

Indexed as:

Seltzer-Soberano v. Kogut

Between

Laura Michelle Seltzer-Soberano and Isaac Soberano,
plaintiffs, and
Borig Kogut and Stephen Balshin, carrying on business under
the name of Majestic Home Inspection Service, defendants

[1999] O.J. No. 1871

Court File No. 97-SR-120268

Ontario Superior Court of Justice
B. Wright J.

Heard: May 10-12, 1999.

Judgment: May 26, 1999.

(10 pp.)

Counsel:

Steven L. Graff, for the plaintiffs.

Susan J. Stamm, for the defendant Kogut.

Laurie K. Murphy and Gabriel J. Chang, for the defendant Balshin, c.o.b. as
Majestic Home Inspection Service.

¶ 1 **B. WRIGHT J.**:— In May, 1996, the plaintiffs purchased a house from the defendant Kogut. Prior to the closing of the transaction, a house inspection was performed by the defendant Balshin. Subsequent to moving into the house the plaintiffs discovered that their cars could not enter the double garage without the front of the cars scraping on the concrete garage floor. There is no dispute that the front of the plaintiffs' cars scrape on the garage floor. The garage is built underneath the house and is entered by a fairly steep driveway down from the street.

¶ 2 The plaintiffs claim against Kogut for misrepresentation and against Balshin for breach of contract and negligence. Kogut and Balshin cross-claim against each other for contribution and indemnity in the event that the plaintiffs are successful against either defendant.

The Problem

¶ 3 The driveway is built of concrete imbedded with electrical cables or panels for the

purpose of melting snow. At the bottom of the driveway, approximately two feet in front of the garage door, is a metal drainage grate running the width of the driveway. John Boyd, O.L.S., testified that from the garage floor to the other side of the drainage grate there is a dip of 2 1/2" - going down from the garage and up past the other side of the drainage grate. This 2 1/2" difference in level forms a gully. When the plaintiffs' cars are driven into the gully the front of the cars scrape on the concrete floor of the garage. The plaintiffs currently use two long steel plates to bridge the gully. This works, but the plates tend to shift and are somewhat unsightly.

Liability of the House Inspection

¶ 4 Mr. Balshin is a registered member of the Ontario Association of Home Inspectors pursuant to the Ontario Association of Home Inspectors Act, 1994, S.O. 1994, c. P-65.

¶ 5 He performed the usual home inspection for the plaintiffs. They allege that he breached his contract and was negligent in failing to point out the problem of the front of cars scraping on the garage floor when entering the garage.

¶ 6 The usual house inspection is general in nature and is performed by a visual inspection. A house inspector cannot be held responsible for a problem which is not readily apparent by a reasonable visual inspection. A house inspector would be held to a different standard of responsibility if requested to respond to a specific question, i.e., "We want to know if there is any evidence of termites in this house?" If that specific question was asked of a house inspector, the inspector, unless expert in that area, would probably tell the proposed purchaser to consult a pest control company.

¶ 7 I find in this case that a house inspector could not visually discover the problem of the driveway configuration which caused the plaintiffs' cars to scrape on the garage floor. The only way the problem could be discovered would be to actually drive a car into the garage. Whether the problem would manifest itself would depend on the make of car because of variances in clearance between the ground and the car's front bumper.

¶ 8 Therefore, the action against the defendant Stephen Balshin, carrying on business under the name Majestic Home Inspection Service, is dismissed.

Liability of the Vendor

¶ 9 The plaintiffs allege that Mr. Kogut knew about the problem and when questioned whether there was a problem he fraudulently misrepresented to them that there was no problem. Mr. Kogut denies that there was a problem with cars entering the garage and he disputes that he was asked whether there was a problem.

¶ 10 Mr. Kogut purchased the house from the builder in 1991. If Mr. Kogut had experienced the problem which the plaintiffs experienced it seems reasonable that he would have required the builder to rectify the problem. There is no evidence that this happened because Mr. Kogut claims there was no problem.

¶ 11 Mr. Kogut drove a 1989 BMW 535 during the time he lived in the house. He testified

that he drove in and out of the garage for five years without any problem. He stated that on maybe five occasions when he had passengers in the car there would be a slight scraping of the car on the garage floor.

¶ 12 Mr. Kogut now drives a BMW 328 which he says is lower to the ground than his previous BMW. He stated that his new car sometimes scrapes when going over a particular speed bump where his previous car did not scrape.

¶ 13 When the Soberanos moved into the house they had an Acura Integra and a Honda Accord. They now drive a BMW 318 and a Toyota Camry. All four cars apparently encountered the problem of scraping on the garage floor.

¶ 14 I take judicial notice of the fact that there are numerous makes of automobiles which have a variance of clearance from the roadway to the bottom of the front bumper. >From my own interest in cars I have observed over the past ten years that the front bumpers and undercarriage of cars have become lower to the ground.

¶ 15 What could have answered the issue in this case was evidence comparing the bumper-to-road clearance between Mr. Kogut's 1989 BMW 535 and Mr. Soberano's BMW 318. This evidence should not have been difficult to obtain. However, no such evidence was presented.

¶ 16 Mrs. Soberano testified that prior to completing the signing of the agreement of purchase and sale on January 31, 1996, she asked Mr. Kogut if there was any problem getting in and out of the garage. His response was, "No".

