1966

Richard Nolan Jardine v. Brunswick Corporation : Brief of Appellant

IN THE SUPREME COURT
of the
STATE OF UTAH

RICHARD NOLAN JARDINE,
Plaintiff-Respondent,

vs.

BRUNSWICK CORPORATION,
Defendant-Appellant.

10631
Case No.

BRIEF OF APPELLANT

APPEAL FROM A JUDGMENT OF THE THIRD DISTRICT COURT FOR SALT LAKE COUNTY
HONORABLE BRYANT H. CROFT, JUDGE

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STATEMENT OF THE NATURE OF THE CASE.

Plaintiff alleges he was damaged when he financed the investor who was supposed to finance him in a bowling venture, plaintiff's expenditures allegedly resulting from misrepresentation by defendant as to the investor's ability.

DISPOSITION IN LOWER COURT

The court denied Brunswick's motion to dismiss at the close of plaintiff's case and ultimately entered judgment for plaintiff for $28,714.34 and costs.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the judgment and dismissal of the action.

STATEMENT OF FACTS

Since this court on appeal looks at the facts most favorably to the respondent, we state the facts as they appear from plaintiff's case in chief, ignoring the facts developed by appellant in its defense. Such basis for the statement of facts also clearly delineates appellant's contention that Brunswick's motion to dismiss at the close of plaintiff's case was well taken.

Jardine was a retired "self made" man. Although he had had little formal schooling, he had been successful in accumulating assets worth about a quarter of a million dollars through various business ventures, including the operation of a sawmill in which he had about 30 employees, trucking, farming and building and leasing business properties. (R. 120-124, 181-187) He became interested in becoming the operator of a bowling alley. Ida Young, a lady who was a friend of plaintiff's, a bowler, and a real estate saleslady suggested he talk with Brunswick, who sells bowling equipment. (R. 125) Costs of equipment and building were discussed and it was decided that Jardine did not want to attempt to undertake to finance the entire venture, but that Jardine would buy the bowling equipment if an investor were found who wanted to handle the financing of and construct the building and lease it to Jardine. (R. 127, 189) Brunswick said it thought financing was no problem, that there were investors available who were interested in constructing a building for lease to an operator. (R. 127) Brunswick introduced a doctor to Jardine as one interested in mak-

ing such an investment, and Jardine went to a bowling operators' school given by Brunswick in Chicago. The doctor however declined the proposition. (R. 131) Brunswick then introduced Jardine to Jack Charlesworth, as a person who could build and finance the building. (R. 133) Charlesworth was then working on a construction project, constructing between 15 and 20 houses at Hill Field. Charlesworth took Jardine, Jardine's son and Ida Young, all of whom were interested in obtaining a bowling alley to operate, and who later formed and owned Sunrise Lanes, Inc., as the operating company (R. 202-204, 321), on an inspection trip to take a look at his work at Hill Field and it appeared therefrom as if "he would have plenty of money, and plenty coming in." (R. 251) Charlesworth told them he expected an income from that project in the range of $60,000 which he expected to put into the bowling alley building. (R. 215, 251)

Charlesworth had also made arrangements with third parties to build other buildings for other bowling alley operators. (R. 252-255)

Jardine and Charlesworth, after considering a building site recommended by Brunswick, on which it held an option (R. 128, 136), expanded their plans and decided to acquire a large 18½ acre tract on which Jardine's friend, Ida Young, would obtain a commission. (R. 137-139, 245, 286) This was to be acquired as a site for a shopping center complex. (R. 137) Brunswick thought the part to be used for bowling lanes was suitable. (R. 245)

Charlesworth thereupon formed a new corporation, Compact Building Company, with Charlesworth as president. (Ex. P. 2, R. 349) It was intended that the new corporation would purchase the site and construct the building. (R. 134, 135, 143) When, however, the initial $500 down payment on a total purchase price of $37,000 for the land could not be raised by Compact, the contemplated transaction was changed. (R. 147, 215, Ex. P. 6, R. 349) Jardine contracted to buy the 18½ acres himself, taking a deed for 2 acres, valued at $4,000, on which the bowling building was to be built, paying $9,000 of the purchase price to the seller. (Ex. P. 6, R. 349, R. 147, 148, 247) Jardine then conveyed the 2 acres to Compact who agreed to build, lease to Jardine and reimburse him for the payment. (Ex. P. 8, R. 349, Ex. P. 9, R. 349)

When the Hill Field payments did not materialize as anticipated, Compact did not have funds for construction on the 2 acre site thus acquired and owned by it. (R. 218, 219, 259, 297) Charlesworth knew that Jardine had $23,000 cash which he was going to use as a down payment on the equipment he was going to buy from Brunswick. (R. 297) Charlesworth asked Jardine to advance $23,000 to Compact to be repaid in ample time for the purchase of the bowling equipment. (R. 297) Brunswick wrote the following letter to Jardine:

