

THE GR COURT DOCKET

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SPECIAL DOUBLE ISSUE: Dismissal of abusive proceeding upheld; Home buyer who got more land than he bargained for not entitled to damages for lost secondary transactions

By Stephen Thiele

This special double issue of the GR Docket features two recent victories obtained by Gardiner Roberts LLP lawyers for our clients.

Dismissal under r. 2.1.01 upheld

In the first case, *Nikou v. Karageorgos*¹, Gavin Tighe, partner and certified specialist in civil litigation, and Jonathan Nehmetallah, litigation associate, succeeded in upholding a lower court ruling which dismissed actions against, among others, lawyers on the grounds that the actions were frivolous or vexatious or an abuse of process under r. 2.1.01(1) of the *Rules of Civil Procedure*.

(i) Facts

The plaintiff in this case had commenced actions in 2012 and 2015 in connection with a family dispute that had seen the plaintiff and his siblings cut out of his grandfather's Will. The 2012 and 2015 actions were ultimately dismissed and discontinued respectively.

In 2017, the plaintiff started three new actions against family members and a number of lawyers who acted in the 2012 and 2015 actions and who were involved in transactions related to his grandfather's and grandmother's estates. In the three new actions, the plaintiff claimed damages for harassment and defamation. Those actions were dismissed by a judge last spring under r. 2.1.01. In dismissing the actions, the judge refused to permit the plaintiff to amend his pleadings.

The plaintiff appealed the dismissals on the grounds that the judge failed to find that the proceedings were frivolous or vexatious or an abuse of process, failed to give reasons why the pleadings could not be amended, and erred in dismissing the actions because the harassment and defamation claims were supported by the pleadings.

(ii) Findings of the Court

The appellate court found that while

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A number of our lawyers have enjoyed in-house corporate positions and been appointed as board members of tribunals or as judges.

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the motion judge did not describe the actions as frivolous or vexatious or an abuse of process, it was evident that the actions had been dismissed for this reason. The judge had notified the plaintiff that the court was considering a dismissal of the actions on the grounds that they were frivolous or vexatious or an abuse of process, and found that the pleadings did not support the cause of actions identified therein.

A claim that lacks legal basis or legal merit is frivolous. A claim instituted without a reasonable ground is vexatious.

Similarly, the decision to dismiss the claims without giving the plaintiff an opportunity to amend his pleadings was justified because it would be pointless to permit amendments to pleadings that did not have legal merit or that could not sustain a cognizable cause of action. Even read generously, the Court of Appeal noted that the pleadings did not sufficiently express the gravamen of cognizable causes of action.

The three new actions represented an attempt to re-open the 2012 and 2015 actions. This was an abuse of process. Accordingly, the motion judge committed no error in dismissing the harassment and defamation claims since those allegations related to the pleadings and evidence given in the 2012 and 2015 actions.

Damages significantly limited in land purchase

In the second case, *Bielanski v. Mundenchira*², James Cook and Scott Gfeller, litigation partners at Gardiner Roberts LLP, were successful in limiting a lawyer's exposure to damages in a residential real estate transaction where

his clients got more land than what they had bargained for. The most significant aspects of this decision were the court's refusal to admit the plaintiffs' expert evidence and to grant damages for the plaintiffs' alleged loss of opportunity to invest in other properties. Rather than applying the principles in *Toronto Industrial Leaseholds Ltd. v. Posesorski*³, the court applied the principles in *Kienzle v. Stringer*⁴.

(i) Facts

In 2005, the plaintiffs entered into an agreement to buy a residential property in Mississauga (the "2005 Property"). The 2005 Property formed part of a larger property that was supposed to be subdivided into two separate lots. However, on the closing of the transaction the entire property, or both lots, were mistakenly transferred to the plaintiffs.

Both the plaintiffs' lawyer and the seller's lawyer had failed to notice an error in the legal description to the deed of the 2005 Property that was ultimately registered on title.

