

CITATION: Tarion Warranty Corporation v. Kozy, 2011 ONCA 795
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COURT OF APPEAL FOR ONTARIO

Rosenberg, MacPherson and Epstein JJ.A.

BETWEEN

Tarion Warranty Corporation

Appellant (Appellant)

and

David L. Kozy

Respondent (Respondent)

David Outerbridge, for the appellant

Martin J. Prost, for the respondent

Heard: September 8, 2011

On appeal from the judgment of Justice Donald Downie of the Ontario Court of Justice, dated December 31, 2010, dismissing the appeal from the acquittal of the respondent by Justice of the Peace Gerry Solursh of the Ontario Court of Justice, dated September 9, 2008, on two charges under section 22 of the *Ontario New Home Warranties Plan Act*.

MacPherson J.A.:

A. INTRODUCTION

[1] The appellant Tarion Warranty Corporation (“Tarion”) appeals from the decision of Justice Donald Downie of the Ontario Court of Justice dated December 13, 2010. In that decision, Downie J. dismissed an appeal from Justice of the Peace Gerry Solursh’s acquittal of the respondent David Kozy on two charges under the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, c. O-31 (“*ONHWP Act*”). Both judges based their decisions on a conclusion that Mr. Kozy was not a “builder” within the meaning of the term in the *ONHWP Act*.

B. FACTS

(1) The parties and events

[2] Tarion is the corporation designated by regulation to administer the *ONHWP Act*. The *ONHWP Act* is consumer protection legislation aimed at protecting purchasers of new homes in Ontario.

[3] In 2006, Joseph and Irena Kobylinski purchased a rural property at 91 Farlain Lake Road East in the Township of Tiny in Simcoe County. In August 2006, they entered into a contract with Mr. Kozy for the construction of a house on the property.

The contract provided:

The Contractor agrees to supply all the materials, and perform all the work... as described in the contract documents and as set out below. The Work shall be done on the premises... which are owned by the Owner....

[4] Mr. Kozy performed the majority of the construction work for a price of \$153,594, including GST. The Kobylinskis paid for several items outside the scope of the contract: \$6,600 for driveway work and the septic system, \$6,254 for the well and water system connected to the house, and \$4,458 for two fireplaces.

[5] Mr. Kozy did not register as a builder under the *ONHWP Act*. The statute provides that:

1. In this Act,

“builder” means a person who undertakes the performance of all the work and supply of all the materials necessary to construct a completed home whether for the purpose of sale by the person or under a contract with a vendor or owner;

[6] Because he did not register, Mr. Kozy was charged with two offences under s.22(1)(b) of the *ONHWP Act* for violating ss. 6 and 12 of the *Act*, which provide:

6. No person shall act as a vendor or a builder unless the person is registered by the Registrar under this Act.

12. A builder shall not commence to construct a home until the builder has notified the Corporation of the fact, has provided the Corporation with such particulars as the Corporation requires and has paid the prescribed fee to the Corporation.

(2) The trial

[7] Justice of the Peace Solursh acquitted Mr. Kozy of both charges. For the purpose of this appeal, the parties prepared an Agreed Statement of Facts which includes this summary of the Justice of the Peace’s decision:

Justice of the Peace Solursh held that Mr. Kozy did not fall within the definition of “builder” or “vendor”. He based his decision primarily on: (a) the fact that the construction contract was silent on the question of who would construct the major structural components of the Residence, and (b) what he described as an absence of evidence as to who performed this work.

(3) The appeal

[8] Justice Downie dismissed Tarion’s appeal from the Justice of the Peace’s acquittal of Mr. Kozy. In the Agreed Statement of Facts, the parties record this description of Downie J.’s decision:

The issues of statutory interpretation were the same on appeal as they were at trial. Also at issue on appeal was whether the decision of the Justice of the Peace at trial was unreasonable in light of the evidence.

