NEW MEXICO LAW REVIEW

Volume 16
Issue 1 *Winter 1986*

Winter 1986

Commercial Law

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COMMERCIAL LAW

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I. INTRODUCTION

Since the end of the most recent survey year in March 1984, the New Mexico Supreme Court rendered a very significant decision in the area of commercial law.[1] The court indicated that, by means of proper negotiation and proper drafting of commercial contracts, an attorney may avoid subsequent claims of fraud or misrepresentation in many cases, thus promoting the principle of certainty discussed in the preceding commercial law survey article.[2] Other decisions have emphasized, but not resolved, continuing problems in the commercial law area which must be addressed in the future.

II. CONTRACTS AND EXTRA-CONTRACTUAL THEORIES

A. Drafting Contracts to Avoid Fraud Claims

The supreme court held, in *Rio Grande Jewelers Supply, Inc. v. Data General Corp.*,[3] that when a commercial contract contains an express "integration clause,"[4] contains an explicit and complete disclaimer of express and implied warranties, and is negotiated at arms length, parties to that contract cannot thereafter claim negligent misrepresentation by asserting claims or rights not based upon the language of the contract.

Rio Grande Jewelers involved the purchase and sale of computer hard-

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1. Rio Grande Jewelers Supply, Inc. v. Data Corp., 101 N.M. 798, 689 P.2d 1269 (1984).
2. Otten and Wilson, *Commercial Law*, 15 N.M. L. REV. 187 (1985).
3. 101 N.M. 798, 689 P.2d 1269 (1984).
4. The following is an example of an integration clause:

> THIS WRITTEN AGREEMENT CONSTITUTES THE ENTIRE AGREEMENT BETWEEN THE PARTIES. ALL PRIOR OR CONTEMPORANEOUS NEGOTIATIONS AND/OR UNDERSTANDINGS ARE MERGED HEREWITH. NO PRIOR OR CONTEMPORARY NEGOTIATION, UNDERSTANDING OR AGREEMENT SHALL BE BINDING UNLESS EXPRESSLY CONTAINED IN THIS AGREEMENT. *NO ADDITION, DELETION OR AMENDMENT TO THIS AGREEMENT SHALL BE VALID UNLESS EXPRESSED IN A WRITING SIGNED BY BOTH PARTIES*. THERE ARE NO WARRANTIES, REPRESENTATIONS OR PROMISES OF ANY KIND, AND NO OBLIGATIONS WHATSOEVER, WITH RESPECT TO THE SUBJECT MATTER OF THIS AGREEMENT, EXCEPT THOSE SPECIFICALLY SET FORTH IN THIS AGREEMENT.

ware and programmable software.[5] When the system did not perform according to its expectations, Rio Grande Jewelers sued on a variety of legal theories including negligent misrepresentation.[6] The New Mexico Supreme Court found that the negligent misrepresentation claim was in conflict with Section 55-2-316 of the Uniform Commercial Code[7] and with public policy in favor of freedom of contract. The court cited four factors which compelled its decision: (1) the contract provided that that document was the "complete and exclusive" agreement of the parties; (2) there was an effective disclaimer of warranties contained in the contract; (3) the representations made by the plaintiff in the negligent misrepresentation claim were the same as those in the breach of warranty claim; and (4) the issue of fraud was not argued on appeal.[8]

The decision did not involve a claim of innocent misrepresentation, but presumably such claims would also be barred if the criteria set forth in *Rio Grande Jewelers* are met. Likewise, the decision failed to address claims of actual fraud, but did cite *Bell v. Lammon*[9] with approval.[10] The decision did not address the question of the extent to which a written contract can limit or affect claims of express or implied warranty either. However, in *Newcum v. Lawson,*[11] it was held that parties may contract away implied warranties by the use of a disclaimer warranty provision in the contract.

Read together, these decisions provide the commercial attorney with a means of avoiding claims for fraud and misrepresentation which seem inevitably to accompany any deal which has gone bad. Some steps which the commercial attorney can take to effect such a result are:

1. Include a detailed integration clause in each commercial contract.

5. 101 N.M. at 799, 689 P.2d at 1270.

