1969

Reliable Furniture Company v. American Home Assurance Co., Western Genearal Agency, and General Adjujstment Bureau : Brief of Respondents

IN THE SUPREME COURT OF THE STATE OF UTAH

RELIABLE FURNITURE COMPANY,
Plaintiff and Appellant,
vs.
AMERICAN HOME ASSURANCE CO., WESTERN GENERAL AGENCY, and GENERAL ADJUSTMENT BUREAU,
Defendants and Respondents.

Case No. 11656

BRIEF OF RESPONDENTS

Appeal from a Judgment of the Third Judicial District, Salt Lake County, Honorable D. Frank Wilkins Presiding

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STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a decision of the District Court, Third Judicial District, Salt Lake County, dismissing, as a matter of law, the appellant's case against all defendants after presentation of the evidence by plaintiff-appellant. Findings and a formal judgment were filed on April 28, 1969 (R 34-36).

DISPOSITION IN THE LOWER COURT

Plaintiff originally filed its action in the District Court, Third Judicial District against Fidelity and Guaranty Insurance Underwriters, Inc., American Home Assurance Company, Western General Agency and General Adjustment Bureau. Subsequently, Fidelity and Guaranty Insurance Underwriters, Inc. was dismissed from the action and the

dismissal was affirmed by this court in *Reliabile Furniture Co. vs. Fidelity and Guaranty Insurance Underwriters, Inc.* 14 U. 2d 169, 380 P 2d 135 (1963). On pre-trial in the instant action, the respondent's motions to dismiss each of the remaining parties defendant was granted; however, on appeal to this Court that decision was reversed. *Reliable Furniture Co. vs. Fidelity and Guaranty Insurance Underwriters, Inc.* 16 U. 2d 211, 398 P. 2d 685 (1965). There after an amended complaint was filed by the plaintiff adding a cause of action sounding in fraud and the case was set for jury trial. After presentation of the appellant's evidence, the Honorable D. F. Wilkins, Judge, granted respondent's motion for an involuntary non-suit under Rule 41-b Utah Rules of Civil Procedure.

RELIEF SOUGHT ON APPEAL

Respondents contend that the decision of the District Court dismissing appellant's cause of action should be affirmed.

STATEMENT OF FACTS

Appellant, Reliable Furniture Company (hereinafter referred to as "Reliable") is a Utah corporation which has conducted furniture operations in the State of Utah. The corporation is primarily owned by Mr. Sam Herscovitz and his wife, with Mr. Herscovitz in complete control (R 55-56, 64). On March 30, 1961, shortly after Mr. Herscovitz arrived at the Reliable store in Ogden, a fire occurred which destroyed

a portion of the building and a portion of the Reliable inventory (R 72-76).

At the time of the fire, Reliable was a named insured under two separate policies of fire insurance. One policy was issued by Fidelity and Guaranty Insurance Underwriters, Inc. (hereinafter referred to as "F&G") and insured Reliable against loss by fire to its stock and inventory. The second policy was issued by American Home Assurance Company (hereinafter referred to as "American") and it insured Reliable against business interruption loss (Exhibit P-2).

Following the loss, Western General Agency (hereinafter referred to as "Western") requested Mr. William J. Holmes, an independent insurance agent in Ogden, to assign the loss to the General Adjustment Bureau, an independent adjustment company (hereinafter referred to as "GAB"). Western is an insurance services agency providing general services to insurance agencies in the Utah area (R 245) (R 196). Mr. William Ball of the GAB was given the assignment. The GAB's function was to investigate and determine the amount of loss and to file a report with the company from whom it received its assignment (R 204, 258). The GAB had no part in determining when, or even if, payment would be made (R 204, 258). Mr. Herscovitz testified that he knew that Mr. Ball's only duty in connection with this loss was the mathematics and that Mr. Ball had nothing to do with payment (R 159, 167-168).

