1977

Daniel M. Schwartz, Bernice L. Schwartz And Alvin I. Smith : M.D. Haltrom And Michael S. Tanner : Brief of Respondents

Utah Supreme Court

IN THE SUPREME COURT

OF THE STATE OF UTAH

DANIEL M. SHCWARTZ, AND
BERNICE L. SCHWARTZ,

Plaintiffs-Respondents,

Vs.

M.D. HALTOM AND MICHAEL
S. TANNER,

Defendants-Appellants.

BRIEF OF

Appeal from a Judg
Court of the Third Judicial D
County, State of Utah, by the
Jr., Judge.

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OF THE STATE OF UTAH

DANIEL M. SCHWARTZ, AND BERNICE L. SCHWARTZ, Plaintiffs-Respondents, Vs. M.D. HALTOM and MICHAEL S. TANNER, Defendants-Appellants.	)	CASE NO. 14832 and CASE NO. 14844

BRIEF OF RESPONDENTS

NATURE OF CASE

Respondents, Daniel M. Schwartz and Bernice Schwartz commenced an action against the Appellants alleging a violation of the Utah Uniform Securities Act and fraud regarding the sale of a home by Mr. and Mrs. Schwartz. After a trial before the Honorable Ernest F. Baldwin,Jr., Judgment was entered against Defendants, Stan Tanner, Michael S. Tanner and M.D. Haltom. Appellants, Michael S. Tanner and H.D. Haltom have appealed from said Judgment.

DISPOSITION IN LOWER COURT

Judgment was entered in favor of Respondents against Appellants, Michael S. Tanner and M.D. Haltom, and Defendant, Stan Tanner, in the sum of $40,643.00 as damages and $7,500.00 as attorney's fees based upon Respondents' fraud, deceit and statutory action under the Utah Uniform Securities Act.

RELIEF SOUGHT ON APPEAL

Appellants are requesting this Court to reverse the findings and reverse and vacate the Judgment entered by the Trial Court and for costs of this action herein incurred. Respondents request that this Court affirm the Trial Court's findings and Judgment and for costs of this action herein incurred.

STATEMENT OF FACTS

Respondents, Daniel M. Schwartz and Bernice Schwartz were the owners of real property located at 1792 Millbrook Road, Salt Lake County, State of Utah, which was listed for sale (T.14); that pursuant to said offer of sale, Respondent, Daniel M. Schwartz was contacted by Appellant, M.D. Haltom on December 8, 1968 at the San Francisco Airport (T.15); that during the course of said meeting, Appellant, M.D. Haltom made representations of a pending merger of Bishop Industries and United Equities on a three-to-one or four-to-one ratio,of an acquisition of a 915,000 acre buffalo ranch,of uranium properties, Scotty Auto Service Center, representations that Jiffy John had been approved by the Los Angeles Smog Control Board; that there were 5,000,000 shares of stock which could be purchased at $3.00 per share; that Western States Capitalization was 540,000 shares at $1.00 per share, and that Mr. Stan Tanner, the principal of Mr. M.D. Haltom was willing to pledge shares of said stock and issue a note so that the property owned by Respondents could be transferred free and clear of liens (T.18, 21, 22, 23, 24 and 25). Respondent, Daniel Schwartz was advised by

M.D. Haltom that he had first hand knowledge regarding the representations of the various companies for which stock was to be placed in escrow to secure a note on the property in question (T.82 and 83). That Appellant, M.D. Haltom had on several occasions represented that the home which was to be purchased by Stan Tanner for his son, Michael S. Tanner was to be free and clear of all liens (T.24 and 91). Respondent attempted to make an independent check on United Equities' stock through a stock broker and have a check on Mr. Krueger's credit, who was reported to have been the President of United Equities (T.65 and 67).

In reliance upon M.D. Haltom's representations regarding the value of the stock which was to be placed as security, Respondents decided to go forward with the sale of the property in question to Stan Tanner (T.45, 53, 54 and 59). That on January 2, 1969, Stan Tanner personally executed and delivered to the Respondents a promissory note in the principal sum of $40,643.00 with interest and the note was secured by a pledge of 10,000 shares of common stock of Bishop Industries and 20,000 shares of the common stock of Western States Land. (Exhibit "5d") That as additional consideration for the sale of the home in question, Stan Tanner, on the 2nd day of January, 1969, granted an option for the purchase of Bishop Industries, Inc. stock (T.36, Exhibit "4"). That based upon said representations of M.D. Haltom and the option, a Warrnaty Deed was issued by the Respondents to Appellant, Michael S. Tanner and Louise

Tanner (T.43, Exhibit "6").

