1966

Wendell W. Motter and Betty F. Motter, His Wife v. Russell R. Bateman and Myrna Gaye Bateman, His Wife : Respondent's Brief

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IN THE SUPREME COURT OF THE STATE OF UTAH

WENDELL W. MOTTER and
BETTY F. MOTTER, his wife,
Plaintiffs and Respondents,
— vs. —
RUSSELL R. BATEMAN and
MYRNA GAYE BATEMAN,
his wife,
Defendants and Appellants.

Case
No. 10552

RESPONDENTS' BRIEF

STATEMENT OF KIND OF CASE

This is an action by plaintiffs to recover the balance due on a written contract for the sale of a business and rental of a building, and counteraction by defendants for rescission of the contract and return of monies paid thereon.

DISPOSITION IN LOWER COURT

The case was tried to a jury in the Fifth Judicial District, St. George, Utah. Defendants now appeal from a verdict and judgment in favor of the plaintiffs.

Defendants' Motion for Judgment Notwithstanding the Verdict and Motion for New Trial was denied.

RELIEF SOUGHT ON APPEAL

The Statement of Facts contained in Appellants' Brief is incomplete and entirely misleading.

STATEMENT OF FACTS

Defendants were residents of San Diego, California, where defendant Russell R. Bateman had been employed for approximately eight years as an Electrical Test Design Engineer for General Dynamics. He was 31 years old and very familiar with electrical equipment, and a college graduate.

On August 24, 1961, Mr. Bateman was in St. George, Utah, and visited with Mr. Motter, a casual acquaintance. Mr. Motter was sole proprietor of a business known by the name and style of Motter Electric.

On August 24, 1961, and for several days thereafter, defendant Russell R. Bateman and plaintiff Wendell W. Motter had almost continuous discussions relative to the purchase of the furniture, fixtures, automotive equipment, franchises, inventory, and stock in trade of Motter Electric Co., located in a building owned by plaintiffs in St. George, Utah. These discussions included at least one conference between defendant Bateman and Dexter Snow, St. George C.P.A., who had been instructed by plaintiff Wendell Motter to make available to Mr. Bateman *all*

records pertaining to the business, including book inventory, sales volume, profits, book value of furnishings and fixtures. These items had a total book value of $27,994.44 as of August 31, 1961 (T. 130, L. 10 to and including T. 130, L. 19).

As a result of these conversations and investigations by Bateman, on August 28, 1961, plaintiffs Motter and defendants Bateman entered into a contract of sale which provided, among other conditions, "That Bateman shall pay for the said business, furniture, fixtures, inventory, signs, franchises, truck, and Fiat automobile, the sum of $25,000.00. That the said items sold hereby shall be such items as are now in said building, which items have been approved and are accepted by the said Bateman." (Plaintiffs' Exhibit 2, par. 2.)

Defendants took possession of the business September 1, 1961, and continued in possession until January 27, 1962. On January 27, 1962, defendants mailed plaintiffs a Notice of Rescission, *dated January 27, 1962* and received by plaintiffs on February 2, 1962, alleging therein certain purported statements made by plaintiff Wendell W. Motter, allegedly made prior to August 28, 1961, which statements apparently were the basis for defendants' attempted rescission.

However, on or about *January 25, 1962,* plaintiffs Motter served upon defendants Bateman a Notice of Default (Plaintiffs' Exhibit 9) in the terms of the Contract. Thus, *prior to the time of the attempted rescission,* defendants Bateman had been served with written notice of their default under the contract.

On or about December 25, 1961, defendant Russell R. Bateman verbally informed plaintiff Wendell Motter that he, Bateman, was "not making it and I have got to give it back to you." (T. 32, L. 7 to and including T. 32, L. 20.) Defendant began to sell and move the merchandise out (T. 32, L. 21 to and including T. 33, L. 3), (T. 72, L. 22 to and including T. 73, L. 7). Defendants refused plaintiffs' offer to help liquidate the business (T. 75, L. 8 to and including T. 76, L. 2), and finally walked out of the transaction on or about February 4, 1962 (T. 94, L. 20 to and including T. 94, L. 24). Several months after defendants closed the business, they mailed plaintiffs Motter an Inventory (Plaintiffs' Exhibit 9), which purported to be a list of inventory and equipment left in the building by defendants when they had departed the premises.

Plaintiffs gave defendants credit on the contract payments due for all monies received under the contract; for the full value of defendants' purported inventory (Plaintiffs' Exhibit 9), and filed this action on *December 27, 1962* to recover the balance due on the contract of sale ($7,104.43) and the balance due on rental of the building up to the time a new tenant was obtained ($2,400.00). On *February 7, 1964,* defendants filed an answer and counterclaim for rescission and return of $7,056.75, paid by Bateman prior to breaching the Contract of Sale.

