1961

Curtis C. Bosworth and Dorothy Bosworth v. George I. Norman, Jr. and Robert Sherman dba Downbeat Broadcasting : Brief of Appellants

Utah Supreme Court

Kipp and Charlier; Tel Charlier; Attorneys for Defendants;

IN THE SUPREME COURT
of the
STATE OF UTAH

CURTIS C. BOSWORTH and
DOROTHY BOSWORTH,
Plaintiffs and Respondents,

— vs. —

GEORGE I. NORMAN, JR.,
and ROBERT SHERMAN,
d/b/a DOWNBEAT BROAD-
CASTING,
Defendants and Appellants.

Case
No. 9518

APPELLANTS' BRIEF

KIPP AND CHARLIER
TEL CHARLIER
Attorneys for Defendants

TABLE OF CONTENTS

Cases Cited

Texts Cited

IN THE SUPREME COURT
of the
STATE OF UTAH

CURTIS C. BOSWORTH and
DOROTHY BOSWORTH,
Plaintiffs and Respondents,

— vs. —

GEORGE I. NORMAN, JR.,
and ROBERT SHERMAN
d/b/a DOWNBEAT BROAD-
CASTING,
Defendants and Appellants.

Case
No. 9518

APPELLANTS' BRIEF

NATURE OF CASE

The case evolves around the question of the necessity of a seller of real estate to divulge the existence of a party wall of a buliding on the real estate to a purchaser.

DISPOSITION IN LOWER COURT

The Second Judicial District Court (Judge Charles G. Cowley) held the plaintiffs and respondents (seller) entitled to specific performance of contract for the sale and purchase of real property as against the defense of fraud and misrepresentation for sellers' failure to disclose the existence of a party wall of the building situate on the real property.

RELIEF SOUGHT

The relief sought on this appeal is as follows:

A. Reversal of lower court's decision.

B. Ruling of rescission of the contract.

C. Order directing judgment to be entered in favor of defendants on counterclaim for damages.

STATEMENT OF FACTS

Plaintiffs in this action purported to sell a certain building and lot located at 2268 Washington Boulevard, Ogden, Utah, to defendants under a certain "agreement" (Exhibit A) (TR11) for a total purchase price of $30,000.00. Defendants gave plaintiffs a check for $5,000.00 (Exhibit B) (TR11) to be held in escrow until a title insurance policy was issued. The balance was to be paid at the rate of $5,000.00 per year, plus interest. The title was to be conveyed by "quit claim" deed. Also, in the "agreement" was the following language: "Buyers are assured

by the sellers at the time of closing that all taxes, encumbrances, liens, or other possible indebtedness has been paid in full and is (their) complete liability." (Exhibit A) (TR11)

The defendant buyers later determined that the north wall of the building was subject to a party wall agreement (TR52) (Exhibit D-1) (TR33) and that there was a discrepancy as to ownership of the south one inch of the property. As a result, defendant could not put the building to the use to which they had anticipated without prohibitive expense. (TR33, 34, 95, 96) As a result, defendants immediately notified plaintiffs that they could not proceed with the "agreement" (TR54) as they could not use the property for the purpose for which they were purchasing it. In the meantime and before the title insurance policy had been issued (it never was), plaintiffs attempted to cash defendants' check on which a stop payment order had been issued. (TR25, 26)

Thereafter and by reason of defendants' inability to remodel the building because of the party wall, defendants were unable to conduct their business to their loss of $16,000.00 (TR56) in addition to architects' fees incurred in the sum of approximately $800.00. (TR36)

Never at any time did the plaintiffs inform defendants that in fact there was a party wall in existence.

STATEMENT OF POINTS

POINT I

THAT THE COURT ERRED IN FAILING TO DISMISS PLAINTIFFS' COMPLAINT ON DEFENDANTS' MOTION BY REASON OF PLAINTIFFS' FAILURE TO DISCLOSE THE EXISTENCE OF THE PARTY WALL.

POINT II

THAT THE COURT ERRED IN FAILING TO FIND IN FAVOR OF DEFENDANTS ON DEFENDANTS' COUNTERCLAIM.

ARGUMENT

POINT I

THAT THE COURT ERRED IN FAILING TO DISMISS PLAINTIFFS' COMPLAINT ON DEFENDANTS' MOTION BY REASON OF PLAINTIFFS' FAILURE TO DISCLOSE THE EXISTENCE OF THE PARTY WALL.

It is clear from the evidence and is undisputed that the plaintiffs at no time disclosed to the defendants that there was in existence a party wall on the building which was the subject matter of the contract between the parties. The law appears clear that by reason of plaintiffs' failure to so disclose concealed material facts, defendants are entitled to a rescission of the agreement and the general law we quote as follows:

23 Am. Jur., Fraud and Deceit Sec. 50:

> "Title, Ownership and Encumbrances. — The general rule is well settled that false statements or misrepresentations as to the title, or the char-

acter of one's title, to real estate, made for the purpose of inducing some business transaction or dealing in connection therewith, constitute actionable fraud and may form the basis either for an action in tort for damages or for rescission . . ."

