1949

Carl Van Tassell and Elda Van Tassell v. C. Ed. Lewis and Lucille M. Lewis : Brief of Appellant

Utah Supreme Court

Skeen, Bayle & Russell; Attorneys for Appellants;

7340

In the Supreme Court
of the State of Utah

CARL VAN TASSELL and ELDA VAN TASSELL,
Plaintiffs and Appellants,

vs.

C. ED. LEWIS and LUCILLE M. LEWIS,
Defendants and Respondents.

No. 7340

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BRIEF OF APPELLANT

This suit was instituted in the District Court for Duchesne County to set aside a deed from the plaintiffs to the defendants for failure of consideration. The defendants filed a general denial. The case was tried to the Court. Findings and Conclusions of Law were made and found and a decree entered in favor of the defendants.

STATEMENT OF FACTS

The defendant, C. Ed Lewis, is a real estate operator, with his place of business in Salt Lake City. The plaintiff and

his wife owned a ranch in Duchesne County upon which there was a mortgage for $8,000.00. Lewis advertised for sale a dairy located in California described as:

> "The Meister Dairy farm consisting of 126 acres, more or less, located at Meridian (Tisdale Wier) Calif. Together with all improvements thereon, water rights and all machinery and livestock, equipment, etc., as per attached list." (Def. Exhibit 4).

The plaintiffs became interested and proposed selling their property and with one Gail Van Tassell, a relative, purchasing the California property. Van Tassell called at Lewis's place of business, and Lewis proposed purchasing his farm for $10,000.00 subject to the mortgage. Carl Van Tassell signed a deed. (Exhibit A). The deed was not acknowledged by Mrs. Van Tassell, and Lewis went to her father's home at Peoa where she was then staying and later the notarial certificate of one C. Ed. Burke was affixed to the deed. (Deposition 3). Carl Van Tassell and Lewis then proposed going to California. Lewis, in his deposition, testifies as follows: (Deposition 4).

> "Q. At the time he handed it to you did you pay him any money?
>
> A. I wrote the check for $10,000, and we was flying to California that same day and we put the whole thing in escrow, with an agreement showing that if—
>
> Q. Just a minute as to the agreement. You put the check and the deed in escrow?
>
> A. In my office, with the deed. I put the $10,000 check in the office and we drew an agreement, providing that if we had a crackup his wife was to

get the $10,000 and the whole deal was to be cancelled.

Q. Was that in writing?

A. Yes.

Q. Have you a copy of that?

A. No, it is in my office.

Q. Did Mrs. Van Tassel sign the agreement?

A. The notes?

Q. No, the agreement that you say you attached to the check and the warranty deed and kept in your office.

A. I don't know just what instrument you mean."

The check was received in evidence as Exhibit B. It was made to Carl Van Tassell and Elda Van Tassell and was endorsed by Carl Van Tassell only, signing the name of Elda Van Tassell as agent but without any authority so to do. (Tr. 4). No further reference in the record is made to the escrow and so far as appears from the record the escrow was never released by the plaintiffs. Carl Van Tassell and Lewis went to California, and Lewis took with him a check payable to Ward Meister and Lueltha Meister, who were supposed to be the owners of the ranch which Lewis had listed for sale and in which the plaintiffs were interested. The check to the Van Tassell's and the check to the Meisters were both dated December 26, 1947 (Exhibits B and D). The deed (Exhibit A) and the check (Exhibit B) to Van Tassells were left in escrow in Lewis's office, but the check to the Meisters for $10,000.00 was taken to California by Lewis. Negotiations were had between Lewis and Meisters

and Lewis and Van Tassell. Van Tassell (Tr. 14) testified that he and Meister did not get together but that Lewis passed from one to the other carrying on the conversations. On the 27th of December, an agreement was drawn up between the Meisters and the Van Tassels (Exhibit 3) (Tr. 7, 11).

The property being sold was described in the agreement as

> "The Meister dairy farm located near the Tisdale Wier near Meridian in said County and State."

It was a temporary memorandum, and all of the parties expected to follow up with a permanent contract in which the property would be described. (Tr. 14, 16). Van Tassells went to the county seat and tried to get a description of the property they were to purchase, together with an abstract. They sought to ascertain what cattle, dairy equipment, etc., would go with the farm but were unable to get anything definite either as to the land or the personal property (Tr. 15). Before leaving California, the next day Lewis agreed to cooperate in procuring a valid and enforceable contract.

Gail Van Tassell testified that Lewis said:

> "A. He said that when we brought our wives down a permanent agreement would be drawn up, the abstract and the deeds and the list of all the personal property, all the cows and so forth, would be drawn up to date and cleared and put into the bank as an escrow agreement. He would take care of that business for us.
>
> Q. Did he tell you that he would take care of it for you?
>
> A. Yes, he said he would stand back of us and see that that was completed." (Tr. 60).

