
CANADA / JUDGMENT

0741340 B.C. Ltd. v. Johnston

2012 BCSC 363

COURT

Supreme Court of British Columbia

DECIDED

13 March 2012

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2012 BCSC 363 0741340 B.C. Ltd. v. Johnston

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

0741340 B.C. Ltd. v. Johnston,

2012 BCSC 363

Date: 20120313

Docket: S091153

Registry: Vancouver

Between:

0741340 B.C. Ltd.

Plaintiff

And

Debra Lynne Johnston

Defendant

Corrected Judgment: The text of the Judgment was corrected at paragraphs 45 to 48 on June 26, 2012

Before: The Honourable Mr. Justice Affleck

Reasons for Judgment

Counsel for the Plaintiff:

G.R. Johnson

M.G. Swanson

Counsel for the Defendant:

R.S. Anderson, Q.C.

J.K. Yamashita

Place and Date of Trial/Hearing:

Vancouver, B.C.

January 26, 2012

Place and Date of Judgment:

Vancouver, B.C.

March 13, 2012

The Applications

- [1] On November 17, 2011, the defendant filed a notice of application for the summary trial and dismissal of the plaintiff's claim and for the summary trial and judgment for the defendant on the counterclaim. On December 1, 2011, the plaintiff filed a notice of application to adjourn the defendant's application pending cross-examination on Affidavit #1 of the defendant and Affidavit #1 of Rodney Barton Johnston ("Mr. Johnston"), both made on November 14, 2011, in support of the summary trial application.
- [2] The statement of claim seeks damages for breach of a contract to purchase a strata lot. The further amended statement of defence alleges the plaintiff breached a fundamental term of the contract regarding a hedge, and failed to meet its obligations of disclosure pursuant to the Real Estate Development Marketing Act, S.B.C. 2004, c. 41 [REDMA]. The defendant seeks rescission, return of the deposit, and damages.

The Material Evidence Regarding the Location of a Hedge which the Defendant Alleges was Fundamental to the Contract to Purchase a Strata Lot

- [3] The defendant and Mr. Johnston are wife and husband respectively. In 2008 they decided to purchase a townhouse in a strata development known as Vinterra. The plaintiff is the developer of Vinterra.
- [4] The listing agent of the townhouse was MAC Marketing Solutions Inc. ("MAC") and Tara Fluet in 2008 was an employee of MAC who dealt with the defendant and with Mr. Johnston in regard to their interest in purchasing at Vinterra. Jim Titus at the material time was a real estate agent who represented the defendant in the intended transaction and had many dealings with Ms. Fluet. Mr. Titus also was the listing agent for the Johnston family in respect of the home they were then living in which I will call the "existing home".

- [5] In November 2008, the defendant listed the existing home for sale with Mr. Titus. She and Mr. Johnston, along with Mr. Titus, met with Ms. Fluet to view several locations at Vinterra. The defendant and Mr. Johnston were particularly attracted to Strata Lot 44 because it had a home with the back yard facing southwest. This was important to the defendant and Mr. Johnston in part because Mr. Johnston suffers from psoriasis which he treats by exposure to sunlight.
- [6] In her Affidavit #1, the defendant deposes that "the back yard of [Strata Lot 44] was completely open and unenclosed [and] [g]iven the proximity of Strata Lot 44 to the public park and the lack of enclosure, [Mr. Johnston] and I were extremely concerned about security and privacy."
- [7] The defendant and Mr. Johnston depose there were discussions about both the privacy concerns and Mr. Johnston's psoriasis and his need for sunlight. Ms. Fluet denies any discussion about psoriasis.
- [8] On November 18, 2008, the defendant made a written offer (the "First Offer") to purchase Strata Lot 44. Attached to the offer were several addendums, one of which was signed by the defendant, and reads in part:

Seller to provide and install a 6' Cedar Hedge, and wire fencing along the hedging to enclose back yard. To extend[sic] patio to full width of home.

