CITATION: Warren Woods Land Corporation v. 1636891 Ontario Inc., 2012 ONCA 12
DATE: 20120106
DOCKET: M40854 (C54786)

COURT OF APPEAL FOR ONTARIO

Weiler J.A. (In Chambers)

BETWEEN

Warren Woods Land Corporation, 617567 N.B. Inc.,
1340258 Ontario Inc. and 797045 Ontario Limited

Applicants
(Respondents in Appeal/Responding Parties)

and

1636891 Ontario Inc.

Respondent
(Appellant/ Moving Party)

Christopher A.L. Caruana, for the moving party

Barbara Frederikse, for the responding parties

Heard: January 3, 2012

On appeal from the order of Justice Barry H. Matheson of the Superior Court of Justice dated December 5, 2011, with reasons reported at 2011 ONSC 7177, and on a motion for a stay pending appeal.

Weiler J.A.:

[1] The issue on this motion is whether the appellant (the "Manager") has satisfied the three criteria for the granting of a stay under rule 63.02(1)(b) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. The criteria that the Manager must establish are: (1)

the appeal raises a serious question; (2) it will suffer irreparable harm if the stay is not granted; and (3) on a balance of convenience, it would suffer greater harm if the stay is not granted than the respondents would suffer if the stay is granted: *Circuit World Corp. v. Lesperance* (1997), 33 O.R. (3d) 674 (C.A.), at p. 676-77. The three components of the test are interrelated. The overriding question is whether granting the stay is in the interests of justice: *BTR Global Opportunity Trading Limited v. RBC Dexia Investor Services Trust*, 2011 ONCA 620, at para. 16.

[2] The order sought to be stayed is an order removing all notices filed by the Manager on the land of the respondents (the "Owner"). In making the order, the application judge held that, at the time the notices were registered, the Manager did not have an interest in the land in issue.

[3] Any interest the Manager had in the land at the time it registered the notices on title arises out of the Development Management Agreement between the Manager and the Owner, dated September 16, 2005. Article 3.14 of the Agreement contains a provision giving the Manager a contingent right or option to purchase some of the land as follows:

> 3.14 Agreement to sell lots to the Manager
>
> The Owner shall provide written notice to the Manager of the commencement of servicing for each phase of each approved draft plan on the Lands. The Manager shall have the one time right upon receipt of each such notice to acquire some or all of the residential lots arising from that particular phase of the draft plan approved Lands, such right to be exercised within thirty (30) days of receipt of such notice. The purchase price shall be the then market value at the time that the right to

> purchase is exercised, as agreed by the Owner or as determined by an appraiser selected by the Owner and the Manager and failing agreement on the appraiser, the purchase price shall be determined by averaging the values as calculated by an appraiser appointed by the Owner and by an appraiser appointed by the Manager.

[4] The Owner was dissatisfied with the Manager's work and advised the Manager in February 2007 that it wished to terminate the Agreement, but did not take the steps to terminate envisaged by the Agreement. The Owner made no payments to the Manager after June 1, 2007.

[5] On October 16 and 28, 2009, the Manager registered the notices in question claiming entitlement to an unregistered interest in the Owner's property pursuant to s. 71(1) of the *Land Titles Act*, R.S.O. 1990, c. L.5.

[6] The Owner sent a Notice of Complaint to the Manager on August 8, 2011, referring to default on the part of the Manager.

[7] The Manager replied by letter dated August 25, 2011, indicating its understanding:

> We had collectively, with you, agreed to suspend working on the project and the only outstanding item between us was the $400,000 that you owed us. This payment at the time you indicated you could not make due to cash flow constraint and we agreed to wait in the payment until the property was refinance[d], sold, or developed. We secured this obligation by registering the agreement on title.

[8] The Owner then purported to formally terminate the Agreement on August 30, 2011 and brought an application to have the notices that the Manager registered on title removed.

[9] At this point, the event triggering the Manager's option to purchase some of the Owner's land (*i.e.*, commencement of servicing) had not occurred. However, when the Owner's representative, Mr. Ruscica, was cross-examined on his affidavit in support of the motion he agreed that, "if the agreement wasn't validly terminated, or somehow the Court finds that it should still remain, then [the Manager] still would have an interest in the land." In reliance on this admission the Manager opposed the motion. The Manager further submitted that the Agreement created a contingent option to purchase land which was an interest in land.

