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

Utah Supreme Court

Daniel A. Alsup; Richards, Alsup and Richards; Attorneys for Respondents;

CASE NO. 9518

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

CURTIS C. BOSWORTH and
DOROTHY BOSWORTH,

Respondents,

vs.

GEORGE I. NORMAN, JR., and
ROBERT SHERMAN, Partners,
doing business as Downbeat
Broadcasting Associates,

Appellants.

Respondents' Brief

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Appellants.

STATEMENT OF FACTS

The parties will be called plaintiffs and defendants. The action involves a contract for the sale and purchase of real property on Washington Boulevard in Ogden, Utah, and the effect of a party wall agreement as to the north wall of the building. For convenient reference we quote the contract between the parties as follows:

> "This 27th day of June, 1960, it is hereby intended and understood that Curtis C. Bosworth, his wife, heirs, and assigns, herein referred to as Sellers, agree to sell a certain building together with its certain real property located at 2268 Washington Boulevard, Ogden, Utah, to George I. Norman, Jr., and Robert Sherman, dba DOWN-

BEAT BROADCASTING ASSOCIATES, operators of KSVN, a radio station located in Ogden, Utah, herein referred to as the Buyers, for the total price of $30,000.00 at the following terms:

> "A $5,000.00 check to be held in escrow by the Seller pending issuance of title insurance to be paid for by the Buyers, abstract to be furnished to the Title Company by the Sellers; a quit claim deed to be filed and given to the Buyers from the Sellers; and a first mortgage to be executed and filed against said property to the benefit of the Sellers in the amount of $25,000.00 plus interest at the rate of 7%.
>
> "The Buyers will pay the Sellers $5,000.00 each and every year effective one year from the date of the transfer of the deed until the entire balance of $25,000.00 principal plus interest at 7% amortized but on the unpaid balance only, is paid. Payment to be made in one installment annually.
>
> "Buyers are assured by the Sellers at the time of closing that all taxes, encumbrances, liens or any other possible indebtedness has been paid in full and is their (Sellers') complete liability. Buyers pay all taxes after July 1, 1960.
>
> "This being the entire written and oral agreement between Buyers and Sellers this 27th day of June, 1960. Buyers pay all costs and attorneys' fees in case of default."

Plaintiffs take issue with defendant's statement of fact that there was a discrepancy as to ownership of the south one inch of the property. They also take issue with the statement that upon learning of the plaintiffs' party wall agreement, defendants immediately notified plaintiffs they could not proceed with the contract; and also take issue with the statement that because of the party wall defendants could not remodel the building. We think, however, these last two factual disputes are of no great consequence on this appeal.

Additional important facts are these: The property involved in this transaction is located on Washington Boulevard in the center of the business district (T-5). Plaintiffs afforded defendants ample opportunity to inspect the premises and they did inspect the same before purchasing (T-8, 39, 41). Plaintiffs wanted defendants to wait and have the transaction handled in a normal manner with attorneys for both parties involved. Defendants refused to wait and insisted on closing the transaction immediately (T-9, 10). The party wall in question was plainly visible and ascertainable by physical inspection (T-19, 34, 37, 97). There is no suggestion in the evidence that plaintiffs were unaware of the party wall after they inspected the premises, or that the party wall was of any importance. It was not of any importance to plaintiffs (T-19). The trial court personally viewed the premises before making its Findings of Fact. The contract was at least largely drafted by the defendants (T-10, 101). There is no sugestion in the evidence that plaintiffs sought to mislead defendants with respect to the party wall or to conceal it from defendants. The sale of the property in question was by street number

and not by metes and bounds (Exhibit A), and there are no affirmative obligations imposed by the party wall agreement (Page 45 of Abstract of Title, Exhibit D).

Aside from the fact that the sale was by quit claim deed, we make the following observations regarding the alleged one-inch discrepancy in the south boundary of the property:

(1) If such a discrepancy existed and if a warranty deed had been called for, this would not be a material discrepancy.

(2) There is in fact no one-inch discrepancy that is a cloud on the title. We can't cite the court to the page of the abstract (Exhibit D) where this one-inch discrepancy is found; however, as shown in the abstract of title and in the title report (Exhibit 1), a stranger to the title conveyed property on the south of the property involved in this lawsuit and the description in this stranger conveyance overlaps one inch. This is not a cloud on the title. (See Utah State Bar Association Title Standard No. 9.)

