COURT FILE NO.: 02-CV-239636 SR
DATE: 20050609

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
DOUGLAS GORDON ATKINSON Plaintiff	*Ian M. Thompson*, for the Plaintiff
- and -	
TWS DEVELOPMENTS INC. Defendant	No one appearing for the Defendant
	HEARD: June 7, 2005

SWINTON J.:

[1] The Plaintiff, Douglas Atkinson, has brought an action to recover the deposit which he paid to the Defendant, TWS Developments Inc., in accordance with an agreement for the purchase and sale of a condominium unit, as well as damages. The Defendant did not appear for trial.

[2] On April 15, 2002, the Plaintiff entered into an agreement of purchase and sale for Suite 1108, 797 Don Mills Road, Toronto, a unit in Metropolitan Toronto Condominium Corporation No. 1368. Pursuant to the agreement, he made three deposits to the Defendant developer, totalling $30,000.00. Although there was a subsequent amendment to the agreement of purchase and sale requiring the deposits to be held by the Defendant's solicitors in trust, the monies were never paid to the solicitors.

[3] The Plaintiff was provided with a disclosure statement by the Defendant, which had registered a declaration under the *Condominium Act* on April 12, 2001. It showed the common expenses for Unit 1108 to be $182.26 per month. It also stated that the inflation rate to be applied was 3% per annum each year after December 1999. It also

stated that as of March, 1999 there were no judgments against the property, nor was the corporation a party to any lawsuit material to the property. The proposed first year budget indicated that the budget would be balanced, and it allocated $6,000.00 for repairs and maintenance.

[4] On August 7, 2002, the solicitor for the Plaintiff sent a letter of requisitions to the solicitors for the Defendant, which included a requisition for an up-to-date status certificate. The closing date was August 28, 2002. When the solicitor for the Defendant replied on August 26, 2002, the statement of adjustments revealed a common expense charge of $331.00 per month for the unit. The Plaintiff was told to obtain the status certificate from the condominium corporation.

[5] The solicitor for the Plaintiff was required to contact the condominium corporation for a status certificate, which the Plaintiff picked up on the day of closing. The status certificate revealed a number of things, including:

(a) the common expenses for the unit due for September were $328.20;
(b) the budget of the condominium corporation for the current fiscal year was accurate and might reflect a deficit of $50,000.00 to $70,000.00 plus a deficit from years prior to $209,159.05;
(c) there was a dispute between the condominium corporation and the developer with respect to the repair of deficiencies, which the engineering consultant of the corporation, Halsall Associates Limited, priced at between $1.367 million and $3.349 million;
(d) the Defendant had not provided the condominium corporation with all the documents and specifications with respect to the building which it was legally required to provide, which had caused the condominium corporation to launch an application against the Defendant on March 21, 2002, seeking the production of that material and damages for non-production.

[6] In the course of his inspection of the unit on the day of closing, the Plaintiff also found a notice in a cupboard, advising that there was mould in the building which constituted a health risk and which would require measures to remove it.

[7] Given what he had learned, the Plaintiff decided not to proceed with the closing, although he had provided the necessary funds to his solicitor. A demand was then made for the return of the deposit on the grounds that there had been a failure to disclose material amendments to the disclosure statement.

[8] The Plaintiff relies on the disclosure provisions in s. 52 of the *Condominium Act,* R.S.O. 1990, c. C.26. Pursuant to s. 180(1) of the *Condominium Act, 1998*, S.O. 1998, c. 19, the disclosure provisions in the 1998 Act do not apply if the declarant with respect to a corporation has entered into an agreement for purchase and sale of one or more units in the corporation before the day the new Act came into force – that is, before May 5, 2001. It has been admitted that the Defendant had sold one or more units in the building prior to

May 5, 2001. In that case, pursuant to s. 180(1)(b) of the 1998 Act, certain provisions in the earlier Act apply. Section 180(1)(b) reads,

> Subject to subsection (2), sections 51 to 54 of the *Condominium Act*, being chapter C.26 of the Revised Statutes of Ontario, 1990, except subsection 52(5) of that Act, as those sections existed immediately before the coming into force of section 184, continue to apply.

