Court of Queen's Bench of Alberta

Citation: Terrace Consulting Inc. v. Jackson, 2011 ABQB 108

Date: 20110222
Docket: 1008 00349
Registry: Medicine Hat

Between:

Terrace Consulting Inc.

Plaintiff

- and -

Kent Jackson and Myrna Jackson

Defendant

Reasons for Judgment
of
J.B. Hanebury, Master in Chambers

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[1] The plaintiff applies for summary judgment to enforce its remedies under an offer to purchase a condominium. The defendants say that they were told that they were signing a rent to own contract. At issue is the question of whether an entire agreement clause in the contract can trump an allegation of negligent misrepresentation.

FACTS

[2] Kent Jackson became aware of a "rent to own program" for new condominiums in Medicine Hat in November, 2008. In 2009, he met with a representative of the plaintiff, Terrace Consulting Inc., at a show home and viewed the units. He states that the representative told him that 100% of any rent money paid by him would be applied to the down payment to purchase a condominium and, after the 12 month term, if he wished to move forward with the purchase, he could proceed. However, he was also told that he had the right to walk away from the contract.

[3] Mr. Jackson states that the representative advised that he had to fill out a rental application, which he did. She also stated that if he and his friend decided not to move forward with the purchase a walk-through would be conducted, and if the condo was in good condition, their deposit would be returned.

[4] Mr. Jackson states that he was uncertain as to whether he wished to remain in Medicine Hat and he was assured by the representative that he had the right to leave and walk away from the rental option at any time. It was explained to him that there would be a pre-approval process to ensure that they qualified should they ultimately proceed with the purchase.

[5] As Mr. Jackson knew that neither he nor his friend had income sufficient to qualify, he asked his mother, Myrna Jackson, to help them get the pre-approval. His mother met with the representative to look at the condominium and, as she states in her affidavit, the same arrangements were described to her.

[6] Mr. Jackson and his mother were advised that they had been approved and could move in. Mr. Jackson gave the representative a bank draft for $4000.00, which he understood to be a refundable deposit. The representative advised that she had the paper work for the rent to own program and met with Mr. Jackson and his mother at the restaurant where Mr. Jackson worked.

[7] According to Mr. Jackson, at the time of the signing of the contract, the representative reiterated the fact that the documentation related to a rent to own program. Neither Mr. Jackson nor his mother were aware that what they were signing was an actual unconditional contract to purchase the unit. Their meeting took approximately ten minutes.

[8] Subsequently Mr. Jackson's health deteriorated, he lost his position at the restaurant and moved from Medicine Hat. He contacted the plaintiff's representative who advised him he would get the deposit back assuming there was no damage to the unit.

[9] Mr. Jackson says he and his mother were subsequently threatened with legal action. He received a phone call from the plaintiff's representative who advised that if they moved back in for the remainder of the lease and continued to make the monthly payments, they would be released at the end of the contract. They did so, eventually dropped off the keys and completed a walk-through of the unit. They have not received back their deposit.

[10] The plaintiff commenced this action and seeks to rely upon the written contract. Mr. and Ms. Jackson have defended and also counter claimed for the return of the deposit. No affidavit was filed by the representative of the plaintiff who dealt with the Jacksons. The plaintiff states that this representative is no longer with the company.

PLEADINGS

[11] The statement of defence alleges innocent, negligent and fraudulent misrepresentation, mistake and non est factum. The counterclaim adopts the allegations found in the statement of defence and seeks judgment or damages for $4000.00, the amount of the deposit.

[12] The plaintiff argues that the purchase contract contains an entire agreement clause which provides that the purchaser agrees that there are "no representations, warranties, collateral agreements, zoning conditions... except as expressed in this offer to purchase." The agreement also provides that "this agreement shall constitute the entire agreement between the developer and the purchaser and no representations, warranties and previous statements made by any person or agent other than those contained in this agreement shall be binding on the developer so as to vary the terms of this agreement."

[13] It is established law that fraudulent misrepresentation must be plead with specificity. Rule 13.7 *Alberta Rules of Court;* ***WIC Premium Television Ltd. v. General Instrument Corp.*** (1999) 253 A.R. 153 (Q.B.); ***Pepsi-Cola Canada Inc. v. P.M. Foods Ltd.*** (1985) 61 A.R. 340 (Q.B.). The pleading should include: the alleged misrepresentation; when, where, how, by whom and to whom it was made; its falsity; the inducement; the intention that the plaintiff should rely on it; the alteration of the plaintiff of his or her position relying on the misrepresentation; and, the resulting loss or damage: ***W.I.C. Premium***.