This testimony was not contradicted. Lewis failed utterly to comply with this part of the agreement, but hastened to Salt Lake, and on December 30, 1947, deposited the check drawn by C. Ed. Lewis Company on Walker Bank and Trust Company to Ward Meister and wife in the account upon which it was drawn (Ex. D). On January 5, 1948, he also took the check of C. Ed Lewis Company drawn to Carl Van Tassell presumably in payment of the ranch and deposited it to the account of C. Ed. Lewis and Company, the drawer of the check, in Walker Bank & Trust Company (Ex. B). (See photostatic copy of bank account, plaintiffs' Exhibit C).

The 4th entry of the second page of the bank statement shows deposit of $13,659.00 and on the same day, a check drawn on the account for $10,000.00. The preceding balance in the account was $4,734.00. (Ex. C-A). For some reason the bank statement for December is not now in the record although it was stipulated that it would be produced by Lewis and it was mailed to the Judge (Tr. 72).

Carl Van Tassell and Gail Van Tassell stayed on the Meister Ranch for some time attempting to procure a valid contract for the purchase of the property (Tr. 16). While they were continuing their efforts to procure the contract, the Bank of America repossessed the cattle and dairy equipment and the Federal Land Bank was proceeding to foreclose the mortgage (Tr. 66). Thereupon, Meister gave Van Tassells $9,000.00 which he had received on account of the purchase of the property, and of course, the boys surrendered whatever possession they may have had and returned to Duchesne.

On the 25th of February, Lewis re-mortgaged the Van Tassell property for $8,240.00 to one Hill and paid the mortgage upon the property existing at the time he took the deed. (Tr. 73).

ASSIGNMENT OF ERRORS

1. The court erred in finding that the check (Exhibit B) constituted payment for the property described in the Complaint.

2. The court erred in finding that plaintiffs delivered unconditionally to the defendant a warranty deed to the premises described in the Complaint herein.

3. The court erred in finding that a valid contract for the purchase of the Meister property in California was made between the plaintiffs and the said Meister and erred in refusing to find that the said contract was void for uncertainty.

4. The court erred in finding that Elda Van Tassell authorized the endorsement of her name upon the check by Carl Van Tassell and that she received benefits therefrom.

5. The court erred in drawing conclusion of law No. 1 for the reason that the check from Lewis to Van Tassell was not drawn against funds with which to pay the same and the check from the said Lewis to Meister was likewise drawn without funds in the bank with which to pay the same, and both of said checks were fraudulent and void.

6. The court erred in making and entering judgment in favor of the defendants and against the plaintiffs.

POINTS ARGUED

I

THE SCHEME BY MEANS OF WHICH LEWIS PROCURED POSSESSION OF THE VAN TASSELL DEED WAS FRAUDULENT FROM THE BEGINNING.

The evidence is conclusive that the check (Exhibit B) from C. Ed. Lewis to Carl Van Tassell and Elda Van Tassell was drawn on an account without sufficient funds from which it could be paid, and likewise the check from Lewis to Meister was not a good check. Both checks are dated December 26, 1947. That was before Lewis and Van Tassell went to California and before negotiations had been entered into for the sale by Lewis of the Meister property to Van Tassell. There could have been no assurance at that time that Meister could or would sell to Van Tassell, that Lewis would earn a real estate dealer's commission, or, that Meister would agree to pay him $10,000.00 out of the first payment upon any valid contract of sale. At that time evidently Lewis had no intention of buying the Van Tassell property and certainly he had no intention of permitting the check to be presented for payment by Van Tassell.

These statements are amply supported by the testimony of Lewis himself for he said that he was holding both the check and the deed in escrow.

> "providing that if we had a crackup his wife was to get the $10,000.00 and the whole deal was to be cancelled."

Van Tassell's wife would not have gotten the $10,000.00

because the check was not good. Lewis knew that if the check had been presented to the bank, it would have been dishonored. Subsequently, Lewis testified that there was no agreement respecting the escrow. Had it been an honest transaction, Lewis would have delivered the check and taken the deed and would then have attempted to make an honest sale of the Meister property to Carl Van Tassell and Gail Van Tassell.

It is significant that Lewis took with him to California a check from C. Ed. Lewis Company to Ward Meister and Luelthia Meister. He had their names, he had the acreage of some land, and he had a list of personal property. The record does not disclose that he had even met the Meisters before that time. In order to consummate his scheme, it was necessary for him to make some sort of a showing of an agreement in California. He could not deliver the check which he had taken to California to Meister as a payment on the contract for the check would be dishonored if presented for payment. He, therefore, under the pretense of making a contract, procured the endorsements presumably of the Meisters on the $10,000.00 check. The picture at that stage of the development of his scheme reveals his plans from the beginning. He had kited two checks for $10,000.00 each. He had, as he said, the Van Tassell deed in escrow. Something had to be done to keep the checks out of the hands of the payees. Meister had to get some money to interest him in a contract. That was provided by Gail Van Tassell and Carl Van Tassell in another way. Obviously he would not give Lewis all the money he procured and so Lewis juggled the two checks. The clever scheme devised of depositing the Meister check drawn by

C. Ed Lewis Company to the account of C. Ed. Lewis Company and the Van Tassel check drawn by C. Ed. Lewis Company to the account of C. Ed. Lewis Company seemed to the district court to meet all the requirements of a bona fide transaction. The bank made the entries and stamped the checks as if they represented an ordinary business transaction. We, therefore, come squarely face to face with the question as to whether the passing of these two checks constituted a consideration for the delivery of the deed. It is not for us to characterize the acts of the defendant, C. Ed. Lewis, in the use of the two checks (Exhibits B and D) as fraudulent or worse. It is only necessary to point out that in the use of the checks, the defendant secured title to the real estate without the semblance of consideration.