In the course of investigations seeking to determine the extent of loss under both policies, Mr. Ball advised Mr. Herscovitz that he should not be in a hurry to settle the business interruption loss. Mr. Herscovitz concurred in this advice and was not desirous of adjusting the business interruption loss at an early date (R 88, 100, 139, 162). He was only anxious to obtain the proceeds of the inventory loss (R 94) and, after the completion of the investigation of the inventory loss, a proof of loss in relation to the inventory loss was signed by Mr. Herscovitz on or about May 7, 1961 and forwarded to F & G (R 158).

On June 16, 1961, Mr. Day, for the first time received authority from F & G to pay the inventory loss in the amount of $84,923.39 (R 249). Western had no authority to pay claims in this amount and such authority could only be given by the insurance company (R 254). Because of the absence of a required co-signer on June 16, 1961, the $84,823.39 check was not delivered to Mr. Herscovitz, but an appointment was made for a meeting in the Reliable office in Ogden on Monday, June 19, 1961, for the purpose of delivering the check and seeking to adjust the business interruption loss (R 249, 250).

For approximately two hours in the afternoon of June 19, 1961, Mr. Ball worked with the books and records of Reliable, working during part of this time with Wayne Dykstra, Reliable's bookkeeper (R 136, 209, 216, 217). At the conclusion of this investigation Mr. Ball advised Mr. Herscovitz that he comput-

ed the business interrruption loss to be in the amount of $12,609.39, although Mr. Ball had advised Mr. Dykstra that he thought the loss should be substantially lower (R 217-218). There was substantial dispute between Mr. Ball and Reliable's personnel concerning the period of prior business activity to be used in computing the business interruption loss. Reliable had suffered losses in the amount of $63,149.73 in the fiscal year of 1960 and business had been in reverse since April 1960 (R. 142-143). Mr. Herscovitz wanted Mr. Ball to use years other than 1960 because of this loss pattern (R 165-166). Mr. Herscovitz himself filed a proof of loss on June 15, 1961 in which he claimed a loss of $48,386.00; in the original complaint the loss was claimed to be $40,776.61; subsequently it was raised to $70,000.00 and now it is claimed that the loss was in the area of $128,000.00 (R 151-152); Exhibit D-9, Appellant's Brief p.13).

Both Mr. Dykstra and Mr. Herscovitz believed the loss to be greater and expressed this to Mr. Day and Mr. Ball (R 210). According to Mr. Herscovitz he then demanded payment of the inventory loss (R 100). In response to this demand, Mr. Herscovitz testified that Mr. Day said that there would be no payment on the inventory loss until Mr. Herscovitz signed the proof of loss in the amount of $12,609.39 (R 100). When asked the alternatives to his failure to sign the proof of loss relating to the business interruption loss, Mr. Day stated, "arbitration on both claims or suit in Court" (R 101). Mr. Herscovitz

turned to Mr. Ball and asked him if that was the way it had to be and Mr. Ball said, "Yes, that's the way it has to be" (R 101). This statement was the only participation by Mr. Ball in the entire conversation between Mr. Day and Mr. Herscovitz and it was stated in a soft mumble and at a time when Mr. Herscovitz knew that Mr. Ball had no connection with the payment of the loss (R 163, 168).FN/

At this same meeting on June 19, 1961, Mr. Herscovitz signed the proof of loss for the business interruption loss in the amount of $12,609.39 (Exhibit D-13) and received two separate drafts; one drawn on the account of F & G in the amount of $84,-923.39 covering the loss of inventory, (hereinafter referred to as "F & G draft") and one drawn on the account of American in the amount of $12,609.39 for business interruption loss, hereinafter referred to as the "American draft" (R 102, 104). The American draft contained the following language on the face of the draft: "In full settlement of Business Interruption Coverage", and on the reverse side it contained, in part, the following: "Endorsement by payee constitutes a receipt and release for the items mentioned on the face of this check" (Exhibit D-12). The proof of loss signed by Mr. Herscovitz contained no language of release and Mr. Herscovitz so under-

FN/ Mr. Dykstra had no specific recollection of this statement; Mr. Day denied that any of this conversation ever occurred (R 210-211, 256). However, for purposes of this appeal, we have stated only those facts which are most favorable to Mr. Herscovitz's version of this meeting.

stood that the signing of the proof of loss did not affect his rights (R 153, Exhibit D-13). He signed it only so he could collect the F & G draft (R 154).

