CITATION: Upper Vista Niagara Falls Development Corp. v. Ajibola, 2024 ONSC 5537
COURT FILE NO.: CV-24-62224 (St. Catharines)
DATE: 2024/10/07

SUPERIOR COURT OF JUSTICE-ONTARIO

RE: UPPER VISTA NIAGARA FALLS DEVELOPMENT CORP., Applicant

AND:

SHAKIRU OLASUNKANMI AJIBOLA and OWENS WRIGHT LLP, Respondents

BEFORE: Gibson J.

COUNSEL: Samuel Zakhour and Catherine Willson, Counsel for the Applicant

Rohit Sharma, Counsel for the Respondent Shakiru Olasunkanmi Ajibola

HEARD: September 24, 2024

ENDORSEMENT

Overview

[1] The Applicant Upper Vista Niagara Falls Development Corp. ("the Applicant") developed a condominium property at 7711 Green Vista Gate, in the city of Niagara Falls ("the Building"). The Respondent Shakiru Olasunkanmi Ajibola ("the Respondent") entered into an Agreement of Purchase and Sale ("APS") with the Applicant dated March 22, 2022, for a total consideration of $1,249,900, to purchase Unit 303 of the Building.

[2] The agreement called for six deposit cheques to be paid on specified dates. The cheques were made out to Owens Wright LLP ("Owens Wright"), in trust. Owens Wright is the real estate lawyer for Upper Vista with respect to purchase of units in the Building. All cheques and bank deposits were deposited into Owens Wright's trust account. To present, the Respondent has paid a total deposit amount of $197,485.

[3] In November 2022, during a visit to Niagara Falls to inspect the property's location, the Respondent says he discovered that a condominium building had already been constructed on the land and was occupied. The Building had an occupancy permit from the city since July 23, 2020. Mr. Ajibola says he had understood that he was purchasing a new pre-construction property. Later that same month, the Respondent visited Unit 303 and found that it was occupied by the builder and was being used by the Applicant as a model suite to promote its project. However, the Respondent did not raise this issue until November 2023, a year later.

[4] The Respondent asserts that the Applicant has misrepresented by failing to disclose the material fact that the property being sold to him is not a new pre-construction property, and was being used as a model suite. The purchase transaction has not closed.

[5] The Applicant has brought an application seeking the following relief:

a. A Declaration that the Respondent is in breach of his obligation under the APS dated March 22, 2022, and that the Agreement is at an end;

b. An Order that the deposits totalling $197,485 ("the Deposits") paid by the Respondent to Upper Vista as required by the APS has been forfeited; and

c. An Order that Owens Wright, Upper Vista's real estate law firm holding the trust funds on behalf of the Respondent, shall disburse the funds from its trust account to Upper Vista.

Facts

[6] The Respondent entered into an APS dated March 22, 2022, with the Applicant to purchase Unit 303 of the Building (the "Unit"). The Agreement called for six deposit cheques to be paid to Upper Vista on the following dates: March 22, 2022 $10,000; April 21, 2022 $62,495.00; June 20, 2022 $31,247.50; November 17, 2022 $31,247.50; April 26, 2023 $31,247.50; September 13, 2023 $31,247.50. The cheques were made out to Owens Wright, in trust. All cheques and bank deposits were deposited into Owens Wright's trust account.

[7] Owens Wright's practice with respect to its handling of Upper Vista's Agreements is that when a condominium is sold, the firm is sent the documentation with respect to the agreement so that it can begin to deal with the purchase.

[8] Under s. 73(2) of the *Condominium Act, 1998* (the "Act"), a purchaser is entitled to a 10-day period during which they may rescind or terminate the Agreement without any financial penalties. This is referred to as the "Cooling Off Period" after executing an Agreement. The Respondent did not exercise his right during that period to terminate the Agreement.

[9] The purchase of the Unit was to close on March 21, 2024. On March 14, 2024, Owens Wright sent all documents required to affect the closing to Rohit Sharma, the Respondent's real-estate lawyer, with a closing date of March 21, 2024. On March 21, 2024, Owens Wright advised Mr. Sharma that if they did not receive Mr. Ajibola's closing package with all the necessary documents and funds by end of day, that the Respondent would be in default.

