1988

John Russo v. Bridlewood Corporation : Brief of Respondent

Utah Court of Appeals

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IN THE SUPREME COURT

OF THE STATE OF UTAH

JOHN RUSSO and ROBERT RUSSO,)

Plaintiffs-Appellants,)

v.) Case No. 860457

BRIDLEWOOD CORPORATION,)

Defendant-Respondent.) 88-0083-CA

BRIEF OF DEFENDANT-RESPONDENT BRIDLEWOOD CORPORATION

Appeal From the District Court of the
Second Judicial District

Weber County

Honorable David E. Roth,
District Judge

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STATEMENT OF ISSUES

1. Did Bridlewood Corporation discharge its duty of disclosure when its agent, Robert Penton, disclosed to the plaintiffs' agent, Steve Brown, the fact that soil slippage existed on the property and the fact that George Adamson, an engineer, had examined the slippage and rendered an opinion about it?

2. Did Bridlewood Corporation, as seller of the restaurant property, have any obligation to conduct an investigation of the soil slippage on the restaurant property and, if so, did Bridlewood discharge its obligation?

NATURE OF THE CASE

This was an action for damages that the plaintiffs claimed to have suffered as a result of soil slippage on restaurant property they purchased from defendant Bridlewood Corporation. The plaintiffs alleged that Bridlewood either intentionally or negligently misrepresented the character of the property or that Bridlewood intentionally concealed from them the fact of the soil slippage on the property. The plaintiffs have also argued, though it was not alleged in the complaint, that the defendant breached a duty to investigate the facts surrounding the soil slippage.

DISPOSITION IN LOWER COURT

After a trial to the court, Judge David E. Roth of the Second Judicial District Court, Weber County, held that

Bridlewood's real estate agent, Bob Penton, had adequately disclosed the facts surrounding the soil slippage on the property. As a result, Judge Roth entered judgment in favor of the defendant.

RELIEF SOUGHT

Bridlewood seeks an order of this Court affirming the judgment of the trial court.

STATEMENT OF FACTS

The plaintiffs' statement of facts sets forth in detail most of the facts relevant to this appeal. In reality, there were few disputed issues of fact at trial, and the plaintiffs have accepted the trial court's findings of fact. Bridlewood believes, however, that the following additional facts are relevant to the points of law that the plaintiffs argue in their brief.

Since the plaintiffs' claim is for fraudulent concealment, the critical facts relate to what Bridlewood, through its agents, disclosed to the plaintiffs, through their agent. The testimony at trial revealed that all of the essential information that Bridlewood knew about the condition of the restaurant property was disclosed to the plaintiffs' agent. The only breakdown in communication occurred between the plaintiffs' agent and the plaintiffs themselves.

The story of the discussions among the parties and

their agents can get confusing. The following "cast of characters" is therefore supplied for the Court's reference:

Character	Role
Bridlewood Corporation	Defendant
Clinton Frank	Bridlewood's president
Rick Wadman	Bridlewood's first listing agent
Bob Penton	Bridlewood's second listing agent
George Adamson	Engineer who examined the property
Robert Russo and John Russo	Plaintiffs
Steve Brown	Plaintiffs' real estate agent

All of the discussions between the parties occurred between their real estate agents; there was no direct contact between Bridlewood and the plaintiffs. (R. 191.) The plaintiffs' agent, Steve Brown, was a longtime acquaintance of the plaintiffs who did much more than merely act as a conduit for offers and counteroffers. (R. 313.) Mr. Brown gave the plaintiffs advice about available properties, the price to offer for the property, and the terms of the offer. He also advised the plaintiffs about the restaurant business in general, since Mr. Brown himself had operated a restaurant in Ogden. (R. 300.)

Bridlewood's first agent, Rick Wadman, entered into a listing agreement with Bridlewood on August 14, 1980. Mr. Wadman's listing was renewed three times, and the last listing ended on December 31, 1983. (R. 193.) Early in his listing tenure, Mr. Wadman became aware that there was a crack in the asphalt on the east side of the restaurant parking lot. That crack appeared to Mr. Wadman to be stable until the Summer of 1983, when Wadman noted additional slippage. (R. 199-200.)

In order to determine what was causing the apparent slippage on the property, Mr. Wadman consulted George Adamson, an engineer who had been recommended to Mr. Wadman because of his knowledge of soils conditions in the Birch Creek area near the restaurant. (R. 208, 212.) Mr. Adamson looked at the property with Mr. Wadman and told him that the additional slippage had occurred because of saturation from recent heavy rainfall. Mr. Adamson told Mr. Wadman that he couldn't predict exactly what would happen in the future, but that the soil could remain stable for 50 to 100 years if there was no further unusual saturation. (R. 213.)

