1970

Consolidated Finance Corporation v. Kent Moulton, dba South Davis Camper Sales, and Mid-Century Insurance Company, A Foreign Corporation : Appellant's Brief

Utah Supreme Court

OF THE STATE OF UTAH
IN THE SUPREME COURT

CONSOLIDATED FINANCE CORPORATION,
Plaintiff and Appellant,

vs.

KENT MOULTON, dba SOUTH DAVIS CAMPER SALES, and MID-CENTURY INSURANCE COMPANY, a foreign corporation,
Defendants and Respondents.

Case No. 12266

APPELLANT'S BRIEF

Appeal from the Third Judicial District Court
For the County of Salt Lake
Honorable Stewart M. Hanson, Judge

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STATEMENT OF THE NATURE OF THE CASE

Plaintiff sought in the Trial Court judgment against a bonding company and a used camper salesman for the sale price of a used trailer which the salesman sold. The salesman collected and converted the sales price. Plaintiff's claim is based on Section 41-3-16, U.C.A., which requires the bonding company to guarantee that the dealer will conduct his business without fraud.

DISPOSITION IN THE LOWER COURT

Following the trial of this matter, Trial Court granted a motion to dismiss plaintiff's complaint with prejudice and upon the merits, and denied plaintiff any relief whatsoever.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks a reversal of the Trial Court's judgment and an order entering judgment in its favor and against defendants for the balance owing from the sale price of the trailer, an agreed figure of $2,206.60, plus costs and attorney's fees.

STATEMENT OF FACTS

The facts in this matter are simple and to a large extent undisputed.

Plaintiff's claim is based on the requirements of Section 41-3-16, Utah Code Annotated, which requires a dealer in campers to provide a bond conditioned upon him conducting his business as a dealer without fraud or fraudulent representation. Kent Moulton, dba South Davis Camper Sales, was such a dealer, and Mid-Century Insurance Company furnished the bond guaranteeing his freedom from fraud and fraudulent representation.

Early in 1967 plaintiff repossessed a trailer in Pioche, Nevada and arranged with Moulton to pick the trailer up and bring it to his trailer sales location in Davis County. Moulton picked up the trailer and

brought it to his yard. Title to the trailer was kept by plaintiff during the period that it was in the yard (R. 42). In May of 1967 Moulton advised plaintiff's agent Allen that he had a sale for the trailer and needed the title to deliver to the buyer of the trailer (R. 42). Plaintiff delivered the title and received a check, Exhibit P-2, in payment for the net of the sale price of the trailer (R. 42). The check was deposited in the bank but dishonored for insufficient funds.

Plaintiff's agent checked with the bank on which the Exhibit P-2 was drawn and was advised that it was not good. The check was held for several days to get information as to its collectibility and finally put in to plaintiff's bank for collection (R. 64). Collection efforts were continued and Moulton finally personally contacted plaintiff's manager, Allen, and said, "Well, there had been a mix-up at the bank," and "rather than send it back, I will give you another one and you take and run it through and it will be all right." (R. 65). Plaintiff then received a second check for $4,700.00, which is Exhibit P-6. This check was made directly to Consolidated's agent, Clyde Allen, but was actually the plaintiff's money (R. 65). Plaintiff continued to make efforts to collect and finally, through a number of small payments, collected $2,493.40, leaving a balance owing to plaintiff of $2,206.60 (R. 68).

Plaintiff's witness Allen testified that there was no arrangement for credit to Moulton for the purchase price of the trailer (R. 42-43). Moulton did not testify to any arrangement for extension of credit.

There is no question that plaintiff placed the trailer with the dealer for sale. The dealer agreed to sell it and pay the net received to the owner (R. 74-75). The title was surrendered upon the representation by defendant Moulton that he had sold the trailer and needed title to complete the transaction (R. 75). There was no evidence of any agreement on the part of plaintiff to extend credit to Moulton for the amount due from the sale of the trailer (R. 76).

Moulton converted the money to his own account. There never was sufficient money in his account to pay plaintiff. Moulton had no arrangements with the bank to honor the check. Although the bank did have arrangements with defendant Moulton to finance or floor the purchase by him of new trailers, they had no agreement to finance or floor the purchase of this used trailer (R. 49-50-51).

