SUPREME COURT OF NOVA SCOTIA
Citation: Deep Cove Marine v. Romkey, 2009 NSSC 250

Date: 20090821
Docket: Hfx No. 281864
Registry: Halifax

Between:

J. Hartling Holdings Incorporated,
a body corporate, carrying on business as
Deep Cove Marine

Plaintiff

- and -

Margaret Cecilia Romkey, Marc Adam Romkey
and Jim Snair, the latter carrying on business as
Sunnybrook Yachts

Defendants

DECISION ON MOTIONS FOR SUMMARY JUDGMENT

Judge: The Honourable Justice Gerald R.P. Moir

Heard: June 4, 2009, in Halifax, Nova Scotia

Last Submissions: June 18, 2009

Counsel: Jane O'Neill and Lauren Cicen for the plaintiff
David Farrar, Q.C. and Alex Keaveny for the defendants
Margaret Cecilia Romkey and Marc Adam Romkey
Alan V. Parish, Q.C. and Denny Pickup for the
defendant Jim Snair

By the Court:

Introduction

[1] Hartling Holdings Incorporated was created to take title to a 2003 Sea Ray 300 DA Sundance yacht under a Bill of Sale between Margaret Romkey and Marc Romkey and the principal of Hartling Holdings, James Hartling, trading as "Deep Cove Marine". Hartling Holdings pleads for rescission and repayment of the $146,000 purchase price. Ms. and Mr. Romkey move for summary judgment. Mr. Jim Snair, who acted as broker on behalf of both sides, is also a defendant and he, too, moves for summary judgment.

Facts

[2] The Sea Ray was owned by Ms. Romkey's husband, Mr. Romkey's father, who died in 2005. In 2003, he had a collision with another boat and the Sea Ray had to undergo more than $20,000 worth of repairs.

[3] After Mr. Romkey died, his two heirs, the defendants, hired Mr. Snair to broker a sale of the Sea Ray. At that time, Mr. Snair was also representing Mr.

Hartling as a potential purchaser of pleasure crafts. On February 24, 2006, shortly after he was retained by the Romkeys, Mr. Snair wrote to Mr. Hartling about the Sea Ray. He said that it met Mr. Hartling's requirements for a potential purchase, "It is as you requested - like new, building stored ..."

[4] There is a dispute between the Romkeys and Mr. Snair about whether he was told of the accident. Mr. Hartling dealt exclusively with Mr. Snair, and Mr. Hartling was never told of the accident, about that there is no dispute.

[5] The parties also seem to be in agreement about the importance to a purchaser of a used yacht of knowing whether it had been in an accident. Ms. O'Neill accurately summarizes the evidence given at discovery:

> What all parties do agree on, however, is that the fact that the boat was in an accident was material to the sale. Mr. Snair says that had he known of the accident, he would have disclosed it to Mr. Hartling; Mrs. Romkey says that she never would have sold the boat unless she was satisfied that Mr. Hartling knew about the accident and Mr. Hartling says that he never would have purchased the boat had he known about the accident.

Indeed, Mr. Snair has a form for disclosure by sellers and it includes a question about accidents. (Mr. Snair claims to have sent the form to the Romkeys, and they deny receiving it.)

[6] The Sea Ray seemed like new to Mr. Hartling when he inspected it on three occasions. He felt very comfortable that he was “getting a boat that met my criteria”. Mr. Hartling choose not to have a survey done, or to talk with Mr. Terry Conrad, who had worked on the boat, including making the mechanical repairs required after the collision.

[7] Ms. Romkey and Mr. Hartling signed a purchase agreement in March, 2006. It contained a clause permitting the purchaser to have the Sea Ray surveyed, and to terminate, or renegotiate, the agreement based on the survey. The agreement says nothing about representations, neither to confirm or to exclude any.

[8] The agreement closed a few days after it was signed. No survey was conducted. The bill of sale was signed by the purchaser, apparently to evidence his being bound by terms in the bill. The bill provides:

> THE GRANTEE has inspected the said vessel or caused inspection to be made on his behalf and accept [sic] title to the said vessel and its equipment “as is, where is”.

The bill also purports to exclude representations made by Mr. Snair:

> THE YACHT BROKER, in connection with this transaction, makes, or has made, no warranties, either express or implied, and no representation regarding title, condition or fitness or any other representation concerning the herein described vessel.

Mr. Hartling read the bill of sale, or at least he skimmed through it.

