1983

Russell Acton, Andrew Acton And Carol E. Acton v. J. B. Deliran, A Utah Corporation; Gerald House; Era Realty Center; Daryl Yates And Marydon Yate : Brief of Plaintiffs-Appellants Russell Acton Andrew Acton And Carol E. Acton

IN THE SUPREME COURT OF THE STATE OF UTAH

RUSSELL ACTON, ANDREW ACTON and CAROL E. ACTON, Plaintiffs-Appellants,	:	
vs.	:	
J. B. DELIRAN, a Utah corporation; GERALD HOUSE; ERA REALTY CENTER; DARYL YATES and MARYDON YATES, husband and wife,	:	Case No. 19300
Defendants-Respondents, and Cross-Appellants.	:	

BRIEF OF PLAINTIFFS-APPELLANTS RUSSELL ACTON
ANDREW ACTON AND CAROL E. ACTON

APPEAL FROM A JUDGMENT
OF THE FIFTH JUDICIAL DISTRICT COURT
IN AND FOR IRON COUNTY, STATE OF UTAH
HONORABLE CHRISTIAN RONNOW, JUDGE

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and Jerald House

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BRIEF OF PLAINTIFFS-APPELLANTS

STATEMENT OF THE NATURE OF THE CASE

Plaintiffs-Appellants, Russell Acton, Andrew Acton and Carol E. Acton, (hereafter referred to as "appellants") justifiably relied upon misrepresentations, made either mistakenly or recklessly, by defendant-respondent ERA Realty Center ("ERA") prior to appellants' purchase of a small building and surrounding property in Cedar City, Utah. The misrepresentations concerned the legality of a water hook-up on the property. As a result of ERA's misrepresentations, appellants purchased a building and property with no legal water hook-up on it, and subsequently learned that it would

cost appellants almost as much as the purchase price to acquire a legal water hook-up. Appellants are entitled to have the real estate contract with defendants-respondents J. B. Deliran and Gerald House rescinded and recover from them all payments appellants have made on the property since they purchased it.

DISPOSITION IN LOWER COURT

Following a jury trial on appellants' claims for recision based upon fraudulent misrepresentations and mutual mistake, the jury found that the real estate contract between appellants and J. B. Deliran and Gerald House should be upheld, and dismissed appellants' claims against them and ERA. The Court denied appellants' motions for a directed verdict and judgment notwithstanding the verdict, and entered a judgment in accordance with the jury verdict.

RELIEF SOUGHT ON APPEAL

Appellants seek reversal of the district court's judgment on the grounds that, as a matter of law, there is no reasonable basis in the evidence to justify the verdict of the jury against appellants and in favor of defendants-repondents.

STATEMENT OF FACTS

In or about February, 1981, appellant Andrew Acton went to defendant-respondent ERA for the purpose of finding a building and property in which to establish an auto repair shop

with his brother, appellant Russell Acton. He was shown some property by one of the ERA sales agents, Audrey Lebbon. One of those properties was the property at issue in this lawsuit, at the time owned by Daryl and Marydon Yates. Andrew Acton rejected the property at the time because of the run down condition of the building on the property. Some time later, in June, 1981, Andrew looked at the property again with Mrs. Lebbon. At this time the property had been purchased, and relisted with ERA, by defendants-respondents J. B. Deliran ("Deliran") and Gerald House ("House") although this fact was not made known to appellants. At the time of the first visit, in February, 1981, Andrew was shown a description of the Yates' property, a "listing," which stated that there was "water in building." During the June visit to the property, Mrs. Lebbon again showed the Yates listing to Andrew, although the property belonged at the time to Deliran, and ran water from a frost-free spigot on the property. Subsequent to the June, 1981 visit to the property by Mrs. Lebbon and Andrew, a visit to the property was made by Mrs. Lebbon, Andrew Acton, Russell Acton, Russell's wife, Gail, and Robert Behunin, the Cedar City building inspector.

