COURT OF APPEAL FOR ONTARIO

CITATION: Colonna v. Fellin, 2024 ONCA 224
DATE: 20240327
DOCKET: COA-23-CV-0713

2024 ONCA 224 (CanLII)

Pepall, Sossin and Dawe JJ.A.

BETWEEN

David Colonna and Do All Consulting Inc.

Plaintiffs (Respondents)

and

Renato Fellin and 2243282 Ontario Inc. o/a Rossi Consulting Group

Defendants (Appellants)

Renato Fellin, acting in person for the appellants

Matthew Bradley and Kim Ferreira, for the respondents

Heard: March 13, 2024

On appeal from the judgment of Justice Lucy K. McSweeney of the Superior Court of Justice dated May 31, 2023, with reasons reported at 2023 ONSC 3330.

Sossin J.A.:

[1] The appellant, Renato Fellin, is the sole officer and director of the other appellant, 2243282 Ontario Inc. o/a Rossi Consulting Group ("Rossi").[1] The respondent, David Colonna, is an individual who conducts business by financing,

[1] At the hearing, we granted Mr. Fellin leave to represent his corporation, Rossi, as well as himself.

developing, and selling real estate in Ontario.[2] In September 2018, Mr. Colonna signed a joint venture agreement with the appellants (the "JVA"), concerning the purchase and development of a property on 2355 Taylorwoods Blvd. in Innisfil (the "Property").

[2] The Property was not developed, and the respondent sought summary judgment under r. 20.04(2)(a) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, arguing that the appellants had breached the JVA. The motion judge agreed and found: (1) the parties made a valid JVA; (2) the appellants breached the JVA; (3) the appellants owed the respondent $609,928.15 in expectation damages; and (4) punitive damages were not warranted.

[3] The appellants appeal the motion judge's findings of liability and calculation of expectation damages. Additionally, three days before the hearing of the appeal, the appellants brought a motion to file fresh evidence relating to the calculation of damages.

[4] For the reasons set out below, I would dismiss the motion to admit fresh evidence and dismiss the appeal.

[2] Although Mr. Colonna's business "Do All Consulting Inc." was also a plaintiff, the motion judge found this corporation was not a party to the JVA. Accordingly, summary judgment was sought against the appellants solely by Mr. Colonna. Therefore, references to the respondent refer only to Mr. Colonna.

2024 ONCA 224 (CanLII)

BACKGROUND

[5] The JVA stipulated that the appellant, Rossi, would purchase the Property through contributions from the respondent; the title to the Property would be held by Rossi; the contribution of the respondent would be secured with a no-interest mortgage against the Property; and the profit would be divided equally after repaying the parties' contributions and addressing any tax liabilities.

[6] While Mr. Fellin had full authority to run the development project on the Property, the JVA required that he inform the respondent in writing of any decisions or plans on how it would proceed and seek written acknowledgement and consent for those decisions.

[7] The JVA also set out that Rossi acknowledged that the Property was currently approved for a severance, but that it would seek to obtain a further severance for a third lot on the Property. The clause further clarified that, if Rossi was unsuccessful in obtaining the third lot on the Property, then Rossi would proceed to develop the Property with only two lots commencing in March of 2019.

[8] This representation of the severance status was inaccurate. Although severance into two lots had initially been approved subject to certain conditions, those conditions were not met. As a result, months before the parties entered into the JVA, the severance application had been deemed refused.

2024 ONCA 224 (CanLII)

[9] On September 26, 2018, the respondent advanced $200,000 to the appellants in accordance with the JVA. The appellants purchased the Property with this contribution and an additional $250,000 mortgage. The appellants registered the transfer of the Property to Rossi.

[10] The appellants did not register a mortgage for the respondent prior to the commencement of the litigation. Mr. Fellin never obtained a site or survey plan; he did not prepare drawings or any architectural or engineering plans for the development and never applied for building permits. Mr. Fellin applied to the Town of Innisfil (the “Town”) to sever the Property into two lots, but on March 21, 2019, the Town rejected Mr. Fellin’s severance application. Mr. Fellin did not appeal the severance decision.

[11] In April 2019, Mr. Fellin requested that the respondent provide a further $12,000 contribution toward development. He represented that development was proceeding and that financing had been held up but was coming through.

[12] On September 19, 2019, Mr. Fellin substituted the initial $250,000 mortgage placed on the Property at the time of the purchase with a larger mortgage of $290,000, without telling the respondent. He then took the leveraged amount of $26,000 for his personal purposes.

