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Vera T. Callister v. Lucy C. Callister : Brief of Respondent

Utah Supreme Court

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James W. Beless, Jr.; Brayton, Lowe & Hurley; Attorneys for Plaintiff and Respondent;

Bryce E. Roe; Fabian & Clendenin; Attorneys for Defendant and Appellant;

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**IN THE SUPREME COURT
of the
STATE OF UTAH**

VERA T. CALLISTER,
Plaintiff and Respondent,

—vs.—

v.

LUCY C. CALLISTER, Individually
and as Executrix of the Estate of
Alfred Cyril Callister, Deceased,
Defendant and Appellant.

FILED

Ca - 1963

Supreme Court, Utah

Case No. 10013

RESPONDENT'S BRIEF

**APPEAL FROM A JUDGEMENT OF THE
THIRD DISTRICT COURT FOR
SALT LAKE COUNTY
HONORABLE A. H. ELLETT, JUDGE**

**JAMES W. BELESS, JR., and
BRAYTON, LOWE & HURLEY
1001 Walker Bank Building
Salt Lake City 11, Utah
*Attorneys for Plaintiff
and Respondent.***

**BRYCE E. ROE
FABIAN & CLENDENIN
800 Continental Bank Building
Salt Lake City 11, Utah
*Attorneys for Defendant
and Appellant.***

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IN THE SUPREME COURT of the STATE OF UTAH

VERA T. CALLISTER,

Plaintiff and Respondent,

v.

LUCY C. CALLISTER, Individually
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Alfred Cyril Callister, Deceased,

Defendant and Appellant.

Case No.
10013

RESPONDENT'S BRIEF

STATEMENT OF FACTS

Omitting the various innuendos and arguments contained in appellant's statement of facts, a simple statement follows. We shall, as did appellant, refer to plaintiff as Vera, and defendant as Lucy.

Vera was formerly the wife of Dr. Callister. She obtained a divorce decree which awarded alimony. As soon as the divorce was final Dr. Callister married Lucy. Alimony became delinquent. He made gifts to Lucy of stocks valued in excess of \$90,000 telling her that the transfers were made for the purpose of removing these

stocks from his name and placing them beyond the access of Vera. (R. 51) At the time of his death, Dr. Callister owed Vera \$11,150.00 together with accrued interest. (R. 40)

Lucy acted as executrix of the doctor's estate. She filed a probate inventory showing assets of \$809.12. (R. 86) Claims were filed in the total amount of \$14,874.43. (R. 79, 80, 87) Lucy allowed and paid all claims except Vera's by using the meager assets she had inventoried in the estate and by advancing some funds she claimed as her own. She rejected Vera's claim.

Vera filed an action to establish her claim against the estate and to establish that the stock transfers were in fraud of creditors. Lucy, while executrix, did not disclose any information available to her tending to show an intent by the doctor to defraud Vera as a creditor. Not only did Lucy fail to disclose any such information, she also, as executrix, denied Vera's pleading, which alleged that the doctor intended by the transfer of stock to hinder, delay or defraud her as a creditor.

Vera compromised her claim for \$4000 because she had little evidence to establish the doctor's fraudulent intent. (R. 52-13) A release, stipulation and judgment of dismissal were executed and Vera's attorney closed his file. (R. 52-25)

Six months later, Llewellyn Thomas, an attorney for the Utah state tax commission came to Vera's attorney, while conducting an investigation regarding inheri-

tance taxes due in the doctor's estate. (R. 52-21) Thomas asked Vera's attorney why Vera had settled her claim. He showed Vera's attorney an affidavit by Lucy asserting to the tax commission the very thing that Lucy, as executrix, had so staunchly denied, namely, that the transfer of stock was made for the purpose of defrauding the creditor Vera. (R. 51) The pertinent part of this affidavit is

"That her husband told her that the transfers were made for the purpose of removing these stocks from his name and placing them beyond access of his former wife, Vera Callister, to whom the doctor owed certain monies for arrearages in an alimony judgment which she had against him;

