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Thomas B. Peterson, Coleen v. Peterson v. Midwest Construction, Inc. Midwest Realty & Finance, Inc., A. D. Coats And Vao Bowers : Appellant's Brief

In the Supreme Court of the State of Utah

THOMAS B. PETERSON, COLEEN V. PETERSON,

Plaintiff-Appellant,

- vs. -

MIDWEST CONSTRUCTION, INC. MIDWEST REALTY & FINANCE, INC., A. D. COATS AND VAO BOWERS,

Defendants-Respondent.

Case No. 10890

APPELLANT'S BRIEF

Appeal from the Judgment and Order of the Third Judicial District Court for Salt Lake County, Utah. Honorable Frank Wilkins.

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TABLE OF CONTENTS

CASES CITED

TABLE OF CONTENTS

OTHER AUTHORITIES CITED

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STATEMENT OF KIND OF CASE

This is an action on an Earnest Money and Offer to Purchase Agreement and also for Fraud in the inducing the Plaintiffs to enter into the agreement.

DISPOSITION IN THE LOWER COURT

Defendants' motion to dismiss the fraud action for failure to state a cause of action was granted and Defendant, Midwest Realty & Finance Inc.'s motion for summary judgment on all causes of action in Plaintiffs' complaint was granted.

RELIEF SOUGHT ON APPEAL

Reversal of the lower court's decision.

STATEMENT OF FACTS

Plaintiffs were negotiating with the Defendant, A. D. Coats, to purchase a house which was to be built by the Defendant, Midwest Construction Company in the 1966 Utah Parade of Homes Show.

Plaintiff signed an Earnest Money Receipt and Offer to Purchase Agreement agreeing to purchase the house and property at cost. Cost was estimated to be between $25,000.00 and $27,000.00. The Earnest Money Receipt and Offer To Purchase Agreement, provided that an exact cost would be furnished prior to construction. The agreement was signed by the Plaintiff, and Defendant A. D. Coats, an agent for Defendant, Midwest Realty and Finance, Inc. (R-33).

Construction was commenced, the Defendant did not furnish an exact cost, nor did they mention any price change.

When construction was nearly completed, the Defendants A. D. Coats, and Vao Bowers, induced Plaintiffs to move into the new home, and to deed their old home and property over to Defendant Midwest Realty

and Finance, Inc. This was done allegedly for the purpose of selling the old home for a down payment on the new home. At this time no mention was made of a price increase in the new home.

After settling down in the new home, Plaintiffs were approached by Defendant Vao Bowers who informed them that the price would have to be raised as the cost exceeded their estimate. He asked them to sign an agreement providing that Plaintiffs would pay full cost. On this agreement, there was no estimate of cost. Plaintiff refused to sign stating that they had agreed on a price between $25,000.00 and $27,000.00. Defendant Vao Bowers told them that unless they signed they would have to move out of the new home and would forfeit their $1,000.00 deposit. The Plaintiffs acquiesced, after Vao Bowers wrote a limit of $30,000.00 on the subsequent agreement.

Nothing more was said concerning the price until some months later when the Plaintiffs were to close the transaction. At that time, Defendant, A. D. Coats, told them the cost was raised to $33,000.00. Plaintiffs refused, negotiations failed, and this suit was commenced.

Plaintiffs pleaded four causes of action: The first was for specific performance on the new property at approximately $25,000 to $27,000; the second was in the alternative for breach of contract; the third was for

fraud alleging the Defendants knew at the time they induced Plaintiffs to sign the Earnest Money Receipt and Offer to Purchase and/or when they induced Plaintiffs to move into the new home that they would not adhere to their original estimate of between $25,000.00 and $27,000.00; the fourth cause of action was to require Defendants to apply Plaintiffs' equity in their old home to purchase price of their new home. Plaintiffs included Midwest Realty & Finance Inc. as Defendant alleging that Midwest Construction Inc. was a mere conduit through which Midwest Realty & Finance Inc. conducted its business and limited its liability and in the fraud action on the grounds that Vao Bowers and A. D. Coats were acting as agents for Defendant Midwest Realty & Finance Inc. when they committed the fraud. (R-1-6)

Defendant then made a motion to dismiss for failure to state a cause of action. The motion was denied by Judge Stewart M. Hansen. (R-9)

At the time of the above motion, Defendants also made a motion for a more Definite statement alleging that Plaintiffs had used the term Defendants without alleging specifically which Defendants had done what acts and therefore, Defendants could not answer the complaint. Judge Hansen granted this motion. (R-11).

