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Unilateral Mistake as Defense to Specific Performance - Measure of Damages Recoverable by Vendee at Law - Kappelman v. Bowie

UNILATERAL MISTAKE AS DEFENSE TO SPECIFIC PERFORMANCE — MEASURE OF DAMAGES RECOVERABLE BY VENDEE AT LAW

Kappelman v. Bowie[1]

Defendants-appellees, husband and wife, with little education or business experience, signed a standard multiple listing contract with a real estate broker, authorizing the sale of property for $9,500, subject to a $90 ground rent to be created; the property had cost them $8,500 and they had spent some $2,000 in repairs and improvements. Subsequently, they were told by an agent of the broker that they would have to take less money to secure a cash sale. Thereafter the agent submitted an offer to buy in fee for $7,500 cash, in the form of a standard contract prepared by the

[1] 201 Md. 86, 93 A. 2d 266 (1952).

agent, which defendants read and signed after making and initialing certain minor alterations. Defendants testified that they thought the price was to be $7,500 subject to a ground rent to be created, that at the time of signing they asked the agent about the ground rent, and that he replied: "That will be taken care of." The buyer's bill for specific performance was dismissed in the lower court, on the ground that the price was grossly inadequate, the chancellor making no finding on the question of mistake. The Court of Appeals affirmed, holding that there was a unilateral mistake on the part of the defendants which, under all the circumstances of the case and coupled with gross inadequacy of consideration, constituted a defense to specific performance.

In its opinion, the Court of Appeals emphasized the defendants' lack of education and business experience and said that in dealing with the experienced agent of an established real estate concern they "placed reliance upon one who stood in a confidential relationship to them". In consequence, when told by him that the ground rent would be "taken care of", it was not unnatural for them to assume that the ground rent would be created before the settlement was put through. Though the mistake was the defendants' own and one induced by their own agent, to which the plaintiff had in no way contributed and with which he was in no way chargeable, this did not prevent the defendants from setting it up as a defense. The plaintiff's contention to the contrary, said the Court,

> ". . . overlooks the true basis for the rule, which is rooted in the proposition that equity may refuse the extraordinary remedy of specific performance where to do so would enforce a hard bargain, at least where the mistaken party was not grossly negligent and the opposite party would not be prejudiced except to the extent of losing a windfall."[2]

Under what circumstances will specific performance of a contract to sell land be denied because of the defendants' unilateral mistake? If denied, what is the measure of plaintiff's recovery at law? Inadequacy of the legal remedy is ordinarily assumed. As the Court of Appeals has stated:

> "While . . . an application for specific performance is always addressed to the sound discretion of the court, yet where a contract respecting real estate is in writing

[2] *Ibid*, 90.

> and is in its nature and circumstances unobjectionable, it is . . . a matter of course . . . to decree a specific performance. . . ."[3]

Even so, equitable relief in such a case is not an absolute right, but is one which may be denied, in the sound discretion of the court, if the result would be inequitable or if the case is characterized by features precluding equitable relief.

Even though the plaintiff's conduct has not been such as to cause him to be refused a judgment for damages or such as to entitle the defendants to any affirmative relief against him, it may be such as to cause the remedy of specific performance to be denied him. If a contract has been induced by misrepresentation (even though innocent), or mistake, or if the consideration is grossly inadequate, or enforcement will cause unreasonable hardship, specific enforcement thereof may be refused.[4] But its refusal as well as its granting is in the sound discretion of the court, and the question is one where the traditional discretionary powers of the equity courts have particularly persisted with no very definite principles governing their exercise.

Where the mistake of the defendants has been caused by misrepresentations or conduct of the plaintiff, relief by way of specific performance is in general refused, at least where any appreciable hardship would result to the defendants from enforcement. This is true, although the plaintiff may not have been guilty of any fraud or sharp practice or may have made misrepresentations in all good faith.[5] Here the reasoning is that it is inequitable for the plaintiff to seek enforcement of a contract which he has obtained only as a result of a mistake by the defendants which he himself has caused or contributed to; the plaintiff in such circumstances is not doing equity when he seeks it. The defendants' mistake, however, to be effective as a defense in this type of case, must have come as a result of his reliance upon the plaintiff's representations or conduct, and must be material in the sense that damage or hardship will result;[6] otherwise there is no inequity on the plaintiff's

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[3] Budacz v. Fradkin, 146 Md. 400, 407, 126 A. 220 (1924).

