THE EXECUTORY ACCORD

By Louis G. Adolfsen

A litigator knows how to assert breach of contract. There may be other theories of liability as well, like anticipatory breach, interference with contract or unjust enrichment. But how many of you have ever heard of an "executory accord"? This is how I learned this principle of contract law.

A number of years ago our firm was retained to sue on behalf of a company who had agreed to perform introductions to a company that had a service business. Under the contract that our client executed prior to engaging us they were to be paid a percentage of the sales from each introduction. The company promising to pay the percentages was a start-up company and had some slow going. For that reason, it said to our clients that it preferred to pay them the sum of $40,000 per month in lieu of the percentage. The new contract also permitted termination on 30 days notice.

Our clients, again before they engaged us, said that they were willing to accept the second contract provided that it was performed. In other words if they were not paid the $40,000 per month under the second contract, they were going to rely on the first contract and demand the percentage of sales payment. When the second contract was not performed, we were engaged by the companies performing the introductions and asked to sue.

Because the matter was such a bitter dispute, regrettably we decided to make a claim under the Racketeer Influenced and Corrupt Organizations Act ("RICO"). First, we failed to plead it properly, neglecting to allege a conspiracy. Then, when we did allege a conspiracy, the federal judge saw through it and said that RICO simply was not applicable. While the district judge could have retained jurisdiction, he declined to do so and dismissed the case remanding it to our state court. The federal judge issued his decision orally from

the bench and then took us to chambers and asked if there was any possibility of settlement. The bitterness between the parties continued and the judge sensed that settlement was not possible at that time. We then got up to leave and began walking out of the court room when someone, who apparently had listened to the argument we made before we went into the Judge's chambers, mumbled: "sounds like an exectory accord." No one said anything but I was puzzled by the comment.

When I got back to the office I turned to a hornbook, Farnsworth on Contracts, which I had purchased a long time ago following my clerkship on the New York Court of Appeals. I felt that the Farnsworth text gave me pretty much anything I needed on contract law in short order and was a useful resource. I looked in the index. I found that an executory accord is a situation where an obligee who is unwilling to give up his rights under the original contract until the obligor has actually performed the new contract, can make what is called an "accord" rather than a substituted contract. According to Farnsworth an accord is "a contract under which the obligee promises to accept a stated performance in satisfaction of the obligor's duty."

The concept of an executory accord was explained in Denburg v. Parker Chapin Flattau and Klimpl, 82 N.Y.2d 375, 624 N.E.2d 995, 604 N.Y.S.2d 900 (1993) which involved a dispute between a law firm and a former partner in which the court held that a provision in the partnership agreement requiring certain payments upon a partner's withdrawal were unenforceable. Like my case, the court concluded that there was a disputed factual issue surrounding a purported settlement agreement, which was the executory accord. As the Court in Denburg explained the concept (82 N.Y.2d at 384):

> Historically, executory accords were not enforceable; although the underlying obligation remained in effect, an accord without satisfaction was not binding *(see, Larscy v Hogan & Sons*, 239 NY 298, 301-302;*Reilly v Barrett*, 220 NY, at 173). Upon recommendation of the Law Revision Commission, however, the Legislature in 1937 discarded the common-law rule, and now an executory accord is enforceable so long as "the promise of the party against whom it is sought to enforce the accord is in writing and signed by such party" (General Obligations Law § 15-501 [2]). By implication, the common-law rule survives to the extent an executory accord is not reduced to writing.

Once I figured out that my client might have made an exectory accord, following the remand to state court, I immediately served an amended complaint in which I argued breach of contract as my first cause of action and "executory accord" as my second cause of action. The defendant, after taking discovery, and knowing of my client's position as to how the first contract would come back into being if the second contract was not performed, moved for summary judgment. I opposed by arguing breach of contract and that my client had also stated a cause of action for executory accord.

That was all the court needed. The Judge found a question of fact as to whether the first contract still applied because the second contract had not been performed. This was enormously significant. Under the second contract the most my clients could recover was $160,000. Under the first contract their potential recovery was in the millions of dollars. This caused the plaintiff to quickly respond to and accept my client's demand of $200,000 (the $160,000 plus interest).

In my view, the executory accord concept was developed in recognition of the practical realities of business with no lawyers around. Many times a party to a contract says, "Let's rip it up and start all over." Sometimes that makes sense. But if the other party says "I'll rip up the first contract, but only on condition that you fulfill the second contract," the ground work is laid for another basis for recovery. If your client had that kind of conversation, and then tells you that the second contract was breached, well, you may be dealing with an executory accord.

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