ARGUMENT

POINT I.

DEFENDANTS' OBJECTION TO INSTRUCTION NO. 7 IS NOT WELL TAKEN FOR THE FOLLOWING REASONS:

1. THERE IS NO TESTIMONY OR PROFFER OF TESTIMONY IN THE TRANSCRIPT THAT THERE WAS ANY DISPARITY IN EXPERIENCE OR INTELLIGENCE BETWEEN PLAINTIFF WENDELL W. MOTTER AND DEFENDANT RUSSELL R. BATEMAN, WHICH WOULD MAKE DEFENDANT BATEMAN MORE SUSCEPTIBLE TO FRAUD THAN THE ORDINARY PRUDENT PERSON. ALL OF THE TESTIMONY IS TO THE CONTRARY.

   A. DEFENDANT RUSSELL R. BATEMAN WAS A TEST EQUIPMENT DESIGN ENGINEER (T. 72, L. 2 TO AND INCLUDING T. 7, L. 19).

   B. DEFENDANT RUSSELL R. BATEMAN WAS 31 YEARS OF AGE AT THE TIME HE EXECUTED THE CONTRACT (T. 161, L. 5 TO AND INCLUDING T. 161, L. 7).

   C. DEFENDANT WAS EITHER A COLLEGE GRADUATE OR COMPLETING COLLEGE (T. 23, L. 7 TO AND INCLUDING T. 23, L. 7), AND FAMILIAR WITH ELECTRICAL EQUIPMENT.

Before the issue of disparity of experience between the plaintiff Wendell W. Motter and defendant Russell R. Batman was an issue in this action, defendants were obligated to prove:

(1) False representation of a material fact;

(2) Knowledge of its falsity, or culpable ignorance of its truth;

(3) With intent that it should be acted on by the party deceived; and

(4) Inducing him to contract to his injury.
(17 C.J.S., p. 905, par. 153.)

The court's Instruction No. 7 correctly stated the elements the jury should take into consideration in determining the presence of fraud in the inducement, or lack of it. To enlarge, or attempt to further define categories of susceptibility of defendant to fraud would have opened a "Pandora's Box" of presumptions to fly in the face of the "Ordinary Prudent Person" presumption, which is a basic cornerstone of the law of contracts.

Defendant's feeble attempt to prove undue influence ("defendant Motter (sic) was a very good friend of defendant's brother") or a confidential relationship between the parties ("the defendant Russell Bateman had known the plaintiff Wendell Motter since 1950") must fall of its own weight, due to a lack of any foundation in fact.

The Utah case of *De Frees* v. *Carr*, 8 Utah 488, 33 Pac. 217 (1893), quoted at length in defendants' brief under Point I, is quoted out of context, and defendants should have copied into their brief the opening sentence, "One whose mind has become enfeebled by epileptic attacks, * * *." There is no similarity to the present case.

The final answer to the spurious argument contained in defendants' brief, Point I, is that when the jury returned for explanation of "Question No. 5," they had obviously answered Question No. 3, "No." The only thing left to determine then was the finding by the court that the contract was valid.

> "* * * to entitle one to relief from his contract on the ground of fraud *all the elements of fraud must exist,* and where an essential element is absent one may not avoid his contract on such ground." (Emphasis added.) (17 C.J.S. Contracts, sec. 154, p. 907.)

Also:

> "* * * written contracts between parties dealing on a parity are not to be set aside without clear proof of fraud calling for judicial interference." (17 C.J.S. Contracts, sec. 154, p. 907.)

POINT II.

AFTER DELIBERATING SEVERAL HOURS, THE JURY RETURNED TO THE COURTROOM AND PRESENTED THE COURT A WRITTEN QUESTION (T. 173, L. 21 TO AND INCLUDING T. 173, L. 27):

> *"WE ARE DIVIDED ON QUESTION 5. PLEASE EXPLAIN WHAT EFFECT THIS WILL HAVE ON THE FOLLOWING QUESTIONS IN REGARD TO THE VERDICT."* (Emphasis Added.)

The jury did not ask for the effect the answer to Question No. 3 would have *on the following questions.*

Obviously, they had already answered Question No. 3 — "Did the plaintiff Wendell W. Motter, prior to the execution of said documents by the defendants, willfully make any false representation to the defendants of and concerning the said business, with intention that the defendants would rely thereon?"

The question had at this time been answered "No," and was answered "No," on the final verdict. The verdict and Answer to Special Interrogatories show no evidence of having been changed. With Question No. 3 answered in the negative, the only question left to answer was Question No. 7, an arithmetical computation only, based on the evidence submitted by plaintiff and never controverted by defendants.

