, which losses or damage occurred August 27, 1949. Pertinent is the following language:

'On or about August 26, 1949, there occurred a hurricane which destroyed an undetermined number of Boxes of citrus fruit then on the trees located on the property being sold to you. Included in the sale, of course, was all citrus fruits as will appear by reference to the contract. Since the hurricane, and up to this date, you have contended that under the provisions of said contract, and particularly ***437** paragraph 7 thereof, Floridagold is legally obligated to allow you an abatement on the purchase price agreed in the contract to be paid. We, on the other hand, have expressly denied, and now expressly deny, that under the terms of said contract, and particularly paragraph 7 thereof, that you are entitled to any abatement on the purchase price by reason of the destruction of the citrus fruit by the hereinabove mentioned hurricane.

'The closing date set for the consummation of the sale is October 1, 1949, and you have proposed that the sale be consummated in accordance with the terms of the contract with the understanding that if at any time between the date hereof and November 1, 1950, you should file suit in the appropriate court of Polk County, Florida, to determine whether under said contract you are entitled to an abatement on the purchase price, we will not plead an estoppel or waiver on your part to bring said suit by reason of the closing on this date in accordance with the terms of the contract.

'While, as above set forth, we expressly deny that you are entitled to any reduction in the pur-

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chase price by reason of said hurricane, we, nevertheless, agree that should you bring an action between now and November 1, 1950 for the purpose of having the question judicially determined, we will not interpose as a defense an estoppel or waiver by reason of the closing on this date.

'By this agreement not to plead estoppel or waiver against you, is not to be construed as an agreement not to plead any other defense available to this company to any action you may institute, nor shall it in anywise be construed as an admission on our part that you are legally entitled to any reduction in the purchase price by reason of the damage hereinabove mentioned.'

On October 1, 1949, W. H. Hamiltin, attorney for Floridagold Citrus Corporation, wrote Chester Ferguson, attorney for Triple E Development Company, and confirmed the agreement that Triple E Development Company would have until November 1, 1950, in which to bring suit to ascertain whether or not the seller of the described property or the buyer thereof should sustain the hurricane losses or damages to the fruit which occurred on August 27, 1949. The contract of sale was in other respects satisfactorily closed and the parties by agreement were to obtain an adjudication by the courts of the hurricane losses or damages to the fruit, as defined by the terms and provisions of the purchase and sale agreement dated July 25, 1949.

The Triple E Development Company, on March 22, 1950 filed in the Circuit Court of Polk County its amended bill of complaint and alleged that on October 1, 1949, pursuant to the contract of purchase and sale the buyer paid to the Floridagold Citrus Corporation, the seller, the additional sum of $250,000.00 and simultaneously executed a note payable to the Floridagold Citrus Corporation in the sum of $1,693,000.00, being the balance due on the purchase price of all of the described property, both real and personal, as described in the contract of purchase and sale. Mortgages securing the payment of the above note, pursuant to the purchase and sale contract dated July 25, 1949, were executed by the Triple E Corporation.

It was further alleged that at the time of the execution of the purchase and sale contract by the parties on July 25, 1949, there were not less than 500,000 boxes of citrus fruit on the trees on the citrus groves covered by the aforesaid contract. On August 27, 1949, after the execution of the contract and prior to the closing date on October 1, 1949, a severe hurricane struck the citrus property and destroyed not less than 162,000 boxes of citrus fruit which were on the trees on July 25, 1949, and the seller failed to deliver the same to the purchaser; it was the obligation and duty of the Floridagold Citrus Corporation, under the purchase and sale agreement, to deliver said 162,000 boxes of citrus fruit to the Triple E Development Company on October 1, 1949, or to permit or allow an abatement of the values thereof as against the agreed purchase price in the total sum of $2,048,000.00. Or since the ***438** parties have closed the sale by mutual agreement left open for adjudication by the court the question of the hurricane losses or damages to the fruit, then the value of the 162,000 boxes of fruit should be ascertained and a credit allowed on the original note in the sum of $1,693,000.00 as given by the Triple E Development Company to Floridagold Citrus Corporation as the balance due on the property covered by the purchase and sale agreement.

