1966
*Nov. 21, 22
Dec. 19

LEONARD SLEEN, H. THORNTON R. GREGG and THOMAS JOHN HOPWOOD (*Defendants*) ..... APPELLANTS;

AND

HARRY L. AULD (*Plaintiff*) .....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Promissory note—Note given by way of payment of balance owing for purchase price of shares—Action to recover balance owing on note—Counterclaim for damages for fraudulent misrepresentations—Defendants' failure to establish that they were induced to enter contract to purchase shares by reason of fraudulent misrepresentation by plaintiff.

The respondent brought an action against the appellants for the balance owing on a promissory note dated January 11, 1960. The note was given by way of payment of the balance owing by the appellants to the respondent for the purchase price of all the shares of a restaurant company, which had been owned by the respondent and his wife. The appellants denied liability on the note, and counterclaimed for damages for fraudulent misrepresentations, which they claimed had been made to them by the respondent and had induced them to enter into the contract for the purchase of the shares.

The trial judge dismissed the respondent's claim and awarded to the appellants one half of the damages that they had claimed. On appeal, the respondent's claim on the note was allowed and the majority of the Court directed that the damages claimed by the appellants be referred back for assessment. The appellants appealed and the respondent cross-appealed from the judgment of the Appellate Division.

Held: The appeal should be dismissed and the cross-appeal allowed.

The appellants failed to establish that they were induced to enter the contract to purchase the shares by reason of fraudulent misrepresentation by the respondent. The Court agreed with the reasons of Porter J.A., in his dissenting judgment, for deciding that, accepting the findings of the trial judge as to certain statements made by the respondent to the appellant H, the evidence did not support the conclusion that it was their reliance upon those statements which led the appellants to enter into the contract to purchase the shares.

The following items of evidence were significant in this regard:

1. It was not the respondent who first sought to effect the sale to the appellants. On the contrary, H, on learning that the respondent wished to dispose of the business, made the first approach.
2. A statement by the respondent about not having to put his hand into his pocket was made, according to H, on an occasion when

*PRESENT: Cartwright, Martland, Judson, Ritchie and Hall JJ.

the respondent explained the daily cash register to him. This book clearly disclosed a $4,000 payment made to the company by another company controlled by the respondent in March 1959, which the trial judge said was not discovered by the appellants until 1962.

3. In considering the impact of the respondent's representation that the restaurant was paying its way, it was significant that the agreement precluded the respondent from receiving payments for the shares (other than a $2,000 cash payment plus the value of the liquor on the premises) unless the business was earning a net profit.

4. It was after the appellants had operated the business for seven months at a loss, and after they had received a balance sheet and a statement of liabilities of the company, prepared as of the date of the sale of the shares, that they agreed to execute the promissory note in favour of the respondent.

5. Notwithstanding the lack of success in the operation of the restaurant business, the appellants made payments on the note until December 1960.

6. No suggestion of misrepresentation on the part of the respondent was made until after the respondent had sued on the note in August 1962, more than three years after the agreement was made.

APPEAL and CROSS-APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division, allowing in part an appeal from a judgment of Manning J. dismissing the respondent's action under a promissory note and awarding damages to the appellants under a counterclaim for false misrepresentation in respect of the sale of certain shares. Appeal dismissed and cross-appeal allowed.

William B. Gill, Q.C., for the defendants, appellants.

Reginald J. Gibbs, for the plaintiff, respondent.

The judgment of the Court was delivered by

MARTLAND J.:—This action was brought by the respondent against the appellants for the balance owing on a promissory note dated January 11, 1960, whereby the appellants promised to pay the respondent $10,727.09 with interest at 6 per cent per annum on the unpaid balance, computed from June 1, 1959. The note was payable at the rate of $350 per month from March 15, 1960, until February 15, 1963, when the balance was payable. It contained provision for acceleration of payment in the event of non-payment of any instalment.

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This note was given by way of payment of the balance owing by the appellants to the respondent for the purchase price of all the shares of Safari Restaurants Limited (hereinafter called "the Company"), which had been owned by the respondent and his wife. The Company operated a restaurant in the City of Calgary. The appellants Gregg and Hopwood were members of a Calgary law firm which, prior to and for some time after the sale, acted for the respondent.

