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2011 CarswellAlta 1321, 2011 ABQB 488, [2012] A.W.L.D. 3401, [2012] A.W.L.D. 3400, 206 A.C.W.S. (3d) 225

Leishman v. Virostek

Elaine M. Leishman, Plaintiff and Todd Virostek and Wilma Virostek, Defendants and Robin Burwash, Maxwell Town and Country Ltd., 790823 Alberta Ltd. And Loren Reagan, Third Party

Alberta Master

Master J.B. Hanebury

Heard: June 23, 2011
Judgment: July 28, 2011
Docket: Lethbridge/Macleod 1006-00476

Counsel: Richard A. **Low**, for Plaintiff

J. Kelly Hannan, for Defendants

C. Otto, for Third Party

Subject: Contracts; Property; Civil Practice and Procedure

Real property --- Sale of land — Agreement of purchase and sale — Interpretation of contract — Conditions — Conditions precedent — Miscellaneous

Damages — Application by plaintiff vendor for summary judgment of $154,587 — Plaintiff sold house to defendants, conditional on defendants selling their house — Defendants waived condition in February 2008 — However, in September 2008, economy worsened and defendants had still not sold their home so they did not complete sale — Plaintiff sold home two years later, but for less money, so sought damages for her loss — Defendants argued summary judgment was inappropriate because the property was incorrectly described in the agreement, there were latent defects that would have entitled them to rescind contract and plaintiff did not prove she received notice of waiver on time — Application allowed in part — Defendants planned to purchase both lots but contract only referred to one lot — However, listing clearly showed both lots and plaintiff always intended to convey both lots so there was no unilateral mistake that would prevent judgment — Defendants claimed defects included leaky skylight, problematic boiler and dead trees — There was insufficient evidence on these alleged defects and, even if defendants' complaints were accurate, they did not render the property uninhabitable so defendants would have been entitled to damages at most — There was no clear evidence plaintiff received

waiver on time — However, parties treated contract as binding for six months after and defendants did not make any claim for return of deposit, so evidence established mutual waiver and it was too late for defendants to raise this argument — There was no genuine issue for trial — However, defendants were given until September 15th to examine realtor's file and plaintiff on quantum of damages, then matter would be remitted back to court for assessment. (8 pp.).

Real property --- Sale of land — Completion of contract — Time of performance — Waiver

Breach of contract damages — Application by plaintiff vendor for summary judgment of $154,587 — Plaintiff sold house to defendants, conditional on defendants selling their house — Defendants waived condition in February 2008 — However, in September 2008, economy worsened and defendants had still not sold their home so they did not complete sale — Plaintiff sold home two years later, but for less money, so sought damages for her loss — Defendants argued summary judgment was inappropriate because the property was incorrectly described in the agreement, there were latent defects that would have entitled them to rescind contract and plaintiff did not prove she received notice of waiver on time — Application allowed in part — Defendants planned to purchase both lots but contract only referred to one lot — However, listing clearly showed both lots and plaintiff always intended to convey both lots so there was no unilateral mistake that would prevent judgment — Defendants claimed defects included leaky skylight, problematic boiler and dead trees — There was insufficient evidence on these alleged defects and, even if defendants' complaints were accurate, they did not render the property uninhabitable so defendants would have been entitled to damages at most — There was no clear evidence plaintiff received waiver on time — However, parties treated contract as binding for six months after and defendants did not make any claim for return of deposit, so evidence established mutual waiver and it was too late for defendants to raise this argument — There was no genuine issue for trial — However, defendants were given until September 15th to examine realtor's file and plaintiff on quantum of damages, then matter would be remitted back to court for assessment. (8 pp.).

