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Vera T. Callister v. Lucy C. Callister : Appellant's Reply Brief

Utah Supreme Court

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APR 1 1964

IN THE SUPREME COURT OF THE STATE OF UTAH

FEB 28 1964

VERA T. CALLISTER,

Plaintiff and Respondent,

v.

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

Defendant and Appellant.

Supreme Court, Utah

Case No.
10013

APPELLANT'S REPLY BRIEF

Appeal From a Judgment of the Third District Court
For Salt Lake County
Honorable A. H. Ellett, Judge

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TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	3
ARGUMENT	
I. The doctrine of judicial estoppel has no appli- cation to this case.	7
II. Rule 60(b) does not create a new substan- tive ground for setting aside judgments.	12
III. There was no reliance justifying the trial court in setting aside the prior judgment.	13
CONCLUSION	18

AUTHORITIES CITED

CASES

<i>Arnstein v. Porter</i> , 154 F.2d 464, 470-471	20
<i>In re Blodgett's Estate</i> , 93 Utah 1, 70 P.2d 742, 749	6
<i>Collins v. Collins</i> , 48 Cal.2d 325, 309 P.2d 420....	14-17
<i>Colton v. Stanford</i> , 82 Cal. 351, 23 Pac. 16, 16 Am. St. Rep. 137	14
<i>Emmons v. Barton</i> , 109 Cal. 662, 42 Pac. 303	7
<i>Jorgensen v. Jorgensen</i> , 32 Cal.2d 13, 193 P.2d 728..	14

	Page
<i>Kelly v. Bank of America Nat. T & Savings Assoc.</i> , 112 Cal. App. 2d 388, 246 P.2d 92	7
<i>McCarter et al. v. Zeller</i> , 35 Cal. App. 593, 170 Pac. 636	16
<i>Parkinson v. The California Company</i> , 10 Cir., 233 F.2d 432	10
<i>Podlasky v. Price et al.</i> , 87 Cal. App.2d 151, 196 P.2d 608	16
<i>Tanzola v. De Rita</i> , 45 Cal.2d 1, 285 P.2d 897	7
<i>Tracy Loan and Trust Company v. Openshaw</i> , <i>Investment Company et al.</i> , 102 Utah 509, 132 P.2d 388	8
<i>Vai v. Bank of America National Trust and Savings</i> <i>Association</i> , 56 Cal.2d 329, 364 P.2d 247	17
<i>Waddy v. Grimes</i> , 154 Va. 615, 153 S.E. 807	16

TEXTS AND TREATISES

California Code of Civil Procedure	
§ 1849	7
§ 1881	7
2 Bancroft's Probate Practice (2nd Ed.) § 337.....	13
6 Moore's Federal Practice par. 65.15, pages 2101 et seq.	20
Utah Code Annotated 1953, 78-24-8(1)	7
Utah Rules of Civil Procedure, 60(b)	12
Webster's New Collegiate Dictionary (1961 Ed.)..	6

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APPELLANT'S REPLY BRIEF

PRELIMINARY STATEMENT

Respondent has simplified the fraud issue by conceding (Respondent's Brief, p. 9) that ordinary litigants have no duty voluntarily to disclose facts helpful to the opposition; but has raised a new issue by calling her action "fraud" while arguing about it as if she were the beneficiary of some new kind of judicial and administrative estoppel.

To accomplish her purpose she has paraphrased what Lucy said and did to the detriment of Lucy's position. As a result, the "simple" statement of facts in respondent's brief tends to mislead. On page 1, for example, she states that Dr. Callister made gifts to Lucy "*telling her* that the transfers were made for the purpose of removing the stocks from his name and placing them beyond the access of Vera," from which an unwary reader would conclude that the telling was done when the transfers were made, whereas the appellant had offered to show that Dr. Callister's statement was made sometime after he had taken the steps to transfer the stocks.

