
CANADA / JUDGMENT

Chen v. Cao

2014 BCSC 404

COURT

Supreme Court of British Columbia

DECIDED

12 March 2014

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2014 BCSC 404 Chen v. Cao

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Chen v. Cao,

2014 BCSC 404

Date: 20140312

Docket: S116691

Registry: Vancouver

Between:

Xiang Bin Chen

Plaintiff

And

Sa Cao, Shafik Ladha, RE/MAX Westcoast Realty Ltd.

Defendants

- and -

Docket: S117002

Registry: Vancouver

Between:

Sa Cao

Plaintiff

And

Xiangbin Chen

Defendant

Before: The Honourable Madam Justice Bruce

Reasons for Judgment

Counsel for Xiang Bin Chen:

Cameron L. Lee

Counsel for Sa Cao:

Song Xue

Counsel for Shafik Ladha and RE/MAX Westcoast Realty Ltd.:

Christopher J.A. Johnston

Place and Date of Trial:

Vancouver, B.C.

February 18-21, 2014

Place and Date of Judgment:

Vancouver, B.C.

March 12, 2014

INTRODUCTION

- [1] The dispute between the parties concerns the sale of a residence located at 10371 Shell Road, Richmond, BC (the "Property"). On July 11, 2011, the claimant, (Xiang Bin Chen), and the defendant (Sa Cao) entered into a contract whereby Chen agreed to purchase the Property from Cao for a price of \$1,050,000. Chen paid a deposit of \$51,500, which continues to be held in trust. The completion date was September 29, 2011.
- [2] Chen failed to complete the purchase of the Property on the completion date as a result of what he alleges was a negligent misrepresentation of the square footage of the residence on the Property. Whereas the Multiple Listing Service ("MLS") listing for the Property indicated that the residence was 4024 square feet, after he signed the contract Chen discovered that the actual square footage of the residence was 3404 square feet. Chen joined the seller's real estate agent (Shafik Ladha and RE/MAX Westcoast Realty Ltd.) as parties to the action because they were responsible for the MLS listing that misrepresented the square footage of the residence on the Property.

- [3] In response to Chen's action, Cao commenced an action against Chen for damages as a result of his breach of the contract. Although the Property was subsequently sold to a third party, the purchase price was less than \$1,050,000. In addition, Cao seeks an order that the deposit paid by Chen be forfeited to him by way of damages.
- [4] By consent, the Court granted an order that both actions would be heard at the same time.
- [5] Chen called two witnesses in his case; himself and his daughter-in-law Ms. Yin. The parties also filed a joint book of documents that each party agreed was admissible in the trial. At the conclusion of Chen's case, Ladha and RE/MAX Westcoast Realty Ltd. applied for a dismissal of the action based on no evidence pursuant to Rule 12-5(4) of the Supreme Court Civil Rules, B.C. Reg. 168/2009. Cao also argued that Chen's action against her should be dismissed based on Ladha and RE/MAX's no evidence motion.

ARGUMENT

- [6] The defendants argue that Chen has failed to prove some evidence regarding each element of the tort of negligent misrepresentation. Relying upon *Kingu v. Walmar Ventures Ltd.* (1986), 10 B.C.L.R. (2d) 15 (C.A.), the defendants maintain the tort of negligent misrepresentation is only proven when the following requirements are met:
1. A false statement negligently made;
 2. A duty of care on the person making the statement to the recipient. A duty of care does not arise unless the person making the statement is possessed of special skill or knowledge on the matter in question; and the circumstances establish that a reasonable person making the statement would know that the recipient is relying upon his skill or judgment;
 3. Reasonable reliance on the statement by its recipient; and
 4. Loss suffered as a consequence of reliance.
- [7] The defendants say there is no evidence of a false statement negligently made. The total area of the residence is 4024 square feet or larger when one includes the garage space as part of the total area. Further, the defendants maintain there is no evidence that to include the garage space in the calculation of total area is negligent in that it falls below the standards expected of a real estate agent. In this regard, the defendants argue Chen's case must fail because he has not led expert evidence of the standard of care: *Perrault v. North Vancouver (District)*, 2010 BCSC 382; and *Seiler et al. v. Mutual Fire Insurance Company et al.*, 2003 BCSC 1423.
- [8] The defendants also maintain that the seller's agent owed no duty of care to Chen in the circumstances because it would have placed them in a conflict of interest position regarding their own client: *Gordon v. Krieg*, 2013 BCSC 842.

