# Ontario Real Estate Law Developments

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## SCC RULES ON MITIGATION AND SPECIFIC PERFORMANCE IN A REAL ESTATE DEAL GONE WRONG

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*And the bravest man in all the land*
*Turns white with mortal fear.*
*For he knows the smallest leak may grow*
*To a flood in a single night;*
*And he knows the strength of the cruel sea*
*When loosed in its angry might.*
P. Cary, "The Leak in the Dike" (1873)

The concept of mitigation, in essence, is that a plaintiff cannot sit idly by, watching damages escalate if reasonable steps can be taken to avoid or reduce the loss. Having seen the leak in the dike, the theory would hold, the Dutch boy is obligated in law to stop the flood by stopping the leak, rather than waiting for the dike to break altogether, with the catastrophic losses (the "strength of the cruel sea") that would ensue. In a real estate context, mitigation means purchasing a reasonable alternative property.

A tricky mitigation question arises, however, when a plaintiff is seeking specific performance. Specific performance is a remedy that is sometimes pleaded in the alternative to damages: the plaintiff says that the defendant breached a contract, and specific performance would require the defendant to perform the contract. Damages would be sought in the alternative. This type of relief is not at all uncommon in lawsuits involving real property: the transaction fails to close, the plaintiff sues to have the property delivered. The next natural question is: If plaintiffs sue for specific performance, do they still have to mitigate?

On the one hand, the duty to mitigate completely runs counter to the concept of specific performance. If I sue to have my property returned, it makes no sense to have me mitigate by purchasing another property.

On the other hand, from the defence perspective, why shouldn't the plaintiff have to mitigate, particularly if they lose their case for specific performance? If you slightly change the fact situation, you can see where the real problem arises. Assume that a plaintiff sues for recovery of real property worth $100,000. The plaintiff loses the claim for specific performance, because the judge finds there was nothing unique about the property, and damages would therefore be an adequate remedy. But while the lawsuit was ongoing, that property increased in value from $100,000 to $1 million. Does the defendant have to pay the $1 million, when the plaintiff could have bought replacement property that would also have increased in value? Shouldn't the defendant's damages be

capped at $100,000?

In a decision released October 17, 2012, the Supreme Court of Canada answered this question with an unequivocal "sort of". In *Southcott Estates Inc. v. Toronto Catholic District School Board*, the plaintiff, Southcott, sued the Toronto Catholic District School Board for specific performance when the Board failed to satisfy a condition in an agreement of purchase and sale, and failed to extend the closing date.

The trial judge and the Court of Appeal found that the Board had breached the contract. But both the trial judge and the Court of Appeal found that Southcott was not entitled to specific performance, because there was nothing unique about the property, and damages were an adequate remedy. The question then became: what was the quantum of damages? And in particular, should such damages be reduced because of a failure to mitigate?

Southcott argued that, although it lost the claim for specific performance, it was still reasonable to advance the claim, because it proceeded expeditiously and there was substance to the specific performance claim. Even though it did not succeed, it was still reasonable for Southcott to not mitigate its damages by purchasing alternative property.

The Supreme Court of Canada agreed that "there may be situations in which a plaintiff's inaction is justifiable notwithstanding its failure to obtain an order for specific performance where circumstances reveal 'some fair, real, and substantial justification' for his claim or 'a substantial and legitimate interest' in seeking specific performance".

The Supreme Court continued, that substantial justification does not completely relieve the plaintiff with an obligation to mitigate, "rather it recognizes that such a claim for specific performance informs what is reasonable behaviour for the plaintiff in mitigation".

But in this case, the Supreme Court found that Southcott did not have substantial justification. Why? Because "[a] plaintiff deprived of an investment property does not have a "fair, real, and substantial justification" or a "substantial and legitimate" interest in specific performance unless he can show that money is not a complete remedy because the land has "a peculiar and special value" to him.

