Richards v. Gibeault, No. 93-2-08 Rdcv (Teachout, J., July 25, 2008)

STATE OF VERMONT
RUTLAND COUNTY

JO ANN RICHARDS and	)	
CHARLES JAMES RICHARDS,	)	
Appellants,	)	
	)	
v.	)	**RUTLAND SUPERIOR COURT**
	)	**DOCKET NO. 93-2-08 Rdcv**
	)	
MARK GIBEAULT,	)	**on appeal from**
Appellee.	)	**Docket No. 537-6-07 Rdsc**

SMALL CLAIMS APPEAL
Decision

Appellants were Plaintiffs in Small Claims Court and appeal a judgment for Appellee/Defendant issued on January 16, 2008. Plaintiffs were Sellers and Defendant was the Buyer under a contract for the sale of property. The Small Claims Judge concluded that the parties' contract was void because of Plaintiffs' misrepresentation due to failure to disclose a possible boundary dispute, and held that Defendant was entitled to the return of the $2,500 security deposit.

Oral argument was held on April 14, 2008, and Mr. Richards appeared with Attorney Joseph O'Rourke. Mr. Gibeault appeared and represented himself. The court has reviewed the record and memos filed by the parties, considered the arguments presented at oral argument, and listened to the tape of the hearing that took place on December 13, 2007.[1]

In appeals from the Small Claims Court, the Superior Court's review is based on the record below and limited to questions of law. See 12 V.S.A. § 5538; V.R.S.C.P. 10. For reasons set out more fully below the court reverses the Small Claims judgment, and remands the case for entry of judgment for Plaintiffs/Appellants.

Plaintiffs owned a half acre lot in a residential zone upon which they had

[1] The court had granted Plaintiffs a default judgment when Defendant did not appear for a previously scheduled trial on October 2, 2007. On October 10, 2007, it set aside the default and rescheduled the trial for December 13th.

constructed a small building which they had used to operate a snack bar as a legal non-conforming use. Defendant, an experienced commercial buyer, was interested in the property for investment but did not intend to open another snack bar. Mr. Pell, the realtor, showed Defendant the property on November 6, 2006, and gave him copies of the MLS listing sheet and other relevant documents including a disclosure of Mr. Pell's agency relationship with Plaintiffs, a zoning opinion noting the parcel's permitted and conditional uses, a Seller's Property Information Report (Seller's Report) signed by Mr. and Mrs. Richards, a survey map, tax bills, a certificate of occupancy, and the warranty deed conveying the property to the Richardses from its prior owner with specific non-competition covenants further limiting the use of the property.

Two days later on November 8, 2006, Defendant made a cash offer to purchase the property for $160,000.00 without any conditions other than a date for the removal of personal property belonging to Plaintiffs. The offer was accepted and a purchase and sale agreement executed the same day. According to the agreement, Defendant paid a $2,500 deposit and the parties agreed to close on December 1, 2006.

On November 27, 2006, Mr. Richards and Mr. Gibeault met at the property for a walk through. At that time, Mr. Richards pointed out the location of a buried propane tank to Mr. Gibeault, noting that they would need to prorate any remaining fuel at closing. Mr. Richards explained to Mr. Gibeault that he had been advised by Jeff Brown, an individual who mowed the grass for Plaintiffs as well as their rear neighbors, Mr. and Mrs. Coltey, that the Colteys had previously questioned whether the fence crossed their property line. Mr. Richards testified that he had written to the Colteys, whom he has known for a long time, after receiving Mr. Brown's second-hand comment but that the Colteys had declined to answer the letter or to raise any concerns when they saw each other in person. He also testified that he told Mr. Gibeault he was waiting for a surveyor to come and would be responsible for fixing any problem which might be identified concerning the placement of the fence.

On November 29, 2006, Defendant's attorney wrote Plaintiffs' attorney stating his concern that the property was not in a commercial zone (a fact which Defendant conceded at trial he was aware of from the beginning), that there was a boundary dispute with an adjoining neighbor and that State remediation requirements for previously removed gas tanks had not been met. Defendant's attorney sought assurances on all three issues and warned that the closing would not take place on December 1st and might not happen at all. Defendant's attorney wrote again on December 1st, restating his concern about the zoning and commenting that the "negative history with some neighbors," an apparent reference to the potential boundary dispute, might limit Defendant's ability to secure necessary permits for a nonconforming use and raising lingering concerns about additional remediation requirements. The letter advised that Defendant "is unwilling to purchase the property 'as-is' and we respectfully request that the deposit be returned."

