1987

Bob Russell v. Donald Larkin, and Lava Products : Brief of Respondent

Utah Court of Appeals

Gary W. Pendleton; Pendleton and Terry; Attorney for Respondents.
David Nuffer, Jacqueline Hatch; Snow, Nuffer, Engstrom and Drake; Attorneys for Appellant.

IN THE UTAH COURT OF APPEALS

BOB RUSSELL,	)	
Plaintiff-Appellant,	)	No. 870264-CA
vs.	)	Priority No. 14b
DONALD LARKIN, and LAVA PRODUCTS,	)	
Defendants-Respondents.	)	

BRIEF OF RESPONDENT

APPEAL FROM THE FIFTH JUDICIAL DISTRICT COURT
IN AND FOR WASHINGTON COUNTY, STATE OF UTAH,
THE HONORABLE ERNEST F. BALDWIN PRESIDING.

Gary W. Pendleton - 2564
East 100 South, Suite 101
St. George, Utah 84770
Telephone (801) 628-4411

152 N. 200 E #

Attorney for Respondents/
Defendants

David Nuffer - A2431
Jacqueline Hatch - A4845
SNOW, NUFFER, ENGSTROM & DRAKE
90 East 200 North
St. George, Utah 84770
Telephone (801) 628-1611

Attorneys for Appellant/
Plaintiff

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JURISDICTION AND NATURE OF PROCEEDINGS BELOW

Respondents generally agree with Appellant's statements regarding the jurisdiction of this Court and the nature of the proceedings below.

STATEMENT OF FACTS

In late 1981, Appellant responded to Respondents' newspaper advertisement for the sale of the subject cinder block plant and related equipment. (T 17)

From the beginning of their dealings, Appellant understood that Respondents had never operated the plant; could not and would not warrant its condition. (T 21, 153-154, 158) In fact, Appellant knew that Respondents had seen the plant produce block on only one occasion. The former owners had requested permission to make one more "run" after turning possession of the plant to Respondents. (T 21)

According to Appellant's own account, Respondent Larkin "directed" him to talk to the former owners and find out what the machinery was capable of doing. (T 153-154) Respondent Larkin also encouraged Appellant to talk to Gerald Strong who had completely rebuilt the block plant. (T 155)

Appellant also initiated contact with Praschak Block Company, the original manufacturer of the plant. (T 154) Following this contact, Appellant inspected the machinery and found nothing which discouraged him from pursuing contract negotiations with Respondents. (T 155)

Respondents did nothing which in any way impaired

Appellant's access to or inspection of the machinery. (T 153)

In the course of negotiations Respondent Larkin attempted to project the income-producing capability of the plant by using various levels of production and assuming various factors including the wholesale price of block, the cost of cement, cinders, labor, repairs and maintenance, etc. (Plaintiff's Exhibits Nos. 3, 4, and 14)

On or about March 25, 1982, Appellant approached Respondent Larkin and asked him to prepare another projection based upon an abbreviated year (9 months). (T 45-46; Plaintiff's Exhibit No. 14) By Appellant's own account, this revision was sought because: "I'd been there long enough to know it [the block plant] wouldn't operate the way he [Larkin] said it would do." (T 166) By March, Appellant was thoroughly acquainted with the block plant and related equipment. (T 35, 36, 166-167)

By May, 1982, Appellant had become discouraged as a result of problems he was experiencing with the plant and decided not to pursue the consummation of any contract with Respondent Lava Products. (T 150) In Appellant's own words: ". . . it became obvious to me about then that there was no way, with my limited funds, that I could ever get that block machine to operate." (T 52)

Appellant then testified that in September, 1982, Respondent Larkin contacted Appellant and offered to help Appellant get the block plant into operation. (T 52-53, 157) The record clearly indicates that Respondents spent a great amount of

time and money in the fulfillment of that commitment. (T 54, 57-59, 63-68)

Between October, 1981, and December, 1982, Appellant spent at least 73 days at the block plant. (T 152) Finally the parties reached an agreement regarding the lease and purchase of the plant. This agreement was reduced to writing and signed on December 21, 1982. (Plaintiff's Exhibit No. 18)

Appellant's own ledgers indicate that following the execution of the agreement, he never made the necessary investment of operating capital, spending but a small fraction of the monies which had been projected for repairs, maintenance, and labor. (T 169-170, 172-175; Plaintiff's Exhibit No. 31)

Frustrated and discouraged by continuing difficulties, Appellant ultimately abandoned the undertaking in September, 1983. (T 100-101) This lawsuit was initiated in October.