And because the trial judge found that specific performance was not available, as "the land was nothing more unique to Southcott than a singularly good investment", the Court concluded that "Southcott cannot therefore justify its inaction."

The Court therefore concluded that Southcott still owed a duty to mitigate its damages, notwithstanding its specific performance claim, and Southcott failed to mitigate its damages by purchasing reasonable alternative properties.

## The Effect of the Decision

The Supreme Court did not expressly make new law in *Southcott*. Prior decisions of the Court (in 1979 and 1996) already recognized the duty to mitigate and what one needs to show to establish that a property is unique.

But the real effect of this decision is to make claims for specific performance substantially less attractive to plaintiffs, particularly in real estate transactions. In most cases, such plaintiffs will still have a duty to mitigate, which could involve purchasing alternative properties that are on the market. Therefore if a plaintiff really wants to maintain the claim for specific performance, the plaintiff may need to go "all in", meaning that if they lose that claim for specific performance, and they fail to mitigate, they may obtain something less than the actual damages they suffer at the time of the judgment.

And indeed, if the plaintiff does purchase alternative property to mitigate, it is difficult to see how such a plaintiff could ever succeed in a claim for specific performance. When the plaintiff claims at trial the property was unique and therefore the court should grant specific performance, the defendant would naturally respond, "How can they say that? Look at this replacement property they purchased; of course the property was not unique."

Assuming the plaintiff can get past that hurdle, and actually succeeds in establishing specific performance after purchasing replacement property, what does the plaintiff do now? It now has two properties. While the plaintiff could just later sell the property that was purchased to mitigate, what if there was an illiquid market for the property (such as after a real estate crash, or for shares in a company that are thinly traded)?

Critics of the Supreme Court's decision in *Southcott* could argue that this decision results in unjustifiable windfalls to the defendants. Using the analogy of the $100,000 property that increases in value to $1 million, if the Court awards damages, then that means that the defendant was in breach of its legal obligations. Notwithstanding the fact that the defendant was breaching its legal obligations, that same defendant would enjoy the $900,000 increase in value, because the plaintiff should have purchased replacement property in the interim. And it is no matter that the plaintiff sought specific performance (and it appears it does not even matter if the plaintiff had a good case for specific performance) to have the property delivered. The benefit still accrues to the defendant.

But such battles were lost almost 40 years ago in the *Asamera* case. In that case and others, the courts have basically viewed this result as an allocation of risk exercise. If the plaintiff can take reasonable steps to replace the property, then upon doing so, the plaintiff would enjoy the rise in fortunes related to that property, and similarly suffer the consequences of a decline in value. But if the plaintiff does not take those reasonable steps, then the plaintiff has effectively walked away from the benefits (or burdens) of ownership in the intervening time, and in so doing, those rights are effectively transferred to the defendant.

The net result? If you seek specific performance and choose not to mitigate your losses in the interim, you do so at your own peril. Of course, what constitutes reasonable steps to mitigate will vary from case to case and as such there may be other reasons to not take intervening steps prior to trial. No doubt plaintiffs will rely on the Court's comment in *Southcott* that "such a claim for specific performance informs what is reasonable behaviour for the plaintiff in mitigation" to allege that the very good (but ultimately unsuccessful) claim for specific performance, coupled with other factors, leads to the result that purchasing replacement property (or other steps to mitigate) was not reasonable.

While each case will turn on its specific facts, one potential way of avoiding the consequences of *Southcott*, at least as it relates to real property, is to seek a *lis pendens* or "certificate of pending litigation" at an early stage with respect to the property. This effectively registers a notice on the property, such that if it is ever sold, the purchaser has notice that someone is seeking to recover the property. Before a court makes an order for *lis pendens*, it will engage in an analysis of whether the property is unique. If the Court decides at that early stage that the property is not unique, it will not issue a *lis pendens*, and presumably at that point the plaintiff would know that it has to mitigate its losses by purchasing replacement property. And if the Court decides that the property is unique at that early stage, then that should go a long way, if not the entire way, in establishing a "substantial and legitimate interest" in the claim for specific performance.

