



## Newburger v. Lubell

495 NY2d 1 (1931)

### Case Brief Summary

#### Facts

The plaintiffs, a firm of stockbrokers, bought and sold securities for the defendant, and carried them for his account, under a written agreement.

Such written agreement stated that any controversy arising between the parties should be determined by arbitration.

As the result of their transactions, the defendant became indebted to the plaintiffs on January 2, 1931, in the sum of \$48,937.23, for the purchase and sale of securities, which indebtedness the defendant is alleged to have confirmed and approved.

In partial liquidation of this debit balance the plaintiffs applied securities belonging to the defendant's brothers, of the value of \$34,374.26, under a claim that such use was authorized by the terms of guaranties in writing.

The brothers contested the plaintiffs' right to apply the securities or the proceeds upon account of the defendant's debt, and have submitted the controversy to the decision of arbitrators.

In that arbitration, brought by the brothers, the defendant is not a party.

In the event that the arbitration finds that the use of the proceeds is allowable, the balance due from the defendant to the plaintiff stockbrokers will be reduced to the sum of \$14,562.97. If the arbitration finds that such use is not allowable, the debit balance of the defendant will be left at \$48,937.23, the figure at which it stood at the close of the account.

The plaintiffs contended that they did not know of any controversy existing between themselves and the defendant.

Accordingly, plaintiffs requested the defendant to advise them whether he claims that any controversy exists. He did not, however, respond to the call.

As a result, plaintiffs contend that they are fearful that an action at law to recover the balance due (as opposed to arbitration) may be deemed to be a waiver of the right to resort to arbitration. Plaintiffs further expressed the concern that a petition for the appointment of an arbitrator, could also be met by the objection, that in the absence of a controversy, there is no need of the appointment, and nothing to decide.

These facts have therefore led the plaintiffs to demand judgment declaring that no controversy exists between them and the defendant, and for the sum of \$48,937.23, upon which judgment they agree to credit any sums received from the defendant's brothers pursuant to the guaranties; or in the alternative, if any controversy exists, that arbitration be directed to proceed in accordance with the contract.

#### Issue:

Can plaintiffs, the brokerage firm Newburger, maintain an action at law, for a declaratory judgment, without waiving their right under the contract to have disputes under the brokerage contract resolved by arbitration.

#### Holding and Rule:

Yes. Plaintiff can maintain an action in law for declaratory action under the contract without a breach or waiver of the same.

#### Synopsis of Rule of Law

This case holds that it is necessary to perform a contract in order to avoid a breach.

Here the Court found that defendant Lubell's inability to respond to plaintiff's inquiries as to whether a controversy existed (that would under the contract be resolved by arbitration), together with his failure to pay the moneys owed to plaintiffs pursuant to the brokerage agreement, could be deemed a breach of contract.

As a result, this case stands for the rule that it is necessary to perform a contract to avoid a breach.

Accordingly, the court found that plaintiffs could proceed with their action for a declaratory action in law (and still maintain a later case under the arbitration called for in the contract).

#### Discussion:

The Court found that a suit for a declaratory judgment is a discretionary remedy, which may be withheld if existing forms of action are reasonably adequate, and the court found that such existing forms were indeed adequate.

Nonetheless, the Court further held that plaintiffs could sue at law, and reduce their claim to judgment, due to the actions of breach by the defendant.

In such holding, Judge Cardozo found that if the defendant does not contest the debt, plaintiffs will have judgment by default, but if defendant does contest, with the result that a controversy develops, they will be free to discontinue, and get the benefit of the contract that whatever controversy arises shall be settled by arbitration.

The court saw no force in the objection that a waiver or abandonment of the benefits of arbitration could be inferred from the mere commencement of an action in the absence of notice that a controversy existed.

The plaintiffs were not restricted, however, to an action at law. For the court found that if the defendant fails to pay the debt and refuses to declare himself as to the reason for the failure, leaving the plaintiffs uncertain whether he contests it or not, they may file their petition under the Arbitration Law, alleging their uncertainties and praying that the defendant be required to submit to arbitration whatever controversies exist.

If the defendant in response to the petition disclaims any controversy and concedes the debt, the court held that they would not appoint arbitrators to compose a non-existing difference or one not within the scope of the defendant's promise, but the defendant may be estopped in such circumstances from interposing a defense thereafter.

The court finally held that, if the defendant remains obstinately silent, the court may infer from the very fact of silence that the petitioner's demand is not so plainly and fully uncontested as to make resort to arbitration useless, and may then proceed to a decree accordingly.

Judge Cardozo, the author of the decision, and chief judge of the NYS Court of Appeals (later a Supreme Court Justice), wrote that "one who has become a party to a contract for the arbitration of future differences, must live up to his engagement according to its spirit. He will not be permitted to wrest it from its purpose, and turn it into a shallow form by taking refuge in a disingenuous silence or in subtle and adroit evasions." In other words, a person must perform a contract to avoid its breach.