> "At the request of Mr. Jack Charlesworth, I am writing this note to inform you that it will be satisfactory with us for you to pay the majority of the balance due remaining of your down payment upon the arrival of the lanes. This amount

> will be a sight draft attached to a Shipper's Order Bill of Lading." (Ex. P. 10, R. 349)

When asked for a "stronger" statement, Brunswick refussed. (R. 299) This letter was delivered by Charlesworth to Jardine. (R. 299) When asked by Jardine about the transaction as proposed, Brunswick said it was all right with Brunswick, but warned Jardine to "protect yourself." (R. 157, 200) The $23,000 was advanced by Jardine to Compact. According to Jardine's testimony, Jardine advanced the $23,000 relying upon the fact that *Charlesworth* told Jardine that Charlesworth was going to get payments from the Hill Field job in order to pay Jardine. Jardine further testified that the reason he advanced the $23,000 was because Brunswick wrote the above quoted letter, delaying the down payment. (R. 219) Jardine took a promissory note, executed by Compact and Charlesworth, secured only by an assignment of the proceeds of a life insurance policy in the event of Charlesworth's death. (R. 157, 200, 262) Construction was then commenced.

When the moneys which were anticipated from the Hill Field construction project were not forthcoming, laborers and materialmen could not be paid. (R. 163) No loan could then be obtained on the unfinished bowling building project. (R. 266) Mechanics lien claimants brought an action to foreclose their liens. Jardine and Compact were parties to the foreclosure action in which there were various claims, counterclaims and cross claims. (Case No. 138888, R. 350) Compact deeded the 2 acre site back to Jardine. (Ex. 14, R. 349) Jardine,

while represented by his counsel in the foreclosure suit, entered into a compromise settlement which released Compact from any claim Jardine had arising out of the transaction. (R. 226)

Jardine paid $1,000 to Brunswick as a down payment on the contract to buy equipment. He expended $175.00 for food and lodging while attending school in Chicago, $169.10 for train fare, agreed to pay his sons $350.00 to attend a bowling school in Los Angeles and paid Dodson Welding $20.24 for work on the building. The fair market value of the 2 acre tract was $4000. These items together with the $23,000 loan totalled $28,714.34, the amount of the judgment. (R. 167) The court found these expenditures were made in reliance upon Brunswick's representations as to Charlesworth's ability to build and finance a biulding, which representations the court found to be false, which Brunswick would have known to be false had it made investigations.

Jardine had formed a corporation, Sunrise Lanes, Inc., as a prospective operator of the bowling lanes. (R. 202) This corporation had as principal stockholders and officers, Jardine, his two adult sons, and his real estate broker Ida Young with all of whom he consulted before each of his ventures. (R. 203-206, 321) Although he used his lawyer for the incorporation, he did not consult him on any of the other transactions related herein, but, instead, used his real estate saleslady, Ida Young, to draft the documents involved including deeds, contracts, agreements, notes and lease. (R. 139, 193, 208)

The only evidence in plaintiff's case of representations concerning Charlesworth or Compact is the following:

(a) Jardine's testimony relating to the introduction of Jardine to Charlesworth by Brunswick's Tracy, when no loan was contemplated.

> "A. Well, Jack Charlesworth came in a little bit late. We were all in there when he came. When he came in Harold Tracy got up and told me, 'This was Jack Charlesworth, President of Compact Building Company and that he could build these buildings and finance them and there was nothing to worry about.'" (R. 133)

(b) Jardine's testimony relating to a comment made by Dinius of Brunswick when *Charlesworth* said,

> "he had his money tied up, wasn't able to get this down payment for this ground at the particular time and wondered if I (Jardine) would advance the money for the ground. Carl Dinius said, if this would hurry the thing and get it in gear he thought it would be a good thing - - - - . If we can get this thing started now we will have it open for the leagues. If it drags on getting started we could be in trouble for the fall leagues." (R. 147-148)

(c) Jardine's testimony relating to a comment made by Dinius of Brunswick on Charlesworth's Hill Field job,

> " - - - - that he felt like this draw would be okay and he wouldn't have any problems, and Dinius himself and Harold and everybody concerned was anxious to get this thing going - - - - . We had discussed several times - - - - as to the

ability he had once he got the money from Hill Field - - - - . The general statement was that when he got this money that it could be really rolling and it seemed like we were all happy at this point." (R. 233-235)

(d) Ida Young's testimony relating to a comment made by Dinius of Brunswick,

"I remember distinctly Carl Dinius saying that Mr. Charlesworth, after he completes the construction of this bowling alley, from then on Brunswick themselves are going to finance him on all the rest of the buildings for the Brunswick equipment. Now, this is the statement that was made at the time. Not only that, another statement that I remember Harold Tracy making was that Charlesworth would be a good man to build the building because he knew exactly how to construct that building to house the Brunswick lanes."