The Triple E Development Company in its amended bill of complaint prayed (1) for an order or decree construing the rights of the respective parties with reference to the loss of the 162,000 boxes of citrus fruit alleged to have been caused by the hurricane on August 27, 1949, as defined by the purchase and sale agreement dated July 25, 1949, and particularly paragraph 7 thereof; (2) the Triple E Development Company under the purchase and sale agreement was entitled to a credit on its note (previously delivered which represented the balance due on the purchase price of all the property) to the extent of the value of the 162,000 boxes of citrus fruit destroyed by the hurricane; (3) evidence should be taken as to the value of the lost or des-

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troyed fruit and a credit allowed on the original note to the extent of the value of said losses. Attached to and made a part of the amended bill of complaint was a copy of the purchase and sale agreement of the parties and numerous other pertinent exhibits.

The Floridagold Citrus Corporation filed a motion to dismiss the amended bill of complaint on grounds substantially as follows: (1) the amended bill fails to state a claim for relief; (2) the amended bill seeks relief which tends to vary and contradict a written unambiguous contract; (3) the plaintiff is bound by the terms and provisions of its written instrument; (4) the amended bill is a repetition of the allegations of its original bill of complaint; (5) the several issues, questions, claims and contentions alleged in the amended bill were clearly set forth in the original bill of complaint; (6) the amended bill attempts to make out a case by argument rather than by pleading the facts; (7) it affirmatively appears that the plaintiff is not entitled to the relief sought and prayed for. An order was entered below granting or sustaining the motion to dismiss the amended bill of complaint. A review of the order of dismissal by petition for interlocutory certiorari is sought in this Court.

[1] On many occasions we have held that the truthfulness of well pleaded allegations appearing in a bill of complaint when presented to a Chancellor for a ruling on motion to dismiss, as a matter of fact, for the purpose of disposition or a ruling thereon are admitted to be true. Van Woy v. Willis, 153 Fla. 189, 14 So.2d 185. It is not disputed that the parties executed the purchase and sale contract on July 25, 1949, or that they closed the sale agreement on October 1, 1949, or that a hurricane struck the grove property on August 27, 1949. From the allegations of the amended bill on the motion to dismiss it is safe to infer that 162,000 boxes of citrus fruit were destroyed on August 27, 1949. The controlling question presented here on this state of the record is: which party to the contract of sale shall sustain the loss of the 162,000 boxes of citrus fruit caused by the hurricane on August 27, 1949-the buyer or the seller?

[2][3][4][5][6] This Court, from time to time, has approved certain rules to be observed in the construction of contracts and among them are the following: (1) the contract should be considered as a whole in determining the intention of the parties to the instrument; (2) the conditions and circumstances surrounding the parties to the instrument and the object or objects to be obtained when the contract was executed should be considered; (3) courts should place themselves, as near as possible, in the exact situation of the parties to the instrument, when executed, so as to determine the intention of the parties, objects to be accomplished, obligations created, time of performance, duration, mutuality, and other essential features; (4) if clauses in a contract appear to be repugnant to each other, they must be given ***439** such an interpretation and construction as will reconcile them if possible; if one interpretation would lead to an absurd conclusion, then such interpretation should be abandoned and the one adopted which would accord with reason and probability; (5) if the language of a contract is contradictory, obscure or ambiguous or where its meaning is doubtful so that it is susceptible of two constructions, one of which makes it fair, customary, and such as a prudent man would naturally execute, while the other interpretation would make it inequitable, unnatural, or such as a reasonable man would not be likely to enter into, then the courts will approve the reasonable, logical and rationable interpretation. Florida Power Corp. v. City of Tallahassee, 154 Fla. 638, 18 So.2d 671.

[7][8] On October 1, 1949, the seller transferred to the buyer all of the property described in the purchase and sale agreement, except the citrus fruit destroyed by the August 27, 1949, hurricane. The buyer at the time paid to the seller the stipulated amount of cash and executed a note for the balance due on the purchase price of the property. The payment of the note was secured by mortgages describing all the property transferred and con-

veyed to the buyer by the seller. The buyer contended on the closing date that it was entitled to an abatement of the agreed purchase price, under the purchase and sale agreement, to the extent of the value of the citrus fruit destroyed by the August, 1949 hurricane. The seller denied that the buyer, under the purchase and sale agreement, was entitled to an abatement of the purchase price to the extent of the value of the citrus fruit destroyed by the August, 1949 hurricane. All other details of the transaction by mutual consent were satisfactorily closed but the remaining item of the hurricane loss or damages, which item by an additional and subsequent agreement of the parties was left suspended for adjudication by the courts. See Exhibit 'B', Tr. 54.

