IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Watson v. Havaday Developments Inc.,* 2011 BCSC 505

Date: 20110421
Docket: 4179
Registry: Golden

Between:

George Watson and Rick Fleming

Plaintiffs

And

Havaday Developments Inc.

Defendant

Before: The Honourable Mr. Justice Melnick

Reasons for Judgment

Counsel for the Plaintiffs:	B. Fairley
Counsel for the Defendant:	K. Ducey
Place and Date of Hearing:	Golden, B.C. and Cranbrook, B.C. January 31, 2011 and March 21, 2011
Place and Date of Judgment:	Cranbrook, B.C. April 21, 2011

[1] This is an application for summary judgment by the plaintiffs, George Watson ("Mr. Watson") and Rick Fleming ("Mr. Fleming"). The plaintiffs seek the return of deposits they paid to the defendant, Havaday Developments Inc. ("Havaday"), on account of residential condominium units being developed by Havaday. They claim that Havaday is in breach of its disclosure requirements under the *Real Estate Development Marketing Act,* S.B.C. 2004, c. 41 ("*REDMA*"). Havaday rejects this. Its position is that the deposits should be forfeited to it because the plaintiffs failed to complete their purchasers' contracts.

I. BACKGROUND

[2] Havaday is the developer of a golf course and residential housing project in Cranbrook. Part of the development includes Boulder Creek Villas ("Boulder Creek"), a condominium project of largely duplex and some stand-alone units. On November 4, 2007, Mr. Watson and Mr. Fleming each entered into a contract for the purchase of a stand-alone strata-titled unit in Boulder Creek. Mr. Watson paid a deposit of $77,876.75 and Mr. Fleming paid a deposit of $66,567. These deposits were equal to 10% of the total purchase prices including certain extras. Each deposit was paid in two instalments as part of each deposit related to contracts for extras.

[3] Boulder Creek was in the planning stages when the plaintiffs entered into the purchasers' contracts with Havaday. Construction had not started. Thus, the sales were governed by the *REDMA*.

[4] Pursuant to the *REDMA*, the plaintiffs were each provided with a disclosure statement at the time of entering into their contracts. The disclosure statement was a consolidation of the original disclosure statement and a first amendment. Counsel for the plaintiffs took umbrage with that, submitting that the *REDMA* dictated they be given an original disclosure statement and the amendment so they would be aware of what changes were in the amendment. There is no force to that argument, in my view. The consolidated disclosure statement the plaintiffs each received disclosed the current state of affairs at the time they purchased. The history of any changes

was of no importance to them. But, clearly, future changes would be, which is why the *REDMA* obliged Havaday to file and serve upon them any amendments that were incorporated into the disclosure statement after the point at which those changes became relevant to them, i.e. after the date they signed agreements to purchase their strata properties.

[5] The agreement to purchase that Mr. Watson entered into on November 4, 2007, provided for a purchase price of $669,000, on which he paid a deposit of $66,900. Mr. Watson entered into a second contract with Havaday dated October 1, 2008, for certain extras, or “finishing options”, in the amount of $109,767.50, on which he paid a deposit of $10,976.75. The “consolidated disclosure statement” he received was stated to be a consolidation of the original statement dated September 21, 2007, as amended dated November 1, 2007. Both the original and amended statement had been filed with the Superintendent of Real Estate. The disclosure statement provided that construction was expected to start in November 2007 and completed in November 2008. Both dates were stated to be estimates. A building permit had not yet been issued. The disclosure statement stated that, once the permit had been issued, an amendment to the disclosure statement would be filed with the Superintendent of Real Estate and a copy “...issued to each purchaser”.

[6] Although the purchase agreement provided a mechanism for determining the completion date, it listed August 30, 2009, as the “outside date” for completion. The vendor had the option to extend this date for 120 days. Certain other conditions also applied.

[7] Mr. Fleming’s contract of purchase was essentially identical, except that the purchase price of his strata lot was $619,000, on which his deposit was $61,900; his contract for finishing options was dated October 24, 2008, and was for $46,670 with a deposit of $4,667; and a second purchaser, Shirley Fleming, also signed the contract for the finishing options.

