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Contracts - Frustration Inapplicable to Restrictive Zoning Laws Existing When Premises Leased

DePaul College of Law

This latter decision is the one which the majority of the court in the instant case reversed and remanded.

The Illinois statutes provide for notice to a resident by publication only where the defendant has gone out of the state, or on due inquiry cannot be found, or is concealed within the state, so that he cannot be served.[38] Thus it can be seen that the notice requirement in Illinois complies with the Due Process Clause as interpreted by the Supreme Court in the instant case.

[38] Ill. Rev. Stat. (1955) c. 47, §§ 4, 5, c. 110 §§ 14, 15.

CONTRACTS–FRUSTRATION INAPPLICABLE TO RESTRICTIVE ZONING LAWS EXISTING WHEN PREMISES LEASED

Plaintiff obtained a judgment by confession for rent pursuant to an executed lease. Defendant sought to vacate the judgment on the grounds that when the lease was executed, both the plaintiff and the defendant contemplated that the premises would be used for the manufacturing of automotive parts; and that after the execution of the lease and occupation of the premises by the defendant, the defendant was notified by a city building inspector that the use being made of the premises violated an existing zoning ordinance; and that the foregoing facts constituted impossibility of performance on the part of the defendant. The court held that the primary promise of a lessee is to pay rent and there is nothing legally impossible about paying such rent; therefore, the doctrine of commercial frustration was not applicable because the zoning ordinance was in existence at the time of the making of the lease. *Warshawsky v. American Automotive Products*, 12 Ill. App. 2d 178, 138 N. E. 2d 816 (1956).

Although the doctrine of frustration has been mentioned in cases throughout the United States, there is not, as can best be determined, a court of last resort which has expressly applied it or Section 288 of the *Restatement of Contracts*[1] in determining the final outcome of a contracts case.[2] Here, an intermediate court in Illinois, in a rare instance, mentions the doctrine but does not apply it, pursuant to the vast majority of decisions of courts throughout the United States.

[1] Where the assumed possibility of a desired object or effect to be attained by either party to a contract forms the basis on which both parties enter into it, and this object or effect is or surely will be frustrated, a promisor who is without fault in causing the frustration, and who is harmed thereby, is discharged from the duty of performing his promise unless a contrary intention appears. Rest., Contracts § 288 (1932).

[2] Osius v. Barton, 109 Fla. 556, 147 So. 862 (1933), was a case where the court based its authority on § 288 of the Restatement of Contracts but actually used real property and equity principles without mentioning the doctrine of frustration.

In analyzing the origin and application of the doctrine of frustration, Professor Anderson observes:[3]

> The doctrine of frustration is the doctrine which grew from the *Coronation Cases*. In each of the two principal *Coronation Cases*,[4] the facts involved a contract between the owner of premises situated along the route of the coronation procession, and a hirer under which the hirer promised to pay a large sum of money to the owner, and, in exchange, the owner promised to allow the hirer to occupy the premises during the time scheduled for the procession. The procession was postponed on account of the illness of the king. In *Krell v. Henry*, the Court of Appeal held that the hirer was discharged of the duty to pay the money, but several months later, in *Chandler v. Webster*, the Court of Appeal held that the hirer remained under a duty to pay.

This was clearly a contract to rent, the performance of which remained entirely possible. The owner was capable of renting, and the hirer of paying. The disappointment suffered by the hirer did not excuse him from being liable for his rent.[5]

The defendant in the instant case contended that performance on his part had become impossible due to the frustration of the contract. It is to be noted that frustration and impossibility are not synonymous; rather, each has its individual legal implications which are totally unrelated in theory from the other. In frustration, "performance remains possible, but the expected value of performance to the party seeking to be excused has been destroyed by a fortuitous event, which supervenes to cause an actual but not literal failure of consideration."[6]

This restriction on the scope of the applicability of the doctrine—to situations where performance is possible but undesirable—must be emphasized so as not to be misled by the language to the contrary in *Leonard v. Autocar Sales and Service*,[7] where the court stated:

[3] Anderson, Frustration of Contract—A Rejected Doctrine, 3 De Paul L. Rev. 1 (1953).

[4] Krell v. Henry [1903] 2 K.B. 740; Chandler v. Webster, [1904] 1 K.B. 493.

