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Agency—Principal Held Notified Through Agent Acting for Both Seller and Purchaser of Real Property

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RECENT CASES

AGENCY—PRINCIPAL HELD NOTIFIED THROUGH AGENT ACTING FOR BOTH SELLER AND PURCHASER OF REAL PROPERTY

The Plaintiff entered into an executory agreement with a seller evidenced by a memorandum to purchase the seller's farm for $3,000.[1] Later, Cash, the seller's attorney, called plaintiff and said that another purchaser, the defendant, had offered $4,000 for the farm. Plaintiff told Cash that his contract with the seller was enforceable and refused to pay more than $3,000, threatening suit if the seller sold to anyone else. Defendant later bought the farm for $4,000 without knowledge of plaintiff's executory agreement or threat of suit, whereupon plaintiff sued him, as well as the seller and his wife, for specific performance.[2] The question, raised first in the Court of Appeals, was whether defendant, through Cash, who had acted for both defendant purchaser and the seller, is to be held notified of the earlier executory agreement between plaintiff and the seller and hence must take the farm subject to it. Defendant urged: (1) he never had personal knowledge of the agreement; and (2) Cash was acting adversely to defendant's interest at the time of the transaction; therefore, defendant had neither actual nor constructive notice of the agreement and should take the farm free of the agreement. The Court, by a majority of four, affirmed the Appellate Division's judgment which required defendant to convey good and clear title to the farm upon payment by plaintiff of $3,000. *Farr v. Newman*, 14 N.Y.2d 183, 199 N.E.2d 369, 250 N.Y.S.2d 272 (1964).

If a purchaser has notice of a previous encumbrance, he will take the land subject to it.[3] In this instance, defendant purchaser was represented by Cash, his agent. Ordinarily, if an agent receives notice within the scope of his employment, his principal is deemed to have notice regardless of whether or not the agent communicated the information to his principal.[4] However, there

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1. The trial court held that this agreement was unenforceable because the memorandum did not conform to the statute of frauds requirement. The Appellate Division reversed. Farr v. Newman, 18 A.D.2d 54, 238 N.Y.S.2d 204 (4th Dep't 1963).

2. The Newmans, having moved out of the juristiction, did not appear. Farr v. Newman, 18 A.D.2d 54, 238 N.Y.S.2d 204 (4th Dep't 1963).

3. See Wheeler v. Standard Oil Co., 237 App. Div. 765, 263 N.Y. Supp. 272 (3d Dep't), *aff'd*, 263 N.Y. 34, 38, 188 N.E. 148, 149 (1933). Knowledge is notice. *Knowledge* can be either actual knowledge or the means of knowledge with the duty of using it. *Notice* can be either knowledge as defined above, in which case it is usually called actual notice. Or it can be notice through operation of law such as notice of a recorded deed, or notice through an agent without any reference to whether the party charged therewith had or might have had actual knowledge or not. This notice is generally called constructive notice. Long, *Notice in Equity*, 34 Harv. L. Rev. 137 (1920).

4. The presumption of communication arises both from the "alter ego" theory of agency, and the legal duty of the agent to inform his principal. *In re* Locust Bldg. Co., 299 Fed. 756 (2d Cir. 1924), *cert. denied*, Keighley v. American Trust Co., 265 U.S. 590 (1924); Vernon v. Title Guarantee & Trust Co., 7 Cal. App. 2d 171, 46 P.2d 191 (1935); Farnsworth v. Hazelett, 197 Iowa 1367, 199 N.W. 410, 38 A.L.R. 814 (1924); Ratshesky v. Piscopo, 239 Mass. 180, 131 N.E. 449 (1921); McCutcheon v. Dittman, 164 N.Y. 355, 58 N.E.

