No. 14798 - ✱

# Supreme Court of Illinois

EAMES
~~Hoyt~~ et al

vs.

Morgan et al
(Opinion by Breese)

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Delivered the opinion of the Court.

Mr. Justice Bradley This is an action on the case for deceit on the part of plaintiffs in error, in selling a lot of land in Chicago, for a quantity of wood; they falsely representing the lot to be clear of incumbrance. A bond was executed by Eames, for the conveyance of the property, clear of incumbrance on the delivery of the wood of the kind and quality and at the place therein specified, Eames to obtain possession of the lot until the wood should be delivered.

There are four Counts in the declaration, all alleging in substance, that the defendants in error were induced, by the fraudulent acts and declarations of the plaintiffs in error, to sell and deliver to them, one thousand cords of wood, and to receive therefor, a lot of ground with the appurtenances in the city of Chicago which one of the plaintiffs in error, Eames, was to convey to them, on the delivery of the wood — that plaintiffs in error, falsely represented that they had good title, that the lot was clear of incumbrance, and that they could convey when the wood was delivered. The general issue was pleaded, a trial had, and a verdict and judgment rendered for the defendants in error for two thousand four hundred and eighty four dollars and costs. Whereupon the plaintiffs in error have brought here, by writ of error, and have assigned as error the following:

1. That the declaration is insufficient if there is any in the Cause upon which to render any profunt. 2 The Court refused a continuance of the Cause on the 13th. May 1861. 3. The Court refused the motion for the plaintiffs to specify the amendments in the declaration. 4. The Court tried the Cause without the issue being made up the defendant Evans objecting. 5. The Court refused the motion for a new trial on the part of each of the plaintiffs in error. 6 The Court erred in the various and various rulings made on the trial of the Cause to which the defendants at the time excepted. 7 The instructions for the plaintiffs were severally erroneous, & the instructions asked by the defendant and refused by the Court should have been given.

As to the first error assigned, we are of opinion that the declaration is ~~altogether~~ good in form and substance. The action was case for fraud and deceit, and not upon the contract to convey the lot of land. The averments in the declaration are, in the first Count, after setting out the bond for the deed, that after the execution of the bond and condition the said plaintiffs under and by virtue and in performance of said Contract delivered to the said Evans a large quantity of wood to wit one thousand Cords of wood of great value to, and the plaintiffs aver that they have never received any payment or consideration

whatever for said wood, and also, that the Defendant to the plaintiffs, for delivering the said Wood, and the obtaining a good and sufficient title, per fine ance, of the real estate above described, according to the provision of said bond and condition; and also that the defendants falsely, fraudulently and knowingly, and for the purpose of deceiving the said plaintiffs, and before the consummation and delivery of the said Wood, represented to the said plaintiffs that the said Defendants had a good and valid title to the said real estate, when in truth and in fact, the said Evans and Fordham, at the time they made such representation, had conveyed the same in fee, by deed, on the 16th of June 1857, to one Jeremy Otis as trustee, in trust for the payment of eleven hundred dollars in four months from the date thereof; and further, that the said lots were sold on the twenty day of April 1858, in default of the payment of said eleven hundred dollars, by virtue of a power of sale in said trust deed in default of payment of the said sum of money; and the plaintiffs further aver that on inquiry being made by the said plaintiffs, during the negotiation, in reference to said contract as to the title to the said lots, the said defendants proposed to furnish an abstract of the

title thereof, and thereupon did, on the day of the date of said bond or during the negotiation pending the execution of said bond, procure an abstract which extended down to the thirteenth day of June 1857, three days anterior to the conveyance aforesaid to James Ellis, pretending fraudulently, and for the purpose of deceiving the plaintiffs in the premises, that no sale or transfer of the lot had taken place since that time, and the plaintiffs aver that although they have demanded a deed from said Evans of the lot in accordance with the said agreement the said Evans has refused to execute such deed, and is, and always has since the execution of said bond, been utterly unable in law and in fact to make a good title to the said lot clear of all incumbrance. And that they, said plaintiffs by means of such false and fraudulent representations and pretences and confiding in the same were induced to and did deliver the said bond to the said Evans. The other County do not differ materially from this, and we are at a loss to perceive what element is wanting to make it a good declaration in an action on the case for a deceit.

The rule is well established, that a false affirmation made by a defendant with intent

to defraud the plaintiff, whereby the plaintiff receives damage, is the ground of an action upon the case in the nature of deceit. Pasley et al. v. Freeman 3 Term Rep. 51. And this when the defendant may not be benefitted by the deceit, or that he should collude with the person who is benefitted. Ibid. Weatherford vs. Fisherback 3 Scam. 170. With How much greater force should this principle apply when the defendant is benefitted by the deceit? The proofs sustain all the material allegations of the declaration, and show a case of the most deliberate and premeditated fraud going to the extent of preparing an abstract of title showing the title to be in Eames three days before the consummation of the bargain. This shows deliberation and continuance, and on the presumption, that the defendants in error, were dealing with an honest man, a resort to the records would not, by an ordinarily cautious man, be deemed necessary. It was a deliberate, well concerted plan to get the wood for a lot incumbered to near its full value, under protestations and professions at the time, that it was free of incumbrance.

As to the second error assigning a continuance on the 13th of May 1861 by reason of the amendments to the declaration, it is sufficient to say, the plaintiffs in error fail to show what those amendments

was, and wherein they were material. Big only those material amendments are made, changing in some degree the character of the claim ~~or character to subject the defendants to~~, that a continuance is allowed. Hawks & Lands 3 Gilm. 227. Ill. Mains & Fire Ins. Co. vs Marseilles Manu. Co. 1 Gilm. 236 Comstock vs. Hadsell 1 Scam. 525

As to the third point, the Circuit Court should have required the plaintiff to specify the amendments he had made to the declaration, or being called on for that purpose by the defendant in a regular manner, as he was to called on in this case. This was an error, but not of a character sufficient to reverse the judgment, the record showing a full and fair trial on the merits.

