

Horth v. Slokker Canada Corp.

Between

Slokker Canada Corp., (appellants), and
J'Neene Horth and Chris Hauck, (respondents)

[1998] O.J. No. 4151

DRS 99-02882

Docket No. C29151

Ontario Court of Appeal

Toronto, Ontario

McMurtry C.J.O., Laskin and Borins JJ.A.

Heard: October 13, 1998.

Judgment: October 16, 1998.

(2 pp.)

Practice — Judgments and orders — Summary judgments — Setting aside — Triable issue.

Appeal by the defendant from summary judgment. The plaintiffs sued the defendant for damages resulting from a breach of a building contract. The plaintiffs claimed that the defendant breached its duty to obtain a building permit. The defendant argued that the plaintiffs improperly refused to remove a Certificate of Pending Litigation.

HELD: Appeal allowed. The summary judgment was set aside, except for the provision that the deposit and the amount paid for upgrades were to be returned to the plaintiffs. The issue of whether the defendant had a duty to do more than to apply for a building permit, and the issues relating to the Certificate of Pending Litigation, should have been left to the trial judge. As the plaintiffs no longer sought specific performance, the Certificate of Pending Litigation was ordered to be removed from title.

Counsel:

J. Gardner Hodder, for the appellant.

Michael Woods, for the respondent.

The following judgment was delivered by

¶ 1 **THE COURT** (endorsement):— We think that the motion judge was wrong to make a finding of liability against the appellant on a motion for summary judgment. In our view whether the appellant had a duty to do more than apply for a building permit, the scope of any such duty, and any damages flowing if the duty is established are all issues more appropriately left to the trial judge.

¶ 2 The appellant concedes, however, that it is obligated to return to the respondents the deposit and the amount paid for upgrades. Whether the certificate of pending litigation should have been registered on title and any damages flowing from the respondents' unwillingness to remove it, depend on whether the appellant had a duty to try to rectify the driveway problem before terminating the agreement. Thus, issues relating to the certificate of pending litigation should also be left to the trial judge.

¶ 3 Finally, because the respondents are no longer seeking specific performance the certificate of pending litigation should now be removed from title.

¶ 4 Accordingly, the appeal is allowed. The judgment dated January 27, 1998 is varied by setting aside paragraph 2. The respondents' motion for summary judgment, other than as reflected in paragraph 1, is accordingly dismissed. The order dated January 27, 1998 shall be varied by providing for an order removing the certificate of pending litigation from title. There shall be no costs of the motions before the motion judge. The appellant is entitled to its costs of the appeal.

McMURTRY C.J.O.

LASKIN J.A.

BORINS J.A.