COURT OF APPEAL FOR ONTARIO

CITATION: Zhang v. Primont Homes (Caledon) Inc., 2024 ONCA 622
DATE: 20240820
DOCKET: COA-23-CV-0781

Roberts, Miller and Gomery JJ.A.

BETWEEN

Yu Zhang and Jun Dai

Plaintiffs (Respondents)

and

Primont Homes (Caledon) Inc., Spectrum Realty Services Inc., Brokerage, Stephen Paul Bozzo, Zorica Aromatario, Homelife Landmark Realty Inc., Brokerage*, and Yu Si*

Defendants (Appellants*)

David Fogel, for the appellants

Yu Zhang and Jun Dai, acting in person

Heard: June 25, 2024

On appeal from the judgment of Justice Irving W. André of the Superior Court of Justice, dated July 6, 2023, with reasons reported at 2023 ONSC 4036.

Gomery J.A.:

Overview

[1] The appellants, a real estate agent and brokerage, appeal the trial judge's order requiring the appellants to pay damages to their former clients, the respondents.

[2] The trial judge found that the appellants negligently misrepresented the location of a proposed development to the respondents and that, relying on this misrepresentation, the respondents entered an agreement of purchase and sale ("APS") for a property within the development. Upon discovering the actual location of the property, the respondents abandoned the agreement and sued the appellants. They also sued the developer and its agents but settled these claims prior to trial.

[3] The trial judge found that the property's location, as represented by the appellants, drove the respondents' decision to enter into the APS and to deposit a total of $120,000 towards the purchase price. The respondents agreed to forfeit the deposit funds to settle their litigation with the developer. The trial judge concluded that the respondents were entitled to recover damages from the appellants equivalent to the deposit plus interest.

[4] The appellants argue that the trial judge erred in finding that they negligently misrepresented the property's location and that the respondents were entitled to recover damages from them for this misrepresentation.

[5] I am not persuaded that the trial judge made any reversible error and would dismiss the appeal.

Background

[6] In February 2017, the respondent Jun Dai signed an APS for a house to be built in a new subdivision by a developer, Primont Homes (Caledon) Inc. ("Primont"). Mr. Dai was interested in the purchase as an investment. He had been told by the appellant, Yu Si, a real estate agent working for the respondent Homelife Landmark Realty Inc., Brokerage, that the property was located at or near the intersection of Mayfield Road and Kennedy Road in Brampton.

[7] Two months later, the respondent Yu Zhang joined Mr. Dai as a co-purchaser on the APS. The respondents together made a series of payments totalling $120,000 as a deposit on the total purchase price of $1,232,500, as required under the APS. The purchase was set to close in March 2019.

[8] In May 2018, the respondents drove by the intersection of Mayfield Road and Kennedy Road to check on the progress of the development. It was at this point that they discovered that the property they had agreed to purchase from Primont in the APS was not located at the site indicated by the appellants but rather at a site about three kilometres north, in Caledon. The respondents took the position that they should not be required to close the purchase and brought this action against various parties, including the appellants, Primont, and Primont's agents. They took the position that all the named defendants had misrepresented the location of the development, as a result of which the respondents were not

required to complete the purchase of the property and were entitled to a return of their deposit.

[9] Prior to trial, the respondents settled their claims against all parties except the appellants. As part of that settlement, the respondents agreed that Primont was entitled to keep the $120,000 deposited. In exchange, Primont abandoned its counterclaim against the respondents for damages flowing from their repudiation of the APS.

[10] Following the trial of the remaining action against the appellants, the trial judge ordered them to pay $120,000 to the respondents, interest on this amount, and costs of $30,000. He declined to award the respondents any damages for lost profit.

Issues

[11] The appellants argue that the trial judge made reversible errors in concluding that (1) the appellants misrepresented the property's location, this misrepresentation was negligent, and the respondents reasonably relied on this misrepresentation in signing the APS and advancing $120,000 to Primont; and that (2) the appellants' negligent misrepresentation caused the respondents to suffer any damages that they were entitled to recover from the appellants.

