COURT OF APPEAL FOR ONTARIO

CITATION: Taylor v. 864773 Ontario Inc., 2020 ONCA 345
DATE: 20200603
DOCKET: C67381

Rouleau, van Rensburg and Roberts J.J.A.

BETWEEN

Donald Taylor, Eleanor Hepburn, Mary Lou Taylor-Hawley and Janet Taylor Walker

Applicants (Respondents/ Appellants by way of cross-appeal)

and

864773 Ontario Inc.

Respondent (Appellant/ Respondent by way of cross-appeal)

Frank Sperduti and Graham Splawski, for the appellant/respondent by way of cross-appeal 864773 Ontario Inc.

Cameron Fiske and William S.M. Cord, for the respondents/appellants by way of cross-appeal Donald Taylor, Eleanor Hepburn, Mary Lou Taylor-Hawley and Janet Taylor Walker

Heard: in writing

On appeal from the judgments of Justice Michael R. Gibson of the Superior Court of Justice dated July 25, 2019.

REASONS FOR DECISION

A. OVERVIEW

[1] Pursuant to an option agreement, the appellant had a right of first refusal in respect of land owned by the respondents. A dispute arose as to whether the appellant had validly exercised its option. The application judge declared that the appellant's purported exercise of the option was invalid because its offer was not for a "like amount" to a third party offer for the purpose of the agreement.

[2] On appeal, the appellant argues that the application judge erred in concluding that its offer was not sufficiently "like" the third-party offer. The respondents cross-appeal, seeking to vary the language in the judgments to facilitate the sale to the third party.

[3] For the following reasons, we dismiss the appeal and allow the cross-appeal.

B. BACKGROUND

[4] The subject property is a piece of undeveloped farmland in Burlington. The appellant, a neighbouring land owner, has a right of first refusal in respect of the sale of the property pursuant to an option agreement entered into by the parties' legal predecessors. The appellant can exercise its option under the agreement by indicating its willingness to purchase the property "upon the same terms and conditions and for a like amount" as a third-party offer.

[5] There have been many unsuccessful attempts to sell the land. The respondents now seek to sell the land to a third party pursuant to a conditional agreement of purchase and sale with a purchase price of $15.3 million. The conditions in the agreement include the purchaser's satisfaction with the environmental condition and development suitability of the property. The respondents notified the appellant of this offer pursuant to the terms of the option agreement. The appellant then purported to exercise the option by making an offer to buy the property for $10,000,000, with no conditions.

[6] The respondents brought the underlying application seeking a declaration that this was an invalid exercise of the option and that the option be discharged from title. The appellant brought a counter-application, seeking a declaration that it had validly exercised the option. Its position was that considering the factual matrix of the property and the option, and notably the impediments to development of the property, the proposed $10,000,000 purchase price offered without conditions is a "like amount".

[7] The application judge allowed the respondents' application in part and dismissed the appellant's counter-application. He declared that the option had not been validly exercised because $10,000,000 is not a "like amount" to the $15.3 million offer. The application judge further declared that the option to purchase will be extinguished should the transaction be completed and at that point the

respondents could move for an order directing the removal of certain instruments related to the option agreement from title.

C. ANALYSIS

(1) The Application Judge Did Not Err in Concluding that the Exercise of the Option is Invalid

[8] The appellant alleges that the application judge disregarded two key pieces of evidence. First, the appellant explains that the development costs it alleges will have to be incurred to develop the property for residential purposes are such that its offer of $10,000,000 without conditions is a like amount to the $15.3 million offer received by the respondents. The appellant argues that the application judge disregarded this evidence solely on the basis that no expert opinion was led in support, despite the fact that the evidence filed by the appellant came from its corporate vice-president who had first-hand knowledge of the matter. Second, the appellant argues that the application judge did not consider the fact that numerous prior agreements of purchase and sale had failed to close because of the significant development costs that would have to be incurred by prospective purchasers.

[9] We see no reason to interfere with the application judge’s conclusion. He considered all of the relevant evidence and his conclusion that the appellant's offer was not in a “like amount” is well supported in the record.

[10] The third-party agreement of purchase and sale in the amount of $15.3 million received by the respondents, states that the property is being bought “as is” without representations or warranties. Nothing in the record indicates the purchaser’s proposed use of the property. Even accepting the existence of “extraordinary costs” associated with developing the property, as advanced by the appellant in its supporting affidavit, adjustments to the purchase price to account for these costs may not be demanded. It is simply speculation as to whether the third-party purchaser will seek to renegotiate the price and, if such a renegotiation is attempted, whether it will result in a new or modified agreement of purchase and sale or the agreement simply falling through. In our view, none of these possibilities change the nature of the existing offer.

