

Developer required to answer discovery questions about misleading other buyers

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During the course of litigation, plaintiffs may seek evidence that a defendant has engaged in a similar pattern of impugned conduct with other people who are not involved in the lawsuit. In the case of a disgruntled buyer of a home in a development, the buyer may want to know whether there have been similar complaints and how those complaints were resolved. Defendants may understandably wish to refuse to provide such evidence since the other complaints are not involved in the lawsuit.

In *Wijeyathungam v. Forest Hill Homes (Cornell Rouge) Ltd.*, 2023 ONSC 1797 (CanLII), the defendant builder was ordered to answer discovery questions about other buyers who shared the plaintiff's complaint about a home that she had agreed to purchase.

In 2016, the plaintiff agreed to buy a home in a new housing development that was being built by the defendant (Forest Hill). When the plaintiff signed the agreement of purchase and sale (APS), the construction of the house that she was purchasing had not yet started.

The plaintiff later refused to complete the transaction. She argued that she had been misled into believing that the home she was purchasing would be fully detached, whereas the home as constructed was semi-detached.

Litigation ensued, in which the plaintiff sued Forest Hill and her own real estate agent.

During the examination for discovery of a sales representative from Forest Hill, the plaintiff's lawyer asked a series of questions that were all directed in various ways at eliciting evidence about whether Forest Hill had received similar complaints from other buyers about being misled by the promotional materials and/or representations into thinking that they were buying fully-detached rather than semi-detached homes.

Amongst other questions, plaintiff's counsel asked whether there were other similar complaints for sales of detached homes in the development and whether the builder had sent out an email to everyone who had complained, offering them a price adjustment. The lawyer also asked how the builder had resolved other complaints. The common thread connecting the questions was that they were aimed at determining whether Forest Hill was aware of other buyers of homes in the development who had also claimed to have been misled into mistakenly believing that they were purchasing a detached rather than a semi-detached house.

Forest Hill refused to answer the questions on the basis that they were not relevant. The Ontario Superior Court of Justice then heard a motion brought by the plaintiff for an order requiring Forest Hill to answer the disputed questions.

In Ontario, persons being examined for discovery are required to answer questions relevant to any matter in issue in the action. The issue of what is "relevant" to any matter in issue in the action is generally determined by the pleadings (the statement of claim and defences). Documents and questions on discovery are "relevant" if they are logically connected to and tending to prove or disprove a matter in issue based on the pleadings: *Sycor Technology Incorporated v. Kiaer*, 2012 ONSC 5285, at para 23.

This is not a high threshold since identifying at least one basis of relevance is sufficient to decide the issue. Pleadings must be interpreted "generously", in the sense that they must be given "the widest latitude" that is "reasonable and not fanciful": *152729 BC Ltd v. Chicago Title Insurance Company Canada*, 2022 ONCA 321, at

para. 31.

In the plaintiff's pleading, she specifically pleaded that Forest Hill misrepresented to her that she would be purchasing a detached home. She claimed that the sales office displayed only model detached houses and townhouses and that all the marketing materials presented to her depicted the properties as detached homes or did not provide a description about the house.

In the motion judge's view, the plaintiff's claim could reasonably be understood as advancing several different causes of action:

- i. A claim in contract based on the doctrine of unilateral mistake, which would require the plaintiff to prove that Forest Hill either knew or ought to have known about her mistake regarding the semi-detached property, and that it would be "unconscionable" for Forest Hill to insist on upholding the contract;
- ii. The equitable remedy of rescission of the APS, which is available for a false or misleading representation that induced a contract; and
- iii. A claim in tort for damages arising from negligent misrepresentation, which was addressed in Forest Hill's defence by denying that had it induced her to purchase the property by misrepresenting it to be a detached home.

In the motion judge's view, the questions regarding other buyers were not seeking improper similar fact evidence that was intended to show that Forest Hill had a general propensity to act in the same way towards other people. Rather, the plaintiff's claim was that she was misled by the marketing materials because they were objectively misleading and she wanted to show that other buyers were similarly misled by the same marketing materials. In other words, she was not arguing that Forest Hill had some sort of "corporate propensity" to mislead buyers into believing they were buying fully detached homes, but that the marketing materials were misleading.

None of the plaintiff's claims could succeed unless she could establish that she honestly believed that she was contracting to buy a fully detached house. In the motion judge's view, as a matter of common sense and human experience, the existence of other buyers who became similarly confused about what they were buying would make the plaintiff's claim appear at least somewhat more likely to be true. Conversely, the non-existence of any such other buyers would make her claim seem at least somewhat less likely to be true. Based on the low threshold test for relevance, the question of whether there were any such other buyers was relevant.

Forest Hill also argued that the questions were improper since they were directed solely to the credibility of the witness and that their prejudicial effect outweighed their probative value. Neither of these arguments was accepted. Questions may be asked that may have some potential bearing on a witness's credibility if they are also relevant to some other material fact in issue. Further, evidence that emerges from answers during examination for discovery will not necessarily be admissible evidence at trial. Admissibility at trial is a separate issue from relevance for the purposes of discovery. Requiring the proposed questions to be answered, along with any reasonable follow-up questions, would simply give the parties a proper foundation to argue admissibility issues in front of the trial judge in due course.

The motion judge therefore ordered Forest Hill to answer the questions regarding complaints from other buyers of semi-detached homes in the development.

The case shows that in order to establish relevance, a plaintiff must establish that the questions are not simply a fishing expedition intended to obtain favourable evidence that may be damaging to the defendant. Rather, the questions must be specifically relevant to a material fact that is central to the legal claims as pleaded. Whether the plaintiff will succeed in proving that she was actually misled by the marketing materials or sale representative has yet to be determined. A PDF version is available to download [here](#).

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