1977

Daniel M. Schwartz v. M. D. Haltom And Michael S. Tanner : Brief of Appellant Michaels. Tanner

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

DANIEL M. SCHWARTZ, :

Plaintiff and Respondent, :

vs. :

Case No. ~~14832 and~~ 14844

M. D. HALTOM and MICHAEL S. TANNER, :

Defendants and Appellants. :

BRIEF OF APPELLANT MICHAEL S. TANNER

Appeal From The Judgment Entered In The Third Judicial District Court, In And For Salt Lake County, State of Utah, The Honorable Ernest F. Baldwin, Jr., Judge

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MISCELLANEOUS

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NATURE OF THE CASE

This is an appeal from the Judgment entered against the defendant-appellant Michael S. Tanner entered on the 20th day of September, 1976 in the Third Judicial District Court, in and for Salt Lake County, State of Utah after a trial before the Judge, the Honorable Ernest F. Baldwin, Jr.

DISPOSITION IN LOWER COURT

A Judgment was entered against the defendant-appellant for the sum of $40,643.00 as damages and the sum of $7,500.00 as attorney's fees.

RELIEF SOUGHT ON APPEAL

The appellant seeks an Order of this Court reversing the Judgment and Findings entered by the Trial Court and awarding the appellant his costs incurred in this action.

STATEMENT OF FACTS

The plaintiffs Daniel M. Schwartz and Bernice L. Schwartz were owners of a house located at 1792 Millbrook Road, Salt Lake County, State of Utah, which was listed for sale beginning in 1966 when the plaintiffs left the State of Utah and established residence in California. (T. 14)

Mr. and Mrs. Schwartz had authorized their attorney in Salt Lake City, plaintiff Alvin I. Smith, to receive offers for purchase of the house and relay them to California. (T. 100)

Sometime in November of 1968, the defendant, Stan Tanner, defendant, Earl J. Knudson, a real estate broker and defendant M. D. Haltom, contacted Mr. Smith at his office in Salt Lake City, Utah. (T. 102) Mr. Haltom indicated that he represented the defendant Stan Tanner, a resident of Phoenix, Arizona (T. 102) and said that Stan Tanner wanted to purchase the plaintiff's house in Salt Lake City, which he was going to give to his son, the appellant Michael S. Tanner. (T. 104) Mr. Haltom said any offer from Stan Tanner was conditioned upon the sale of the house to Stan Tanner, free and clear of any mortgage. At this meeting, M. D. Haltom discussed with Mr. Smith (T. 112) the possible means of collateralizing the proposed purchase of the property and made some statements regarding Stan Tanner's holding in the stock of several corporations. (T. 104 to T. 112).

On December 8, 1968, Daniel Schwartz met for a period of two hours personally with the defendant, M. D. Haltom in San Francisco, California. (T. 15) At this meeting, Mr. Haltom again indicated that he represented

Stan Tanner who wanted to purchase a house in Salt Lake City, which he was going to give free and clear to Michael Tanner to induce the appellant to come to Utah from his residence in Phoenix, Arizona to operate a business in Salt Lake City in which Stan Tanner had an interest. (T. 16) Mr. Haltom made an offer on behalf of Stan Tanner to purchase the house for $47,000.00 the price at which it was listed. (T. 17) The balance of the purchase price, after payment of an outstanding mortgage of $3,000.00 was to be paid by a personal note executed by Stan Tanner. (T. 17) Mr. Haltom also stated that as security for the note, Stan Tanner would pledge certain stock in Bishop Industries Incorporated and other stock. (T. 18) During this meeting, Mr. Haltom made several statements and representations about the above-mentioned corporation and several other companies, United Equities Company and Western States Land of Utah. (T. 18 to 24). At no point in this conversation did Mr. Haltom indicate that he was representing the appellant or that the appellant was a party to Stan Tanner's purchase of the plaintiff's property. (T. 63) The plaintiff stated at the trial that at this time he did not request any collateral from the appellant nor asked that the appellant sign the note. (T. 62, 63).