6. *Id.*

7. N.M. STAT. ANN. § 55-2-316 (1978) provides, in effect, that a seller can, by explicit contract terms, exclude implied warranties which would otherwise be applicable to a sale of goods.

8. *Rio Grande Jewelers,* 101 N.M. at 799, 689 P.2d at 1270.

9. 51 N.M. 113, 179 P.2d 757 (1947). *Bell* addresses the extent to which the terms of a written contract can preclude allegations of actual fraud; and held that when a written contract between the parties *specifically* deals with a particular aspect of the transaction between the parties, one of the parties to the contract cannot later avoid the express provision of the contract by alleging fraud. The court noted that "[t]he mere allegation of fraud does not constitute a blanket invitation to disregard utterly the parol evidence rule. The field for employing such evidence even where fraud is alleged, is not unlimited." *Id.* at 119, 179 P.2d at 761. *See, e.g.,* Alford v. Rowell, 44 N.M. 392, 397, 103 P.2d 119, 122 (1940). The written contract in *Bell* relating to the sale of a business, contained an express provision as to the manner in which the inventory of the business was to be taken into account in calculating the purchase price of the business. *Bell,* 51 N.M. at 116, 179 P.2d at 758. The purchaser later brought an action alleging fraudulent misrepresentations by the seller with regard to the manner in which the price of the business was to be calculated. *Id.* at 117, 179 P.2d at 759. The court concluded that since the written contract dealt with the specific subject matter which was the subject of the alleged fraudulent misrepresentations, the plaintiff would not be allowed to assert the claim of fraudulent misrepresentation. *Id.* at 119, 179 P.2d at 761.

10. 101 N.M. at 799, 689 P.2d at 1270.

11. 101 N.M. 448, 455, 684 P.2d 534, 541 (Ct. App. 1984).

Preferably, that clause should be underlined or otherwise emphasized in the contract; and

2. Describe in detail the warranties being made in every commercial contract. Specifically, disclaim any other express or implied warranties. The language of any such disclaimer will, of course, depend upon the nature of the transaction.

Under *Rio Grande Jewelers*, the attorney who incorporates integration clauses and disclaimer provisions into the contract may prevent a party's later claim of innocent or negligent misrepresentation. He may also avoid claims of breach of express or implied warranties not contained in the written agreement. However, such general provisions will not, in themselves, prevent a party for whom a deal has gone bad from asserting a claim for actual fraud, unless the written contract specifically deals with the subject matter of the alleged fraud.[12] In order to minimize the chances of such a claim being successfully asserted, the commercial attorney should spend substantial time familiarizing himself with the business of his client and with the types of disputes common in this client's line of business. For example, if an attorney represents a shopping center developer, and if it appears from discussions with the client, and from a review of reported cases in the area, that a common type of alleged misrepresentation in the context of shopping center leases relates to the presence of major tenants in the shopping center, the lease should contain an express disclaimer as to that specific subject matter. Such an express disclaimer should, under *Bell*, preclude even a claim of actual fraud with regard to that subject should the tenant's business in the shopping center later prove to be unprofitable.[13]

In addition to setting forth all matters which the parties have agreed upon, it is suggested that the agreement should also describe terms discussed by the parties and not agreed to. For example, an attorney who represents a seller of real property should specifically disclaim any warranties in the agreement as to the availability of utilities to the property when the availability of those utilities has been discussed, but is uncertain, and cannot be guaranteed.

A party to a commercial transaction, particularly a party who is relatively sophisticated in the subject matter of the transaction, should be reluctant to deal with an unsophisticated party not having legal counsel. The knowledgeable party, at a minimum, should write a letter to the other party suggesting that he retain counsel to review the contract documents before signing. In large or complex transactions, a sophisticated client may consider refusing to deal with another party until that party has obtained legal counsel. It is important to remember that the principles

12. *See Bell*, 51 N.M. at 119, 179 P.2d at 761.