"That the doctor was very bitter about having to pay this alimony because he felt that his former wife had received more than her fair share of the property upon their divorce;"

This change of position, whereby the executrix later asserted that the stock transfer was in fraud of creditors (and consequently was not in contemplation of death) resulted in a tax saving of \$4286.60. (R. 128)

After Lucy's settlement with the tax commission, she filed her final account with the probate court and petitioned for approval of her skillfully contrived administration and for her discharge from her fiduciary duties. (R. 141) Vera objected thereto and brought the present suit alleging three causes of action; first, that Lucy was unjustly enriched, second, that she should hold

the stocks as constructive trustee and third, that because of concealment from the court and from Vera of the fact that the doctor had told her that the transfers of stock were made to defraud Vera, the release, stipulation and judgment of dismissal should be set aside and she should be allowed to litigate her claim.

The court granted a summary judgment against Lucy on the third cause of action because she had breached her duties as a court official, which "came ahead of any right she had as an heir of transferee". (R. 53) The court said she had a duty "to the court as well as to the creditors" to disclose facts relating to fraudulent transfers to herself, and to include such property as estate assets. (R. 56)

ARGUMENT

POINT I.

THE COURT MAY SET ASIDE A JUDGMENT FOR ANY REASON JUSTIFYING RELIEF INCLUDING FRAUD UPON THE COURT.

Judge Ellett was understandably shocked by his court official's playing "fast and loose" in estate matters. He exercised his sound discretion in setting the judgment aside because of the acts of a court official, whereby she took advantage of her position, not only by concealing information, which she had a duty to disclose, but also by denying fraudulent intent on the part of Dr. Callister and then later asserting such a fraudulent intent, both to her personal benefit.

An independent action was commenced to set the judgment of dismissal aside under Rule 60(b) U.R.C.P. Rule 60(b) provides, in part, that

“The court may in the furtherance of justice relieve a party . . . from a final judgment . . . for the following reasons: . . .

“(7) Any other reason justifying relief from the operation of the judgment . . . This rule does not limit the power of a court . . . to set aside a judgment for fraud upon the court . . .”

Under 60(b)(7) Judge Ellett was justified in setting the judgment aside for many reasons other than fraud, including such reasons as (a) He did not want an officer of the court to profit by her position at the expense of a creditor of the estate. (b) He wanted an officer of his court to fully disclose relevant facts to those persons to whom she had a duty of trust. (c) He wanted an officer of his court to fully disclose relevant facts to the court itself. (d) He did not want an officer of his court to engage in sharp practice because the act of the officer is, in fact, an act of the court, and the public in general, and creditors of estates in particular, are entitled to expect and receive fair and impartial treatment from the court and its officials in the probate of an estate.

Likewise, Judge Ellett felt there was “fraud upon the court.” Fraud upon the court may arise when a court official violates a duty to deal with the court with integrity and honesty.

“‘Fraud upon the court’ should, we believe, embrace only that species of fraud which does, or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery can not perform in the usual manner its impartial task of adjudging cases that are presented for adjudication.” 7 *Moore’s Federal Practice*, Par. 60.33.

The court was fully justified in setting aside the judgment, under Rule 60(b), for fraud upon the court or any other reason justifying relief. The bulk of the arguments in appellant’s brief are therefore inapplicable.

We discuss their arguments in the order presented in appellant’s brief.

POINT II.

THERE WAS FRAUD UPON THE PLAINTIFF.

Lucy argues that the specific intent of Dr. Callister to defraud Vera might be proved by circumstantial evidence of the surrounding circumstances, rather than by showing direct statements by the doctor showing his intent. She quotes an inapplicable rule, about direct *testimony* by a transferor, to the effect the transferor’s direct testimony *denying* his fraudulent intent might not be worthy of belief. Here, we have neither direct testimony (Dr. Callister is deceased) nor do we have denial of fraudulent intent, but rather a *declaration* against interest *admitting* the fraudulent intent.