Shortly after that meeting, the appellants went to ERA's office in Cedar City, Utah and had a telephone conference

call with defendant-respondent House, the principal of J. B. Deliran. The result of the conference was that the appellants signed an Earnest Money Agreement, drafted by Mrs. Lebbon, and the closing on the property was to be held on or about August 12, 1981.

Shortly prior to the closing, appellants had a survey done on their property by David Grimshaw. The closing on the property was held as scheduled, on a Friday. Russell and Andrew Acton spent the weekend cleaning up the building on the property and went in the following Monday morning to see the water superintendent of Cedar City. At that time the water superintendent told appellants that there was an illegal water connection on the property, that the water in the building was being piped in improperly, and it would cost the appellants well over $20,000.00 to have a legal water connection established at the property. The property had been purchased for $23,800.00.

The Actons immediately went to Mrs. Lebbon's office at ERA and explained the situation to her. She was surprised and promised to do all she could to rectify the situation. She had her broker, Brad Smoots, call Gerald House and see if he would rescind the sale. Mr. House refused. Appellants looked into other alternatives for obtaining water, without success. They

subsequently brought an action in the Fifth District Court for Iron County, State of Utah, alleging fraudulent misrepresentation and mutual mistake and praying for recision of the real estate contract.

The matter went to trial and was heard by a jury on November 8, 9, and 10, 1983 before the Honorable Christian Ronnow, circuit court judge, sitting by designation.

The jury returned their verdict that the contract between appellants and defendants-respondents should not be rescinded. Appellants' counsel, who had moved for a directed verdict subsequent to defendants-respondents' counsel resting their case, moved for a judgment notwithstanding the verdict. Appellants' motion for directed verdict, and subsequent motion for judgment notwithstanding the verdict, were denied by the court. This appeal then ensued.

ARGUMENT

I. The evidence does not support a verdict that there were no fraudulent misrepresentations or mutual mistake made and that the land sale contract between appellants and defendants-respondents J. B. Deliran and Gerald House should be upheld.

References to the Transcript of the trial will be designated "Tr." References to the Transcript will only be made to testimony before the jury, due to the nature of this appeal.

A. All of appellants' witnesses at trial testified that appellants had no notice, constructive or actual, that the water on the property they purchased was not a legal hook-up.

Andrew Acton's testimony to the jury remained consistent throughout direct examination and cross examination by two defense counsel. Andrew testified that he and his brother wanted to establish an auto repair shop in Cedar City, Utah, and pursuant to that desire, Andrew went to ERA and met with Audrey Lebbon, one of their sales agents, some time in February, 1981 (Tr. 172). He told her what he needed in a building and property, including the need for water and sewer hook-ups (Tr. 174). He testified that Mrs. Lebbon took him to the property in February of 1981, at which time he rejected the building because of its run-down condition (Tr. 179). He then testified that, subsequent to examining the property at issue in this case, Mrs. Lebbon took him to a property in Enoch, Utah, which was suitable to his needs but was zoned improperly for a commercial establishment. He and his brother attempted to get it rezoned by the city of Enoch but were unsuccessful (Tr. 179-180, 278). The next time Andrew visited the property at issue in this case with Mrs. Lebbon was in June of 1981. They visited the property at this time with Andrew's brother, Russell (Tr. 180-182, 279).

Subsequent to that meeting, Mrs. Lebbon set up a meeting between the Actons and Robert Behunin, the Cedar City building inspector. The Actons wanted to find out what the building codes were and what they needed to do to get their building up to city specifications so they could open their business (Tr. 182-184, 282-284). At this meeting, Mrs. Lebbon turned on a frost-free water spigot that was in the building, out of which water ran (Tr. 184). Andrew further testified that, either at the second meeting at the property with Mrs. Lebbon and Russell, or at the third meeting at the property, with Mrs. Lebbon, Russell, Russell's wife, Andrew and Mr. Behunin, Mrs. Lebbon showed Andrew a copy of the listing of the property, which indicated that there was water in the building. Andrew testified that the name on the listing was Yates (Tr. 184-185, 313). Andrew went on to testify that there was no discussion of the legality or illegality of the water hook-up on the property with Mr. Behunin (Tr. 185).