Pertinent language of paragraph 7 of the purchase and sale agreement of the parties is viz.: 'It is understood that damage to said property, in order to entitle the second party (the buyer) to relieve itself from the obligations hereof, must be material as to substantially reduce the value of the remaining property. As an example, it is conceivable that a hurricane could cause substantial damage to the fruit crop now on the trees and the remaining fruit would still be worth as much, or practically so, market price, as the whole would have been, and it is the intent of the parties that if the remaining undamaged property (fruit then on trees) has a market value substantially equal to the value of the whole had there been no damage, the second party shall be obligated to consummate the purchase'. The above language indicates that the buyer and seller carefully considered two important items of the transaction viz.: first, the citrus fruit then on the trees of the three groves better described in the contract; and second, which party to the agreement should sustain the losses, if any, which could be caused by a hurricane prior to the closing date on October 1, 1949.

The parties, by their agreement, intended that compensation for the fruit caused by a hurricane should be permitted or allowed only in the event the damage was substantial. It was intended that the damage to the fruit was to be so material as to 'substantially reduce' the (market) value of the remaining fruit crop not damaged by the hurricane. If the remaining fruit on the trees-after the hurricane-could be sold on the market for an amount 'substantially equal to the value of the fruit crop had there been no (hurricane) damages', then the hurricane damage to the fruit should be sustained by the buyer, otherwise, the hurricane damage should be sustained by the seller. The quoted portions, supra, of paragraph 7 should be construed with the subsequent agreement of the parties identified as Exhibit 'B'.

It is alleged that the trees on the three groves at the time of the hurricane had not less than 500,000 boxes of citrus fruit and the hurricane destroyed 162,000 boxes thereof. For illustrative purposes, let us assume that this fruit at the time of the hurricane was worth $1.00 per box ***440** and the remaining 338,000 boxes of fruit were sold on the market for the sum of $500,000.00, then under the terms and provisions of the purchase and sale agreement and the intention of the parties as reflected by the agreement, the hurricane damages must be sustained by the buyer and not the seller because there did not exist substantial hurricane damages. On the other hand, if the remaining 338,000 boxes of citrus fruit sold on the market for a price or sum of only $338,000.00, then substantial hurricane damages existed as stipulated to by the parties and the loss sustained thereby would fall on the seller and not the buyer.

The order dismissing the amended bill of complaint is quashed.

SEBRING, C. J., and THOMAS and ROBERTS, JJ., concur.
HOBSON, J., concurs specially.
TERRELL and ADAMS, JJ., dissent.
HOBSON, Justice, concurring specially.

I concur in the conclusion reached by Mr. Justice CHAPMAN that the order which was entered by the Circuit Judge dismissing the amended bill of complaint, should be quashed.

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However, I cannot agree with Mr. Justice CHAPMAN'S construction of paragraph 7 of the contract. A copy of the contract between the parties litigant is attached to the amended bill of complaint as Exhibit 'A'.

Paragraph 7 of said contract is quoted in full in the opinion prepared by Mr. Justice CHAPMAN. My construction of paragraph 7 of the contract differs from the construction placed upon it by Mr. Justice CHAPMAN in that I hold the view the option given to the vendee 'to conclude or refuse to conclude the purchase without any liability on its part' in the event there should be any *substantial* damage to the assets should not be construed to have any effect whatsoever upon the agreement of the parties in the opening words of paragraph 7, to-wit: 'all hazards and risks to all assets shall continue those of the party of the first part until the transaction is closed on October 1, 1949 * * *.' Moreover, the formula set forth in paragraph 7 and construed by Mr. Justice CHAPMAN as a formula for determining whether *any* damage actually existed was not a formula for that purpose but was solely for the purpose of determining whether there was 'any *substantial* damage to the assets, including fruit crop' which would *entitle* the vendee *to exercise its option* and 'refuse to conclude the purchase without any liability on its part.'