Moulton testified that he had a man pick up the trailer (R. 79). He had it in his yard for two or three months. Obtained the title and warranty papers on it before he had a sale for it (R. 80). Originally the trailer was offered for $5,500.00, but the price reduced when no offers were received to $5,000.00. The $4,700.00 check for the net on the trailer sales was picked up in Bountiful (R. 80). Moulton testified he advised Allen that the check wasn't good at the time he delivered it to him, but that the check was delivered on the date it bears, May 26th (R. 81). He also testified that when the second check was delivered, he advised Allen that it was not good (R. 81). After both checks had bounced, Moulton discussed

with Allen putting the balance on a contract and letting it be paid monthly, but this was not done and Moulton went broke and didn't pay any more than the amounts collected (R. 81).

Moulton collected the $5,000.00 sale price in March, 1967, he testified (R. 82). He did not give Allen, Consolidated's agent, a check until May. Moulton ran the money from the sale price of the trailer through his South Davis account and does not recall whether he advised Allen about the sale and the receipt of the $5,000.00 when the transaction occurred (R. 82). Allen, the agent for Consolidated who handled the transaction with defendant Moulton, testified that he had no recollection or reference that Moulton ever advised him that the checks when delivered were not good, and that it was only a few days after he had delivered title that the check was received in the mail (R. 86-87). Moulton testified also that at the time the figure on the trailer was arrived at, he intended to pay Allen for the trailer (R. 87).

There is no evidence of an agreement between plaintiff and Moulton to sell the trailer to Moulton. The court, in its memorandum decision and findings, found that the relationship between plaintiff and defendant Moulton was one of seller and purchaser (R. 30). Court places great emphasis on the fact that after Moulton had delivered the two insufficient funds checks, his attempts to pay off the checks before he went broke shows an intention not to defraud (R. 30).

In the court's Finding No. 3, (R. 91), the court finds that Moulton sold the trailer on or about the 26th of May, 1967 for the sum of $5,000.00. There is no evidence whatsoever that this was the date when it was sold. This finding contradicts Moulton's own evidence (R. 82).

Conclusion No. 1, that the relationship was that of seller and purchaser, is without support of any evidence and contrary to the testimony of both parties to the transaction. Even if the court is correct that the relationship was seller and purchaser, the giving of the insufficient funds check was a fraudulent payment by purchaser of the purchase price.

ARGUMENT

POINT I

MOULTON, AS A MATTER OF LAW, CONDUCTED HIS BUSINESS AS A DEALER FRAUDULENTLY.

Plaintiff submits that the Trial Court completely misconceived the law applicable to the operations of automobile dealer and failed to apply the provisions of Section 41-3-16, Utah Code Annoted, as intended by the legislature of the State of Utah.

The evidence in several areas shows fraudulent conduct on the part of Moulton. The evidence is undisputed, uncontradicted, and clear and convincing.

(a) Moulton sold the trailer and collected $5,000.00 on the sale price in March, 1967 without advising the plaintiff of the sale or collection (R. 82).

It is undisputed, since it is the testimony of Moulton himself, that he collected the proceeds from the sale two months before he told the plaintiff about the sale. There is no question about this matter since it is Moulton's own testimony on cross-examination. There is no question about the date of the check for $4,700.00 since it bears the date of May 26th and was delivered within a few days of the date it bears (R. 42).

Since this is defendant Moulton's own testimony and the check is a document clear on its face, it is submitted by plaintiff that this is clear and convincing evidence, undisputed, and must be considered as the basis for a finding as a matter of law that Moulton engaged in a fraudulent transaction.

(b) Moulton delivered a check on May 26th or shortly thereafter bearing date of May 26th at a time when he did not have money available in the bank to pay the check. There is no question the check was not postdated. Moulton claims that he advised Allen, agent of plaintiff, that the check was not good, but Allen denies that any representation of this kind was made. As a matter of fact, the check was delivered through the mail, according to Allen, and no conversation occurred at which there could be a contradiction of the face of the check itself which shows no evidence of postdating.

