

CANADA / JUDGMENT

Dimaulo v. Sun Peaks

2000 BCSC 369

COURT

Supreme Court of British Columbia

DECIDED

29 February 2000

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2000BCSC369

Citation: Dimaulo v. Sun Peaks

Date: 20000229
2000 BCSC 369Docket: 27765
Registry: Kamloops
IN THE SUPREME COURT OF BRITISH COLUMBIABETWEEN: DOMINIC VINCENZO DIMAULO, TRAVIS LLOYD ABBEY,
KELLY ANDREW MOSS and LESLIE ROBERT LEDUC
PLAINTIFFSAND: SUN PEAKS RESORT CORPORATION
DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE BLAIR

Counsel for the Plaintiff:

J.B. Carter

Counsel for the Defendant:

R.D. Lee

Date and Place of Hearing/Trial:

Kamloops, B.C.

February 21, 2000

- [1] The Defendant Sun Peaks Resort Corporation ("Sun Peaks") applies for an order pursuant to Rule 19(24) of the Rules of Court striking the plaintiffs' writ of summons and statement of claim and dismissing this action. The plaintiffs seek damages from Sun Peaks for losses incurred in developing Lot 1, Plan KAP53479, ("Lot 1").
- [2] Sun Peaks created the subdivision containing Lot 1 as part of its' ski resort development located at Tod Mountain near Kamloops. Sun Peaks, on or about June 5, 1995, sold Lot 1 to Andrew Cedric Mooney and Randy Jean Mooney who on February 24, 1998, sold Lot 1 to the plaintiffs. The plaintiffs purchased Lot 1 knowing it was covered with structural fill, but upon construction they encountered extensive deposits of organic material beneath the structural fill. The plaintiffs incurred additional costs in removing the organic material and altering their development plans and seek to recover these costs from Sun Peaks.
- [3] The plaintiffs claim that in not disclosing the presence of the organic material on Lot 1, Sun Peaks:
1. breached the provisions of the Real Estate Act, R.S.B.C. 1996, c. 397 ("the Act");
 2. fraudulently misrepresented the true condition of Lot 1; and
 3. negligently misrepresented the condition of Lot 1.

Sun Peaks submits that none of these claims can be sustained in law and thus the action must be dismissed.

- [4] The Supreme Court of Canada in *Hunt v. Carey Can. Inc.* (1990), 49 B.C.L.R. (2d) 273, addressed the issue of the test to be applied in considering an application under Rule 19(24) (a), stating at p. 289:

Thus, the test in Canada governing the application of provisions like R. 19(24)(a) of the British Columbia Rules of Court is the same as the one that governs an application under R.S.C., O. 18, r. 19: assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ranking with the others in R. 19(24) of the British Columbia Rules of Court should the relevant portions of a plaintiff's statement of claim be struck out under R. 19(24)(a).

The issue is whether it is plain and obvious that the plaintiffs' claims in tort under the Act, fraudulent misrepresentation and negligent misrepresentation disclose no reasonable causes of action, or whether the plaintiffs have presented a case that is fit to be tried.

1. The Real Estate Act:

- [5] The plaintiffs in their statement of claim acknowledge receiving and relying on Sun Peaks' Disclosure statement of November 15, 1994, and geotechnical report of September 17, 1994, relating to the subdivision in which Lot 1 was located. The Act requires the filing of such documentation to proceed with a subdivision. Section 75(2)(a) of the Act provides that every purchaser of subdivided land "is deemed to have relied on the representations made in the prospectus". Subsection (2)(b) provides that a purchaser of the land subdivided may recover loss or damage if a material false statement is contained in the prospectus.
- [6] In *Grenoble v. MacNaught* (1992), 78 B.C.L.R. (2d) 166, the Court of Appeal held that the purchaser referred to in s. 75, then s. 59, included only purchasers who bought subdivided land directly from the party filing the required prospectus under the Act. In the instant case, the plaintiffs purchased from the Mooneys, not Sun Peaks, and I find the plaintiffs cannot base their claim on the deemed reliance provisions of the Act relating to subdivisions. Where the plaintiffs' claim rests on the deemed reliance provisions, I find it discloses no reasonable claim.

2. Fraudulent Misrepresentation

- [7] The plaintiffs claim that Sun Peaks' failure to disclose the placement and presence of organic material on Lot 1 constituted a fraudulent misrepresentation. There was no direct contact between the plaintiffs and Sun Peaks upon which fraudulent misrepresentation can be founded, however the plaintiffs submit that although there is silence between the parties regarding the presence of organic fill material on Lot 1, Sun Peaks' subdivision prospectus and geotechnical report together amount to a positive assertion which would found a cause of action under fraudulent misrepresentation.
- [8] In *Sorenson v. Kaye Holdings*, [1979] 6 W.W.R. 193, the B.C. Court of Appeal addressed the issue of fraudulent misrepresentation where there was silence on a matter between the vendor and purchaser of property. Lambert J.A. stated at p. 225:

The first question is whether silence constituted a misrepresentation. This is not a contract of utmost good faith, nor was there a fiduciary relationship between the parties. In the absence of such a special contract or relationship, it is not deceit for a vendor to fail to decry his own wares unless he makes some positive assertion that becomes distorted by the failure.

[Emphasis added]

Notwithstanding the silence between the plaintiffs and Sun Peaks, it is not plain and obvious that the plaintiffs will fail in this cause of action given what might be considered a positive assertion by Sun Peaks as found in para. 23 of the statement of claim. I decline to strike this cause of action.

3. Negligent Misrepresentation

[9] Although not explicitly stated, the plaintiffs in paras. 20 and 22 of the statement of claim appear to allege negligent misrepresentation by Sun Peaks. The Supreme Court of Canada in *Hercules Management Ltd. v. Ernst & Young* (1997), 146 D.L.R. (4th) 577 addressed negligent misrepresentation, La Forest J. setting out the factors for analysis at para. 41:

... A prima facie duty of care will arise on the part of a defendant in a negligent misrepresentation action when it can be said (a) that the defendant ought reasonably to have foreseen that the plaintiff would rely on his representation and (b) that reliance by the plaintiff, in the circumstances, would be reasonable. Even though, in the context of auditors' liability cases, such a duty will often (even if not always) be found to exist, the problem of indeterminate liability will frequently result in the duty being negated by the kinds of policy considerations already discussed....

The plaintiffs' allegations of negligent misrepresentation against Sun Peaks rest on foreseeability and reasonableness which lie in the factual context of the case. I cannot conclude that the plaintiffs will plainly and obviously fail on this cause of action. If I have any doubts they must go in the plaintiffs' favour.

Amendments

[10] The plaintiffs acknowledge that their pleadings require amendment, particularly in their allegations of negligence against Sun Peaks, and with this judgment amendments will be needed to those parts of the statement of claim relating to the Act. The plaintiffs will have 14 days in which to amend their statement of claim.

Costs

[11] Given the mixed success of the application, costs will be in the cause.

"R.M.L. Blair, J."

The Honourable Mr. Justice R.M.L. Blair

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