At trial Appellant called Michael Bracken and Lemuel Leavitt as witnesses. Bracken testified that he had previously operated the block plant for the former owner, Veyo Concrete Products, and that he had been able to operate the plant on a continuous basis. (T 136-137) Bracken also testified that Veyo Concrete had been able to produce between 9,000 and 11,000 block per week with this plant. (T 138-139) Finally, Bracken testified that he found nothing unrealistic in Respondent Larkin's production projections. (T 139-140)

Leavitt's testimony provided no more support for Appellant's position than had Bracken's. Leavitt testified that

he had worked at the plant when it was owned and operated by Veyo Concrete. (T 145)

After Appellant had abandoned his interest in the block plant, Leavitt and another individual had purchased the plant from Respondent Lava Products paying $3,000 more for the facility than Appellant had contracted to pay. (T 142, 146-147; Plaintiff's Exhibit No. 18 and Defendant's Exhibit No. 37) Leavitt testified that as late as September and October, 1986, he had produced as many as 7,000 blocks per week at the plant. (T 143-145) He also testified that in his opinion a production projection of 40,000 blocks per month would not be unreasonable if the operator possessed sufficient capital. (T 146)

SUMMARY OF ARGUMENT

Appellant's evidence failed to establish a prima facie case of fraudulent or negligent misrepresentation. Indeed Appellant's own evidence fails to establish that Respondents made any representation which could have reasonably been understood to be presently existing fact. Furthermore, if projections provided are so construed, Appellant's own evidence fails to establish that the representations were false.

Even if the income projections were representations of fact and were false, there is no evidence indicating that Repondents knew or should have known that the projections were inaccurate or misleading.

Finally, the evidence clearly establishes that Appellant could not have acted reasonably and in ignorance of the

falsity of the representations. His own evidence establishes that long before he executed the lease/purchase agreement, he had acquired a position equal with, if not superior to, Respondents--a position from which to thoroughly evaluate the condition and capacity of the block plant.

ARGUMENT

POINT I

IT WAS NOT NECESSARY FOR THE TRIAL COURT TO WEIGH THE EVIDENCE OR EVALUATE THE CREDIBILITY OF WITNESSES IN ORDER TO REACH ITS CONCLUSION.

Respondents agree with the authorities cited in Point I of Appellant's brief. A review of the transcript (T 198-201) clearly indicates that it was not necessary for the trial court to weigh the evidence or evaluate the credibility of any of the witnesses called by Appellant. Indeed the trial court was of the opinion that the evidence presented, viewed in the light most favorable to Appellant, did not establish a prima facie case of fraudulent or negligent misrepresentation.

Even if this Court shall determine that the trial court improperly engaged in weighing the evidence or judging the credibility of witnesses, it is respectfully submitted that this conduct did not constitute prejudicial error since, as hereafter pointed out, there was no evidence adduced by Appellant concerning essential elements of his case. See Cerritos Trucking Co. v. Utah Venture No. 1, Utah, 645 P.2d 608 (1982).

POINT II

APPELLANT FAILED TO ESTABLISH A PRIMA FACIE CASE OF FRAUDULENT OR NEGLIGENT MISREPRESENTATION.

The elements of fraudulent misrepresentation are set forth in the oft-cited case of Pace v. Parrish, 122 Utah 141, 247 P.2d 273 (1952). These elements include:

(1) That a representation was made;

(2) concerning a presently existing material fact;

(3) which was false;

(4) which the representor either

(a) knew to be false, or

(b) made recklessly, knowing that he had insufficient knowledge upon which to base such representations;

(5) for the purpose of inducing the other party to act upon it;

(6) that the other party, acting reasonably and in ignorance of its falsity;

(7) did in fact rely upon it;

(8) and was thereby induced to act;

(9) to his injury and damage.

122 Utah at 144-145.

Where a claim is made for negligent misrepresentation, there is a slight variation in the fourth element of the cause and one who is in a superior position to know material facts may be held liable if he carelessly or negligently misrepresents the facts, provided that the other elements of fraud are made out. Jardine v. Brunswick Corporation, 18 U.2d 378, 423 P.2d 659

(1967) (Note particularly footnote 2 and accompanying text at 381).

Whether the case is considered one of fraud or negligent misrepresentation, it is obvious that Appellant failed to establish that the income projections were made or intended as representations concerning "a presently existing material fact".

In Hartford v. Drive-In Corporation, 374 Mich. 192, 132 N.W.2d 143 (1964), the Supreme Court of Michigan affirmed a chancellor's decision denying rescission upon allegations of fraud and misrepresentation where plaintiff claimed to have relied upon a sample operating statement projecting net earning based upon gross annual sales of $150,000, $175,000, and $200,000.