[9] Section 52 of the earlier Act sets out the pre-sale disclosure obligations. It reads in part as follows:

> 52. (1) An agreement of purchase and sale entered into after the 1st day of June, 1979 by a declarant or proposed declarant of a unit or proposed unit for residential purposes is not binding on the purchaser until the declarant or proposed declarant has delivered to the purchaser a copy of the current disclosure statement and all material amendments thereto.
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> (2) The purchaser, before receiving delivery of a deed to or transfer of the unit, may rescind the agreement of purchase and sale within ten days after receiving the disclosure statement or, where there has been a material amendment thereto, within ten days after receiving the material amendment.
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> (3) A person may rescind an agreement of purchase and sale under subsection (2) by giving written notice of the rescission to the declarant or proposed declarant or to the solicitor of the declarant or proposed declarant.
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> (4) Every declarant or proposed declarant who receives notice of rescission under subsection (3) from a person entitled to rescind the agreement of purchase and sale under subsection (2), shall forthwith refund, without penalty or charge, to the person giving notice, all money that the declarant or proposed declarant received from that person under the agreement that was credited as payment against purchase price.
>
> (5) Where any statement or material required under this Act to be provided by a declarant or proposed declarant to a purchaser of a unit or proposed unit for residential purposes contains any material statement or information that is false, deceptive or misleading or fails to contain any material statement or information, the corporation or any unit owner who relied on such statement or material is entitled, as against the declarant or the proposed declarant to damages for any loss sustained as a result of such reliance.
>
> (6) The disclosure statement referred to in subsection (1) shall contain and fully and accurately disclose,
>
> (a) the name and municipal address of the declarant or proposed declarant and of the property or proposed property;
>
> (b) a general description of the property or proposed property including the types and number of buildings, units and recreational and other amenities together with any conditions that apply to the provision of amenities;

(c) the portion of units or proposed units which the declarant or proposed declarant intends to market in blocks of units to investors;

(d) a brief narrative description of the significant features of the existing or proposed declaration, by-laws and rules governing the use of common elements and units, and of any contracts or leases that may be subject to termination or expiration under section 39;

(e) a budget statement for the one year period immediately following the registration of the declaration and the description;

(f) where construction of amenities is not completed, a schedule of the proposed commencement and completion dates; and

(g) any other matters required by the regulations to be disclosed.

(7) The budget statement mentioned in clause (6) (e) shall set out,

(a) the common expenses;

(b) the proposed amount of each expense;

(c) particulars of the type, frequency and level of the services to be provided;

(d) the projected monthly common expense contribution for each type of unit;

(e) a statement of the portion of the common expense to be paid into a reserve fund;

(f) a statement of the assumed inflation factor;

(g) a statement of any judgments against the corporation, the status of any pending lawsuits to which the corporation is a party and the status of any pending lawsuits material to the property of which the declarant or proposed declarant has actual knowledge;

(h) any current or expected fees or charges to be paid by unit owners or any of them for the use of the common elements or part thereof and other facilities related to the property;

(i) any services not included in the budget that the declarant or proposed declarant provides, or expenses that the declarant or proposed declarant pays and that might reasonably be expected to become, at any subsequent time, a common expense and the projected common expense contribution attributable to each of those services or expenses for each type of unit;

(j) the amounts in all reserve funds; and

(k) any other matters required by the regulations to be disclosed.

[10] The Defendant has admitted, through a Request to Admit to which it did not respond, that in the period from March, 2002 to August 28, 2002 it was aware of allegations by the condominium corporation that there were substantial deficiencies in the contruction or modification of the common elements in the building, which would require

a substantial increase in the common expenses for each unit if TWS did not honour its warranty or complete the repairs. The Defendant was also aware of the application commenced by the condominium corporation in March, 2002.