- [9] The defendant describes this as the "First Hedge Term."
- [10] The defendant's evidence is that she and Mr. Johnston "discussed the First Hedge Term with Ms. Fluet before the First Offer was forwarded by Ms. Fluet to the plaintiff." The defendant deposes the First Hedge Term and the location of the hedge "were a crucial part of our decision to make an offer on Vinterra."
- [11] The defendant deposes that the plaintiff counteroffered to the First Offer and, among other changes, deleted the First Hedge Term. The defendant did not accept the counteroffer because of the deletion and because she was becoming concerned about the sale of the existing home. However, on November 29, 2008, an offer was made to purchase the existing home, and the next day the defendant made a Second Offer to purchase Strata Lot 44. The Second Offer was prepared by Ms. Fluet and had several addendums. In paragraph 32 of her Affidavit #1, the defendant describes the addendums which she initialled or signed and which were witnessed by Ms. Fluet or Mr. Titus. The defendant's evidence is that the Addendums to the Second Offer were prepared by Ms. Fluet at the Vinterra site office while Ms. Johnston and Mr. Titus were present. One such addendum provided as follows:

Seller to provide and install [sic] a 4' Cedar Hedge along property boundary of rear yard.

- [12] The Addendum concerning the hedge is described by the defendant in her affidavit as the "Second Offer Hedge Term" and she deposes that it was discussed with Ms. Fluet before the Second Offer was given to the plaintiff, and that term "and the corresponding location of the hedge were very important to us."
- [13] The plaintiff made a counteroffer to the Second Offer which contains several addendums including an amendment to the Second Hedge Term, which amendment reads:
- Seller to provide and intall [sic] a 4' Cedar Yew Hedge along property boundary of rear yard.
- [14] The counteroffer was accepted by the defendant on December 1, 2008, with a completion date of January 29, 2009. The defendant also accepted an offer to purchase the existing home with the same completion date. On December 15, 2008, the defendant paid a deposit of \$76,900 towards the purchase of Strata Lot 44.
- [15] On January 20, 2009, the defendant and Mr. Johnston depose that they met with Darren Lanthier, a representative of the plaintiff, for the purpose of a "deficiency walk-through." There was no hedge planted at that time, but the defendant "agreed with Mr. Lanthier that the trees would be planted before the completion date." On January 26 or 27, 2009, the defendant and Mr. Johnston "observed that a few trees had been planted around the boundary of the back yard." The defendant spoke to Mr. Lanthier, who "did not provide a satisfactory explanation ."
- [16] The defendant deposes that on either January 26 or January 27, 2009, a sales agent of the plaintiff (who appears to have been Catherine Thaker) telephoned her to say "the Hedge had not been planted due to an 'easement' issue." On January 26, 2009, the plaintiff wrote to the Strata Council requesting permission to build a fence "to enclose the back yard of Strata Lot 44." On the evening of either January 26 or 27, 2009, the defendant and Mr. Johnston contacted Ms. Fluet and Mr. Titus to determine the nature of the easement issue. The defendant deposes that Ms. Fluet "told us that same night that everything would be resolved to our satisfaction with the hedge being planted before the completion date ."
- [17] The plaintiff relies on the affidavit of Catherine Thaker who in 2008 and 2009 worked for MAC in marketing and sales and who, in her Affidavit #1, gives evidence as follows:
5. During my phone call with Ms. Johnston, I said that I was calling to talk about the hedge and to see what Ms. Johnston's concerns were. Ms. Johnston appeared very angry. Her voice was raised and after I briefly introduced myself it seemed like she was no longer interested in letting me talk. Ms. Johnston told me she was going to go to strata council to ask for a fence enclosing the yard behind strata lot 44 and she complained about how Jim Titus did not take care of her. She said that the fence enclosing the yard behind strata lot 44 was the most important issue for her. I recall the phone call lasting about two or three minutes. At no time during this call did I tell Ms. Johnston that a hedge could not be planted in the yard behind strata lot 44. Moreover, at no time during this call did I mention that there were any "easement issues." At the time I placed this phone call, I had no knowledge of there being an

easement in the rear yard behind strata lot 44 and, at the present time, I have no knowledge of there being an easement in the rear yard behind strata lot 44.

