COURT OF APPEAL FOR ONTARIO

CITATION: Grandfield Homes (Kenton) Ltd. v. Chen, 2024 ONCA 236
DATE: 20240404
DOCKET: COA-23-CV-0722

Roberts, George and Monahan JJ.A.

BETWEEN

Grandfield Homes (Kenton) Ltd.

Applicant (Appellant)

and

Xiao Lu Chen

Respondent (Respondent)

Michael Doyle and Sarah Jamshidimoghadam, for the appellant

Spencer Toole, for the respondent

Heard: March 25, 2024

On appeal from the judgment of Justice Markus Koehnen of the Superior Court of Justice, dated May 23, 2023, with reasons reported at 2023 ONSC 3058.

REASONS FOR DECISION

[1] This appeal arises out of a failed residential real estate transaction between the parties. On May 5, 2017, the parties concluded an agreement of purchase and sale, in which the respondent agreed to purchase a home to be built by the appellant for $3,350,000. The respondent paid several deposits totalling $502,500. The closing date was scheduled for January 2, 2019; it was extended twice at

the respondent's request, first until January 14, 2019, and then again until February 20, 2019. On February 19, 2019, the respondent advised that she was refusing to close the transaction. The respondent alleged that the appellant misrepresented the square footage and finishings of the house, which she discovered when viewing the finished house in early February 2019.

[2] The appellant commenced an application to obtain declaratory relief that the respondent breached the agreement of purchase and sale and that it is entitled to retain the deposits paid by the respondent. In para. 3 of its application factum, the appellant requested, as further declaratory relief, that it was entitled to claim damages beyond the deposits. It requested that the court order a trial of the issue of those additional damages:

> The Applicant vendor now applies pursuant to Rule 14.05 (3)(d) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the "**Rules**") for a determination of its rights under the purchase agreement. It seeks to have the Court declare that the contract was breached by the purchaser; that, as a result, the purchaser is not entitled to return of her deposits, which the vendor is entitled to retain; and that the vendor is entitled to claim further damages flowing from that breach of contract, which it asks this Court to direct to trial. [Bolded emphasis in original; underlined emphasis added.]

[3] The application judge found that neither of the respondent's alleged misrepresentations gave her the right to breach the agreement and declared that she was in breach. He also ordered that the appellant shall retain the deposits. The application judge declined to grant the order that there be a trial of the issue

of damages beyond the forfeited deposits, finding that 1) this relief was not in the notice of application or contained in the appellant's evidence; and 2) a trial of this issue would bifurcate the issue of damages, result in a multiplicity of proceedings, and cause potential unfairness to the respondent.

[4] The appellant submits that the application judge erred in finding that: 1) the appellant's request for a trial on damages was not sufficiently pleaded; 2) a trial on damages would result in a bifurcation and multiplicity of proceedings; and 3) there would be any prejudice to the respondent.

[5] We are not persuaded that the application judge made any error in his dismissal of the appellant's request for a trial on damages.

[6] We start with the well-established principles that, absent amendment, lawsuits are to be "decided within the boundaries of the pleadings," and the parties are entitled to have a resolution of their dispute based on the pleadings: *Rodaro v. Royal Bank of Canada* (2002), 59 O.R. (3d) 74, at para. 60; *Mihaylov v. 1165996 Ontario Inc.*, 2017 ONCA 116, 134 O.R. (3d) 401, at para. 123. The rationale underlying those principles is fairness: the responding party is entitled to know the case to be met.

[7] We note that the appellant's claims for a declaration that they are entitled to seek additional damages and an order of a trial of that issue must be specifically pleaded. Subsections (a) and (b) of r. 38.04 of the *Rules of Civil Procedure*,

R.R.O. 1990, Reg. 194, require that the notice of application "shall state" both (a) "the precise relief sought," and (b) "the grounds to be argued". This would include addressing why the appellant is entitled to claim relief with respect to the additional damages.

