

CANADA / JUDGMENT

Grimshaw v. Progroup Realty Ltd.

2004 BCCA 523

COURT

British Columbia Court of Appeal

DECIDED

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2004 BCCA 523 Grinshaw v. Progroup Realty Ltd. COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: Grimshaw v. Progroup Realty Ltd., 2004 BCCA 523 Date: 20041013 Docket: CA031724

Between: Rebecca Grimshaw Appellant (Plaintiff) And Progroup Realty Ltd. doing business as Re/Max Progroup Realty and the said Progroup Realty Ltd., John Jacob Moldowan, Maureen Simpson and Kathy Scott Respondents (Defendants) Before: The Honourable Mr. Justice Hall The Honourable Mr. Justice Mackenzie The Honourable Mr. Justice Smith R. Grimshaw Appearing on her own behalf G.E.H. Cadman, Q.C. Counsel for the Respondents Place and Date of Hearing: Vancouver, British Columbia 13 September 2004 Place and Date of Judgment: Vancouver, British Columbia 13 October 2004 Written Reasons by: The Honourable Mr. Justice Hall Concurring in by: The Honourable Mr. Justice Mackenzie The Honourable Mr. Justice Smith Reasons for Judgment of the Honourable Mr. Justice Hall:

- [1] The appellant, Rebecca Grimshaw, appeals from a judgment of Mr. Justice J.W. Williams pronounced 20 February 2004 dismissing her action against the respondents. In her action she alleged that the respondents had breached a contract, had been negligent, and were in breach of a fiduciary duty they owed to her. She also alleged fraudulent conduct on the part of the respondents. As the trial judge noted, this action arose out of a failed real estate transaction.
- [2] In 1998, what is described as a custom home development was planned for the Abbotsford area. A Mr. Buck was the principal of a numbered company that was building the homes. Progroup Realty Ltd. and its principal, Mr. Moldowan, were in charge of marketing this development. As I understand it, in a custom home development, the land and proposed building are sold to an interested purchaser and thereafter the home is built with specific features requested by the purchaser. Because of this, the developer usually wishes to have some non-refundable amount of money in hand. This is because if the purchase and sale of the home should not complete, the potential loss to the developer arising from the customization of an individual home will be ameliorated. Mr. Moldowan testified as follows concerning his discussion with the plaintiff appellant and the rationale for the \$20,000 non-refundable deposit that had been paid to the developer in this case: Q All right. Just before we go back to the contract, there's some words in the right-hand top portion of -- there's some words in the top right-hand portion of the document, "no" underlined and "direct". A

Correct. Q Is that your handwriting? A That is in my handwriting, yeah. Q And -- and can you tell His Lordship, please, why those words are on the page? A Well, quite clearly this was discussed very directly with Mrs. Grimshaw was the fact that all our contracts, every one of them, was pre-typed, that the \$20,000 goes directly to the seller and is non-refundable. And -- and that was extremely clear to her. And I explained to her what the reason (sic) -- the reason and rationale was, and that reason and rationale was very clearly that the developer was custom building the home and standard in the industry would be that is protection for him, that if she defaults for any reason the developer has that money to turn the home back into what would be more saleable to the general public in case somebody painted the walls purple or green... Q Okay. Let me -- let me just stop you there, sir. She brings these notes with her for your meeting with her on the 5th of May? A Correct. Q And with respect to this note, she proposed that the \$20,000 be held until completion. A Correct. Q And you made it clear to her that that could not be the case. A Positively.

- [3] In April 1998, the appellant became interested in purchasing one of the custom homes being developed by Buck's company. She attended an open house that spring. She approached one of the original defendants, Ms. Scott, an employee of the real estate company, to make an offer to purchase a home. The purchase price was in the range of \$200,000. However, the offer she made in April was not acceptable to the developer. Thereafter, in early May, she had a meeting with Mr. Moldowan that resulted in her making an offer that was accepted by the developer. She was, as a term of the offer, required to pay a \$20,000 non-refundable deposit. The conversation she had and the rationale for the requirement of the deposit is in part set forth in the excerpt of evidence found at para. 2 above. As building went forward, she also paid additional sums to the developer for specific custom features of the home. Ultimately, when the transaction could not be completed, her loss in the transaction included the deposit and additional sums, which aggregated approximately \$25,000.
- [4] What went wrong in this transaction was that the developer and the mortgagee who was financing the development had a falling out in the summer of 1998. It is not possible from the evidence to discern who was in the right or in the wrong in that particular controversy but one result was that the development could not be completed as planned. Some of the houses were completed and sold to purchasers but the appellant's transaction could not ultimately be closed.
- [5] After problems arose in the latter part of 1998, Mr. Moldowan appears to have kept in close contact with the appellant. He did this in order to see if her transaction could be successfully completed despite the difficulties of the developer, or, if that should prove to be impossible, to endeavour to have the New Home Warranty program reimburse Ms. Grimshaw for money she had paid to the developer. Initially, she elected to pursue the route of endeavouring to close the transaction. In these efforts, she was assisted by her lawyer and Mr. Moldowan. Ultimately it proved not to be feasible to complete the transaction. Thereafter in early 1999 she elected to pursue the remedy of seeking to recover her funds through the New Home Warranty program. However, that route was frustrated when New Home Warranty went