(c) Under (a) and (b), by the defendant Moulton's own admissions, he was guilty of the

> crime of embezzlement as defined in 76-17-5, Utah Code Annotated, which defines said act as "every person entrusted with any property as bailee, tenant or lodger, or with any power of attorney for the sale or transfer thereof, who fraudulently converts the same, or the proceeds thereof, to his own use, or secretes it with a fraudulent intent to convert it to his own use. is guilty of embezzlement."

It is undisputed, uncontradicted and admitted by Moulton under oath that, without Consolidated's knowledge, he sold Consolidated's trailer, received $5,000.00, put it in his bank account, and two months later gave a bum check for the proceeds of the sale. In doing these acts, he engaged in a series of fraudulent acts and conducted his dealer's business in a fraudulent manner, converting plaintiff's property. which subjected the bonding company to liability for the loss caused to plaintiff. The evidence is clear, convincing, and uncontradicted of this fraudulent conduct.

It becomes even more obvious that there was an intention to defraud when one takes into consideration the fact that Moulton never did make the check good. He converted plaintiff's funds to other purposes. There was no effort on his part to postdate or get an agreement for an extension of credit for the purchase price of the trailer. Section 76-20-11, Utah Code Annotated, makes the drawing of insufficient funds checks a crime and provides:

"The making, drawing, uttering, or delivering of such check, draft, or order as aforesaid shall be prima facie evidence of intent to defraud."

(d) The giving of the check dated June 26th, Exhibit P-6, again was the violation of the criminal code because once more the check was not paid and was drawn against insufficient funds. The same argument in (a) and (b) would be true of this check since it obtained an extension of credit, permitting him to use plaintiff's money for additional time.

The only alleviating circumstance that is present to contradict the clear, convincing evidence that Moulton intended to defraud Consolidated is that after he had converted the vehicle and used the proceeds from its sale in his business, he attempted to pay back the $4,700.00 which he had obtained fraudulently. Was there ever a converter who acted otherwise when caught in the act?

The record is replete with other evidence of wrongdoing by Moulton in the manner in which he appropriated the proceeds from the sale of plaintiff's trailer. One could not argue fairly that the evidence is not clear and convincing. The four points made in (a), (b), (c) and (d) are cases where there is no contradiction in the evidence as to what happened.

The case closest on the facts and law which plaintiff has been able to find in its research is *Commercial Insurance Company of Newark, New Jersey v. Watson*, 261 F. 2d 143, (Tenth Cir.). This case came out of New Mexico to the Tenth Circuit and the

language of the licensing statute contained the language that is in the Utah Code. Judge Murrah discussed several cases. The circumstances under which the claim against the bonding company arose in the Commercial Insurance case are so similar to this case that a recitation of Murrah's opinion on the point may be helpful:

> "Import was a wholesale dealer in foreign automobiles. Powell represented to Import's Manager that he had a sale for a Volkswagen and induced Import to give him possession of it and to deposit the title papers in the Los Alamos branch of a Santa Fe Bank with a sight draft for the purchase price in the sum of $1,625. The title papers so deposited consisted of an assignment from the original nonresident owner by power of attorney to Import's Manager, and a "reassignment of title by registered dealer" from Import to Powell's Downtown Auto Sales at Santa Fe. When the sight draft was not paid, Powell instructed Import to draw another draft for the amount of the purchase price, with title attached, on another bank where he usually did business, and through which he would "floor-plan" the car. Import finally instructed the bank to release title to Powell without payment of the draft, but to return the attached power of attorney. In a subsequent telephone conversation, Import complained of nonreceipt of payment and Powell professed not to understand why payment had not been made by the bank, and said that he would go to the bank and see what was up. Several days later, Powell sold the automobile and delivered the certificate of title and a bill of sale. Powell died shortly thereafter without having ever paid Import for the purchase price

of the automobile. When the purchaser of the automobile from Powell was unable to secure transfer of title because of the absence of the power of attorney from the original owner, Import then delivered the power of attorney to clear the title and took an assignment of the purchaser's claim against Powell."

"The appellant also challenges the sufficiency of the evidence to prove fraudulent conduct by the requisite clear and convincing evidence, especially since the person to whom the fraud is attributable is dead. And see Pacific Royalty Co. v. Williams, 1 Cir., 227 F. 2d 49, 55. But we think Powell's actions in obtaining possession of the automobile and then title for the ostensible purpose of "floor-planning" the car at a bank, when considered in the light of his later professions not to know why payment had not been made by the bank, though he had not negotiated the agreed financing, certainly indicate an intent to defraud his seller. Indeed, it was quite sufficient to justify the court's finding of fraudulent conduct."

