COURT OF APPEAL FOR ONTARIO

CITATION: 1000029174 Ontario Inc. v. Miculinic Investment Corp., 2024 ONCA 526
DATE: 20240704
DOCKET: COA-23-CV-0438

Roberts, Miller and Gomery JJ.A.

BETWEEN

1000029174 Ontario Inc. and 2303515 Ontario Inc. in Trust

Applicants (Respondents/
Appellants by way of cross-appeal)

and

Miculinic Investment Corp.*, 1612363 Ontario Inc., 5013361 Ontario Inc., Deborah Miculinic, and Vel Miculinic

Respondents (Appellant*/
Respondent by way of cross-appeal)

AND BETWEEN

Miculinic Investment Corp.

Applicant (Appellant/
Respondent by way of cross-appeal)

and

2303515 Ontario Inc. and 1000029174 Ontario Inc.

Respondents (Respondents/
Appellants by way of cross-appeal)

Jason Squire and Spencer Jones, for the appellant/respondent by way of cross-appeal

Gavin Tighe and Lauren Rakowski, for the respondents/appellants by way of cross-appeal

Heard: June 24, 2024

On appeal from the judgment of Justice Andra Pollak of the Superior Court of Justice, dated March 16, 2023, with reasons reported at 2023 ONSC 1727, and from her order dated August 23, 2023; and on cross-appeal from her costs order dated March 27, 2024.

REASONS FOR DECISION

[1] This appeal and cross-appeal turn on the interpretation of an agreement of purchase and sale that contained an ambiguity concerning the calculation of the purchase price that was inclusive of the Harmonized Sales Tax ("HST") to be remitted under the *Excise Tax Act*, R.S.C. 1985, c. E-15.

[2] The appellant vendor, Miculinic Investment Corporation, seeks payment of the remaining escrow funds currently held by the respondent purchasers' counsel, in the amount of $273,851.33. The respondent purchasers, 2303515 Ontario Inc. and 1000029174 Ontario Inc., submit that the appeal should be dismissed but also seek leave to appeal the application judge's amended endorsement and costs order.

[3] These reasons explain why we allow the appeal and remit it for a rehearing. We therefore do not reach the cross-appeal.

Background

[4] The appellant sold a mixed residential and commercial use property to the respondents. The agreement of purchase and sale, entered into on August 4, 2021, stipulated that the purchase price of $11,500,000 included the

unspecified HST payable on the commercial portion of the property. However, the agreement of purchase and sale did not expressly delineate which portions of the property were for residential and commercial use, neither did it provide a mechanism for determining the amount of the HST payable. The parties' differences on this issue did not arise until just prior to closing.

[5] The respondents disputed the use designation set out in the Statement of Adjustments prepared by the appellant's real estate lawyer and refused to pay the entirety of the purchase price. The respondents took the position that a greater portion of the property was for commercial use and attracted HST to which they wished to apply input tax credits and thereby lower the amount payable to the appellant. The parties agreed to partially close the sale without prejudice to the adjudication of their dispute. The amount of $9,179,067.29 was released to the appellant. With the deposit of $1,000,000 paid on the execution of the agreement of purchase and sale, $10,179,067.29 was paid to the appellant. The respondents' counsel held the amount of $549,957.52 that was set aside in escrow pending the resolution of the parties' dispute. On March 6, 2023, the respondents paid, with prejudice to the appellant, the amount of $276,106.19.

[6] In her reasons for judgment, dated March 16, 2023, other than noting that it failed to designate the portions of the property that were subject to residential and commercial uses, the application judge did not otherwise interpret the agreement of purchase and sale. Instead, she principally relied on the appraisal prepared by

D. Bottero & Associates Limited, dated March 4, 2022, of the property's market value as of November 29, 2021 ("the Bottero appraisal evidence"), which was attached to the affidavit of the respondents' principal, Angelo Muscillo, and the acceptance by the Canada Revenue Agency ("CRA") of the respondents' HST return submitted post closing in which a certain portion of the property was designated as for commercial use and subject to HST in the amount of $1,046,902.65. She concluded that the appellant was therefore entitled to be paid by the respondents the further amount of $276,106.19 in satisfaction of the purchase price. As earlier noted, the respondents had paid this amount to the appellant on March 6, 2023.

