Pumphrey v. Quillen

135 N.E.2d 328 (1956) | Cited 10 times | Ohio Supreme Court | June 13, 1956

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WEYGANDT, C. J.

The nub of this controversy is the nature of the structure of the house involved in the transaction.

This is described as follows in one paragraph of the plaintiffs' petition:

"Wooden forms had been constructed with an opening about one foot in width and through such opening earth and clay had been poured into said forms and as a binding agent straw had been mixed therewith and after said material had been tamped the forms were removed and in outer coating, first of some tarlike preparation on the outside of the walls, and plaster on the inside, served to completely conceal the fact that said walls were constructed of earth, clay and straw as aforesaid; and that thereafter and before the events herein complained of, a thin veneer of Perma-Stone had been placed along the outside of the walls; and that all of said facts concerning-said building and the composition of said walls were well known to each of the defendants at all of the times herein complained of."

The plaintiffs allege further that they entered into the purchase contract relying on the misrepresentations which were made for the purpose of inducing them to believe the house was of tile construction.

The Court of Appeals found no evidence of conspiracy among the various defendants, and no evidence warranting a judgment against the two owners.

But as to the defendant selling broker. Taylor, that court held that the record does disclose evidence of fraud and deceit on his part. Said the court:

"While the law in this state, governing actions in deceit, is by no means clearly settled, yet, there may be found, in the Supreme Coat decisions, a tendency to treat the necessary element of intent, or, in other language, scienter, as an intent to deceive, to mislead, to convey a false impression. Obviously, this must be a matter of belief or Of absence of belief that the representation is true. The state of the speaker's mind must bsinquired into in determining whether an action of deceit can be maintained. The required intent is indeed present in cases where the speaker believed his statement to be false, as also in cases where the representation is made without any belief whatsoever of its truth or falsity.

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"Most courts in this country have gone further and held that, where representations are made by a person who is conscious that he has no sufficient basis of information to justify them, he may be culpably liable in an action in deceit. When one asserts a fact as of his own knowledge, or so positively as to imply that he has knowledge, when he knows that he has not sufficient information to justify it, he may be found to have the intent to receive."

It is hoped that the following citation of authority will have the effect of settling the law of this state by the approval of the view expressed by the Court of Appeals.

Eighty years ago in the fourth paragraph of the syllabus in the case of Parmlee, Admr. v. Adolph, 28 Ohio St., 10, this court held:

"4. To constitute representations fraudulent so as to be a ground for the rescission of a contract, they must be both false and fraudulent. If they are made with an honest belief, at the time, of their truth, they are not fraudulent; but if made recklessly, and without any knowledge or information on the subject calculated to induce such belief, and they are untrue, then they are fraudulent."

And in the opinion in that case, on page 21, Ashburn, J., made the following comment:

"Where a party, from the nature of the transaction and his relation to the parties and the facts are such that he is charge-able with a knowledge of the truth of the representations he makes, if they are false, he can not escape liability by saying he believed them to be true. It was his duty to know whether they were true, and his belief will not excuse him from liability to the person injured thereby, unless the facts will reasonably justify a prudent man in such belief."

Two years later in the second paragraph of the syllabus in the case of Aetna Insurance Co. v. Reed, 33 Ohio St., 283, this court held:

"2. An action will lie for a false representation of a material fact, whether the party making it knew it to be false or not, if he had no reason to believe it to be true, when made, and it was done with the intention of inducing the person to whom made to act upon it, and the latter does so, sustaining a damage in consequence.

And in the opinion in that case, on page 294, Ashburn, J., supplemented his earlier statement as follows:

"'If the party made the representation riot knowing whether it was true or false, he can not.be considered as innocent; since a positive assertion of a fact is, by plain implication, an assertion of knowledge concerning the fact. Hence, if a party have no knowledge, he has asserted for true what he knew to be false.' Bigelow on Fraud, 61 * * *"

In the subsequent case of Mulvey v. King, 39 Ohio St., 491, the pronouncement in the Reed case, supra, was approved.