Cases considered by *Master J.B. Hanebury*:

Bedrock Exploration Ltd. v. Allen (2003), [2003] 11 W.W.R. 695, 2003 ABQB 532, 2003 CarswellAlta 851, 39 C.P.C. (5th) 360, 347 A.R. 265, 16 Alta. L.R. (4th) 302 (Alta. Q.B.) — referred to

Belzil v. Bain (2001), 300 A.R. 72, 2001 ABQB 890, 2001 CarswellAlta 1375, 45 R.P.R. (3d) 233 (Alta. Q.B.) — referred to

Gibb v. Sprague (2008), 2008 CarswellAlta 690, 70 R.P.R. (4th) 177, 2008 ABQB 298, [2008] 9 W.W.R. 746, 93 Alta. L.R. (4th) 91, 447 A.R. 8 (Alta. Q.B.) — referred to

Guarantee Co. of North America v. Gordon Capital Corp. (1999), [2000] I.L.R. I-3741, 126 O.A.C. 1, 247 N.R. 97, 49 B.L.R. (2d) 68, [1999] 3 S.C.R. 423, 15 C.C.L.I. (3d) 1, 178 D.L.R. (4th) 1, 1999 CarswellOnt 3171, 1999 CarswellOnt 3172, 39 C.P.C. (4th) 100 (S.C.C.) — referred to

Hagel v. Moffat (2010), 2010 ABQB 613, 2010 CarswellAlta 1895, 96 C.L.R. (3d) 304 (Alta. Q.B.) — considered

Keen v. Alterra Developments Ltd. (1993), 1993 CarswellOnt 642, 35 R.P.R. (2d) 278 (Ont. Gen. Div.) — considered

Leasing Group Inc. v. Prospect Developments (2003) Inc. (2010), 92 R.P.R. (4th) 310, 2010 ABQB 234, 26

Alta. L.R. (5th) 33, 2010 CarswellAlta 1013 (Alta. Q.B.) — distinguished

Papaschase Indian Band No. 136 v. Canada (Attorney General) (2008), *(*sub nom. *Lameman v. Canada (Attorney General))* 372 N.R. 239, [2008] 5 W.W.R. 195, 2008 CarswellAlta 398, 2008 CarswellAlta 399, 2008 SCC 14, [2008] 2 C.N.L.R. 295, 68 R.P.R. (4th) 59, 292 D.L.R. (4th) 49, *(*sub nom. *Canada (Attorney General) v. Lameman)* [2008] 1 S.C.R. 372, *(*sub nom. *Lameman v. Canada (Attorney General))* 429 A.R. 26, *(*sub nom. *Lameman v. Canada (Attorney General))* 421 W.A.C. 26, 86 Alta. L.R. (4th) 1 (S.C.C.) — considered

Pioneer Exploration Inc. (Trustee of) v. Euro-Am Pacific Enterprises Ltd. (2003), 339 A.R. 165, 312 W.A.C. 165, 27 Alta. L.R. (4th) 62, 2003 ABCA 298, 2003 CarswellAlta 1498 (Alta. C.A.) — referred to

Thiel v. Perepelitza (1982), 37 A.R. 43, 1982 CarswellAlta 75, 19 Alta. L.R. (2d) 293 (Alta. C.A.) — considered

***Master J.B. Hanebury*:**

1 Ms. Leishman sold her house in Picture Butte to the Virosteks, conditional on the Virosteks selling their house in Turner Valley. The purchasers waived that condition in February, 2008. In September, 2008, when the transaction was due to close, the economy had taken a turn for the worse and they had not sold their Turner Valley house. As a result, the Virosteks did not complete the transaction. Two years later Ms. Leishman sold her house, but for less money. She now seeks summary judgment for damages in the amount of $154,587.95. The Virosteks, relying on issues that only came to their attention after the closing date, say her claim must go to trial.

Facts

2 The purchasers and Ms. Leishman entered into a contract on February 14, 2008. It was for the purchase of 505 Maple Crescent in Picture Butte, legally described as Lot 42. The sale was conditional on the sale of the purchasers' home in Turner Valley, which condition was to be met or waived by written notice to Ms. Leishman by 9 PM on February 29, 2008, failing which the contract ended immediately thereafter.

3 On or about February 28, the parties amended the closing date from April 30, 2008, to September 15, 2008.

4 On February 29, 2008, the purchasers signed a notice of waiver of the condition and gave that notice to their real estate agent. The evidence does not confirm if this document was received by Ms. Leishman or her agent prior to 9 p.m. as required under the contract.

