Rule 21(b) — Failure to join a party.

Seals

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SOUTHERN PACIFIC TRANSPORTATION COMPANY	)	
VS.	)	C.A. NO. H-82-0316
EUREKA INVESTMENT COMPANY and MUSTANG TRACTOR AND EQUIPMENT COMPANY	)	PLAINTIFF DEMANDS A TRIAL BY JURY

PLAINTIFF'S ORIGINAL COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Southern Pacific Transportation Company, hereinafter referred to as Plaintiff, complaining of Eureka Investment Company and Mustang Tractor and Equipment Company, hereinafter referred to as Defendants, and for cause of action would show unto the Court the following:

I.

PLAINTIFF

Plaintiff is a Delaware Corporation organized and existing by virtue of law, with a registered agent for service of process within the State of Texas, Mr. H. B. LaTourette, General Attorney, 913 Franklin, Houston, Texas, 77001.

II.

DEFENDANTS

Defendant, Eureka Investment Company is a Texas corporation organized and existing by virtue of law, with its principal place of business at 7777 Washington Avenue, Houston, Texas, 77007. Defendant, Mustang Tractor and Equipment Company, is the successor in interest of Eureka Investment Company and has assumed all rights, interests, assets and liabilities of Eureka Investment Company. Defendant, Mustang Tractor and Equipment Company, is a Texas corporation organized and existing by virtue of law, with a registered agent for

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service of process, Mr. Leonard N. Martin, 7777 Washington Avenue, Houston, Texas, 77007.

III.

JURISDICTION

Plaintiff is a corporation incorporated under the laws of the State of Delaware having its principal place of business in the State of California and Defendants, Eureka Investment Company and Mustang Tractor and Equipment Company, are corporations incorporated under the laws of the State of Texas having their principal places of business in a state other than the State of California. The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars ($10,000.00).

IV.

FACTUAL BACKGROUND

On or about July 11, 1978, Plaintiff, Southern Pacific Transportation Company purchased from Defendant, Eureka Investment Company a 9.107 acre tract of land out of the William Black Survey, Abstract 114, Harris County, Texas, (hereinafter "Property"), located at 7621 Wallisville Road in Houston, Texas. The purchase price was $535,546.24 cash. Plaintiff purchased the Property for future development. Defendant Eureka had previously purchased the Property from Olin Chemical Corporation (hereinafter "Olin"), in 1973.

V.

Defendant, Mustang Tractor and Equipment Company (hereinafter "Mustang"), is the successor in interest of Eureka Investment Company and has assumed all rights, interests, assets and liabilities of Eureka Investment Company.

VI.

In 1950, Olin purchased the Property from Southern Acid and Sulphur Company. Olin started operations at the site for the dry formulation of pesticides in 1950 and for the liquid formulation of pesticides in 1955.

Shortly after purchasing the Property, Defendant Eureka employed Olshan Demolishing Company to remove the plant and other structures located on the Property. During the demolition process, significant quantities of pesticides, or pesticide contaminated materials, were buried. Thereafter, in 1978, Eureka sold the Property to the Plaintiff. Eureka still owns the adjacent tract which was part of the original Olin tract. Prior to the sale, Plaintiff was not aware that the Property had been the site of a pesticide formulation and manufacturing plant nor was Plaintiff aware that potentially hazardous concentrations of pesticides existed on the Property.

VII.

On June 19, 1981, Plaintiff was formally advised by the United States Environmental Protection Agency, (hereinafter EPA), that the Agency had conducted sampling operations on Plaintiff's Property and on the adjacent Houston Belt & Terminal Railway right-of-way and had found potentially hazardous concentrations of chemical contaminants. The EPA requested that Plaintiff present a plan for cleaning up the site. Plaintiff immediately put Eureka on notice of the claim being made by the EPA and advised Eureka that Plaintiff had a potential claim for (1) clean-up costs and (2) the decrease in the fair market value of its property. Subsequently, Plaintiff supplemented its notice and tendered rescission of the transaction. In conformity with §17.50 A(a) of the Texas Deceptive Trade Practices Act, Plaintiff notified Eureka that if the tender of rescission was not accepted, Plaintiff had a potential cause of action under the Texas Deceptive Trade Practices Act. TEX. BUS. & COM. CODE ANN. tit. 2 §17.41, et seq.