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## THE NEW PROVINCIAL POLICY STATEMENT IN DRAFT

*— Marc P. Kemerer. Reprinted with permission. © Blaney McMurtry LLP.*

The Province of Ontario has released the draft policies of the proposed new Provincial Policy Statement ("PPS"). The PPS sits atop the hierarchy of planning instruments in the Province; all municipal council and Ontario Municipal Board decisions must be consistent with the PPS.

The draft just released maintains the existing PPS policies and supplements them with policies that emphasize compact, inter-connected and environmentally responsible growth. Briefly: under the new PPS, compact, inter-connected development would require:

- greater economic coordination between municipalities
- urban development that is transit supportive
- protecting the efficient movement of goods and services by:
  - strengthening protection for major facilities (including transportation and municipal services) and industries against incompatible development

- encouraging the adaptive reuse of existing infrastructure and/or the use of green infrastructure
- protecting transit corridors and the employment areas in close proximity to them .

Environmentally responsible growth will mean that:

- development and land use patterns "maintain biodiversity and resilience to climate change"
- public parks and conservation areas are protected from negative impacts
- development that may impact on the habitat of endangered and threatened species cannot proceed without first meeting applicable provincial and federal standards
- stormwater management measures represent an environmental benefit
- lot creation in prime agricultural areas will be further discouraged by limiting the size of such lots to the minimum area required to accommodate the use and appropriate sewage and water services

Whiles these policies do not necessarily represent new principles in our planning lexicon, they are becoming, literally, ever more entrenched as they transform the type of development this Province is experiencing.

The Province is presently seeking feedback on the draft policies. Given the important role of the PPS, it is important that municipalities, developers and builders, most of whom are now in the throes of the Provincial Growth Plan conformity exercises, understand all of the implications of the proposed new policies. We would be pleased to discuss these draft policies and their significance with you in further detail.

# WILL DEVELOPERS BE REQUIRED TO SUBSIDIZE CANADA POST'S FINANCIAL LOSSES?

*— Marc P. Kemerer, Tammy Evans and Anthony Garber. Reprinted with permission. © Blaney McMurtry LLP.*

Canada Post recently provided notice via the offices of mayors across Canada that, in addition to the current requirement for the developer to build either a condominium mailroom or provide super mail box pads, developers will now be charged a one-time fee of $200 per address to install and activate these community mailboxes for new developments. Canada Post has confirmed to the writers that the new fee, which will be charged beginning January 1, 2013, will be collected directly from developers.

Municipalities regularly seek comments from Canada Post on planning applications, resulting in a standard condition imposed on developers to complete, at their own cost, the base infrastructure required for installation of the community mailbox. Developers have accepted this condition as part of the costs of building a new community. Rather than offsetting Canada Post's actual activation or installation and maintenance costs however, this new fee appears to be an attempt to recover some of Canada Post's ongoing financial losses resulting from a decrease in mail volume and the increasing use of alternative and more immediate delivery systems.

The *Canada Post Corporation Act* grants Canada Post the "sole and exclusive privilege of collecting, transmitting and delivering letter" within Canada. That Act and its Regulations do not, however, contemplate the imposition of development fees such as those being proposed.

The new fee has attracted considerable concern among the development industry; the Building Industry and Land Development Association and the Ontario Home Builders Association together wrote to Canada Post on October 29, 2012 to express the strong opposition on the part of their member to this new charge. Given that the fee may, in our view, be very well outside of the jurisdiction of Canada Post to charge, it will be interesting to see how far both sides will push this envelope. Stay tuned!

