Court of King's Bench of Alberta

Citation: First National Financial Corporation v Letterio

Date:
Docket: 2001 00172
Registry: Calgary

Between:

First National Financial Corporation and First National Financial Limited Partnership by its general partner First Financial GP Corporation

Plaintiffs

- and -

Donato Letterio also known as Don Letterio, Scott Taylor and S.D. Taylor & Company, Real Estate Appraisers and Consultants Ltd. also known as S.D. Taylor & Company Ltd.

Defendants

Endorsement
of the
Honourable Justice A.L. Froese

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[1] This is an appeal from the summary dismissal of the Plaintiffs' claim against the Defendants by an Applications Judge in an oral decision delivered on April 19, 2023 (the "**Decision**").

[2] There are no significant facts in dispute. The main issue before me on appeal is narrow – whether the Applications Judge was correct in summarily dismissing the Plaintiffs' claim on the basis that there was no merit to the Plaintiffs' claim for losses caused by negligent representation due to the operation of a disclaimer clause in a mortgage financing appraisal report. While the

Applications Judge also dismissed the Plaintiffs' claim for breach of contract in her Decision. There was no appeal from that aspect of her Decision.

Background

[3] The relevant background is as follows.

[4] The Plaintiff, First National Financial Corporation ("**FNFC"**) is a publicly traded company listed on the Toronto Stock Exchange, in the business of mortgage lending and servicing. FNFC is the sole limited partner of the Plaintiff, First National Financial Limited Partnership ("**FNF LP**"), holding a 99.99% voting interest in FNF LP. FNFC derives all of its income from FNF LP. First National Financial GP Corporation ("**FNF GP Corp.**") is the sole general partner of FNF LP, owning a 0.01% interest in FNF LP[1]. FNF GP Corp. is wholly owned by FNFC.

[5] The Plaintiffs are parties to a Limited Partnership Agreement. FNFC and FNF GP Corp. are distinct corporations and registered as such.

[6] The Defendants are Donato Letterio, also known as Don Letterio, ("**Mr. Letterio**") and Scott Taylor ("**Mr. Taylor**") and S.D. Taylor & Company, Real Estate Appraisers and Consultants Ltd., also known as S.D. Taylor & Company Ltd. (collectively, "**S.D. Taylor**").

[7] Mr. Letterio is a real estate appraiser and a member of the Appraisal Institute of Canada. Mr. Letterio prepared a current market residential real estate appraisal (the "**Appraisal**") for a residential property in Calgary (the "**Property**"). Mr. Letterio was the individual who personally inspected and appraised the Property. S.D. Taylor was on FNFC's approved financial institution list, and Mr. Letterio worked for S.D. Taylor when preparing the Appraisal. The Appraisal is also signed by Mr. Taylor.

[8] The Appraisal for the Property was requested of Mr. Letterio by a mortgage broker to assist the proposed purchaser of the Property in securing a mortgage. The written request from the mortgage broker to Mr. Letterio sought the Appraisal for "First National". "First National" is not a legal entity or a registered trade name.

[9] While FNFC had at one point been the mortgage lending entity when the company was privately held, at the time of the Appraisal, FNF GP Corp. was the party that held any residential mortgages, and that advanced mortgage funds.

[10] Mr. Letterio gave evidence that he had prepared appraisals for FNFC over 100 times previously, and understood any request for an appraisal to "First National" to refer to FNFC. Mr. Letterio had stated that he was not familiar with the existence of FNF LP or FNF GP Corp. prior

[1] The parties agree that First National Financial GP Corporation, or FNF GP Corp., is incorrectly described as First Financial GP Corporation in the style of cause.

to this action being commenced. Mr. Letterio had been provided with express instructions in the past that the client for any appraisal for "First National" would always be FNFC, per an instructing memorandum entitled, "Appraisal Requirements" that he had received from a currently unknown source. Mr. Letterio also stated that in his 17 years as an appraiser, he had never been asked for an appraisal by either FNF LP or FNF GP Corp. The Applications Judge found that this general evidence was unchallenged, and it remains so.