are two exceptions to the general rule. First, when the agent has a duty to a third party not to disclose confidential information, there is a presumption of noncommunication to the principal based on that duty.[5] And second, when the agent is acting in his own interest, or in the interest of a third party adversely to his principal, there arises a presumption that the agent will not disclose facts to his principal which would defeat the agent's or the third party's adverse interest.[6] This exception is obviously the most difficult of practical application, and unfortunately the least well articulated by the Courts of New York. Often it is said that there must be fraud by the agent because fraud raises the presumption that the agent will not communicate any information to his principal which would reveal the deception.[7] Other cases, no less frequent, hold that it is not the fraud, but rather the adversity of interest implicit in the situation which eliminates the presumption of communication.[8] This result is most often reached by

97 (1900); Howell v. Mills, 53 N.Y. 322 (1873); Hyde v. Bloomingdale, 23 Misc. 728, 51 N.Y. Supp. 1025 (Sup. Ct. 1898); Annot., 4 A.L.R. 1592 (1914) (concerning both the alter ego theory and the presumption of communication); Holmes, The Common Law, 180-83 (1963). This has been called a "conclusive presumption" as it would seem to be rebuttable only by rebutting the agency relationship, or putting the agency within the exceptions. These presumptions and duties also include knowledge gained by the agent outside the immediate transaction but affecting it and in the agent's mind at the time. Story, Agency § 140 (5th ed., 1875); 3 Am. Jur. 2d *Agency* §§ 200, 273-74 (1962) (concerning duty to inform); Long, *Notice in Equity*, 34 Harv. L. Rev. 137, 158 (1920) (concerning the alter ego theory).

5. *In re* Locust Bldg. Co., 299 Fed. 756 (2d Cir. 1924), *cert. denied*, Keighley v. American Trust Co., 265 U.S. 590 (1924); Farnsworth v. Hazelett, 197 Iowa 1367, 199 N.W. 410, 38 A.L.R. 814 (1924); Benedict v. Arnoux, 154 N.Y. 715, 49 N.E. 326 (1898); Henry v. Allen, 151 N.Y. 1, 45 N.E. 355, 36 L.R.A. 658 (1896); 3 Am. Jur. 2d *Agency* § 285 (1962). This was the backbone of the argument below.

6. Innerarity v. Merchant's Nat'l Bank, 139 Mass. 332, 1 N.E. 282 (1885); Carr v. Nat'l Bank & Loan Co., 167 N.Y. 375, 60 N.E. 649 (1901), *aff'd*, 189 U.S. 426 (1903); Benedict v. Arnoux, 154 N.Y. 715, 49 N.E. 326 (1898); Henry v. Allen, 151 N.Y. 1, 45 N.E. 355, 36 L.R.A. 658 (1896); Murray v. Beard, 102 N.Y. 505, 7 N.E. 553 (1886); Otsego Aviation Serv. v. Glens Falls Ins. Co., 277 App. Div. 612, 102 N.Y.S.2d 344 (3d Dep't 1951); 7 C.J.S. *Attorney and Client* § 139 (1937). *But see*, Annot., 4 A.L.R. at 1612 (1914).

7. American Surety Co. v. Pauly, 170 U.S. 133 (1898); Allen v. S. Boston Ry. Co., 150 Mass. 200, 22 N.E. 917 (1889) (questions whether it is fraud in agency, or activity outside the scope that eliminates the presumption of communication); Innerarity v. Merchant's Nat'l Bank, 139 Mass. 332, 1 N.E. 282 (1885); Benedict v. Arnoux, 154 N.Y. 715, 49 N.E. 326 (1898); Weisser's Adm'rs v. Denison, 10 N.Y. 68, 61 Am. Dec. 731 (1854). 3 Am. Jur. 2d *Agency* § 282 (1962); Meecham, Agency, § 721 (2d ed. 1914).