[10] On March 21, 2024, True Law, litigation lawyers for the Applicant, sent a letter to Mr. Sharma advising that Upper Vista was ready, willing, and able to complete the purchase and sale of the Unit. After close of business on March 21, 2024, Owens Wright sent a letter to Mr. Sharma at approximately 7:00 p.m., via email and fax, advising that the Respondent was in default of the Agreement. On April 17, 2024, the Applicant's counsel sent a Certificate of Default and on and May 6, 2024, Owens Wright sent a Termination Letter to Mr. Sharma. As of the date of the hearing of this application, Owens Wright has not received any properly executed closing documents for the purchase of the Unit, nor the remainder of the purchase price. The total amount of the deposits, $197,485.00, remains in the trust account of Owens Wright.

Positions of the Parties

[11] The Applicant takes the position that it wishes to respond to what it says is the Respondent's breach of the Agreement by terminating the Agreement and that, as a result, the Applicant is entitled to claim the $197,485.00 under the provisions of the *Condominium Act, 1998* and the Agreement. The Applicant says it will mitigate its damages by taking steps to re-sell the Unit at a reasonable price and will look to the Respondent for any shortfall on any eventual re-sale.

[12] The Respondent takes the position that the Applicant breached the Agreement by failing to disclose the material information that the property was a model suite and had been constructed and occupied before the signing of the APS. He asks that the application be dismissed and the Deposit be returned to him by Owens Wright.

Issues

[13] The issues to be determined on this application are:

1. Did the Respondent breach the Agreement by failing to close the purchase of the property on March 21, 2024?

2. Did the Applicant breach the Agreement by failing to disclose the material information that the property was a model suite and had been occupied before the signing of the APS?

3. Should the Deposit be forfeit to the Applicant, or returned to the Respondent?

Analysis

[14] Subsection 81(1) of the Act mandates that "a declarant [in this case, Upper Vista] shall ensure that a trustee of a prescribed class or the declarant's solicitor receives and holds in trust all money, together with interest earned on it, as soon as a person makes a payment" on account of an Agreement for a proposed unit. The declarant's solicitor in this case is Owens Wright.

[15] Subsections 81 (4) and (5) of the Act provide that Owens Wright must hold the money in an Ontario trust account. Subsection 81(7) provides:

> (7) Despite the registration of a declaration and description, the person who holds money in trust under subsection (1) shall hold it in trust until, (a) the person holding the money in trust disposes of it to the person entitled to it, where the disposal is done in accordance with this Act and an agreement that the person who paid the money has entered into with respect to the proposed unit.

[16] There is no provision in the Act that precludes the payment of the deposit to Upper Vista as long as this payment is in accordance with the provisions of the Agreement. The relevant provisions

of the Agreement are as follows: Section 1.02 - sets out the purchase price and the deposits; Section 1.03 - defines the deposits; Section 2.01 (jj) - definition of purchase price; Section 8.01 - default by purchaser; Section 8.02 - evidence of default; Section 8.03 - vendor's remedies; Section 8.05 – rights of vendor; and, Section 15.01 – notice.

[17] The cumulative effect of these provisions is that the Respondent is in breach of his obligations under the Agreement, and it is open to the Applicant to declare the Agreement terminated (section 8.03) and, upon such event, Owens Wright may pay any deposits held to Upper Vista (sections 1.3, 8.03). While section 81(7) of the Act, and the above sections of the Agreement state that Upper Vista may take these steps unilaterally as long as it is in compliance with the provisions of the Act and the Agreement, Upper Vista seeks Court approval to ensure it is not exposed to a future claim by the Respondent for the deposit. In addition, Upper Vista wishes to re-sell the Unit to another purchaser and to ensure there is no risk in doing so. These steps are accomplished by seeking declarative relief that the Agreement is terminated.

[18] The declarative relief sought by the Applicant is properly the subject of an application pursuant to the provisions of Rule 14.05(3)(d), (e) and (h) of the *Rules of Civil Procedure*.

[19] The Respondent has raised an array of other issues in an attempt to defend his position. These are problematic. The Respondent's position is undermined by significant deficits in credibility.