Since the 'substantial damage formula' was placed in the contract for the purpose only of deciding whether the Petitioner would have the right at its election to refuse to conclude the contract without any liability on its part and recoup the $100,000 which it had advanced at the time of the execution of the contract it cannot be held that it was agreed between the parties that said 'formula' would be used in connection with the proviso that 'all hazards and risks to all assets shall continue those of the party of the first part until the transaction is closed on October 1, 1949 * * *.' This proviso obligated the Respondent to produce and deliver over to the Petitioner on October 1, 1949 all of the assets including of course, the fruit which was on the trees or in the maternal flower at the time the contract was executed with the possible exception of customary and normal 'droppage.' The question is one of deficiency in *assets* and only secondarily a question of value. The duty which rested upon the Respondent was to deliver all assets and if it were unable to do so through no fault of Petitioner then the damages would be gauged by determining the value of assets (fruit) which Respondent failed to deliver at the time (October 1, 1949) it was obligated to deliver such assets.

It is my opinion that the contract between the parties litigant clearly and unequivocally placed all hazards and risks to all assets upon the party of the first part (vendor) until the closing of the transaction on October 1, 1949.

The vendee did not exercise its option in favor of refusing to conclude the transaction and the provision of the contract with reference to said option and the formula therein providing a method of ***441** determining whether there was *substantial* damage did not come into play nor did said provision annul, modify or in any manner affect the provision of the contract which provided that 'all hazards and risks to all assets shall continue those of the party of the first part until the transaction is closed on October 1, 1949.' Futhermore, the rule applicable to construction of contracts that where there are two inconsistent provisions in a contract the latter takes precedence over the former is invoked only in those cases wherein the inconsistency is definite and unmistakable. A subsequent provision in a contract which is not clearly inconsistent should not be given a construction which would make it so and if it is susceptible of more than one construction the Court should adopt that construction which is consistent with prior provisions of the contract.

The option which was granted to the vendee was for its (the purchaser's) sole benefit and consequently should not be construed to relieve the vendor of any of his obligations under the contract including the express provision that 'all hazards and risks to all assets should continue those of the

party of the first part until the transaction is closed on October 1, 1949.'

The agreement that all hazards and risks to all assets should be those of the Respondent and the option granted to Petitioner, under certain stipulated conditions, to refuse to conclude the transaction are two separate and distinct provisions. They are not interdependent. Each has its purpose and sphere of operation. Therefore it cannot be said, that Petitioner is estopped from suing for reformation of the note and mortgage by a reduction of the face amount of those obligations because of failure on the part of Respondent to deliver all of the assets, nor that Petitioner waived its right to institute and maintain such a suit. But if such were not the case it could not be successfully contended that the Petitioner waived the obligation of the Respondent under the proviso that 'all hazards and risks to all assets should continue those of the party of the first part until the transaction is closed on October 1, 1949'; or that Petitioner estopped itself by concluding the transaction and not insisting upon exercising its option, because Respondent expressly agreed in writing that it would not assert a waiver or estoppel against Petitioner if the Petitioner would conclude the deal and leave the dispute of the parties to be adjudicated by a court of competent jurisdiction. The Respondent in its letter written to the Petitioner under date of September 30, 1949 said: 'While, as above set forth, we expressly deny that you are entitled to any reduction in the purchase price by reason of said hurricane, we nevertheless, agree that should you bring an action between now and November 1, 1950 for the purpose of having the question judicially determined, we will not interpose as a defense an estoppel or waiver by reason of the closing on this date.'

It is, therefore, my conclusion that if the Petitioner herein can establish a deficiency in assets in any amount it should be entitled to a reformation of the mortgage and note by a reduction thereof in an amount equal to the proven value of the assets which were not delivered to the Petitioner on October 1, 1949. If this is not the proper method of determining the amount of reduction in the note and mortgage to which the petitioner may be entitled then we should expressly hold that the proper method of determining such question, in all similar cases where it is agreed that all hazards and risks to all assets should be upon the vendor until the closing of the transaction and transfer of the property, would be to use the formula which the parties used only with reference to the option clause-not that the parties by their unilateral option clause *adopted* that formula as the proper measure of damages in connection with the provision that all hazards and risks to all assets should be those of the vendor until October 1, 1949.

