COURT OF APPEAL FOR ONTARIO

CITATION: EPRF Holdings Limited v. Fergus Bloor Inc., 2024 ONCA 707
DATE: 20240923
DOCKET: COA-22-CV-0208

Nordheimer, Gomery and Wilson JJ.A.

BETWEEN

EPRF Holdings Limited

Plaintiff/Defendant by Counterclaim (Appellant)

and

Fergus Bloor Inc.*, Storekey Holdings Inc.* and Cushman & Wakefield ULC

Defendants/Plaintiffs by Counterclaim (Respondents*)

Alan B. Dryer and Orly Kahane-Rapport, for the appellant

Robert G. Plate, for the respondents

Heard: August 20, 2024

On appeal from the judgment of Justice Andra Pollak of the Superior Court of Justice, dated August 30, 2022, with reasons reported at 2022 ONSC 4940.

REASONS FOR DECISION

[1] This is a dispute over who, in the circumstances of this case, gets to keep a deposit on the purchase price of a commercial property (the "Property") once the parties' agreement of purchase and sale ("APS") was terminated. On a summary judgment motion, the motion judge found that the respondents were entitled to

terminate the APS because the appellant failed to comply with the respondents' requisitions to remove an open building permit with respect to the Property. As a result, she held that the respondents were entitled to recover their deposit. She denied the appellant's claims for the deposit and for punitive damages.

[2] After hearing oral submissions, we dismissed the appeal with reasons to follow. These are our reasons.

Facts

[3] A $350,000 deposit was made by the respondent, Fergus Bloor Inc. ("Fergus"), on the price of the Property that it agreed to buy from the appellant, EPRF Holdings Limited ("EPRF"), pursuant to the APS. The purchase was to close on April 1, 2020. The deposit was kept in trust by a broker pending the closing.

[4] The APS contained a standard term allowing the buyer to require the seller to remove or remedy "any valid objection to title or … any outstanding work order or deficiency notice" within a set deadline, and providing for the termination of the agreement and return of the deposit if the seller did not do so and the buyer refused to waive its rights:

> If within that time [March 27th 2020, that is, five days prior to the scheduled closing date of April 1st, 2020] any valid objection to title or to any outstanding work order or deficiency notice … is made in writing to the Seller and which Seller is unable or unwilling to remove, remedy or satisfy or obtain insurance in favour of the Buyer and any mortgagee … and which the Buyer will not waive, this

> Agreement notwithstanding any intermediate acts or negotiations in respect of such objections, shall be at an end and all monies paid shall be returned without interest or deduction and Seller, Listing Brokerage and Co-Operating Brokerage shall not be liable for any costs or damages.

[5] On February 21, 2020, Fergus advised EPRF in writing that it had discovered that there were two outstanding work permits issued by the City of Toronto with respect to the Property. Fergus asked EPRF to remove them as the title insurer would not extend coverage to them. Fergus again asked EPRF to remove the permits on March 17, 2020. The next day, EPRF told Fergus that both permits had been removed.

[6] During the same time period, Fergus repeatedly sought an extension of the closing date due to the Covid-19 pandemic, which EPRF refused.

[7] On March 31, 2020, Fergus advised EPRF that it had discovered that, contrary to EPRF's representation, one of the open work permits had not been deleted. Fergus advised that it remained willing to close but would not do so until this issue had been resolved. Later that day, it delivered a notice of assignment of the APS to a newly incorporated company, the respondent Storekey Holdings Inc. ("Storekey").

[8] On April 1st, 2020, Storekey advised EPRF that it was terminating the APS due to EPRF's failure to remove the outstanding work permit. It took this step even

though EPRF offered an undertaking and indemnity with respect to the permit. The permit was in fact deleted on April 6, 2020.

[9] Following the termination, EPRF sued the respondents for payment of the $350,000 deposit, damages for breach of the APS, and punitive damages. Among other things, it alleged that Fergus assigned the APS to Storekey in bad faith to divert liability to a shell corporation. The respondents counterclaimed for return of the deposit. Both sides moved for summary judgment.