- [18] On January 27, 2009, the defendant signed various documents to complete the purchase of Strata Lot 44, including those necessary for the financing of the purchase.
- [19] On January 28, 2009, the defendant "observed no changes with respect to the back yard and the placement of the trees. Rod [Mr. Johnston] told me that the plaintiff was unable to install the hedge as the boundary of the back yard of Strata Lot 44 was located on Vinterra common property and that the plaintiff was unable to guarantee a permanent hedge around Strata Lot 44." The defendant declined to complete the transaction and on January 29, 2009, her counsel wrote to the solicitor for the plaintiff, taking the position the plaintiff had breached the contract and demanding return of the deposit.
- [20] Darren Lanthier was employed at the material time by the construction manager for the plaintiff. He recalls the walk-through of Strata Lot 44 with the defendant, Mr. Johnston and Mr. Titus. Mr. Johnston told Mr. Lanthier that he and the defendant wanted to install a fence at the rear yard, and Mr. Lanthier said they would need strata council approval. Mr. Lanthier deposes that the hedge requested by the defendant was installed by January 29, 2009, and he understood the defendant requested further hedging "along the sides of the yard behind Strata Lot 44 and that was provided." On January 29, 2009, Mr. Lanthier took photographs of the hedge behind Strata Lot 44 and they are exhibited to his affidavit. From those photographs and from reviewing the language of the Hedge Terms it is not difficult to recognize why misunderstanding arose. The photographs show a hedge which, in the absence of further evidence, could reasonably be described as "along property boundary of rear yard."
- [21] Dan Thomson was employed at the material time by MAC. In his Affidavit #1, he deposes that he "dealt with purchasers who became increasingly difficult." On January 28, 2009, he received a call from Tara Fluet who told him that she had received a call from Mr. Johnston who was "yelling at her." Mr. Thomson telephoned Mr. Johnston who "asked for hedge material to be installed along the sides of the rear yard, which was not something the Developer was required to do under Mr. Johnston's contract; however, as a gesture of good faith, I indicated to Mr. Johnston that the developer would plant a hedge on the sides of the property, but that the strata council at Vinterra would have the right to remove such hedge." Notwithstanding Mr. Johnston's evidence to the contrary, Mr. Thomson's evidence is that he did not tell Mr. Johnston the developer was unwilling to install a hedge.
- [22] Mr. Johnston's evidence about the conversation with Mr. Thomson is that at about 5:00 p.m. on January 28, 2009, Mr. Thomson called him and said that a solution to their satisfaction would be forthcoming in the evening with respect to the hedge. However, a couple of hours later, Mr. Thomson telephoned Mr. Johnston and told him that the hedge would not be planted as the plaintiff did not have the legal right to do so because the proposed location was on Vinterra common property. Mr. Johnston's further evidence is that Mr. Thomson

proposed that the plaintiff could plant the hedge without approval of the strata council but the strata council would probably have it removed. Mr. Johnston deposes that he then said that the defendant was not interested in Mr. Thomson's proposal and would not complete the purchase of Strata Lot 44. Mr. Thomson makes no mention of that last remark in his affidavit.