[11] The issue in this case is whether the Plaintiff was entitled to rescind the agreement of purchase and sale and demand the return of his deposit because the Defendant failed to disclose material amendments to the disclosure statement provided to him.

[12] According to *Abdool v. Somerset Place Developments of Georgetown Ltd.* (1992), 10 O.R. (3d) 120 (C.A.), s. 52(1) of the Act creates an ongoing disclosure obligation. The Court of Appeal set out the declarant's obligation at p. 149:

> ... the declarant must deliver an amended disclosure statement if the change would provide a purchaser reasonable cause to reconsider whether to confirm the agreement of purchase and sale or to rescind or, to the same effect, if the change is likely to influence the decision of a purchaser to purchase the condominium unit.
>
> ....
>
> Amendments that substantially change a purchaser's anticipated use and enjoyment of the unit or the amenities associated therewith or that adversely affect the value of the unit, are, I would think, clearly material amendments that revive the recission period.

In that case, the Court held that the registration of construction liens on the property was not a material change of circumstances, since the vendor was required to provide clear title on final closing.

[13] Section 57(6)(e) of the Act requires disclosure of a budget statement for the one year period immediately following the registration of the declaration and the description. Section 57(7)(g) requires that the budget statement disclose pending lawsuits to which the corporation is a party and any pending lawsuits material to the property of which the declarant is aware. In this case, the condominium corporation had initiated legal proceedings against the Defendant in March, 2002 because of concerns about extensive deficiencies in the construction of the building and the Defendant's failure to provide the necessary documentation and plans for the technical audit by the condominium corporation's engineers. Moreover, the common expenses for the unit were $331.00 per month, not the $182.26 set out in the disclosure materials.

[14] In my view, this was information which a reasonable purchaser would want to know, as it is the type of information which could influence his or her decision to purchase. Here, there was a real risk that the value of the unit would be adversely affected because of the costs of litigation against the Defendant and the potential liability for significantly increased common expenses if the Defendant refused to do the extensive repairs needed. Therefore, the Defendant had an obligation to disclose this material amendment to the disclosure statement. Once the Plaintiff became aware of this information, he had the right pursuant to s. 52(2) of the Act to rescind the agreement of purchase and sale, and therefore he is entitled to the return of the $30,000.00 paid as a deposit pursuant to s. 52(4).

[15] The Plaintiff also seeks damages pursuant to s. 52(5) of the Act to cover his moving expenses, the expenses incurred for the storage of his furniture while he found another place to live, and his legal fees for the real estate transaction. In my view, that subsection is inapplicable for two reasons. First, s.180(1)(b) of the 1998 Act provides that s. 52(5) of the old Act does not apply. Second, that subsection gives a right to claim damages to unit owners, and the Plaintiff never became an owner (see *Abdool, supra*, pp. 132, 135).

[16] For these reasons, I order that the Plaintiff will have judgment for $30,000.00 plus pre-judgment interest at 2.5%, which counsel calculated to be $1,833.55 for 161 days.

[17] The Plaintiff also sought costs on a substantial indemnity scale, given that he made an offer dated March 17, 2003 to settle for $29,900.00. As he has done better than the offer, he is entitled to costs on a substantial indemnity scale pursuant to Rule 49.10(1). However, he is only entitled to substantial indemnity costs from the date of the offer, and the Bill of Costs has been calculated on the basis of substantial indemnity costs throughout.

[18] I have reduced the fees for the period up to the offer to a partial indemnity scale. I fix the costs at $8,500.00 for fees plus GST of $595.00 plus disbursements of $2,697.39 for a total of $11,792.39.

[19] In conclusion, I order that the Plaintiff will have judgment for $30,000.00 plus pre-judgment interest of $1,833.55 and costs of $11,792.39.

Swinton J.

Released: June , 2005

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B E T W E E N:

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- AND –

TWS DEVELOPMENTS INC.

REASONS FOR JUDGMENT

Swinton J.

Released: June 9, 2005

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