[13] On December 6, 2019, again without the respondent’s knowledge, Mr. Fellin used the Property as collateral to obtain a $35,000 loan for one of his other

2024 ONCA 224 (CanLII)

properties. He then further encumbered the Property with a collateral mortgage for $143,000 and did so for his own interests.

2024 ONCA 224 (CanLII)

DECISION BELOW

[14] The motion judge found that there was a valid JVA and that the severance of the Property did not form a condition precedent for the agreement as argued by the appellants. Mr. Fellin admitted in cross-examination that the parties entered into the JVA and the appellants' statement of defence expressly admitted that the parties entered into the JVA. Moreover, Mr. Fellin prepared the draft JVA and provided it to the respondent for review and signature.

[15] The motion judge found that at the time the respondent signed the JVA, the parties were *ad idem* that they would: (i) purchase the Property, with the title to be held by Rossi; (ii) secure the respondent's interest with a no-interest mortgage; (iii) seek severance to build as many homes as permitted on the Property; (iv) develop the Property accordingly, with development to commence in March 2019; and (v) sell the Property for maximum return.

[16] The motion judge found that Mr. Fellin's misrepresentation that the Property was approved for severance was not a deliberate attempt to mislead the respondent, but she also found that the lack of severance did not void the JVA. The parties agreed in the JVA that development would begin in March 2019 even if further severance was not obtained, and Mr. Fellin acknowledged that when

severance was denied, he determined the Property could be developed with one house on it.

[17] The motion judge then found that the appellants breached the JVA. Mr. Fellin took the respondent's financial contribution but failed to register the required mortgage on the Property, failed to perform any development steps, leveraged the Property's equity for his own ends, and transferred the Property's title for his own purposes. The steps he did take were done without the required notice or consent of the respondent. The motion judge found that Mr. Fellin, as of April 2019, was no longer interested in performing his role under the JVA. The motion judge noted that these findings did not require an assessment of the relative credibility of the parties but rather were based on her assessment of the evidence as a whole.

[18] The motion judge then awarded the respondent damages of $609,928.15 to place him in the position he would have been in had the contract been performed as agreed.

[19] The appellants argued that the record on summary judgment was insufficient to permit the court to calculate expectation damages. The motion judge found that although there is an inherent challenge in calculating expectation damages due to the necessarily hypothetical nature of the exercise, this was not a ground to refuse

2024 ONCA 224 (CanLII)

damages. It was appropriate to conduct such analysis to calculate the respondent's damages resulting from breaches of the JVA.

[20] The motion judge accepted the expert evidence of the respondent's expert, Oxana Vialykh, a property appraiser and land economist. The appellants produced no expert evidence and did not cross-examine Ms. Vialykh.

[21] The motion judge based the calculation of expectation damages on the reasonable hypothetical scenario used by Ms. Vialykh, in which the Property was developed with a single-family home that was rented out until it could be sold. The motion judge accepted the scenario of a 2,500 square-foot bungalow on the Property, sold in May 2022 for $1,600,000, as the basis for the calculation. She further accepted that the cost of construction in such a scenario would be $277,143.70. The motion judge also found a variety of other deductions would apply, such as the cost of transferring/selling the Property and project management fees. She also assumed that the parties would split the proceeds of any development on a 50/50 basis, as set out in the JVA.

[22] Finally, the motion judge refused to grant the requested $50,000 of punitive damages because she could not conclude that Mr. Fellin had a fraudulent intention and, in any event, because of the significant size of the expectation damages awarded.

2024 ONCA 224 (CanLII)

ANALYSIS

(1) The Fresh Evidence Motion

[23] The appellants seek to admit as fresh evidence: (i) the first four pages of a document entitled “Building Measurement Guideline” from the Appraisal Institute of Canada (the “Measurement Guideline”); (ii) the first page of an “Advisory” from the Home Construction Regulatory Authority (“HCRA”) dated February 1, 2021 (the “2021 Advisory”); and (iii) a pamphlet from the Town dated January 1, 2019 that related to development charges (the “2019 Pamphlet”).

[24] The test on a motion to adduce fresh evidence on appeal is well-established. The moving party must prove that the proposed evidence:

> a. could not have been adduced at first instance through the exercise of reasonable diligence;
> b. is relevant upon a decisive or potentially decisive issue;
> c. is credible, and
> d. if reasonably believed, when taken with the other evidence adduced at trial, could be expected to have affected the result: *Palmer v. The Queen*, [1980] 1 S.C.R. 759, at p. 775.

[25] In oral submissions, Mr. Fellin represented himself and Rossi, and stated that an important context of this appeal were key errors made by the appellants’ previous two counsel. Mr. Fellin did not suggest that the material filed as fresh evidence was not available at the time of the summary judgment motion (and,

2024 ONCA 224 (CanLII)

indeed, confirmed the documents are all publicly available), but rather that counsel failed to put these documents into evidence.