Subsequent to that visit, Andrew and Russell Acton signed an Earnest Money Agreement, after talking on a telephone conference call with Gerald House, and arranged for a survey to be done on the property by David Grimshaw (Tr. 186-189, 285-286). The closing on the property took place after that, on a Friday (Tr. 192). The Acton brothers spent

the weekend cleaning up the debris in the building, and went in on the following Monday to see the Cedar City water superintendent, Theon (Bud) Bauer, about getting permits for the building (Tr. 194-195, 288).

At that meeting, Mr. Bauer told the Actons that he could not find any legal water hook-up on their newly purchased property. The Actons then asked Mr. Bauer what it would cost to get water. Mr. Bauer indicated that the appellants would have to install a water main on to the public water main. He pointed out that the nearest available water was 2100 feet away (Tr. 194-196). Testimony by Andrew about the cost of getting a legal water hook-up to the city water main was not allowed, and later Mr. Bauer could not recall the figure he gave to the appellants.

Subsequent to their meeting with Mr. Bauer, Russell and Andrew went to Audrey Lebbon's office at ERA and told her what had occurred. She was quite surprised and told them she would look into it (Tr. 197-198). She pulled the listing on the property and showed it to the Actons. It was the Deliran listing. Neither Andrew nor Russell had ever seen it before, nor had they known that the property had changed hands since February of 1981 (Tr. 203-204, 287-288, 291-292). The Actons subsequently went to an attorney to look at other possibilities

for getting a legal water hook-up (Tr. 198-199). They learned subsequently that the water that ran out of the spigot on the property they had purchased was an illegal connection running off of a water line used by their neighbor, Wayne Smith (Tr. 199-200).

In concluding his testimony, Andrew stated that the Actons could not get a variance from the city in order to use the water line that ran through their property from Mr. Smith's property, the cost was prohibitive if they wished to attach their own water line to the city water system, and appellants did not consider renting the property because they would have had to put substantial amounts of money into the building to renovate it and no one would rent it without water (Tr. 200-202).

On cross examination, Andrew reiterated his testimony on direct. He denied that he and Mr. Behunin ever discussed an illegal water connnection on the property (Tr. 233). This was later confirmed by Mr. Behunin (Tr. 407-409).

Russell Acton then testified extensively, and in his testimony in response to direct examination and under somewhat grueling cross examination by both defense counsel, his testimony matched that of Andrew Acton concerning meetings with and representations by Audrey Lebbon and Bob Behunin. More

important, Russell testified about the circumstances of the survey done by David Grimshaw. During the survey, at which Russell Acton helped Mr. Grimshaw, Wayne Smith came over and had some discussions with Mr. Grimshaw and Russell Acton. Russell testified that the only discussions held between Wayne Smith and Russell Acton had to do with property that Smith owned that cut off the Yates property from the public highway, and that the Actons would have to get some sort of easement from Smith in order to have access to the property. At no time did the question of legality of the water hook-up come up in discussions between Wayne Smith and Russell Acton (Tr. 296-299, 314-315).

Carol Acton, the mother of Russell and Andrew Acton, testified briefly. She didn't have personal knowledge about the events preceding the purchase of the property but she did testify that at no time during the negotiations for the property, the visits to the property, and the subsequent closing on the property did Andrew or Russell tell her that there was a potential problem with the water in the building (Tr. 329).