¶ 17 Mr. Kogut denies that Mrs. Soberano asked that question. From the beginning of their interest in this property the plaintiffs had concerns about the steepness of the driveway. However, prior to finalizing the agreement of purchase and sale Mr. Soberano, along with Mrs. Soberano, drove his car down the driveway to the garage door and backed out. He testified that this test of the driveway satisfied him that he had no more concerns about the steepness of the driveway.

¶ 18 Prior to finalizing the agreement of purchase and sale on January 31, 1996, the plaintiffs had never raised any concern about getting in and out of the garage. Therefore, the question which Mrs. Soberano alleges she asked comes out of the blue and has no previous foundation.

¶ 19 In examination-in-chief Mrs. Soberano was asked why she asked the question. She responded that she had never encountered a driveway so steep and she was, "concerned about crashing the front end into it". In cross-examination she was asked to elaborate and she mentioned the possibility of crashing into the "wall of the garage" or, "into anything".

¶ 20 There are three possibilities: 1) the question was not asked; 2) the question was not asked with reference to entering the garage but with reference to any problem getting in and out of the driveway; and, 3) the question was asked out of the blue as a last minute thought. I find that it is more probable that if the question was asked, it was with reference to the driveway

because the steepness of the driveway had been a concern of the plaintiffs from the beginning.

¶ 21 On a review of all of the evidence I find that the plaintiffs have failed to prove that Mr. Kogut made any misrepresentation which would incur liability. Therefore, the action against Mr. Kogut is dismissed.

Damages

¶ 22 The plaintiffs discovered the problem on June 1, 1996, when they moved into the house. They have not repaired the problem. They have been using the garage for their cars by utilizing the steel plates.

¶ 23 Exhibit 15 is an estimate dated March 16, 1999, to replace the left side engine shield and repaint the front bumper of Mrs. Soberano's 1998 Toyota Camry at a cost of \$507.84.

¶ 24 The defendants objected to the admissibility of this damage claim because no relief for car damage was requested in the statement of claim. I allowed the estimate to be filed and reserved on the question of allowing the damage claim.

¶ 25 The estimate is for damage to Mrs. Soberano's new car. This damage was apparently caused by the car being driven into the garage after Mrs. Soberano knew that there was a problem with her previous car scraping on the garage floor. Damages cannot be allowed in this situation when Mrs. Soberano knew her car may scrape on the garage floor but apparently decided to take her car into the garage anyway. This claim is denied.

¶ 26 John Boyd, O.L.S., prepared a sketch dated May 5, 1999, which shows the existing and proposed elevations of the driveway. There are two proposed grade changes. The one proposed for the top part of the driveway has nothing to do with the current problem of the gully at the drainage grate. He testified that his proposed grade change near the drainage grate would alleviate the problem. However, he made no recommendation of how the grade should be changed. He stated that the method for changing the grade should be left to a construction expert.

¶ 27 I questioned Mr. Boyd with respect to the difference in levels between the garage floor and where driveway meets the garage floor. He responded that the garage floor was about 3/4 of an inch higher. He would not venture an opinion on whether grinding down that 3/4" at the lip of the garage floor would alleviate the problem.

¶ 28 Mr. Memme of Tojoro Construction Ltd. provided the plaintiffs with an estimate dated December 9, 1996, to tear up and replace the complete driveway for \$16,900. However, Mr. Memme prepared his estimate without reference to any plan to correct the problem. Mr. Memme's expertise is in residential concrete foundations and drainage. There was no evidence that he had ever installed a concrete driveway.

¶ 29 Mr. Memme provided no alternative to solve the current problem.

¶ 30 The plaintiffs appear to be of the view that it is necessary to redo the whole driveway

because of the electrical heating system being one continuous system. However, no witness appeared to know much about electrical driveway heating systems.

¶ 31 Furthermore, there is a question of how well the electrical heating system is working. Mr. Soberano indicated that the system does not work at the top part of the driveway. As well, Mr. Memme testified that Mr. Soberano showed him a broken electrical cable. It may be that this type of driveway heating system is approaching its probable life span coming up to nearly ten years.

¶ 32 Tom Rotozinski, a professional engineer, prepared a report dated March 11, 1999, in which he offered two less expensive solutions to the problem. His alternatives are:

- * A system of steel grating ramps at the bottom of the slope to change the approach angle may be considered (estimated cost, less than \$5,000.00).
- * A second alternative involves raising the garage floor using a concrete topping; if the heat cables are placed in three panels horizontally as we are led to believe, it is possible to disconnect the lower panel and pour a new panel with new cables on top to change the angle of approach to the raised garage slab (estimated cost approximately \$10,000.00).

¶ 33 It was Mr. Rotozinski's opinion in his oral testimony that it would not be necessary to replace the whole driveway in order to solve the problem.

¶ 34 I am not satisfied that the plaintiffs have adequately explored the alternatives to solve the problem in order to determine the cost. Therefore, the plaintiffs have not properly proven any damages and I make no decision with respect to damages.

Conclusion

¶ 35 There will be an order dismissing the action against both defendants, with costs payable to both defendants by the plaintiffs. If there are any issues with respect to costs, I may be contacted, otherwise, the costs are payable forthwith after assessment.

B. WRIGHT J.

QL Update: 990611
cp/s/rsm