Summary Judgment Can Be An Effective Tool in Defending Negligent Misrepresentation Cases

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In *Kokanee Mortgage M.I.C. Ltd. v. Burrell*, the British Columbia Court of Appeal recently clarified the test for summary dismissal of negligent misrepresentation cases involving clear and unambiguous limitation of liability clauses. The correct approach is to assume all other elements of the tort are satisfied and then determine whether reliance was nevertheless reasonable. If not, summary dismissal should be granted.

The plaintiff mortgage company provided a loan to a borrower based on an allegedly negligent appraisal. The appraisal was prepared for the borrower, not the lender. The appraisal contained a clause that, on its face, appeared to exclude liability to anyone other than the borrower unless the appraisers consented:

> *Liability is expressly denied to any person other than the client and those who obtain written consent and, accordingly, no responsibility is accepted for any damage suffered by any such person as a result of decisions made or actions based on this report.*

The defendant appraisers argued that this clause meant the plaintiff could not have reasonably relied on the appraisal. The defendant brought an application for summary dismissal of the action.

In the court below, Madam Justice Gropper of the British Columbia Supreme Court held that *Micron Construction Ltd. v. Hongkong Bank of Canada* 2000 BCCA 141 established a two-part test for determining the effect of a limitation of liability clause. Madam Justice Gropper described the two-part test as: first, whether reliance would have been reasonable absent the disclaimer clause; and second, whether the reliance was reasonable despite knowing about the disclaimer. She dismissed the defendant's application on the basis that the existence of a duty of care absent the disclaimer was a triable issue and must be determined at the first stage of the two-stage test.

On appeal, the defendant appraisers argued that *Micron* does not endorse a two-stage test that precludes summary judgment.

The British Columbia Court of Appeal agreed, allowed the appeal, and granted summary dismissal of the action.

The Court of Appeal held that *Micron* does not mandate a two-stage test. When a clear and unambiguous limitation of liability clause is cited as the basis for an application to summarily dismiss a negligent misrepresentation action, the question the court must answer is as follows: assuming that in the absence of a disclaimer the plaintiffs' reliance would have been reasonable, was it reasonable for the plaintiffs to rely with knowledge of the disclaimer.

With respect to the limitation of liability clause at issue, the Court of Appeal held:

> *The disclaimer itself provided a mechanism to allow entities other than the client to rely on the opinion expressed and it was reasonable for both parties to expect that that mechanism would be used. It was also reasonable for Coast Appraisal to take steps to control the risk of liability to third parties relying on their opinion. There are a variety of bona fide business or reputational reasons why Coast Appraisal would seek to control that risk and, if they considered it appropriate in their business interests, to refuse that consent.*

The Court of Appeal held that the plaintiff mortgage company's reliance on the appraisal was not reasonable in the circumstances.

The Court of Appeal's decision *Kokanee Mortgage* firmly establishes that summary judgment procedures are an effective tool in the defence of negligent misrepresentation cases involving clear and unambiguous limitation of liability clauses.

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