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# RECENT CASES

## Action For Breach of Fiduciary Duty Against Solicitor Was Dismissed

Ontario Superior Court of Justice, August 14, 2012

The plaintiff, Chris Kubas ("Kubas"), owned the corporate plaintiffs 732663 Ontario Ltd. ("732") and 1121935 Ontario Ltd. ("112"). The defendant lawyer, Devendranauth Misir ("Misir") was a director and shareholder of 984 Bay St. Inc. ("984"). Misir did not disclose this to Kubas. In 1993, 732 invested in a second mortgage on property owned by 984, and the charge documents were prepared by Misir's law firm, although Misir did not create these documents and was not a party to the second mortgage transaction. There was also no evidence that Misir or his firm acted for Kubas or 732 on the second mortgage. The second mortgage was renewed twice by Kubas without any advice from Misir or his firm, although the firm again prepared the renewal documents. In 2000, Kubas decided to have 732 increase its second mortgage and extend the term, relying on the advice of the defendant Mervyn Smith ("Smith") who was Kubas's accountant. Again, Kubas did not receive any advice from Misir or his firm. Kubas obtained independent legal advice for this transaction.

When the second mortgage matured in 2003, 984 defaulted on repayment of the mortgage. Instead of taking enforcement steps, Kubas, on behalf of 732, and Misir, on behalf of 984, entered into an Agreement to Postpone and Renew Mortgage (the "Agreement"). This Agreement provided for 732 to postpone and renew its second mortgage. It was predicated on 984 being able to refinance its first mortgage, and on Misir providing an assignment of life insurance policies in the amount of $800,000 and on his personal guarantee of the mortgage. The refinancing did not materialize and the mortgagor did not have the means to pay out the second mortgage. 984 was put into receivership, and there were no proceeds of sale to satisfy 732's second mortgage claim. All of the parties had also engaged in an almost identical transaction involving a second mortgage on another commercial property owned by another corporation of which Misir was a director and shareholder, namely Bloor West Investments Ltd. When this second mortgage also went into default, 732 did not seek to enforce its second mortgage claim, but transferred it to another numbered corporation, which was not a party to these proceedings. In due course, Bloor West Investment Ltd.'s property was sold, and there were no proceeds of sale to satisfy the second mortgage claim. Accordingly, the plaintiffs sued for damages resulting from their losses related to the second mortgage investments and for breach of the Agreement resulting from Misir's failure to provide his personal guarantee. Misir and his firm brought a motion for summary judgment to dismiss the claim.

The motion was granted. The plaintiffs took the position that Misir and his law firm were liable for the plaintiffs' losses because they breached their retainer and their fiduciary duty by acting for the plaintiffs in relation to the mortgage investments without disclosing the personal interest that Misir had in the mortgaged premises. In that regard, Kubas claimed that Misir was acting for him throughout the period from 1993 to 2000 when the second mortgages were entered into. The plaintiffs also claimed that Misir never urged them to obtain independent legal advice. The moving defendants argued that even assuming that such a breach of fiduciary duty, the plaintiffs could not succeed in their claim as there was no evidence that the alleged breach of fiduciary duty in any way caused the losses suffered by the plaintiffs. The Court stated that to establish a claim for damages or restitution based on an alleged breach of a fiduciary duty, the plaintiff must not only establish that the defendant breached some fiduciary duty but also that there was some causal link between the breach and the alleged damages. The evidence showed that any alleged breach of fiduciary duty could only have occurred prior to 2000, since the plaintiffs retained independent counsel to act for them after that time. The Court found that even assuming that the moving parties breached a fiduciary duty owed to the plaintiffs, the plaintiffs' losses were caused by virtue of the fact that they made investments in second mortgages on properties where the true value of the properties did not provide adequate security for the mortgage investments.

The plaintiffs also claimed that the Agreement had created a binding contract between the parties, and that Misir had failed to honour the terms of the Agreement requiring assignment of life insurance and his personal guarantee. The

Court found that the Agreement was conditional upon the mortgagor being able to successfully refinance the first mortgage, which did not occur. Consequently, this Agreement became void and unenforceable when the refinancing did not occur.

