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Marvin Petersen and Beverly Petersen v. Voyle Mecham : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

MARVIN PETERSEN and
BEVERLY PETERSEN, his wife,
Plaintiffs and Respondents,

vs.

VOYL MECHAM,
Defendant and Appellant.

Case No.
10,113

RESPONDENTS' BRIEF

Appeal from the Judgment of the Third Judicial District Court,
in and for Salt Lake County
Hon. Stewart M. Hanson, Judge

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POINT II: THE TRIAL COURT FURTHER ERRED IN FINDING THAT THE PLAINTIFFS WERE READY, WILLING AND ABLE TO CANCEL AND TERMINATE THE AGREEMENT BY AND BETWEEN THE PARTIES.

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RESPONDENTS' BRIEF

STATEMENT OF NATURE OF CASE

This is an action by the Respondents, Marvin Petersen and Beverly Petersen, for rescission of a contract and demanding a reconveyance of realty situated in the State of Wyoming, which was conveyed by them to Appellant in exchange for an interest in seller's contract of sale of property in Idaho, based upon certain misrepresentations alleged to have been made by the Appellant in order to induce the Respondents to enter into the exchange.

DISPOSITION IN THE LOWER COURT

The case was tried to the Court sitting without a jury, and Respondents were awarded judgment, cancelling and rescinding a contract entered into by the Appellant and Respondents and ordering a reconveyance of the land in question to the Respondents.

RELIEF SOUGHT ON APPEAL

The Respondents seek judgment of this Court affirming the judgment and decree of the lower Court.

STATEMENT OF FACTS

The Respondents agree in part with the Appellant's Statement of Facts, but in addition thereto desire to call to the court's attention additional facts totally ignored in the Appellant's Brief, and upon which the Court below rested its Findings of Fact, Conclusions of Law and the ultimate Judgment and Decree.

Prior to October 1, 1962, Respondents listed their Wyoming ranch property for sale with Duffin Realty through its licensed real estate agent, Glen Van Tassell. At approximately the same time, the Appellant entered into a listing agreement listing his purchaser's interest in a motel property situated in Arco, Idaho, with the same real estate company. Thereafter, the agent, Glen Van Tassell, and the real estate broker, Gordon Duffin, in company with the Appellant himself, made personal

contacts with at least six prospective purchasers of the interest of the Appellant in and to the Arco Motel. In the first part of October, 1962, (R 31) the Appellant, Van Tassell and Duffin took one Winn Nelson, a farmer of Dayton, Idaho, to the motel for the purpose of selling the Appellant's interest therein to Mr. Nelson. During the course of their conversations, the Appellant told all of those present, including Winn Nelson, that the motel had made him \$3,000.00 per month and that he had books to prove it. (R 31) (R 124).

On a subsequent occasion, approximately the middle of October of the same year, (R 33) the Appellant met Zola Beebe, Dek Nickolson, Van Tassell and Duffin at the motel and in the course of their conversations the Appellant told all who were present that the motel had made him \$3,000.00 per month. (R 34). Nickolson was not satisfied with the Appellant's records of income and asked that more detailed information be procured. The Appellant later on furnished a written operating statement to the office of Duffin Realty pursuant to the request of Mr. Nickolson. These records showed a net income of approximately \$3,000.00 per month. (R 37). Van Tassell examined this record and later displayed it to Mrs. Zola Beebe (R 138) and Respondent, Marvin Petersen. (R 40).

Van Tassell and the Appellant later went to the home of Dell Nebeker, another rancher in Star Valley, Wyoming, and offered the Appellant's interest in the Arco Motel to him for sale. On that occasion the Appel-

lant told this prospective buyer that this motel netted him \$3,000.00 per month. (R 127 & 128).

Another rancher, Mr. Alma Shumway, also of Star Valley, Wyoming, had his farm for sale and he was contacted by both Van Tassell and the Appellant and he was told by either Van Tassell or Appellant in the presence of both of them that the motel had showed a \$3,000.00 a month net profit for the Appellant. (R 132).