POINT II

THE TRIAL COURT MISCONCEIVED THE NATURE OF THE FRAUD REQUIRED TO SUPPORT A JUDGMENT FOR PLAINTIFF.

Plaintiff's claim against defendant Moulton and defendant's bonding company, Mid-Century Insurance Company, is based on a regulatory statute of the State of Utah, Section 41-3-16. As far as applicable to the cause of action, said statute reads as follows:

> Motor dealers "shall procure and file with the administrator a good and sufficient bond in the amount of $5,000.00 with corporate surety thereon, duly licensed to do business within the state of Utah, approved as to form by the attorney general of the state of Utah, and conditioned that said applicant shall conduct his business as a dealer without fraud or fraudulent representation, and without the violation of any provision of this act."

There was clearly a violation of the section by Moulton in the transaction with plaintiff. His conduct may actually have been criminal. He might have been convicted of the crime of obtaining property by false pretenses. However, that is not what plaintiff must show in order to recover against the bonding company.

The regulatory statutes envision a higher level of honesty and fair dealing with the public generally than where criminal conduct is the concern. This fraud is of the nature of the fraud that is a tort.

Fraud as used in the regulatory statute is the kind of fraud that is defined by *Corpus Juris Secundum* and cited in the case of *Vogelsang v. Wolpert*, 38 Cal. Rptr. 440, 227 C.A. 2d 102, page 445, where the California court was concerned with the fraudulent obtaining of property without adequate consideration. The court there stated, page 445:

> "Wilful fraud, to borrow a figure from classical antiquity, is a hydra-headed monster; its faces are various; they may differ one from another as markedly as personal and business relation-

ships are unlike in the modern world, but all of them have this in common that wilful fraud is always instinct with guile. By false representations, knowingly made, the beneficiary of actual fraud has wilfully induced another to part with his property without adequate compensation; he has been guilty of overreaching, of dishonest gain by misleading another, of obtaining property under circumstances which are unfair and unconscionable and which the law will not tolerate.

In 37 C.J.S. Fraud § 1, pages 204-205, it is said:

"Fraud is a generic term which embraces all the multifarious means which human ingenuity can devise and are resorted to by one individual to gain an advantage over another by false suggestions or by suppression of the truth. In its general or generic sense, it comprises all acts, omissions, and concealments involving a breach of legal or equitable duty and resulting in damage to another, or the taking of undue or unconscientious advantage of another; * * *

"Fraud has also been defined as any cunning, deception, or artifice used to circumvent, cheat, or deceive another."

The kind of fraud that plaintiff submits is intended in the bonding provision is also discussed in additional California case, *Wayne v. Bureau of Private Investigators and Adjusters, Department of Professional and Vocational Standards*, 20 Cal. Rptr. 194, 201 C.A. 2d 427. This was a proceeding to review an order of suspension of a private investigator

and adjuster's license. The basis on which the license was suspended was an accusation that the investigator and adjuster engaged in "fraud and dishonesty in failing to disclose that he was acting in behalf of an adverse party." The court in discussing the law applicable, stated as follows:

> "(2) Fraud embraces multifarious means whereby one person gains an advantage over another and means in effect bad faith, dishonesty or overreaching.
>
> "There is no doubt that a false impression may consist in a concealment of what is true as well as the assertion of what is false. (See Commonwealth v. Smith, 242 Ky. 365, 46 S. W. 2d 474, 477.) The causing or the bringing about of false impressions under the circumstances constitutes fraud. The petitioner here in effect admits that had he refused to give any answers to the questions put to him by the interviewees with reference to whom he represented that undoubtedly he would have had to return to his office with no statements. He elected to suppress or intentionally withhold information from the interviewees which, had it been given, would have resulted in the interviewees' being fully informed. His motive was obvious. It was said in Commonwealth v. Smith, supra, at 478:
>
> "Fraud vitiates whatever it touches. 'It is a generic term which embraces all the multifarious means which human ingenuity can devise and are resorted to by one individual to get an advantage over another. No definite and invariable rule can be laid down as a general proposition defining fraud, as it includes all surprise, trick, cunning, dissembling and