*Kubas v. Misir*, 2012 OREG ¶58,944

## Commercial Tenant Awarded Costs on Substantial Indemnity Scale

Ontario Superior Court of Justice, August 30, 2012

Although the applicant's commercial lease had not expired, the respondent landlords locked the applicant out, alleging that the premises were being used to operate a brothel. On the morning of the hearing of an application for relief from forfeiture, the parties entered into a consent order that the applicant be permitted to resume possession, and that its equipment be returned to it by the respondents. The matter was adjourned to July 11, 2012. On the return of the matter on July 11, the personal respondent advised the Court that the corporate respondent's solicitor was not his solicitor, and that the personal respondent wished to retain his own counsel. The matter was again adjourned and was heard on August 22, 2012. The applicant sought costs on a substantial indemnity scale totalling $57,536.66.

The application was granted in part. The Court stated that in determining the quantum of costs, the overall objective is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular circumstances, rather than an amount determined by actual costs incurred by the successful litigant. The Court noted that it was not required to come to a conclusion about the merits of the respondents' position on the motion. Rather, the Court stated that its mandate was to scrutinize the manner in which the respondents and the applicant conducted themselves after the lockout. The Court found that costs on a substantial indemnity scale were appropriate based on the respondents' conduct toward the applicant after the lockout, which was high-handed, aggressive, and designed to intimidate the applicant.

The Court noted that the applicant retained counsel who made efforts to resolve the dispute without litigation, but the respondents rebuffed these efforts. In that regard, the respondents refused to provide evidence for the unsupported allegation that the premises were being used as a brothel, and forced the applicant to proceed with the application for relief from forfeiture at considerable legal expense. Accordingly, taking into account the time spent by the applicant's counsel, the results achieved, the complexity of the matter, and the application of the principle of proportionality, the total fees and disbursements, including taxes, should be fixed at $50,000. The remaining issues between the parties, including a determination of the damages suffered by either party as a result of the lockout, were to be dealt with at a trial.

*2156384 Ontario Inc. v. C & K Property Management Inc.*, 2012 OREG ¶58,945

## Applicants Not Entitled To Have Vesting Order Set Aside

Ontario Superior Court of Justice, September 17, 2012

In January 1909, Round Island (the "Island") was purchased by two business partners, Thomas Nicholson ("Nicholson") and John Curtis ("Curtis"). The applicants were Curtis's great-grandchildren and the respondent was Nicholson's granddaughter. Curtis died in 1912, leaving a will in which he appointed Union Trust as his executor and trustee. In the will, Curtis had left his entire estate to his two daughters, "Alice" and "Elizabeth". In 1921, Union Trust brought an application as executor of Curtis's estate to be registered as owner of the Island along with Nicholson. Canada Trust Company became the successor to Union Trust, but could find no file concerning the Island or Curtis. Efforts were made to locate the heirs of Curtis to no avail.

The respondent relied upon evidence that her grandfather had obtained title to the Island as part of a division between the partners of their assets, but for unknown reasons, title to the Island had never been changed. In 1994, the respondent obtained an order that her name be substituted for that of her grandfather, Nicholson, so title was held by herself and Union Trust. She subsequently brought an application for a vesting order which would remove the names of Union Trust and Curtis from title. She also asked that the order be made without notice to those parties. The vesting order was granted and the respondent became the sole registered owner of the Island. The applicants applied for an order setting aside the vesting order and, instead, substituting their names for that of Union Trust as 50 per cent

owners of the Island.

The application was dismissed. The Court reviewed the nature of a vesting order and referred to case law which stated that a vesting order has a dual character, being on one hand a court order, and on the other hand a conveyance of title. Once the vesting order has been registered on title, its attributes as an order cease to exist for all purposes, and it attributes as a conveyance prevail. However, the Court further stated that an order that has been registered on title under the *Land Titles Act* (the "Act") is not completely immune from attack, and that attack must be made under sections 159 and 160 of the Act. The Court proceeded under those sections, even though the applicants did not refer to these sections in their application.