Audrey Lebbon, the sales agent for ERA, testified next. She was obviously a critical witness in that appellants

claimed that she was the source of the misrepresentations about water availability on the property. Mrs. Lebbon's testimony affirmed everything to which Russell and Andrew Acton had testified previously. She stated that on the first visit to the property with Andrew, in February, 1981, Andrew saw the Yates listing, stating that water was in the building. She also testified that she ran water out of the spigot at that meeting (Tr. 342-343). On the second visit, with Andrew and Russell, she testified that she had a copy of the Yates listing with her (Tr. 344). She initially testified that she had to be working from the J. B. Deliran listing, since that was the one that was in her office, or the current Multiple Listing Service listing (Tr. 347), but upon being refreshed with her testimony from her deposition, which had been taken prior to the trial, she admitted that she had not obtained a specific copy of the Deliran listing, even though she knew the property had changed hands and had been relisted. She stated that she assumed the terms were the same, and did not know that there were any differences in the two listings (Tr. 348-350, 367-368).

Mrs. Lebbon testified that water could have been turned on at the second visit, with Russell and Andrew, and that the water might have been turned on during the third visit, with Russell, Russell's wife Gail, Andrew, Mrs. Lebbon and Robert Behunin (Tr. 345-347).

She stated that she showed the appellants, for the first time, the Deliran listing which does not say there is water in the building, after the sale of the property. Mrs. Lebbon stated that the earnest money agreement, which she drafted, did not say anything, one way or the other, about water on the property (Tr. 358). She then confirmed what Andrew and Russell had said, that is, subsequent to the closing, and to the Actons' meeting with Bud Bauer, they came over to her office and told her that there was no legal water connection on the property they had just purchased. She further testified that, prior to that day, neither Andrew nor Russell Acton had ever told her that there was a problem with water on the property (Tr. 359-362). She confirmed that the Actons asked her to ask her broker to talk with Gerald House about a recision of the contract. She did so (Tr. 362-363).

Mrs. Lebbon was then subjected to intense cross-examination and did not change her story. Indeed, questions were put to her by the trial court judge, and she testified that she knew the Actons needed water in the building, she assured them there was water in the building, and, although she reviewed the Deliran listing on the property prior to the purchase of the property by the appellants, she said she was not on notice that there was a question about the

legality of the water hookup (Tr. 364-365, 397-399). She admitted that she failed to make any notation on the earnest money agreement about water on the premises due to an oversight (Tr. 387).

The appellants then called Robert Behunin, the Cedar City Building Inspector, as the next witness. Behunin confirmed the testimony of Andrew and Russell Acton and Mrs. Lebbon concerning his meeting with them at the property subsequently purchased by the appellants. He testified that he saw water running out of the spigot in the building. He further testified that he felt there was not a water meter on the property and that he told the Actons they would have to pay for a connection of a water meter on the property. He also testified that he did not believe there was any discussion about the legality of the water hook-up itself on the property (Tr. 407-409). At the time he told appellants of the need for a water meter, he told them that they should go see the water superintendent, Bud Bauer, about getting the water meter hooked up, and that any water or sewer connections would be under the city water department (Tr. 421). In response to cross-examination, Behunin stated that he knew that if there was no water meter, the connection was illegal, but Behunin also testified that he did not tell the appellants that the hook-up was illegal (Tr. 422).

The above-cited testimony represents a crystallized view of the evidence appellants put on to show the misrepresentations made to them prior to their purchase of the property. The testimony is consistent, and, indeed, almost exactly synonymous among the various witnesses, even though the witnesses ranged from appellants to an agent of one of the defendants-respondents to disinterested persons. At this point in the trial, the testimony overwhelmingly showed reckless, or at least mistaken, representations made concerning a critical aspect of the property appellants wished to purchase.

B. None of defendants-respondents' witnesses clearly contradicted or rebutted any of appellants' witnesses' testimony.

The defendants-respondents ERA and Deliran put on three witnesses who tried to undermine the testimony of the witnesses put on by appellants. The first witness, Nancy Hale, (spelled Hail in the Transcript), was the listing agent for the property purchased by the Actons on the Deliran listing. She testified that she was in the office when Andrew and Russell Acton came in after seeing Bud Bauer, notifying Audrey Lebbon that there was no legal water on the property. What defendants-respondents hoped to show with her testimony was that Russell or Andrew Acton acknowledged that they had been told by Bob Behunin, the Cedar City building inspector, that

there was an illegal water connection. The transcript shows that Behunin testified that he had never said such a thing to the Actons, and Mrs. Hale's testimony only indicated that she asked the Actons if they had been told by Behunin that there was an illegal water hook-up on their property. There was no response from either of the Actons (Tr. 439-441).

