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Article 16

Contract--Deceit--Representations--Opinions (Banner v. Lyon and Healy, 249 App. Div. 569 (1st Dept. 1937))

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The court distinguishes its decision by which it finds a valuable consideration in the instant case for the defendant's promise, in this fashion: "True it is that some *dicta* will be found in the opinion that the so-called 'Bank Night' promises were void because of lack of consideration. However, the rule promulgated in a criminal prosecution is unlike that in a civil suit. * * * the above cases construed a criminal statute. Criminal statutes must be strictly construed. The rights of a prize winner were in no wise discussed or involved, and any reference to the invalidity of the contract by reason of inadequate consideration must be assumed to be *obiter dictum.*" [11]

L. J.

CONTRACT — DECEIT — REPRESENTATIONS—OPINIONS.—This is an action for deceit brought against the defendant corporation for the alleged fraudulent statements made by its sales agent, one Freeman. The alleged fraud arose in the following manner: The plaintiff, a noted violinist, purchased the violin in question from Freeman with a certificate stating that the violin was the work of a great "Master, Antonius Stradivarius in Cremona 1717 as shown by the label it bears", and that the "top" (also described as "belly" or "table") was of "Spruce of Stradivarius' choicest selection and unique among his violins as we have seen by reason of its unusual strength". It is further to be noted that in its numerous previous sales the instrument had always been regarded as a genuine Stradivarius. The plaintiff, after using the violin satisfactorily for more than ten years, and after stating, "It is one of the finest Stradivarius violins in existence and totally unsurpassed" discovered that the "left half of the top" was not the original work of Stradivarius, but that it was the substituted work of, probably, a French artisan, who had made repairs upon the instrument in 1840 and 1850. Therefore the plaintiff brought this action for the difference between what he had paid for the violin and its actual value. *Held,* judgment for plaintiff in lower court reversed and complaint dismissed. No action lies for deceit where scienter, a necessary element of the tort, is lacking or where the statements made by the agent were mere opinions or beliefs rather than representations. *Banner* v. *Lyon and Healy,* 249 App. Div. 569, 293 N. Y. Supp. 236 (1st Dept. 1937).

Deceit actions will lie when one party to an agreement know-

theatre to obtain his prize without any expense to him." People v. Mail & Express Co., 179 N. Y. Supp. 640 (1919), *aff'd,* 231 N. Y. 586, 132 N. E. 898 (1921).

[11] Wecht, J., in Simmons v. Randforce Amusement Corp., 162 Misc. 491, 293 N. Y. Supp. 745 (1937).

ingly [1] makes a false representation concerning a material fact [2] with which he intends to [3] and actually does induce the innocent party to act to his own detriment.[4] In the action at bar, scienter (knowingly making a false statement) was found to be lacking by the court. Therefore, since one of the essential elements of a deceit action was lacking, the action would not lie.[5]

The instant case, however, presents another question the solution of which had some bearing on the dismissal of the complaint, namely, whether the alleged statements were representations or opinions? A representation is any statement made with regard "to some fact, circumstance or state of facts pertinent to the contract which is influential in bringing about the agreement." [6] Thus, when a false representation of a material fact is made, the injured party may seek relief by either commencing a deceit action in a court of law [7] or claiming equitable relief in the form of rescission,[8] or any other remedy which justice may require.[9] However, before the individual can receive any assistance, it must be decided whether the statement is a representation of fact or an opinion, for if the statement is the latter no relief may be had.[10] "It is not always easy to determine whether a given statement is one of opinion or of fact." [11] The fact that the language of the speaker is in opinion form is certainly not controlling.[12] The court considers the subject matter and the superior knowledge of the one making the representation in determining whether the statement is in reality one of fact.[13] Whether or not the subject matter is such as would not usually be known to the party, and whether reliance is placed on the superior knowledge of the one

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[1] Ultramares Corp. v. Touche, 255 N. Y. 170, 174 N. E. 441 (1931); Thayer v. Schelley, 137 App. Div. 166, 121 N. Y. Supp. 1064 (1st Dept. 1910); Rose v. Goodale, 169 N. Y. Supp. 446 (1918).

[2] Moore v. Abbey, 213 App. Div. 787, 210 N. Y. Supp. 766 (4th Dept. 1925).

[3] Habebb v. Dass, 111 Misc. 437, 181 N. Y. Supp. 392 (1920), *aff'd*, 196 App. Div. 974, 188 N. Y. Supp. 925 (2d Dept. 1921).

