COURT OF APPEAL FOR ONTARIO

CITATION: 6038212 Canada Inc. v. 1230367 Ontario Ltd., 2014 ONCA 415
DATE: 20140520
DOCKET: C57219

Gillese, van Rensburg and Hourigan JJ.A.

BETWEEN

6038212 Canada Inc. and John Yang

Plaintiffs (Appellants)

and

1230367 Ontario Ltd. and Surinder Sumra

Defendants (Respondents)

and

Zheng Anderson

Third Party (Respondent)

Steven J. Greenberg, for the appellants

Hank Witteveen, for the respondents 1230367 Ontario Ltd. and Surinder Sumra

Ian R. Stauffer and Lesly Joseph, for the respondent Zheng Anderson

Heard: May 8, 2014

On appeal from the judgment of Justice V. Jennifer MacKinnon of the Superior Court of Justice, dated May 24, 2013, with reasons reported at 2013 ONSC 3022.

ENDORSEMENT

[1] The appellants 6038212 Canada Inc. (“603”) and John Yang raise a number of arguments on appeal with respect to the trial judge’s dismissal of their crossclaim against the respondents 1230367 Ontario Ltd. (“123” or the “vendor”) and Surinder Sumra and their third party claim against the respondent Zheng Anderson.

[2] The appeal arises out of the purchase of a commercial property and restaurant in Ottawa in 2005. The property was contaminated by tetrachloroethylene originating in a dry cleaners’ that had been operated by a former tenant. At the time of the purchase, the vendor 123 (which is the respondent Sumra’s company) was in possession of three environmental reports. A Phase I non-intrusive environmental site assessment (“ESA”) report concluded that there were no apparent environmental concerns associated with the property. Two later reports that were based on a subsurface drilling program, had identified groundwater contamination exceeding applicable Ministry of the Environment criteria, and had provided a preliminary budget for remediation of $100,000 to $150,000.

[3] The appellants assert that 603 purchased the property without knowledge of the environmental contamination, which only came to Mr. Yang’s attention a few years later, after contamination was discovered to have migrated through the groundwater to an adjoining property.

[4] The appellants claim that the vendor had a duty to disclose the contamination and was in breach of that duty. They also claim that the third party, who acted as legal counsel for 603 in the purchase of the property, was negligent in failing to request environmental information from the vendor, and in failing to ensure that an environmental warranty was included in the agreement of purchase and sale.

[5] The trial judge made a number of findings of fact that are fatal to this appeal. All of the findings were well-supported by the evidence. They resulted, to a considerable extent, from her conclusion that Mr. Yang was not a credible witness.

[6] In particular, the trial judge found that Mr. Yang, despite his denials, knew about the contamination before he chose to waive an environmental condition in the agreement of purchase and sale, and before closing the transaction. The trial judge concluded that Mr. Yang had received all three environmental reports. She accepted Mr. Sumra's testimony that he had provided the reports to Mr. Yang in a folder with other relevant information. The appellants assert that the trial judge ought to have rejected this evidence because Mr. Sumra stated at one point in his testimony that he had not received the second report (although later he said that he had received it). It is the function of a trial judge to consider and to weigh any inconsistency in the evidence of a party. Mr. Sumra was cross-examined at some length on the question of when and how he had provided the

environmental reports to Mr. Yang. While the trial judge did not advert to an apparent inconsistency from his earlier testimony, we are not persuaded that there was any error in her assessment of credibility, and in her finding that Mr. Yang had received the reports. This finding, and the conclusion that Mr. Yang completed the purchase transaction knowing about the environmental problems with the property, was supported by other evidence at trial.

[7] Mr. Yang admitted having heard “rumours” about contamination at the property. He had a Ph.D. in chemistry and experience in real estate matters, including the purchase of a property he knew to be contaminated three years earlier. He testified that he knew the lender financing the purchase, CIBC, would require an environmental report, and he acknowledged that the Phase I ESA report was faxed from his lawyer’s office to CIBC. Nevertheless, Mr. Yang denied having received *any* reports from Mr. Sumra, including the Phase I ESA report, and was unable to explain how it had ended up in his lawyer’s office.

[8] The evidence concerning the price reduction for the property was consistent with Mr. Yang’s knowledge of the environmental contamination. According to Mr. Sumra, he and his son met with Mr. Yang in the company of a real estate agent (whose identity was misrepresented by Mr. Yang), and demanded a reduction of the purchase price based on the environmental condition of the property. Mr. Yang’s evidence was that he provided no explanation at all to justify a lower price; yet he was able to obtain a reduction in

the purchase price of $200,000. The trial judge was entitled to accept Mr. Sumra's evidence, as she did, that the negotiations between two experienced businessmen that led to an agreed price reduction was based on the environmental issues.

[9] In the face of the finding that Mr. Yang knew about the contamination, there is no basis for the appellants' claim against the vendor or the lawyer.

[10] The conclusion that the respondent Anderson was not negligent was driven by the facts as found by the trial judge. The agreement of purchase and sale included a condition permitting the purchaser to satisfy itself respecting the environmental condition of the property, and included a requirement that the vendor provide any existing environmental reports upon request of the purchaser. Ms. Anderson testified that Mr. Yang had undertaken to deal with the conditions in the agreement, and that he had ultimately waived the conditions, including the environmental condition. Ms. Anderson had the Phase I ESA report in her files, which she could only have received from Mr. Yang, and she confirmed that she had faxed this document to his lender, CIBC. Prior to the closing, Mr. Yang signed a waiver/consent, acknowledging that Ms. Anderson had specifically recommended undertaking the environmental assessments as stated in the agreement of purchase and sale, that it was his decision not to do the assessments, and that he had instructed his lawyer not to order any new environmental reports "as [he] already received one which has been accepted by

the mortgage company". All of this is consistent with Ms. Anderson's evidence that Mr. Yang had undertaken to address the environmental issues in relation to the property himself, and that he had decided that no further investigations were necessary.

[11] In these circumstances, the trial judge made no error in finding that the respondent Anderson met the appropriate standard of care. There was no error in the trial judge's rejection of the opinion of the appellants' expert witness that she had breached the standard of care, which depended on a number of assumptions that were not borne out by the evidence. We would also reject the appellants' assertion that the waiver/consent signed by Mr. Yang required Ms. Anderson to specifically request environmental reports from the vendor, even in the absence of any instructions from Mr. Yang. The evidence as a whole fully supports the conclusion that Mr. Yang was satisfied with the extent of his knowledge about the environmental condition of the property, and, notwithstanding the advice of his counsel, was unwilling to conduct any further investigations.

[12] In the end, this appeal seeks to challenge a number of the trial judge's findings of fact. The appellants have not persuaded the court that there was any palpable and overriding error, or indeed any error, in the facts found at trial.

[13] Finally, the appeal with respect to the trial judge's provisional assessment of damages could only succeed if the trial judgment on liability were reversed. It is unnecessary to address the question of damages in view of our conclusion that the appeal fails.

[14] The appeal is dismissed. Costs to the respondents 123037 Ontario Ltd. and Sumra fixed at $15,000; costs to the respondent Anderson fixed at $15,000, in each case inclusive of disbursements and HST and payable by the appellants.

"E.E. Gillese J.A."
"K. van Rensburg J.A."
"C.W. Hourigan J.A."