The closing did not occur. The record suggests that the deposit has been held continuously by the realtor, Mr. Pell, and that the Plaintiffs' claim against Mr. Gibeault was for a ruling entitling the Richardses to the deposit because Mr. Gibeault refused to

agree to the release of the deposit to them. Defendant Gibeault did not file a counterclaim asserting his right to the return of the deposit on the basis of misrepresentation. The Small Claims Judge nonetheless permitted him to assert misrepresentation as a defense to the Plaintiffs' claim for the deposit under the contract, and the Richardses, who were represented, did not object. The parties and trial court addressed the merits of Mr. Gibeault's claim of misrepresentation, and this court will do so also on this appeal.

The law recognizes two types of misrepresentation: intentional representation, and negligent misrepresentation. It appears from the record that intentional misrepresentation was the basis of the decision.

The elements of fraud or intentional misrepresentation are as follows:

> An action for fraud and deceit will lie upon an intentional misrepresentation of existing fact, affecting the essence of the transaction, so long as the misrepresentation was false when made and known to be false by the maker, was not open to the defrauded party's knowledge, and was relied on by the defrauded party to his damage.

Silva v. Stevens, 156 Vt 94 at 102 (1991), citing *Union Bank v. Jones*, 138 Vt. 115, 121(1980).

Mr. Gibeault claimed that the Richardses made misrepresentations on the Seller's Report in three respects: boundary line dispute, underground tank, and presence of fill material, and he reaffirmed in his memorandum on appeal filed March 31, 2008 that these were the bases for his claim. The Small Claims Court decided that the Richardses made a misrepresentation by failing to inform Mr. Gibeault of a possible boundary dispute before he signed the contract, and the Court never reached the other two grounds.

The issue is whether the evidence in the record supports the trial judge's findings with respect to the boundary dispute, and whether the findings support the conclusion. The conclusion is stated as follows:

> The court concludes that the plaintiff had heard second hand, that there was an issue with the fence and the adjoining neighbor, TheColteys (sic). The plaintiff had heard that they thought the fence might be on their property. He did not talk to the adjoining neighbor to see if indeed there was an issue with the fence and should have informed the defendant of the possible boundary dispute prior to the buyer signing the Purchase and Sales agreement. . . . It was the responsibility of the seller to make sure that there was no boundry (sic) dispute with the adjoining neighbor and the court concludes that he failed to do so.

Order, pages (unnumbered) 4-5.

The findings of fact related to this conclusion are in Paragraphs 13 and 14:

> ¶ 13. The plaintiff stated that he had heard from Jeff Brown, who mowed the lawn of the property and also mowed the lawn of the adjoining neighbor that the boundary line where the fence was placed was six inches over on the adjoining neighbor's property.
>
> ¶ 14. When the plaintiff and the defendant met on the 28th[2] of November the plaintiff stated to the defendant that there had been a possible problem of the placement of the fence but a section had been removed and he hadn't heard from the adjoining neighbors, the Colteys, since 2003. The plaintiff did not talk directly with the Colteys but heard of a concern through Jeff Brown who mowed the two pieces of property.

The record evidence shows that contrary to the finding in ¶ 13, Mr. Richards did not testify that he had heard from Jeff Brown that the fence had been placed six inches over the Coltey's line. Rather he testified that he learned of the exact misplacement of the fence from a survey which was performed sometime after the closing with Defendant fell through. The record evidence also does not support a finding that a section of the fence had been removed prior to late November of 2006.

The statement at issue is the Plaintiffs' answer to question (n) on page 2 of the Seller's Report:

> (n) Are there any boundary line disputes, claims of adverse possession, encroachments, shared driveways, party walls or zoning set back violations? Answer: No.

The date this information was provided to Mr. Gibeault was November 6, 2006, and Mr. Gibeault's argument is that he relied on it when he signed the Purchase and Sales Agreement on November 8, 2006.

The record evidence is that as of November 6, 2006, when the statement was provided to Mr. Gibeault, the Richardses made the following additional statements concerning boundaries in the Seller's Report: that the property had been surveyed in the late 1980's by George Stannard, and that the boundary lines were marked by metal pins. (Answers to questions (i)-(k) on page 1 of the Seller's Report.)

In determining whether the Richardses made a misrepresentation to Mr. Gibeault as of November 6, 2006, it is important to review the status of the Richardses' knowledge on that date. They knew that the boundary of their property was established by a survey that had been done before their ownership. They knew that they had erected a fence during their ownership that was intended to be on the boundary line. They had been told a few years before by Jeff Brown, an individual who mowed the grass for both the

[2] It appears from the record that the actual date was the 27th of November, but the difference is immaterial.