(R. 252)

(e) Ida Young's testimony relating to comments made by Dinius of Brunswick,

" - - - - That he thought that Mr. Charlesworth would be a good contractor for Mr. Jardine, that he knew exactly how to build the building to house the Brunswick lanes. He knew how to build the building to Brunswick's specifications for their lanes. I can't remember how it came up about Mr. Charlesworth's project up close to Hill Field. - - - - And I believe at that time that Mr. Charlesworth said he would like to take all of us up to see the project up at Hill Field, and Mr. Dinius said he thought that would be a good idea - - - - that he had a nice setup." (R. 274)

Liabilities of Charlesworth and Compact were shown by Plaintiff's Exhibit 1 (R. 349) but there was no evidence relating to assets or net worth of either, nor was the solvency of either one discussed. (R. 214)

There was no evidence that payments were not expected from Hill Field by all concerned, nor does plaintiff's record show why the payments ultimately were not received.

STATEMENT OF POINTS AND ARGUMENT

POINT 1.

DEFENDANT'S MOTION TO DISMISS AT THE CLOSE OF PLAINTIFF'S CASE SHOULD HAVE BEEN GRANTED BECAUSE THE EVIDENCE CONSTITUTING PLAINTIFF'S CASE IN CHIEF DOES NOT SHOW A CAUSE OF ACTION GENERALLY AND IN THE FOLLOWING PARTICULARS, IN THAT SAID EVIDENCE FAILED TO SHOW:

(a) A REPRESENTATION.

(b) ITS FALSITY.

(c) ITS MATERIALITY.

(d) DEFENDANT'S KNOWLEDGE OF ITS FALSITY OR IGNORANCE OF ITS TRUTH.

(e) DEFENDANT'S INTENT THAT ANY REPRESENTATION BE ACTED UPON BY PLAINTIFF AND IN THE MANNER REASONABLY CONTEMPLATED.

(f) PLAINTIFF'S IGNORANCE OF ITS FALSITY.

(g) PLAINTIFF'S RELIANCE UPON ITS TRUTH.

(h) PLAINTIFF'S RIGHT TO RELY THEREON.

(i) PLAINTIFF'S CONSEQUENT AND PROXIMATE INJURY.

The nine elements listed above are requisite for liability for misrepresentation. *Stuck v. Delta Land & Water Company,* 63 U. 495, 227 P. 791, 795, cited with approval in many Utah cases including *Pace v. Parrish,* 122 U. 141, 247 P. 2d 273.

(a) REPRESENTATION.

Considering the introduction made by Brunswick of Charlesworth to Jardine in light of the circumstances, there was no "representation."

When the introduction was made, it was for the purpose of getting together one who wanted to take the financial risk of constructing and owning a building with one who wanted to lease it on completion.

There was no thought in anyone's mind then that Jardine would advance risk capital. Therefore, when Brunswick said, by way of introduction, that Charlesworth was a person "who could build the buildings and finance them" this was neither intended as, nor would it reasonably have been construed by Jardine as being, a representation as to Charlesworth's credit. It was, rather, an expression of opinion that the desired building could be acquired through Charlesworth. There was no representation of fact, rather a statement of opinion. In fact, Jardine testified that the solvency of Charlesworth or Compact was not discussed by Brunswick. (R. 214)

There was an expression of opinion by Brunswick but no representation of fact. Charlesworth told Jardine that the building would be built by getting a mortgage and by using money he expected to receive.

> "Q. You, in fact, had talked with Charlesworth right after you met Charlesworth about how Charlesworth — or Compact Building would get this building built, didn't you?
>
> A. Yes, with Dinius. The three of us were together.
>
> Q. And it was Charlesworth who told you how he would do it, wasn't it?
>
> A. Well, I think that he mentioned at the time he would have to get a mortgage on this ground plus money he already had coming he could do the building." (R. 209)

Whether said mortgage could be obtained in the future, and whether funds would be received in the future can be the basis of speculation and opinion, but not the basis for a representation of fact.

(b) FALSITY.

Plaintiff did not show that the statement, made on introduction, that Charlesworth could "build the buildings and finance them," was then an untrue statement.

The statement did not relate to solvency, at least in Jardine's mind, because Jardine stated that solvency of Charlesworth or of Compact was not discussed. (R. 214) But if it be assumed that it did relate to solvency,

there was no evidence relating to assets or net worth of either Charlesworth or Compact.