[10] The Owner argued that, while the intention of the parties was to create an interest in land upon the happening of certain events, the question of whether an interest in land had been created was not purely factual. The Manager only had a right to an "incorporeal hereditament" at common law, that is, a right that is not tangible. Relying on *Bank of Montreal v. Dynex Petroleum Ltd.*, 2002 SCC 7, 1 S.C.R. 146, at para. 8, it submitted that, "[a]t common law, an interest in land could issue from a corporeal hereditament but not from an incorporeal hereditament." The Owner argued that, since the Manager had a right to an incorporeal hereditament, the Manager did not have an interest in the land in question at the time it registered the notices.

[11] In addition, the Owner argued that, as a matter of law, article 3.14 was void because the Agreement had no time limit and thus offended the rule against perpetuities. An equitable interest is void if it can vest beyond the perpetuity period of twenty-one years: *Politzer v. Metropolitan Homes Ltd.,* [1976] 1 S.C.R. 363.

[12] The application judge quoted the *Bank of Montreal* decision. He then held that, "[s]ince it was still within the right of the [Owner] not to develop the land, [the land] could be sold and the [Manager] would not have the right to acquire land under the Management [Development] Agreement. [The Manager] had no right to register notices on title." Accordingly, the notices were struck. It is this decision that the Manager has appealed and for which it seeks a stay.

[13] In my opinion, the Manager has not met the test for a stay.

[14] There is no serious question to be determined

[15] The arguments made before the application judge as to whether article 3.14 of the Agreement created an interest in land, were also made before me. I agree with the application judge's conclusion that article 3.14 did not give the Manager an interest in the land at the time it registered the notices on title. My reasons for doing so are, however, somewhat different than his.

[16] The Manager submits that the application judge ought to have converted the application into an action and that there are serious issues to be tried, namely, whether there was an interest in land at the time of the purported termination of the Agreement and whether the Agreement was validly terminated. The Manager did not distinguish para. 8 of *Bank of Montreal*. Nor, as was ultimately done in *Bank of Montreal*, did the Manager give any reason why the common law prohibition on the creation of an interest in land from an incorporeal hereditament should not be maintained.

[17] More importantly, the Manager's submissions ignore the Owner's argument concerning the rule against perpetuities. The case law is clear that an option to purchase land constitutes an interest in land: *Frobisher Ltd. v. Canadian Pipelines & Petroleums Ltd.*, [1960] S.C.R. 126. Equally clear, is that an option to purchase land is subject to the rule against perpetuities: *Politzer*. While the application judge did not deal with this argument, it is certainly before me. Even if article 3.14 was an option to purchase and did create an interest in land,[1] the Owner's argument that the Agreement is void because it offends the rule against perpetuities is unanswered by the Manager.

[18] Refusing to grant a stay will not result in irreparable harm

[19] Irreparable harm is harm which cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other: *RJR-Macdonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at p. 341.

[20] If a stay is not granted, the Manager will not be able to enforce the Agreement by way of specific performance as the Owner intends to sell the land. However, the Manager concedes that it cannot meet the test for specific performance in *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415. The Manager put forward no evidence that the lands in question are unique such that irreparable harm would result if a stay is not granted. The lands were always intended for development. While the Manager will be out of

[1] Where a party's right to purchase land is conditional on the occurrence of a certain event that is solely within the land owner's control, the party does not appear to have an interest in land but only a contractual right: *Irving Industries (Irving Wire Products Division) Ltd. v. Canadian Long Island Petroleums Ltd.*, [1975] 2 S.C.R. 715. Where there is only a contractual right, and not an interest in land, the rule against perpetuities does not apply.

business, it is a shell corporation incorporated for the sole intent of developing the properties in issue, which is plainly not going to be done by the Manager now.

[21] The balance of convenience does not favour granting a stay

[22] If a stay is granted, the Owner will not be able to refinance the lands and to sell them pending the outcome of the appeal. On the other hand, if a stay is not granted, the Manager will not be without a remedy. It will still be in a position to sue for damages for alleged breach of the Agreement.

Disposition

[23] As the Manager has not met any of the criteria for granting a stay, the motion for a stay is dismissed.

[24] If the parties are unable to agree on the costs of this motion, they may arrange a fifteen minute teleconference with me through the Motions Clerk on or before January 13, 2012.

"Karen M. Weiler J.A."

RELEASED: January 6, 2012