O/A 4-9-97

IN THE
SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
MAR 10 1997
CLERK, SUPREME COURT
By
Chief Deputy Clerk

GILCHRIST TIMBER COMPANY, C. L. BRICE, L. A. BRICE, ANDY M. BRICE, SAM BRICE,

Plaintiffs/Appellants,

vs.

ITT RAYONIER INCORPORATED, a Delaware Corporation,

Defendants/Appellees,

vs.

NATURAL RESOURCE PLANNING SERVICES, INC., a Florida Corporation, and ANDREW V. SANTANGINI, JR., an individual,

Third-Party Defendants.

CASE NO. 89,015

(USDC NO. 88-10172-MMP

REPLY BRIEF OF PLAINTIFFS/APPELLANTS

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STATEMENT OF THE FACTS

RAYONIER, apparently being dissatisfied with the manner in which the Eleventh Circuit stated the FACTS provides its own STATEMENT OF THE CASE AND FACTS. However, Rayonier's STATEMENT omits the following facts relevant to the portion of its argument which are outside the certified question.

After purchasing the subject timber land, Gilchrist Timber began planning for the sale of the timber and land. (R8-85). Gilchrist Timber's plan included merchandising approximately half of the cut over timber land by breaking the land up into smaller parcels of not less than ten acres to be sold off in a retail fashion to pay off the land mortgage. (R8-74).

To facilitate the sale the land was divided into compartments. The oldest timber was located on Compartment 14, therefore it was cut first. (R8-86). After Compartment 14 was cut, that compartment was surveyed, a homeowners association was formed to hold title to the roads located therein, and Gilchrist Timber did all the things necessary under agricultural zoning to sell the land. (R8-88,89).

Arrangements were made with Margaret Akins, a realtor, to handle the sales of the land. (R8-89). After Ms. Akins had made land sales totaling between $330,000.00 and $340,000.00, a purchaser of one of the parcels applied for a home building permit from Gilchrist County. Gilchrist County refused to issue the permit because the land was zoned P-1. (R8-90).

P-1 (Preservation) zoning, according to the Gilchrist County Zoning Ordinance, allows only Forestry operations, Grazing of

livestock, Essential Services, Hunting, Concentrated agricultural feeding operations which are incidental to grazing operations, Public Services and facilities, and Recreation Facilities. (Plaintiff's Exhibit No. 156, R8-92). Preservation zoning does not allow any type of residential use. The agricultural zoning represented by the Santangini appraisal does allow residential use. (R8-92).

The fact that the land was zoned preservation, which did not allow any type of residential use, had a tremendous adverse effect on Gilchrist Timber's plans to sell the land. The plan to prepare the land, break it up into smaller parcels and sell the small parcels would not work because of the preservation zoning. (R8-93). Brice and Mincy would not have bought the land or the timber had they known that the land was zoned for preservation. (R9-72).

When Gilchrist Timber notified Florida National Bank that the land was not zoned agricultural as represented, but that it was attempting to have the zoning changed to a less restrictive zoning classification, Florida National Bank required Gilchrist Timber to have the land reappraised. (R8-98,99). The updated 1988 appraisal, also prepared by Mr. Santangini, recognized that the actual zoning of a portion of the land was Preservation and stated the value of the land to be $6,014,500.00, more than $2,500,000.00 less that the value stated in the 1984 Santangini appraisal. (Plaintiff's Exhibit 140; R9-138; R10-221,222).

After it was unsuccessful in obtaining judicial relief from the restrictive preservation zoning, in desperation, Gilchrist

Timber sold the land which had not been sold in small parcels and the uncut timber.

Rayonier omits reference to Bill Berry's, a high-ranking Rayonier officer, testimony that he knew that Florida's counties were required to adopt Comprehensive Land Use Plans. He also admitted that no one on behalf of Rayonier made any effort to verify the zoning of the Gilchrist Tract before the sale. One of Rayonier's subsidiary corporations, Rayland Corporation, with whom it worked closely, employed an experienced zoning person. After the fact, he was called to see if he could help out with the situation. (R10-230).