Plantiffs ammended their complant to specifically name which Defendants had done what acts.

Judge Hansen then moved from the Law and Motion bench in the Third Judicial District and the newly appointed Judge, Frank Wilkins, took his place.

Defendants then made another, identical, motion to dismiss the fraud action for failure to state a cause of action (R-21).

Judge Wilkins granted this motion.

At the time of the above, Defendant, Midwest Realty and Finance Inc. moved for summary judgment on the grounds that it was not using the Defendant, Midwest Construction Company as a conduit through which to conduct their business and limit their liability. In support of this motion, Defendants attached an affidavit of Defendant A. D. Coats, which alleged that the two corporations were separate. The affidavit showed a list of the stockholders and officers of the two corporations.

Judge Wilkins granted the motion for summary judgment and Plaintiffs' appeal.

Plaintiffs' had no chance for discovery inasmuch as Defendants had never answered Plaintiffs' complaint prior to the motion to dismiss.

ARGUMENT

POINT I

ALL MOTIONS TO DISMISS SHOULD HAVE BEEN DENIED PURSUANT TO UTAH CODE ANNOTATED SECTION 78-7-19.

As may be seen from the record and the facts as they are quoted above, Defendants made a motion to dismiss pursuant to rule 12(b)(6) *Utah Rules of Civil Procedure,* which was denied by Judge Stewart Hansen. Judge Hansen was then moved from the Law Motion Bench, 3rd Judicial District, and Judge Frank Wilkins took his place. The Defendants, still not having answered Plaintiffs complaint, made another, identical motion to dismiss pursuant to rule 12(b)(6).

Utah Code Annotated Section 78-7-19 provides:

> If an application for an order made to a Judge of a Court in which the action or preceeding is pending is refused in whole or in part, or is granted conditionally, no subsequent application for the same order can be made to any other Judge except of a higher court.

Defendant contends that the facts in the instant case falls within the purview of Section 78-7-19. The only events which transpired between the denial of the first motion, and the raising of the second, was the

interjection of an amended complaint by the Plaintiffs'. The amended complaint, in substance, was identical to the original complaint. It differed only in that it specifically named which Defendants had done what, rather alleging generally the word Defendants, and it also alleged that Defendant, Midwest Realty and Finance, Inc., was conducting business through Midwest Construction Company. The fraud causes of action at which Defendants' two 12(b)(6) motions were directed were substantially identical.

Section 78-7-20 provides that a violation of the above sections 78-7-19 may be punishable as contempt. At the hearing, Plaintiffs counsel raised the statute and asked for dismissal on that basis. Although he did not ask for contempt sanctions, he did argue that attorneys fees should be paid them for having made the second appearance on the same motion. Plaintiff contends that it was improper to bring the two 12(b)6) motions, and that the lower court should have dismissed the second motion on the basis of section 78-7-19.

POINT II

THE FRAUD CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED PURSUANT TO RULE 12(b)(6). PLAINTIFF'S ALLEATIONS WERE SUFFICIENT TO STATE A CAUSE OF ACTION IN FRAUD AGAINST THE DEFENDANTS.

At the hearing on the Motion to Dismiss, Defendants' motion was granted on the basis that the mere estimate contained in the Earnest Money Receipt and Offer to Purchase Agreement was not a sufficient representation to be the basis of a fraud cause of action. The fraud cause of action was dismissed as to all four Defendants.

