

1961

Richard P. Smoot and Barbara M. Smooth v. Howard L. Lund and Gwen C. Lund : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

— FILED

1961

RICHARD P. SMOOT and
BARBARA M. SMOOT,

Plaintiffs and Appellants,

— vs. —

HOWARD L. LUND and
GWEN C. LUND,

Defendants and Respondents.

Clerk, Supreme Court, Utah

Case
No. 9515

APPELLANTS' BRIEF

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APPELLANTS' BRIEF

PRELIMINARY STATEMENT

The plaintiffs-appellants brought this suit consisting of four causes of action. We are concerned on this appeal with a summary judgment granted as to the plaintiffs-appellants' Second Cause of Action. This cause of action was based upon an agreement solicited by the defendant-respondent, Howard L. Lund, while acting as the attorney for the plaintiff-appellant Richard P. Smoot under the terms of which appellant Smoot was to lend money to Lund to help him buy and develop a real estate project.

Appellant Smoot sued to reform the contract alleging the contract as drafted does not incorporate the total agreement between the parties because respondent Lund fraudulently drafted it so that it would not express the agreement as made between the parties. Appellant Smoot also prayed for sums due him under the agreement for general damages and for exemplary damages for fraud. Lund tendered \$15,347.50 into court and moved for Summary Judgment on this cause of action which motion was granted. The appellants Smoot contend that:

1. The tender of \$15,347.50 did not entitle the defendants to a summary judgment.

2. The appellant is entitled to a reformation of the contract and that this is an issue which cannot be resolved on a motion for Summary Judgment.

3. The issue of whether or not Smoot is entitled to damages and costs cannot be disposed of on a motion for Summary Judgment.

STATEMENT OF FACTS

The facts alleged in the plaintiffs' Amended Complaint must be considered as established for purposes of this appeal since summary judgment was granted the defendants on the allegations contained in the Second Cause of Action of the Amended Complaint.

Some time prior to February 9, 1959, the defendants solicited financial support from the plaintiffs to finance

a real estate venture which the defendants were engaged in.

At all times pertinent to this transaction the defendant, Howard L. Lund, was the attorney for the plaintiff-appellant Richard P. Smoot. Smoot loaned \$36,000.00 to finance the real estate venture. Smoot agreed to accept one of the lots as an \$8,500.00 payment on the loan and Howard Lund agreed to secure the balance of \$27,500.00 with a lien on certain real property owned by the defendants and located at 2337 East 13th South, Salt Lake City, Utah, and by a trust deed to a lot in Santa Clara County, California.

Lund further agreed that the remaining real estate would be developed and sold and that in the event the sales price for this property was in excess of \$12,500.00 the excess would be divided between Smoot and Lund.

Thereafter on February 9, 1959, Lund prepared a document designated as Exhibit "B" in the Complaint (R-7) and executed a deed of trust to the California property, a copy of which was designated as Exhibit "C" in the Complaint. (R-9, 10)

The defendant Howard L. Lund represented to his client Smoot that the document Exhibit "B" was legally sufficient to give effect to all the terms of their understanding and was sufficient to secure the obligation of \$27,500.00 and the interest he was to receive in the real estate development.

The defendant Lund drafted the document (R-7) in such a way that it neither protected the plaintiffs with a recordable lien on the real estate nor did it spell out the agreement that plaintiffs were to share the profits from the sale of the remaining real estate if sold for more than \$12,500.00.

The appellant further alleges that Lund drew the Promissory Note intentionally excluding therefrom the usual provisions allowing the costs of collection and attorney fees to the holders of the note in the event suit had to be brought to collect said note in order to protect himself at the expense of his client and that the appellant is thereby damaged to the extent of his costs of court and attorneys' fees.

The appellant further alleges that the defendant, Howard L. Lund, executed in plaintiffs' favor a trust deed to a lot in Santa Clara County, California, to secure the \$27,500.00 note and advised the plaintiff not to record it and by reason of the trust and confidence that Smoot had in Lund the Smoots did not do so. Thereafter the defendant, Howard L. Lund, conveyed the California property to a third party in violation of the trust deed given to the Smoots to secure their loan.

Upon learning of this the Smoots filed suit asking the following relief:

1. That the court reform the contract to conform to the actual agreement between the parties and enforce plaintiffs' rights therein.

2. For a judgment for the balance due under the promissory note designated as Exhibit "B" in the Complaint.

3. That the plaintiffs obtain their attorney fees and costs of collection by reason of the act of Lund in preparing the note without the usual cost of collection and attorney fee clause being included therein.