Richardses and their rear neighbors, Mr. and Mrs. Coltey, that the Colteys had questioned whether the fence crossed their property line. Mr. Richards had written to the Colteys, whom he had known for a long time, after receiving Mr. Brown's comment second-hand, but the Colteys had not answered the letter or raised any concerns, including when they saw each other in person when Mrs. Coltey came to the snack bar.

The Small Claims Court finding that the Richardses heard from Jeff Brown that the Richardses' fence was six inches over on the Colteys' property is not consistent with record evidence. What Jeff Brown passed on to the Richardses from the Colteys was only a vague concern about the fence being on the Colteys' side of the boundary line, with no extent or location identified.

The question is whether the actual record evidence supports a finding that there was a boundary dispute on November 6, 2008. The evidence does not support such a finding. The fact that a person who mows lawns reports a concern about whether the fence is over the line is not sufficient to establish that an actual boundary dispute exists. The Colteys themselves never contacted the Richardses in any way, or made any claim that the Richardses were trespassing, despite an invitation to do so. They never did more than express a vague concern to a third party. Their actions did not amount to a claim to land that the Richardses purported to convey to Mr. Gibeault. The Richardses themselves relied on the survey as an identification of boundaries, and had taken reasonable steps to respond to a hearsay comment relayed to them about whether the placement of the fence corresponded to the surveyed boundary line. They received no response. The Richardses were making no claim that they owned property the Colteys claimed. The question was whether the fence was properly placed.

Under these circumstances, there were no assertions of claims to property that can be reasonably called an actual boundary dispute. There was no evidence presented by Mr. Gibeault at the trial that there was an actual boundary dispute on the date he received the Seller's Report from the Plaintiffs. Mr. Gibeault had the burden of proof on the issue of misrepresentation, but appears to have relied on the testimony of Mr. Richards.

The evidence of subsequent events are consistent with the fact that on November 6, 2006, the Richardses had no dispute with the Colteys. When Mr. Richards did the walk-through with Mr. Gibeault in late November, Mr. Richards told Mr. Gibeault he was waiting for the surveyor to come and would fix any misplacement of the fence which might be identified. In fact, the fence was later found to be six inches off the boundary line for a length of twelve feet, and Mr. Richards moved the fence to correspond with the surveyed boundary line. The Richardses laid no claim to the Colteys' land but relied on their survey, and there is no evidence that the Colteys relied on anything other than the same line that the Richardses did: the line that had been surveyed by Mr. Stannard.

Even if the facts are viewed as showing a "boundary dispute" at some level, Mr. Gibeault, in order to show misrepresentation, must have some evidence that the misrepresentation affects "the essence of the transaction." The evidence does not support such a showing. Mr. Gibeault did not claim that the actual size or location of the line of

the potentially disputed area was germane to his decision not to purchase the property. Instead, Mr. Gibeault testified that a possible boundary dispute would have been important because he did not want to buy a property that would bring difficulties with neighbors over a boundary, but he presented no evidence that such would have been the case if he had proceeded with the purchase under the contract. To the contrary, the Richardses told Mr. Gibeault prior to closing that they would take care of any misplacement of the fence so there would be no such problems, and they had taken steps to do so, and eventually did so. The evidence of Mr. Gibeault simply does not show that a boundary dispute was present, or that to the extent there was a discrepancy in the placement of the fence, it affected the essence of the transaction.

Since the record evidence does not support a finding or conclusion that the Richardses misrepresented the fact of a boundary dispute that affected the essence of the transaction, the next question is whether there is sufficient other record evidence to support the decision of the Small Claims Court, specifically on the bases of Mr. Gibeault's other two claims of misrepresentation in the Seller's Report: the underground storage tank and the existence of fill.

Mr. Gibeault claims that the Richardses misrepresented the property by denying in the Seller's Report that there were any underground storage tanks currently on the property. It is true that in the Seller's Report, the Richardses had expressly denied that there were currently any underground storage tanks on the property.[3] Nonetheless, the listing documents clearly indicate that the snack bar was heated by propane, and Mr. Gibeault had the listing documents when he inspected the property on November 6, 2006, before signing the contract. He had sufficient information to cause him to look to see where the propane tank was located, and to conclude that it was underground if it was not visible. He had clear information that the building on the property was heated by propane. In view of these facts, the "no" answer to the presence of underground tanks cannot be viewed as a misrepresentation "affecting the essence of the transaction."

Another necessary element of intentional misrepresentation is that a misrepresentation must be "relied on by the defrauded party to his damage." At the hearing, Mr. Gibeault offered no testimony that he might not have made an offer on the property or might have made a different one had he known that the propane tank was underground. He only claims there was a misrepresentation on this issue, but does not show that it satisfies the legal requirements necessary to prove a misrepresentation claim, entitling him to a remedy.

