1981

Cerritos Trucking Co., Et Al. v. Utah Venture No. 1, Et Al. And Utah Development Company, Inc., Et Al. v. Bettilyon Realty Company, Et Al. : Brief of Cross Defendant-Respondent, Bettilyon Realty

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

CERRITOS TRUCKING CO., et al.,

Plaintiffs-
Respondents,

vs.

UTAH VENTURE NO. 1, et al.,

Defendants-
Appellants.

No. 17185

UTAH DEVELOPMENT COMPANY, INC., et al.,

Cross Plaintiffs-
Appellants,

vs.

BETTILYON REALTY COMPANY, et al.,

Cross Defendants-
Respondents.

BRIEF OF CROSS DEFENDANT-RESPONDENT, BETTILYON REALTY

Appeal from Judgment of the Third Judicial District Court, Salt Lake County, State of Utah, The Honorable Peter F. Leary

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CASES

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BRIEF OF CROSS DEFENDANT-RESPONDENT BETTILYON REALTY

STATEMENT OF THE CASE

The plaintiffs-respondents seek from the defendants-appellants damages and specific performance of an option to purchase real property; the defendants-appellants seek rescission of said option and, in the alternative, damages

against plaintiffs-respondents and cross defendants-respondents based upon misrepresentation and breach of fiduciary duty.

DISPOSITION OF THE CASE BY LOWER COURT

Following a trial by jury, the district court granted directed verdicts in favor of the plaintiffs and cross defendants and against the defendants, counterclaimants, and cross claimants and entered Findings of Fact and Conclusions of Law.

RELIEF SOUGHT ON APPEAL

The cross defendant-respondent, Bettilyon Realty and Investment Company, herein referred to as Bettilyon Realty Company, seeks to sustain the directed verdict of the district court.

STATEMENT OF FACTS

The cross defendant-respondent, Bettilyon Realty, agrees with the statement of facts as set forth as part of the Statement of the Case with Citations to the Record in the brief of the appellants and as modified and supplemented by the Statement of the Case as set forth in the brief of the plaintiffs-respondents and the cross defendant-respondent,

Dunahoo, except with regard to those facts and circumstances as are specifically considered below.

The appellant, William J. Lowenberg, is a real estate broker, having been so licensed in the State of California for some 30 years and with most of his experience being in the development of his own properties. (Tr. p. 52; testimony of Lowenberg). He has had significant experience in development of warehouses and industrial property in California prior to venturing into the State of Utah (Tr. pp. 53, 54; testimony of Lowenberg). He generally utilizes realtors only to locate potential tenants for his developments, and he normally determines his own price and terms. (Tr. pp. 55, 56; testimony of Lowenberg). In requesting assistance from Bettilyon Realty, Lowenberg advised he had some space and, if it had anybody interested, to come and see him. He did not sign any real estate listing agreement with Bettilyon. (Tr. p. 58; testimony of Lowenberg). The only agreement between Lowenberg and Bettilyon Realty was a letter dated February 21, 1978, prepared and mailed to Lowenberg by Bettilyon's sales representative, Gerald F. Daughtrey (Tr. p. 59; testimony of Lowenberg). That letter reads as follows:

> Dear Bill:
>
> This letter is to confirm our telephone conversation of February 17, 1978, registering my client, Fiber Science Inc., a Division of EDO Corporation of New York, for you[r] development in the Salt Lake International Center.

The commission schedule is 5% of sale price or 5% of gross lease.

I am looking forward to placing a client in your development.

Please execute and return original.

