

Damages awarded for slander of title and failure to complete transaction (McKenzie v. Fabco Holdings Inc.)

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Does the threat of litigation over a property allow a buyer to back out of a pending transaction? What are the consequences if the threatened litigation is unfounded? These issues were addressed by the Ontario Superior Court of Justice in *McKenzie v. Fabco Holdings Inc.*, 2024 ONSC 6325 (CanLII).

The decision arose from two concurrent claims brought by the plaintiffs (the McKenzies) relating to the sale of their property in Aurora, Ontario.

The first claim involved an aborted sale of the property from the McKenzies to Fabco Holdings and an assignee corporation in 2016. Fabco had agreed to buy the property for \$4.5 million but refused to complete the purchase, claiming that it had discovered a claim for adverse possession of a portion of the property being asserted by the adjacent property owner (Anthony). The McKenzies sold the property to another buyer in 2018 for \$2,875,000 and sued Fabco for the damages based on the lower sale price.

In a related action, the Court of Appeal for Ontario affirmed that Anthony's claim for adverse possession of the McKenzie's property was unfounded: *Anthony v. McKenzie*, 2019 ONCA 147 (CanLII).

Based on the outcome of the earlier adverse possession litigation, the trial judge determined that Fabco had no basis to refuse to complete the purchase since the McKenzies could have conveyed clear and marketable title. In certain cases, a "reasonable threat of litigation" may justify a party's repudiation of an agreement to complete a transaction: *Gajasinghe v. Dewar*, 2007 CanLII 37682 (Ont. S.C.). Here, however, there was no objectively reasonable basis to believe that a suit would be brought on substantial grounds.

As a result, the McKenzies obtained judgment against Fabco and its assignee attributable to the breach of the agreement to complete the purchase in the total amount of more than \$1.747 million based upon the lower sale price.

In the second claim, the McKenzies sued Anthony for injurious falsehood and slander of title for his role in aborting the sale to Fabco and the delays in completing the eventual sale of the property in 2018.

Citing *International Sausage House Ltd. v. Hammer Estate*, 2015 BCSC 1155, at paragraph 206, the trial judge noted that in order to succeed in their claim for slander of title, the McKenzies had to satisfy a 4-prong test:

1. The Defendant published words of disparagement about the Plaintiffs' property;
2. The words were false;
3. The words were published with malice; and
4. The Plaintiffs sustained damages as a result.

Injurious falsehood requires substantially similar grounds.

In the court's view, Anthony's assertion of his claim for adverse possession was sufficient to constitute a false statement to a listener, reflecting adversely on the McKenzies' ability to convey marketable title to their property. Anthony's registration of a caution and application containing a description of his claim for adverse possession was a publication of false statements adversely affecting the McKenzies' property.

Further, the evidence was that one of Anthony's goals was to dissuade prospective or committed purchasers from buying the McKenzies' property. He was aware of Fabco's interest in the McKenzie property. He was afforded the opportunity to withdraw the false and recklessly released information he disseminated before Fabco terminated the transaction yet he persisted in his untenable position.

Prongs 1-3 of the test for slander of title were therefore satisfied.

The claim against Anthony faced a greater obstacle with the fourth prong, which required a "direct or natural connection" to the damages claimed. In that regard, since Anthony's adverse possession claim was without legal or factual foundation, it could not be said to have caused Fabco's repudiation of the transaction. Fabco, as the court found, had other reasons for breaching the agreement.

It was a different story, however, with regard to the subsequent delay in the completion of the sale to the ultimate buyer. Anthony was found to be responsible for the delays since he persisted with his claims after Fabco repudiated the transaction. He registered a caution then brought an application seeking title without *bona fide* grounds. He did so knowingly, without legal foundation or factual justification. In the trial judge's view, he did so in bad faith.

Slander of title or injurious falsehood may be found based upon the registration of documents against title that are based on false grounds: *International Sausage House Ltd.*, at para. 206; *Almas v. Spenceley* (1972), 1972 CanLII 609 (ON CA), at p. 657. The trial judge determined that Anthony's actions were part of a campaign to oblige the McKenzies to accede to his demands for a resolution without which a clean sale of their property was not going to be possible.

The sale to the ultimate buyer would have closed in December 2017 but for Anthony's adverse possession claim and the illegitimate and unwarranted registered clouds on marketable title. It did not close until April 2018, 130 days later. The delays in the sale were necessitated by the steps the McKenzies took to rid the property of Anthony's clouds on title.

The court therefore awarded damages to the McKenzies against Anthony for slander of title/injurious falsehood in the amount of \$57,790.88, reflecting interest, carrying expenses and other costs incurred due to the delay.

The case demonstrates that while the threat of litigation may justify a party's refusal to complete the transaction, such a threat must be based upon well-founded grounds rather than an excuse to justify other reasons for refusing to close. The case further demonstrates the damages that may arise when a party falsely asserts an interest in a property and causes a termination or delay in a sale. A PDF version is available for download [here](#).

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