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*Dec. 2, 3
Dec. 19

DOUGLAS JUNKIN AND YETTA JUNKIN (*Defendants*) ..... } RESPONDENTS.

AND

JOHN H. BEDARD AND AMELIA BEDARD (*Plaintiffs*) ..... } APPELLANTS;

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Fraud and misrepresentation—Pleading—Necessity for precision—Immaterial variation between pleading and facts established in evidence.

Although it is well established by the authorities that a party relying upon allegations of fraud must plead them with precision, the rule does not go so far as to require that a plaintiff's action be dismissed if the misrepresentation on which he relies is pleaded as an oral one while the evidence at the trial proves that misrepresentation, but made in writing. If every fact necessary to make up the cause of action for deceit is pleaded, and the variance between the pleading and proof cannot have resulted in the defendant failing to call evidence that he would otherwise have adduced, or prejudiced him in any way in the conduct of his defence, the plaintiff is entitled to succeed.

APPEAL from a judgment of the Court of Appeal for Ontario[1], reversing a judgment of Barlow J. Appeal dismissed.

J. J. Robinette, Q.C., for the defendants, appellants.

E. G. Black, Q.C., for the plaintiffs, respondents.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Appeal for Ontario[1], setting aside a judgment of Barlow J. and directing judgment to be entered in favour of the respondents for damages to be assessed by the Master. Counsel agree that the amount in controversy in the appeal exceeds $2,000.

The action is for damages for deceit.

On March 18, 1954, the respondents signed an offer in writing to exchange certain properties owned by them for a summer hotel property owned by the appellants at a valuation of $35,000. The offer was accepted on March 30, 1954. The contract was carried out in due course and the respondents took possession of the hotel property on May 1, 1954. They carried on the hotel business from that date until the commencement of their action on November 14, 1954.

The misrepresentation relied on by the respondents was pleaded in para. 3 of the statement of claim as follows:

3. Prior to the making of the said offer by the plaintiffs, the defendants each represented to the plaintiffs, orally, that the business done by them in the year 1953 in the Rice Lake House at Gore's Landing amounted to $16,000. This representation was made by the defendants for the purpose of inducing the plaintiffs to make an offer, was false to the knowledge of the defendants, and was relied upon by the plaintiffs and was one of the principal reasons that the plaintiffs made the said offer.

Laidlaw J.A. delivered the unanimous judgment of the Court of Appeal. After a careful review of the evidence and giving full weight to the opinion of the learned trial judge

[1] [1956] O.W.N. 287.

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as to the credibility of certain witnesses, he made findings of fact which in my opinion are correct. These may be summarized as follows:

The appellants employed one Anderson as their agent to find a purchaser for the hotel property. The appellant Mrs. Junkin, acting for her husband, the other appellant, as well as for herself, told Anderson that the gross revenue from the hotel business was approximately $16,000 and the net profit after paying expenses approximately $9,700. Mrs. Junkin intended that this information should be given by Anderson to prospective purchasers as an inducement to make an offer. The information was false, and Mrs. Junkin knew it was false. Anderson gave this information to the respondents in writing on March 7, 1954. The respondents relied upon it and were induced by it to make their offer to purchase. The respondents suffered damages in that the value of the hotel and equipment was less than the price which the respondents were induced by the false representation to agree to pay. It should be mentioned that there is no suggestion that Anderson knew of the falsity of the representation or was in any way a party to the fraud practised upon the respondents.

Accepting, as I do, the findings of fact made by the Court of Appeal briefly summarized above, it would appear that the appeal must fail unless the point taken by Mr. Robinette as to the form of the pleadings is fatal to the respondents' case.

While all the findings of fact set out above were supported by the evidence, the respondents both testified that they were induced to make their offer by oral representations made to them by the appellants personally on March 14, 1954, which were identical with those made in writing by Anderson. The learned trial judge found that the respondents were mistaken in this evidence and that the oral representations, if made, were made not on March 14 but on March 28, after the offer had been made.

Mr. Robinette referred to several decisions in which it has been held that a party relying upon allegations of fraud must plead them with precision. In *Bell v. Macklin*[1], Strong C.J. said at pp. 583-4:

> In pleading fraud parties are still, notwithstanding the laxity in pleading which seems now to some extent to be countenanced by the Judicature Act, bound to more than ordinary exactitude, (see observations of Fry J. in *Redgrave v. Hurd,* 20 Ch.D.1.) and if there were not more substantial grounds for maintaining the judgment under appeal it might be worth while to inquire whether a plaintiff could be entitled to relief in a case charging fraud, when his own statement on oath varies so materially from his pleading as we find it does here.

