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Grant M. Robertson And Edith Williams Robertson, Aka Edith L. Robertson v. Donald W. Geis; Sloan Smith; Sloan Smith Associates, Ltd.; First Dividend Corporation, A Utah Corporation; And Intermountain Capital Corporation of Utah And Intermountain Capital Corporation of Utah v. John W. Robertson And Zelda Robertson : Brief of Defendant-Appellants Sloan Smith And Donald W. Geis

IN THE SUPREME COURT OF THE STATE OF UTAH

GRANT M. ROBERTSON and EDITH WILLIAMS ROBERTSON, aka EDITH L. ROBERTSON, his wife,

Plaintiffs and Respondents,

vs.

DONALD W. GEIS; SLOAN SMITH; SLOAN SMITH ASSOCIATES, LTD.; FIRST DIVIDEND CORPORATION, a Utah corporation; and INTERMOUNTAIN CAPITAL CORPORATION OF UTAH,

Defendants and Appellants,

and

INTERMOUNTAIN CAPITAL CORPORATION OF UTAH,

Defendant and Third-Party Plaintiff and Appellant,

vs.

JOHN W. ROBERTSON and ZELDA ROBERTSON, his wife,

Third-Party Defendants and Respondents.

Case No. 12902 and 13099

BRIEF OF DEFENDANT-APPELLANTS SLOAN SMITH AND DONALD W. GEIS

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Case No. 12902

BRIEF OF DEFENDANT-APPELLANTS SLOAN SMITH AND DONALD W. GEIS

NATURE OF THE CASE

This was an action by the Plaintiffs against the Defendants Donald W. Geis and Sloan Smith for damages for fraud and as against the Defendant InterMountain

Capital Company to void and set aside a mortgage which said company held against certain real property owned by the Plaintiffs and Third-Party Defendants.

DISPOSITION IN LOWER COURT

The Honorable Bryant H. Croft, District Judge of Salt Lake County, Utah, granted a judgment against the Defendant-Appellants Smith and Geis.

RELIEF SOUGHT ON APPEAL

The Defendant-Appellants seek a reversal of the judgment and a judgment of no cause of action against the Plaintiff.

STATEMENT OF FACTS

Mr. Sloan Smith formed Sloan Smith and Associates, Ltd., a Bermuda corporation, in February, 1962 (R-382). Mr. Smith, as president and the principal stockholder, organized the company for the purpose of purchasing equipment for resale in South and Central America (R-384) Early in 1963, Mr. Smith negotiated with Mr. John Whitley, President of InterMountain Capital Corporation, to obtain additional working capital for his business (R-487). In order to complete the transaction with InterMountain Capital, Mr. Smith and Mr. Geis,

an employee of Sloan Smith Associates, Ltd., turned over to the corporation their personal money and property (R-435-463-470) and sought to obtain additional property to be pledged along with their own to secure a loan from InterMountain Capital Corporation in the amount of $60,000.00. One of the people with whom Mr. Geis discussed the possibility of investment was the Plaintiff-Respondent, Mr. Robertson. These discussions were carried on over a period of several weeks. In May, 1963, Mr. Robertson and his wife delivered a deed to 8½ acres of farm property in Salt Lake County (P-1), to Mr. Geis, as agent of Sloan Smith Associates, Ltd. The delivery was a conditional delivery and subject to the terms of a Memorandum Agreement prepared by Mr. Smith (P-2). Prior to the actual delivery of the property, Mr. Geis, on behalf of the corporation, delivered the aforementioned Memorandum Agreement to the Robertsons for their review (R-332-333). The Robertsons reviewed the agreement and contacted Mr. Geis complaining the agreement did not contain the terms which Geis had previously represented it would contain, and, further, requested that Mr. Smith submit a new proposal (R-334). Mr. Smith, however, would only accept the property under the terms set forth in that Memorandum Agreement. After retaining the agreement for ten days, to two weeks (R-378), the Robertsons signed the same, and

when it was delivered to Geis, Mr. Robertson stated "I told him if they wouldn't live up to that, they wouldn't live up to any contract or something to that effect." (R-334).

During the course of the trial, a great point was made by Plaintiffs that they were reluctantly led to the point of parting with their property. Yet, after the deed to the property, which is the subject of this lawsuit, was delivered to Mr. Geis, a much more valuable piece of property, a motel of net value of $70,000.00, was tendered by Robertsons to Geis. This was not accepted by Geis for the reason that by committing their own assets to the project, Smith and Geis had acquired sufficient property to obtain the money needed from InterMountain Capital. (R-701-703). The South American venture, the business all of the parties hoped would be successful, failed, (R-515-516), and because the results were not as all parties believed they would be, Plaintiff-Respondents now claim fraud by Mr. Geis and Mr. Smith and InterMountain Capital seeks an interest in the property of the Robertsons greater than the conditions provided for in the Memorandum Agreement (P-2), even though, through its President, Mr. Whitley, InterMountain Capital took the property with notice that its use was to be only for a period of ten years (R-479-480-488).

