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Real estate deals don't belong in court

Step encroachment doesn't constitute grounds to cancel this sale agreement

If the buyers of a house find out after signing the purchase agreement that the front steps encroach on the city road allowance, can they back out of the deal? That was the issue that had to be decided in a recent case before the Superior Court in Toronto.

In March of this year, Alexander and Tamar Royt made an offer to purchase a home on Vesta Dr., in what used to be Forest Hill.

The Royts made two deposits totalling $150,000 on account of the total purchase price of $1,470,000.

The seller was Hilary J. Goldenberg. Her listing with MLS included a Seller Property Information Statement (SPIS) saying that there were no encroachments.

On several occasions in this column, I have expressed the view that the SPIS results in more litigation than it seeks to avoid, but the real estate community is seriously divided on this issue.

In the case of the Vesta Dr. property, it did result in litigation.

Attached to the agreement of purchase and sale was a 1940 survey that did not show any encroachments on adjoining lands.

The buyer, Alexander Royt, is in the business of designing and building luxury houses. At the time the agreement was signed, he was not certain of his plans for the property but had mentioned to the seller that he hoped to demolish the house and rebuild.

In June of this year, several months prior to closing, Royt obtained a survey that showed concrete steps, a concrete landing and stone retaining walls that encroach on the municipal road allowance. (The house is perched on a rise significantly higher than street level.)

Royt continued to prepare site plans for construction on the property but became concerned about the encroachments onto that part of the front yard owned by the city, between the sidewalk and the front lot line.

Almost three months after the deadline for searching the title had passed, the buyers asked to cancel the contract and have their deposit money refunded.

The seller then suggested three options to encourage a smooth closing of the transaction.

She offered to obtain an encroachment agreement from the city to allow the improvements to remain in place.

She offered to buy title insurance and/or reduce the price by $14,000 to cover the cost of removing the steps, landing and retaining walls.

The buyers refused these options and brought an application before the Superior Court of Justice under the Vendors and Purchasers Act.

This legislation allows the parties to a purchase agreement to apply relatively quickly to a court in order to determine whether any particular issue is or is not a fatal title defect, and if appropriate, to bring the contract to an end.

The buyers told the judge they relied on the SPIS and if the encroachments had been disclosed, they would not have bought the house. The three options offered by the seller, they said, were inadequate.

The seller, on the other hand, argued that the improvements are not encroachments, and were built with city permission.

At the trial, expert real estate appraiser Barry Lebow testified that in his opinion the matters in dispute were "minor" and if disclosed to the buyers, "would not have any bearing on market value or marketability."

In her decision, released Sept. 1, 2006, Justice Susan Himel agreed with Lebow that the structures complained of were "so trivial and commonplace" that they would have little or no impact upon the use and enjoyment of the property by the purchasers.

She also agreed that the three options suggested by the seller, including title insurance, were satisfactory answers to the buyers' objections. They were reasonable and would allow the buyers to receive substantially what they contracted for under the agreement.

"In my view," she wrote, "the (buyers) took an unreasonable position by rejecting the proposals offered."

Justice Himel ruled that the improvements to the front yard do not affect the use or enjoyment of the property and any deficiency is not material nor would it affect marketability.

"If the structures are encroachments," she ruled, "they are a trivial risk and are commonplace."

She added that the statements about encroachments made on the SPIS were not misrepresentations, nor were they material inducements to entering the purchase agreement.

The buyers' application to terminate the agreement and get a refund of their deposit was dismissed and the seller was awarded a total of $50,708 in court costs, on top of the purchase price.

The transaction closed on the scheduled closing date without a price abatement and without the offered title insurance policy.

Today, the house is for rent.

There are several lessons to be learned from this case:

1. There is no substitute for an up-to-date land survey.

2. Signing or relying on a Seller's Property Information Statement may be risky to your bank account.

3. Real estate transactions belong in the land registry office, not in a courtroom.

4. If a real estate transaction starts to go sideways, it is imperative that all parties act in good faith with the mutual goal of getting the deal closed. Compromise is not a dirty word.

5. Relying on an alleged title defect to renegotiate or back out of a signed agreement is not a good idea. It doesn't usually work.

6. There are better ways for a buyer and seller to spend more than $50,000 each than in legal fees to resolve a perceived title defect.