> unfair ways by which another is cheated.' (Citations) 'Actual fraud' may be discovered as follows, 'when the party intentionally, or by design, misrepresents a material fact, or produces a false impression in order to mislead another, or to entrap or cheat him, or to obtain an undue advantage of him; in every such case there is positive fraud, in the truest sense of the terms.' (Citations) 'The principal difference between 'actual' and 'constructive' fraud is that in the first case there is an intent to induce another to part with property or surrender some legal right, while in the other, although the act may accomplish that purpose, there is no such intent on the part of the actor.' "

This court has on several occasions had before it the problem of interpreting the bonding law. The first case was *Bates v. Simpson*, 121 Utah 165, 239 P. 2d 749. In this case the court held that the protection of the statute applied to a person financing automobile transactions and defrauded when the automobile dealer converted the proceeds of a loan to his own personal use. In the *Bates v. Simpson* case, it was agreed on the appeal that judgment against the bonding company in favor of the customer was proper (page 170).

In the case of *Lawrence v. Ward*, 5 Utah 2d 257, 300 P. 2d 619, this court had before it the question of whether or not fraud existed which would make the bond available to a mortgagee. The fraudulent representation by the used car dealer was to a bank employee that the used car dealer was the owner of the automombile, when in fact he was not, and did not

have title. The bank did not require the dealer to exhibit the title to the automobile or deliver it, and the bonding company claimed that this was negligence on the bank's part which would bar its recovery from the bonding company for the fraud of the dealer. This court, in ruling in favor of the bank, made the following holding (Ward is the used car dealer):

> "Ward, knowing of the method used by the bank in financing his sales, deliberately contrived to deceive its agent. This was no mere promise or opinion; he stated that he owned the automobile, knowing that the agent would believe him and act upon his representation. Clearly this was fraud and the bank should have judgment against the bonding company for this amount.
>
> "(5) 2. One Dalton purchased a 1954 Chevolet from United Auto Sales and executed his note to the Sandy City Bank. A check, payable to Dalton and United Auto Sales jointly, was sent to the company by the bank and later cashed and collected. When the company was unable to deliver title, Dalton refused to pay on the note because his endorsement on the check was a forgery. The trial court gave judgment for the bank against Ward and Selleneit since they had received the proceeds of the check. A forgery likewise falls within the protection of the bond and it is immaterial that the bank carried insurance against forgery."

In the *Lawrence v. Ward* decision, court discussed the Arizona case of *Commercial Standard Insurance Co. v. West*, 74 Ariz. 359, 249, P. 2d 430. The

Arizona case expanded the coverage to include the people doing other things with the used car dealer than buying a car off his lot. The most significant aspect of the Commercial Standard case, however, is the holding that a mere conversion of monies is fraud within the meaning of the statute and is an act covered by the bond. This is the situation in our present case as Moulton converted Consolidated's money and applied it to his own use. In describing the kind of act which is covered by the bond, the Arizona Supreme Court stated that:

> "(3, 4) The instant statute and bond are not limited but are all-inclusive where there has been an unlawful act by the dealer, for the statute expressly provided that "Such bond shall inure to the benefit of any person who shall suffer any loss by reason of *any unlawful act of the licensee*." (Emp. sup.) The Supreme Court of Louisiana, in the case of Hartman v. Greene, 193 La. 234, 190 So. 390, 391, stated:
>
> > "The term 'an unlawful act' does not mean necessarily a criminal act; it means a wrongful act, or a tort—any wrongful act (not involving a breach of contract) for which a civil action will lie. * * *"

Applying this rule to the facts of this case, we hold that the surety (appellant) is liable to appellee for the conversion by defendant Reid of moneys belonging to appellee, as the acts complained of arose out of Reid's actions in the capacity of a used car dealer. Had the latter not been a licensed dealer he would have been unable to follow the procedure outlined to procure for himself the commission out of the re-

> serve fund which was set up at the bank for such dealers. We perceive no legal distinction between the admitted right of the bank to recover on the bond had it suffered a loss and the right of the appellee to do likewise."