Mr. Berry further admitted that a reason for having an independent appraisal was that people more readily believe an independent appraisal than one prepared in-house. (R11-40). He admitted that he used the information contained in the Santangini appraisal in attempting to market the property. (R11-7,8,9). Mr. Berry testified regarding some handwritten notes he had made which proved that he was concerned about the new wetlands laws prior to the time the subject land was contracted for sale. (R11-16). Mr. Berry also admitted that he may very well have used the Santangini appraisal to attempt to get Mr. Brice to increase his offer from $550.00 an acre to $620.00 per acre. (R11-37).

Rayonier omits reference to Mr. Brice's testimony that <u>he did not have enough information on the tracts</u> prior to the first meeting with Rayonier to make them a firm offer of $550.00 an acre. (R8-140).

The following sentence from Rayonier's Answer Brief is a misstatement of the facts: "During their first or second meeting with Rayonier, either in the late spring or early summer of 1995, Brice and Mincy requested copies of any available appraisals of the tract from Rayonier." (Rayonier's Answer Brief, p. 6) (Emphasis added). The record clearly shows that the appraisals were given to Brice and Mincy unsolicited. (R8-53; R9-191).

Rayonier makes numerous statements such as "Gilchrist Timber simply assumed that the Gilchrist Forest tract was zoned 'agricultural'." (For example, Rayonier's Answer Brief, p. 13). In support of that statement it cites (R7-273-3-5). This citation is to the specific Order on appeal to the Eleventh Circuit. This finding is not supported by the record. The record is clear that Brice and Mincy made no assumption but relied on the statements, that the land was zoned agricultural, contained in the Santangini appraisal. (R8-57,59, 60, 61).

ARGUMENT

In an attempt to support its contention that this Court's opinion in Besett v. Basnett, 389 So.2d 995 (Fla. 1980) does not control resolution of the certified question in this case Rayonier argues: "Instead, Besett interprets only the 'reliance' element of a cause of action for **fraudulent** misrepresentation." (Rayonier's Answer Brief, p. 14 (emphasis in original)). Rayonier attempts to draw a distinction between the recipient's right to rely on a fraudulent misrepresentation and the recipient's right to rely on a negligent misrepresentation. That distinction, if any exists, is not relevant to the facts of this case.

This Court held in Joiner v. McCullers, 158 Fla. 562, 28 So.2d 823, 824 (Fla. 1947), a case involving fraud, that:

> The knowledge, by the maker of the representation, of its falsity, or in technical phrase, the scienter, can be established by either one of the three following phases of proof: (1) That the representation was made with actual knowledge of its falsity; (2) without knowledge either of its truth or falsity; (3) under circumstances in which the person making it ought to have known, if he did not know, of its falsity.

(Emphasis added). *See also* Florida Standard Jury Instructions MI-8(a), reported at 613 So.2d 1316 (Fla. 1993): "First, whether (defendant) * * * made the statement knowing [he] [she] was without knowledge of its truth or falsity."

The record in this case is clear that Rayonier made no effort to determine whether the representations made in the Santangini appraisal regarding zoning and other facts were true or false. (R9-163,164,180). Despite that lack of knowledge, Rayonier included the Santangini appraisal, or information from the Santangini appraisal, in the prospectus it prepared and used for the purpose of trying to get someone interested in purchasing the Gilchrist Tract and Mr. Berry may very well have used the Santangini appraisal in attempting to get Mr. Brice to increase his offer from $550.00 an acre to $620.00 an acre. (R9-165; R11-37). Mr. Berry admitted that a reason for having an independent appraisal was that people more readily believed an independent appraisal than one prepared in-house. (R11-40). Therefore, the representations made by Rayonier in this case, without knowledge as to its truth or falsity, were fraudulent misrepresentations rather than negligent misrepresentations.

The negligence of Mr. Santangini in his preparation of the appraisal must not be confused with the misrepresentation made by Rayonier without knowledge as to the truth or falsity of such representation. Mr. Santangini's acts were negligent; Rayonier's acts were fraudulent.

A brief analysis will show that the factual situation stated in the certified question from the Eleventh Circuit is a legal impossibility under Florida law. Under Florida law, a party who transmits false information without knowledge of its truth or falsity is liable for fraudulent misrepresentation, not negligent misrepresentation.