Mr. Wadman called Mr. Frank in Illinois to tell him about his discussion with Mr. Adamson. (R. 214.) Mr. Frank himself did not talk to Mr. Adamson. (R. 173.) Thus Mr. Frank, and therefore Bridlewood, had no greater knowledge about the condition of the property than did Mr. Wadman, since Mr.

Wadman was the source of Bridlewood's knowledge of the condition.

Bridlewood listed the property with its second agent, Bob Penton, beginning January 1, 1984. (R. 238.) Mr. Penton obtained his knowledge about the condition of the property from Mr. Wadman. Mr. Wadman told Mr. Penton all of the essential information about the condition of the property. Mr. Wadman told Mr. Penton that there was a crack in the asphalt and slippage on the east side of the property; that the cement slab on which the freezer sat had cracked and fallen because of the slippage; and that George Adamson, an engineer, had examined the property and opined that it could slip again but that it might be stable for 50 to 100 years. (R. 224-5.) Mr. Wadman also told Mr. Penton that Clinton Frank of Bridlewood was aware of the soil slippage. (R. 255.) At this point Mr. Penton knew as much if not more than Mr. Frank knew about the soil slippage, and thus had no reason to call Mr. Frank for more information.

Mr. Penton immediately visited the property. (R. 255.) Although there was snow on the ground that covered the crack in the asphalt, Mr. Penton was able to see the area underneath the freezer overhang where the cement slab had fallen six to eight inches. (R. 257-8.) Mr. Penton could see that slippage without bending, stooping, or removing any snow. (R. 273-4.)

Mr. Penton immediately returned to his office to call Steve Brown, the plaintiffs' agent, to tell him what he had seen. (R. 262.) Mr. Penton spoke with Mr. Brown on the telephone for 10 to 15 minutes. (R. 263.) Mr. Penton passed on to Mr. Brown precisely the same information that Penton had received from Mr. Wadman. Mr. Penton told Mr. Brown that he had learned of the slippage from Wadman; that he (Penton) had visited the property and had seen the soil slippage by the freezer; and that George Adamson, the engineer, had examined the property and opined that it might remain stable in the future. (R. 262-4; 291-2; 304-5.) Mr. Penton told Brown he thought the plaintiffs should be informed of these facts. (R. 263, 276.) Mr. Penton testified that Mr. Brown was concerned and that Brown said he would talk to the plaintiffs about the slippage and call Penton back. Mr. Penton testified that Mr. Brown told him the next day that the plaintiffs did not consider the slippage a problem and would go ahead with the closing. (R. 265, 277.)

Mr. Brown in fact never visited the property, never called Wadman or the engineer, and never told the plaintiffs about his discussion with Penton. (R. 305-6.) John Russo testified that he would have been concerned if he had been told an engineer had been hired to look at the property, and would have gone back to look at the property if he had been told

there was soil slippage on the property. (R. 351-2.) Mr. Brown conceded at the trial that Penton told him about both the soil slippage and the engineer's visit to the property. (R. 292, 305.)

The plaintiffs contend that Brown justifiably confused the slippage that Mr. Penton described with some drainage erosion Brown had seen at the northeast edge of the property. (Plaintiffs' Brief at 29.) That erosion, however, was some 20 feet away from the freezer that Mr. Penton linked to the soil slippage. (R. 303.) Moreover, Robert Russo described the erosion as a "small spot" that was a "minor, very minor, problem." (R. 319, 326.) That description, of course, is wholly inconsistent with a problem serious enough for an engineer to look at and for Penton to make a special call to Brown to disclose it.

Bridlewood's president, Clinton Frank, had visited the property in July, 1983, but did not return to Utah until well after the closing of the transaction. (R. 179.) The slippage line in the asphalt had been visible to Mr. Frank when he visited the property in July. (R. 167-8.) Even after Mr. Penton acquired the listing in January, 1984, Mr. Frank assumed that the condition would be visible to anyone who visited the property. (R. 182.) Mr. Frank testified that he did not intend to conceal the condition of the property from anyone.

(R. 177, 190.) Indeed, it was Mr. Frank who had decided not to repave the area of the asphalt crack when that was considered as a solution to the asphalt slippage months before the plaintiffs' purchase of the property. (R. 228-9.)

SUMMARY OF ARGUMENT

Judge Roth correctly held that Bridlewood did not conceal any facts about the property. Bridlewood's real estate agent disclosed to the plaintiffs' agent everything Bridlewood knew about the property. The plaintiffs testified that they would have been concerned and would have investigated if they had known those facts. The plaintiffs' agent, however, failed to reveal to the plaintiffs any of the facts he had learned from Bridlewood's agent. Bridlewood cannot be held responsible for the concealment by the plaintiffs' own agent.

