

CITATION: Mutual Apartments Inc. v. Lam Estate, 2011 ONCA 119
DATE: 20110210
DOCKET: C50801

COURT OF APPEAL FOR ONTARIO

Moldaver, Simmons and Gillese JJ.A.

BETWEEN

Mutual Apartments Inc.

Plaintiff (Appellant)

and

Gab Yi Lam by Her Estate Trustee Sec Yong Lam and Sec Yong Lam Personally

Defendants (Respondents in Appeal)

Paul Neil Feldman and Oscar Strawczynski, for the appellant

David M. Goodman, for the respondents

Heard: February 8, 2011

On appeal from the judgment of Justice Jane E. Kelly of the Superior Court of Justice
dated June 26, 2009.

APPEAL BOOK ENDORSEMENT

[1] The third paragraph in Schedule “A” to the Agreement of Purchase and Sale (the “Agreement”) stipulated that the Offer and Agreement were conditional “upon the Purchaser being approved by the first mortgager to assume the first mortgage.” That same paragraph of the Agreement went on to expressly state that if the “Purchaser’s proposed assumption of the first mortgage is not approved, this Offer and the resulting Agreement shall be null and void.”

[2] The trial judge found that this condition had not been fulfilled. She further found that Mutual (the Purchaser) “had no intention of assuming the existing mortgage” and that Mutual could not blame the respondents (defendants) for not providing an assumable mortgage. The trial judge also found that the Purchaser had no right to waive this condition and that the Vendors had not waived it.

[3] We see no basis on which to disturb these findings of the trial judge. The record amply supports such findings.

[4] Accordingly, the Agreement of Purchase and Sale is void. For these reasons alone, this appeal must be dismissed. We would add that nothing in these reasons should be taken as endorsing the reasoning below on the other issues, including the reasoning in respect of the second deposit cheque and mitigation of damages.

[5] Costs to the respondent fixed in the sum of \$10,000, all inclusive.