Even if negligent misrepresentations were at issue in this case, Florida should not adopt § 552A of the Restatement (Second) of Torts. Section 552A adds nothing to the existing Florida law regarding fraud. For misrepresentation to be actionable, whether made negligently or fraudulently, the defrauded party must show an injury which results from acting in justifiable reliance on the representation. Alexander/Davis Properties, Inc. v. Grahm, 397 So.2d 699 (Fla. 4th DCA 1981). If, as stated in § 552A, the recipient of a negligent misrepresentation is negligent in relying on the misrepresentation, his reliance is not justifiable and he is barred from recovery by existing law. Therefore, § 552A adds absolutely nothing to the law of negligent misrepresentation and should not be adopted.

Gilchrist Timber acknowledges that a majority of the states which have considered § 552A have adopted it. However, the better reasoned opinions are those from courts in states such as

California and Rhode Island which have considered § 552A and rejected it. The California Court of Appeals in Carroll v. Gava, 98 Cal. App. 3d 892, 897 (1979) in rejecting comparative negligence, and therefore § 552A, as a defense to negligent misrepresentation stated:

> Whatever that trend may be (citation omitted), the concept has no place in the context of ordinary business transactions. The modern law of misrepresentation evolved from the 'action on the case of deceit' in business transactions. (citations omitted). Business ethics justify reliance upon the accuracy of information imparted in buying and selling, and the risk of falsity is on the one who makes a representation. (citation omitted). This straightforward approach provides an essential predictability to parties in the multitude of everyday exchanges; application of comparative fault principles, designed to mitigate the often catastrophic consequences of personal injury, would only create unnecessary confusion and complexity in such transactions.

The Supreme Court of Rhode Island followed Carroll in Estate of Braswell v. People's Credit Union, 602 A.2d 510 (R.I. 1992). After analyzing the majority and minority views, that court stated:

> Consequently, in weighting the respective rationales of the majority and minority views, we are of the opinion that the minority view is better suited to the goals this jurisdiction seeks to achieve. We therefore agree with and adopt the propositions that the application of comparative-fault principles would only create unnecessary confusion and complexity in business transactions and that the risk of falsity should fall upon the party making the representation.

Id. at 515.

Rayonier relies heavily on Florida Statutes 768.81(1) to support is argument for adoption of § 552A. That section does not apply to the cause of action in this case. Florida Statutes § 768.71(2) provides that Part II of Chapter 768, which includes §

768.81, applies only to causes of action arising on or after July 1, 1986. The cause of action in this case arose in 1985, prior to the effective date of § 768.81. Therefore, § 768.81 provides no support for Rayonier's argument.

Prior to § 768.81, this Court had adopted comparative negligence as the law of Florida. Hoffman v. Jones, 280 So.2d 431 (Fla. 1973). In its opinion in Hoffman this Court stated that it was concerned with proper compensation for the victims of accidents. The Court stated at page 436: "[W]e must recognize the problem of determining a method of securing just and adequate compensation of accident victims who have a good cause of action." The Court made no reference in its opinion in Hoffman to other causes of actions, particularly negligent misrepresentation.

Rayonier's attempt to distinguish Lynch v. Fanning, 440 So.2d 79 (Fla. 1st DCA 1983) and Held v. Trafford Realty Co., 414 So.2d 631 (Fla. 5th DCA 1982) by claiming a difference between "the contractual right to secure a survey" to discover the falsity of a representation and the right to check zoning to discover the falsity of a representation is incredible. The court in Lynch stated: "Appellee's argument in *Held* that the buyer could have discovered the representation to be false, i.e., that the subject property was not ocean front property, by conducting a survey, as the buyer had a contractual right to do, was held not to eliminate the buyer's cause of action." Lynch, at 80. The fact that the buyer had a contractual right to conduct a survey adds nothing to the opinion. The result would have been the same, whether the buyer had a contractual right to conduct the survey or not. The

important point is the fact that even though he could have discovered the representation to be false, and did not, his cause of action was not eliminated. The other cases on this issue relied on by Rayonier have been adequately discussed and distinguished in Gilchrist Timber's Initial Brief.