Sometime in November of 1962, (R 136) Mrs. Zola Beebe saw the motel for the first time. She met the Appellant at the motel and the Appellant told her and Van Tassell that he had averaged \$3,000.00 per month from his operation of the motel. (R 137). Later on, in the office of Duffin Realty, Mrs. Beebe was shown written records showing with some fluctuations an approximatae net income of \$3,000.00 per month. (R 138). After seeing these records, Mrs. Beebe entered into a contract to purchase and took over the motel on the 2nd day of January, 1963. (R 138). She remained there until the 13th of March of the same year. Later on, Van Tassell brought Exhibit P4 to Mrs. Beebe, (R 139) which was another operating statement subsequently submitted by the Appellant to the office of Duffin Realty, and which had been typed by the Duffin Realty secretary, Kay Lee.

Mrs. Beebe had also discovered some records in the furnace room of the motel, Exhibit P5, and after examining both P4 and P5, Mrs. Beebe told Mr. Van Tassell that she wanted to come home (R 139). Both

of these records show Appellant did not net \$3,000.00 per month or anything close to it. She made no payment under the terms of the original contract with Appellant whatsoever (R 140), and after returning to Salt Lake City came to the office of Respondents' Counsel in company with the Respondents and thereafter this law suit was filed (R 140).

Van Tassell's dealings with the Respondents came in the midst of these various negotiations. He first contacted them concerning Appellant's interest in the motel during the first part of December, 1962. (R 63). He told them of the motel and what Appellant told him he made per month from its operation. (R 63). He also showed Respondent, Marvin Petersen, the original operating statement furnished to the office of Duffin Realty by Appellant showing approximately \$3,000.00 per month net income. (R 64). The Plaintiff went over these records with Van Tassell and subsequently went home and discussed the records with his wife. (R 64). Respondents relied upon what Van Tassell had told them concerning the income of the motel and upon this operating statement. (R 64). On or about December 20, 1962, the Respondents entered into an Agreement with Appellant wherein Respondents purchased 59.38% of Appellant's agreements of sale with Mrs. Zola Beebe, and in return delivered a Deed of Conveyance of the Respondents' interest in their ranch in Star Valley, Wyoming. (R 65).

After Van Tassell had been shown the second

operating statement typed by Mrs. Kay Lee in the early part of January, 1963, he had some arguments with his broker, Gordon Duffin, concerning these records, (R 42) and he went to the Appellant and told him these were not in accordance with the original records Appellant had furnished to him. (R 42). When Van Tassell was asked for the substance of his conversation with Appellant, he testified as follows:

“Well, I told Mr. Mecham, I said, ‘Voyl, this is not the same set of records that we represented this place to Mr. Petersen and Mrs. Beebe.’ And I said, ‘Something has got to be done about it. Mrs. Beebe is unhappy. This place isn’t doing the business she was told it would do. Mr. Petersen relied on my figures when I sold him the equity in this motel, and it was entirely misrepresented.’ ”

Getting no satisfaction from either of these people, he went first to Mrs. Beebe (R 43) and disclosed the discrepancies and fraud which had been committed and subsequently went to the Respondents and told the whole story to them. (R 44). They contacted their lawyers and this action was commenced. (R 45).

STATEMENT OF POINTS

POINT I: THE TRIAL COURT ERRED IN FINDING “THAT TO INDUCE THE PLAINTIFFS TO ENTER INTO SAID WRITTEN AGREEMENT THE DEFENDANT REPRESENTED (TO PLAINTIFFS) THAT DURING

THE PERIOD OF TIME HE HAD OPERATED THE MOTEL HE HAD MADE AN AVERAGE NET INCOME OF \$3,000.00 PER MONTH; THAT THIS REPRESENTATION WAS A MATERIAL REPRESENTATION.”