This is not only a declaration against interest, which in and of itself is sufficient to be an exception to the hearsay rule, but is an admission by Lucy’s predecessor

in title, and as such is binding upon Lucy, who is in privity with him. Contrary to appellant's assertion that Dr. Callister's statement of his fraudulent intent would not be admissible because the statement was made subsequent to the transfers, the general rule of law, which has been set forth in many Utah cases, is to the effect that:

“When intent is a material element of a disputed fact, declarations of a decedent made after, as well as before, an alleged act that indicate the intent with which he performed the act, are admissible.”

20 Am. Jur. Evidence, Par. 585 (Cumulative Suppl.) *Kelly v. Bank of America Nat. T. & Sav'gs Association*, 112 Cal. App. 2d 388, 246 P2d 92, 34 ALR 2d 578. *Annotation* 34 ALR 2d 588. *Mower v. Mower* (1924) 64 Utah 260, 228 P 911; *Chamberlain v. Larson* (1934) 83 Utah 420, 29 P2d 355; *Stanley v. Stanley* (1939) 97 Utah 520, 94 P2d 465; *First Security Bank v. Burgi* (1952) 122 Utah 445, 251 P2d 297.

Lucy's contention that the doctor's statement would not be admissible in evidence is therefore erroneous.

Lucy argues that Vera should have proved her case by circumstantial evidence, and that she was therefore not harmed by Lucy's concealment of facts in violation of her fiduciary duty of full disclosure. Declarations by the transferor are a part of the circumstantial evidence. *Mower v. Mower*, 64 Utah 260, 228 P 911, 914. Furthermore, Lucy would have to concede that a case without an outright admission by Dr. Callister of his

fraudulent intent would be a weaker case than one based upon such an admission. Vera was, therefore, harmed by concealment of such statement because the weakness of a case induces its settlement for a small amount.

Lucy argues the admission of fraudulent intent by the doctor was a privileged communication by one spouse to another, but Lucy had no qualms about waiving the “privilege” when it was to her advantage to disclose the communication to the tax commission. She had the duty to disclose the same statement to a creditor in the probate proceeding so long as she was executrix, and she could only avoid such a duty by either declining to act or by resigning as executrix, neither of which would she do. It would be most peculiar to permit a fiduciary to breach her duty of full disclosure and justify such breach on the grounds that she had a personal privilege. More importantly, communications between husband and wife while engaged in the perpetration of a fraud are not privileged. 58 *Am. Jur. Witnesses*, par. 398.

It is amazing to note that Lucy next asserts, “Lucy presently contends, and has contended all along, that the transfers weren’t made with intent to defraud Vera.” (Appellant’s brief, page 19). This is a remarkable statement in light of the assertion to the tax commission that the doctor told her the transfers were made for the purpose of placing the stock beyond the access of Vera; which statement was submitted to the tax commission for the purpose of establishing that the transfers were

not in contemplation of death.

Lucy next argues that a litigant *generally* has no duty to disclose facts helpful to the opposition. This is conceded, and the cases cited by Lucy on the point are sound, but they are inapplicable because there is no fiduciary relationship involved in those cited cases. Vera concedes that if there were no fiduciary duty of full disclosure, then failure to disclose would not be fraudulent, but Vera does not agree that it is either “preposterous” or “unreasonable” that Vera should expect a full disclosure from the executrix. Lucy had a duty of full disclosure when Vera asserted her claim, which duty continued after Lucy denied the claim and suit was brought against her.

In discussing the duties of an administrator, Bancroft says:

“Once appointed and acting, the representative becomes as to the heirs and devisees, a fiduciary, and practically a trustee in many respects, subject to the burden of dealing with a fairness which is the settled concomitant of such relationship, . . .

“Thus the personal representative of a decedent occupies a dual position; he stands in a fiduciary relationship to the creditors and heirs of the deceased, and at the same time he has obligations as an officer of the court which appointed him.

2 *Bancroft's Probate Practice*, 2nd Ed. Pars. 332, 337.

