

CANADA / JUDGMENT

# Paniccia v. Eckert

2013 BCSC 156

## COURT

Supreme Court of British Columbia

## DECIDED

4 February 2013

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2013 BCSC 156 *Paniccia v. Eckert* IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: *Paniccia v. Eckert*, 2013 BCSC 156 Date: 20130204 Docket: 31923 Registry: Penticton Between: Domenico Paniccia and Helena Irene Atroszenko-Paniccia Plaintiffs And Felix John Eckert, Parkside Realty Inc. Doing business as Royal LePage Parkside Reality, Larry Young, Donna Young, and Pears Home Inspections Ltd., doing business as D-Tect Home Inspections Defendants Before: The Honourable Mr. Justice Barrow Reasons for Judgment Re Costs Counsel for the Plaintiffs: T.J. Johnston Counsel for the Defendant, F.J. Eckert: R.K. Oliver Counsel for the Defendants, Parkside Realty Inc., L. Young and D. Young: V. Reakes Place and Date of Trial/Hearing: Kelowna, B.C. November 8, 2012 Place and Date of Judgment: Penticton, B.C. February 4, 2013

- [1] The plaintiffs sued their real estate agent, Mr. Young, and the person from whom they purchased their house. As against the vendor, Mr. Eckert, they alleged breach of contract. As against both the vendor and their real estate agent, they alleged negligent and fraudulent misrepresentation. In addition, the plaintiffs claimed that Mr. Young breached his fiduciary duty to them and was guilty of deceit. Following a trial, I dismissed their claims as against their real estate agent and granted judgment for a small portion of their claims as against the vendor, Mr. Eckert. My reasons are indexed at 2012 BCSC 1428.
- [2] Mr. Young seeks special costs pursuant to Rule 14(1)(b)(i) or double costs under Rule 9-1. The defendant, Mr. Eckert, also seeks special costs. In both cases, the claim for special costs rests on the fact that fraud was alleged and not proven. In the case of Mr. Young, the claim also rests on the fact that breach of fiduciary duty was alleged but not proven.
- [3] Special cost, or as they were sometimes earlier referred to "solicitor-and-client costs", are awarded where the conduct of the unsuccessful party can be properly characterized as reprehensible, scandalous or outrageous. Instances of reprehensible conduct include unproven allegations of breach of fiduciary duty and unproven allegations of fraudulent misrepresentation or deceit. It is not merely that such allegations are made and then not proven, which attracts punitive costs consequences, but rather it is where such allegations are made recklessly (see generally *Ip v. Insurance Corp. of British Columbia* (10 November 1993), New Westminster SO-3158 (B.C.S.C.) per McKinnon J.). McKinnon J. also made the

point in Ip that "an allegation of fraud...casts a serious pall over [a person's] reputation in the community". For that reason, "very careful consideration" needs to be given to the circumstances by a litigant before advancing such a claim.

- [4] There was, as against Mr. Young, no basis to conclude that he made fraudulent misstatements or that he was in breach of his fiduciary duty. I am not aware that there was ever any basis to so conclude. This is not a case in which there was evidence which might support such a conclusion but which later proved insufficient for one reason or another. Based on the record, there was never any basis for believing the Mr. Young was dishonest in any way, never mind fraudulent. Further, the allegation was pressed to the conclusion of the trial. It was argued that Mr. Young "used his superior realtor skills...to get [the plaintiff] to sign". There was no evidence to support such an allegation. In the transaction at issue, Mr. Young acted in a dual agency capacity. It was argued that he "single-mindedly" preferred the interests of the vendor over those of the plaintiff purchaser. There was no evidence to support that assertion.
- [5] Mr. Young has been a realtor in Summerland for 32 years. Summerland is a small community. A reputation for honesty and integrity is important in many professions, including real estate sales, and perhaps especially in small communities where others are likely to be aware of such allegations. To endure the allegation of dishonesty absent any evidentiary basis for it is conduct that the court should dissociate itself from. Awarding special costs is one way of doing that (see *Fullerton v. Matsqui* (1993), 74 B.C.L.R. (2d) 311 (C.A.) at para. 23).
- [6] I am satisfied that the claim of fraudulent misrepresentation and breach of fiduciary duty is worthy of rebuke by way of an award of special costs. That said, the case against Mr. Young did not rest entirely on an allegation of fraud and breach of fiduciary duty. There were allegations of simple negligence as well. Those allegations were not proven. Such allegations do not, without more, generally attract an award of special costs. I have considered whether to award special costs for some proportion of the trial to account for this aspect of the case. I have decided against that for two reasons. First, it seems to me to be arbitrary and unworkable to attempt to do that in this case. The allegations of simple negligence are neither greater nor lesser than the allegations said to be fraudulent. Second, Mr. Young made an offer to settle this case on the basis of a waiver of costs. He bettered that offer. He would be entitled to double costs as a result. To award special costs for some portion of the trial and double costs for another is unworkable. In the result, Mr. Young is entitled to special costs pursuant to Rule 14-1(1)(b)(i).
- [7] Mr. Eckert also seeks an order for special costs. His claim rests on a somewhat different footing than that of Mr. Young. He argues that the claim of deceit and fraudulent misrepresentation was made without any basis. He argues that to make such an allegation knowing that he was a man in his 80s, and whose wife was gravely ill, and to seek punitive damages in the bargain is conduct worthy of rebuke by way of special costs. One other distinguishing feature is that the plaintiffs recovered judgment, albeit for a small portion of

their claim (something like 4 percent of that which was claimed, according to Mr. Eckert). Counsel for Mr. Eckert also points out that he has taken the position with the plaintiffs from the outset that there was no basis for the claim of deceit, and if successful, he would be seeking special costs.

- [8] As to the latter point, I do not consider that putting the other side on notice that a claim would be made for special costs is a basis for awarding such costs. Doing so would elevate it to something approaching the status of an offer to settle without actually being such an offer. Further, the fact that such a position is taken does not change or colour the conduct that is said to ground the special cost award. It is either conduct that should attract the award or not; taking the position in advance of trial that special costs would be sought neither adds to nor detracts from the underlying conduct.
- [9] Further, I was satisfied that in three respects Mr. Eckert knew about material latent defects associated with his property. One related to diesel buried on the property, another related to the electrical power to the barn, and the third was with respect to a leaking skylight and the wall around the chimney. He warranted that there were no such defects. I was not satisfied that he lied about the condition of the house, rather that he knew about the defects, and had he turned his mind to them when he completed the property disclosure statement, he would have realized his error. While there were relatively minor matters on the overall scheme of the plaintiffs' claims, they served in part to ground their belief that they had been dealt with unfairly more generally.
- [10] In these circumstances, I am not satisfied that an award of special costs is warranted. However, neither am I satisfied that it is appropriate to deprive the defendant of any portion of his costs notwithstanding that he was unsuccessful in defending all of the plaintiffs' claims. Mr. Eckert is entitled to his costs at Scale B. "G.M. Barrow, J." The Honourable Mr. Justice Barrow

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