Cordially,

Gerald F. Daughtrey

[Emphasis added]

(Ex. 9-D)

Fiber Science had requested the assistance of Bettilyon Realty in locating space in Salt Lake City for its business operations. Bettilyon's representative, Gerald Daughtrey, showed the officers of Fiber Science the Lowenberg property. In April of 1978, Edmond Dunahoo, president of Fiber Science, met in Salt Lake City with Donald Heimark, (Tr. p. 138; testimony of Dunahoo) an officer of Cerritos Trucking. (Tr. p. 65; testimony of Heimark). Fiber Science was interested in leasing the Lowenberg property. (Tr. p. 140; testimony of Dunahoo). Heimark was a personal friend of Dunahoo and had been advised by the latter that Fiber Science was planning on moving its business operation to Salt Lake City. Heimark had determined that Cerritos Trucking might be interested in purchasing the Lowenberg property for investment purposes. (Tr. p. 66; testimony of Heimark). Cerritos Trucking determined that it wished to make an offer to purchase the Lowenberg property with the intention of subsequently leasing a portion to Fiber Science. (Tr. p. 70; testimony of Heimark; Tr. p. 140; testimony of Dunahoo). Daughtrey had presented to Lowenberg a

verbal offer from Fiber Science to lease a portion of the building at 13 1/2¢ a sq. ft. which offer was rejected by Lowenberg. (Tr. pp. 125 and 288; testimony of Daughtrey; Tr. p. 289; testimony of Lowenberg). Fiber Science did not thereafter again attempt to lease the building from Lowenberg. (Tr. p. 150; testimony of Dunahoo). There were two reasons why Dunahoo made no further attempts on behalf of Fiber Science to lease the property from Lowenberg: first, because Dunahoo was interested in participating with other Fiber Science officers in the purchase of the property (Tr. p. 168; testimony of Dunahoo); second, because Fiber Science needed assurances that it could expand into additional space in the building if the need arose, and Dunahoo believed that the additional space would be made available if the Fiber Science lease was with Cerritos Trucking. (Tr. pp. 169 and 170; testimony of Dunahoo). Lowenberg had told Daughtrey that he would not guarantee the availability of additional space in the building. (Tr. p. 123; testimony of Daughtrey).

In response to the meeting between Heimark and Dunahoo, Daughtrey submitted to Lowenberg a written offer for the purchase of the subject property by Cerritos Trucking Company. (Tr. pp. 70 and 71; testimony of Heimark; Ex. 3-P). Thereafter, a verbal agreement was reached between Mr. Lowenberg and Cerritos Trucking for the lease of the subject property to Cerritos Trucking with an option to purchase. On or about April 28, 1978, Lowenberg and Cerritos Trucking executed the lease and

Lowenberg executed the option to purchase. The option agreement had been prepared by Lowenberg's attorneys at his personal direction. (Tr. pp. 223 and 224; testimony of Lowenberg). On or about the same date, Cerritos Trucking sublet a portion of the building to Fiber Science pursuant to written agreement. (Ex. 10-P).

In about January of 1979, Lowenberg and Daughtrey learned that neither Dunahoo nor any of the other Fiber Science officers would be participating with Cerritos Trucking in the purchase of the property under the option. (Tr. pp. 211, 213, 273 and 274; testimony of Daughtrey). Thereafter, Cerritos Trucking exercised its option to purchase, and Lowenberg refused to complete conveyance of the property, alleging that he had granted the option for the purchase of the property with the understanding that the Fiber Science officers would participate in the purchase and that, in the absence of that participation, he no longer was obligated to sell and convey.

With particular reference to the Statement of Facts as set forth in the appellants' brief, it is therein represented that Daughtrey told Lowenberg that the Fiber Science group would own or participate in the ownership of the property. Mr. Daughtrey's testimony was that during the meeting in approximately the middle of 1978, in which he, Mr. Dunahoo, Mr. Lowenberg and others were present, Mr. Lowenberg was told either by himself or Mr. Dunahoo that Fiber Science officers did want to participate. (Tr. pp. 127 and 128; testimony of Daughtrey).

