COURT OF APPEAL FOR ONTARIO

CITATION: Naeem v. Bowmanville Lakebreeze West Village Ltd., 2024 ONCA 383
DATE: 20240513
DOCKET: COA-23-CV-0966

van Rensburg, Sossin and Dawe JJ.A.

BETWEEN

Shireen Naeem

Plaintiff (Respondent)

and

Bowmanville Lakebreeze West Village Ltd.

Defendant (Appellant)

Adam Lifshitz, for the appellant

J. Daniel McConville and Roshni Khemraj, for the respondent

Heard: May 9, 2024

On appeal from the judgment of Justice Jill C. Cameron of the Superior Court of Justice, dated August 9, 2023, reported at 2023 ONSC 4558.

REASONS FOR DECISION

[1] In 2016, the respondent signed an agreement to purchase a newly constructed home from the appellant homebuilders for $629,900 (“the APS”). The closing date for the transaction was then postponed several times, at the appellant’s request. The closing was eventually rescheduled for April 23, 2019. When the transaction did not close on that date, the appellant took the position that the respondent had breached the contract, that the APS was terminated, and that the respondent had forfeited her $82,916.19 deposit.

[2] The respondent sued the appellant. Although she originally sought specific performance and damages, she ultimately moved for summary judgment on the basis that she was only seeking the return of her deposit, with interest. Both parties agreed that the question of whether the respondent should get her deposit back was amenable to summary judgment.

[3] The motion judge granted the respondent’s motion, finding that it was appropriate in the circumstances of this case to relieve her from the forfeiture of her deposit. The appellant appeals from that decision.

[4] At the hearing, we dismissed the appeal with reasons to follow. These are those reasons.

[5] The appellant’s main argument is that the motion judge applied the wrong legal test for granting relief from forfeiture. Citing *Shah v. Southdown Towns Ltd.*, 2017 ONSC 5391 and *Wang v. 2426483 Ontario Limited*, 2020 ONSC 3368, the

appellant submits that "relief from forfeiture is not available to a party as a remedy where the contractual breach was entirely [that party's] fault and within [that party's] control".

[6] We disagree. The motion judge correctly referred to and relied on the factors set out by this court in *Redstone Enterprises Ltd. v. Simple Technology Inc.*, 2017 ONCA 282, 137 O.R. (3d) 374, which has been followed in numerous other cases: see e.g., *Ching v. Pier 27 Toronto Inc.*, 2021 ONCA 551; *Azzarello v. Shawqi*, 2019 ONCA 820, leave to appeal refused [2019] S.C.C.A. No. 521; *Rahbar v. Parvizi*, 2023 ONCA 522, 485 D.L.R. (4th) 239. *Redstone* directs judges to consider two main factors: (i) whether the forfeited deposit is "out of all proportion to the damages suffered" by the vendor; and (ii) whether it would be unconscionable for the vendor to retain the deposit. As Lauwers J.A. explained in *Redstone,* at para. 30:

> The list of the indicia of unconscionability is never closed, especially since they are context-specific. But the cases suggest several useful factors such as inequality of bargaining power, a substantially unfair bargain, the relative sophistication of the parties, the existence of *bona fide* negotiations, the nature of the relationship between the parties, the gravity of the breach and the conduct of the parties.

[7] Significantly, *Redstone* does not make it a precondition for obtaining relief from forfeiture that the party seeking relief demonstrate that they were not to blame for the contractual breach. Although the would-be buyer's conduct will often be

highly relevant to the question of whether it would be unconscionable to permit the vendor to keep the deposit, it is only one factor to be considered.

[8] As Pepall J.A. noted in *Ching,* at para. 78:

> [R]elief from forfeiture is an equitable and discretionary remedy. Absent a legal or palpable and overriding error, it is not for this court to substitute its discretion for that of the trial judge.

[9] We are not persuaded that the motion judge in this case committed any palpable and overriding errors. Citing *Redstone,* she correctly noted that "[a] finding of unconscionability must be exceptional and strongly compelled on the facts of the case". She found that this high standard was met on the facts here.

[10] One factor the motion judge relied on was her conclusion that the appellant is a sophisticated party that is "in the business of negotiating agreements of purchase and sale with prospective homebuyers", whereas the respondent "is a widow who worked two jobs while undergoing cancer treatment in order to save enough money to put the deposit down on a home for her family". Another factor she took into account was that the appellant had apparently suffered no loss as a result of the transaction not closing.

[11] Perhaps most significantly, however, the motion judge was sharply critical of the appellant's conduct in the years before the transaction fell through. After extending the closing date twice in accordance with the notice provisions of the

APS, the appellant purported to extend the “firm” closing date of May 14, 2018 to a date in March 2019, despite giving the respondent insufficient notice.

[12] When the respondent then requested a few months later to have the closing date pushed back further to late April or the first week of May 2019, the appellant replied that the date could not be moved past April 23, 2019, or else the respondent would lose her right to compensation for the delay in completing the house. The motion judge found as a fact that when the respondent agreed to the April 23, 2019 closing date she “was not told, nor was she aware, that she did not have to sign the amendment and that the APS was voidable at this juncture.” The motion judge found further that the appellant’s representative had “deliberately” misled the respondent “into thinking she had no choice but to set a new date”.

[13] In our view, the motion judge was entitled to conclude as she did, on the facts as she found them, that it would be unconscionable to permit the appellant to keep the deposit.

[14] For these reasons we dismissed the appeal. As agreed by the parties, costs of the appeal are fixed at $12,500 all inclusive, payable by the appellant to the respondent.

“K. van Rensburg J.A.”

“L. Sossin J.A.”

“J. Dawe J.A.”