II

THE INSTRUMENT DESIGNATED AS A CONTRACT OF SALE BETWEEN MEISTER AND VAN TASSELL (EXHIBIT 3) WAS NOT A VALID, COMPLETED OR ENFORCEABLE CONTRACT.

It is enough to say that before a contract can be valid and enforceable, the subject matter of the contract must be in some form designated. Not a word in the instrument directly or indirectly makes known the subject matter of the contract. A dairy farm means cows, but how many? It means dairy equipment and evidently it meant land in this case. None of them are described, and there is no reference

to any document in which a description can be found. This is particularly true in this case because it is made to appear by the record (Tr. 66) that before the contract was completed, the Bank of America took away the livestock. It is true that the prospectus which Lewis used in the entrapment of the defendants designated 101 dairy cows, 50 dairy heifers, etc., but they were not the property of the Meisters. They were owned either absolutely or by some sort of a title retaining contract by the Bank of America. It could not, therefore, be said that the Meister Dairy farm included the 151 head of dairy cows and heifers. It could not be said that the dairy farm meant all dairy cattle on the farm. Neither could it be said that the contract meant all of the equipment on the farm because it, too, was owned or subject to the control of the Bank of America. Likewise, while the prospectus said 111 acres of land, it was not described or otherwise designated and obviously it could be only a part of the subject matter of the contract; therefore, no contract was made but $9,000.00 had been paid and Lewis had a deed to the Carl Van Tassell ranch, as he had to so handle the deed as to establish some sort of a pretense for taking over the Van Tassell ranch at Duchesne. This could not be called a completed transaction in any sense which would justify him, through the manipulation of the checks, in taking the deed to the property. He undertook to do more than to bring together a man who wanted to sell and a man who wanted to buy. He guaranteed, according to the undisputed testimony, to draw up a contract, see to the clearing of the titles to the property, which Van Tassell proposed to purchase and to put the papers in escrow. He not only failed to do this but his subsequent conduct indicates

unmistakably that he did not intend to do so when he made the promise.

III

THERE IS NO EVIDENCE THAT ELDA VAN TASSELL AUTHORIZED HER HUSBAND TO ENDORSE HER NAME ON THE CHECK.

If the endorsement of Elda Van Tassell on this check was of any significance whatsoever, then, upon the record, the court must find that she gave her husband no authority to make the endorsement. Our theory of the case is that the checks were fraudulent from the beginning and that therefore the endorsement is of no significance, but inasmuch as the court has found, as a fact, that Elda Van Tassell authorized her husband to endorse her name on the check, we cannot ignore the fact that the evidence is conclusive to the contrary and with this statement, we submit the assignment.

IV

THE CONCLUSIONS OF LAW AND THE DECREE ARE WHOLLY UNSUPPORTED BY THE EVIDENCE.

The conclusion of the court is

> "That the defendants paid to the plaintiffs and for the use and benefit of the plaintiffs the sum of $10,000.00 in cash."

and upon this conclusion the court enters a Decree that C. Ed. Lewis is the owner of the real estate described in the complaint and the decree.

If the defendant paid plaintiffs $10,000.00 in cash for the deed to the real estate, he paid it through the manipulation of the checks (Exhibits B and D). We have made clear the method of handling the checks. The contract of sale from Meister to Van Tassell was never completed. Lewis undertook to complete it and was not lawfully entitled to any compensation until he did so. It could not be completed because the Bank of America took away the cattle and the dairy equipment. Meister recognized that and repaid all the money he had received. The Van Tassells had no alternative. When the true owner took the property away, that ended their connections with the Meister dairy. They could do nothing but leave. Under the facts in the case, there was no basis whatsoever for a real estate dealer's commission if that is what Lewis contends was the basis for the juggling of the checks. He recognized this when he said in his deposition that he held the deed and check in escrow. What he obviously meant was that he held them in escrow pending the consumation of a valid contract of sale of the Meister property. He did not mean that he and Van Tassell might be killed in an airplane accident at all and he did not mean that Mrs. Van Tassell was going to get $10,000.00 if they were because there was no $10,000.00 in the bank with which to pay the check, and so there is no basis whatsoever in this record for a conclusion that Lewis paid $10,000.00 for the Van Tassell property or the decree to the effect that he was the owner thereof.

To affirm this judgment would be to sanction gross fraud and imposition perpetrated through misrepresentation and

concealment and the most flagrant betrayal of trust by agents who were seeking and securing the confidence of their victim.

Respectfully submitted,

SKEEN, BAYLE & RUSSELL
Attorneys for Appellants.