The statement could have related to skill in constructing buildings. Assuming it did, there was no evidence that Charlesworth or Compact was unskilled.

The statement probably related in part to the fact that Charlesworth could obtain construction personnel and equipment and in part that he would be able to pay for the construction as it progressed. Assuming it did, as to the first part, there is no evidence as to Charlesworth's or Compact's personnel or equipment. As to the second part, the evidence was that when the statement was made, income was coming in from the Hill Field project which was going to be used for the construction, but that subsequently conditions changed, income was not received as expected, and once in the bind of having a half completed building, interim financing could then not be obtained. There was no evidence that Charlesworth and everyone else concerned didn't anticipate that periodic payments totaling about $60,000 would be forthcoming from the Hill Field project which could be used for the construction of the bowling building. The only evidence was to the contrary,that when the representation was made these payments were expected. The statement, therefore, was true when made.

Plaintiff attempted to show that the builder was not licensed. At the time any statement regarding ability to build was made, the corporation with whom plaintiff later dealt was not yet in existence, and so could not have had

a license. Although a license had been issued to another business entity based on an examination taken and passed by Charlesworth (R. 285) the question of license, or lack thereof, is not material because one constructing a building for himself is not a contractor, and needs no license. 58-23-2(5), UCA 1953. Such was the case here.

There was no evidence as to what investigation Brunswick made or what was found on any such investigation.

(c) MATERIALITY.

The statement that Charlesworth could build the buildings and finance them relates to and is material to the contemplated transaction in which Charlesworth would build and lease to Jardine, but does not relate to and is therefore not material to the subsequent reversed transaction in which Jardine did the financing. Jardine is not complaining about not getting a lease, but of losses incurred on loans.

(d) KNOWLEDGE.

There is no evidence concerning Brunswick's knowledge of Compancť's solvency, skill, ability, credit or income. Plaintiff, in presenting his case, had no Brunswick employee nor any other witness testify as to knowledge of Brunswick.

Compact expected money in the future which did not materialize. Holding Brunswick liable necessitates the conclusion that Brunswick should have realized that

for some reason, not shown in plaintiff's case, the funds would not eventually be forthcoming. There was no evidence as to what Brunswick knew or should have known about the future income from Hill Field.

(e) INTENT THAT REPRESENTATION BE ACTED UPON IN MANNER REASONABLY CONTEMPLATED.

One introducing a landlord to a prospective tenant does not reasonably contemplate that the prospective tenant will lend the funds for acquisition and construction without security.

Forseeability of damage is necessary.

> "In order that such liability may exist, it is necessary that . . . the person giving the information should have, or be chargeable with, knowledge that . . . the person to whom it is given will be likely to be injured in person or in property as a result of acting thereon."
>
> 65 CJS Negligence, Par. 20.
>
> See also, 37 CJS Fraud, Par. 141

Plaintiff must have relied on a representation in a transaction intended by defendant.

> "One who in the course of his business or profession supplies information for the guidance of others in their business transactions is subject to liability for harm caused to them by their reliance upon the information if
>
> (a) he fails to exercise that care and competence in obtaining and communicating the information which its recipient is justified in expecting, and

(b) the harm is suffered

(ii) because of his justifiable reliance upon it in a transaction in which it was intended to influence his conduct or in a transaction substantially therewith."

"h. TRANSACTIONS FOR GUIDANCE IN WHICH THE INFORMATION IS SUPPLIED. As in the case of a maker of a fradulent representation, the liability of one who negligently supplies information for the guidance of another is restricted to the loss suffered in the transaction for guidance in which the information was furnished or in a transaction of the same type and of substantially the same extent. Thus, accountants who negligently make an audit of the books of the A Corporation, which they are told is to be used for the purpose of obtaining a particular line of banking credit, are not subject to liability to a wholesale merchant whom the corporation has induced to supply it with goods on credit by showing him the certificate of the audit. On the other hand, it is not necessary that the transaction in which the negligent audit is relied upon should be the very one to influence which the audit has been made. It is enough that it is a transaction substantially identical therewith. Thus, in the situation above dealth with, if the corporation, finding that at the moment it does not need the credit to obtain which the audit was procured, subsequently uses it to obtain from the bank a later credit, the accountants will be liable to the bank for the loss resulting from its extension of the credit unless the financial condition of the corporation has materially changed in the interim."

American Law Institute, Restatement of Torts, Par. 552.

