MAXWELL FREEDMAN (*Defendant*) ....APPELLANT;

AND

D. THOMPSON LIMITED (*Plaintiff*) ....RESPONDENT.

1967
*Nov. 3
1968
Jan. 23

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Agency—Contract for electrical renovations to buildings entered into with agent of unnamed owner—Agent at instigation of defendant requesting plaintiff not to file lien in respect of work—Defendant falsely represented as owner—Plaintiff acting on representation to its prejudice—Defendant estopped from denying that he was owner.

By identical offers to purchase, one K offered to purchase two apartment houses from the defendant F. Three days after the date of the said offers, which were accepted on the same day, K gave notice to F that he had assigned all his right in the offers to purchase to C Ltd. and on the following day F's solicitor, by letter to the solicitors for the said

*PRESENT: Cartwright C.J. and Martland, Ritchie, Hall and Spence JJ.

C Ltd., acknowledged receipt of the notice of assignment. Under a term in the offers to purchase, K was entitled to immediately attend on the premises to execute repairs and renovations and he thereby agreed to indemnify and save harmless the vendor from any and all claims whatsoever and to provide the vendor with waivers of lien from all subcontractors and suppliers before any work was commenced.

K was the operator of a partnership (BJ&L) which appeared to act as the agents for a series of companies including C Ltd. So soon as the offers to purchase had been accepted, BJ&L under the direction of K proceeded to enter the two apartment buildings and to carry out very extensive renovations thereto. The office manager of BJ&L requested the plaintiff company to make an estimate of the renovations necessary to the electrical work in the buildings and upon receipt of the said estimates he authorized the work to proceed on a cost plus basis. It was arranged that the accounts would be paid from the proceeds of the rent. The plaintiff was requested not to file a lien in respect of its work. A written document was presented to it at the instigation of the defendant embodying this agreement, which stated that the plaintiff's agreement was being made at the request of a proposed mortgagee, and at the request of F, the registered owner.

In an action brought against K, BJ&L and F to recover the balance owing for work done on the buildings, the plaintiff obtained judgment against F. The action was dismissed against K and BJ&L although F was given judgment against K for such amount as he was required to pay to the plaintiff. An appeal by F was unanimously dismissed by the Court of Appeal. With leave, F then appealed to this Court.

Held (Cartwright C.J. and Hall J. dissenting): The appeal should be dismissed.

Per Martland J.: The plaintiff contracted with an agent to do the work for the owner. The defendant represented that he was the owner, and the plaintiff acted on that representation, to its own detriment. The defendant was estopped from denying that he was the owner.

Per Martland, Ritchie and Spence JJ.: Before agreeing to proceed with the work it was represented to the plaintiff that BJ&L were only acting as agents for an unnamed owner who would, of course, be liable for payment. The plaintiff proceeding in its ordinary course acted on that representation and entered into the contract. But before it had commenced work on the contract the defendant, through his solicitor, made the further representation that he was the registered owner and enabled BJ&L to obtain the plaintiff's waiver of the right to claim a lien on the properties for the amount which would become due to it. This representation was false and the defendant knew he had already sold the properties and that C Ltd. was entitled to become the registered owner. The solicitor demonstrated his knowledge of the falsity and of the importance of the representation in a letter written by him to the solicitors for C Ltd. His representation and his knowledge were attributable to his client the defendant. The plaintiff acted on that representation to its prejudice, and the defendant accordingly incurred liability.

Per Cartwright C.J. and Hall J., *dissenting*: It was not pleaded that K ordered the plaintiff's work and services as agent of F, or that F agreed to pay for them. Apart from the provisions of the *Mechanics Lien Act* an owner does not become liable to pay for work done on his premises

1968

FREEDMAN v. D. THOMPSON LTD.

which he has not ordered and for which he has not agreed to pay. The fact that F sought and obtained waivers of the right to file liens did not create a liability in contract on his part.