13. Discussed, *supra*, note 9.

set forth in *Rio Grande Jewelers* are limited only to situations involving commercial contracts which are negotiated at arms length. These principles do not apply to contracts in which one party, by virtue of his relationship to the other party, owes a fiduciary duty. In such instances, no negotiations should take place until both parties are represented by independent legal counsel.

Finally, be mindful that the principles set forth in *Rio Grande Jewelers* are fully applicable only in the context of a negotiated contract, and may not be fully applicable in the context of "form" agreements in which there is no real negotiation.

B. An Implied Warranty of Habitability

In *Newcum v. Lawson,*[14] the court of appeals considered, but did not decide, whether an implied warranty of habitability exists with respect to the sale of a new residence. The issue was not decided because the particular sale was subject to a contract expressly excluding implied warranties.[15] However, the court seemed to hint that it might, in the future, find an implied warranty of habitability in cases where the contract of sale does not expressly provide otherwise.

C. "As Is" Clauses

In *Eichel v. Goode, Inc.,*[16] the court found that an "as is" provision in a contract for sale of equipment was effective to disclaim warranties but was not effective to disclaim liability premised in negligence. This case points out the advisability of having any "disclaimer" clause in a contract specifically disclaim causes of action based on negligence. The case further advises that while a well-drafted disclaimer will probably be effective to avoid breach of express or implied warranty claims by injured third parties, even the most complete disclaimer provision will not prevent a negligence claim by an injured third party.

Similarly, in *Gouveia v. Citicorp Person to Person Financial Center Inc.,*[17] it was held that an "as is" clause does not necessarily relieve one from liability for fraud. Under *Bell,*[18] in order for a written contract to provide an absolute defense to a claim of fraud, the contract must expressly deal with the specific subject of the alleged fraud. For example, a contract for the sale of a house specifically disclaiming any warranties or representations regarding the condition of the roof would provide an absolute defense for a later claim of fraud based upon alleged misrepre-

14. 101 N.M. at 455, 684 P.2d at 541.
15. 101 N.M. 246, 249, 680 P.2d 627, 630 (Ct. App. 1984).
16. 101 N.M. 572, 578, 686 P.2d 262, 268 (Ct. App. 1984).
17. *Id.*
18. 51 N.M. 113, 179 P.2d 757 (1947). *See* note 9 for discussion of *Bell.*

sentations as to the condition of the roof; it would not provide an absolute defense based on a claim of actual fraud with respect to the condition of the plumbing.

III. INSURANCE MATTERS

It was held in *Patterson v. Globe American Casualty Co.*,[19] that there is no implied private right-of-action arising from an insurance company's violation of the New Mexico Unfair Insurance Practices Act.[20] The opinion emphasized, however, that the decision should not be read to exclude private actions against an insurance company which arise from sources other than the Act.[21] In any event, the legislature has since provided a private cause of action for violations of the Unfair Insurance Practices Act.[22]

In *March v. Mountain States Mutual Casualty Co.*,[23] the court reiterated that settlement between an insured party and his alleged tortfeasor—thereby prejudicing the insurance company's subrogation rights—operates to destroy the insured's claim against his insurance company with respect to those injuries. This is so even without proof that the insurance company has been prejudiced by the settlement. *March* seems to support the argument that in order to determine whether prejudice to the insurance company must be shown before a proscribed action by the insured will defeat coverage under the policy, the relevant distinction is between first party insurance policies and liability insurance policies, and not between "exclusions" and "conditions subsequent."[24]

IV. REAL ESTATE CONTRACTS

Manzano Industries, Inc. v. Mathis,[25] is another of a seemingly endless line of cases which have decided whether the forfeiture of a real estate contract shocks the conscience of the court. The apparent inability of the courts to set forth any workable guidelines in this area should lead the commercial attorney to reconsider the seller's traditional preference of real estate contracts over mortgages as a security device.