POINT II. THE TRIAL COURT FURTHER ERRED IN FINDING THAT THE PLAINTIFFS WERE READY, WILLING AND ABLE TO CANCEL AND TERMINATE THE AGREEMENT BY AND BETWEEN THE PARTIES.

POINT III: THE UNCONTROVERTED TESTIMONY BY THE PLAINTIFFS SHOWS THAT THEY ENTERED INTO THE CONTRACT WITH THE DEFENDANT BECAUSE OF THE REPRESENTATIONS BY VAN TASSELL WITH RESPECT TO MRS. BEEBE AND NOT BECAUSE OF THE REPRESENTATIONS AS TO INCOME.

ARGUMENT

POINT I: THE TRIAL COURT ERRED IN FINDING “THAT TO INDUCE THE PLAINTIFFS TO ENTER INTO SAID WRITTEN AGREEMENT THE DEFENDANT REPRESENTED (TO PLAINTIFFS) THAT DURING THE PERIOD OF TIME HE HAD OPERAT-

ED THE MOTEL HE HAD MADE AN AVERAGE NET INCOME OF \$3,000.00 PER MONTH; THAT THIS REPRESENTATION WAS A MATERIAL REPRESENTATION."

The Appellant first argues that the Court erred in Finding of Fact No. 3 in two particulars:

1. In finding that Defendant made any representation at all to the Plaintiffs, and
2. In finding that the alleged misrepresentation was material.

The Respondents will argue these points in the order set forth by the Appellant.

1. THE COURT DID NOT ERR IN FINDING THAT APPELLANT MADE REPRESENTATIONS TO THE RESPONDENTS. The whole argument of the Appellant seems to be based upon the fact that the Appellant had no personal dealings with the Respondents prior to the time that the Respondents entered into the transaction with the Appellant. It is true that Mr. Petersen at no time claimed to have had a personal conversation with Mr. Mechem prior to entering into the contract. This, however, certainly does not defeat his right of action. The familiar rule of law applicable to the case at bar has been well set forth in the case of *Crystal Pier Amusement Co. vs. Cannan*, (Cal.) 25 Pac.2d 839, 91 ALR 1357. That case holds that false representations, to be actionable, need

not have been directly made to the person suing therefor, but it is sufficient if they were made to a third person, with the intention that they should reach the ears of the Plaintiff and be acted upon by him.

The court further states:

“A representation made to one person with the intention that it shall reach the ears of another, and be acted upon by him, and which does reach him, and is acted upon by him to his injury, gives the person so acting upon it the same right to relief or redress as if it had been made to him directly.” *Henry v. Dennis*, (Maine) 49 Atlantic 58.

In the Henry case, we find this language:

“It is of no consequence that the letter was directed to W. S. Henry and Company, when it was in fact relied upon by Henry as a member of the firm of Henry & Parsons. It is not necessary, in order for a Defendant to be liable for the consequences of his misrepresentations, that he should know the names of the persons to whom the misrepresentations may be communicated, provided, he contemplated that they should be communicated to others and be acted upon by them.”

In the case at bar, the Appellant, in the presence of the real estate broker, Duffin, and his authorized agent, Van Tassell, told a number of prospective purchasers what his income from the motel operation had been. He told this in the forepart of October to Winn Nelson of Dayton, Idaho. Thereafter he told the same thing to Mrs. Zola Beebe and Dek Nickolson. Later he

told the same thing to Dell Nebeker and Alma Shumway. All of these statements were made on occasions in which he was endeavoring to sell his motel interest and to persons he hoped would be interested in purchasing it. Certainly, it does not take argument to persuade anyone that one of the vital considerations any prospective purchaser would have in the motel property or any interest therein would be what the past performance of the motel had been under the operation of the proposed seller. In the case at bar, each of the prospective purchasers who testified were advised either by the Appellant himself, or by Van Tassell in the presence of the Appellant that this motel had produced a net income to the Appellant of \$3,000.00 per month. The Appellant having so represented his earnings from the motel in the presence of the real estate broker and authorized agent of the company with whom he listed the property for sale, can hardly express surprise that Van Tassell, in attempting to sell the Appellant's interest in the property to the Respondents, told them that the motel had netted the Appellant \$3,000.00 a month during the period of time he operated it, and showed the Respondent, Marvin Petersen, the books and records to that effect, which had been delivered to Duffin Realty by the Appellant. The facts in this case fall clearly within the rules set forth in *Crystal Pier Amusement Co. vs. Cannan*, and which rule has also been set forth in 23 *Am. Jur.*, page 955, as follows:

“In order to be relied upon, a representation may be, and frequently is, made directly to the

injured person by the person sought to be charged. Direct statement to a representee, however, is not always necessary in order to give such representee a right to rely upon a statement made, for it is immaterial whether it is made to him directly or indirectly, or whether it passes through a direct or circuitous channel in reaching him, provided it is made with the intent that it shall reach him and be acted upon by him, and that such intent is in fact accomplished. For example, a representation may be relied upon if it is made to a third person to be communicated to the complaining person, or with a view of reaching and influencing him, or to a third person in his presence with a view to influence him, or if it is made to a class of persons of whom the complaining party is one, or even if it is made to the public generally with a view to its being acted upon and the complaining party, as one of the public, acts on it and suffers damage thereby. It is not necessary that the person making a representation knows the names of the persons to whom it may be communicated, provided he contemplates that it shall be communicated to others and be acted upon by them."

Even if it were argued that the Appellant did not know the Respondents personally at the time representation was made to them, certainly he knew he had this interest in the motel property listed for sale and that inquiries concerning the past operation of the motel while it was under his management and ownership would be communicated by the broker and his agents in the same manner the Appellant had represented the operation of the motel to the broker and his

agent. Presumably, he would be anxious to have this information given to all prospective purchasers inasmuch as he had freely given the same information himself, in the presence of the broker and the agent, to several other prospective purchasers. There is no evidence that he ever, at any time, attempted to withdraw this information until January, when he furnished the second set of records to Duffin Realty. It was this second set of books which were so far different from the representations made to the Respondents, Mrs. Beebe and the other prospective purchasers, that caused Mrs. Beebe to leave the motel, refusing to make any payment on the contract. Then, upon the obtaining the true facts, the Respondents commenced this action for rescission.

The Appellant in the first full paragraph of his Brief, at page 8 thereof, makes a most interesting observation. The statement beginning with the second sentence states as follows:

“This appears from the fact that Van Tassell was the listing agent for both the parties, and thus, his representations are not chargeable to the Defendant any more than they are chargeable to the Plaintiffs.”

The statement is true that Van Tassell was the agent for both parties. It would, therefore, follow that Van Tassell was the agent for the Appellant in representing to the Respondents and all prospective purchasers the operation of the motel, and Van Tassell would be the agent of the Respondents for the purpose of representing their ranch in Star Valley, Wyoming.

to all prospective purchasers. Thus, the representation of Van Tassell as agent for the Appellant in representing the monthly income from the motel to the Respondents would be chargeable to the Appellant. The Trial Court felt it was not necessary under the facts of this case to find that Van Tassell was the Appellant's agent in connection with the representations made because of the prior rule heretofore set forth. However, the agency rule to which the Appellant has alluded in his Brief would charge the Appellant with the false representations made by Van Tassell.

2. THE COURT DID NOT ERR IN FINDING THAT THE ALLEGED MISREPRESENTATION WAS MATERIAL. The next argument of the Appellant is founded upon Appellant's contention that the interest acquired by the Respondents was not in the motel or its income, but merely a fraction of the Appellant's sellers' interest in the contract between the Appellant and Mrs. Zola Beebe. The Appellant argues that the interest acquired by the Respondents was not an interest in the motel itself, and, therefore, they had no right to rely upon the representations as to income. It is argued that these representations would only be material between Mrs. Beebe and the Appellant and could not be a material consideration for the inducement of the transaction between Appellant and Respondents.