Quite apart from any question of the adequacy of the pleadings the plaintiff's claim based on estoppel could not succeed because the evidence of its responsible officer, read as a whole, negatived the suggestion that, assuming misrepresentations of fact were made by F, the plaintiff was induced thereby to alter its position.

APPEAL from a judgment of the Court of Appeal for Manitoba dismissing an appeal from a judgment of Bastin J. Appeal dismissed, Cartwright C.J. and Hall J. dissenting.

Walter C. Newman, Q.C., for the defendant, appellant.

H. Sokolov, Q.C., and *David Wolinsky*, for the plaintiff, respondent.

The judgment of Cartwright C.J. and of Hall J. was delivered by

THE CHIEF JUSTICE (*dissenting*):—The circumstances out of which this appeal arises and the course of the proceedings in the Courts below are set out in the reasons of my brother Spence and, as far as possible, I shall refrain from repetition.

It is first necessary to consider the nature of the cause of action pleaded by the respondent. The amended statement of claim alleges that from October 1, 1963, until March 14, 1964, the appellant was the registered owner and in possession of the Rozel Apartments and that from October 3, 1963, to May 5, 1964, he was the registered owner and in possession of the Windsor Apartments. This allegation is admitted in the statement of defence of the appellant.

The statement of claim continues:

4. At all material times, the Defendant Paul Klass, in his personal capacity or as the representative of Baird, Johnson & Lee, was the manager of the afore-described properties, and with the knowledge and acquiescence of the Defendant Maxwell Freedman, caused extensive improvements to be made thereto. The reason and purpose for such improvements was to increase the market value of the said properties, and the Defendant Maxwell Freedman, after such improvements had been effected, did sell and transfer said properties at amounts greatly in excess of the purchase prices paid by him.

5. The Plaintiff contributed to such improvements by supplying electrical materials, work and services in the amount of $5,700.00 (later reduced to $4,275.00) to said Rozel Apartments, and in the amount of $990.00 to said Windsor Apartments.

6. The Plaintiff, also at the request of the Defendant Maxwell Freedman, while he was the registered owner, waived its rights to file Mechanics' Liens in respect of the improvements effected to the said properties and the Plaintiff claims and submits that said Defendant is estopped for denying his responsibility and liability to the Plaintiff for the payments of its accounts.

7. The Defendant, Maxwell Freedman, as the owner of the aforedescribed properties, obtained advantage and benefit from the goods, materials and services supplied by the Plaintiff.

8. The Plaintiff's accounts, as aforesaid, remain unpaid in whole or in part although demand for the same has been made by the Plaintiff.

It concludes with a claim for payment of the said sums of $4,275 and $990.

The allegations in the last sentence of para. 4 were not substantiated. The appellant sold both apartments to Klass on October 4, 1963, at profits of $4,750 and $4,000 respectively.

In my view, the statement of claim does not disclose any cause of action against the appellant. It is not pleaded that Klass ordered the respondent's work and services as agent of Freedman; it is not pleaded that Freedman agreed to pay for them. Apart from the provisions of the *Mechanics' Liens Act* an owner does not become liable to pay for work done on his premises which he has not ordered and for which he has not agreed to pay.

It is not necessary to consider whether the evidence supports the allegations in para. 7, of the statement of claim, since even if it does the fact of an owner being benefited by work done on his property does not, apart from some statutory provision, impose upon him a liability to pay for it in the absence of any agreement binding him to do so.

It may well be that Freedman would be estopped from denying that he was the owner of the two apartments at the time the respondent rendered its services but this in itself would not advance the respondent's case because simply *qua* owner, in the absence of contract, Freedman would not be liable.

The fact that Freedman sought and obtained waivers of the right to file liens does not create a liability in contract on his part. It would have been a simple matter for the respondent to exact from Freedman a personal promise to pay as a condition of signing the waivers.