The Court noted that there was no evidence in the form of any memorandum, note or other written instrument in support of the respondent's application by which Curtis purportedly transferred his interest in the Island to Nicholson. However, the Court further noted that a party could obtain relief in equity from the application of section 4 of the *Statute of Frauds* if the party can establish sufficient part performance to take the case out of the statute. The Court stated that while adverse possession was not sufficient to acquire title under the Act, such possession, when coupled with improvements and expenditures to the property, as made by Nicholson, would be sufficient to show part performance. The Court also pointed to an affidavit sworn by a trust officer with Union Trust that the Island formed part of the partnership business of Nicholson and Curtis. Since Union Trust had obtained the order registering it on title in 1921, the Court found it unlikely that the trust officer would have been unaware of the purchase by Nicolson if it had happened prior to 1921. The Court found that this information made it more likely that Nicholson had purchased Curtis's interest after he died. Finally, the fact that Canada Trust had no record of the Curtis estate was more consistent with the estate having been fully administered at some point after 1921 and the file destroyed.

*Sheard v. Peacock*, 2012 OREG ¶58,946

## Insurance Company Ordered To Indemnify Vendors Being Sued By Purchasers

Ontario Court of Appeal, September 25, 2012

The respondents were insured under a homeowners' insurance policy (the "Policy") issued by Unifund Assurance Co. ("Unifund"). When they sold their home, they completed a seller property information statement ("SPIS") in which they made certain representations about the property to the purchaser. The purchaser of the property commenced an action (the "Main Action") against both the respndents and the company that performed the home inspection. The Main Action alleged that the respondents intentionally failed to disclose problems with the house, including leaks in the roof and basement, and bad wiring. The purchaser also alleged that they took steps to disguise these problems prior to the sale. The respondents notified Unifund about the Main Action and sought defence costs and indemnity, but Unifund denied coverage. The respondents then applied for a declaration that Unifund owed them a duty to defend them in the Main Action and to indemnify them for any damages that they might be found to owe. Before the application was heard, the plaintiff in the Main Action amended the statement of claim, making no changes to the facts, but re-labeling most of the respondents' alleged misconduct as negligent rather than intentional.

Before the application judge, Unifund argued that the respondents were not covered by the policy because the amended claim should be disregarded as derivative of the claim for intentional misrepresentation, and that the real substance of the claim was as originally pleaded. The application judge disagreed, and declared that Unifund had a duty to defend and indemnify the respondents under the Policy. The application judge relied on the Supreme Court of Canada decision in *Non-Marine Underwriters, Lloyd's of London v. Scalera*, which held that a claim for negligence will not be derivative if the underlying elements of the negligence and of the intentional tort are sufficiently disparate to render the two claims unrelated. She found that in this case, one or more of the respondents' claims could trigger indemnity, so Unifund had a duty to defend unless it could demonstrate application of an exclusion clause. The application judge also found that the exclusion clause, which provided that Unifund would not insure claims arising from damage to property "owned" by an insured, did not apply. She rejected Unifund's argument that the exclusion clause referred to the past tense and that, since the respondents had owned the property in the past, the exclusion applied. Unifund appealed.

The appeal was dismissed. The Court stated that an insurer has a duty to defend if the pleadings allege facts which, if true, would require the insurer to indemnify the insured. If there is any possibility that the claim falls within the policy

coverage, the insurer must defend. The Court noted that in this case, the Policy only covered damage to property that was found to have been caused by unintentional conduct. Unifund continued to maintain on appeal that the amended claim against the respondents, based on negligent misrepresentation, was derivative of the cause of action upon which the original claim was based, namely intentional misrepresentation.