[4] EDGAR AND EDGAR, TORTS (3d ed. 1936) 178–187; Seneca Wire & Mfg. Co. v. Leach, 247 N. Y. 1, 159 N. E. 700 (1928); Long v. Warren, 68 N. Y. 426 (1887); Ochs v. Woods, 221 N. Y. 335, 117 N. E. 305 (1917); Humphrey v. Merrian, 32 Minn. 197, 20 N. W. 138 (1884).

[5] *Ibid.*

[6] BLACK, LAW DICTIONARY (2d ed. 1910) 1020. Fitzgerald v. Supreme Council, 39 App. Div. 259, 56 N. Y. Supp. 1005 (4th Dept. 1899); Foster v. McAlester, 3 Ind. Terr. 307, 58 S. W. 679 (1900).

[7] EDGAR AND EDGAR, TORTS (3d ed. 1936) 178.

[8] WHITNEY, CONTRACTS (2d ed. 1934) 126.

[9] WHITNEY, *loc. cit. supra* note 8; EDGAR AND EDGAR, *loc. cit. supra* note 7; Merry Realty Co. v. Shamokin, 230 N. Y. 316, 30 N. E. 306 (1921).

[10] WHITNEY, CONTRACTS (2d ed. 1934) 120; Oberlander v. Spiess, 45 N. Y. 175 (1871); Yasewen v. Pollack, 155 Misc. 475, 280 N. Y. Supp. 512 (1934); Brady v. Cole, 164 Ill. 116, 45 N. E. 438 (1896).

[11] 6 ENCYCLOPEDIA OF LAW & PROCEDURE (Pop. ed. 1909); Marshall v. Seeley, 49 App. Div. 433, 63 N. Y. Supp. 355 (1st Dept. 1900).

[12] Watson v. People, 87 N. Y. 561 (1881).

[13] See note 11, *supra*.

making the statement are usually questions of fact for the jury.[14] Since *Derry* v. *Peek*,[15] courts have encountered difficulty in formulating any one principle that would be applicable to all cases. They have decided each case on its own peculiar facts and circumstances.[16]

The decision in the case at bar dismissing the complaint seems justified because the statements made to the plaintiff were mere opinions since: (1) plaintiff was himself an expert in violins and could not have relied on the superior knowledge of the seller and (2) he was in a position to draw his own conclusions from the documents presented and the complexity of the instrument. On the other hand, if the buyer had no knowledge concerning violins and relied solely on the vendor's statements, *a different situation would have been presented* and it would seem that the statements would be deemed representations.[17]

B. B.

CRIMINAL CONVERSATION AND ALIENATION OF AFFECTIONS—LOSS OF ACTION DUE TO "HEART BALM" LAW.—Plaintiff sued to recover damages for criminal conversation and alienation of affections of his wife, the acts alleged occurring subsequent to the enactment of Article 2-A of the New York Civil Practice Act.[1] The Appellate Division of the Second Department declared the statute to be unconstitutional on the ground that the legislature cannot validly abrogate a common law action without replacing it with an adequate substitute. On appeal, *held,* reversed. Quoting substantially from the report of *Fearon* v. *Treanor*,[2] the court ruled that the legislature

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[14] 6 ENCYCLOPEDIA OF LAW & PROCEDURE (Pop. ed. 1909); Marshall v. Seeley, 49 App. Div. 433, 63 N. Y. Supp. 335 (1st Dept. 1900).

[15] L. R. 14 App. Cas. 337, H. L. (1889); KERR, FRAUD & MISTAKE (4th ed. 1910) 397, 400.

[16] Frank v. Bradley, 42 App. Div. 178, 58 N. Y. Supp. 1032 (1st Dept. 1899); Benedict Co. v. McKeage, 201 App. Div. 761, 195 N. Y. Supp. 288 (3d Dept. 1922); Brady v. Edwards, 35 Misc. 435, 71 N. Y. Supp. 972 (1901); Jackson v. Collins, 39 Mich. 557 (1878); Hirschberg Optical Co. v. Michaelsen, 1 Neb. 137, 95 N. W. 461 (1901); People's Bank v. Romano, 62 P. (2d) 445 (1936).

[17] In Powell v. Fletcher, 45 St. R. 294, 18 N. Y. Supp. 451 (1892), it was held that where a dealer in violins is an expert and the buyer is not, a false and fraudulent opinion will make the vendor liable.

[1] N. Y. CIV. PRAC. ACT art. 2-A, § 61b: "The rights of action heretofore existing to recover sums of money as damages for the alienation of affections, criminal conversation, seduction, or breach of promise to marry are hereby abolished."

[2] Fearon v. Treanor, 272 N. Y. 268, 5 N. E. (2d) 815 (1936) (declaring constitutional that part of Section 61b abolishing remedies for seduction and breach of promise to marry).