[10] The motion judge held that the outstanding work permit entitled the respondents to terminate the APS. Having failed to remove the second permit despite two written requisitions to do so, the appellant could not convey good and marketable title. Under the APS, it was EPRF's obligation to either have the work permit removed or to offer insurance. It could have also delayed the closing date for a few days, as suggested by the respondents. The respondents were not obliged to accept EPRF's undertaking and indemnity as an alternative solution.

[11] As a result, the motion judge found that the respondents were entitled to the return of the $350,000 deposit. She rejected EPRF's claim that Fergus had assigned the APS in bad faith to Storekey.

Issues on appeal

[12] These are the questions arising on the appeal:

(i) What is the appropriate standard of review?

(ii) Did the motion judge commit a reversible error in finding that the outstanding work permit entitled the respondents to terminate the APS?

(iii) If so, did she err in finding that the respondents forfeited the deposit?

(i) The applicable standard of review requires deference to the motion judge's findings of fact

[13] The appellant says that the standard of review on this appeal is correctness. It contends that the APS is a standard form contract and that the motion judge's interpretation of it is a question of law, based on *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23, at paras. 4, 24, and 28, and *2651171 Ontario Inc. v. Brey*, 2022 ONCA 148, 468 D.L.R. (4th) 545, at paras. 2 and 13. Alternatively, if the motion judge made a mixed finding of fact and law, the appellant argues that she made an extricable error of law such that the correctness standard applies, based on *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at para. 50.

[14] Although the APS is a standard form contract, we do not agree that the motion judge's decision should be reviewed on a correctness standard.

[15] The appellant concedes that an open building permit may constitute a valid objection to title. The question is whether it rose to this level in the specific circumstances of this case. This required the motion judge to make a mixed finding

of fact and law with respect to the parties' rights and obligations under a contract based on her assessment of the evidence, as in *Himidian v. Farquharson*, 2019 ONCA 575, 435 D.L.R. (4th) 480, at para. 8; *Bennett Law Chambers Professional Corporation v. Camcentre Holdings Inc.*, 2022 ONCA 658, 164 O.R. (3d) 161, at paras. 41-43. That the dispute arose in the context of a standard form contract does not change the nature of her determination.

[16] This is not a case like *2651171 Ontario Inc.*, where the resolution of the parties' dispute turned purely on the interpretation of a formula set out in a standard form contract. Nor does the motion judge's interpretation give rise to an extricable question of law. As held in *Sattva*, at paras. 53 and 55, such a "rare" question arises only with "the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor". As explained below, we do not agree with the appellant that the motion judge misapprehended the applicable legal test.

[17] Since the motion judge's decision turned on a determination of mixed fact and law, this court must defer to it absent an error of principle or palpable and overriding error of fact.

(ii) The motion judge committed no reversible error in finding that the outstanding work permit entitled the respondents to terminate the APS

[18] The motion judge found that Fergus delivered two proper requisitions with respect to the outstanding work permits and that the appellant had until March 27, 2020, to either have them closed or deleted or to obtain insurance over them for the respondents' benefit. Since the appellant did neither, the respondents were entitled to treat the APS as being at an end and recover their deposit.

[19] On this appeal, the appellant argues that the open building did not go to the root of title and so did not allow the respondents to walk away from the APS. It relies on evidence that the permit related to a neighbouring property, that it had been incorrectly registered against the Property, and that the City of Toronto had stated that it would be deleted. In these circumstances, the appellant contends that the open work permit was not material, posed no risk of litigation, and did not go to the root of title.

[20] The motion court judge considered this same evidence and rejected the same argument advanced by the appellant. She accepted the respondents' evidence that the open work permit was a legitimate concern. The permits had been open since 2011. EPRF had told Fergus that both work permits would be removed immediately when the issue was first raised on February 21, 2020.

