G. F. GLATT, THE TRUSTEE OF THE PROPERTY OF WILLIAM D. TRENWITH, A BANKRUPT (PLAINTIFF)..... APPELLANT;

AND

G. F. GLATT, THE TRUSTEE OF THE PROPERTY OF STEWART GODDARD, A BANKRUPT (DEFENDANT)..... RESPONDENT.

1936
* Nov. 25, 26.
1937
* Feb. 2.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Judgment—Action to set aside judgment—Charge of fraud not established against party obtaining judgment attacked—Judgment attacked on allegation of facts different from facts alleged in defence in first action—Facts established by newly discovered evidence as ground for setting aside judgment.

The action was brought to set aside a judgment. The trial Judge, Rose C.J.H.C. ([1935] O.R. 410), held that, though the judgment attacked could not successfully be impeached on the ground of fraud, yet plaintiff should succeed on the ground that newly discovered evidence, of which it could be said that it could not by the exercise of due diligence have been discovered before the judgment attacked was pronounced, established that the judgment attacked was one to which the party obtaining it was not entitled. The judgment of Rose C.J.H.C. was reversed by the Court of Appeal for Ontario ([1936] O.R. 75) which dismissed the action. The grounds taken by Middleton J.A. in that Court were: that fraud in obtaining the judgment attacked, charged as the basis of the present action, was not proved; also that a defendant who allows an action to go to trial upon a certain defence of facts set up which fails, cannot by bringing an action to set aside the judgment set up another and inconsistent defence of facts. The plaintiff appealed to this Court.

Held that the appeal should be dismissed, on said grounds taken by Middleton J.A. and also on the following ground:

* PRESENT:—Duff C.J. and Rinfret, Crocket, Davis and Kerwin JJ.

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A judgment cannot be set aside on the ground of facts established by newly discovered evidence, unless it is proved that the evidence relied upon could not have been discovered by the party complaining by the exercise of due diligence. This is a rule which must be applied with the utmost strictness, otherwise the finality of judgments generally would be gravely imperilled. In the present case the plaintiff was bound to establish in the most entirely convincing way that the rule had been met, and this had not been done in the case presented at trial.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario (1) which (reversing the judgment of Rose C.J.H.C. (2)) dismissed the action.

By an order of McEvoy J. dated November 9, 1934, "in the matter of the bankruptcy of William D. Trenwith," leave was given (upon terms) to Margaret Trenwith, the wife, and a creditor, of said William D. Trenwith, to commence proceedings in the name of the Trustee (G. F. Glatt) at her own expense for the purpose of setting aside a judgment obtained in the Supreme Court of Ontario on December 27, 1932 (for $5,186.94) by G. F. Glatt, Trustee of the Estate of Stewart Goddard, against said William D. Trenwith.

The action was brought, and was tried before Rose, C.J.H.C., who gave reasons for judgment in which the facts are discussed at length (2). He held that, though the judgment atacked in the action could not successfully be impeached on the ground of fraud, the relief claimed by the plaintiff could be granted upon the ground that newly discovered evidence established the fact that the judgment was one to which Goddard (or his trustee) was not entitled; that the evidence was new and convincing and it could be said that the evidence could not by the exercise of due diligence have been discovered before the judgment was pronounced; and that the plaintiff was entitled to succeed. He thought that plaintiff's pleading was sufficient to justify the judgment upon the ground taken, but would allow any amendment deemed requisite. By the formal judgment it was declared and adjudged that the said judgment of December 27, 1932, was null and void, and the defendant was restrained from taking any action upon or in any manner enforcing that judgment.

(1) [1936] O.R. 75; [1936] 1 D.L.R. 387.

(2) [1935] O.R. 410; [1935] 4 D.L.R. 99.

The defendant appealed to the Court of Appeal for Ontario. That Court allowed the appeal and dismissed the action (1). In his reasons, Middleton J.A. (with whom Mulock, C.J.O., in that Court, and with whom also this Court, in the judgment now reported, agreed) stated that the action as brought was to declare that the judgment in the original action was procured by fraud. He referred to the holding of the trial Judge; also to the fact that no amendment in plaintiff's pleading had been made; and held that plaintiff's pleading, which charged fraud, was not sufficient to justify the judgment of the trial Judge. He then proceeded to say, in part, as follows (including a short outline of facts):

Taking the narrow view of this appeal, it appears to me that the judgment cannot stand. Fraud is charged and fraud is not proved. It follows that the action fails.