Mr. Gibeault claims that the Richardses misrepresented the property by denying in the Seller's Report that "any fill or off-site material had been placed on the property."

[3] The Seller's Report did disclose that in 1990 tanks from a former gas station located on the property had been removed and an addendum to the Richardses' purchase agreement describing State plans to monitor remediation of the site was attached. Although Mr. Gibeault's attorney advised Plaintiffs' attorney that concerns about the adequacy of these remediation plans influenced his client's decision to withdraw from the sale, Mr. Gibeault did not testify at trial that the remediation plans were not properly disclosed or that they influenced his actions.

(Question (a) on page 1.) Mr. Gibeault claims that Mr. Richards advised him on the late-November walk-through that fill had been brought in for the construction. Mr. Richards denied at trial that he made such a statement, stating that the only material that had been trucked in was perhaps a couple of landscaping boulders. Even if the trial court accepted Mr. Gibeault's testimony as a basis for a factual finding that fill had been placed on the property, Mr. Gibeault offered no other evidence that the existence of fill affected his offer.

In sum, with respect to any claim of intentional misrepresentation, the Small Claims Court did not have grounds based on the record evidence or the requisite elements of a misrepresentation claim to support its judgment for the Defendant on grounds of misrepresentation.

Neither the parties nor the Court were specific in distinguishing intentional misrepresentation from negligent misrepresentation. It is incumbent upon this court, therefore, to review whether the judgment could be affirmed on grounds of negligent misrepresentation. The requisite elements of negligent misrepresentation are:

> One who, [1] in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, [2] supplies false information [3] for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them [4] by their justifiable reliance upon the information, if he [5] fails to exercise reasonable care or competence in obtaining or communicating the information.

Restatement (Second) of Torts § 552(1) (1977), quoted in *Limoge v. People's Trust Co.*, 168 Vt. 265, 269 (1998). If any one of these elements is not shown, any claim of negligent misrepresentation fails.

Mr. Gibeault's evidence does not support judgment because with respect to the propane tank and fill-material claims of misrepresentation, his evidence does not show the fourth element: justifiable reliance upon the information. As noted above, he offered no evidence that he would not have made an offer on the property, or would have made a different offer, if he had known that the propane tank used for providing heat was located underground. Even if the judge believed his testimony that Mr. Richards told him fill had been brought to the property, he offered no evidence that he relied on any representation by Mr. Richards that there was no fill material on the property.

With respect to the boundary issue, Mr. Gibeault has not shown that the Richardses failed to exercise reasonable care in communicating the information (the fifth element). The issue is, when the correct evidence is reviewed, could the Small Claims Court find that it was negligent for the Richardses to answer "no" to the question about boundary disputes, in the light of what they knew on November 6, 2008? This court concludes, as a matter of law, that the record evidence, even when viewed in the light most favorable to the Defendant and discounting all modifying evidence, does not show

negligence.

The Richardses had become aware of a comment three years before from the Colteys relating to a concern about the placement of the fence. They had followed up with a letter to the Colteys inviting a response defining the issue, and they had never received a response indicating that the Colteys had a dispute with them, despite significant opportunity on the part of the Colteys to communicate with them. The Richardses' reliance was not on the fence as their claim of title but on the survey which was specifically described in the same section of the Seller's Report. The Richardses, having taken reasonable measures under the circumstances, had no reasonable grounds to think that there was a dispute with the Colteys about where the common boundary was, and indeed, there was none. On these facts, there is not a sufficient evidentiary basis to show negligence in communicating information.

Mr. Gibeault, despite not having filed a counterclaim for the return of the deposit, defended the Richardses' claim for return of the deposit by claiming misrepresentation. He was allowed to do so without payment of fee, but he nonetheless had the burden of proof to show misrepresentation. For the reasons set forth above, his evidence did not support the trial court's finding and conclusion of misrepresentation, and the court has found no alternative grounds on which the judgment may be affirmed. The contract was valid,[4] and Plaintiffs' evidence established their right to the deposit in the event of default by the Defendant in failing to close, which is what occurred.

Accordingly, the judgment must be reversed and the case remanded to the Small Claims Court to enter judgment for the Plaintiffs, the Richardses.

ORDER

For the foregoing reasons, the judgment of January 16, 2008 is reversed, and the case is remanded for entry of judgment for the Plaintiffs.

Dated at Rutland, Vermont, 24th day of July, 2008.

_____
Mary Miles Teachout
Presiding Judge

[4] The Small Claims Judge concluded that misrepresentation on the part of Plaintiffs voided the contract. Even if Defendant had shown misrepresentation, the result would not have been a voiding of the contract, but a remedy for the misrepresentation. The error has no effect because of the reversal of the judgment.