VIII.

As a result of the aforesaid events, Plaintiff has purchased for $535,546.24 a tract of land of no value and

which represents a potential liability. Accordingly, Plaintiff seeks by this action judicial rescission of the transaction with accompanying reconveyance of title and possession of the Property to Defendants and restitution to the Plaintiff of the $535,546.24 paid for the Property plus, to the extent permitted by law, interest on the principal and value of the improvements. Alternatively, Plaintiff seeks actual and punitive damages under the appropriate statutes.

COUNT I

MUTUAL MISTAKE

IX.

NOW COMES, Plaintiff, Southern Pacific Transportation Company and for a cause of action against Defendants, Eureka Investment Company, and Mustang Tractor and Equipment Company, would show the honorable Court the following:

1. Plaintiff hereby adopts by reference all of the factual allegations as set forth in Paragraphs IV through VII above and Plaintiff relies upon the factual allegations therein contained the same as if such were set out here in full.

2. At the time of the subject transaction both Plaintiff and Eureka were mistaken by reason of mutual ignorance or misconception of a fact material to the transaction. Both Plaintiff and Eureka were unaware that the Property was contaminated with potentially hazardous toxic chemicals.

3. The fact that the Property was contaminated with potentially hazardous toxic chemicals constitutes a material fact.

4. The mistake was not induced by the negligence of Plaintiff and Plaintiff could not have averted the mistake by the exercise of ordinary care. Plaintiff endeavored to fully apprise itself of all of the circumstances material to the transaction. None of the transaction documents disclosed

that the Property had been formerly used for the formulation and packaging of pesticides. Further, a search of the deed records failed to disclose such former use of the Property and physical inspection did not and could not have disclosed the problem.

5. If Plaintiff had known of such contamination or the potential for such contamination, Plaintiff would not have entered into the transaction.

6. Rescission of this transaction and restitution of the monies paid by Plaintiff will not result in prejudice to Defendants except for loss of the bargain. Eureka presently occupies half of the original Olin tract which contains two hazardous waste disposal pits. Consequently, Eureka's resumption of possession of the Property should not place an undue hardship upon Defendants.

7. By reason of the mistake as to the contamination of the Property by potentially hazardous toxic chemicals, Plaintiff is entitled to rescission of the transaction and restitution of the $535,546.24 that it paid for the Property plus, to the extent allowed by law, interest on the principal and the value of the improvements.

8. Defendant, Mustang Tractor and Equipment Company, is the successor in interest of Eureka Investment Company and has assumed all rights, interests, assets and liabilities of Eureka Investment Company.

9. Plaintiff has made a timely tender of rescission which has been rejected.

COUNT II

UNILATERAL MISTAKE

X.

Further pleading, and in the alternative, Plaintiff would show the Court that:

1. Plaintiff hereby adopts by reference all of the factual allegations made in Paragraphs IV through VII above, and Plaintiff relies upon the factual allegations therein

contained the same as if such factual allegations were set forth here in full.

2. At the time of the subject transaction, Plaintiff by reason of ignorance was mistaken as to a fact material to the transaction.

3. Plaintiff was unaware that the Property was contaminated with potentially hazardous toxic chemicals. If Plaintiff had known of such contamination or of the potential for such contamination, it would not have purchased the tract.

4. Plaintiff hereby adopts by reference all of the allegations as set forth in Count I, Paragraph IX, Subparagraphs 3 and 4 above and Plaintiff relies upon the allegations therein contained the same as if such were set out here in full.

5. Plaintiff's mistake is of so great a consequence that to enforce the contract as made would be unconscionable. In essence there has been a total failure of consideration. Plaintiff has received nothing but a potential liability for the monies it paid. The potential liability that the Property represents greatly outweighs any other consideration.

6. Plaintiff hereby adopts by reference all of the allegations as set forth in Count I, Paragraph IX, Subparagraphs 6, 7, 8 and 9 above and Plaintiff relies upon the allegations therein contained the same as if such were set out here in full.