"Crosby was also the administrator or manager of the estate in Utah. As administrator he had the duty to make full disclosure of all matters and information regarding the estate. It is not unlike a partnership where one partner manages the business. He must make full disclosure of his acts and the state of the business and render a correct accounting." *In re Blodgett's Estate*, 93 Utah 1, 70 P2d 742, 749.

Justice Cardozo in the case of *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545, 62 A.L.R. 1, quoted in 2 Scott on Trusts, p. 909, said:

"Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unending and inveterate. Uncompromising rigidity has been the attitudes of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. Only thus had the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court."

In *Burns v. Skogstad*, 69 Idaho 227, 206 Pac. 2d 765, 769, in a case remarkably close to the case at bar, the Court said:

"... it was the duty of the executor in dealing with these legatees to make a full disclosure of all relevant facts and to treat them with utmost frankness. 3 *Bogart Trusts and Trustees*, Sec. 493 and 544. The burden was upon the defendants to show that this duty was performed. This the defendants have not done. The record is silent as to what disclosures, if any, were made by the executor as to the condition, or value of the estate, or as to the interests of the legatees therein."

"Utmost fairness and good faith is required of an executor with those whom he purports to represent." 33 C.J.S. 1102, Sec. 142, note 41. The executor primarily represents the creditors of the estate of the decedent and secondarily the heirs. *Mutual Life Ins. Co. of N. Y. v. Farmers & Mechanics Bank*, 173 F. 390; *In re Weinberg's Estate*, 296 N.Y.S. 7, 162 Misc. 867. A trust relation exists between the executor and the creditors, especially if the estate is insolvent. *Reconstruction Finance Corp. v. Lee*, 290 Mich. 328, 287 N.W. 757.

It is always held to be actual fraud for an executor to take for his own benefit a position in which his personal interest will conflict with his primary duty to creditors. *Scholz v. Hazard*, 68 Colo. 343, 191 Pac. 123; 2 *Bancroft's Probate Practice* 648, Sec. 339. *Woodson v. Reynolds*, 42 N.M. 161, 76 P2d 34.

Lucy as executrix had a legal duty to disclose to Vera, as a creditor, facts in Lucy's knowledge regarding the assets of the estate and fraudulent transfers by the

decedent. The probate inventory filed by Lucy (R. 85) and the inheritance tax inventory (R. 100) were half truths. 2 *Bancroft's Probate Practice*, 657 Sec. 506, states: "If property was conveyed by the decedent in his lifetime in fraud of creditors and the assets are insufficient to pay his debts, such property may be recovered in most states in an action by the representative and *must be inventoried* although it is an 'asset' only for the payment of debts." (emphasis ours). *Adams v. Prather*, 176 Cal. 33, 167 P. 534.

In *Baker v. Baker*, 24 Tenn. App. 220, 142 S.W. 2d 737, the court states:

"The executor is bound to disclose material facts within his knowledge wherein the beneficiary's interest is to be affected by a transaction with the executor, concealment by the executor being fraudulent in law and furnishing basis for equitable relief."

See 3 *Pomeroy's Equity Jurisprudence*, Sec. 902.

In re Dryden's Estate, 155 Neb. 552, 52 N.W. 2d 734, holds that "The personal representative of an estate and his attorney are officers of the court and are fiduciaries in their relation to the estate of the deceased and the persons interested therein," and that failure of the executor and his attorney to disclose facts material to such interested persons to protect their interests is extrinsic fraud requiring equitable relief. This duty of disclosure by an executor was again spelled out in *Purinton v. Dyson*, 8 Cal. 2d 322, 65 P.2d 777, 113 A.L.R. 1230.