ARGUMENT

POINT I

THE COURT ERRED IN FINDING THAT SMITH AND GEIS HAD COMMITTED FRAUD AS THE PLAINTIFF-RESPONDENTS NOT ONLY FAILED TO ESTABLISH FRAUD BY CLEAR AND CONVINCING PROOF, BUT THE EVIDENCE, AS A MATTER OF LAW, WAS TO THE CONTRARY.

PROMISES IN GOOD FAITH

The general rule is that fraud cannot be predicated on statements which are promissory in their nature when made and which relate to future action or conduct. In other words, unless fraudulent intentions exist when the alleged promises and representations are made, they do not constitute fraud, for which an action of deceit can be maintained.

37 Am. Jur. 2d, p. 92, Section 60, also Section 68, p. 104.

Papanikolas, et al., vs. Sampson, et al., 73 Utah 404, 274 Pac. 856.

Hull vs. Flinders, 83 Utah 158, 27 P.2d 56.

Neilson vs. Leamington Mines & Exploration Corporation, 87 Utah 69, 48 P.2d 439.

In *Papanikolas vs. Sampson,* supra, the Court said:

As to what constitutes actionable fraud, respondents quote the following from 12 R.C.L. pp. 254, 255:

> "Since a fraud must relate to facts than existing or which have previously existed, the general rule is that fraud cannot be predicated upon statements promissory in their nature and relating to future actions, nor upon the mere failure to perform a promise, or an agreement to do something at a future time, or to make good subsequent conditions which have been assured. Nor, it is held, is such nonperformance alone ever evidence of fraud. Reasons given for this rule are that a mere promise to perform an act in the future is not, in a legal sense, a representation, and a failure to perform it does not change its character. *Moreover, a representation that something will be done in the future, or a promise to do it, from its nature cannot be true or false at the time when made. The failure to make it good is merely a breach of contract, which must been enforced by an action on the contract, if at all.*" (Italics added.)

Also, in *Hull vs. Flinders,* supra, the Court stated:

> "* * * *Hence to render nonperformance fraudulent, the intention not to perform must exist when the promise is made, and if the promise is made in good faith when the contract is entered into, there is no fraud though the promisor subsequently changes his mind and fails or refuses to perform.*" (Italics added.)

In *Nielson vs. Leamington Mines and Exploration Corporation,* supra, the Court declared:

> "* * * To predicate a cause of action in fraud upon a failure to perform a promise, there must be an intention on the part of the promisor at the time of making the promise not to perform it."
>
> "If the promise is made in good faith when the contract is entered into, there is no fraud though the promisor subsequently changes his mind and fails or refuses to perform." 12 R.C.L. 262; *Hull vs. Flinders,* 83 Utah 158, 27 P.2d 56.

Nonperformance of the promise alone is not evidence of fraud. 12 R.C.L. 255.

We urge that the evidence established that all representations made by Smith and Geis at the time of the transaction with Roberstons were made in good faith, with full intent to comply with the promises made, and that in any event, the Respondents, the Robertsons, did not rely on their representations. While we believe it is clear from the evidence that Geis and Smith were acting in good faith, the Robertsons have failed to sustain their burden of proof and to establish by clear and convincing evidence to the contrary. If subsequent irregularities occurred in the handling of the property, there was no intent at the time the contract was entered into or prior thereto that such should occur. *Stuck vs. Delta Land and Water Company,* 63 Utah 445, 227 Pac. 971.

The taking of the Robertsons' property for security purposes was made when Sloan Smith Associates, Ltd., had and was experiencing a successful operation in Central America, when Mr. Smith was personally worth a substantial amount of money and at a time when he had reason to believe that his operation in Central America would continue to be successful and would yield substantial profits (R-412). The company had shipped to and sold buses in South and Central America, from which a profit of over $100,000.00 had been realized. After the contract with the Robertsons had been entered into, the company shipped equipment to Central America between September, 1963, and January, 1964, valued in excess of $200,000,00. This was paid for in part by the $60,000.00 loan from InterMountain Capital Corporation as it was represented to Roberstons it would be.

With this background of a successful operation by the company, it is illogical to maintain that Smith and Geis had a plan in mind to defraud the Robertsons and that they or the company did not intend to keep the promises made by them.

Also, subsequent and within a few weeks to the transaction in question, the Robertsons offered to Smith and Geis, additional property, a motel of the approximate value (net) of $70,000.00 to be used by them in the same way and for the same purposes as the 8½ acres. It is undisputed that the property was refused as the company

had completed its financing program as far as bringing in other investors was concerned (R-703-704).