[8] When Mr. Watson and Mr. Fleming entered into the contracts to purchase their strata lots, the project was defined as a 43 unit development to be constructed

in a single phase. Boulder Creek was to be part of a much larger planned community and the plaintiffs' units were to front on a golf course (the first of two courses to be eventually constructed). Certain other amenities were also to be provided. However, as sometimes happens with projects of this kind, not everything went as envisioned in November 2007.

[9] Havaday filed an amendment to the disclosure statement dated June 25, 2008, with the Superintendent of Real Estate. The plaintiffs acknowledge that they received it and no issue arises from it.

[10] However, on January 20, 2009, Havaday filed a further amendment with the Superintendent of Real Estate. It contained some housekeeping changes, such as a change in the address of Havaday's registered office. It also contained what the plaintiffs contend were material changes to the disclosure statement, namely that Boulder Creek would now proceed in two phases, not one; the first phase, of which the plaintiffs' units were to be a part, was to consist of 28 units; a planned community park was no longer included in the first phase; and, further, phase one was to be completed by September 30, 2009.

[11] The original disclosure statement clearly stated that if there was to be a change in the outside date of August 30, 2009, an amendment would be filed to disclose the change and it would be issued to each purchaser. Further, s. 16(1)(b) of the *REDMA* provides that when such an amendment is filed, each purchaser must be provided with a copy of it within a reasonable time after filing.

[12] Both Mr. Watson and Mr. Fleming maintain that they were never provided with a copy of the January 20, 2009, amendment.

[13] Havaday, through its director, Jay Savage ("Mr. Savage"), says that the plaintiffs were provided with copies of the amendment by email. Mr. Savage does not say that he sent the copies or who did. No copy of the email transmission or any acknowledgment or receipt by the plaintiffs is provided. Mr. Savage says that it was the practice of Havaday to communicate with all buyers by email. Ms. Ducey,

counsel for Havaday, also points to a letter dated December 28, 2009, written by Mr. Fairley, counsel for the plaintiffs, to the then solicitors for Havaday, giving reasons why the plaintiffs were not going to complete. Those reasons included that the January 2009 amendment was never delivered to the plaintiffs. However, counsel for Havaday suggested it must have been or how else would Mr. Fairley have been aware of it? From any number of sources, I suppose, one of which could be that the plaintiffs, or one of them, received it in a reasonable time after January 20, 2009.

[14] Apparently, one or two more amendments to the disclosure statement were filed by Havaday, which the plaintiffs also deny receiving, but they do not appear to be relying on that.

[15] In any event, construction continued and in June 2009, Havaday registered a rent charge against the lands of which the plaintiffs' units formed a part. The plaintiffs complain that they should have received notice of the full details of this rent charge by way of an amendment to the disclosure statement.

[16] As it turned out, occupancy permits were issued for the plaintiffs' units in July 2009. On August 5, 2009, Havaday gave notice to each of them that their units were finished and ready to be transferred to them; that is, in advance of August 30, 2009, the originally estimated outside date. However, on August 11, 2009, Mr. Fairley wrote to Havaday indicating that the plaintiffs were not then prepared to close due to a number of deficiencies that had not, in the view of the plaintiffs, been addressed.

[17] Subsequently, by a letter dated August 18, 2009, Havaday notified Mr. Watson that the outside date was now December 28, 2009. Mr. Fleming was likely aware of that notice as well because neither Havaday nor either of the plaintiffs made any move toward completing the two purchases until December 16, 2009. On that date, Havaday gave notice to both Mr. Watson and Mr. Fleming that they expected them to close on December 28, 2009. The plaintiffs refused. The plaintiffs add that they were never provided with an amendment to the disclosure statement changing the outside date to December 28, 2009.