I agree to the judgment quashing the order dismissing the amended bill of complaint.

Fla. 1951
Triple E Development Co. v. Floridagold Citrus Corp.
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END OF DOCUMENT

550 F.3d 1031, 21 Fla. L. Weekly Fed. C 1269
(Cite as: 550 F.3d 1031)

H

United States Court of Appeals,
Eleventh Circuit.
UNITED STATES FIDELITY & GUARANTY COMPANY, Plaintiff-Appellant,
v.
LIBERTY SURPLUS INSURANCE CORPORATION, Defendant-Third-Party-Plaintiff-Appellee,
United States Fire Insurance Company, Defendant,
v.
Allen Ironworks, Inc., et al., Third-Party-Defendants.

No. 08-10544.
Dec. 2, 2008.

Alberta L. Adams, Eules A. Mills, Jr., Mills, Paskert, Divers, P.A., Tampa, FL, for Plaintiff-Appellant.

Dorothy Venable DiFiore, Andrew J. Lewis, Haas, Dutton, Lewis, P.L., Tampa, FL, for Liberty Surplus Ins. Corp.

Appeal from the United States District Court for the Middle District of Florida (No. 06-01180-CV-ORL-31-UAM); Gregory A. Presnell , Judge.

Before BLACK, PRYOR and COX, Circuit Judges.

Prior report: 2007 WL 3024345

***1032** PER CURIAM:

This appeal presents the question whether the law of the place of contracting, which is Massachusetts, or the law of the place of the insured's risk, which is Florida, governs a coverage dispute under an insurance policy for a commercial contractor. Liberty Surplus Insurance Corporation insures the operations of John T. Callahan & Sons, Inc., a commercial contractor, based in Massachusetts, that has construction projects in Florida and other states. Westlake Apartments, Ltd. obtained an arbitration award against Callahan for damages that arose from work performed by Callahan and its subcontractors on a project in Florida. Callahan subrogated its interests to United States Fidelity & Guaranty Company, and USF&G filed this action to recover under the insurance policies issued by Liberty, which provide comprehensive general liability coverage. The district court determined that the Supreme Court of Florida would apply the law of Massachusetts, under the doctrine of *lex loci contractus,* and the policies do not provide coverage for the claims. USF&G appeals and argues that the Supreme Court of Florida would apply the law of the situs of the insured risk and, under the law of Florida, the claims of defective workmanship by USF&G would be covered under the policies. Because we conclude that this appeal raises a question of state law that is unsettled, we certify the question to the Supreme Court of Florida to determine which law governs the insurance policy.

I. BACKGROUND

Callahan is a commercial contractor that primarily works in Massachusetts and Florida. Callahan is a Massachusetts corporation with its principal place of business in Massachusetts. In December 1999, Callahan entered a contract with Westlake Apartments, Ltd. for the construction of an apartment complex in Sanford, Florida. The agreement required Callahan to post a payment and performance bond. Callahan obtained the bond from USF&G. Callahan, as principal, and USF&G, as surety, issued the bond and named Westlake as an owner-obligee.

In 2001, Callahan applied for a commercial insurance policy from Liberty. Callahan submitted the application from its Massachusetts office to an insurance broker in Massachusetts. Before Liberty issued the policy, it investigated the operations of Callahan. That investigation revealed that Callahan was a “general contractor with work performed

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generally in [Massachusetts and Florida with] some work starting in" Connecticut.

The investigative file included a "Schedule of Contracts" that listed the active projects of Callahan, including the Westlake project. Liberty knew about the Westlake project in Florida. Laura Corwin, the underwriter for the Callahan policy, testified that Liberty was aware that Callahan "worked in Florida, had offices in Florida, and that Liberty 'was being asked to insure operations in Florida.' "

Liberty issued Callahan a commercial general liability insurance policy effective from January 1, 2002, to January 1, 2003. The policy was mailed to Callahan in Massachusetts. Liberty issued a second policy effective from January 1, 2003, to January 1, 2004. The policies provided Callahan with liability coverage for negligent conduct that constituted a covered "occurrence" and occurred in "Massachusetts, Florida, or any other state in which [Callahan] operated. The policies did not provide casualty insurance for the real property on which [Callahan] was conducting its construction activities."