There was no representation by Daughtrey that the property would in fact be owned by the Fiber Science group. The appellant further represents that Daughtrey negotiated the option between Lowenberg and Cerritos Trucking. However, the evidence before the court was that Daughtrey neither determined the option price nor the length of the lease (Tr. p. 133; testimony of Daughtrey). He was neither involved in making recommendations to Lowenberg nor negotiating terms, but rather only in relaying information between Lowenberg and Cerritos Trucking. (Tr. pp. 117 and 286; testimony of Daughtrey; Tr. pp. 55 and 56; testimony of Lowenberg). Although Daughtrey advised Lowenberg that it was his understanding that the Fiber Science officers intended to participate in the property, it was at no time represented by Daughtrey that a lease by Fiber Science was conditional upon the property being sold to its officers. (Tr. pp. 207, 208 and 278; testimony of Daughtrey). While Mr. Lowenberg testified that he was unwilling to grant an option to purchase to anyone other than the officers of Fiber Science, such alleged intention was never communicated to either Mr. Daughtrey or the officers of Cerritos Trucking. (Tr. p. 106; testimony of Heimark; Tr. p. 275; testimony of Daughtrey). Mr. Dunahoo testified that he was not certain he had ever met Lowenberg. (Tr. p. 171; testimony of Dunahoo). It is obvious, therefore, that Lowenberg had made no such representation to him.

POINT I.

THE TRIAL COURT CAN GRANT A DIRECTED VERDICT IF THERE IS NO SUBSTANTIAL EVIDENCE IN SUPPORT OF APPELLANTS' CLAIMS

When there is no substantial dispute in the evidence and when the court can say as a matter of law that reasonable persons could find only one way on the facts, then it is the duty of the court to determine the applicable law and direct the jury to return a verdict under the law and the facts presented. Roylance v. Davies, 18 Utah 2d 395, 424 P.2d 142 (1967). Granting a motion for directed verdict is justified if there is no substantial basis in the evidence which would support a verdict for the non-moving party. Mel Hardman Productions v. Robinson, 604 P.2d 913 (Utah 1979).

Only if there is some substantial evidence in support of the essential facts which the defendant Lowenburg is required to prove in order to entitle him to recover is the question one of fact for the jury rather than one of law for the court. Christensen v. Utah Rapid Transit Co., 83 Utah 231, 27 P.2d 468, 471 (1933). "Substantial evidence is that which would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed." Mood v. Myers, 48 Wash. 2d 476, 296 P.2d 525 (1956).

POINT II.

THE TRIAL COURT WAS CORRECT IN GRANTING CROSS-DEFENDANT BETTILYON A DIRECTED VERDICT ON APPELLANTS' CLAIM THAT BETTILYON BREACHED A DUTY OF TRUST AND CONFIDENCE

A. BETTILYON AND APPELLANT LOWENBERG WERE NOT IN A FIDUCIARY RELATIONSHIP

Defendant Lowenberg failed to introduce any substantial evidence supporting the claim that Bettilyon was in a fiduciary relation to him. If a real estate agent is a middleman, no fiduciary relation to either principal exists. Barber's Super Markets, Inc. v. Stryker, 84 N.M. 181, 500 P.2d 1304 (Ct. App. 1972). The real estate agent is a middleman if employed for the mere purpose of bringing the possible buyer and seller together so that they may negotiate their own contract. Stryker, supra, at 1311. The middleman's duties are limited by his contract to finding and procuring a purchaser able, willing, and ready to accept the client's terms, or to effect a transaction with his client on any terms satisfactory to both parties. Smith v. Howard, 158 Cal. App. 2d 343, 322 P.2d 1034 (1958). In such a case, the broker has nothing to do with the trade. His advice is not needed. Anderson v. Thatcher, 76 Cal. App. 2d 50, 172 P.2d 533 (1946). The principal does not rely on the broker for the benefit of his skill or judgment. Stryker, supra. The broker is not entitled to use discretionary authority for the benefit of his employer. Smith, supra.