The appellants denied liability on the note, and counterclaimed for damages for fraudulent misrepresentations, which they claimed had been made to them by the respondent and had induced them to enter into the contract for the purchase of the shares.

The contract of sale, made on May 26, 1959, provided for the sale by the respondent and his wife to the appellants of their shares in the Company, for the sum of $40,000 plus the value of all stock-in-trade on the restaurant premises, less the amount of all the liabilities of the Company. If such liabilities exceeded $40,000 the excess was to be paid by the vendors of the shares. The agreement provided for the determination of the liabilities by the Company's auditor.

The respondent, and a company which he controlled, Western Store Fixtures Limited, agreed to cancel the Company's indebtedness to each of them. (In fact, at the time of the agreement, the Company was indebted to Western Store Fixtures Limited in the amount of $32,700, but the respondent owed the Company $7,525. By agreement, both of these debts were cancelled.)

The agreement provided for vendors' liens on the shares sold and for payment of the balance due under the agreement if the appellants resold the shares.

The appellants agreed to give a promissory note for the balance payable for the shares, on the terms and conditions in the agreement.

The purchase price was payable, in cash, as to $2,000 and the value of the liquor on the premises at invoice price. The balance was payable, with interest at 6 per cent per annum, in monthly payments of $1,542.98 less the monthly pay-

ments payable by the Company under all its finance contracts, plus one half of the Company's net monthly profits (if any), after deduction therefrom of the said sum of $1,542.98.

The evidence is that the figure of $1,542.98 represented the monthly amount due, at the time of sale, by the Company under its finance contracts. For such time as those payments were required to be paid by the Company, in essence, the vendors were to be paid only out of the Company's net profits (if any).

The Company's auditor prepared a statement of liabilities and a balance sheet, as of May 31, 1959, which were received by the appellants early in January 1960. The former fixed the total of Company liabilities to be deducted from the purchase price of $40,000 at $26,445.81. The latter disclosed an indebtedness of $32,700 of the Company to Western Store Fixtures Limited, and a debt of the respondent to the Company of $7,525. It disclosed assets of $62,964 and liabilities (including capital stock equity of 15,050 shares of no par value at $15,050) of $79,329.41. The difference between these two figures, $16,365.41, was shown on the balance sheet as being:

Balance at debit on September 30, 1958	$ 12,293.94
Add loss per statement	4,071.47
	$ 16,365.41

A footnote to the balance sheet stated:

Note – Item of $7,525.00 due from H. Auld & $32,700.00 due to Western Store Fixtures Ltd. will not apply after May 31, 1959.

In the interval between the date of the sale of the shares, May 31, 1959, and the receipt of the statement of liabilities and balance sheet, in January 1960, there had been no net profits earned from the operation of the restaurant by the appellants.

It was subsequent to the receipt of this material from the Company's auditor that the appellants, on January 11, 1960, signed the promissory note in favour of the respondent on which the latter has sued. The effect of that note was to commit the appellants to make specific monthly payments to the respondent, not tied to the earning of net

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profits by the Company. At the same time, the respondent and his wife signed an agreement to accept the note in full satisfaction of all claims under the agreement, thereby relinquishing any lien on the shares, and freeing the appellants from the obligation to make full payment of the balance owing under the agreement in the event of a resale of the shares.

During the year 1960 payments were made on the note by the appellants, the last being made in December of that year.

In February 1960, the restaurant was leased on a basis whereby the tenant paid as rent 10 per cent of the gross proceeds each month. This lease was terminated in July 1961. Early in 1962 an agreement was made by the appellants to sell the shares to one Haderer for $47,500, with a down payment of $15,000 in the form of restaurant equipment, which was subsequently distrained by Haderer's landlord.

When Haderer was unable to complete the transaction, the shares were returned to the appellants who sold them to one Vogel at a price of $28,000 with a cash payment of some $7,500. No further payments were made and the Company went into liquidation, out of which the appellants recovered $4,000.