The general rule is that an estimate or opinion is not a sufficient representation to support a cause of action in fraud. However, there is a well recognized exception to that general rule if the person making the estimate or the opinion was an expert and the Plaintiff held him out to be such and if the estimate or the opinion was given by the Defendant with knowledge that it was false. See *Sime v. Malouf* 95 C.A.2d, 82, 212 P. 2d 946, rehearing denied, 95 C.A. 2d 82, 213 P. 2d 788; *Teare v. Sussman* 120 Colo. 488, 210 P. 2d 446. Prosser states the rule as follows:

> The courts have developed numerous exceptions to the rule that misrepresentations of opinion are not a basis for relief. Apparently all of these may be summed up by saying that they involve situations for special circumstances which make it very reasonable or probable that the Plaintiff should accept the Defendant's opinion and act upon it and so justify a relaxation of the distrust which is considered admirable between bargaining opponents. . . . Further, it has been recognized very often that the expression of an opinion may carry with it an implied assertion,

> not only that the speaker knows no fact which would preclude such an opinion, but that he does know facts which justifies his opinion. There is a general agreement that such an assertion is to be implied when the Defendant holds himself out or is understood as having special knowledge of the matter which is not available to the Plaintiff, so that his opinion becomes in effect an assertion summarizing his knowledge.

Posser,The Law of Torts, 566 (2d ed.) (1955) (and the cases cited therein). Opinions, estimates, and promises in contractual transactions all fall under the same rule. *Prosser, op. cit. supra.* The court in *McWilliams v. Barnes,* 172 Kan. 701, 242 P.2d 1063, stated "The general rule applicable here is that a party defrauded in the making of a contract who discovers that fraud after having partly performed may continue with performance and also have an action for damages." In *Flemming v. Flemming-Felt Company,* 7 Utah 2d 293, 233 P.2d 712, the Utah court stated that "under some circumstances it may be possible to base the deception required in fraud upon a state of mind by showing that a promissor has a preconceived determination not to perform his promises."

It is precisely the exception to the general rule which the Plaintiffs contend applies to the instant case. They were dealing with a construction company, a real estate company, and agents of both. It is their opinion that these agents could qualify as experts at estimating

the cost of the construction of the home. There is also no doubt that the Defendants were in a much better position to determine the cost of construction of the home than the Plaintiffs. Also, Plaintiffs alleged that the Defendants knew that the estimates were false at the time they made them. Thus, Plaintiff's complaint, under the rule in the cases cited in the previous paragraph, was sufficient to state a cause of action for fraud and the motion to dismiss should have been denied.

It is always a factual question as to whether a person making a misrepresentation, knew at the time of so making that the representation was false. Plaintiffs contend that such an inference may be based on the mere fact that the esimate was approximately one-third to one-quarter lower than the cost which Defendant subsequently represented as the cost of construction. Regardless whether this inference is sufficient to support a fraud cause of action, Plaintiff should have at least been given a chance to discover facts which might tend to prove that A. D. Coats and Vao Bowers were experts and whether they knew at the time they represented the estimate to be between $25,000.00 and $27,000.00 that it was incorrect and would attempt to raise the price to $33,000.00; and whether they made the low estimate only with the intent to induce the Plaintiffs to sign the Earnest Money Receipt and Offer to Purchase Agreement, and to obtain the $1,000.00 deposit paid by Plaintiff. Assuming that the Defendants did have such knowledge and intent, Plaintiffs would have been defrauded.

Plaintiffs should have been given a chance to discover these facts and the cause of action should not have been dismissed under rule 12 (b) (6) *URCP*.

Plaintiffs also alleged in their third cause of action that it was fraudulent for Defendants to induce Plaintiffs to move into the new home and deed their old home over to Defendants without telling them that the costs had exceeded the original estimate. This point was not touched on in Defendant's motion to dismis or argument on that motion. Plaintiffs' counsel raised the issue at the argument on the motion but the lower court dismissed Plaintiffs' third cause of action in its entirety.

