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Lawyer not obligated to negotiate better purchase agreement

When a lawyer is presented with an unconditional but obviously defective agreement of purchase and sale by a client, does he or she have an obligation to try to negotiate an improvement to its terms?

That was the question for the court to decide in the case of Graham v. Diamond, released by the Ontario Superior Court of Justice in June.

In July, 2002, Patrick and Heather Graham entered into an agreement to purchase a house on Carrington Lane in Quinte West from George Diamond. The agreement was conditional until the end of the month on the Grahams arranging satisfactory financing, failing which the deal would die and the deposit money would be returned.

There was no condition for either an environmental assessment or a home inspection.

After the financing condition had been waived and the deal was firm, the Grahams retained Belleville lawyer Raymond Kaufman to represent them in the transaction.

Prior to closing, Kaufman confirmed with the city of Quinte West that there were no outstanding work orders on file against the property. The transaction closed August 16, 2002.

Three years later, the buyers sued the sellers, their real estate agents, their lawyer, and others claiming damages for serious and permanent injuries resulting from apparent contamination of either the land or the building itself.

Among other things they claimed that Kaufman failed, neglected or refused to ensure that a proper environmental site assessment was performed at the property, and that it was a customary practice to have a home inspection performed on the property before the closing of the purchase.

In response to the law suit, counsel for Kaufman brought an application in the Superior Court of Justice in Belleville in May asking the court to dismiss the action against him on the basis that there was no genuine issue for trial.

Kaufman s position in court was that he accepted the retainer from the Grahams after all the conditions in the agreement had been waived by them, that he completed all the standard title and other searches and had certified title in accordance with standard solicitor s practice.

On June 4, Justice Michael Quigley released his decision dismissing the claim against Kaufman without the need to have a trial.

There is no law, wrote the judge, to suggest that the Grahams were entitled to either a home inspection or environmental assessment unless there was a condition in the agreement to that effect.

Even if (Kaufman) had been alerted to such potential problems, I am not convinced that Kaufmann s retainer to close the transaction could be extended to include an obligation on his part to examine the possibility of the existence of such problems. Once Kaufmann had completed the title search and found the property free and clear of any encumbrances and/or title problems . . . the Grahams were then obligated to close.

In his decision, the judge asked, Did Kaufmann have any obligation to negotiate a better deal than the one negotiated by the Grahams themselves?

Answering his own question, the judge wrote, Firstly, he was never instructed to do so, and secondly, had he been so instructed, the Grahams were not entitled to a better deal by virtue of their signed agreement of purchase and sale. In effect, the Grahams are asking the court to find that Mr. Kaufmann should have closed the barn door some days after the horse had bolted the stable.

Several lessons emerge from the case of Graham v. Diamond:

Lawyers should be consulted before an offer is signed, or at the very least, during the conditional period. Getting legal advice after the conditions have been waived is very risky.

Buyers who sign agreements that are not conditional on home inspections are risking years of aggravation and huge expenses to remediate a defective house.

Trying to renegotiate any part of a firm transaction is frequently a waste of time and effort.

And finally, there is no such thing as a simple real estate deal which doesn t require legal advice in advance. Even the most straightforward transaction can blow up, resulting in years of expensive litigation.

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Graham v. Diamond

Between

Patrick Graham, Heather Graham, personally, Tiffany Tessier, Liam Graham by his Litigation Guardian Heather Graham, Rebecca Graham by her Litigation Guardian Heather Graham and Zachariah Graham by his Litigation Guardian Heather Graham, Vernon Kidd, Barbara Bourassa and Donald Bourassa, plaintiffs, and George Diamond, Royal LePage Pro Alliance Realty, Raymond Kaufmann, Mark Plumpton, Monica Plumpton, the Corporation of the City of Quinte West, Paul Azia, Cooney Transport Ltd., and Leon Collins Trucking Limited, defendants

[2010] O.J. No. 2435

2010 ONSC 3269

Belleville Court File No. CV-05-1411-00

Ontario Superior Court of Justice

M.J. Quigley J.

Heard: May 26, 2010.

Judgment: June 4, 2010.

Counsel:

The plaintiffs Patrick Graham and Heather Graham appearing in person.

M. Christine Fotopoulos, for the defendant, Raymond Kaufmann.

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1 **M.J. QUIGLEY J.**:-- This is a motion for summary judgment brought by the defendant, Raymond Kaufmann, (Kaufmann) to dismiss this action against him, on the basis that there is no genuine issue requiring a trial with respect to the plaintiffs' claims as against Kaufmann.