5 In any event, on September 12, 2008, Ms. Leishman's solicitor sent the closing documents, including the transfer of land, to the purchasers' solicitor. He advised the purchasers' solicitor that an up-to-date real property report and compliance certificate had been ordered but not received. He gave an undertaking to provide this documentation when it was received. Ms. Leishman's solicitor received it on September 15, 2008.

6 On September 15, 2008, prior to this documentation being forwarded, the purchasers' solicitor informed Ms. Leishman's solicitor that his clients would not be proceeding with the purchase of the property because they had not yet sold their Turner Valley house.

7 Unbeknownst to the purchasers, a mistake had been made in the legal description of the property. The house straddled two lots, and while the municipal address was correct, the house was on Lot 42 and Lot 35. The conveyancing documents provided to the purchasers' solicitor were only for Lot 42.

8 Ms. Leishman then relisted the property for sale and sold it in 2010 for $447,000. She now seeks judgment for her loss.

9 The purchasers raised three issues which they argue bar the granting of judgment on a summary basis.

Issues

10 Firstly, the purchasers say that judgment should not be granted because the property was incorrectly described and they would have received only half of a house.

11 Secondly, the purchasers argue that there were defects in the property, including a leaky skylight, problematic boiler and dead trees on the property. They say they may not have closed the transaction as a result.

12 Thirdly, the purchasers argue that Ms. Leishman has not discharged her onus of establishing the facts necessary for judgment as she did not prove that the waiver of condition was received by her within the time allotted.

Analysis

13 The purpose of a summary judgment application was considered by the Supreme Court of Canada in *Papaschase Indian Band No. 136 v. Canada (Attorney General)*, 2008 SCC 14 (S.C.C.) at paragraph 10:

> This appeal is from an application for summary judgment. The summary judgment rule serves an important purpose in the civil litigation system. It prevents claims or defences that have no chance of success from proceeding to trial. Trying unmeritorious claims imposes a heavy price in terms of time and cost on the parties to the litigation and on the justice system. It is essential to the proper operation of the justice system and beneficial to the parties that claims that have no chance of success be weeded out at an early stage. Conversely, it is essential to justice that claims disclosing real issues that may be successful proceed to trial.

14 The test when considering an application for summary judgment is well known. In essence, there must be no genuine issue for trial: *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 (S.C.C.).

15 In considering a summary judgment application, the plaintiff bears the evidentiary burden of proving its cause of action on a balance of probabilities. Each and every fact necessary to support the claim must be proven. After it has done so, the evidentiary burden shifts to the defendant, but the ultimate burden remains, as always, with the plaintiff. The defendant can avoid a summary judgment in favour of the plaintiff by proving that there is a genuine issue for trial. If the defendant does so, the plaintiff has failed to meet its ultimate burden: *Pioneer Exploration Inc. (Trustee of) v. Euro-Am Pacific Enterprises Ltd.*, [2003] A.J. No. 1305 (Alta. C.A.).

16 The issues raised by the purchasers must be considered in light of this test.

Does the incorrect description of the property raise a genuine issue for trial?

17 The purchasers argue that, for the contract to be enforceable, the parties must have had the same intent, as ascertained from its outward expression: Fridman, *The Law of Contract 5th ed.* (Toronto: Carswell 2006) at 14. They say that they planned to purchase both lots but Ms. Leishman's conduct indicates an intention to sell only one lot.

18 They note that the purchase and sale contract refers only to Lot 42, and a municipal address of 505 Maple Crescent. Similarly, the transfer only referred to lot 42. The real property report would have disclosed the two lots but it was not provided with the closing documents. Finally, the eventual sale of the property was only of lot 42 and lot 35 was transferred to the new purchasers some 4 months later. The purchasers point to this action as well and note that lot 35 was not mentioned in the statement of claim and the real property report was not included in the affidavit of records.