8. Carr v. National Bank & Loan Co., 167 N.Y. 375, 60 N.E. 649 (1901), *aff'd*, 189 U.S. 426 (1903); Constant v. Univ. of Rochester, 111 N.Y. 604, 19 N.E. 631 (1889); Murray v. Beard, 102 N.Y. 505, 7 N.E. 553 (1886); ("Uberrima fides," utmost faith); New York Cent. Ins. Co. v. National Protection Ins. Co., 14 N.Y. 85 (1856); Torrey v. Bank of Orleans, 9 Paige (N.Y.) 649 (1842), Van Epps v. Van Epps, 9 Paige (N.Y.) 237 (1841) ("The policy of the rule is to shut the door against temptation; . . . ." *Id.* at 242); Otsego Aviation Serv. v. Glens Falls Ins. Co. 277 App. Div. 612, 102 N.Y.S.2d 344 (3d Dep't 1951); 3 C.J.S. *Agency* § 141 (1937); 4 Kent's Commentaries 438 (13th ed. 1884) (not dealing directly with non-communication, but saying that there is ". . . the presumption of the existence of fraud [which is] inaccessible to the eye of the court."); 2 N.Y. Jur. *Agency* § 269 (1958); Restatement (Second), Agency § 282 (1958):

> (1) A principal is not affected by the *knowledge* of an agent in a transaction in which the agent secretly is acting adversely to the principal and entirely for his own or another's purposes, except as stated in subsection (2). (2) The principal is affected by the *knowledge* of an agent who acts adversely to the principal: (a) if the failure of the agent to act upon or to reveal the information results in a

starting with the presumption that normally the agent will serve his principal with all of his abilities and will always act in the principal's interest, rather than as a disinterested umpire between two parties.[9] This presumption is inappropriate where the agent acts simultaneously for two parties whose interests are in direct conflict.[10]

Although the defendant argued that this adverse agency rule should apply in his favor, the Court held that there was a great difference between the cases relied on for that proposition and the instant case. The Court distinguished between an agent's knowledge on the one hand, and notice given by a third person to an authorized agent on the other.[11] Here, defendant's agent, Cash, was notified by plaintiff who reasonably believed that the agent was duly authorized to receive the notice. Where a third person dealing with an authorized agent gives him notice, that notice is imputed to the principal.[12] That the agent is acting adversely to the principal's interest cannot impair the effectiveness of the notice. The opinion implies that the Court might well have come to another conclusion had the agent merely discovered on his own

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violation of a contractual or relational duty of the principal to a person harmed thereby; (b) *if the agent enters into negotiations within the scope of his powers and the person with whom he deals reasonably believes him to be authorized to conduct the transaction,* or (c) if, before he has changed his position, the principal knowingly retains a benefit through the act of the agent which otherwise he would not receive." (Emphasis added.)

Sec. 282 is distinguished however from sec. 271, *infra*, in that sec. 271 deals with *notification* and sec. 282 deals with *knowledge*. Comment (d) to sec. 282 says, "A *notification* is effective if the person giving it has done the required act; a condition of mind of the one notified is unimportant if the required act is performed." *But see*, Seavey, *Notice Through an Agent*, 65 U. Pa. L. Rev. 1, 7 (1916): "Adverse interest or action by the agent is immaterial, unless known to the notifier." *Accord*, Restatement (Second), Agency § 271 (1958):

> A notification by or to a third person to or by an agent is not prevented from being notice to or by the principal because of the fact that the agent, when receiving or giving the notification is acting adversely to the principal, unless the third person has notice of the agent's adverse purposes.

9. Constant v. Univ. of Rochester, 111 N.Y. 604, 19 N.E. 631, 2 L.R.A. 734 (1889), Murray v. Beard, 102 N.Y. 505, 7 N.E. 553 (1886) ("Uberrima fides," utmost faith), Conkey v. Bond, 34 Barb. (N.Y.) 276 (1861); Utica Ins. Co. v. Toledo Ins. Co., 17 Barb. (N.Y.) 132 (1853) (*aggregatio mentium* argument—one mind cannot meet); 3 C.J.S. *Agency* § 138 (1937); Story, Agency § 210 (5th ed. 1857).

