

1967

E. L. Gear And Fern Bate Gear v. Robert H. Davis : Respondent's Brief

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In the Supreme Court of the State of Utah

E. L. GEAR and FERN BATE GEAR,
husband and wife,

Plaintiffs and Respondents,

vs.

ROBERT H. DAVIS,

Defendant and Appellant.

**CASE
NO. 10895**

RESPONDENTS' BRIEF

STATEMENT OF THE KIND OF CASE

This is an action for fraud and deceit tried to the court without a jury, wherein the lower court awarded judgment for the plaintiffs, who are the respondents herein.

RELIEF SOUGHT

Respondents believe the judgment in their favor and against defendant-appellant was proper, and deny that any reversible error was committed by the lower court. Consequently, respondents seek an affirmation of the trial court's judgment.

STATEMENT OF FACTS

Appellant's brief raises no question as to the facts found by the lower court upon which the judgment is predicated, and there is apparently no claim that the facts as found by the lower court are not fully supported by the evidence. The sole claim of the appellant seems to be that the false and fraudulent statements made to plaintiffs by defendant must have been in writing in order for them to be asserted as an exception to discharge under Section 17 of the Bankruptcy Act, and that the false and fraudulent acts, conduct and statements of the defendant were simply promises made to plaintiffs to do something in the future and, therefore, are not actionable.

As the facts as found by the lower court do not seem to be in controversy, and as an aid to the court in considering the law matter raised in appellant's brief, we believe it worthwhile to set out verbatim the Findings of Fact and Conclusions of Law which the court made. These are as follows:

FINDINGS OF FACT

1. That during all times material in this action, defendant was the president of Mountain Motors, Inc., a Utah corporation, also known as Provo Studebaker Company, and was the manager and operator of the corporation's Studebaker automobile agency in Provo, Utah.

2. That plaintiffs loaned to defendant the following sums of money on or about the dates indicated:

November 24, 1961:	\$5000.00
July 15, 1962:	\$5200.00
July 22, 1963:	\$5000.00

February 22, 1964:	\$4495.25
April 14, 1964:	\$5000.00
May 20, 1964:	\$6500.00
July 9, 1964:	\$6900.00
August 11, 1964:	\$5000.00
	<hr/>
Total	\$43,095.25

3. That promissory notes were made, executed and delivered by defendant to the plaintiffs covering each of said loans, and upon at least one occasion, to-wit, on or about May 25, 1964, defendant consolidated and renewed the loans which were then outstanding by the execution of a new promissory note in the amount of \$25,000.00, and at that time the then outstanding notes were destroyed.

4. That in addition to the foregoing, plaintiffs purchased 100 shares capital stock of Mountain Motors, Inc., for the sum of \$12,500.00 from the defendant herein on or about September 25, 1963, and paid for said stock the sum of \$7450.00 by their check and \$5050.00 by cancellation of defendant's promissory note payable to plaintiffs dated July 22, 1963, in the amount of \$5000.00; that on or about January 9, 1964, plaintiffs purchased from defendant an additional 10 shares of capital stock of Mountain Motors, Inc. and paid therefor the sum of \$1250.00.

5. That Mountain Motors, Inc. ceased doing business shortly after the month of December, 1964, and said business is now defunct; that in the month of December, 1964, defendant moved to the State of Colorado; that on or about July 16, 1965, defendant was adjudicated a bankrupt on a petition filed by him in the District Court of the United States for the District of Colorado, Denver, Colorado; that

the indebtedness of defendant to plaintiff referred to above was duly scheduled for discharge; that on or about February 24, 1966, the United States District Court for the District of Colorado made and entered an order discharging defendant from all provable claims and debts, except debts excepted by the Bankruptcy Act from the operation of a discharge in bankruptcy.

6. That in or about the month of February, 1964, partially because the Studebaker Company had moved its automobile manufacturing business to Canada, the sales of automobiles by Mountain Motors, Inc. dropped from between 25 to 30 per month to about 2; that repossessions of previously sold automobiles by Mountain Motors, Inc., during February and March, 1964, increased at an unprecedented rate; that on or about April 10, 1964, defendant was informed by his accountant and knew that the business of Mountain Motors, Inc. was in precarious financial condition and that the same had lost in excess of \$22,000.00 in the previous 6 months, most of which loss occurred in the months of February and March, 1964; that defendant knew that he would have to look to the business of Mountain Motors, Inc. to repay any funds that he might personally borrow, and he further knew that plaintiff reposed in him extra-ordinary trust and confidence; that notwithstanding such information and knowledge he did not reveal to the plaintiffs any of the circumstances of Mountain Motors, Inc. which rendered his ability to repay practically impossible, but at all times willfully concealed the true condition of the business of Mountain Motors, Inc. and his personal inability to repay the loans, by deliberately misleading plaintiffs and making false and deceptive statements calculated to prevent inquiry and investigation, and

further calculated to create in plaintiffs the false impression that there was nothing wrong with the business of Mountain Motors, Inc., and that the same was prosperous and profitable to the defendant. For example, after April 10, 1964, defendant's deceptive talk, acts, and conduct were as follows:

(a) On or about April 14, 1964, defendant stated to plaintiffs that he wanted to buy the stock of Mountain Motors, Inc. owned by Chester and Mable Oliver; that the business of Mountain Motors was very good, and that it was in sound financial condition; that if he owned the stock which was then owned by the Olivers he would be able to save Mountain Motors, Inc. about \$1300.00 each month since he was paying that much to them; that on or about May 20, 1964, defendant, in substance and effect, repeated said statements, and assured plaintiffs that there was no chance at all of losing their money; that in reliance upon said statements, all of which were false and untrue, plaintiffs loaned defendant \$5000.00 on April 14, 1964, and the sum of \$6500.00 on May 20, 1964.