The Appellant, Michael S. Tanner testified that in November of 1968 he came to Salt Lake City to look for suitable homes for his family and to take a position in his father's organization (T.166 and 167). He further testified that any property would have to be transferred to him without a mortgage (T.166); that on the 20th day of February, 1969, prior to the Appellant, Michael S. Tanner moving into the residence in question, a mortgage was issued to Milne Truck Lines (T.172 and 173, Exhibit "17"), and that the bulk of the proceeds as the result of said mortgage was tendered to Jenifer Day, a corporation which was owned by Michael S. Tanner's father and stepmother, and, Michael S. Tanner had an interest in said corproation at one time (T.162 and 178). That Michael S. Tanner lived in the home for a period of approxiamtely one year, at which time he moved out (T.181).

Defendant, Stan Tanner, defaulted on the payment of the promissory note in question and Alvin I. Smith, as an escrow agent, attempted to find a market for the sale of the stock in question, but was unable to find a market for the stock and was advised by Appellant, Michael S. Tanner, that there was no market for the stock in question (T.139 and 142).

The buffalo deal, which was represented as being placed in escrow by Appellant, M.D. Haltom, on December 8, 1968, did not materialize (T.207); the merger never occurred, (T.215) and there was a dispute with the Jiffy John contract (T.190 and 191).

The Trial Court entered Judgment in favor of Respondents, Daniel M. Schwartz and Bernice L. Schwartz against Defendants, M.D. Haltom, Stan Tanner and Michael S. Tanner for $40,643.00 damages and $7,500.00 attorney's fees (R.80). The Court also awarded damages against Stan Tanner for $21,870.29 as interest on the aforementioned note (R.80).

POINT I

SUFFICIENT EVIDENCE WAS PRESENTED BY THE RESPONDENTS IN THE LOWER COURT TO SUPPORT THE COURT'S FINDINGS AND JUDGMENT.

Sufficient evidence was presented on a trial of the issues to establish the liability of Appellants, M.D. Haltom and Michael S. Tanner. 37 C.J.S., Fraud § 61 at pp. 347, 348 states:

> "However, the circumstances may be such as to impose liability for representations made by others, as where parties jointly participate in defrauding complainant. This is especially true where there was a conspiracy to defraud, but it is not essential to liability that there should have been such a conspiracy." (emphasis added)

The transcript, when viewed favorable to the Respondents, clearly indicates that there was a systematic program of obtaining the property in question without a mortgage lien. However, before the Appellant, Michael S. Tanner moved into the property, the same was mortgaged and the proceeds tendered to a corporation over which he had previously been associated and over which his father and stepmother had a controlling interest (T.166).

The Utah Supreme Court indicated in the case of Greenwell v. Duvall, 9 U.2d 89, 338 P.2d 118 (1959) that clear and convincing evidence is necessary only where the moving party is attempting to set aside a written agreement and that where no written agreement is involved, only a preponderance of the evidence is necessary. The Utah Supreme Court in Lamb v. Bangart, 526 P.2d 602 (1974), at p. 609 in explaining Child v. Child, 8 U. 2d 261, 332 P.2d 891 (1958) in regard to a fraud action states:

> "... if the evidence appears to be such that reasonable minds acting fairly, reasonably and in good conscious could be regarded as clear and convincing as the ordinary meaning of these words imply, the findings should not be disturbed. The findings and judgment should not be disturbed unless the court can say affirmatively and with some degree of assurance that there is no reasonable basis in the evidence that could fairly and rationally support the requisite degree of proof, i.e., by clear and convincing evidence."

The Court, in reviewing the evidence is obligated to review the evidence in a light most favorable to Respondent's postition. The Court, in Jardine v. Brunswick Corp., 18 U.2d 378, 423 P.2d 659 (1967), at p. 662 states that the Court must:

> "...take the evidence in a light most favorable to plaintiffs (prevailing party) position, as we are obligated to do on this review."

This statement is supported in Ewell & Son, Inc. v. Salt Lake City Corp., 27 U.2d 188, 493 P.2d 1283 (1972).