[11] The Appraisal's effective date was March 6, 2017, and was addressed solely to FNFC, the limited partner, who was also listed as the "intended user". The Appraisal provided an "As Is" firm market value for the Property in the amount of $931,000 and an "As If 100% Complete" value of $955,000.

[12] The Appraisal's Ordinary Assumptions and Limiting Conditions contained the following clauses, which the parties agreed were standard terms:

> 1. This report is prepared at the request of the client and for the specific use referred to herein. It is not reasonable for any other party to rely on this appraisal without first obtaining written authorization from the client, the author and any supervisory appraiser, subject to the qualification in paragraph 11 below. 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. Diligence by all intended users is assumed.
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> …
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> 13. Written consent from the author and supervisory appraiser, if applicable, must be obtained before any part of the appraisal report can be used for any purpose by anyone except the client and other intended users identified in the report. Where the client is the mortgagee and the loan is insured, liability is extended to the mortgage insurer. Liability to any other party or for any other use is expressly denied regardless of who pays the appraisal fee. Written consent and approval must also be obtained before the appraisal (or any part of it) can be altered or conveyed to other parties, including mortgagees (other than the client) and the public through prospectus, offering memoranda, advertising, public relations, news, sales or other media.

[13] The covering letter dated March 9, 2018 under which the Appraisal was delivered was also addressed to FNFC. The letter noted that the Appraisal's Ordinary Assumptions and Limiting Conditions "affect the value conclusions, the use, and the intended user of the report. Please read carefully, and pay particular attention to all of these assumptions, conditions and special limitations."

[14] On March 24, 2017, a mortgage loan agreement was entered into between FNF GP Corp. and the purchaser of the Property. Mortgage funds of $744,000.00 were advanced to the purchaser by FNF GP Corp., secured against a mortgage registered on the Property. The title for the Property

reflected that the mortgagee was FNF GP Corp. FNFC did not enter into any contract with the purchaser, or lend money to the purchaser.

[15] Answers to undertakings supplied on behalf of the Plaintiffs confirmed that the underwriter for the mortgage loan had an opportunity to review the Appraisal before funds were advanced.

[16] The purchaser subsequently defaulted on the mortgage. FNF GP Corp. brought foreclosure proceedings in relation to the Property. FNFC was not a party to the foreclosure proceedings. The Property was sold for $652,000 (less than the mortgaged amount) in December 2018, resulting in a loss.

[17] On April 16, 2019, a historical appraisal of the Property was obtained by the Plaintiffs, also effective March 6, 2017, and it opined that the value of the Property was $685,000 on an "As Is" basis.

[18] The Plaintiffs brought an action against the Defendants on June 4, 2020, alleging breach of contract, negligence and negligent misrepresentation.

[19] The Defendants applied for summary dismissal of the Plaintiffs' claim pursuant to Rule 7.3 of the Alberta *Rules of Court*, Alta Reg 124/2010 in an application filed December 9, 2020.

The Decision

[20] The summary judgment application was heard April 4, 2023, and the Decision was delivered via oral reasons on April 19, 2023.

[21] The record before the Applications Judge was

- for the Defendants: Affidavit sworn by Mr. Letterio, sworn December 8, 2020 and filed December 9, 2020; Transcript of Questioning on Mr. Letterio's Affidavit on April 6, 2021; Answers to Undertakings of Mr. Letterio; and
- for the Plaintiffs: Affidavit of Douglas Farmer, sworn October 5, 2021 and filed November 10, 2021; Transcript of Questioning on Mr. Farmer's Affidavit on December 15, 2021; Answers to Undertakings of Mr. Farmer; Affidavit of Robert Inglis, sworn January 27, 2022 and filed February 2, 2022; Transcript of Questioning on Mr. Inglis's Affidavit; the Limited Partnership Agreement that was an exhibit to Mr. Inglis's Transcript; and Answers to Undertakings of Mr. Inglis.