Three years later, the plaintiffs bought another residential property and in 2009 decided to sell the 2005 Property. While the maximum appraisal for the 2005 Property was \$920,000, the plaintiffs listed the 2005 Property for sale for \$1.125 million.

The 2005 Property did not sell until 2011. The plaintiffs argued that the inability to sell the 2005 Property until 2011 was the result of their real estate lawyer's negligent failure to notice the error in the deed's title description. The misdescription caused the 2005 Property to be viewed by property tax assessors as being a 100 foot wide lot rather than a 50 foot wide lot and



thus a higher property tax value was attributed to the 2005 Property than otherwise should have been attributed to it. The plaintiffs contended that, in turn, potential buyers were dissuaded from making offers on the 2005 Property due to the higher than normal property taxes for a 50 foot wide lot.

The plaintiffs further argued, among other things, that their inability to sell the 2005 Property until 2011 as a result of the title error caused them to lose the opportunity to buy investment properties.

In contrast, the lawyer argued that the plaintiffs' alleged losses were not reasonably foreseeable and that the plaintiffs knew about the error in the 2005 Property's title description as far back as 2005. Accordingly, the error could have been rectified years before the plaintiffs listed the 2005 Property for sale in 2009.

(ii) Expert report rejected

To support their claim, the plaintiffs relied upon an expert report which had calculated the plaintiffs alleged losses based on their inability to sell the 2005 Property. The plaintiffs' expert took the difference between the plaintiffs' actual cash flows and the cash flows they would have generated assuming that the 2005 Property had been sold in 2009 to calculate a loss of \$390,000.

The lawyer challenged the admissibility of the expert's report on the grounds of relevancy and necessity.

The court held that the expert's report was inadmissible because it simply presented

calculations based largely on assumptions and materials provided by the plaintiffs and their lawyer. The court determined that it was able to do most, if not all, of the calculations based on evidence from a lay witness and that while some evidence was obtained independently, that evidence was speculative.

As well, the court found that the expert's report was unreliable based on its assumptions and that it addressed damages that were not reasonably foreseeable.

(iii) Findings on damages

With respect to damages, although the lawyer had breached his duty of care to the plaintiffs, the bulk of the damages claimed were not reasonably foreseeable. It is a general principle of law that in a negligence action, the damages a plaintiff seeks must be reasonably foreseeable in both fact and law.

In this case, the plaintiffs' damages were not reasonably foreseeable.

The court accepted the lawyer's argument that in the circumstances the plaintiffs would have bought the 2005 Property despite the error in the property's legal description set out in the deed. Accordingly, recovery for the pure economic loss suffered by the plaintiffs was limited to the actual transaction and not secondary transactions.

This meant that the plaintiffs were not entitled to recover damages for their alleged loss of opportunity in having their equity in the 2005 property tied up while it did not sell.

In any event it was found that the plaintiffs had led no reliable evidence that the 2005 Property was not selling because its property taxes were inflated or that they actually suffered any losses because the equity was tied up for a year-and-a-half. Also, there was no evidence that the real estate lawyer knew that the plaintiffs intended to use the equity in the 2005 Property to invest in condominiums. As a result, the damages sought for lost opportunity were not reasonably foreseeable.

Other losses claimed by the plaintiffs for loss of value in the 2005 Property and carrying costs, interest on the payment of property taxes, and aggravation and mental distress damages were also denied.

The court found that the only recoverable damages available to the plaintiffs was a small amount of money paid to the real estate lawyer to commence the application against the original seller. The court held that this money was paid for fees related to the real estate lawyer's error and that payment would have been unnecessary if the error had not been made.

(iv) Case under appeal

The plaintiffs have filed a Notice of Appeal of this decision.

(v) Assistance on the matter

Mr. Cook and Mr. Gfeller were assisted in the preparation of written legal argument presented at trial by Stephen Thiele, partner and Director of Legal Research for Gardiner Roberts LLP.

- 1 2019 ONCA 83
- 2 2019 ONSC 1162
- 3 (1994), 21 O.R. (3d) 1 (C.A.)
- 4 (1981), 35 O.R. (2d) 85 (C.A.)

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