1959

# Calvin M. Kempf and Mary B. Kempf v. Jack H. Denter and Ohrea N. Denter : Brief of Appellants

Utah Supreme Court


Olsen and Chamberlain : Attorneys for Plaintiffs;

# IN THE SUPREME COURT OF THE STATE OF UTAH



CALVIN M. KEMPF and
MARY B. KEMPF,
*Plaintiffs and Appellants,*

— vs. —

JACK H. DENTER and
OHREA N. DENTER,
*Defendants and Respondents.*

Case
No. 9032

# BRIEF OF APPELLANTS

OLSEN AND CHAMBERLAIN,
*Attorneys for Plaintiffs.*

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## Authorities Cited



## Cases Cited



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# BRIEF OF APPELLANTS

## STATEMENT OF FACTS

This appeal is taken from a verdict of the jury finding that the plaintiffs had fraudulently induced the defendants to enter into a certain uniform real estate contract for the sale of a motel and cafe known as the Fireside Motel and Cafe at Ephraim, Utah, wherein the plaintiffs and appellants were the sellers and the defendants and respondents were the buyers. A judgment was thereafter entered awarding the defendants the sum of $7,000.00.

In this Statement of Facts we have stated the defendants' case in the best possible light and in most instances refer directly to the testimony of the defendants. For this reason, the facts cannot be controverted since the defendants' case can be no stronger than their own testimony. *Ray* v. *Consolidated Freightways,* 4 U. 2d 137, 289 P. 2d 196.

Jack H. Denter and Ohrea Denter, his wife, negotiated for a period of 14 to 15 months for the purchase of the Fireside Motel at Ephraim, Utah, from the appellants (Tr. 261). Jack Denter was a man of considerable business experience having served as the Sales Manager for Maycock Brokerage Company (Tr 249) and also having owned and operated a cafe in Salt Lake City, Utah, for approximately eight years (Tr. 212). Mr. Denter had a great deal of experience in analyzing business costs and records involved in such operations (Tr. 250). On cross-examination Mr. Denter displayed a very apt knowledge of costs, methods of computing costs and estimating costs from gross proceeds and receipts (Tr. 250, 255).

The parties finally entered into the sales agreement which is the subject of this action on the 26th day of August, 1957. Thereafter in the latter part of September the Denters moved to Ephraim, Utah, and took over the active operation of the Fireside Motel and Cafe. The Denters operated the cafe with the help of Mr. and Mrs. Kempf during the months of October, November, and December of 1957, at which time they continually expressed satisfaction with their purchase and the operation of the property (Tr. 326). The Denters then con-

tinued to operate the cafe property for an additional five months or an approximate total period of eight months, at which time they served notice upon the Kempfs that they were rescinding their contract because of the fraudulent representations made during the sales negotiations. An action was filed and the issues were defined and the plaintiffs were accused specifically of making the following fraudulent representations which induced the defendants to enter into the uniform real estate contract under which the motel property was purchased (Answers to Interrogatories, Record 13, 14). They stated that the plaintiffs had misrepresented the facts as follows:

A. That they had no other sources of income other than the operation of the motel and cafe.

B. That during the operation of the motel they had accumulated in the bank $28,000.00.

C. That from the operation of the motel and cafe, the profit had been sufficient to pay for the same in full in seven years.

D. That the profit from the operation of the motel and cafe were sufficient to permit the plaintiffs to purchase a new Buick four out of five years.

E. That the operation of the cafe and motel would gross the sales price within two years.

F. That the operation of the cafe and motel could be handled by hiring all of the help and it would make a profit.

G. That the low net for the operation would be $10,000.00.

H. That only 90 per cent of the gross receipts of the cafe were reported and the plaintiffs inferred that not all of the funds received in operating the motel were reported.

I. That the income from the operation of the cafe and motel was sufficient to pay an average payroll of approximately $400 and $900 per month and still show a good profit.

