Soboczynski et al. v. Beauchamp et al.

2015 ONCA 282 *April 23, 2015*

The parties entered into an agreement of purchase and sale which contained an "entire agreement" clause. Before the transaction closed, the defendant vendors completed a seller property information statement ("SPIS") in which they stated that the property was not subject to flooding and undertook to inform the plaintiff purchasers of any important changes to the information contained in the SPIS. The defendants failed to inform the plaintiffs of a pre-closing basement flood. After the closing, the basement flooded again, and the plaintiffs found out about the earlier flood. They sued the defendants for damages for negligent misrepresentation. The trial judge found that the entire agreement clause in the agreement of purchase and sale acted as a bar to the action. The Divisional Court allowed the plaintiffs' appeal. The defendants appealed.

Held, the appeal should be allowed.

The action was not precluded by the entire agreement clause. The entire agreement clause operated retrospectively, not prospectively. Its application was restricted to limit representations, warranties, collateral agreements and conditions made prior to or during the negotiations leading up to the signing of the agreement of purchase and sale. When the defendants made representations in the SPIS, a document completed after the agreement of purchase and sale was signed, the entire agreement clause was spent.

The plaintiffs' negligent misrepresentation claim failed in the absence of evidence that they relied on the defendants' representations.

The issue at the centre of this appeal is the legal effect of an entire agreement clause in an agreement of purchase and sale. Specifically, does the clause preclude a purchaser's action in negligent misrepresentation against a vendor for non-contractual representations made subsequent to entering into the agreement but before closing?

The trial judge concluded that the entire agreement clause in the APS acted as a bar to the respondents' action.

The Divisional Court disagreed with the trial judge's conclusion that the entire agreement clause precluded the respondents' tort action. The SPIS required the appellants to tell the respondents about the pre-closing flood. They failed to do so

I (the Panel of Court of Appeal) would allow the appeal. I agree with the Divisional Court that the representations the appellants made in the SPIS are actionable notwithstanding the entire agreement clause in the APS. *However*, in my view, the evidence does not support a finding that the respondents relied on the representations that form the basis of their claim for negligent misrepresentation. In the absence of reliance, the respondents' claim must fail.

Despite my conclusion that the entire agreement clause does not prevent the respondents from advancing a claim in negligent misrepresentation, in my view, their claim still fails because they have not established the fourth element of negligent misrepresentation — reasonable reliance.

The tort of negligent misrepresentation has five elements: *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1964] A.C. 465 (U.K. H.L.); *Queen v. Cognos Inc*., [1993] 1 S.C.R. 87, [1993] S.C.J. No. 3, at p. 110 S.C.R. These elements are (1) a duty of care based upon a special relationship between the plaintiff and defendant; (2) an untrue, inaccurate or misleading statement by the defendant; (3) negligence on the part of the defendant in making the statement; (4) reasonable reliance by the plaintiff on the statement; and (5) damage suffered by the plaintiff as a result

First, when the respondents waived the home inspection condition, there was nothing for the appellants to disclose. They waived the condition prior to the January 9 water incident. Second, and more significantly, there is no evidence that the inspector who performed the home inspection on behalf of the respondents relied on the SPIS in conducting his home inspection or even knew that it existed. Further, the trial judge rejected Mr. Soboczynski's testimony that the SPIS was "part of the property inspection" process. He also expressly found, at para. 30, that the SPIS "was unrelated to the results of an inspection". In the light of these findings, I would not give effect to this submission.

In any event, at the time the property changed hands on January 18, 2008, the $1,648.59 worth of damage caused by the January 9 flood had been repaired. There was no damage to speak of, substantial or otherwise.

Here, had the appellants told the respondents of the January 9 flood, the respondents' position in relation to their obligations under the APS would not have changed. The respondents would have been obliged to complete the transaction under the terms of the APS. The fact that the respondents did not suffer any damage compensable in tort solidifies their inability to prove reliance