4. That Lund be ordered to obtain a re-conveyance of the property in California which was deeded to the Smoots as security for the loan and conveyed away in fraud on the Smoots.

5. For exemplary damages.

6. For costs of court.

The defendants, almost three months after the action was filed, tendered the sum of \$15,347.50 into court after denying any sum at all was due (R-38) and moved for Summary Judgment on the Second Cause of Action which was granted.

STATEMENT OF POINTS

POINT I

THE TENDER INTO COURT OF ANY SUM BY THE DEFENDANTS COULD NOT JUSTIFY THE TRIAL COURT IN GRANTING A JUDGMENT AGAINST THE PLAINTIFFS.

POINT II

THE TRIAL COURT ERRED IN RULING THAT AS A MATTER OF LAW THE PLAINTIFFS

WERE NOT ENTITLED TO THE OTHER RELIEF REQUESTED IN PLAINTIFFS' SECOND CAUSE OF ACTION.

(A) THE PLAINTIFFS ARE ENTITLED TO REFORMATION IF THEY CAN PROVE THE FACTS ALLEGED.

(B) IF THE PLAINTIFFS PROVE THEIR ALLEGATIONS THAT THE DEFENDANT HOWARD L. LUND INTENTIONALLY EXCLUDED FROM THE PROMISSORY NOTE PROVISIONS NORMALLY INCLUDED BY LAWYERS TO ALLOW THEIR CLIENTS TO RECOVER COSTS OF COLLECTION AND ATTORNEY FEES, THE DEFENDANT WOULD BE LIABLE FOR SUCH COSTS AND FEES.

(C) THE TRIAL COURT ERRED IN RULING THAT THE PLAINTIFFS COULD NOT RECOVER EXEMPLARY DAMAGES AS A MATTER OF LAW.

ARGUMENT

POINT I

THE TENDER INTO COURT OF ANY SUM BY THE DEFENDANTS COULD NOT JUSTIFY THE TRIAL COURT IN GRANTING A JUDGMENT AGAINST THE PLAINTIFFS.

There is no rule of procedure in this state that permits the defendant in an action to tender into court the sum he thinks due and then obtain a judgment against the plaintiff.

The rules do provide for an offer of judgment which if accepted results in a judgment against the defendant

and if not accepted deprives the plaintiff of interest and costs in the event he recovers no more than the amount of the offer of judgement.

“RULE 68 OFFER OF JUDGMENT

(a) **TENDER OF MONEY BEFORE SUIT.** When in an action for the recovery of money only, the defendant alleges in his answer that before the commencement of the action he tendered to the plaintiff the full amount to which the plaintiff was entitled, and thereupon deposits in court for the plaintiff the amount so tendered, and the allegation is found to be true, the plaintiff cannot recover costs, but must pay costs to the defendant.

(b) **OFFER BEFORE TRIAL.** At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon judgment shall be entered. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer.”

There is nothing in the record to show that the tender made was more than an offer of settlement which the

trial court required the plaintiffs to accept by ordering that the tender be received and the cause of action be dismissed. The defendants did not comply with the rule cited above and had they done so they would not be entitled to a summary judgment but could thereby avoid interest and costs if the offer of judgment was refused and the plaintiffs failed to recover more than the offer of judgment.

POINT II

THE TRIAL COURT ERRED IN RULING THAT AS A MATTER OF LAW THE PLAINTIFFS WERE NOT ENTITLED TO THE OTHER RELIEF REQUESTED IN PLAINTIFFS' SECOND CAUSE OF ACTION.

(A) THE PLAINTIFFS ARE ENTITLED TO REFORMATION IF THEY CAN PROVE THE FACTS ALLEGED.

The defendant, Howard L. Lund, was the attorney for the plaintiffs and drew the strange document in issue, (R-7). The plaintiffs allege that he misrepresented the legal effect of the document assuring them that the legal result of the document was that the Smoots would receive as consideration for financing the project one-half of all profits on the sale of the remaining portion of the real estate over \$12,500.00.

A misrepresentation of law by an attorney to his client or even to a lay person not his client is a fraud. *Restatement of Torts*, Sec. 621 Comment (d). *Goodrich v. Sears*, 270 Fed. 971; *Staten Island Ice Co. v. U. S.* 85 Fed. (2d) 68; *Engelbrecht v. Engelbrecht*, 323 Ill. 208, 153

N.E. 827; *Emerson Co. v. Anderson*, 58 Mont. 617, 194 Pac. 160; *White v. Henican*, 77 Okl. 123, 186 Pac. 224, 9 A. L. R. 1041; (Annotations on this point 96 A. L. R. 992); *Restatement of Contracts*, Sec. 474, Comment (d); *Cranmer v. Kansas City Highway Co.*, 112 Kan. 298, 211 Pac. 118.

