Citation: Tregobov v Paradis et al, 2017 MBCA 60 Date: 20170607
Dockets : AI16-30-08561;
AI17-30-08816

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Alan D. MacInnes
Mr. Justice Christopher J. Mainella
Madam Justice Janice L. leMaistre

B E T W E E N :

LIANNE TREGOBOV	)	
	)	
(Plaintiff) Appellant	)	***F. J. Trippier*** *and*
	)	***A. K. Anjoubault***
- and -	)	*for the Appellant*
	)	
NORMAND PARADIS, IRENE PARADIS, GLEN WILLIAMS, SARAMAX INVESTMENTS LTD., carrying on business as CENTURY 21 BACHMAN AND ASSOCIATES, MANTIN CONSULTING INC., carrying on business as CENTURY 21 BACHMAN AND ASSOCIATES and 5887381 MANITOBA LTD., carrying on business as CENTURY 21 BACHMAN AND ASSOCIATES	)	***J. A. Myers*** *and*
	)	***S. A. Gabor***
	)	*for the Respondents David Paradis as litigation administrator of the estate of Normand Paradis, deceased, and David Paradis and Brian Paradis as executors of the estate of Irene Paradis, deceased*
	)	
(Defendants) Respondents (by first original action)	)	***G. M. Fleetwood*** *and*
	)	***A. D. Domenco***
	)	*for the Respondents Glen Williams; and for Saramax Investments Ltd., Mantin Consulting Inc. and 5887381 Manitoba Ltd., each carrying on business as Century 21 Bachman and Associates*
- and -	)	
	)	
B E T W E E N :	)	*Appeals heard and Decision pronounced:*
	)	***June 7, 2017***
LIANNE TREGOBOV	)	
	)	
(Plaintiff) Appellant	)	
	)	
- and -	)	
	)	
IRENE PARADIS as executor of the estate of NORMAND PARADIS, deceased, IRENE PARADIS, GLEN WILLIAMS,	)	

SARAMAX INVESTMENTS LTD., carrying on business as CENTURY 21 BACHMAN AND ASSOCIATES, MANTIN CONSULTING INC., carrying on business as CENTURY 21 BACHMAN AND ASSOCIATES and 5887381 MANITOBA LTD., carrying on business as CENTURY 21 BACHMAN AND ASSOCIATES	)
(Defendants) Respondents (by second original action)	)
- and -	)
B E T W E E N :	)
LIANNE TREGOBOV	)
(Plaintiff) Appellant	)
- and -	)
DAVID PARADIS as litigation administrator of the estate of NORMAND PARADIS, deceased, DAVID PARADIS and BRIAN PARADIS as executors of the estate of IRENE PARADIS, deceased, GLEN WILLIAMS, SARAMAX INVESTMENTS LTD., carrying on business as CENTURY 21 BACHMAN AND ASSOCIATES, MANTIN CONSULTING INC., carrying on business as CENTURY 21 BACHMAN AND ASSOCIATES and 5887381 MANITOBA LTD., carrying on business as CENTURY 21 BACHMAN AND ASSOCIATES	)
(Defendants) Respondents	)

On appeal from 2015 MBQB 136

MAINELLA JA (for the Court):

Introduction

[1] Normand Paradis and Irene Paradis (the vendors) were an elderly couple who sold their home to the plaintiff in late 2009. When the plaintiff bought the home she was aware of evidence of some previous water infiltration along the north basement foundation wall (the north wall) and that certain foundation repair to the north wall would be required.

[2] Winnipeg experienced episodes of unusually heavy rainfall in May 2010, culminating with three consecutive days of significant rainfall in late May resulting in flooding of the plaintiff's basement.

[3] The flooding caused damage to wall paneling in the basement which, when removed, disclosed significant basement cracks to the north, east and west foundation walls.

[4] The plaintiff appeals the judgment dismissing her Manitoba, *Court of Queen's Bench Rules*, Man Reg 553/88 (QB Rules), r 20(A) action for fraudulent misrepresentation against the vendors and their real estate agent, Mr. Williams (Williams), and also against Williams for negligent misrepresentation. She also appeals the order of elevated costs against her on a Class IV basis as opposed to the regular Class II basis.