***1033** Problems arose at Westlake Apartments, and after repeated attempts to correct the defects, Westlake demanded arbitration with Callahan and USF&G. Liberty acknowledged the arbitration demand, reserved its rights under the policy, and provided counsel to Callahan to respond to the arbitration demand. Before the arbitration, Liberty informed Callahan's counsel that it would no longer participate in the defense of Callahan. USF&G, as surety for the project, and Callahan entered a settlement agreement with Westlake. Under the settlement agreement, USF&G was "subrogated to the position of Callahan against Liberty[,]" and Callahan and Westlake assigned their rights against Liberty to USF&G.

USF&G brought this action for breach of contract against Liberty to recover the full amount of the settlement. USF&G argues that the law of Florida governs and the damage to the Westlake apartments, caused by the defective work of subcontractors, is covered by the Liberty policies. Liberty asserts that the law of Massachusetts applies and bars coverage under the policies. The parties filed cross-motions for partial summary judgment and disputed the applicable state law. The district court applied the rule of *lex loci contractus* and held that the law of Massachusetts governed the interpretation of the insurance policies. Based on the application of the law of Massachusetts, the district court later granted summary judgment in favor of Liberty.

II. DISCUSSION

When it exercises jurisdiction based on diversity of citizenship, 28 U.S.C. § 1332, a federal court must apply the choice of law rules of the forum state to determine which substantive law governs the action. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496, 61 S.Ct. 1020, 1021, 85 L.Ed. 1477 (1941). This diversity action was commenced in Florida. This Court "must determine which state's substantive law the Florida Supreme Court would choose to govern interpretation of the [Callahan] polic[ies], as [it is] 'bound to decide the case the way it appears the state's highest court would.' " *Shapiro v. Associated Int'l Ins. Co.*, 899 F.2d 1116, 1118 (11th Cir.1990) (quoting *Towne Realty, Inc. v. Safeco Ins. Co. of Am.*, 854 F.2d 1264, 1269 n. 5 (11th Cir.1988)).

Florida courts traditionally have applied the doctrine of *lex loci contractus* and held that the law of the state where the contract was made or to have been performed governs the interpretation of the contract. *Id.* at 1119. This doctrine was recognized as early as 1856 in *Perry v. Lewis*, 6 Fla. 555 (1856). The Supreme Court of Florida stated, "The general principle by civilized nations is, that the nature, validity, and interpretation of contracts are to be governed by the laws of the country where the contracts are made or are to be performed ...." *Id.* (internal quotation marks omitted). Since then, Florida courts have adhered to the rule of *lex loci contractus* in most contractual disputes, including those that involved automobile insurance policies,

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see Sturiano v. Brooks, 523 So.2d 1126, 1129 (Fla.1988), and uninsured motorist policies, *see Lumbermens Mut. Cas. Co. v. August*, 530 So.2d 293, 295 (Fla.1988).

Florida courts have departed from the rule of *lex loci contractus* in limited instances. Under the public policy exception, Florida courts depart from the rule of *lex loci contractus* " 'for the purpose of necessary protection of [Florida] citizens [and to enforce] some paramount rule of public policy.' " *State Farm Mut. Auto. Ins. Co. v. Roach*, 945 So.2d 1160, 1164 (Fla.2006) (quoting ***1034***Herron v. Passailaigue*, 92 Fla. 818, 110 So. 539, 542 (1926)). Florida courts also have departed from the rule of *lex loci contractus* in disputes that involve contracts related to the conveyance or devise of real property. *See In re Estate of Swanson*, 397 So.2d 465, 466 (Fla.Dist.Ct.App.1981); *Kyle v. Kyle*, 128 So.2d 427, 429 (Fla.Dist.Ct.App.1961). As this Court noted, "In Florida, ... the validity of a contract to convey an interest in real estate is governed by the law of the state in which the real estate lies." *Xanadu of Cocoa Beach, Inc. v. Zetley*, 822 F.2d 982, 985 (11th Cir.1987).