Analysis

(1) The trial judge made no reversible error in finding that the appellants negligently misrepresented the property's location and that the respondents relied on this misrepresentation

[12] The appellants contend that there was no basis in the evidence for the trial judge to find that they misrepresented the location of the property or that the respondents relied on anything they said about the property. They also challenge the trial judge's finding that the appellants were negligent in the absence of expert evidence on the standard of care of a realtor or broker.

[13] The parties gave divergent accounts of their interactions and communications prior to Mr. Dai's signature of the APS. The trial judge assessed the evidence, in particular as it related to what the appellants allegedly communicated to Mr. Dai about the location of Primont's proposed development. While alive to issues with the respondents' evidence, the trial judge preferred it to the appellants' evidence.

[14] The trial judge found that the appellants' misrepresentation about the property's location was a key factor in the respondents' decision to invest their money in the development. The respondents decided to purchase this particular property because they believed "it was in a 'mature' community with large houses

and schools". He effectively concluded that the respondents would not have signed the APS and deposited $120,000 had they known the property's actual location.

[15] The trial judge's findings of fact with respect to the misrepresentation, and the respondents' reliance on it, were open to him to make on the evidence. It is not this court's role to reassess or reweigh the evidence absent a palpable and overriding error of fact or mixed fact and law. No such error has been identified here.

[16] The respondents did not adduce any expert evidence on the standard of care of a real estate agent or broker. I am not persuaded, however, that such evidence was required to establish the appellants' breach of their duties as realtors in the circumstances of this case.

[17] As a general rule, expert evidence is required to support a claim against a licensed professional, such as a real estate agent: *Krawchuk v. Scherbak*, 2011 ONCA 352, 106 O.R. (3d) 598, at para. 130, leave to appeal refused, [2011] S.C.C.A. No. 319. A breach may, however, be established without the need for expert evidence if a case involves "non-technical matters or those of which an ordinary person may be expected to have knowledge": *Krawchuk,* at para. 133, citing *Zink v. Adrian*, 2005 BCCA 93, 37 B.C.L.R. (4th) 389, at para. 44, *per* Southin J.A. (concurring).

[18] In my view, it was open to the trial judge to find that the appellants' representation that the property was located at Mayfield and Kennedy Roads, as opposed to a completely different location three kilometres distant, involved a non-technical matter. No expert evidence was accordingly required to find that the appellants' misrepresentation was negligent.

(2) The trial judge made no reversible error in finding that the appellants' negligent misrepresentation caused the respondents' damages

[19] The appellants contend that the trial judge erred in finding that their negligent misrepresentation caused the respondents to suffer any loss. They argue that the respondents could not, as a matter of legal principle, recover against the appellants without first recovering damages against Primont. Moreover, the trial judge should have found that the respondents were themselves the authors of their damages, as they could have avoided any financial loss had they not repudiated the APS. Finally, the appellants advance a technical argument based on the pleadings.

[20] In my view, the trial judge did not make a reversible error in finding that the respondents' damages were caused by the appellants' negligent misrepresentation.

[21] A successful plaintiff in a tort action is entitled to be compensated for all reasonably foreseeable losses caused by the tort and to be put into the position they would have occupied but for the injury caused by the defendant, insofar as it

is possible to achieve this through a monetary payment: *BG Checo International Ltd. v. British Columbia Hydro and Power Authority,* [1993] 1 S.C.R. 12, at p. 37; *2105582 Ontario Ltd. (Performance Plus Golf Academy) v. 375445 Ontario Limited (Hydeaway Golf Club)*, 2017 ONCA 980, 138 O.R. (3d) 562, at para. 58.

[22] Proof of causation is fact-specific: *Clements v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181, at para. 8; *Bowman v. Martineau*, 2020 ONCA 330, 447 D.L.R. (4th) 518, at para. 12. As stated by Roberts J.A. in *Bowman*, at para. 10, citing *James Street Hardware and Furniture Co. v. Spizziri* (1987), 62 O.R. (2d) 385, at p. 404: "[T]he restoration of the plaintiff's position requires an approach that is not unnecessarily complicated or rule-ridden but responsive to the facts of each given case".

[23] The appellants' first causation argument is that the respondents could not legally establish that they suffered any loss as a result of the misrepresentation because they did not complete the purchase. To put it another way, the respondents were required to prove that they had the right to repudiate the APS as a condition precedent to any recovery against the appellants.