The Utah Supreme Court in Lund v. Phillips Petroleum Co., 10 U.2d 276, 351 P.2d 952 (1960), at p. 954 stated:

> "To be sustainable in law the verdict need only fall within the orbit so that it can be said that

there is substnatial evidence from which reasonable minds could believe the facts."

A general proposition regarding the sufficiency and weight of evidence is stated at 30 Am Jur 2d, Evidence, § 1080, p. 226.

"...evidence is sufficient or satisfactory if it is such as to satisfy an unprejudice mind of the truth."

After reviewing the transcript in question, it is evident that there is sufficient evidence to support the Trial Court's findings and Judgment in favor of Respondents, against the Appellants in this case.

POINT II

THE RESPONDENTS, ON A TRIAL OF THE ISSUES, PROVED THE ELEMENTS OF STATUTORY FRAUD AGAINST THE APPELLANTS.

The Utah Uniform Securities Act, Utah Code Annotated § 61-1-22 (1)(b) states:

"any person who
(b) offers or sells a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading (the buyer not knowing of the untruth or omission), and who does not sustain the burden of proof that he did not know,and inthe exercise of reasonable care could not have been known, of the untruth or omission, is liable to the person buying the security from him, who may sue either at law or in equity to recover the consideration paid for the security, together with interest at six percent per year from the date of payment, costs, and reasonable attorney's fees, less the amount of any income received on the security, upon the tender of the security or for damages if he no longer owns the security. Damages are the amount that would be recoverable upon a tender less the value of the security when the buyer disposed of it and interest at six percent per year from the date of disposition.

> (2) Every person who directly or indirectly controls a seller liable under subsection (1), every partner, officer, or director of such a seller, every person occupying a similar status or performing similar functions, every employer of such a seller who materially aids in the sale, and every broker-dealer or agent who materially aids in the sale are also liable jointly and severally with and to the same extent as the seller, unless the nonseller who is so liable sustains the burden of proof that he did not know, andin exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist. There is contribution as in cases of contract among the several persons so liable."

Section 61-1-13 (10)(a) states:

> "The words, 'sale', or 'sell' include every contract of sale of, contract to sell, or disposition of, a security or interest in a security for value."

Section 61-1-13 (10)(f) states:
"The terms defined in this subsection do not include (i) any bona fide pledge or loan..." (emphasis added).

In reviewing the transcript in question, it does appear that the stocks which were deposited in escrow with Alvin I. Smith were placed in escrow as a pledge for the note. However, an option was also granted to purchase stock as additional consideration (Exhibit "4", T.36). Also, the statute utilizes the qualifying language of bona fide pledge or loan and the Utah Supreme Court in Guarantee Mortgage Co. v. Flint, 66 U.128, 240 P. 175 (1925), at p. 136 adopts the language of 37 Am Jur 2d Fraud and Deceit, Section 12 at page 33 which states:

> "The law requires good faith in every business transaction, and does not allow one intentionally to deceive another by false representations or concealments, and if he does so, it will require him to make good such representations...."

And the transcript herein clearly indicates that good faith was not involved in the transaction with the Respondent as shown by the representations made by Appellant, M.D. Haltom (T.18, 21, 22, 23 and 24) and the fact that the Appellant, Michael S. Tanner mortgaged the home prior to moving into the same and tendered the money to a corporation controlled by his father, (T.173) after having made statements that the home would have to be transferred without a mortgage (T.166).

The Fedearl Court, in Securities & Exchange Commission v. Guild Films Co., S.D. N.Y. 178 F. Supp 418 (1959), in attempting to determine bona fide or good faith, at p. 423 stated:

> "The touchstone to the transaction is the good faith of the parties. A good faith consisting not of an absence of intent to evade the statute, but an absence of intent on the part of the one delivering the proprty that it be sold and an absence of intent on the part of the one receiving it at the time he receives the property to sell it."