Assuming that the Defendants, Vao Bowers and A. D. Coats did not know at the time they made the estimate of $25,000.00 to $27,000.00 that it was low, there may still have been a misrepresentation when they induced Plaintiffs to move into the new home without telling them that the costs had exceeded the original estimate Undoubtedly it would seem that at the time construction was nearly completed and Defendants induced Plaintiffs to move, they should have known the cost of construction had exceeded the $27,000.00. This might be inferred from the fact that shortly therafter, the Defendant, Vao Bower approached Plaintiffs and told them that the price had exceeded $27,000.00 and asked them to sign an agreement to the effect that they would pay for everything that Defendants estimated to

be the cost. The question is whether the mere silence in not telling them that the costs had exceeded the estimate is sufficient to support a fraud cause of action.

The general rule is that the Defendant has a duty of disclosure where he has special knowledge or means of knowledge not open to the Plaintiff and is aware that the Plaintiff is acting under a misapprehension. *Prosser op. cit. supra at* 535 *and the cases cited therein.* The Utah court in *Cole v. Parker,* 5 Utah 2d 263, 300 P. 2d 623 stated that a material nondisclosed or half-truth may be the basis for an action for fraud. The rule as stated in 23 Am. Jr.§78, 854 is as follows:

> The principal basic in the law of fraud as it related to nondisclosure is that a charge of fraud is maintainable where a party knows material facts and is under a duty, under the circumstances, to speak and disclose his information, but remains silent. . . . Generally speaking, however, in the conduct of various transactions between persons involving business dealings and commercial negotiations or other relationships relating to property, contracts, miscellaneous rights, there are times and occasions when the law imposes upon a party a duty to speak rather than remain silent in respect to certain facts within his knowledge and thus to disclose information. . . . Among other ways the obligation to communicate facts may arise is from the fact that . . . the party does something or says something, which for want of disclosure is false and deceptive, and is placed or places himself in a position

> where the silence will convey a false impression, or from the fact that a statement or representation has been made in the bona fide belief that it was true, and before it is acted upon the party who has made it discovers that it is untrue.

See also the cases cited in 23 *Am. Jur.* § 79, 856. This appears to be the precise type of case as the instant case. Defendants' estimate was apparently low. Without saying anything, Defendants induced Plaintiffs to move into the new home and deed their old property over to Defendants. Plaintiffs did so apparently still relying on the estimate of $25,000.00 to $27,000.00. A question of fact exists as to whether Defendants knew whether the estimate was low and still remained silent when they induced Plaintiffs to move. Regardless of that factual issue, Plaintiffs' complaint is still sufficient to state a cause of action in fraud based on nondisclosure. The lower court should not have granted Defendants' motion under 12(b)(6) *URCP*.

It appears that the Plaintiffs' allegations concerning the representation and nondisclosure of the Defendants, Vao Bowers and A. D. Coats were sufficient to support a cause of action in fraud. Thus, the motion granting the motion to dismiss against these Defendants was improper and should be reversed. Since it is claimed that the Defendants Vao Bowers and A. D. Coats acted as agents for the Defendants, Midwest Construction Company and Midwest Realty & Finance Company, it was also improper to dismiss these Defendants from the

fraud cause of action. This is true even assuming the Defendant, Midwest Realty & Finance Company, was not conducting business through the Defendant construction company and, thus, the corporate veil cannot be pierced. They would still be liable under an agency theory.

POINT III

DEFENDANT, MIDWEST REALTY & FINANCE, INC., SHOULD NOT HAVE BEEN GRANTED SUMMARY JUDGMENT AND BEEN DISMISSED FROM THE SUIT. AN ISSUE OF FACT WAS RAISED AS TO WHETHER THEY WERE CONDUCTING BUSINESS THROUGH MIDWEST CONSTRUCTION COMPANY.