[18] In refusing to complete on December 28, 2009, counsel for the plaintiffs, in the letter dated August 11, 2009, provided a list of reasons:

> 1. The development was always represented to our client to be a golf course development, and Exhibit A to the disclosure statement clearly lays out that our client's strata lot would be located within an eighteen hole golf course. Our client's unit was specifically to be located adjacent to the golf course fairways. No such golf course exists and there is no assurance that one will ever be built;
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> 2. The development was represented as in integrated neighbourhood with amenities. While the disclosure statement is not completely precise on which amenities would go in at which time, the fact is that there are no amenities whatsoever in place and the development is nothing more than some scattered houses spread over a large disturbed construction area.
>
> 3. The disclosure statement amendment filed in January of 2009 which converted the development to a phased project was never delivered to our client. Instead of an integrated community the development now consists of less than 20 finished units scattered throughout the proposed development area;
>
> 4. The disclosure statement represented that a park, green spaces, and landscaping would be in place on completion and there are none;
>
> 5. There is no completed driveway to the residence;
>
> 6. The entire project appears to be in foreclosure, and accordingly there is no likelihood whatsoever that the development will ever be completed as represented in the disclosure statement.
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> 7. There does not appear to be a "developer" in place, or if there is, it is not the one named in the disclosure statement. Our clients have had no response from the named developer, to whom we have written to as long ago as September, with inquiries as to the state of the development. No assurances have been provided from the developer as to the completion of the development, in fact there has been no communication whatsoever. It appears that such work as is being done is being co-ordinated by Realty Investments Corporation or Investit Financial Inc., neither of which companies are named anywhere in the disclosure statement. Under these circumstances it is evident that the lenders will simply recoup their loans and the further development of the project will be at an end, or at least be substantially deferred.

[19] In fact, the property on which the 18 hole golf course is located was sold by Havaday to another company. It was not completed on December 28, 2009. At the time the plaintiffs refused to complete, only nine or ten holes were finished. It is scheduled to open in June 2011. The statements made as to the extent of the "amenities" and green spaces, landscaping, etc. then in place were substantially

correct. So, too, was the statement with respect to the driveway(s). No paving had been done although, apparently, funds had been set aside for this purpose to be done when weather permitted.

[20] In fact, on December 28, 2009, Havaday was in financial difficulty. Its lenders had assumed direction for the project although, technically, Havaday was still the developer. In that sense, there was nothing that Havaday was bound to disclose with respect to its identity. Of course, it would be bound to disclose if a trustee in bankruptcy had been appointed with respect to its affairs. If this has happened, I did not find any evidence to suggest it occurred on or before December 28, 2009.

II. DISCUSSION

[21] The plaintiffs advanced a number of reasons why they should not be required to complete their purchases, which one might characterize as firing a bucket of grapeshot over the deck of Havaday. However, the Court of Appeal has provided the plaintiffs with a potential cannonball with which to hit Havaday below the waterline of its defence. In *Chameleon Talent Inc. v. Sandcastle Holdings Ltd*, 2010 BCCA 300, which dealt with a developer's duty of disclosure, the Court of Appeal decided that a failure to modify construction dates in an amendment to a disclosure statement is fatal.

[22] First, let me step back and refer to the recent decision of Mr. Justice Masuhara in *Ulansky v. Waterscape Homes Limited Partnership*, 2011 BCSC 83. At paras. 45-51, he helpfully summarized the law respecting a developer's duty to disclose, including references to *Chameleon*, as follows:

> *(a) Duty of Disclosure*
>
> [45] Pursuant to section 14 of *REDMA*, a developer who intends to market a development must prepare and file a disclosure statement. A disclosure statement is defined in s. 1 of *REDMA*:
>
> > "disclosure statement" means a statement that discloses material facts about a development property, prepared in accordance with section 14(2) [*filing disclosure statements*], and includes any amendment made to a disclosure statement;

[46] The requirements of a disclosure statement under the *REDMA* are set out in s. 14 as follows:

> **Filing disclosure statements**
>
> 14 (1) A developer must not market a development unit unless the developer has
>
> > (a) prepared a disclosure statement respecting the development property in which the development unit is located, and
> >
> > (b) filed with the superintendent
> >
> > > (i) the disclosure statement described under paragraph (a), and
> > >
> > > (ii) any records required by the superintendent under subsection (3).
>
> (2) A disclosure statement must
>
> > (a) be in the form and include the content required by the superintendent,
> >
> > (b) without misrepresentation, plainly disclose all material facts,
> >
> > (c) set out the substance of a purchaser's rights to rescission as provided under section 21 *[rights of rescission]*, and
> >
> > (d) be signed as required by the regulations.