An option was granted for the sale of certain securities and certain securities were pledged as security for the note, the pledged securities could be sold in the event of a default on the note and in the present case, a default did occur. The Utah Supreme Court in Combined Metals Reduction Co., et al. v. State Tax Commission, 111 U.156, 176 P.2d 614 (1947) at page 616 adopted Webster's New International Dictionary definition of bona fide as:

"being in or with good faith; without fraud or deceit..."

and as shown by the sections of the transcript quoted above, Appellants clearly indicated an absence of good faith in their transactions with Respondents. The Utah Supreme Court in S & F

Supply Company v. Hunter, 527 P.2d 217 (1974) in reference to Utah Code Annotated, 61-1-22 at pp. 220,221 stated,

> "That its objective was to moderate the requirements of common law fraud and the difficulties involved in its proof, by imposing a higher standard of ethics and responsibility upon the sellers of securities and placing upon them the affirmative duty of making full disclosure of all material facts; and a concomitantly, it is intended to reduce the buyer's burden of investigation and inquriy, and make it easier for him to obtain redress on the basis of deception. Under which provisions, a buyer need only show by a preponderance of the evidence that in making the sale, the Seller made an untrue statement or omission concerning the material fact and that the buyer did not know the untruth or omission. And, an aspect of this statute important to note, is that when the buyer has done so, the statute does change the burden of proof by expressly requiring the seller to show that he .... did not know, and in the exercise of reasonable care could not have known, of the untruth or omission."

The Appellant, M.D. Haltom, indicated that he had first hand knowledge of the representations made to Respondent (T.82 and 83) and the Appellant, Michael S. Tanner, having full knowledge of the prior transactions borrowed against the equity in the real property by the mortgage executed on February 20, 1969 and transferred proceeds of the loan to a corporation controlled by his father, Co-Defendant, Stan Tanner (T.172 and 173).

Louis Loss on Securities Regulation, Volume I 2d Edition (1961), when referring to exempted transactions commencing page 645, makes a distinction that the pledge or sale must be bona fide and as clearly shown by the transcript in this case, the pledge and the option were not bona fide pledges for the security of the note.

POINT III

THE RESPONDENTS SUSTAINED THEIR BURDEN OF PROOF IN REGARD TO COMMON LAW FRAUD.

The Court, in Pace v. Parish, 122 U.141, 247 P.2d 273 (1952) established the following requisites for common law fraud and taking the evidence in a light favorable to Respondent, it is clearly demonstrated that they have been proved in the instant case.

1. That a representation was made: M.D.Haltom made representations to the Respondent regarding the viability of certain stock (T.18, 21, 22, 23 and 24) and Appellant, Michael S. Tanner represented that the home in question must not have a mortgage (T.166).

2. Concerning a presently existing material fact: M.D. Haltom made such representations (T.18, 21, 22, 23 and 24) and Michael Tanner indicated the home could not have a mortgage or lien. However, Michael Tanner mortgaged the home before moving into the same. (T.166, 172 and 173).

3. Which were false: The representations made by M. D. Haltom were false as shown in that the buffalo deal fell through (T.207), no merger took place (T.215); that there was a dispute with Jiffy John (T.190) regarding Michael S. Tanner, the fact that he mortgaged the property after having indicated that one of the conditions was that he receive the property free and clear (T.166, 172 and 173).

4. Which the representor either (a) knew to be false,

or (b) made recklessly, knowing that he had insufficient knowledge upon which to base said representations: M.D.Haltom represented he had first hand knowledge regarding the transaction in question (T.82 and 83) and Michael S. Tanner represented that the home was to be transferred without a lien but prior to moving into the home, executed a mortgage and diverted the proceeds to Jenifer Day, Inc., a company owned by his father and step-mother (T.162, 166 and 173).

5. For the purpose of inducing the other party to act upon it: Respondents did in fact act upon the representations of Appellants (T.53).

6. That the other party, acting reasonabley and in ignorance of its faslity: Respondents' actions were reasonably based on the representation of M.D.Haltom (T.18, 21, 22, 23 and 24).

7. Did in fact rely upon it: In this instance, Respondents did rely upon the representations (T.53) and were thereby induced to act (T.53).

8. To his injury and damage: Respondents conveyed their real property (T.44) and received no compensation other than $711.25 as an interest payment received from Michael S. Tanner (T.58).

The Utah Supreme Court in In Re Madsen's Estate, 123 U.327, 259 P.2d 595 (1953) at p. 605 in defining fraud stated:

> "Fraud is defined to be any act, omission, or concealment which involves a breach of legal duty, trust, or

> confidence justly reposed, and injurious to another, or by which an undue and unconscious advantage is taken of another; and it may be collected and inferred from the nature and circumstances of the transaction." (emphasis added)

In the case presently before the Court, it is clear from the transcript that both Appellants were involved in obtaining the Respondents' property without a mortgage and Respondents have been injured as a result thereof.