Lucy's failure to fully disclose was not only a breach of duty as a fiduciary. It was the means of reaping a benefit for Lucy personally. She was an officer of the court, who in the language of our court in *Weyant v. Utah Sav. & Tr. Co.*, 54 Utah 181, 182 P. 189, 9 A.L.R. 1119, "used the court as an instrument to gain her own end." *In re Sullivan's Estate*, 51 Ariz. 483, 78 P.2d 132, is a case involving failure of an executor to disclose material facts to creditors. The court said:

"When a party who speaks falsely or refuses to speak truly occupies a fiduciary relation toward an injured party so that it is his duty to state all the facts, and if further he profits by his own fraudulent conduct, the conduct will justify equity in intervening even in a collateral proceedings whether the fraud be considered extrinsic or intrinsic."

Lucy argues that there was no reliance. The test of reliance in a case of concealment is whether or not Vera would have acted differently had there been a disclosure. 37 C.J.S. *Fraud*, par. 29. Vera testified that although she would have been guided by counsel, had the statement by Dr. Callister been disclosed to her, she would not have settled. (R-52-53) Furthermore, Vera's lawyer said that he would not have advised settlement had the statement by Dr. Callister as to his fraudulent intent been disclosed by Lucy. (R-52-26)

Lucy cites *Colton v. Stanford*, 82 Cal. 351, 23 P.16, as authority as to when a fiduciary's duty of disclosure terminates. That case holds that the fiduciary duty continues so long as the relationship continues. Lucy hasn't

yet resigned as executrix and still has the duty of full disclosure. In none of the cases cited by Lucy is the fiduciary exonerated from an original duty to disclose by virtue of the fact that a suit is pending to establish the very thing concealed.

Lucy asserts that this was an arm's-length transaction because Vera had counsel. Vera's counsel was duped along with Vera. He would not have advised compromising Vera's claim had Lucy disclosed facts known to her. (R-52-26)

There was a fiduciary duty of accounting for assets and of full disclosure and a breach of said duties, reliance on which changed Vera's course of conduct.

POINT III.

LUCY'S FRAUD WAS EXTRINSIC.

The fraud is stated by Lucy to be intrinsic and not the type which is the basis for setting aside a judgment which must be extrinsic. The distinction between intrinsic and extrinsic fraud has been criticized as being largely a matter of semantics; but even if the distinction is a valid one, where a fiduciary has a duty to make a full and fair disclosure to the adverse party of relevant and material facts, a failure to do so is extrinsic fraud and is the basis for setting aside a judgment. 7 *Moore's Federal Practice*, 60.37, footnote 22. Where testamentary trustees had a duty to disclose to beneficiaries their self dealing, the trustees' failure to disclose was held to be both intrinsic and extrinsic fraud and an order vacating a judgment was affirmed. *Re Enger*, 225 Minn. 229, 30 NW 2d 694, 1 ALR 2d 1048. An order setting

aside a judgment was held to be proper where a guardian obtained a release and discharge from his wards. The court said, "If there was fraud in obtaining the release, this fraud was certainly extrinsic to the judgment." *Park v. Park*, 123 Fed 2d 370, 372.

Furthermore, if there is fraud upon the court as here, the very language partially quoted by Lucy in her brief from *Haner v. Haner*, 13 Utah 2d 299, 373 P2d 577, 578-9, shows that the judgment should be set aside as being extrinsic fraud. The court said:

"It is sometimes said that when a judgment is attacked collaterally on the ground that it was obtained by fraud or deceit it will be set aside only for extrinsic fraud. But we are in accord with the indicators in the Restatement of Judgments that this is too limited. It seems more realistic to say that when it appears that the processes of justice have been so completely thwarted or distorted as to persuade the court that in fairness and good conscience a judgment should not be permitted to stand, relief should be granted. However, inasmuch as the plaintiff here seems to be relying on the ground of fraud, there is a distinction which it is necessary to point out. In order to justify granting relief, the alleged wrong would have to be of the type characterized as extrinsic fraud: that is, fraud based on conduct or activities outside of the court proceedings themselves; and which is designed and has the effect of depriving the other party of the opportunity to present his claim or defense. This type of fraud, which is regarded as a *fraud* not only upon the opponent, but *upon the court itself*, can be accomplished in a number of ways,

such as making false statements or representations to the other party or to witnesses to prevent them from contesting the issues; or by that means or otherwise preventing the attendance of the parties or witnesses; or by destroying or *secret-ing* evidence; so that fair trial of the issues is effectively prevented.” (Emphasis ours).

