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Sales - Contracts To Sell - Damages for Failure to Perform Due To Vendor's Inability to Convey Title

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NOTES

SALES — CONTRACTS TO SELL — DAMAGES FOR FAILURE TO PERFORM DUE TO VENDOR'S INABILITY TO CONVEY TITLE

Defendant contracted to sell immovable property to plaintiff, who deposited $1000 toward the purchase price. Upon defendant's inability to deliver title because he had previously sold the property to another, plaintiff sued for a return of double the deposit.[1] The trial court allowed a return of the deposit, but rejected the claim for double the deposit. The court of appeal affirmed. *Held,* Civil Code Article 2463[2] requires a return of double the deposit only when breach of the contract to sell is arbitrary; inability of the vendor to convey title because he has previously sold the property in question is not arbitrary. *Allen v. Ponchatoula Beach Development Corporation,* 137 So. 2d 649 (La. App. 1st Cir. 1962).

In Louisiana any money deposited on a contract to sell an immovable is presumed to be earnest money unless otherwise stipulated.[3] Either party may recede from a contract upon which earnest money has been deposited by suffering the penalty provided by Civil Code Article 2463: the "buyer" by forfeiting the deposit; the "seller" by returning double the deposit.[4] The cases

1. Plaintiff also sued the corporation of which defendant was the general manager. On trial of the case it was shown that defendant had sold the property in question to the corporation before he entered into the contract to sell to the plaintiff. Plaintiff alleged that defendant entered into the contract as agent for the corporation, and asked for specific performance of the contract. However, this claim was abandoned by stipulation between the parties in the trial court.

2. LA. CIVIL CODE art. 2463 (1870): "But if the promise to sell has been made with the giving of earnest, each of the contracting parties is at liberty to recede from the promise; to wit: he who has given the earnest, by forfeiting it; and he who has received it, by returning the double."

3. Haeuser v. Schiro, 235 La. 909, 106 So. 2d 306 (1958); Maloney v. Aschaffenburg, 143 La. 509, 78 So. 761 (1918); Smith v. Hussey, 119 La. 32, 43 So. 902 (1907); Capo v. Bugdahl, 117 La. 992, 42 So. 478 (1906). For a discussion of the French and Roman concepts of earnest money, see Hebert, *The Function of Earnest Money in the Civil Law of Sales,* 11 LOYOLA L. REV. 121, 140 (1930); 3 OEUVRES DE POTHIER, TRAITÉ DE CONTRAT DE VENTE nos 496-509 (2d ed. 1861).

4. LA. CIVIL CODE art. 2463 (1870). When earnest money is deposited with a contract to sell an immovable, neither party is entitled to specific performance. Haeuser v. Schiro, 235 La. 909, 106 So. 2d 306 (1958). Thus if *A* contracts to sell an immovable to *B* three months from the date of the contract, with a $100 deposit as earnest money, and before consummation of the sale the market value is *increased* by $200, *A* can save $100 by receding from the contract and returning double the deposit. *B*'s only recourse is to accept double the deposit, for he cannot get specific performance.

Conversely, if the market value *decreases* by $200 before the sale is to be con-

that have considered whether recovery of double the deposit should be allowed when the seller is unable to deliver valid title have not been consistent. Early cases allowed a seller who was unable to deliver valid title to recede from the contract only upon returning double the deposit.[5] Later jurisprudence, however, adopted the view that the seller had to return only the deposit, not its double, unless he arbitrarily violated his promise.[6] One case specifically held that inability to deliver a merchantable title was not an arbitrary breach and that the seller thus was not bound to return double the deposit.[7]

The result is different if the contract to sell provides that the buyer may demand double the deposit *or* specific performance. In this situation the courts hold the deposit not to be earnest money, and permit recovery of double the deposit even if the seller is unable to deliver a valid title.[8] The rationale of this conclusion has been said to be that earnest money is deposited to secure to the parties the privilege of withdrawing from the contract; since the parties reserved the right to demand specific performance, they did not intend to reserve the right to withdraw, and thus did not intend the deposit to be earnest money.[9] This jurisprudential distinction between earnest money and money deposited under a contract which provides for return of double the deposit *or* specific performance seems unjustified. Since both are essentially liquidated damages,[10] it would

summated, *B* can save $100 by receding from the contract and forfeiting the deposit. *A* must accept the return of the deposit, for he has no right to specific performance.

5. Lyons v. Woman's League of New Orleans, 124 La. 222, 50 So. 18 (1909); Legier v. Braughn, 123 La. 463, 49 So. 22 (1909); Smith v. Hussey, 119 La. 32, 43 So. 902 (1907).

6. Morgan & Lindsey v. Ellis Variety Stores, 176 La. 198, 145 So. 514 (1933); Baton Rouge Investment & Realty Co. v. Bailey, 157 La. 838, 103 So. 184 (1925); Williams v. Meyer, 29 So. 2d 599 (La. App. Orl. Cir. 1947).