On June 20, 1961, Mr. Herscovitz instructed Mr. Dykstra to deposit the F & G draft in the Reliable account and instructed him *not* to deposit the American draft (R 213). Prior to that time Mr. Herscovitz had contacted Mr. Holmes and on June 20, 1961 contacted an attorney, Mr. Spooner, for the specific purpose of discussing the events of June 19th with him (R 105-106, 139). Mr. Herscovitz took no further action until he had actually collected into the Reliable account the proceeds of the F & G draft. After ascertaining that these proceeds had been collected, he then endorsed the American draft and deposited it for collection (R 106,141, 154). Shortly after receiving the benefits from the American draft, Reliable filed suit on August 11, 1961.

ARGUMENT

POINT 1

INTRODUCTION

Appellant appeals from the trial court's determination dismissing its action against all three defendants. In analyzing the correctness of this determination it is imperative to first establish the legal theories advanced by appellant against each defendant. First as against American, plaintiff seeks to recover for its alleged business interruption loss under the provision of the American policy (R 31-33).

In so doing it seeks to set aside the effect of the settlement evidenced by the language found on the American draft, asserting that it was the result of fraud and duress. Second, as against American, Western and GAB it seeks to recover for damages allegedly caused by the alleged fraud of Mr. Day and Mr. Ball, which it asserts caused it to enter into the above mentioned settlement. Appellant also apperently seeks to claim redress from all three defendants for damages allegedly arising from the alleged fraudulent and coercive conduct of Mr. Day and Mr. Ball (R 22-28).[FN/] What distinction can be drawn between the alleged misrepresentations in the Third Cause of Action and the allegation of fraud and coercion in the First and Second Causes of Action is difficult to ascertain. It would appear to relate to the same conduct.

Distilled to their essence, all of the allegations of the complaint hinge on appellant's assertion that it was coerced into accepting a settlement in the amount of $12,609.39 for its business interruption loss as a condition for its receipt of $84,923.39 for the inventory loss. Inability to support this crucial assertion would result in the failure of all of the causes of action. After the presentation of appellant's case-in-chief it was clear that there was no evidence to support this assertion and no evidence which would have justified a trier of fact in returning a verdict for appellant against any defendant.

FN/ Neither Mr. Day or Mr. Ball as individuals are parties to this action.

First, there was absolutely no evidence that appellant entered into a settlement of the business interrruption loss as a result of economic duress. In fact the evidence was just to the contrary; he endorsed the American draft and obtained the proceeds *after* he had collected the proceeds from the inventory loss. Second, there was absolutely no evidence that appellant relied on any representation of Mr. Day or Mr. Ball. Again, the evidence was just to the contrary; Mr. Herscovitz knew they couldn't compel him to sign a release to obtain the proceeds of the inventory loss and he consulted with counsel before endorsing the draft. Third, there was absolutely no evidence that any of the alleged representation and coercive conduct was authorized by American, Western or GAB or that such conduct was within the scope of the responsibilities of either Mr. Day or Mr. Ball. Particularly, as to the GAB, Mr. Herscovitz testified that he knew it had nothing to do with payment.

We respectfully submit that when confronted with this complete lack of evidence supporting any of its contentions, the trial judge was legally required to dismiss this action.

When this matter was before this court for review in *Reliable vs. Fidelity and Guaranty Insurance Underwriters, Inc.* 16 U 2d 211 398 P 2d 685 (1965) only the bare pleadings and a transcript of pre-trial proceedings were before the Court. Thus, appellant's reliance on that holding is misplaced. The trial judge did exactly what this Court held it should do — give

appellant an opportunity to present all its evidence. This was done and it was properly found to be legally insufficient. Additionally, at the time this matter was before this Court the American draft, defendant's Exhibit D-12 was not in evidence. It is this Exhibit endorsed after the collection of the F & G draft, which contains the language of settlement and release, not the document of June 19, 1961, which appellant asserts that he signed only because he wanted to get the F & G draft. Such assertion has no applicability to the endorsement of the American draft.