As principal authority for the proposition that the reported income from the Appellant's operation of the

motel is immaterial and collateral to the transaction between the Appellant and Respondents, Appellant cites 23 *Am. Jur.*, Section 113, on Fraud and Deceit. Here Appellant cites the first part of paragraph 113, but does not quote the last part of the paragraph. The last part is most significant and provides as follows:

“It has been held, however, that they need not relate directly to the nature and character of the subject matter of the contract, but that it is sufficient if they are so closely connected with the contract that the parties would not, except for the representations, have entered into it, and by such representations were induced to enter into it to the knowledge of the other party.”

Furthermore the test of materiality of the representation has been well stated in 37 *CJS*, page 252, in the following language:

“A false representation to be actionable, or, likewise, a false concealment to be actionable, must relate to a matter material to the transaction involved; that is, the false representation or concealment must be the efficient, inducing and proximate cause, or the determining ground, of action or omission. Thus, representations are material if the transaction would not have occurred in their absence or with knowledge of their falsity, and if they are related directly to the transaction involved. Likewise, the concealment of facts which, if known, would have influenced a party to refrain from action causing injury has been held material. A representation is immaterial if the same thing would have been done in the same way in the absence of such representation; and, in general, failure to dis-

close facts which did not substantially affect the transaction have been held immaterial. Representations are likewise immaterial if they caused no injury, or if they were mere expressions of opinion on which the hearer had no right to rely."

To test the case at bar by these principals, we ask the question as to whether the Respondents would have entered into their transaction with the Appellants except for the statements reported to them concerning the net income of the motel.

In the first place, they had never seen the motel itself. This was because the Respondent, Marvin Petersen, had back trouble, and could not ride in an automobile. (R 72). However, the Respondent, Marvin Petersen, examined the books and records furnished to Duffin Realty by the Appellant. He testified that he discussed these same records with his wife, and that they relied upon this information before being willing to enter into the transaction. The report that the motel had been showing this profit to the Appellant was a prime consideration to them. In the event the purchaser failed in the payment of the contract, the past record of income was a material consideration as to what kind of property the Respondents could expect to take back and what kinds of expectations they would have in contemplating a resale of the property.

Certainly, the matter of the record of income of the prior owner of the motel is not a collateral and immaterial item to the Respondent. If it had been represented to have had a poor prior existence, one might expect

a new purchaser would have a similar experience and hence, this would be a questionable investment. Where it is represented that the motel operation was showing a good profit, one might expect a new purchaser of the property to have a similar profitable experience from which one might expect a good record of contract payments. Therefore, under the tests set forth by the authorities cited above, there can be no question but what the representations of prior income were very material considerations. As a matter of fact, as testified by Van Tassell, the real estate agent, these representations were the very basis upon which he sold the fractional interest of the Appellant's contract equity in the motel to the Respondents.

POINT II. THE TRIAL COURT FURTHER ERRED IN FINDING THAT THE PLAINTIFFS WERE READY, WILLING AND ABLE TO CANCEL AND TERMINATE THE AGREEMENT BY AND BETWEEN THE PARTIES.

The Appellant argues that there is no record to support that portion of Finding of Fact No. 3 which states the Plaintiffs at all times have been ready, willing and able to cancel and terminate the written agreement by and between the parties terminating any interest they may have acquired therein and returning the same to the Defendant. Paragraph 7 of the Complaint on file herein (R 2) states as follows:

“That the Plaintiffs are ready, willing and able to cancel and terminate the written agreement marked Exhibit “A” attached hereto and return any interest they may have by reason thereof to the Defendant.”

This tender and offer was made far in advance of any foreclosure of the seller's interest by reason of non-payment. One sentence in the Pre-trial Order agreed to by both parties is as follows:

“The parties agree that both Plaintiffs and Defendant have lost all of their equity in the motel *since this action was commenced.*” (Emphasis added).