When introducing a prospective landlord to a prospective tenant, defendant would not reasonably have contemplated that the transaction would change and that instead of having a building built for him to occupy, the tenant would himself advance funds for the construction of the building he was to occupy. Even if such a complete switch should have reasonably been contemplated, it would be even more remote that plaintiff would have reasonably contemplated that such financing would be made without a credit check, an examination of financial statements and without adequate security. The record shows that after he decided to finance the construction, plaintiff did none of these. (R. 208)

Not only did Brunswick not contemplate at the time it made the introduction of the prospective landlord and tenant that a statement then made would be relied upon in a transaction whereby the tenant financed the construction, but when Brunswick heard that plaintiff was later contemplating such a transaction, Brunswick expressly warned plaintiff to "protect yourself." (R. 157, 200) This shows that Brunswick had not previously contemplated that a loan would be made.

Since no loan was contemplated at the time a statement was made, loss arising therefrom is not actionable.

(f) IGNORANCE.

Plaintiff had many meetings with Charlesworth who told plaintiff about his Hill Field job which later caused financial problems on the bowling alley. Plaintiff even

went to Hill Field with Charlesworth and examined the work and observed its status. (R. 210, 250)

Charlesworth told plaintiff he was in financial difficulty because his payments on the Hill Field job were not forthcoming. (R. 215)

The very fact the builder didn't even have the down payment, much less money even to start construction, would give any reasonable person knowledge of financial difficulty.

(g) RELIANCE.

Jardine consulted with Ida Young, the realtor who drafted the various documents and who interested him initially in the bowling alley project. (R. 199) He consulted with his sons. (R. 206) He consulted with Charlesworth and checked on Charlesworth's work. (R. 250) He ignored defendant's recommendation as to a building site. (R. 128, 136) All indicate lack of reliance.

But of more importance, Jardine's testimony regarding "reliance" in making the $32,000 loan, was that he relied on two things, *Charlesworth's* statement and Brunswick's letter. Jardine testified:

"Q. How did you know he had it coming?

A. Just from what he told me.

Q. What did he say?

A. He said he had this money coming from Hill

Field.

Q. On this Hill Field project you had examined?

A. Yes.

Q. What did he say? When did he expect it?

A. I believe he told me he got paid on the 15th of each month.

Q. How much money did he say he had coming?

A. Golly, I don't remember for sure. But it seemed to me $58 or $60,000.00 at this — I can't say this for sure.

Q. It was in that range wasn't it?

A. Plenty sufficient to take care of —

Q. Yes. And so you relied upon Charlesworth's statement that he was going to get that money from Hill Field, didn't you —

A. Yes." (R. 215)

"Q. Then the same situation prevailed on the $23,000.00 as prevailed on the $9,000.00 as to Charlesworth's statement to you as to why he needed an advance?

A. This is true.

Q. And you were still relying upon the fact that he told you he was going to get payments from the Hill Field job in order to pay you? Is that right?

A. This is true, but this isn't — this isn't the reason I gave him the money. The reason I gave him this money was because Bob Dobbs sent me this note telling me it was all right to give it to him. Without that note, I wouldn't have given him nothing." (R. 218-219)

The letter is Exhibit P. 10 in which Dobbs of Brunswick merely stated Brunswick would be willing to post-

pone receipt of payments from Jardine, and which was delivered with the warning, "protect yourself." The letter in no way indicates that Brunswick is recommending that the money due it should be advanced to Charlesworth. It is simply an agreement by Brunswick to postpone receipt of a down payment. There is no evidence of reliance upon a *representation* by *Brunswick.*

(h) RIGHT TO RELY.

Plaintiff was a middle aged businessman who had owned business properties and had operated various enterprises including contractor for hauling, contractor for cutting timber, owner and operator of sawmill employing 30 men, builder and owner of grocery store, barber shop and cafe. All were profitable. (R. 120-124, 181) He had used lawyers in various business transactions but didn't on this one, (R. 165) yet he seeks to be held harmless from results of his own poor business judgment. He seeks to impose upon Brunswick the duty it would have if it were his guardian, merely because Brunswick "recommended" a builder. A general recommendation is not actionable because it is a mere matter of opinion.

> "When the representation is made concerning something which is mere matter of opinion, which every man can exercise his own judgment upon and inquire about, it is the plaintiff's own fault if he suffers himself to be deceived."
>
> *Stuck et. al. v. Delta Land & Water Co.,* 63 U. 495, 227 P. 791, 795, 796.

Brunswick's statement that Charlesworth was a good builder can't support an action in fraud or negligence.

A general statement re financial standing is not actionable.

> "A general statement or report stating conclusions as to the financial standing of a third person which is made the basis of credit to him is not generally actionable."
>
> 23 Am. Jur. Fraud and Deceit, p. 845, note 20.
>
> See also, 32 ALR 2nd 209.

Here, there was no representation of fact.