The appeal judge held that the Justice of the Peace at trial had misapprehended the evidence regarding the role played by Mr. Kozy in building the Residence. Downie J. stated at paragraph 20 of his Reasons for Judgment:

It is clear that the learned Justice of the Peace was in error when he stated on page six of his judgment “There was no evidence before the court as to who performed these services, and at what cost”, while he was referring to major structural components of the building such as footings, foundation, framing, plumbing and rough-in electrical. There was evidence before the court by Mr. Kozy and Mr. Kobylinski that it was in fact Mr. Kozy who performed most of these services.... It is clear from the evidence... that Mr. Kozy’s workers did in fact do the majority of the work. It is only the work that was evidenced in Exhibit #21 where Mr. Kobylinski acted as contractor and hired outside

persons, other than Mr. Kozy, to do the work. It is clear that Mr. Kozy was not doing the well drilling, the connection of the well to the house, the septic system and the connection of the septic system to the house, as well as certain fireplace work that was contracted out.

The appeal judge went on to consider whether Mr. Kozy qualified as a “builder” and “vendor” for purposes of the *ONHWP Act*, in light of the roles played by Mr. Kozy and by the Kobylinskis.

The appeal judge held that:

- (a) the addition of fireplaces by the Kobylinskis would not take the construction by David Kozy out of the definition of “builder”;
- and
- (b) the Kobylinskis’ involvement in arranging and paying for the well and septic system did take the construction by David Kozy out of the definition of “builder”.

(4) Leave to appeal

[9] By order dated March 24, 2011, Winkler C.J.O. granted Tarion’s application for leave to appeal pursuant to s. 131 of the *Provincial Offences Act*, R.S.O. 1990, c. P33. In his endorsement supporting the order, the Chief Justice said, at para. 5:

The interpretation of the definition of “builder” is a question of law. As to whether it is essential in the public interest, the issue of the definition of “builder” is central to the entire statute. This is consumer protection legislation which affects any potential new home buyer in Ontario.

C. ISSUE

[10] The sole issue on the appeal is whether the appeal judge erred in his interpretation of the term “builder” as used in the *ONHWP Act*.

D. ANALYSIS

[11] The appeal judge noted that the definition of “builder” in the *ONHWP Act* is a person who undertakes the performance of “all the work and supply of all the materials” necessary to construct a completed home. He concluded that the addition of fireplaces by the owners did not remove Mr. Kozy as the “builder”. However, he reached the opposite result with respect to the owners’ separate arrangements for the installation of septic and well systems. The core of his reasoning is contained in this passage:

The question in this case is, did Mr. Kozy and his workers do all of the work necessary to build a completed home. In the view of the court they did not. They did not do the septic system and they did not do the well. There is no way a home could be described as a completed home that did not have an operational toilet and sewer system, whether connected to a municipal system or to a septic system and there is no way a home could be considered a completed home if it did not have a water system. The Kobylinski’s as owners arranged and paid for the installation of these systems. Therefore, to this court it seems that Mr. Kozy is not “a builder” as defined in the Act, even as that term has been expanded by some of the case law.

[12] With respect, I am not persuaded by this analysis. In my view, the purpose of the *ONHWP Act*, the leading cases interpreting the term “builder”, and the facts of this case suggest that Mr. Kozy is a “builder” within the meaning of the *Act*.

(1) **The purpose of the *ONHWP Act***

[13] Justice MacFarland of this court recently had occasion to consider the purpose of the *Act* and, specifically, the implication of that purpose for the interpretation of the term “builder” in *Tarion Warranty Corporation v. Boros*, 2011 ONCA 374, at paras. 20-22:

I begin with the observation of this court in *Ontario New Home Warranty Program v. Lukenda*. (1991), 2 O.R. (3d) 675 (Ont. C.A.), at p. 676;

The major purpose of the *Plan Act* is to protect purchasers of new homes by requiring that vendors and builders be screened for financial responsibility, integrity and technical competence. To assure public protection, it provides warranties, a guarantee bond and compensation in the event of loss by a purchaser resulting from dealings with a registrant. In order to effect this purpose of the *Plan Act*, a broad and liberal interpretation of its provisions is appropriate.

This court further observed in *Mandos v. Ontario New Home Warranty Program* (1995), 86 O.A.C. 382 (Ont. C.A.), at p. 383: “The *Ontario New Home Warranties Plan Act*, R.S.O. 1990, c. O-13 is remedial legislation and should be given a fair and liberal interpretation.”

The central issue in this case is whether the respondent meets the definition of “builder” as it is defined in the *ONHWP Act*. It would appear that this question has not arisen in this court before. However, as outlined above, the prior jurisprudence of this court with respect to the *ONHWP Act* requires that a broad and liberal approach be taken to interpreting the meaning of the term “builder” in order to reflect the remedial purpose of the *Act*.

