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Olszewski v. Trapman

Between

Mark Olszewski and Mark Olszewski In Trust for Bozena
Olszewski, applicants, and
Yvonne J.P. Trapman and Anthony J. Menchella and Re-max West
Realty Inc., respondents

[2000] O.J. No. 2965
Court File No. 55821/00

Ontario Superior Court of Justice Sheppard J.

Heard: July 4, 2000.
Judgment: August 2, 2000.
(17 paras.)

Sale of land — Remedies of purchaser — Rescission or annulment — Breach of warranty or false representation.

Action by the purchasers for rescission of a contract of purchase and sale, and the return of their deposit of \$100,000. The parties entered into an agreement dated April 3, 2000. The purchase price was \$1,110,000. The agreement described the property as being approximately 1.5 acres. The vendor agreed to provide a survey. He did not have one. The buyers had a survey done. It was dated April 14, 2000. The lot had a very irregular shape and was 1.15 acres. The agreement was conditional upon the buyers being able to get approval for a building permit from the City. They were looking to build a new home of about 16,000 square feet. There were no fence, hedges or other obvious physical markers or boundaries to the property. On May 16, the City advised that the zoning was rural residential and maximum lot coverage for buildings was 10 per cent of lot area. The maximum ground space that could be occupied by a building was 5,009.8 square feet. The buyers took the position that the actual size of the lot was so significantly less than what was both represented and contracted for that the agreement was null and void ab initio, entitling them to rescind the contract and recover their deposits.

HELD: Action allowed. The agreement was void ab initio and the buyers were entitled to rescind the contract. The deposit was ordered to be released forthwith. The inaccurate statement as to the property's acreage was a substantial overstatement which, having regard to the buyers' intention for the property, was such as to entitle them to rescind the contract.

Statutes, Regulations and Rules Cited:

Ontario Rules of Civil Procedure, Rule 14, 14.05(3)(d), 14.05(3)(h).

Counsel:

David M. Sanders, for the applicants.
Alan D. Drenfeld, for the defendants

¶ 1 **SHEPPARD J.**— The parties entered into a standard form Toronto Real Estate Board agreement of purchase and sale for a residential property located in Vaughan. The agreement was dated April 3rd, 2000. The purchase price was \$1,110,000 with a deposit of \$100,000. Requisition date was May 15th, 2000. Closing date was June 1st, 2000.

¶ 2 The agreement described the property as having a frontage of "AS PER SURVEY" and being "Approximately 1.5 acres" in area.

¶ 3 The vendor agreed "to provide, at his expense, within 72 hours, an existing survey of said property" The vendor failed to do this. Apparently the vendor did not have a survey. The purchaser had a survey done. It was dated April 14, 2000. A copy is attached. I attach the copy to show the exceptionally irregular shape of the lot and hence the difficulty in calculating acreage.

¶ 4 The agreement was also "... conditional by the purchaser for 21 days upon the purchaser being able to get approval for a building permit from the City of Vaughan".

¶ 5 The applicant, Mark Olszewski, stated the following facts in his supporting affidavit: (He was not cross-examined on his affidavit.)

- (1) the real estate agent, who was a dual agent, verbally informed the purchasers that the lot was "a two acre lot".
- (2) that he first visited the property on April 3rd, 2000.
- (3) that he and his family were looking to have a new home of approximately 16,000 square feet.
- (4) that there were no fence, hedges or other obvious physical markers or boundaries to the property.
- (5) that having signed the agreement on April 3rd, 2000, he had a colleague contact the City of Vaughan to determine zoning and any building restrictions.
- (7) that on May 16th, 2000, the City of Vaughan advised that the zoning was "Rural Residential" and maximum lot coverage (for buildings) was 10 percent of lot area.
- (9) that on May 8th, the agent personally delivered to a colleague a survey (i) which was sent on to him. He noted the survey did not

provide acreage.