J. That the profits from the operation were sufficient to pay the expenses of sending two children to private schools.

K. That the plaintiffs' liquor bill alone charged to the business ran over $1,000.00 a year.

L. That the plaintiffs were reluctant to sell, but were doing so because of the ill health of Mary B. Kempf.

The Kempfs denied that the statements were made to the defendants. The evidence showed that during the fourteen to fifteen months of negotiations between the parties on the sale of the properties that the respondents made a good many trips down to view the properties and made inquiries of other sales people who had stayed at the property and also examined the books and accounts of the appellants concerning the exact income and expenses of the business. The books were made available to them on any request and upon one occasion both respondents examined the books in some detail concern-

ing the gross income and expenses of the business. Mrs. Denter specifically recalled going over such items as exact days' receipts for the gross business on certain dates and also such expenses as the gas bill, electric light bill, and salaries (Tr. 458 to 462).

The jury impaneled to hear the matter found for the Denters and against the Kempfs, and awarded the sum of $7,000.00 to the Denters. This appeal is taken from that verdict and the judgment of the Court based thereon.

## STATEMENT OF POINTS

### Point I.

THE TRIAL COURT ERRED IN REFUSING TO GRANT A DIRECTED VERDICT FOR THE PLAINTIFFS BELOW AND FURTHER ERRED IN REFUSING TO SET ASIDE THE VERDICT OF THE JURY AND GRANT JUDGMENT IN FAVOR OF PLAINTIFFS NOTWITHSTANDING THE VERDICT.

### Point II.

THE COURT ERRED IN ADMITTING INTO EVIDENCE EXHIBITS AND STATEMENTS NOT RELIED UPON BY THE DEFENDANTS AND NOT KNOWN TO THE DEFENDANTS.

### Point III.

THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE EXHIBITS CONTAINING INFLAMATORY HEARSAY AND CONCLUSIONS OF COUNSEL.

## ARGUMENT

### Point I.

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PLAINTIFFS BELOW AND FURTHER ERRED IN REFUSING TO SET ASIDE THE VERDICT OF THE JURY AND GRANT JUDGMENT IN FAVOR OF PLAINTIFFS NOTWITHSTANDING THE VERDICT.

Assuming the representations to have been made as testified to by the respondents herein an examination of the representations leads to one conclusion: The representations claimed go to the fact of income from the cafe and motel business either directly or indirectly. Mr. Denter claims that the representations were another way by saying that the amounts of profit from the motel operation were substantial.

Even assuming arguendo, that the representations were made and that they were made for the purpose of inducing the defendants to act, we find neither reliance nor any entitlement to rely upon those representations by the defendants to their injury and damage as is required under decisions of this Court. *Pace v. Parish*, 122 Utah 141, 247 P. 2d 273. From the defendants' testimony we find without contradiction that they, Jack Denter and his wife Ohrea Denter, did examine the books of the Fireside Motel. Jack Denter testified that he examined the books to some extent on at least two occasions. Ohrea Denter testified that she spent some time in the company of her husband and one of the sellers, Mary Kempf, in examining the books and particularly books concerning wage items, sales items, a gas bill, electric light bill, and that they examined particularly individual day receipts (Tr. 458 to 462). Mrs. Denter then stated that she did not go through the books thoroughly, but that she did examine

item by item certain days' receipts and did comment upon them and discuss them with her husband and Mary Kempf; that she and Mary Kempf left the room and left the books with Calvin Kempf, Jack Denter, and a salesman by the name of Broome. The defendants did not rely upon any of the alleged statements or representations claimed to have been made by the plaintiffs. They made an independent investigation and had all of the facts open to them upon the investigation. Under these circumstances the buyers cannot be heard to say that they had a right to rely on representations they undertook to investigate and verify themselves, particularly where all the information was available to them (Am. Jur., Vol. 23, Fraud & Deceit, Sec. 147).

The representee cannot assert fraud when he closes his eyes in order not to see it; he must take some precaution against being deceived by those with whom he deals. *Pace* v. *Parrish, supra,* Annotation: 61 ALR 511. The defendants below and respondents here have not proved by clear and convincing evidence that they relief upon any of the alleged representations made by the plaintiffs. *Pace* v. *Parish, supra.* Conversely, the evidence of the respondents convincingly demonstrates that they did not rely on the plaintiffs but insisted upon an examination of their books which were an accurate record of the plaintiffs' business activity; and that the defendant Jack H. Denter had sufficient experience to clearly understand the books and records and to interpret them in the light of his experience with a similar type business. The major part of the receipts of the Fireside Cafe and Motel were

from the cafe operation, a type of operation in which Mr. and Mrs. Denter had been connected for the past years in Salt Lake City.

