COURT FILE NO.: 04-CV-277412 CP
DATE: 20050824

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
SOLLY LEWIS AND HERSL KALIF	)	***Samuel S. Marr*** and ***Vadim Kats*** - - for the plaintiffs
	)	
Plaintiffs	)	
	)	
- and -	)	
	)	
CANTERTROT INVESTMENTS LIMITED, SANDOR HOFSTEDTER, MARK SAMUEL MANDELBAUM, GEORGE HOFSTEDTER, LARRY FROOM, ALEX LEWIN, HELEN GORENDER AND NORMAN HILL REALTY INC.	)	***A. Irvin Schein*** and ***Stephen C. Nadler*** - - for the defendants
	)	
Defendants	)	
	)	
	)	**HEARD:** June 28 and 29, 2005

REASONS FOR DECISION

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992*

CULLITY J.

[1] The plaintiffs moved for leave to amend their pleading and to certify the proceedings pursuant to the *Class Proceedings Act, 1992*, S. O. 1992, c. 6.

[2] They seek to represent a Class consisting of the purchasers of residential condominium units in a project known as the Residence of Beauclaire in Thornhill, Ontario. In the statement of claim, as originally issued on October 18, 2004, they claimed damages against the defendants in respect of certain alleged misrepresentations concerning the monthly assessments and maintenance fees that would be payable by purchasers of units in the project. The condominium corporation - York Region Standard Condominium Corporation No. 974 – was created by registration pursuant to the *Condominium Act, 1998,* S.O. 1998, c. 19 on June 28, 2002.

[3] The defendants, Cantertrot Developments Limited ("Cantertrot") and Norman Hill Realty Inc ("Norman Hill Realty"), were, respectively, the vendor of the units and the listing agent for their sale. The defendants, Sandor Hofstedter, Mark Samuel Mandelbaum, George Hofstedter, Larry Froom and Alex Lewin were either officers or directors, or both, of Cantertrot or of the condominium corporation at the time of the sale of the units. Helen Gorender is alleged to be an employee of Norman Hill Realty and the primary sales agent with respect to the units.

[4] One of the proposed amendments to the statement of claim is to add, as additional defendants, H & R Property Management Ltd. (“H & R Property”) and Stanley Cappe. The latter was an employee, and the general manager, of H & R Property and, as well as the original individual defendants, he is alleged to have drafted, approved and authorized the preparation and distribution to Class members of documentation containing the misrepresentations. The other proposed amendments would add claims for breach of contract against Cantertrot and for restitutionary remedies against all of the defendants.

[5] Marketing of the units had commenced in 1999. The sales closed for the most part in early August, 2002. As the *Condominium Act*, *1998*, S.O. 1998, c. 19 came into force on May 5, 2001, plaintiffs’ counsel submitted that it was that statute, and not the *Condominium Act*, R.S.O. 1990, c. C. 26 that contains the material statutory rights and duties of the parties. As, for the purpose of this motion, it was not suggested that the relevant provisions of the statutes differ in their effect, I will refer only to those of the 1998 legislation.

[6] Given the nature of the amendments sought, it will be convenient to deal with the two motions together.

Section 5 (1) (a) of the CPA - disclosure of a cause of action

[7] The question whether the requirement in section 5 (1) (a) is satisfied must be determined solely on the basis of the pleadings. Evidence is not admissible and the "plain and obvious test" applicable in motions under rule 21.01 (1) (b) is to be applied.

[8] The causes of actions originally pleaded against the defendants, other than Helen Gorender, and Norman Hill Realty, are for negligence, negligent misrepresentation, breach of the *Condominium Act*, fraud, oppression pursuant to section 248 of the *Ontario Business Corporations Act*, R.S.O. 1990, c. B. 16, as amended, (“OBCA”). There is also a claim for punitive damages against these defendants and a plea of breach of fiduciary duty against George Hofstedter, Larry Froom and Alex Lewin as officers and directors of Cantertrot and the condominium corporation. Against Helen Gorender and Norman Hill Realty, the plaintiffs claim damages for negligence, negligent misrepresentation and punitive damages. Although at the hearing counsel did not assert the existence of a cause of action for fraud and deceit against these defendants, material facts sufficient to support such a cause of action have, in my opinion, been pleaded.