[22] The Applications Judge found that the test for summary judgment was as stated in ***Weir-Jones Technical Services Incorporated v Purolator Courier Ltd***, 2019 ABCA 49 [***Weir-Bowen***], summarized by the Applications Judge as follows:

> The Court must consider whether it is possible to fairly resolve the dispute summarily, having regard to the state of the record and the issues. The applicant must demonstrate either "no merit" or "no defence" and no genuine issue requiring trial. If the applicant has met its burden, the respondent must put its best foot forward and demonstrate from the record that there is a genuine issue requiring trial. Ultimately, the Court must be left with sufficient confidence in the state of the record such that it is prepared to exercise its discretion to summarily resolve the dispute.

[23] The Applications Judge further noted that "the plaintiff cannot resist summary dismissal simply by raising a doubt but is not required to prove its case to defeat the application. It is sufficient for the plaintiff to show that the applicant has not proved its defence on a balance of probabilities, *Stefanyk v. Stevens*, 2018 ABCA 125, paragraph 16."

[24] The Applications Judge noted that the basis for the Defendants' application was that the Appraisal was prepared for the sole use of FNFC, but that it was FNF GP Corp. that advanced the mortgage loan and that neither FNF GP Corp. or FNF LP were entitled to rely on the Appraisal in the circumstances, either under the contract or in negligence.

[25] The Applications Judge found that there was no dispute that FNFC was the named client in the Appraisal. She rejected the argument of the Plaintiffs that they operated as one entity under "First National." She cited the above-quoted disclaimer clauses 1 and 13 of the Appraisal's Ordinary Assumptions and Limiting Conditions, which established that the Appraisal was to be for the use of only the defined "intended user", which was FNFC. She noted that the evidence established that the underwriter involved in the loan had an opportunity to review the Appraisal. She also noted that the evidence established that the employees of FNF GP Corp. would have been familiar with the above-noted terms in the Ordinary Assumptions and Limiting Conditions.

[26] She found as a fact that the Plaintiffs did not advise the Defendants that anyone other than FNFC would be relying upon the Appraisal, or request or receive permission for any other entity to rely upon the Appraisal. She further found that there was no evidence that any of the Plaintiffs alerted the Defendants to any change in their appraisal instructions, or that any reference to "First National" was intended as a reference to all three corporate entities. The invoice was directed to FNFC, and paid without comment.

[27] The Applications Judge rejected the Plaintiffs' argument that FNFC was acting as FNF GP Corp.'s agent in obtaining the Appraisal, noting that this argument was "surprising" as it would be contrary to the Limited Partnership Agreement and would eliminate the limited liability for the limited partner. In any event, there was no evidence of any such agency being disclosed to the Defendants and, again, no permission to use the Appraisal in this way.

[28] Given that there was no contractual privity, the only cause of action available to the Plaintiffs was negligence. The Applications Judge rejected that this was an avenue available to the

Plaintiffs, on the basis that "disclaimer in the appraisal operates to negate a duty of care." The Applications Judge found as follows:

> The duty of care has been restricted even in situations where the appraiser was put on notice that the client intended to assign its mortgage to a new mortgagee after closing (*Capital Direct*) and where the appraiser did the appraisal for a broker with a lender to be determined (*Nussbaum*). No duty was found to be owed to the new mortgagee or the subsequently identified lender in those cases.
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> The evidence is clear that no one from First National Financial GP Corporation or First National Financial Limited Partnership ever requested or advised any of the defendants that they would be relying on Mr. Letterio's appraisal or received permission to do so. In the particular facts and circumstances here, reliance by First National Financial GP Corporation in the face of a disclaimer that is emphasized in the report and the covering letter is unreasonable.
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> In short, our courts and those of other provinces have consistently applied such provisions as contained in the appraisal at issue such that other, even related parties are not owed a duty and may not reasonably rely on the appraisal absent permission from the appraiser to do so or special circumstances which have not been argued to exist in this case.

[29] The Applications Judge accordingly granted the Defendants' application for summary judgment and dismissed the Plaintiffs' action.

Issues on Appeal and Standard of Review

[30] The issue on appeal is whether the Applications Judge was correct in summarily dismissing the Plaintiffs' claim for negligent misrepresentation against the Defendants on the basis of the disclaimer negating a duty of care to the party holding the mortgage, FNF GP Corp.