[14] The defence does not comply with these requirements.

[15] Although the parties did not raise this issue, a similar problem with the pleadings arose in the only case relied upon by the defendants: ***1250810 Alberta Ltd. v. 1284768 Alberta Ltd.,*** 2010 ABQB 125, para. 46. Generally, a failure to properly plead fraud prevents one from relying upon it: ***Hansen v. Twin City Construction Co.*** (1982) 19 Alta. LR. (2d) 335 at 339 (Q.B.).

ISSUE

[16] The defendants relied on the decision of this court in ***1250810 Alberta Ltd. v. 1284768 Alberta Ltd.*** to argue that in light of the misrepresentation, summary judgment should not be granted. The question at issue is whether the entire agreement clause precludes the defence of misrepresentation raised by the Jacksons and therefore summary judgment should be granted.

POSITIONS OF THE PARTIES

[17] The test for summary judgment is well-established and not disputed by the parties. There must be no genuine issue for trial: ***Pioneer Exploration Inc. (Trustee of) v. Euro-Am Pacific Enterprises Ltd.,*** [2003] A.J. No. 1305 (A.B.C.A.). Where relevant facts are contested, the matter is usually remitted to trial. However, if the applicant can make its case for summary judgment using the facts relied upon by the respondent, summary judgment may be granted. For the purposes of this application I have accepted the relevant facts established by the Jacksons.

[18] Pointing to the entire agreement clauses in the executed contract, Terrace Consulting Inc. says it is entitled to judgment even in the face of the defendants' allegations, as parol evidence cannot be admitted: ***Hawrish v. Bank of Montreal*** [1969] S.C.R. 515. See also: ***Dover Towing (1995) Ltd. v. Paramount Towing Ltd.***, 2000 ABCA 147; ***Gainers Inc. v. Pocklington Financial Corp.***, 2000 ABCA 151, ***Zaccardelli v. Kraus***, 2003 ABQB 319.

[19] In response, the Jacksons rely on the decision of Manderscheid J. in ***1250810 Alberta Ltd. v. 1284768 Alberta Ltd.*** to argue that the entire agreement clause found in the contract between the parties does not preclude the defences they have raised.

[20] To consider these arguments it is necessary to consider the parol evidence rule and the development and efficacy of entire agreement clauses (or limitation or exclusion clauses as they are sometimes called).

ANALYSIS

[21] The parol evidence rule generally bars extrinsic evidence that alters, adds to, subtracts from, or varies the meaning of the written document. The court may only look to the four corners of the document to ascertain its terms. It is presumed that the parties intended what they wrote and as a result their intention is found in the written contract.

[22] The classic decision on this issue is ***Bank of Montreal v. Hawrish***. In that case, a guarantor was sued by the Bank on his guarantee. The guarantor defended the claim on the basis that he had been orally advised by the manager of the Bank that, upon certain conditions occurring, he would be released from his guarantee.

[23] The Court found that this allegation did not constitute a defence as it would have contradicted the terms found in the written guarantee. While collateral evidence could be admitted where it did not contradict the terms of the written document; it could not be admitted where it did.

[24] Exceptions to this general rule permit the admission of parol evidence in certain circumstances, such as when the agreement is ambiguous; to demonstrate the factual matrix of the agreement; to establish a condition precedent or a collateral agreement; to demonstrate that the document was not intended to constitute the whole agreement; or to support a claim for rectification: ***Guaranty Properties Ltd. v. Edmonton (City)*** 2000 ABCA 215, relying on ***Gallen v. Allstate Grain Co.*** (1984) 9 D.L.R. (4th) 496 (B.C.C.A.), leave to appeal to S.C.C. refused (1984) 56 N.R. 233 (S.C.C.).

[25] Entire or complete agreement clauses were developed in order to preclude the introduction of evidence outside the written contract that would be conflict with it. Parties rely on such clauses to argue that pre-contract representations, collateral warranties or implied terms should be inadmissible.

[26] The courts have not uniformly interpreted the effect of these clauses. As has been noted by one commentator, “[t]his type of clause is probably more effective in Alberta than in other jurisdictions.” He states that in this province this type of clause is “prima facie, an almost complete answer to an attempt to imply further terms beyond those found in the document.”[1]

[27] Entire agreement clauses have been considered by the courts in many circumstances as the courts seek to balance the need for commercial certainty against the provision of relief in situations where an injustice would otherwise occur.