Plaintiff may not rely upon statements where he has equal means of discovery. He could have checked on the builder himself and in fact did investigate the builder by checking his current project at Hill Field, which was the very project, the failure of which precipitated Jardine's loss. (R. 210, 250)

> "The representations that the note was 'as good as gold,' and that the investment company would see that the plaintiff 'did not lose a penny,' in and of themselves; are matters of mere opinion, exaggerated statements, and trade talk, and not actionable. So far as made to appear, the plaintiff and the investment company dealt at arm's length with equal means of knowledge, dealing with each other on equal terms and free from and uninfluenced by any fiduciary or trust relation. . . .
>
> "Not anything is shown or made to appear, nor is there any claim made, that the plaintiff had not equal means with the investment company to find out the financial responsibility of the

Whites, nor is it shown or made to appear or any claim made that there was anything with respect to their financial responsibility or inability to pay the note which was peculiarly within the knowledge of the investment company and not of the plaintiff, or that any such matter was withheld from the plaintiff by the company. It was shown that about six months or more after the plaintiff purchased the note, White went into bankruptcy. If when the plaintiff purchased the note White was then insolvent, not anything is made to appear that the investment company had knowledge of such fact. The plaintiff testified she has no knowledge of White's delinquency until January, 1930, when he surrendered his contract to the plaintiff and she took possession of the property. We are thus of the opinion that no actionable fraud may be predicated on such claimed representations."

Ackerman v. Bramwell Inc. Co. et. al. 80 U. 52, 12 P. 2nd 623, 626.

"Under any standard of conduct, and in the absence of accompanying actual deception, artifice, or misconduct, it is well agreed that where the means of knowledge are at hand and are equally available to both parties, and the subject matter is equally open to their inspection, if one of them does not avail himself of those means and opportunities, he will not be heard to say that he was deceived by the other's misrepresentations."

23 Am. Jur. Fraud and Deceit, Par. 155.

Here, plaintiff should have taken precautions a prudent investor would have taken before lending funds, such as check credit rating, and get security for the loan.

A representation may be relied upon only if a reasonably prudent person under the circumstances would have done so.

> "The essence of what the plaintiff is seeking to accomplish is to have the defendant become in effect a surety or guarantor of the debt of Mickelson, without the defendant having so agreed or receiving anything for doing so. This would impose liability in the nature of a contractual obligation in the absence of the classic essentials: a promise and a consideration. For this reason it is resorted to only where circumstances are such that equity and good conscience render its application imperative in order to avoid an obvious unfairness and injustice. Further prerequisites to the interposition of such an estoppel are the requirements that the promise or representation relied on must be sufficiently definite and certain that the plaintiff acting as a reasonable and prudent person under the circumstances would be justified in placing reliance upon it; and in case of uncertainty or doubt the responsibility is upon the plaintiff to ascertain the facts before acting upon it."
>
> *Petty v. Gindy Manufacturing Corporation*, ... U. ....., 404 P. 2d 30, 32.

The Petty case in which the plaintiff there was represented by the same counsel as plaintiff Jardine here, was an attempt, as in this case, to hold the one making a representation liable for damage suffered by the plaintiff's relying thereon. Although the Petty theory was promissory estoppel rather than Jardine's theory of negligence, the factual situation is similar. In the Petty case plaintiff made a loan to a third party, Mickel-

son, who had assigned as security therefor commissions to be paid by the defendant Gindy who manufactured trailers sold by Mickelson as a dealer. Before making the loan Petty inquired as to the amount of commissions assignable as security. Gindy stated, "they have sufficient orders in or pending to more than cover this." The commissions turned out to be insufficient. The Court stated that Gindy, who made the representation, was not liable.

If plaintiff is aware misstatement is untrue, he may not rely thereon.

> "Later, and before the plaintiff had become bound to convey and long before he had conveyed his ranch away, he was informed in writing that the annual income was $12,400. It is not claimed, and there is no proof to show that the last statement was untrue. Thereafter the plaintiff wrote that he was desirous of making the trade, and later made it without any objection whatever that the income of the apartments had been misrepresented. . . .
>
> "We agree with the trial court that the plaintiff failed to make out a case against either of the defendants, and that the verdict was correctly directed for all the defendants."
>
> *Baird v. Eflow Inc. Co. et. al.* 76 U. 232, 289 P. 112, 114.
>
> "But we also understand the rule to be that if he became advised of the fraud perpetrated upon him in season to recede from his engagement, and yet, with knowledge of the falsity of the representations which had induced the con-

tract, elects to perform, and clearly manifests his intention to abide by the contract, he condones the fraud and is without remedy."

Hull v. Flinders, 83 U. 158, 27 P. 2d 56, 58.