Plaintiff's complaint joined Midwest Realty & Finance, Inc., as Defendant in both the fraud and the contract causes of actions. It is Plaintiffs' belief that the Defendant, Midwest Construction Company has very little capital, if any. Plaintiffs further believe that the Defendant construction company transfers the proceeds from the sales of homes to the Midwest Realty & Finance, Inc. while the liabilities incurred remain with the construction company. It should be pointed out that Plaintiffs' old home which was to be used as a down-payment on the new home was deeded over to Midwest Realty & Finance Inc. Defendant, Midwest Realty & Finance, Inc. objected to Plaintiffs' allegations in a motion for

summary judgment. In support of its motion, it attached an affidavit signed by the Defendant, A. D. Coats. This affidavit simply listed primary stockholders and officers of the two corporations, then went on to state conclusions that the two corporations were separate entities.

Plaintiff contends that the Defendants' motion and affidavit simply raised an issue of fact for the jury to decide. *Welchman v. Wood,* 9 Utah 2d 17, 337 P.2d 59. Therefore, it was not proper to dismiss the case against Midwest Realty & Finance on summary judgment. Ibid; *Auto Lease Company v. Central Mutual Insurance Company,* 7 Utah 2d 336, 325 P.2d 264. The most recent Utah pronouncement on this issue, is found in the opinion by Mr. Justice Ellett, in the case of *June Singleton v. George V. Alexander, and William J. Greer, a co-partnership, dba Carefree Laundry,* case number 10780 (August 15, 1967). In this case Judge Ellett stated, "It will be noted that a summary judgment can be granted only when it is shown that there is no genuine issue as to any material fact ,and that the moving party also is entitled to judgment as a matter of law under those facts."

There may be an issue as the weight to give Defendants' affidavit, when Plaintiffs did not submit an opposing affidavit. The general rule is "There is no obligation on Plaintiff to establish her entire case in a pretrial deposition. Summary relief cannot be imposed as trial by affidavit; such relief is drastic and can only

be imposed when all facts are admitted which are determinative of duty or right." *Champlin vs. Oklahoma Furniture Manufacturing Company,* 269 F.2d 918. Sometimes the rule is stated that an affidavit on summary judgment may be used "not to decide any issue of fact present, but solely to discover if any real issue of fact exists. If there is an issue of fact to be determined, a summary judgment cannot be entered." This is also the rule in Utah. In the Utah case cited above, *Singleton vs. Alexander and Greer, dba Carefree Laundry,* case No. 10780 (August 15, 1967), Judge Ellett stated: "The court cannot consider the weight of testimony or the credibility of witnesses in considering a motion for summary judgment. He simply determines that there is no disputed issue of any material fact and that as a matter of law the party should prevail."

A qualification on the general rule is shown in *Dupler vs. Yeates,* 10 Utah 2d 251, 351 P. 2d 624. In this case the Plaintiffs brought a fraud cause of action alleging he had relied on several misrepresentations of the Defendants. It appeared that previously the same Plaintiffs had brought the same cause of action against different Defendants in a Wyoming case. In the Utah case, the Defendant moved for summary judgment on the grounds of no reliance. In support thereof, he submitted certified copies of the Wyoming court proceedings, wherein the same Plaintiffs swore they had relied on other persons who were the Wyoming Defendants. The Utah court held that where the moving parties

evidentuary material is in itself sufficient and the opposing party fails to proffer any evidentiary matter when he is presumably in a position to do so, the court should be justified in concluding that no genuine issue of fact is present, nor would be present at the trial. The Utah court distinguished between the affidavits which are self-serving in nature, and affidavits containing documentary evidence which were in effect admissions by the Plaintiffs' against their own interest.

> "In contrast to the self-serving declarations usually proferred by movants for summary judgment, these statements are made by the opposing parties themselves . . . Presenting at most, improbable questions of credibility, these documentary statements have a high degree of probative value. Furthermore, knowledge of reliance or lack of it is within the peculiar province of the Plaintiffs. It is not practicable to expect the Defendants to present more convincing proof than these contradictory assertions, by those who know the most concerning the question of reliance . . . Furthermore, the record contains the agreement of August 20, 1956, between the Plaintiffs and (the Defendants in the Wyoming cases) . . . The settlement agreement, . . . raised the inference that the Plaintiffs are fully compensated for the damages they now seek to recover from the Defendants (in the Utah case)."