Vera keeps saying that Lucy swore to the Tax Commission that the transfers of stock were made *for the purpose of defrauding Vera* when, as a matter of fact, the affidavit said no such thing. The only statement in the affidavit attributable to Dr. Callister was that

"The transfers were made for the purpose of removing the stocks from his name and placing them beyond access of his former wife, Vera Callister."¹

The evidence would show that Vera Callister remained close to some, if not all, of her and Dr. Callister's children. It is legitimate to suppose that Dr. Callister sought to prevent such "access" to the property as Vera might

¹This is harmonious with what Lucy said in her deposition (R. 59:15): " * * * my husband thought it was best to put them in my name." At that time counsel failed to ask why, notwithstanding the question would seem to be the logical next step in inquiring about claimed fraudulent transfers.

have had through her children — his statutory heirs. It is also legitimate to suppose that he was trying to prevent oppressive or harrassing lifetime conduct by Vera — another kind of “access” — since Vera knew the stocks were important to him.

There's no denying that the affidavits were made in connection with negotiations about the inclusion of the transferred property in Dr. Callister's estate for tax purposes, but contrary to what Vera would have one believe, the commission had been informed fully about Vera's action against Lucy, the defenses to it, and its settlement. It had to take a stand with respect to the late Dr. Callister's intent, and the affidavits contain some (but not much) evidence of that intent. The Tax Commission made its own investigation and decided to settle for less than the full amount claimed. That's what Vera had done previously.

Respondent's treatment of the precedents resembles her treatment of the facts. Cases cited on page 7 of respondent's brief, in support of the proposition that Dr. Callister's statement would be admissible against Lucy, all concerned delivery of deeds and aren't pertinent to the question presented.

At page 8 of her brief respondent says that communications between husband and wife while they are engaged in perpetration of a fraud are admissible—and some courts so hold. But Vera hasn't introduced any evidence — let alone proved — that Dr. Callister's statement was made while the parties were so engaged.

In discussing *In re Blodgett's Estate*, 93 Utah 1, 70 P.2d 742, 749, on page 20 of her brief, respondent makes much of the fact that an administrator has "the duty to make full disclosure of all matters and information regarding the estate," but gives an unwarrantedly narrow interpretation to the following:

"But [Crosby] being the superior party in such case does not mean that he is under obligation to advise his partner in matters affecting a conflict of interests between themselves."

Counsel assumes that "advise" means "to give advice to; to recommend (a course of action) to; to counsel; warn" — one meaning in a standard desk dictionary; but does not mean "to give information or notice to; to apprise; inform" — another definition of the same dictionary.² The latter definition is the one that has some relation to the facts being considered by the court in *Blodgett*.

The other cases relied upon to support Vera's claim that Lucy had a duty to disclose evidence to her do not support the proposition. None of them involves similar facts; and none has placed upon a fiduciary a duty to make the kind of disclosure sought by Vera. Their main purpose seems to be to add moral tone to the brief through repetition of high-sounding, solemn exhortations about duty, trust and honor. We, too, believe fiduciaries ought to do what they are supposed to do, but we believe that the scope of the duty must be found in

²Webster's New Collegiate Dictionary (1961 Ed.).

the law -- including decided cases — not in counsel's *ipse dixit*.

Treatment of other cases by respondent was also loose. *Emmons v. Barton*, 109 Cal. 662, 42 Pac. 303, is characterized as being decided upon the basis of an 1849 statute on husband-wife privilege and as being no longer the law. The case did refer to §1849 of the Code of Civil Procedure; but the husband-wife privilege was found in §1881, the same as 78-24-8(1) Utah Code Annotated 1953. *Kelly v. Bank of America Nat. Trust & Savings Assn.*, 112 Cal. App. 2d 388, 246 P.2d 92, wasn't concerned with the husband-wife privilege; and the privilege holding of *Emmons* was expressly approved in *Tanzola v. De Rita*, 45 Cal. 2d 1, 285 P.2d 897.

ARGUMENT

I

THE DOCTRINE OF JUDICIAL ESTOPPEL HAS NO APPLICATION TO THIS CASE.

It is apparent from respondent's brief that her sense of outrage was spawned in Lucy's "inconsistent positions" — taken in defending inconsistent claims against her by Vera and the Tax Commission.