[26] Questions relating to the conduct of the appellants' previous counsel are not before us on this appeal. The concern is whether the motion judge committed any reversible errors in her conclusions with respect to the appellants' breach of the JVA, and her determination of the respondent's expectation damages.

[27] The respondent takes issue with the late notice of the motion for fresh evidence and the fact that this evidence was available through the exercise of due diligence at the time of the motion. In any event, the respondent argues that these documents could have no reasonable bearing on the motion judge's decision.

[28] According to the respondent, the Measurement Guideline, which outlines a method of calculating "liveable area space", was not a binding rule on appraisers, and in any event, it is unclear on the record whether Ms. Vialykh considered 2,500 square feet to mean 2,500 square feet of "liveable area space" including the basement and garage or not.

[29] The HCRA's 2021 Advisory governs obtaining a license to sell property in the municipality. The respondent submits that even if this document was relevant beyond the costs the motion judge already allocated relating to the sale of the Property, it came into force after the events giving rise to the summary judgment decision and has no retroactive effect.

2024 ONCA 224 (CanLII)

[30] Finally, the respondent notes that the 2019 Pamphlet includes an exemption for “redevelopment” which covers the Property.

[31] I agree that these documents could have been obtained at the time of the summary judgment motion. Fundamentally, as I will explain, the appellants failed to put their best foot forward at the summary judgment motion and are now trying to remedy the shortcomings in their evidence. In any event, the fresh evidence would not have affected the motion judge’s decision. I would dismiss the motion to admit fresh evidence.

(2) The Liability Appeal

[32] In written submissions (filed at a time when the appellants were represented), the appellants argue that they should not be liable for the breach of the JVA because the development of the Property was frustrated by the Town’s decision to deny severance. The respondent submits that frustration was not raised on the motion and is being argued for the first time on appeal.

[33] Whether or not it is properly raised, it is clear the requirements of frustration are not met in this case. Applying the test for frustration set out in *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, 2001 SCC 58, [2001] 2 S.C.R. 943, at paras. 53 and 55, the party relying on frustration must establish that a supervening event occurred that the parties did not contemplate at the time of contract, which renders the performance of the contract radically different from that which was undertaken.

2024 ONCA 224 (CanLII)

In this case, the denial of severance was not an unforeseeable event which radically altered the parties' expectations. Rather, it was specifically adverted to in the JVA itself.

[34] In any event, this argument is premised on the appellants' claim that the motion judge erred in finding that a term of the JVA was that the parties would "seek severance to build as many homes as permitted on the Property." The appellants claim that the motion judge implied this term when the express intent of the JVA was only to develop the Property if there were two or more lots.

[35] I see no such error. The motion judge's finding that the parties intended to develop the Property with as many homes as possible was supported on the evidence. For example, Mr. Fellin testified that the parties wanted to sell the Property for as much as possible in order to maximize profit, and admitted on cross-examination that after severance was denied, he determined the Property could be developed with one house on it.

[36] I would reject this ground of appeal.

[37] In my view, there is no basis for appellate interference with the motion judge's conclusion that there was a valid JVA and the appellants breached it.

(3) The Damages Appeal

[38] The appellants allege a number of specific errors in the motion judge's calculation of expectation damages:

2024 ONCA 224 (CanLII)

a. That the motion judge erred in finding that the likely cost of constructing a 2,500 square foot detached bungalow was $277,143.70;

b. That the motion judge erred in finding that the parties would have likely rented the Property prior to selling;

c. That the motion judge erred in failing to reduce damages to account for HST on Rossi's management fee; and

d. That the motion judge erred in assessing damages on a pre-tax basis, without accounting for the respondent's speculative tax liability.

[39] The appellants argue that the motion judge's error in calculating the construction costs, together with the errors in the imputed rental income and applicable taxes, led to an unfairly inflated finding with respect to expectation damages. In short, the appellants argue that the damages found by the motion judge put the respondent in a much better position than if the JVA had been performed.

[40] I disagree and address these arguments below.

(a) The motion judge did not err in calculating the construction costs

[41] According to the appellants, the motion judge erred by calculating the cost of construction without accounting for the finished basement and garage. While in their view, these costs are generally not accounted for in a cost of construction, to exclude them while including those items in the estimated sale price of the home resulted in an unfairness.

2024 ONCA 224 (CanLII)

[42] The appellants also argue that even if the cost of construction were based on a 2,500 square foot bungalow with no finished basement and no provision for the attached two-car garage and landscaping, a correct calculation would produce a figure of $725,000, well in excess of the $277,143.70 found by the motion judge.

