11/24/64 CHIMEKAS AND OTHERS v. MARVIN AND WIFE

131 N.W.2d 297 (1964) | Cited 1 times | Wisconsin Supreme Court | November 24, 1964

Action by plaintiffs G. W. Chimekas and Charles O. Chaloupka and their wives against defendants Walter Marvin and wife to recover damages for alleged fraudulent misrepresentations made by defendants.

A summary of the material allegations of the complaint is as follows: On or about October 25, 1963, plaintiffs Chimekas entered into a contract with defendants to purchase a residence property in the city of Milwaukee for $17,000; as an inducement for the Chimekas entering into the contract the defendants knowingly falsely represented and warranted that the basement was dry and waterproof; in fact it was not dry or waterproof; normal rain or snow causes considerable water to seep into the basement; the basement walls have been damaged to the extent that the building is undesirable and unfit for occupancy; on or about November 20, 1963, the Chimekas paid the full agreed consideration for the property to defendants, and the Chimekas "assigned and transferred all of their rights under said contract" to the Chaloupkas by way of gift; defendants then conveyed the property to the Chaloupkas; by reason of the fraud and breach of warranty plaintiffs have been damaged in the sum of $5,000.

Defendants demurred to the complaint on the grounds: (1) That it failed to state facts sufficient to constitute a cause of action; and (2) there was a defect of parties plaintiff in that the Chaloupkas are not proper parties plaintiff to the action. The trial court filed a memorandum decision in which it was determined: A cause of action for fraud is not assignable; the Chimekas upon transfer of their interests to the Chaloupkas have not shown that they sustained damage; and the Chaloupkas having received their rights by gift have sustained no damages. The Conclusion reached was that the complaint did not state facts sufficient to constitute a cause of action.

Under date of June 4, 1964, an order was entered which sustained the demurrer to the complaint without stating whether it was sustained on both grounds, or only on the ground of failure to state facts sufficient to constitute a cause of action. Plaintiffs have appealed from the order.

CURRIE, C.J. The trial court correctly held that the cause of action attempted to be pleaded in the complaint was one at law for fraud. While the word "warranted" is used in one place and "breach of warranty" in another, the other allegations clearly establish the nature of the action as one in tort for fraud and not in contract for breach of warranty.

While the complaint alleges that plaintiffs Chimekas assigned all their rights under the contract to plaintiffs Chaloupkas, this is not an allegation that the former assigned their tort cause of action for

fraud to the latter. Thus we reach the same Conclusion as did the trial court with respect to the Chaloupkas not becoming assignees of the cause of action for fraud. The trial court, however, based its result upon the untenable reason that this type of tort action is not assignable. The accepted test of assignability of a cause of action is whether it survives the death of a party. P.C. Monday Tea Co. v. Milwaukee County Expressway Comm. (1964), 24 Wis. 2d 107, 111, 128 N.W.2d 631; John v. Farwell Co. v. Wolf (1897), 96 Wis. 10, 17, 70 N.W. 289, 71 N.W. 109; 6 Am. Jur. (2d), Assignments, p. 214, sec. 30. Zartner v. Holzhauer (1931), 204 Wis. 18, 26, 27, 234 N.W. 508, 76 A.L.R. 396, holds that as the result of the 1907 amendment (ch. 353, Laws of 1907) to sec. 331.01, Stats., a cause of action for deceit in inducing a conveyance of real estate survives the defrauded party's death. Such a cause of action, therefore, is assignable.

The fact that plaintiffs Chimekas made a gift of their rights under the contract does not affect the issue of whether they sustained any damages because of defendants' alleged false representations. A defrauded vendee's measure of damages is the difference between the value of the property as represented and its actual value as purchased. Anderson v. Tri-State Home Improvement Co. (1955), 268 Wis. 455, 464, 67 N.W.2d 853, 68 N.W.2d 705; Kimball v. Antigo Bldg. Supply Co. (1952), 261 Wis. 619, 621, 53 N.W.2d 701. Thus the complaint states facts sufficient to constitute a cause of action in favor of plaintiffs Chimekas.

Defendants cannot raise by demurrer the issue whether plaintiffs Chaloupkas are real parties in interest of the cause of action alleged in the complaint. When there is an excess of parties plaintiff, a motion to strike, and not a demurrer, is the proper procedure with which to challenge the complaint of a party plaintiff who has no interest in the subject matter alleged therein. Marshfield Clinic v. Doege (1955), 269 Wis. 519, 522, 69 N.W.2d 558; State ex rel. Kratche v. Civil Court (1923), 179 Wis. 270, 272, 191 N.W. 507. See also 2 Callaghan's Wisconsin Pleading and Practice (3d ed.), p. 132, sec. 13.43, and Angers v. Sabatinelli (1940), 235 Wis. 422, 431, 432, 293 N.W. 173.

By the Court. -- Order reversed, and cause remanded with directions to overrule the demurrer.