POINT II

THE ACTION OF SAM HERSCOVITZ IN NEGOTIATING THE AMERICAN DRAFT CONSTITUTED A FULL AND FINAL SETTLEMENT OF THE BUSINESS INTERRUPTION CLAIM AND THERE WAS NO EVIDENCE THAT IT WAS THE RESULT OF FRAUD OR DURESS.

The evidence in this case demonstrates beyond peradventure that there was a dispute between Mr. Ball and Mr. Herscovitz as to the amount of the business interruption loss (R 217-218). Mr. Ball believed that it should have been substantially less than $12,000.00; Mr. Herscovitz believed it should have been much higher. See supra pg. 5. If the dispute could not be resolved the policy provided for a method of resolution upon demand of either party (Exhibit P-2). Mr. Herscovitz was familiar with this provision (R 155), but never made any such demand either before or after he had collected the funds from the

F & G draft. In addition, there was a question as to whether or not any amount was due under the policy because of the suspicious nature of the origin of the fire (R 249). Thus, at no time prior to the preparation of its draft on June 19, 1961, did American agree to any settlement. The preparation of the various proofs of loss by appellant, either on the 15th of June or the 19th of June did not constitute an agreement by American to pay anything, they were merely claims by the insured as to what he believed his loss to be.

On its face the American draft provided that it was "in full settlement" and it provided on the reverse side that endorsement constituted "a receipt and release". There would appear to be no dispute that Mr. Herscovitz was aware of these provisions at the time he endorsed the draft and, in fact, beside consulting an attorney, was himself a law school graduate (R 54). We submit that in these circumstances, Reliable is bound by the clear language on the draft and the negotiation of the American draft constituted acceptance of the conditions of payment. Any other result would be contrary to public policy and well established legal principles. Mr. Herscovitz at the time of endorsement and collection was free to reject these conditions; he chose not to. American was under no obligation to make any payment until there was an agreement between it and the insured as to the amount of loss and a determination as to coverage.

In the spirit of compromise it made its offer, appellant accepted this offer and should be bound thereby.

The general rule is stated in 1 Am. Jr. 2d, *Accord and Satisfaction*, Section 18:

> "A creditor to whom remittance is made as payment in full of an unliquidated or disputed claim has the option either of accepting it upon the condition on which it was sent or of rejecting it, and if it clearly appears that the remittance was sent upon the condition that it be accepted in full satisfaction, then failure to reject it will result in an accord and satisfaction. This, acceptance and use of a check purporting to be 'in full' or employing words of similar import, or accompanied by a letter to that effect, amounts to an accord and satisfaction of the larger claim of the creditor if that claim is unliquidated or disputed. The moment the creditor indorses and collects the check with knowledge that it is offered in full satisfaction of a disputed claim, he thereby agrees to the condition and is estopped from denying such agreement. It is then that the minds of the parties meet and the contract of accord and satisfaction becomes complete. It is not necessary to show that the creditor knows the legal effect of his acceptance of the check, and his intent in accepting the check is immaterial, since the mere acceptance will be regarded as assent."

This court has adopted with approval the above quote and stated that acceptance of a check operates as a full discharge when "the condition that it is to be accepted in full satisfaction of the pending claim or

obligation . . . (is) expressly made." *Hintze vs. Seaich*, 20 U. 2d 275, 437 P 2d 202, 207 (1968). As noted above the draft tendered to Mr. Herscovitz, and later negotiated by him, contained such an express condition.

