Citation: Spencer v Sutton-Harrison, 2024 MBCA 15
Date: 20240209
Docket: AI23-30-09930

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Diana M. Cameron
Madam Justice Lori T. Spivak
Madam Justice Anne M. E. Turner

B E T W E E N:

BRENDA ARLENE SPENCER	)	***S. M. Hamm*** *and*
	)	***M. M. LaBossiere***
(Plaintiff) Appellant	)	*for the Appellant*
	)	
- and -	)	***G. M. Harasymchuk*** *and*
	)	***J. Humphries***
SUTTON-HARRISON REALTY and BOB DAYMOND	)	*for the Respondents*
	)	
	)	*Appeal heard and*
(Defendants) Respondents	)	*Decision pronounced:*
	)	***February 9, 2024***

On appeal from *Spencer v Sutton-Harrison*, 2023 MBKB 16 [*Spencer*]

CAMERON JA (for the Court):

[1] The plaintiff appealed the decision of the trial judge, which dismissed her claim of negligence against the defendants. At the hearing of the appeal, we dismissed it with reasons to follow. These are those reasons.

[2] The plaintiff and her ex-husband owned six parcels of land in rural Manitoba (the land). During the process of their separation and divorce, the plaintiff engaged the defendant, Bob Daymond (Daymond), to provide an opinion of value regarding the land. In April 2018, he provided an opinion of value for the land totalling $1,400,000 (the April 2018 opinion).

[3] The plaintiff claimed to have relied on the April 2018 opinion when she entered a separation agreement with her ex-husband in September 2018. In November 2018, two parcels of the land were put up for sale (the half section). The plaintiff subsequently asked Daymond for a further opinion of value regarding the half section. Daymond's subsequent opinion of value assessed the half section within a range of $570,000 to $595,000. This amount was significantly higher than the April 2018 opinion, which valued the two individual parcels forming the half section at $160,000 and $200,000 respectively (totalling $360,000 for the half section). In response to an inquiry from the plaintiff's counsel (not the same as counsel on the appeal), Daymond explained that the difference in value resulted from his new consideration of a couple of private sales of the same type and class of land.

[4] In February 2019, the half section sold for $600,000.

[5] The plaintiff subsequently hired an accredited appraiser. In August 2022, the appraiser signed an affidavit attaching his report valuing the land at $1,884,630 as of April 2018.

[6] The plaintiff claims that Daymond breached the duty of care of a reasonable and prudent real estate agent presumed to be acting in the same circumstances when he prepared and provided the April 2018 opinion. The plaintiff asserts that she relied on that opinion when she entered her separation agreement and that this reliance resulted in damages.

[7] The trial judge found that, while Daymond owed a duty of care to the plaintiff, he did not breach the standard of care expected of a reasonable and prudent real estate agent acting in the same circumstances. He also found that the plaintiff had not proven damages. The plaintiff appeals both findings.

[8] Regarding standard of care, at the hearing of this appeal, the defendants conceded, and we agree, that the trial judge erred to the extent that he grounded his finding that Daymond had not breached the required standard of care on the basis that the plaintiff could be presumed to be "a reasonable consumer" who "got exactly what she paid for" (*Spencer* at para 6). In this regard, the trial judge appeared to be referring to the difference in quality that "a reasonable consumer" (*ibid* at para 70) would expect between an opinion of value from a real estate agent versus an assessment by an accredited appraiser, which is significantly more expensive. While we agree that there may be qualitative and quantitative differences between the two, the duty of care of a reasonable and prudent real estate agent acting in the same circumstances exists regardless of the price charged for the service.

[9] We also agree that the trial judge could have been clearer in his analysis of the reasonable standard of care in relation to the arguments made by the plaintiff that Daymond was not credible in his description of the steps that he took when preparing the April 2018 opinion and in identifying how Daymond had met the standard of care.

[10] Nevertheless, for the plaintiff to succeed she must prove all elements of the tort of negligence. That is, she must prove that there was a duty of care, that the duty was breached, that the plaintiff sustained damages and that the damages were caused in fact and law by the defendants' breach (see *Ruest v Manitoba (Water Stewardship Department)*, 2019 MBCA 1 at para 16).

[11] As indicated in *OZ Merchandising Inc v Canadian Professional Soccer League Inc*, 2021 ONCA 520 at para 18:

> . . . Without proof of damages, the negligence claims cannot succeed. Consequently, even if the appellant demonstrated the trial judge erred in holding the respondents did not owe a duty of care to the appellant, and further erred in holding there was no breach of that duty of care, the negligence claim would still fail.

[12] The parties agree, as do we, that the trial judge's finding that damages were not proven involves questions of fact or mixed fact and law and is therefore reviewable on the standard of palpable and overriding error (see *Housen v Nikolaisen*, 2002 SCC 33 at paras 10, 36).

[13] The trial judge based his finding that damages had not been proven on the following:

- there was no evidence about what role the opinion of value played in the separation agreement or what the separation agreement said about the value of the land;
- the portion of the separation agreement filed as evidence in the trial mentioned an equalization payment but not the amount of that payment; and
- the plaintiff was not sure if she and her ex-husband split the $600,000 equally.

[14] In addition, he found that the plaintiff failed to prove that the appraisal of $1,884,630 was correct and the April 2018 opinion of $1,400,000 was incorrect.

[15] Furthermore, we cannot accede to the plaintiff's argument that, assuming the standard of care was not met, it would have necessarily meant that the $1,400,000 value in the April 2018 opinion was incorrect. Variations between the opinions of appraisers are not uncommon—there can be very large differences of opinion between appraisals of real property (see *Royal Bank of Canada v Westech Appraisal Services Ltd*, 2018 BCSC 473 at para 163; *VSH Management v Neufeld*, 2002 BCSC 755 at para 80; *Haven Invt Ltd v Harper*, 1986 CanLII 728 at para 28 (BCCA); *Regency Mortgage Corp v Buchan*, 1984 CarswellBC 1143 at para 9, [1984] BCJ No 973 (BCSC)).

[16] Thus, we are unconvinced that the trial judge made any palpable and overriding error in his determination that damages were not proven.

[17] In the result, the appeal was dismissed with costs.

Cameron JA

Spivak JA

Turner JA