

Albrecht v. Sokol

Between
Hans Albrecht, and
Leslee Sokol

(2001), 42 R.P.R. (3d) 101 (Ont. Sup. Ct.)
Court File No. 01-CV-210943

Ontario Superior Court of Justice
Nordheimer J.

Heard: May 17, 2001.
Judgment: May 18, 2001.
(19 paras.)

Counsel:

J. Gardner Hodder, for the applicant.
William S.M. Cord, for the respondent.

¶ 1 **NORDHEIMER J.** (endorsement):— This is an application pursuant to section 3(1) of the Vendors and Purchasers Act, R.S.O. 1990, c. V.2 for the determination of whether a requisition made on behalf of the applicant/purchaser has been validly answered by the respondent/vendor.

¶ 2 The applicant entered into an Agreement of Purchase and Sale on February 28, 2001 for the purchase from the respondent of a residential property known municipally as 2635 Lakeshore Boulevard West in the City of Toronto. The sale is scheduled to close on May 24, 2001.

¶ 3 The southern perimeter of the property fronts onto Lake Ontario. The northern perimeter borders on Lakeshore Boulevard West. The property includes a water lot that extends from a portion of the shoreline some 300 feet into the lake.

¶ 4 Subsequent to entering into the Agreement of Purchase, and Sale, the applicant was advised by his conveyancing solicitor that the water lot commenced, not at the shoreline as it presently exists, but at the shoreline as it existed at the time that the property became part of the Land Titles system.

¶ 5 As a consequence of this advice, the applicant spoke to the respondent's husband who confirmed that he had been receiving correspondence from the Ministry of Natural Resources

relating to that part of the property not covered by the water lot which lies between the old shoreline and the existing shoreline (the "disputed area"). It is the position of the Ministry of Natural Resources that the disputed area belongs to the Crown and that the owner of 2635 Lakeshore Boulevard West must pay rent to the Crown for the use of the disputed area. It appears that the former owner of 2635 Lakeshore Boulevard West did pay such rent to the Ministry. However, it does not appear that the respondent has ever made any such payments.

¶ 6 The applicant then had discussions with someone from the Ministry of Natural Resources who explained that the disputed area belongs to the Crown because it is an unauthorized landfill beyond the original water's edge which is not part of the water lot. There is no issue that the disputed area does indeed belong to the Crown.

¶ 7 On May 8, 2001 the applicant's solicitor sent a letter of requisitions to the respondent's solicitor which included the following requisition:

"I AM ADVISED BY THE PURCHASER certain of the lands which were represented to him as included in the lands to be purchased herein, are claimed by the Ministry of Natural Resources. I am further advised that the Ministry of Natural Resources has offered to sell to your client such piece of land, not shown on the survey, and added later by landfill, or otherwise.

REQUIRED ON OR BEFORE CLOSING: Abatement of the purchase price by the amount required to purchase this land or inclusion in the Legal description of the lands now claimed by the Ministry of Natural Resources together with a [sic] evidence that your client has purchased such land from the Ministry of Natural Resources."

¶ 8 In response, the respondent's solicitor sent a letter dated May 15, 2001 which replied to this requisition as follows:

- "(a) The requisition as set out is vague and it is not clear what objection is being made to our client's title. To such end, we deny the validity of the said requisition.
- (b) Alternatively, it is the Vendor's position that the agreement of purchase and sale (the "Agreement") describes the lands being the subject matter of the Agreement. You will note that the dimensions of the property are described as having a frontage of 60 feet, more or less, and a depth of 200 feet, more or less. As appears from the description set out in the parcel abstract, as well as from the survey of Winters, Maugham, & Glenday which is in our possession, a copy of which is enclosed herewith, the actual dimensions of the property to be conveyed in fact exceed the lands described in the Agreement.
- (c) We are also advised that your client inspected the property prior to closing and viewed its dimensions and limits at that time. Your client is obtaining what he bargained for, and then some.

