ANNA MAUD CRAMPSEY, PATRICIA ELIZABETH CRAMPSEY McDONNELL, JAMES GERRARD CRAMPSEY and MARY TERESA CRAMPSEY (*Defendants*) ..... APPELLANTS;

1968
*Oct. 9, 10
Dec. 20

AND

FREDERICK DEVENEY (*Plaintiff*) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Agency—Estoppel—Lands transferred to mother and adult children as joint tenants—Property managed exclusively by mother and later listed for sale without children being consulted—Offer to purchase accepted—Failure of children to protest after learning what mother had done—Repairs and improvements by purchaser—Subsequent refusal of children to close when formal tender made—Action for specific performance.*

In 1943, pursuant to the will of the husband of the appellant A, the executor transferred a property, consisting of 14 acres and a house, to A and her three adult children as joint tenants. For the next twenty years A managed the property exclusively and although the children realized that they had some sort of interest in it, they did not interfere with or even question the management thereof by A. In 1960 she listed the property for sale without notifying the children of what she intended to do and only two actually knew of the listing. Early in 1963 she accepted, in the presence of one of her daughters, the plaintiff's offer to purchase. The other two children were subsequently informed of the sale, but there was a failure on the part of all the children to make any protest when they learned what their mother had done. However, on being informed that their signatures were required on the deed, they refused to sign, and later refused to close when formal tender was made on the closing date.

The plaintiff had previously been granted permission by A, again without consulting her children, to enter the property and make repairs on the basis that such permission was not to be construed as possession. The plaintiff carried out the repairs as well as substantial renovations to the house and later he and his family moved in without obtaining permission to do so. A's children having refused to close, the plaintiff commenced an action for specific performance. His action was successful at trial and, on appeal, the decision of the trial judge was upheld by a majority of the Court of Appeal. The plaintiffs then appealed to this Court.

*Held:* The appeal should be allowed.

No agency relationship existed between the mother and her children at the time of sale. She had no express authority to bind the children to the contract; nor was it possible to draw any inference of actual authority.

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

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The children were not estopped by their silence and inaction after they had learned of the contract from denying that their mother had authority to sell their interests in the property. Silence and inactivity in the circumstances of this case were not a representation to a third party that their mother had authority to sell. Nor did the silence of the three children amount to ratification of their mother's act. The mother did not purport to act as agent for the others.

Accordingly, the appeal by the children against the decree of specific performance as to their respective interests in the property succeeded and it was held that specific performance against the mother's interest should not be granted. The plaintiff's alternative claim for damages against the mother for breach of warranty of authority was allowed. A counterclaim for occupation rent for the period during which the property was occupied less an allowance to the plaintiff for the amount expended by him by way of repairs was also allowed.

APPEAL from a judgment of the Court of Appeal for Ontario[1], upholding by a majority, a decision of Parker J. that respondent was entitled to specific performance of an agreement for the purchase and sale of certain lands and premises. Appeal allowed.

*W. J. Smith, Q.C.*, for the defendants, appellants.

*R. N. Starr, Q.C.*, for the plaintiff, respondent.

The judgment of the Court was delivered by

JUDSON J.:—This is an appeal from a judgment of the Court of Appeal of Ontario[1] upholding by a majority, a decision of Parker J. that the respondent was entitled to specific performance of an agreement for the purchase and sale of a property consisting of fourteen acres and a house.

In 1943, pursuant to the will of William James Crampsey, the husband of the appellant Anna Maud, the Capital Trust Corporation, as executor, transferred the property to Anna and her three children, Patricia, Teresa and James (all of whom were then of age) as joint tenants and not tenants in common. Capital Trust had managed the property from 1921, the date of William Crampsey's death, to 1943, the date of the transfer to the four beneficiaries. From 1943 to 1963, the year of the purported sale, Anna managed the property exclusively and received the rents from it, some of which she distributed among the children. They did not

[1] [1967] 1 O.R. 647, 62 D.L.R. (2d) 244.

at any time interfere with or even question her management of the property although they realized that they had some sort of interest in it.