10. However there are cases which hold that if the two principals know of all the adversity the agency shall be acceptable and both principals will be held to it. Strangely, most cases do not mention the effect of this knowledge but it seems to be implicit in the decisions. See Constant v. Univ. of Rochester, 111 N.Y. 604, 19 N.E. 631 (1889); In the matter of Williams, 37 Misc. 2d 542, 235 N.Y.S.2d 815 (1962); 3 C.J.S. *Agency* § 141 (1937); 2 N.Y. Jur. *Agency* § 203 (1958) (Agent's duty not to act for adverse principals) and § 269 (Imputation of knowledge). *But see*, Empire State Ins. Co. v. Am. Cent. Ins. Co., 138 N.Y. 446, 34 N.E. 200 (1893) which seems to say that even with the principals' knowing of the adversity there must not be an element of discretion in the agent.

11. Knowledge of the agent acquired not by the action of third parties, but by the agent because of his actions has generally not been imputed to his principal when he is acting adversely. However, when an agent is held out to receive notice and a third person, relying on this holding out, so notifies him, the principal is held regardless of the agent's adversity. See Central Trust Co. v. Folsom, 167 N.Y. 285, 60 N.E. 599 (1901); Crane v. Greunwald, 120 N.Y. 274, 24 N.E. 456 (1890); Restatement (Second), Agency §§ 271, 282 (1958). Both cases "estopped" the principal from denying receipt of funds which the agent had at least apparent authority to receive, in spite of the fact that the agent was acting in his own interest.

12. See note 11 *supra*.

plaintiff's executory agreement in the course of his investigations and had failed to inform his buyer principal about it.[13] In that situation plaintiff would not have relied on the authority of Cash to act as defendant's agent and plaintiff would have been no worse off than if the seller had sold the farm directly to defendant.[14]

The majority, in affirming the judgment, refuses to hold the defendant insulated from Cash's knowledge simply because Cash also acted for the seller. In the light of the distinction between notice given to an authorized agent on the one hand and knowledge independently acquired by him on the other, the majority considered it immaterial for purposes of imputing his knowledge to his principal whether the authorized agent acted either fraudulently or on behalf of conflicting interests. In any event, the opinion pointed out it must be assumed with the court below that Cash was not guilty of fraud, but merely of an "error of judgment." Finally, the argument that either fraud or conflicting interest precluded imputation of knowledge had not been raised below.[15]

The dissenting opinion, without directly confronting the majority's position, stresses that the rationale for imputing his agent's knowledge to a principal is the presumption that the agent will normally communicate the information to his principal. But such an inference is not appropriate when, as was the case here, the agent is representing a third party with interests adverse to those of the principal.[16]

With two apparently innocent purchasers involved, the question before the Court was on whom to place the risk of the dual agency relationship presented here. The majority places the risk on the person who acts through an agent; the minority in effect places this risk on a stranger to the agency relationship whose actions demonstrate his reliance on its apparent efficacy. Stated that bluntly it is not difficult to align oneself with the majority. An analogy to the

13. However, due to other statements of the court, this is doubtful. Basically, they do not feel the agent was acting adversely as defined in Restatement (Second), Agency § 282 comment (c) (1958): *"Meaning of acting adversely.* The mere fact that the agent's primary interests are not coincident with those of the principal does not prevent the latter from being affected by the knowledge of the agent if the agent is acting for the principal's interests." This would seem *contra* to the holdings of the cases in footnote 8 *supra.*

14. Had the buyer dealt directly with the seller without notice of the outstanding equity, he would have taken the land free of that equity. Williamson v. Brown, 15 N.Y. 354, 362 (1857); Jackson v. Campbell, 19 Johns. (N.Y.) 281 (1822); Jackson v. Given, 8 Johns. (N.Y.) 136 (1811); see, N.Y. Real Prop. § 294(3).