[8] This court has held that the pleadings in an application include the supporting affidavits: *Voreon Inc. v. Matas Management Services Inc.*, 2023 ONCA 745, at para. 55; *1100997 Ontario Limited v. North Elgin Centre Inc.*, 2016 ONCA 848, 409 D.L.R. (4th) 382, at para. 17; see also *Angeloni v. Estate of Francesco Angeloni*, 2021 ONSC 3084, at paras. 27-29. However, there is no mention of any claim for additional damages in the appellant's notice of application or supporting affidavit materials.

[9] We are not persuaded by the appellant's submission that the claim for additional damages was implicitly included or necessarily ancillary to the existing pleading that the respondent breached the agreement of purchase and sale. On the most generous and liberal interpretation, the plain meaning of the notice of application belies this suggestion. The only express pleading in the notice of application that concerned monetary damages is the appellant's request to retain the deposits as a consequence of the respondent's breach. If the appellant was seeking additional damages as a consequence of the respondent's breach, this claim should have been pleaded and particularized so that the respondent would understand the case she had to meet. To hold otherwise would render

meaningless the requirement under r. 38.04 of the *Rules* that "the precise relief sought" be stated.

[10] Moreover, the appellant did not disclose in its supporting affidavit materials or during its affiant's cross-examination that it was claiming damages beyond the respondent's deposits or that it was seeking a trial of the issue of those damages in the application. On the contrary, in the course of the October 9, 2019 cross-examination of its affiant, Barry Zhang, counsel for the respondent directed a question to appellant's counsel concerning the appellant's request for damages. Appellant's counsel confirmed that, in the application, the appellant was not seeking monetary damages beyond the respondent's deposits, as follows:

> [RESPONDENT'S COUNSEL]: Then this is a question for you [appellant's counsel]. You are seeking to keep the deposit. That's the extent of the damages that you are after?
>
> [APPELLANT'S COUNSEL]: No.
>
> [RESPONDENT'S COUNSEL]: What damages are you after?
>
> [APPELLANT'S COUNSEL]: In this application? In this application, the relief claimed is as stated in the Notice of Application which we can look at if you'd like.
>
> [RESPONDENT'S COUNSEL]: Let's do that.
>
> [APPELLANT'S COUNSEL]: Okay.
>
> …
>
> [RESPONDENT'S COUNSEL]: So am I correct in saying that the relief sought is partially an entitlement to retain

> the deposit paid by Ms. Chen at 1(b) on that page of your Notice of Application?
>
> [APPELLANT'S COUNSEL]: It is correct as stated.
>
> [RESPONDENT'S COUNSEL]: Is [*sic*] there any other monetary damages that you are seeking?
>
> [APPELLANT'S COUNSEL]: Well, let's have a look. No.[1]
>
> [Emphasis added.]

[11] Counsel for the appellant submits that the transcript is ambiguous and that his answers were not dispositive of the question being asked. We disagree. While counsel's initial answer on the cross-examination suggests that additional damages were being sought, counsel then explicitly clarified that those damages were not being sought in the application nor were they set out in the notice of application that appellant's counsel was looking at in response to the questions. The confirmation that a claim for additional damages was not pleaded in the notice of application disposes of the appellant's submission that this relief should be inferred from any of the subsections of para. 1 of the notice of application, which outlined the prayer for relief, including the basket clause. Its counsel's answers were given on behalf of and bind the appellant; there is no evidence that the appellant sought to correct or amend its counsel's answers: *Di Millo v. 2099232*

[1] The omitted portion of the transcript was a request from the affiant for water.

Ontario Inc., 2018 ONCA 1051, 430 D.L.R. (4th) 296, at paras. 61-62, leave to appeal refused, [2019] S.C.C.A. No. 55.

[12] Importantly, the appellant never sought to amend its pleadings, either before or at the hearing of the application. The appellant could not amend its notice of application by simply including the relief in its factum: *Primont (Castelmont) Inc. v. Friuli Benevolent Corporation*, 2023 ONCA 477, 484 D.L.R. (4th) 240, at para. 74, particularly absent any affidavit evidence in support of the claim for relief. As noted above, in its factum, the appellant framed its request as further declaratory relief that it is entitled to pursue further damages, which it asked to proceed to trial. This had to be pleaded.