[9] Each of the various causes of action is premised on an allegation that the information provided in the condominium declaration, the budget and a sales flyer with respect to the

maintenance fees and monthly assessments to be paid by owners of units was "inaccurate, false, deceptive, misleading" and deficient in material respects. It is alleged, further, that, as well as participating in the preparation and distribution of the documentation, each of the defendants knew, or ought to have known, that it had the above defects. In response to a demand for particulars, plaintiffs' counsel advised that the inaccurate, false, deceptive and misleading representations related to the estimates of the maintenance fees, total expenses - including security expenses and utilities - for the first year after registration and that these were significantly understated. It is alleged that, to the actual, or reasonably imputed, knowledge of the defendants, each of the putative Class members reasonably relied on the accuracy and completeness of the estimates when deciding to purchase a unit, to execute the necessary agreements and to complete the transaction. The existence of duties of care based on a special relationship between the plaintiffs and defendants arising from the statutory disclosure requirements of the *Condominium Act* and their knowledge of the reliance the plaintiffs would place on the misrepresentations is also specifically pleaded. Particulars of the alleged breaches of the duty of care are provided and it is alleged that, as a consequence of these defaults, Class members suffered damages including increased maintenance fees, loss of services and diminished property values.

[10] Defendants' counsel submitted that none of these claims had any chance of succeeding at trial. In his submission, each of them was premised on an assumption that, by relying on the alleged misrepresentations, the Class members suffered damages and it was plain and obvious that this could not be established. This was said to be so because the representations relied on by the plaintiffs - contained in documents considered to be incorporated in the statement of claim - could not reasonably be considered to relate to fees and expenses other than those to be incurred in the first year after registration. As, pursuant to section 75 of the *Condominium Act,* Cantertrot had an obligation to indemnify or reimburse, the Class members for any excess of the liabilities actually incurred in the first year over the amounts estimated in the documents, they would not have suffered any loss.

[11] The response of plaintiffs' counsel was that it was fundamental to their case that Class members relied on the misrepresentations when making their decisions to purchase units and that the questions whether such reliance was reasonable and whether damages were suffered as a result of it were questions of fact that must be dealt with at the trial of the common issues, or on an individual basis. I am satisfied that those submissions are correct.

[12] On the basis of the above, and the other allegations of fact in the statement of claim, I find that causes of action in negligence and negligent misrepresentation have been sufficiently pleaded and, likewise, the claims for breach of the statutory disclosure requirements in the *Condominium Act,* and for the oppression remedy under the OBCA. With respect to the OBCA remedy, the plaintiffs rely also on allegations that certain of the defendants have deliberately divested Cantertrot of its assets with knowledge of its potential liability - and in order to make it judgment proof.

[13] The claim for fraud is pleaded in the alternative to that for negligent misrepresentation. Again, the pleading is, in my opinion, adequate for the purpose of this cause of action. It is alleged that the defendants intentionally distributed documentation with knowledge that its contents were inaccurate, false, deceptive misleading and incomplete, for the purpose of inducing Class members to purchase units, and that they succeeded in doing this.

[14] Similarly, for the purpose of section 5 (1) (a) of the CPA, the claim for breach of fiduciary duty, and the proposed claim for restitutionary remedies are, in my opinion, adequately supported by the facts pleaded: *cf., York Condominium Corporation No. 167 v. Newry Holdings Ltd* (1981), 32 O.R. (2d) 458.

[15] The proposed amendment to include a claim against Cantertrot for breach of contract is, however, inadequately pleaded without more facts relating to an express, or implied, term that was allegedly breached.