The other cases cited by Lucy relating to extrinsic and intrinsic fraud are not in point because they do not involve a fiduciary’s failure to disclose. Lucy seems to concede this since she states that concealment is “not a basis for setting aside the judgment unless the relationship between Vera and Lucy was such that there was a special duty of disclosure.” (Appellant’s brief, 31). Lucy had a special duty of disclosure in that she was executrix.

POINT IV.

LUCY HAD A FIDUCIARY DUTY OF DISCLOSURE.

Lucy cites 75-11-14 UCA 1953 providing an executrix need not bring suit to recover property fraudulently conveyed unless the creditor pays the costs of suit, but Lucy concedes that the statute does not apply to this situation, where the executrix herself is the one in possession of the property fraudulently transferred.

Lucy infers that because a creditor can directly sue an executrix when she is a fraudulent transferee, there is therefore a recognition of a conflict of interest, and Lucy then concludes that “it would be unrealistic to expect Lucy to protect Vera’s claim.” (Appellant’s brief, 34). By this Lucy must mean that where there is a con-

lict of interest, a fiduciary is relieved from any duty of full disclosure. Such is not the law and Lucy cites no cases which support such a proposition. The case of *Emmons v. Barton*, 109 Cal. 662, 42 P 303, cited by her merely holds that where an executrix was the fraudulent grantee, it would be useless for a creditor to demand that she sue herself or furnish costs of such suit. (Parenthetically Lucy also cites this case as holding that statements by a deceased husband made after a conveyance are inadmissible. This holding was based on an 1849 California statute. California no longer so holds. See *Kelly v. Bank of America Nat. T. & Savings Association supra*.)

Lucy complains that no effort was made by Vera to remove her as executrix. Her reasoning must be that Vera must assume that Lucy will not properly discharge her duties, including that of full disclosure. Lucy, not Vera, knew that Dr. Callister had stated his fraudulent intent. Only Lucy knew that she was concealing information. Vera had no reason to petition to remove Lucy since she had no indication that Lucy was concealing information until she learned of the affidavit Lucy filed with the tax commission. Surely, Lucy cannot seriously contend that because Vera did not petition to remove her from office on the ground that Lucy had a conflict of interest, that such inaction protects Lucy from any wrongdoing on her part while Lucy held onto said office despite her conflict of interest.

Lucy cites *Borge v. Traaen*, 158 Ore. 454, 75 P2d

939, as authority for the proposition that Vera is not a

creditor of the estate because she had not reduced her claim to judgment and thus the executrix owed no fiduciary duty to her. The case does not so hold.

In the *Borge* case, a creditor of the deceased filed no claim in probate, and after the administratrix, who was the wife of the decedent, was discharged upon the closing of the estate, the creditor brought suit against her, claiming a transfer in fraud of creditors. A demurrer was sustained by the lower court and affirmed on appeal. The court said that no claim had been filed in the estate during the probate, and that because no claim was filed, any claim which she might originally have had was barred and that she was no longer a creditor of the estate. There was no allegation that there were any claims filed with the administratrix which were not paid. The court said that the administratrix did not commit fraud by not inventorying the transferred property because it was not in fact a part of the estate inasmuch as it was not needed to pay debts. The court cited the Oregon statute providing that an administratrix should bring an action to recover property transferred in fraud of creditors *when the assets of the estate are insufficient to satisfy claims*. Since the creditor had not filed her claim, and since therefore the estate was not insolvent, the administratrix had no duty to inventory the property. The obvious distinction between the case at bar and the Oregon case, which Lucy ignores, is that a claim *was* filed in our case.