19 They argue that this misdescription is more than a mere clerical error by the office of Ms. Leishman's conveyancing lawyer. They argue that all of the evidence suggests that Ms. Leishman did not intend to sell them Lot 35. Therefore they have a defence based on unilateral mistake rendering the contract unenforceable: *Bedrock Exploration Ltd. v. Allen*, 2003 ABQB 532 (Alta. Q.B.) at para. 32.

20 Ms. Leishman responds that these allegations are silly. The failure to include lot 35 was an oversight and had nothing to do with the failure of the purchasers to close the transaction. There are separate tax certificates for each lot and separate municipal addresses; however the taxes for both lots were billed under Lot 42. She relies on the Alberta Court of Appeal decision in *Thiel v. Perepelitza*, 1982 CarswellAlta 75 (Alta. C.A.).

21 In that case the purchaser and vendor looked at the lands and signed a sale agreement. The vendors then discovered that the lands comprised more than 6 acres, not the 4.8 acres they had advertised. The vendor tried to change the boundaries of the land to reduce its size. The purchasers brought an action for specific performance.

22 The Court of Appeal said, at paras. 12 and 14:

> ...and so the surrounding circumstances at the time of contracting in this particular case clearly identifies the parcel of land the parties referred to in the agreement for sale... In my view the fact that the agreement for sale described the parcel as being 4.8+/- acres does not, simpliciter, give rise to an argument based on mistake as to the subject matter of the contract when the contract is construed in the light of the surrounding circumstances. Those circumstances disclosed that the parties agreed upon and identified the parcel that was the subject matter of the contract... those circumstances make it clear that the subject matter of the contract was the area of land identified by the parties when the purchaser attended at the site.

23 In this case the listing sheet clearly showed the lot size as being 120 × 126 feet, ie. both lots, not just Lot 42. Taxes for both lots were billed to Lot 42. Ms. Leishman confirms that it was always her intention to convey both lots to the defendants. As in the case of *Thiel*, all of the parties involved clearly knew what was being transferred. It is not reasonable to think that Ms. Leishman had any intention of transferring only half of her house. It makes no sense.

24 There is no genuine issue to go to trial on the question of unilateral mistake.

Do the alleged defects in the property in relation to the skylight, boiler and trees, raise a genuine issue for trial?

25 The purchasers argue that the alleged defects entitle them to the rescission of the contract, and rely on the case of *Keen v. Alterra Developments Ltd.*, 1993 CarswellOnt 642 (Ont. Gen. Div.). In that case the claim was related to the construction of a "dream" house and certain promises were made by the builder as to the elevation of the entry to the home. The entry elevation was crucial to the French country house look of the purchasers' desired home and they had already sold another lot as the correct elevation could not be obtained. The builder failed to advise them of a change in the elevation prior to construction and then would not allow them to assign the contract. The purchasers sought the return of their deposit.

26 The court considered when an innocent misrepresentation provides a right to the rescission of the contract. At common law, it must relate to a representation that is a condition, ie. a vital term that goes to the root of the contract. In equity, it must not necessarily relate to a term of the contract, but it must have been an inducement to enter into the contract

27 The court found that, in the facts of that case where the elevation was clearly of crucial importance to the purchasers, there were innocent misrepresentations that induced the purchasers to enter into the contract. The deposit was returned to them and the counterclaim against them was dismissed.

28 In this case the purchasers say that the realtor alleged that the roof had been repaired and the boiler was operational. They also say that the silence of Ms. Leishman as to some of the trees on the property being dead amounts to a misrepresentation as it was winter and the health of the trees could not be ascertained. The trees, they say, were important to them as they were considering running a day home and needed a good yard.

29 There is no evidence that there was a problem with the boiler in 2008. Repairs to the roof and the boiler were ultimately undertaken at the time of the sale in 2010, at a cost of $3100.00 and $1753.50 respectively.

30 The purchasers do not say that they would not have purchased the property had they known these representations were incorrect. They say they *may not* have purchased the property.

31 These facts are simply insufficient to support a claim for rescission either in equity or under the common law.

32 The defendants also argue that these problems were defects in the property that should entitle them to the rescind the contract and the return of their deposit.