[16] The requirement in section 5 (1) (a) is, in my judgment, satisfied. This would apply to the proposed claims against H & R Property and Mr Cappe as much as to those against the other defendants. To the extent that the court has a discretion to refuse leave to add a party even where the proposed cause of action against that person would be sufficiently disclosed for the purpose of section 5 (1) (a), I believe this is a case where leave should be granted to add Mr Cappe and his employer as defendants. The plaintiffs first became aware of their participation when responding material was filed on these motions. An evidential basis for such participation exists in affidavits filed on behalf of the defendants and, as it is admitted that Cantertrot has no assets, I see nothing abusive in permitting the plaintiffs to sue the individuals, and their employers, who allegedly were responsible for the preparation and distribution of the misrepresented information. I do not know - and the plaintiffs probably do not know, at this stage - whether H & R Property has assets sufficient to satisfy a judgment and, of course, the fact that an employer will be vicariously liable for a servant's torts does not relieve the latter from personal liability. This is not a case such as that referred to by Master Macleod in *Plante v. Industrial Alliance Life Insurance Company* (2003), 66 O.R. (3d) 74 (Master) where the addition of a party will delay or complicate the proceedings for no apparent good reason, or where it appears that the desire to do so was made to harass, or put unfair pressure on the other side, as discussed by Farley J. in *National Trust Co v. Furbacher*, [1994] O.J. No. 2385 (G. D.).

[17] In my opinion, it is reasonable for the plaintiffs at this stage of the proceedings to wish to join all persons who may have been responsible for the facts that, if proven, would establish liability. Leave is therefore granted to add H & R Property and Mr Cappe as co-defendants.

5 (1) (b) - the proposed Class

[18] The plaintiffs seek to represent a Class with approximately 120 persons who received title to the units from Cantertrot after 28th June, 2002, the date on which the declaration in respect of the condominium corporation was registered. Membership in the proposed Class is determinable by an application of objective criteria and I am satisfied that there is the necessary

rational connection between the class definition and the proposed common issues. It is an essential element of the plaintiffs' case that the same misrepresentations were made to each Class member in the documentation provided to them all, and each has the causes of action that have been pleaded. While, as I will indicate, the question of reliance on the alleged misrepresentations will give rise to individual issues, the common issues I will accept will be shared by each Class member. The Class definition is, therefore, not over inclusive - arbitrarily or otherwise. It is, in my judgment, satisfactory for the purpose of section 5 (1) (b)

Section 5 (1) (c) common issues

[19] Plaintiff's counsel has provided a list of 16 proposed common issues. In my judgment, not all of these satisfy the requirement of commonality. Those that do - and others I would add - are as follows:

> (a) Did the defendants, or any of them, breach a duty of care owed to members of the Class;
>
> (b) Did the defendants, or any of them know - or ought they to have known - that the information with respect to the maintenance fees and monthly assessments in the disclosure statement, budget and flyer were inaccurate, false, deceptive, misleading and did not contain material statements or information?
>
> (c) Did the defendants, or any of them, misrepresent in the disclosure statement, budget and flyer the amount of maintenance fees and common expenses?
>
> (d) Did the defendants, or any of them, make such misrepresentations intentionally and with the intent to deceive Class members?
>
> (e) Absent any other material representations, or material facts within the knowledge of a Class member, would it have been reasonable for such member to have relied on such misrepresentations in making the decision to purchase a unit?
>
> (f) if the answer to questions (a), (b), (c) or (d) is yes, what would be the measure of damages for Class members who relied reasonably on such misrepresentations?
>
> (h) Did the defendants, or any of them, fail to comply with the statutory disclosure requirements of the *Condominium Act?*
>
> (i) Did the defendants, or any of them, deliberately withhold information from the Class that the maintenance fees were likely to be substantially

higher than as represented in the disclosure statement, budget and flyer?

(j) Did the defendants, George Hofstedter, Larry Froom and Alex Lewin, or any of them, owe fiduciary duties to the Class and, if so, did they breach those duties?

(k) Did the defendants, or any of them, take steps to remove all the assets from Cantertrot, rendering it judgment proof?

(l) Were the acts or omissions of the defendants, or any of them, oppressive or unfairly prejudicial or in disregard of the interests of the Class for the purposes of section 248 of the OBCA?

(m) Should punitive damages be awarded against the defendants or any of them?

[20] Subject to common issue (e), issues relating to whether Class members relied on the alleged misrepresentations, and, if so, were reasonable in doing this, whether damages flowed from such reliance and the computation of any such damages are, I believe, essentially issues that must be determined on an individual basis. Despite the existence of these issues I am satisfied that a determination of the common issues - one way or the other - should significantly advance the litigation.