In the event the Court does not agree that the certified question is answered by Besett and its progeny, then it may determine the public policy of this state in the absence of a legislative pronouncement. Van Bibber v. Hartford Accident & Indemnity Insurance Co., 439 So.2d 880, 883 (Fla. 1983). Public policy should dictate that laws related to business matters provide guidance regarding what may be legally expected by those who interact in the business community. There must be some standard for expected conduct. In this case there must be some standard upon which a recipient of a representation can rely in conducting his business affairs. That standard for the recipient of information must be consistent, otherwise there can be no predictability of results.

If the standard the recipient must follow depends on the degree of culpability of the representor, i.e., whether negligent or fraudulent, the recipient must decide whether to rely or not at his peril. The recipient may not learn the degree of culpability of the representor until it is too late. This is not a satisfaction solution.

Rayonier's argument that "The innocent defendant cannot always bear the risk of loss resulting from his alleged negligent misrepresentation." is ludicrous. If the defendant is guilty of

negligent misrepresentation he cannot be innocent. Rayonier's argument ignores the fact that no one is under an obligation to make any representation. When a representation is made, the recipient of the representation should be allowed to rely on the truth of the representation, whether made truthfully, negligently or fraudulently, unless the representation is known to be false or its falsity is obvious. If the law falls short of this requirement, then there can never be reliance on any representation and every representation must be verified by the recipient.

The burden of verifying the truth of the representation must always rest on the person who chooses to and makes the representation. In the event the person does not wish to suffer the result which occurs when the facts are not as represented, he should elect not to make the representation. It is that simple. This requirement would place no heavier burden on the representor that he should bear. Once a representation is made with the intent to induce the recipient of the representation to act thereon, whether made fraudulently or negligently, the representor should become a guarantor of the truth of the representation. Gilchrist Timber does not argue, as suggested by Rayonier, that the recipient of a representation be relieved of proof of justifiable reliance. That remains an element of any cause of action for fraud.

Finally, Rayonier asks this Court to usurp the authority of the Eleventh Circuit Court of Appeals and decide the issues in the case on the merit. (Rayonier's Answer Brief, p. 41). By

certifying the question herein to this Court, the power of the Eleventh Circuit to make determinations of the issues pending in that Court was neither transferred to nor shared with this Court. Sun Insurance Office, Limited v. Clay, 319 F.2d 505, 508 (5th Cir, 1963). (Reversed on other grounds, Clay v. Sun Insurance Office, Ltd., 377 US 179, 12 L.Ed.2d 229, 84 S.Ct. 1197 (1964)). In the event this Court decides to review this case on the merits, it should consider all briefs which have been filed in the Eleventh Circuit.

Rayonier's argument in this portion of its Brief does not differ greatly from its argument which was rejected by the jury in the trial court. It should be rejected by this Court. Rayonier argues that the facts do not reveal that Rayonier ever made a misrepresentation of material fact to Gilchrist Timber. (Rayonier's Answer Brief, p. 41). The evidence proved that the Santangini appraisal was presented to Brice and Mincy on their first meeting with Rayonier for the purpose of discussing the land purchase. (R8-53,55,56). Mr. Berry admitted that a reason for Rayonier obtaining an independent appraisal is that they are more readily accepted than an in-house appraisal. (R11-40). He confirmed that he used the information contained in the Santangini appraisal in attempting to market the property. (R11-7,8,9). He also admitted that he may very well have used the Santangini appraisal to attempt to get Mr. Brice to increase his offer from $550 an acre to $620 an acre. (R11-37).

Mr. Smith testified that after the Santangini appraisal was received by Rayonier, he assisted in preparing what he called a

"Prospectus", which included the Santangini appraisal, or information from the Santangini appraisal. The purpose of the "Prospectus" was to try to generate some interest in purchasing the Gilchrist Tract. (R9-165).

A transferor of information may be liable for merely passing on a third party's information. Commonwealth Mortgage Corp. v. First Nationwide Bank, 873 F.2d 859, 866-67 (5th Cir. 1989) (see also trial court's Order of December 11, 1990, in which it correctly recognized that "[t]he defendant gave the appraisal to the plaintiff, the plaintiff did not obtain it independently." (R4-97-3).