The legal effect of the endorsement is not vitiated by the fact that Mr. Herscovitz disputed the amount due or that he was accepting the claim in full satisfaction. In 75 ALR, 905, 916, it is noted:

> "Generally, where the amount due is unliquidated or disputed, and a remittance of an amount less than that claimed is sent to the creditor, together with a statement that it is in full satisfaction of the claim, and the tender is accompanied by such acts or declarations as amount to a condition that, if the remittance is accepted in full satisfaction of the disputed claim, and the creditor is aware of such conditions, the acceptance of such remittance constitutes an accord and satisfaction, *although the creditor protests at the time that the amount tendered is not accepted in full satisfaction.*" (Emphasis added).

The Restatement of Contracts, Section 420 observes:

> "Acceptance by a creditor of any performance tendered by the debtor as satisfaction of a pre-existing contractual duty, or of a duty to make compensation, is not prevented from operating as satisfaction by the creditor's manifested refusal to regard it."

See also the illustrations and comment under said Section.

Appellant may not argue that payment of the

$12,609.39 draft was a payment of an admitted part due and therefore not a complete settlement. In Willeston, *Contracts*, 3d Ed. Section 129, it is stated:

> "Not infrequently, though a claim is unliquidated or the subject of a bona fide and reasonable dispute, it is conceded that at least a certain amount is due. While it would appear that in paying this conceded part of the claim, the debtor was merely doing what he was previously bound to do, the law looks upon an unliquidated or disputed claim as a whole and does not attempt to set a value upon it, or to define the extent of the debtor's legal obligation. Accordingly, such a claim is dealt with as a chattel is dealt with, as something the adequacy of which as consideration will not be measured. By the weight of authority, the payment of the amount admittedly due will support a promise to discharge the whole claim. Whether such payment is made by check or otherwise is immaterial."

In any event, in the case at bar, this was a disputed claim with no admission by American that any amount was due and owing on June 19, 1961, or at the time of endorsement.

Nor should Appellant be heard to claim that the endorsement was void because it was the result of any fraud, duress or coercion existing at that time. The only duress testified to by appellant's president was the need for the i n v e n t o r y loss payment (R 94,

153).[FN/] These funds had been collected by appellant prior to the endorsement of the American draft so the duress, if any, was alleviated. At no time during the trial was Appellant able to articulate any theory of fraud, duress or coercion which influenced his decision to endorse the draft and collect the funds.

In comparable cases where duress may have existed, but ended before the execution of the release, the courts have barred recovery. *Gottleib vs. Charles Scribner Sons*, 232 Ala. 33, 166 So. 685 (1936); *Kall vs. W. G. Block Co.*, 319 Ill. 339, 150 N.E. 254 (1926); *Ashland Coal and Coke Company vs. Old Ben Coal Corporation*, 187 Atl. 596 (Del. 1934); *Neher vs. Kerr*, 70 Ind. App. 363, 123 N.E. 467 (1919).

We submit that when Appellant made a decision to endorse the American draft, he was fully aware of the consequences and he should not now be heard to complain.

POINT III

THE ACTION OF SAM HERSCOVITZ IN NEGOTIATING THE AMERICAN DRAFT IN SETTLEMENT OF THE BUSINESS INTERRUPTION CLAIM CONSTITUTED A RATIFICATION OF THE EVENTS OF JUNE 19th.

FN/ Typical of appellant's position was the following testimony of Mr. Herscovitz at page 153 of the reporters transcript:

"Q. Mr. Herscovitz, so I understand this clearly, is your testimony that the only reason you signed Defendant's Exhibit 13, which is the Proof of Loss, agreeing to the amount of the loss was because Mr. Day said to you, 'If you don't sign this, you aren't going to get your $84,000.00' is that correct?

"A. Absolutely correct."

Obviously, once the funds were collected the threat was meaningless.

Appellant argues that the trial court took the endorsed American draft out of context and that it should have reviewed the transaction as a whole. We submit that it is appellant who seeks to ignore the entire transaction and seeks only to focus on the alleged events of June 19, 1961. Typical of this attempt is the following language from appellants brief at page 7:

> "But the case Reliable presents to this Court is not a normal case. It is a case of fraud and duress compelling Reliable to accept a token settlement or face certain destruction from lack of funds."