[28] In ***Paddon Hughes Development Co. v. Pancontinental Oil Ltd.*** [1998] A.J. 1120, para. 44, the Court of Appeal said in relation to such clauses:

> [C]ourts have generally equated entire agreement clauses with the parol evidence rule. An entire agreement clause may, however, be broader than the parol evidence rule. Otherwise the clause would be redundant. The effect of "entire agreement" clauses will necessarily depend on their precise wording.

[29] One of the earliest cases to consider such a clause was ***Case Threshing Machine v. Mitten*** (1919) 59 S.C.R. 118 (S.C.C.). The Court, erring on the side of commercial certainty, held that parties cannot expect a court of law to relieve them from their obligations under a contract because its terms appear harsh. The written contract provided that the terms of the agreement were found in the writing exclusively and a party who signed such a contract cannot escape its obligations.

[30] Judicial consideration in Alberta of the question of the effect to be given to such clauses appears to have started with ***Kaster v. Cowan*** [1925] 2 D.L.R. 742 (A.C.A.D.) where the contract for the sale of a stallion provided that “all agreements and conditions [are] being stated herein”. The Court found that no other agreements, or conditions could be introduced into evidence in light of that clause.

[31] Master Funduk described the court’s approach succinctly in ***Alberta (Treasury Branches) v. Robinson***, 1999 ABQB 627 at para.15 when he noted that “[t]here needs to be certainty in commerce so equity and the common law have devised some ground floor rules to govern commercial transactions [and] one is that pre-contract discussions between the parties is (sic) not admissible to vary or contradict a written contract.”

[32] This approach has been followed by the Alberta courts in a number of decisions, including: ***Marwood Cedar Homes Ltd. v. Hanson Food Processing Ltd.*** (1988) 86 A.R. 207 (M.C.); ***C Corp (Ontario) Ltd. v. Wesbru Holdings Ltd.*** (1988) 91 A.R. 210 (M.C.); ***Steeplejack Services (Canada) Ltd. v. Access Scaffold & Ladder*** (1989) 98 A.R. 330 (M.C.);

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[1] *The Use of Extrinsic Evidence in the Interpretation of Written Agreements in Alberta*, Tom F. Mayson (2004) 42 Alta. L. Rev. 499-542 at para. 123.

Everall Construction Limited v. Stuart Olson Construction (1990) 74 Alta. L.R. (2d) 357 (M.C.); ***Bucci Xenex Project Ltd. v. Ramasiuk***, 2010 ABQB 389.

[33] It has been referred to with approval by the Alberta Court of Appeal in ***Gainers Inc. v. Pocklington Financial Corp.*** 2000 ABCA 151 para. 15 et seq.:

> When the deal is complete in the written contracts, and not subject to an escrow, other evidence (parol evidence) is inadmissible to vary or contradict a clear written contract...
> Even earlier promises or representations, otherwise having legal effects, may be wiped out by suitable contractual clauses: ***Case v. Mitten***, supra. There is such a "whole contract" clause here. Such a clause may also bar side oral contracts... Similarly, the parties may validly contract, as they did here, that oral modifications of the contract will be ineffective, and that amendments must be written...[all citations omitted]

[34] Parties sought ways to avoid the limitations imposed by entire agreement and similar clauses. One approach was to frame a claim in tort rather than in contract.

[35] In each of ***Central Trust v. Rafuse*** [1986] 2 S.C.R. 147, ***BG Checo Int. Ltd. v. B.C. Hydro & Power Authority*** [1993] 1 S.C.R. 12 and ***Queen v. Cognos Inc.*** [1993] 1 S.C.R. 87, the Court considered when a claim relating to pre-contractual misrepresentations could be made both in contract and in tort.

[36] In ***BG Checo*** the Court held that where a given wrong appears to support an action in contract and in tort, the party may also sue in tort, unless the contract indicates that the parties intended to limit or negate the right to sue in tort. The Court held that generally the duty imposed by the law of tort can only be nullified by clear wording.

[37] In ***Cognos*** the Court went on to point out that if the pre-contractual representation relied on by the plaintiff became an express term of the subsequent contract, there could be no concurrent action in tort for negligent misrepresentation.

[38] In ***Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilidng Ltd.*** [1997] 3 S.C.R. 1210, the Court noted that limitation or exclusionary clauses will be strictly construed against the party seeking to rely upon them.