Mrs. Hale's testimony does not support defendants-respondents' contention that the Actons knew about the water problem prior to closing on the property. Indeed, it supports appellants' earlier testimony that they had never seen the Deliran listing, which did not mention water on it (Tr. 439), and Mrs. Hale admitted that she was in the courtroom when Behunin testified that he mentioned a water meter problem to the appellants, but not a water hook-up problem (Tr. 443).

Defendants-respondents then put on Wayne Smith. Smith testified that he went on to the property during the survey being done by David Grimshaw and Russell Acton. His initial testimony was that he thought he mentioned something about the problem with the water connection on the property, although he was not certain (Tr. 468-469). Throughout the rest of his testimony, he indicated that he really couldn't remember specifically what was said; indeed, he said "I - I can't remember a lot of times what I did last week, and that's a long

ways back to know exact conversation of what was said on that day [the day of the survey]" (Tr. 470). Under cross examination, Smith reiterated that he really couldn't remember what was said on that day (Tr. 473), that he couldn't recall if certain conversations he had with appellants were before or after August 12 (the day of the survey) (Tr. 471), and that he wasn't exactly sure that water was even discussed on that day (Tr. 474).

Defendants-respondents' final witness was David Grimshaw, the surveyor. Grimshaw testified that he didn't remember the exact words, but thought that Smith mentioned to Russell Acton that there was a problem with water on the property. Grimshaw testified that they didn't make any kind of a search for a water meter during the course of the survey, that the only things he was asked to do was locate the four corners of the property and see if the building was on the property (Tr. 488). Under cross examination, however, Mr. Grimshaw stated that he did not specifically remember what Mr. Smith said to Russell Acton, but that he mentioned several things, including something about water (Tr. 491-492). Russell Acton, called as a rebuttal witness, specifically disputed Grimshaw's recollection and stated that Mr. Smith was on the property for perhaps fifteen minutes during the course of six

hours of surveying the property, that nothing was said about water by Mr. Smith or Mr. Grimshaw, and that much of the time he was out surveying the property with Grimshaw, Russell was up to 25-30 feet away from Grimshaw and Smith, digging for one of the corner posts on the property (Tr. 495-497). He conclusively stated that the only subjects discussed with Mr. Smith were the boundary lines of the property and the access problem that resulted from Mr. Smith owning property across the mouth of the property Russell and Andrew Acton were thinking of purchasing (Tr. 496-497).

Of the three witnesses called by the defendants-respondents, Mrs. Hale's testimony only confirmed that of the appellants. Mr. Smith's testimony was so uncertain as to be incompetent, and Mr. Grimshaw only vaguely recollected something discussed concerning water - a recollection specifically rebutted by Russell Acton. Defendants-respondents put on no other testimony, or any other kind of evidence, undermining any of the two and one-half days of testimony put on by appellants' witnesses supporting the contention that appellants had no idea that there was a problem concerning water on their property and that they specifically relied upon the representations, physical, verbal and written, that there was water on the property.

II. Under Utah law, the trial court erred in not entering a directed verdict, or judgment not withstanding the verdict, because there is no substantial evidence to support the jury verdict.

The most recent statement by the Utah Supreme Court on judgments not withstanding the verdict is in Gustaveson v. Gregg, 655 P.2d 693 (Ut. 1982). The case involved an assault upon one bowler by another bowler in a Salt Lake County bowling alley. This court concluded that the bowling alley operators were not liable in any way to the person assaulted, and the trial court should have granted a motion for judgment notwithstanding the verdict. During the course of its opinion, the court set forth the prevailing Utah case law on the criteria that must be fulfilled in order to justify the granting of a judgment notwithstanding the verdict. This court stated that,

> "[T]he granting of a motion for judgment notwithstanding the verdict is only justified if, after looking at the evidence and all of its reasonable inferences in a light most favorable to the party moved against, the trial court concludes that there is no competent evidence which would support a verdict in his favor."