Upon the fourth error assigned, the cause was not tried without the issue being made up. The plea of not guilty, the only plea to the action, was filed, and it was not necessary to file it again. Nor it stood for the defendant's benefit, under which he could give every admissible matter of defence, and which the record shows he did do. The rule is, a defendant should answer an amended declaration anew, unless he has a plea or file which covers such amendment. Any declaration in the

form of action used. McAllister v Ball 28 Me. 210.

As to the fifth and sixth errors assigned, we see no reason for granting a new trial, nor any exceptionable rulings of the Court in the progress of the cause, save the one we have already noticed.

Now as to the instructions.

Those given for the plaintiffs placed the case on the ground of deceit, the only ground on which it could be placed and there is nothing in any one of them to which exception can be taken.

The instructions given for the defendant were as favorable to him, as the case justified. The jury was told that every false affirmation did not amount to a fraud, and if by an ordinary degree of precaution, the plaintiffs in this case could have ascertained the falsity of the representations complained of, then the plaintiffs were not entitled to a verdict. To entitle them to a verdict it should appear that the representations or means used were of such calculated to deceive a person acting with ordinary prudence, and in determining this question the jury should consider the circumstances under which they were made and whether, under the

circumstances, the representations were such as a person of common prudence would or should have relied upon, or as would be likely to mislead such a person. The jury were further told the plaintiffs were not entitled to recover unless the jury believed from the evidence, that the defendants made the representations alleged in the declaration and that representations were false and were made with an intent to defraud plaintiffs, and that the plaintiffs were induced by such representations to make the contract. The court also instructed the jury for defendants if the plaintiffs shipped wood to defendant Eames, that was more than one third green, or that was not of the kind and quality mentioned in the contract, Eames was not bound to receive it, and if he did not receive such wood, the plaintiffs cannot recover for it.

The following instructions asked by the defendants were refused and exceptions taken

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Fourth.—If the jury believe, from the evidence, that the defendants made the representations alleged in the declaration, yet the plaintiffs are not entitled to recover for the wood delivered under the contract with Eames, if they believe, from the evidence, that plaintiffs did not perform their contract with defendants, by delivering 1,000 cords of wood at the time and of the kinds and quality mentioned in said contract, and if the plaintiffs did not perform the entire contract, they cannot recover, because the defendant Eames was not bound to perform his part of the contract until the
191 plaintiffs had performed on their part according to the terms of their contract.

Sixth.—The court instructs the jury, that upon the pleadings and proofs in this case, the plaintiff is not entitled to recover.

Seventh.—The court instructs the jury, that as a matter of law, the plaintiffs are not entitled to recover in this action against Eames and Fordham for the violation or non-performance of the contract between plaintiff and Eames.

Eighth.—The court instructs the jury, that though they may believe, from the evidence, that the defendants made the false and fraudulent representations alleged in the declaration; yet the plaintiffs are not entitled to recover upon the pleadings in this case.

Ninth.—If the plaintiffs are entitled to recover at all, they can only recover the value of the wood delivered, and such as was of the kind and quality mentioned in the contract after deducting therefrom the freight.

192 Tenth.—The court instructs the jury, that they cannot render a verdict against the defendant Fordham for any default or non-performance on the part of defendant Eames of his contract with the plaintiffs.

Eleventh.—If the jury believe from the evidence that the defendants did make the representations alleged in the declaration, and also that they were false, yet the plaintiffs cannot recover if the jury further believe from the evidence that the defendants did not intend to deceive and defraud the plaintiffs. If, therefore, the defendants at the time they made such representations intended in good faith to remove the incumbrances upon said land by the time they were to convey the same to the plaintiffs, and were prevented from doing so by the non-performance of the contract on the part of the plaintiffs, then the plaintiffs can not recover.

Twelfth.—Every false affirmation does not amount to a fraud. If by an ordinary degree of precaution the plaintiffs in this
193 case could have ascertained the falsity of the representations complained of, then the defendants are not liable, and the searching of the records of the county was an ordinary degree of precaution, which the plaintiffs ought to have taken before concluding to purchase. (Refused as drawn.)

Thirteenth.—If the jury believe, from the evidence, that the plaintiffs did not comply with and keep their written contract, in evidence, with Eames on their part, they are not entitled to any damages as against him under that contract, in any form of action. And in this case, as the plaintiffs must have sustained actual damage, recognized by the law as such, if the plaintiffs have not shown any damage sustained by them other than the failure of Eames to comply with that contract by conveying the land clear of incumbrance, the jury will find for the defendants.

Keeping in view that this action is not brought on the contract or for its violation but for fraud and deceit, the gravamen of the offense of these instructions is obvious. The gravamen of the action here is the deceit practiced by the plaintiff in error and it is wholly immaterial in this view whether the defendants in error purchased thru contract or not.

The instruction marked II and refused, was held entirely proper by the Court for the defendants, and in the charge of the first one given. [illegible]

The jury came to error in refusing these instructions. The merits of the case, on law and fact, were fully before the jury, and by the instructions they understood the proper verdict. [illegible]

The motion to retire, in the proper cases, the exercise to the discretion of the Court to continue the cause on defendants affidavit, of the absence of a witness, is a motion. As the suit is not brought on the contract, and his testimony was not material, consequently, the Court did not err in refusing the continuance. The Court however did continue the cause until the second day of the next term, to enable the parties to prepare for trial, to which the defendant did not object.

The judgment of the Circuit Court must be affirmed.

Judgment affirmed.

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vs
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Opinion by
Meek J.

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