- [23] Mr. Titus made his Affidavit #1 on November 16, 2011. He deposes to a discussion among the defendant, Mr. Johnston, Ms. Fluet and himself in which Ms. Fluet said "that a hedge may be possible around the rear yard." Mr. Titus deposes that he was the drafter of the First Hedge Term on the instructions of the defendant, which term was not accepted by the plaintiff.
- [24] Mr. Titus deposes that the defendant made the Second Offer with Mr. Titus drafting the Second Hedge Term as a result of conversations among the defendant, Mr. Johnston, himself and Ms. Fluet. His understanding was that the amended Second Hedge Term, which changed the hedge from cedar to yew, was drafted by the plaintiff. As of December 1, 2008, Mr. Titus understood the plaintiff intended to install a 4' hedge in accordance with the amended Second Hedge Term. Both parties by this time may have had a hand in drafting Hedge Terms.
- [25] Mr. Titus deposes that on January 28, 2009, he was informed by the defendant that the hedge had not been planted. Mr. Titus spoke to "Darren," who told him there could be no guarantee the Vinterra strata council would not insist on the removal of the hedge because it would be on common property. Mr. Titus also telephoned Ms. Fluet who said that a gate would need to be installed in the hedge. Mr. Titus has no recollection of Ms. Fluet mentioning any easement issue. Mr. Titus understood the Johnstons had no objection to a gate. Later that day, Mr. Titus learned from Mr. Johnston that the "head of MAC Marketing" had told Mr. Johnston the strata council could refuse to plant the hedge in the location the defendant and Mr. Johnston intended because it would be on common property.
- [26] Anthony Miachika is a director and officer of the plaintiff. Mr. Miachika exhibits the Contract and Purchase of Sale of Strata Lot 44 and addendums. He deposes that the consolidated disclosure statement dated October 26, 2007, regarding Vinterra, indicates that no strata lot at Vinterra includes a rear yard comprised of "green space" that is part of the strata lot. The green space is common property. Mr. Miachika's evidence is that he understood the defendant wanted a hedge to be planted on the common property boundary "that separates the Vinterra property from non-Vinterra park property [a]s such we were willing to accommodate the defendant's request to install a hedge."
- [27] Tara Fluet in her Affidavit #2 deposes that she "clearly told" the defendant and Mr. Johnston that (a) she did not think a fence would be possible; (b) she did not think the developer could fully enclose the yard behind Strata Lot 44 because the gardeners that tend to that space--the common property--would need to access it; (c) if they wanted to have a hedge and fence enclosing the back yard of Strata Lot 44 they could put that in the offer; and (d) it would be for the developer to decide whether or not it was possible to put in the hedge. Tara Fluet

further deposes that she never told the defendant or Mr. Johnston that a fence or hedge enclosing the rear yard of Strata Lot 44 could be guaranteed. She also deposes that she had a conversation on the telephone with Mr. Johnston in late 2009 in which she denies telling Mr. Johnston that everything would be resolved to the satisfaction of the defendant and Mr. Johnston, but believes she told him "something along the lines of 'if it's in writing I'm sure it will be sorted out'". She also denies telling Mr. Titus that the plaintiff would not complete the hedge.

Is the Question of the Hedge Capable of Summary Determination?

- [28] The defendant argues this is a relatively straightforward case in which it is possible to make findings of fact from the affidavits and give judgment in her favour. The defendant emphasizes that the Rules of Court provide that their object is to secure the just, speedy and inexpensive determination of a proceeding on its merits in a manner that is proportionate to the amount involved, the importance of the issues in dispute and the complexity of the proceeding.
- [29] The defendant says this matter is not complex, and the amount involved, which includes a deposit of \$76,900 and damages of somewhat under \$50,000, is relatively modest and therefore this case lends itself to summary disposition.
- [30] On the other hand, the plaintiff submits there are disputes on important elements of the evidence which are not amenable to resolution on the affidavits alone. The plaintiff urges me to adjourn the defendant's application to permit cross-examination on the affidavits of the defendant and Mr. Johnston, at which time a summary trial may be feasible.
- [31] There are two main issues on which the outcome of this litigation and of the applications before me depend. One is the issue concerning the nature of the agreement by the defendant to install a hedge, and the other is an issue related to REDMA. I will deal firstly with the issue concerning the hedge.
- [32] There were numerous discussions among the defendant, Mr. Johnston, Mr. Titus, Ms. Fluet, Mr. Lanthier and a Mr. Thompson about the hedge. The affidavits suggest considerable disagreement, not only on what was said at various times about the location of the hedge, but also about the importance the parties attached to the hedge and whether it was a fundamental term of the contract. The defendant and Mr. Johnston place emphasis on the crucial importance of the location of the hedge as a basis on which they would enter into the contract. Ms. Fluet gives evidence that suggests the level of importance the defendant and Mr. Johnston attach to it was not brought to her attention as clearly as suggested by the defendant and Mr. Johnston.
- [33] The plaintiff draws my attention to the reasons for judgment of Blair J. in *Urban Holdings Ltd. v. MacDuff and others*, 2007 BCSC 631, which rely on the oft-quoted reasons in *Inspiration Management Ltd. v. McDermott St. Lawrence Limited* (1989), 36 B.C.L.R. 2d 202, in which McEachern C.J.B.C. urged judges to try cases summarily in appropriate instances

