

Ontario Court of Appeal Doubles Down on Entire Agreement Clauses Not Precluding Misrepresentation Allegations

November 22, 2022

In *10443204 Canada Inc v 2701835 Ontario Inc*, [2022 ONCA 745](#), the Ontario Court of Appeal (the “**Court**”) overturned a summary judgment decision where the motions judge elected to enforce an entire agreement clause in the face of a claim of fraudulent misrepresentation. .

This decision is in line with another recent decision of the Court holding that entire agreement clauses do not, on their own, preclude a party from relying on allegations of fraudulent misrepresentation.

The Motion

2701835 Ontario Inc. (“**270**”), the defendant, entered into a purchase agreement (the “**Agreement**”) of the plaintiff, 10443204 Canada Inc.’s (“**104**”) coin laundry business. The Agreement gave 270 the right to terminate the agreement if it was not satisfied that certain conditions with respect to the business were met. The Agreement also contained an entire agreement clause, part of which noted in part: “There is no representation, warranty, collateral agreement or condition, affecting this Agreement other than as expressed herein.”

In November 2019, 104 commenced an action against the 270 alleging that there was default in payment of an instalment under the vendor take-back mortgage such that the entire balance of the purchase price for the coin laundry business was due.

270 defended and counterclaimed, alleging that it had only entered into the Agreement because of fraudulent or negligent misrepresentations made by 104 concerning the gross revenues of the coin laundry business. The motion judge granted the 104’s summary judgment motion, finding there was no genuine issue for trial in respect of 270’s misrepresentation claim.

The motion judge cited the decision in *Royal Bank of Canada v. 1643937 Ontario Inc.*, [2021 ONCA 98](#) (“**Royal Bank**”), where the Court held that a defence of misrepresentation is not precluded by reason only of the existence of an entire agreement clause.

However, the motion judge went on to distinguish *Royal Bank* on the basis that there was unequal bargaining power in that case, which was not the case as between 270 and 104.

The motion judge further held that it was not only the entire agreement clause but several other factors that combined with it that meant that 270 could not rely on the defence of misrepresentation. The other factors cited by the motion judge were:

- 270 could have demanded other contractual protections such as a guaranteed minimum income for the business;
- 270 had the right to walk away from the transaction based on the lawyer review or financing condition;

- 270 could have sought the assistance of an accountant or included an audit of the business' income as a condition of the Agreement, but did not; and
- 270 had an opportunity to attend at the business and verify income.

The Appeal

270 appealed the summary judgment decision, which made it liable for the balance of price in the Agreement. The Court allowed the appeal, set aside the summary judgment, and directed the matter to return to the Superior Court for trial.

270 appealed the motion judge's decision on two grounds: (1) the motion judge erred in law by treating the entire agreement clause as prohibiting a defence of fraudulent misrepresentation, and (2) the motion judge erred in finding that the clause had a prohibitive effect because 270 had opportunities to perform due diligence on the status of the business.

The Court noted that the motion judge found that 270 did not learn the true facts of the representations about the business at any time before closing the transaction.

The Court relied on *Free Ukrainian Society (Toronto) Credit Union Ltd v Hnatkiw et al.*, [1964 CanLII 180 \(ONCA\)](#) ("**Free Ukrainian**"), which held that the onus is on the plaintiff to prove the defendants had unequivocal notice of the truth. An opportunity to investigate a false representation does not deprive a party of their right to avoid a contract.

As such, the Court held that the motion judge erred in giving the entire agreement clause a preclusive effect because of 270's lack of due diligence.

Key Takeaways

In *10443204 Canada Inc v 2701835 Ontario Inc*, [2022 ONCA 745](#), the Court reinforced the authority of *Free Ukrainian* and *Royal Bank* concluding that an entire agreement clause, even combined with the opportunity to conduct due diligence regarding representations, will not preclude a party from relying on the defence of misrepresentation to avoid a contract.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

WeirFoulds^{LLP}

www.weirfoulds.com

Toronto Office

4100 - 66 Wellington Street West
PO Box 35, TD Bank Tower
Toronto, ON M5K 1B7

Tel: 416.365.1110
Fax: 416.365.1876

Oakville Office

1320 Cornwall Rd., Suite 201
Oakville, ON L6J 7W5

Tel: 416.365.1110
Fax: 905.829.2035