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*Oct. 25
Dec. 16

IRVIN HEPTING AND GERTRUDE HEPTING (*Plaintiffs*) ..... APPELLANTS;

AND

ANTHONY SCHAAF, KATHERINE SCHAAF AND ANDREW EXNER (*Defendants*) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Real property—Sale of house—Fraudulent misrepresentation—Claim for damages—Presumption as to worth not rebutted—Evidence of reduced value due to the misrepresentation.

The defendants AS and KS, who were husband and wife, sold their house to the plaintiffs, through the agency of the defendant E, a realtor. The defendants fraudulently concealed the fact that no permit existed to build a basement suite in the house. The plaintiffs brought an action claiming damages and were awarded judgment for $2,500. The defendants' appeal to the Court of Appeal having been allowed, the plaintiffs, with leave, appealed to this Court.

Held: The appeal should be allowed.

The evidence adduced by the plaintiffs plus the presumption authorized by the authorities that, *prima facie*, the property was worth the sum paid for it, justified the trial judge in fixing the damages at $2,500, unless evidence adduced on behalf of the defendants rebutted this presumption.

*PRESENT: Taschereau C.J. and Martland, Judson, Hall and Spence JJ.

There was sound basis for the trial judge's conclusion that the defendants had not succeeded in rebutting the presumption. The plaintiffs then were justified in depending upon the admissions made by the defendant E in his examination for discovery, *i.e.*, that the value of the house with a rentable suite therein, presumed to be $17,700 because of its purchase at that amount, would be reduced by $2,500 if it did not contain such a rentable basement suite.

McConnel v. Wright, [1903] 1 Ch. D. 546; *Steele v. Pritchard* (1907), 7 W.L.R. 108; *Rosen v. Lindsay* (1907), 7 W.L.R. 115; *London County Freehold & Leasehold Properties Ltd. v. Berkeley Property and Investment Co., Ltd.,* referred to.

APPEAL from a judgment of the Court of Appeal for Saskatchewan, allowing an appeal from a judgment of MacPherson J. Appeal allowed.

The Hon. C. H. Locke, Q.C., for the plaintiffs, appellants.

D. G. McLeod, Q.C., for the defendants, respondents.

The judgment of the Court was delivered by

SPENCE J.:—This is an appeal from a judgment of the Court of Appeal of Saskatchewan dated December 11, 1962. By that judgment the said Court of Appeal allowed an appeal from the judgment at trial of MacPherson J. dated September 26, 1961, granting to the plaintiffs judgment against all defendants for $2,500 and costs. The statement of claim in the action (case p. 1) sets out the purchase by the plaintiffs from the defendants Schaaf through the agency of the defendant Exner of premises known as 1306 Horace Street, Regina, and the alleged fraudulent misrepresentation in reference thereto made by the defendant Exner as agent for the defendants Schaaf. Although the prayer for relief in para. 10, subpara. (*a*) thereof is for a declaration that the agreement be rescinded, the statement of claim recites that the transaction was closed and that the plaintiffs went into occupation of the premises. It is probably for this reason that MacPherson J., in his reasons for judgment, considered the remedy of damages only. The defendants, in their notice of appeal to the Court of Appeal of Saskatchewan, set out their grounds of appeal as follows:

1. That the said judgment is against law, evidence and the weight of evidence.
2. That the learned trial judge erred in holding that the defendants, or any of them, are guilty of deceit.

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3. In the alternative, there was no evidence that the defendant, Exner, acted fraudulently or had any knowledge of the matters complained of.
4. That the learned trial judge misdirected himself with respect to the measure of damages and should have held that there was no evidence on which to base an assessment of damages for deceit against the defendants, or any of them.
5. That the learned trial judge erred in holding, if he did so hold, that the fraud and deceit, alleged in the plaintiff's statement of claim, had been proven and should have held that the plaintiffs had not established the fraud alleged against the defendants.

Giving judgment for the Court of Appeal of Saskatchewan, Maguire J.A. said:

> The claim of the plaintiff at trial was limited to one of damages, it not being possible to obtain nor grant rescission in that title to the purchaser's former dwelling had been transferred to the vendors in part satisfaction of the purchase price, and subsequently sold, thus preventing the parties being placed back in status quo.
>
> It is not necessary, for the purposes of this appeal, to consider the several findings of the trial judge, other than the award of damages set at the sum of $2,500.00.

The plaintiffs obtained leave to appeal the judgment from the Court of Appeal of Saskatchewan to this Court and the respondents, in their factum, at p. 4, set out the following "Points in Issue" (p. 4):

(1) The Respondents submit that the Learned Trial Judge erred in holding that the Defendants, Exner and Schaaf, perpetrated a fraud by concealment.

(2) The fraud alleged was not proven.

(3) The agent, if anything, gave only an innocent misrepresentation and the principal did not deliberately employ an agent in order that an untrue representation would be made.