The above authorities hold it a fraud even though no attorney-client relationship existed. This should be true a fortiori where the advice and interpretation is given by the plaintiffs' own attorney who drafted the contract and who is personally interested in it.

If the plaintiffs prove that their attorney falsely represented that the document prepared by him spelled out in legal verbage the understanding of the parties, they are entitled to have the agreement reformed by the court to conform to the true agreement between the parties.

“Still another remedy is applicable for a particular kind of fraud. This remedy is reformation of a writing which owing to the fraud of one of the parties and mistake of the other fails to express the agreement at which they arrived.” (*Williston on Contracts* No. 1525 Page 4272)

If the contract was to be reformed as prayed, the plaintiffs would be entitled to a share of the profits in the real estate venture and not just a return of their money loaned to the Lunds. The right to reformation of this contract for fraud cannot be disposed of on a motion for summary judgment, the issue of fraud being an issue of fact. Indeed, the burden of proof is usually imposed

upon the attorney dealing with his clients to show the complete fairness of the transaction and that he protected his client in every way possible. *York v. James*, 26 Wyo. 184, 165 Pac. (2d) 109.

(B) IF THE PLAINTIFFS PROVE THEIR ALLEGATIONS THAT THE DEFENDANT HOWARD L. LUND INTENTIONALLY EXCLUDED FROM THE PROMISSORY NOTE PROVISIONS NORMALLY INCLUDED BY LAWYERS TO ALLOW THEIR CLIENTS TO RECOVER COSTS OF COLLECTION AND ATTORNEY FEES, THE DEFENDANT WOULD BE LIABLE FOR SUCH COSTS AND FEES.

It is hard to believe that any attorney, if *employed* to draw a promissory note for \$27,500.00, would draw it so that if the maker did not pay the note when due his client could not recover his costs of collection including reasonable attorney fees.

The plaintiffs allege that the attorney intentionally excluded these provisions in order to protect himself in the event of default. If these allegations are proved, the client would surely be entitled to damages for his intentionally excluding these provisions.

An attorney occupies a position of trust and confidence with reference to his client's affairs and in dealing with his client he must exercise the highest degree of care; the utmost good faith, honesty, integrity, fairness, and fidelity. 7 C.J.S. Sec. 125, Page 957.

If the note in issue had been drawn with a third party as maker instead of the payees' own attorney it is extremely doubtful that such a document would meet the standard of practice required of attorneys in this state and, if it did not, the defendant Lund would be guilty of negligent practice and would be liable to his client. A fortiori he is liable if he intentionally excludes these provisions in a note where he is the maker and his client is the payee.

This issue was ruled upon as a matter of law, the trial court holding in effect by its ruling that an attorney owes no duty in dealing with his client to incorporate the usual and reasonable provisions in a promissory note to protect his client. This is certainly an issue of fact which cannot be decided against the plaintiffs as a matter of law.

**(C) THE TRIAL COURT ERRED IN
RULING THAT THE PLAINTIFFS COULD
NOT RECOVER EXEMPLARY DAMAGES
AS A MATTER OF LAW.**

The plaintiffs allege that the defendants defrauded them in the following particulars :

1. By advising them that recording the trust deed was unnecessary and then selling the very property conveyed to them by the trust deed.
2. By falsely advising the plaintiffs as to the legal effect of the "Promissory Note."

3. By so drafting the agreement that it deprived the plaintiffs of substantial rights in order for Lund to profit thereby and have the advantage of his client.

If these allegations are sustained by the evidence the plaintiffs could be awarded exemplary damages. Exemplary damages may be allowed against an attorney who, when dealing with his client, violates his duty. The cases do not even require a showing of actual damage so strict is the law as it relates to the duty owed by an attorney to his client. 7 C.J.S. No. 157 at Page 1004; *Hill v. Montgomery*, 56 N.E. 320; *Greenberg v. Billelo*, 7 N.Y.S. (2d) 735; *Harmening v. Howland*, 141 N.W. 131.

CONCLUSION

The court erred in granting Summary Judgment on plaintiffs' Second Cause of Action. There are substantial issues of fact to be tried and the offer to pay a sum deemed by the defendants to be a sufficient sum to settle the case does not entitle them to Summary Judgment.

Respectfully submitted,

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