In regard to M.D. Haltom's liability, 37 Am Jur 2d, Fraud and Deceit, Section 320, at p. 423 states:

> "An agent is personally liable for damage caused to third persons by his fraud or false representations, even though he is acting in behalf of his employer, and even though he receives no benefit from the transaction."

Also, in regard to the fraud of Michael S. Tanner, 37 Am Jur 2d Fraud and Deceit, Section 33, p. 59 states:

> "... the rule is firmly established and followed in the great majority of jurisdictions that it is an act of fraud to purchase or obtain goods or services with a preconceived intent not to pay for them." (emphasis added)

And in the case presently before the Court, the evidence is uncontested that the Appellant, Michael S. Tanner, requested that the home in question be acquired without a lien, but prior to moving into said home, executed a mortgage (T. 166 and 172, Exhibit "17").

The case of Bunnell v. Bills, 13 U.2d 83, 368 P.2d 597 (1962) relied upon by the Appellants can be distinguished in that said case concluded that the individual parties were merely pursuing their own course of action without any desire

or intention of causing harm to another or to cause another party to breach his contract and the Court, therefore, held that liability would not be found in such an incident. However, in the case presently before the Court, the testimony as indicated above shows a systematic scheme to deprive the Respondents of the proeprty in question without a mortgage and overt action by the Appellants toward this end.

The Utah Supreme Court in Ellis v. Hale, 13 U.2d 27, 373 P.2d 382 (1962) at p. 385 adopts the Restatement of Torts Section 533 in holding that:

> "If a person fraudulently makes a misrepresentation of facts to another with the intention that it will be transmitted to a third person, the latter may have a cause of action against the misrepresenter."

Michael S. Tanner clearly represented that the home in question was to be without a mortgage (T.166). However, as shown by his own action, this was clearly not his intention (T.173) and the Restatement of Torts Second Edition Section 503 states:

> "(1)(a) representation of the makers own intention to do or not to do a particular thing is fraudulent if he does not have the intention."

And as shown with Michael Tanner, he clearly did not have the intention of not having a mortgage placed upon the home because a mortgage was placed upon the home prior to Mr. Tanner's moving into the same. (T.173). The Utah Supreme Court in Elder v. Clawson, 14 U.2d 379, 384 P.2d 802 (1963) held that fraud may be committed by suppression of the truth and silence,

and that a falsehood or suggestion of falsehood is not necessary.

The Appellants have made much of the fact that Respondents should have known that the statements made were misrepresentations and that Respondents had an independent duty to investigate said representations. However, the Restatement of Torts, Second Edition, Section 540 states:

> "The recipient of a fraudulent misrepresentation of fact is justified in relying upon its truth, although he might have ascertained the falsity of the representation had he made an investigation."

Williston on Contracts, Third Edition, Volume 12, Section 1512 at at p. 427 states:

> "Although many decisions require that a Plaintiff should not have been too foolish in believing what no reasonable man in his position should believe, it is going too far, both in reason and on the authorities, to say that a plaintiff, unless his conduct was not wholly irrational, should lose his rights because he failed to make independent investigation and believed what he was told. It should not lie in the mouth of a man who induced his reliance to assert that the reliance was negligent.
>
> A defendant, who misrepresents the facts and induces the plaintiff to rely on his statements should not be heard in an equitable action to assert that the reliance was negligent unless Plaintiff's conduct in the light of his intelligence and information is preposterous or irrational."

This section was quoted with approval in Pace, et al. v. Parish, Supra and the Utah Supreme Court in Benzer v. Continental Dry Cleaners, Inc., 548 P.2d 898 (1976) at p. 900 seems to have adopted the above general propositions in stating:

> "The law does not generally approve or give advantage to one who intentionally deceives another, obstructs him from learning the facts, and then attempts to impute fault and responsibility to the other party for believing him."

Respondents utilized reasonable care in attempting an independent verification of Appellants' statements (T.65 and 67) and were justified in relying upon Appellants' statements.

CONCLUSION

The Trial Court was correct in entering Judgment against the Appellants, M.D. Haltom and Michael S. Tanner, and based upon the foregoing arguments and authorities, said Judgment should be affirmed and Respondents should be awarded their costs of this appeal.

DATED this 1st day of September, 1977.

RESPECTFULLY SUBMITTED,

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