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Can a Director Be Held Personally Liable for Misrepresentations Made During a Real Estate “Flip”?

Canadian Courts impose a duty on parties to a real estate transaction not to lie or mislead one another about the true nature of the transaction taking place. The Ontario Court of Appeal has recently affirmed that the director of a corporation will be held personally liable for fraudulent misrepresentations made during the course of a real estate purchase.

The Facts

In *Meridian Credit Union Limited v. Baig*, 2016 ONCA 150, per LaForme J.A. (“*Baig*”), the individual appellant purchased a building in Toronto (the “Property”) from a court-appointed receiver (the “Receiver”) for \$6.2 million (the “Original Sale”). The appellant agreed to re-sell the property to another company, Yellowstone Property Consultants Corp. (“Yellowstone”) for \$9 million. However, the appellant did not disclose the re-sale agreement to the Receiver. Had the Receiver known about the re-sale to Yellowstone, it would not have sought Court approval of the Original Sale.

The appellant’s lawyers advised him that in order to avoid land transfer tax on the “flip”, the

appellant should transfer title to the Property to Yellowstone directly. Accordingly, both the appellant and his lawyers made a deliberate effort to conceal the sale of the Property to Yellowstone, for fear that the Receiver would not receive Court approval if the \$2.8 million price differential was disclosed.

The Receiver was notified that title was to be directed to Yellowstone on closing. The Receiver assumed that Yellowstone was the appellant’s company; this misunderstanding was never corrected by the appellant, nor by his lawyers. The appellant’s lawyers delivered documents to the Receiver in which Yellowstone was listed as the purchaser. The Receiver obtained Court approval for the transaction.



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Title was transferred to Yellowstone.

Ultimately, one of the creditor banks discovered the secret re-sale (the “Bank”). The Receiver assigned its cause of action against the appellant to the Bank. The Bank then started an action against the appellant. The Bank sought an accounting of the profit made on the re-sale to Yellowstone or damages for breach of contract, fraudulent misrepresentation, and conspiracy.

On a motion for summary judgment, the motions judge found the appellant liable for the misrepresentations made by his lawyers. The motions judge further found the defendant personally liable. Although the appellant did not have a duty to disclose the re-sale to Yellowstone, the motions judge held that the failure by the appellant to correct the Receiver’s impression that Yellowstone was the appellant’s company was a fraudulent misrepresentation.

On appeal, the Court of Appeal upheld the ruling that the appellant was personally liable for fraudulent misrepresentation.

1. The Director Was Liable for Fraudulent Misrepresentation

The Court of Appeal held that the appellant was liable for civil fraud. In particular, all the elements of a fraudulent misrepresentation were made out in this case:

a. ***There was a false representation by the appellant.*** The Court held that the appellant’s conduct amounted to a

misrepresentation. The appellant and his lawyers actively concealed the re-sale agreement to Yellowstone. Moreover, they fraudulently misrepresented that Yellowstone was the appellant’s corporation incorporated to close the sale with the Receiver. The appellant personally signed a title direction that falsely identified Yellowstone as the purchaser. While the appellant had no duty to disclose the “flip” transaction, the failure to correct the Receiver’s misunderstanding that Yellowstone was the purchaser under the appellant’s agreement with the Receiver amounted to a misrepresentation.

b. ***The appellant had some level of knowledge of the representation’s falseness, i.e. whether knowledge or recklessness.*** The appellant personally signed the title direction which he knew was false. To avoid land transfer tax, the appellant knew that two sales were being represented as one. The Receiver was directed to transfer title to Yellowstone without the Receiver ever knowing that Yellowstone was an arms-length corporation.

c. ***The false representation caused the plaintiff to act.*** The appellant’s misrepresentations caused the Receiver to seek Court approval and transfer title directly to Yellowstone. If the appellant had not falsely

misrepresented Yellowstone as his own company, the Receiver would have acted differently. If the Receiver had known the appellant was likely to profit on a re-sale to Yellowstone, it would likely have withheld its consent to the transaction.

d. ***The appellant’s actions resulted in a loss.*** The Receiver suffered a loss as a result of the appellant’s conduct. The Receiver lost the opportunity to negotiate a higher price with the appellant or a third party.

Accordingly, in the instant case, the appellant was liable for civil fraud.

2. The Appellant Director Was Personally Liable

The appellant argued that the motions judge failed to explain why he pierced the corporate veil to find the appellant personally liable for the fraudulent misrepresentation. The Court of Appeal upheld the motions judge’s finding notwithstanding.

In Canada, officers, directors and employees of corporations are personally liable for any tortious conduct (including fraudulent misrepresentation), even if that conduct was in good faith or in the best interests of the corporation.

In this case, the appellant made fraudulent misrepresentations in his *personal* capacity. As such, he could not hide behind the “corporate veil” to render himself immune from his own tortious conduct. The Court of Appeal held:

- The corporation incorporated by the appellant never took title to the Property. The appellant's corporation never had any dealings with the Receiver and was never part of the transaction. Indeed, the whole fraud was that the appellant's corporation was not the purchaser being represented.
- The appellant signed the title direction (which falsely indicated Yellowstone as purchaser) as "Ahmed Baig", without any reference to his corporation or to any title or position he held at the corporation.
- [The appellant's lawyers] statement [was that the appellant lawyer's firm] represented Ahmed Baig.

In the circumstances, then, the appellant acted in his personal capacity during the transaction. The fraudulent misrepresentations were his and his alone; they were not those of his corporation. Accordingly, the appellant could not hide behind the corporate veil in this case.

Conclusion

The *Baig* case illustrates that while a director may not have a positive duty to disclose the agreement to re-sell the property to an arms-length party, she or he cannot lead the seller to misunderstand whose corporation is actually purchasing the property. The fraudulent misrepresentation in *Baig* arose

from the appellant's silence and half-truths about who Yellowstone actually was, as well as Yellowstone's true role in the transaction. In such cases, the director can be held personally liable for "sitting by" and allowing the seller to believe a false version of events giving rise to the transaction.