Another interesting case arriving at the conclusion advocated by plaintiff is *State ex rel MacNaughton v. New Amsterdam Cas. Co.*, 1 Wis. 2d 494, 85 N.W. 2d 337. In this case the customer of the used car lot had left his automobile to be sold, and without his knowledge or consent, the used car dealer mortgaged the car to a finance company and subsequently sold the car after the bond covering his operation had expired. The bonding company defended on the ground that the innocent owner of the automobile did not sustain a loss until the sale and that the mortgaging of his car did not damage him. The Wisconsin Supreme Court, in the following language, required the bonding company to pay the loss to MacNaughton:

> "(1, 2) DeWitt's act of mortgaging the MacNaughton Pontiac on October 5, 1953, constituted a fraudulent conversion, — grounds for suspension or revocation of his license under the statute. That act took place within the bond period. Appellant contends that MacNaughton suffered no actual loss, however, until the car was sold the following April. We cannot agree. MacNaughton's loss was actual when the car was mortgaged, whether he knew it or not. Appellant argues that the mortgaging caused no more loss to MacNaughton than if DeWitt had taken $10 out of his pocket without his knowing it, used it for two weeks and

then put the money back without his knowledge. The analogy fails because by his act DeWitt placed himself in a position where he could not "put it back," and where he could not perform his contract with MacNaughton. After the date of the mortgage MacNaughton's interest was subject to the mortgage; he could not have prevailed against the mortgage interest of an innocent party."

This court, in a number of cases not dealing directly with automobile dealers or the type of transaction between plaintiff and Moulton, has discussed principles which are believed to be applicable. In the case of *Elder v. Clawson,* 14 Utah 2d 379, 384 P. 2d 802, the court stated at page 382.

"So we conclude that here there was a suppression of the truth, which the party with superior knowledge had a duty to disclose, which amounted to fraud.

"One of the fundamental tenets of the Anglo-American law of fraud is that fraud may be committed by the suppression of the truth * * * as well as the suggestion of falsehood * * * *."

"Silence, in order to be an actionable fraud, must relate to a material matter known to the party and which it is his legal duty to communicate to the other contracting party, whether the duty arises from a relation of trust, from confidence, inequality of condition and knowledge, or other attendant circumstances * * * *."

> "The principle is basic in the law of fraud as it relates to nondisclosure that a charge of fraud is maintainable where a party who knows material facts is under a duty, under the circumstances, to speak and disclose his information, but remains silent * * *."

The Elder case involved a buyer-seller relationship, and surely the relationship was equally confidential here where Moulton was entrusted with valuable property to be sold.

The court also has enlightening language in some of the criminal cases. One of the most recent ones points out that the giving of an insufficient funds check where there has been no arrangements for credit or no funds available to pay the check, is strong evidence, in accordance with the statutory language, of intent to defraud. Moulton never did have money available to make the checks good that he gave to Consolidated and repeatedly represented to Consolidated a false state of facts that there was some foul-up on the bank's part when he knew there was not. The case referred to is *Utah v. Coleman*, 17 Utah 2d 166, 406 P. 2d 308, in which the court unanimously held, in an opinion by Justice Crockett, as follows:

> "It is not to be doubted that the making and delivering of a check when the maker does not have sufficient funds or credit with the bank to cover it, in the absence of any other proof, is sufficient proof to make a prima facie case of intent to defraud as Sec. 76-20-11 provides. However, any other evidence bearing upon the accused's intent must be considered. For ex-

ample, even if he did not have sufficient money or credit in the bank at the instant the check was made and delivered, if the proof showed that he had arranged to have money or credit in the bank by the time the check is presented for payment, that would negate any intent to defraud; and the evidence need raise only a reasonable doubt as to his having such intent in order to preclude his conviction."

It is respectfully submitted that the evidence is clear and convincing that Moulton engaged in fraudulent conduct and that his bond should be available to the plaintiff to pay the loss suffered as a result of said fraudulent activity.

CONCLUSION

It is respectfully submitted that this court should reverse the Trial Court and order judgment entered in favor of the plaintiff and against the defendant for the amount of loss sustained by plaintiff, together with a reasonable attorney's fee for the plaintiff's attorney.

Dated this ..... day of ....., 1970.

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