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

Utah Supreme Court

Bushnell, Crandall & Beesley; Attorneys for Respondents;

IN THE SUPREME COURT
of the
STATE OF UTAH

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

vs.

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Defendants and Respondents.

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BRIEF OF RESPONDENTS

BUSHNELL, CRANDALL & BEESLEY
Attorneys for Respondents

INDEX

AUTHORITIES CITED

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STATEMENT OF FACTS

Although the Respondents do not agree with all of the statements contained in the Statement of Facts made by the Appellants, no extended discussion will be made at this time since the points argued require a review of the evidence pertinent to the issues raised on appeal. However, the Respondents feel obligated to call attention to the fact that the Statement of Facts unduly emphasizes claimed negotiations for a period of 14 to 15 months, that the Respondents continually express

satisfaction with their purchase, and the claim that the Respondents frequently examined the books in some detail. An offer was made and refused in the summer of 1956 and thereafter no negotiations of any consequence were conducted by the parties until the following summer when at the instigation of the Appellants, new negotiations were commenced. During the fall of 1957 as a result of the hunting trade, the operation and receipts from the business were satisfactory. However, starting with the first part of 1958 the gross receipts were not as represented and in March and April the Respondents became suspicious of the accuracy of the representations made by one of the Appellants, and on May 12, 1958 notice was served upon the Appellants that it appeared that the motel was sold as a result of misrepresentations. According to the Respondents they were only able to make a cursory examination of books, representing a few months operation, which were not complete or showed any totals of any consequence. However, these matters will be discussed in more detail in the argument of the points presented by the Appellants.

STATEMENT OF POINTS

Point I.

THE TRIAL COURT PROPERLY SUBMITTED THE CASE TO THE JURY. (Reply to Appellant's Point I.)

Point II.

THE COURT COMMITTED NO ERROR IN ITS RULINGS ON ADMISSIBILITY OF EVIDENCE. (Reply to Appellants' Point II and III).

ARGUMENT

Point I.

THE TRIAL COURT PROPERLY SUBMITTED THE CASE TO THE JURY.

The first point relied upon by the Appellants challenges the sufficiency of the evidence for submitting the same to the jury, and contends that the Court should rule as a matter of law in favor of the Appellants. It is fundamental that if there is any substantial competent evidence, the case will be submitted to the jury on factual issues. The issues raised by the Appellants go to the question of whether there was in fact actual reliance by the Respondents upon representations made by the Appellants and whether the Respondents notified the Appellants of their intention to rescind within a reasonable period of time after becoming aware of the misrepresentations.

A. RELIANCE. The main contention of the Appellants in this regard is to the effect that the Respondents had ample opportunity to examine the books and records of the Appellants in connection with their operation of the cafe and motel, and as a result of such inspection they, therefore, did not rely upon any representations made by the Appellants. It is hard to believe that there is any validity to this argument since if the Respondents had in fact had ample opportunity and did examine the books and therefore knew the true nature of the operation of the business for the preceding years, they would have learned that from 1951 through 1957 when it was sold to the Respondents the business had operated at a loss (Exhibits 19 and 20). It cannot seriously be contended that the Respondents

would sell a cafe and terminate his employment which nette for him during 1956 $7,339.10 (Exhibit 23) and knowingl take over a losing operation.

Since the jury found in favor of the Respondents, it i assumed that they believed their statements concerning a examination of the books. The Respondents stated that the only had an opportunity on one occasion to make a cursor examination of a few of the items in the books involving the operation. This evidence is corroborated by the testimony o the Real Estate Agent who was present and interested the Respondents in the motel and cafe. The testimony of Mr. Denter, one of the Respondents, is as follows:

> Q. And tell us what took place in connection with those books?
>
> A. Well, I ask Mrs. Kempf if that was the books. And she said this was just for 1957. That they were not complete. And I went through them, and the thing that impressed me the most on the books, was the salary of $400.00 to $900.00 a month throughout the year.
>
> Q. Did you discuss that with Mr. Kempf?
>
> A. I told Mr. Kempf, that if I cut down with my family, the salary, that it would help pay my down payment, my payments each month.
>
> Q. Did you at any other time see any of the books?
>
> A. No sir, I did not.
>
> Q. Did you at any other time ask to see the books?
>
> A. In 1956, when Mr. Kempf said that they were in Richfield at that time was the only time that I ever

saw the books was in 1957 at one time, and that was in just 1957 records.

Q. And how long did you take to examine the books?

A. Just a few minutes, because they weren't complete. The thing that impressed me most with the books was the salary of $400.00 to $900.00 a month.