7. Williams v. Meyer, 29 So. 2d 599 (La. App. Orl. Cir. 1947).

8. Kinler v. Griffin, 251 F.2d 655 (5th Cir. 1958); Poche v. Ruiz, 239 La. 573, 119 So. 2d 469 (1960); Caplan v. Airport Properties, 231 La. 1071, 93 So. 2d 661 (1957) (transcript shows that contract provided for a double return of the deposit, *or specific performance*); Ducuy v. Falgoust, 228 La. 533, 549, 83 So. 2d 118, 123 (1955) (contract provided: "In the event . . . the vendor does not comply with this agreement to sell within the time specified, purchaser shall have the right either to demand the return of double the deposit, or specific performance."); Williams v. Terese, 120 So. 2d 80 (La. App. Orl. Cir. 1960).

9. See Ducuy v. Falgoust, 228 La. 533, 83 So. 2d 118 (1955).

10. Morgan & Lindsey v. Ellis Variety Stores, 176 La. 198, 218, 145 So. 514, 520 (1932): "The giving of earnest money . . . is like the posting of a forfeit, or liquidated damages . . . ."

The contract provision in Ducuy v. Falgoust, 228 La. 533, 83 So. 2d 118 (1955), providing for a double return of the deposit, or specific performance, was treated as stipulated or liquidated damages.

appear that the proper question in both cases is what should be considered an adequate defense to the buyer's demand for damages. The contract is one *to sell*, and not a *sale*; thus, the Civil Code articles dealing with perfected sales seem inappropriate, and the articles dealing with conventional obligations should apply.[11]

The Civil Code provides that a promisor prevented from performing his obligation by an irresistible force or fortuitous event is not required to pay damages.[12] An irresistible force or fortuitous event implies a supervening event beyond the control of the promisor.[13] Thus it has been held a valid defense that performance became impossible because of a third person's action taken after the obligation was assumed.[14] Although no case was found squarely holding that impossibility of performance because of prior sale of the property to a third person is not due to a fortuitous event, one case in which a contract reserving the right to specific performance was perfected at a time when the seller was unable to deliver valid title lends support to this proposition.[15] That decision, allowing return of double the deposit to the aggrieved buyer, seems tantamount to a recognition that impossibility due to inability of the seller to convey title is not a defense against damages if the inability existed at the time the contract was entered.

Still another defense against a claim for damages for nonperformance of an obligation is error of fact or law[16] if the error relates to the "principle cause" of the obligation.[17] In such a

11. Smith, *Recovery of Damages for Non-Delivery and Eviction in Louisiana—A Comparison*, 17 LA. L. REV. 253, 254 (1957).

12. LA. CIVIL CODE art. 1933(2) (1870). The irresistible force or fortuitous event must make performance impossible rather than only more burdensome. Jung v. Gwinn, 174 La. 111, 139 So. 774 (1932); Cook & Laurie Contracting Co. v. Dennis, 124 La. 161, 49 So. 1014 (1909); Forsman v. Mace, 111 La. 28, 35 So. 372 (1903). Two exceptions provided in the article are the seller's expressly or impliedly assuming the risk of the force or event, and the force or event being preceded by some fault of the promisor. LA. CIVIL CODE art. 1933(3) (1870).

13. LA. CIVIL CODE art. 3556(15) (1870).

14. Bauman v. Michel, 190 La. 1, 181 So. 549 (1938) (wife recorded declaration that the property constituted the family home and refused to join in conveyance); Cabral v. Barkerding, 50 So. 2d 516 (La. App. Orl. Cir. 1951) (same); Webb v. Gee, 128 So. 2d 449 (La. App. 4th Cir. 1961) (non-cancellation of a mortgage note due to dereliction of a notary public).

15. Ducuy v. Falgoust, 228 La. 533, 83 So. 2d 118 (1955), in which the vendor was unable to deliver a valid title. It must be noted that this case dealt with a contract which preserved the right to specific performance, whereas that in the instant case did not. However, as has been pointed out, this distinction should not dictate a different result in the case of nonperformance. See note 10 *supra*.

16. LA. CIVIL CODE art. 1819 (1870).

17. *Id.* art. 1823.

case the engagement is voidable by the party who contracted under the error.[18] The principal cause, or motive, of the seller's obligation in a contract to sell is to obtain the purchase price, while that of the buyer is to obtain ownership of the object to be sold.[19] Invalidity of the seller's title thus destroys the principle cause of the buyer's obligation, but not of the seller's. Consequently, the buyer may avoid the contract because of such error, but the seller may not.[20] Although a seller may obligate himself to deliver a valid title in the belief that he can do so, this belief constitutes a secondary cause or motive, and error in it will constitute a defense for him only if the parties expressly so provide.[21] Similarly, a buyer's mistaken belief that he can furnish the purchase price should be no defense to his failure to fulfil his obligation to buy.

The court in the instant case did not discuss the defenses available to one who has invalid title to property he has contracted to sell.[22] Although it cited three early cases as holding that the seller's inability to deliver valid title was not an arbitrary breach,[23] it gave no reasons for holding that the breach by the seller must be arbitrary for Civil Code Article 2463 to apply. It did not discuss those cases in which the parties had contractually reserved the right to specific performance and the buyer was granted return of double the deposit upon the seller's inability to perform.[24]

18. *Id.* art. 1881.