[5] Diebler v. Bernard Bros., Inc., 385 Ill. 610, 617, 53 N.E. 2d 450, 453 (1944) where the court stated: "It would certainly be an innovation to establish a rule that all lessees, affected in the same way, were relieved from the obligations of their leases. It would be most difficult to suggest a business which has not been affected in some way by the prevailing conditions. It would not be an exaggeration to assert that the business of every retail dealer and merchant in the land has been reduced because of his inability to obtain an adequate supply of goods to meet the necessities of his former customers. It is common knowledge that retail business generally, and of every kind, has been made more difficult and, no doubt, on the whole, less profitable, by innumerable restrictions and governmental regulations. If all such merchants and others, for that reason, are to be relieved of the obligations of their contracts, then every butcher, grocer, merchant and other dealer, could abandon his lease with impunity. All such lease contracts would be wiped out with one fell swoop, because their business had become less profitable."

[6] Lloyd v. Murphy, 25 Cal. 2d 48, 153 P. 2d 47, 50 (1944).

[7] 392 Ill. 182, 187, 64 N.E. 2d 477, 479 (1945), cert. denied 327 U.S. 804 (1946).

The doctrine of frustration is an extension of this exception (where from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular person or thing, it is always implied that the death or destruction of that person or thing shall excuse performance) to cases where the cessation or nonexistence of some particular condition or state of things has rendered performance *impossible*[8] and the object of the contract frustrated.

The use of the word "impossible" in *Leonard v. Autocar Sales and Service*[9] and as defendant used it as being part of the doctrine of frustration in the instant case is erroneous, because, as stated, impossibility occurs where, owing to the nature of the performance, it cannot be done; in frustration, however, the performance is possible, but it is undesirable to one of the parties.[10]

The doctrine of frustration is most frequently raised in the field of leases. During World War II many leased premises were restricted by government orders from operating as the parties had contemplated they would. Courts of last resort uniformly held the tenant liable for the rent in these situations.[11]

> The importance of these . . . cases may be diminished by the common-law real property rule that the destruction of a building on the leased premises does not end the tenant's liability for rent. If a tenant remains liable for rent after the building has been destroyed, it would seem obvious that he should remain liable where he suffers some other and lesser casualty.[12]

[8] Italics added.

[9] Authority cited note 7 supra.

[10] See note 6 supra; 6 Williston, Contracts § 1935 (rev. ed., 1938): "Performance remains entirely possible, but the whole value of the performance to one of the parties at least, and the basic reason recognized as such by *both* parties, for entering into the contract has been destroyed by a supervening and unforseen event. This does not operate primarily as an excuse for the promisor, the performance of whose promise has lost its value, but as a failure of consideration for the promise of the other party, not in a literal sense it is true, *since the performance bargained for can be given,* (italics added) but in substance, because the performance has lost its value. The name 'frustration' has been given to this situation." Accord: Dorn v. Goetz, 85 Cal. App. 2d 407, 193 P. 2d 121 (1948); also, Gray Milling Co. v. Sheppard, 359 Mo. 505, 222 S.W. 2d 742, 748 (1949), where the court said: "If a party by his contract charge himself with an obligation possible to be performed, he must make it good unless its performance is rendered impossible by an Act of God, the law, or the other party. *Unforseen* (italics added) difficulties, however great, will not excuse him." (This court rejects the doctrine of frustration completely; and if unforseen difficulties will not excuse performance, then it would follow that forseen events certainly will not.)

[11] See notes 6–7, supra; Mitchell v. Ceazan Tires, Ltd., 25 Cal. 2d 45, 153 P. 2d 53 (1944); Frazier v. Collins, 300 Ky. 18, 187 S.W. 2d 816 (1945); Nickolopulos v. Lehrer, 132 N.J.L. 461, 40 A. 2d 794 (1945), cert. denied 325 U.S. 876; Wood v. Bartolino, 48 N.M. 175, 146 P. 2d 883 (1944).

[12] Anderson, Frustration of Contract–A Rejected Doctrine, 3 De Paul L. Rev. 1, 17 (1953); Lind v. Spannuth, 3 Ill. App. 2d 112, 120 N.E. 2d 381 (1954).

