COURT OF APPEAL FOR ONTARIO

CITATION: 200 Ferrand Realty Limited v. 1284225 Ontario Limited, 2024 ONCA 684
DATE: 20240913
DOCKET: COA-23-CV-1196

Lauwers, Paciocco and Harvison Young JJ.A.

APPLICATION UNDER rules 14.05(3)(d), (g) and (h) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194

BETWEEN

200 Ferrand Realty Limited

Applicant
(Appellant)

and

1284225 Ontario Limited

Respondent
(Respondent)

George Limberis and Kevin Mitchell, for the appellant

Chris Reed, for the respondent

Heard: September 5, 2024

On appeal from the judgment of Justice Mohan Sharma of the Superior Court of Justice, dated October 6, 2023, with reasons reported at 2023 ONSC 5595.

REASONS FOR DECISION

[1] The litigants are parties to an assignment agreement under which 1284225 Ontario Limited ("128") and 200 Ferrand Realty Limited ("Ferrand") share the revenue from a parking lot at an office building. Under the parking agreement, Ferrand is the provider of parking spaces to the Don Valley Business Park Corporation and Amexon Realty Corporation (collectively "Amexon"). Although 128 had formerly acquired ownership of the parking lot addressed in the parking agreement, it transferred its rights under that agreement to Ferrand in the assignment agreement. Pursuant to the assignment agreement, 128's sole responsibility under the parking agreement is to collect the revenue, keep 40% of it, and remit the 60% balance to Ferrand.

[2] 128 grew discontent with the parking rates and pursued negotiations with Amexon. Ferrand refused to sign their negotiated new parking arrangement, in part because it purported to convert 128 into a party after it had assigned its rights away. Ferrand took the position that 128 was not a party to the parking agreement and had no right to initiate or pursue changes in the parking rates charged by Ferrand to Amexon. This dispute over 128's right relating to changes in the parking rates is the subject of the current appeal.

[3] In companion litigation involving 128, Amexon and Ferrand, reported at 2024 ONCA 247, this court reversed a related decision made by the application judge and set the parking rates that Amexon would have to pay. This court's decision

had the effect of rendering moot one of the major issues addressed in the decision under appeal – how parking rates under the parking agreement were to be calculated. This court held that pursuant to the parking agreement, those rates are set by a formula that the agreement provides, therefore negotiation is not necessary. Based on that formula this court then fixed the parking rate going forward until the next adjustment.

[4] The primary remaining issue in the current appeal as a result of that appeal decision is whether 128 has any status under the parking agreement to participate in setting the parking rates as if it were a party to the parking agreement together with Ferrand and Amexon when the issue next arises. The application judge thought that 128 should have participative status given its entitlement to a 40% share of the parking lot revenue, and to accomplish this result, implied a term into the parking agreement giving 128 such status. The application judge did so even though the implied term issue was not raised by the parties. The application judge relied on *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619, at para. 29. He gave the parties no opportunity to be heard on the implied term issue or the use of that authority during or after the hearing. It is improper for a judge to raise personally and without notice the issue on which the disposition turns without inviting submissions from the parties: *Rodaro v. Royal Bank of Canada* (2002), 59 O.R. (3d) 74 (C.A.), at paras. 61-63.

[5] We allow the appeal and set aside the judgment. We dismiss 128's application. We also dismiss Ferrand's application for a declaration as to 128's rights under the parking agreement. As we see it, 128 has no right to participate in the formulation or negotiation of the parking rates under the parking agreement because it is not a party to the parking agreement. There was no warrant for the application judge's implication of a term in 128's favour in the parking agreement. 128's interest in the proper performance of Ferrand's obligation to request parking rate increases under the parking agreement is governed by Ferrand's duty of good faith to 128 under the assignment agreement: see *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494; *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45, [2020] 3 S.C.R. 908; *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7, [2021] 1 S.C.R. 32; *2161907 Alberta Ltd. v. 11180673 Canada Inc.*, 2021 ONCA 590, 462 D.L.R. (4th) 291.

[6] As the parties agreed, the respondent shall pay the appellant costs in the amount of $9,000 all-inclusive.

"P. Lauwers J.A."
"David M. Paciocco J.A."
"A. Harvison Young J.A."