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RESTITUTION - RELIANCE LOSSES IN CONTRACT WITHIN STATUTE OF FRAUDS

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RESTITUTION—RELIANCE LOSSES IN CONTRACT WITHIN STATUTE OF FRAUDS —Plaintiff, the owner of a seasonal night club, orally agreed to lease the premises for three years to the defendant. The plaintiff had a written lease prepared but it was not executed. Negotiations by letters and telegrams between the parties proved that the document was not a definite integration of their agreement sufficient to satisfy the statute of frauds governing leases of land for periods longer than one year. During this interval of negotiation, plaintiff at defendant's express request had procured a liquor license for the following year at the night club, hired a watchman, retained counsel to draw the proposed lease, and incurred telephone and other incidental expenses. Upon defendant's subsequent refusal to perform the oral contract, plaintiff brought suit for recovery of his various expenses and in addition for loss of the use of the premises during the first year of the proposed lease. *Held,* the unenforceability of the lease under the statute of frauds prevented plaintiff from recovering for loss of the use of the premises, but did not bar his right to reimbursement for the expenses incurred at defendant's request. *Minsky's Follies of Florida, Inc. v. Sennes,* (5th Cir. 1953) 206 F. (2d) 1.

The interests involved on the side of a person injured through breach of contract have been classified as three—the expectation, restitution, and reliance interests.[1] Since recovery of the plaintiff's expectation interest necessarily involves the enforcement of the contract, this interest will not serve as the basis for recovery where the contract is made either unenforceable or void by the

[1] These categories of "interests" are set out by Fuller and Perdue, "The Reliance Interest in Contract Damages," 46 YALE L.J. 52, 373 (1936).

statute of frauds. Protection of the restitution interest, however, need not be barred by the unenforceability of the contract.[2] Recovery under this theory involves the familiar requirement that the defendant contract-breaker receive a "benefit" from the plaintiff, with the latter relying on the performance of the contract. It is said that retention of the benefit "unjustly enriches" the defendant, and that he should be compelled to disgorge and make restitution on general principles of fairness regardless of the unenforceability of the contract.[3] Of course if the acts conferring such benefits amount to part performance of the oral contract, it is taken out of the statute of frauds and plaintiff may possibly be made whole to the extent of his expectation interest.[4] However, in the principal case the court could not grant plaintiff expectation damages for loss of the use of the premises because of both the contract's unenforceability and the absence of sufficient part performance. Furthermore, the court's decision allowing the plaintiff reimbursement for his several other expenses cannot be attributed solely to the orthodox concept of "benefit." Quite clearly, the night watchman and the liquor license[5] were not usable by the defendant without possession of the night club, nor were they ever "received" by him so that he had an obligation to make restitution.[6] The court seems rather to have recognized that plaintiff's expenses were incurred at the specific request of defendant, in reliance on the latter's promised performance, and that in the absence of either part performance or a defined "benefit," plaintiff's detriment or reliance interest should be the object of recovery. Traditionally, cases basing recovery on a pure reliance loss theory have been rare,[7] but an increasing number are now granting relief substantially with this interest in mind.[8] A few of the latter cases seem to

[2] 2 WILLISTON, CONTRACTS, rev. ed., §534 (1936); 2 CONTRACTS RESTATEMENT §355, comment *a* (1932).

[3] Fuller and Perdue, "The Reliance Interest in Contract Damages," 46 YALE L.J. 52 at 53-54 (1936). See also WOODWARD, QUASI CONTRACTS §95 (1913).

[4] Jeanblanc, "Restitution Under the Statute of Frauds: What Constitutes a Legal Benefit," 26 IND. L.J. 1 at 36 (1950). The author stresses the vital difference in this connection between "partial performance" and "preparatory reliance." An illustrative case is Cocheco Aqueduct Assn. v. Boston & Maine R.R., 59 N.H. 312 (1879).

[5] Defendant could not transfer or sell a liquor license in Florida unless in connection with a sale of premises. Fla. Stat. Ann. (1943) §561.32.

[6] 2 CONTRACTS RESTATEMENT §348 (1932) seems to require for restitution the "receipt" of the benefit by the defendant. It ought to be noted that this requirement is more easily fulfilled where the parties are reversed from their position in the principal case, i.e., where the plaintiff is the purchaser or lessee and has improved or conferred value on defendant's land. See Santoro v. Mack, 108 Conn. 683, 145 A. 273 (1929); People's National Bank v. Magruder, 77 Fla. 235, 81 S. 440 (1919); Lemire v. Haley, 93 N.H. 206, 39 A. (2d) 10 (1944).

[7] Boone v. Coe, 153 Ky. 233, 154 S.W. 900 (1913), typifies the classic view that where no benefit is received, no obligation to pay is implied.

[8] See discussion in Fuller and Perdue, "The Reliance Interest in Contract Damages," 46 YALE L.J. 373 at 390 et seq. (1936). A leading case representing this tendency is Kearns v. Andree, 107 Conn. 181 at 187, 139 A. 695 (1928), where the court stated that without regard to the extent of the benefit conferred, ". . . services have been performed at the request of him for whom they were done and in the expectation that compensation would be made for them. . . ." Some cases within the statute of frauds allowing recovery

rationalize their results on the principle that an equitable estoppel prevents the defendant from setting up anything in the contract to oppose the natural consequences of his own course of conduct.[9] More decisions reach the same conclusion by simply diluting and expanding the notion of "benefit" from a tangible value conferred on the defendant to any bargained-for act.[10] Such expansion results in an overlapping of the restitution and reliance interests and seems to assure recovery for cases coming within the twilight zone, i.e., those where both a benefit and a request are present.[11] It may have the additional effect of reimbursing the plaintiff in an amount measured not by defendant's enrichment, but by his own detriment.[12] This flexibility in the concept of "benefit" is desirable, particularly where defendant's request has caused expenditures on the part of the plaintiff which would otherwise be unreasonable. However, where no "request" can be found or inferred courts are prone to refuse further expansion of the remedy, since damages for losses incurred, even through foreseeable reliance, are not likely to be given for breach of an unenforceable contract.

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of reliance losses are Randolph v. Castle, 190 Ky. 776, 228 S.W. 418 (1921) (plaintiffs had remained unemployed at defendant's request); Huey v. Frank, 182 Ill. App. 431 (1913) (defendant had requested plaintiff lessor to provide telephone service and window lettering for rooms to be leased to defendant).

[9] E.g., Goodman v. Dicker, (D.C. Cir. 1948) 169 F. (2d) 684. However, this theory would hardly fit the facts of the principal case.

[10] 46 YALE L.J. 373 at 392 (1936). Matousek v. Quirici, 195 Ill. App. 391 (1915) (lease of a vacant store to ensure against competition held a benefit to lessee). A decision employing the concept of a bargained-for performance is Mergenthaler v. Dailey, (2d Cir. 1943) 136 F. (2d) 182.

[11] Such merger seems to exist in the principal case if one could say that the liquor license, watchman, and payment of attorney's fees were "bargained for" between the parties as part of the whole agreement, and then add defendant's request for these things. It is interesting that at page 4 the court twice uses the phrase "at defendant's request and for his benefit."

[12] See WILLISTON, CONTRACTS, rev. ed., §536 (1936).