STATEMENT OF POINTS

Point 1: The trial court did not err in denying defendants' motion to dismiss the complaint.

Point 2: The trial court did not err in dismissing defendants' counterclaim.

ARGUMENT

Point 1: The trial court did not err in denying defendants' motion to dismiss the complaint.

Defendants' motion to dismiss was made at the conclusion of the plaintiffs' case and before defendants offered evidence. It appears to us, however, that the whole question involved here is whether or not there was fraud, and in our consideration of this Point 1 we shall review all the evidence in the case, since reading the transcript will certainly show plaintiffs' case was at least as strong before defendants' case was presented as it was at the conclusion of the trial. Actually, Points 1 and 2 may be considered together, since both are founded upon alleged fraud of the plaintiffs. Perhaps an orderly presentation of the points would require that we review only the plaintiffs' testimony against the law on fraud to determine if that testimony shows fraud as a matter of law. We believe, however, that the whole picture can best be presented if we review all the evidence on both sides to see if the court erred in holding that there was no fraud.

The contract called for conveyance by quit claim deed. It contained this provision:

> "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 . . . ."

It is this language that defendants seek to balloon into a representation by plaintiffs that there was no party wall agreement affecting the property. Our first inquiry, then, is whether or not this language is susceptible of such an interpretation. We believe it is not.

The court must make its own interpretation of this language, and we find no authorities one way or the

other that are helpful to the court in making its interpretation. A statement of our own interpretation is admittedly of little value to the court. We must state, however, that read in its entire context the Sellers by this language merely assure the Buyers that they don't owe anything on the property. It is an assurance that there is no mortgagee, lienholder or the like to arise and contest the sale and conveyance. It is an assurance that the Buyers are dealing with the persons who are able to consummate the sale and that even though the conveyance is by quit claim, the Sellers have good right to convey and will assume and pay any indebtedness existing against the property. To balloon such ambiguous language into a false and fraudulent representation as to the condition of the premises is, we feel, unwarranted. It is unwarranted particularly where, as here, the contract is in large measure the Buyers' contract, which Sellers were, to some degree at least, pressured into signing.

> "The language of a covenant must be read in an ordinary or popular, and not in a legal or technical sense. 21 CJS Page 896."
>
> ". . . the representation must contain the essential elements of fraud; and it must be definite and specific, mere vague, general or indefinite statements being insufficient, ..." 37 CJS Page 224.

Let us assume, however, a less ambiguous statement. Assume the contract provided as follows: "Sellers warrant the premises are free from all encumbrances". This is the language that would be impliedly contained in a warranty deed. Would the existence of a party wall agreement make this statement a false and

fraudulent representation? We find no cases on the fraud question specifically. However, if the party wall agreement would not constitute a breach of this express warranty, by the same token its existence would certainly not make the representation false and fraudulent. The cases hold that under similar circumstances a party wall agreement does not violate a warranty against encumbrances.

We find no Utah cases. What appears to be the general rule is stated in 92 CJS, paragraph 206, page 66, as follows:

> "Ordinarily a party wall easement is not an encumbrance warranting rejection of title by a purchaser contracting for a conveyance free of encumbrances, a mutual easement of adjoining proprietors in a party wall being a benefit and not a burden. It has been held that a party wall is not such an encumbrance as justifies rejection of title where there is no representation on the subject in the contract, where existence of party walls is plainly discernible from inspection of the premises, and where the party wall agreement contains no covenant to rebuild but relates solely to the existing wall as long as it may stand, or where the sale was by house number instead of by metes and bounds; nor is a party wall agreement an encumbrance where it is a mere personal covenant not running with the land."

As to the party wall in this case, there is no representation on the subject in the contract. The evidence indicates the party wall is plainly discernible from in-

spection, the party wall agreement contains no covenant to rebuild, and the sale was by house number and not be metes and bounds.