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ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
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ALEXANDER ROYT AND TAMAR ROYT Applicants/Purchasers **- and -** HILARY J. GOLDENBERG Respondent/Vendor	))))))))))))))))	David N. Bleiwas, for the Applicants/Purchasers Barbara L. Grossman, for the Respondent/Vendor
	)	
	)	**HEARD:** August 14, 2006

REASONS FOR DECISION

[1] The purchasers applied for a declaration that their objection to title had not been satisfactorily met and that they were entitled to rescind the agreement of purchase and sale entered into on March 8, 2006 regarding 114 Vesta Drive in Toronto. As alternative relief, they sought a declaration rescinding the agreement based upon alleged misrepresentations by the vendors concerning the existence of encroachments onto a road allowance. The application was brought under section 3(1) of the *Vendors and Purchasers Act,* R.S.O. 1990, c.V.2 and Rule 14.05(2) and (3) of the *Rules of Civil Procedure*. The application was also for the return of the deposits and for costs of a survey and site plan. Given that the closing of the real estate transaction was scheduled for the day after the hearing of the application, I provided my decision at the conclusion of the argument and indicated that I would deliver written reasons at a later date. I concluded that neither the objection to title regarding encroachments nor representations made by the vendor entitled the purchaser to rescind the agreement.

FACTUAL BACKGROUND:

[2] On March 8, 2006, the applicants made an offer to purchase a property located at 114 Vesta Drive in Toronto, Ontario for the price of $1,470,000. They made two deposits totalling $150,000. The vendor s listing with MLS included a Seller Property Information Statement (SPIS) completed by the vendor which stated that there were no encroachments. Attached to the agreement of purchase and sale and referenced in the agreement entered into between the parties was a survey conducted in 1940 which did not show any encroachments on adjoining lands. At the time of signing the agreement, the purchasers were not certain of their plans for the property but had mentioned to the vendor that they hoped to demolish the house and rebuild. In fact, the purchaser Mrs. Royt did not see the interior of the property until early June and the purchasers offer did not contain a condition of a home inspection. While the agreement was not conditional on the sale of their own house, the applicants decision regarding the use of the Vesta property was dependant upon their ability to sell their own house and the price they received. The purchasers were given a tour of the house in June 2006 and there was no mention by the vendor s husband of any encroachments.

[3] The purchaser Alexander Royt is in the business of designing and building houses. In June 2006, he obtained a survey that noted concrete steps, a concrete landing and stone retaining walls which encroached on the municipal road allowance by up to almost eight feet. The applicants continued to prepare site plans for the property. They say that after discussing the matter with their solicitor, they became concerned about the impact of the encroachments. The deadline for requisitions (other than those going to the root of the title) was April 18, 2006. The applicants requisitioned rescission of the agreement and the return of the deposits on July 4, 2006. The parties became involved in a series of communications and embarked upon discussions to resolve the issue.

[4] The vendor offered to obtain an encroachment agreement from the City prior to closing but the purchaser refused. The vendor also offered to secure title insurance

and/or provide an abatement of $14,000 in the purchase price, representing the cost of removing and replacing the steps, landing and retaining walls. The applicants took the position that each of these proposals was unsatisfactory and demanded that the deal be rescinded and the deposits returned. When the respondent refused, the applicants brought this application and the respondent vendor brought a cross-application for relief in her favour. The vendor retained an expert who provided an opinion that the road allowance encroachments would have no impact on the value of marketability of the property. The purchasers point out that, other than his own experience, the vendor s expert opinion is not based on data to support his views.

POSITIONS OF THE PARTIES:

[5] The parties agree that this court has jurisdiction to hear the application and cross-application under the *Vendors and Purchasers Act* regarding any requisition or objection or any claim for compensation or any other question arising out of or connected with the contract for purchase and sale of a property. Section 3 provides a process that is expeditious and offers a summary determination of the issues prior to a scheduled closing date where there are no disputed facts. The legislation is broadly worded such that the court may make a declaration that the purchaser is entitled to the return of the deposit and bring the contract to an end: see *Lloyd v. Cutts* [1948] O.W.N. 410.

[6] The applicants take the position that they relied upon the accuracy of the SPIS when they entered the agreement of purchase and sale. The form completed by the vendor said that there were no encroachments. The applicants say that, had the encroachments been disclosed in the SPIS or on the old survey of 1940, they would not have entered into the agreement or incurred the costs for a new survey. They argue that various proposals by the vendor including an encroachment agreement from the City, title insurance and/or an abatement of $14,000 in the purchase price are inadequate responses to their objection. The existence of the encroachments would affect the marketability of the property. Title insurance provides no compensation for reduced marketability of the property. An abatement in price is also only a short-term solution. The applicants also argue that they are entitled to rescind the agreement because of the misrepresentations made by the vendor. The vendor knew about the encroachments at the time that the SPIS was completed as they had constructed the structures in question.