- [9] The defendants argue that while there is some evidence that Chen relied upon the statements concerning square footage contained in the MLS listing, it was not reasonable to rely on such statements in light of the clear waiver or warranty contained in the document. It is no excuse that Chen failed to read this waiver or failed to have it translated into Mandarin: see *Saberi v. Angell Hasman & Associates*, 2008 BCSC 680. The defendants also maintain that Chen did not rely on the statement concerning square footage in the MLS listing, but on his assessment, after viewing the home, that it was large enough to meet his family's needs.
- [10] Lastly, the defendants argue there is no evidence of a loss incurred by Chen because the property appraisal indicates the home, at 4024 square feet, has a market value of \$1,050,000, which was the purchase price.
- [11] In addition to these arguments, Cao says Chen's case should be dismissed because there is no evidence of a representation made by her regarding the square footage of the home.
- [12] Chen argues there was a misleading statement in the MLS listing authored by the defendant real estate agent because it is standard industry practice not to include the garage space in the finished area or living area of the home. To include the garage space in the finished area without defining it as garage space misled Chen as to the total living area of the residence by (he says) 520 square feet. Chen argues that this is the type of case in which it is not necessary to call expert evidence to prove the standard of care because it is obvious that an error of this magnitude constitutes a breach of industry standards.
- [13] Alternatively, Chen argues that the court should take judicial notice of the standards set by the Real Estate Board of British Columbia without the need to call evidence of these standards and without the need to call an expert to establish the standard of care expected of real estate agents in BC. Further, Chen argues that the court should accept the findings of fact in *Manarin v. Stelmaschuk Doucette Realty Ltd. and Leckie*, 2010 BCPC 81, that the Real Estate Council of BC instructs realtors that when measuring homes it is standard practice not to include non-living spaces such as a garage in their calculations. Chen maintains that such a clear error requires no expert evidence and is self-evident: *Davie v. Huchschlag et al.* (5 July 1993), Vancouver C910767 (B.C.S.C.); *Mlazgar v. Brick*, 1999 SKQB 91; *Hack v. Rusnak*, 2013 SKPC 128; and *Guy v. Wagner et al.* (9 February 1987), New Westminster C941842 (B.C.S.C.).
- [14] In the further alternative, Chen applied to re-open his case to call expert evidence of the standard of care. The defendants opposed this application on the ground that to do so constitutes improper splitting of Chen's case. This evidence was available to Chen before the commencement of the trial and he was not taken by surprise by the defendants' application.