(4) The Plaintiffs proved no loss resulting from the alleged fraud.

Counsel for the respondents submitted argument upon the first three of these propositions but there appears no reason to disturb the finding of MacPherson J. at trial, who said:

> I find that the defendants Exner and Schaaf did perpetrate a fraud on the plaintiffs Hepting by concealing the fact that no permit to build the suite existed.

Therefore, these reasons are concerned only with whether the plaintiffs have proved damages for the fraudulent misrepresentation found by the learned trial judge.

The only evidence upon damages adduced by counsel for the plaintiff at the trial was, firstly, one question and answer put to the plaintiff Gertrude Hepting:

Q. Have you had any experience in prices and values of houses of this type?

A. Oh, yes, I've seen enough houses that I know that house isn't worth 17,6, what we paid for it, not without a basement suite. It's not built that good.

THE COURT: No. She has seen houses, Mr. Gerrand.

MR. GERRAND: Well, I won't press that because I have lots of evidence on that point.

That evidence which, of course, was of no weight whatsoever, was not referred to again at the trial or on appeal. Secondly, counsel for the plaintiffs read in as part of the plaintiffs' case, *inter alia,* the answers of the defendant Exner upon the examination for discovery as follows:

83. Q. As a real estate agent you would know, I take it, that there would be a substantial difference in value between that house with a properly rentable suite and one where the suite could not be occupied by law?

A. That is right.

84. Q. You would agree to that?

A. Yes.

85. Q. Would you like to venture an estimate of what the difference might be in value with or without?

A. Twenty-five hundred dollars.

and the answer of the defendant Schaaf upon examination for discovery:

73. Q. Mr. Exner has made an estimate of the value of that property without the right of the rentable suite would be $2500.00 less than with it. Do you agree with those figures?

A. Yes, I imagine it would be very close.

Giving judgment for the Court of Appeal of Saskatchewan, Maguire J.A. quoted those questions and answers and said:

The first extract of evidence referred to deals with the varying value of the dwelling depending upon whether it contained a legal, and thus rentable, basement suite or not. It is thus of no help in determining damages within the rule or basis quoted. It does not in any sense go to establish that the purchasers obtained a property of less value than the price paid therefor.

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The learned justice in appeal was there applying the judgment of Lamont J. in *Hasper v. Shauer*[1] at p. 215:

> The measure of the plaintiff's damage in an action of deceit is, as stated by the trial judge, the difference between the contract price and the real value of the land (if that value be less) at the time the contract was entered into.

and also quoted Kerr on Fraud and Mistake, 7th ed., p. 498.

In *McConnel v. Wright*[2], the Court of Appeal considered an action for damages for deceit. Collins M.R. said (p. 554):

> That obliges me to say something as to the principle upon which damages are assessed in these cases. There is no doubt about it now. It has been laid down by several judges, and particularly by Cotton L.J. in *Peek v. Derry,* 37 Ch. D. 541; but the common sense and principle of the thing is this. It is not an action for breach of contract, and, therefore, no damages in respect of prospective gains which the person contracting was entitled by his contract to expect come in, but it is an action of tort—it is an action for a wrong done whereby the plaintiff was tricked out of certain money in his pocket; and therefore, prima facie, the highest limit of his damages is the whole extent of his loss, and that loss is measured by the money which was in his pocket and is now in the pocket of the company. That is the ultimate, final, highest standard of his loss. But, in so far as he has got an equivalent for that money, that loss is diminished; and I think, in assessing the damages, prima facie the assets as represented are taken to be an equivalent and no more for the money which was paid.

Cozens-Hardy L.J., said at p. 559:

> As a rule of convenience, and indeed almost of necessity, the property which would have been acquired by the company, if all the statements in the prospectus had been correct, must prima facie be taken to be worth the precise sum paid for the property, neither more nor less. This is the prima facie presumption, and it is sufficient for the decision of the present case, for no evidence has been adduced by the defendant to rebut the presumption.

That statement has been accepted in the Court of Appeal of Manitoba in *Steele v. Pritchard*[3], and *Rosen v. Lindsay*[4], where, at p. 117, Phippen J.A. said:

> The law on this point appears to be clearly laid down by the Court of Appeal in England in *McConnell v. Wright,* [1903] 1 Ch. 554. It is probably most tersely stated by Cozens-Hardy L.J., at p. 559, (and the above quotation is repeated).

[1] [1922] 2 W.W.R. 212.
[2] [1903] 1 Ch. D. 546.
[3] (1907), 7 W.L.R. 108.
[4] (1907), 7 W.L.R. 115.

In *London County Freehold & Leasehold Properties, Ltd. v. Berkeley Property and Investment Co., Ltd.*[1], Slesser L.J., said at p. 1047:

> The damage will be the difference between £611,000 paid for the property and the amount which the plaintiffs would have paid had they known the actual circumstances as to these eleven flats.