The Court also noted that the general fact situation involving representations made on the sale of a home could potentially generate claims for both fraudulent misrepresentation and negligent misrepresentation. The facts, as set out in the amended pleadings, could support a finding either of negligent or intentional misconduct. Since the concern was not whether the pleadings were designed manipulatively to generate insurance coverage, but only with the facts as pleaded, the Court agreed with the application judge that the claim for negligent misrepresentation was not derivative of the claim for intentional misrepresentation.

In regard to the exclusion clause, the Court stated that an exclusion clause, to be effective, must “clearly and unambiguously” exclude coverage. Unifund relied on the verb tense used in the exclusion clause found in the Policy. However, the Court found that the application judge had correctly pointed out that the word “owned” in the Policy’s exclusion clause could be interpreted in either the present or past tense. Hence, the Policy did not unambiguously exclude coverage. The Court also found that the respondents had notified Unifund of the potential claim as soon as they became aware that the plaintiff in the Main Action had amended the claim in a way that would attract coverage. In these circumstances, they did not breach the timely notification requirement in the Policy as alleged by Unifund.

*Aitken v. Unifund Assurance Company*, 2012 OREG ¶58,947

## Action By Tenants Against Contractor Hired By Landlord Was Dismissed

Ontario Superior Court of Justice, October 1, 2012

The plaintiffs were tenants in a shopping mall (the “Mall”). The third party, Yorkdale Shopping Centre Holdings Inc. (“Yorkdale”), was the owner of the Mall. Yorkdale engaged the defendant, EllisDon Corporation (“EllisDon”), to perform construction work in the Mall. EllisDon occupied, rent-free, a vacant portion of the third floor of the Mall. A vandal caused flooding on the third floor by turning on a fire hose, and the resultant flooding caused water damage to the third floor and to some of the retail stores on the second floor.

As a result of the water damage, the plaintiffs, who were tenants in the Mall, sued EllisDon on the ground that EllisDon was an occupier of the third floor space and had a duty to secure that space. The lease required both the tenants of the Mall and the landlord to maintain insurance covering water damage claims on the premises. The lease also provided a mutual release and waiver between the landlord and tenant for any occurrences forming the subject matter of insurance coverage. The release and waiver extended to “those for whom the other is in law responsible with respect to occurrences insured against . . . by the releasing party”. EllisDon moved for summary judgment for dismissal of the action on the ground that the tenants were precluded under the mutual release and waiver provisions of the lease from suing both the landlord and EllisDon.

The motion was granted. The Court noted that EllisDon was a contractor hired by the landlord to perform renovations at the Mall. The landlord had delegated the renovations to EllisDon. The Court found that the parties must have intended that the protection arising from the waiver between the landlord and the tenant be extended to others involved in the renovation work. The reason behind the inclusion of the release and waiver was to require the landlord and tenant to insure their respective portions of the risk. It also provided certainty that their insurance costs would not be affected by one party asserting subrogation rights. The Court held that in order to give effect to this intention, the benefit of the waiver must be extended to a contractor such as EllisDon.

The activities of EllisDon were the very activities contemplated as coming within the scope of the contract, as EllisDon was retained in furtherance of Yorkdale’s obligations as landlord to its tenants. To suggest that the landlord was not responsible for the presence of EllisDon at the Mall was simply wrong. To permit the plaintiff to advance a subrogated claim against EllisDon when it could not advance a claim against the landlord would lead to a result that the subrogation clause was intended to prevent.

*Williams-Sonoma Inc. v. EllisDon Corporation*, 2012 OREG ¶58,948

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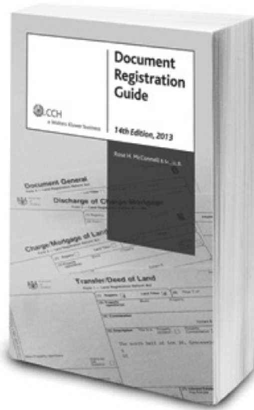


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