IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Riegel v. Revelstoke Mountain Resort Limited Partnership et al.,*** 2012 BCSC 3

Date: 20120104
Docket: 12636
Registry: Salmon Arm

Between:

Ross Riegel

Plaintiff

And:

Revelstoke Mountain Resort Limited Partnership, by its general partner Revelstoke Mountain Resort Inc., and Revelstoke Mountain Resort Inc. and Max Wright Real Estate Corporation dba Southeby's International Realty Canada

Defendants

Docket: 12314
Registry: Salmon Arm

Between:

Daniel Ward and Leanne Anderson

Plaintiff

And:

Revelstoke Mountain Resort Limited Partnership, by its general partner Revelstoke Mountain Resort Inc., and Revelstoke Mountain Resort Inc.

Defendants

Before: The Honourable Mr. Justice Groves

Reasons for Judgment
In Chambers

Counsel for the Plaintiffs:	Andrew Morrison Agent for Robert Lundberg
Counsel for the Defendants:	Rodney Chorneyko Agent for Scott Griffin
Place and Date of Hearing:	Revelstoke, B.C. November 21, 2011
Place and Date of Judgment:	Revelstoke, B.C. January 4, 2012

[1] On the 21st of November 2011 while sitting in Revelstoke, British Columbia, I heard two applications in the above-noted actions, the first being an application by the defendants to adjourn the hearing of summary trial, which application to adjourn was dismissed, and the second being the actual summary trial application under Rule 97 of the *Rules of Court*.

[2] As noted, the adjournment application was dismissed. Summary judgment was granted to the plaintiffs in each action with full Reasons to follow. These are those Reasons. Additionally, as I noted in granting judgment on the 21st of November 2011, these reasons are based on the persuasive oral and written argument of the plaintiffs. Of additional note, the defendant did not make additional representation at the summary judgment application over and above these made on the adjournment application.

[3] In March 2007, the plaintiffs in these two actions entered into contracts of purchase and sale with the defendant Revelstoke Mountain Resort Limited Partnership ("Revelstoke LP") to purchase units in something called the Nelsen Lodge Development. The plaintiff Ross Riegel ("Riegel") paid a deposit for Unit 26 of $155,800. Daniel Ward ("Ward") and Leanne Anderson ("Anderson") paid a deposit of $159,800 for the purchase of Unit 38. These were presale units, units in a condominium development not yet built. The provisions under the *Real Estate Development Marketing Act*, S.B.C. 2004, c. 41, ("REDMA") apply to the contracts.

[4] The plaintiffs had received a disclosure statement dated March 12, 2007. Shortly after signing the interim agreements and paying the deposits, it is conceded that the plaintiffs receive a first amendment which was filed on April 12, 2007 and it is also conceded that they received an second amendment disclosure statement dated November 16, 2007.

[5] That being said, subsequent amendments to this disclosure statement were filed being a third, fourth, fifth and sixth amendments and the plaintiffs did not receive these amended disclosure statements. The dates for the amendments were January 15, 2008, January 28, 2008, February 8, 2008, and October 28, 2008.

[6] There was apparently a seventh amended disclosure statement which was dated February 3, 2009 and the plaintiffs did receive that amended disclosure statement. It is the plaintiffs' evidence that when they received the seventh amended disclosure statement they realized that they did not receive the third, fourth, fifth and sixth amendments.

[7] On the 15th of April 2009, the plaintiffs delivered letters to Revelstoke LP exercising what they viewed as their right to rescission by virtue of Revelstoke LP's failure to abide by the provisions of REDMA, failure to deliver the amended disclosure statements in a timely way. The plaintiffs requested a return of their deposits and Revelstoke LP refused. The plaintiffs advised the court that after their request, Revelstoke LP delivered certificates to Sotheby's, the real estate company holding the deposits, falsely stating that the plaintiffs had not delivered further deposits when due, causing Sotheby's to pay the deposits held to Revelstoke LP as liquidated damages, something the contracts of Purchase and Sale provided for. This alleged false representation is of a particular concern to the plaintiffs, as the payment of their deposits to Revelstoke LP meant they have no security for the funds they advanced as deposits.

[8] Revelstoke LP is a limited partnership. It appears to be a limited partnership created for the purposes of this development, and the plaintiffs attest to this development being close to completion. They attest to the deposits being inappropriately obtained from Sotheby's as a result of false representations by Revelstoke LP to Sotheby's.

[9] The plaintiffs argue convincingly, specifically in regards to an adjournment application, that if the matter was adjourned, there was the real possibility of them not being able to obtain their deposits back. The deposit funds are substantial and based on that concern as well as other concerns which will become apparent in these Reasons, the application for an adjournment of summary trial was dismissed.

[10] The other issue at play in regards to the adjournment of this matter is the issue of previous representations to the court on an earlier summary judgment

application. Though I dealt with this in my reasons on the adjournment application on the 21st of November 2011, some detail is required for these reasons.

[11] These plaintiffs are clearly not the only parties that had a dispute with Revelstoke LP in regards to this development and the return of their deposits. There was an earlier case of *Pinto v. Revelstoke Mountain Resort Limited Partnership*, 2010 BCSC 422, before Mr. Justice N. Smith of this court which had apparently identical facts, save and except as to the deposit amount in the name of the plaintiff. The arguments about REDMA and its provisions and the consequences of what appears to be conceded, Revelstoke LP's failure to provide amendments to disclosure statements in a timely way, were argued before Mr. Justice N. Smith and Mr. Justice N. Smith granted judgment for Pinto against Revelstoke LP for the return of Pinto's deposit. The matter was subsequently heard in the Court of Appeal, *Pinto v. Revelstoke Mountain Resort Limited Partnership*, 2011 BCCA 210. The Court of Appeal upheld the decision of Mr. Justice N. Smith.

