COURT OF APPEAL FOR ONTARIO

CITATION: Mouralian v. Groleau, 2024 ONCA 342
DATE: 20240506
DOCKET: C70741

Roberts, Trotter and George JJ.A.

BETWEEN

Natalie Mouralian

Plaintiff (Appellant)

and

Isabelle Groleau

Defendant (Respondent)

Kenyah Coombs, for the appellant[1]

Matthew Morden, for the respondent

Heard: in writing

On appeal from the order of Justice Jasmine T. Akbarali of the Superior Court of Justice, dated May 13, 2022, with reasons reported at 2022 ONSC 2925.

REASONS FOR DECISION

[1] This appeal arises out of a failed real estate transaction. The appellant entered into an agreement of purchase and sale for the respondent's residential

[1] Counsel was retained after the materials on this appeal were filed. Counsel wrote to the court on April 12, 2024, advising that she would not be filing any further submissions on this matter pursuant to the case management directions dated March 27, 2024.

property (the “APS”). The appellant appeals the dismissal of her action for the return of her $70,000 deposit. The purchase price for the property was $1,499,000. The appellant failed to close the transaction because she could not obtain financing. The respondent subsequently sold the property at a profit.

[2] The appellant commenced an action for the return of her deposit. The respondent brought a motion for summary judgment to dismiss the appellant’s action. The motion judge allowed the motion for summary judgment and dismissed the appellant’s action, awarding the respondent her costs in the amount of $12,000 all-inclusive.

[3] The appellant argues that the motion judge erred in dismissing her action. She essentially repeats on appeal the arguments rejected below: that the motion should have been dismissed because there were genuine issues requiring a trial as to whether she should be entitled to relief from forfeiture. She relies on her arguments that it would be unconscionable for the respondent to keep the deposit because: (1) the respondent suffered no loss; and (2) the appellant’s personal circumstances at the time she entered into the agreement of purchase and sale, through to the closing date, meant that she lacked the capacity to enter into the APS. The appellant’s personal circumstances include her struggles with mental

health and a recent bereavement. She seeks to file fresh evidence of medical evidence that she lacked capacity at the time that she entered into the APS.

[4] We do not admit the fresh evidence. First, it is not in proper form for opinion evidence because it consists of the appellant's affidavit, to which she merely appends her doctor's letter. Moreover, even if it were submitted in proper form, this evidence would not have changed the outcome because the appellant's doctor does not opine that the appellant lacked capacity to enter into the APS.

[5] Turning to the appeal, we are not persuaded that the motion judge made any reversible error.

[6] The motion judge properly considered the applicable two-part test for forfeiture from *Stockloser v. Johnson*, [1954] 1 Q.B. 476 (C.A.): (1) whether the forfeited deposit was out of all proportion to the damages suffered; and (2) whether it would be unconscionable for the seller to retain the deposit.

[7] The motion judge assumed that the first part of the test was made out, primarily because the respondent did not suffer a loss, and turned to the question of unconscionability. Having considered a variety of indicia of unconscionability, she determined that it would not be unconscionable for the respondent to retain the deposit. She was not persuaded that the appellant lacked capacity to sign the APS. She found that there was no inequality of bargaining power: the parties had

never met when the APS was concluded, the respondent was unaware of the appellant's circumstances, each party had an agent advising them, the APS was negotiated at arms-length, and the appellant had some past experience buying real estate. Moreover, the motion judge observed that the appellant did not seek to repudiate the agreement at any time until her financing fell through and had admitted on cross-examination that she had intended to complete the transaction. Relatedly, the motion judge concluded that the bargain between the appellant and the respondent was not improvident, as reflected by the appellant's stated intention to close the transaction.

[8] In sum, the appellant is seeking to relitigate the issues determined by the motion judge without identifying any reversible error made by the motion judge in her analysis or findings. That is not the role of this court.

[9] As the motion judge concluded: "[i]n reality, this litigation arises because the [appellant], despite her best intentions, encountered some unfortunate circumstances which impacted her ability to sell her other properties and obtain the financing she needed to close the real estate transaction with the [respondent]".

[10] We see no basis to intervene.

[11] Accordingly, the appeal is dismissed.

[12] The respondent is *prima facie* entitled to her partial indemnity costs of the appeal from the appellant. If the parties cannot agree on the amount of those costs, they may make brief written submissions of no more than one page plus costs outline within 7 days of the release of these reasons.

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