Q. Did discussions and negotiations continue while you were examining them there?

A. No. They let me look through, me and the wife, kind of glanced through them. But they didn't have any totals on them at that particular time that I recall.

Q. In other words, you didn't have any totals as to what the gross was for that much of the year or expenses? You could just look at individual items?

A. Yes.

Q. For any particular time?

A. That is right.

Upon cross-examination Mr. Denter again reaffirmed that he only saw the books on one occasion (Tr. 257).

Again at Page 330 of the Transcript on cross-examination, the witnesse testified: "The only time I ever saw any of his books was just prior to my purchasing and they were incomplete records of the year 1957" (Tr. 454).

Mrs. Denter testified concerning this same subject matter as follows:

Q. Mrs. Denter, upon how many occasions did you come to Ephraim in connection with the proposed purchase of the Fireside Motel and Cafe?

A. Three times.

Q. And would you be able to tell us in what years those trips were made?

A. There were two trips in '56 and one in '57.

Q. During any of those trips, did you or your husband have occasion to examine the books of the operation?

A. In the yeat of '57.

Q. And you only came on one trip in '57, is that right?

A. Just one.

Q. And where were those books located when they were examined?

A. In the Kempf home.

Q. Any particular room or place in the Kempf home?

A. In the front room.

Q. Did you or your husband at any time ever examine books when you were present at the kitchen table?

A. No sir, never.

Q. Was there a discussion before that examination took place concerning those books with Mrs. Kempf?

A. Yes sir. Mrs. Kempf said that they weren't complete. We were able to look at them, what she did have there.

Again on page 159 of the Transcript Mrs. Denter testified that the books were not complete and they only glanced at a few of the months in 1957. Mr. Broome, a Real Estate Agent and an independent witness, corroborated the testimony of the Respondents as follows (Tr. 164 and 165):

Q. Well do you recall being in the home with Mrs. Kempf and where some books were available for inspection?

A. Yes.

Q. All right, did you or did you not go over with Mr. Kempf to get some coffee at that time?

A. I do not remember going.

Q. And what discussion took place at that time concerning the books?

A. Well, Mr. Denter naturally wanted to see some of the earlier books. There was only the, as I recall, the 1957.

Q. What was said about it?

A. Mr. Denter wanted to see them and Mr. Kempf said they were in Richfield. So of course, they weren't available.

Q. What about the books that were there. Did you examine them?

A. Only briefly.

Q. Were they summarized and complete?

A. No.

Q. What?

A. They were incomplete. They were still working on them.

Q. Is that the only time any discussion was ever had in your presence concerning the examination of books?

A. I think that is the only time we ever saw any books, yes.

On cross-examination this witness maintained his position as shown in the foregoing testimony (Tr. 202).

A further factor to be considered by the jury as to whether the Respondents should have insisted upon securing all of the books and examined them was the testimony of the Appellant Mr. Kempf that his wife's health was not good and that was the reason he had to sell. The Respondent Denter was asked concerning this item and the effect it had upon him, and he stated as follows: "I just took Mr. Kempf's word that his wife's health wasn't at the best and that is why he had to sell." And again concerning the same subject matter, whether it was taken into consideration, the following question and answer was reported:

> Q. And that didn't enter into your consideration in buying the business?
>
> A. Well yes. It had a bearing on it, because I couldn't understand why a man would want to sell such a profitable business unless he had a good reason to sell it. And I figured that that was as good a reason as any. And I know that I would sell my cafe if my wife were in the same position.

People are normally trusting by nature and are reluctant to challenge or show any suspicion or doubt as to the veracity of statements made by other persons. Such suspicion would have been shown if under the circumstances the Respondents had insisted upon seeing all of the books. The statement as to Mrs. Kempf's health was more than sufficient to throw the purchasers off guard.

The foregoing evidence was more than sufficient to

warrant the submission of this issue to the jury. The Court in Instruction No. 9 (R. 56) instructed the jury as follows:

> "You are further instructed that before a fraudulent misrepresentation is material, the representee must have had a right to rely on the statements made by the representor and must have actually relied thereon as an inducement to his action.
>
> "Therefore, if you find that the defendants did not rely upon any statements made by the plaintiffs, or that they made independent investigation themselves and relied upon their own investigation, you must find for the plaintiffs and against the defendants."