The case of *Keith v. Bowers*[26] reaffirms earlier New Mexico decisions that termination of a real estate contract usually terminates any promissory

19. 101 N.M. 541, 685 P.2d 396 (Ct. App. 1984).
20. N.M. STAT. ANN. § 59A-16-1 (Supp. 1984).
21. 101 N.M. 541, 544, 685 P.2d 396, 399 (Ct. App. 1984).
22. N.M. STAT. ANN. § 59A-16-30 (Supp. 1984).
23. 101 N.M. 689, 687 P.2d 1040 (1984).
24. *See* Otten and Wilson, *Commercial Law*, 15 N.M. L. REV. 187 (1985).
25. 101 N.M. 104, 678 P.2d 1179 (1984).
26. 102 N.M. 19, 22, 690 P.2d 1013, 1016 (1984).

notes or other evidence of indebtedness which the purchaser gave to the seller in connection with the real estate contract.[27]

V. REAL ESTATE BROKERS

A broker's fiduciary obligation to its principal extends beyond the expiration of the broker's formal listing agreement.[28] The court, in *Swallows v. Laney,*[29] listed various factors to be considered in determining a fiduciary relationship between a broker and his principal: (1) the course of conduct between the broker and the principal; (2) the extent to which the broker holds himself out to the principal as a confidant; (3) the degree of the principal's dependence on the broker; (4) the sophistication of the principal in real estate matters; and (5) the familiarity of the principal with the value of the subject property.

In view of a broker's fiduciary obligations to his principal, it is suggested that a broker should be careful to keep his role as a broker separate from his role as a principal whenever he enters into business transactions with present or former clients. If a broker should, on his own account, enter into a real estate transaction with a present or former client, the contract should have a provision which clearly characterizes the relationship and the purchaser's intentions with regard to the property.[30]

Almost without exception, a broker should refuse to enter into business transactions with existing or former clients unless such clients have obtained independent legal counsel.

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27. Davies v. Boyd, 73 N.M. 85, 385 P.2d 950 (1963).

28. Poorbaugh v. Mullen, 99 N.M. 11, 18, 654 P.2d 511, 518 (Ct. App.), *cert. denied,* 99 N.M. 47, 653 P.2d 878 (1982).

29. 102 N.M. 81, 84, 691 P.2d 874, 877 (1984).

30. An example of such a clause is:

> THE SELLER RECOGNIZES THAT PURCHASER, WHICH IS A LICENSED REAL ESTATE BROKER, IS PURCHASING THE PROPERTY FOR ITS OWN ACCOUNT, AND THAT IT IS THE INTENT OF THE PURCHASER TO DEVELOP, RESELL, MANAGE OR OTHERWISE DEAL WITH THE PROPERTY IN A MANNER WHICH MAY RESULT IN A PROFIT TO PURCHASER. THE SELLER FURTHER ACKNOWLEDGES AND AGREES THAT, SINCE PURCHASER IS A LICENSED REAL ESTATE BROKER, SELLER HAS SOUGHT AND OBTAINED INDEPENDENT COUNSEL AND ADVICE IN EFFECTNG THIS TRANSACTION, AND IS RELYING ON SELLER'S OWN EXPERIENCE, KNOWLEDGE AND JUDGMENT, AND THAT THE SELLER HAS NOT RELIED UPON ANY ADVICE OR REPRESENTATIONS OF PURCHASER IN DETERMINING WHETHER SELLER SHOULD ENTER INTO THIS AGREEMENT, SELLER FURTHER AGREES THAT, NOT WITHSTANDING THE FACT THAT PURCHASER WILL RECEIVE A REALTOR'S COMMISSION WITH RESPECT TO THIS TRANSACTION. THERE DOES NOT EXIST ANY AGENCY OR FIDUCIARY RELATIONSHP BETWEEN SELLER AND PURCHASER WITH RESPECT TO THIS TRANSACTION, AND THAT THIS TRANSACTION HAS BEEN NEGOTIATED BETWEEN THE PARTIES ON AN ARM'S-LENGTH BASIS.

A statement made by the listing broker on the multiple listing service computer listing sheet that the property in question was in "all top shape" gave rise to a claim of misrepresentation and fraud against the listing broker by a purchaser who had read and relied upon the computer listing sheet prior to purchasing the property.[31] In *Gouveia v. Citicorp Person to Person Financial Center Inc.*,[32] the court found that a listing broker can reasonably anticipate that information which he places on the multiple listing computer listing sheet will be seen and relied upon by potential purchasers of the property and that the broker can therefore be held liable if such information is false and if he was negligent in making the misrepresentation.