[31] An appeal from a decision of an Applications Judge is governed by Rule 6.14 of the Alberta *Rules of Court*. The parties agree that the standard of review from a decision of an Applications Judge is correctness: ***Bacheli v Yorkton Securities***, 2012 ABCA 66 at para. 30.

[32] The appeal is on the record that was before the Applications Judge. No additional evidence was adduced by any of the parties in support of this appeal.

[33] The Plaintiffs argue that the Decision was incorrect on several grounds. First, that the Applications Judge misstated the test for duty of care in negligent misrepresentation. Second, that the Applications Judge failed to consider reasonable reliance. Third, that the Applications Judge erred in determining that FNFC did not suffer a loss.

[34] The Defendants argue that the Decision was correct, and that the test for summary judgment was met.

Analysis

Test for Summary Judgement

[35] The Applications Judgment correctly summarized the test for summary dismissal as being that as set out in ***Weir-Jones*** at para 47. The parties do not take issue with the test as set out by the Applications Judge. The essential aspect is that the applicant for summary dismissal must establish, with reference to the record and issue, on a balance of probabilities that there is no merit to the respondent's claim, and no genuine issues before the Court that require trial. If the resisting party, after putting "its best foot forward", does not demonstrate a genuine issue requiring trial, summary disposition is not available.

[36] As noted in the Defendants' brief of argument, "the outcome does not have to be obvious" and the Court may make "contested findings of material facts": ***Hannam v Medicine Hat School District No 76***, 2020 ABCA 343, citing ***Weir-Jones***. The Court must, however, have sufficient confidence in the state of the record to summarily dismiss the action.

Did the Applications Judge Misstate the Test for Duty of Care in Negligent Misrepresentation or Fail to Consider Whether Reliance was Reasonable?

[37] The test for whether there has been negligent misrepresentation is set out in ***Queen v Cognos Inc***, [1993] 1 SCR 87 at 110 [***Cognos***]:

1. there must be a duty of care based on a "special relationship" between the representor and the representee;
2. the representation in question must be untrue, inaccurate or misleading;
3. the representor must have acted negligently in making said misrepresentation;
4. the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and
5. the reliance must have been detrimental to the representee in the sense that damages resulted.

[38] This is a sequential test. If there is no duty of care, one does not embark upon the evaluation of the other aspects of the test: ***Nussbaum v Hall***, 2022 ABQB 388 [***Nussbaum***] at para 56.

[39] The main issue before me, and that was before the Applications Judge, was whether the Defendants owed a duty of care to any Plaintiffs other than FNFC, the recipient of the Appraisal, and how the disclaimer impacted the duty of care as a whole.

[40] The Plaintiffs argued that a disclaimer clause does not necessarily negate a duty of care, and is only one factor in the two-pronged test for establishing a duty of care as set out in ***Hercules Management Ltd v Ernst & Young***, [1997] 2 SCR 165 [***Hercules Management***], at para 20:

> 1. is there a sufficiently close relationship between the parties … so that, in the reasonable contemplation of the [defendant], carelessness on its part might cause damage to that person? If so,
> 2. are there any considerations which ought to negative or limit (a) the scope of the duty and (b) the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise?

[41] The Plaintiffs argue that the Applications Judge did not embark upon this analysis at all and allowed the existence of a disclaimer to overwhelm the analysis of whether there was a duty of care.

[42] The Plaintiffs also submit that FNFC, the general partner FNF GP Corp, and the limited partner FNF LP are, in substance, one company. The Plaintiffs argue that the appraisal was prepared for the benefit of all of them, and that the appraisal was intended to be relied upon by FNF GP Corp., which was the actual lender.

[43] As noted by the Plaintiffs, ***Hercules Management*** (at para 24) sets out factors to consider whether a "sufficiently close relationship" exists:

> (a) the defendant ought reasonably to foresee that the plaintiff will rely on his or her representation; and
> (b) reliance by the plaintiff would, in the particular circumstances of the case, be reasonable.

[44] The Plaintiffs then note the following as indicia of reasonable reliance, and say that these "will indicate a prima facie duty of care" (***Hercules Management*** at para 43):

> (1) The defendant had a direct or indirect financial interest in the transaction in respect of which the representation was made.
> (2) The defendant was a professional or someone who possessed special skill, judgment, or knowledge.
> (3) The advice or information was provided in the course of the defendant's business.
> (4) The information or advice was given deliberately, and not on social occasion.
> (5) The information or advice was given in response to a specific enquiry or request.