The Oregon case also states that a direct action cannot be taken against the transferee until a judgment

has been obtained against the transferor thereby establishing that the transferor had an obligation to the creditor, and, until then, an equitable lien cannot be imposed on the transferred property. This may have been the rule in Oregon in 1938 as well as in some other states, but 25-1-15 UCA 1953, provides, in part, as follows:

"25-1-15. RIGHTS OF CREDITORS WITH MATURED CLAIMS. — Where a conveyance or obligation is fraudulent as to a creditor, such creditor, when his claim has matured, may, as against any person, except a purchaser for fair consideration without knowledge of the fraud at the time of the purchase or one who has derived title immediately or mediately from such a purchaser:

(1) Have the conveyance set aside or obligation annulled to the extent necessary to satisfy his claim; or,

(2) Disregard the conveyance, and attach, or levy execution upon, the property conveyed."

This statute requires no reduction to judgment, but authorizes a direct remedy against the transferee. Our case does not involve any equitable lien in any event. Utah rules relating to a joinder of actions should also do away with any requirement of prior judgment. Even if a prior judgment were required, Vera does have a judgment as to alimony which is a determination that the transferor had an obligation, which would satisfy the rationale of the Oregon rule, even though not further reduced to a judgment as to the amount actually due.

Lucy's conclusion that there was no fiduciary relationship is therefore not substantiated.

Lucy argues that an executrix has no duty of disclosure and cites *In re Blodgett's Estate*, 93 Utah 1, 70 P2d 742, as authority for the proposition. That case, in the very language quoted by Lucy, holds that there is a duty of disclosure by an executrix or administratrix and that until there is a full disclosure there is a breach of duty. The Court said there was no duty to *advise*, but said:

“... His duty as administrator went to the obligation to take into possession and disclose all estate property and all information to those interested in the estate as to estate matters, thus putting them on the same plane as he was as to such information regarding all the assets and transactions, but, when that is done, he has performed his duty to a party in regard to whom he is in controversy as to their respective interest....

“All we need to do is to determine if there were reasonable grounds for controversy and, if so, whether he furnished her full information as executor from which she could decide in their controversy as beneficiaries what she would or would not do....

“... The law is plain that he has his duty as trustee to her and as such it must be fully performed.”

The court then found there was full disclosure.

Our very point is that Lucy did fail to disclose, not that there was any duty or failure to *advise*. The Blodgett case does not even discuss the assertion by

Lucy that **personal dislike** between the executrix and a **beneficiary** excuses the executrix from her duty of full disclosure.

The case of *Jorgensen v. Jorgensen*, 32 Cal. 2d 13, 193 P2d 728, 732, is cited by Lucy as authority for the proposition that a fiduciary has no duty of full disclosure. In that case the husband asserted his legal conclusion in a divorce action that certain property was his separate property, rather than community property. There was no failure on his part to disclose assets. All the court held was that there was no fraud because there was no concealment of facts, and the husband was entitled to assert his legal position without being guilty of fraud, with which we agree. There was not even an *allegation* that facts concerning the separate or community property were known to the husband and not known by the wife or that any such facts were concealed. Why Lucy cites this case we can't imagine, because the court states the following law:

"It is necessary to examine the facts in the light of the policy that a party who failed to assemble all his evidence at the trial should not be privileged to relitigate a case, as well as the policy permitting a party to seek relief from a judgment entered in a proceeding in which he was deprived of a fair opportunity fully to present his case.

“The latter policy applies when a party’s adversary, in violation of a duty arising from a trust or confidential relation, has concealed from him facts essential to the protection of his rights.”

even though such facts concerned issues involved in the case in which the judgment was entered. 'The failure to perform the duty to speak or make disclosures which rests upon one because of a trust or confidential relation is obviously a fraud, for which equity may relieve from a judgment thereby obtained, even though the breach of duty occurs during a judicial proceeding and involves false testimony, and this is true whether such fraud be regarded as extrinsic or as an exception to the extrinsic fraud rule.' (Citing authority) In this state equitable relief has been granted from final judgments settling the accounts of guardians, administrators, or executors who withheld information that would have enabled the beneficiaries to attack the accounts. (Citing authority) The same principle applies to decrees distributing the estate of a decedent adversely to the rights of beneficiaries who have been precluded from pursuing their rights by concealment of facts by the fiduciary. (Citing authority)"

Lucy contends that if Lucy had not been executrix and another executrix had sued her to recover the property fraudulently conveyed, she would have had no fiduciary duty of disclosure. We see no relevancy to such argument because she did assume the duties of an executrix and must discharge them.