(b) That on or about July 9, 1964, defendant stated to plaintiffs that he wanted to buy the stock of Ross Fazzio owned by the said Ross Fazzio in Mountain Motors, Inc. because Ross Fazzio was demanding equality in the business and was interfering with its operation; that defendant again repeated that business was real good, all of which was false and untrue; that defendant further stated in substance and effect, that Mountain Motors, Inc. would pay a dividend on capital stock of \$750.00 in the Fall of the same year, which would more than compensate plaintiffs for their loss of dividend on Hamilton Fund stock which they were requested to convert to cash by the defendant

to loan to him, the payment of which dividend defendant well knew could not be done, and was false and untrue; that in reliance upon said statements plaintiffs loaned defendant the sum of \$6900.00 on July 9, 1964.

(c) That on or about August 11, 1964, defendant stated to plaintiffs that he wanted to borrow \$5000.00 in order to pay off the back part of the property then being occupied by Mountain Motors, Inc., and that he would then rent it back to the corporation for the sum of \$750.00 per month; that in reliance upon said statements, plaintiffs loaned defendant the sum of \$5000.00; that in truth and in fact the statements were fabrications and were false and untrue.

(d) That although plaintiff, E. L. Gear, was a member of the board of directors of Mountain Motors, Inc., he was not notified of any director's meetings and did not attend any of said meetings, and defendant deceitfully, in order to keep plaintiffs from learning of the true facts as to the business of Mountain Motors, Inc., instructed the secretary of the corporation to omit notice to the plaintiff as to such meetings, but to show him as present so that plaintiff could collect director's fees; that specifically, during the month of April, 1964, and thereafter, meetings of the board of directors were had concerning the business of Mountain Motors, Inc., at which plaintiff, E. L. Gear, was shown as present, but was not present, and was not notified by reason of defendant's instructions to his subordinates.

7. That plaintiffs relied on the statements, conduct and actions of the defendant, and would not have loaned him the money as aforesaid, from and after April 10, 1964, if the true facts had been known or disclosed to them.

8. That a reasonable attorney's fee for legal services rendered to the plaintiffs herein is the sum of \$3600.00.

9. That defendant paid the interest on the loans above set forth to about December 1, 1964.

From the foregoing Findings of Fact the court now makes and enters the following:

CONCLUSIONS OF LAW

1. That plaintiffs are entitled to judgment from and against defendant in the sum of \$23,400.00 for monies loaned to defendant by plaintiffs after April 10, 1964, together with interest thereon in the sum of 7% per annum from December 1, 1964, until the date hereof, less the sum of \$1000.00 paid on or about October 11, 1964, amounting in all to the sum of \$26,359.50; that plaintiffs are further entitled to judgment against defendant in the sum of \$3600.00 for the use and benefit of their attorneys herein, and for costs expended in the amount of \$40.60, totaling in all the sum of \$30,000.10.

2. That the false, fraudulent, deceptive and misleading statements, acts, and conduct of the defendant, and his willful and deliberate concealment of the true condition of the business of Mountain Motors, Inc. from and after April 10, 1964, constitutes fraud and the obtaining of money by false representations.

3. That under the provisions of Title 11, Section 35(a) (2) USCA, as amended, the indebtedness set forth above is excepted from the operation of defendant's discharge in bankruptcy.

Let judgment be entered accordingly.

ARGUMENT

POINT 1

THE FRAUDULENT STATEMENTS, CONDUCT, ACTS AND ARTIFICES OF THE DEFENDANT AS FOUND BY THE LOWER COURT CONSTITUTE OBTAINING MONEY OR PROPERTY BY "FALSE PRETENSES OR FALSE REPRESENTATIONS" WITHIN THE MEANING OF SECTION 17 (a) (2) OF THE BANKRUPTCY ACT, AND THERE IS NO REQUIREMENT THAT SUCH FALSE PRETENSES OR FALSE REPRESENTATIONS BE IN WRITING.