The issue having properly been submitted to the jury, and the jury having found the facts in favor of the Respondents, the Court properly denied the motion for new trial, or judgment notwithstanding the verdict. The Respondents were told that the business would make a net profit of $10,000.00 a year. An examination of the complete books would have disclosed that there was in fact a loss for each of the years. Under such circumstances, it is inconceivable that the Respondents did in fact make a complete and thorough investigation and as a result thereof relied upon the information contained in the books as contrasted to the representations made by the Appellants.

B. TIMELINESS OF RECISSION. The Appellants contend that the Court errored in submitting this issue to the jury. Whether a party acts within a reasonable period of time in exercising the right to rescind after acquiring knowledge of the falsity of the representations is a factual question. It is only in extreme cases where no reasonable minds could conclude

to the contrary is the Court permitted to rule as a matter of law that the recission was not made timely.

The Respondents made only one quarterly payment on the contract and that was for the last quarter of 1957. The receipts for those months were consistent with a gross revenue within the minimums represented by the Appellants. It was testified by the Respondents that the hunting season was a factor in having good business for the months (Tr. 227). At the expiration of the first quarter of 1957, the Respondents stated that the business was very, very poor (Tr. 227), and that in March or April it was necessary for the Respondents to cash in four insurance policies (Tr. 328) and further that in April or May he had a discussion with one of the Appellants concerning the payment of a balance owing on an inventory, at which time he discussed with him the fact that the business as represented was not present (Tr. 230).

One of the other representations relied upon by the Respondents were statements made by the Appellant Kempf that he had no other source of income, other than from the operation of the motel (Tr. 160, 231). The Respondent, Jack Denter, testified that April went by and in the first part of May as a result of a contact with a customer, he went into Salt Lake and asked his attorney to make an investigation concerning employment of the Appellant Kempf (Tr. 228, 229). At the conclusion of that investigation, the Respondent requested that a letter dated May 12, 1958, Exhibit 8, be sent to the Appellants. Exhibit 8 discloses that reference was made to the claimed misrepresentations and that Mr. Denter desired to cancel and rescind the contract. A meeting was requested

with the Appellants, or their attorney. No reply was received to that letter and on June 2, 1958, by registered mail, the contract was actually rescinded (Exhibit 9). Further testimony concerning the timeliness and rescission can be found in the Transcript at pages 227 and 228, 230, 317, and 328. Mrs. Denter testified concerning the subject matter as follows (Tr. 455):

> Q. Mrs. Denter, when did you first know that Mr. Kempf had another full time job from which he was receiving compensation?
>
> A. Not until Mr. Denter went into Salt Lake City to see you, and that was around the last of April, or the first part of May. I forgot just what time that you investigated for him.

Since most of the misrepresentations were concerning the quantity of the business, it would take a considerable period of time to ascertain whether those representations were accurate or not. Mr. Kempf, one of the Appellants, admitted that October was normally a good month for operating the business (Tr. 431). It was only during the first quarter of 1958 that the business dropped sufficiently to cause the Respondents to become suspicious. However, during the first part of May a misrepresentation which was either true or false and readily ascertainable was called to the attention of the Respondents, more particularly, the fact that the Appellants had another source of income during all of the time that he operated the motel. Immediately after ascertaining and verifying this fact, the letter, Exhibit 8, was sent to the Appellants.

It is well established that a party having the right to

rescind does have a reasonable time in which to exercise that right. 53 ALR 2d, 757. 102 ALR, 912.

It is further held that the question of timeliness is an issue for the jury. 53 ALR 2d, 766.

The Court's instruction on this issue was greatly in favor of the Appellants. The instruction was as follows:

> "You are instructed that if a party to a contract discovers fraud and elects to rescind and have the contract set aside for that reason, this election must be exercised promptly upon discovery of the fraud and that any delay longer than that absolutely required by the circumstances of the party is a bar to relief and constitutes a defense to a proceeding by the agreed parties; because notice of rescission must follow promptly upon discovery of a false statement."

Nevertheless, in spite of the foregoing instruction, the jury found as a matter of fact that the rescission was promptly made after discovery of the fraud and since there is sufficient competent evidence to submit this factual issue to the jury that determination cannot be upset as a matter of law.

As an additional item the Appellants make reference to the provision of the Uniform Real Estate Contract to the effect that no warranties or misrepresentations have been made. However, again it appears to be fundamental law that if the entire contract was entered into as a result of fraudulent misrepresentations, the provision referred to is likewise set aside and is no defense to an action wherein the entire contract is rescinded.

Point II.

THE COURT COMMITTED NO ERROR IN ITS RULINGS ON ADMISSIBILITY OF EVIDENCE. (Reply to Appellants Points II and III).

