

## Misrepresentations made before signing of an agreement may allow for damages

By **James R.G. Cook**

Law360 Canada (September 20, 2024, 3:00 PM EDT) -- At issue in many real estate disputes is whether a party made any misrepresentations about the property at issue that gave rise to damages. Buyers are generally required to satisfy themselves of most issues concerning the property before the transaction closes. However, in some cases, misrepresentations made before the signing of an agreement of purchase and sale (APS), may allow a buyer to sue for damages if they were not in a position to have discovered the nature of the misrepresentation at the time of signing. In the case of a new-build property, such misrepresentation may involve the location of the property, as illustrated in *Zhang v. Primont Homes (Caledon) Inc.*, 2024 ONCA 622.



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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, Ont. However, in 2018, the buyers drove by the intersection to check on the progress of the development and discovered that the property was not located in Brampton but in Caledon, Ont., 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 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.

Before 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. 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 appeal turned largely to the findings of fact made by the trial judge on the divergent accounts of the parties' communications before the signing of the APS. The trial judge 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 found to be 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 based on *Krawchuk v. Scherbak*, 2011ONCA 352, at paragraph 130, leave to appeal refused, [2011]S.C.C.A. No. 319. The Court of Appeal affirmed, however, that a breach may be established without the need for expert evidence where the issues are "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 that did not require expert evidence. The Court of Appeal agreed.

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, relying on a British Columbia decision, *Kaltenegger v. Cao*, 2022 BCSC 2203.

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, 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. Nothing in the APS precluded the buyers from suing their own real estate agent or broker for 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 argued, the buyers 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, "The 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 failed and the appeal in its entirety was therefore dismissed.

An important point to note is that upon learning where the property was actually going to be located, the buyers took prompt action to enforce their rights and terminate the transaction. While they did not ultimately litigate the developer's liability for the misrepresentation, they were able to recover damages from their real estate agent who failed to confirm the location of the property before they signed the APS. The case is a cogent example of liability flowing from a highly specific misrepresentation — in this case, the actual location of the property — that may entitle a buyer to refuse to recover their deposit by way of damages.

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