Section 35 (a) (2) of Title 11, United States Code Annotated, is the codified Section 17 (a) (2) of the Bankruptcy act. The material part of this Section reads as follows:

"(a) A discharge in bankruptcy shall release a bankrupt from all his provable debts whether allowable in full or in part, except such as (2) are liabilities for obtaining money or property by false pretenses or false representations, or for obtaining money or property on credit or obtaining an extension or renewal of credit in reliance upon a materially false statement in writing respecting his financial condition made or published or caused to be made or published in any manner whatsoever with intent to deceive,"
(Underscoring supplied)

It will be noted that the language of the statute set forth above does not require the misrepresentations contemplated by the underscored part thereof to be in writing, which is the part on which respondents rely. And, no such requirement has apparently been imposed by any

judicial construction. At page 584 in 9 Am Jur 2nd the editors state: "The misrepresentation under the first part of the Bankruptcy Act 17 (a) (2), as distinguished from the part added in 1960, need not be in writing." See also the annotation in 133 ALR at page 451, making the same categorical statement. None of the cases cited by appellant in his brief express a contrary view, and the writer has been unable to locate any text at variance to the foregoing.

While it is true that some of the false and fraudulent statements made by the defendant to the plaintiffs were matters pertaining to his financial condition, these are so intertwined with others not pertaining to his financial condition, and with his fraudulent acts, conduct and artifices which were not matters of finance, that it is impossible to isolate them from the general pattern of dishonesty and fraudulent purpose which the lower court found to have been the case. The cases are uniform in holding that it was not the intent of Congress in passing the Bankruptcy Act to exonerate dishonest debtors. **Hamby v. St. Paul Mercury Indem. Co.**, C.A. Va. 1954, 217 F. 2d 78; **In re Oxford Inv. Co.**, D.C. Cal. 1965, 246 F. Supp. 651; **Koch v. Segler**, Mo. App. 1960, 331 SW 2d 126, 78 ALR 2d 1220. And the court said in the case of **Beneficial Finance Co. vs. Norton**, 1962, 185 A 2d 218, 76 NJ Super. 577:

"False pretenses or false representations" within subsection (a) (2) of this section means any conduct tantamount to fraud, and is not limited to false representations as to one's financial condition."

The cases cited by appellant are not to the contrary. See the Louisiana case of **Sears, Roebuck vs. Sofio**, 138 So.

2d 616, heavily relied on by appellant, wherein the court states as follows:

“The two circumstances referred to are unusual to say the least. The trial judge gave two written reasons. He was convinced of defendant’s honest purpose and that no fraud was perpetrated. The trial court heard and observed these witnesses and we cannot say that manifest error has been committed.” (Underscoring supplied)

POINT II

THE STATEMENTS, ACTS, CONDUCT AND ARTIFICES OF APPELLANT AS FOUND BY THE TRIAL COURT CONSTITUTE FRAUD AND ARE NOT SIMPLY MATTERS OF FUTURITY OR PROMISE OF THINGS TO BE DONE IN THE FUTURE.

Where all the essential elements of fraud exist, indebtedness incurred as a result thereof is not discharged in bankruptcy. **National Finance Co. of Utah v. Valdez**, 11 Utah 2d 339, 359 P.2d 9.

In the case at bar, the lower court found all the elements of fraud, and except for appellant’s claim that some of the false and fraudulent matters found by the court are really promises of things to be done or performed in the future and are, therefore, not actionable, there is no claim that the record does not support such findings.

To say that the statements, acts and conduct of the defendant are simply matters of good-faith promises to do something in the future is to completely ignore the record and the trial court’s findings. Among others, the court made specific findings of willful and deliberate concealment, and misleading statements, acts, and conduct calculated to pre-

vent inquiry and investigation. This is certainly not the case of the good-faith promise which appellant contends for. The many statements of defendant made at various times were patent fabrications, tailored by him to fit the time and circumstances and the human frailties of the plaintiffs in order to throw them off their guard and extract monies from them, without which he would have been unable to do so. This was at the very least, "active concealment", which is regarded in law as positive fraud.

"Concealment becomes a fraud where it is effected by misleading and deceptive talk, acts, or conduct, where it is accompanied by misrepresentations, or where, in addition to a party's silence, there is any statement, word, or act on his part which tends affirmatively to a suppression of the truth, to a covering up or disguising of the truth, or to a withdrawal or distraction of a party's attention from the real facts; then the line is overstepped and the concealment becomes a fraud. Such conduct is designated 'active concealment' and it produces the same result in law as positive misrepresentation."

"Very little in addition to nondisclosure of material facts is required to prevent the application of the general rule which renders mere silence nonactionable, and to make a party guilty of fraud. For instance, statements ordinarily regarded as expressions of opinion may be considered as sufficient where calculated to mislead and to prevent an examination of the property involved, or to throw the owner off his guard in order to gain the property from him. Indeed, it has been said that the least degree of misrepresentation constitutes very potent evidence of fraud under such circumstances, and that a single word, a nod, a wink, a shake of the head, or a smile, intended to induce the

belief in the existence of a nonexistent fact, may be sufficient." 23 Am Jur 872.

CONCLUSION

The trial court correctly found, in essence, that defendant's indebtedness to the plaintiffs arose as a result of false statements and artful and deceptive words, acts, and conduct practiced upon plaintiffs, which, when the true facts were known, were more or less obviously said or done with intention to defraud. Such are unquestionably "false pretenses" or "false representations" within the meaning of those terms as used in the Bankruptcy Act, and the trial court's judgment should, therefore, be affirmed.

Respectfully submitted,

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