But I prefer to place my judgment upon broader grounds and so it is necessary to very shortly outline the facts giving rise to the litigation. In the original action Goddard claimed that he was liable upon a covenant in a mortgage upon certain Florida lands; that he sold the lands to Trenwith who as part of the consideration undertook to assume and pay off the mortgage made by Goddard; that Trenwith had failed in this duty and that the mortgagee had recovered against him, Goddard, upon his covenant. He therefore sought a judgment to indemnify him as covenanted and agreed. In this action Trenwith denied that he was a purchaser of the lands in question and that he had covenanted as alleged. When a deed was produced bearing apparently his signature he denied his signature and charged that it was a forgery. The action was tried before the Honourable Mr. Justice Logie and he found on this issue against Trenwith, the signature was his and judgment followed. An appeal was had from this judgment and the judgment was affirmed.

This action was to set aside the earlier judgment. In it Trenwith changes his front entirely. He now says that the signature is his signature, but that it was obtained to the document fraudulently by Stephens, Inc., a real estate agent in Florida, that he signed the document in blank intending it to be filled up and to be used by Stephens, Inc., to aid in the carrying out of altogether another transaction concerning other lands not in the same township. The trial Judge has found this to be established and that it is sufficient to entitle Trenwith to the relief sought. It is to be observed that the fraud proved was not that of Goddard, or of the present defendant, his assignee, but it was fraud of a third party. It is also to be observed that it is not a discovery of new facts, or of new evidence. It is a discovery by Trenwith of the fact that his own evidence at the earlier trial was erroneous and the telling by him of an entirely different story. It is perhaps not material but the issue raised by Trenwith was supported by substantially the same witnesses as those who testified on his behalf at the former trial, but these witnesses gave entirely different evidence at the two trials. It does not necessarily follow that Trenwith and these witnesses are guilty of perjury. It is certain that he and they testified

(1) [1936] O.R. 75; [1936] 1 D.L.R. 387.

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to two totally and irreconcilable stories and the Judge who heard this evidence is convinced that on the latter occasion the story told is true.

I quite agree with the learned trial Judge that Goddard in the first action was guilty of no fraud or perjury, and *a fortiori* Glatt as his trustee in bankruptcy, and who had been substituted as plaintiff before the date of the trial, was innocent, and I assume that in that action Trenwith would have been entitled to succeed had he put forward the story which he now tells.

It is I think clear beyond possibility of a doubt that a defendant who is sued must in the action in which he is sued put forward all defences which he has to the plaintiff's claim. He cannot allow the action to go to trial upon a certain defence which he sets up and when that defence fails set up another and inconsistent defence by bringing an action to set aside the judgment. If in the original action he applies for some relief, his application will be scrutinized with the greatest of care, but there would be no end to litigation if proceedings such as these received the sanction of the court. I can find no trace of any similar action ever having been brought.

* * *

The plaintiff appealed to this Court. By the judgment now reported the appeal was dismissed with costs.

A. C. Heighington K.C. and *H. G. Steen* for the appellant.

G. R. Munnoch K.C. and *F. A. Brewin* for the respondent.

The judgment of the court was delivered by

DUFF C.J.—This appeal should be dismissed.

I should be satisfied to put my judgment upon the grounds stated in the judgment of Mr. Justice Middleton in the court below. There is, however, a supplementary ground which I think it is desirable to state.

Admittedly, the appellant could not succeed on the ground that the judgment was procured by fraud. The learned trial Judge held, however, that certain

newly discovered evidence establishes the fact that the judgment is one to which Goddard (or his trustee) was not entitled.

It is well established law that a judgment cannot be set aside on such a ground unless it is proved that the evidence relied upon could not have been discovered by the party complaining by the exercise of due diligence. The importance of this rule is obvious and it is equally obvious that the finality of judgments generally would be gravely imperilled unless the rule were applied with the utmost strictness.

The appellant was bound to establish this proposition in the most entirely convincing way. On this point, the case presented by the appellant to the trial Judge was not,

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in my judgment, satisfactory. I mention only one circumstance,—the solicitor who had the conduct of the proceedings on behalf of Goddard leading to the judgment in question was not called and no explanation is offered of the failure to call him.

The appeal will be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Symons, Heighington & Shaver.*

Solicitors for the respondent: *McRuer, Mason, Cameron & Brewin.*