Even assuming that the representations enumerated in the Statement of Facts were made, the defendants have no right to close their eyes and accept unquestioningly any representations made to them but they have the duty to make such investigation of inquiry as reasonable care under the circumstances would dictate. And in this case such investigation was made. The duty of a reasonable man under such circumstances as is discussed in detail in the case of *Lewis et al* v. *White, et al,* 2 Utah 2d 101, 269 P. 2d 865. No matter how naive or inexperienced the defendants were, they could not close their eyes and accept unquestionably any representations made to them. It was their duty to make such investigation and inquiry as reasonable care under the circumstances would dictate.

There being no evidence whatsoever disputing the respondents' independent investigation they are precluded, as a matter of law, from recovery, and the matter should not have gone to the jury.

A second novel situation is presented in this case since the buyers took possession of the property and all its benefits and operated it for a period of eight months before electing to rescind their contract. This case falls within the well settled rule that the right to elect to rescind a contract on the ground of fraud must be exercised promptly upon discovery of the fraud and that any delay which is inconsistent with the degree of promptness required by the circumstances is a bar to relief and con-

stitutes a defense to the proceedings (24 Am. Jur., p. 32, Sec. 208). The defendants, buyers of the Fireside Motel and Cafe, took active possession of the property the latter part of September and actively operated it during the months of October, November, and December of 1957, after which period of time they made the first installment payment due under the uniform real estate contract, Exhibit 1, of $1,350.00, which payment was made in January, 1958, by the defendants to the plaintiffs shortly after its due date of December 31, 1957 (Tr. 327). During this period the defendants took all of the benefits of the operation and on many occasions expressed satisfaction with the business to the plaintiffs who were then assisting them with the operation. The following is a portion of the transcript shown at pages 326 to 327:

CROSS - EXAMINATION — JACK H. DENTER

Q. Yes. Then in your opinion, $35,000.00 gross would have been bad business?

A. That is right, sir. With the expenses and my private expenses, such as Dentist bills and that, I don't think it would carry it. Yes sir, I think it is bad.

Q. Now Mr. — excuse me just one minute.

A. Yes sir.

Q. Mr. Denter, did you discuss the business of the motel with Mr. and Mrs. Kempf during the months of October, November, and December of 1957?

A. Not in the way of business. We just worked together. I don't think there was anything that I can recollect that there was anything. I was plenty

satisfied with the business at that time, because it was a good business at that particular time.

Q. As a matter of fact, did you tell them that you were satisfied with the business?

A. At that particular time, yes.

Q. And did you tell them that you liked the town?

A. I certainly did.

Q. And you liked your customers?

A. That is right.

Q. And that you appreciated their help?

A. That is right.

Q. And did you — you told them on numerous occasions during the month of October, November, and December, isn't correct?

A. Yes. That I appreciated their help, I sure did.

Q. Yes. Now during the month of January, did you have any discussions with Mr. and Mrs. Kempf concerning the business?

A. No sir, I didn't.

Q. During the month of January, you made your quarterly payment which was due the last of December, isn't that correct? During the month of January, you made a payment on the contract?

A. That was for October, November, and December of 1957.

Q. That is right.

A. Yes.

Q. But you made it in the latter part of January?

A. That is right.

Q. And at that time you were satisfied with the business?

A. That is right.

Q. Now when did you first become dissatisfied with the business?

A. About March.

Under these circumstances and for a period of eight months the defendants continued to treat the contract as valid and the property as their own and continued to perform under the contract. Their conduct was such as to ratify and confirm the entire contract if we could assume that they had the alternative of rescission available to them. It further appears that if their gross income from the period were extended for a full calendar year, their income would have exceeded $35,000.00. This sum is considerably in excess of the minimum of $30,000.00 the plaintiffs represented the business had grossed in past years. The evidence was that the defendants repeatedly affirmed the contract and they therefore cannot now be heard to demand rescission. A similar fact situation appeared in the landmark case of *Grymes* v. *Sanders,* 93 U. S. 55, 62, where the court used the following language:

