COURT OF APPEAL FOR ONTARIO

CITATION: 2533619 Ontario Inc. (Calibrex Development Group) v. Lucadamo, 2024 ONCA 536
DATE: 20240708
DOCKET: COA-23-CV-1148

Roberts, Trotter and George JJ.A.

BETWEEN

2533619 Ontario Inc. o/a Calibrex Development Group

Applicant (Appellant)

and

John Lucadamo*, Lloyd Parsons, and Scott Charles Corin

Respondents (Respondent*)

Richard Macklin and Neil G. Wilson, for the appellant

William Doodnauth, for the respondent

Heard: April 30, 2024

On appeal from the judgment of Justice Sharon Lavine of the Superior Court of Justice, dated September 26, 2023.

REASONS FOR DECISION

[1] This appeal arises out of a failed agreement of purchase and sale entered into on April 27, 2017 ("the APS") for a residential development project. MSM Developments Ltd. ("MSM") entered agreements to purchase three neighbouring lots, including the respondent's property. MSM subsequently assigned these agreements to the appellant. The standard form APS included a

time is of the essence clause, which provided that the time for completing any matter in the agreement could be extended or abridged by agreement. The APS was amended on July 31, 2017 to provide for a target closing date of April 12, 2018 that could be extended in order to allow the appellant some flexibility to apply for and obtain severance approval on behalf of the respondent and the other vendors. The APS stipulated that closing would be 30 days following the appellant's receipt of severance approval.

[2] It is uncontroverted that it was the appellant's express obligation to apply for the severance approval. There is no dispute that the appellant had no communications with the respondent between 2018 and 2022 until surveyors and representatives from the Town of Georgina (the "Town") attended the respondent's property one day, unannounced.

[3] The respondent refused access. Up until August 2018, he had made inquiries of his real estate agent and attended the Town building department to try to find out about the status of the sale. He learned from the Town that the appellant had not commenced the severance application. When contacted by the appellant in 2022, the respondent took the position that the APS was no longer valid and was at an end, and he refused to deal further with his real estate agent and the appellant. The appellant brought an application for, among other relief, a declaration that the parties are governed by the APS, a declaration that the

respondent was in breach of the APS, and an order for specific performance compelling the respondent to permit the surveyor and Town to attend the property.

[4] The application judge dismissed the application. She found that the appellant had breached the APS because it had "entirely failed to do what was necessary to perform its obligations under the contract within a reasonable time" without any explanation, and that the respondent was justified in treating the APS at an end.

[5] The appellant argues that the application judge erred in dismissing the application. Even if the appellant had breached the APS by its delay, the respondent had acquiesced to the delay because the passive act of declining to sign a consent was not sufficient to amount to an election to terminate the APS. In any event, the respondent could not treat the APS at an end without first providing reasonable notice of a closing date.

[6] We are not persuaded by the appellant's submissions. We see no error in the application judge's disposition of this matter.

[7] The application judge properly applied the applicable governing principles. As she correctly stated, first, where an APS has an ambiguous deadline or no fixed deadline for closing, "the law will imply a term that it must be performed within a reasonable time" and that "what is reasonable will be determined on the facts of the individual case": see e.g., *Jesan Real Estate Ltd. v. Doyle*, 2020 ONCA 714,

26 R.P.R. (6th) 233, at para. 48; *Ju v. Tahmasebi*, 2020 ONCA 383, at para. 20. Further, she considered that "the court will readily imply a promise on the part of each party to do all that is necessary to secure performance of the contract", citing to *Dynamic Transport Ltd. v. O.K. Detailing Ltd.*, [1978] 2 S.C.R. 1072, at pp. 1083-84.

[8] We also agree that the application judge correctly distinguished *Stamm v. Ratz*, [1990] 37 C.L.R. 233 (Ont. Dist. Ct.), a decision that is not binding on this court, and that turns on its own facts. In *Stamm*, the court applied the governing principles referenced above in para. 7 in circumstances where there was no determined fixed or target date for completion of home renovations that could inform the determination of what was a reasonable time for the performance of the contract. The court found in the particular circumstances of the *Stamm* case that it was reasonable for notice of a deadline for completion to have been given. However, we do not read the decision as stipulating that notice is mandatory in every case. Rather, whether notice is fairly required is one aspect of the constellation of factors, including the relationship between and reasonable expectations of the parties and the length and explanation for the delay in performance, that informs what is reasonable in the circumstances of each case.

[9] We are not persuaded by the appellant's arguments that its breach of the APS should not have warranted the termination of the APS or that the respondent was in breach in treating the APS at an end because: 1) he failed to give timely

notice of a new deadline for completion before terminating the APS; and 2) he passively acquiesced to and did not give clear acceptance of the appellant's failure to perform its obligations under the APS.

[10] As the application judge found, since the appellant had taken no steps to fulfill its obligations under the APS for almost five years without explanation, by the time the appellant started to take steps in 2022, it was already in breach. It was open to the application judge to find that the target date, while not a fixed closing date, nevertheless informed what delay would be reasonable in this case, and that by its inordinate delay, the appellant had therefore failed to perform its obligations under the APS within a reasonable time. As the application judge also observed, the appellant "did not need to be put on notice that [it] was obliged to do all that was necessary to obtain approval in a timely fashion".

[11] The respondent was not in breach of any obligation under the APS and had not passively acquiesced to the appellant's breach. The respondent had no obligation in the circumstances of this case, as found by the application judge, to give the appellant another chance to cure its default. By refusing access to his property, taking the position that the APS was at an end and refusing to deal further with his real estate agent or the appellant, the respondent clearly communicated its acceptance of the appellant's repudiation of the APS.

[12] We see no basis for appellate intervention. Accordingly, the appeal is dismissed.

[13] In accordance with the parties' agreement, the respondent, as the successful party on the appeal, is entitled to its costs in the all-inclusive amount of $7,500 from the appellant.

"L.B. Roberts J.A."
"Gary Trotter J.A."
"J. George J.A."