Mr. Lowenberg has had substantial experience in the real estate business. (Tr. pp. 51, 53, 54; testimony of Lowenberg). He has been a licensed real estate broker in the State of California for over a 30-year period. (Tr. p. 52; testimony of Lowenberg). Bettilyon and Lowenberg did not enter into any sales agency contract or listing agreement. (Tr. p. 58; testimony of Lowenberg). Mr. Lowenberg contacted a number of real estate agencies, including Bettilyon, notifying them that he had space available, and to "bring me a tenant." (Tr. p. 59; testimony of Lowenberg).

Mr. Lowenberg did not authorize Daughtrey to negotiate on his behalf; he simply wanted him to find a potential tenant at his terms. (Tr. p. 55; testimony of Lowenberg). Mr. Lowenberg is experienced and sophisticated in the real estate business and did not rely on the advice or skill of Gerald Daughtrey. Lowenberg himself set his own price and terms. (Tr. p. 56; testimony of Lowenberg). Mr. Daughtrey was "just an errand boy passing the information back and forth." (Tr. p. 117; testimony of Daughtrey).

Mr. Lowenberg introduced no substantial evidence showing that he vested any discretion in Daughtrey to negotiate on his behalf or that he counseled with him or placed any reliance on his advice. Rather, he relied on his own experience and judgment. Therefore, there existed no fiduciary relation between Bettilyon and Lowenberg.

B. EVEN IF BETTILYON WERE IN A FIDUCIARY RELATION TO LOWENBERG, THERE WAS NO BREACH OF A DUTY OF TRUST AND CONFIDENCE

Even if Bettilyon were in a fiduciary relation to Mr. Lowenberg, Bettilyon breached no duty of care. Lowenberg claims that Bettilyon breached its fiduciary duty since Daughtrey failed to lease the property to Fiber Science, as Lowenberg desired, but, instead, directed his efforts towards arranging a purchase of the property. However, as stated above, it was not within the scope of Daughtrey's responsibilities to negotiate on behalf of Lowenberg. Lowenberg conducted his own negotiations. Daughtrey's duties were limited to presenting offers, relaying messages, and obtaining signatures from the parties. Lowenberg's attorney prepared the option agreement. (Tr. p. 29; testimony of Lowenberg).

Lowenberg also claims that Bettilyon breached its fiduciary duty since Daughtrey had failed to inform Lowenberg that Fiber Science would have leased the property whether or not a purchase option was granted to its officers. This claim, however, is inconsistent with the evidence. Lowenberg was aware that Fiber Science was interested in leasing the property. Lowenberg testified that Daughtrey had presented to him a verbal offer from Fiber Science to lease part of the building. (Tr. p. 289; testimony of Lowenberg). Lowenberg rejected this offer. Subsequently, Fiber Science did not extend any further offers to

Lowenberg to lease the property. Later Fiber Science leased part of the building from Cerritos Associates. Fiber Science, in part, did not lease directly from Lowenberg because Lowenberg could not guarantee Fiber Science the availability of additional space it may have needed for future expansion. (Tr. p. 170; testimony of Dunahoo; Tr. p. 123; testimony of Daughtrey).

III.

THE TRIAL COURT WAS CORRECT IN DIRECTING A VERDICT IN FAVOR OF BETTILYON ON APPELLANTS' CLAIM OF MISREPRESENTATION

A. THERE WAS NO MISREPRESENTATION OF A PRESENTLY EXISTING FACT

The trial court was correct in granting a directed verdict in favor of Bettilyon since Lowenberg failed to produce substantial evidence of each of the required elements of fraud:

> (1) that a representation was made; (2) concerning a presently existing material fact; (3) which was false; (4) which the one making the misrepresentation either (a) knew to be false, or (b) made recklessly knowing 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 ignorance of its falsity; (7) did in fact rely upon it; (8) and was thereby induced to act; (9) to its injury and damage."