On January 2, 1969, Stan Tanner personally executed and delivered to the plaintiffs a Promissory Note in the principal amount of $40,643.00 with interest and this note was secured by a pledge of 10,000 shares of the common stock of Bishop Industries, Inc. and 20,000 shares of the common stock of Western States Land of Utah. (Exhibit 5-D) Contemporaneously, the plaintiffs, Daniel and Bernice Schwartz executed a Warranty Deed in favor

of Michael S. Tanner and Louisa Tanner. (Exhibit 6-D).

The appellant, Michael S. Tanner, was called as a witness by the plaintiff. (T. 154) He testified that in November of 1968, he came to Salt Lake City to look for homes suitable for his family after his father, Stan Tanner had offered to purchase for him a home to induce him to live in Salt Lake City and to take a position with his father's organization (T. 166, 167). The appellant, at this time, selected three houses, one of which was the house owned by the plaintiffs (T. 168). The appellant testified that he did not know the details surrounding the acquisition of the home by Stan Tanner or that stock was involved in the purchase of the house prior to the time the house had been purchased (T. 169). He testified that prior to the closing on the plaintiffs house in January, 1969, he had never seen any of the documents or agreements used in the closing (T. 183). He stated that prior to the closing he did not have any detailed conversations with either Mr. Haltom or Stan Tanner (T. 183).

On February 20, 1969, the real property at issue was mortgaged by the appellant (T. 172 and Exhibit 17-P). The funds obtained by the mortgage went to Jennifer Day Enterprises, a Nevada corporation in which Stan Tanner had an interest (T. 161, 173). The appellant lived in the house for a period of approximately one year at which time he moved out to find a more suitable residence (T. 181).

The note signed by Stan Tanner was unpaid at the time of trial in the amount of $40,643.00. (R. 76)

The trial court entered judgment in favor of the plaintiffs Daniel M. Schwartz and Bernice L. Schwartz against the defendants, M. D. Haltom

Stan Tanner, and Michael Tanner for $40,643.00 and $7,500.00 for attorney's fees (R. 80). The Court also awarded damages against Stan Tanner for $21,870.29 for interest on the aforementioned note (R. 80).

POINT I

THE EVIDENCE PRESENTED BY THE PLAINTIFFS AT TRIAL DOES NOT SUSTAIN THE LOWER COURTS FINDING OF APPELLANTS INVOLVEMENT IN A CONSPIRACY

The Trial Court in the Findings of Fact entered in this action based the liability of the appellant Michael Tanner upon his involvement as a conspirator in a plan to defraud the plaintiffs. The trial court found in Paragraph 5 of the Findings of Fact that the appellant had acted at all times in concert with M. D. Haltom and Stan Tanner in a scheme and plan to defraud the plaintiffs (R. 70). While not making any specific finding as to the knowledge or extent of involvement of the appellant, the Court stated in Paragraph 12 of the Findings of Fact that M. D. Haltom "acting on his own behalf and in conspiracy with the defendants, MICHAEL S. TANNER and STAN TANNER, willfully made misrepresentations of material facts and willfully omitted to state facts . . ." (R. 74)

In the case of Bunnell v. Bills, 13 Utah 2d. 83, 368 P. 2d 597 (1962) the plaintiffs sought to establish liability on the basis of conspiracy to cause a breach of contract. The court held that no conspiracy had been proven because the evidence had not shown that the parties were engaged in a concerted action to cause the breach of contract, nor did the evidence show that such action was, in fact, done for the group or part of a plan. The court cited as authority for this proposition the case of Teamsters, Chauffers & Helpers of America, Local 222 v. Board of Review, Department of Employment Security,

10 Utah 2d 63, 348 P. 2d 588 (1960). In the Teamsters case, the Court states the general proposition that there is no basis for holding a group of persons responsible for the acts of one unless it is affirmatively established that the group is engaged in a concerted activity and that the action of one is, in fact, done for the group as part of a plan.

