

CANADA / JUDGMENT

Ferrer v. Roy

2019 BCSC 1949

COURT

Supreme Court of British Columbia

DECIDED

14 November 2019

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2019 BCSC 1949 Ferrer v. Roy IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Ferrer v. Roy, 2019 BCSC 1949 Date: 20191114 Docket: S86422 Registry: Nanaimo Between: Enrique Ferrer and Nelly Ferrer-Timmers Plaintiffs And Louise Roy and Aaron Nicklen Defendants Before: The Honourable Mr. Justice Baird Reasons for Judgment Counsel for the plaintiffs: G. Hooper Counsel for the Defendants: P. Guy Place and Date of Hearing: Nanaimo, B.C. September 25, 2019 Place and Date of Judgment: Nanaimo, B.C. November 14, 2019

INTRODUCTION

[1] The defendants herein apply for summary dismissal of the plaintiffs' claim on the basis that it is barred by s. 8 of the Limitation Act, S.B.C. 2012, c. 13 which reads as follows: 8 Except for those special situations referred to in sections 9 to 11, a claim is discovered by a person on the first day on which the person knew or reasonably ought to have known all of the following:

- (a) that injury, loss or damage had occurred;
- (b) that the injury, loss or damage was caused by or contributed to by an act or omission;
- (c) that the act or omission was that of the person against whom the claim is or may be made;
- (d) that, having regard to the nature of the injury, loss or damage, a court proceeding would be an appropriate means to seek to remedy the injury, loss or damage.

[2] The plaintiffs respond that they became aware only recently that the defendants contributed to the loss alleged in the claim and the limitation defence should be dismissed. Alternatively, they say that the issue is not suitable for summary determination.

BACKGROUND

[3] In September 2014, the plaintiffs purchased a residential property in Parksville, BC through the agency of the defendants, who were retained as their realtors. Before the transaction closed, the vendor, a person named Roman Janik, declared in a disclosure statement that there was a contract of warranty insurance on the property. This representation was false. It

was repeated in a property inspection report produced for the plaintiffs by a company allegedly recommended by the defendants. The plaintiffs have a theory that this happened because the vendor was present for the inspection and fed the misinformation to the inspector who simply recorded it in his report without inquiry. The evidence suggests that the defendant, Louise Roy, was also present for the inspection.

- [4] The plaintiffs say that they relied on the warranty insurance representation and completed the transaction to their detriment. Within a couple of months of taking possession, they discovered that the residence leaked badly from alleged construction defects. They claim that it has cost them in excess of \$350,000 to complete the necessary repairs. In a Notice of Civil Claim originally filed on May 20, 2015 under Nanaimo Registry No. 75691 ("the first action"), and subsequently consolidated and amended, the plaintiffs have sued the vendors, the City of Parksville, the real estate brokerage with which both their own and the defendants' realtors were associated, the vendors' real estate agent in her personal capacity, and the property inspector and his company.
- [5] The plaintiffs say that they did not name the defendants Roy and Nicklen in the first action because they thought that they had "covered" themselves by suing their brokerage. Be that as it may, on January 8, 2019, they filed the claim presently before me ("the second action") naming the defendants personally. The defendants say that the second action is out of time. The plaintiffs respond that they only recently discovered an actionable cause against the defendants through a deposition filed by the defendant Louise Roy in the first action dated November 20, 2018. In this deposition she admitted that she and the defendant Aaron Nicklen knew all along that there was no warranty insurance on the property.
- [6] The plaintiffs themselves drafted the pleadings in the second action. They are now represented by a lawyer who told me that an application to amend is likely on the way. For the time being, based on the pleadings as they stand, and as amplified by the evidence filed on this summary trial application, the second action would seem to make rather a specific allegation. It is not that the defendants failed in any duty to confirm the vendor's representation concerning warranty insurance. In fact, a provision in the contract of purchase and sale specified that the defendants had limited knowledge about the property, took no responsibility for the accuracy of information provided by the vendor, and the plaintiffs accepted such information at their own risk.
- [7] Instead, the substance of the second action is that the defendants actually knew about the falsity of the warranty insurance representation and negligently failed to disclose it to the plaintiffs. The defendants claim by way of response that, prior to closing the transaction in question, they told the plaintiffs that the property was not covered by home warranty insurance, and that the vendors would be responsible for any construction deficiencies in any event. The plaintiffs removed all subjects and completed the sale knowing full well that there was no warranty insurance. The defendants deny contributing in any way to the plaintiffs' losses.

- [8] By order of this court made on March 28, 2019, the first and second actions were ordered to be heard together. The defendants applied for this relief on the basis of the degree of commonality between the two actions, the likelihood that the defendants would be obliged to testify in both, the expense and inconvenience of multiple proceedings, and the potential mischief of inconsistent verdicts. After this order was made the trial of the first action, scheduled to begin in September, 2019, was adjourned. The time estimate for the dual proceeding treating with both the first and second actions is approximately 20 days. A new trial date has not been fixed.

DISPOSITION

- [9] The issue here is not suitable for summary determination because it hinges exclusively on an issue of credibility. I cannot determine on the written record before me who is telling the truth about pre-closing discussions concerning warranty insurance. This is a question best left to the trial judge, who will be able to observe and assess the witnesses and make findings of credibility. I am also concerned about the possibility of inconsistent findings. The trial judge, on all of the evidence, might well come to a different conclusion concerning when the plaintiffs knew or reasonably ought to have known that they had a claim against the defendants.
- [10] The matter is hereby remitted to the trial list for determination in due course. Costs will be in the cause. "Baird J."

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Prepared on 28 October 2026 · Esheria