19. See Smith, *A Refresher Course in Cause*, 12 LA. L. REV. 2 (1951).

20. LA. CIVIL CODE art. 1881 (1870).

21. 3 TOULLIER, LE DROIT CIVIL FRANÇAIS n° 39 (1846).

22. Neither error nor impossibility was raised by counsel for the parties as a possible defense to the buyer's claim.

23. Botto v. Berges, 47 La. Ann. 959, 17 So. 428 (1895); Williams v. Meyer, 29 So. 2d 599 (La. App. Orl. Cir. 1947); Meade v. Viguerie, 11 La. App. 585, 123 So. 378 (Orl. Cir. 1929). Two of these cases may be distingished, however. In the *Botto* case the plaintiff sued "to recover $200 deposited by plaintiff as earnest of her promise to buy, should the title prove satisfactory." 47 La. Ann. at 959, 17 So. at 429. Defendant was unable to convey a valid title. The court said: "The promise to transfer property for cash, under a title in every respect legal, was a condition not complied with by the defendants, and it, in consequence, justifies the plaintiffs in praying that the written agreement of promise to buy be declared no longer of any effect." *Id.* at 962, 17 So. at 430. Thus, it seems that the contract was resolved for failure of a resolutory condition. In the *Meade* case the plaintiff hired an agent to buy property for him, and the agent offered the wife of the property owner $550 and the wife accepted. Plaintiff put up a $55 deposit, but the property owner refused to ratify the acceptance of his wife. The court granted only a return of the deposit. It appears, however, that no contract ever came into existence, because there was no acceptance of the plaintiff's offer by the property owner.

24. Kinler v. Griffin, 251 F.2d 655 (5th Cir. 1958); Poche v. Ruiz, 239 La. 573, 119 So. 2d 469 (1960); Ducuy v. Falgoust, 228 La. 533, 83 So. 2d 118 (1955); Williams v. Terese, 120 So. 2d 80 (La. App. Orl. Cir. 1960).

Rather than deciding whether or not the seller's breach is arbitrary, it is submitted that the proper approach is to determine whether the articles of the Civil Code dealing with error and impossibility of performance afford relief to a seller unable to deliver title to property he has contracted to sell.[25] Impossibility of performance because the seller has previously sold the property to another should not be considered a defense to the buyer's claim for damages, because the inability to deliver valid title is not caused by an irresistible force or fortuitious event which occurs after the obligation is assumed. Neither should error as to his ability to deliver valid title constitute a defense, because this error relates to an accessory cause, the belief that he can deliver valid title — rather than to the principal cause, to obtain the price.[26] It would be preferable to allow the buyer damages when the seller is unable to deliver a valid title at the time he contracted to sell[27] whether or not the breach is arbitrary.[28] This principle should apply both when there is earnest money and when the contract stipulates that the buyer may choose specific performance or forfeiture of double the deposit.

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25. The recovery of damages for breach of contract is based on the notion of fault, but a finding of fault does not depend upon a finding of bad faith. 3 TOULLIER, LE DROIT CIVIL FRANÇAIS n° 230 (1846). Every contravention of an engagement, every failure or omission which is the result of negligence, or lack of care, or ignorance with regard to things which one can or should know is a fault under civilian theory. A good faith breach of contract requires the assessment of damages unless the obligor has been prevented from fulfilling his obligation by an event which he could neither foresee nor prevent, *i.e.*, by a fortuitous event or *force majeure. Ibid.*

26. One French case indicates that the judge does not have to allow damages if he finds that the vendor was in good faith and that his error was justifiable. S.1929.1.86; D.H.1928.591. However, the court seems to have treated the transaction as a completed sale rather than a promise of sale. FRENCH CIVIL CODE art. 1599 (LA. CIVIL CODE art. 2452 (1870)) was used as authority.

27. Although the court found that the seller did not own the property when he contracted to sell it, the opinion does not reveal whether he was in good or bad faith. This determination is useful only to determine the amount of damages due the buyer. If the seller is in bad faith, the buyer is entitled to all damages that are the direct consequence of the breach. LA. CIVIL CODE art. 1934(2) (1870). If the seller is in good faith, the buyer is entitled only to the damages within the contemplation of the parties at the time of the contract. *Id.* art. 1934(1). When the buyer deposits earnest money, it appears that the amount of the deposit is the amount of damages contemplated by the parties; it would seem that in the instant case this amount equalled all damages consequent from the breach, thus pretermitting the necessity of determining whether defendant was in good or bad faith.

28. A consideration which may favor the decision in the instant case is that the Louisiana Supreme Court has decided that an evicted vendee may only recover the purchase price; he is not entitled to damages. Burrows v. Peirce, 6 La. Ann. 297 (1851). Thus if the suggested decision were followed, one who contracted to sell property and later discovered that his title was invalid could escape damages