[39] Appellate decisions in Alberta and British Columbia have found that entire agreement or similar clauses in agreements will not shield a defendant from a claim in tort based on negligent or fraudulent misrepresentation, unless the clause has specifically contemplated such a claim: ***Bank of Montreal v. 239199 Alberta Ltd.*** [1993] A.J. No. 577 (Alta. C.A.); ***Zippy Print Enterprises Ltd. v. Pawliuk*** [1994] B.C.J. No. 2778; ***Betker v. Williams*** (1992) 63 B.C.L.R. (2d) 14 (B.C.C.A.). See also: ***Unryn v. Melcor Developments Ltd.*** [1994] A.J. No. 636 (Q.B.); ***Opron Construction Co. v. Alberta*** (1994) 151 A.R. 241 (Q.B.), para. 71; ***Beenham v. Rigel Oil & Gas***

Ltd., 1998 ABQB 1043 (Q.B.); ***Dornan Petroleum Inc. v. Petro Canada*** (1996) 189 A.R. 241 (Q.B.).

[40] In ***40 Sunpark Plaza Inc. v. 850453 Alberta Inc.***, 2007 ABQB 54, at para.70, Coutu J. found that an entire agreement clause, which provided that there were no representations other than those contained in the contract, was insufficient to avoid the claim for misrepresentation as the clause did not specifically exclude negligent or fraudulent misrepresentation.[2]

[41] This case law has resulted from claims for tortious or actionable misrepresentation and resultant damages and the entire agreement clause has been raised as a defence. In other words, negligent or fraudulent misrepresentation has been used as a sword against which entire agreement clauses have been ineffective.

[42] The ground shifts when misrepresentation is used as a defence to shield a party from a claim under a contract with an entire agreement clause.

[43] Not surprisingly, an entire agreement clause will not preclude a defence of fraudulent misrepresentation where there is an entire agreement clause: ***Opron Construction Co.*** at paragraphs 711 -714; ***Slessio v. Jovica et al.*** [1973] A.J. No. 205 (A.C.A.D.) para. 42; ***1250810 Alberta Ltd.*** (supra) para. 44. The court will not countenance fraud and will find a way to redress it.

[44] The law is not as clear on the effectiveness of negligent misrepresentation as a defence in the face of a contract with an entire agreement clause.

[45] Whether an entire agreement clause will preclude a defence of negligent misrepresentation to a claim in contract was considered by the British Columbia Court of Appeal in ***Zippy Print Enterprises Ltd. v. Pawliuk***. In that case the claim was by the franchisor, seeking payment by the franchisee of funds it alleged were owing under the contract. The franchisee defended the claim, arguing misrepresentation. The plaintiff relied on the entire agreement clause found in the contract signed by the parties.

[46] Lambert J. A. pointed out that it was possible to consider the facts of the case pursuant to either tort principles or contract principles. He said that if he were to find a different result should flow depending on the principles applied, he "would be concerned that [he] had perhaps

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[2]When considering when entire agreement clauses may be successfully used as a shield in the face of claims of misrepresentation, some courts have decided to take a different approach when both parties are commercial entities or where they have negotiated the terms of their agreement with the benefit of legal advice: ***No. 2002 Taurus Ventures Ltd. v. Intrawest Corp.*** 2007 BCCA 228; ***MacMillan v. Kaiser Equipement Ltd.***, 2004 BCCA 270 at para. 37, relying on the dissenting reasons of Newbury J. in ***Turner v. Visscher Holdings Inc***. (1996) 23 B.C.L.R. (3d) 304 (C.A.).

misconceived the applicable principles" as there was only one set of facts. With those facts, he said, he should either find liability by the franchisee, or that he had a sound defence. The legal route he chose should not affect the outcome; the facts should determine the outcome. He hastened to add that it was not impossible to have two different results, one in contract and one in tort, but if there were, "there is room for further thought."

[47] Turning to the principles in tort, he first confirmed that the case law holds that negligent misrepresentations can be actionable in tort in the face of an exclusionary clause when the clause does not specifically state that liability for negligence is excluded.

[48] Turning then to the situation in contract, he noted the general rule that a commercial enterprise cannot make an intentional oral representation designed to persuade a party to enter into a standard form contract of adhesion [such as banking documents] and then, by invoking the parol evidence rule, rely on the written contract to escape liability for the untrue representation.