COUNT III

FAILURE OF CONSIDERATION

XI.

Further pleading, and in the alternative, Plaintiff would show the Court that:

1. Plaintiff hereby adopts by reference all of the factual allegations as set forth in Paragraphs IV through VII above, and Plaintiff relies upon the factual allegations therein contained, the same as if such allegations were set out here in full.

2. As a result of the aforesaid events, Plaintiff has purchased for $535,546.24 cash a tract of land of no value and which represents a potential legal liability. There has been a total failure of consideration. Plaintiff has received nothing but a potential liability for the monies it paid. The potential liability that the Property represents greatly outweighs any other consideration. Accordingly, Plaintiff seeks by this action judicial rescission of the transaction with accompanying reconveyance of title and possession of the Property to Defendants and restitution to the Plaintiff of the $535,546.24 paid for the Property plus, to the extent permitted by law, interest on the principal and value of the improvements.

3. Plaintiff hereby adopts by reference all of the allegations as set forth in Count I, Paragraph IX, Subparagraphs 6, 8 and 9 above and Plaintiff relies upon the allegations therein contained the same as if such were set out here in full.

COUNT IV

FRAUD IN THE INDUCEMENT

XII.

Further pleading, and in the alternative, Plaintiff would show the Court that:

1. Plaintiff hereby adopts by reference all of the factual allegations as set forth in Paragraphs IV through VII above, and Plaintiff relies upon the factual allegations therein contained, the same as if such allegations were set out here in full.

2. At the time of the subject transaction, Plaintiff was desirous of purchasing the Property of Defendant Eureka for future development, and the suitability of the Property for human presence and the ability to utilize the Property was an important factor in Plaintiff's decision to purchase. All of the aforesaid facts were known by Defendant Eureka.

3. Plaintiff was entirely unaware that the Property had been formerly used for the formulation and packaging of pesticides and that it was contaminated with potentially hazardous toxic chemicals. The fact that the Property was contaminated constitutes a material fact. If Plaintiff had known of such contamination or of the potential for such contamination, Plaintiff would not have entered into the transaction.

4. Prior to the date of the transaction and in the course of negotiations for the sale and the purchase of the Property, Plaintiff inspected the premises. The fact that the land was contaminated with potentially hazardous chemicals was known to Eureka. Eureka was under a duty to disclose material facts which it knew Plaintiff was ignorant of. Moreover, Eureka knew that Plaintiff was acting on the assumption that no such facts existed.

5. Alternatively, Eureka's duty to disclose arose from its affirmative acts of fraudulent concealment. Such acts in themselves implied a representation that the concealed facts did not exist. The facts pertaining to the Olin plant and its subsequent removal were peculiarly in the knowledge of Eureka. Eureka's actions in removing the plant and structures and in grading the tract, in the light of the subsequent sale, constituted affirmative acts of concealment. These acts prevented Plaintiff from obtaining knowledge of the activities of Olin on the site and prevented Plaintiff from obtaining sufficient knowledge to be on notice to make inquiries.

6. Defendant Eureka's concealment was false and misleading to Plaintiff. The Property was at the time of the transaction contaminated with potentially hazardous concentrations of toxic chemicals. Moreover, Eureka failed to disclose the above material facts with full knowledge that its concealment was false and misleading to Plaintiff.

Denied

7. Because of said concealment, Plaintiff was induced to enter into the transaction for the purchase of the Property. Plaintiff would not have entered into the transaction except for the implied representation that the Property was not contaminated with toxic chemicals. The fact that the Property was contaminated and Eureka's fraudulent concealment thereof, were not apparent or ascertainable to Plaintiff on its inspection of the premises.

Denied

8. Eureka knowingly and willfully concealed the fact that the Property had been the site of a pesticide formulating and packaging plant and the fact that the Property was contaminated by hazardous concentrations of toxic chemicals. Eureka concealed these facts with the intention that Plaintiff would thereby be induced to purchase the Property.

Denied

9. By reason of said concealment by Eureka, Plaintiff now seeks rescission of the transaction and restitution of the $535,546.24 that it paid for the Property plus, to the extent permitted by law, interest on the principal sum and the value of the improvements.