Under the terms of the Pre-Trial Order, there was no issue requiring any proof on this point. After the Complaint had been filed, if the Appellant had wished to have his contract equity restored, he could have had it immediately. Rescission is all that the Respondents have ever asked for in this case. As set forth in the Pre-trial Order, the interest in the contract was lost by reason of non-payment of the payments, but this loss occurred *after* the action was commenced. This then became the risk assumed by the Appellant in this case. He knew that after the property had been tendered back to him, if he refused to accept it, the property may thereafter be lost by reason of non-payment and if the Respondents prevailed that this loss would be his. He chose to assume that risk and, therefore, cannot be heard to complain at this time. It is further submitted that upon the reading of the entire record and exami-

nation of the evidence adduced at the trial, it is extremely doubtful that in losing the Appellant's so-called interest in the motel, anything of value was in fact lost.

POINT III: THE UNCONTROVERTED TESTIMONY BY THE PLAINTIFFS SHOWS THAT THEY ENTERED INTO THE CONTRACT WITH THE DEFENDANT BECAUSE OF THE REPRESENTATIONS BY VAN TASSSELL WITH RESPECT TO MRS. BEEBE AND NOT BECAUSE OF THE REPRESENTATIONS AS TO INCOME.

It is true that one of the considerations leading the Respondents to enter into the contract with the Appellant were the representations by Van Tassell concerning the character of Mrs. Zola Beebe and her ability to operate and manage the motel in a profitable manner. The Appellant here argues that this was the only basis upon which the Respondents entered into the contract. To so argue is to totally ignore the record in this case. On cross examination in several places counsel for the Appellant tried to get an admission from the Respondent, Marvin Petersen, that he was only relying on Van Tassell's representation as to the character and ability of Mrs. Beebe. These various encounters between counsel for the Appellant and the witness, Marvin Petersen, appear for several pages. (R 74, 75 and 76). Time and again the witness told counsel for the Appellant that while he was relying upon representations with

respect to Mrs. Beebe, he also relied upon the representation that the motel had netted the prior owner \$3,000.00 per month in income. Furthermore, on direct examination, the record is replete with statements that the Respondents relied upon what they were told by Van Tassell and what they were shown by Van Tassell was the operation of the Appellant during the period of time he had operated this motel. The evidence is not only ample on which the court could so find. The evidence repeats over and over again that the outstanding material representation upon which the Respondents relied as an inducement to enter into this contract with the Appellant was the representation that the prior owner had been making a net profit of \$3,000.00 per month from his operation of the motel. The Respondents need not seek out a fragment of the record to this effect and then urge this court on appeal to sustain the Trial Court under familiar rules of law. Rather, the Respondents merely invite the Court to examine the record because in that examination the Court will find an abundance of evidence to the effect that the primary inducement used by the real estate salesman and the primary basis upon which the Respondents entered into this contract was founded upon the representation made of past income from the Appellant's operation of the motel.

Furthermore, as the court observed in the last sentence of its Memorandum Decision, "If it were a question of Van Tassell's testimony alone, the result might be different, but by the testimony of the many

others who testified it clearly appears that the Defendant himself induced the contract in question by fraud." The various witnesses brought forward by the Respondents showed a clear pattern in which the Appellant himself had represented openly and on various occasions that this motel had netted him \$3,000.00 per month during the months he had operated it and that he had books to support it. There was evidence that these books were shown to the Respondents and the record is clear that they relied upon these representations as inducement to enter into the contract with the Appellant. It is beyond the comprehension of the writer how the Appellant can seriously urge upon this Court that the representations of income were not given any real consideration by the Respondents in connection with their entering into the contract in question.

CONCLUSION

Respondents respectfully submit that each of the essential elements in the Trial Court's Finding of Fact and Conclusions of Law are fully supported by competent evidence, that the Court committed no error in so finding, and that the decision of the Trial Court should be affirmed.

Respectfully submitted,
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