[47] The form and content required in a disclosure statement under *REDMA* is provided in the Superintendant's Policy Statement 1, entitled "Disclosure Statement Requirements for Development Property Consisting of Five or More Strata Lots" (the "Policy Statement"). With respect to disclosure obligations under "permitted uses", the Policy Statement requires as follows:

> **2.2 Permitted use**
>
> Describe the zoning applicable to the development property and the permitted use of all strata lots in the development. State whether any strata lot may be used for commercial or other purposes not ancillary to residential purposes.

[48] Section 23 of *REDMA* provides that, in the event of a breach of any provision of Part 2, which includes s. 14 regarding disclosure statements, any agreement to purchase a development unit is unenforceable:

> **Agreements void for non-compliance**
>
> 23 A promise or an agreement to purchase or lease a development unit is not enforceable against a purchaser by a developer who has breached any provision of Part 2 *[Marketing and Holding Deposits]*.

(b) <u>What is a material fact?</u>

[49] The terms "material fact" and "misrepresentation" are defined in section 1 of *REDMA:*

"material fact" means, in relation to a development unit or development property, any of the following:

> (a) a fact, or a proposal to do something, that affects, or could reasonably be expected to affect, the value, price, or use of the development unit or development property;...

"misrepresentation" means

> (a) a false or misleading statement of a material fact, or
>
> (b) an omission to state a material fact;

[50] The case law has further elaborated on what is required in terms of disclosure of material facts. In *Chameleon Talent Inc. v. Sandcastle Holdings Ltd.*, 2009 BCSC 1670, the court set out the following test:

> 48 As to whether the term "material fact" in *REDMA* ought to be defined subjectively or objectively, the legislation being new, there are few authorities on which one may rely directly. The defendant submitted for the purpose of analogy the decision of Russell J. in *Bigleaf* [*Ventures Ltd. v. Marine Drive Properties Ltd.*, 2009 BCSC 633], who at para. 38 adopted this quote from p. 11 of *Dureau* [*v. Kempe-West Enterprises Ltd*., [1989] B.C.J. No. 2123]:
>
> > I adopt the meaning given to the words "material fact" in the *Securities Act* as appropriate to the meaning of "material" in section 59 of the *Real Estate Act*. There are differences in the legislation, but the definition is one which, in my view, accords with common sense. In other words, the word "material" is not specifically directed towards the loss that would be suffered if the material fact were found to be false, but rather to the effect which the material fact has, or is deemed to have, on the purchaser's willingness to buy, and for what price. In other words, you look at the effect which the material fact would have on the purchaser's willingness to buy for the price offered, and if the statement is such that it could reasonably affect his judgment whether to buy, and for what price, that is material for the purpose of this section.
>
> 49 The Court of Appeal in *Jameson* [*House Properties Ltd. (Re)*, 2009 BCCA 339] also mentioned at para. 43 that an objective test must be applied to determine whether a fact is material namely, would a reasonable person would conclude that the fact in issue would affect "the value, price, or use of the development unit?"...

[51] The Court of Appeal affirmed the summary trial judgment in 2010 BCCA 300, and added as follows:

> As indicated, a "material fact" is a defined term: a fact, or a proposal to do something, that affects or could reasonably be expected to affect the price, value, or use of a unit. Under the *Act*, a disclosure statement must plainly disclose all material facts. ... The requirements imposed on a developer under the *Act* to file and deliver disclosure statements, and amendments to such, disclosing material facts

> cannot turn on the knowledge possessed by any given purchaser or prospective purchaser.
>
> [Emphasis by Masuhara J.]