[24] The appellants rely on *Kaltenegger v. Cao*, 2022 BCSC 2203 for this proposition. In that case, Mr. Kaltenegger sued Ms. Cao after she repudiated her agreement to buy his house. Ms. Cao took the position that she was entitled to abandon the contract because both Mr. Kaltenegger and Ms. Cao's realtor, Mr. Liu,

had misrepresented the property's boundaries. The B.C. Supreme Court trial judge who heard both actions concluded that Ms. Cao had not proved that she was entitled to repudiate her contract with Mr. Kaltenegger and that she must accordingly compensate him for the difference between the price she agreed to pay for the house and the price he ultimately obtained for it from another buyer. Although Ms. Cao had proved that Mr. Liu made negligent misrepresentations that induced her to enter into the contract, the trial judge held that this "negligence did not entitle Ms. Cao to break her contract with Mr. Kaltenegger." As a result, Ms. Cao was not entitled to recover any damages for Mr. Liu's misrepresentations.

[25] Based on *Kaltenegger*, the appellants contend that, since the respondents did not comply with their obligations pursuant to the APS, they cannot recover any damages flowing from the appellants' misrepresentation.

[26] I reject this argument. I am not persuaded that *Kaltenegger* establishes a general rule that any plaintiff who agrees to buy property based on misrepresentations of any kind by a third party, such as a realtor or lawyer, is legally foreclosed from recovering damages for that misrepresentation if they fail to complete the purchase. The result in *Kaltenegger* was, on my reading, specific to the facts of that case. Alternatively, if *Kaltenegger* does purport to establish a general rule, I reject it. The appellants have not pointed to any other authority

supporting their argument on this point. Their position is moreover inconsistent with the Supreme Court of Canada's jurisprudence on concurrent liability.

[27] The appellants are conflating the issue of causation with the respondents' entitlement to assert a separate cause of action against the appellants because of their negligent misrepresentation. The two issues are distinct. A party who has suffered damages may have concurrent claims in contract and tort. In a case "where a given wrong *prima facie* supports an action in contract and in tort, the party may sue in either or both, except where the contract indicates that the parties intended to limit or negative the right to sue in tort": *BG Checo*, at p. 26, citing *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147. As stated in *Rafuse*, at p. 206, "the plaintiff has the right to assert the cause of action that appears to be most advantageous to him in respect of any particular legal consequence".

[28] In *Edgeworth Construction Ltd. v. N. D. Lea & Associates Ltd*., [1993] 3 S.C.R. 206, the principle of concurrent liability was applied where a plaintiff had concurrent claims in contract and tort against two different parties. A contractor successfully bid on a road building contract and entered into a contract with the province of British Columbia for the work. It alleged that it lost money on the project due to errors in the specifications and construction drawings by an engineering firm hired by the government. The contractor sued the engineers who had done the work and their firm for negligent misrepresentation. The action was struck on

the basis that the plaintiff's sole recourse was a claim in contract against the government. Citing *BG Checo*, the Supreme Court of Canada allowed the plaintiff's appeal, rejecting the argument that the plaintiff's contract terminated any duty of care between the contractor and the engineers. In short, "the presence of a contract does not bar the right to sue in tort": *Edgeworth*, at p. 217.

[29] Citing *BG Checo* as well as *Rafuse*, the Court also rejected the argument that the contractor ought to have sued the province, which could then in turn bring a third-party claim against the engineers. It held that "the notion that there is only one right way to proceed – in contract – undercuts the philosophy expressed by this Court … that plaintiffs may sue concurrently in contract and tort, provided the contract does not negate the imposition of a duty of care in tort": *Edgeworth*, at p. 220.

[30] There is no suggestion that anything in the APS in this case precluded the respondents from suing their own real estate agent or broker for a negligent misrepresentation. There was therefore nothing preventing the respondents from suing the appellants, whether or not they chose to pursue a claim in contract (or tort) against Primont. Whether or not the respondents, by failing to close the transaction with Primont, were themselves the authors of the damages they claim against the appellants, is a separate question, to which I now turn.