DECISION

- [15] I agree with the defendants that Chen must establish some evidence of the four requirements described in Kingu at para. 22 in order to successfully defend this no evidence motion. The evidence must not be weighed at this stage but merely considered to determine if, assuming the evidence is believed, it could support the inferences sought to be drawn by Chen.
- [16] This is not a straightforward case of a mathematical or clerical error regarding the square footage of the residence located on the Property. There is no evidence that anyone has taken measurements of the residence to establish its precise square footage. Although Chen retained an expert to appraise the Property, the appraiser did not take his own measurements and instead assumed the Property was either 4024 square feet or 3445 square feet to establish their comparable market values.
- [17] The evidence before the court regarding the square footage of the residence is contained in the following documents:
1. A floor plan of the main floor and roof and the basement and foundation dated April 18, 2001, that indicated a total area of 2070 square feet on the main floor and roof and 1440 square feet on the basement level and an additional floor space of 520 square feet in the garage.
 2. An MLS listing document dated February 12, 2009 that indicated the main floor area of the residence was 2005 square feet and the basement had 1440 square feet of finished space with a grand total floor area of 3445 square feet. This document was authored by Srivatsan Rangaraajan as a Global Force Realty Ltd. agent and as listing agent for the then owner, B. & P. Gounder.
 3. An MLS listing document dated March 16, 2010, that indicated the main floor area was 2064 square feet and the finished "floor down" was a total of 1960 square feet for a grand total floor area of 4024 square feet. This document was authored by the defendant, Ladha as a RE/MAX agent and as listing agent for Cao.
 4. An MLS listing document dated October 11, 2011, that indicated the main floor area was 2000 square feet and the finished floor area down was 1440 square feet and the unfinished floor area was 590 square feet for a grand total floor area of 4030. This document was authored by Michael He as Royal Pacific Riverside Realty agent and as the listing agent for Cao.
- [18] Although this evidence is capable of supporting a number of alternate inferences regarding the total floor space of the Property, one inference that could be drawn is that the home has 3445 square feet of finished living space and 520 to 590 square feet of garage space. This necessarily leads to a conclusion that Ladha did not falsely represent the total area of the Property as significantly less than its actual measurements because the addition of these figures results in a total area of between 3965 and 4035 square feet. The question is essentially whether Ladha falsely misrepresented or misled Chen by not differentiating

between the garage and the other areas of the residence.

- [19] In the MLS document authored by Ladha, the garage space is included, without differentiation, in the calculation of "finished floor basement". Whether or not this mischaracterizes the "garage" area depends upon the nature of this space in this particular residence. There is very little evidence before the court regarding the inside of the home apart from the description of the rooms contained in the MLS listing documents. Chen testified that there were two suites in the basement that were occupied by tenants; however, he did not view one of the suites and provided no description of the other. Further, Chen did not testify that he viewed the garage and did not testify as to whether it was finished or unfinished space. From the photograph of the residence contained in the MLS listing documents, it is apparent that the garage is attached to the residence and is parallel with the ground or basement floor. While the floor plan refers to a "double garage", it does not indicate whether the room is finished or unfinished. The only evidence that the garage is unfinished floor space is the statement in the MLS document dated October 11, 2011, which includes 590 square feet in this category of total area.
- [20] The paucity of evidence concerning the lower floor of the residence is a concern because it may well be that one of the suites in the basement is located in the garage space or that the garage is finished living space in some respect. It would be mere conjecture to infer from the term "garage space" that it is entirely unfinished. Thus I am unable to infer from the limited evidence before me whether it was a false or a misleading statement to include the garage in this home in the category of "finished floor down".
- [21] If I am wrong in this conclusion, and the characterization of the 590 square feet as "unfinished floor" in the October 11, 2011, MLS listing document is some evidence that the garage space was falsely characterized by Ladha, the question remains whether this is an error that falls below the standard of care expected of a realtor acting for the seller as a listing agent. There is no evidence before the court as to the industry standard regarding the inclusion or exclusion of garage space in the finished area of a home. Whether or not there is a need for expert evidence on this point, Chen called no evidence of industry standards. Instead, Chen asks the court to take judicial notice of industry standards or accept the findings of fact in Manarin.
- [22] I am unable to accept that the standard of care in the real estate industry in BC regarding the characterization of a garage as unfinished floor space is broadly known and accepted such that the court could take judicial notice of it.
- [23] Further, the conditions for admitting testimony from a prior proceeding are clearly absent in this case. It is hearsay evidence and must be approached from the perspective of necessity and reliability. I find that neither criterion is established in the circumstances.
- [24] First, there is no indication that the evidence of the standards in the real estate industry led in Manarin was under oath and subject to cross-examination. The Provincial Court is empowered to accept hearsay evidence and there is nothing in the judgment that indicates