With the greatest respect, it appears to me that in the judgments below the matter has been dealt with as if the

1968

FREEDMAN v. D. THOMPSON LTD.

Cartwright C.J.

action were one for damages for fraudulent misrepresentation or for conspiracy to defraud the respondent. It is well settled that in such actions fraud must be both pleaded and proved. It has not been pleaded in this case.

Quite apart from any question of the adequacy of the pleadings it appears to me that the respondent's claim based on estoppel could not succeed because the evidence of its responsible officer, Philip Kaplan, read as a whole, negatives the suggestion that, assuming misrepresentations of fact were made by Freedman, the respondent was induced thereby to alter its position.

I would allow the appeal and dismiss the action with costs throughout.

MARTLAND J.:—I am in agreement with the reasons of my brother Spence.

In my opinion, the evidence establishes that the respondent undertook to do work on the two apartment buildings at the request of an employee of the firm of Baird, Johnson & Lee. Both that firm and the respondent knew that the firm was not making this arrangement as principal, but as agent for some other person. The respondent reasonably presumed that it was doing the work for the registered owner.

The respondent was requested to agree not to file a lien in respect of its work. A written document was presented to it at the instigation of the appellant embodying this agreement, which stated that the respondent's agreement was being made at the request of Hathaway Investments Ltd., as proposed mortgagee, and at the request of Maxwell Freedman, the registered owner. The agreement was being requested

> for the purpose of inducing the mortgagee to advance moneys secured by a first mortgage on the said property; for the purpose of permitting the owner of the said property to pay the costs of constructing the building or buildings erected or now under construction . . . .

I am of the opinion that this was a representation by the appellant that the respondent's work was being done for him. The respondent agreed not to file a lien on the basis of the representations made in that document. That is the way the document itself reads.

In short, the respondent contracted with an agent to do the work for the owner. The appellant represented that he

was the owner, and the respondent acted on that representation, to its own detriment. The appellant is estopped from denying that he was the owner.

I think that this claim is sufficiently pleaded by paras. 4, 5 and 6 of the amended statement of claim. Paragraphs 5 and 6 are quoted in the reasons of the Chief Justice. The relevant portion of para. 4 reads as follows:

> 4. At all material times, the Defendant Paul Klass, in his personal capacity or as the representative of Baird, Johnson & Lee, was the manager of the aforedescribed properties, and with the knowledge and acquiescence of the Defendant Maxwell Freedman, caused extensive improvements to be made thereto ....

I would dispose of the appeal in the manner proposed by my brother Spence.

The judgment of Ritchie and Spence JJ. was delivered by

SPENCE J.:—This is an appeal by leave from the judgment of the Court of Appeal for Manitoba delivered on July 6, 1966, whereby that Court unanimously dismissed the appeal by the (defendant) appellant from the judgment of Mr. Justice Bastin pronounced on January 5, 1966. By the latter judgment the respondent was awarded judgment in the amount of $5,265 with costs.

The appellant had purchased an apartment house known as the Rozel Apartments in the City of Winnipeg from Messrs. Zlotnick and Goldin by means of an offer to purchase dated September 6, 1963, and had further purchased another apartment house in the City of Winnipeg known as the Windsor Apartments from a Mr. Popeski by an offer to purchase dated September 16, 1963.

By identical offers to purchase dated October 4, 1963, one Paul Klass offered to purchase these two apartments from the appellant Freedman. Paul Klass was a defendant in the action but the action of the respondent was dismissed against him and Messrs. Baird, Johnson and Lee at trial although the appellant was given judgment against the said Paul Klass for such amount as he was required to pay to the respondent.

The consideration in the agreement to purchase by the appellant as to the Rozel Apartments was $82,000, and the consideration in the agreement to purchase made by Paul Klass for the said apartment was $86,750. The considera-

1968

FREEDMAN v. D. THOMPSON LTD.