Gouveia held that the duties of a real estate broker are generally determined by reference to the standard of care of brokers in the community.[33] It is strongly suggested that an attorney representing a real estate broker discuss with his client the advisability of preparing a form of listing agreement specifically setting forth what the broker does and does not agree to do or be responsible for with respect to the listing. Such a listing agreement, while probably not effective with regard to claims of third parties against the broker, can be extremely helpful in defending the broker against claims of breach of duty by the broker's own principal.

VI. PROCEDURAL MATTERS

In *Miller and Associates Ltd. v. Rainwater*,[34] the New Mexico Supreme Court declared N.M. Stat. Ann. §38-7-1 (1978) unconstitutional. That statute provided, in effect, that a verified complaint on open account not denied by a verified answer, established the validity of the open account at trial.[35] The court concluded that provisions of the statute were "merely a rule of evidence," a subject within the exclusive jurisdiction of the New Mexico Supreme Court, and that it is unconstitutional for the legislature to enact a statute which deals exclusively with evidentiary and procedural matters.[36]

In *McClain Co. v. Page & Wirtz Construction Co.*,[37] the court addressed the issue of an award of attorneys fees. When both parties are in substantial breach of a contract, each of the defaulting parties is precluded from

31. 101 N.M. 572, 575, 686 P.2d 262, 265 (Ct. App. 1984).
32. 101 N.M. 572, 686 P.2d 262 (Ct. App. 1984).
33. *Id.* at 577-78, 686 P.2d at 267-68.
34. 102 N.M. 170, 171, 692 P.2d 1319, 1320 (1985).
35. 102 N.M. 170, 172, 692 P.2d 1319, 1321 (1985).
36. *Id.* at 171-72, 692 P.2d at 1320-21.
37. 102 N.M. 284, 694 P.2d 1349 (1985).

recovering attorneys fees from the other under a contractual provision relating to the awarding of attorneys fees.[38]

The case of *Kirk Co. v. Ashcraft*,[39] illustrates the limitations upon the "business records" exception to the hearsay rule. The business records exception is properly limited to routine and clerical types of entries, such as the dates and amounts of purchases and payments.[40] It may not be used to allow introduction of evidence—such as reports, analysis, judgments and other subjective kinds of information—even though such information may technically have been gathered and produced in the ordinary course of business.[41]

VII. EMPLOYER-EMPLOYEE MATTERS

The New Mexico Supreme Court, in *Danzer v. Professional Insurors Inc.*,[42] adopted a definition of what constitutes dismissal for "good cause" under an employment contract. Good cause is "some [cause] inherent in and related to the qualifications of the employee or a failure to properly perform some essential aspect of the employee's job function.[43]

A commercial attorney preparing employment contracts, employees' manuals or other documents referring to termination for "good cause," should list specific examples of what constitutes "good cause." A phrase such as "any other cause inherent in or related to the qualifications of the employee or any failure properly to perform some essential aspect of the employee's job function," is also recommended.

VIII. CONCLUSION

In most cases in which litigation arises in a commercial context, the dispute results from a failure fully to consider and document the respective rights and obligations or the parties. This article was intended to provide the practitioners with suggestions which may be helpful in avoiding, or at least limiting, some of the more common of these problems.

38. *Id.* at 285, 694 P.2d at 1350.
39. 101 N.M. 462, 684 P.2d 1127 (1984).
40. *Id.* at 468-69, 684 P.2d at 1133-34.
41. *Id.* at 468, 684 P.2d at 1133.
42. 101 N.M. 178, 679 P.2d 1276 (1984).
43. *Id.* at 183, 679 P.2d at 1281 (quoting Comfort & Fleming Ins. Brokers, Inc. v. Hoxsey, 26 Wash.App. 172, 177, 613 P.2d 138, 141 (1980)).