We believe it is fair to ask appellant a number of questions. What *compelled* it to endorse the American draft after collecting the $84,923.39? What *compelled* it to endorse the American draft at all? What prevented appellant from merely destroying the draft? What prevented appellant from placing the draft in an envelope and returning it to where it came? The answer to all these questions is obvious — nothing, except Mr. Herscovitz's desire to acquire "the $12,609.39 in [his] bank account." (R 155).

We submit that even if one accepts Mr. Herscovitz's testimony concerning the events of June 19, 1961, his conduct in endorsing the American draft after the termination of any economic duress, demonstrated that he was willing to abide by the settlement of June 19, 1961 regardless of how that settlement was achieved.

The general rule is stated in 77 A.L.R. 2d 427, 428:

> "A contract entered into under duress is generally considered not void, but merely voidable and is capable of being ratified after the duress is removed, such ratification resulting if a party entering into the contract under duress intentionally accepts the benefits growing out of it, remains silent, acquiesces in it for any consirerable length of time after opportunity is afforded to void it or to have it annulled, or recognizes its validity by acting on it."

In this regard it should be emphasized again that Herscovitz consulted with counsel, was himself legally trained, and expressly made certain that the F & G draft had cleared and that he had the available cash on hand to continue to operate his business before endorsing the American draft. Having had the opportunity to escape from the claimed duress, and thereafter having endorsed the draft and accepted the fruits of the conduct which appellant contends was tantamount to duress, it is apparent that a ratification occurred. In this regard, the case of *State vs. Barlow*, 107 Ut 292, 153 P 2d 647 (1944), is pertinent where the Court stated:

> "As a rule, in a transaction requiring mutual consent, if consent is obtained by coercion, the victim may either affirm or avoid the transaction, but he may not claim the benefits and escape the obligations." (P. 307)

Implicit in the court's language is the conclusion

that accepting the benefits in the face of duress constitutes ratification.

In *Farrington vs. Granite Stake Fire Insurance Co.*, 120 Ut. 109, 232 P 2d 754 (1951), the Court rejected the right of an insurance company to rescind for misrepresentation where the insurer knew of the facts a few days after a fire and accepted a premium payment knowing of the fire and did nothing "till suit was brought". The court noted:

> "One who claims a right of rescission must act with reasonable promptness, and if after such knowledge, he does any substantial act which recognizes the contract as in force, such as the acceptance of more than half of the premium would be, such an act would usually constitute a waiver of his right to rescind." (P. 119)

The old addage of "What is sauce for the goose, is also sauce for the gander" is pertinent.

In *LeVine vs. Whitehouse*, 37 Ut. 260, 109 Pac. 2 (1910), the Court in considering the effect of fraud stated:

> "The rule is that, where a party has been induced to enter into a contract by false and fradulent representations, he may . . . rescind the contract, but the great weight of authority holds that, if the party defrauded continues to receive benefits under the contract after he has become aware of the fraud, he will be deemed to have affirmed the contract and waived his right to rescind." (P. 272)

Of importance is the fact that the court accepted the following quote from 9 Cyc. 436:

> "The party defrauded will generally lose his right to rescind if he takes any benefit under the contract or does any act which *implies an intention to abide by it or an affirmance of it after he has become aware of the fraud.*" (Emphasis added)

The importance of the wording is the recognition of an intention or implication to affirm from the act of accepting the benefits.

Subsequently, in the decision of *Taylor vs. Moore*, 87 Ut. 493, 51 P 2d 222 (1935), a case involving fraud (and it should be remembered that this court in the instant case used the word fraud), the Utah Supreme Court approved the following quote from the decision of the United States Supreme Court in *Shappirio vs. Goldberg*, 192 U.S. 232(1904):

> " 'He cannot . . . treat the property as his own and exercise acts of ownership over it which shows an election to regard the same as his, and at the same time preserve his right to rescission (sic.)'."

In *McKellar Real Estate & Investment Co. vs. Paxton*, 62 Ut. 97, 218 Pac. 128 (1923), the court speaking of rescission as to real estate purchase contract made it clear that a person seeking to disaffirm must do it in unequivocal terms and not exercise dominion over the property.