Gustaveson v. Gregg, 655 P.2d at 695. The court cited several earlier cases which specifically hold for the same proposition. In one of those earlier cases, Koer v. Mayfair Markets, 19 Ut.2d 339, 431 P.2d 566 (1967), the court set forth

the above standard, but stressed that the party against whom a motion for judgment notwithstanding the verdict is made is entitled only to "all reasonable inferences" (emphasis added), Koer v. Mayfair Markets, 431 P.2d at 570. In the Koer case, a customer shopping at defendant's store allegedly slipped on a grape and sustained injuries. She sued for negligence, the trial court entered a judgment notwithstanding the jury verdict in her favor, and she appealed. This court stated that the plaintiff-appellant's mere fall did not prima facie establish a jury question, and that without more evidence, such an inference that the grape was on the floor, and, therefore, the employer knew or should have known of its presence, is not tenable. Id.

The same analysis applies in the instant case. Out of a three-day jury trial, the only testimony proffered by defendants-respondents that in any way indicates that appellants had any notice, constructive or actual, that there was a problem with the legitimacy of the water hookup on the property they wished to buy is a surveyor who stated that something having to do with water was discussed by Mr. Smith when he was on the property during the survey. Grimshaw did not testify to anything more specific, such as what was discussed concerning water, whether the discussion was about a

water meter, that water came out of the spigot on the property, or that the water connection was legal or illegal. Apparently, upon this slender testimony, the jury determined that appellants were not the victims of fraudulent and reckless misrepresentations, or the victims of mutual mistake, and the jury returned a verdict upholding the contract between appellants and defendants-respondents. Given this minimal amount of evidence, and particularly in the face of the wealth of testimonial evidence put on by appellants during the course of the trial, the trial court judge's denial of appellants' motion for judgment notwithstanding the verdict is contrary to Utah law.

CONCLUSION

At the trial of this case, appellants presented close to two and one-half days of testimony concerning the events surrounding their purchase of the property at issue. The tesimony included that of the appellants, that of the agent of defendant-respondent ERA, and that of various disinterested parties. No matter from what source, all of appellants' witnesses confirmed that appellants had been told that there was water on the property they purchased; they had seen that water flowed from a spigot on the property prior to their purchase; and they had seen what they thought was the correct

listing of the property, which stated that there was water on the property. The first they learned of a problem with water on the property was after they closed on the property.

Given the legal theories upon which appellants founded their case, fraudulent (reckless) misrepresentation and mutual mistake, defendants-respondents could compromise appellants' case by providing evidence of notice, constructive or actual, to the appellants of a problem with water on the property. In the half-day that defendants-respondents put on their entire defense, none of their witnesses clearly and indisputably testified that appellants had such constructive or actual notice. One of defendants-respondents' witnesses confirmed the testimony of appellants' witnesses. One witness's memory was so bad that his testimony was practically incompetent, and the final witness testified to vague recollections about a discussion between Wayne Smith, David Grimshaw and Russell Acton about water, without any further description of the conversation. The jury returned a verdict against appellants, refusing to rescind the contract between appellants and defendants-reponaents Deliran and House. The trial court judge denied appellants' motions for a directed verdict and judgment notwithstanding the verdict, contrary to Utah law. Appellants are entitled to a recision of the Real Estate Agreement between

them and defendants-repondents Deliran and House, and a return of all monies they have paid on the property to date. Such a result is based not only upon sound legal principles, but also upon the overwhelming weight of evidence presented at the trial in this case.

Respectfully submitted, this 3rd day of January, 1984.

PRINCE, YEATES & GELDZAHLER

By _____
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MAILING CERTIFICATE

On this 3rd day of January, 1984, I hereby certify that I caused to be mailed, postage prepaid, two copies of the foregoing Brief of Appellants, to the following parties of record:

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