The observation of Fry J. to which the learned Chief Justice referred appears at 20 Ch.D. pp. 5-6. That was an action for specific performance of a contract to purchase a house. The defence was that the defendant had been induced to sign the contract by misrepresentation and there was a counterclaim for damages. Counsel for the plaintiff said in argument:

> The defence is that the contract was induced by misrepresentation. The misrepresentations relied upon ought to be specifically stated in the pleadings . . . The *Judicature Act* has made no difference in this respect.

and Fry J. observed:

> I do not think the *Judicature Act* affects such a question as this, because it is only fair play between man and man that the Plaintiff should know what is charged against him.

In *Graham Sanson & Co. v. Ramsay*[2], Masten J., as he then was, speaking for the majority of the Appellate Division, said at p. 79:

> By our Rules (see 141 and 143) fraud is not to be alleged generally, but the particular matters constituting the fraud must be specifically alleged. These Rules should be taken to apply to every misrepresentation, whether innocent or fraudulent.

In *Washburn v. Wright*[3], Riddell J., as he then was, delivering the unanimous judgment of the Appellate Division, said at p. 144:

> The learned Judge has found fraud, in my opinion wrongly. No fraud is charged; the itemised statement is set up by the statement of defence as a defence, and this is not met by a plea of fraud. We have recently said: "It is not too much to require any one who intends to charge another with fraud . . . to take the responsibility of making that charge in plain terms" . . . and the person making the charge is confined to the particular fraud charged.

[1] (1887), 15 S.C.R. 576.
[2] (1922), 22 O.W.N. 78.
[3] (1914), 31 O.L.R. 138, 19 D.L.R. 412.

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At p. 145 the learned judge added:

> Nothing further is said about fraud during the trial, and it is obvious, I think, that the question of fraud was not gone into at all.
>
> Notwithstanding all this, if the facts proved established fraud, we might now allow an amendment, and, if all the facts were before the Court, permit the finding of fraud to stand, or, if all the facts were not or might not be before the Court, direct a new trial.

I have no wish to suggest any doubt as to the accuracy of any of these statements but, in my opinion, they are not applicable to the circumstances of the case at bar. The weight of the charge made by the respondents against the appellants in the case before us is that the latter tricked the former into offering $35,000 for the hotel property by the representation, false to the knowledge of the appellants, that the business done by them in the year 1953 in the hotel amounted to $16,000. Every fact necessary to make up the cause of action for deceit was pleaded and I have already indicated my agreement with the finding of Laidlaw J.A. that every such fact was proved. What is urged for the appellants is that while the respondents proved the making of the very representation pleaded their action cannot be maintained because in their pleading they stated it was made orally but by their evidence they proved it was made in writing.

If it appeared that this variance between the pleading and the proof could have resulted in the appellants failing to call evidence which they would otherwise have adduced, or that it prejudiced them in any way in the conduct of their defence, it might well be that the judgment could not stand and that the question whether a new trial should be ordered would arise; but, in my opinion, in the particular circumstances of this case the variance was immaterial and caused no prejudice to the defence.

In his reasons the learned trial judge does not refer to this question of pleading but does deal with the representation made by Anderson. He says in part:

> The plaintiffs allege that one Anderson, whom they allege was the agent of the defendants, on the 7th March 1954 gave them a statement showing gross earnings of the hotel during 1953 of $16,000, and a net profit of about $9,700.

His reasons for rejecting the respondents' claim, so far as it was based on this allegation, proceed not on the form of the pleadings but on his view that the evidence did not satisfy

him, (i) that the representation was false, or (ii) that Anderson was the agent of the appellants. Laidlaw J.A. took a different view of the effect of the evidence on these two points and, as already stated, I agree with his findings. The learned justice of appeal makes no mention in his reasons of the point of pleading and it is a reasonable inference that either it was not raised or he regarded it as immaterial. In my opinion, no amendment of the pleadings is now necessary.

It was argued that the respondents failed to prove damage but I agree with the Court of Appeal that damage was shown and that in the circumstances of this case the proper course was to direct a reference. The reasons of Laidlaw J.A. state correctly the principles to be applied in assessing the damages.

For the reasons given by Laidlaw J.A. and those set out above, I would dismiss the appeal with costs, with the usual provisions as to a married woman in the case of the appellant Yetta Junkin.

Appeal dismissed with costs.

Solicitor for the defendants, appellants: H. M. Swartz, Toronto.

Solicitor for the plaintiffs, respondents: E. G. Black, Toronto.

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*PRESENT: Kerwin C.J. and Rand, Cartwright, Fauteux and Abbott JJ.