[13] Moreover, it is by no means certain that the amendment would have been granted had the appellant sought to amend its notice of application. To succeed, the appellant would have been required to include affidavit evidence explaining the withdrawal of the position given at its affiant's cross-examination and some factual basis for its claim for damages beyond the forfeited deposits. Furthermore, it would have been obliged to meet the respondent's potential arguments of non-compensable prejudice, including the lateness of the requested amendment, the change of litigation strategy, and the potential expiry of a limitation period.

[14] The appellant also argued that the application judge did not consider the unfairness to the appellant in denying its claim for this relief. We are not persuaded by the appellant's argument of unfairness or prejudice to it in light of the circumstances of this case. The application judge granted the appellant the relief that it had pleaded. The appellant chose to frame its claim in the way that it did when its notice of application was issued in 2019, which was confirmed during its affiant's cross-examination. It had four years to amend its pleadings or to file affidavit evidence that gave rise to the additional damages claim that it now wishes to assert. It also had the opportunity at the case conference before Morgan J. in August 2022, to agree to the respondent's request for a trial or at least to ask at that point for a trial of the issue of additional damages. It did not do so. Rather, it sought to proceed with the hearing of its application. While the application judge certainly had the discretion to order a trial of an issue, there had to be an issue to order to trial. In this case, there was simply no issue to order to trial.

[15] For completeness, we turn to the second ground of appeal. We agree with the application judge's assessment that ordering the trial of the additional damages would result in a bifurcation of the issue of damages, an unnecessary multiplicity of proceedings, and potential prejudice to the respondent.

[16] The appellant has not asked that we set aside the application judge's entire judgment, let alone his order that the deposits are forfeited. As a result, the issue of damages would be bifurcated and could result in inconsistent findings with

respect to the quantum of the appellant's damages. Two examples serve to illustrate this point. First, as the application judge noted, if the appellant incurred a substantial loss in the resale of the property, this could provide evidentiary support for the respondent's submission that the appellant had misrepresented the quality of the home's finishings. If this submission were accepted, a reduction of the appellant's claimed damages could result, potentially below the amount of the forfeited deposits ordered by the application judge. Second, if it were established at trial that the appellant had failed to mitigate its damages, this failure could result in a finding that the appellant was not entitled to any damages or damages in an amount less than the forfeited deposits, again in contrast with the application judge's determination with respect to the deposits.

[17] We turn finally to the question of prejudice.

[18] Allowing the bifurcation of the issue of damages gives rise to an unnecessary multiplicity of proceedings. Proceeding in this way squanders scarce judicial resources and prejudices the efficient and due administration of justice. While the bifurcation of issues may, in some cases, be a sensible way to proceed, there was no reason why the issue of damages could not be determined in one proceeding in this case.

[19] Moreover, there is potential prejudice to the respondent. The respondent was entitled to respond to the case she had to meet as framed in the appellant's

pleadings and could very well have responded differently had the appellant pleaded its claim for additional damages. A claim for forfeited deposits already paid is different from a claim for the loss of the market value of the subject property. Absent a claim in the pleadings, including in the appellant's affidavit materials, or a motion to amend, we do not accept that the respondent was put on notice of the appellant's additional damages claim because of general statements made by previous judges in the context of an unrelated motion and a scheduling attendance. Bald statements that the appellant might be seeking additional damages in an unparticularized amount are inadequate to allow the respondent to know the case she had to meet. There was nothing in the notice of application or the appellant's affidavit materials regarding the claim for additional damages for the respondent to answer. As earlier indicated, it was insufficient for the appellant simply to seek the relief in its factum.

[20] We see no basis to intervene. Accordingly, the appeal is dismissed.

[21] The appellant shall pay the respondent her partial indemnity costs of the appeal in the agreed upon amount of $17,000 inclusive of disbursements and HST.

"L.B. Roberts J.A."
"J. George J.A."
"P.J. Monahan J.A."