Michigan Law Review

Volume 54 | Issue 5

1956

Restitution - Fraud - Prospective Vendee's Rights Against Broker

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RESTITUTION—FRAUD—PROSPECTIVE VENDEE'S RIGHTS AGAINST BROKER—Defendant was retained as a real estate agent by the vendor. He listed the vendor's eighty acres and buildings for sale. Plaintiff, a prospective purchaser, offered $7,000 for the property. Defendant failed to transmit this offer to the vendor and, instead, fraudulently caused the vendor to convey

to two strawmen, as purported purchasers, for $6,500. After the defendant had falsely told the plaintiff that the latter's offer for the whole tract had been rejected, plaintiff purchased seventeen acres, including the buildings, for $6,000, an admittedly fair price. The strawmen conveyed the remaining sixty-three acres to the defendant's son, defendant giving the vendor plaintiff's $6,000 and $500 of his own money. Plaintiff brought suit asking damages or conveyance to him of the remaining sixty-three acres. The lower court dismissed. On appeal, *held,* reversed, one judge dissenting. On paying into court the additional $1,000 of his offer, plaintiff is entitled to a conveyance of the sixty-three acres. *Harper v. Adametz,* (Conn. 1955) 113 A. (2d) 136.

The law of restitution seemingly has no conceptual pigeonhole into which this case fits.[1] The decision is also unique in that it grants a prospective vendee the land for which he sought to bargain. No other case granting this type of relief to a land purchaser could be found by the writer. Had plaintiff been the vendor, a wide range of remedies would have been available.[2] A vendor whose broker fraudulently retains land for himself can either force the broker to return the property, recover the value of the property, or receive an accounting of the broker's profits.[3] However, since the plaintiff in the principal case is not the vendor but the prospective purchaser, a serious question is raised as to whether defendant's enrichment was at plaintiff's expense. Plaintiff had no contract to buy that which he sought to have returned.[4] Nor did he receive land less in value or area than he paid for.[5] In short, plaintiff's claim to the additional land under an unjust enrichment-constructive trust theory must be based on the fact that the broker's false statements deprived him of the opportunity to bargain for the land.[6] Fraud inducing inaction is actionable. Generally, this doctrine

1 See DAWSON, UNJUST ENRICHMENT 112 (1951), concerning the problem of classification. The author points out that the failure of the American law of restitution to provide a workable system of classification has resulted in a growing confusion in analysis and much difficulty of prediction in restitution cases.

2 The broker's retention of the land without full compensation to the vendor places him in the classic role of "a person who has been unjustly enriched at the expense of another [and who] is required to make restitution to the other." RESTITUTION RESTATEMENT §1, p. 12 (1937).

3 Hall v. Paine, 224 Mass. 62, 112 N.E. 153 (1916); Allegheny By-Product Coke Co. v. J. H. Hillman & Sons Co., 275 Pa. 191, 118 A. 900 (1922). See 62 A.L.R. 63 (1929).

4 Mere listing of property with a broker gives no rights to a prospective purchaser [Blondell v. Turover, 195 Md. 251, 72 A. (2d) 697 (1950)] even if the broker has an "exclusive" right to find a buyer. Muller v. Killam, (Tex. 1951) 229 S.W. (2d) 899.

5 In the usual case, where the action is between a vendee and vendor, this lack of pecuniary loss might well preclude an action in fraud and deceit, but it would not be decisive in an action for recission and restitution. See PROSSER, TORTS 567 (1955); 106 A.L.R. 125 (1937).