The cases recognize that the taking of inconsistent positions is sometimes justifiable and that, in any event, the doctrine of judicial estoppel does not automatically

establish the truth of one or the other of the positions advanced. Vera's position seems to be that because Lucy "misbehaved" Vera should win, without regard to the merits of the action for rescission or long-recognized essential elements of fraud.

Tracy Loan and Trust Company v. Openshaw Investment Company et al., 102 Utah 509, 132 P.2d 388, was an action by an administrator to determine ownership of stock, the defendants being the investment company and all decedent's heirs. The administrator and C. R. Openshaw both claimed beneficial ownership of 638 shares of stock, but in an earlier divorce proceeding C. R. Openshaw had denied under oath that he was the owner of anything in the corporation except 50 shares of stock. In ruling upon a contention of the appellant that C. R. Openshaw was estopped to take inconsistent positions in the two actions, this court said:

"The testimony of Clarence R. Openshaw in the divorce proceedings was almost diametrically opposed to his verified pleadings and testimony in the present case. * * * His testimony was positive in both cases. In fact, the testimony indicates that he made his statements as to the purported facts carefully and deliberately. Counsel for appellant contends that inasmuch as he knew all the facts all the time he either perjured himself in the divorce action or in this case; and that the law does not permit a litigant to play fast and loose with the court so as to give testimony to suit his own purposes in one action and then in a later action be permitted to contradict his testimony because it is advantageous

for him to do so. Appellant contends that the rule of 'judicial estoppel' applies to bar Clarence R. Openshaw from asserting ownership of the 638 shares of stock issued to his father's trustee, for the reason his prior testimony amounts to a sworn declaration that he had no stock nor any interest in any stock except the 50 shares which he swore in 1932 he then no longer owned. * * *

After stating that the rule should be invoked only where prior and subsequent litigation involved the same parties, and where one party had relied on the former testimony and changed his position, the court pointed out that the party invoking the rule must show that he has done something or omitted to do something in reliance upon the conduct of the other parties, by reason of which he will be prejudiced if the facts are shown to be different from those on which he relied.

"The general rule is that testimony given by a witness in a prior action, except where the parties are the same and there is reliance to the prejudice of the party invoking the rule of estoppel, such testimony in the prior action merely constitutes evidence which may be employed to impeach the witness or to contradict his inconsistent testimony in the subsequent action. * * *

"If a witness commits perjury, even though the statute of limitations bars prosecution for such offense by reason of lapse of time, a person who testified falsely can be reached by contempt proceedings, which may in many instances have a more salutary effect than preventing a witness from finally telling the truth."

In *Parkinson v. The California Company*, 10 Cir., 233 F.2d 432, the parties sought to invoke the rule of judicial estoppel on the ground that a petition filed in a state court, being under oath, estopped plaintiff from questioning facts asserted in the petition, and that those facts conclusively showed an independent intervening cause of plaintiff's damage. The court said:

“True it is that a ‘judicial estoppel’ of the nature contended for by defendants has been recognized. * * * This reflects the minority viewpoint which has encountered inhospitable reception outside the State of Tennessee. The Supreme Court of Wyoming has observed that ‘the Tennessee courts probably go too far’ and has indicated that a position taken by a man in one proceeding ordinarily is merely evidence and cannot work an absolute estoppel in another, and that only in cases such as the one it then had before it, where the man was successful in the position taken in the first proceeding would such evidence rise to the dignity of conclusiveness in another. * * * Moreover, in its most rigid application, the Tennessee rule seems not to apply to statements of law or opinion, statements made through mistake or otherwise not knowingly false, nor to pleadings not in fact inconsistent or contradictory.

