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CONTRACTS--SPECIFIC PERFORMANCE-DEFENSE OF HARDSHIP CAUSED BY DEFENDANT'S IMPROVEMENTS AFTER GIVING OPTION TO PURCHASE

Robert E. Anstaett
University of Michigan Law School

CONTRACTS—SPECIFIC PERFORMANCE—DEFENSE OF HARDSHIP CAUSED BY DEFENDANT'S IMPROVEMENTS AFTER GIVING OPTION TO PURCHASE—In a lease of plaintiff's corner lot to defendant corporation in 1941, the latter granted plaintiff a five-year option to purchase adjacent lots owned by defendant for $35,000, which was then a fair price. In 1945 defendant's officers, overlooking the option agreement, authorized construction of a warehouse on the adjacent property. After defendant had expended about $20,000 in the construction, plaintiff exercised her option by giving notice to defendant. Upon defendant's refusal to convey, plaintiff sued for specific performance. The trial court dismissed the complaint. *Held*, reversed and remanded with instruction to decree specific performance upon condition that plaintiff pay the option price plus such appreciation in value of the lot as resulted from the improvement, reserving defendant the right to remove the warehouse within a specified time; complaint to be dismissed should plaintiff fail to tender the required amount. *Fontaine v. Brown County Motors Co.*, 251 Wis. 433, 29 N.W. (2d) 744 (1947).

The court concluded that the plaintiff should have some benefit from her bargain since she was blameless, but that a loss should not be imposed on defendant even though brought about by its own negligence. As authority for the latter proposition, the court relied on a case involving unilateral mistake as to the terms of a written agreement.[1] Where a person executes a harsh contract

[1] Woldenberg v. Riphan, 166 Wis. 433, 166 N.W. 21 (1918).

under an erroneous conception of its contents, such a mistake, even though negligently made, is generally recognized as a ground for refusing specific performance.[2] But where both parties enter into a fair contract with their eyes open, a party's subsequent negligence rendering specific performance costly to himself would seem to stand on different ground.[3] The contract which is sought to be enforced in this suit arose when the optionee gave notice of her election to exercise the option. But the fact that all the terms of the sale contract are embodied in the option agreement, from which the defendant cannot retreat, causes the courts to treat the situation, for the purpose of hardship analysis, as one in which the contract of sale arises at the time the option agreement is made.[4] A corollary of the principle, adhered to by most jurisdictions, that mere inequality of the reciprocal performances promised will not prevent a decree for specific performance [5] is the idea that inadequacy of consideration, arising from subsequent changes which are of such a nature that the parties did or should have contemplated the possibility of their happening, generally is not such a hardship as will avoid a specific performance.[6] It would seem to follow that hardship produced by a defendant's voluntary acts subsequent to the making of the contract should not be a reason for denying specific performance.[7] So the court in the principal case seems correct in holding that the circumstances do not require a refusal of specific relief to plaintiff. A conditional decree for *cy pres* performance, if the variation is advantageous to defendant and qualifies relief offered to plaintiff, does not seem objectionable, where it is the only alternative to a denial of specific relief.[8] But it is question-

[2] McCLINTOCK, EQUITY, § 72 (1936); 2 CONTRACTS RESTATEMENT, § 367(c) (1932).

[3] Note the sentiment of Turner, L.J., in Helling v. Lumley, 3 DeG. & J. 493 at 499, 44 Eng. Rep. 1358 (1858): "The Court will not permit a Defendant to put himself in such a position as that his performance of his agreement shall create a forfeiture, and then to turn round and say that the Plaintiff shall not have a specific performance of the agreement. . . ."

[4] See O'Connell v. Lampe, 206 Cal. 282, 274 P. 336 (1929); Willard v. Tayloe, 8 Wall. (75 U.S.) 557 (1869).

[5] Conrad v. Schwamb, 53 Wis. 372, 10 N.W. 395 (1881); POMEROY, SPECIFIC PERFORMANCE, 3d ed., § 194 (1926).

[6] Rogers Bros. Coal Co. v. Day, 222 Ky. 443, 1 S.W. (2d) 540 (1927); POMEROY, SPECIFIC PERFORMANCE, 3d ed., § 178 (1926).

[7] Adams v. Weare, 1 Bro. C.C. 567, 28 Eng. Rep. 1301 (1784); Telegraphone Corp. v. Canadian Telegraphone Co., 103 Me. 444, 69 A. 767 (1908); POMEROY, SPECIFIC PERFORMANCE, 3d ed., §§ 187, 190 (1926). This has not been followed where loss to defendant would be grossly disproportionate to plaintiff's benefit from a specific performance [Murfeldt v. N.Y., W.S. & B.R. Co., 102 N.Y. 703, 7 N.E. 404 (1886); City of London v. Nash, 3 Atk. 512, 26 Eng. Rep. 1095 (1747)] and where public interest would suffer [Whitney v. The City of New Haven, 23 Conn. 624 (1855); Rockhill Tennis Club of Kansas City v. Volker, 331 Mo. 947, 56 S.W. (2d) 9 (1932)].

[8] For a discussion of conditional decrees, see Durfee, "Mutuality in Specific Performance," 20 MICH. L. REV. 289 at 298-305 (1922). Generally a variation is decreed requiring optionee to compensate for uncontemplated improvements paid for involuntarily by optionor, whether made by public authority [Pearce v. Third Ave.

able whether equity should vary the performance of a contract in order to compensate for subsequent changes which the parties should have contemplated.[9] Where a decree for specific performance is so conditioned, it must be for the reason that equity requires one to pay for what it gives him, where to do so does not obviously violate settled guides for the exercise of discretion in equity.

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Improvement Co., 221 Ala. 209, 128 S. 396 (1930)] or at optionee's direction [Old Time Petroleum Co. v. Turcol, 18 Del. Ch. 121, 156 A. 501 (1931)].

[9] In Peterson v. Chase, 115 Wis. 239, 91 N.W. 687 (1902), a variation was decreed requiring optionee to reimburse optionor for 1/3 of the value of voluntary improvements; but see dictum to the contrary in Old Time Petroleum Co. v. Turcol, 18 Del. Ch. 121, 156 A. 501 (1931), and the implication in 5 WILLISTON, CONTRACTS, rev. ed., 3993 (1937). No variation being made for appreciation in market value of the premises through the fault of neither party [Willard v. Tayloe, 8 Wall. (75 U.S.) 557 (1869), and cases collected in 65 A.L.R. 7, 72-77 (1930)], there seems to be no reason for a different rule as to improvements voluntarily made by optionor in the face of his contingent duty to convey at a set price.

But if the price is to be varied, it is at least arguable that the decree, instead of permitting removal by defendant, should give plaintiff the optional right to require defendant to remove the warehouse and convey the land at the contract price.