[43] The respondent argues that the motion judge's finding regarding the cost of construction was available on the evidence including a review of the Town's building permits.

[44] The appellants did not adduce any expert evidence on damages. Instead, they provided only an affidavit from Mr. Fellin in which he gave his own assessment on construction costs.

[45] The motion judge preferred the evidence of Ms. Vialykh and specifically averted to the appellants' failure to "put their best foot forward" on the summary judgment motion:

> In conducting the loss of profit analysis I am mindful of reiterating that the aim is not to put the plaintiff in a better position than if the contract had been performed. To the extent that loss of profit damages are significant, I consider the obligation on the Defendants on a summary judgment motion to put their best foot forward
>
> In that regard I observe that an equal obligation is on the court to do justice by "doing the best it can" on the evidence adduced. A defendant's failure to put further available evidence before the court to resist the Plaintiffs case simply makes the court's necessary assumptions and calculations more difficult. However, the Defendant's failure cannot be permitted by a court to derail a summary

2024 ONCA 224 (CanLII)

> judgment for lost profit damages where the Plaintiff, as here, has met its onus.

[46] The motion judge was correct to note that the obligation on the parties in a summary judgment motion is to "put their best foot forward": *Sweda Farms Ltd. v. Egg Farmers of Ontario*, 2014 ONSC 1200, at paras. 26, 27, 32, and 33, aff'd 2014 ONCA 878, at paras. 2-4, leave to appeal refused, [2015] S.C.C.A. No. 97. The appellants failed to do so.

[47] In light of this summary judgment context, I see no error in the calculation of construction costs, based on expert evidence and public records such as building permits.

[48] In my view, the damages calculations of the motion judge were based on findings of fact that were available to her and rooted in the limited evidence in the record. These findings are entitled to deference.

(b) The motion judge did not err in finding that the parties would have rented the Property prior to selling

[49] The motion judge found that if the appellants complied with the JVA, the parties would have rented the Property prior to selling. The appellants assert that "no evidence was adduced" to support this finding. In the alternative, the appellants argued that the rental income imputed by the motion judge should be reduced by $30,000 to account for income tax and property tax.

2024 ONCA 224 (CanLII)

[50] The respondent submits that the motion judge's findings were in fact well-supported in the record. For example, Mr. Fellin acknowledged in his affidavit that he was hoping to offset monthly mortgage payments with "rent money" collected from the Property. Furthermore, in his cross-examination, he testified that the parties intended to tear down the existing house, build and rent out the new home or homes, and then sell.

[51] I agree. I see no basis to interfere with the motion judge's finding that the parties would have rented the Property. This finding was open to her on the record.

[52] The arguments related to tax deductions are addressed, along with the other tax-related issues, in the following section.

(c) The motion judge did not err by failing to assess tax consequences

[53] The appellants' remaining arguments with respect to damages concern the tax implications.

[54] The motion judge reduced damages payable to the respondent to account for the management fee that Rossi might have obtained if it performed the JVA. The appellants argue that the motion judge should have further reduced the respondent's damages to account for HST on the management fee.

[55] At the summary judgment motion, however, the appellants led no evidence to show that HST would have applied to the management fee or that such HST would have reduced the parties' net profit.

2024 ONCA 224 (CanLII)

[56] The motion judge assessed expectation damages for lost opportunity on a before-tax basis. The appellants argue that she ought to have reduced damages to account for the respondent's speculative tax liability, including both deductions for capital gains and the above-noted taxes on rental income. The respondent contends that speculative tax liability is not relevant to the assessment of damages.

[57] Again, here, the motion judge did not have evidence in the record which could have clarified the tax consequences of the development for the parties.

[58] As discussed above, the parties have an obligation on a motion for summary judgment to "put their best food forward": *Sweda Farms Ltd.*, at para. 26.

[59] To the extent that the appellants, on appeal, have raised specific issues that might have altered the motion judge's calculation, such as with respect to potential tax liability and indeed development fees, this information was not put before her, and it was not an error for her to focus on the record as it stood.

[60] In my view, this ground of appeal fails.

2024 ONCA 224 (CanLII)

DISPOSITION

[61] For these reasons, I would dismiss the appeal.

[62] I would order that the respondent, Mr. Colonna, is entitled to costs from the appellants in the amount of $15,000 all-inclusive.

Released: March 27, 2024 “S.E.P.”

“L. Sossin J.A.”
“I agree. S.E. Pepall J.A.”
“I agree. J. Dawe J.A.”

2024 ONCA 224 (CanLII)