The court was not convinced that the hypothesized income figures constituted representations of fact upon which plaintiff could have reasonably relied. We quote from the opinion:

> We have examined the written materials which plaintiff claims were false and upon which he claims to have relied. Assuming, but only arguendo, that they contained representations upon which plaintiff was entitled to rely, we cannot find in the proofs any evidence of their falsity. They consisted of three sample operating statements showing what net income could be expected, normal operating expenses considered, from assumed gross annual sales of $150,000, $175,000 and $200,000. There is nothing in the record to suggest that plaintiff's net income would have been less than that hypothesized had he in fact grossed $150,000. That he did not realize gross sales during his 10 months of operation at a rate which even approached $150,000 for the year,

> could very well have been the result of plaintiff's own mismanagement, of which there was some evidence.
>
> 132 N.W.2d at 144.

Even if the projections in the instant case are viewed as statements of fact rather than estimates or opinion, the unrebutted testimony of Michael Bracken and Lemuel Leavitt establishes that the projections were not unrealistic in light of their experience both before and after the subject transaction. (T 139-140, 146)

Furthermore, assuming that the projections were representations of fact and were false, it is apparent, in light of the testimony of the former operator and the current owner, that Appellant failed to present any evidence indicating that the Respondents knew or should have known that the projections were false or misleading.

Perhaps the most obvious void in Appellant's case lies in the fact that if representations were made and if they were false, Appellant could in no way have acted reasonably and in ignorance of their falsity. Appellant, by his own account was in possession of the subject property for at least 73 days prior to the time he signed the lease/purchase agreement. (T 151-152) His access to the equipment and the former owners was not impaired in any way (T 153) and he was not only encouraged, but by his own account "directed", to talk to the previous owners concerning the production capabilities of the block plant. (T 153-154) He was also encouraged to talk to Gerald Strong who had completely

rebuilt the block plant (T 155) and he called Praschak and discussed the plant's operation with the original manufacturer. (T 154)

One who complains of injury by reason of another's misrepresentation may not heedlessly accept as true that which his own experience calls into question. See Jardine v. Brunswick Corp., supra; Mikkelson v. Quail Valley Realty, Utah, 641 P.2d 124 (1982); Kohler v. Garden City, Utah, 639 P.2d 162 (1981).

By March, 1982, Appellant was thoroughly familiar with the condition and capacity of the plant and related equipment. (T 166-167) He ultimately signed the lease/purchase agreement in December, 1982, and was contemplating exercising his option to purchase as late as July or August, 1983. (T 85, 181)

The argument that Appellant acted reasonably and in ignorance of the falsity of representations made is in direct conflict with Appellant's own testimony.

Finally, to the extent that Appellant seeks to establish a claim for negligent misrepresentation, the evidence clearly establishes that he, rather than the Respondents, was in the superior position to evaluate the condition of the block plant and related equipment and consequently his negligence was as great, if not greater, than any negligence of which Respondents may have been guilty.

CONCLUSION

It is respectfully submitted that Appellant's evidence failed to establish a prima facie case of fraudulent or negligent

misrepresentation. Indeed Appellant's own evidence fails to establish that Respondents made any representation which could have reasonably been understood to be presently existing fact. Furthermore, if projections provided are so construed, Appellant's own evidence fails to establish that the representations were false.

Even if the income projections were representations of fact and were false, there is no evidence indicating that Respondents knew or should have known that the projections were inaccurate or misleading.

Finally the evidence clearly establishes that Appellant could not have acted reasonably and in ignorance of the falsity of the representations. His own evidence establishes that long before he executed the lease/purchase agreement, he had acquired a position equal with, if not superior to, Respondents--a position from which to thoroughly evaluate the condition and capacity of the block plant.

The Judgment of Dismissal should be affirmed and Respondents should recover their costs on this appeal, and should, pursuant to the provisions of Rule 33, Rules of the Utah Court of Appeals, recover attorney's fees reasonably incurred in the defense of this appeal.

RESPECTFULLY SUBMITTED this 10th day of November, 1987.

Gary W. Pendleton
Attorney for Respondents

DELIVERY CERTIFICATE

I do hereby certify that on this 10th day of November, 1987, I did personally deliver four copies of the foregoing BRIEF OF RESPONDENTS to:

David Nuffer
Jacqueline Hatch
SNOW, NUFFER, ENGSTROM & DRAKE
P. O. Box 400
St. George, Utah 84770.

Gary W. Pendleton