[49] Considering the effect of an exclusion clause on this general rule, he held at para. 45:

> ...A general exclusion clause will not override a specific representation on a point of substance which was intended to induce the making of the agreement unless the intended effect of the exclusion clause can be shown to have been brought home to the party to whom the representation was made by being specifically drawn to the attention of that party, or by being specifically acknowledged by that party, or in some other way.

[50] He described a point of substance as one that, if it had been known that the representation was false at the time it was made, then it might reasonably be supposed that the party to whom the representation was made would not have entered into the contract.

[51] Has this statement of the law been adopted in Alberta?

[52] The defendants point to a single case[3], ***1250810 Alberta Ltd. v. 1284768 Alberta Ltd.*** In that case the defendant argued that an offer to purchase certain land was void and unenforceable due to false representations made in relation to its fundamental terms. It counterclaimed for the loss of the profit from the planned sale of a portion of the lands and additional engineering and other costs incurred. The offer contained an entire agreement clause that provided that there were no other warranties, representations or collateral agreements other than those found in the contract.

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[3]The defendants also mentioned in oral argument ***TWT Enterprises Ltd. v. Westgreen Developments (North) Ltd.*** [1992] A.J. No. 569 (Alta. C.A.). A review of that case indicates that the Court declined to consider the argument of negligent misrepresentation and founded its decision on the allegation of fraudulent misrepresentation.

[53] The Court acknowledged that the law has not allowed a party who has made a fraudulent misrepresentation to hide behind an exculpatory or limitation clause. Manderscheid J. referred to ***Zippy Print*** (supra) and adopted that Court's finding in relation to the need for precise wording for an exclusion clause to defeat a claim in tort. He noted that the same approach has been taken by the Alberta courts and referenced a series of cases that deal with claims in tort. He did not go so far as to adopt the reasoning of Lambert J.A., of the British Columbia Court of Appeal, on the ability of a negligent misrepresentation to provide a defence to a contractual claim in the face of an entire agreement clause.

[54] Manderscheid J. found that fraudulent misrepresentation had not been properly pled and therefore should not be considered. However, despite that failure, summary judgment was not appropriate in light of the evidence of misrepresentation actually found in the transcripts. In any event, he said, the counterclaim raises a triable issue in negligence and the claim and the counterclaim should both go to trial.

[55] From this case law the following general principles relevant to the case before this Court have been established:

> (a) a claim may sound both in tort and in contract;
>
> (b) when the claim in tort is for a representation that preceded the contract, to be actionable that representation must not have become an express term of the contract;
>
> ©) if there is an entire agreement clause in a contract it will be strictly construed against the party relying on it;
>
> (d) when a valid claim in tort is brought, an entire agreement or similar clause in the contract will not operate to bar the claim in tort unless the clause has specifically excluded a claim in negligence;
>
> (e) when a claim is in contract and a defendant alleges fraudulent misrepresentation, an entire agreement clause will not summarily foreclose a defence based on that allegation;
>
> (f) in British Columbia when a claim is in contract and a defendant alleges negligent misrepresentation, an entire agreement clause will not summarily foreclose a defence based on that allegation if the misrepresentation was on a point of substance that could reasonably have induced the defendant to enter into the contract; and
>
> (g) this latter statement of the law does not appear to have been adopted in Alberta.

DECISION

[56] In the case before this Court, as in ***1250810 Alberta Ltd.***, fraudulent misrepresentation has been pled, but the particulars have not been adequately described. As in that case, the evidence provided in the affidavits of the purchasers supports a claim of intentional misrepresentation, either fraudulent or negligent.

[57] The counterclaim is based in tort and in law is not defeated by the entire agreement clause. It therefore raises a triable issue and it should proceed to trial.

[58] The defence, had it been properly pled, would also defeat the application for summary judgment.

[59] The goal of the court is to see that justice is done.

[60] As in ***1250810 Alberta Ltd.***, an intentional misrepresentation of the nature alleged in this case should proceed to trial. Therefore, the defendants are directed to amend their statement of defence to better particularize the alleged misrepresentations as required by the *Alberta Rules of Court*. These amendments, if they are not made by consent, will be considered by me on the morning chambers list in Medicine Hat on Wednesday, April 6, 2011.

[61] If the parties cannot agree as to costs, they may speak to costs on that date.

Heard on the 02nd day of February, 2011.
Dated at the City of Medicine Hat, Alberta this 22nd day of February, 2011.

J.B. Hanebury
M.C.C.Q.B.A.

Appearances:

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