[7] The respondent takes the position that the requisition was invalid as the requisition date had passed; alternatively, they argue that if there is a deficiency, it is not an issue of title. The encroachments are not on the property. The vendor could still convey the entire property. The respondent also says that they had completed the SPIS noting no encroachments because they had permission from the City of Toronto given years earlier as a boulevard permit that allowed them to build. Technically, the structures are not encroachments. However, the vendor is not able to provide a copy of any documents showing that a permit was issued and the City does not have the records because of changes made to its computer system. The vendor also argues that the objection about encroachments is academic as the applicants had always had plans to demolish the dwelling and rebuild. Only recently, did they talk about maintaining the existing structure and renovating. The vendor argues that the applicants are not acting in good faith and that what is underlying the application is that they have not been able to sell their own house at the price they had hoped to obtain and simply want to find a way out of the agreement.

ANALYSIS:

[8] The agreement of purchase and sale provided that the applicants had until April 18, 2006 to make objections to title in the form of requisitions except for any objection going to the root of title. In paragraph 10 of the agreement, the vendor had held out that title to the property was good and free from all registered restrictions, charges, liens and encumbrances, except as otherwise specifically provided. Where valid objections to title are raised which the vendor is unable or unwilling to remove and which the purchaser will not waive, the agreement will be at an end and the purchaser is entitled to the return of any deposits.

[9] The applicants argue that an objection about an encroachment is one that goes to the root of title and is permitted after the deadline for requisitions has expired: see *Martin v. Kellogg* [1932] O.R. 274 (C.A.); *Brown v. Laffradi* [1961] O.W.N. 263 (Ont.H.C.); *Mountroy Ltd. v. Christiansen*, [1955] O.R. 352 (Ont.H.C.); appeal dismissed [1955] O.W.N. 540 (C.A.). The respondent relies upon a line of cases which held that, if an encroachment s effect on use and enjoyment is trivial, it should be overlooked and the requisition will be regarded as invalid even if timely: see *Martin v. Kellogg, supra*; *Re Marchment Co. Ltd. v. Midanik* [1947] O.W.N. 363 (H.C.J.); *Papsotiriou v. Picciolo* [1989] O.J. No. 1529 (Dist.Ct.); *Bowes & Cocks Ltd. v. Aspirant Investments Ltd.*, [1984] O.J. No. 228 (H.C.J.). Where the loss is not substantial, a requisition may be answered satisfactorily with a modest abatement. In that case, the vendor is able to deliver substantially what was contracted for and the transaction can proceed: see *LeMesurier v. Andrus,* reflex, (1986), 54 O.R. (2d) 1 (C.A.)*; Houston v. Royal Bank* [1991] O.J. No. 981 (Ont. Gen.Div.); *Patacairk v. Hathaway,* [1995] O.J. No. 2846 (Ont.Gen.Div.); *Mark and Mark v. Rosen* (1960) 23 D.L.R. (2d) 532 (Ont.C.A.).

[10] As for rescission based upon misrepresentations by the vendor, the test for whether the purchaser is entitled to rescission is discussed by McLachlin J.A. (as she then was) in *Kingu v. Walmar Ventures Ltd.* 1986 CanLII 142 (BC C.A.), (1986) 10 B.C.L.R. (2d) 15 (B.C.C.A.) at 20:

Rescission may always be obtained for fraudulent misrepresentation which induced the plaintiff to enter into the contract. But it may be obtained for innocent (non-fraudulent) misrepresentation only in cases where the plaintiff establishes the following requirements.

(a) A positive misrepresentation must have been made by the defendant .

(b) The representation must have been of an existing fact .

(c) The representation must have been made with the intention that the plaintiff should act on it

(d) The representation must have induced the plaintiff to enter into the contract .

(e) The plaintiff must have acted promptly after learning of the misrepresentation to disaffirm the contract

(f) No innocent third parties must have acquired rights for value with respect to the contract property

(g) It must be possible to restore the parties substantially to their pre-contract position

(h) An executed contract for the sale of an interest in land will not be rescinded unless fraud is shown .