In May 1960, Anna, without consulting any of her children, listed the property for sale with a real estate firm at $4,000 per acre for a term of six months. Patricia and Teresa knew of the listing but James was never aware of it. No one was attracted by the offer. However, in February 1963, Deveney offered to purchase the property for $2,400 per acre. By this time Anna was very eager to sell. She had had trouble with a tenant of the house. She signed an agreement dated February 19, 1963, accepting the offer, which provided for a down payment of $250, $7,800 cash payable on the closing date of August 1, 1963, and the balance secured by mortgage. Teresa was present when her mother signed the agreement. The day after Anna telephoned Patricia and informed her of the sale. James was not informed immediately but he came to know of it some time before the actual closing date, which, after a number of extensions, was finally fixed at November 15, 1963.

In April, at the request of the purchaser's solicitor, the vendor's solicitor sent a draft deed which indicated that all four of the appellants were grantors. The former immediately wrote back asking for proof that the grantors were in fact the widow and all the children of William James Crampsey. In May, Deveney's solicitor asked for permission for his client to enter the property and make repairs on the basis that such permission was not to be construed as possession. Anna, without consulting any of the children, through her solicitor, granted permission on these terms. Deveney carried out the repairs as well as substantial renovations to the house and in September he and his family moved in without obtaining permission to do so. In late October, after numerous extensions of the closing date had been agreed upon, Anna's solicitor asked for an extension so that he might obtain the signatures of the children. This was granted. The children, however, on being informed that their signatures were required, refused to sign, and later refused to close when formal tender was made on the closing date. The respondent commenced an action for specific performance.

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Two questions are raised by this appeal. Was Anna an agent for her children with authority to sell the property on the above-recited terms, and if not, were the children estopped from denying that she had the authority to sell their respective interests in the property? In my view, no agency relationship existed between Anna and her children at the time of the sale. It is true that she had managed the property and collected the rents for many years. She always asserted her right to do this and that she alone had the right to sell and to sign the deed. No one in the family questioned her assertions. The fact that Anna had the property listed for sale in 1960 does not take the matter any further. She had no authority from the children to do so. Indeed, she did not even notify them of what she intended to do and only two actually knew of the listing.

On these facts, which are but a brief summary of the findings of the trial judge and the Court of Appeal, Anna had no express authority to bind the children to this contract of sale. Nor is it possible to draw any inference of actual authority. Indeed, her position was all to the contrary—that she did not need their authorization. None of the children presumed to contradict her.

The majority in the Court of Appeal affirmed the trial judge's order for specific performance against all four joint tenants by applying the doctrine of agency by estoppel. This doctrine is defined in 1 Hals., 3rd ed., pp. 158-9 in the following terms:

> Agency by estoppel arises where one person has so acted as to lead another to believe that he has authorised a third person to act on his behalf, and that other in such belief enters into transactions with the third person within the scope of such ostensible authority. In this case the first-mentioned person is estopped from denying the fact of the third person's agency under the general law of estoppel, and it is immaterial whether the ostensible agent had no authority whatever in fact, or merely acted in excess of his actual authority.

The majority judgment held that the three children negligently or culpably stood by and allowed their mother to contract on the faith of a fact which they could have contradicted. They could not afterwards dispute that fact in an action against them. (*Freeman v. Cooke*[2].)

McGillivray J.A., in his dissent, would have held that the three inactive joint tenants, who believed their mother's

[2] (1848), 2 Exch. 654.

honest but mistaken assertions of her right to sell and who did not know the precise nature of the interest which they had taken in the property under their father's will, were not estopped by their silence and inactivity after they had learned of their mother's acceptance of the offer to purchase.

We have nothing in this case except the following:

(a) The knowledge of the children that the property had been listed for sale in 1960. Whether they knew of the precise terms of that listing does not appear from the evidence.

(b) The knowledge of one daughter, Teresa, that her mother was contemplating a sale early in 1963 and her presence with her mother in the real estate agent's office when the mother signed her acceptance of the offer.

(c) The failure on the part of all the children to make any protest when they learned what their mother had done.

When Deveney made his offer, all that he knew was that a certain person had listed for sale a 14-acre property at a price of $4,000 per acre. He knew nothing of three other persons who were interested in the property and whom he seeks to bind by his contract. They made no representations to him. I agree with McGillivray J.A. that their silence and inaction after all three had learned of the contract cannot be built up into a representation by them to the purchaser that their mother had authority to sell their interests in the property. Silence and inactivity in the circumstances of this case are not a representation to a third party that their mother had authority to sell.

