COURT FILE NO.: 07-CV-331036 PD2
DATE: 20070427

SUPERIOR COURT OF JUSTICE - ONTARIO

2007 CanLII 14624 (ON SC)

RE: **GORDON S. RIDGELY**, Applicant

- and -

LIEF NIELSON, Respondent

BEFORE: **Justice M. Forestell**

COUNSEL: **Adam Stephens**, for the Applicant

M. Scott Martin, for the Respondent

DATE HEARD: April 27, 2007

E N D O R S E M E N T

[1] This is an application by Mr. Ridgely, a purchaser, for a declaration that he is entitled to rescind an agreement of purchase and sale and for the return of his deposit of $60,000.00. The purchaser argues that the vendor, Mr. Nielson, has failed to show good title because, after the agreement was entered into, a title search revealed an easement for storm and sanitary sewers. A survey revealed that the easement is 20 feet wide, covers most of the rear garden and 26% of the property. In addition, a two-storey gazebo, which was a prominent advertised feature of the property, encroaches on the easement. The purchaser requisitioned a release of the easement. The vendor has responded that it was not a valid objection.

[2] Section 10(d) of the Agreement for Purchase and Sale reads as follows:

> TITLE: Provided that the title to the property is good and free from all registered restrictions, charges, liens, and encumbrances except as otherwise specifically provided in this Agreement and save and except for…(d) any easements for drainage, storm or sanitary sewers, public utility lines, telephone lines, cable television lines or other services which do not materially affect the present use of the property.

[3] Counsel for the vendor takes the position that this provision should be interpreted to mean that all easements for 'drainage, storm or sanitary sewers, public utility lines, telephone lines, cable television lines' are excepted from the requirement to provide good and free title

regardless of whether such easements 'materially affect the present use of the property.' The vendor argues that the words 'which do not materially affect the present use of the property' relate only to 'other services' and not to the enumerated list. As set out in Eli Lilly & Co. v. NovoPharm [1998] 2 S.C.R. 129 at 166-7: "A court should interpret a plainly worded document by presuming that the parties intended the legal consequences of their words..."

[4] In my view the plain meaning of the words used in provision 10(d) is that the words 'which do not materially affect the present use of the property' apply to each of the enumerated forms of easements as well as to 'other services. Any other interpretation would lead to an absurd result. If the interpretation urged by the vendor were correct, easements for 'other' unnamed services would affect title but easements for the enumerated services which affected the use of the property as much or more would not affect title.

[5] There does not appear to be any caselaw considering this provision of the standard TREB agreement of purchase and sale. In *Landucon-Yonge* v. *Safeguard Real Estate*, [1992] O.J. No. 2790, Farley J. observed that section 10(d) had recently been added to the standard agreement. He therefore did not interpret the section in that case. However, he observed as follows: "While conceivably it is not necessary to include (d) (or for that matter (c)) for the reasons hereafter set out, I think it helpful to have a standard form document that does recite the legal fences between the vendor and purchaser so that the parties may use it as a checklist in their negotiations as well as being alerted to their respective rights and obligations under the law." Farley J. went on to articulate the test for determining whether an easement in any significant way affects the use of enjoyment of property. He quotes from the decision of Moldaver J. in *Stefanovska* v. *Kok* (1990), 73 O.R. (2d) 368: "…the test to be applied is whether the vendor can convey substantially what the purchaser contracted to get. In this regard, all of the surrounding circumstances must be considered to determine if the alleged impediment to title would, in any significant way, affect the purchaser's use or enjoyment of the property."

[6] The proper interpretation of section 10(d) is therefore, as observed in obiter by Farley J., is that it is effectively a contractual statement of the common law test.

[7] Applying that test, the remaining issue in this case is whether the easement and encroachment in this case materially affect the present use of the property. The vendor argues that the easement and the encroachment do not materially affect the present use of the property. The property is a residential property with a rear garden or backyard and a deck and gazebo. The backyard, it is submitted may continue to be used and enjoyed with little or not impact from the easement. The municipal authorities could require alterations to the encroaching gazebo, but this fact does not mean that the use of the property is materially affected. The vendor concedes that future building in the backyard is affected by the easement but argues that the purchaser is entitled only to rely on present us and not 'reasonable intended use.'

[8] There are four considerations identified in the caselaw as relevant to determining materiality: (1) the location of the easement; (2) the size of the easement; (3) the point of access; and, (4) the owner's enjoyment of the property.

2007 CanLII 14624 (ON SC)

[9] I have considered these factors and determined that the easement in this case materially affects the present use of the property. The easement occupies most of the rear garden or backyard; it is 3400 square feet and represents 26% of the total area of the property; access to the existing pipes necessarily requires access to the rear garden or backyard; the property is residential and the yard is an integral part of the enjoyment of the property.

[10] While I have evidence before me of the particular interest of the purchaser in landscaping, installing a pool and building an extension to the house, I do not find it necessary to rely on these portions of the evidence. I find that, objectively, use of a yard or garden is part of the enjoyment of a residential property. Moreover, in this case, the garden and the gazebo and deck featured prominently in the promotional material in relation to the house. The specific plans of the purchaser to landscape, install a pool or build a modest addition are to be reasonably expected.

[11] In *Dennis* v. *Hockin*, [1993] O.J. No. 1701 Hoilett J. considered an easement that bisected a backyard and consumed 20% of the backyard and 10% of the total property. He observed: "All quibbling apart, no one reasonably suggested that a property-owner reasonably advised would erect any structure, including a swimming pool, in the backyard. It is beyond question that the use that the easement significantly compromises the use that the purchaser could make of the backyard." He concluded in that case, that the easement was 'major' and the purchaser was entitled to rescind.

[12] In this case, the easement similarly 'significantly compromises' the purchaser's use of the backyard. I find that the easement alone materially affects the present use of the property. It is therefore not necessary to consider the impact of the encroachment of the gazebo.

[13] For the reasons above, the application of the purchaser for a declaration that the requisitions are valid and that the purchaser is entitled to rescind the agreement is granted. I further order that the deposit paid by the applicant purchaser to the respondent vendor and held in trust by Chestnut Park Real Estate Limited be returned to the Applicant together with interest thereon.

[14] The Applicant also sought the costs of the survey and costs on this application. The parties may deliver written submissions to me on these issues.

_____

Forestell J.

DATE: April 27, 2007

2007 CanLII 14624 (ON SC)