Spence J.

tion in the offer to purchase by the appellant as to the Windsor Apartments was $60,000 and the consideration in the offer to purchase the said apartment by Klass was $64,000. The two offers to purchase by Klass were made by him as an individual but he testified at trial that they were really made in his capacity as trustee of or agent for a limited company known as Confidence Enterprises Ltd.

Three days after the date of the said offers, which were accepted on the same day, Paul Klass gave notice to the appellant that he had assigned all his right in the offers to purchase to the said Confidence Enterprises Ltd. and on the following day the appellant's solicitor, Mr. A. M. Zivot, by letter to Messrs. Pollock, Nurgitz and Bromley, solicitors for the said Confidence Enterprises Ltd., acknowledged receipt of the notice of assignment. Both of the offers to purchase made by Klass and assigned to Confidence Enterprises Ltd. contained as para. 12 the following term:

> 12. The undersigned will be entitled to immediately attend on the premises to execute repairs and renovations and hereby agrees to indemnify and save harmless the vendor from any and all claims of any nature whatsoever and provide the vendor with Waivers of Lien and Building Declaration before commencement of any repairs and renovations. The Waivers of Lien shall be from all sub-trades and material suppliers. The undersigned agrees to reimburse the vendor for any loss of rental suffered by the vendor on account of tenants being caused inconvenience or disturbance as a result of such repairs and renovations; the said repairs and renovations shall be conducted with a minimum of inconvenience and disturbance to the tenants.

The evidence at trial revealed that the said Paul Klass operated a partnership under the name of Baird, Johnson & Lee, no persons of any of those names being with the partnership at that time. Baird, Johnson & Lee appeared to act as the agents for a series of companies including Confidence Enterprises Ltd., Pacific Leaseholds Ltd., and Hathaway Investments Ltd. All of those companies had been incorporated by various members of the law firm of Pollock, Nurgitz and Bromley and the partners of that firm were some of the officers in the said companies. So soon as the offers to purchase had been accepted, Baird, Johnson & Lee under the direction of the said Paul Klass proceeded to enter the two apartment buildings, the tenants of which remained in possession, and to carry out very extensive renovations thereto. When this work had commenced, Mr. A. M. Zivot, the solicitor for the appellant,

wrote in such capacity to Messrs. Pollock, Nurgitz & Bromley, his letter dated October 21, 1963, which reads as follows:

October 21, 1963

Messrs. Pollock, Nurgitz and Bromley,
Barristers and Solicitors,
209 Notre Dame Avenue,
Winnipeg 2, Manitoba.

Attention: Mr. G. Pollock

Dear Sirs:

Re: Sale of Rozel Apartments; Freedman to Klass

As per the terms of the offer to Purchase, Mr. Klass was to supply Mr. Freedman with Waivers of Lien from all sub-contractors and suppliers before any work was to be done.

Mr. Freedman has advised the writer that Mr. Klass is now in the process of putting in a gas unit and that the window man and plumbers have started or will be starting work. In addition, there has been some lumber supplied on the building.

We would, therefore, ask you to please contact your client and obtain waivers from all the above mentioned parties immediately or we shall have no alternative but to write to these people advising them to cease work and we shall consider the offer null and void and at an end.

We are returning to you building declarations in duplicate re the Rozel Apartments and the Windsor Court with one copy of the Waiver of Lien for your client.

There has been an arrangement between Mr. Klass and Mr. Freedman, whereby Mr. Freedman would leave two suites in the Rozel Apartments, probably Suite 21 and Suite 5, vacant for Mr. Klass to use as storage, etc. In consideration of same, Mr. Klass has agreed to pay $50.00 per month for each suite or a total of $100.00, commencing from October 15th, 1963. Freedman could have rented one of these suites. However, Klass insisted no more leases be signed.

We would appreciate it if you would send us a letter confirming these rental arrangements between Klass and Freedman.