whether the evidence concerning standards set by the Real Estate Council of BC was admitted through an expert witness, a lay witness, as hearsay or by consent. Moreover, it is apparent that without a transcript of the proceedings before the Provincial Court in Manarin, the court does not have a complete record of the evidence sought to be admitted in this trial. Second, the parties to this action and the Manarin action are not the same and the defendants in this trial did not have an opportunity to cross-examine the witness who may or may not have testified in the Manarin trial. Third, there is no necessity proven. Chen is not forced to rely on the testimony led in an earlier proceeding because the declarant is now deceased or otherwise unavailable to testify in this trial. Indeed, Chen could have led this evidence from any realtor licenced to practice in BC. Without these prerequisites, it is my view that the evidence lacks the proper safeguards and guarantees of trustworthiness to overcome the dangers inherent in hearsay.

- [25] As a consequence, there is no evidence before the court from which I may infer that including garage space in the category of finished floor space falls below the standards expected of a realtor. This may not be a case in which expert evidence of the standard of care is mandatory (unlike the circumstances before Justice Kloegman in *Perrault*); however, it is also not a case where the conduct is dishonest or fraudulent or so blatantly negligent or egregious that no evidence of the standards expected of a realtor is required.
- [26] As I said earlier, this is not a straightforward mathematical error or a clerical mistake where negligence can be founded upon the duty of a realtor who provides information to prospective buyers to exercise reasonable care and skill to ensure the information is accurate. Characterizing a garage as finished or unfinished floor space requires the exercise of judgment by the realtor. Whether or not Ladha's characterization of the garage in this case as finished floor area was negligent clearly depends on industry standards. Absent some evidence of what those standards are the court is unable to draw any inferences regarding Ladha's exercise of judgment.
- [27] Thus I must conclude that while there may be a duty of care owed by Ladha and RE/MAX to Chen, there is no evidence that he breached that duty of care.
- [28] Turning to Chen's alternate argument, I am also satisfied that this is not an appropriate case to permit a re-opening to call additional evidence. Chen was aware of the evidentiary burden upon him to prove negligent misrepresentation. The defendants made their position regarding the requirement to adduce expert evidence clear prior to trial. Thus Chen cannot argue that he was taken by surprise. To permit Chen to re-open his case in these circumstances would be tantamount to permitting him to split his case. The evidence required to establish the standard of care was available to Chen prior to trial with the exercise of due diligence. Chen chose to proceed to trial on the basis that expert evidence of the standard of care was not necessary and the court could take judicial notice of the standard of care. The failure to lead evidence regarding this element of the tort was not merely an oversight.

[29] In my view, the circumstances of this case are similar to the facts in Seiler. In Seiler, the plaintiffs sought to re-open their case when the court granted the defendants' no evidence motion based on a failure to call expert evidence of the standard of care. At paras. 44-46, Edwards J. dismissed the application to re-open on the ground that it was impermissible case splitting:

The plaintiffs' decision in this case not to call expert evidence essential to prove their case was not an oversight. Plaintiffs' counsel's submission was that expert evidence was not necessary in this case. To permit the plaintiffs to now introduce expert evidence, or to apply to call defendants' representatives as hostile witnesses would amount to permitting the plaintiffs to split their case.

Gold v. Gold, [1992] B.C.J. No. 651 refers to authority that the Court has inherent jurisdiction to permit a party to re-open a case to introduce evidence which could not have been discovered with due diligence. This is not such a case.

I find that Rule 40(7) does not permit case splitting in this way. I find it is not open to the plaintiff to seek to continue the trial despite the defendants' successful applications under Rule 40(8).

[30] This reasoning applies equally to the case at hand.

[31] For these reasons, I dismiss Chen's action against the defendants for negligent misrepresentation. The defendants are entitled to their costs at Scale B.

[32] Cao's action against Chen should be rescheduled through the registry.

"Bruce J."

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