The instant case would fall into such a category. Here, the leased premises were available for occupancy and could be used by the tenant for any purpose he desired with the exception of a certain type of automotive manufacturing. He could even have used the premises for a slightly different type of automotive manufacturing. Clearly then, this should not permit a frustration type defense, for there was an *existing* zoning law in effect when this lease was entered into. As a California court reasoned:

> . . . The answer depends on whether an *unanticipated*[13] circumstance, the risk of which should not be fairly thrown on the promisor, has made performance vitally different from what was reasonably expected. The purpose of a contract is to place the risks of performance upon the promisor and the relation of the parties, terms of the contract, and circumstances surrounding its formation must be examined to determine whether it can be fairly inferred that the risk of the event that has supervened to cause the alleged frustration was not reasonably forseeable. If it was forseeable there should have been provision for it in the contract (or the party should have checked existing zoning laws), and the absence of such a provision gives rise to the inference that the risk was assumed. . . . The courts have required a promisor seeking to excuse himself from performance of his obligations to prove that the risk of the frustrating event *was not reasonably forseeable*[14] and that the value of counterperformance is totally or nearly destroyed, for frustration is no defense if it was forseeable. . . .[15]

Consequently, it logically follows that where there is a forseeable situation which will disappoint a party to a contract, he cannot claim the doctrine of frustration as a defense, even if it were accepted and applied by the courts of last resort.[16] This corollary is a necessary conclusion derived from the undisputed premise that where there is an existing law, such law is to be taken into consideration by the parties prior to the execution of the contract, as such laws are clearly forseeable.

The effect of a contrary result was considered by an Illinois court:

> If individuals were permitted to void solemn obligations because of ignorance of existing laws in force at the time of the execution of said instrument, then such existing laws would become useless and of no value.[17]

Moreover, the same court[18] discussed the presumption that everyone knows the law, declaring:

[13] Italics added.

[14] Italics added.

[15] Lloyd v. Murphy, 25 Cal. 2d 48, 153 P. 2d 47, 50 (1944). See Phelps v. School Dist. No. 109, 302 Ill. 193, 134 N.E. 312 (1922); see Dean v. Lowery, 50 Ill. App. 254 (1893); Bunn v. Prather, 21 Ill. 217 (1859).

[16] Accord: Mitchell v. Ceazan Tires, Ltd., 25 Cal. 2d 45, 153 P. 2d 53 (1944); Raner v. Goldberg, 244 N.Y. 438, 155 N.E. 733 (1927); Shedd-Bartush Foods of Illinois v. Commodity Credit Corp., 135 F. Supp. 78 (N.D. Ill., 1955), aff'd. 231 F. 2d 555 (1956). (The court rejected the doctrine of frustration, holding that the event was in contemplation of the parties.)

[17] Kazwell v. Reynolds, 250 Ill. App. 174, 177 (1928).

[18] Ibid.

If . . . neither party knew of that fact, then it becomes the duty of the purchaser to have advised himself as to whether or not such an ordinance was in existence.

The conclusion to be drawn from this analysis is that the doctrine of frustration is an attempted defense by a disappointed party to a contract who finds his required performance possible, but undesirable, in that the forseeable object contemplated by both parties has become unforseeably no longer obtainable. This doctrine has been universally rejected by American courts of last resort. The contract remains possible of performance, as in the instant case, and mere disappointment in the final outcome of the bargain, or failure to adequately and wisely draft contracts, or to investigate existing laws which are clearly forseeable, offer no legal defense to a contract.

CRIMINAL LAW–ABILITY TO RESIST PSYCHOLOGICAL COERCION A FACTOR IN DETERMINING VOLUNTARY NATURE OF CONFESSION

Fikes, an uneducated Negro of low mentality, was picked up by Selma, Alabama police and charged with breaking and entering the apartment of the mayor's daughter and attempting to rape her. Booked on an "open charge of investigation," Fikes was not taken before a magistrate per Alabama law but was locked up in the Selma jail the night of the arrest. The following morning police officers questioned petitioner for three hours. The next day he was questioned for another two hours in the morning, and that afternoon he was taken to Kilby State Prison, roughly fifty-five miles from Selma. At the prison there were several hours of interrogation and similar questioning for two more days, after which Fikes confessed. Counsel was admitted after the confession was obtained, marking the first time Fikes had come in contact with anyone other than the police officers, the sheriff of Selma, and his employer. At no time prior to the first confession was Fikes allowed to see relatives or friends. After another week of similar interrogation Fikes gave a second confession. He was subsequently convicted in a trial in which the evidence against him consisted of the challenged confessions and two witnesses who testified that petitioner had previously attacked them. The mayor's daughter failed to identify petitioner as her assailant. Petitioner's conviction was affirmed by the Supreme Court of Alabama, which in turn was reversed by the United States Supreme Court holding that the failure to take the defendant before a magistrate and the incarceration in isolation for a week of questioning, coupled with defendant's low mentality, rendered the confessions obtained thereby involuntary and their use a violation of petitioner's rights under the Fourteenth Amendment to the Federal Constitution. *Fikes v. Alabama*, 352 U.S. 191 (1957).