Because the plaintiffs alleged that there existed a conspiracy to defraud, the burden to prove the existence of such conspiracy is even greater than most other civil cases. In Lundstrom v. Radio Corporation of America, 17 Utah 2d 339, 405, states the general rule that fraud must be proven by the plaintiff by clear and convincing evidence and that a cause of action will not lie in mere suspicion or innuendo raised by the relationship of two parties. See also, Tanner v. Pillsbury Mills, 3 Utah 2d 196, 281 P. 2d 391 (1955) and Harris v. Capital Records, 50 Cal. Rptr. 539, 413 P. 2d 139 (1966).

In this case, no evidence was presented by any of the four witnesses produced by the plaintiff that the appellant was involved in a conspiracy, scheme or plan to defraud the plaintiffs. Daniel Schwartz stated that to his knowledge at the time Mr. Haltom made the representations on behalf of Stan Tanner, the appellant was "only going to move into the house." (T. 63) The fact that the appellant may have benefited by the agreement made between Stan Tanner and the plaintiffs does not make the appellant liable on the basis of the actions of Stan Tanner. Lundstrom v. Radio Corporation of America, supra, and 57 Am Jur 2d, Fraud and Deceit, § 305, (1969). The fact that the appellant received the benefit of the property would at most make him liable in a cause of action based on unjust enrichment.

The second witness produced by the plaintiff, Attorney Alvin I. Smith, admitted that prior to the closing of the agreement to purchase the house, he did not know the appellant personally and that he had not had any discussions with the appellant (T. 148). He testified that as far as he knew the appellants only involvement other than signing the deed with his wife occurred on May 1, 1969, five months after Stan Tanner and the plaintiffs had negotiated the sale, when the appellant delivered a cashier's check to his office for a payment to the plaintiff on the home in which he was living (T. 150).

When called by the plaintiff on direct, the appellant stated that he did not discuss the matter in detail with Stan Tanner and did not discuss, or even see, any of the documents or agreements involved in this case prior to the closing of the house in January of 1969 (T. 183).

The fourth witness called on behalf of the plaintiffs was Earl J. Knudson, a real estate agent and an officer of Western States Land of Utah (T. 184). He did not testify to any fact which supported the plaintiffs claim that the appellant was involved in a conspiracy.

The appellant submits that the trial court was in error in finding that a conspiracy to defraud was proven by clear and convincing evidence and that the appellant was an active participant in a conspiracy. Therefore, the finding of a cause of action against the appellant should be reversed and the appellant awarded his costs in bringing the action.

POINT II

THE PLAINTIFF FAILED TO PROVE ALL OF THE ELEMENTS OF COMMON LAW FRAUD IN RELATIONSHIP TO THE APPELLANT

The plaintiff had the burden to establish all of the elements of a cause of action of fraud, as set forth in Pace v. Parrish, 122 Utah 141, 247 P. 2d 273 (1952), which are:

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 representation;
5. For the purpose of inducing the other party to act upon it;
6. That the other party, acting reasonably and in belief of its falsity;
7. Did in fact rely upon it;
8. And was thereby induced to act;
9. To his injury and damage.

The plaintiff had the burden of proving each and every element by clear and convincing evidence and could not rely on mere suspicion or innuen which may have been present because of the appellant's relationship to Stan Tanner. Lundstrom v. Radio Corporation of America, 17 Utah 2d 114, 405 P. 2d 339 (1965) and Bezner v. Continental Dry Cleaners, Inc. 548 P. 2d 898 (Utah 1976).

After trial, the counsel for the appellant made a motion for a directed verdict or in the alternative for a new trial, on the grounds that ther

was not sufficient evidence to sustain a judgment of fraud against the defendant, Michael S. Tanner.

The appellant submits that the evidence presented to the trial court does not sustain the lower courts finding of liability against the appellant on the basis of common law fraud under the standard of clear and convincing evidence.