The Appellants in their Points II and III make reference to the admissibility of Exhibit No. 12, statements concerning a misrepresentation of $60,000.00 gross receipts, and the admissibility of Exhibits No. 8 and No. 9.

A. EXHIBIT NO. 12. Two listing agreements were signed in connection with the tentative sale of the property. Exhibit No. 12 was the first listing agreement, and was dated 9/15/55. Exhibit No. 13 was a second listing agreement, dated 1/24/56. In substantially all particulars, the same information is contained on both cards. However, in recopying the information contained on Exhibit No. 12 onto Exhibit No. 13, the gross revenue was shown to be $30,000.00 to $50,000.00 as contrasted to $38,000.00 to $50,000.00. A secretary in the office of the Real Estate Agent stated that she copied the information from the earlier listings to the subsequent one and in so doing, made the change since it was somewhat difficult to read the writing on the first listing agreement. Exhibit 6, a copy of Exhibit 13 used by the Real Estate Agent, was admitted without objection (Tr. 142). Likewise Exhibit 13 was received without objection (Tr. 302). Mrs. Brown, the secretary in the Real Estate Office, testified concerning the discrepancy of the figures as to the gross revenue (Tr. 113). Mr. Kempf testified that the information contained on the listing card was intended by him to be passed onto prospective customers (Tr. 422, 423). Mr. Broome, the Real Estate Agent, testified that the information contained on his salesmen

copy, Exhibit 6, was not only given to Mr. Denter, the purchaser, but Mr. Denter in fact read the listing card (Tr. 166, 255). Mr. Denter also testified that he read the listing agreement, Exhibit 6 (Tr. 214-5). The discrepancy between the two figures was discussed in great detail when another agent by the name of Swalberg was on the witness stand (Tr. 303-310). Mr. Swalberg testified that he had entered the information on Exhibit 13, which was in direct conflict with the testimony of Mrs. Brown. A specimen of the handwriting of Mr. Swalberg was procurred and was introduced as an exhibit. It was therefore necessary to introduce Exhibit 12 and Exhibit 13 for the purpose of permitting the jury to inspect the same to compare the handwriting and to test the credibility of the witnesses as to who copied the information from one card to the other and how the change came into existence. Nevertheless, all of the information contained on Exhibit 12 was before the jury without its introduction; more particularly as cited above, the difference between the $38,000.00 and $30-000.00 minimum gross receipts was thoroughly discussed, as well as the representations by Mr. Kempf as to specific receipts for specific years (Tr. 423).

Without Exhibit 12 the Appellants had represented that the minimum gross receipts were in excess of $40,000.00. A hand bill printed by the Appellants, Exhibit 7, stated "The gross income for two years is more than the asking price." The asking price on both listing agreements was $82,900.00. Consequently the minimum yearly receipts would have to have been in excess of $40,000.00.

In view of all of the foregoing facts and circumstances, the Court did not error in receiving Exhibit 12 as evidence and

certainly there can be no claim of any prejudicial error even assuming there was not a sufficient basis for its admissibility.

B. REPRESENTATION OF $60,000.00 GROSS. The Appellants in their Brief on Page 13 state that 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 Clinger Realty that it looks like they would make $60,000.00 annually on the place. The truth of the matter is that this item was discussed with the Appellant Kempf, the Secretary in the Real Estate Office, and the Real Estate Agent, and in no case was any objection made to such testimony. On pages 66 and 67 of the Transcript Mr. Kempf was interrogated concerning this matter and no objection was submitted by counsel for the Appellants. On Pages 113 and 114 of the Transcript Mrs. Brown, secretary, was interrogated concerning the subject matter, and again no objections were made. On Page 158 of the Transcript the same subject matter was discussed with Mr. Broome, a Real Estate Agent, and again no objection was made by counsel.

Counsel for the Appellants contend that a discussion of such statements was prejudicial error in that it may have led the jury to believe that "Mr. Kempf had a propensity to make fictitious statements about the business." There was no question in the minds of the jury as a result of all of the evidence that Mr. Kempf had such a propensity. He represented on the listing agreements that the business netted $10,000.00 per year. However, a C.P.A.'s exhibit after analyzing the books and the income tax statements filed by the Appellants, disclosed the following losses for each of the years in question:

1951	$2,553.94
1952	563.15
1953	288.38
1954	913.52
1955	4,264.57
1956	1,567.52
1958 (9 months)	168.63

(Exhibit 19)