- (i) The document is not a survey but a "Site Plan" prepared, according to counsel, for the respondents in September 1980. The respondents had given the site plan to the agent in connection with an earlier attempt by the respondents to sell their property through this same agent.
- (10) that he commissioned an engineer in his employ who held a doctorate in mathematics to estimate the size of the lot. Using the survey (actually the site plan), he concluded the lot area was 1.2 acres.
- (11) that he then commissioned a registered Ontario Land Surveyor to prepare a survey. The surveyor reported on May 11th, 2000 that the lot size was 1.15 acres.
- (12) that given the zoning restrictions, he concluded that the maximum ground space that can be occupied by a building was 5,009.8 square feet.
- (13) that it was his and his family's intention to build a house on the property occupying approximately 16,000 square feet.

¶ 6 I believe both the requisition date of May 15th and the closing date of June 1st passed with nothing happening. The purchasers/applicants essentially take the position that the actual size of the lot was so significantly less than what was both represented and contracted for that the agreement was null and void "ab initio", entitling the purchasers to rescind the contract and recover their deposit.

¶ 7 The respondents' position is essentially that the applicants knew or ought to have known that the property was in fact 1.15 acres and that the applicants had not proceeded in good faith. Respondents' counsel tended to overstate the facts. For example, in the respondent's factum at paragraph 4, counsel stated:

... The purchaser knew or ought to have known this (i.e. that the property was in fact 1.15 acres because):

- a) prior to his April 3rd execution of the Agreement, being the pre-April 3rd date on which his agent received a Site Plan of the Property setting out its dimensions;

¶ 8 On this one allegation alone, I note:

- (1) the agent was in fact a dual agent.
- (2) the Site Plan had been given to the agent when he was the agent for the vendors in respect of an earlier listing for sale. There was no evidence that the purchasers/applicants received this "Site Plan"

until May 8th as stated by Mark Olszewski at point 9 above.

¶ 9 I have concluded on the evidence that the applicants learned reliably for the first time that the acreage was in fact 1.15 acres when they received this advice from their own surveyor on May 11th, 2000.

¶ 10 This information as to actual acreage as opposed to the represented acreage presented a problem in light of the City of Vaughan's zoning and building by-laws.

¶ 11 Faced with these facts, the applicants rescinded the agreement. The issue is: were they entitled to do in law.

¶ 12 Mr. Sanders produced a very helpful factum succinctly stating the applicable principles of law and the following chart which again succinctly summarizes the facts and results in the cases cited:

The discrepancy comparison between 51, the lot herein, and similar reported cases:

	Promised Lot Size	Actual Lot Size	Actual lot size is __% of promised	Actual lot size is __% smaller
51*	1.5 acres	1.15 acres	76.67%	23.33%
Bouskill v. Campea	172 foot depth	160.75 feet deep	93.46	6.541%
663865 v. Docherty	88 foot depth	72 feet	81.82%	18.18%
Tejani v. Abreu	0.75 acres	0.61 acres	81.33%	18.67%
Hyrsky v. Smith	160 foot breadth	84 foot breadth	52.50%	47.50%

* "51" is the tag given to the property which is the subject of this litigation.

663865 Ontario Ltd. v. Docherty [1995] O.J. No. 956 (Gen.Div.) Tab 2

Hyrsky et al. v. Smith [1969] 2 O.R. 360 (H.C.J.) Tab 4

Tejani v. Abreu [1994] O.J. No. 776 (Gen. Div.) Tab 5

¶ 13 As for stating the applicable principles of law, I do not think that I can do any better than cite the following paragraphs from applicant's counsel's factum:

"11) Where an agreement for the purchase of land described as having a depth of 172 ft. "more or less" and the depth proved to be 11 ft. short, the purchaser is entitled to refuse to complete. The deficiency [of 6.541%] was too substantial to fall within the words "more or less".

Bouskill v. Campea (1976), 68 D.L.R. (3d) 577 (Ont. C.A.), at Quicklaw p. 2. - Tab 1

13) "The question whether the deficiency is substantial enough to entitle the purchaser to avoid the transaction is a question of fact and depends upon all the circumstances of the case."

Bouskill v. Campea (1976), 68 D.L.R. (3d) 577 (Ont. C.A.), at Quicklaw p. 3. - Tab 1

14) It is relevant that fact that the boundaries of the property were not readily ascertainable upon inspection due to the total absence of any stakes or markers.