POINT V.

THERE WERE NO TRIABLE ISSUES OF FACT.

Lucy argues that there was a triable issue of fact as to reliance. Where a false representation has been made, which, from its nature, might induce another to act, there is a presumption that there was a reliance

on the representation. 24 *Am. Jur.* Fraud and Deceit, Par. 264. Not only was there this presumption, but there were the depositions of both Vera and her counsel wherein Vera testified that she would not have settled had Lucy told her of the statement by Dr. Callister of his fraudulent intent (R-52-53), and Vera's counsel testified that he would not have advised settlement had he known of the statement (R-52-26). Furthermore, there was not only a concealment by the fiduciary but also an express denial of Dr. Callister's intent when Lucy knew the doctor had divulged a fraudulent intent (R-28). Had there been no such denial there would have been no compromise.

Lucy also argues that there was an issue as to whether or not the statement by Dr. Callister was material. It was the key to the whole question of his intent.

Lucy argues that she had no intention to mislead. This is inconceivable.

Lucy next presents the ingenious argument that Vera may be estopped because she did not instantly bring suit, but permitted Lucy to continue to assert to the tax commission that Dr. Callister had an intent to defraud creditors. Lucy does not point out what detriment she conceivably could have suffered nor what misrepresentation Vera made which could be the basis of estoppel.

Lucy contends that the timeliness of an action to set aside a judgment is a matter of fact which a Court on a motion for summary judgment could not decide.

Although admittedly the timeliness of bringing an action may involve questions of fact as well as law, when there is no genuine issue as to the facts involved, as here, then a Court on a motion for summary judgment should decide the question. There is no genuine issue as to the length of time involved in filing the suit after discovery of the fraud, nor as to possibility of prejudice to Lucy as a result of any delay, nor as to actual injury because of delay, nor as to rights of third parties, all of which are the “issues of fact” affecting the right to rescind, according to the authority cited by Lucy. *Brown v. Hassens*, 212 Ore. 246, 319 P2d 929. Judge Ellett properly ruled that there was no genuine issue of fact, which ruling must have been based upon the pleadings, the depositions and statement of counsel. A trial court would be considering no facts other than those before Judge Ellett.

A comparable time for rescission of 3 months was recently held timely by this court in *Elder v. Clawson*, Utah, 384 P2d 802.

Lucy argues that Vera has unclean hands, because her counsel, pursuant to the pretrial court’s suggestion, pointed out to Lucy’s counsel inheritance tax savings that would result if it were conceded that Dr. Callister had an intent to defraud creditors, which would rebutt an intent to make a gift in contemplation of death. There was no “invitation” to do anything. Vera’s suggestion was only pointing out the benefits to the estate tax wise, and hence to Lucy personally, of the recognition of

Vera's claim (R-52-12). It was Lucy, not Vera, who was carrying water on both shoulders. Evidence of the doctor's intent was available to Lucy, not Vera.

POINT VI.

A NEW ACTION IS NOT NECESSARY.

Rule 60(b) URCP clearly authorizes that a judgment be set aside either by motion or by independent action.

CONCLUSION

Despite Lucy's efforts to make it appear that she, the executrix, had not sinned but, in fact, had been sinned against, this is simply a case in which there was sharp practice by an executrix to her own financial advantage, which Judge Ellett said he would not allow, because officers of the court are expected to uphold the dignity and honor of the court. We submit that he should be affirmed.

Respectfully submitted,

JAMES W. BELESS, JR., and
BRAYTON, LOWE & HURLEY
JOHN W. LOWE

1001 Walker Bank Building
Salt Lake City, Utah

*Attorneys for plaintiff
and respondent.*