[9] The accident was well publicized around Chester, where the Sea Ray was used by the late Mr. Romkey. Mr. Hartling also used the boat there. It was not long before Mr. Hartling learned about the accident. He offered it back, put it in storage, and brought the suit in due course.

[10] In the short time he used the Sea Ray, Mr. Hartling encountered a mechanical problem. The problem did not result from the collision, and there is no evidence that the collision caused any remaining defect.

<u>The Claims at Issue</u>

[11] Against Mr. Snair, the statement of claim pleads that he owed Mr. Hartling fiduciary duties including a duty "to disclose that the boat had been in a serious collision". Further, his statement that the Sea Ray was "like new" is alleged to have been a negligent misrepresentation.

[12] Against the Romkeys, the statement of claim alleges that Snair was their agent and the Romkeys are bound by his misrepresentations. It also alleges that the Romkeys' silence about the collision amounts to a misrepresentation. Furthermore, it sets up various provisions in the *Sale of Goods Act*, which I shall deal with later.

[13] Mr. Hartling claims rescission and damages.

Principles for Summary Judgment

[14] Parties seeking summary judgment must show "that there was no arguable issue of material fact requiring trial" and, if that is shown, the parties against whom judgment is sought are "then required to establish their claim as being one with a real chance of success": *Orlandello* v. *Nova Scotia (Attorney General)*, [2005]

N.S.J. 249 (C.A.) at para. 25, reiterated in *Milbury* v. *Nova Scotia (Attorney General)*, [2007] N.S.J. 187 (C.A.) at para. 17.

[15] The *Nova Scotia Civil Procedure Rules* that came into effect at the beginning of this year do not alter these principles. Rule 13.04(1) provides:

> A judge who is satisfied that evidence, or the lack of evidence, shows that a statement of claim or defence fails to raise a genuine issue for trial must grant summary judgment.

"Statement of claim" and "statement of defence" are given extended meanings in Rule 13.02 to cover parts of a pleading as well as to include similar pleadings.

Tortious Misrepresentation

[16] Mr. Farrar argues for the Romkeys that none of the five requirements in *Queen* v. *Cognos*, [1993] S.C.J. 3 can be satisfied in this case, and each is so clearly beyond proof that there is no material fact requiring trial on this subject. Mr. Pickup supports this submission.

[17] Ms. O'Neill's primary response is that Mr. Hartling seeks rescission and there is an arguable case for contractual misrepresentation that founds the claim for rescission. However, the statement of claim alleges tortious misrepresentation against Mr. Snair and it appears to make that claim against the Romkeys as well.

[18] Each of the five requirements must be met to establish negligent misrepresentation. The defendants were content to leave the first, a duty of care based on a special relationship, aside for the purposes of their motions.

[19] The second of the *Cognos* requirements is "the representation is question must be untrue, inaccurate, or misleading". In this case, a trial judge would have to determine whether it was untrue, inaccurate, or misleading to describe a Sea Ray that had been in an accident as being "like new". A new Sea Ray is most unlikely to have been in an accident. On the other hand, a Sea Ray that had been damaged in an accident might have been so well repaired as to be like new. There is a material fact in dispute that requires resolution by trial.

[20] The third requirement is that the representor acted negligently in making the representation. The strong evidence of the importance of telling a purchaser about

a serious accident involving a yacht like the Sea Ray suggests to me that a trial judge would have to make findings before this requirement could be determined.

[21] The argument for the defendants against the fourth *Cognos* requirement, reasonable reliance on the representation, turns on whether "like new" includes "accident free". In my assessment that can only be determined on the whole of the evidence, including the evidence about the importance of a yacht having been in a serious collision.

[22] The fifth, and last, requirement in *Cognos* is detrimental reliance "in the sense that damages resulted". As far as we know, the Sea Ray is in very good shape. However, the evidence about the importance of an accident history leads me to conclude that it is open to the plaintiffs to produce evidence, and make arguments, that a loss results from purchasing a Sea Ray with a accident history while believing it had none. The loss would relate to whatever makes the history important, probably diminished value.

[23] Each of the five requirements for negligent misrepresentation is live on the facts of this case. Each involves arguable issues of material fact requiring a trial.

Contractual Misrepresentation

[24] A misrepresentation that induces a contract may found a claim to the equitable remedy of rescission. I have already stated my conclusion that there is an arguable case for a finding that the "as new" statement is an "accident free" misrepresentation. Further issues arise.

[25] An argument for the Romkeys is that the statement was made to Mr. Hartling by Mr. Snair in his capacity as Hartling's broker. Mr. Snair was agent for both and, in my assessment, it will take a trial judge to unravel whether the Romkeys were bound by what Mr. Snair said. The issue requires a series of findings and remains a genuine issue that is in dispute and requires a trial.