6 Another possible approach is that the broker, knowing that the vendor would sell the entire tract for $6,500 at the time the plaintiff made his $7,000 offer, interfered with what almost certainly would have been a benefit to the plaintiff. This is analogous to the doctrine in the law of wills that a defendant who wrongfully interferes with the expectation of an intended donee is held to be a constructive trustee for the donee. E.g.: Monach v. Koslowski, 322 Mass. 466, 78 N.E. (2d) 4 (1948) (defendant by fraud prevented testator from changing his will); Pope v. Garrett, 147 Tex. 18, 211 S.W. (2d) 559 (1948) (defendants, heirs of decedent, prevented her from executing a will).

is applied when the owner of a fungible asset such as stock is fraudulently induced not to sell, and then suffers a loss when the market drops.[7] But the inaction in the principal case was not of this type since the plaintiff never owned the land in dispute. Indeed, in a strikingly similar case, the Connecticut court denied the relief it granted here on the ground that a purchaser lulled into inaction had no claim to damages or title simply because a broker's fraud caused him to miss an opportunity to purchase.[8]

Neither does this case fit into that category of restitution remedies termed the "making good" of a representation. Basically, this theory holds that if *A* represents to *B* that *A* is selling exclusive French fabric, *B*, if defrauded by receiving only dollar store goods, can force *A* to "make good" his representation.[9] The facts of the principal case do not fit into this pattern in that defendant made no positive representation which plaintiff asks to have "made good."[10] Here the basis of relief is not that defendant set a standard of performance through representations which he later failed to carry out. Rather, the defendant's representations purposely failed to reveal what the prospective buyer should have been entitled to bargain for.[11]

At first glance, the result in the principal case would seem to be analogous to the Connecticut money damage rule followed in fraud and deceit actions. This is termed the "loss-of-bargain" rule and grants the plaintiff the difference between what was paid and the value which the article should have had, had it been as represented.[12] However, the principal case goes even further, since the plaintiff is not merely compensated for a bargain-gone-sour but is given the benefit of a bargain never actually made. In addition, he is given the land itself instead of the usual money recovery. By granting the purchaser the land, this unique decision leaves unanswered some vital questions: what rights remain open for the vendor who was

[7] Fottler v. Moseley, 179 Mass. 295, 60 N.E. 788 (1901); David v. Belmont, 291 Mass. 450, 197 N.E. 83 (1935).

[8] Gilfillen v. Moorhead, 73 Conn. 710, 49 A. 196 (1901).

[9] The theory has been seldom used in this country. Cases in which the theory has been utilized are Vanbibber v. Beirne, 6 W.Va. 168 (1873) and New Era Motors, Inc. v. Burst, (8th Cir. 1931) 53 F. (2d) 41. It has been soundly criticized even in England, where the doctrine arose. BOWER, ACTIONABLE MISREPRESENTATION, 2d ed., §§193-198 (1927).

[10] See Piper v. Hoard, 107 N.Y. 67, 13 N.E. 632 (1887); Given v. Times-Republican Printing Co., (8th Cir. 1902) 114 F. 92; Jones v. Bolles, 9 Wall. (76 U.S.) 364 (1869). These are "making good" cases involving assertive conduct which the asserter is precluded from denying; in effect, the application of estoppel. The "making good" theory might be said to be involved in the principal case on the argument that the broker represented to the plaintiff that he had conveyed his offer to the vendor. If he had, it almost certainly would have been accepted. Therefore, the defendant must "make good" by giving to the plaintiff what the plaintiff would have gotten had defendant done as he represented he had.

[11] Curtis & Co. v. Olds, 250 Pa. 320, 95 A. 526 (1915), held a wife bound to "make good" representations made by her husband to creditors. The case differs on the facts from the principal case in that the wife was forced, in effect, to make specific performance of her husband's positive promise of payment.

[12] This is a majority rule in the United States. Gustafson v. Rustemeyer, 70 Conn. 125, 39 A. 104 (1898); PROSSER, TORTS 568 (1955). But see HARPER, TORTS 471 (1933), where the author (the plaintiff in the principal case) criticizes this rule as a measure of compensatory damage in a tort action. These sources also discuss the "out-of-pocket" damage rule followed in the minority of states.

the party actually defrauded,[13] and how will these rights affect a subsequent purchaser from the plaintiff? Despite the fact that the decision raises many such problems, there is no doubt that an equitable result was reached as between the parties in court. This desire to do equity despite a dearth of precedent appears to be the real basis for the decision.

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[13] The vendor under the decree will apparently receive the balance of the plaintiff's original offer for the entire tract from the money which was paid into court. What happens if the vendor refuses the money and wants his land back is uncertain. See note 3 supra and adjacent text.