bankrupt. Thus, a series of unforeseen and unexpected misfortunes occurred in the attempted home purchase. The result was that the appellant lost the money she had invested in this transaction. Not surprisingly, the appellant was most upset by this course of events.

- [6] Faced with these losses, Ms. Grimshaw sought to blame the real estate company respondent and those associated with it for these losses. She made a complaint about Mr. Moldowan to the governing real estate body and as well she took civil action against the respondents.
- [7] The real estate body did not find her complaints well founded. After hearing evidence and submissions at trial, the learned judge did not find substance in the allegations she advanced in the civil action.
- [8] From the dismissal of her action, she has launched this appeal. She argues that the trial judge erred in his findings of fact, that he was prejudiced or biased against her, that he did not afford her a proper hearing, and that he did not apply a correct test in determining whether the respondents were in breach of a fiduciary duty that he found was owed to the appellant.
- [9] In my opinion, no basis at all is disclosed in the evidence to support any suggestion that the learned trial judge was in any way biased against the appellant or that he did not afford her ample opportunity to present her case. The appellant was not represented at trial by a lawyer. It is apparent to me from the record that the learned trial judge was extremely patient with the appellant and he afforded her a full and complete opportunity to advance the allegations she made in her case. I conclude that there is no foundation for these particular allegations concerning the conduct of the trial.
- [10] Although the appellant advanced arguments at trial that two employees of the realty company, the respondents Simpson and Scott, had done something wrong in connection with this transaction, it was and is obvious that there was no basis in the evidence for such allegations. The trial judge made no error in dismissing the case against these respondents.
- [11] At trial and in this Court the appellant appeared to concentrate more on the role of Mr. Moldowan in involving her in this transaction. She alleged that he had not properly explained the transaction to her, that he had somehow changed the agreement she signed and she asserted that in general, he had not behaved in a proper fashion for a realtor. With respect to her narrative of events surrounding her entry into the contract of purchase and sale of the property, the learned trial judge did not find her to be a reliable historian. He observed that where there was a conflict between the evidence of the appellant and that of the respondent Moldowan, he preferred the evidence of Mr. Moldowan.
- [12] From my perusal of the evidence, it appears to me that this conclusion of the learned trial judge was soundly based on the evidence. The testimony of both Ms. Scott and Mr. Moldowan was to the effect that they had carefully explained the nature of the transaction to her. The fact that she initialled the purchase contract in a number of places tends to support the evidence that she was made aware of specific features of this contract. Mr. Moldowan

advised her to consult with her banker. This recommendation arose because when he suggested she might want to speak to a lawyer, she demurred to that suggestion on the basis it would simply cost her money to do so. He then went on to suggest it might be useful for her to talk to her banker about the transaction. The evidence accepted by the trial judge clearly establishes that she was fully informed by the realtors about the terms of this transaction of purchase and sale.