33 Problems with real property are considered in law to be either patent or latent defects. The differences between the two have been described in the case law:

> Defects of quality may be either patent or latent. Patent defects are discoverable by inspection and ordinary vigilance on the part of a purchaser and latent defects are such as would not be revealed by any inquiry which a purchaser is in a position to make before entering into the contract for purchase: ***Nash v. McMillan*** (1997) 222 A.R. 4 at 11 (QB).

34 In *Hagel v. Moffat*, 2010 CarswellAlta 1895 (Alta. Q.B.) the court confirmed that the vendor is under no obligation to call patent defects to the purchaser's attention. Absent concealment of the defects, the purchaser cannot complain later. Caveat emptor applies. However, a latent defect must be disclosed. Failure to draw the purchaser's attention to a latent defect entitles the purchaser to damages only, unless the defect is such that it renders the house dangerous or uninhabitable: *Belzil v. Bain*, 2001 ABQB 890 (Alta. Q.B.), para 56-58; *Hagel v.*

Moffat, para. 9; *Gibb v. Sprague*, 2008 CarswellAlta 690 (Alta. Q.B.) para 44, 49.

35 Assuming, for the purposes of this decision, that all of these defects are latent defects, there is no evidence that any of them rendered the premises uninhabitable or dangerous. They, at most, entitle the purchasers to damages, for which no claim has been made in the counterclaim. This argument does not raise a genuine issue for trial.

Does the failure of Ms. Leishman to prove that she received the waiver of condition on time raise a genuine issue for trial?

36 The onus is on the applicant to prove its case. The purchasers argue that this includes an obligation to demonstrate that Ms. Leishman received the waiver of the purchasers' condition on time and she has not done so. The contract, they point out, makes time of the essence and required that the condition be met or waived by written notice to Ms. Leishman by 9 p.m., Feb. 29, 2008. If the notice was not given, "then [the] Contract is ended immediately following that Condition Day."

37 In support of its argument the purchasers rely on *Leasing Group Inc. v. Prospect Developments (2003) Inc.*, 2010 ABQB 234 (Alta. Q.B.). In that case a waiver of a true condition precedent was signed by the vendor on time but communicated outside the contractual time limit. The purchasers treated the contract as at an end and successfully sued for the return of their deposit.

38 Strekaf J., in the course of her reasons noted that this was not a situation where there was evidence of mutual waiver of the true condition precedent.

39 In this case there is no clear evidence that Ms. Leishman received the waiver within the time set out in the offer. Closely examined, the copy of the waiver attached to Ms. Leishman's affidavit has a date and fax number that may indicate it was sent to her agent on an indecipherable date in March, 2008.

40 However, the situation in this case differs from that in *Leasing Group*. Assuming for the purposes of this decision that the condition in issue was a true condition precedent, both parties continued to treat the contract as a binding contract for the next six months. Closing documents were forwarded. No mention was made of the contract ending in February, 2008, until the commencement of this action in 2010. No claim was made prior to this action for the return of the deposit.

41 There is evidence of mutual waiver in this case. Both parties fully intended to complete the transaction for the six months after the alleged late delivery of the waiver of condition. It is simply too late to raise this argument. It does not raise a genuine issue for trial.

Conclusion

42 The application for summary judgment is granted.

43 Mr. and Ms. Virostek ask that judgment not be awarded and damages be assessed. They did not cross-examine Ms. Leishman. They now seek access to her realtor's and lawyer's files, apparently to ensure that appropriate efforts at mitigation were made and adjustments were not made to the purchase price in relation to the aforementioned problems with the property.

44 The realtor's lawyer made no submissions on this point and the application for access to the realtor's file

is granted. The request to view the file of Ms. Leishman's lawyer is denied as it is unclear how access to that file is relevant to the remaining issue.

45 The realtor's file is to be provided forthwith. If Mr. and Ms. Virostek wish to examine Ms. Leishman in relation to her claim for damages that is to occur by September 15, 2011. The matter is to be remitted back to court for an assessment by October 31, 2011.

46 If the parties cannot agree as to costs, they may speak to the question within 30 days of the date of these reasons.

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