“It is doubtful that the two pleadings under consideration here are actually inconsistent. One seems merely to omit certain facts set out in the other. Be that as it may, we must reject the theory that the pleadings of the claim under oath, apart from equitable considerations which may be deemed in reason to operate as an estoppel by conduct, irrevocably freezes the contentions of

the pleader so that under no circumstances may he alter his view in that, or another, case, or assert an inconsistent position. This would not be in keeping with the spirit of the Federal Rules of Civil Procedure, Rule 8(e)(2), 28 U.S.C.A. would be out of harmony with the great weight of authority independent of that rule, and would discourage the determination of cases on the basis of the true facts as they might be established ultimately. Even in the case of false statements in pleadings, public policy can be vindicated otherwise — and more practicably and fairly in most instances — than through suppression of truth in the future.”

Vera would go further than the much-criticized Tennessee rule. She would not require an actual inconsistency, nor success in the first action. She would have this court hold as a matter of law that the mere submission of evidence in a case involving somewhat inconsistent theories would entitle Vera to annulment of the previous judgment, release and payment, and a second chance to win her case — or to obtain a higher figure for settlement (and perhaps a still-higher one for settlement of an inchoate third case).

We submit that no policy nor case law justifies setting aside the judgment and release entered into after arm’s-length negotiations between experienced counsel, particularly when there was in fact no reliance by Vera upon Lucy having “confessed all.”

If Vera contends that Lucy and her counsel had a duty (enforceable by contempt proceedings) to disclose

to Vera all the evidence that might be used against them in this case; that denial of statements in pleadings was a breach of ethics constituting a fraud on the court by her counsel; or that there was any perjury either before the trial court or the Tax Commission — she and her counsel are invited to test these matters in an appropriate proceeding. But this court should not use Vera's arguments and her counsel's bald assertions as a basis for establishing a proposition, which if general, would discourage reasonable persons from undertaking to act as personal representatives, and foreclose those willing to act from making reasonable settlements of contested matters.

II

RULE 60(b) DOES NOT CREATE A NEW SUBSTANTIVE GROUND FOR SETTING ASIDE JUDGMENTS.

Respondent argues that there was “fraud upon the court” as that term is used in Rule 60(b) of the Utah Rules of Civil Procedure. But the rule is procedural and refers litigants back to the general law to find the grounds for setting aside a judgment. Under Rule 60(b) the action wasn't timely to reinstate the prior action because the “motion” was not filed within three months.

With respect to the claimed “fraud upon the court,” respondent confuses Lucy's status as an officer of the

probate court with her status as a litigant in the civil action. Admittedly a personal representative is a kind of "officer of the court" in connection with probate proceedings,

"At least in respect of those matters in which they act only under direction and subject to the approval of the court." 2 *Bancroft's Probate Practice* (2nd Ed.) §337.

But the case settled by these parties through their counsel was not a probate matter. It was a contested civil action in which both parties were represented by counsel and in which the primary relief sought by Vera was to set aside a conveyance by Dr. Callister and reach Lucy's individual assets.

The questions presented in this appeal cannot be resolved by saying that an executrix is an "officer of the court," any more than they can be resolved by the trial court's platitude that "the law insists that a dead man be honest before he is liberal."

III

THERE WAS NO RELIANCE JUSTIFYING THE TRIAL COURT IN SETTING ASIDE THE PRIOR JUDGMENT.

Vera's conception of "reliance" is immaculately simple. She says that if she had known of Dr. Callister's statement she wouldn't have settled for the same price. *Nowhere does she say that she settled in the belief that*

Lucy had disclosed to her all relevant information about Dr. Callister's affairs. The reliance for which she advocates is not the test, and her employment of an attorney made it apparent that she was not relying on Lucy to "do right" by her. The entire lawsuit was handled by her attorney, and while he contends (Respondent's Brief, p. 14) that he "was duped along with Vera," no claim has been made that Lucy was a fiduciary to him.

In addition to *Colton v. Stanford*, 82 Cal. 351, 23 Pac. 16, 16 Am. St. Rep. 137, and *Jorgensen v. Jorgensen*, 32 Cal.2d 13, 193 P.2d 728, cited in appellant's original brief, a number of other cases (apparently overlooked by respondent) have considered the effect of independent advice upon the claimed duties of fiduciaries.