[14] This approach requires an interpretation of “builder” that would cover persons who build a home but leave some work to be performed by the owner. Courts have

recognized that the *Act* contemplates that owners will often perform some work relating to a construction project: see, for example, *Ontario New Home Warranty Plan v. McPhail*, [1997] O.J. No. 4570, at para. 21 (C.J.), MacDonnell Prov. J. (discussing s. 13(2)(a) of the *ONHWP Act*, which provides that ONHWP warranties do not cover “work supplied by the owner”). Given the purpose of the *Act*, it is important not to deny such owners New Home Warranty Program coverage. To hold that a contractor who leaves some work to a homeowner is not a “builder” would therefore be inconsistent with the statutory scheme.

(2) The leading cases

[15] In several cases involving interpretation of the *ONHWP Act*, courts have articulated tests delineating when a person falls within the term “builder”.

[16] In *JRC Developments Inc. v. Tarion Warranty Corp.*, 2010 ONSC 6205, [2010] O.J. No. 5089, at para. 4 (Div. Ct.), Molloy J. said that whether a contractor is a “builder” involves consideration of “who was responsible for completing the essential elements of the home and who had control over the construction of the home.”

[17] In *R. v. Segal*, 2006 ONCJ 80, [2006] O.J. No. 1034, at para. 54 (C.J.), Reinhardt J. said:

In order to rationalize section 13(2)(a), which contemplates that an owner may provide some work or materials to the construction of the new home, with the definition of a “builder”, which refers to the provision of “all” work and materials, *the definition of a “builder” has been interpreted as meaning the provision of a significant portion of*

construction. A home is not taken outside of the purview of the *Act* only because the owner was responsible for some work or materials. [Emphasis added.]

[18] Applying these tests, a long line of decisions in the courts and before the Ontario Licence Appeal Tribunal and the Ontario Commercial Registration Appeal tribunal have held that the fact that an owner is responsible for the installation of water and septic systems does not mean that a contractor is not a “builder” under the *ONHWP Act*: see, for example, *Ontario (5319-ONHWP-Claim), (Re)* [2009] O.L.A.T.D. No. 363, aff’d *JRC Developments Inc. v. Tarion Warranty Corp., supra*; *R. v. Boissonneault* (14 July 2004), North Bay, unreported (C.J.); *Lam (Re)*, [1997] O.C.R.A.T.D. No. 92; *Ontario (2947-ONHWP-Claim)(Re)*, [2006] O.L.A.T.D. No. 54; and *Staples (Re)*, [2006] O.L.A.T.D. No. 175.

[19] The appeal judge was aware of this case law. He said that “[t]he existing cases have purported to try and get around the definition of ‘builder’” and “changed the definition” from the one in the statute.

[20] With respect, I do not agree. The interpretation of the definition of “builder” in cases like *McPhail*, *JRC Developments Inc.*, *Segal* and *Boissonneault* is, in my view, consistent with the consumer protection purpose of the *ONHWP Act*, the wording of the definition of the word “builder”, and a contextual reading of the definition with other provisions of the *Act*, such as s. 13(2)(a).

(2) Application to this case

[21] Finally, once the proper definition of “builder” is set down, its application in this case is easy. Mr. Kozy did almost all of the construction work on the new Kobylinski home. The contract listed 12 separate categories of exterior work and about 20 separate categories of interior work to be performed by Mr. Kozy. Mr. Kozy was responsible for constructing virtually the entire home. The only work outside Mr. Kozy’s responsibility related to the water and septic systems and two fireplaces. The work done by Mr. Kozy cost \$153,594. The water and septic system work cost \$12,854. By either yardstick, Mr. Kozy was the “builder”. The owners’ subsidiary participation in the construction project did not negate warranty coverage for them; nor did it remove the duty on Mr. Kozy to comply with the *ONHWP Act*.

E. DISPOSITION

[22] I would allow the appeal and order a new trial on both charges. I would not award costs.

RELEASED: December 16, 2011 (“M.R.”)

“J.C. MacPherson J.A.”

“I agree M. Rosenberg J.A.”

“I agree G.J. Epstein J.A.”