[5] After hearing the appeals, both were dismissed with reasons to follow. These are those reasons.

Appeal of the Dismissal of the Claim

[6] Williams listed the vendors' property and received notice from an agent, who had shown the property, of the existence of some moisture

damage in the basement. Williams caused the vendors to have the basement looked at and to obtain a cost for the repair of the north wall. Upon receipt of the estimate, he met with the vendors who, after discussion, decided to reduce the list price of the property by $15,000, the amount of the estimate if all of the work estimated was required. The property was then put back on the market for sale at a reduced price of $15,000 from the original list price.

[7] There was no evidence of any knowledge by the vendors or Williams of the existence of foundation problems with the east and west basement walls at the time of the sale. The only knowledge of foundation issues at the time of the sale was with the north wall.

[8] The evidence established that the plaintiff had her own agent representing her when the property was inspected and the offer made, and that prior to her purchase of the property she, her husband and her agent knew of the $15,000 price reduction and of the need for the foundation work, though they may not have known the full details of the possible repairs.

[9] As the trial judge explained in his reasons, the disclosure by Williams to the plaintiff of expected work and costs to fix the known problems was less than forthcoming, the plaintiff was prepared to pay reasonable costs to fix the north wall, and the listing price had been lowered, taking into account all the possible costs, that were known at the time, to repairing it. The opinion Williams gave to the plaintiff as to the cost of repairing the north wall was a “guesstimate”, as the plaintiff’s husband called it, as opposed to a fact. It was open to the trial judge to not consider Williams’ opinion as a material inducement.

[10] Other evidence of a lack of inducement is that the plaintiff negotiated a further reduction of the price of the home by $9,900, to address existing water damage in the basement that she was aware of, after speaking to Williams about the north wall that needed repair.

[11] The plaintiff also claimed damages for fraud in the failure of the vendors and Williams to disclose a defect in the level of the backyard which permitted water to pool and pond necessitating pumping of the water from the yard from time to time.

[12] The trial judge found that no representation had been made concerning the level of the backyard, that the plaintiff never questioned that, and that the condition of the backyard was not a latent defect which had to be disclosed, but a patent defect discoverable by the plaintiff by inspection and ordinary diligence.

[13] As for the plaintiff's claim against Williams for negligent misrepresentation, the trial judge concluded that any inadequate disclosure caused the plaintiff no damage as, again, there was no reliance.

[14] In determining that there was no reliance by the plaintiff upon the representations made by the vendors and Williams, the trial judge referred to *Alevizos v Nirula*, 2003 MBCA 148, where Scott CJM stated, "In the end, the question that needs to be answered is: Can it be said that the purchasers were induced to enter into the contract as a result of the misrepresentation or fraud of the vendors?" (at para 40).

[15] Considering all of the circumstances, we have not been persuaded that the trial judge made a reversible error when he dismissed the claim against the vendors and Williams because of a "lack of proof of reliance" (at

para 27). In our view, it was open to him on the record to conclude that the plaintiff was not induced to enter into the contract to purchase the home as a result of the fraudulent misrepresentations of the vendors and/or Williams or as a result of any negligent misrepresentation on the part of Williams. As regards to the claims against Williams for fraud, reliance on statements of opinion or a salesman's puffery, as opposed to a fact, are typically insufficient for the purposes of establishing the element of reliance (see Lewis N Klar, *Tort Law*, 5th ed (Toronto: Carswell, 2012) at 704).

Appeal of Elevated Costs

[16] Costs were dealt with by a different judge (the costs judge) after the trial judge's retirement.

[17] The defendants' counsel sought costs on a solicitor-client basis or alternatively, on an elevated level. The plaintiff's counsel agreed that the defendants were entitled to costs, but on neither a solicitor-client nor elevated level.

[18] Costs on a Class II scale would have resulted in the defendants being indemnified for about one-third of their actual costs, while costs on a Class IV scale resulted in roughly two-thirds indemnification.

[19] The costs judge acknowledged that fraud was alleged against the defendants and, significantly, that the action was commenced under QB r 20(A) which is intended to provide a more expeditious and less expensive process for claims under $100,000.