Denied

10. Defendant, Mustang Tractor and Equipment Company, is the successor in interest of Eureka Investment Company, and has assumed all rights, interests, assets and liabilities of Eureka Investment Company and is therefore liable for the defalcations of Eureka Investment Company.

Denied

11. Plaintiff has made timely tender of rescission which has been rejected. Plaintiff stands ready to do full equity to the Defendants.

Denied

COUNT V

DECEPTIVE TRADE PRACTICES

XIII.

Further pleading, and in the alternative, Plaintiff would show the Court that:

1. Plaintiff adopts by reference all of the factual allegations as set forth in Paragraphs IV through VII above, and Plaintiff relies upon the factual allegations therein contained the same as if such were set forth here in full.

2. Defendant Eureka has engaged in trade and commerce, as that term is defined in §17.45(6), TEX. BUS. & COMM. CODE ANN., in that Eureka has sold real property which has directly or indirectly affected the people of the State of Texas. More particularly, Eureka on or about July 11, 1978, sold to Plaintiff 9.107 acres of land out of the William Black Survey, Abstract 114, Harris County, Texas, for the sum of $535,546.24 cash.

3. Plaintiff is a "consumer", as that term is defined in §17.45(4), TEX. BUS. & COMM. CODE ANN., in that Plaintiff is a corporation that has acquired goods by purchase.

4. On or about July 11, 1978, Plaintiff purchased the Property from Eureka for the sum of $535,546.24 cash. Plaintiff alleges that Eureka, in inducing Plaintiff to part with its money, engaged in false, misleading, and deceptive acts and practices in the conduct of its trade and commerce, which, independently and collectively, have adversely affected the Plaintiff. Specifically, Eureka failed to disclose that the Property was contaminated with potentially hazardous toxic chemicals, a fact known to Eureka at the time of the transaction. Moreover, Eureka failed to disclose that the Property had been the site of a pesticide formulating and packaging plant, a fact also known to Eureka at the time of the transaction. These failures to disclose were intended to induce the Plaintiff to enter into a transaction which

Plaintiff would not have entered had the information been disclosed. Such failures to disclose by Eureka were false, misleading and deceptive and thus, unlawful under §17.46 TEX. BUS. & COMM. CODE ANN.

5. Further pleading and in the alternative, Plaintiff would show to the Court that Eureka's failure to disclose the fact that the above-referenced Property was contaminated with potentially hazardous toxic chemicals constituted an unconscionable action or a course of action as defined by §17.45(5) of the Texas Deceptive Trade Practices Act. Such failure to disclose took advantage of Plaintiff's lack of knowledge to a grossly unfair degree. Moreover, Eureka's failure to disclose that the Property had been the former site of a pesticide formulating and packaging plant took advantage of Plaintiff's lack of knowledge. Eureka's failure to disclose such information resulted in a gross disparity between the value received and the consideration paid for the Property. Such failure to disclose material information by Eureka constituted an unconscionable action or a course of action under §17.50(a)(3) TEX. BUS. & COMM. CODE ANN.

denied

6. Plaintiff hereby adopts by reference all of the allegations as set forth in Count IV, Paragraph XII, Sub-paragraph 10 and Plaintiff relies upon the allegations therein contained the same as if such were set out here in full.

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7. Plaintiff alleges that it is a consumer, as that term is defined in §17.45(4) of the TEX. BUS. & COMM. CODE ANN. and that it has been adversely affected by the unlawful acts and practices and/or unconscionable actions engaged in by Eureka, as herein above set forth. Specifically, Plaintiff states that, but for Eureka's unlawful and/or unconscionable failure to disclose information, it would not have purchased the Property and that as a direct result of Eureka's unlawful conduct, Plaintiff has been adversely affected economically for which it may recover its monetary damages from Defendants in the sum of $1,000,000.00. Plaintiff would further plead

denied

that because of the employment of unlawful acts by Eureka, Plaintiff is entitled to have such amount of actual damages trebled under the provisions of §17.50(b) (1) of the TEX. BUS. & COMM. CODE ANN. and is also entitled to court costs and attorneys' fees under Subsection (d) of said provision. Alternatively, Plaintiff is entitled to an order rescinding the transaction and restoring to Plaintiff the $535,546.24 paid to Eureka. Moreover, Plaintiff is also entitled to recover its court costs and attorneys' fees under §17.50(d) of the TEX. BUS. & COMM. CODE ANN.