DECISION:

[11] The objection made by the applicants relates to four stairs and a concrete landing and two parts of a retaining wall in the front yard of the property in question. These structures extend over the lot line onto a section of City of Toronto land between the sidewalk and the front lot line. On July 4, 2006, two months after the requisition deadline of April 18, 2006, the applicants delivered their objection letter. The purchasers had obtained a new survey report on June 27, 2006 in order to prepare a new site plan for submission to the Committee of Adjustments. The survey report made reference to the walls, landing and stairs but did not note them as encroachments or contentious concerns. The new survey (without the report) was attached to the objection letter. The respondent replied in a series of letters: first, stating that the objection was made out of time, second, that it involved a trivial issue and, finally, offering some alternative solutions.

[12] I agree that the nature of the objection made by the purchasers goes to the root of title or concerns a latent title defect and may be made after the deadline for requisitions and up until the closing date of the transaction. Having viewed photographs of the structures in question, it is apparent to me and it would have been apparent to any prospective purchaser that the property did not conform to the 1940 survey. That should have caused the applicants to ask questions immediately. Although the structures are obvious, I also agree with the respondents that the structures complained of are so trivial and commonplace that they would have little or no impact upon the use and enjoyment of the property by the purchasers. The vendors have attested to the fact that the stairs, landing and southern retaining wall were installed fifteen to twenty years ago after obtaining a boulevard permit from the City. Those improvements replaced old stairs that led from the sidewalk and the northern retaining wall has been in place since the vendor purchased the property twenty-seven years earlier. The City made improvements on the street within the last two years and no issue was made about the retaining walls and stairs. Other adjacent properties in the neighbourhood also have stairs or retaining walls which extend over the front lot line. I have considered the independent opinion provided by Barry A. Lebow who has extensive experience in the field. He is of the view that the matters complained of in the requisition concerning the stairs, landing and retaining walls being on City owned property are minor and if disclosed to buyers, would not have any bearing on market value or marketability. The purchaser s surveyor and mortgagee also did not express concerns regarding completion of the transaction with the stairs, landing and retaining wall extending over the front lot line onto the City owned area.

[13] Furthermore, I find that the respondents answered the requisition satisfactorily with three alternative solutions: obtaining an encroachment agreement from the City, purchasing title insurance in the purchasers names and at the vendor s cost and/or giving an abatement based upon the cost of removing the stairs, landing and retaining wall and rebuilding those areas. Title insurance was contemplated as a response to an objection under section 10 of the purchase agreement. That clause is now in the standard Ontario Real Estate Association form and, according to a number of authorities, the use of title insurance is a creative and acceptable answer to a

purchaser s title objection in appropriate circumstances: see Kathleen A. Waters, Saving the Deal with Title Insurance , *Law Society of Upper Canada Special Lectures* (2002) *Real Property Law*; Mark L. Karoly, Requisitions , *Solid Footings: The Commercial Real Estate Transaction*, Ontario Bar Association Conference, May 12, 2004 at 28; *The Law Society of Upper Canada, 48th Bar Admission Course*, Academic Phase 2005. Title insurance is a way of allowing a transaction to close while addressing a possible problem. Here, the respondent went so far as obtaining a commitment to insure. In my view, the applicants took an unreasonable position by rejecting the proposals offered. The applicants said they found the responses unacceptable but their reasons for doing so were without foundation. As a result, I find that the requisition made on July 4, 2006 was not a valid objection.

[14] In the decision of *Stefanovska v. Kok* reflex, (1990), 73 O.R. (2d) 368 (Ont.H.C.), Moldaver J. said at 378:

In my respectful opinion, the test to be applied in cases of this nature 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 purchasers use or enjoyment of the property.

[15] Applying this test to the case at bar, I find that the structures in question do not affect the use or enjoyment of the property and any deficiency is not material nor would it affect marketability. The plans expressed by the purchaser to tear down the house and structures and redevelop the property demonstrated their intention at the time of entering the agreement. Although the purchasers are at liberty to do what they wish with the property including retaining the house and structures, that does not alter the situation. The stairs and walls are easy to remove and rebuild can be done at a minor cost. If the structures are encroachments, they are a trivial risk and are commonplace. Since the vendor is able to convey all the land and buildings under the contract, rescission is not an available remedy for the purchasers. In the text, P. Perrell and B. Engell, *Remedies and the Sale of Land, Second Edition* (Butterworths: Toronto, 1998) at 50, the authors write, A good title is defined as a marketable title and one that can, at all times and under all circumstances, be forced upon an unwilling purchaser who is not compelled to take a title with defects, clouds or the reasonable threat of litigation to mar peaceful possession. In my view, the vendor was able to provide good title to the purchasers in this case. This is one of those cases where the purchasers objection is about a minor or trivial matter which does not justify termination of the agreement.

