COURT OF APPEAL FOR ONTARIO

CITATION: VP Auto Sales & Service Ltd. v. Ahmed^2 Inc., 2024 ONCA 507
DATE: 20240626
DOCKET: COA-23-CV-1134

Sossin, Monahan and Madsen JJ.A.

BETWEEN

VP Auto Sales & Service Ltd.

Plaintiff (Respondent)

and

Ahmed^2 Inc.*, Ahmed Group (971 Burnhamthorpe Rd. E.) Inc.* and High Point Realty Limited

Defendants (Appellants*)

Shahzad Siddiqui and Osman Ali, for the appellants Ahmed^2 Inc. and Ahmed Group (971 Burnhamthorpe Road E.) Inc.

David A. Brooker, for the respondent

Heard: June 19, 2024

On appeal from the judgment of Justice William S. Chalmers of the Superior Court of Justice dated September 20, 2023.

REASONS FOR DECISION

[1] This litigation arises out of a failed commercial real estate transaction.

[2] The appellants appeal the decision of the motion judge granting partial summary judgment on the issue of liability in favour of the respondent and bring a motion for the admission of fresh evidence.

[3] For the reasons that follow, we would dismiss the motion for the admission of fresh evidence and dismiss the appeal.

FACTS

[4] The respondent was the seller and owner of a property located at 971 Burnhamthorpe Road East, Mississauga ("the Property"). On January 25, 2021, the respondent entered into an Agreement of Purchase and Sale for the Property ("the Agreement") with the appellant, Ahmed^2 Inc. The closing date was set for May 2, 2022. At some point prior to March 31, 2022, Ahmed^2 Inc. told the broker that the price was too high and asked for a discount. The respondent refused.

[5] One week prior to closing, the lawyers on both sides began negotiating and finalizing the terms of the closing documents. On the closing date, Ahmed^2 Inc. took the position that the respondent was in breach of the Agreement and did not close. The respondent has been unable to resell the Property.

[6] The respondent brought a motion seeking summary judgment against Ahmed^2 Inc. for the purchase price of $4,750,000.

[7] The motion judge found that the summary judgment process was appropriate for determining whether there was a breach of the Agreement. Interpreting the terms of the Agreement and the written record allowed the motion judge to conclude that Ahmed^2 Inc. had breached the Agreement by refusing to

close and that there was no genuine issue requiring a trial with respect to the liability issue. As set out below, he rejected the appellants' argument that the respondent had fundamentally breached the Agreement, as the breaches alleged were either not breaches, or were not serious and did not go to the root of the Agreement. The application judge found a genuine issue requiring a trial was present with respect to damages and consequently directed a trial on that issue alone.

(1) The vendor-take-back mortgage

[8] The Agreement provided that the respondent was required to accept a vendor-take-back mortgage ("VTB") for up to 70% of the purchase price at an interest rate of 5% per year for a one-year term. The appellants argued that the VTB as drafted was materially different than what had been agreed to because it prohibited Ahmed[2] Inc. from registering a second mortgage on title without prior consent. The motion judge found that this discrepancy did not amount to a fundamental breach of the Agreement as it did not prohibit a second mortgage altogether, but rather merely required consent in order to protect the priority of the VTB. Moreover, in the motion judge's view, there was no reason to believe that the respondent would not provide consent for a second mortgage as long as the VTB had priority.

[9] The appellants also objected to a term in the VTB that required the assignment of material contracts as security. The respondent argued that this is a typical term for this kind of mortgage, intended to protect the lender in the case of a default under the mortgage. Nonetheless, the respondent offered to include a cure period, so that Ahmed[2] Inc. would have a 7-day period to cure default under the mortgage before security would be enforced. The motion judge held this was a reasonable offer.

(2) Acting reasonably to secure zoning

[10] Under the Agreement, the respondent was obligated to use "best efforts" to secure zoning for the Property. The Agreement also provided that the Property was sold on an "as-is, where-is" basis. On March 31, 2022, Ahmed[2] Inc. waived the due diligence condition in the Agreement despite knowing the status of the zoning was incomplete. The motion judge held that, after that point, there could be no breach of the condition requiring the respondent to make best efforts regarding the zoning issue.

(3) Early possession of the Property

[11] The Agreement provided that, once the due diligence condition was waived, Ahmed[2] Inc. had the right to enter the Property for marketing purposes so long as insurance coverage was obtained and utility expenses were paid.

[12] Ahmed[2] Inc. made several requests for occupancy after having waived the due diligence provision. In response, it was asked for proof of insurance but none was ever provided. As such, the motion judge concluded that the respondent was under no obligation to provide early possession.

(4) Failure to remove vehicles and debris from the Property

[13] On the day of closing, Ahmed[2] Inc. noticed vehicles and debris on the Property. Although the respondent took the position that it was under no obligation to clear the premises due to the sale being on an “as-is, where-is” basis, it took steps for the removal of the vehicles. On the extended closing date of May 3, 2022, the vehicles had been cleared. The motion judge held that nothing in the Agreement required the respondent to remove the vehicles or debris.

[14] In conclusion, as noted, the motion judge held that the breaches alleged by the appellants were not serious and that the respondent had not fundamentally breached the Agreement. By contrast, he found that Ahmed[2] Inc. had breached the Agreement when it failed to close the transaction on May 3, 2022.