[4] RESTATEMENT, CONTRACTS (1932), Sec. 367, Comment (a).

[5] Ginther v. Townsend, 114 Md. 122, 78 A. 908 (1910); Crane v. Judik, 86 Md. 63, 38 A. 129 (1897); Newman v. Johnson, 108 Md. 367, 70 A. 116 (1908); Gordon v. Gross, 141 Md. 490, 119 A. 267 (1922); McLaughlin v. Leonhardt, 113 Md. 261, 77 A. 647 (1910); Ellicott v. White, 43 Md. 145 (1875).

[6] Lucas v. Long, 125 Md. 420, 94 A. 12 (1915).

part, in the absence of fraud or sharp practice, when he seeks to enforce his contract.

Where, however, the defendants' mistake is in no way caused by nor chargeable to the plaintiff, the reasons stated above for denying him relief in equity when his legal remedy is inadequate lose much of their force. The instant case is of this type; the defendants' mistake was induced not by the plaintiff, but by the defendants' own agent, for whose disregard of duty the plaintiff, as the court recognizes, was not responsible. Furthermore, there was nothing in the instant case to show that the plaintiff was aware of or on notice of the defendants' mistake, so as to be in the position of having sought to take knowing advantage thereof when he signed the contract, — a circumstance which has sometimes been relied upon as a reason for denying equitable relief.[7]

It is nevertheless well established that here too specific performance may be refused, if to grant it would cause undue hardship to the defendants.[8] The plaintiff may still be regarded as acting inequitably and be remitted to his legal remedy when he seeks the benefit of a contract which he has obtained as a result of mistake on the defendants' part, the enforcement of which will be harsh as against the defendants, even though there has been "more or less negligence" in the defendants.[9] Since here the plaintiff has neither induced the defendants' mistake nor knowingly sought to take advantage of it, his inequity in seeking to enforce the contract would seem to be simply in seeking the benefit of a bargain which would work a hardship against the defendants.[10]

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[7] See *e.g.*, Webster v. Cecil, 30 Beav. 62, 54 Eng. Rep. 812 (1861); Mansfield v. Sherman, 81 Me. 365, 17 A. 300 (1889). *Cf.* Samuel v. Cityco Co., 141 Md. 27, 118 A. 124 (1922).

[8] See, in addition to the instant case, Diffenderfer v. Knoche, 118 Md. 189, 84 A. 416 (1912); Henneke v. Cooke, 135 Md. 417, 109 A. 113 (1919); Somerville v. Coppage, 101 Md. 519, 61 A. 318 (1905).

[9] Henneke v. Cooke, *supra*, n. 8; Samuel v. Cityco Co., *supra*, n. 7. But the defendant's negligence may sometimes cause specific performance to be granted, particularly if the hardship is not excessive. See Tamplin v. James, 15 Ch. Div. 215 (1879), and *cf.* Kalis v. Shor, 193 Md. 643, 69 A. 2d 486 (1949), where it was said that a purchaser of leasehold property had "no right" to assume that the ground rent on the property was redeemable without making inquiry and specific performance was granted. If the plaintiff's position has changed, this will also cause specific performance to be granted, the defendant being estopped to urge his mistake as a defense; see Trotter v. Lewis, 185 Md. 528, 45 A. 2d 329 (1946), and Samuel v. Cityco Co., *supra*, n. 7.

[10] In POMEROY, SPECIFIC PERFORMANCE OF CONTRACTS, (3rd Ed., 1926), Sec. 245, Note 1(a), it is pointed out that cases where specific performance is denied because of the defendant's own mistake are those in which considerable hardship would result if specific performance were decreed.

Hardship that is merely the result of the defendants' own improvidence in making a bad bargain is not, however, ordinarily a defense to specific performance. Inadequacy of consideration without more, unless so gross as to shock the chancellor's conscience, will not prevent equitable relief. In the instant case, the Court of Appeals agreed with the lower court that the price was "grossly inadequate", but went on to say:

> "Mere inadequacy of price is, of course, not a sufficient ground for denying specific performance, but it may be considered in connection with other grounds of equitable relief."[11]

Presumably then, except for the defendants' mistake in supposing that they were selling subject to a ground rent to be created, specific performance would have been granted, in spite of the inadequacy of the contract price. Neither the mistake without the hardship, nor the hardship without the mistake would have defeated the plaintiff.