[23] Counsel for Havaday referred to the 1992 decision of the Ontario Court of Appeal in *Abdool v. Somerset Place Developments of Georgetown Limited, (*1992) 58 O.A.C. 176, 96 D.L.R. (4th) 449. The Ontario Court of Appeal found that the onus of demonstrating that a disclosure statement fails to comply with the requirements of s. 52 of the *Condominium Act,* R.S.O. 1980, c. 84, is on the purchaser. This section is set out at para. 20 of *Abdool*. It is similar to ss. 14, 15 and 16 of the *REDMA*. The Ontario legislation provides for circumstances in which a purchaser of a strata property may rescind the contract. The Ontario Court of Appeal found that the exceptional nature of the rescission remedy requires that a purchaser satisfy an exacting test of materiality.

[24] It is not necessary for me to analyze *Abdool* in detail because it is clear to me from the analysis of Madam Justice Fitzpatrick in *Maguire v. Revelstoke Mountain Resort Ltd. Partnership*, 2010 BCSC 1618 (which refers extensively to *Abdool*), and of our Court of Appeal in *Chameleon* and *Jameson House Properties Ltd., Re*, 2009 BCCA 339, that:

> 1. a substantial delay of many months in a completion date is, in British Columbia, material;
>
> 2. a change in a project from a single phase to two phases is material;
>
> 3. a change in ownership, or control, or of the directors of the developer does not ordinarily mean that the identity of the developer has changed;
>
> 4. a change in the developer’s financing may or may not be material; and
>
> 5. a developer is obliged to provide each purchaser with all amendments to its disclosure statement until closing.

[25] I find that it is probable that Havaday did not provide the plaintiffs with any amendments to its (consolidated) disclosure statement other than that of June 25, 2008. Ms. Ducey, on behalf of Havaday, suggested that there should be a trial because the evidence on this point is in conflict. But, in one sense, the acceptable evidence is not in conflict. Each of the plaintiffs states from his own knowledge that he did not receive these amendments. The evidence of Mr. Savage is essentially hearsay. There is no suggestion that he sent emails to the plaintiffs with the amendments. He simply says that Havaday did so because that was its practice. He gives no source for his belief. Even if his evidence is acceptable for consideration in a summary trial, I am satisfied, on a balance of probabilities, that Havaday did not send any amendments to the plaintiffs after that of June 2008. Therefore, there was a clear failure on the part of Havaday to comply with the requirements of the *REDMA* to provide copies of these amendments to Mr. Watson and Mr. Fleming.

[26] I find, as well, that the changes noted in the amendment of January 20, 2009, respecting the change from a one phase to a two phase development, and the extension of the outside completion date, were, in all the circumstances, material. They were changes that could well have affected the price, value and use of the plaintiffs' units. Thus, Havaday was obliged to provide notice of that information to the plaintiffs in a formal way, i.e. in an amendment.

[27] I am satisfied that the identity of Havaday, as developers, did not change so as to require a new disclosure statement.

[28] While, as noted earlier, the plaintiffs raised any number of arguments as to why they were not required to complete their contracts on December 28, 2009, I find that they succeed on the argument that the January 20, 2009, amendment contained changes material to their contracts and that Havaday never provided this amendment to them in breach of its disclosure requirements under the *REDMA*. Thus, Havaday cannot enforce its contracts of purchase and sale with Mr. Watson and Mr. Fleming.

III. CONCLUSION

[29] The contracts between Havaday and the plaintiffs, Mr. Watson and Mr. Fleming, are unenforceable by Havaday. The plaintiffs are entitled to the return of their deposits and any interest that has accrued on those deposits while being held in trust. There is liberty to apply to speak to the question of interest if there is any disagreement on the amount(s) payable. I could not find any provision in the contracts that specified any rate of interest.

[30] The plaintiffs are entitled to one set of costs on Scale B.

"Melnick, J."