[20] She said this (at para 14):

> While I cannot say that the plaintiff's claim was baseless, I can say that the amount of money at issue did not justify an eight day trial. Even accepting the plaintiff's argument that there was evidence to support her claim, the principle of proportionality places an onus on litigants to realistically evaluate not just the merits of their claim but the cost of pursuing it. This is not to say that the cost of litigation means that the system can provide a remedy only for those who have suffered significant loss. Rather, the process chosen must be proportionate to the matters at stake. Litigants with smaller claims must at least attempt to streamline their cases. Under Rule 20A, the case conference process is there to assist them in doing so. It is clear from the case conference memoranda in this case, that the case conference judge encouraged counsel to consider the strength of the case against the [agent] and to attempt to narrow the issues. Yet the plaintiff pursued all aspects of the claim. And to the extent that the plaintiff's claim dealt with flooding in the backyard, it would appear unrelated to the allegation of fraud.

In the end, the costs judge ordered costs on a Class IV scale.

[21] We have a concern with the decision as to elevated costs. The costs judge took into account the fact that the vendors were "not insured" for the purpose of defending their claim (at para 15). The nature of a party's retainer with their counsel is an irrelevant factor for the purpose of exercising discretion as to costs under QB r 57.01 (see *TJD v OJK*, 2002 MBQB 207 at para 5).

[22] However, our concern ultimately does not assist the plaintiff. There is no basis to conclude that the order of elevated costs here amounts to an injustice (see *Pitblado LLP v Sidhu et al*, 2015 MBCA 52 at para 27). Two circumstances are noteworthy.

[23] First, an allegation of fraud was made but not proven. That is a relevant factor to take into consideration in deciding whether to impose

elevated costs in the given circumstances (see *Manitoba Keewatinowi Okimakanak Inc v McIvor*, 2007 MBCA 134 at para 8).

[24] Second, it was open to the costs judge to conclude that the principle of proportionality was ignored in this case.

[25] Proportionality is the watchword for expedited actions (see QB r 20A(5); *Pitblado LLP* at para 15; and *National Concrete Accessories Canada Inc v AAA-Zaid*, 2017 MBCA 28 at para 35). The plaintiff disregarded the sage advice of the case conference judge who told her to narrow her claim. In our view, case conference judges should routinely express their frank views as to the merits of a QB r 20A action while exploring possible settlement (see QB r 20A(22); and *Pitblado LLP* at para 15). The benefits of doing so are obvious. The civil trial here took eight days of court time. Many of the damages claimed had no connection to any misrepresentation relating to the problems with the north wall of the home's foundation. That is readily apparent from the record. Court time would have been saved if the claim had been narrowed and reasonable agreements had been made well before the trial.

[26] The decision to jump from costs on a Class II level to a Class IV level on a QB r 20A action requires a rationale as to why it is necessary and proportional to do so given the conduct of the unsuccessful party (see *Manitoba Keewatinowi Okimakanak Inc* at paras 13-14). Ordering elevated costs on a Class III level is an alternative where unfounded allegations of fraud are made in a QB r 20A action (see *Tereck Diesel Ltd v Gebhardt et al*, 2010 MBQB 182 at para 26).

[27] In our view, maintaining the allegation of fraud despite a weak case, as the costs judge noted, and conducting the claim as if it were a

regular civil action as opposed to a QB r 20A action, contrary to the principle of proportionality, were reasons for the costs judge to exercise her discretion as she did. While another judge may have imposed elevated costs on a Class III basis, as opposed to Class IV basis, on these facts, that is not a reason for this Court to interfere with the costs order that was made (see *Hamilton v Open Window Bakery Ltd*, 2004 SCC 9 at para 27).

[28] It is trite law that a costs award must be fair and reasonable in all of the circumstances of the case. Fairness and reasonableness is a two-way street. The plaintiff drives the case and the defendants cannot simply walk away. They must defend, particularly in a case where allegations of fraud are made against them, or run the risk of facing an adverse finding and judgment. While the costs award here is significant, relative to the amount of the plaintiff's claim, we have not been persuaded that it is unfair or unreasonable in the circumstances.

Disposition

[29] The plaintiff's appeals are dismissed with costs in favour of the defendants.

Mainella JA

MacInnes JA

leMaistre JA