If there would have been no inequity on the plaintiff's part in seeking to enforce the contract in the instant case, in spite of the inadequacy of the price, in the absence of the defendants' mistake, it is not altogether apparent why it becomes any more inequitable for him to do so with that element added, when he was neither responsible for nor aware of the mistake. Perhaps it is felt that the hardship to the defendants is greater where he has not only contracted to sell for an inadequate price but has done so under the mistaken supposition that he was to get more. It may be argued too that the defendants who with full knowledge agrees to sell for an inadequate price is estopped to urge as a defense the hardship resulting to him from enforcement. And where, as in the instant case, the defendants are inexperienced in business dealings and poorly educated, this has not infrequently been a factor of some influence in causing specific enforcement to be denied.[12]

While, however, unilateral mistake of the defendants may be a defense to specific performance, denial of equitable relief does not necessarily mean that the defendants are absolved from liability under his contract. The plaintiff may still have his remedy at law. In *Ray v. Eurice*,[13] de-

[11] *Supra*, n. 1, 91.

[12] See *e.g.*, Gordon v. Gross, *supra*, n. 5; Banaghan v. Malaney, 200 Mass. 46, 85 N. E. 839 (1908); Friend v. Lamb, 152 Pa. 529, 25 A. 577 (1893); Kelley v. York Cliffs Imp. Co., 94 Me. 374, 47 A. 898 (1900); Shoop v. Burnside, 78 Kan. 871, 98 P. 202 (1908).

[13] 201 Md. 115, 93 A. 2d 272 (1952).

cided at the same term as the instant case, it was held that an alleged mistake by a defendant contracting to construct a house as to the specifications and plans embodied in the contract could not be set up as a defense in a suit at law for breach of contract by the owner of the premises, the Court saying:

> "The law is clear, absent fraud, duress or mutual mistake, that one having the capacity to understand a written document who reads and signs it . . . is bound by his signature in law, at least. . . . In Maryland there may be exceptions in procedings for specific performance, but otherwise the rule is in accord."[14]

Assuming then that in the instant case, the plaintiff, although denied relief in equity, could recover at law in a suit for breach of contract, what would be the measure of damages recoverable?

The general rule in a suit by the buyer of land for damages for total breach of contract by the seller, was stated as follows in *Hartsock v. Mort*,[15] quoting the Michigan case of *Hammond v. Hannin*:[16]

> " 'If the vendor acts in bad faith, — as, if having title he refuses to convey, or disables himself from conveying, — the proper measure of damages is the value of the land at the time of the breach; the rule, in such case, being the same in relation to real as to personal property. But, on the other hand, if the contract of sale was made in good faith, and the vendor for any reason is unable to perform it, and is guilty of no fraud, the clear weight of authority is that the vendee is limited in his recovery to the consideration money (paid) and interest, with perhaps in addition, the costs of investigating the title'."[17]

This is the so-called "English" rule, first laid down in *Flureau v. Thornhill*,[18] which makes the amount recoverable by the buyer depend upon whether the defendant has acted in "good" or "bad" faith. Under the so-called "Ameri-

[14] *Ibid*, 125-126.
[15] 76 Md. 281, 288-289, 25 A. 303 (1892).
[16] 21 Mich. 374, 387 (1870).
[17] That costs of investigating title are recoverable was specifically held in Baltimore Permanent Build. & Land Society v. Smith, 54 Md. 187 (1880). In Markoff v. Kreiner, 180 Md. 150, 23 A. 2d 19 (1941), recovery for expenditures in improving the property, made in good faith by the purchaser, was allowed.
[18] 2 Black. W. 1078, 96 Eng. Rep. 635 (1776).