"Since the complaining party must rely on representations in order to render them actionable, it follows that they must deceive him. In any fraud case, in order to secure relief, the complaining party must, therefore, honestly confide in the representations or, as has been said, must reasonably believe them to be true. The law will not permit one to predicate damage upon statements which he does not believe to be true, for if he knows that they are false, it cannot truthfully be said that he is deceived by them. This principle is applicable however false and dishonest the representations may be, and regardless of the fact that they are made with intent to deceive."

23 Am. Jur. Fraud and Deceit, Par. 143.

Here the very fact that the builder needed to borrow from plaintiff apprised plaintiff of the fact he was unable to build the building.

(i) PROXIMATE INJURY.

Plaintiff's claimed injury resulted from a poor loan, not from the builder's failure to complete a building and lease it to plaintiff. When any statement was made regarding Compact, neither Jardine nor Brunswick contemplated that Jardine would be risking his own funds by making a loan to Charlesworth. Therefore the damages claimed from the poor loan are remote.

Furthermore, if plaintiff is entitled to damages, it is plaintiff's burden to prove the amount thereof, which

he has not done. Plaintiff, when the building was partially completed, ordered the builder off the job and demanded and received a conveyance of the property. (Ex. P. 14, R. 349) The value of the improved property must be deducted from amounts expended therefor.

> "For false representations concerning financial condition, recovery may be had for all damages sustained as a natural consequence of the fraud, as where goods sold on false representations of the purchaser's solvency are not paid for and the measure of the defrauded seller's damages is the value of the goods with interest, or, if the seller does receive partial payment for his property, the difference between the value of the property and the value of the consideration received in exchange."
>
> 37 CJS. Fraud, Par. 142(C).
>
> "Some cases hold that the measure of damages for fraudulent representations inducing a sale on credit to a third person is the value of the property at the time of the sale, less the amount paid and the value of any security taken.
> . . .
>
> "The measure of damages for inducing a loan to a third person by misrepresenting his financial condition has been held to be the difference between the amount of the loan and the value of the security given for the loan, if any, at the date of the loan."
>
> Annotation, 72 ALR 2d, 943, 944, 945.

There is no evidence as to its value, consequently plaintiff has failed to establish the amount of his damages.

POINT 2.

PLAINTIFF WAS CONTRIBUTORILY NEGLIGENT.

Jardine had as much opportunity as did Brunswick to check the assets, liabilities and net worth of Charlesworth, and of the subsequently incorporated Compact Buildings, the corporation with which Jardine ultimately dealt.

A prudent investor before making a $23,000 loan would:

(a) Examine the borrower's financial statement.

(b) Get a credit report.

(c) Get adequate security even if the financial statement and report were favorable.

Plaintiff did none of these, yet looks to Brunswick as a guarantor against losses he would have avoided under usual good business practices.

Plaintiff argues that he did not require a financial statement, as a prudent investor would have done, because he assumed Brunswick had done so, inasmuch as Brunswick had required Jardine to furnish a financial statement. The assumption is not justifiable, because the relationships are not comparable. Brunswick was intending to extend credit to Jardine. Neither Brunswick nor Jardine was intending to extend credit to the builder. There was no credit risk involved with the builder until Jardine decided to undertake the financing of the building himself. Only then did a financial statement become material. Brunswick, until then, had no reason to require

a financial statement because neither it nor Jardine had a credit risk. If anyone was neglectful in not examining a financial statement when a loan was contemplated by Jardine, it was he.

The same is true of a credit report.

Regardless of information disclosed by a financial statement and credit report, a reasonably prudent person would have required adequate security.

Jardine's most obvious contributory negligence, however, is in closing his eyes to the obvious conclusion that a builder, who is supposed to acquire a building site and construct and pay for a building of this size who does not initially have a $500 down payment for the land, and who has no funds with which to even commence construction is not in the best of financial shape. The very fact that the builder did not have funds, and couldn't get them, apprises plaintiff of the fact that the builder could not "build and finance the building," and that any statement made by Brunswick to that effect was no longer true.

In a recent case this court said:

> "Further than this, the pictures show that the land was covered with rocks up to the size of a man's head and it was so obviously rocky that if the plaintiffs had taken the trouble to walk over it, the most casual of inspections would have shown that it was not good for cultivation. Parrish did nothing to actively prevent the Paces from making an inspection and it would have been little trouble to do so. Under those circumstances,

> we believe that it must be said as a matter of law that the plaintiffs did not use reasonable care and diligence. They were, therefore, not entitled to rely on the representation and that item of $1,750 in the judgment cannot be sustained."
>
> *Pace, et al v. Parrish, et al.* 122 U. 141, 247 P. 2d 273, 275.

POINT 3.