Rayonier cites Atlantic Nat'l Bank v. Vest, 480 So.2d 1328 (Fla. 2d DCA 1985) for the proposition that a fact is material only "if, but for the alleged . . . misrepresentation, the complaining party would not have entered into the transaction." Rayonier's Answer Brief, p.42). Materiality is a question of fact properly determined by the jury. Vest at 1332. The uncontradicted testimony at trial, which the jury obviously believed, was that Brice and Mincy would not have purchased the land or the timber had they known the land was zoned for preservation. (R9-72). The evidence supporting the jury's conclusion that Rayonier intended to induce Gilchrist Timber to act on the misrepresentation contained in the Santangini appraisal has been fully discussed in other portions of this argument.

Rayonier argues that it did not fail to exercise reasonable care, but hired an appraisal firm who prepared the appraisal, and therefore they should be exonerated from any liability. Rayonier

assumed that the report was accurate and used it in an effort to market the Gilchrist Tract to Gilchrist Timber without verifying the accuracy of the report. (R9-163,164); (Rayonier's Answer Brief, p. 43). This certainly proves negligence.

Rayonier then argues that it should not have known that the zoning information was inaccurate; that they did not know Brice and Mincy had relied on the zoning information within the appraisal report; that they had no way of knowing that Brice and Mincy had relied upon the zoning information within the appraisal report or that the "agricultural" zoning of the property was even important to the two purchasers. This argument makes absolutely no sense; such knowledge is not required for liability.

Rayonier next argues that the evidence shows Rayonier did not intend to induce Gilchrist Timber's reliance on the appraisal report because Rayonier "was itself unaware that the zoning classification stated in the appraisal report was inaccurate." (Rayonier's Answer Brief, p. 44). Rayonier's reliance on Gomez v. Hawkins Concrete Constr. Co., 623 F.Supp. 194, 201 (N.D. Fla. 1985), and Berg v. Newton, 537 So.2d 165, 167 (Fla. 2d DCA 1989) is misplaced. The facts as stated in the Gomez opinion are: "Hawkins at trial testified that he did not know that statement was included in the agreement." Gomez at 201. (Emphasis added). The evidence is clear in this case that Mr. Smith knew that the statements regarding zoning were included in the appraisal. (R9-164). Likewise, Berg provides Rayonier no support. In Berg, the alleged misrepresentation resulted from Newton presenting a letter from the zoning department which indicated that the land was zoned

for mobile home use. The letter which contained the misrepresentation was from a person totally foreign to Newton. In this case, the misrepresentation was in an appraisal made at the request of and furnished to Brice and Mincy by Rayonier. Rayonier confuses the issue by mixing the questions of "intent to induce" with "intent to defraud". There is no requirement that Gilchrist Timber present any evidence that Rayonier intended to defraud it, it must simply show that Rayonier made representations without knowledge as to the truth or falsity of such representation, which it did.

Rayonier clearly misstates the holding in First Florida Bank v. Max Mitchell & Co., 5458 So.2d 9 (Fla. 1990). Section 552, Restatement (Second) of Torts (1976), adopted by this Court in that case, relates to the classes of persons to whom a representor may become liable because of the representor's knowledge of the existence of that particular group, rather than the representor's knowledge that the recipient would rely on the information, as argued by Rayonier. In Max Mitchell, this Court quoted the following from comment h under § 552. "It is enough that the maker of the representation intends it to reach and influence either a particular person or persons, known to whom, or a group or class of persons, distinct from the much larger class who might reasonably be expected sooner or later to have access to the information, and foreseeable to take some action in reliance upon it." Max Mitchell at 15. Rayonier knew that Brice and Mincy might foreseeable take some action in reliance on the Santangini appraisal. There is no difference between the actions of Rayonier

in this case and Mitchell in Max Mitchell. They both personally delivered the documents to the person who would rely upon them in taking action to their detriment.

CONCLUSION

The public policy of this State mandates that a recipient of information must be allowed to rely thereon without running the risk that the representation may have been made negligently rather than intentionally. Therefore, the issue certified to this Court by the Eleventh Circuit Court of Appeals should be answered in the affirmative.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copies of the foregoing have been furnished to Thomas M. Baumer, Post Office Box 4788, Jacksonville, Florida 32201, John F. Roscow, III, Post Office Drawer C, Gainesville, Florida 32602, and Andrew V. Santangini, 1109 NW 23rd Avenue, Gainesville, Florida 32605, by U.S. Mail, this 7th day of March 1997.

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