Cheever v. Schramm, 577 P.2d 951, 954 (Utah 1978). Each element of fraud must be proved by clear and convincing evidence. Cheever, supra. Therefore, the directed verdict is incorrect only if there is substantial evidence to meet Lowenberg's burden of clear and convincing proof.

Lowenberg claims that Daughtrey misrepresented that the option to purchase was for the benefit of the officers of Fiber Science and that those individuals would own or participate in the ownership of the property upon exercising the option. It is not disputed that Daughtrey did present an offer to Lowenberg from Cerritos Trucking for a lease and an option to purchase in which it was intended that the officers of Fiber Science would participate to some degree in ownership of the building.

Lowenberg's fraud claim is clearly inadequate since no misrepresentation was made of a presently existing material fact. Cheever, supra. Daughtrey simply presented to Lowenberg an offer, which he accepted, for Cerritos Trucking to have a lease on the property and an option to purchase. When the option was set up, Dunahoo and Heimark intended and so advised Daughtrey that the officers of Fiber Science were to participate in the ownership of the property. (Tr. pp. 153 and 168; testimony of Dunahoo; Tr. pp. 88-90; testimony of Heimark; Tr. p. 130; testimony of Daughtrey). Daughtrey relayed this to Lowenberg. At the most, this was a representation of intention. The only premise upon which that representation can be actionable as fraud is if, at the time it was made, Daughtrey actually did not intend that the officers of Fiber Science would participate in ownership of the property. Schrow v. Guardstone, Inc. 18 Utah 2d 134, 417 P.2d 643, 645(1966). An expression of an intention to perform is actionable as fraud only if the representation of intention was contrary to the actual intention

of those making the representation. Berkeley Bank for Cooperatives v. Meibos, 607 P.2d 798 (Utah 1980). Lowenberg would have to prove that at the time Daughtrey made the representation that Daughtrey, Dunahoo, and Heimark intended the officers would participate in ownership, they actually did not so intend. Thus, Lowenberg would have to prove that Daughtrey had an actual intent to deceive. However, absolutely no evidence was introduced that Daughtrey did not intend at the time of the execution of the option that the officers of Fiber Science would not participate in ownership of the property or that Daughtrey attempted to actually deceive Lowenberg into believing that the officers would participate in ownership.

B. APPELLANTS CANNOT MAKE A CLAIM FOR NEGLIGENT MISREPRESENTATION SINCE THIS CLAIM IS INCONSISTENT WITH THEIR THEORY THAT A MISREPRESENTATION WAS MADE OF A PRESENTLY EXISTING FACT

As stated above, for Lowenberg to be successful on a fraud action he must prove that a misrepresentation was made of a presently existing fact. Since the alleged misrepresentation made in this case was an expression of an intention to perform in the future, Lowenberg, to be successful on his claim, must prove that Daughtrey actually intended to deceive Lowenberg. Lowenberg would have to prove that Daughtrey actually did not intend that the officers of Fiber Science would participate in

ownership of the property even though he represented that his intention was that they would participate. This is a requirement of actual deceit. Since Lowenberg must prove actual deceit by Daughtrey, a claim of a negligent misrepresentation is not available as a cause of action. When the alleged misrepresentation is an expression of an intention, actual deceit is required for a misrepresentation cause of action. A negligent misrepresentation could not fulfill the required element that there must be misrepresentation of a presently existing fact.

C. EVEN IF APPELLANTS DO HAVE A CAUSE OF ACTION FOR NEGLIGENT MISREPRESENTATION, BETTILYON, AS A MATTER OF LAW, MADE NO NEGLIGENT MISREPRESENTATION

The elements of negligent misrepresentation must be proved by clear and convincing evidence. Jardine v. Brunswick Corp., 18 Utah 2d 378, 423 P.2d 659 (1967). Therefore, the directed verdict is incorrect only if there is substantial evidence to meet Lowenberg's burden of clear and convincing proof.