Yours truly,

LAMONT, BURIAK & ZIVOT

AZ:PJ
Encls.

per: A. ZIVOT

The office manager of Baird, Johnson & Lee was one Harold Kaplan and the said Harold Kaplan approached his brother, one Philip Kaplan, who was the office manager of the respondent, and requested that the respondent company make an estimate of the renovations necessary to the electrical work in both these apartments. Upon receipt of the said estimates the said Harold Kaplan authorized the work to proceed. Although the only contemporaneous

1968

FREEDMAN v. D. THOMPSON LTD.

Spence J.

document as to the contents seems to be the letter from Messrs. Baird, Johnson & Lee to the respondent dated November 5, 1963, which reads:

> This is to verify the electrical work on the Rozel Apartments—105 Clark Street to pursue on a cost plus basis, as per our conversation.

Two invoices were delivered later by the respondent. These two invoices are dated, respectively, March 16, 1964, as to the "Rozelle" Apartments, and April 22, 1964, as to the Windsor Apartments. Both of those invoices show that the account was to be paid in twelve monthly instalments; that of the Rozel Apartments to commence on April 1, 1964, and that of the Windsor Apartments to commence on May 1, 1964.

Philip Kaplan testified at trial that these monthly payments were arranged so that the cost of the renovations to the electrical work could be paid out of the rentals received.

Mr. Zivot had written to Messrs. Pollock, Nurgitz & Bromley his letter of October 21, 1963, recited *supra*, demanding the waivers of lien. Prior to the respondent commencing any work on either of the apartments, the said Harold Kaplan had attended the respondent and requested such waivers of lien. The respondent had then prepared waivers of lien on its own forms as to one of the apartment buildings but upon submitting it to Messrs. Baird, Johnson & Lee, the document was said to be unsatisfactory; then waivers of lien were prepared by Messrs. Pollock, Nurgitz & Bromley. These waivers of lien were submitted to Mr. Zivot as solicitor for the appellant and in his aforesaid letter to Messrs. Pollock, Nurgitz & Bromley of October 21, 1963, he said:

> We are returning to you building declarations in duplicate re the Rozel Apartments and the Windsor Court *with one copy of the Waiver of Lien for your client.*

(The italicizing is my own.)

The learned trial judge, with whom I agree, held that Mr. Zivot, therefore, would be aware of the terms of the waiver of lien and that his knowledge would be the knowledge of his client. The said waivers of lien, produced at trial as exhibits, both purported to be "at the request of Hathaway Investments Ltd., the previous mortgagees, *and at the request of Maxwell Freedman. the registered owner*". (The italicizing is my own.)

In his evidence, Philip Kaplan, the office manager of the respondent, testified that he had been informed by his brother Harold Kaplan of Messrs. Baird, Johnson & Lee that the latter were not the owners of the premises and that, therefore, he presumed that they were acting only as agents for the owner. Philip Kaplan also testified that at the time the respondent agreed to proceed with the work on a cost plus basis he had not inquired further as to the identity of the owner and that he had caused no searches to be made in the registry office. When, however, the waivers of lien were presented for execution by the respondent they did show that the registered owner was Maxwell Freedman, and Philip Kaplan has testified and Paul Klass has admitted, that at no time from then until after the work was completed and the monthly payments fell into arrears was the respondent ever informed that anyone but the said Maxwell Freedman had any title or interest in the property. Again I agree with the learned trial judge in his finding that this conduct by Maxwell Freedman through his solicitor constituted not only silence but a representation that he the appellant was the owner of the property and would be responsible for the payment of the account which would become due to the respondent for the work to be performed by it.