[16] I now turn to the issue of whether the purchasers were entitled to rescind the agreement on the basis that the vendor made misrepresentations by checking off no encroachments on the Seller Property Information Statement. In *Rampersad v. Rose*, [1997] O.J. No. 2012, Deputy Judge Searle of the Small Claims Court discussed the use of the SPIS in real estate transactions:

It is a form adopted by the local real estate board about 1993 and is a form of disclosure ostensibly used to provide potential purchasers with information about the property . The form contains a number of explanatory and qualifying statements.

[17] The term encroachment refers to an unauthorized or illegal or unlawful intrusion onto another s land: see *Black s Law Dictionary*, *Eighth Edition*, (West Publishing Co.: St. Paul, 2000); *Concise Oxford Dictionary, Eleventh Edition* (Oxford University Press: New York, 2004). In this case, the stairs, landing and retaining walls extend over the front lot line onto City owned property but were constructed with permission of the City and, certainly, without objection. The survey report obtained by the purchaser did not characterize the structures as encroachments. The Seller Property Information Statement (SPIS) had notations on it that the information is provided for information purposes only and is not a warranty even if attached to an agreement of purchase and sale. The form also stated Buyers must still make their own enquiries . While the vendor s husband agrees that if he was now asked about encroachments (after seeing the recent survey), he would answer the question differently, he has provided an explanation for completing the SPIS the way he did. I do not consider the statements made on the form to be misrepresentations.

[18] Furthermore, there is no evidence adduced by the purchasers that the statements regarding alleged encroachments were *material* to the making or were inducements to entering the purchase agreement. The applicants make an assertion that had they known of the encroachments, they would not have entered into the agreement; however, there is no other evidence supporting that contention and the evidence that is available suggests that the purchasers had plans to redevelop the property and remove the stairs and retaining walls.

[19] Misrepresentations involve a misstatement of a fact which is *material* to the making or inducement of a contract: see Fridman, G.H.L. *The Law of Contract, Third Edition* (Carswell:Toronto), 293. It cannot be said that the representation was of an existing fact and that it induced the purchaser to enter into the contract.

[20] I apply the policy approach outlined by Grange J.A. in *LeMesurier v. Andrus* reflex, (1986), 54 O.R. (2d) 1 at 7 where he said:

I think the purchaser s reliance upon this clause can be described as capricious or arbitrary where the vendors had removed the curb and replaced it within the lot line so that it did not encroach on the adjacent lot, and I cannot find her action to be reasonable and in good faith . If we were to give the clause the meaning and force ascribed to it by the trial judge, there would be very few contracts for the sale of urban land that could survive. It would be a rare case where a careful survey would not disclose some minor discrepancy. Vendors and purchasers owe a duty to each other honestly to perform a contract honestly made. As Middleton J. put it in *Hurley v. Roy* (1921), 50 O.L.R. 281 at p. 285, 64 D.L.R. 375 at p. 377: The policy of the Court ought to be in favour of the enforcement of honest bargains .

[21] In conclusion, I find that the purchasers objections to title were trivial. The three alternatives presented by the vendor in response were reasonable and would have allowed the transaction to close with the purchasers receiving substantially what they had contracted for under the agreement.

[22] Furthermore, rescission based upon alleged misrepresentations in the SPIS form was not available. Rescission is an appropriate remedy where the representation would result in receiving something substantially different from what was bargained for and what would be received: see Fridman, G.H.L., *The Law of Contract, Third Edition*, (Carswell: Toronto), at p. 305.

RESULT:

[23] For the reasons outlined above, the application by the purchasers for a declaration that their objection to title made on July 4, 2006 entitles them to rescind the agreement of purchase and sale is dismissed. The application for a declaration that the purchasers are entitled to rescind the agreement because of alleged misrepresentations by the vendor regarding the existence of encroachments is also dismissed. The cross-application for a declaration that the purchasers were required to accept as a full and satisfactory answer to the requisitions, title insurance obtained by the vendor and/or an abatement is granted. The other relief sought by the purchasers for return of the deposits and reimbursement of the costs of a survey and site plan is dismissed.

[24] A decision on costs will be delivered to the parties following receipt of written submissions which are to be filed according to a timetable already set by me.

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HIMEL, J.

DATE: September 1, 2006

COURT FILE NO.: 06-CV-316199PD1

DATE: 2006-09-01

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

Alexander Royt and Tamar Royt

- and

Hilary J. Goldenberg

REASONS FOR DECISION

HIMEL J

Released: September 1, 2006