

COURT OF APPEAL FOR ONTARIO

CITATION: Pencor Construction Inc. v. 1322295 Ontario Ltd., 2024 ONCA 273

DATE: 20240412

DOCKET: COA-23-CV-0967

van Rensburg, Zarnett and George JJ.A.

BETWEEN

Pencor Construction Inc.

Plaintiff (Respondent)

and

1322295 Ontario Ltd. and Marino Rakovac

Defendants (Appellants)

Daniel Richter, for the appellants

James Butson, for the respondent

Heard and released orally: April 11, 2024

On appeal from the judgment of Justice John Krawchenko of the Superior Court of Justice, dated August 8, 2023.

REASONS FOR DECISION

[1] This is an appeal from a summary judgment for payment on a mortgage and granting a writ of possession. The appellants assert that the motion judge erred in rejecting their defence of unconscionability and in granting summary judgment. We do not give effect to these arguments, and we dismiss the appeal.

[2] The mortgage was for a one-year term, requiring interest only monthly payments and maturing in March 2022. The renewal provisions set out in the mortgage commitment letter, which formed part of the mortgage agreement, provided that if the borrower was not in default and if circumstances permitted him to, the lender would allow the borrower to renew the mortgage for an additional one-year term for a 1% Lender Fee plus legal fees and 0.5% Broker Fee.

[3] At first instance the appellants raised two defences that were dismissed by the motion judge. Only the second is relevant to the appeal: the appellants contend that the motion judge erred in failing to find that the respondent acted unconscionably at the time of renewal.

[4] The motion judge considered the evidence consisting of unsigned documents and emails exchanged between the parties and a mortgage broker. His conclusion was that the term of the mortgage had expired, the renewal was discretionary, and that the respondent had exercised its discretion not to renew, but offered terms of a short extension which were not accepted by the appellants, who “fashioned” their own bargain and made three additional interest payments which the respondent accepted. The motion judge rejected the assertion that the respondent had agreed to renew the mortgage for an additional year but made it impossible to renew by repeatedly and unlawfully changing the conditions for renewal until they became intolerable. He drew an adverse inference from the appellants’ failure to provide evidence from the mortgage broker.

[5] We see no reversible error in the motion judge’s analysis and conclusions. First, the appellants acknowledge that the respondent had the discretion to renew or not to renew. Second, the evidence fully supports the motion judge’s conclusion that there was no agreement to renew on the original terms. The documents and emails that were exchanged suggest the contrary – that the respondent was seeking new and different terms for the renewal that the appellants did not accept. Third, the doctrine of unconscionability permits the court to set aside a contract where the four-part test for unconscionability is met. There was no renewal contract in this case, and accordingly nothing to set aside. The appellants’ attempt to use unconscionability to affect a renewal on the terms of the original mortgage is misplaced.

[6] We also see no error in the motion judge’s conclusion that summary judgment was appropriate. The motion judge was able to determine the matter on the materials before him, and there was no genuine issue requiring a trial.

[7] Accordingly, the appeal is dismissed. On consent of the parties, costs are fixed at \$5,000, all-inclusive, in favour of the respondent.

“K. van Rensburg J.A.”

“B. Zarnett J.A.”

“J. George J.A.”