[31] The appellants contend that, even if the respondents were not required as a matter of principle to go through with the purchase as a condition to recovery for

the appellants' negligent misrepresentation, the trial judge should have found on the facts of this case that it was the respondents' decision to repudiate the APS that actually caused their financial loss. By the respondents' own admission, the property they agreed to purchase increased in value between the time they executed the APS and the trial. Had the respondents not repudiated the APS, they would have acquired a property worth $1,800,000, or nearly $600,000 more than they would have had to pay for it.

[32] The appellants' second causation argument is fundamentally a mitigation defence.

[33] In the context of negligent misrepresentation, courts generally focus on the date that a misrepresentation is discovered, "which is when the representee can be expected to take any necessary mitigating steps": Bruce MacDougall, *Misrepresentation and (Dis)Honest Performance in Contracts*, 2d ed. (Toronto, Ontario: LexisNexis, 2021), at §6.154, p. 495.

[34] In this case, the respondents learned of the negligent misrepresentation months prior to the closing date in the APS. Having discovered the misrepresentation, they had to take reasonable steps to mitigate a potential loss. This involved deciding whether to proceed with the purchase of the property. The respondents chose to take the position that the APS was null and void *ab initio* or, alternatively, that they were entitled to repudiate it. Primont eventually agreed to a

dismissal of its counterclaim against the respondents in exchange for the respondents' abandonment of their claim for a return of the deposit. This meant that the respondents were out of pocket $120,000.

[35] The appellants' mitigation argument presupposes that the respondents foresaw or should have foreseen that the property would increase in value when they discovered the misrepresentation, even though the property was not as well-situated and therefore not as attractive an investment as they had been led to believe. The appellants bear the burden of proving a failure to mitigate: *Bowman*, at para. 31, citing *Janiak v. Ippolito*, [1985] 1 S.C.R. 146, at p. 163. They did not obtain a retrospective appraisal showing that the property had already increased in value at the time the respondents realized the property's actual location and had to decide whether or not to proceed with the APS, nor did they present any other evidence to prove that the respondents should have realized that they would not suffer damages if they proceeded with the purchase.

[36] There was accordingly no evidence that the increase in value was reasonably foreseeable. As counsel for the appellants himself stated in argument on appeal, the appellant Ms. Si "got lucky" in that real estate values rose. In the circumstances of this case, the respondents did not have to assume the risk of an uncertain market to recover against the appellants. The appellants should not be

able to escape the legal consequences of their negligence because the respondents did not take that risk and market conditions happened to improve.

[37] Finally, the appellants contend that the trial judge should not have ordered them to pay damages to the respondents because, in the respondents' statement of claim, they did not seek an order for damages against the appellants. They instead sought an order holding the appellants liable for contribution and indemnity if the respondents were ordered to pay damages or costs to any of the other defendants then named in the action.

[38] This technical argument should not succeed, in my view. It is not the case that the respondents obtained relief that was not pleaded or that the appellants were somehow taken by surprise by this result.

[39] In their statement of claim, the respondents sought contribution and indemnity from the appellants for any amounts they were required to pay to Primont. At the beginning of trial, the trial judge was advised of the settlement between the respondents and Primont whereby the respondents agreed to forfeit the $120,000 deposit to Primont in exchange for the dismissal of Primont's counterclaim.[1] As a result, the respondents took the position that they were entitled

[1] There was no transcript produced of the trial submissions of counsel, however, the parties agreed that the trial judge was advised of the settlement.

to recover $120,000 from the appellants in contribution and indemnity for the amount that they were required to forfeit to Primont under the terms of the settlement.

[40] In these circumstances, no pleadings amendment was required to reflect the settlement. The essence of the respondents' claim was pleaded, and the appellants could not have been surprised by the respondents' position that they were entitled to repayment of the $120,000 deposited plus interest. The issues to be resolved, and the evidence relevant to them, remained the same whether or not the statement of claim was formally amended.

Disposition

[41] For these reasons, I would dismiss the appeal. Since the respondents are self-represented and did not identify any income foregone or disbursements associated with the appeal, I would not award them any costs.

Released: August 20, 2024 "L.B.R."

"S. Gomery J.A."
"I agree. L.B. Roberts J.A."
"I agree. B.W. Miller J.A."