[11] Further, we do not accept the appellant’s argument that the application judge did not consider the property’s history of failed attempts at sale. These prior offers are referenced in his reasons. The fact that prior offers have fallen through as a result of higher than expected development costs does not establish the requisite similarity between the purchase prices at issue.

[12] As for the appellant’s argument that the application judge erred by concluding there was insufficient evidence that the unconditional offer is worth the difference in price, we disagree. The application judge was not required to accept the partisan opinion of similarity tendered by the appellant’s own officer, an opinion premised on the appellant’s proposed use of the property. He properly concluded

that absent expert evidence confirming the appellant's proposed adjustments are necessary and appropriate when comparing the two offers, it would not "accord with sound commercial principles and good business sense, or indeed common sense" to make adjustments of that magnitude.

[13] In these circumstances, we see no error in the application judge's conclusion that the proposed purchase price of $10,000,000 is not a "like amount" to the $15.3 million purchase price being considered by the respondents. It may well be that, if the appellant was the party seeking to purchase the property, it would demand a reduction in the purchase price equal to the amount of the costs it alleges need to be incurred to develop the property for residential purposes. The fact remains, however, that the $15.3 million price has not been renegotiated and, at this point, nothing in the record indicates that it will be.

(2) The Cross-appeal is Allowed on Consent

[14] The appellant agrees that, if its appeal is dismissed, the respondents' cross-appeal regarding the form of the judgments should be allowed. As a result, we allow the cross-appeal, set aside paragraph two of both judgments and replace them with the following:

> THIS COURT DECLARES that the rights of 864773 Ontario Inc. to purchase the Property (as hereinafter described) pursuant to the Option to Purchase dated the 14th day of June, 1973, registered against those lands and premises known municipally as 1309 Appleby Line, in the City of Burlington, Ontario and registered as

Instrument No. 364344 as against PIN 07183-0185 (LT), (the "Property"), which rights were assigned by Instruments Nos. 642060 registered June 3, 1986, 680569 registered November 19, 1987 and 684283 registered January 15, 1988, are extinguished in their entirety on the completion of the purchase of the Property pursuant to an Agreement of Purchase and Sale between Taylor, Donald; Hepburn, Eleanor, Walker, Janet Taylor; and Taylor-Hawley, Mary Lou as Sellers and John Vitulli Jr. in trust (and without personal liability) as Buyer, dated the 17th day of December, 2018, (the "Agreement of Purchase and Sale") by John Vitulli Jr. in trust (and without personal liability) or his Permitted Assignee, as defined in Schedule A, paragraph 10 of the Agreement of Purchase and Sale.

THIS COURT ORDERS that immediately following the registration of a Transfer/Deed of Land from Donald Taylor, Eleanor Hepburn, Janet Taylor Walker and Mary Lou Taylor-Hawley to John Vitulli Jr. in trust (and without personal liability) or his Permitted Assignee, showing consideration of $15,300,000.00, the Land Registrar for the Regional Municipality of Halton (No. 20) (hereinafter referred to as the "Land Registrar") is hereby directed to delete, discharge or otherwise rule off the title abstract for PIN 07183-0185 (LT) Instruments Nos. 364344, registered June 14, 1973, 642060, registered June 3, 1986, 680569, registered November 19, 1987 and 684283, registered January 15, 1988, forthwith upon this Order, being submitted for registration.

THIS COURT ORDERS that a law statement of a lawyer for Donald Taylor, Eleanor Hepburn, Janet Taylor Walker and Mary Lou Taylor-Hawley that the Transfer of the Property has been made to either John Vitulli Jr. in trust or a Permitted Assignee, as defined in Schedule A, paragraph 10 of the Agreement of Purchase and Sale, shall be full and sufficient evidence of same having occurred and the Land Registrar shall accept such law statement as good and sufficient evidence of same, and is directed and shall on the registration of such Transfer of the Property with such law statement, delete,

> discharge or otherwise rule off the instruments referred to in paragraph 2 of this Order.

D. DISPOSITION

[15] The appeal is dismissed, the cross-appeal is allowed and the judgment is varied as described above.

[16] If the parties cannot agree on costs of this appeal and cross-appeal, they may make brief submissions in writing electronically to coa.e-file@ontario.ca, not to exceed five pages in length as follows: the respondent within ten days of the release of this decision, and the appellant within five days thereafter.

"Paul Rouleau J.A."
"K. van Rensburg J.A."
"L.B. Roberts J.A."