In the first paragraph of the syllabus in the later case of Gleason v. Bell, 91 Ohio St., 268, 110 N.E., 513, this court held:

"1. Where a purchaser was induced to buy and pay for a city residence, by false representations made to him by the vendor as positive statements of fact clearly impling knowledge of the owner of the truth of the facts stated, and made under such circumstances that the vendor should have known of the falsity of the representations, and they were of such a nature as to affect the character, utility and value of said property, and the purchaser had a right to and did rely thereon, and suffered damage by reason thereof, he may recover. In such a case an averment that the vendor knew the representations to be false and made them with intent to deceive is not essential."

And in the opinion in that case, on page 275, Matthias, J., observed:

"Under the circumstances detailed in this petition it is not incumbent upon the plaintiff to aver and prove that the defendant knew the representations were false and made them with intent to deceive. The facts set up in this petition show that the party making the representations should have known whether they were true or false, and further show that they were made not as an expression of opinion but as positive statements of fact, with the intention that they should operate as an inducement to the sale of said premises. The recital of the transaction in the petition sufficiently shows that the representations were so made as to imply that the maker knew them to be true and intended that his statements should be so understood, believed and relied upon and operate as an inducement to the purchase of the premises.

"'A positive statement implies knowledge, and if the party who makes it has no knowledge on the subject, he has told scienter what is untrue; he has affirmed his knowledge.' 1 Bigelow on Fraud, 513.

In the more recent case of Drew v. Christopher Construction Co., Inc., 140 Ohio St., 1, 41 N.E. (2d), 1018, the pronouncement in the Gleason case, supra, was approved and followed.

The foregoing expressions are consistent with the following summary in 37 Corpus Juris Secundum, 255, Section 20.

While it has been broadly stated that to recover for fraudulent representations it must appear that the defendant knew of their falsity, such knowledge is generally held unnecessary."

And in 23 American Jurisprudence, 921, Section 128, the rule is summarized as follows:

If one asserts that a thing is true within his personal knowledge, or makes a statement as of his own

knowledge, or makes such an absolute, unqualified, and positive statement as implies knowledge on his part, when in fact he has no knowledge as to whether his assertion is true or false and his statement proves to be false, he is as culpable if he had wilfully asserted that to be true which he absolutely knew to be false and is equally guilty of fraud."

In 19 Ohio Jurisprudence, 377, Section 75, the rule is stated:

"If a person makes a representation not knowing whether it is true or false, he cannot be considered as innocent, since a positive assertion of a fact is, by plain implication, an assertion of knowledge concerning the fact."

In the instant case the record discloses the following cogent evidence offered by one of the plaintiffs, Mr. Pumphrey:

"Q. Now, what did Mr. Taylor say at that time in answer to your question as to how the house was constructed? A. Hstold me it was the constructed with Perma-Stone on the outside of it.

"Q. What did you say to Mr. Taylor at that time? A. Well, I asked him if the house was really constructed the way he told me it had been, and he said, 'yes,' it was.

"Q. Now, you said that you later went upstairs and you asked him again about the construction of the house, is that right? A. That's right.

"Q. What did you ask him on this second occasion? A. I asked Mr. Taylor if he was sure that it was constructed of tile.

"Q. What was his exact answer at that time? A. And he told me it was.

"Q. And you are certain that there were two specific instances where he represented that the walls were tile on that first visit there, one in the basement and one up on the second floor? A. Yes."

And Mrs. Pumphrey corroborated this as follows:

"Q. Were, you in the basement, and did you hear any conversation between Mr. Taylor and Mr. Pumphrey on that date? A. I did, sir.

"Q. Will you relate the conversation that you heard? A. My husband asked him the construction of the walls of the house, and he said they were constructed of tile.

"The Court. He said what?

"A. They were constructed of tile, the walls of the house were constructed of tile."

Hence, this court finds itself in agreement with the conclusion of the Court of Appeals that "the evidence is sufficient for the submission to a jury of the question of fraudulent misrepresentation amounting to deceit on the part of Taylor." This court affirms the judgment of the Court of Appeals remanding the cause to the Court of Common Pleas for a retrial against the defendant selling broker, Taylor.

Judgment affirmed.

MATTHIAS, HART, ZIMMERMAN, STEWART and BELL, JJ., concur.

TAFT, J., dissenting.In my opinion, this decision and especially paragraph one of the syllabus represents a radical departure from previous pronouncements of this court with respect to the necessity of scienter in an action for deceit.

