

CITATION: Langen v. Sharma, 2024 ONSC 4212
COURT FILE NO.: CV-23-00002388-0000
DATE: 2024 08 02

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: John LANGEN and Nancy LANGEN, Applicants

Rajnish SHARMA and Veena SHARMA, Respondents

BEFORE: Bloom, J.

COUNSEL: J. Wong, counsel for the Applicants

M. Klaiman, counsel for the Respondents

HEARD: June 5, 2024

2024 ONSC 4212 (CanLII)

ENDORSEMENT

I. INTRODUCTION

[1] This matter is an Application for remedies arising from a failed purchase and sale agreement in respect of the sale of the Applicants' residence located at 4 McArthur Heights in Brampton, Ontario.

[2] The Applicants seek: (a) an award of damages of \$400,000, being the difference between the contract price and the lesser amount secured on resale, (b) carrying costs of \$25,319.69, and (c) forfeiture of the deposit of \$100,000. They

contend, as the basis of their claim, that the Respondents breached the purchase and sale contract.

[3] The Respondents raise two arguments in defense against the claims of the Applicants. First, they contend that they were entitled not to close the transaction based on the innocent, material misrepresentation of the Applicants as to the municipal taxes on the property subject of the sale. Second, they rely upon the alleged bad faith conduct of the Applicants arising from and related to the alleged misrepresentation. The Respondents also seek the return of the deposit monies, based on their entitlement not to close the transaction.

[4] The Respondents do not contest the *quantum* of the damages sought, the *quantum* of the carrying costs sought, and the *quantum* of the deposit subject of the forfeiture sought.

[5] In view of the positions of the parties, and the fact that neither contested that the matter could be heard as an Application, I have addressed the proceeding as an Application. In my view Rule 14.05(3)(h) supports the hearing of this matter as an Application, as contended by the Applicants in their materials.

II. UNDISPUTED FACTS

[6] The Respondents, who are spouses, and their son, Anubhav Sharma, on April 23, 2022 entered into an agreement to purchase from the Applicants, who are also spouses, their home at 4 McArthur Heights in Brampton, Ontario for \$2,900,000.

[7] The 3 Sharma's paid a deposit of \$100,000.

[8] On May 1, 2022 the agreement was amended to remove Anubhav as have purchaser, and to extend the closing date to August 15, 2022.

[9] The transaction did not close on August 15, 2022.

[10] The property was resold at a loss of \$400,000; additional carrying charges were incurred by the Applicants of \$25,319.69.

[11] The agreement of purchase and sale contained an entire agreement clause which provided:

This Agreement including any Schedule attached hereto shall constitute the entire Agreement between Buyer and Seller. There is no representation, warranty, collateral agreement, or condition which affects this agreement other than as expressed herein.

III. ARGUMENTS OF THE PARTIES

A. Arguments of the Applicants

[12] The Applicants submit that the Respondents could not obtain the necessary financing to close the transaction; and that they consequently attempted to use a discrepancy between the amount of municipal taxes in the listing of the property, and that in the reassessment which took into account a renovation of the property, to leave the transaction without liability. The Applicants submit that this conduct violated the Respondents duty of honest performance under the purchase and sale contract.

[13] Moreover, the Applicants contend that, contrary to the allegations of the Respondents, there was no material misrepresentation by them on the issue of municipal taxes. The Applicants argue, moreover, that they conveyed to the Respondents on the issue of municipal taxes only what they believed to be true; that they acted in good faith; and that the Respondents accepted without liability of the Applicants any material misrepresentation made to them by the Applicants on the tax issue. Finally, the Applicants submit that there was not present in law the necessary duty of care by them to the Respondents to found a claim for equitable rescission based on innocent, non-negligent material misrepresentation on the municipal tax issue.

B. Arguments of the Respondents

[14] The Respondents argue that the claims of the Applicants are without legal foundation, because they were entitled not to perform the contract based on the innocent, non-negligent, material misrepresentation by the Applicants on the issue of municipal taxes, and based on the bad faith performance by the Applicants of the purchase and sale contract.

