Manitoba Trial

10 W.L.R. 89

Whitla v. Toye

Macdonald, J.

Judgment: February 12, 1909

Counsel: *A. Haggart*, K.C., and *H. Phillipps*, for plaintiff.
C.P. Fullerton and *J.P. Foley*, for defendant.

***Macdonald, J.*:**

1 The plaintiff entered into an agreement with the defendant for the purchase of 275 acres of fruit land near Slocan city, in British Columbia, and this agreement he now seeks to rescind and to recover the moneys paid by him under it, alleging fraud and misrepresentation on the part of the defendant, entitling him (plaintiff) to relief.

2 The negotiations leading up to the executed agreement were carried on between the parties personally and without witnesses, and there are unfortunately many contradictions, some of them presenting an appearance of a deliberate perversion of the truth.

3 The defendant on several occasions transacted business with the plaintiff in the latter's capacity of a solicitor, and in this way the plaintiff became aware of the defendant's interests in fruit lands in British Columbia, and suggested that he had some money coming in that he would like to invest in some good fruit lands in that province, with the object of turning over at a profit. The defendant then introduced and recommended the land in question in this action. Differences arise as to what was said at that interview. The plaintiff says that the defendant stated that he had an option to purchase this land, and that the time for exercising it would shortly lapse, and suggested that, as he himself was short of money, the plaintiff take the option off his hands, or, if the plaintiff would take a two-thirds interest, he would take one-third. After the defendant describing and recommending the property, the plaintiff finally was induced to take over the whole property, and at the time paid the defendant $200, which he states was required to be remitted to the owners in British Columbia for the purpose of extending and keeping the option in force. The defendant denies that he was disposing of an option, but says rather that he was making a sale to the plaintiff. The evidence satisfies me that the plaintiff's version is the true one, and that the defendant did represent that he had an option and was anxious to dispose of it, and that the $200 paid at the time was so paid by the plaintiff for the purpose, as he was led to believe by the defendant, of preserving the option. The plaintiff, I have no doubt, thought that he was stepping into the place of the defendant and taking the option off his hands, whereas the defendant had no option and was simply speculating on the chance of securing the property and turning it over to the plaintiff, as he did, at a large advance on the price he could buy it at, knowing at the time the price at which it could be bought.

4 The plaintiff asked the defendant the price of the land, meaning the price at which the defendant held the option, and the defendant replied by stating the price to be $35 an acre. The plaintiff thought this figure too high, and it was agreed that the defendant should endeavour to renew the option at $32.50 an acre, and the defendant also undertook to secure a change in the terms that he pretended to have.

5 The defendant claimed to have had the option from his son, a member of the firm of Toye & Co., real estate agent at Nelson, B.C., which firm, it was alleged, had an option from the owners.

6 The defendant says that the price at which his son gave him the option was $30 an acre, and that the son urged him to buy at that figure. In his examination on discovery he says: "I told Mr. Whitla we had an option on some property;" and, in answer to the question, who do you mean by "we?" said: "I mean Toye & Co.; my son was a member of the firm; they were a firm of real estate agents in Nelson, B.C."

7 McQuarrie, one of the members of the firm of Toye & Co., in reference to this option says, in answer to the following questions: —

Q. Who purchased this land from the owners, Pearcy and Jeffs? A. I did.

Q. Did you have an option on it? A. Yes.

Q. Have you got that option? A. No.

Q. Did you buy the land from Pearcy and Jeffs, and then sell it to John Toye? A. I bought it for John Toye at the time on an option, that is the reason I got the option to sell it to him.

Q. Did he ask you to get it? A. Yes.

8 The option, then, was obtained for the defendant, and when he says that the firm of Toye & Co. had an option from the owners, and that he secured it from them through his son, he states what is not true.

9 This is not, however, the only particular in which he shews his disregard of the truth.

10 In his discovery evidence he further says that the price quoted to him before negotiating with the plaintiff was $30 an acre, and in the trial evidence he at first maintained the position that he had no knowledge of any other figure at which he could purchase excepting the $30 per acre; yet in his letter to Taylor & O'Shea of 31st December, being the date upon which he closed with the plaintiff, and which he refused to produce on his examination for discovery, he writes as follows: "I have option, 10 days, date December 29th, on 275 acres near Slocan city, Pearcy's ranch, $17 per acre from Toye & Co., subject to title being O.K. I have sold to Henry Walter Whitla, barrister, of Winnipeg, at $32.50 per acre, 1-3 cash, balance in 1, 2, and 3 years at 7 per cent.," &c. Then he had to admit that he knew on 31st December he could purchase at $17 an acre, and knew it when he got the plaintiff's cheque for $200, and he further admits that he asked Toye & Co. to buy for him at that figure. The glaring inconsistencies and contradictions in his evidence completely shatter any possibility of giving credence to his evidence.

11 I find that he represented to the plaintiff that he had an option to purchase at $35 per acre, and that he was unable to take advantage of that option, and offered the plaintiff the benefit of it; that the plaintiff relied upon and placed confidence in this and other false and fraudulent representations made to him by the defendant, entitling him to the relief he seeks; that the plaintiff relied upon the representations of the defendant as to the character and quality of the property; and that such representations were false to his knowledge. Such representations are fully set forth in the report of the witness McQuarrie, a member of the firm of Toye & Co. and a party to the fraud perpetrated by the defendant. In that report he overreaches the extreme of gross exaggeration by stating that "in regard to irrigation there has been installed a ram which pumps water

automatically with the current of the creek, and there is therefore no expense incurred in the operation of the same," whereas, as a matter of fact, there is no irrigation system on the property — a representation which in itself is sufficient to entitle the plaintiff to relief.

12 The plaintiff is entitled to a rescission of the agreement and to a return of the moneys paid by him under it, together with the moneys expended by him and interest thereon, as claimed, together with costs.