[12] The *Pinto* case is of great significance to this matter before me. That is particularly of note as a result of a previous application for summary judgment heard by my brother Mr. Justice Powers on July 5, 2010. At that point, Revelstoke LP was represented by Murray Clemens, Q.C. and the plaintiffs were represented by Mr. Robert Lundberg of Revelstoke.

[13] In July 2010, the *Pinto* decision, the decision of Mr. Justice N. Smith had been resolved at trial but the Court of Appeal decision was pending. (The Court of Appeal matter was argued in November 2010 and as noted earlier, decision was rendered in April 2011). On behalf of Revelstoke LP, this defendant, their then counsel made a number of representations to the court before Mr. Justice Powers, the net effect of that persuasive representation was that the application for summary judgment was adjourned pending the Court of Appeal decision in *Pinto*. Mr. Clemens on behalf of Revelstoke LP represented to the court that the upholding of *Pinto* in the Court of Appeal would be, to use the tennis term, a "kill shot" that

would decide this present litigation. Justice Powers noted at page 29 of the transcript from July 5, 2010 as follows:

> Well, if I heard you so far, Mr. Clemens, maybe this is the first step. If your client loses on the appeal, if Justice Nathan Smith's decision is upheld in *Pinto*, then you agree that Mr. Lundberg's clients are entitled to judgment.

[14] Mr. Clemens' response to that statement by Mr. Justice Powers, "I am done here, yes". Further on, Mr. Justice Powers says the following, "So the Court of Appeal will decide these three cases when it decides *Pinto*". Mr. Clemens' comments at that time were "it will". (Of note, before Mr. Justice Powers were these two cases and another one not currently before me, that is the reference to "these three cases").

[15] Mr. Chorneyko on behalf of new counsel for Revelstoke LP, Mr. Scott Griffin, stated two things to the court. First off, he indicated that in support of his adjournment application, that the defendants wish to explore with their former counsel, Mr. Clemens what he meant by his representations to the court. I pointed out to Mr. Chorneyko that Mr. Griffin appears to have been retained since July 2011 and that there are no issues of solicitor-client privilege between a client and his solicitor so Revelstoke LP has had the months of July, August, September and October to make those inquiries but appears not to have done so.

[16] Additionally, Mr. Chorneyko argued that the defendants were arguing estoppel on the grounds that one of these current plaintiffs was the general contractor on this project and the other plaintiffs were involved in the development business in the Revelstoke area.

[17] In my view, that estoppel argument is without merit when one considers s. 21(3) of REDMA which provides that a purchaser has a right to rescission when a purchaser does not receive a disclosure statement that he or she is entitled to receive. Additionally, I determined that the case of *Chameleon Talent Inc. v. Sandcastle Holdings Ltd.*, 2010 BCCA 300, dealt with that argument completely.

[18] Turning to the application for judgment, the plaintiffs in this action sought judgment on an issue in which there is no factual dispute. I am satisfied that this is an appropriate case in which judgment can be granted under Rule 9-7.

[19] The defendants failed to deliver four amendments to the disclosure statement that REDMA requires them to disclose. The plaintiffs argued that Revelstoke LP contravenes s. 16(1)(b) of REDMA by failing to deliver these amendments to the plaintiffs in a timely way.

[20] REDMA, it should be noted, is a substantial departure from its predecessor, *The Real Estate Act*. REDMA imposes obligations to deliver amendments to existing purchasers within a reasonable time. REDMA requires developers to prepare and file disclosure statements setting out all material facts related to the development and the sale of units. REDMA defines the terms "material facts" broadly and requires developers to file amended disclosure statements when material facts change or when a developer becomes aware of false or misleading statements, or when there are omissions of material facts in a statement of disclosure or any prior amendment.

[21] REDMA is clearly legislation which has consumer protection as its basis. As the Court of Appeal opined at para. 17 of the *Pinto* decision:

> The *REDMA* is consumer protection legislation. One of its central objectives is to ensure that material facts are provided to purchasers when developments are being marketed to them… Consumer protection legislation is to be interpreted generously in favour of the consumer.

[22] REDMA provides that the developer has a continuing obligation, even after the presale of the unit, to ensure that the information in the current disclosure statement is accurate. Section 16(1) of REDMA as noted earlier requires a developer to deliver an amended copy to each purchaser within a reasonable time after it has filed the amendment. The remedies in REDMA include a right of rescission, as noted in s. 21(3), if a purchaser does not receive the amended disclosure statement that he or she is entitled to receive.

[23] The undisputed facts here are that Revelstoke LP has contravened REDMA by failing to deliver multiple amendments to the plaintiffs within a reasonable time after they were filed. As noted earlier, the Court of Appeal in *Pinto*, on virtual identical facts, found that there had a breach of REDMA and required Revelstoke LP to return the deposits.

[24] I am satisfied that the amendments which were not disclosed do in fact contain material facts, they include changes to strata fees, they include the construction of an additional units, they note changes to estimated completion dates of some phases, and particularly they note the location of, and new completion dates for the recreational facilities, all of which could reasonably expected to affect the value of the units. In *Pinto*, the Court of Appeal has conclusively determined that at minimum, amendment five contains material facts and it is clear in this case that amendment five was not delivered to these purchasers.

[25] I am satisfied that these purchasers have proven on the materials before me that they had a right to rescission as a result of the actions of Revelstoke LP. I conclude that Revelstoke LP has contravened REDMA. The plaintiffs are granted their order seeking rescission of their contract of purchase of sale, a declaration that their contract of purchase of sale is unenforceable and an order requiring Revelstoke LP to refund the deposits.

[26] The plaintiffs will each have their costs on Scale B.

The Honourable Mr. Justice Groves