[7] On August 23, 2023, the application judge dismissed the appellant's motion to reopen the proceedings to admit the appellant's fresh evidence of a recent CRA HST assessment that accepted the appellant's use designation of the property and assessing the HST related to the sale as $773,051.33.

[8] In an amended endorsement dated March 27, 2024, the application judge awarded the appellant costs in the amount of $87,503.09.

Analysis

[9] Excepting the March 6, 2023 payment of $276,106.19 to the appellant, we agree that the application judge's judgment, including the costs order, must be set aside and that there be a new hearing.

[10] The application judge did not engage in the required analysis of the agreement of purchase and sale. As *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, instructs, the agreement must be interpreted as a whole and the court should look to the words of the agreement and the factual matrix at the time the agreement was made to determine the objective intentions of the parties: at paras. 57-58. The application judge did not follow this analysis.

[11] We do not agree with the respondents' submission that paragraph 31 of the application judge's reasons shows that she engaged with the relevant factors, including the factual matrix, as required under the *Sattva* analysis. Nor is the application judge's characterization of her judgment in her subsequent August 23, 2023 reasons dismissing the fresh evidence motion of assistance.

[12] Nowhere in her March 16, 2023 judgment does the application judge set out her interpretation of the agreement of purchase and sale and her findings about what the parties' reasonable expectations or intentions were. Nowhere does she grapple with the discrepancies between the various CRA assessments or indicate why, if she did, she rejected the appellant's evidence, including its expert evidence, about the use and value of the property at the time the agreement of purchase and sale was entered into by the parties.

[13] We also agree that the application judge erred in her treatment of the Bottero appraisal evidence. The Bottero appraisal evidence was prepared "for the purpose

of providing a retrospective Opinion of Market Value of the Subject Property" as of November 2021, some three months past the time of purchase in August 2021, and was based on the factual information given by the respondents as to the residential and commercial use allocations of the property. Further, the Bottero appraisal evidence was arguably inadmissible because the author of the report was not qualified as an expert, did not sign the required expert's form attesting to his duty as an expert, and the report was merely appended as an exhibit to the affidavit of the respondents' principal. These deficiencies were not merely technical. Subrule 39.01(7) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, requires that "[o]pinion evidence provided by an expert witness for the purposes of a motion or application shall include the information listed under subrule 53.03(2.1)." The Bottero appraisal evidence was not in compliance with these mandatory requirements for the admission of expert evidence. Moreover, the Bottero appraisal evidence was hearsay as it was appended as an exhibit to another individual's affidavit. The application judge never grappled with or addressed these issues in her reasons. As gatekeeper she was required to do so.

[14] As a result, the application judge's judgment must be set aside, and the analysis done afresh.

[15] The requisite analysis is not something that this court can carry out on this record. It requires the kind of evidentiary assessments and findings of fact, credibility, and reliability that should not be performed by an appellate court.

Disposition

[16] Accordingly, we allow the appeal and set aside the application judge's judgment, including her costs disposition. As a result, we do not reach the respondents' cross-appeal. As agreed by the respondents, the March 6, 2023 payment of $276,106.19 to the appellant remains unaffected.

[17] As the successful party on this appeal, the appellant is entitled to its costs in the all-inclusive amount of $25,000. We leave the costs of the first hearing and of the costs appeal to the judge rehearing the applications.

[18] We order that the applications be remitted before another judge of the Superior Court for a new hearing. The parties should seek a case management conference to determine next steps for the rehearing of this matter.

"L.B. Roberts J.A."
"B.W. Miller J.A."
"S. Gomery J.A."