

Underground Storage Tank/Industrial Property Sale: Oregon Appellate Court Addresses Fraudulent Misrepresentation Claim



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The Court of Appeals of Oregon (“Court of Appeals”) addressed in an April 24th Opinion an issue arising out of the sale of an industrial property. See *Gunner, LLC v. Miller*, 2024 WL 1756829.

The question involved whether the seller of the property fraudulently misrepresented the existence of an underground storage tank (“UST”) to the buyer.

Gunner, LLC (“Plaintiff”) purchased an industrial property from John D. Miller (“Defendant”).

The Plaintiff subsequently discovered an active UST beneath a concrete planter box. Plaintiff, at its expense, decommissioned the UST.

Plaintiff filed a breach of contract action against Defendant to recover the decommissioning costs. It argued that Plaintiff misrepresented the existence of the UST. The trial court found in favor of Defendant.

Plaintiff argued on appeal that the trial court erred by granting Defendant’s Motion for Directed Verdict.

In addressing Plaintiff’s appeal, the Court of Appeals noted that the Defendant ordered an environmental site assessment (“ESA”) of the property in 2004. The ESA indicated that an abandoned UST and fuel pump island were present.

The property owner prior to Defendant had indicated that the UST had been decommissioned. Further, soil tests are stated to have determined that no contaminants in the vicinity of the UST were present. Therefore, Defendant purchased the property and subsequently installed two concrete planter boxes directly above the fuel pump island and UST as part of a landscape project.

The Plaintiff hired an environmental assessment firm to conduct an ESA. The firm asked that the Defendant fill out an environmental site assessment questionnaire. Relevant questions and answers included:

“[Question]: Are there currently any registered or unregistered storage tanks (above or underground) located on the Property?”

“[Answer]: No.

“[Question]: Do you have any prior knowledge that there have been previously, any registered or unregistered storage tanks (above or underground) located on the Property?”

"[Answer]: Yes.

"[Question]: Are there currently any vent pipes, fill pipes, or access ways indicating a fill pipe protruding from the ground on the Property or adjacent to any structure located on the Property?"

"[Answer]: Yes.

"[Question]: Do you have any prior knowledge that there have been previously, any vent pipes, fill pipes, or access ways indicating a fill pipe protruding from the ground on the Property or adjacent to any structure located on the Property?"

"[Answer]: No."

The Defendant also provided the prior ESA and soil test results to the firm conducting the ESA. Therefore, the UST was identified as decommissioned-in-place in the general vicinity of the planter boxes.

Plaintiff subsequently removed the planter boxes and discovered a metal pipe that was part of the fuel island connected to the UST. In addition, the UST had not actually been decommissioned.

The Plaintiff argued in its breach of contract action that Defendant engaged in a fraudulent misrepresentation because of its failure to disclose the existence of the UST in the questionnaire responses and concealment of the pipe beneath the planter boxes. Trial testimony included the Plaintiff and its business manager testifying that based on a review of the environmental reports they were aware of the existence of the UST in the general location at the time of purchase. However, they testified that it was assumed to have been decommissioned.

The Plaintiff argued on appeal that the placement of the planter boxes over the vicinity of the UST triggered a duty on the Defendant's part to fully disclose the UST and its current status. This is stated to be based on the insufficiency of the disclosure in that the UST had not been decommissioned.

Defendant responded that the disclosure of the prior ESA and soil test indicated the existence and location of the UST and provided what information were in hand regarding its status.

The Court of Appeals rejects the Plaintiff's claim concluding that it had actual knowledge of the existence of the UST. Therefore, it was not deemed reasonable for the Plaintiff to rely on the representations made in response to the questionnaire.

The Opinion notes:

. . . To be sure, Miller's answers raised some uncertainty about whether there were currently any USTs on the property, and neither Point Source nor Gunner would have been able to visibly locate the UST during their site inspections because the metal pipe was concealed by the planter boxes. However, Miller made sufficient disclosures related to the concealed UST.

The Court of Appeals notes the Defendant provided the prior ESA to Plaintiff's environmental consultant which identified an abandoned UST beneath the pump island. Plaintiff's agent was determined to have known that the UST existed on the property at the time of purchase.

A copy of the Opinion can be downloaded [here](#).