The plaintiffs' effort to impose liability on Bridlewood on the basis of a failure to investigate the soil slippage on the property is misplaced for two reasons. First, the claim is not supported by the facts. When Bridlewood's real estate agents became aware of slippage on the property, they examined the property, hired an engineer with expertise in soils problems, and obtained the engineer's opinion about the condition of the property. All of this information was disclosed to the plaintiffs' agent.

Second, the duty of investigation that the plaintiffs attempt to impose on Bridlewood is a duty that is unique to listing brokers of residential real estate. The duty has never been imposed on a seller of real property, and it has never been applied to the sale of commercial real estate. Bridlewood's only duty was to disclose what it had learned about the property, and it discharged that duty.

ARGUMENT

Although the plaintiffs alleged in their complaint claims for intentional and negligent misrepresentation and for fraudulent concealment, they take issue on this appeal only with the trial court's holding that there was no fraudulent concealment. The plaintiffs have also argued the theory that Bridlewood's listing agent failed to investigate the nature of the soil slippage on the property. The plaintiffs accept Judge Roth's findings of fact and challenge only his conclusions of law. As is discussed more fully below, Judge Roth's ruling was correct on all of the issues.

I. JUDGE ROTH CORRECTLY HELD THAT BRIDLEWOOD'S DUTY OF DISCLOSURE WAS DISCHARGED WHEN ITS REAL ESTATE AGENT DISCLOSED TO THE PLAINTIFFS' REAL ESTATE AGENT THE FACTS ABOUT THE SOIL SLIPPAGE ON THE RESTAURANT PROPERTY.

The facts adduced at trial can support no conclusion other than that Bridlewood's agent discharged Bridlewood's obligation of disclosure. As the plaintiffs point out in their

brief, the negotiations and closing of the transaction were conducted solely through the parties' real estate agents. The plaintiffs had never spoken with Clinton Frank or any other Bridlewood representative before this case was filed. Therefore, the focus of this case is on the knowledge of the parties' agents and their discussions.

Rick Wadman, Bridlewood's first real estate agent, was the source of Bridlewood's knowledge about the soil slippage. Mr. Wadman investigated the slippage by hiring an engineer, George Adamson, who examined the property. Mr. Adamson told Mr. Wadman that although the slippage appeared to have stablized as of the time of his examination (July, 1983), it could slip further if additional heavy rain saturation occurred. This was the very information that Mr. Wadman passed on to Bob Penton, Bridlewood's second real estate agent.

Mr. Penton immediately examined the property himself and passed on the information he had received to the plaintiffs' agent, Steve Brown. It was at that point that the only breakdown in communication occurred in this case. Mr. Brown decided not to do anything with the knowledge he had received from Mr. Penton. He didn't visit the property. He didn't tell his clients about the slippage. He didn't tell them about the engineer's examination and conclusions. Mr. Brown didn't tell the plaintiffs anything about his

conversation with Mr. Penton. The plaintiffs testified that they would have investigated further if they had been told about the slippage and the engineer's examination.

In order to prove a case of fraudulent concealment, the plaintiffs must prove that the defendant knowingly or recklessly concealed a latent condition of the property; that the latent condition existed at the time of the sale and would have been material to the plaintiffs' decision to purchase; and that the defendant concealed the condition for the purpose of inducing the plaintiffs to buy the property. Sugarhouse Finance Co. v Anderson, 610 P.2d 1369, 1373 (Utah 1980). The plaintiffs must prove each of these elements of fraud by "clear and convincing" evidence. Cheever v. Schramm, 577 P.2d 951, 954 (Utah 1978); Pace v. Parrish, 122 Utah 141, 143, 247 P.2d 273, 274 (1952).

The plaintiffs in this case not only failed to prove that Bridlewood had any intent to conceal anything from them, but they failed to establish the very foundation of the claim: a concealment by Bridlewood. The only concealment in this case was Steve Brown's failure to tell his clients what he had learned from Bridlewood's agent. The plaintiffs' argument that Bridlewood should have foreseen Brown's concealment is both ludicrous and inconsistent with their concession that they are bound by their agent's acts and omissions.

