Michigan Law Review

Volume 40 | Issue 4

1942

SPECIFIC PERFORMANCE - EFFECT OF A VENDOR'S BREACH OF A COLLATERAL AGREEMENT

Michigan Law Review

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Specific Performance — Effect of a Vendor's Breach of a Collateral Agreement — The vendor sought specific performance of a land contract containing the following clause, "On default by the buyer, the binder shall be retained by the seller, but if the seller shall be unable to make conveyance as above stipulated then the binder shall be returned and all obligations shall cease." It was agreed orally by the parties that the vendor would help the vendee finance the purchase. The vendor did provide the vendee with an application for a mortgage from a bank, but the bank did not promise to take the mortgage. Held, specific performance should be refused, both because of the quoted clause, which provided for liquidated damages, and because the plaintiff breached the collateral agreement to help finance the purchase. 1 Gilman v. Murphy, (R. I. 1941) 21 A. (2d) 272.

The courts are almost universally agreed that a contract provision establishing liquidated damages or providing a penalty for breach of the contract does not deprive either party of the remedy of specific performance, unless the contract indicates that such a result is intended by the parties. The weight of authority is against the interpretation of the principal case if the liquidated damages provision is the basis of the decision. 2 However, since the Rhode

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1 The dissenting opinion held that the oral stipulation had been substantially performed.

2 See 32 A. L. R. 584 at 592 (1924). In Rittenhouse v. Swieckicki, 94 N. J. Eq. 36 at 39, 118 A. 261 (1922), the court stated, "there must be something apart from the fact that there is a provision for liquidated damages to show that its payment is to be the equivalent for performance. There must be found in the engagement a contemplated alternative whereby the parties are given an option to perform or to refuse to perform and pay the specified damages. That alternative engagement is easily expressed, and if relied upon should appear with reasonable clearness and certainty."
Island court hitherto has adhered to the majority view, and since the court does not purport to overrule any previous cases, the real reason for the denial of specific performance must be the plaintiff's breach of the collateral agreement to help finance the defendant's purchase. The court in effect holds that the substantial fulfillment of a collateral stipulation by the vendor which induces the vendee to enter into the contract is a condition of the contract the breach of which precludes the vendor from obtaining specific performance. In determining the propriety of the decision, it may be helpful to decide whether a breach of this collateral stipulation would prevent the vendor from recovering damages in a law action. Although referred to by the court as a representation, the stipulation probably is not a representation in the strict sense because it is a promise to perform an act in the future. It would seem that the parties intended performance of the vendor's oral agreement to help the vendee finance the purchase to be a condition precedent to the vendee's performance, since the vendee probably was unable to carry out the contract unless he received such assistance. Since the collateral agreement is oral, there is the question whether proof of it by parol evidence would be excluded in an action at law. If the proof is admitted, the vendor would not be able to recover damages, because he did not fulfill a condition precedent to the vendee's obligation to perform. Even if recovery is disallowed at law, should relief also be denied by a court of equity when the plaintiff made a bona fide attempt to fulfill the condition precedent? It might be argued that an equity court should grant a conditional decree of specific performance, the payment of the purchase price being conditioned on the vendor's providing an adequate mortgage to enable the vendee to purchase the property on the basis originally contemplated. A barrier to such a conditional decree is found in the requirement that for equity to grant specific performance the contract must be certain in all of its material terms. A decree merely requiring the vendor to arrange for a mortgage would be open to the objection that the terms of the mortgage might not be acceptable to the vendee. If, on

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8 Dike v. Greene, 4 R. I. 285 (1856); Paolilli v. Piscitelli, 45 R. I. 354, 121 A. 531 (1923).

4 "Even if complainant's construction of the stipulation were adopted, she would not be entitled to a decree of specific performance in the circumstances clearly established by the evidence before us, as she herself failed to do equity." Principal case, 21 A. (2d) 272 at 275.


6 3 Williston, Contracts, rev. ed., § 634 (1936): "Accordingly it may be shown by parol evidence . . . that the parties agreed by parol that the writing in question should not become effective until some future day or the happening of some contingency, if this is not inconsistent with the express terms of the writing."


8 It was probably the intention of the contracting parties that a mortgage was the type of financial help desired.

9 "One of the great advantages which equity has over common law is that . . . a decree in equity may be molded in such a way as to give full protection as to the rights of the parties as set forth in the pleadings and in the evidence." 6 Page, Contracts, 2d ed., § 3368 (1922).

the other hand, the court decreed all the particulars of the mortgage which the vendor was to provide before he could require performance by the vendee, the court would be making a contract for the parties, contravening an established principle of equity. Nevertheless, a court of equity, if so inclined, could formulate the terms of the mortgage from the surrounding circumstances and embody it in a conditional decree. The principal case leaves unanswered the question why the vendee is not bound to return the binder in view of the fact that the vendor's breach of the collateral agreement is serious enough to prevent his obtaining specific performance.

12 See 30 A. L. R. 572 (1924), for validity and enforceability of provisions for renewal of lease at rental not determined; 37 A. L. R. 365 (1925), in regard to uncertainty as to terms of mortgage or note contemplated by contract for sale of real property as affecting right to specific performance; Young v. Nelson, 121 Wash. 285, 209 P. 515 (1922); Light v. Kleinginna, 107 N. J. Eq. 149, 152 A. 1 (1930); Lake Shore Power Co. v. Village of Edgerton, 43 Ohio App. 545, 184 N. E. 37 (1932); McCarty v. Harris, 216 Ala. 265, 113 So. 233 (1927). The last case involved a contract for the sale of land which provided that the purchaser could obtain a first mortgage on the property, but failed to specify the amount of the mortgage. The court held that the contract was not so uncertain as to warrant refusal of specific performance.
13 The court was not called upon to decide the question because the vendee did not request a return of the binder.