- [13] One of the allegations advanced by the appellant was that the realtors had not alerted her to the fact that the developer Buck was having financial difficulties although they knew that this was so. The evidence of Mr. Moldowan on this point, which was accepted by the trial judge, was that although there had been a lien filed in May on behalf of the Workers' Compensation Board and later some tradesmen's liens, this was not a matter of concern to him as an experienced realtor. He testified that disputes often arise in developments and that liens are filed to simply protect the positions of those who are having controversies or disputes with the developer. It seems to me that there was a proper basis in the evidence for the trial judge to find that to the knowledge of the realtors, this developer was not experiencing financial problems of any consequence at the time the transaction was entered into between the appellant and the developer.
- [14] It was only later in the summer that a controversy arose, as I noted, between the developer and his financier. This dispute was the source of the problems that ultimately resulted in the loss of money by the appellant. But in my view, this was an event wholly unanticipated by the realtors in April and May 1998. It is clear to me that there was no knowledge on the part of the respondents at the relevant time that there was any financial difficulty being experienced by the developer. Of course it follows from this that they, not having any knowledge, could scarcely conceal such knowledge from the appellant. The trial judge properly found that there was no support in the evidence for this allegation by the appellant. The judge said this concerning the New Home Warranty and the state of knowledge of the realtor at the material time:
- [41] Furthermore, in my view, whether or not there were financial difficulties being experienced by the developer is of substantially less import when one considers that the deposit which had been paid by the plaintiff was fully secured or protected by virtue of the New Home Warranty Program which the defendant Mr. Moldowan had satisfied himself was properly in place with respect to the project. Indeed Mr. Moldowan testified that the builder had originally taken the view that larger deposits should be required from persons making offers, but Mr. Moldowan prevailed upon the developer to limit the deposit to \$20,000 because that was the ceiling of coverage provided by the New Home Warranty Program. In that way, the security of the deposit would be properly insured save and except for the events which came to pass here, namely the bankruptcy of the New Home Warranty Program. It is not reasonable to impose upon the defendant Mr. Moldowan a duty to contemplate that the New Home Warranty Program would fail by reason of bankruptcy. In these circumstances I do not find that the defendant Mr. Moldowan knew that the developer

was in financial difficulty through the summer of 1998, nor do I find that he failed to make appropriate inquiries. By virtue of his concern with the New Home Warranty coverage it is my finding that he took reasonable measures to protect the security of the plaintiff's deposit.

- [15] The core conclusions of the learned trial judge are set forth in his reasons as follows:
- [49] Unfortunately the plaintiff, in her disappointment, some understandable anger and zeal, has launched an attack upon the defendants. I suppose it is human nature that when one sustains a loss it is not uncommon that efforts are made to find and identify others to be responsible. In the present case it is my conclusion that the plaintiff has quite erroneously and improperly fixed upon the defendants in this action. In fact, she is the victim of incredible bad fortune, most particularly the financial failure of the developer of the Downes Road Estates and the untimely and unfortunate bankruptcy of the New Home Warranty Program. I doubt she has recourse against either of those situations.
- [50] In my view, the plaintiff's conduct in her prosecution of this lawsuit has been improper. I refer particularly to the allegations of fraud, deceit and breach of fiduciary duty as she has levelled those against the defendants, especially Mr. Moldowan. The fact is, realtors rely upon their reputations. On the basis of the evidence before me, Mr. Moldowan has been a professional realtor for in excess of a quarter century. He has been active in his professional organization and has been involved in measures to oversee competence and ethics in that profession. According to what I know, he has never been the subject of allegations of misconduct. Defending this action has been costly to him both in financial terms and in terms of stress and damage to his reputation. The accusations that give rise to this harm are unfounded and malicious. The plaintiff deserves to be roundly chastised for her prosecution of this lawsuit in the manner in which she has proceeded.
- [16] I may say that based upon my perusal of the record in this case, the above conclusions of the learned trial judge seem to be amply justified by the evidence. This appellant has certainly suffered a significant loss of funds by reason of the rather remarkable circumstances that not only did the developer get into financial difficulty but as well the program that was intended to address such potential difficulty, namely the New Home Warranty program, declared bankruptcy before the appellant could claim reimbursement under the program. These two unusual and unanticipated events have ultimately resulted in no recovery of funds by the appellant, and this obviously is a great misfortune for her.
- [17] However, it must be said that her effort to fix the responsibility for her misfortune upon the realty company and its agents is based on a misapprehension of events. I am in agreement with the observation of the learned trial judge that not only can it be said that Mr. Moldowan did not act in any way improperly in this transaction, but in fact he actively took steps to see if the plaintiff could be preserved from financial losses arising from the transaction. The criticism the appellant sought to direct at him and his associates is not well founded.

[18] Having reviewed the record of the trial proceedings, I do not consider that the judge made any error either in his appreciation of the evidence or in the application of the law to the facts he found. I am in agreement with the conclusions of the learned trial judge and accordingly I would dismiss this appeal. "The Honourable Mr. Justice Hall" I Agree: "The Honourable Mr. Justice Mackenzie" I Agree: "The Honourable Mr. Justice Smith"

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