Mr. Kempf admitted that on one of the listing agreements he stated that the gross for the year 1953 was $50,000.00 and for 1954 was $44,000.00. In fact his books and income tax returns disclosed that the gross for 1953 was $30,411.14 and for 1954 was $30,063.02. In one of the listing agreements the gross was represented as being between $38,000.00 and $50,000.00 and on the hand bill, Exhibit 7, it was stated that the gross for two years was more than the asking price, and as stated, the asking price was $82,900.00. However, the gross for all of the years in question was as follows:

1951	$ 7,135.25
1952	28,080.63
1953	30,411.14
1954	30,063.02
1955	27,280.65
1956	33,369.29

(Exhibit 19)

Mr. Kempf testified that a discussion concerning his employment took place in the presence of Mr. Denter, Al Broome, Mr. Kempf's wife, and Mr. Swalberg (Tr. 443). Mr. Swalberg was called as a witness and admitted that he had never met Mr. Denter and was not present at any conversations wherein he was involved (Tr. 106, 107).

Although Mr. Kempf testified that he had discussed his other employment with Denter before the purchase, this was emphatically denied by Mr. Denter (Tr. 231), which testimony was corroborated by the Real Estate Agent, Mr. Broome (Tr. 160).

Mr. Kempf also testified that he did not know who had the keys to the property after the Denters vacated the same and that he only received information from the neighbors at a subsequent time concerning this matter (Tr. 74 and 75). The Town Marshall, Mr. Sevy, testified that he met Mr. Kempf on the property, advised him he had the keys and offered to give them to Mr. Kempf (Tr. 449). There were other miscellaneous representations made by the Appellants such as the fact that salaries of $400.00 and $900.00 a month could be paid and still the business show a profit. A $1,000.00 a year liquor bill was charged against the property, that a substantial bank account had been accumulated from the operation of the property, that the receipts had been sufficient to pay for the motel during the seven years it was operated, and that the Appellants had been able to buy a new Buick automobile consistently during the time they had operated the business. All of these representations were refuted by the testimony in the case.

In view of the foregoing, it is difficult to believe that the jury was prejudiced by the statements concerning the $60,000.00 received into evidence without objection since it would cause them to believe that Mr. Kempf had a propensity to make fictitious statements about the business.

The Appellants do not contest the fact that misrepresen-

tations were made, but rather argue that the Respondents were not justified in relying thereon. A strong case was made against the Appellants in this regard as is evidenced by the fact that a local jury found by clear and convincing evidence against a local resident who held a responsible position as a Probation Officer and in favor of a non-resident represented by other than local counsel. Since counsel did not object to the admissibility of such evidence, they cannot claim that there has been any error, and certainly there can be no contention of any prejudicial error.

C. EXHIBITS 8 AND 9. Exhibits 8 and 9 were letters written by counsel for the Respondents concerning their position in connection with the property. More particularly, Exhibit 8 is a letter dated May 12, 1959 which refers to the claim of the Respondents that the sale had been made by virtue of misrepresentations and that the Respondents desired to cancel and rescind the same. The second paragraph then requests a meeting with the Appellants, or their attorney. Exhibit 9 is a letter dated June 2, 1958. The first paragraph actually rescinds the contract and in the second paragraph, a tender is made to return the parties to the status quo. The third paragraph suggests that during an adjudication of the issues involved that some arrangements be made for the purpose of operating the property during the favorable tourist season. Certainly there is no statement in any of those letters which would be at all prejudicial. They were material and properly admitted to show the timeliness of the action of the Respondents and to establish the actual fact of recission and the tender of the property to the Appellants.

CONCLUSION

The Respondents have in fact actually rescinded the contract. The Appellants have been back in possession prior to the date of trial and during the time of this Appeal. Not only have the Respondents been damaged by virtue of their selling a cafe in Salt Lake and terminating employment, but they lost $6,073.61 as a result of the misrepresentations which caused them to take possession of the property. (Exhibit 22). Not counting the down payment and first quarterly payment a return of which was awarded in this action. The case has been tried before a jury and the jury has found in favor of the Respondents. There is no question but what there is sufficient factual evidence to warrant the submission of the case to the jury upon the issues raised by the Appellants in their Brief. Nor is there any error in the admissibility of evidence by the Court. The Appellants have their property back and the Respondents only seek to have returned to them the down-payment and one quarterly payment made after they were in possession. The Counterclaim for the additional items of damage was withdrawn during the time of trial. In view of all of these facts and circumstances it is respectfully submitted that the judgment of the jury should be affirmed.

Respectfully submitted,

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Attorneys for Respondents