Despite this assurance, and EPRF's representation that both permits had been deleted in March, one of them remained open over a month later. In the motion judge's view, this "signaled to the [respondents] that there may be a problem with the removal of the second work permit", despite EPRF's position that this would be straightforward. She concluded that EPRF could not deliver good and marketable title, entitling the respondents to terminate the APS.

[21] We find no error in the motion judge's analysis.

[22] The appellant contends that the test to determine whether a seller can deliver good and marketable title is objective, and little or no weight should be given to a purchaser's subjective views. The appellant submits that the motion judge accordingly erred in principle in relying on the respondents' evidence about their concerns about the open work permit because the purchaser was "acting in a capricious or arbitrary manner in order to avoid its own contractual duties."

[23] This argument mischaracterizes the test to be applied. As held in *Stefanovska v. Kok* (1990), 73 O.R. (2d) 368 (H.C.), at p. 378, "all of the surrounding circumstances must be considered to determine if the alleged impediment to title would, in any significant way, affect the purchasers' use or enjoyment of the property". The materiality of a deficiency should accordingly be assessed with regard to how, objectively speaking, the defect could impede the peaceful enjoyment of property. But, if a buyer has a legitimate and specific

intended use for the property, their subjective expectations and concerns may also be relevant.

[24] The motion judge considered the argument that the respondents' termination of the APS was capricious and arbitrary. She found that the respondents fully intended to proceed with the purchase of the Property right up to the evening of March 31, 2020, when they discovered that the second work permit had not been removed and that insurance remained unavailable. She rejected the appellant's allegation that Fergus had acted in bad faith either by assigning its rights under the APS to Storekey or by invoking the open permit as a basis to terminate. It is not this court's role to revisit the motion judge's findings on this point.

[25] The existence of the open permit gave rise to three legitimate and non-trivial concerns for the respondents. First, they could not obtain title insurance. Second, they intended to sell or lease the Property, and an open work permit could impede this. Third, if the City did not voluntarily remove the work permit – as it had failed to do, despite EPRF's repeated requests – the respondents would have to bring a court application, something they wished to avoid. On this evidence, it was open to the motion judge to find that EPRF could not deliver peaceful possession of the Property.

[26] As the appellant concedes, an open building permit may give rise to a valid objection. In both *Thomas v. Carreno*, 2013 ONSC 1495, 31 R.P.R. (5th) 311, aff'd 2013 ONCA 566, 35 R.P.R. (5th) 5, and *1854822 Ontario Ltd. v. Estate of Manual Martins*, 2013 ONSC 4310, courts found that an open permit could expose a property owner to work orders, expensive remedial work, and potential litigation. Where "the purchaser's right to enjoyment of the property is by no means certain", the open building permit is not a "minor defect" but rather goes to the root of title: *1854822 Ontario Ltd.*, at para. 15.

[27] The appellant contends that these cases are distinguishable because they concerned building permits for possible remedial work that had to be completed on the properties. Here, by contrast, the building permit that remained outstanding at the closing date did not, on its face, relate to any deficiency on the Property. As held by the motion judge, however, the outstanding work permit still exposed the respondents to risk, given the inability of EPRF to obtain its deletion by the City immediately on request. As held by this court in *Holmes v. Graham* (1979), 21 O.R. (2d) 289 (C.A.), at p. 292, a purchaser cannot be "compelled to take a title which would expose him to litigation or hazard"; a good and marketable title is "free from litigation, palpable defects and grave doubts and couples a certainty of peaceful possession with a certainty that no flaw will appear to disturb its market value."

[28] The motion judge's finding about litigation risk was not speculative. She was entitled to infer that litigation was a real possibility on the evidence before her, notably EPRF's failure to obtain the removal of the open permit weeks after it had raised the issue with the City.

[29] Given our conclusion on the second issue, we need not consider the third issue raised on the appeal.

Disposition

[30] The appeal is accordingly dismissed with costs fixed at $8,000 plus HST as agreed by the parties.

"I.V.B. Nordheimer J.A."
"S. Gomery J.A."
"D.A. Wilson J.A."