

CANADA / JUDGMENT

McGowan et al. v. Campbell

1999 BCCA 50

COURT

British Columbia Court of Appeal

DECIDED

29 January 1999

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COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

JOHN T. McGOWAN and SANDRA M. McGOWAN

PLAINTIFFS (APPELLANTS)

AND:

DOUGLAS ROY CAMPBELL, F.W.C. THE LAND COMPANY INC. d.b.a. COLDWELL BANKER THE LAND COMPANY INC., C.T. REALTY FRANCHISING INC. d.b.a. COLDWELL BANKER AFFILIATES OF CANADA INC.

DEFENDANTS (RESPONDENTS)

Before: The Honourable Mr. Justice Macfarlane The Honourable Madam Justice Newbury The Honourable Madam Justice Huddart

Robert T.C. Johnston, Q.C. Counsel for the Appellants

W. Rory Lambert Counsel for the Respondent, Douglas Roy Campbell

Patrick G. Guy Counsel for the Respondent, F.W.C. The Land Company Inc.

Place and Date of Hearing Victoria, British Columbia January 12, 1999

Place and Date of Judgment Vancouver, British Columbia January 29, 1999

Written Reasons by: The Honourable Madam Justice Newbury

Concurred in by: The Honourable Mr. Justice Macfarlane The Honourable Madam Justice Huddart

Reasons for Judgment of the Honourable Madam Justice Newbury:

- [1] This is an appeal from the dismissal of the McGowans' action against the vendor of a house located on a "view" lot ("Lot 61") in North Saanich. The McGowans had two central complaints - first, that the defendant Mr. Campbell misrepresented to them orally that the view from Lot 61 would remain unobstructed by any house that might be built on the adjoining Lot 62; and, second, that he made both oral and written misrepresentations to them about the boundaries of Lot 61. The plaintiffs alleged that both sets of statements were incorrect: they say they had to pay their neighbour \$20,000 to re-site his proposed house to avoid obstructing their view; and Lot 61 turned out to be smaller than what they had been led to believe. Indeed, an outdoor barbecue and patio pertaining to the McGowans' house were found to encroach on the adjacent property.
- [2] The plaintiffs claimed they relied on Mr. Campbell's statements in deciding to purchase Lot 61, and sought damages of some \$71,000 for the amounts they spent in reaching a satisfactory arrangement with the owner of Lot 62, and the diminution in value of their lot due to the inaccuracy of the alleged misrepresentations. In addition to suing Mr. Campbell, they sued the real estate agency ("Coldwell Banker") which had the listing of the property for sale, claiming it was vicariously liable for the acts of the vendor Mr. Campbell, who was also Coldwell Banker's employee or agent.
- [3] Counsel before us engaged in some discussion as to whether the plaintiffs' claims sounded in contract or tort. Mr. Guy, counsel for Coldwell Banker, argued that the plaintiffs had not pleaded "contractual misrepresentation" and that the trial judge had treated the claim exclusively as one in tort. However, the plaintiffs' amended writ does on a fair reading support a claim in contract at least insofar as the misrepresented property boundaries are concerned (in this regard, I note in particular paragraphs 16, 17 and 18 of the endorsement), and the court below seems to have dealt with the case on the bases of both contract and tort - in my view, correctly.
- [4] The trial judge rejected any claim in contract relating to the view from Lot 61, relying on a clause in the parties' agreement excluding any representations or warranties outside the written document. He then considered whether the McGowans had made out a case of negligent misrepresentation, either with respect to "the view issue" or the "encroachment issue". On the first question, he found that the plaintiffs' version of their conversation with Mr. Campbell at the time they inspected Lot 61 was less reliable than his, and rejected their allegation that Mr. Campbell had "made the definitive statement that no house could be built on Lot 62 that would impede the view from Lot 61." Instead, he found that Mr. Campbell had offered an opinion as to why it was unlikely a house would be built on Lot 62 that would seriously obstruct the view from Lot 61 - an opinion that, the Court found, Mr. Campbell had honestly held. As well, it was noted the McGowans had made their own investigation into the matter and had satisfied themselves that what Mr. Campbell told them was correct.
- [5] Before us, Mr. Johnston for the plaintiffs submitted that the trial judge had mischaracterized Mr. Campbell's responses to Mrs. McGowan's questions concerning possible construction on Lot 62, and that this constituted an error of law. I have difficulty accepting this submission

which, as counsel for the respondents argued, is essentially an invitation to this court to substitute other facts for those found at trial. Mr. Johnston conceded there was evidence on which the Court's findings could be based. In this regard, reference may for example be made to Mr. Campbell's testimony in chief:

Q Now, during your meetings with the McGowans, was there any discussion with them about construction on lot 62? A Oh yes, there was. We, um, stood out by the barbecue, I remember that. Um, after we discussed the difficulties of myself getting my driveway in, and showed them the width of the lot, the depth of it, and the steepness is self-explanatory just looking at it, and I told them in my opinion, whoever buys that lot is going to have one heck of a time trying to get up that hill and get a driveway in so they can have a house. And in all our opinions, that was it, and it was agreed upon. I mean it's self-explanatory when you looked at it.

