CITATION: McLean v. Crotty, 2018 ONSC 6211
COURT FILE NO.: 8852/18
DATE: 2018-10-17

2018 ONSC 6211 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
SCOTT CAMERON MCLEAN Applicant	)	Ronald van der Steen, for the Applicant
– and –	)	
CAROLE ANNE CROTTY and BERNARD WILLIAM CROTTY Respondents	)	Francy Kussner, for the Respondents
	)	**HEARD:** October 17, 2018

REASONS FOR JUDGMENT

GRAY J.

[1] This case involves a real estate transaction that is scheduled to close on October 19, 2018. The applicant claims that an easement, that is registered on title, was not disclosed in the Agreement of Purchase and Sale, and thus he is entitled to rescind the agreement.

[2] Because of the urgency with which this application was brought and heard, my reasons will be considerably shorter than they otherwise would have been.

[3] For the reasons that follow, I hold that the applicant is entitled to rescind the agreement, and is entitled to a return of his deposit.

Background

[4] An Agreement of Purchase and Sale was executed on June 10, 2018, for a piece of vacant land at 135 Watson Avenue in Oakville. The purchase price is for $1,259,000, with a deposit of $75,000.

[5] Paragraphs 8 and 10 of the agreement of purchase and sale are particularly relevant. They provide:

> **8. TITLE SEARCH:** Buyer shall be allowed until 6:00 p.m. on the 5 day of October, 2018 (Requisition Date) to examine the title to the property at Buyer's own expense and until the earlier of : (i) thirty days from the later of the Requisition Date or the date on which the conditions in this Agreement are fulfilled or otherwise waived or; (ii) five days prior to completion, to satisfy Buyer that there are no outstanding work orders or deficiency notices affecting the property, and that its present use (Single family residential (building lot)) may be lawfully continued and that the principal building may be insured against risk of fire. Seller hereby consent to the municipality or other governmental agencies releasing to Buyer details of all outstanding work orders and deficiency notices affecting the property, and Seller agrees to execute and deliver such further authorizations in this regard as Buyer may reasonably require.
>
> **10. 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 (a) any registered restrictions or covenants that run with the land provided that such are complied with; (b) any registered municipal agreements and registered agreements with publicly regulated utilities providing such have been complied with, or security has been posted to ensure compliance and completion, as evidenced by a letter from the relevant municipality or regulated utility, (c) any minor easements for the supply of domestic utility or telephone services to the property or adjacent properties,; and (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 use of the property. If within the specified times referred to in paragraph 8 any valid objection to title or to any outstanding work order or deficiency notice, or to the fact the said present use may not lawfully be continued, or that the principal building may not be insured against risk of fire is made in writing to Seller and which Seller is unable or unwilling to remove, remedy or satisfy or obtain insurance save and except against risk of fire (Title Insurance) in favour of the Buyer and any mortgagee, (with all related costs at the expense of the Seller), and which Buyer will not waive, this Agreement notwithstanding any intermediate acts or negotiations in respect of such objections, shall be at an end and all monies paid shall be returned without interest or deduction and Seller, Listing Brokerage and Co-operating Brokerage

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> shall not be liable for any costs or damages. Save as to any valid objection so made by such day and except for any objection going to the root of the title, Buyer shall be conclusively deemed to have accepted Seller's title to property.

[6] As it happens, there is an easement registered on title to the property, in favour of the Town of Oakville. In substance, it provides for an easement granting the right to a complete and open view of the historic house on an adjoining property. Pursuant to the terms of the easement, the transferor is required to keep the land subject to the easement free from any obstruction that is higher than 1.5 metres. Apparently, the easement was granted to the Town as a condition of obtaining a severance of three lots that formerly made up a larger piece of land.

[7] There is a dispute as to whether there was any discussion about the easement before the Agreement of Purchase and Sale was executed. The applicant swears, in his affidavit, that he did not know about the easement. He identifies an MLS listing for the property that he says discloses nothing about the "View Corridor" easement. I note that in the listing agreement that he identifies, there is mention of a "View Easement", but there is no description as to where it is or what it means.

[8] In the respondents' material, it is suggested that the applicant's real estate agent had discussions with the respondents' real estate agent, in which the easement was disclosed, and what it involved. They have produced a slightly different MLS listing, in which there is mentioned a "View Easement (for the original heritage home)", but no further details are provided.

[9] Having the regard to the view I ultimately take of this mater, it is not necessary to resolve the conflicting affidavit evidence in this respect.

[10] As noted earlier, the requisition date specified in paragraph 8 of the Agreement of Purchase and Sale was October 5, 2018.

[11] On October 4, 2018, the solicitor for the applicant wrote to the solicitor for the respondents, in which he pointed out that the property is subject to an easement consisting of approximately 1,050 square feet or 15 per cent of the property. As a result of this easement, the

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applicant is "seeking to have the Agreement set aside and his deposit returned less any reasonable costs incurred by the sellers."

[12] By letter dated October 5, 2018, the applicant's solicitor submitted a letter raising 13 requisitions. The issue concerning the easement is not mentioned.

[13] On October 11, 2018, the applicant's solicitor sent a letter raising a specific requisition regarding the easement.

Submissions

[14] Counsel for the applicant submits that his client is entitled to rescind the Agreement of Purchase and Sale, and is entitled to a return of his deposit.

[15] Counsel submits that paragraph 10 of the Agreement of Purchase and Sale is clear. It provides that the title to the property must be free from all registered encumbrances except as specifically provided in the Agreement, save and except only for certain narrow exceptions that do not apply here. This easement, that is clearly an encumbrance, is not mentioned in the Agreement of Purchase and Sale. That being the case, the purchaser is entitled to rescind the Agreement.