- (d) The conveyance which will be made by the Vendor on closing will be of those lands and premises described in the Agreement and the Vendor will retain no interest in any abutting lands. We are unaware of any claim contrary to or inconsistent with our client's to the lands being the subject matter of the Agreement and is not clear from your requisition as to which plans, if any, you claim are so affected.
- (e) In any event in the further alternative, paragraph 25 of the Agreement provides that it is the complete agreement between the parties and that there are no other agreements, representations or warranties save and except as are in writing and set out in the Agreement.
- (f) In any case and in the further alternative, the Vendor denies that it was at any time represented to your client by anyone prior to the execution of the Agreement that any lands which may belong to the Ministry of Natural Resources or any other party were part of the lands being the subject matter of the Agreement. I am advised by Mr. Sokol, who is not the Vendor under the Agreement, that he has spoken with your client since the Agreement was entered into respecting an interest he believes your client might be able to acquire in lands abutting owned by the Provincial Crown which he understands are now wholly submerged."

¶ 9 As a consequence of that response, the within application was launched.

¶ 10 The first objection which the respondent has to this application is that there are facts in dispute with the result that recourse to section 3(1) of the Vendors and Purchasers Act is not available. I do not agree that there are any material facts regarding the central issue that are in dispute. The central issue is clear. The applicant says that he agreed to purchase a waterfront property and he now finds out that the respondent cannot give title to the disputed area which means that he is not going to receive a waterfront property. As a consequence, the applicant says that he is not getting what he bargained for. The respondent, on the other hand, says that the applicant is getting what the Agreement of Purchase and Sale calls for him to receive. While I will resolve those competing positions later, I mention them now to show that there are no material facts in dispute which would, for example, require this matter to be resolved by a trial as opposed to the summary procedure provided for under the Act.

¶ 11 The respondent also asserts that the requisition is vague. I do not accept that assertion. While the requisition might have been more completely worded, it is clear what is being sought and there could be no confusion in the mind of the respondent or her solicitor as to the issue that was being addressed through the requisition.

¶ 12 Finally, the respondent relies on the entire agreement clause in the Agreement of Purchase and Sale. I do not see how that clause has any application to the issue before me. It is not a question that the applicant is relying on some representation outside the scope of the Agreement of Purchase and Sale. Rather it is a question as to what it is that the Agreement of Purchase and Sale calls on the respondent to convey.

¶ 13 The precise wording from the Agreement of Purchase and Sale is as follows:

"2635 Lakeshore Boulevard fronting on the south side of Lakeshore Boulevard in the City of Toronto and having a frontage of 60 feet, more or less, by a depth of 200 feet, more or less, and legally described as Plan M328, Part Lot A, Plan M161 Part Lots 195 and 206, water lot in front"

¶ 14 The respondent says that if one looks at the survey, for the property, and takes out the disputed area, the applicant is still getting a property which has a frontage of 60 feet and a depth of 200 feet (indeed in excess of 200 feet) and therefore the applicant is getting what he contracted to get. I do not accept that that assertion is correct nor do I accept that it is the proper way to approach the issue. The applicant agreed to purchase a waterfront property. If he does not obtain the disputed area, he will in fact acquire a property in which only half of the southern end of the property fronts on the lake. The other half will front on an area of rocky landfill which, it is clear, the applicant will either have to pay rent for or will have to purchase. That is plainly not what the applicant intended to when he signed the Agreement of Purchase and Sale nor do I find that it fairly lies in the mouth of the respondent to suggest otherwise, particularly when the respondent knew, but did not reveal to the applicant, that there was this issue with the Ministry of Natural Resources regarding the disputed area prior to the Agreement of Purchase and Sale being entered into.