[20] The Respondent has submitted a sworn affidavit stating that he entered into the Agreement to purchase the Property. In his affidavit dated June 7, 2024, the Respondent explicitly states that he was always aware of the Agreement of Purchase and Sale that he signed: a. "I entered into an [APS] with the vendor"; b. "I have always complied with the terms of the [APS]" c. "I made a deposit cheque (…) payable to the applicant's solicitor" d. "I have, until now, made a total deposit of $197,485.00". Mr. Ajibola goes so far as to even state sections of the APS in his affidavit at paragraph 27, 28, 31, 35 and others. The Respondent was and is obviously aware of the Agreement he signed and made the deposits outlined on page 1 of the Agreement.

[21] On July 4, 2024, a month after his sworn testimony, the Respondent then took a different position, and swore under oath that he was not the one who signed the Agreement. He swore on July

4 that the signature found on the Agreement is not his. The Agreement was sent to the Respondent's email address which he signed electronically and initialled 57 times. He admits that he is the only person who has access to his email address yet swears that it was not him who signed or initialed. On the hearing of the application, his counsel submitted yet another position: that Mr. Ajibola was confused by the electronic signature used to sign the documents. This strains credulity.

[22] The Respondent has made a complaint to the Real Estate Commission of Ontario ("RECO") in regard to this transaction. RECO made findings against the Respondent and found his statements to be lacking in evidence. Based on the reviewed information, it was established that Upper Vista's flyer and the purchase agreement signed by Mr. Ajibola back on March 22, 2022 indicated that the subject property was a 2-storey condominium unit with 3 bedrooms, 2 parking spots, and 2 lockers located on the third floor of the building ("303"). The Respondent also signed the purchase agreement electronically together with the Applicant through the Respondent's own personal email. RECO found that the other allegations concerning the Respondent not being provided with paperwork, lawyer information, forgery of signature and inaccurate number of parking spaces included, were not substantiated.

[23] The Respondent raises an array of issues that are not pertinent to this application. Some of the Respondent's claims are that: a. his realtor, Mr. Godfrey, did not conduct his due diligence with respect to the Property; b. Mr. Godfrey did not inform him that the building was already constructed; c. he believes the unit was occupied; d. he was shown the unit as a pre-construction, but did not know it was already built.

[24] Any potential legal disputes that may exist between Mr. Ajibola and his realtor for misrepresentation or lack of due diligence regarding the property are separate and apart from the Respondent's failure to close the purchase and sale. Upper Vista took no part in the interactions between Mr. Ajibola and his realtor. These claims are irrelevant to the present application. This application is to determine whether the Respondent has breached the Agreement, and if the Applicant is entitled to the Deposits. The proper method to address the Respondent's concerns are through a cross-application, a separate application or through an action, none of which have occurred.

[25] At the end of the day, the present application is a simple contract dispute. The Respondent has not established that the Applicant has engaged in any bad faith or has made a material misrepresentation regarding the status of the Unit at the time that the APS was signed. There is no reliable evidence that the Unit was represented as being pre-construction. No representations were made by the Applicant that were untrue. The Respondent waited over a year after he was aware of the status of the Unit before raising an issue, and continued to make deposit payments during that interval.

Conclusion

[26] The Respondent has breached the APS by failing to close the purchase of the property on March 21, 2024. The issues raised by the Respondent are irrelevant to the present application. The application will be granted.

Order

[27] The Court:

a. Declares that the Respondent is in breach of his obligation under the APS dated March 22, 2022, and that the Agreement is at an end;

b. Orders that the deposits totalling $197,485 ("the Deposits") paid by the Respondent to the Applicant as required by the APS have been forfeited; and

c. Orders that Owens Wright, the Applicant's real estate law firm holding the trust funds on behalf of the Respondent, shall disburse the funds from its trust account to the Applicant.

Costs

[28] The parties are encouraged to agree upon appropriate costs. If the parties are not able to agree on costs, they may make brief written submissions to me (maximum three pages double-spaced, plus a bill of costs) by email to my judicial assistant at mona.goodwin@ontario.ca and to Kitchener.SCJJA@ontario.ca. The Applicant may have 14 days from the release of this decision to provide its submissions, with a copy to the Respondent; the Respondent a further 14 days to respond; and the Applicant a further 7 days for a reply, if any. If no submissions are received within this timeframe, the parties will be deemed to have settled the issue of costs as between themselves. If

I have not received any response or reply submissions within the specified timeframes after the Applicant's initial submissions, I will consider that the parties do not wish to make any further submissions, and will decide on the basis of the material that I have received.

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M.R. Gibson J.

Date: October 07, 2024