COURT OF APPEAL FOR ONTARIO

CITATION: Ju v. Tahmasebi, 2020 ONCA 383
DATE: 20200615
DOCKET: C67658

Doherty, Hourigan and Fairburn JJ.A.

BETWEEN

Hong Ju and Songlin Cai

Applicants
(Appellants)

and

Monir Tahmasebi and Golden Life Realty Ltd.

Respondents
(Respondents)

Julian Binavince, for the appellants

Pathik Baxi, for the respondent

Heard: In Writing

On appeal from the judgment of Justice Janet Leiper of the Superior Court of Justice, dated October 11, 2019.

REASONS FOR DECISION

Overview

[1] The appellants and individual respondent ("respondent") entered into two agreements of purchase and sale ("agreements") for a property that the appellants were responsible for having severed into two lots.

[2] The respondent provided a $100,000 deposit at the time that the agreements were entered into, to be held in trust by Golden Life Inc. ("Golden Life"). The respondent agreed to pay a second total deposit of another $100,000 ($50,000 per lot), in accordance with the following term:

> The buyer agrees to pay an additional deposit of $50,000 dollars payable to Golden Life Realty Ltd. in trust after the seller provides City or OMB severance approval to the buyer's lawyer. [Emphasis added.]

[3] Over two years after the agreements had been entered into, the appellants informed the respondent that the lots had been severed. Shortly after having told the respondent about the severance, the appellants insisted on payment of the second deposit "ASAP". When the respondent did not comply with the appellants' unilaterally imposed deadline for payment, the appellants terminated the agreements and relisted the properties for sale. When the specified closing date finally arrived, neither party tendered to close.

[4] The appellants brought an application for two declarations: (a) that the respondent had repudiated the agreements by failing to pay the second deposit by the date insisted upon by the appellants; and (b) that the $100,000 held in trust by Golden Life be transferred to the appellants. The appellants also asked for an order directing a trial with respect to the damages caused by the respondent's purported repudiation of the agreements.

[5] The application judge concluded that the appellants had set an "unreasonable date for the payment of the second deposit" and ought not to have terminated the agreements. The application was dismissed.

[6] This is an appeal from that decision. The appellants claim that the application judge erred in three respects:

1. misapprehending the date on which the approval for severance had been obtained;
2. misapprehending the date on which the second deposit should have been paid; and
3. misapplying the doctrine of good faith performance.

[7] For the reasons that follow, the appeal is dismissed.

Findings of Fact and the Decision Appealed From

[8] The application judge's findings of fact, to which we owe deference, are central to understanding her conclusion that the appellants set an unreasonable date for the payment of the second deposit and, therefore, ought not to have terminated the contract. Those factual findings are as follows:

(a) March 23, 2016 – The agreements were signed.

(b) November 20, 2017 – The respondent wrote to the appellants, suggesting that they had failed to seek timely severance.

(c) December 15, 2017 – Although the Committee of Adjustment originally denied the application to sever, that decision was successfully appealed to the Toronto Local Appeal Body ("TLAB"). The TLAB granted severance on certain conditions being met.

(d) December 15, 2017 to June 27, 2018 – The appellants did not inform the respondent that severance had been granted.

(e) December 19, 2017, January 26, February 20, and March 12, 2018 – Unaware that severance had been granted, the respondent wrote to the appellants asking for updates about the status of the severance application. No response was received.

(f) March 25, 2018 – The appellants' counsel finally wrote back to the respondent, claiming he had been busy with work and away. The respondent was not told about the TLAB decision granting severance.

(g) June 8, 2018 – Certificate of Official issued pursuant to s. 53(42) of the *Planning Act*, R.S.O. 1990, c. P.13, confirming that the severed parcel of land could be conveyed.

(h) June 27, 2018 – The severed parcel of land was transferred by the appellants to themselves for no consideration.

(i) June 27, 2018 – On the same day that the severed land was transferred to the appellants, they informed the respondent for the first time that severance had been approved. As the agreements contained a condition that "the closing will be 60 days after the seller received a separate deed from the City of Toronto", the appellants set a closing date 60 days into the future.

(j) July 6, 2018 – The respondent asked for an extension of 45 days to close the properties because the agreements had been outstanding for more than two years and she was out of the country for the summer.

(k) July 22 and 25, 2018 – The request for an extension of time was refused and the appellants demanded the second deposit "ASAP".

(l) August 1, 2018 – The appellants informed the respondent that she was in default and that the appellants would "exercise their rights under the agreements", including terminating the agreements if the second deposit was not paid by August 7, 2018.

(m) August 7, 2018 – The appellants terminated the agreements and later listed the properties for resale.

[9] The application judge worked with this constellation of facts in arriving at her conclusion that the appellants had not behaved reasonably when they insisted on payment of the second deposit on such a tight turnaround.

[10] The application judge found that, despite the respondent's repeated inquiries about the status of the application to sever, the appellants never informed her that the city, through the TLAB decision, had actually approved the application on December 15, 2017. Rather, the appellants chose to inform the respondent about the approval of severance only after the severance was complete and the parcel of land had been transferred. At that point, the closing date for the property was fixed under the agreements for 60 days later.