As appears from plaintiffs' petition, the alleged representation of defendant Taylor relied upon by plaintiffs was "that the outside walls of said house were of tile construction." That they were not of such construction appears from the allegations of the petition as to the manner of their construction which allegations are quoted in the majority opinion.

As indicated by the syllabus in the instant case, defendant Taylor did not know that his representation as to "the construction" was use. On the evidence in the record, reasonable minds could reach no other conclusion.

This house had been built by a ma named Rogers in 1939. In 1946, it was purchased by a man named Mack who thought its walls were constructed of tile and who did not learn of its peculiar type of construction until he had lived in it for several months and then not from any examination or discovery but only by being informed by neighbors who had seen it built. In 1950, Mack applied Perma-Stone to the exterior walls below the roof line. In 1952, the Quillens, who are co-defendants with Taylor, acquired the house from Mack, who did not tell them about its peculiar type of construction. The Quillens, as well as the real estate man who represented Mack in selling the house to them and who was a builder, believed that the house was of masonry construction. The Quillens listed the house for sale with a real estate man named Force who is also a co-defendant. Defendant Taylor learned of the availability of the Quillen property through the Akron Real Estate Board multiple listing arrangement. Defendant Taylor obtained permission from Force to show the property to the plaintiffs. An appraiser examined the property for his bank and reported it as a masonry building; and a loan in a substantial amount was granted to plaintiffs on the basis of that appraisal. There is no evidence that anyone, who had any contact with the house after Mack had disposed of it, either as an owner, a real estate salesman, an appraiser or in any other capacity, even suspected the true nature of its construction until February 1953 when plaintiffs removed the wall

boards in the attic and drilled one-inch holes through the exterior walls. This was after plaintiffs had lived in the house for over six months. Even plaintiffs' building expert admitted on cross-examination that, if he had examined the property before those wall boards had been pulled down, he would have assumed the building to be of masonry construction.

The "rule" quoted in the majority opinion from American Jurisprudence is by its words to apply only "when in fact he [the maker of a false statement] has no knowledge as to whether his assertion is true or false," a situation wholly different from that in the instant case where defendant Taylor believed as everyone else did that this building was of masonry construction.

Paragraph one of the syllabus in the instant case represents a statement of the minority rule. See 23 American Jurisprudence, 927, Section 132. In 23 American Jurisprudence, 910, Section 122, it is said:

"The rule is well settled * * * in a majority of American jurisdictions and in the English courts, that in a law action of deceit in tort scienter must be established. Scienter, a term usually employed in legal issues involving fraud, means knowledge on the part of a person making representations, at the time when they are made, that they are false."

Ohio has always followed the majority rule. See 19 Ohio Jurisprudence, 368, Section 67.

For example, in Taylor v. Leith, 26 Ohio St., 428, the syllabus reads in part:

"3. The defendant requested the court to instruct the jury, 'that to constitute fraud there must have been bad faith on the part of defendant; that is, the representations by the defendant must have been not only false, but known by the defendant to be false, or such as he had no good reason to believe to be true.'

"This instruction the court refused to give as asked, but gave it with the following addition: 'or did not know to be true' -Held, that the instruction as given was calculated to mislead the jury by giving them to understand that representationswhich were untrue in fact would give a cause of action, although they may have been founded in mere mistake.

"4. If the representations on which the action is founded were, when made, believed to be true, and the facts of the case were such as to justify the belief, there would be no fraud and there could be no recovery.

As recently as last July, it was said in the opinion by Bell, J., in Greenwalt v. Goodyear Tire & Rubber Co., 164 Ohio St., 1, 6, 59, 128 N.E. (2d), 116:

"To maintain an action for damages for deceit certain elements must be present. There must be (1) an actual or implied false representation or concealment (2) of a material fact (3) with knowledge of its

falsity (4) made with the intent to mislead another into relying upon it and (5) followed by actual reliance thereon by such other person having the right to so rely (6) with injury resulting to such person because of such reliance." (Emphasis added.)

Also, in paragraph one of the syllabus of Drew v. Christopher Construction Co., Inc., 146 Ohio St., 1, 41 N.E. (2d), 1018, which purports to approve and follow Gleason v. Bell, 91 Ohio St. 268, 110 N.E., 513, it is stated that "a purchaser * * * may maintain an action to recover the damages sustained as a result" of "false representations of a vendor" where such representations were when made "known by the vendor to be untrue."