[15] More specifically, the Respondents allege that they were entitled to the equitable remedy of rescission for the misrepresentation; and that the Applicants acted in bad faith in performing the contract, by not granting an extension to close the transaction to accommodate the Respondents' efforts to obtain necessary financing. As to the allegation of bad faith performance, the Respondents place significant weight on the allegation that it was the misrepresentation by the Applicants on the tax issue which required the accommodation they sought.

IV. GOVERNING PRINCIPLES

A. Innocent Misrepresentation

[16] The Defendants raise the issue of non-negligent, innocent misrepresentation.

[17] The principles governing that doctrine, as it relates to contract law, are discussed in John D. McCamus, *The Law of Contracts 2d ed.*, (Toronto: Irwin Law Inc., 2012) chapter 10.

[18] The essential principles which emerge from that discussion are : (1) in order to provide a basis for the equitable remedy of rescission the misrepresentation must be a statement of present or past fact that is false; (2) the fact must be material to the decision of the innocent party to enter the contract; (3) the misstatement must have served as an inducement to the decision to enter the contract; (4) equitable rescission can take place along with obtaining a judicial decree to that effect, or can be accomplished by notice of election to rescind communicated by the innocent party, where the election is accompanied by a mutual restoration of the benefits conferred by the parties upon each other; and (5) a rescissionary judicial decree must be sought by the innocent party where the misrepresenter has brought a proceeding to enforce the contract.

B. Effect of Entire Agreement Provisions

[19] The Respondents put forward the following discussion in the reasons of Justice Epstein for the Court in *Krawchuk v. Scherbak*, 2011 ONCA 352 at paras. 71 to 74 as governing the application of entire agreement clauses in cases such as the one at bar:

[71] This takes me to the Scherbaks' second argument that the trial judge erred in finding a duty of care in the face of what is commonly referred to as an "entire agreement" clause, also called an "integration clause", contained in the agreement of purchase and sale.

[72] The entire agreement clause contains the following wording:

This Agreement including any Schedule attached hereto, shall constitute the entire Agreement between Buyer and Seller. There is no representation, warranty, collateral agreement or condition, which affects this Agreement other than as expressed herein.

[73] The clause excludes reliance on representations that are alien to "[t]his Agreement" or "any Schedule attached hereto". In this case, the SPIS was specifically referred to in Schedule "A" to the agreement through the wording: "Included with the offer is the property information statement." Thus, the representations in the SPIS are not alien to the agreement; they have been specifically incorporated into the agreement by the parties and are [page616] available to the parties for the purposes of establishing liability if they are found to be untrue, inaccurate or misleading.

[74] It follows that neither the fact that the statements in the SPIS were not warranties nor the entire agreement clause precludes a finding that the Scherbaks owed a duty of care to Ms. Krawchuk.

[20] The current state of the law has been stated by the Ontario Court of Appeal in *10443204 Canada Inc. v. 2701835 Ontario Inc.*, O.J. No. 4795. The principles which emerge are that an entire agreement clause in a contract can exclude a negligent or fully innocent misrepresentation in accordance with the terms of the clause, but does not exclude from remedy a fraudulent misrepresentation. Justice Zarnett made that point explicitly in the following passage at paras. 24 to 26:

3) Entire Agreement Clauses and Fraudulent Misrepresentations

24 Entire agreement clauses are "generally intended to lift and distill the parties' bargain from the muck of negotiations": *Soboczynski v. Beauchamp*, [2015 ONCA 282](#), [125 O.R. \(3d\) 241](#), at para. 43, leave to appeal to S.C.C. refused, [\[2015\] S.C.C.A. No. 243](#). They are generally read

to apply to what was said or done before the agreement was made, so as to exclude such dealings from affecting the interpretation of the agreement. They are essentially a codification of the parol evidence rule: *Soboczynski*, at paras. 45-47.

25 However, it is one thing to exclude pre-contractual dealings from the interpretive process. It is another to attempt to extend the reach of an entire agreement clause so that it effectively limits the remedies available for a fraudulent misrepresentation. To be consistent with *Hasham* and *Fea Investments*, such a clause, in denying recourse to representations before the making of the contract, could not be read as applying to fraudulent misrepresentations. It could not be read as denying the right of an innocent party to a remedy for a fraudulent misrepresentation, including to rely on the fraudulent misrepresentation as a defence to the action.

