COURT OF APPEAL FOR ONTARIO

CITATION: Gatoto v. 5GC Inc., 2024 ONCA 210
DATE: 20240321
DOCKET: COA-23-CV-0389

Pepall, George and Dawe JJ.A.

BETWEEN

Jeanne Gatoto

Applicant (Appellant)

and

5GC Inc.

Respondent (Respondent)

Allan Rouben, for the appellant Jeanne Gatoto

Chris Argiropoulos, for the respondent 5GC Inc.

Heard: February 27, 2024

On appeal from the order of Justice Byrdena MacNeil of the Superior Court of Justice, dated March 16, 2023, with reasons reported at 2023 ONSC 1772.

REASONS FOR DECISION

[1] The appellant, Jeanne Gatoto, sought an order permitting her to purchase a residential property pursuant to an Option to Purchase Agreement ("Option" or "Option Agreement") or, in the alternative, an order that a $25,000 downpayment be returned to her together with interest. She appeals from the dismissal of her application.

Background Facts

[2] The appellant and the respondent, 5GC Inc., entered into a Lease and an Option Agreement relating to property in Hamilton in which the appellant had resided since November 1, 2013. The Lease had a 36-month term ending on October 31, 2016. Thereafter, it was a month-to-month tenancy.

[3] Under the Option Agreement, the appellant could exercise an option to purchase the property for a fixed amount, provided she complied with the Lease. The Option could be exercised up until October 31, 2015, for $303,187 or from November 1, 2015 to October 31, 2016 for $318,346. The closing of an agreement of purchase and sale arising from the exercise of the Option was to occur within 30 days of the expiration of the Lease.

[4] In late November 2014, and on August 4, 2016, the respondent introduced the appellant to representatives from Butler Mortgage to assist with her mortgage options.

[5] Section 109 of the *Residential Tenancies Act, 2006*, S.O. 2006, c. 17, states that a landlord shall provide, on request, rent receipts to its tenant. In April or May of 2016 and again in August of 2016, the appellant requested rent receipts from the respondent. The respondent provided receipts for the years 2013, 2014, and 2015 on August 22, 2016. On September 6, 2016, the appellant advised the respondent that her income tax filings were not completed due to missing rent

receipts that the respondent had not provided to her. She maintained that she needed the income tax information to apply for mortgage financing.

[6] On October 23, 2016, the respondent offered to extend the Option Agreement to October 31, 2017, at a higher price based on the current value of the property. He noted that the appellant had had three years to get her financials ready for the closing. The respondent advised the appellant that if she did not agree to the extension, the Option would expire and her ability to purchase the property would disappear. The appellant refused the offer. The appellant failed to exercise the Option either by October 31, 2015 or by October 31, 2016.

[7] Ultimately, the appellant issued a Notice of Application seeking, among other things, a declaration that she was entitled to complete the Option at the October 31, 2016 price in the Option Agreement and that the respondent's failure to provide rent receipts deprived her of the ability to complete the Option.

Analysis

[8] The appellant raises, in essence, three grounds of appeal.

[9] First, she submits that the application judge erred in her interpretation and approach to determining that the Option had expired. The appellant relied on *Jesan Real Estate Ltd. v. Doyle*, 2020 ONCA 714, 26 R.P.R. (6th) 233 and *Sail Labrador Ltd. v. Challenge One (The)*, [1999] 1 S.C.R. 265 to argue that the Option Agreement was a bilateral contract and, therefore, the appellant could only

be deprived of its benefit if she substantially breached its terms. The appellant says that as no such breach occurred, the Option was available to her at a date later than the expiry date of October 31, 2016. She argues that this position is supported by the absence of a “time is of the essence” provision in the Option Agreement. She submits that because the lease agreement provided that the lease would continue as a month-to-month tenancy after October 31, 2016, the appellant could exercise the Option after that date as long as she was still leasing the property. While the appellant acknowledges that after October 31, 2016 she could no longer hold the respondent to the purchase price set out in the Option Agreement, she argues that she should be permitted to attend at the Superior Court to ask a judge to fix an appropriate purchase price.

[10] We disagree. The Option Agreement clearly spelled out the terms that governed the parties. The month-to-month tenancy that ensued after the fixed-term ended did not operate to extend the Option Agreement expiry date of October 31, 2016 or the availability of the fixed Option purchase price. Nor did the Option continue until 30 days from the expiration of the Lease. The 30 days was the time within which the agreement of purchase and sale was to close once the Option had been exercised. While the court’s interpretation in *Jesan* was aided by a “time is of the essence” clause, the lack of one in this case is not determinative. The Option Agreement set out a deadline by which the option and accompanying purchase price had to be exercised. Unlike *Jesan*, the Option Agreement does not

contain a mechanism to calculate the purchase price after the expiry of the stipulated time period. The parties could not have intended that they be required to attend at the Superior Court to ask a judge to fix the purchase price, as the appellant suggests. Rather, the Option Agreement relies on clear time limits that had to be respected. The appellant was not in a financial position to exercise the Option and failed to do so. There was no error in the application judge's interpretation or her finding that the Option had expired.

[11] Second, the appellant submits that the application judge erred in her causation analysis.

[12] Again, we disagree. The application judge held that the appellant had failed to establish a causal relationship between the respondent's failure to provide rent receipts and the appellant's failure to file income tax returns for 2014 and 2015 or to obtain mortgage financing. There was no evidence that the Canada Revenue Agency had refused to accept the rent amounts submitted nor any evidence that the appellant ever submitted a mortgage application for consideration. Furthermore, had she filed her income tax return for 2014 earlier than April 2016, she would have been aware of the need for relevant documents in time to meet the October 31, 2016 deadline. It was open to the application judge to conclude that causation had not been proven due to the failure of the appellant to adduce any evidence that established causation. The appellant simply was never in a

position to exercise the Option and purchase the property on the terms stipulated in the Option Agreement.

[13] Third, the appellant asserts that the application judge erred in failing to convert the application into an action.

[14] We disagree. The appellant opted to commence her proceeding by application. On June 30, 2020, she unsuccessfully sought an order from Arrell J. to convert the application into an action. If she was dissatisfied with that order, a remedy was available to her. In any event, it would not appear that she asked the application judge to convert her application to an action. The application judge can hardly be faulted for failing to do so. In any event, rule 38.10(1) is discretionary in nature: *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

Disposition

[15] For these reasons, the appeal is dismissed. Costs are awarded to the respondent in the amount of $12,500 inclusive of disbursements and applicable tax, as agreed by the parties.

"S.E. Pepall J.A."
"J. George J.A."
"J. Dawe J.A."