Judge Roth correctly held that Steve Brown's knowledge was chargeable to the plaintiffs, and that once Brown was made aware of the soil slippage and the engineer's examination and opinion, he should have told the plaintiffs what he knew. The plaintiffs and their agent were then obligated to conduct such further investigation as might have been necessary to inform themselves of the nature of the slippage. Cheever v. Schramm, 577 P.2d 951, 954 (Utah 1978). "'Knowledge which is sufficient to lead a prudent person to inquire about the matter when it could have been ascertained conveniently, constitutes notice of whatever the inquiry would have disclosed, and will be regarded as knowledge of the facts.'" Peterson v. Koch Industries, Inc., 684 F.2d 667, 671 (10th Cir. 1982) (citation omitted).

Judge Roth's conclusions of law are consistent with precedent from this Court. For example, in Cole v. Parker, 5 Utah 2d 263, 300 P.2d 623 (1956), this Court upheld the trial court's denial of the plaintiff's claim for rescission of a real estate purchase contract. The plaintiff had claimed that the defendant failed to disclose certain facts about the water supply to the agricultural property in question. Before the plaintiff had purchased the property, the defendant-vendor had shown the plaintiff around the property and had taken the plaintiff to see the source of the creek that supplied water to

the property. The defendant also told the plaintiff that the creek could deliver more water to the property if it were lined along a portion of its course.

After taking possession of the property, the plaintiff discovered that there was a fault along the course of the creek into which much of the water supply was lost, resulting in what the plaintiff deemed an insufficient water supply to the land. The plaintiff claimed that the defendant had taken him on a roundabout tour of the land for the purpose of concealing the existence of the fault; that the existence of the fault was not reasonably discoverable; and that the defendant's failure to disclose it constituted a fraudulent concealment.

This Court upheld the trial court's judgment for the defendant on the ground that the defendant had made adequate disclosure of the condition of the water supply to the property.

> While we agree with plaintiffs' cited authorities that a material nondisclosure or a half-truth may be the basis for an action on fraud as well as a positive representation, . . . we do not agree that because the seller did not discuss with particularity the cause of the loss of water, the buyer is at liberty to rescind his contract. . . . "It was [the buyers'] duty to make such investigation and inquiry as reasonable care under the circumstances would dictate . . . ."

5 Utah 2d at 266, 300 P.2d at 625 (citing Lewis v. White, 2 Utah 2d 101, 269 P.2d 865 (1954)).

In the present case, the plaintiffs acquired constructive knowledge, through their agent, that the property they were about to buy had experienced soil slippage and that the seller had retained an engineer to examine the slippage condition. At that point the duty of investigation and disclosure shifted to the plaintiffs' agent. The parties agree that Steve Brown breached that duty. The plaintiffs chose not to sue Mr. Brown, their longtime acquaintance, but that omission does not change the fact that the only failure to investigate and disclose was his. Judge Roth correctly held that Bridlewood is not responsible for Brown's failure to disclose the slippage condition to the plaintiffs, or for the plaintiffs' consequent failure to investigate and inform themselves about the condition.

II. BRIDLEWOOD DISCHARGED WHATEVER DUTY IT HAD TO INVESTIGATE THE FACTS ABOUT THE SOIL SLIPPAGE ON THE RESTAURANT PROPERTY.

As is discussed more fully below, the duty of investigation that the plaintiffs seek to impose on Bridlewood is a duty that the plaintiffs concede has been accepted in only two states. Even in those states, the duty is unique to real estate brokers. The theory is misapplied to Bridlewood, the seller of the property in the present case. The simplest response to the claim, however, is that Bridlewood and its agents conducted a sufficient investigation to have discharged such an obligation even if it existed.

When Bridlewood's first agent, Rick Wadman, saw evidence of soil slippage on the property, he didn't stand pat with that knowledge; he retained George Adamson, an engineer who had been recommended to Mr. Wadman because of his experience and knowledge of soils problems in the vicinity of the restaurant property. Mr. Adamson examined the property and told Mr. Wadman that it was difficult to predict what would happen in the future, but that the property could remain stable for the next 50 to 100 years.

When Mr. Wadman conveyed this same information to Bob Penton, Bridlewood's next listing agent, Mr. Penton also investigated the situation. Mr. Penton immediately visited the property and examined the area of worst slippage that Mr. Wadman had described, under the freezer at the back of the building. Mr. Penton saw the very slippage that Mr. Wadman had described to him. Mr. Penton immediately called the plaintiffs' agent, Mr. Brown, and conveyed to Brown the contents of his conversation with Mr. Wadman and related what he had seen when he visited the property. It was at this point that any investigation or disclosure ceased. Mr. Brown neither investigated the problem nor disclosed it to his clients. Thus, to the extent that a duty of investigation could be applied to a seller of commercial real estate, Bridlewood and its agents discharged that obligation.