26 In my view, this is exactly the conclusion reached by this court in *Royal Bank*, at para. 43: "the defence of misrepresentation is not precluded or diminished by reason only of the existence of an entire agreement clause".

C. The Duty of Good Faith Contractual Performance

[21] In *2161907 Alberta Ltd. v. 11180673 Canada Inc.*, 2021 ONCA 590 at paras. 42 to 45 Justice Rouleau set out the principles concerning the duty of good faith contractual performance:

The Law

42 The Supreme Court in *Bhasin v. Hrynew*, [2014 SCC 71](#), [\[2014\] 3 S.C.R. 494](#), explained that good faith contractual performance is a general organizing principle of the common law of contract. The court also recognized a more specific "manifestation" of the organizing principle in the duty to act honestly in the performance of contractual obligations: at para. 33. In this case, there is no issue as to the existence of a duty of good faith since the parties expressly stipulated such a duty in the License Agreement. The issue is therefore to determine the content of that duty in the circumstances and whether it was breached.

43 Good faith requires "simply that parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily": *Bhasin*, at para. 63. The duty requires that "in carrying out his or her own performance of the contract, a contracting party should have

appropriate regard to the legitimate contractual interests of the contracting partner": *Bhasin*, at para. 65. It does not require that contracting parties serve each other's interests. However, they may not seek to undermine those interests in bad faith.

44 In *Bhasin*, the court identified four distinct legal doctrines operating as manifestations of the general organizing principle: 1) the duty of cooperation between the parties to achieve the objects of the contract; 2) the duty to exercise contractual discretion in good faith; 3) the duty not to evade contractual obligations in bad faith; and 4) the duty of honest performance. These doctrines generally reflect the situations and relationships in which the law requires contracts to be performed honestly, and reasonably, and not capriciously or arbitrarily. Accordingly, the list of recognized duties is not closed: *Bhasin*, at para. 66.

45 The application judge did not specify which of these doctrines was at play in this case, nor did she have the benefit of the Supreme Court's decisions in *C.M. Callow Inc. v. Zollinger*, [2020 SCC 45](#), [452 D.L.R. \(4th\) 44](#), or *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, [2021 SCC 7](#), [454 D.L.R. \(4th\) 1](#), both of which were released after her decision. In its notice of counter-application and its factum, 111 focusses on the duty of honest performance. 111 alleges that 216 knowingly misled 111 about the amounts available to it under the Loan Agreement, that the Branding Fee would be paid and that rent would be deferred. After knowingly misleading 111 in this way, it simply terminated the agreement. 111 further alleges that 216 terminated the agreement to avoid payment of the Branding Fee. All of this conduct, in 111's submission, amounts to a breach of the duty of honest performance.

V. ANALYSIS

A. Findings of Fact

[22] In order to apply the governing legal principles, I must first make findings of fact based on the record before me.

[23] I accept the evidence of Rajnish Sharma in his affidavit of October 27, 2023 as to a number of events prior to the failed closing on August 15, 2022. I will now set out those facts.

[24] Prior to entering into the purchase and sale agreement Mr. and Mrs. Sharma had reviewed the listing agreement for the property. It stated that the property contained at least 6900 square feet of living space, approximately 4800 of which were above ground. Mr. and Mrs. Sharma visually confirmed, prior to signing the contract, that those dimensions were reasonably accurate, but did not make specific measurements.

[25] The listing stated that the municipal taxes on the property were \$7297.03 for 2021.

[26] The amount of the assessed taxes was important to the two Sharmas in their decision to purchase the property, because they wanted to make sure that they could afford to pay the expenses, including taxes, related to owning the property.

[27] They were content with the amount of taxes in the listing because it was approximately \$600 to \$700 above what they were paying on their existing home.

[28] In late May or early June of 2022 Anubhav, the son of Mr. and Mrs. Sharma, advised them, based on discussion with their mortgage broker, that they could not obtain financing to buy the property in question, because the municipal taxes were incorrect. The agency which did the tax assessment, MPAC, had relied on a square footage for the property in making the assessment which was substantially lower than the true figure; a correction in assessment would increase the taxes on the property.