COUNT VI

FRAUD IN A REAL ESTATE TRANSACTION

XIV.

Further pleading, and in the alternative, Plaintiff would show the Court that:

1. Plaintiff hereby adopts by reference all of the factual allegations as set forth in Paragraphs IV through VII above, and Plaintiff relies upon the factual allegations therein contained, the same as if such allegations were set out here in full.

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2. Plaintiff hereby adopts by reference all of the allegations as set forth in Count IV, Paragraph XII, Subparagraphs 2 and 3 above and Plaintiff relies upon the allegations therein contained the same as if such were set out here in full.

same

3. Prior to the date of the transaction and in the course of negotiations for the sale and purchase of the Property, Plaintiff inspected the premises. Eureka was under a duty to disclose material facts pertaining to the Property's former use and its potential or actual contamination with hazardous toxic chemicals. Eureka's duty to disclose arose from its affirmative acts of fraudulent concealment. The facts pertaining to the Olin plant and its subsequent removal were peculiarly in the knowledge of

denied

Eureka. Eureka's actions in removing the plant and structures and in grading the Property, in the light of the subsequent sale, constituted affirmative acts of concealment. These acts prevented Plaintiff from obtaining knowledge of the activities of Olin on the Property and prevented Plaintiff from obtaining sufficient knowledge to be on notice to make inquiries.

4. Plaintiff hereby adopts by reference all of the allegations as set forth in Count IV, Paragraph XII, Sub-paragraphs 6, 7, 8 and 10 above and Plaintiff relies upon the allegations therein contained the same as if such were set out here in full.

5. If the implied representations made by Eureka had been true, the value of the property purchased by Plaintiff would have been $535,546.24. The land purchased actually has a negative value due to the fact that Plaintiff must expend in excess of $1,000,000.00 to make the Property suitable for human presence and future development. Because of Eureka's false and fraudulent acts of affirmative concealment, Plaintiff has been damaged in the sum of $1,535,546.24, being the difference between the value of the Property as impliedly represented by Eureka and the actual value of the Property as received by Plaintiff, which amount Plaintiff is entitled to recover under the provisions of §27.01(b), TEX. BUS. & COMM. CODE ANN. Moreover, because Mustang has benefited from the fraudulent acts of Eureka, it is therefore jointly and severally liable to Plaintiff for such actual damages.

6. Plaintiff would further show that Eureka willfully engaged in affirmative acts of fraudulent concealment and knowingly took advantage of its fraud and that Mustang has knowingly benefited from Eureka's fraudulent acts. Consequently, under the provisions of §27.01(c), TEX. BUS. & COMM. CODE ANN., Eureka and Mustang have become liable to Plaintiff for exemplary damages in the amount of $3,071,092.48.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that Defendants, EUREKA INVESTMENT COMPANY and MUSTANG TRACTOR AND EQUIPMENT COMPANY, be cited to appear and answer herein and that upon final trial hereof, Plaintiff prays:

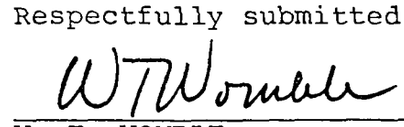
1. That the Court order judicial rescission of the above-mentioned transaction by reason of the grounds set forth in Counts I - V, and that the Court order restitution to the Plaintiff of the $535,546.24 paid for the Property plus, to the extent permitted by law, interest on the principal and the value of the improvements.

2. Alternatively, Plaintiff prays that judgment be entered against Defendants for violation of the Texas Deceptive Trade Practices Act in the sum of $3,000,000 plus court costs and reasonable attorneys' fees.

3. Alternatively, Plaintiff prays that judgment be entered against Defendants for violation of the Texas Land Fraud Statute (§27.01, TEX. BUS. & COMM. CODE ANN.) in the sum of $4,605,000.00.

4. For such other and further relief to which Plaintiff may be entitled, either at law or in equity.

Respectfully submitted,



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