Collins v. Collins, 48 Cal.2d 325, 309 P.2d 420, was an action to set aside a husband-wife property settlement agreement on the ground that the husband had breached his fiduciary relationship in inducing the wife to execute the agreement. Plaintiff had employed an attorney and negotiations were conducted by the attorney with the husband. Plaintiff and her attorney had begun an investigation of the community property but did not pursue it because plaintiff was satisfied with the terms of the settlement. Defendant had done nothing to preclude plaintiff or her attorney from investigating the property, and when the property settlement was executed, plaintiff relied on the advice of her counsel. The court said:

"The situation here is similar also to that in *Cameron v. Cameron*, 88 Cal. App.2d 585, 593-595, 199 P.2d 443, where a judgment setting aside a property settlement agreement at the instance of plaintiff wife was reversed. It was there held that '[1] when one undertakes an investigation [as Mrs. Cameron did before she made the property settlement agreement] and proceeds with it without hindrance it will be assumed that he continued until he had acquired all the knowledge he desired and was satisfied with what he learned. He cannot be heard to say that he relied on the representations of the other party. [citation.] * * * [3] the decision of plaintiff's attorneys to accept defendant's proposal without a contest, although now claimed to have been ill advised and unfair to her was her decision and she is bound thereby."

Recognizing the fiduciary position of a husband with respect to community property, the court said he must either (1) disclose fully information concerning the community property, or (2) "deal with her at arm's length and as he would with a stranger, all the while giving her the opportunity of independent advice as to her rights in the premises." The court went on to say:

"Here the parties were dealing with one another at arm's length—or at least the husband gave the wife every opportunity to deal at arm's length—when the settlement agreement was negotiated. The wife had independent advice. The fact that it appears that she was eager to secure a Nevada divorce and that therefore she did not obtain, or have her counsel obtain, a complete listing of the properties of the parties is not chargeable to the husband. * * *"

In *McCarter et al. v. Zeller*, 35 Cal. App. 593, 170 Pac. 636, although a fiduciary relationship was not involved, reliance was. The court said:

“Furthermore it affirmatively appears that the plaintiff did not rely upon any representations of the defendant. The record shows that Mrs. McCarter, before making the agreement in suit, sought the advice of an attorney and acted throughout the transaction on his advice.”

In *Podlasky v. Price et al.*, 87 Cal. App.2d 151, 196 P.2d 608, plaintiff claimed a right to rescind an agreement because of the fraud of the defendant. The court said:

“Since the respondent employed both a veteran broker and a seasoned lawyer who advised her throughout the negotiations for the compromise, she did not rely on anything told her by appellants and therefore cannot enforce the rescission.”

Waddy v. Grimes, 154 Va. 615, 153 S.E. 807, was a suit by heirs of an insane person, since deceased, to set aside a conveyance of land by the trustee-guardian to his own wife. A decree of the lower court setting aside the conveyance was reversed by the Supreme Court of Virginia which said:

“Where the trustee deals directly with the cestui trust, the transaction is not *ipso facto* voidable at the election of the cestui trust; but only *prima facie* presumed to be invalid, which presumption may be rebutted.

“As is said in *Kerr on Fraud and Mistake* at page 151: ‘this rule does not, however go to the

length of avoiding all transactions between parties standing in fiduciary relation, and those to whom they stand in such relation. All that the court of equity requires is, that the confidence which has been reposed be not betrayed. A transaction between them will be supported, if it can be shown to the satisfaction of the court that *the parties were, notwithstanding the relation, substantially at arm's length and on equal footing, and that nothing has happened which might not have happened had no such relation existed* * * * ' ' (Emphasis added).

One recent California Supreme Court case did set aside a stipulated property settlement agreement even though both parties were represented by counsel. It is *Vai v. Bank of America National Trust and Savings Association*, 56 Cal.2d 329, 364 P.2d 247, wherein the court distinguished the facts from those in *Collins v. Collins*, 48 Cal.2d 325, 309 P.2d 420, *supra*, on the ground that the negotiations for the property settlement agreement in *Vai* were not in fact at arm's length, the husband having claimed to be too ill to face a contested lawsuit. The court said:

"Plaintiff in the instant case discontinued the adversary proceedings commenced by her at the request of defendant who offered to supply full and complete information concerning the property all of which was conceded to be community and who further stated that he was willing to negotiate a fair and equitable settlement. It would seem that plaintiff chose not to terminate the fiduciary relationship nor to deal at arm's length, but instead to take the defendant's offer at face value. She signed the agreement believing

that she was fully and accurately informed as to the Vai community financial position.”