In the instant case the evidence shows no intent to repudiate the settlement. First, after Herscovitz accepted both drafts, the duress ended. Especially so

when he cashed the F & G draft since that eliminated the essence of any "wrongdoing" in the theory of economic duress. Thereafter, instead of repudiating the $12,609.39 payment, he retained it and sought to "keep his cake and eat it too." He endorsed and cashed the American draft which can only be judged to be an acceptance of the settlement. He could not legally negotiate the draft after the duress had terminated and claim that the executed release was not binding. Further, full consultation with counsel was had before any action was taken. As a consequence, ratification or waiver exists as a matter of law.

Appellant's reliance on the holding in *Purvis vs. Penna. R. Co.* 198 F. 2d 631 (3d Cir., 1952) is misplaced. A review of the facts in that case demonstrates its inapplicability. Plaintiff, a railroad employee was injured while working. After recovering from his injuries he went to the railroad office to collect back pay. It was alleged that while there he signed a release of all claims for the injury and also received $45.00. Plaintiff believed this represented payment for back pay. The check contained release language which the plaintiff did not notice or read prior to, or at the time of negotiation. The jury found that the plaintiff did not sign the release in the railroad office, but the trial judge held that he was barred from recovery because of the language of the negotiated check. The appeals court reversed this finding holding that there could be no ratification of the release in as much as the jury found that plaintiff did not even know he had

signed a release for his claimed injuries. Plaintiff believed the $45 check related to back pay not to his injuries.

This holding has no relevance to the case at bar where Mr. Herscovitz was aware of all the circumstances; was aware of the language of the American draft and had the advice of counsel before acting.

POINT IV

THERE WAS NO EVIDENCE TO SUPPORT APPELLANT'S CLAIM OF FRAUD.

With reference to appellant's contention that the trial court erred in failing to submit the case to the jury on the issue of fraud or duress, what heretofore has been stated as the position of respondent in the previous arguments applies with equal force. Appellant had his payment for the inventory loss before endorsing the American draft; thus, no fraud or coercion affected his actions at that time. Additionally, at the time Mr. Herscovitz executed the draft, thus accepting the settlement of the business interruption loss, he did so, not on release of Mr. Day's statment, but rather acted based on his own investigation. Mr. Herscovitz testified that he was aware of his rights even though he accepted the draft (R 153, 155). Also, all the evidence shows that Mr. Herscovitz was not relying on any statement of Mr. Day or Mr. Ball. He was relying upon his own interpretation of the law as well as the advice of his legal counsel.

It is well settled that reliance is an essential ingredient to a cause of action for fraud. The reliance must be on the misrepresentation of the defrauding party. *Pace vs. Parrish*, 122 Ut. 141, 247 P 2d 273. Prosser, *Torts*, 3d Ed. pg. 729 notes:

> "In order to be influenced by the representation, the plaintiff must of course have relied upon it, and believed it to be true. If it appears that he knew the facts, or believed the statement to be false, or that he was in fact so skeptical as to its truth that he reposed no confidence in it, it cannot be regarded as a substantial cause of his conduct. *If, after hearing the defendant's words, he makes an investigation of his own, and acts upon the basis of the information so obtained, he may be found not to have relied on the defendant, since the fact that he was unwilling to accept the statement without verification is evidence that he did not believe it.*" (Emphasis added).

The judgment entered by the trial court expressly found that there was no evidence of reliance by Herscovitz to his detriment on any representation of agents for Western General Agency or General Adjustment Bureau (R 35).

Appellant, in its brief sets out the necessary elements to establish fraud. It recognizes the necessity of showing reliance as well as other elements. What it fails to do is to set forth any evidence which would justify a trier of fact in finding that all of these elements existed in this case. Of particular importance is the complete lack of the recitation of any evidence,

which established that appellant relied on the statements of Mr. Day. Immediately after the departure of Mr. Day and Mr. Ball, Mr. Herscovitz called Mr. Holmes. The next day he contacted a lawyer concerning this specific transaction. He gave instructions to his bookkeeper regarding the American draft. His entire testimony demonstrated a complete lack of belief as to the statement of Mr. Day.