[45] The Plaintiffs state that four of the five factors apply to them. The Defendants disagree, and state that the factors above may establish *prima facie* reliance, but not a *prima facie* duty of care.

[46] However, a case not referenced by the Plaintiffs and that specifically deals with a disclaimer cause is ***Kokanee Mortgage MIC v Burrell,*** 2018 BCCA 151 [***Kokanee Mortgage***]. ***Kokanee Mortgage*** involved a mortgage company which loaned money to a business based on an allegedly negligently prepared appraisal. The borrower defaulted on the loan, and the mortgage company sued the appraiser for negligent misrepresentation. The appraisal was prepared for the borrower, rather than the lender, and contained a clause excluding liability against any other party relying on the appraisal unless the appraiser consented. The appeal addressed whether the action for negligent misrepresentation should be summarily dismissed on account of the limitation of liability clause.

[47] In ***Kokanee Mortgage***, the British Columbia Court of Appeal noted that regardless of whether the "five indicia of reasonable reliance are satisfied does not mean that a duty of care has been established": para 24, citing ***Micron Construction Ltd v Hong Kong Bank of Canada***, 200 BCCA 141 [***Micron Construction***] at para 93. Given the existence of the disclaimer clause, the Court asked, "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?": para 24, citing ***Micron Construction*** at para 93. The Court noted the failure of the plaintiff to seek consent for relying on the appraisal, and found that "[t]o treat Kokanee's reliance as reasonable in these circumstances would be to permit Kokanee, through its otherwise reasonable reliance, unilaterally to impose a practically non-disclaimable duty on Coast Appraisal": para 38. Given the clear and unambiguous wording of the disclaimer, it was unreasonable for the mortgage company to rely on the appraisal: para 40.

[48] The Plaintiffs say that reasonable reliance, in addition to being the fourth consideration in the negligent misrepresentation test, is also part of the analysis of whether there is a duty of care. The Defendants says that the totality of the case law has established that "reliance" is subsumed within the first step of the "special relationship" analysis when determining whether there was a duty of care.

[49] The Plaintiffs' and Defendants' positions are both defensible. When assessing a negligent misrepresentation claim, reasonable reliance is considered when evaluating whether there is a *prima facie* duty of care in the first step, and whether there is a sufficient causal link between the negligent misrepresentation and the plaintiff's loss in the fourth step: Lewis N Klar, *Remedies in Tort* (Toronto: Thomson Reuters, 1988) (loose-leaf updated 2025), ch 19 at 9. The courts and secondary sources have not always been clear about whether these considerations interact or should be considered separately: Lewis N Klar, *Remedies in Tort,* ch 19 at 9. Courts often evaluate

reasonable reliance as a combined inquiry that considers whether the plaintiff reasonably relied on the defendant's misrepresentation: Lewis N Klar, *Remedies in Tort,* ch 19 at 9.

[50] Regardless of what approach is taken, the parties agree that the Court must consider reasonable reliance as part of the duty of care analysis.

[51] The Plaintiffs argue that the Applications Judge failed to engage in an analysis of negligent misrepresentation, rendering her Decision incorrect. They argue that instead of stating and applying the negligent misrepresentation test, she instead simply gave full effect to the disclaimer. The Plaintiffs submit that on a proper analysis of the law of negligent misrepresentation, there was a duty of care owed to all Plaintiffs, and the Plaintiffs' reliance on the Appraisal was reasonable.

[52] I do not agree that the Applications Judge did not address reasonable reliance in the Decision. While the Applications Judge did not expressly set out the test for establishing a duty of care, the components are there.