15. This is the first time the defendant argued the adverse agency exception, and the majority says, ". . . this court will not consider new arguments, whether of law or fact, or both, where it appears that if they had been raised at the trial an adequate defense might have been adduced by the other party (Osgood v. Toole, 60 N.Y. 475; Persky v. Bank of America Nat'l Ass'n, 261 N.Y. 212, 185 N.E. 77; Cohen and Karger, Powers of the New York Court of Appeals (1952), § 162)." Instant case at p. 188, 199 N.E.2d at 372, 250 N.Y.S.2d at 276.

16. Citing Benedict v. Arnoux, 154 N.Y. 715, 49 N.E. 326 (1898), Otsego Aviation Serv. v. Glens Falls Ins. Co., 277 App. Div. 612, 618-20, 102 N.Y.S.2d 344, 348-50 (3d Dep't 1951). Also for the establishment of the rule citing New York Cent. Ins. Co. v. National Protection Ins. Co., 14 N.Y. 85 (1856), Utica Ins. Co. v. Toledo Ins. Co., 17 Barb. (N.Y.) 132 (1853). Henry v. Allen, 151 N.Y. 1, 45 N.E. 355 (1896) speaks of notice to agent, but there is no question of depending on agent's apparent authority. The previous cases do not rest on *notice* to an agent, but only *knowledge of* an agent.

torts doctrine of *respondeat superior* might shed some light on the majority's underlying decision, to put the risk of an agency relationship on the principal rather than an outsider. Among others, there are two social policy reasons behind *respondeat superior* which may have been in the back of the Court's mind.[17] One is the ability of the master to control his servants as opposed to the lack of control in an outsider. In the instant case, defendant was in a better position to control his agent than was the plaintiff, even if this meant finding a new agent. And secondly, the master, not the outsider, benefits by the master-servant relationship. So too, a principal is benefited by being able to do business through an agent instead of doing it in person. Because the agency relationship is vital to our society it should be held effective whenever possible. To penalize a person for depending on a relationship which, to all appearances, exists, would substantially weaken the usefulness of agency law. Plaintiff, it would seem, had no reason to doubt Cash's authority as an agent empowered to receive notice of the outstanding equity. He therefore proceeded to do everything he thought necessary to protect his interest. Thus, it is difficult to see why plaintiff, an innocent third party, should bear the risk of the questionable activities of another's agent. It was, after all, the defendant who selected Cash as his agent and, at least vis-à-vis an innocent stranger should assume the risk of his conduct.[18] Had plaintiff not dealt with Cash as an agent, he could not have claimed reliance on the agency; if that had been the case, and in the absence of other facts, this might have been a stronger case for refusing to impute to the defendant the knowledge of Cash because of the latter's adverse interests.[19]

MICHAEL SWART

CIVIL PROCEDURE—JURISDICTION UNDER "TORTIOUS ACT" PROVISION OF NEW YORK LONG-ARM STATUTE OBTAINABLE OVER NON-RESIDENTS ONLY WHEN SUCH ACTS ARE COMMITTED WITHIN THE STATE

In two recent cases New York residents brought suits on theories of negligence and breach of warranty against non-domiciliary defendants involved in the manufacture of products used in or sent into New York. Mr. and Mrs. Feathers, plaintiffs in the first case, sued for personal injuries and property damage caused

17. Latty, Introduction to Business Associations 56 (1951).
18. Moore v. Metropolitan Nat'l Bank, 55 N.Y. 41, 47 (1873).
19. This action commenced by Farr against Newman and Hardy appears to be the only substantial basis for his remedy. Unfortunately, Newman left the jurisdiction. Though it has been suggested in 9 Utah L. Rev. 496 (1964) that plaintiff might be able to recover damages from the attorney on the theory of interference with contractual rights, this would be a doubtful remedy in light of the court's statement that the attorney had not acted fraudulently in considering the contract unenforceable. Defendant, on the other hand, because of the agency relationship could possibly sue the attorney for a breach of that relationship and stand a better chance of recovery than plaintiff would. The attorney appears to have breached the ABA Canons of Professional and Judicial Ethics 3 (Canon 6) (1957) as well as general agency principles long accepted.