Background

2 On July 9, 2002, the plaintiffs Patrick and Heather Graham (the Grahams) entered into an agreement of purchase and sale (agreement) to purchase from George Diamond (vendor), a residential property known as 34 Carrington Lane, in the City of Quinte West, County of Hastings, Ontario (see Exhibit A to Tab 2 of the Motion Record filed on behalf of Kaufmann (the Record)).

3 This agreement was conditional upon the Grahams arranging satisfactory financing by the end of July, 2002, otherwise, the offer would become null and void and the deposit monies would be returned to the Grahams in full, without interest.

4 In the agreement the Grahams also acknowledged receipt of a Vendor Property Information Statement (vendor statement) which was completed and signed by the vendor. There was also a provision in the agreement that the vendor was to supply to the Grahams any survey in his possession, if one existed, on or before July 12, 2002. There was a further provision in the agreement that the vendor agreed to have the septic tank pumped on or before the date of closing, set for August 16, 2002.

5 On or about July 12, 2002, the Grahams waived all conditions by executing an OREA Waiver Form, attached as Exhibit B to Tab 2 of the Record, at which time the agreement became final and binding.

6 On July 23, 2002 Kaufmann, a practising solicitor, was contacted by a real estate agent named Kevin Kelso, who asked Kaufmann to act on behalf of the Grahams in connection with the closing of the sale. It is important to note that Kaufmann was only contacted by the Grahams to act on their behalf after all of the conditions had been waived by them. It is also noteworthy that there never was a condition in the original agreement either for an environmental assessment or for a home inspection.

7 Furthermore, the vendor statement at Exhibit D of Tab 2 to the Record confirmed that the vendor was unaware of any environmental assessment or soil contamination of the property or the immediate area, any work orders against the property, or any waste dumps, disposal sites or landfills in the immediate area. There were no problems noted with the septic system.

8 On August 16, 2002 Kaufmann wrote to the Corporation of the City of Quinte West (City) requesting, among other things, any outstanding work orders with respect to the property. Prior to closing of the transaction, Kaufmann stated that his office received a verbal confirmation from the City that there were no outstanding work orders respecting the property. On August 22, 2002 after the closing of the transaction, a written confirmation was received by Kaufmann from the City confirming that no outstanding work orders existed with respect to the property.

9 The Grahams commenced an action against Kaufmann and the other defendants by way of a Statement of Claim dated September 7, 2005, found at Tab 3 of the Record.

10 The Grahams claim that they have suffered physical and emotional illness, as set out in paragraphs 49, 50 and 52 of the Statement of Claim:

> 49. As a result of the negligence of the Defendants, the Plaintiffs have sustained serious and permanent injuries including but not limited to injuries to the respiratory system, ear, nose, and throat, coughing, itchy eyes, post-nasal drip, sore throats, fever and fatigue. They have suffered from asthma, nose bleeds, and ear infections. They have also each sustained traumatic neurosis and emotional shock.
>
> 50. The Defendants' negligence has caused the Plaintiffs severe pain and suffering including headaches, cognitive deficits, deficits with organizational skills, problem solving, nervousness, depression and insomnia. Their enjoyment of life has been permanently lessened and they have been forced to forego numerous activities in which they formerly participated.
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> 52. The negligence of the Defendants has also resulted in a drastic depreciation of the value of the Plaintiffs' property and there is little or no market for their property and they continue to suffer serious financial distress.

11 The Grahams' allegations of negligence against Kaufmann are contained in paragraphs 30 to 33 of the Statement of Claim, namely:

> 30. Kaufmann failed to advise the Grahams that the right of way to the property was privately owned, and that the Grahams and other residents with a right of way would be responsible for arranging and financing repairs on the right of way.
>
> 31. Kaufmann neglected to advise the Grahams of the effects that living on a private laneway would have upon them.
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> 32. Kaufmann also failed, neglected, and/or refused to ensure that a proper environmental site assessment was performed at 34 Carrington Lane.
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> 34. Kaufmann failed, neglected, and/or refused to advise the Grahams of the standard practice of having a home inspection performed on the property before the closing of the sale.

12 Kaufmann attests that prior to closing he advised the Grahams of the right of way and that the cost of maintenance would be shared on a pro rated basis with other landowners (see Exhibit M to Tab 2 of the Record).

13 The Grahams also, by a direction contained in Exhibit E to Tab 2 of the Record, acknowledged and accepted "share in cost of road maintenance".

