

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Qiao v. Fu*,
2024 BCCA 408

Date: 20241129
Docket: CA49609

Between:

Man Qiao

Appellant
(Plaintiff)

And

Lawrence Fu and New World Realty Ltd.

Respondents
(Defendants)

Before: The Honourable Madam Justice Fenlon
The Honourable Justice Fleming
The Honourable Justice Riley

On appeal from: An order of the Supreme Court of British Columbia, dated
December 21, 2023 (*Qiao v. Fu*, 2023 BCSC 2246, Vancouver Docket S180050).

Oral Reasons for Judgment

Counsel for the Appellant: R. Lo

Counsel for the Respondents: S. Twining
S.J. Gladders

Place and Date of Hearing: Vancouver, British Columbia
November 29, 2024

Place and Date of Judgment: Vancouver, British Columbia
November 29, 2024

Summary:

Appeal of an order dismissing the appellant's claim that her realtor was negligent in assisting her with the purchase of three presale units. The trial judge concluded the realtor did not breach the standard of care, finding: the realtor did not forward the contracts of purchase and sale to a notary because the appellant planned to assign the contracts and instructed him not to forward the contracts, and the appellant had not retained a notary. Held: Appeal dismissed. The appellant's arguments on appeal would require this Court to set aside these foundational findings of fact, but there was no basis to do so. A new issue raised at the hearing will not be considered because it was not pleaded and would prejudice the respondent.

[1] **FENLON J.A.:** These reasons should be considered in the context of the reasons for judgment of the trial judge indexed as *Qiao v. Fu*, 2023 BCSC 2246, which set out the relevant facts and background.

[2] The appellant claims that her realtor, the respondent Mr. Fu, was negligent and breached the standard of care owed by a realtor in relation to three presale contracts.

[3] The judge dismissed the claim after a six-day trial. He found the standard of care, which consisted of an obligation to forward the contracts of purchase and sale to a notary retained by Ms. Qiao, had not been breached because Ms. Qiao had not retained a notary and had instructed Mr. Fu not to send the contracts because she intended to assign them to another buyer.

[4] In essence, the appellant on this appeal challenges the judge's findings of fact. The standard of review concerning findings of fact is one of palpable and overriding error. This is a highly deferential standard. It is not open to an appellate court to set aside findings simply because there was some evidence before the judge that could have supported findings different from the ones he made.

[5] We have concluded that all of the arguments raised by the appellant would require us to set aside these critical findings of fact made by the trial judge:

1. Ms. Qiao had not retained a notary prior to the closing date;
2. She had instructed Mr. Fu not to forward the contracts to the notary; and

3. Mr. Fu acted reasonably in following those instructions.

[6] Respectfully, the appellant has not succeeded in establishing palpable and overriding errors with respect to these foundational findings of fact.

[7] The appellant also challenges the judge’s findings on causation, i.e., his conclusion that Ms. Qiao did not have financing in place to complete all of the purchases on the closing date. We find it unnecessary to address that ground of appeal because the first ground is dispositive of the appeal.

[8] The appellant at the hearing raised a new issue: that the judge did not address whether Mr. Fu had a duty to tell Ms. Qiao when the closing date was to be and failed to do so, which caused her not to be ready with her financing on the closing date of July 24, 2017.

[9] As the respondent points out, this claim was not pleaded, nor was it raised at trial. As a result, the respondent did not lead evidence to address the issue and it would be prejudicial if that matter were to be considered on appeal without a proper evidentiary record. As a new issue, we conclude that this ground should not be addressed and we decline to do so. We note nonetheless that the contract of purchase and sale specified that the purchaser, Ms. Qiao, and the purchaser’s solicitor, were to receive the notice of closing date, not the realtor Mr. Fu.

[10] For these reasons, with thanks to counsel for their submissions, we would dismiss the appeal.

“The Honourable Madam Justice Fenlon”

“The Honourable Justice Fleming”

“The Honourable Justice Riley”