

Failure to adduce expert evidence in professional negligence claim fatal to plaintiff (*Korlyakov v. Riesz*)

Litigation | Litigation & Dispute Resolution | Negligence | Real Estate | Standard of Care

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A key element in a negligence action is the definition of the standard of care. In order to determine if a defendant has breached the standard of care, and therefore acted negligently, a court must know the standard to which to hold the defendant. In a professional negligence claim, a plaintiff should be prepared to obtain an expert report to speak to the standard of the particular profession. The Toronto Small Claims Court recently confirmed this point in *Korlyakov v. Riesz et al.*, SC-22-8791(not on CanLII).

The matter involved a failed real estate transaction where the plaintiff entered an agreement of purchase and sale (“APS”) to buy a property in King, Ontario. The APS included a financing term, a term allowing the plaintiff to examine the title by the noted requisition date, and an agreement that the vendor would provide an existing survey of the property.

After the plaintiff paid the deposit, he hired the defendant real estate lawyer to assist in the completion of the purchase. The lawyer conducted a title search and learned the property included a private road subject to rights-of-way in favour of other property owners. The plaintiff advised his lawyer that he did not want the property with the private road included. The lawyer wrote to the vendor’s lawyer, noting that the APS did not disclose the encumbrance, and seeking a return of the plaintiff’s deposit and a release from the APS based on a material misrepresentation (the “Lawyer’s Letter”).

The vendor’s lawyer argued that this was not a valid basis to terminate the APS and took the Lawyer’s Letter as an anticipatory breach of the contract, such that the vendor would not tender for closing and would instead relist the property. However, the vendor’s lawyer also stated that the vendor would give the plaintiff “one last chance” to retract the repudiation of the APS.

The plaintiff’s lawyer wrote back suggesting that the vendor sever the private road from the property at his own expense. The vendor’s lawyer did not respond, repeating his position that there was anticipatory breach. The vendor then resold the property.

The plaintiff hired a litigation lawyer to sue the vendor and her agent for the return of his deposit. The vendor and agent defended, arguing that the plaintiff’s real estate lawyer was liable, in whole or in part, for failing to make the proper searches of title in a timely manner. Despite this argument, the plaintiff did not commence a claim against his real estate lawyer at that time. The plaintiff eventually settled his claim with the vendor and agent for \$25,000, receiving half of the \$50,000 paid.

Two years later, the plaintiff commenced a claim against his real estate lawyer, arguing that he was negligent in handling the aborted transaction. The trial eventually occurred more than 10 years later.

At the trial, the court noted that the plaintiff failed to lead any expert evidence on the relevant standard of care of a real estate lawyer, or how the lawyer fell below that standard of care. The court noted the plethora of case law establishing that, in general, it is inappropriate for a trial court to determine the standard of

care in a professional negligence matter in the absence of expert evidence. The failure to lead such evidence can be fatal to a professional negligence claim. The noted exceptions to this rule are where:

1. The court is faced with “non-technical matters of which an ordinary person may be expected to have knowledge”; or
2. The impugned actions of the defendant are so egregious that it is obvious that his or her conduct fell short of the standard of care, even without knowing precisely the parameters of the standard (citing to *Krawchuk v. Sherbak*, 2011 ONCA 352, at paras. 133-135).

The plaintiff argued that the second exception applied. The Lawyer’s Letter clearly constituted an anticipatory breach of the APS, and such conduct obviously and egregiously fell below the standard of a real estate lawyer.

The court disagreed.

In order to find an anticipatory breach, the refusal to close an APS must be clear and unequivocal. The Lawyer’s Letter was a statement, not that the plaintiff refused to perform the APS, but rather that the agreement was invalid and not binding due to the alleged material misrepresentation regarding the private road.

The court held that even if it was wrong in this regard, the law is clear that when an anticipatory repudiation is accepted, the contract comes to an end. In this matter, the vendor’s lawyer’s responding letters indicated that the APS remained in effect and that the vendor did not accept the alleged anticipatory breach. The letters stated that the plaintiff had “one last chance” to retract his repudiation, but at the same time stated that the vendor would relist the property. Neither the vendor nor his lawyer were called as witnesses at trial to explain the contradictions in their position and messaging.

The court ultimately held that, even without expert evidence on the standard of care, it was not satisfied that the real estate lawyer fell below the standard of care. In general, lawyers are required to bring reasonable care, skill, and knowledge to the performance of the professional service they have undertaken. The usual standard is that of an ordinarily competent lawyer (see *Central Trust Co. v. Rafuse*, 1986 CanLII 29 (SCC)). The Supreme Court has held that a lawyer is not expected to know all aspects of the law, but is required to have a sufficient understanding of the fundamental issues in their area of practice to perceive the need to ascertain the law on a certain point. A lawyer also has a duty to warn his or her client of the potential consequences of a particular course of action.

While the plaintiff did not tender expert evidence, the real estate lawyer did. His expert testified to the standard of care in the specialized context of real estate transaction, which requires a lawyer to apply skill and expertise to search title; identify any title issues; bring such issues to the attention of the client and receive instructions; submit requisitions by the requisition date; and wait for the vendor to comply with the requisitions. The evidence at trial showed that the real estate lawyer did all of the above.

The real estate lawyer testified that he discussed the private road issue with the plaintiff and advised him on numerous occasions of the potential outcomes if he asked for the deposit back. The lawyer told the plaintiff that he may need to sue to get his deposit back. The plaintiff also reviewed the Lawyer’s Letter before it was sent to the vendor’s lawyer. The lawyer conceded that he did not warn the plaintiff that the Letter could be taken as anticipatory breach of the APS. Nonetheless, the court found that the lawyer adequately warned the plaintiff of likely or possible outcomes of the Letter, even though he did not spell out all of the potential means upon which the vendor could arrive at those outcomes.

The court noted that its conclusion was supported by the real estate lawyer’s expert witness who also concluded that the lawyer had met the standard of care. As he did not breach the standard of care, the court held that the plaintiff was not entitled to damages. There was no evidence as to why the plaintiff settled for half of his deposit. Further, the plaintiff had waived the financing condition prior to retaining the real estate lawyer. Accordingly, the lawyer did his title searches after the deal was firm and the options to recover the deposit were limited. Finally, the plaintiff refused to commence an action against the real estate lawyer despite the recommendations of his litigation lawyer. The plaintiff’s decision to ignore this legal advice on how to best recover the deposit was another contributing factor to his loss.

In the result, the entire claim against the real estate lawyer was dismissed.

This decision shows the importance of tendering expert evidence in professional negligence claims. The plaintiff’s failure to do so was fatal to his action whereas the defendant real estate lawyer’s expert evidence strengthened his defence and assisted the court in dismissing the claim against him.

Representation by Gardiner Roberts LLP

The successful real estate lawyer was represented at trial by Eli Bordman, an associate in Gardiner Roberts’ Dispute Resolution Group. A PDF version is available for download [here](#).



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