Defendant Lowenberg failed to present substantial evidence that Daughtrey made a negligent misrepresentation. Daughtrey presented an offer to Lowenberg in which it was anticipated that the officers of Fiber Science would participate in ownership of the property. The officers had a good faith

reasonable basis to believe that they could participate. The president of Fiber Science testified:

> Q. All right. Now, you were the president of Fiber Science at this time, as you've earlier testified. What made you believe that you could participate in ownership of the building that was being leased to your own company?
>
> A. My understanding of the corporate policy was if it were an arms-length deal that it would be satisfactory to be involved in such an arrangement.
>
> Q. Did you believe that this was an arms-length deal?
>
> A. Yes.
>
> Q. On what basis?
>
> A. Because we had negotiated the lease with Cerritos Trucking that was less than was being required for the building originally.

(Tr. pp. 143-144; testimony of Dunahoo).

Daughtrey reasonably and in good faith presented the offer to Lowenberg. Lowenberg must prove that Daughtrey reasonably should have known that the officers of Fiber Science did not intend to participate. There was no evidence produced that the officers of Fiber Science actually did not intend to participate. Daughtrey simply presented an offer. He had no reason to know or suspect that the officers of Fiber Science could not participate or did not intend to participate. He knew nothing of the corporate policy of Fiber Science preventing officers from participating. He had no duty to conduct an investigation to determine the actual intentions of the officers of Fiber Sciences. He has no duty to make a legal determination of the capacity of officers of a corporation to lease property

to their own corporation. He simply informed Lowenberg of a proposed offer which he can reasonably do without verifying the capacity of the buyer to perform the offer. A broker does not grarantee a buyer's performance. FMA v. Build, Inc., 17 Utah 2d 80, 404 P.2d 670(1965).

Additionally, Lowenberg negligently failed to protect his own interest.

> In regard to this alleged cause of action for negligent misrepresentation, it is pertinent to keep in mind that there is recognized a defense somewhat analogous to contributory negligence in other tort actions. The one who complains of being injured by such a false representation cannot heedlessly accept as true whatever is told him, but has the duty of exercising such degree of care to protect his own interests as would be exercised by an ordinary, reasonable and prudent person under the circumstances; and if he fails to do so, is precluded from holding someone else to account for the consequences of his own neglect.

Jardine v. Brunswick Corp., 18 Utah 2d 378, 423 P.2d 659(1967).

Lowenberg "was no neophyte, but was a man of considerable business experience." See Jardine, supra. Lowenberg failed to inquire whether Fiber Sciences would still lease the property if he did not extend an option to purchase to its officers. This failure to inquire is clearly negligent since Fiber Science had previously made an offer to lease which Lowenberg rejected (Tr. p. 289; testimony of Lowenberg), and Lowenberg, therefore, knew that Fiber Science was interested in leasing.

Lowenberg's attorney prepared the option. (Tr. p. 29; testimony of Lowenberg). Lowenberg could easily have assured the participation of ownership of the officers of Fiber Science by including in the option a restrictive assignment clause.

Lowenberg presented no substantial evidence of a negligent misrepresentation by Daughtrey. Even if there were, Lowenberg's own negligence in failing to inquire as to the possibility of a lease and in failing to direct his attorney to insert a restrictive assignment in the option would deny him the relief he seeks.

CONCLUSION

Appellants failed to present substantial evidence in support of each element of their claims; therefore, the trial court was correct in granting respondent Bettilyon a motion for directed verdict.

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CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing Brief of Cross Defendant-Respondent, Bettilyon Realty, were delivered on this 13th day of March, 1981, to:

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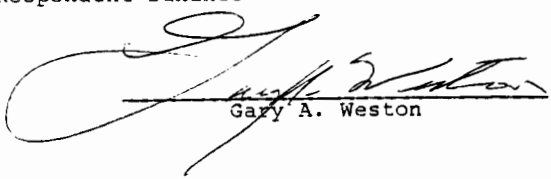

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