

Misrepresentation in Square Footage leads to Rescission of Agreement of Purchase and Sale

Agreement of Purchase and Sale | Commercial Real Estate | Litigation | Litigation & Dispute Resolution | Misrepresentation | Ontario Court of Appeal | Real Estate

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A misrepresentation by the seller and real estate agent as to the square footage of a residential property in Stouffville, Ontario resulted in the rescission of the Agreement of Purchase and Sale (“APS”) and the return of the \$50,000 deposit: *Issa v. Wilson*, 2020 ONCA 756 (CanLII).

The plaintiff, a 26 year old first time home buyer, wanted a home large enough to live with his parents and three sisters. He retained the defendant real estate agent to help him find a suitable home. The same real estate agent acted for the seller of the property.

The agent told the plaintiff that the home size was 2,100 square feet, but this information came from the seller and a 12 year old listing of the home. The MLS listing, based on the same information, represented the size of the home to be 2,000-2,500 square feet.

However, the agent did not measure the home himself to confirm the dimensions.

The buyer visited the property twice before making an offer to purchase, and observed all the rooms while accompanied by family members. During one visit the seller told the plaintiff that the property was about 2,000 square feet.

The APS was signed and shortly before the scheduled completion date, the buyer received an appraisal of the property in connection with his mortgage application. The appraisal indicated that the size of the home was only 1,450 square feet.

The buyer then decided not to complete the purchase of the home. Litigation ensued with the buyer seeking the rescission of the APS and the return of his \$50,000 deposit, which was opposed by the real estate agent and the seller.

In 2019, a trial occurred. Prior to trial, the agent admitted that he was negligent in failing to verify the size of the home. However, the defendants maintained that the plaintiff was not entitled to rescission since the plaintiff had visually observed the property and had entered into the binding APS before receiving the appraisal.

The remedy of rescission may be obtained on the basis of misrepresentation where a defendant makes a false statement that is material and induces the plaintiff to enter into the contract: *Panzer v. Zeifman et al.*, 1978 CanLII 1658 (ON CA); *Singh v. Trump*, 2016 ONCA 747, at para. 156.

In the circumstances, the trial judge found that the buyer was entitled to rescission based on the misrepresentations of the square footage as being 2,000 (or more) square feet. The misrepresentation was “material” and notwithstanding that the buyer had conducted inspections to see the property in person, his observations did not override his expectation that the size of the property was greater than 2,000 square feet. The trial judge found that the buyer’s young age, inexperience with square footage, and being a first time home buyer were all relevant factors to take into account when considering the reasonableness of his belief.

In November 2020, the Ontario Court of Appeal dismissed the defendants’ appeal from the trial decision. One of the defendants’ arguments was based on the legal proposition that where a purchaser inspects a property their reliance on a misrepresentation as to the size of the property will be displaced. The Court of Appeal did not accept that this was an absolute proposition of law and stated that this would depend on the particular facts and circumstances in a given case.

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In the Court of Appeal's view, there were several reasons why the defendants' misrepresentation concerning the size of the home was material to the buyer's decision to purchase:

- The agent made explicit statements about square footage to the buyer and had formally admitted that he was negligent in making these statements. The seller also admitted that he told the buyer that the property was about 2,000 square feet.
- The discrepancy between the negligently communicated size of the home (2,100 square feet and 2,000-2,500 square feet) and the actual size (1,450 square feet) was substantial (ranging from a 27% to 42% discrepancy).
- The buyer's reliance on the representations about the size of the home was supported by the fact that he remained ready to close the purchase until the moment he discovered, through the appraisal of the property related to his mortgage application, that its actual size was only 1,450 square feet. Upon learning this information, he immediately communicated that he was not prepared to complete the purchase.
- Age and experience (or lack thereof) in home buying are, in appropriate cases, relevant contextual factors to be considered by the Court: *Beer v. Townsgate I Limited* (1997), 1997 CanLII 976 (ON CA).

As a result, the appeal was dismissed with costs to the buyer of \$10,000. The decision affirms that a misrepresentation as to the size of the property may be grounds for rescission.

One issue that did not need to be addressed in the case but could come up in similar circumstances is the decision that a buyer must make when discovering a potential misrepresentation before closing. When discovering a misrepresentation before closing a buyer generally faces an election to either rescind or affirm the APS. A party who affirms a contract after becoming aware of the nature of the misrepresentation may lose the right to rescind on the ground of the original misrepresentation. Accordingly, if the buyer intends to rescind an APS on the basis of a misrepresentation as to the size of the property it is important to raise the issue immediately as any steps taken thereafter in furtherance of the closing may be seen as affirming the APS. The buyer in this case did so and thus was entitled to the return of the deposit.

The takeaway for sellers and listing agents is to take steps to verify measurements before making any representations about square footage to a potential buyer. The same issues could arise with regard to any similar misrepresentations of fact about a property listed for sale.

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