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CONTRACTS - FRAUD - EFFECT OF PROVISION IN CONTRACT THAT REPRESENTATIONS OF SELLER'S AGENT ARE NOT BINDING

CONTRACTS — FRAUD — EFFECT OF PROVISION IN CONTRACT THAT REPRESENTATIONS OF SELLER'S AGENT ARE NOT BINDING — Plaintiff sued on promissory notes given it by defendant in part payment of the purchase price for a dumptor. Defendant counterclaimed on the ground that he was induced to buy the dumptor because of fraudulent misrepresentations made by the plaintiff's agent. The contract contained the stipulation that "no representations made by an agent not included herein shall be binding," and therefore the plaintiff contended that the jury could not consider any of the false statements made by its agent. *Held*, said statement is ineffectual to preclude the defendant from asserting fraud. *National Equipment Corp. v. Volden*, (Minn. 1934) 252 N. W. 444.

The rule that parol evidence is inadmissible to alter or vary the terms of a written contract is too well settled to require the citation of any authority in its support. Almost as well established is the rule that such evidence is allowable to show that the making of the contract was procured by fraudulent representations.[1] However, in the instant case an attempt was made, by means of a provision in the contract, to secure from the vendee a waiver of or estoppel against any claim of fraud. Contracts containing such provisions are common, and various distinctions are made by the courts. Where the antecedent fraud is that of the seller himself or of an agent making the representation with the seller's knowledge, generally no effect is given to that provision.[2] On the other

[1] Bridger v. Goldsmith, 143 N. Y. 424, 38 N. E. 458 (1894); Rectenbaugh v. Northwestern Port Huron Co., 22 S. D. 410, 118 N. W. 697 (1908). See also cases collected in 56 A. L. R. 13 at 16 (1928).

[2] Callahan v. Jursek, 100 Conn. 490, 124 Atl. 31 (1924); Mooney v. Cyriacks, 185 Cal. 70, 195 Pac. 922 (1921); and cases collected in 10 A. L. R. 1472 (1921);

hand, where the fraud is solely the agent's, and the vendee knows that the contract must be submitted to and accepted by the vendor before it becomes a binding obligation, many courts have held the vendee barred from showing that he was deceived.[3] However, fully as many jurisdictions have permitted the showing of fraud even in this latter situation.[4] Some courts have distinguished between those cases in which the representations relate to the subject-matter of the contract and those in which they are collateral thereto. Where they pertain to the subject-matter, they are usually admissible in evidence,[5] but where they are really collateral agreements, they are not.[6] In Massachusetts a peculiar distinction is observed. When the fraud is antecedent to the execution of the contract, the defrauded party is precluded from proving the misrepresentation.[7] Not so, when the fraud enters into the making of the contract.[8] A situation

56 A. L. R. 13 at 57 (1928) and 75 A. L. R. 1032 at 1041 (1931). Among the many sound reasons given for the stand of these courts are the following: (1) This stipulation that the contract comprises all the agreements between the parties adds nothing to the legal effect of the instrument, for even without it the contract is deemed complete. (2) Fraud is shown to avoid the contract in its entirety, and that includes this special provision. (3) A party ought not be permitted to invoke an estoppel brought about by his own fraud. (4) Such a clause is against public policy, for it acts as an incentive to commit fraud.

[3] J. B. Colt Co. v. Odom, 136 Miss. 651, 101 So. 853 (1924); Canon City Industrial Stores Co. v. McInerney, 71 Colo. 492, 208 Pac. 457 (1922); and cases cited in 75 A. L. R. 1032 at 1048 (1931). Two excellent arguments are offered by these cases for their holding. In the first place, the buyer should be estopped to assert fraud, since by admitting that the contract contained all the agreements between the parties, he induced the seller to act thereon and enter into the sale. Secondly, this is a good place for applying the rule that when one of two innocent persons must suffer for a loss due to the fraud of another (the seller's agent here), the law will favor the one who was diligent (in this case the vendor, for he inserted that provision into the contract) rather than the one who was negligent (the vendee for entering into the transaction in the face of that stipulation).

[4] Rice v. Levinger, 141 Ore. 413, 18 Pac. (2d) 221 (1933); J. I. Case Co. v. Bird, 51 Idaho 725, 11 Pac. (2d) 966 (1932). See, too, 56 A. L. R. 13 at 57 (1928) and 75 A. L. R. 1032 at 1062 (1931).

[5] General Electric Co. v. O'Connell, 118 Minn. 53, 136 N. W. 404 (1912); Shepard v. Pabst, 149 Wis. 35, 135 N. W. 158 (1912). But see Equitable Mfg. Co. v. Biggers, 121 Ga. 381, 49 S. E. 271 (1904), Georgia being the only State to exclude evidence of the representation where it pertains to the quality or condition of the article.

[6] Schuster v. North American Hotel Co., 106 Neb. 672, 184 N. W. 136 (1921), is an excellent example of a case in which the excluded evidence was an agreement collateral to the subject-matter of the contract. The vendor's agent sold some stock to the vendee and promised that his company would, upon request, accept a return of the stock and repay the consideration with interest.

[7] Colonial Development Corp. v. Bragdon, 219 Mass. 170, 106 N. E. 633 (1914).

[8] Butler v. Prussian, 252 Mass. 265, 147 N. E. 892 (1925); Hashem v. Mass. Security Corp., 255 Mass. 29, 150 N. E. 846 (1926). It is often a matter extremely provocative of difficulty to decide whether the fraud is antecedent to or enters right into the execution of the contract.

similar to that in the present case arises in insurance cases, where there is a provision in the policy that it shall become incontestable for fraud from the date of its issue. Such provision is generally held ineffective.[9] However, if it is slightly varied so as to allow a reasonable period before the policy becomes incontestable, then it is ordinarily upheld.[10] The result in the instant case seems incorrect, for the fraud was solely that of the agent who, in making the representations, was acting beyond the scope of his powers.[11] Of this latter fact the buyer had knowledge because of the express stipulation in the contract limiting the agent's authority. The court, however, was bound by a long line of precedents,[12] none of which have distinguished between a contract induced by the personal fraud of the seller and that induced by the fraud of his agent. In view of the reasons given elsewhere[13] in this note, it is urged that such a distinction ought to be made.

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[9] Reagan v. Union Mutual Life Ins. Co., 189 Mass. 555, 76 N. E. 217 (1905); Welch v. Union Central Life Ins. Co., 108 Iowa 224, 78 N. W. 853 (1899).

[10] See cases collected in 6 A. L. R. 448 at 453 (1920), 13 A. L. R. 674 (1921), and 35 A. L. R. 1491 at 1492 (1925).

[11] The court lightly dismisses the question of the scope of the agent's authority by saying, "The fraud of the agent was the fraud of the plaintiff, since the statements were made in the course of the transaction of which he had charge." Nat. Equipment Corp. v. Volden, (Minn. 1934) 252 N. W. 444 at 445. This is evidently adopting a very broad conception of an agent's authority to act for his principal, and in view of the express limitation upon this authority which is to be found in the contract, the court is probably wrong in its conclusion.

[12] Roseberry v. Hart-Parr Co., 145 Minn. 142, 176 N. W. 175 (1920); Ganley Bros. v. Butler Bros. Bldg. Co., 170 Minn. 373, 212 N. W. 602, 56 A. L. R. 1 (1927), and cases cited therein.

[13] See note 3, supra.