[53] On pages 4-5 of the transcript, the Applications Judge addresses evidence to evaluate whether the Plaintiffs and Defendants had a "sufficiently close relationship", which includes the indicia of reasonable reliance. This evidence includes evidence from Mr. Letterio, where he stated that he had prepared over 100 appraisals for FNFC, and that he was instructed to understand that a request from "First National" for an appraisal meant that the appraisal was for FNFC. Mr. Letterio was not familiar with FNF LP or FNF GP Corp. until this action commenced. Mr. Letterio stated that in his 17 years as an appraiser, he had not been asked to provide an appraisal by either FNF LP or FNF GP Corp. Additionally, the covering letter was addressed to FNFC and FNFC was listed as the Appraisal's "intended user".

[54] In addition, the Applications Judge did expressly consider reliance at page 7:

> The evidence is clear that no one from First National Financial GP Corporation or First National Financial Limited Partnership ever requested or advised any of the defendants that they would be relying on Mr. Letterio's appraisal or received permission to do so. In the particular facts and circumstances here, reliance by First National Financial GP Corporation in the face of a disclaimer that is emphasized in the report and the covering letter is unreasonable. [emphasis added]

[55] The Supreme Court of Canada in ***Hercules Management*** expressly notes that the indicia of reliance must be considered at stage 1 of the test to establish whether there was a duty of care: paras 24-29, 43. However, the Court in ***Hercules Management*** did not factor in a disclaimer clause when evaluating whether there was a duty of care. Subsequent case law has shown that even if the ***Hercules Management*** indicia of reasonable reliance are satisfied, an unambiguous disclaimer clause can render reliance unreasonable: ***Kokanee Mortgage*** at para 40.

[56] The Plaintiffs cite ***Micron Construction*** for the proposition that a disclaimer clause, on its own, does not negate the duty of care. However, ***Micron Construction*** is distinguishable from this matter.

[57] In ***Micron Construction***, a bank made a negligent misrepresentation that financing for a construction project had been secured, when this was not the case. A subcontractor relied on a letter from the bank and performed work, even though the letter contained a disclaimer clause which stated "[t]his bank reference is given at the request of the captioned and without any responsibility on the Bank and its signing officers": at para 13. When the subcontractor was not paid, it contacted the bank which provided further assurances that the financing was in place, which was false.

[58] On the facts, the Esson JA for the majority found it was reasonable for the subcontractor to rely on the bank's assurances: at para 99. A factor that was "critical to that conclusion" was that, to the bank's knowledge, the plaintiff had no alternative source of information to determine whether the project had financing: at para 99. In this same paragraph, Esson JA distinguishes ***Micron Construction*** from a "more typical situation" where a plaintiff could seek out information from another source: at para 99.

[59] The Applications Judge acknowledged that this was a case where FNF GP Corp. could have obtained the Appraisal itself or received permission to rely on it. FNF GP Corp. was not relying on the Appraisal as its only available source of information.

[60] In ***Kokanee Mortgage***, the Court found that "Micron stands for the proposition that whether a duty of care has been established must take into account a disclaimer clause even where all other indicia of reasonable reliance have been satisfied": para 25. I agree with this interpretation of ***Micron Construction***. As such, the Applications Judge was not incorrect when she found that the disclaimer clause operated to negate the duty of care in this case, after evaluating the other factors for reasonable reliance as part of the test to establish whether there was a sufficiently close relationship between the parties.

[61] The Applications Judge specifically accepted the reasoning in and application of the ***Capital Direct*** line of cases to the facts in this case. ***Capital Direct*** was decided by an Applications Judge who granted summary judgment dismissing the action (***Capital Direct Lending Corp v Howard & Co Real Estate Appraisers and Consultants Inc***, 2015 ABQB 410 [***Capital Direct AJ***]). The appeal from the decision of the Applications Judge was dismissed by this Court (2016 ABQB 545 [***Capital Direct ABQB***]), and by the Court of Appeal on further appeal (2018 ABCA 26 [***Capital Direct ABCA***]).

[62] In that case, the defendant appraiser prepared an appraisal for the use of "Capital Direct", without specifying whether the appraisal was for Capital Direct Lending Corp. or Capital Direct Income Trust. The lending corporation registered the mortgage, and conveyed the mortgage to the

income trust shortly after. The lending corporation had notified the appraiser that it was going to assign the mortgage to another company after it secured financing. The borrower defaulted on the mortgage, and the lending corporation and income trust sued the appraiser on the basis that the appraisal was materially incorrect.

