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CONTRACTS - CONSIDERATION- REQUIREMENT OF CONSIDERATION FOR MODIFICATION OF A CONTRACT

David Macdonald
University of Michigan Law School

CONTRACTS — CONSIDERATION — REQUIREMENT OF CONSIDERATION FOR MODIFICATION OF A CONTRACT—Landlord leased space to tenant in a building which was to be erected. The agreement and subsequent modifications provided that the landlord should pay the broker's commission and architect's fees, and have the power to cancel the lease prior to a specified time. The litigation arose over another attempted modification in the form of a letter from the tenant in which the tenant promised to indemnify the landlord for the broker's commission and architect's fees if the landlord should cancel the lease as it had the power to do under the agreement. In compliance with the tenant's request, the landlord signed an acceptance of the letter, which stated that the letter should constitute a binding agreement. The landlord subsequently cancelled the lease, but the tenant refused to reimburse the landlord for the expenses, on the grounds that there was no consideration for the tenant's promises. On suit by the landlord to enforce the modification, *held,* a promise to modify a valid executory contract requires no additional consideration to be binding. *Mid-Century, Ltd., of America v. United Cigar-Whelan Stores Corp.,* (D.C. D.C. 1953) 109 F. Supp. 433.

The present case adds to a small but growing minority of decisions which hold that the consideration for a contract also supports a subsequent promise to modify that contract.[1] The majority of the courts require new consideration, except in the following areas: executed modifications,[2] rescission followed by the formation of a new contract,[3] statutory vitiation of the requirement of

[1] 1 WILLISTON, CONTRACTS, rev. ed., 443-450 (1936). It is concluded in 43 A.L.R. 1451 (1926) and 93 A.L.R. 1404 (1934) that as to leases there is a requirement of consideration. Later cases to the contrary: Commercial Credit Co. v. Perkins, 236 Ala. 616, 184 S. 178 (1938); Miller v. Stanich, 202 Wis. 539, 544, 230 N.W. 47, 233 N.W. 753 (1930).

[2] This rule most often is based on a theory of waiver. Cragin v. Eaton, 133 Miss. 151, 97 S. 532 (1923).

[3] While some cases have supported the result in the principal case by calling any modification a rescission followed by a substituted agreement, the requirements of rescission and substitution which would be universally acceptable to courts following the majority view would evidently be (1) that the original contract was still partly executory on both sides, and (2) that both sides had a moment of freedom not to enter into the substitute agreement. 1 WILLISTON, CONTRACTS, rev. ed., 447-448 (1936).

consideration,[4] modifications of previously breached contracts,[5] or contracts which themselves provide for subsequent modifications.[6] Some cases have reached the same result as the principal case by expanding the definition of consideration to include a promise to complete performance despite unforeseen difficulties,[7] or a promise to give up the privilege of breaching the contract and paying damages.[8] Sometimes the agreement has been enforced as a gift.[9] On the facts of the principal case, most courts would hold the additional promise unenforceable, since the promisee did not agree to do more than his pre-existing duty. The arguments against requiring new consideration are at least twofold. Although it may logically be contended that a contracting party can never be bound to accept part performance in place of the whole, or to provide additional consideration in return for the same performance, there is often a great difference between having the right to full performance and the likelihood of actually obtaining it. For example, where the financial state of one contracting party is extremely weak, the other party may be anxious to bargain away more compensation for the same performance. However, it should be noted that such a situation was not shown in the principal case. A second argument against the need for new consideration in these cases is based on the fact that one of the major reasons for the requirement of consideration in any contract is to prove an intent to be legally bound.[10] Where a valid contract is already in existence, however, the parties in modifying it may be presumed to have this intent. The tenant's intent is accentuated in the present case by his request for an acceptance signed by the landlord. On the other hand, strong policy considerations support the majority view that there must be additional consideration for modifying a contract. If the requirement of new consideration is abandoned, there is a danger that the courts will be unable to set aside modifications obtained by a party in a superior bargaining position who threatens nonperformance simply because of a motive of increasing profit. The problem is one of detecting and preventing duress, and until a satisfactory touchstone for

[4] 40 N.Y. Consol. Laws (McKinney, 1949) §33(2); Mich. Comp. Laws (1948) §566.1.

[5] Of course, an agreement to waive rights after a breach serves as consideration for an additional promise by the breaching party. Where the same party breaches who obtains the sole benefit under the modification, however, courts have held the modification enforceable only when executed, on the grounds of waiver. See Sherman, Clay & Co. v. Buffum & Pendleton, 91 Ore. 352, 179 P. 241 (1919).

[6] Kentucky Home Mutual Life Ins. Co. v. Leitner, 302 Ky. 789, 196 S.W. (2d) 421 (1946).

[7] Linz v. Schuck, 106 Md. 220, 67 A. 286 (1907); *contra,* McGovern v. New York City, 234 N.Y. 377, 138 N.E. 26 (1923).

[8] Lattimore v. Harson, 14 Johns. (N.Y.) 330 (1817); *contra,* Kaye v. Hoage, 63 Misc. 332, 117 N.Y.S. 122 (1909). Williston criticizes the logical value of the argument but ignores the opposing policy consideration of preventing duress. 1 WILLISTON, CONTRACTS, rev. ed., 445 (1936).

[9] Watkins and Son v. Carrig, (N.H. 1941) 21 A. (2d) 591. This rationale is criticized in 40 MICH. L. REV. 748 (1942).

[10] Whittier, "The Restatement of Contracts and Consideration," 18 CALIF. L. REV. 611 at 613 (1930).

this type of duress can be found, the consideration requirement in modification agreements might better be retained.[11]

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[11] Alexander v. S. A. Trufant Commission Co., (Tex. Civ. App. 1895) 34 S.W. 182, rejected the contention that a threat of breach could constitute duress. *Contra,* Thomas v. Brown, 116 Va. 233, 81 S.E. 56 (1914). See Dalzell, "Duress by Economic Pressure I," 20 N.C. L. REV. 237 at 255-276 (1942); Dawson, "Economic Duress—An Essay in Perspective," 45 MICH. L. REV. 253 (1947); 40 CALIF. L. REV. 425 (1952) (outlining the requirements of rescinding an executed contract because of economic duress). It would seem that courts would be more likely to refuse to enforce an executory contract when the same elements are present.