The representations made by Stan Tanner concerning the stock were secondary and not material to the sale of the house. The plaintiffs' house was sold to Stan Tanner by plaintiffs for the consideration of a personal note of Stan Tanner (T. 92). The primary obligation was the note which was secondarily secured by the stock as collateral. (T. 66).

As to Michael Tanner, the plaintiff had the burden of showing that he actually had a preconceived knowledge prior to the time the representations were made to the plaintiffs that the representations made by M. D. Haltom were false, were known by M. D. Haltom to be false, and were made by M. D. Haltom to induce the plaintiffs to act upon the representations. Ellis v. Hale, 13 Utah 2d 279, 373 P. 2d 382 (1962), Marks v. Continental Casualty Co., 19 Utah 2d 119, 427 P. 2d 387 (1967), Lundstrom v. Radio Corporation of America, supra. The record does not reflect any evidence or even any circumstantial evidence that the appellant had any such presently existing knowledge.

Therefore, the appellant submits the cause of action against the appellant should be reversed and the appellant awarded his costs because there is insufficient evidence as to the appellant to support the trial courts finding of all of the elements of fraud.

POINT III

THE PLAINTIFFS FAILED TO EXERCISE DUE CARE IN THEIR BUSINESS DEALINGS WITH STAN TANNER

The plaintiff, Daniel Schwartz, was under a duty to exercise reasonable care and prudence before entering into an "arms-length" business transaction. Lewis v. White, 2 Utah 2d 101, 269 P. 2d 865 (1954). Jardine v. Brunswick Corporation, 18 Utah 2d 378, 423 P. 2d 659, (1967). If the plaintiff did fail to exercise reasonable care, then under the rule as stated in the foregoing cases, the plaintiff failed to prove that he reasonably relied on the representations and the plaintiff could not recover in this action.

In the present case, the plaintiff had the opportunity and ability to independently verify and substantiate the value of the stock being offered as security for the note (T. 65). At trial he stated that he contacted a broker in New York concerning the stock (T. 65), and a banker (T. 67). The plaintiff did not have a credit of Stan Tanner the person signing the note (T. 67). After the December 8, 1968 meeting and until the January 1969 closing the plaintiff had the opportunity and ability to investigate the representations and determine whether or not he should rely on the information communicated to him in the two-hour meeting with M. D. Haltom concerning the stock of Stan Tanner.

Furthermore, the plaintiff was represented by legal counsel, Alvin I. Smith, who had previously known Mr. Stan Tanner and told the plaintiff that the stock was speculative stock (T. 146). The plaintiff relied on the representations of Mr. Smith, who had personally made some investigations of Bishop Industries stock and who had personally purchased some of the

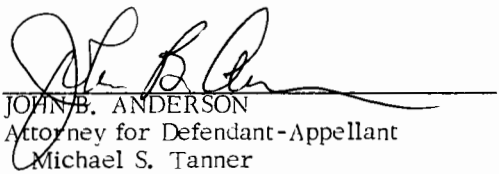
stock in the same period of time (T. 148).

The appellant submits that in the light of the foregoing the decisions of the trial court should be reversed because the plaintiff was not entitled to reasonably rely on the representations made by M. D. Haltom on behalf of Stan Tanner in selling the property and, therefore, the judgment should be reversed.

CONCLUSIONS

On the basis of the foregoing points, the appellant submits the conclusion judgment entered by the lower court should be reversed and the appellant awarded his costs in this matter.

Respectfully submitted,



JOHN B. ANDERSON
Attorney for Defendant-Appellant
Michael S. Tanner

RECEIPT

I do hereby acknowledge receipt of eleven (11) copies of the foregoing brief in the above-styled case of Daniel M. Schwartz, Plaintiff and Respondent vs M. D. Haltom and Michael S. Tanner, Defendant and Appellants, this 22nd day of April, 1977.

UTAH SUPREME COURT

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CLERK