[63] The appraisal in ***Capital Direct*** contained an express clause which prevented third parties from relying on the appraisal without express permission. Additionally, the appraisal itself was time limited. There was no evidence that the appraiser provided authorization for the income trust to use or rely on the appraisal.

[64] The Applications Judge found that the appraisal's limiting words were clear to show that the appraisal was only to be relied upon by the lending corporation as the client. The appraiser therefore did not owe a duty of care to the income trust in ***Capital Direct***.

[65] The Alberta Court of Appeal held that the income trust did not have a cause of action in negligence due to the contractual language which required explicit consent for a third party to use the appraisal: ***Capital Direct ABCA*** at para 5.

[66] In the case at bar, the Applications Judge relied on ***Capital Direct*** in noting that "[t]he duty of care has been restricted even in situations where the appraiser was put on notice that the client intended to assign its mortgage to a new mortgagee after closing". She stated that the Plaintiffs chose to organize their money lending operation by using distinct corporate entities, and that other parties that deal with the Plaintiffs are entitled to rely on this fact. It is noteworthy that the Appraisal in this matter contains the same limitation clause as in ***Capital Direct***.

[67] The Applications Judge also referred to ***Nussbaum***, which is a decision I find particularly instructive for how a disclaimer clause should be considered in a negligent misrepresentation analysis. ***Nussbaum*** is a recent decision of this Court which provides an overview of negligent misrepresentation in the property appraisal context and applies the law to a similar factual situation.

[68] ***Nussbaum*** is an appeal of an Applications Judge's decision which summarily dismissed the Plaintiff's negligence claims. The Plaintiffs were private lenders and investors, who approached the Defendant appraisers through a mortgage brokerage to prepare a property appraisal for a mortgage refinancing. The appraisal was prepared for the mortgage brokerage as the client. The appraisal's intended user was not stated, rather the appraisal provided "Lender to be Determined." The issue was whether the limitation of liability clauses in the covering letter and appraisal itself negated the Plaintiffs' argument that the private lenders could rely on the appraisal.

[69] The appraisal in ***Nussbaum***, similarly to ***Capital Direct***, contains the same limiting language as in clauses 1 and 13 of the Appraisal in this case. In ***Capital Direct***, the appraisal specified that it was only for the use of the intended user.

[70] Justice Loparco reviewed ***Hercules Management***, ***Micron Construction***, ***Kokanee Mortgage***, and ***Capital Direct*** as part of her Reasons. Justice Loparco also considered ***0694841 BC Ltd v Alara Environmental Health and Safety Limited***, 2022 BCCA 67 [***Alara***].

[71] The defendant in ***Alara*** had prepared an environmental assessment report for a property transaction, which incorrectly concluded that the property was not contaminated. The corporation who requested the report assigned its interest to another company, who relied on the report. Both companies were run by the same individual. Even in this case where the companies were closely related, the British Columbia Court of Appeal upheld the summary dismissal decision as the report contained a clear exclusionary clause denying liability to any third party who relies on the report.

[72] Justice Loparco found (at para 82):

> … the jurisprudence is clear that no duty of care is owed by appraisers where there is an unambiguous disclaimer for use and reliance by third parties or outside the effective date included in an appraisal unless, as in *Micron Construction*, there are no readily available alternatives, and the defendant is aware of the reliance by the party in question. [emphasis added]

[73] In ***Nussbaum***, Justice Loparco found that the defendant expressly limited the duty of care in the appraisal. Even though the appraisal stated "Lender to be Determined", this limited the class of persons who could rely on the report, and the lender would have needed to seek the defendant's approval to rely on the appraisal, in accordance with its terms. Justice Loparco found that as the lender was yet to be determined, the client as referenced in the covering letter was the mortgage brokerage, and the clear exclusionary clauses prevented other parties from claiming that they were owed a duty of care. ***Nussbaum*** further confirms that the disclaimer clause is properly considered in the duty of care analysis.