But the *Vai* case does not help Vera, who dealt with Lucy at arm’s length throughout, and who, as far as the record shows, never believed that she had been “fully and accurately informed” as to all of Dr. Callister’s conversations with his second wife.

CONCLUSION

It was clear from respondent’s deposition, and it is clear from her brief, that the fraud claimed does not fit within any classification used by the courts. It isn’t that Lucy misled Vera, *but that Lucy didn’t help her and her attorney win the case*. In her brief she says:

“Vera compromised her claim for \$4,000.00 because she had little evidence to establish the doctor’s fraudulent intent” (page 2).

“ * * * 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” (page 8).

“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” (page 9).

“The test of reliance in a case of concealment is whether or not Vera would have acted differently had there been a disclosure” (page 13).

“Vera’s counsel * * * would not have advised compromising Vera’s claim had Lucy disclosed facts known to her” (page 14).

On the basis of the pleadings and the depositions of Vera T. Callister and James W. Beless, Jr., a trial court would have to conclude that the settlement was not made because of any belief on the part of the litigant and her lawyer that their opponent had made a full and fair disclosure of everything she knew, but on a belief that they would have a difficult time winning the lawsuit. Moreover, the matter concerning which Vera claims she had a right to information^{was} directly involved in the previous action; and in deciding whether or not to settle, Vera made her own investigation and relied upon the advice of competent and experienced counsel. We submit that on this state of facts a trier of the fact could not find the necessary grounds for setting aside the judgment and Lucy is entitled to judgment as a matter of law.

On the other hand, if this court does not agree with our analysis of the precedents on fraud and non-disclosure, Vera is nevertheless not entitled to judgment as a matter of law. The statement by respondent’s counsel at page 24 of her brief that a summary judgment is proper because “a trial court would be considering no facts other than those before Judge Ellett,” is wrong. This court and the federal courts have held time and

again that the question to be decided on a motion for summary judgment is whether there is any genuine issue as to a material fact. If there is, the matter must be tried by a court or a jury *as a fact issue* and not made the basis of a ruling as a matter of law that one party or another should prevail.

The issue ~~is~~^{of} the credibility of the deponents is present in the instant case, and Vera has the burden of establishing the elements of fraud by clear and convincing evidence. Most of the elements are within her own knowledge. As said by Judge Frank of the United States Court of Appeals for the Second Circuit in *Arnstein v. Porter*, 154 F.2d 464, 470-471:

“We agree that there are cases in which a trial would be farcical * * * but where, as here credibility, including that of the defendant, is crucial, summary judgment becomes improper and a trial indispensable. It will not do, in such a case, to say that, since the plaintiff, in the matter presented in his affidavits, has offered nothing which discredits the honesty of the defendant, the latter’s deposition must be accepted as true. We think that Rule 56 was not designed thus to foreclose plaintiff’s privilege of examining defendant at a trial, especially as to matters peculiarly within the defendant’s knowledge.”

The above and other cases are analyzed by Professor Moore in 6 *Moore’s Federal Practice* par. 65.15, pages 2101 et seq. Professor Moore and the cases point out that the motion for a summary judgment is similar to a motion for a directed verdict. In order for the mov-

ing party to prevail it must be established that the fact-finder, on the basis of the facts presented, could not return a verdict for the other party.

If respondent prevails in this action and the case is set down for trial again on the fraudulent conveyance issue and defendant should prevail, respondent would thereafter be able to re-open the judgment again if she found that there had been, at another time and place, another statement by Dr. Callister to Lucy (or to someone else if Lucy had knowledge about it) which might have assisted Vera in winning the lawsuit.

Respectfully submitted,

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