Whatever the source of the jury's request for explanation to Question No. 5, the remarks of the court could only have clarified the doubt as to the necessity of the jury to answer Question No. 5 at all. Thus, in approximately ten minutes, the jury returned, answering Questions 1, 2, 3, and 7.

Question No. 3 was the keystone of this whole case. If the jury had answered it in the affirmative, then all the other nuances of the case, pregnant in Question No. 5, would have been born, to survive or die according to the amount of evidence the parties could muster regarding: (1) representations by plaintiffs (opinion or actionable); (2) knowledge of falsity by plaintiffs; (3) intent they be acted on by the defendants; (4) whether these representations, if false, induced defendants to enter into the con-

tract; or (5) whether defendants entered into the agreement with full knowledge of the facts, having relied on their own full information.

POINT III

HAVING ANSWERED QUESTION NO. 3 IN THE NEGATIVE, THE JURY MADE MOOT ALL OTHER POINTS BELABORED IN DEFENDANTS' BRIEF.

The trial court, under the evidence presented in this case, gave every instruction to which the defendant was entitled.

All of defendant's argument on Point III is based on "vendor making false statement." The jury said he made no false statement concerning the business, with the intention that the defendants would rely thereon.

POINT IV

DEFENDANT COMPLAINS THAT THE JURY'S ANSWERS TO INTERROGATORIES PROPOUNDED IN THE QUESTIONS 1 THROUGH 8 WERE NOT IN PROPER FORM. HE DOES NOT COMPLAIN THAT THEY ARE UNCLEAR, EQUIVOCAL, OR INCAPABLE OF BEING UNDERSTOOD BY ALL CONCERNED. HE PURSUES THE SHADOW AND IGNORES THE SUBSTANCE OF THE LAW AS IT APPLIES TO THE VERDICT IN THIS ACTION.

The policy of the Utah Supreme Court in review of jury verdicts was aptly set out in *Webb* v. *Olin Mathieson*

Chemical Corporation, 9 Utah 2d 275, 342 P. 2d 1094, as follows:

> "It is the declared policy of the Supreme Court to zealously protect the right of trial by jury and not to take issues from them and rule as a matter of law except in clear cases."

This court has spoken many times on its power to review or change jury verdicts, *Felice* v. *Biscardi*, 67 Utah 171, 246 Pac. 535; *James* v. *Robertson*, 39 Utah 414, 117 Pac. 1068; *Martindale* v. *Oregon Short Line Railroad*, 48 Utah 464, 160 Pac. 275; *Taylor* v. *Weber Co.*, 4 Utah 2d 328, 293 P. 2d 925.

This authority of the Supreme Court to review and the circumstance when it would review and change a verdict was put to rest at last in *Porter* v. *Price*, 11 Utah 2d 80, 355 P. 2d 66, as follows:

> "Verdict of jury must not be set aside unless a reasonable man could not come to the same conclusion even when all of the evidence and inferences fairly derived therefrom are taken in light most favorable to (the) prevailing party."

CONCLUSION

If there was fraud involved in the matter before this court, it was the fraud of defendants who told Mr. Motter they were going to give up the business, *then* proceeded to sell the merchandise and truck it away to a place known only to Batemans (T. 72, L. 18 to and including T. 73, L. 7). They then complain that plaintiff will not accept the gift of a return of the "gutted" business and forgive the outrage.

This court is obligated to look at the verdict herein and the rulings of the district court in this matter in a light most favorable to the plaintiff. *Winchester* v. *Egan Farm Service,* 4 Utah 2d 129, 288 P. 2d 790; *Webb* v. *Olin Mathieson Chemical Corporation,* 9 Utah 2d 275, 342 P. 2d 1094. In such a viewing, the unsupported allegations of defendant, in fact, his very testimony, substantiates plaintiff's testimony (T. 57, L. 13 to and including T. 157, L. 22).

Plaintiff submits that the calculated and contradictory testimony of defendants was manufactured out of whole cloth, after they had been served with Notice of Default by plaintiff and had consulted an attorney (T. 75, L. 8 to and including T. 75, L. 25).

Plaintiff respectfully directs the court's attention to the remarks of the trial judge in denying defendants' Motion For a Judgment Notwithstanding the Verdict and Motion for New Trial (T. 181, L. 10 to and including T. 181, L. 27):

> "* * * I do not believe that Mr. Bateman is so inexperienced as to be unaware of what he was doing here. I think he's an adult person, and I think he's been to college and graduated and holding a responsible position and so on, that he knew exactly what he was doing and getting in this business."

The Verdict of the Jury and Judgment on the Verdict should be affirmed.

Respectfully submitted,

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