In my view, therefore, the evidence adduced by the plaintiffs plus the presumption authorized by the authorities which I have cited would have justified the learned trial judge in fixing the damages at $2,500, as he did, unless evidence adduced on behalf of the defendants had rebutted the said presumption. The only evidence adduced on behalf of the defendants was the following:

Firstly, in examination in chief of the defendant Exner:

> Q. Now, the selling price of 1306 Horace Street was $17,700.00. Can you give us your opinion of the value of 1306 Horace?
>
> A. My opinion as to the value of 1306, was that your question?
>
> Q. Yes.
>
> A. It was in line with other three bedroom homes in Rosemont district, as far as selling price, without suites, as just a straight three bedroom bungalow.
>
> Q. Is 1306 Horace Street a three bedroom bungalow?
>
> A. Yes.

and the said counsel requesting and obtaining the recalling of the defendant Exner, asked him for an explanation of his answers upon examination for discovery to questions 83 to 85, quoted aforesaid. In reference thereto, the learned trial judge said:

> Exner was asked in his examination for discovery (83 to 85) if there would be a substantial difference in value between that house (i.e. the one sold to the plaintiffs) with a properly rentable suite and one in which the suite could not in law be occupied. He agreed there would be a difference in value and he estimated the difference at $2,500.00. Schaaf in his examination agreed with Exner. The defendants tried to modify these answers at trial but, in my opinion, without success.

Counsel for the respondents argued that the learned trial judge, in the last sentence just quoted, was referring only to the attempt by counsel for the defence to obtain from the defendant Exner an explanation of his answers to questions 83 to 85 on the examination for discovery. I am of opinion that the learned trial judge's remarks should not be so

[1] [1936] 2 All E.R. 1039.

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limited but that rather he expressed therein his view as to all of the evidence in reference to damages given by the defendant Exner and which I have quoted above, whether it be on his examination in chief or when recalled, and that in the result the learned trial judge found that the defendants had not rebutted the presumption arising from the proof that the plaintiffs had purchased these premises for $17,700 and that, therefore, *prima facie,* the premises, if they had possessed the accommodation represented to the plaintiffs, would have had a value of $17,700.

I am further of the view that upon the evidence, the learned trial judge was justified in coming to the conclusion that the presumption had not been rebutted. It must be remembered that he had found as a fact that the defendants Schaaf and Exner had "perpetrated a fraud on the plaintiffs Hepting by concealing the fact that no permit to build the suite existed" and it would be strange if they sold to the plaintiffs the premises at the price of a house without a rentable suite when they were so anxious to represent the house as one which possessed such a rentable suite. It is true that the defendant Anthony Schaaf had accepted the premises at a valuation of $20,000 very shortly before but in that transaction he was merely taking the premises in trade and in part payment for a hotel building which he was anxious to sell. Evidence of William Johner who acted upon the purchase by the defendant Anthony Schaaf on the premises at 1306 Horace Street, Regina, and who agreed with counsel for the defence in cross-examination:

> Q. Is it fair to say that Mr. Schaaf was selling the hotel rather than buying the house? The principal deal was the sale of the hotel?
> A. Oh, I would say it was.

And the defendant Anthony Schaaf in order to put through the sale of the hotel very quickly waived a term of his offer which required proof that the suite in the basement at 1306 Horace Street was properly rentable. The answer given by the defendant Exner was itself rather equivocal:

> It was in line with other three bedroom homes in Rosemont district as far as selling price without suites, as just a straight three bedroom bungalow.

Q. Is 1306 Horace Street a three bedroom bungalow?

A. Yes.

This might well have meant that the third bedroom in 1306 Horace Street was this basement bedroom which, under the by-laws, could not legally be used as a bedroom. I have read the evidence throughout and have found no positive statement that there were in 1306 Horace Street three bedrooms above the ground level. The learned trial judge listened to the evidence in court, observed the witnesses and assessed the probative value of their evidence. In my view, there was sound basis for his conclusion that the defendants had not succeeded in rebutting the presumption arising from the sale of the house for $17,700. When that presumption is not rebutted then the plaintiffs are justified in depending upon the admissions made by the defendant Exner in his examination for discovery, *i.e.*, that the value of the house with a rentable suite therein, presumed to be $17,700 because of its purchase at that amount, would be reduced by $2,500 if it did not contain such a rentable basement suite.

I am, therefore, of the opinion that the appeal should be allowed with costs, the judgment of the learned trial judge restored; the plaintiffs are entitled to the costs of the appeal to the Court of Appeal of Saskatchewan.

Appeal allowed with costs.

Solicitors for the plaintiffs, appellants: Gerrand & Gerrand, Regina.

Solicitors for the defendants, respondents: Pedersen, Norman, McLeod & Pearce, Regina.