[26] Furthermore, the clause excluding representations and the clause for an "as is, where is" sale are said to preclude the claim for rescission, and possibly the tortious claim also. I have several difficulties with this.

[27] Firstly, these provisions are not in the contract sought to be rescinded. For some reason, we find them at the end of the day in the instrument whose purpose was to transfer ownership in accordance with the purchase agreement. Facts need to be found in order to know whether these provisions are late amendments to the purchase agreement or they are to fall with the rest of the bill of sale if the purchase agreement is rescinded. This issue is expressly raised in paragraph ten of the statement of claim.

[28] Secondly, the confusion over the status of these provisions is compounded by the confusion that results from Mr. Snair's dual agency, and from the importance of an accident history. Ms. O'Neill puts it this way:

> 1) It is not clear who this clause is meant to protect given that it is contained in a contract between the Romkeys and Hartling but refers to Snair, a non-party to the contract;
>
> 2) It is not clear whether the "Broker" referred to in the contract is meant to be Snair as broker for the Romkeys or as broker for Hartling;
>
> 3) It is clear on the evidence that all parties thought the existence of the accident was material to sale of the boat.

[29] In my view, these are not issues that can be resolved by summary judgment. Facts need to be determined by a trial judge, very much in conjunction with determining the question of whether terms in the bill of sale became parts of the contract it consummated.

[30] I thank counsel for the further assistance they provided at my request about entire agreement clauses. This is my third difficulty. There are restrictions on the effectiveness of entire agreement clauses: see Geoff R. Hall *Canadian Contractual Interpretation Law* (LexisNexis, Markham, 2007) p. 232 to p. 238. There may be an analogy between clauses that generally override misrepresentations and entire agreement clauses. Particularly, there may be an analogy with the effectiveness of an entire agreement clause that would override an underlying representation, as in *Zippy Print Enterprises Ltd.* v. *Pawliuk*, [1994] B.C.J. 2778 (C.A.).

[31] This third point goes to the second principle on summary judgment. Even if there were no arguable issues of material fact on the question of the effectiveness of the clauses in the Bill of Sale, there would still be an arguable issue of law.

[32] For these reasons, I will dismiss the motions for summary judgment on the claims based on misrepresentation.

Sale of Goods Act

[33] The plaintiffs plead s. 14, 15(a), 16 and 17 of the *Sale of Goods Act*.

[34] Section 14 of the *Sale of Goods Act* deals with conditions and warranties. It is not possible to characterize the "like new" statement as a condition in the purchase agreement. It may have been a representation that induced the contract but there is no way to find it in the induced contract as a warranty, let alone as a condition. This pleading does not raise an arguable issue of material fact or, otherwise, present a claim with a real chance of success.

[35] Section 16 of the *Sale of Goods Act* provides an implied condition that goods sold by description correspond with the description. This is most useful in cases of a sale without an opportunity for inspection.

[36] The plaintiffs plead that the “like new” statement is part of the description. Again, a statement, possibly a representation, is sought to be made a part of a contract it, at most, induced. The description in the contract does not include “like new”. It reads, “one 2003 Sea Ray 300 DA Sundancer pleasure craft approximately 30' in overall length, bearing the serial number ...”. That is the description by which the Sea Ray was sold.

[37] Section 17 of the *Sale of Goods Act* provides implied conditions of fitness for purpose and “merchantable”, or marketable, quality. The conditions apply to sales by a person in the business of selling the goods bought, and that does not appear to describe the Romkeys. Furthermore, no evidence was produced to suggest the Sea Ray is not fit for its purpose, or was not of marketable quality. See Rule 13.04(4). Indeed, the evidence given at discovery suggests the opposite.

[38] Section 15 of the *Sale of Goods Act* provides an implied condition that the seller has the right to sell the goods. There is no basis for the pleading that the Romkeys lacked authority, and Mr. Hartling withdrew that claim when he gave evidence on discovery. There is a similar claim based on the common law at para. 25 of the statement of claim.

Result

[39] I will dismiss the claims made in paragraphs 23 to 28 of the statement of claim. Otherwise, the motion for summary judgment is dismissed.

[40] It is my duty under Rule 13.07 to give directions for the further conduct of this action, unless all parties waive the requirement. I request counsel advise whether there is a unanimous waiver. If directions are not waived, I will deal with costs at a conference for directions. If that is waived and costs are not settled, counsel may provide written submissions.

J.