can" rule, followed in about half of the states, the buyer's measure of damages would in either case be the difference between the contract price and the market value of the land at the agreed time for conveyance, plus any payments made.[19] The principal justifications for the English rule limiting the buyer, where the seller has acted in good faith, to the recovery of the deposit paid with interest and reimbursement of expenses, have been said to be (1) the difficulty of estimating the lost profit, the "market value" of land being at best an uncertain standard, and (2) the hardship which the usual rule would impose on the seller, in view of the uncertainties involved in real estate titles and the fact that contracts to sell land are usually entered without a preliminary study of the title.[20]

Therefore, whether the vendee in the instant case, if he had brought suit at law, could have recovered the difference between the contract price and the market value of the land plus any payments made, or whether he would be limited to the return of any payments made plus interest and expenses — that is to say, the amount recoverable on a rescission — would depend upon whether the vendors' conduct would be regarded as acting in "good" or "bad" faith.

The statement quoted above from *Hartsock v. Mort*[21] would seem to limit cases of "good" faith to those where the defendant is as a practical matter *unable* to perform and is without fault or fraud. Acting in "bad" faith would seem to mean no more than a refusal to perform when able to do so. Even where defendant lacked title, the property belonging to his wife, it was held in *Horner v. Beasley*[22] that the measure of damages should be based on the value of the land, since it appeared that the wife would have conveyed to the vendee if requested to do so by defendant.

By this test, the refusal of the defendants to convey in the instant case when able to do so would seem to constitute bad faith and in a suit for damages they would have been liable not only for the return of any deposit money but for the difference between the contract price and the market value of the land. If so, the question arises whether refusal of the equity court to decree specific performance against them, because of the hardship which to do so would entail, has actually been particularly beneficial to the defen-

[19] See MCCORMICK, DAMAGES (1935), 680-686.

[20] Fuller and Perdue, *The Reliance Interest in Contract Damages*, 46 Yale L. J. 373, 377 (1937).

[21] *Supra*, n. 15.

[22] 105 Md. 193, 65 A. 820 (1907).

dants. They have been relieved of the hardship of having to convey at an inadequate price, but how does this benefit them if they must pay out as damages the difference between that price and the market value of the property? As Dean Pound has said:

> "There is a hard and fast rule that certain bargains are 'hard' and that equity will not enforce them. In states where the value of the bargain may be recovered at law, it may well be sometimes that the bargain might as well be enforced in equity if it is not to be canceled. But the chancellor is not unlikely to wash his hands of a hard case, saying that the court of law is more callous; let that court act, although that court is the same judge with another docket before him."[23]

It should be noted, however, that in *Markoff v. Kreiner*,[24] the Court of Appeals stated that the measure of damages for a vendor's breach of contract for the sale of real estate is "ordinarily" the purchase money paid under the terms of the contract — a statement inconsistent with those in earlier cases that "where a party fails to perform his contract to convey land, the true measure of damages is the value of the land at the time of the breach of the covenant."[25] The Court in *Markoff v. Kreiner* cites *Horner v. Beasley*[26] as authority for its statement, but that case not only reiterated the rule laid down in *Hartsock v. Mort*,[27] making the measure of damages depend upon whether the defendant acted in good or bad faith, but in fact, as stated above, held the defendant liable for the excess of the market value of the property over the contract price in addition to the amount of the deposit paid on account of the contract. The statement in the *Markoff* case is made in connection with holding that expenditures made by the buyer by way of improvements on the property were recoverable, and it is not believed that the Court intended to state a rule as to the measure of damages different from that of the *Hartsock* and *Horner* cases.[28]

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[23] POUND, INTRODUCTION TO THE PHILOSOPHY OF LAW (1922), 132.

[24] *Supra*, n. 17.

[25] Clagett v. Easterday, 42 Md. 617, 628 (1875). Similar statements are found in Cannell v. McLean, 6 H. & J. 297, 302 (1825), and Marshall v. Haney, 9 Gill. 251, 260 (1850), 4 Md. 498, 508 (1853).

[26] *Supra*, n. 22.

[27] *Supra*, n. 15.

[28] In Wlodarek v. Thrift, 178 Md. 453, 468, 13 A. 2d 774 (1940), a case involving liability of an attorney for negligence in searching title, it was said that the buyer's damages would ordinarily *include* the purchase price paid with interest, which is entirely consistent with the Hartsock and Horner cases.