[16] Counsel for the respondents submits that the applicant was aware of the easement before the Agreement of Purchase and Sale was executed, and it is not open to him to now claim that he can rescind the Agreement. Furthermore, there was sufficient disclosure of the easement in the MLS listing, such that the applicant should have been put upon his inquiry. If he failed to exercise due diligence, that is not the concern of the respondents.

[17] Counsel for the respondents submits that the applicant should be ordered to complete the Agreement of Purchase and Sale as scheduled.

[18] Authorities relied upon by the parties include *Marjan Enterprises Ltd. v. Meisner*, 2003 NSSC 85; *Royt v. Goldenberg* (2006), 50 R.P.R. (4th) 213 (Ont. S.C.J.); *Blinkhorn v. Ainsworth* (1986), 54 O.R. (2d) 82 (C.A.); *Bradbury v. Slon* (1989), 69 O.R. (2d) 326 (H.C.J.); *Jakmar Developments Ltd. v. Smith (*1973), 1 O.R. (2d) 87 (H.C.J.); *Sabem Developments Ltd. v.*

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Dutchmen Homes (1977), 19 O.R. (2d) 70 (H.C.J.); *1450723 Ontario Ltd. v. Keen Sales Inc.*, [2008] O.J. No. 1783 (S.C.J.); *Vandervliet v. 639708 Ontario Corp.* (1994), 40 R.P.R. (2d) 119 (Ont. Gen. Div.); *Brar v. Smith*, 2014 ONSC 5030; and *Haynes v. Hirst* (1927), 27 S.R. (N.S.W.) 480.

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Analysis

[19] In addition to the cases cited by counsel, I have also had regard to a decision of my own, *Hallinan v. Coughlin*, [2009] O.J. No. 1313 (S.C.J.), and a decision of Charney J. in *Savo v. Moursalien*, 2016 ONSC 3326, 73 R.P.R. (5th) 314. In both of those cases, it was held that an encumbrance on title must be disclosed in the Agreement of Purchase and Sale.

[20] I remain of that view. Any other approach would invite uncertainty. As in this case, there is likely to be a dispute as to what was or was not discussed or disclosed prior to the execution of an Agreement of Purchase and Sale. There is likely to be a dispute as to whether something in a real estate listing might or might not have put a prudent purchaser on notice that there might be an encumbrance that he or she should look into. It is only where disclosure of a registered encumbrance is in the Agreement of Purchase and Sale that there can be any certainty as to whether proper disclosure has been made, and that the purchaser must accept the property subject to the encumbrance.

[21] In my view, this consequence flows directly from the wording of the Agreement of Purchase and Sale itself. Paragraph 10 of the Agreement is clear. It requires that any registered restrictions, charges, liens, and encumbrances must be specifically provided in the Agreement. There are exceptions listed in Paragraph 10, but they do not apply here. As was held in both *Hallinan* and *Savo*, *supra*, an easement is clearly an encumbrance that, as required by Paragraph 10 of the Agreement, must be specifically disclosed in the Agreement.

[22] The only remaining issue is whether the encumbrance was sufficiently objected to by the applicant prior to the requisition date.

[23] Paragraph 8 of the Agreement allows the purchaser until 6:00 p.m. on October 5, 2018 to examine the title to the property at his own expense. Paragraph 10 then provides:

> If within the specified times referred to in paragraph 8 any valid objection to title or to any outstanding work order or deficiency notice, or to the fact the said present use may not lawfully be continued, or that the principal building may not be insured against risk of fire is made in writing to Seller and which Seller is unable or unwilling to remove, remedy or satisfy or obtain insurance save and except against risk of fire (Title Insurance) in favour of the Buyer and any mortgagee, (with all related costs at the expense of the Seller), and which Buyer will not waive, this Agreement notwithstanding any intermediate acts or negotiations in respect of such objections, shall be at an end and all monies paid shall be returned without interest or deduction and Seller, Listing Brokerage and Co-operating Brokerage shall not be liable for any costs or damages.

[24] It is to be noted that, except for the use of the term "requisition date" in paragraph 8, neither paragraph 8 nor paragraph 10 specifically require the purchaser to submit something called a "requisition". What paragraph 10 requires is that the purchaser furnish a "valid objection to title" within the times specified in paragraph 8. The Agreement does not require that an objection be in any particular form.

[25] In my view, the letter from the solicitor for the applicant dated October 4, 2018 is clearly an objection to title as contemplated in paragraph 10 of the Agreement. While it does not specifically demand that the respondents clear up the objection to title prior to the closing date, there can be little doubt that if they did so, the applicant would have been required to close the transaction. I do not read paragraph 10 of the Agreement as requiring a specific demand by the purchaser that the vendor satisfy the objection.

[26] In my view, the fact that other requisitions were made subsequently, including a specific requisition regarding the easement, does not alter the effect of the objection made on October 4, 2018. It was a valid objection to title, and if it is not satisfied prior to the closing date (which I can assume now is the case), the applicant is entitled to rescind the Agreement and secure the return of his deposit.

Disposition

[27] For the foregoing reasons, I declare that the Agreement of Purchase and Sale is at an end, and the applicant is entitled to the return of his deposit.

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[28] I will invite written submissions as to costs, not to exceed three pages together with a costs outline or bill of costs. Counsel for the applicant will have five days, and counsel for the respondents will have five days to respond. Counsel for the applicant will have three days to reply.

Gray J.

Released: October 17, 2018

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