¶ 15 I have found two cases which are helpful to the resolution of this matter. First, is *Martin v. Kellog*, [1932] O.R. 274 which involved an issue of an encroachment. In the course of his decision, Masten J.A. said, at p. 280:

"Counsel for the plaintiff raised the point that defendant was precluded by the terms of the agreement from raising the objection in question after the time stipulated for making objections had elapsed. The plaintiff agreed to give to defendant the whole building known as house No. 15. He is unable to do so. I think that the objection in so far as it relates to that portion of the premises which encroaches on the street goes to the 'root of title,' and can be raised notwithstanding defendant's delay. *Armstrong v. Nason* (1895), 25 S.C.R. 263."

¶ 16 The other case is *Re Mountjoy Limited and Christiansen et al.*, [1955] O.R. 352; aff'd., [1955] 3 D.L.R. 840 n, [1955] O.W.N. 540 (C.A.) where Schroeder J. also dealt with an issue of encroachment regarding a building which had a loading platform which was partly situated on lands owned by Canadian National Railways. In holding that the encroachment was a matter which permitted the purchasers to terminate the agreement, Schroeder J. made two observations which I consider have application to the case before me. At p. 356, Schroeder J. said:

"In *Yandle and Sons v. Sutton; Young v. Sutton*, [1922] 2 Ch. 199 at 210, Sargant J. gives a clear and comprehensive definition of a patent defect as follows: 'There is a general observation that I should like to make in conclusion.

In all these cases between vendor and purchaser, the vendor knows what the property is, and what the rights with regard to it are. The purchaser is generally in the dark. I think, therefore, that, in considering what is a latent defect and what is a patent defect, one ought to take the general view, that a patent defect, which can be thrust upon the purchaser, must be a defect which arises either to the eye, or by necessary implication from something which is visible to the eye. It would not be fair to hold that a purchaser is to be subjected to all the rights which he might have found out, if he had pursued an inquiry based upon that which was presented to his eye. I think he is only liable to take the property subject to those defects which are patent to the eye, including those defects which are a necessary consequence of something which is patent to the eye'."

and then at p. 358:

"In all the circumstances, the conclusion seems to me to be inescapable that the platform in question is an integral and important part of the building-property which the purchasers agreed to buy and inasmuch as the vendor can at most assign to them a lease which will expire in 1957 but which is cancellable by the railway company on 30 days' notice, there is a want of title which is substantial and which would result in the purchasers' getting something appreciably less than the subject-matter of their bargain." (emphasis added)

¶ 17 As Mr. Justice Schroeder observed, it is the respondent who knows what the property is, and what the rights with regard to it are. The issue with respect to the disputed area constitutes a latent defect. To require the applicant to complete this transaction without some mechanism to ensure that he also obtains title to the disputed area would result in the applicant getting something which is, without a doubt, less than he bargained for.

¶ 18 In conclusion, I find that the applicant's requisition is a valid one and that it has not been satisfactorily answered by the respondent. I note that the applicant agreed to take an abatement from the purchase price. One solution to this problem would therefore be for the parties to agree that the applicant may withhold the sum of \$20,000 (which is the estimated cost to acquire the disputed area), plus an amount to cover the applicant's costs of acquiring the disputed area from the Ministry of Natural Resources, with the corresponding obligation on the applicant to account for the ultimate purchase price paid and to remit to the respondent any amount remaining after the purchase is completed. However, I do not consider that it is necessary for me to rule on that matter as part of this application. It is up to the parties to come to their own decision as to how to proceed in light of my decision. Along the same lines, the respondent raised the issue as to whether she can rely on the annulment clause in the Agreement of Purchase and Sale. Similarly, that is a matter for the respondent to make her own decision on since it also does not properly fall within the scope of this application.

¶ 19 If the parties cannot resolve the issue of the costs of this application, they may make written submissions to me. The applicant's submissions are to be filed with 10 days of the release of these reasons and the respondent's response is to be delivered within 10 days

thereafter. No reply submissions are to be filed without leave. I would appreciate it if counsel could keep their submissions brief.

NORDHEIMER J.

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