It is not reasonable to believe that Smith and Geis would have refused this additional property if they had any intent to defraud the Robertsons. At the date of the Robertsons' transaction, Smith did not know how he was going to secure credit by the use of the Robertsons' property. He knew only that the property was to be mortgaged for this purpose and in this respect. Smith had not formulated a financing program, nor did he have an intent to organize the First Dividend Corporation to which the property was eventually transferred. Organization of the First Dividend Corporation occurred about three months later and only after InterMountain Capital Corporation refused to loan money to Sloan Smith and Associates, Ltd., as InterMountain Capital Corporation could not loan money to a non-American corporation; thus, necessitating the formulation of the second company. (R-471).

The evidence is clear that at the time of the transfer of the Robertsons' property to First Dividend and its mortgage to InterMountain Capital, Smith and Geis believed, and had a right to believe because of past success, that the company would be able to pay the $60,000.00 promissory note as it matured. Otherwise, they would not have made as a part of the transaction the mortgage of their own personal property, which was

transferred to First Dividend with the Robertsons' 81½ acres. This property consisted of a lot belonging to Geis, which was valued at approximately $6,500.00, Smith's home, in which his family resided, with an equity of $30,000.00, Smith's stock in InterMountain Capital Corporation, worth approximately $10,000.00, and Smith's personal guarantee to pay the note at a time when he was worth a substantial amount of money and when his financial activities were very successful. The lot, house, stock, and the other assets pledged were accepted by InterMountain Capital Corporation for the satisfaction of the note, and a deficiency judgment was entered against Smith at the time of the default of the First Dividend obligation to InterMountain Capital Corporation. (R-470).

From the record, we urge that neither Smith nor Geis made any false or fraudulent representations which were relied upon by the Robertsons and that in dealing with the Robertsons in every instance, they acted in good faith and with reasonable belief.

NON-RELIANCE

The law is clear and definite that where there is no reliance, there cannot be fraud. In the case of *Adamson, et ux., vs. Brockbank, et al.,* 112 Utah 52 (1947), 185 P.2d 264, the Court stated:

To constitute actionable fraud, false representation must relate to past or present fact and not be merely promissory or expression of opinion, and circumstances must justify defrauded parties' reliance or representation as basis of his decision or action without making independent investigation of its truth or falsity, or he must have been dissuaded or prevented from making sufficient investigation.

In the case of *Oberg vs. Sanders, et al.,* 184 P.2d 229 (1947), the court states:

> "The basic elements of actual fraud are representation, its falsity, its materiality, the speaker's knowledge of its falsity or ignorance of its truth, his intent that the repre sentation should be acted on by the person and in the manner contemplated, the hearer's ignorance of its falsity, *his reliance on its truth,* his right to rely thereon,
>
> (Italics added.)
>
> and his consequent and proximate injury."

The evidence is undisputed that the respondents, Robertsons, did not rely on any representations of Smith and Geis: (R-334)

> "Q. Did you have any conversation with Mr. Geis about making the changes in the areas you mentioned when you ultimately gave it to him?

A. None beyond saying I wasn't pleased with the way it read.

Q. Why did you sign it without being pleased? Was anything said to him about that?

A. Yes, I think I told him if they wouldn't live up to that, they wouldn't live up to any contract, or something to that effect."

Based upon the evidence when it appears the conclusion reached in the light of the attendant circumstances is so clearly and palpably unreasonable that no tryer of fact acting fairly and reasonably could accept it, then it must be rejected as a matter of law, by the appellant Court. *Seybold vs. Union Pacific Railroad Company,* 121 Utah 61, 239 P.2d 174; *Continental Bank and Trust Company vs. Stewart,* 4 Ut. 2d 228, 291 P.2d 890; 9 Wigmore Evidence, Section 2494.

CONCLUSION

The record clearly reflects that there was no reliance by the Plaintiff Respondents, Robertsons, on any representation claimed by them to have been made by Defendant-Appellants Geis and Smith. Further, the statements made by Geis were clearly promissory in nature and were made in good faith and related to future action and conduct which Geis reasonably believed could be performed. The record when viewed most favorably

for them establishes that the trial court should have found as a matter of law that Plaintiff-Respondents, Robertsons, failed to meet by clear and convincing evidence their burden as to the elements of fraud. This Court should reverse the judgment of the District Court and direct it to enter Findings of Fact and Conclusions of Law and judgment in favor of Defendant-Appellants Smith and Geis.

Respectfully submitted,

GERALD L. TURNER
Salt Lake City, Utah 84115
Valley Professional Plaza
2525 South Main, Suite 14

DeLOS DAINES
Salt Lake City, Utah 84101
822 Kearns Building
Attorneys for Defendant-Appellants, Sloan Smith and Donald W. Geis