

Real estate agent sued for misrepresenting identity of buyer

Litigation | Litigation & Dispute Resolution | Real Estate | Rules of Civil Procedure

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In *Ker v. Deol*, 2023 ONSC 1167 (CanLII), a motion judge of the Ontario Superior Court of Justice considered whether the buyer's real estate agent could be added as a defendant in a lawsuit brought by the seller arising from an aborted transaction.

In March 2021, the buyer agreed to buy the seller's property in Orangeville, Ontario for \$1,100,000 pursuant to an Agreement of Purchase and Sale (APS). In June 2021, the seller was advised that the buyer would not be completing the transaction. The seller subsequently commenced an action against the buyer for damages due to his failure to close.

In his defence, the buyer claimed that he was approached by an individual (Cheema) with respect to purchasing a home on his behalf. Cheema then made an offer to purchase using the buyer's name as purchaser and paid the deposit through the buyer's real estate agent.

The buyer further claimed that his real estate agent and Cheema were long-time friends who had orchestrated the transaction for Cheema's benefit. The buyer alleged that his agent agreed to arrange the mortgage for the property. He said that he was unsure whether he even signed the APS.

This was all new information to the seller. When the statement of claim was prepared, the seller had no idea that Cheema even existed and did not know about the alleged scheme or the agent's involvement in it.

As the statement of claim originally pleaded only breach of contract, the seller brought a motion to amend the pleading to add Cheema and the buyer's real estate agent as defendants along with a claim of damages for negligent misrepresentation.

The real estate agent opposed the seller's motion to add him as a defendant.

Under Rule 26.01 of the Ontario *Rules of Civil Procedure*, a court has broad power to permit leave to amend pleadings at any stage of a proceeding. The Rule requires the court to grant leave to amend unless the responding party would suffer non-compensable prejudice; the amended pleadings are scandalous, frivolous, vexatious or an abuse of the court's process; or the pleading discloses no reasonable cause of action: *1588444 Ontario Ltd. v. State Farm Fire and Casualty Co.*, 2017 ONCA 42 at paragraph 25.

The real estate agent's lawyer argued that there would be irreparable prejudice to the agent's reputation if the amendment was allowed. However, reputational harm is not the type of non-compensable prejudice that can defeat a motion to amend a claim.

The agent's second argument was that he, as the real estate agent for the buyer, did not owe a duty of care to the seller and therefore no reasonable cause of action could lay against him. In that regard, the seller's agent argued that he made no explicit representations himself to the buyer or her broker.

An amendment to add a defendant can be defeated on the basis that the proposed amendments do not disclose a tenable cause of action: *Diamond Contracting Ltd. v. MacDermid*, 2006 CanLII 24444 (ON CA).

The seller's claim against the agent alleged negligent misrepresentation which requires a plaintiff to prove (amongst other things) that there was a duty of care between the representor and the representee based on a "special relationship".

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The crucial vantage point is that of the “representor” or the seller in this case. A duty of care and special relationship may exist if it is reasonable to foresee from the representor’s perspective that there will be reliance on the representation made.

The thrust of the seller’s claim was that Cheema and the agent had agreed to misrepresent who the purchaser of the property was. According to the buyer himself, the agent orchestrated this scheme and assisted and encouraged Cheema and the buyer to pull the wool over the seller’s eyes. The seller argued that had she known who the real buyer was, there is at the very least a reasonable prospect that she would not have entered into the APS.

In the motion judge’s view, the fact that the seller’s agent was listed on the APS as the broker acting for the buyer was sufficient to ground a cause of action against him. Prior cases have determined that a seller’s agent can be liable to a buyer for certain misrepresentations: *Mohn v. Dreiser*, 2002 CanLII 42547 (ON SC), *Hauck v. Dixon* (1975), 1975 CanLII 754 (ON SC).

Further, in the motion judge’s view, “[a] real estate agent representing a purchaser has a duty of care to the vendor that he is representing who he says he is representing.”

Lastly, the motion judge was concerned that if the agent were not added as a defendant, and the buyer was found to be an innocent dupe, the seller could be left without a remedy. The addition of the agent was therefore necessary to enable the court to adjudicate effectively and completely on the issues in the proceeding.

The court therefore allowed the amendments to the claim, adding the claim for negligent misrepresentation and the agent as a defendant along with the agent’s brokerage and Cheema. Whether the agent will be found liable to the seller for misrepresenting the identity of the buyer has yet to be determined.

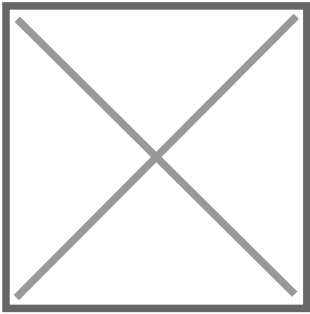
It seems clear from the decision that the court was concerned about the allegation that the agent had actively misrepresented the true buyer of the property. One might draw a distinction between this type of factual misrepresentation and a situation where the identity of a buyer was specifically left undisclosed. Offers to purchase are sometimes made on behalf of a party “in trust” or a corporation whose principals are unknown to the other party.

While an agent should not lie about who they are acting for, it is not clear whether a representation about the identity of a party entering into an APS will always give rise to a duty of care based upon reliance by the other party as to the person signing the APS. In many cases, a seller may not care (or rely upon) whose name appears in the APS. In any event, these are issues to be addressed on another day. A PDF version is available to download [here](#).

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