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Bringing A Contract Rescission Action Is An Anticipatory Repudiation Of That Contract

In *Princes Point v. Muss*, an Appellate Court recently addressed two questions concerning the rights of parties under a purchase and sale agreement for real estate. As the Court stated: "The questions raised by this appeal are whether a prospective purchaser of real property anticipatorily breaches a contract of sale by commencing an action against the seller for rescission of the contract before the closing date, and whether, in the event of the buyer's repudiation, the seller is required to show that it was ready, willing, and able to complete the sale (by obtaining certain government approvals as a condition precedent to closing) in order to retain the deposit and certain other payments as liquidated damages."

The Court recognized that an anticipatory breach, or repudiation, occurs "when a party to a contract unequivocally communicates to its counterpart before performance is due, by a statement or voluntary affirmative act, that it will avoid performance of its contractual duties." However, it went on to state that there "is an apparent absence of case law regarding whether the commencement of an action, particularly one seeking rescission, is itself an anticipatory breach." Although there is precedent that an action seeking a "declaratory judgment" does not constitute an anticipatory breach, the Court reasoned that this "proposition is a rational one, because a declaratory judgment action merely seeks to define the rights and obligations of the parties. If a plaintiff succeeds in obtaining a declaratory judgment, he or she may then proceed to the performance of duties under the contract (as defined by the judgment). An action seeking rescission of a contract is markedly different. In contrast to a declaratory judgment, a plaintiff who succeeds in obtaining rescission can no longer perform: his or her contractual duties will have evaporated. Indeed, by bringing this action for rescission, plaintiff sought to have a court 'declare the contract void from its inception and to put or restore the parties to status quo.'"

Accordingly, the Court concluded that because a rescission action unequivocally evinces the buyer's intent to disavow its contractual obligations, the commencement of such an action before the date of performance constitutes an anticipatory breach.

As to the second question, the Court relied upon the general proposition of law that "a repudiation discharges the non-repudiating party's obligations to render performance in the future" and that a party "will be relieved or discharged from the performance of futile acts or conditions precedent…upon the failure or refusal by a party to honor its obligations under their contract."

Here, the contract required the sellers to obtain development approvals as a condition precedent to closing, but the Court concluded that they "were absolved of that obligation" upon the buyer's anticipatory breach. The Court further held that whether or not the sellers were "on track" to obtain the approvals by the closing date was "of no moment; the record demonstrates that they had been engaged in significant efforts to obtain the approvals" until the buyer's repudiation, and "it was possible, however unlikely, that they could have obtained the approvals before the Final Outside Closing Date (which the parties had been extending on a monthly basis)." The Court said that once the buyer had commenced the action, it would have been "futile and wasteful" for the sellers to continue to seek the approvals in preparation for a closing that the purchaser "was tirelessly seeking to avoid."

Accordingly, the Court held that the seller was not required to show that it was ready, willing, and able to complete the sale because the buyer's anticipatory breach relieved it of further contractual obligations.

Election of Remedies under New York's Human Rights Law

In *Vetro v. Hampton Bays Union Free School District*, a former school district employee's wrongful termination action against a school district, alleging discrimination, was barred by the "election of remedies doctrine." The Supreme Court, Suffolk County, denied the former employee's motion for summary judgment, and granted the school district's cross-motion for summary judgment. The former employee appealed and the Appellate Division agreed and affirmed.

Pursuant to the statutory election of remedies doctrine, found in Executive Law § 297(9) the filing of a complaint with the New York State Division of Human Rights (the "Division") precludes the commencement of an action in the Supreme Court asserting the same discriminatory acts. The Court recognized, however, Executive Law § 297(9) also provides that, "'where the [D]ivision has dismissed such complaint on the grounds of administrative

convenience, ... such person shall maintain all rights to bring suit as if no complaint had been filed with the [D]ivision.'"

In other words, when parties believe they were discriminated against in the workplace by their employer, they may elect to pursue their claims either in the judicial forum (*i.e.*, the New York State Supreme Court), or before the Division. However, if the employees choose to file their discrimination complaints with the Division, or with any local commission on human rights, any court action asserting rights under the Human Rights Law is barred and may not be initiated, except where the Division has dismissed the administrative complaint on the ground of "administrative convenience." As such, a court action will be dismissed on this so-called election of remedies ground where the Division has issued a final determination on the complaint such as a Commissioner's Order or a "no-probable-cause finding."

Here, the Appellate Division ruled that the school district established its "prima facie entitlement to judgment as a matter of law dismissing the complaint." The complaint in this action was "based on the same allegedly discriminatory conduct asserted in complaints the plaintiff filed with the Division, and that the Division dismissed those complaints on the merits and not for mere administrative convenience."

The Court concluded that "the Supreme Court properly granted the defendants' motion for summary judgment dismissing the complaint on the ground that this action is barred by the election of remedies doctrine."

Does Your Family Business Have A Succession Plan?

According to recent statistics, family businesses comprise approximately 90 percent of all business enterprises in the United States. Despite their prevalence, family businesses often fail to continue on into successive generations. On average, less than a third of family owned businesses survive to the second generation, and another 50% don't survive to the third generation.

As a general observation, only a very small percentage of family owned businesses take affirmative steps to establish a business succession plan. These businesses either fail to consult attorneys or do so on an ad hoc basis. Attorney involvement may be limited to forming the business entity (corporation, partnership or LLC), isolated transactions, or sale or dissolution of the business. Owners tend to assume that there is an implied understanding among family members that, upon the death or retirement of an owner or manager, business will continue as usual. More often than not, however, when a business owner retires or dies, the company falls apart.

The first step in putting together a succession plan is to examine the structure of family business in terms of 1) ownership 2) authority and 3) responsibility. Although family businesses are typically owned by one or more family members, the management team and employees may come from outside the family. Moreover, since family businesses "mix" business and family, the family dynamic itself must be examined. How are decisions made within the family as to ownership and management? Are the desires and skill sets of family members taken into consideration? How are promotions and advancement handled? What role do spouses of family members play in the dynamic? How do non-family employees fit into the picture?

Because passing on a family business necessarily involves a transfer of wealth, business owners should also structure their estate plans to ensure that the business assets pass to intended beneficiaries, that there will be sufficient liquidity to operate the business, and that income and estate tax liability is minimized. Business owners should consult with experienced corporate and estate plan counsel to assist in devising a solid succession plan.