American Jurisprudence states the rule as follows:

> "The question whether the existence of a party wall upon or at the division line between the vendor's land and the land of an adjoining owner used or intended to be used by both in the construction or maintenance of buildings on their respective tracts, or an agreement for the construction and maintenance of such a wall of such character as to run with the land, constitutes an encumbrance within the meaning of the rule which requires the vendor in a contract for the sale of land free and clear of encumbrances is a question upon which the decisions are not entirely consistent. Most of the difficulty seems to arise, however, from the fact that in some cases the party wall was erected entirely upon the land of the vendor, or he and his successors in interest were obligated to maintain, repair, or rebuild the wall in case of injury or destruction, whereas in other cases the wall rested upon the properties of both adjoining owners for their mutual advantage and benefit. The rule supported by the majority of the cases and by sound reasoning is that a party wall standing equally upon the land of adjoining proprietors, the central line of which is throughout coincident with the line of division between the respective premises, constitutes no such encumbrance upon or defect in the title of either owner as will relieve

> a purchaser from his contract to purchase the land, so long, at least, as no onerous burdens in respect of repair or rebuilding are imposed upon the owner thereof; where the wall rests equally upon both lots the detriment sustained by each tenement, in becoming servient to the other, is compensated by the benefit it derives from having the other made equally servient to it. The mutual easement for the support of the wall is a benefit, and not a burden, to the purchaser as well as to the adjacent proprietor. It is a valuable appurtenance, which passes with the title of the property, and its value to the purchaser is not diminished by the fact that it is equally beneficial to the adjacent owners." 55 American Jurisprudence, Vendor and Purchaser, page 686.

It seems, therefore, that even if the language of the contract unambiguously and specifically stated what defendants contend that this language says, and even if all the other elements of fraud were present in this case, there would still be no fraudulent representation because the existence of the party wall agreement is not inconsistent with the warranty or representation that there are no encumbrances.

However, are all or even any of the other elements of fraud present in this case? The essential elements of fraud were not pleaded by defendants, but we make no objection to this since we have previously made none. Nonetheless, all the essential elements must be proved by a preponderance of the evidence so as to satisfy the trier of fact.

The nine essential elements of fraud are set forth in *Stuck vs. Delta Land & Water Co.*, 63 *Utah* 495, 227 *Pac.* 791, as follows:

> " ' * * * (1) A representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted upon by the person and in the manner reasonably comtemplated; (6) the hearer's ignorance of its falsity; (7) his reliance upon its truth; (8) his right to rely thereon; (9) his consequent and proximate injury'."

We don't propose to consider and weigh separately each of these nine essential elements against the evidence. However, the following facts stand out: The party wall was of no importance, no materiality, to Mr. Bosworth when he himself acquired the property (T-19). He at no time attached any real significance to it. It was plainly visible on inspection, and Mr. Bosworth gave defendants every reasonable opportunity to inspect. If it was clearly discernible to him, to the architect on first glance, and to the trial court, how can it reasonably be said that he knew, after defendants had both inspected the property, that they were unaware of it? And how can it be said that it suddenly became of vital importance to him and he designedly concealed it from them? The parties were dealing at arms length, and Mr. Bosworth tried to avoid this quick transaction —tried to involve attorneys to handle the transaction in the normal manner. Defendant Norman almost punched witness Giles in the nose when Giles urged the parties to wait and handle it right (T-10). The defendants had

inspected the building, they wanted it, they wanted it immediately, and they wanted no lawyer foolishness involved in their purchase. Just a little delay would have disclosed the party wall agreement (but we don't think it would have made a particle of difference to the defendants at that time). They resisted all efforts at delay, and now they say they were fraudulently taken advantage of.

Did Mr. Bosworth have a duty to speak up about the wall? *If* he *knew* that even after inspection defendants were not aware of the wall; and *if* he *knew* that it was of vital importance to them, or at least of materialty to them; and *if* he *knew* they would not buy the property if he spoke, then perhaps there might be fraud in failing to speak if all the other elements of fraud were present. But the evidence just does not permit the resolving of all these 'ifs' preponderantly for the defendants.

We feel justified in concluding, therefore, without further belaboring the matter, that the court did not err in concluding as a factual matter there was no fraud on the part of the plaintiffs justifiably relied upon by the defendants that would either justify their rescission of the contract or support their claim to damages. We feel that we need not in this brief specifically respond to defendants' second point, since this whole brief is a response to that point as well as to the first point.

In conclusion, we acknowledge the right of the Supreme Court to reverse the trial court on its factual findings. We appreciate, too, however, that the Supreme Court has frequently admonished litigants it would not

reverse the findings of the trial court in an equity case unless the evidence clearly preponderates against those findings. The trial court had many advantages not available to the appellate court, not the least of which was the opportunity to visually inspect the premises. Speaking most conservatively, the least that can be said about the evidence in this case is that the trial court's factual findings are not unreasonable and they should be sustained on this appeal.

Respectfully submitted,
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