

O'Dell v Finger Lakes Dev. Corp.

2007 NY Slip Op 34141(U)

September 6, 2007

Supreme Court, Ontario County

Docket Number: 0000818/2007

Judge: Stephen D. Aronson

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NEW YORK STATE
COUNTY OF ONTARIO
CITY OF CANANDAIGUA

CANANDAIGUA CITY COURT

ANDREW O'DELL and
EDWARD O'DELL,

Claimants,

vs.

DECISION

FINGER LAKES DEVELOPMENT CORP.,

Defendant.

Presiding: Hon. Stephen D. Aronson

Appearances: Claimants by: Andrew O'Dell, *Pro se*

Defendant by: Brocklebank Law Firm, Derek G. Brocklebank, Esq.

Statement of Facts

In this small claims case, the claimants seek \$4,700 in damages from the defendant. The claimants, who are brothers, purchased a mobile home park from the defendant in 2006, pursuant to a written contract. Prior to the closing, the claimants, or one of them, asked the defendant's real estate agent, in words or substance, whether or not there was a problem with the water system. The claimants contend that the defendant's agent advised them, in words or substance, that there were no problems.

An inspection was done before the closing. The inspection showed no problems with the water system. Two (2) months after the closing, the claimants began experiencing problems. A water system repair person was contacted. Multiple leaks were found in the water line, and the claimants had a total water system pipe replacement done.

The claimants produced a letter from the water system repair person. This letter alleges that the defendant was aware of leaking water pipes in November of 2005, prior to the closing. According to this letter, the water system repair person gave the defendant several options and estimates in November 2005, including replacement of leaking pipes and the water pump or replacement of the water pump alone. The defendant opted to have the water pump replaced, apparently because it could not at the time afford the full repairs needed. The credible evidence established that the defendant was aware that the underground water lines leaked prior to the execution of the contract. The claimants seek recovery of their out-of-pocket expenses associated with the repair of the water system after the closing.

Statement of the Issue

Did defendant's failure to inform claimants of the leaks in the water system constitute misrepresentation for which claimants should recover their costs of repair of the undisclosed defects?

Conclusions of Law

In every small claims case, the court is bound to perform substantial justice in accordance with principles of substantive law. This case concerns an area of law that is evolving, namely, whether silence or nondisclosure during the precontractual negotiation phase of a business transaction is actionable as fraud or misrepresentation.

Caveat emptor (let the buyer beware) has long been the guiding principle for parties such as claimants and defendant, who are engaging in arm's length business transactions. But business ethics are changing, and recent court cases from New York and many other states show a definite trend away from caveat emptor and toward concepts of good faith and fair dealing. This new business principle can be

summed up as *caveat mendax* (let the liar beware).¹

In order for a bargaining process to be fair, a party with knowledge of a fact that is material to the contract and that cannot be easily discovered by the other party needs to disclose that knowledge prior to the signing of a contract. Whether a party misleads another by silence or by words, the damaging effect on the bargaining process is the same.²

One way to discern whether material information known only to one party is of the type that should be disclosed because it is not easily discoverable is to call it “nonentrepreneurial” information.³ This term refers to facts that can only be acquired through use or ownership of the property being bought or sold. Information that need not be disclosed is then called “entrepreneurial” information because it is the kind of information that can be readily discovered by any enterprising party.

Young v. Keith, 112 AD2d 625 [3d Dept 1985], stands for the principle that failure to disclose nonentrepreneurial information is actionable as fraud. The sellers had failed to inform the buyers of a mobile home park that the water and sewer system for the mobile home park was in serious disrepair. The basis of the finding was that the sellers had a duty to disclose the information, arising out of the tort doctrine of “superior knowledge.” The defects in the sewer and water system could not have been discovered by the purchasers by means of usual inspections. The court also found it important to note that the plaintiffs were buying an ongoing business, implying that they had an

¹Nicola W. Palmieri, *Good Faith Disclosures Required During Precontractual Negotiations*, 24 Seton Hall L.Rev 70 (1993)

²Susan Rogers Finneran, *Knowing Silence of Nonentrepreneurial Information Is Not Sporting*, 59 Alb L Rev 511, 521 [1995] (citing Stewart Macauley et al., *Contracts: Law in Action* 492 [1995]).

³*Id.*

expectation that they were buying something from which they could immediately make money.

A New York Court of Appeals case cited in *Young v. Keith, supra*, identified a cause of action in fraudulent concealment as far back as 1942. That court stated: "Concealment with intent to defraud of facts which one is duty-bound in honesty to disclose is of the same legal effect and significance as affirmative misrepresentations of fact." *Nasaba Corp. v. Harfred Realty Corp.*, 287 NY 290, 295.

This same Court of Appeals case is cited in a discussion of the business tort of fraudulent concealment in *3-15 New York Practice Guide: Business and Commercial §15.06*, (Matthew Bender & Company, Inc., 2005). In order to recover damages under this tort theory, a plaintiff must establish by clear and convincing evidence one or more of five elements listed in this discussion. Two of these seem pertinent to the case at bar:

(c) the defendant purposely concealed a material fact concerning which defendant possessed superior knowledge or means of acquiring knowledge not available to both parties alike...or (e) the defendant knew that plaintiff was acting under a mistaken belief with regard to a material element of the transaction and defendant failed to disclose and correct that error. *Id.*

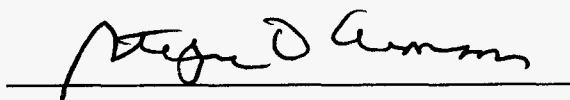
It is clear from the evidence that the defendant knew that the water system was in a deteriorated state and needed more extensive repair than replacement of the water pump. Yet defendant's president Douglas Meiers, Sr. kept this knowledge to himself, as did the real estate agent who acted on defendant's behalf. As one scholar puts it, "Regardless of the intentions of the knowing party, the ability of the unknowing to make the best deal possible is impaired by such an omission."⁴

The principles of good faith and fair dealing would dictate that the defendant

⁴Susan Rogers Finneran, *supra*, at 579.

should have informed claimants of the condition of the water line prior to the signing of the contract. The nondisclosed information was material to the contract. A prudent buyer would be likely to lower his or her purchase offer knowing that extensive repairs would be necessary soon after the purchase was made. It was "nonentrepreneurial information" because it was not the kind of defect that a normal inspection would have revealed. Claimants should not have had to dig up the water line before deciding to sign the contract.

Claimants having provided convincing evidence of the elements of the tort of fraudulent concealment, I hereby find for claimants, in the interest of performing substantial justice, and order defendant to pay the damages associated with the excavation and pipework, totaling \$3,018 plus the \$20 filing fee.



Honorable Stephen D. Aronson
Canandaigua City Court Judge

Dated: Sept. 6, 2007

An appeal from this judgment must be taken no later than the earliest of the following dates: (i) thirty days after receipt in court of a copy of the judgment by the appealing party, (ii) thirty days after personal delivery of a copy of the judgment by another party to the action to the appealing party (or by the appealing party to another party), or (iii) thirty-five days after the mailing of a copy of the judgment to the appealing party by the clerk of the court or by another party to the action.