PLAINTIFF IS BARRED FROM RECOVERY BECAUSE OF A RELEASE EXECUTED BY HIM.

The judgment in favor of Jardine in effect makes Brunswick the guarantor of the loan from plaintiff to the builder. Before Brunswick should be held liable, plaintiff should show that he has unsuccessfully demanded repayment from the borrower, Compact Buildings. The record shows no such demand, and in fact shows the contrary, that plaintiff affirmatively released Compact Buildings. (R. 226)

This release by Jardine of Compact Buildings and Compact Buildings' release of any claim it had in the property or against Jardine puts Jardine in this position: He reaps the benefit of having his obligations to Compact Buildings discharged, he acquires and takes away from Compact Buildings an asset which affects Compact Buildings' solvency and ability to cover any loss claimed by Jardine, while at the same time Jardine saddles Brunswick with all responsibility for Compact Buildings' ultimate inability to perform.

The general rules of guarty set forth in the following

paragraphs of 24 Am. Jur. Guaranty would preclude a recovery here.

> "7. Assurance, Recommendation, or Expression of Opinion. — A contract of guaranty is to be distinguished from an expression of opinion that a third person is trustworthy or reliable, from an assurance that he will comply with contracts or engagements, and from a representation that he is solvent, reliable, or the like. A statement of this character may not be relied on to establish contractual relations; nor may the writer of a letter containing such assurances be held liable at the suit of the addressee unless it is shown that, to his knowledge, the observation or expression of oipnion was false. The authorities recognize that persons who are engaged in mercantile pursuits commonly recommend correspondents one to another without intending to become guarantors of the persons recommended."

> "87. Release of Principal Debtor; Discharge by Operation of Law. — Generally speaking, the guarantor is held to have been released or discharged of liability where it appears that, by reason of some act or omission on the part of the creditor, the principal debtor has become discharged of his obligation without satisfaction thereof."

> "108. Generally; Pursuit of Remedy by Creditor. — In some situations, at any rate, the creditor or obligee, prior to bringing action to recover on the contract of guaranty, is bound to take measures for the collection of the debt from the principal debtor, liability on the part of the guarantor being conditioned upon the exercise of diligence to promote payment by the debtor. The creditor must, unless the guaranty is absolute, de-

mand payment of the debtor and give notice of default to the guarantor; and if he fails to do so, he may be barred of recovery.

". . . the guaranty is held to be conditional, requiring the creditor to proceed against the debtor, where the contract purports to assure or secure the creditor, where the guarantor has agreed to indeminfy the creditor against loss, or where he has guaranteed the 'ultimate payment' of the debt or the 'collection' of the amount thereof."

The primary obligation to plaintiff was the builder's, to build and repay the loan, but the judgment against Brunswick makes it a coobligor. Under 15-4-4 and 15-4-5 UCA 1953 the release of the builder, without a reservation of rights against Brunswick was a release of Brunswick.

"15-4-1. In this chapter . . . 'obligation includes a liability in tort. . . ."

"15-4-4. RELEASE OF CO-OBLIGOR — RESERVATION OF RIGHTS. — Subject to the provisions of section 15-4-3. the obligee's release or discharge of one or more of several obligors, or of one or more of joint or of joint and several obligors, shall not discharge, co-obligors against whom the obligee in writing and as as part of the same transaction as the release or discharge expressly reserves his rights; and in the absence of such a reservation of rights shall discharge coobligors only to the extent provided in section 15-4-5."

"15-4-5. RELEASE OF CO-OBLIGOR — EFFECT OF KNOWLEDGE OF OBLIGEE. —

If an obligee releasing or discharging an obligor without express reservation of rights against a co-obligor then knows or has reason to know that the obligor released or discharged did not pay as much of the claim as he was bound by his contract or relation with that co-obligor to pay, the obligee's claim against that co-obligor shall be satisfied to the amount which the obligee knew or had reason to know that the released or discharged obligor was bound to such co-obligor to pay.

"If an obligee so releasing or discharging an obligor has not then such knowledge or reason to know, the obligee's claim against the co-obligor shall be satisfied to the extent of the lesser of two amounts, namely: (a) the amount of the fractional share of the obligor released or discharged, or (b) the amount that such obligor was bound by his his contract or relation with the co-obligor to pay."

POINT 4.

THE FINDINGS OF FACT AND CONCLUSIONS OF LAW DO NOT SUPPORT AN AWARD, AND THE JUDGMENT IS CONTRARY TO LAW.

The findings and conclusions ignore the points raised above and the judgment based thereon is therefore contrary to law.

CONCLUSION

Brunswick's motion to dismiss at the close of plaintiff's case should have been granted. The judgment should be reversed.

Respectfully submitted,
BRAYTON, LOWE & HURLEY
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