The plaintiffs' argument is more fundamentally flawed, however, because it is misapplied to the defendant in this case. The California case on which the plaintiffs rely so heavily, Easton v. Strassburger, 152 Cal. App. 3d 90, 199 Cal. Rptr. 383, 391 (1984), holds that a listing broker of residential real estate owes a duty to prospective purchasers of the property to exercise reasonable care to disclose any facts materially affecting the value of the property that the broker could discover through the exercise of reasonable diligence. The theory of that case does not apply to Bridlewood for two reasons.

First, and most obviously, the duty that the California appellate court imposed was unique to the listing broker, and was not applied to the seller of the property. Neither the Easton case nor any other case cited by the plaintiffs has extended the duty beyond the broker to the seller of the property. Indeed, this Court has cited Easton as one of the "cases from California which focus on the status and responsibilities of real estate brokers . . . ." Secor v. Knight, 716 P.2d 790, 795 n.1 (Utah 1986) (emphasis added).

The reason the duty of investigation is limited to brokers is apparent from the California court's reasoning in Easton. The court reasoned that real estate brokers are often

in a very commanding position with respect to prospective buyers of residential property; buyers usually have a relative lack of knowledge and experience in real estate transactions and therefore expect the broker to protect their interests. 199 Cal. Rptr. at 388. As a result, the court concluded that the relationship between a real estate broker and a prospective buyer is one of trust and confidence that requires extra vigilance by the broker on the buyer's behalf. Id. The court also relied on the fact that realtors are subject to a written code of ethics that requires them "to discover adverse factors that a reasonably competent and diligent investigation would disclose." 199 Cal. Rptr. at 389.

The seller of the property, by contrast, owes no fiduciary duty to the buyer, Cole v. Parker, 5 Utah 2d 263, 268, 300 P.2d 623, 626 (1956); and has no professional obligation to investigate on the buyer's behalf. The court in Easton imposed the duty of investigation only on the broker, and specifically distinguished cases in which sellers of property had been held liable for fraudulent misrepresentation or concealment. 199 Cal. Rptr. at 390-1. This Court has also distinguished the limited duty of disclosure imposed on the seller of real estate from the broader duty of care that a real estate agent owes to prospective purchasers. Dugan v. Jones, 615 P.2d 1239, 1248 (Utah 1980).

The second reason why the Easton theory is misapplied

to Bridlewood is that the Easton court itself limited its holding to transactions involving residential real estate:

> We express no opinion here whether a broker's obligation to conduct an inspection for defects for the benefit of the buyer applies to the sale of commercial real estate. Unlike the residential home buyer who is often unrepresented by a broker, or who is effectively unrepresented because of the problems of dual agency [citations omitted], a purchaser of commercial real estate is likely to be more experienced and sophisticated in his dealings in real estate and is usually represented by an agent who represents only the buyer's interest. [citation omitted.]"

199 Cal. Rptr. at 390 n.8 (emphasis added).

The court's reasoning applies squarely to the present case. The plaintiffs were purchasing commercial real estate for the purpose of operating a restaurant business on it. The plaintiffs were experienced businessmen who had bought and sold real property before. Most importantly, the plaintiffs' interests were being protected - - or were supposed to have been protected - - by their own real estate agent, who was advising them about price, terms, the property, and even about the restaurant business itself. Thus, even if this Court were to adopt the California appellate court's expansion of negligence liability for brokers, that theory wouldn't apply even to Bridlewood's listing agent in this case. The theory certainly doesn't apply to Bridlewood.

Finally, even if the Easton theory could be applied to Bridlewood's listing agent in this case, and even if Bridlewood's listing agent hadn't discharged his obligation of

investigation, Bridlewood could not be held responsible for its agent's failure to discharge a duty that is unique to the agent. While it is true that a principal may be responsible for its agent's acts or omissions, those acts or omissions must be within the scope of the agent's authority. Under the holding of the Easton case, however, the duty of investigation was imposed only on the broker, and not on the seller of the property. If a listing broker failed to make a reasonable investigation under that theory, he would be breaching his own duty and not any duty that he was performing on behalf of the seller. The plaintiffs cannot bootstrap the alleged failure of Bridlewood's agent to discharge his own duty into a claim of negligence against Bridlewood itself.

CONCLUSION

Bridlewood discharged whatever obligation it had to investigate the soil slippage on the property and to disclose it to the plaintiffs. The only breakdown in investigation and disclosure was between the plaintiffs and their own agent. For these reasons, Bridlewood respectfully requests that the Court affirm the judgment of the trial court.

DATED this 27th day of January, 1987.

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CERTIFICATE OF SERVICE

I hereby certify that I caused two copies of the foregoing Brief to be mailed, postage prepaid, this 27th day of January, 1987, to the following:

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