14 In addition to the above-noted allegations contained in the Statement of Claim, H.M. Lewin, counsel at the time for the Grahams, in a letter dated July 27, 2007 (contained at Exhibit L to Tab 2 of the Record), alleged two other negligent actions of Kaufmann:

> 1. that Kaufmann had a conflict of interest in that he acted for the vendor, the Grahams and the mortgagee, and that Kaufmann had a business relationship with Royal LePage. In this regard, there is no evidence to suggest that Kaufmann ever acted for the vendor, in fact the vendor was represented by separate counsel throughout the transaction.
>
> 2. that Kaufmann closed the transaction without getting written confirmation from the City with respect to water, storm and sanitary sewers. I have previously noted the evidence of Kaufmann with respect to the verbal confirmation he had received from the City prior to closing.

Positions of the Parties

Plaintiffs, the Grahams

15 The plaintiffs' positions have already been enumerated in the Statement of Claim and the July 27, 2007 letter from their former counsel. There was no

additional evidence provided to the court in support of the Grahams' position.

Defendant, Mr. Kaufmann

16 Kaufmann's position can be summarized as follows:

1. that he accepted the retainer from the Grahams after all of the conditions in the agreement had been waived by them, and
2. that he had completed all of the searches with respect to title and had certified title to the vendor in accordance with standard solicitor's practice.

At no time have allegations been proven against Kaufmann that he had not carried out his role as the purchasers' solicitor in a competent manner.

The Law

17 Rule 20 of the *Rules of Practice*, provides in section 20.01 **(**3) as follows:

(3) A defendant may, after delivering a statement of defence, move with supporting affidavit material or other evidence for summary judgment dismissing all or part of the claim in the statement of claim. R.R.O. 1990, Reg. 194, r. 20.01(3).

and in section 20.02:

20.02(1) An affidavit for use on a motion for summary judgment may be made on information and belief as provided in subrule 39.01(4), but, on the hearing of the motion, the court may, if appropriate, draw an adverse inference from the failure of a party to provide the evidence of any person having personal knowledge of contested facts. O. Reg. 438/08, s. 12.

(2) In response to affidavit material or other evidence supporting a motion for summary judgment, a responding party may not rest solely on the allegations or denials in the party's pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue requiring a trial. O. Reg. 438/08, s. 12.

18 In *Canadian Imperial Bank of Commerce v. Ryan Ernest Mitchell* (2010), [2010] O.J. No. 1502, 2010 CarswellOnt 2137 (S.C.J.), at paragraphs 17 and 18, Mr. Justice M.G. Quigley J noted:

17. On a summary judgment motion, the plaintiff seeking judgment must show that there is no genuine issue requiring a trial with respect to a claim or defence. The new standard for summary judgment motions in Rule 20.04 also stipulates in subsection (2.1) that in determining whether there is a genuine issue requiring a trial, the court is required to consider and evaluate the evidence submitted by the parties. The summary judgment motions judge may weigh the evidence, evaluate the credibility of a deponent, or draw any reasonable inference from the evidence for the purpose of obtaining assistance to determine whether there is a genuine issue requiring a trial, unless the judge concludes that it is in the interests of justice for those powers to be exercised only at a trial itself.
18. Notwithstanding the existence of the new rule, the position of the responding party to a summary judgment motion remains as it was previously. The responding party may not simply restate mere allegations contained in its pleadings. He must instead set out in an affidavit material coherent evidence of specific facts showing that there is a genuine issue requiring a trial. It is not sufficient to say that more and better evidence will or might be available at trial. While there is an onus on the moving party to establish that there is no genuine issue requiring a trial, the case law also resolutely establishes that the respondent must "lead trump or risk losing": Rule 20.02(2); *Pizza Pizza Ltd. v. Gillespie et al* (1990), 75 O.R. (2d) 225 (Ont. Ct.); *Irving Ungerman Ltd. v. Galanis* (1994), 4 O.R. (3d) 545 at 552 (C.A.); *High-tech Group Inc. v. Sears Canada Inc.* (2001), 52 O.R. (3d) 97 (C.A.)

19 The 1999 Ontario Court of Appeal case of *Wong v. 407527 Ontario Limited* (1999), 179 D.L.R. (4th) 38, 125 O.A.C. 101 (Ont. C.A.), discusses the obligation of a solicitor when acting for a purchaser of real estate. In that case, Laskin JA. writing for the Court (Tab 10 of the Motion Record), stated at paragraphs 43-47:

43. A lawyer's duty to a client will vary depending on the client's instructions and the limits on the lawyer's retainer. Here, Hui was given an executed agreement of purchase and sale by his clients and instructed to close the transaction. The agreement warranted the rental income on the building for a year after closing. But the warranty was given only by the vendor, a numbered Ontario company, and thus if the rent was not as warranted the respondents could look only to the numbered company for relief. The giving of a warranty by a numbered company should raise a red flag for a reasonably prudent lawyer. Ordinarily a lawyer should discuss this warranty with the client and warn the client of the risk of non-recovery should the warranty be breached. Mr. Lamont said as much and Hui led no expert evidence to the contrary. Indeed, if the respondents had retained Hui before they signed the offer, I would have no hesitation in holding that Hui should have raised with his clients the possibility, even the desirability, of obtaining security for the warranty and sought their instructions on whether to try to negotiate some form of security, be it a holdback on the purchase price of a vendor take back mortgage.
44. But the respondents did not retain Hui until after they had signed the agreement of purchase. Having not sought his advice beforehand, they then sought to hold him liable for failing to improve on the deal they had negotiated without him. In Mr. Lamont's opinion, Hui still had a duty to try and obtain security for the warranty. The trial judge echoed that opinion when she said "[n]o lawyer should presume that no rights can be negotiated."
45. In my view, the trial judge was not sensitive enough to the limitation on Hui's retainer implicit in his being consulted after the agreement

had been signed. Mr. Lamont's opinion may represent a counsel of perfection, but I find it hard to admonish Hui, let alone make a finding of negligence against him, for failing to try to negotiation something to which is clients had no legal entitlement. Cases may arise where a duty of this kind should be imposed on a lawyer, but the court should at least take into account the timing of the lawyer's retainer.

46. I do not, however, rest my concern about Hui's duty to negotiate security on any distinction between business advice and legal advice. Hui submitted that he had no duty to negotiate security for the warranty because this was a business matter, not part of a lawyer's retainer. I do not accept this submission. Although ordinarily clients retain lawyers for legal advice not business advice, on some transactions the two are intermingled and no clear dividing line can be drawn. Thus, a lawyer may well h ave a duty to give advice on the financial or business aspects of a transaction, depending on the client's instructions and sophistication, and on whether the client is relying on the lawyer for that kind of advice.

47. As I have said, had the respondents consulted Hui before signing the agreement, they could reasonably have looked to him for advice on the risk of relying on an unsecured warranty by a numbered company, be it characterized as business advice or legal advice or a mixture of the two. But they consulted Hui only after they had assumed this risk by signing the agreement ... The respondents believed that they had made a good deal; they did not want to get out of the transaction; and at no time did they ask Hui to improve the terms of their agreement. Thus, I am doubtful whether Hui had the duty imposed on him by the trial judge.

Analysis

20 Mr. Kaufmann's obligations to the Grahams as solicitor for the purchasers, have to be looked at in the light of the fact that he received the agreement only after all of the conditions had been removed by the Grahams. Furthermore, there is no evidence to suggest that the Grahams ever alerted Kaufmann as to the potential existence of environmental problems, soil contamination, structural or any other problems related to the property.

21 Even if he had been alerted to such potential problems, I am not convinced that Kaufmann's retainer to close the transaction could be extended to include an obligation on his part to examine the possibility of the existence of such problems. Once Kaufmann had completed the title search and found the property free and clear of any encumbrances and/or title problems going to the root of the title, the Grahams were then obligated to close. Advising the Grahams not to close under those circumstances would most certainly be subjecting them to a lawsuit for specific performance and/or damages.

22 There is no law to suggest that the Grahams were entitled to either a home inspection or environmental assessment unless there was a condition in the agreement to that effect. The property in question had been vacant for two years prior to the agreement being entered into, and the Grahams were well aware of that fact. There is no evidence to suggest that they were not aware of the existence of a private right of way and of their obligation to share in road maintenance, in fact the direction given by them to their then solicitor is evidence to the contrary.

23 The further allegations that Kaufmann was in a conflict of interest by acting for the purchasers and the vendor is not supported by the evidence. The vendor was clearly represented by his own law firm throughout.

24 The fact that the City did not report in writing until five days after the closing of the transaction is moot, in that the City's written report confirmed the verbal report Kaufmann had received prior to closing.

25 Finally, did Kaufmann have any obligation to negotiate a "better" deal than the one negotiated by the Grahams themselves? Firstly, he was never instructed to do so, and secondly, had he been so instructed, the Grahams were not entitled to a "better" deal by virtue of their signed agreement of purchase and sale. In effect, the Grahams are asking the court to find that Mr. Kaufmann should have closed the barn door some days after the horse had bolted the stable.

26 I find that there is no genuine issue for trial with respect to any of the allegations made by the plaintiffs against the defendant Kaufmann. Therefore, the defendant Kauffmann's motion for summary judgment is granted.

Costs

27 If the parties cannot agree on costs, written submissions not to exceed two pages in length, may be made by July 15, 2010 to me at the Brockville Court House.

M.J. QUIGLEY J.