[29] The discrepancy in square footage, and, therefore, taxes arose as a result of the fact that the Applicants had made renovations to the property that were not brought to MPAC's attention, to allow a reassessment in accordance with the assessment system.

[30] Mr. and Mrs. Sharma were concerned about an increase in taxes going forward and the possibility of back taxes being owed on the property.

[31] Mr. and Mrs. Sharma could not secure financing to close on the scheduled date of August 15, 2022.

[32] I accept evidence from the affidavit of Joseph Langen dated July 12, 2023 as the basis for the facts which I now set out.

[33] Negotiations regarding an extension culminated on August 12, 2022 when the purchasers, Mr. and Mrs. Sharma, requested a 3 month extension of the closing date and a \$200,000 reduction in the purchase price.

[34] The Respondents took the position that they needed the extension to secure financing.

[35] The Applicants' ultimate position was that they would agree to an extension of the closing date to September 16, 2022 conditional on the purchasers' providing a further deposit of \$25,000 by August 16, 2022, and the purchasers' delivering their mortgage commitment or approval at least one week prior to closing.

[36] On August 16, 2022 the purchasers communicated that they believed the conditions of the extension offered by the Applicants were too stringent, and, therefore, refused to close the transaction.

[37] The Applicants resold the property at a loss as earlier set out.

[38] I accept the affidavit evidence of Rajnish Sharma that MPAC reassessed the property; and that the taxes became \$10,050.00.

B. Application of the Law to the Facts

[39] I have considered the submissions of the parties, the evidence, and the principles of law set out above. I have concluded that the entire agreement clause in the case at bar excludes the alleged misrepresentation as to municipal taxes contained in the listing. Accordingly, the Respondents are not able to rely upon the doctrine of non-negligent, innocent misrepresentation. Further, based on those findings, I have also concluded that the Respondents' argument based on the duty of good faith contractual performance must fail. Finally, as a result of those conclusions, I make an order that the Respondents are to pay to the Applicants damages of \$425,319.69; and that the deposit of \$100,000.00 is forfeited to the Applicants.

[40] I shall now explain the reasons for those conclusions.

(i) The Entire Agreement Clause Excludes the Alleged Misrepresentation

[41] The entire agreement clause in the *Krawchuk, supra* case relied upon by the Respondents was found by the Court to include in the contract the statements allegedly excluded by the clause. In the case at bar the entire agreement clause does not include the representation as to municipal taxes in the listing as part of the purchase and sale agreement.

[42] Therefore, since the Respondents plead non-negligent, innocent misrepresentation rather than fraudulent misrepresentation, based on the principles articulated by Justice Zarnett in *10443204 Canada Inc.*, *supra* the entire agreement clause in the case at bar precludes reliance by the Respondents on the alleged misrepresentation.

(ii) The Duty of Good Faith Contractual Performance has not been Breached

[43] The basis of the Respondents' argument relying upon the duty of good faith performance was that the Applicants were obligated to accommodate the Respondents' request for an extension, because they had precipitated the need for it by their misrepresentation. In view of the conclusion I have reached in relation to the effect of the entire agreement clause on the alleged misrepresentation, that argument must fail.

(iii) Order

[44] The order I have made as relief for the Applicants reflects that there was no dispute between the parties as to the *quantum* of the damages claimed, or in relation to the forfeiture of the deposit, if the Respondents were not successful in arguing that their non-performance of the agreement was in accordance with law.

VI. COSTS

[45] I shall receive written submissions as to costs of no more than 4 pages, excluding a bill of costs. The Applicants shall serve and file their submissions within 14 days; the Respondents shall serve and file their submissions within 14 days of service of the Applicants' submissions; and there shall be no reply.

Bloom, J.

DATE: August 02, 2024

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BETWEEN:

John LANGEN and Nancy LANGEN

Applicants

-and-

**Rajnish SHARMA and Veena
SHARMA**

Respondents

ENDORSEMENT

Bloom, J.

DATE: August 02, 2024