> * * * Where a party desires to rescind upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once announce his purpose and adhere to it. If he be silent, and continue to treat the property as his own, he will be held to have waived the objection, and will be conclusively bound by the contract, as if the mistake or fraud had not occurred. He is not permitted to play fast and loose. Delay and vacillation are fatal to the right which had before sub-

sisted. These remarks are peculiarly applicable to speculative property like that here in question, which is liable to large and constant fluctuations in value. * * *

In addition to the evidence which developed during the course of the trial, it should be noted that Exhibit 3, the uniform real estate contract entered into by the parties, includes the following provision:

> It is hereby expressly understood and agreed by the parties hereto that the Buyer accepts the said property in its present condition and that there are no representations, covenants, or agreements between the parties herewith with reference to said property except as herein specifically set forth or attached hereto.

The parties expressly contracted against any warranties or representations which were beyond the contract itself. The defendants expressly acknowledged satisfaction thereby with their own investigation.

## Point II.

## THE COURT ERRED IN ADMITTING INTO EVIDENCE EXHIBITS AND STATEMENTS NOT RELIED UPON BY THE DEFENDANTS AND NOT KNOWN TO THE DEFENDANTS.

Over objection (Tr. 111, Tr. 130) of the plaintiffs, the Trial Court allowed into evidence Exhibit No. 12 which was a listing card on the Fireside Motel and Cafe at Ephraim, Utah, which was given to the Klinger Realty Company on September 15, 1955, and which expired December 15, 1955. The Listing Agreement was never seen by Mr. or Mrs. Denter, and for that reason was never relied upon by them. The exhibit was damaging and

prejudicial to the plaintiffs in that it had a gross income figure of approximately $38,000 to $50,000.00. The evidence developed that the gross income of the business had been in the area of $30,000 to $35,000.00, which gross was in full accord with the exhibit actually seen by Mr. and Mrs. Denter (Exhibit 13) which represented the gross as between $30,000 and $50,000.00.

The Court further erred in allowing evidence over the objection of counsel that statements had been made by Mr. Kempf to one of the salesmen of Klinger Realty that, it looks like they would make $60,000 annually on the place. The secretary, Mrs. Virginia Brown, claimed that she overheard this statement being made but that she was in another room and did not know exactly the connection in which the statement was made (Tr. 113, Tr. 115). Further, Mr. Kempf was cross-examined in regard to a $60,000.00 statement. The prejudicial effect this evidence had on the jury was that it led them to believe that Mr. Kempf had a propensity to make fictitious statements about the business and it would influence the jury to be more likely to believe the statements the defendants said the plaintiffs made. The statements were never shown to have influenced the defendants, as a matter of fact they were not known to the defendants. The representations which were allowed in evidence were also beyond the pleadings in the case contrary to the requirement imposed by Rule 9B, Utah Rules of Civil Procedure, requiring allegations of fraud to be pleaded specifically. The plaintiffs had no notice of these charges or allegations and the immaterial matters were brought before the

jury to inflame and prejudice them. It is entirely possible that the entire decision of the jury was based upon these items.

## Point III.

### THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE EXHIBITS CONTAINING INFLAMATORY HEARSAY AND CONCLUSIONS OF COUNSEL.

Over objection of plaintiffs' attorneys the Trial Court allowed into evidence Exhibits 8 and 9, which were letters of council directed to the plaintiffs which were in such language as to prejudice a jury. The exhibits have the effect of giving conclusions of counsel based on hearsay evidence, the status of admissible evidence which would entitle the jury to give that evidence substantial weight and upon which they could base a decision.

## CONCLUSION

In conclusion we submit that the Trial Court erred in failing to grant the plaintiffs' motion for a directed verdict, and further in failing to grant the plaintiffs' motion for a judgment notwithstanding the verdict of the jury. As a matter of law the defendants were not entitled to place any reliance on representations alleged to have been made, and further the defendants affirmed and ratified the contract by their subsequent conduct.

Respectfully submitted

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