Not only must there be reliance, but appellant must show that he suffered some detriment as a result of the reliance. This appellant is unable to do. The act which precludes any recovery in this action is the endorsement of the American draft. As we have emphasized repeatedly, this endorsement was not the result of any representation, of Mr. Day or Mr. Ball. It was endorsed only after collection of the F & G draft, only after consultation with counsel and was totally unrelated to the alleged happenings of June 19, 1961.

Additionally, as to the GAB the trial court found that Mr. Herscovitz, by his own admission, knew that it had nothing to do with the payment and that its only role was in determining the amount of loss. Appellant's attempt to impose liability on the GAB on the basis of a mumbled assent to Mr. Day's alleged statement is a hollow reed, indeed, upon which to impose liability.

Under all these circumstances we respectfully submit that the trial court was absolutely correct in

refusing to submit this issue to the jury. The elements of fraud were non-existent.

POINT V

NO LIABILITY CAN BE IMPOSED ON AMERICAN, WESTERN OR GAB FOR THERE WAS NO EVIDENCE TO ESTABLISH THAT THE STATEMENTS OF MR. DAY OR MR. BALL WERE AUTHORIZED BY THEIR PRINCIPALS OR WERE WITHIN THE SCOPE OF THEIR NORMAL ACTIVITIES.

As we have noted previously, appellant chose not to sue Mr. Day or Mr. Ball individually and seeks to impose liability on American, Western and GAB for the alleged statements of Mr. Day or Mr. Ball. Thus, it is incumbent upon appellant to establish that such conduct was either authorized or within the scope of their normal duties. *Sweatman vs. Linton,* 66 Ut. 208; 241 P. 309, (1925), 35 Am. Jur. 2d. *Master and Servant, Sections* 550 et seq. This appellant failed to do as to any defendant.

First, it is without dispute that the GAB is an independent adjusting firm whose only responsibility was to determine the amount of the loss. It had no control over the payment of the loss, it merely filed a report with the company who retained its services. The alleged misconduct, if it occurred, related solely to the payment of drafts drawn on two insurance companies. Clearly, these payments were not within the specific authority of Mr. Ball or the GAB, nor were they within any apparent authority as Mr. Herscovitz well knew. The alleged mumbled assent by

Mr. Bell to Mr. Day's statement cannot in anyway impose liability on GAB, Western or American.

Second, there was no evidence that would support a finding that Mr. Day was authorized by anyone to withhold delivery of the F & G draft. In fact, it was just to the contrary. American would have no authority to instruct Mr. Day to withhold delivery of a draft drawn on another company. The GAB would have no authority nor interest in the payment, or non-payment, of either draft, and the only evidence was that Western had not instructed Mr. Day to withhold payment. (R 257). In this connection, it should be noted that appellant originally joined F & G as a defendant to this action. Upon motion, F & G was dismissed on the grounds that there was no showing that it ever instructed anyone to withhold payment and this dismissal was affirmed. *Reliable Furniture Co. vs. Fidelity and Guaranty Insurance Underwriters, Inc.* (1963) 14 Ut. 2d 169, 380 P 2d 135. Just as there was no evidence to support a showing that F & G authorized such conduct, we submit that there was no evidence to show American, Western or GAB authorized it either. The conduct, if it occurred, was not such as to impose vicarious liability.

Third, the statements of Mr. Day cannot be attributed to the GAB. Both Western and GAB are independent of each other with no basis in the record for a finding that the acts of Mr. Day can impose liability upon GAB. Nor can this conduct be attributed to American in the absence of alleged.

CONCLUSION

The trial court in this instant case gave full latitude to the appellant to present its case in a light that would allow it to go to the jury. There was a complete absence of evidence which would have supported a jury verdict against any of the defendants. Wherefore, it is respectfully submitted that this Court should affirm.

Respectfully submitted,

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