In July of 1962 the respondent demanded payment of his note, and the next month commenced action upon it. The appellants, for the first time, by their defence alleged fraudulent misrepresentation by the respondent, and counterclaimed for damages. The allegation was that, prior to the sale of the shares by the respondent and his wife, the respondent had represented that the restaurant was earning sufficient money to pay all current expenses in full, including rent and monthly instalments payable to finance companies.

The learned trial judge found that the respondent had told the appellant Hopwood, who conducted the negotiations for the appellants, that the business was "paying its way", and that the respondent had not had to put his hand "in his own pocket" for some time. He found that the appellants had relied on the respondent's statements, and that it was not until 1962 that Hopwood discovered from

the records of the Company that it had always lost money and that the respondent had advanced $4,000 to the business in March 1959.

In the result, he dismissed the respondent's claim and awarded to the appellants one half of the damages they had claimed. Those damages represented all the moneys the appellants testified they had paid into the business of the Company. The 50 per cent reduction was on the basis that the respondent could not have reasonably anticipated that the appellants would continue to put money into the business for the length of time which they did. He gave the appellants judgment for $19,350.

On appeal, the Appellate Division allowed the respondent's claim on the note. The majority of the Court directed that the damages claimed by the appellants be referred back for assessment, to be confined to a period of one and one half years from May 31, 1959, with credit to be given for the amounts received by the appellants on the sales of their shares to Haderer and to Vogel. Porter J.A. dissented as to this direction and would have dismissed the counterclaim.

From this judgment the appellants now appeal and the respondent has cross-appealed.

During the course of the argument before us, counsel for the appellants was advised that the Court was unanimously of the view that, if the appellants were entitled to recover any damages based on the claim that they had been induced to purchase the shares by fraudulent misrepresentation, the measure of damages, in the circumstances of this case, was not the amount of money advanced by the appellants to the Company, but the difference between what the appellants had agreed to pay for the shares and their actual value at the time of purchase.

I do not find it necessary to determine whether damages computed in that way have actually been established. I am in agreement with the reasons of Porter J.A., in his dissenting judgment, for deciding that, accepting the findings of the learned trial judge as to the statements made by the respondent to Hopwood, the evidence does not support the conclusion that it was their reliance upon those statements which led the appellants to enter into the contract to purchase the shares.

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The following items of evidence are significant in this regard:

1. It was not the respondent who first sought to effect the sale to the appellants. On the contrary, Hopwood, on learning that the respondent wished to dispose of the business, made the first approach.

2. The respondent's statement about not having to put his hand into his pocket was made, according to Hopwood, on the occasion when the respondent brought in the daily cash register. Hopwood also says that the respondent took him through the book, showed him the amount of the restaurant's sales and explained the book to him. This book clearly disclosed the $4,000 payment made to the Company by the respondent's company, Western Store Fixtures Limited, in March 1959, which the learned trial judge says was not discovered by the appellants until 1962.

3. In considering the impact of the respondent's representation that the restaurant was paying its way, it is significant that the agreement precluded the respondent from receiving payments for the shares (other than the $2,000 cash payment plus the value of the liquor on the premises) unless the business was earning a net profit.

4. It was after the appellants had operated the business for seven months at a loss, and after receiving the balance sheet and statement of liabilities, that they agreed to execute the promissory note in favour of the respondent.

5. Notwithstanding the lack of success in the operation of the restaurant business, the appellants made payments on the note until December 1960.

6. No suggestion of misrepresentation on the part of the respondent was made until after the respondent had sued on the note in August 1962, more than three years after the agreement was made.

In the light of these facts, and for the reasons given by Porter J.A., I am of the opinion that the appellants have failed to establish that they were induced to enter the contract to purchase the shares by reason of fraudulent misrepresentation by the respondent. I would, therefore,

dismiss the appeal and allow the cross-appeal, both with costs. The respondent should be entitled to the costs of the trial and of the appeal to the Appellate Division.

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Appeal dismissed and cross-appeal allowed, both with costs.

Solicitors for the defendants, appellants: Gill, Condrad & Cronin, Calgary.

Solicitors for the plaintiff, respondent: Prothroe, Gibbs, McCruden & Hilland, Calgary.