It is true that Philip Kaplan in giving evidence at trial for the respondent admitted that he did not ask his brother for whom Baird, Johnson & Lee were agents and that he did not care as his brother had assured him that the respondent's account would be paid out of the rents. He further testified that he authorized the execution of the waivers of lien so that the owner whoever he might be could borrow money with which to do the renovations. Philip Kaplan described this as the ordinary course of the respondent's business. He admitted that the first time that it came to his knowledge that the registered owner was Maxwell Freedman was when the waivers of lien were presented to him for execution, and that not only had he not caused any searches to be made in the registry office but that he did not know any Maxwell Freedman prior to that time. But when a question was put to him:

> Q. So far as you were concerned, the Maxwell Freedman that appeared on the waiver of mechanic's lien was not of much consequence?

1968

FREEDMAN v. D. THOMPSON LTD.

Spence J.

he replied:

A. He was the registered owner.

And further, Kaplan was questioned:

Q. So you were really looking to the block as sort of a security were you?

to which he replied:

A. We were looking to the word of the agent of the owner that the moneys would be paid for the work done.

The view of the trial judge, with which I agree, would seem to be confirmed by several circumstances. *Firstly,* the arrangement that the accounts would be paid from the proceeds of the rent is a definite indication that the owner who would be in receipt of the said rents would be liable to pay the accounts and would pay them. *Secondly,* in his letter to Pollock, Nurgitz & Bromley of October 21, 1963, which I have quoted above, Mr. Zivot said, in part:

We would, therefore, ask you to please contact your client and obtain waivers from all the above mentioned parties immediately *or we shall have no alternative but to write to these people advising them to cease work and we shall consider the offer null and void and at an end.*

(The italicizing is my own.)

In my view, this constitutes an express statement of the solicitor that his client, the appellant, was responsible for the accounts and a threat that, unless he obtained the waivers of lien which he was demanding, the whole situation would be revealed to the contractors thereby making impossible Klass's method of operation. The waivers of lien, of course, would have no effect to discharge the owner's liability but would only prevent the contractor obtaining a security by registration of a lien in accordance with the provincial legislation.

It was the argument of the appellant before this Court that there could be no liability upon the appellant created by virtue of agency established by estoppel unless there had been a representation to the respondent upon which the respondent acted to its prejudice and further that the evidence did not establish any such estoppel because the respondent through its manager Philip Kaplan had agreed to proceed with the work without even knowing the identity of the owner or making any attempt to determine whether that owner were a responsible party. I think the answer to that contention is that although the respondent

had at first agreed to proceed with the work without knowing the identity of the owner and, therefore, of course, without in any way checking the owner's financial ability, the respondent did know that Baird, Johnson & Lee were acting for the owner, and not in their own right. Mr. Harold Kaplan had so informed Philip Kaplan. The respondent at that time could rely on the owner's liability to pay the accounts incurred by his agent and upon its lien rights. Then before it abandoned its right to claim security in the property by way of lien the representation was made to it that Maxwell Freedman was the owner and upon that basis it acted to its prejudice in executing the waivers of lien. There may well have been no representation in making the contract in the first place other than the verbal and that Baird, Johnson & Lee were only acting as agents for an unnamed owner who would, of course, be liable for payment. The respondent proceeding in its ordinary course acted on that representation and entered into the contract. But before it had commenced work on the contract the appellant, through his solicitor, made the further representation that he was the registered owner and enabled Baird, Johnson & Lee to obtain the respondent's waiver of the right to claim a lien on the properties for the amount which would become due to it. This representation was false and the appellant knew he had already sold the properties and that Confidence Enterprises Limited were entitled to become the registered owner. The solicitor demonstrated his knowledge of the falsity and of the importance of the representation in his letter of October 21, 1963. His representation and his knowledge are attributable to his client the appellant. As I have said, the respondent acted on that representation to its prejudice.

I would, therefore, dismiss the appeal with costs.

Appeal dismissed with costs, CARTWRIGHT C.J. *and* HALL J. *dissenting.*

Solicitors for the defendant, appellant: Newman, MacLean and Associates, Winnipeg.

Solicitors for the plaintiff, respondent: Sokolov, Wolinsky and Sokolov, Winnipeg.