[74] To conclude, even though the Applications Judge did not explicitly set out the test for duty of care in negligent misrepresentation, it is clear that she conducted an analysis of the first branch of the test to consider whether the parties had a sufficiently close relationship to ground a duty of care. As part of this analysis, the Applications Judge considered the two elements of a "sufficiently close relationship" as established in ***Hercules Management***, including whether the Defendants ought reasonably to foresee that the Plaintiffs will rely on their representation, and whether it would be reasonable for the Plaintiffs to rely on the representation in the circumstances of the case. Based on her analysis, including a consideration of the disclaimer clause, the Applications Judge found that the Defendants did not owe a duty of care to FNF GP Corp.

[75] I have arrived at the same conclusion on my review of the record and the law.

Did the Applications Judge Err in Determining that FNFC did not Suffer a Loss

[76] The Plaintiffs state that the Applications Judge erred by finding that FNFC did not suffer a loss based on the negligent misrepresentation in the Appraisal.

[77] The Plaintiffs emphasized that FNFC, as the party the Appraisal was addressed to, was owed a duty of care and that it was the party that ultimately suffered a loss from the negligently prepared Appraisal, as FNFC earns all of its income from the limited partnership.

[78] The Defendants did not directly address the issue of loss in their written brief, though it was addressed in oral argument. The Defendants' position is that any loss was allocated to FNFC after the damages were incurred, the Plaintiffs did not present evidence that FNFC suffered a loss, and that compensating FNFC for a loss would not give effect to the fact that FNFC and FNF GP Corp. are separate legal entities.

[79] The Plaintiffs allege that the Applications Judge "erred in determining that FNFC did not suffer a loss." With respect, I find that this is not the conclusion that the Applications Judge reached.

[80] In oral argument in this hearing, the Plaintiffs stated that they raise the issue of loss in part to distinguish the ***Capital Direct*** line of cases from the facts in this matter.

[81] The Applications Judge explained that ***Capital Direct*** involved a lender that did not suffer a loss, and adds (at page 6):

> But Justice Burrows's comments at paragraph 28 of his decision below upheld on appeal are nonetheless apropos. Here, the plaintiff organized their money lending operation using distinct entities – with distinct roles in a limited partnership structure. Parties dealing with the plaintiffs are entitled to rely on the "separation and exclusivity" of those entities. [emphasis added]

[82] The Applications Judge's use of the word "but" implies that the Applications Judge is herself distinguishing the facts of ***Capital Direct*** from this case, and is instead relying on ***Capital Direct*** for the paragraph where Justice Burrows explains that a defendant is entitled to rely on the separation and exclusivity of different corporate entities. The Applications Judge appears to have been referring to ***Capital Direct*** for this principle, rather than for its findings of fact.

[83] Further, the Applications Judge did not make a finding that FNFC did not suffer a loss. In fact at page 5, the Applications Judge states that "the reason that [FNFC] suffered a loss is because someone else – a third party unknown to the appraiser – relied on the appraisal to advance a mortgage loan". The Applications Judge did not dispute the Plaintiff's position that FNFC suffered a loss, but rather found that any loss was not recoverable in this action as the Plaintiffs could not claim that FNFC had suffered a loss to get around the clear disclaimer clause in the agreement.

[84] Regardless of whether FNFP suffered a loss, it is not evident that FNFP met the first stage of the ***Cognos*** test for negligent misrepresentation. There is no indication that FNFP itself relied on the Appraisal at all.

[85] I find that the Applications Judge did not err in determining that FNFC cannot recover for any loss it suffered through FNF GP Corp.'s reliance on the Appraisal.

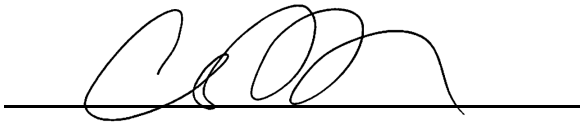
Conclusion

[86] I dismiss the appeal of the Plaintiffs and confirm the summary dismissal of the Action.

Costs

[87] If the parties cannot agree on the issue of costs arising from these Reasons, they have leave to contact me for further direction on written submissions on the issue of costs.

Heard on the11th day of March, 2025.
Dated at the City of Calgary, Alberta this 10th day of December, 2025.



A.L. Froese
J.C.K.B.A.

Appearances:

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Joel Franz
for the Defendants