Thus, as a factual matter the *Dupler* case is very distinguishable from the present case. The statements and the affidavits in the present case are self-serving. Fur-

thermore, they pertain to matters peculiarly within the knowledge of the Defendant, not the Plaintiffs. The Plaintiffs could not be expected to controvert Defendants' averment without a chance for discovery. Furthermore, in the *Dupler* case, the affidavit pleading satisfaction by the Plaintiffs was uncontroverted. Therefore, Plaintiff submits that the facts in the *Dupler* case are so distinguishable from the present case that it is not conrolling. Furthermore, the rule in *Dupler* only goes to determine whether a factual issue exists. It appears from the pleadings of Plaintiffs when contrasted with the affidavit of the Defendant, that there is a factual issue in the present case, and that the affidavit of the Defendant was used, contrary to the *Dupler* rule, to determine the factual issue.

The affidavit of A. D. Coats, apparently made in his capacity as officer for both corporations, Defendant, Midwest Realty & Finance, Inc., and Midwest Construction Company, does not rule out the possibility that the two corporations were acting in concert-or that Defendant, Midwest Construction Company is a conduit through which Defendant, Midwest Realty & Finance, Inc. conducts business. Sweeping aside the conclusions in the affidavit to the effect that the two corporations are separate entities, the only factual averments are who the principle stockholders and officers of the two corporations are. It should be pointed out that it appears from the affidavit that a majority shareholder of Midwest Realty & Finance, Inc., Rulon Jenkins, also owns

20% of Midwest Construction Company. Furthermore, it appears that the officers of Midwest Construction Company are also officers of Midwest Realty & Finance, Inc. From the service of the pleading, it appears that the two corporations share a common office as well as agent for service of process. Thus, it does not conclusively appear that Midwest Realty & Finance, Inc., and Midwest Construction Company are distinctly separate corporate entities. Plaintiffs would like a chance to discover if the assets of the two corporations are as interchangeable as their officers. This could be inferred from the fact that Plaintiffs old home was deeded over to the finance company not the construction company. The fact that some of the stockholers in one of the corporations are not stockholders in the other corporation does not necessarily preclude the contention that Midwest Construction Company is a shell or conduit through which Midwest Realty & Finance conducts business.

The normal case for piercing the corporate veil, would be where the officers of the two corporations are identical rather than the shareholders, inasmuch as it is the officers who conduct business of the corporation. What is essential, is that the corporations have no interchange of assets, and one corporation does not use the other merely to limit its liability. The general rule as stated by Judge Learned Hand in *Kingston Dry Dock Company v. the Lake Champlain Transport Company,*

31 F.2d 265, is that the determination of whether to pierce the corporate veil depends upon common control and whether control is exercised to work a fraud. Thus, the motion for summary judgment should have been denied on the grounds that an issue of fact does remain and that the Defendants affidavit did not dispell all doubt concerning that issue.

CONCLUSION

Plaintiffs contend that it was improper to grant Defendants motion to dismiss and Defendant, Midwest Realty and Finance, Inc.'s motion for summary judgent. The motion to dismiss should not have been brought inasmuch as the identical motion was made and denied by a different Judge at a prior time. Plaintiffs' complaint did state a cause of action in fraud both at the time Plaintiffs' entered into the Earnest Money Receipt and Offer to Purchase Agreement with Defendants', and at the time Defendants induced Plaintiffs to move into the new home. The alleged fraud was perpetrated by Defendants Vao Bowers and A. D. Coats. Their fraud may be held actionable against both the Defendants, Midwest Realty and Finance, Inc., and Defendant Midwest Construction Company on the basis of agency. Furthermore, Defendant Midwest Realty and Finance Company has not shown conclusively that it is not conducting business through Midwest Construction Company, and therefore, its motion for summary judgment

should have been denied on the grounds that a factual issue still remains to be determined.

Respectfully Submitted,

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