Bouskill v. Campea (1976), 68 D.L.R. (3d) 577 (Ont. C.A.), at Quicklaw p. 2. - Tab 1

15) The vendor must persuade the Court that it was in a position on the closing date to convey what the vendor had contracted to convey, not as in a case of specific performance with an abatement, that it was able to convey substantially what she contracted to convey.

Bouskill v. Campea (1976), 68 D.L.R. (3d) 577 (Ont. C.A.), at Quicklaw p. 2. - Tab 1

16) The purchaser is not obliged to communicate his intended use of the property to the vendor; it is not considered relevant to a claim for damages for breach of contract or for the return of a deposit. The

purchaser is not precluded from alleging the materiality of the deficiency having regard to his intent even if he keeps it a secret from the vendor.

Bouskill v. Campea (1976), 68 D.L.R. (3d) 577 (Ont. C.A.), at Quicklaw p. 3. - Tab 1

- 17) For a contract to be rescinded for mutual mistake, the mistake must go to the root of the contract. In order to constitute error in *substantialibus*, there must be a mutual, fundamental mistake as to the quality of the subject-matter. The application of this principle must turn on the facts of each individual case. Thus where a parcel of land as bought, and known by the vendor to have been bought, for speculative investment, and by a mutual mistake of the parties the quantity of land conveyed was approximately one-half that contracted and paid for, and unsuitable for the purchaser's purposes, the Court may order rescission of the contract for error in *substantialibus*, whether it is possible to say that there has been a total failure of consideration or not.

Hyrky et al. v. Smith [1969] 2 O.R. 360 (H.C.J.) [as summarized in the headnote] - Tab 4

- 18) "Where there is an agreement in writing and no reformation is sought, the parties should be held strictly to the thing agreed upon, and the Court should not enter into any discussion of the question how nearly the thing tendered as compliance with the contract corresponds with the thing stipulated for."

Stubbs v. Downey [1957] O.J. No. 197 (C.A.), at 2. - Tab 3
adopting and quoting *Smith v. Curtis* (1925) O.W.N. 163 (C.A.)

- 19) "Rescission is available in the case of an executory contract where a material misrepresentation that was an inducement to enter into the contract is established. It is also a good defence to specific performance."

Panzer v. Zeifman [1978] 20 O.R. (2d) 502 (C.A.), Quicklaw at 4. - Tab 6

adopting *Redican et al. v. Nesbitt* [1924] S.C.R. 135 and *George et al. v. Dominick Corp. of Canada* [1973] S.C.R. 97

[Note: *Panzer v. Zeifman* adopted by *Tejani v. Abreu*, at Paragraph 24]

- 20) "Where the misdescription, although not proceeding from fraud, is in

a material and substantial point, so far affecting the subject-matter of the contract that it may reasonably be supposed, that, but for such misdescription, the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether".

Panzer v. Zeifman (1978), 20 O.R. (2d) 502 (C.A.), Quicklaw at 4. - Tab 6

adopting Flight v. Booth (1834), 1 Bing. N.C. 370 at p. 377, 131 E.R. 1160

[Note: Panzer v. Zeifman adopted by Tejani v. Abreu, at Paragraph 24]

¶ 14 This application was brought under R. 14. Specifically, it would be under R. 14.05(3)(d) and (h).

- (3) A proceeding may be brought by application where these rules authorize the commencement of a proceeding by application or where the relief claimed is,
 - (d) the determination of rights that depend on the interpretation of a deed, will, contract or other instrument, or on the interpretation of a statute, order in council, regulation or municipal by-law or resolution.
 - (h) in respect of any matter where it is unlikely that there will be any material facts in dispute.

¶ 15 In my view, the material facts are not in dispute. The inaccurate statement as to the property's acreage was a substantial overstatement which, having regard to the purchaser's intention for the property, was such as to entitle the purchaser to rescind the contract.

¶ 16 This Court declares that the agreement dated April 3rd, 2000 void ab initio and that the applicants were entitled in law to rescind the contract. Further, this Court orders the agent to release forthwith the deposit money plus accumulated interest to the applicants or as they direct. Should there be an appeal of this order, the agent is directed upon a notice of appeal being filed to forthwith pay the deposit plus accumulated interest into court to the credit of this action.

¶ 17 Costs to the applicants to be assessed.

SHEPPARD J.

[Quicklaw Note: See paper copy for Diagram 1.]