It was also argued that the silence of the three children amounted to ratification of their mother's act. Only the trial judge made a finding of ratification. I agree with the Court of Appeal that ratification cannot be found on the facts of this case. The silence and inactivity are not evidence of approval and adoption of the contract but rather of disquiet disapproval and ignorance of rights and, in the case of one of them, lack of knowledge that a contract had been made. It is unnecessary to discuss *Keighley, Maxsted & Co. v. Durant*[3], although the case is directly

[3] [1901] A.C. 240.

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in point. The mother did not purport to act as agent for the others. She was acting for herself and asserting that she had that right.

The appeal by the children against the decree of specific performance as to their respective interests in the property succeeds. I agree with McGillivray J.A. that specific performance against Anna's interest should not be granted and I can add nothing to what was said by him on this point. There remains the question of whether Deveney's alternative claim for damages against Anna for breach of warranty of authority should succeed.

The draft deed was drawn by the vendor's solicitor to show all four joint tenants as grantors. This was sent on April 8, 1963. The purchaser's solicitor, on April 9, sent in his requisitions, one of which was a requirement of proof that the grantors were the widow and all the children of William James Crampsey, deceased. At this time the purchaser's solicitor knew that his client had signed a contract with only one of four joint tenants.

In spite of this, on May 8, 1963, the purchaser's solicitor wrote to say that his client wanted to repair the house on the property before closing and he sought permission to do this subject to the condition that it was not to be construed as taking possession. Permission was given on these terms. This was a very hazardous thing to do with knowledge of the state of the title, although the solicitor may have been lulled into a feeling of security by the delivery of a draft deed showing all the joint tenants as grantors. In spite of the possible difficulties, Deveney made the repairs and more, in the form of substantial additions and renovations. He moved his family in in September without any further authorization and he was still in possession at the date of the trial. The defendants did not know that he was in possession until November 1, 1963.

The vendor's solicitor had not found out that Anna was not the sole owner until October 29, 1963, the eve of the date of closing as extended. The explanation is that the title had been searched and the draft deed drawn by a law clerk. The date of closing was then extended to November 15, 1963, but on November 7, 1963, he was compelled to inform the purchaser's solicitor that three of the joint owners refused to sign.

Deveney understood throughout that Anna was the sole owner of the property. His solicitor had not informed him of the draft deed showing all four joint tenants as grantors. Even in October, when he wanted to make some change in the contract to provide for a payment of less cash, he negotiated directly with Anna.

On the question of damages, again I agree with McGillivray J.A. This is not a case of failure to convey through defective title. One joint tenant was purporting to contract to sell the complete interest. This was the cause of the inability to convey. McGillivray J.A. made the following award:

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|---|---|
| (a) Return of deposit | $ 250.00 |
| (b) Loss of bargain | 2,000.00 |
| (c) Repairs and improvements | 12,130.00 |
| | $14,380.00 |

There was a counterclaim in this action for occupation rent at $100 per month for the period during which it was occupied, less a fair allowance to the plaintiff for the amount expended by him by way of repairs and improvements.

I would therefore give judgment in this Court in the terms specified by McGillivray J.A., as follows:

> I would allow the appeal and vary the judgment by striking out the order for specific performance and provide in its stead judgment against Anna Maud Crampsey for $14,450 [this figure should be $14,380] and costs less any sum which this plaintiff recovers for repairs in the counterclaim with a direction that the plaintiff have a lien against the interest of Anna Maud Crampsey for the amount by which this award exceeds that on the counterclaim. The action should be dismissed against her co-defendants without costs.
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> The judgment dismissing the counterclaim will be struck out and judgment entered for the plaintiffs by counterclaim for occupation rent at $100 per month for the period of occupation and for costs of the counterclaim less an allowance to the defendant by counterclaim for the amount expended by him by way of repairs. The plaintiffs by counterclaim are to be allowed their costs.
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> In the event that the parties fail to agree regarding the amounts awarded a reference is directed to the Master.
>
> The defendants other than Anna Maud Crampsey will be allowed costs of the appeal.

In this Court the appellants are entitled to their costs. The costs in the Court of Appeal are dealt with in the reasons of McGillivray J.A., which I propose to adopt. The

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judgment for costs at the trial should be against Anna Maud Crampsey only and the defendants are entitled to their costs on the counterclaim.

*Appeal allowed with costs.*

*Solicitor for the defendants, appellants: W. J. Smith, Toronto.*

*Solicitors for the plaintiff, respondent: Pallett & Pallett, Port Credit.*