

KEEPING CURRENT

August 23, 2023

Realtor liable for failing to confirm location of new build property (*Zhang v Primont Homes (Caledon) Inc.*)

By James Cook, Stephen Thiele, and Isabel Yoo

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James Cook
Partner
416.865.6628
jcook@grllp.com

Stephen Thiele
Partner
416.865.6651
sthiele@grllp.com

Isabel Yoo
Associate
416.865.6655
iyoo@grllp.com

In some cases, misrepresentations made prior to the signing of an Agreement of Purchase and Sale (APS), may allow a buyer to sue for damages, as demonstrated by *Zhang v. Primont Homes (Caledon) Inc.*, [2024 ONCA 622 \(CanLII\)](#), in which a real estate agent was found liable to his clients for misrepresentation concerning the location of a development property.

In February 2017, the buyers agreed to buy an investment property to be built in a new subdivision by a developer for \$1,232,500, with a deposit of \$120,000. The transaction was set to close in 2019.

The buyers had been told by their real estate agent that the property was located at or near a specific intersection in Brampton, Ontario. However, in May 2018, the buyers drove by the intersection to check on the progress of the development and discovered that the property that they had agreed to purchase was not located at the site indicated by their agent but rather in Caledon, Ontario,

about three kilometres north of their expected site.

The buyers then took the position that they should not be required to close the transaction and commenced litigation against various parties, including their agent, his brokerage, and the developer. The buyers argued that the defendants had misrepresented the location of the development, and that they were entitled to refuse to complete the purchase of the property and recover their deposit. They also claimed damages for lost profits. The developer counterclaimed for damages flowing from the buyers' repudiation of the APS.

Prior to trial, the buyers settled with the developer and agreed that it was entitled to keep the \$120,000 deposit. In exchange, the developer abandoned its counterclaim.

After a trial in the Ontario Superior Court of Justice, the real estate agent and brokerage were ordered to pay the amount of the deposit (\$120,000) to the buyers,

with interest, and costs of \$30,000. The trial judge declined to award the buyers any damages for lost profits.

On appeal, the agent and brokerage argued that the trial judge erred in finding that they negligently misrepresented the property's location or that the misrepresentation was the cause of any damages suffered by the buyers. The Court of Appeal for Ontario disagreed.

The first ground of appeal was whether the trial judge erred in finding that the appellants negligently misrepresented the property's location and whether the buyers relied on this misrepresentation.

The Court of Appeal noted that the trial judge made findings of fact based on the divergent accounts of the parties' interactions and communications prior to the signing of the APS. The trial judge assessed and preferred the buyers' evidence concerning what the appellants allegedly communicated about the location of the proposed development. Further, the misrepresentation about the property's location was a key factor in the buyers' decision to invest their money in the development because they believed "it was in a 'mature' community with large houses and schools". Had they known of the property's actual location, the buyers would not have agreed to sign the APS or pay the deposit.

The appellants further argued that the buyers ought to have been required to adduce expert evidence on the standard of care of a real estate agent or broker to establish liability. As a general rule, expert evidence is required to support a claim against a licensed professional, such as a real estate agent: *Krawchuk v. Scherbak*, [2011 ONCA 352](#), at paragraph [130](#), leave to appeal refused, [2011] S.C.C.A. No. 319.

A breach may, however, be established without the need for expert evidence concerning "non-

technical matters or those of which an ordinary person may be expected to have knowledge": *Krawchuk*, at paragraph [133](#). The trial judge had found that the appellants' representation that the property would be built near an intersection in Brampton as opposed to a completely different location three kilometres distant was an example of a "non-technical" matter. The Court of Appeal agreed with the trial judge that expert evidence was not required to find that the appellants' misrepresentation was negligent.

The second ground of appeal advanced was that the trial judge erred in finding that the negligent misrepresentation was the legal cause of any loss to the buyers. The appellants argued that the buyers could not, as a matter of legal principle, recover against them without first recovering damages against the developer.

The Court of Appeal disagreed that the buyers were required to prove that they had the right to repudiate the APS as a condition precedent to any recovery against the appellants. The appellants relied on a British Columbia decision, *Kaltenegger v. Cao*, [2022 BCSC 2203](#), which also involved a buyer's repudiation of an agreement due to alleged misrepresentations of the property's boundaries. However, the court in the B.C. case had concluded that the buyer was not actually entitled to repudiate the contract.

The Ontario Court of Appeal did not agree that there was a general rule established by the *Kaltenegger* decision that any plaintiff who agrees to buy property based on misrepresentations of any kind by a third party, such as a realtor or lawyer, is legally foreclosed from recovering damages for that misrepresentation if they fail to complete the purchase.

In the Court of Appeal's view, the issue of causation was distinct from a plaintiff's entitlement to assert a separate cause of action for negligent misrepresentation.



In a case where a given wrong supports an action in contract and in tort, the party may sue in either or both, except where the contract indicates that the parties intended to limit or negative the right to sue in tort”: [*BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, 1993 CanLII 145 \(SCC\), \[1993\] 1 S.C.R. 12](#), at page. 26, citing [*Central Trust Co. v. Rafuse*, 1986 CanLII 29 \(SCC\)](#), [1986] 2 S.C.R. 147. Nothing in the APS precluded the buyers from suing their own real estate agent or broker for a negligent misrepresentation, whether or not they chose to pursue a claim in contract (or tort) against the developer.

Lastly, the appellants argued that the buyers were themselves the authors of the damages they claimed, since the property had increased in value between the time the buyers executed the APS and the trial. Had the buyers not repudiated the APS, they would have acquired a property worth \$1,800,000, or nearly \$600,000 more than they would have had to pay for it. The appellants argued that the buyers could have mitigated and avoided any financial loss had they not repudiated the APS.

The Court of Appeal noted that in claims of negligent misrepresentation, courts generally focus on the date that a misrepresentation is discovered, “which is when the representee can be expected to take any necessary mitigating steps”: [*Bruce MacDougall, Misrepresentation and \(Dis\)Honest Performance in Contracts*](#), 2d ed. (Toronto, Ontario: LexisNexis, 2021), at §6.154, p. 495.

In this case, once the buyers discovered the misrepresentation in 2018 (months before the scheduled completion date), they had to take reasonable steps to mitigate a potential loss, which involved deciding whether to proceed with the purchase of the property. They chose to take

the position that the APS was null and void *ab initio* or, alternatively, that they were entitled to repudiate it. Ultimately, this meant that they were out-of-pocket for \$120,000 after settling the claim with the developer.

The appellants’ position turned on the argument that the buyers should have foreseen that the property would increase in value when they discovered the misrepresentation, even though the property was not as well-situated and therefore not as attractive an investment as they had been led to believe. However, they did not obtain a retrospective appraisal showing that the property had already increased in value at the time the buyers discovered the issue with the property’s actual location, nor was there any evidence proving that the buyers should have realized that they would not suffer damages if they proceeded with the purchase. In the Court of Appeal’s words, “[t]he appellants should not be able to escape the legal consequences of their negligence because the [buyers] did not take that risk and market conditions happened to improve.”

This ground of appeal and the appeal in its entirety were therefore [dismissed](#).

The decision shows the potential consequences of misrepresentations that are made and found to have been relied upon by a party when deciding to enter into an APS.

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