Section 5 (1) (d) - the preferable procedure

[21] While, in my judgment, certification of this action may achieve the legislative objectives of judicial economy, access to justice and behavioural modification, I have some residual concerns that need to be addressed. If these can be dealt with satisfactorily, the first of the three objectives will be achieved as a trial of the common issues should dispose of most of the contentious issues between the parties.

[22] As far as access to justice is concerned, there is no evidence that the financial circumstances of Class members would deter them from proceeding individually but the nature of the claims, and of the issues, is such that the likely cost of individual litigation would obviously be a consideration that is likely to weigh heavily with some, or all, of them.

[23] Contrary to the submission of defendants' counsel, behavioural modification is, in my opinion, an important factor that bears on the issue of certification. I do not accept that, as defendants' counsel submitted, this objective cannot be advanced because Cantertrot is without assets. Independently of the plaintiffs' allegations that the depletion of its assets was deliberate, behavioural modification applies also to the other defendants who were associated with Cantertrot. It is, also, of course, an objective that can relate to the behaviour of others engaged in the same, or similar, enterprises. As plaintiffs' counsel submitted, it is in the interests of justice

that persons in the position of the defendants should be discouraged from making misrepresentations of the type alleged in the statement of claim.

[24] In the light of the above considerations, I believe that a class proceeding is likely to be the preferable method of resolving the claims of Class members. Even if, as defendant's counsel submitted, the losses suffered by such members might fall within the jurisdiction of the Small Claims Court, the advantages of resolving most of the contentious issues at one trial - and the objectives of the CPA - suggest to me that a class action would be the most appropriate procedure for dealing with the plaintiff's claims. However, before making a final disposition of this question, I wish to receive further submissions with respect to the plaintiffs' proposed procedure for resolving the individual issues - including the computation of damages. In this connection, I am in agreement with defendants' counsel that the proposed litigation plan, which consists merely of a number of headings, is unhelpful and quite inadequate. I wish also to have the plaintiffs' reasoned estimates of the quantum of damages that Class members are likely to receive if liability is established against one, or more, of the defendants. Certification will serve no purpose if the potential costs of resolving the individual issues will make it uneconomic for Class members to participate in resolving them.

[25] A date for the hearing of such submissions can be arranged at a case conference.

Section 5 (1) (e) - the proposed representative plaintiffs

[26] Mr Lewis was cross-examined on an affidavit he swore for the purposes of the motion and Mr Kalif was examined under rule 39.03 of the Rules of Civil Procedure. For the most part, these examinations appear to have been addressed far more at the merits of the action than to the issues on this motion. Very little information has been provided about the ability of Mr Lewis and Mr Kalif to act as representative plaintiffs other than that each is the owner of one of the units in the condominium and that each is retired. Mr Lewis is 77 years of age and Mr Taylor is aged 67 years. Mr Lewis had previously served for a period on the board of the condominium corporation and has recently been reappointed. There is nothing to suggest that either of them has any material conflict of interest with other putative Class members and I do not consider that the examinations that were conducted cast any significant doubt on their ability to act as representative plaintiffs. They have retained counsel with experience in class proceedings and have entered into a contingency fee agreement. Counsel are to be responsible for the payment of all disbursements subject to a right to be reimbursed out of amounts contributed by Class members and, in the event that the action is successful, out of any amount recovered from the defendants. In these circumstances**,** I see no reason why, with counsel's assistance, they would not fairly and reasonably represent the other members of the Class. In the absence of any other relevant evidence, I am prepared to make a finding that they would do so.

[27] I will defer a final decision on certification until I have counsels' further submissions on the preferable procedure. As I understand that plaintiffs' counsel may wish to make further amendments to the pleading to support a claim for breach of contract against Cantertrot, there will be no order granting leave at this stage.

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CULLITY J.

Released: August 24, 2005

COURT FILE NO.: 04-CV-277412 CP
DATE: 20050824

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

SOLLY LEWIS AND HERSL KALIF

Plaintiffs

- and -

CANTERTROT INVESTMENTS LIMITED, SANDOR HOFSTEDTER, MARK SAMUEL MANDELBAUM, GEORGE HOFSTEDTER, LARRY FROOM, ALEX LEWIN, HELEN GORENDER AND NORMAN HILL REALTY INC.

Defendants

REASONS FOR DECISION

CULLITY J.

Released: August 24, 2005