ANALYSIS

(1) The fresh evidence motion

[15] The appellants seek to introduce as fresh evidence a report issued by the City of Mississauga in December 2023 and a Notice of Passing of an Official Plan Amendment and a Zoning By-Law dated April 2024. The appellants allege the

fresh evidence will show the failure of the respondent to take steps to secure the zoning of the Property.

[16] The appellants submit that because the documents were issued after the endorsement of the motion judge was released in September 2023, there was no way this evidence could have been obtained and put before the motion judge. Further, they argue the documents are relevant as they bear on a decisive issue, namely, whether the respondent made "best commercial efforts" to obtain zoning, as per the Agreement. The appellants contend that the evidence could affect the outcome "insofar as it will prove that there were various outstanding matters that the Respondent did not address as part of its zoning application; therefore, the Respondent did not make 'best commercial efforts' as required in the Agreement."

[17] The respondent did not submit materials responding to the fresh evidence motion but, in oral submissions, asserted that the proposed evidence would not have changed the outcome of the motion judge's decision.

[18] We are of the same view. This proposed evidence does not satisfy the test under *Palmer v. The Queen*, [1980] 1 S.C.R. 759, in particular, the requirement that the evidence could have affected the result. The motion judge reiterated in his reasons, at para. 54:

> If the Buyer was not satisfied with the Seller's efforts with respect to re-zoning, it could have waived the condition earlier and take [*sic*] over the process. Alternatively, it did

> not have to waive the condition. Once the condition was waived there could not be a breach of the condition.

[19] The proposed evidence, which could show Ahmed[2] Inc. thought that more work on the rezoning had been done than appears to have occurred, would not have affected the motion judge's conclusion on the zoning issue. It was open to Ahmed[2] Inc. to make further inquiries, or to hold off on issuing the waiver, but having done so, the motion judge was clear that this condition of the Agreement was no longer operative. Further, the appellants had not pleaded that the respondent misrepresented the state of the zoning process.

[20] Therefore, the motion for the admission of fresh evidence is dismissed.

(2) The issues on appeal

[21] The following issues are raised by the appellants on appeal:

1) What is the applicable standard of review?
2) Did the motion judge improperly render partial summary judgment rather than remitting the matter to trial?
3) Did the motion judge misapply the law of fundamental breach?
4) Did the motion judge err by novating a new contract without consideration?
5) Did the motion judge ignore essential evidence and fail to account for missing evidence?
6) Did the motion judge improperly make subjective findings against the appellants without any supporting law or evidence?

(3) Standard of review

[22] The palpable and overriding error standard of review applies to the interpretation of a contract, while the correctness standard of review applies to extricable questions of law that arise in the interpretation process: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 36; *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23, at paras. 21 and 24.

[23] The parties do not dispute the applicable standard of review as set out above. The appellants submit that some of the errors it alleges the motion judge committed, such as failing to consider evidence, amount to errors of law which should be reviewed on a standard of correctness. The respondent highlights that findings of fact cannot be reversed absent a palpable and overriding error while questions of mixed fact and law lie on a spectrum, but where they are inseparably intertwined, the decision attracts deference.

(4) The motion judge did not err in granting partial summary judgment

[24] The appellants argue that by deciding the liability issue, but directing a trial on the issue of damages, the motion judge erred by granting partial summary judgment.

[25] One of the purposes of the summary judgment rule is to eliminate the need for a trial or shorten it or the action. If partial summary judgment can be granted

that will meet the purpose of shortening the litigation, this will satisfy the requirements of efficiency and cost-effectiveness: *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 60. Furthermore, the *Rules of Civil Procedure* explicitly contemplate partial summary judgment in circumstances such as this where the only genuine issue for trial is the amount to which the moving party is entitled: *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 20.04(3).

[26] The motion judge instructed himself properly on the principles of trial efficiency and proportionality arising from *Hryniak*.

[27] We see no error in the motion judge's conclusion that granting summary judgment on liability and directing a trial on damages was appropriate in the circumstances of this case.

(5) The motion judge did not misapply the law, misinterpret the contract, ignore evidence, or make unsupported subjective findings.

[28] In our view, the remaining grounds of appeal should be dismissed on the basis that they seek to re-litigate issues that were resolved by the motion judge and the motion judge's findings are entitled to deference.

[29] The appellants argue that, while the motion judge laid out the test for fundamental breach, he did not apply it properly to the facts because he failed to conclude that the alleged breaches by the respondent constituted fundamental breaches.

[30] The appellants also submit that the motion judge accepted as binding, amendments to the Agreement provided by the respondent only three business days before the closing and, with respect to the new terms of the VTB and proof of insurance provisions, without fresh consideration.

[31] The appellants further assert that the court ignored the appellants' need for early, vacant possession of the Property and effectively ignored “essential evidence,” which was before the court on the motion.

[32] Finally, the appellants contend that the motion judge erred by making subjective findings on the meaning of the “as is/where is” clause in the Agreement.

[33] The respondent frames these issues generally as attempts by a sophisticated corporate developer to undo the deal which they entered into with their eyes open to the risks – in short, a form of buyer’s remorse.

[34] We reject these grounds of appeal. The motion judge’s reasons are careful, thorough, and well-reasoned. We see no error in the motion judge’s analysis of the facts, the Agreement or the law on any of these points that would warrant appellate intervention.

DISPOSITION

[35] For these reasons, we would dismiss the appeal and the motion for fresh evidence.

[36] The respondent is entitled to costs. The appellants shall pay costs to the respondent in the amount of $17,500, all-inclusive.

“L. Sossin J.A.”
“P.J. Monahan J.A.”
“L. Madsen J.A.”