Paragraph one of the syllabus in the Gleason case states that "an averment that the vendor knew the representations to be false * * * is not essential" but limits that statement to a situation "where * * * false representations * * * by the vendor" were "made under such circumstances that the vendor should have known of the falsity of the representations." There is no such limitation stated in paragraph one of the syllabus in the instant case, probably because the evidence in the instant case could not support a reasonable inference that defendant Taylor should have known that the house in the instant case was not of masonry construction.

As to the other cases cited in the majority opinion, their ussis a good example of how, to use the words of Professor Bohlen in discussing this problem (42 Harvard Law Review, 733), "difficulties and anomalies are created by thinking in terms of names rather than realities." Those other cited cases dealt with problems as to what must be shown to support actions for equitable relief on account of false representations,-not actions at law for deceit. Thus, Parmlee, Admr. v. Adolph, 28 Ohio St., 10, involved an action to rescind a contract, and Aetna Insurance Co. v. Reed, 33 Ohio St., 283, dealt with rescission of a release. (Parenthetically, it should be noted that the Reed case is the only authority cited in the text to support the statement quoted in the majority opinion from Ohio Jurisprudence; and a reading of paragraph two of the syllabus of that case raises substantial doubt as to whether it does support the broad statement in the quoted portion of that text.) The reason why they are not particularly helpful in determining whether scienter is an essential element of a cause of action at law for deceit based upon false representations is well stated in the opinion in Mulvey v. King, 39 Ohio St., 491, 494, as follows:

"It may be considered as well settled in this state, by the cases above cited, that an action for damages caused by misrepresentation cannot ordinarily be maintained, without proof of actual fraud, or such gross negligence as amounts to fraud. When, however, a person claims the benefit of a contract into which he has induced another to enter by means of misrepresentations, how ever honestly made, the same principles cannot be applied. It is then only necessary to prove that the representation was material and substantial, affecting the identity, value air character of the subject matter of the contract, that it was false, that the other party had a right to rely upon it, and that he was induced by it to make the contract, in order to entitle him to relief either by rescission of the contract or by recoupment in a suit brought to enforce it."

To the same effect see 23 American Jurisprudence, 929 et seq., Sections 133, 134. See also Taylor v. Leith, supra (26 Ohio St., 428), 433, 434.

If, in the instant case, plaintiffs had sought to rescind the transaction of sale rind give back title to the purchased property in exchange for what they had paid the Quillens for it, then, as pointed out in the above quotation from the opinion of Mulvey v. King, they might be entitled to such relief against the Quillens even though the Quillens did not know about the alleged untrue representation by Taylor. If it was only because of that representation that the Quillens received the substantial price paid them by plaintiffs for this property, equity might well prevent such enrichment of them at plaintiffs' expense by decreeing rescission of the transaction of sale. But cf. Traverse v. Long, ante, 249.

Also, if this were an action merely to recover back * * * the price paid for this house from the Quillens to whom it was paid, perhaps the same reasons which justify having no requirement of proof of scienter in rescission actions (i. e., prevention of unjust enrichment) might support such relief at law against the Quillens. See 23 American Jurisprudence, 932, Section 134. However, defendant Taylor never received any such purchase price from plaintiffs. He only received as his commission one-half of the five per cent real estate commission paid. In the absence of proof of scienter, it is difficult to justify any relief against him by way of recovery from him of more than he received out of the transaction. Bohlen, Misrepresentation as Deceit, Negligence, or Warranty, 42 Harvard Law Review, 733, 746.

In the instant case, the majority opinion apparently recognizes tho following anomalous situation as being reasonable and in accordance with the law of this state:

Q owns a house having no value. He employs T to sell it for him. T represents to P that the house is of masonry construction. If it were, it would be worth $8,000. In reliance on that representation, P pays Q $8,000 for the house and Q pays T a commission of $200. Thus Q gets $7,800 for nothing. Under the decision of this court, Q is allowed to keep the $7,800 and P gets his $8,000 back from T who had received only $200 out of the transaction and did not know that his representation was not true.