The trial judge's "characterization" of Mr. Campbell's statement as an expression of opinion rather than one of "present fact" was a matter of factual inference, and that characterization was not shown to be clearly wrong. I would therefore not accede to this ground of appeal.

[6] The factual and legal considerations surrounding the "encroachment" issue are more complex. In this regard, Mr. Campbell did make one or more misrepresentations to the plaintiffs, albeit innocently. The trial judge found that, during one tour of the property by Mrs. McGowan, Mr. Campbell pointed out two white survey stakes which appeared to be at the top and bottom of the property. The Court continued:

He advised her that part of the area which had been landscaped by him - a small patch of lawn - was in fact on Lot 62 but that he had obtained permission from Allen [the adjoining landowner of Lot 62] for that encroachment. This was confirmed by Allen in his evidence.

[24] The plaintiffs allege that Campbell, by so stating impliedly, represented that the other areas such as part of the patio and the barbecue, which were later found by survey to encroach on Lot 62, were wholly within the boundaries of Lot 61.

[25] It was Campbell's evidence that when the encroaching outdoor improvements were constructed that he had sighted [sic] what he perceived the boundary line to be, having regard to the location of the survey stakes, and he was satisfied that all but the patch of lawn were within the boundaries of Lot 61.

Being concerned about the lotlines, the McGowans inserted a clause in the agreement (a largely printed "interim agreement" form, which they completed themselves), requiring Mr. Campbell to supply a "site survey" to them within two days of acceptance of their offer. The relevant portion of the agreement provided:

This offer to purchase is subject to approval as to form and contents by the purchasers' solicitor. Such approval is to be communicated to the vendors within (5) days of acceptance or be deemed to be withheld.

This offer to purchase is subject to appraisal and/or mortgage approval by the purchasers' financial institution. Such approval is to be communicated to the vendor within ten (10) working days of acceptance or be deemed to be withheld.

The property should be in essentially the same condition and contain the same items included in this offer, as viewed on the 28 July, 1992.

Deposit to be held in trust by Caldwell Banker Realty until completion, accumulated interest to be paid to the purchaser.

The above subjects are for the purchasers' benefit only, and may be waived in writing, in whole or in part, unilaterally by the purchaser.

Site survey to be supplied by the vendor to the purchaser within two (2) working days of acceptance. [Emphasis mine]

Further below, the printed form stated:

THERE ARE NO REPRESENTATIONS, WARRANTIES, GUARANTEES, PROMISES OR AGREEMENTS OTHER THAN THOSE SET OUT ABOVE. ALL OF WHICH WILL SURVIVE THE COMPLETION OF THE SALE

THIS OFFER IF ACCEPTED IS A LEGAL AND BINDING CONTRACT. SEE INFORMATION ON BACK. READ IT ALL BEFORE YOU SIGN.

[7] Within the stipulated time, Mr. Campbell delivered a document to the McGowans. It is not clear from Mrs. McGowan's evidence or from the trial judge's Reasons whether that document was the sketch at Tab 10 of Exhibit 1 or the so-called "framing certificate" at Tab 12 prepared by a B.C. land surveyor some time earlier. The first purports to show the "building envelope" on Lot 61, extending to ten feet (the minimum municipal setback requirement) from the boundaries of the property. The second purports to show the "foundation walls of the improvements". It shows no encroachment on Lot 62, whereas the patio and barbecue do in fact cross over the lotline. It is clear the framing certificate was delivered (or re-delivered) by Mr. Campbell to the McGowans' notary shortly before closing at the latest. In response to a request from the McGowans' lender, it was accompanied by a statutory declaration signed by Mr. Campbell as follows:

THAT to the best of my knowledge and belief the concrete foundation was poured in the forms exactly as shown on the survey [attached] without amendment or deletion and there have been no exterior alterations or extensions of the improvements located on the Survey since the date of the said Survey and that therefore the measurements shown on the said Survey Certificate are still correct.

THAT I made this declaration to the National Trust Company or [sic] the purpose of inducing them to provide funding on a mortgage for [the plaintiffs]. [Emphasis mine]

Assuming, then, that the patio and barbecue are "extensions" of their "improvements" - a proposition the defendants did not seriously contest - the statutory declaration was false and the framing certificate was inaccurate.