when it is possible to make credibility assessments that lead to a just outcome. In *Urban Holdings*, Blair J. held the evidence in that case "on critical issues differs significantly, [and] the proper approach is to conclude that it is not possible to find the facts necessary to decide the case. The credibility of the deponents must be tested by their being examined and cross-examined before the court or at least be cross-examined on their affidavits ". Blair J. referred to *Chu v. Lee*, 2006 BCSC 547, where Mr. Justice Melnick observed "that counsel often proceed on the basis of a Rule 18A summary trial [now Rule 9-7] for reasons of economics if nothing else. This is especially so when the amount of the claim, as here, is so modest. However, there is a limit to the extent that the court can go in assessing credibility based only on affidavit evidence. This is, unfortunately, one of those cases."

[34] In my view, those observations apply to the application for a summary trial of the hedge issue in this case. I am not in a position to resolve credibility issues on affidavits alone on that issue. There is much disagreement in the evidence about the placement of the hedge and its importance to the defendant and Mr. Johnston as a fundamental term or otherwise of the contract. I am unwilling to come to conclusions on the facts related to the hedge, which at this stage can only be arbitrary.

[35] I am satisfied that I ought not to try the questions in respect of the hedge pursuant to Rule 9-7.

Did the Plaintiff Fail to Provide Disclosure Statements as Required by REDMA?

[36] The defendant submits the plaintiff breached REDMA in three ways, namely:

- a) the plaintiff did not provide the defendant with all the disclosure statements that the plaintiff was required to provide prior to entering into the contract;
- b) the plaintiff failed to obtain written statements from the defendant acknowledging that she had an opportunity to read each of the disclosure statements the plaintiff was required to provide to her; and
- c) after entering into the contract, the plaintiff failed to file the second amendment to disclosure statements dated December 31, 2008, immediately and provide it to the defendant within a reasonable time after filing.

[37] In her Affidavit #2, sworn November 30, 2011, Ms. Fluet's evidence about the disclosure statements is at paragraph 6(d) and reads as follows:

Prior to or on November 18, 2008, I provided Ms. Johnston with all the disclosure statements that had been issued up to November 18, 2008 by the Developer in respect of the Vinterra project. This was acknowledged by Ms. Johnston in the contract of purchase and sale. After providing the disclosure statements to Ms. Johnston, Mr. Johnston asked me numerous questions about the matters he had read about in these documents.

- [38] Mr. Johnston made his Affidavit #1 on November 14, 2011, which was before Ms. Fluet's Affidavit #2, and he makes no comment on the disclosure statements. Since November 30, 2011, Mr. Johnston has made no further affidavit and therefore has not responded to Ms. Fluet's evidence that he asked numerous questions of her about the disclosure statements. The lack of a responsive affidavit is a factor I have considered but is not decisive.
- [39] The defendant refers me to the examination for discovery transcript of Ms. Fluet which is attached as Exhibit A to Affidavit #3 of Anna Pelzer, a legal assistant with the solicitors for the defendant. Ms. Fluet was asked about disclosure statements and in particular was asked if the plaintiff had a written acknowledgment of receipt by the defendant of the disclosure statements as required by REDMA. Her answer was that the acknowledgment is to be found "in the contract" where the defendant "initialled that she had received it."
- [40] Exhibit C to the Affidavit #3 of Anna Pelzer is a copy of Exhibit #9 on Ms. Fluet's discovery which is the contract of purchase and sale of Strata Lot 44 signed by the defendant on November 30, 2008. Addendum A, paragraph 6, reads:

Disclosure Statement. The Purchaser acknowledges that the Purchaser has received a copy of the disclosure statement for the Development including all amendments thereto and all consolidations thereof, if any, filed up to the date hereof (collectively the "Disclosure Statement") and has been given a reasonable opportunity to read the Disclosure Statement and the execution by the Purchaser of this Contract will constitute a receipt in respect thereof. The Disclosure Statement contains provisions explaining the obligations of the owner for the Strata Lot to pay monthly contributions to the common expenses of the Strata Corporation (Strata Fees).

- [41] The defendant placed her initials in the box next to that paragraph.
- [42] At question 275 of her examination for discovery transcript, Ms. Fluet was asked if there is any other document in which the defendant acknowledged that she had received disclosure statements. Her answer was "no." Exhibit E to the Pelzer affidavit is a copy of Exhibit 11 from Ms. Fluet's discovery and is an "amendment to disclosure statement." It has no provisions similar to paragraph 6 of Addendum A referred to above in these reasons, and the defendant's initials do not appear on it. At her discovery, Ms. Fluet's evidence was that she had given Exhibit 11 to the defendant, but she could not recall handing it to the defendant: "I don't recall the exact moment." Ms. Fluet's evidence was that she was the person "responsible for providing all relevant discovery [sic] statements to a would-be purchaser." No written acknowledgment of receipt of the disclosure statement, which was marked as Exhibit 11 on the discovery, was placed in evidence on the hearing before me.
- [43] Exhibit F to the Pelzer affidavit is a copy of Exhibit 12 from Ms. Fluet's discovery which is a disclosure statement dated October 11, 2007. There is an identical Addendum A with paragraph 6 to the one mentioned above in these reasons with a place for the purchaser's initials, but the defendant's initials do not appear against that paragraph. On her examination for discovery, Ms. Fluet acknowledged she had not given the defendant a copy of that disclosure statement. The same answer was given regarding Exhibits G and H to the

Pelzer affidavit, which exhibits were 13 and 14 respectively on the discovery of Ms. Fluet. The defendant's initials do not appear on either of those exhibits. Exhibit 13 is a consolidated disclosure statement of October 26, 2007, and Exhibit 14 is entitled First Amendment to Consolidated Disclosure Statement. Exhibit 13 has an Addendum A with the same paragraph 6 as is found in the earlier statements. It is not initialled by the defendant. Exhibit 14 has no place for the purchaser's initials and there is no indication on it of receipt. The defendant submitted that Exhibits 13 and 14 were not provided to the defendant in accordance with REDMA but were listed by the plaintiff in the course of the litigation and thereafter copies provided. The plaintiff does not challenge this assertion in argument and I see no evidence to suggest the defendant's submission was wrong.

[44] The defendant pleads in the Further Amended Statement of Defence and Counterclaim, and this is supported by the evidence, that the plaintiff had generated five disclosure statements before November 30, 2008, which was the date of the contract for the purchase and sale of Strata Lot 44. There was a further disclosure statement after the contract was entered into but before the completion date. It was not provided to the defendant. The plaintiff submits the defendant received a consolidation of all disclosure statements up to October 26, 2007, and relies on *Watson v. Havaday*, 2011 BCSC 505, as authority for the proposition that that consolidation is sufficient to meet the plaintiff's obligations under REDMA.

[45] Despite the foregoing discussion of the facts and law on this application I am unable to give judgment without further submissions from the parties.

"Affleck J."

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