In *Shapiro*, we held that the Supreme Court of Florida would depart from the doctrine of *lex loci contractus* and would apply the law of the situs to interpret a contract that insures a stationary risk. 899 F.2d at 1119. The insurance policy in *Shapiro*, which had been issued in California, provided general liability coverage for a nightclub in Florida and similar establishments located in other states. *Id.* at 1117-18. We ruled that the Supreme Court of Florida would use the *Restatement (Second) of Conflicts of Laws* and apply Florida law because the policy insured a risk in Florida whose location was "unchanging." *Id.* at 1119-21. We have followed our precedent in *Shapiro*. *See LaFarge Corp. v. Travelers Indem. Co.*, 118 F.3d 1511 (11th Cir.1997).

In a recent decision that involved automobile insurance, the Supreme Court of Florida reiterated its general rule in broad terms: "[I]n determining which state's law applies to contracts, we have long adhered to the rule of *lex loci contractus.*" *Roach*, 945 So.2d at 1163. The court stated unequivocally, "We have never retreated from our adherence to [the rule of *lex loci contractus*] in determining which state's law applies in interpreting contracts." *Id.* at 1164. The court also restated its rejection of the most significant relationship test from the *Restatement (Second)*. *Id.* at 1163-64.

The parties dispute which law governs the interpretation of the insurance policies issued to Callahan. Liberty contends, on the one hand, that the firm adherence of the Supreme Court of Florida to the rule of *lex loci contractus* establishes that the law of Massachusetts, the state of contracting, applies to the insurance policies. USF&G maintains, on the other hand, that Florida law governs the interpretation of the policies because Florida courts would apply the law of the situs under the *Restatement (Second)* to policies for comprehensive general liability that insure risks related to fixed property in several states. According to USF&G, Florida law governs the interpretation of the policies for claims related to the Florida projects for risks known to the insurer, Liberty, when the policy was issued. Neither party cites a decision of the Supreme Court of Florida that directly controls this issue.

The question whether Massachusetts or Florida law applies is determinative of this appeal. The parties agree that, under Massachusetts law, the policies do not provide coverage for the losses associated with the Westlake project and the decision of the district court should be affirmed. If the law of Florida governs, USF&G contends that the policies insure against defective work by a subcontractor and provide coverage for the Westlake damages. Liberty responds that, even under the law of Florida, the policies do not provide coverage. If the law of Florida governs the policies, then we would reverse and remand to the district court to apply the law of Florida.

We conclude that the issue presented in this appeal is unsettled under Florida law and should be

certified to the Supreme Court of Florida. "This [C]ourt may certify questions of state law to the state's ***1035** highest court." *MCI WorldCom Network Servs. v. Mastec, Inc.*, 370 F.3d 1074, 1078 (11th Cir.2004). Florida law provides that the Supreme Court of Florida may answer questions of state law, certified by this Court, that are "determinative" of the appeal when "there are no clear controlling precedents in the decisions of the Supreme Court of [Florida]." Fla. Stat. § 25.031; Fla. R.App. P. 9.150(a).

III. CONCLUSION

Because we conclude that this appeal presents an unsettled question of Florida law that is determinative of our decision, we respectfully certify the following question to the Supreme Court of Florida for instruction:

DOES THE DOCTRINE OF *LEX LOCI CONTRACTUS* APPLY TO A DISPUTE ABOUT COVERAGE THAT INVOLVES A POLICY FOR COMPREHENSIVE GENERAL LIABILITY INSURANCE, MADE OUTSIDE OF FLORIDA, THAT INSURES THE OPERATIONS OF A CONTRACTOR ON A PROJECT LOCATED IN FLORIDA?

The phrasing of this question should not limit the consideration by the Supreme Court of Florida of the issue in this appeal. "This latitude extends to the Supreme Court's restatement of the issue or issues and the manner in which the answers are given." *Washburn v. Rabun*, 755 F.2d 1404, 1406 (11th Cir.1985). The record, along with the briefs of the parties, shall be transmitted by the Clerk to the Supreme Court of Florida for assistance in answering this question.

QUESTION CERTIFIED.

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