"False statements and misrepresentations as to the existence of liens and encumbrances on reality, as to liens or encumbrances affecting the interest of the representor, or as to the amount of such lines or fraud. Thus, a representation that there is no encumbrance upon real estate, if false to the knowledge of the person making it, constitutes actionable fraud if relied upon by the representee to his injury.

"Likewise, a representation that the title to land is perfect and free from encumbrances amounts to an affirmation of fact insofar as any acts of the party making it in respect of the title are concerned, and if false in respect of such acts, is ground for rescission although innocently made.

"or the principle may be invoked that one who negotiates for a transaction relating to real property is considered by most courts to be under a legal duty to know and speak the truth as to his title thereto and the encumbrances thereon, and he is therefore liable for making false statements as to such matters, although he believed his statements to be true, through forgetfulness that he had previously sold the property or for any other reason which rendered him innocent of intent to deceive."

The underlying philosophy of all the law on this subject is stated in 46 Am. Jur., Sales Sec. 98, where, speaking of misrepresentations in business transactions such as the one at hand, the text states:

> "The tendency of modern jurisprudence is to bring the legal duties of persons engaged in commercial transactions up to the ethical standard of conduct."

And, in 23 Am. Jur., Fraud and Deceit Sec. 24, the law is clearly stated to be that misrepresentations may be made in any manner: by acts, words, etc. The conclusion of the text is that "the mode of falsely representing a matter of fact is immaterial".

The statements as to the law on misrepresentation found in Am. Jur. are also found in Utah law relating to contracts. In *Mawhinney v. Jensen,* 232 P. 2d 769, Justice Wolfe, holding that the terms of a contract are not binding in a situation involving fraudulent representations, stated:

> "But where it may clearly be shown that the terms used in the latter instrument did not correctly embody the prior intention of the parties because of inadvertence, ambiguity or fraud, evidence as to what was really intended by the terms of the instrument or what was inadvertently omitted or added may be shown by clear and convincing evidence." (at page 774)

He also recited the general rule as to parol evidence in such situations: (Page 775)

> "We also point out that parol evidence is always admissible to show fraud, even though it has the effect of varying the terms of the written contract."

Furthermore, the defendants were justified in relying on the sellers' representations, without being under

a duty to first investigate the sellers' title. The law is found in an extensive annotation in 33 A. L. R. 853, where it states:

> "One is not prevented from relying on another's statement of his title to real estate as a basis for contract, by the fact that the public records give him access to such information."

And in the annotated case of *Loverin v. Kuhne,* 94 Conn. 219, 108 Atl. 554 (1919) the court states:

> "Every contracting party has an absolute right to rely on the express statement of an existing fact, the truth of which is known to the opposite party, and unknown to him, as the basis of a mutual engagement; and he is under no obligation to investigate and verify statements, to the truth of which the other party to the contract, with full means of knowledge, has . . . pledged his faith."

The same rule is found in 23 Am. Jur., Fraud and Deceit Sec. 167, where it states:

> "Generally speaking, where one represents to another in a business transaction that he is the owner of certain property or that the property is free from encumbrances, such representations may be relied on without investigation, especially where the representation is in a form calculated to prevent further inquiry."

As previously stated, the policy of the law now is not to blindly regard the technical definition of words used in a contract as the sole criteria of interpretation or standard of the legal relation, but to look through the words to ascertain the true intent of the parties. Hence, it is

further submitted that even apart from the defense of fraud based on misrepresentation, appellant defendants should not be held to the technical wording of a contract which clearly does not express the intention of the parties. (A party certainly does not pay $30,000.00, a fair market value for a quit claim deed.) This position is clearly upheld by Professor Williston in 3 Williston, Contracts Sec. 614, p. 1766 (1936), where he states:

> "It is obvious that this preumption that parties know the technical legal meaning of the language which they use, and thereupon adopt that meaning, may often be very artificial; and it is a reasonable expectation and in accordance with the tendencies of the law that the disposition of courts will be to give language less and less frequently an artificial meaning at variance with the apparent intention of the parties."

POINT II

THAT THE COURT ERRED IN FAILING TO FIND IN FAVOR OF DEFENDANTS ON DEFENDANTS' COUNTERCLAIM.

There is no evidence to the contrary that defendants were damaged by reason of their inability to use the property for its intended use and there is no evidence to the contrary that defendants were damaged in the sum of $16,000.00. It is, therefore, contended that defendants should be awarded judgment in that sum.

CONCLUSION

Based on the foregoing argument and authorities, it appears clear that this Court should reverse the decision

and judgment of the District Court and should find the issues in favor of the defendants and should direct the lower Court to enter judgment in favor of the defendants on their counter-claim against the plaintiffs.

Respectfully submitted,

KIPP AND CHARLIER
TEL CHARLIER

Attorneys for Defendants