- [8] As I have said, the trial judge did not make a clear finding as to which document was delivered when. He treated the clause requiring delivery of a site survey as a "subject to" condition which the plaintiffs had "removed" by later addendum to the interim agreement. In this he did, with respect, misapprehend the evidence. The clause was not expressed as one to which either party's obligation to close was "subject", and it was inserted below the series of "subjects" and below the clause permitting waiver by the purchasers alone. As well, there was no addendum (as there was in respect of the two "subjects") to the agreement that purported to "remove" the clause.
- [9] Mr. Johnston also argues that the trial judge erred in ruling that the plaintiffs could not rely on the "site survey" clause to found a claim for damages in contract. He notes this passage earlier in the trial judge's Reasons:
- [14] The interim agreement did not contain any representations pertaining to this view. It did contain a provision that a site survey be supplied by the vendor within two working days of acceptance. Such a survey was supplied.
- [15] In my opinion the exclusion clause, inserted in the interim agreement by the plaintiffs, precludes them from relying upon the alleged representations of Campbell on a contractual basis. . . .
- [16] The plaintiffs, however, are not limited in relying on the representations alleged on a contractual basis, but, can rely, as they do, on the basis that the representations they allege were made constitute the tort of negligent misrepresentation.
- [10] It may be that the "exclusion clause" (quoted above at para. 6) is not effective to preclude the plaintiffs from relying, as a matter of contract, on the contents of the sketch and/or the framing certificate and accompanying statutory declaration. An argument can be made that delivery of either the sketch or the certificate immediately after acceptance of the offer constituted a representation that became a contractual warranty to the effect that the document was accurate. On the other hand, an argument can be made that the parties intended any obligation Mr. Campbell had in respect of the document would not continue after closing but would be "merged" with the conveyance: see *Fraser-Reid v. Droumtsekas et al.* [1980] 1 S.C.R. 720, at 735.
- [11] We need not decide this issue, however, because no matter what the result in contract, the plaintiffs may still claim damages in tort for negligent misrepresentation. In my view, negligence on the part of Mr. Campbell was shown. Had Mr. Campbell looked more carefully at the sketch, he would have seen it did not show his decks or the patio/barbecue improvements, and that they extended into the ten-foot setback allowance. Had he examined the framing certificate he would have seen that it failed to show the extensions

made beyond the foundation walls shown. Had he read the statutory declaration with the framing certificate attached, he would not have signed it. Unfortunately, he did not exercise this modicum of reasonable care. The fact Mr. Campbell was acting honestly does not protect him from liability, as the trial judge seems to have suggested at para. 26 of his Reasons.

- [12] Did the McGowans rely on the framing certificate and statutory declaration to their detriment? Mr. Guy submitted that the certificate and statutory declaration had been delivered in fact to the plaintiffs' notary (and presumably, by him to the lender) immediately before closing, and that there was no evidence the plaintiffs themselves saw the documents before closing. Of course, having received a "clean" declaration, the notary was not alerted to any discrepancy between the certificate and the actual condition of the improvements. The unfortunate result was that the McGowans may not have had the opportunity themselves to see the certificate. If they had, they might have realized it did not show the patio and barbecue extensions and that the declaration was incorrect. But delivery to the McGowans' agents must be taken to be delivery to them and the agents reasonably relied on the statutory declaration in proceeding with the purchase. In these circumstances, I would conclude that reliance on the part of the plaintiffs was made out, and that Mr. Campbell is liable for the resulting damages.
- [13] A question also arises about the amount of those damages. The trial judge said in the course of his Reasons that the owner of Lot 62, Mr. Allen, "gratuitously" agreed to grant the McGowans an easement and restrictive covenant in respect of the improvements which encroached on his property. Thus \$20,000 of the \$21,000 paid to Mr. Allen by the plaintiffs was "to cover his expenses to re-site the house so as to minimize its impact on the plaintiffs' view". This finding is consistent with Mr. Allen's testimony, although he was not cross-examined on the point and some correspondence between him and his neighbours might have supported a different inference. Ultimately, however, the inference drawn by the trial judge has not been shown to be clearly wrong. In the result, the amount of damages payable by Mr. Campbell resulting from his misrepresentation about non-encroachment should consist of the \$5,540.92 in survey and legal fees incurred by the plaintiffs, and the amount by which the value of Lot 61 was reduced due to the encroachment. Mr. Blake, an expert appraiser retained by the plaintiffs, assessed that reduction at \$5,000. The expert retained by the defendants did not contest this estimate in his report. Accordingly, I would allow the appeal to the extent of finding Mr. Campbell liable for negligent misstatement to the plaintiffs in the amount of \$10,540.92.
- [14] Was Mr. Campbell's negligent act committed in the course of his duties as a realtor for Coldwell Banker? Applying the various criteria discussed by this court in connection with vicarious liability in *B.(P.A.) v. Curry et al.* (1997) 30 B.C.L.R. (3d) 1, I am of the view that such liability should not be imposed. Mr. Campbell's act of providing the framing certificate and statutory declaration to the plaintiffs' agent was the act of a vendor, not of a realtor. There was no evidence a realtor would ordinarily take it upon himself to sign and provide

such documents - indeed, Mr. Campbell testified to the contrary.

[15] I would allow the appeal to the extent stated, and order that Mr. Campbell is liable to the plaintiffs for damages of \$10,540.92. I would also order costs on the usual scale, and thank counsel for their helpful and concise submissions.

"The Honourable Madam Justice Newbury"

I AGREE: "The Honourable Mr. Justice Macfarlane"

I AGREE: "The Honourable Madam Justice Huddart"

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