[11] As the application judge found, having received the respondent's extension request, and knowing that the respondent was out of the country, the appellants proceeded to "set a deadline that they could reasonably have expected would be impossible for the [respondent] to meet." In light of the fact that the appellants had waited over six months to inform the respondent about the "City approval", the triggering event for the second deposit, the application judge concluded that the appellants' demands for fast payment of the second deposit were not reasonable nor "consistent with the organizing principle of good faith that underlies Canadian contract law."

The Date on Which Severance was Approved

[12] The appellants argue that the application judge made a palpable and overriding error by misapprehending the date on which the severance was approved. While December 15, 2017 was the date of the TLAB decision, the appellants maintain that the "approval" was only conditional in nature. According to the appellants, actual approval was not obtained until the "Certificate of Official" was signed pursuant to s. 53(42) of the *Planning Act* on June 8, 2018.

[13] This argument cannot succeed. It overlooks the fact that the agreements specifically refer to the "city … severance approval" being the triggering event for the second deposit. The application judge interpreted that clause to refer to when the city first approves the application for severance. For the application judge, that was when the TLAB decision was rendered.

[14] This court is not engaged in a *de novo* inquiry. The question is whether the trial judge's finding, that the city approval was given in the TLAB decision, constitutes a palpable and overriding error. We see no error, let alone palpable and overriding error, in the application judge's determination that the city's approval was provided in the TLAB decision on December 15, 2017.

[15] The fact that the TLAB decision was conditional on certain steps being taken did not mean that the city had not approved the severance. It was approved subject to the appellants doing what was required of them to obtain the necessary

Certificate of Official. If the parties had intended to have the issuance of the Certificate of Official govern the date for triggering the need for the second deposit, they would have contracted to that effect. Of course, any such agreement would have offered less protection for the appellants because it would have delayed the securing of the second deposit for a significant period of time.

[16] In any event, even if the date for city approval was the date of the Certificate of Official, we agree with the respondent that the application judge's decision did not turn on this point. Whether the date was December 15, 2017 (the TLAB decision) or June 8, 2018 (the Certificate of Official) does not impact the application judge's core reason for finding that the appellants behaved unreasonably.

[17] The fact is that once the respondent was finally informed of the severance, she asked for an indulgence because she was out of the country. The respondent's whereabouts were captured in counsel correspondence at the time. While the appellants suggest that the respondent's claim that she was out of the country constitutes inadmissible hearsay, this misses the point. This case did not turn on whether the respondent was actually out of the country or not, but on the fact that, in light of the history of this matter, when faced with a request for an indulgence, the appellants behaved unreasonably. That finding is not fixed in the date of the city approval, but in the appellants' behaviour in the over six months preceding their sudden insistence upon payment of the second deposit.

[18] We see no error in the application judge's reasoning to this effect and defer to her conclusion.

The Date on Which the Second Deposit Should have been Paid

[19] The appellants argue that the application judge erred in law by failing to set out what would have constituted a reasonable time within which to pay the second deposit. They argue that, in light of a clause in the agreements, stating that time was of the essence, it was reasonable for the respondent to pay the second deposit "immediately" after she learned of the severance. The appellants say that this should have occurred within 24 hours and, at the outside, within one week of them having shared with the respondent that severance was complete.

[20] Where there is no express reference in an agreement to the time of performance, the law requires performance within a reasonable time. What is reasonable will be determined upon the facts of the individual case: *Illidge v. Sona Resources Corporation* 2018 BCCA 368, at para. 61. The application judge was under no obligation to set out what date would have been reasonable. The key is that, in light of all of the operative facts, she concluded that August 7, 2018 was not reasonable.

The Duty of Good Faith Performance

[21] The appellants take issue with the application judge's finding that their imposing of the August 7, 2018 deadline was not "consistent with the organizing

principle of good faith that underlies Canadian contract law." The appellants claim that they were merely curing what they understood to be a breach with respect to the obligation to pay the second deposit. The appellants argue:

> If payment of the Second Deposit was overdue …, the [appellants] were under no duty to waive the default or provide an extension for the payment of the Second Deposits. Put another way, if the [respondent] was in default with respect to the payment of the Second Deposits, it was not 'unreasonable and inconsistent with the organizing principle of good faith that underlies Canadian contract law' for the Purchaser to terminate the Agreements.

[22] This is a circular argument. In our view, it is just another way of saying that the respondent's payment of the deposit was overdue. That argument is directly contrary to the application judge's conclusion, as previously addressed, that there was nothing in the agreements demanding the payment by a specific date or within a specific time.

[23] We defer to the application judge's conclusion that it was a violation of the principle of good faith to proceed as the appellants did: ignore the respondent's repeated requests for an update for many months, withhold critical information about the city approval, and then demand immediate payment by an arbitrarily set date when the respondent said she was not in a position to pay because she was out of the country and needed an indulgence.

[24] The application judge's reference to the appellants having behaved in a manner that was inconsistent with the organizing principle of good faith underlying

Canadian contract law was really just another way of saying that the appellants had acted unreasonably. As noted in *Bhasin v. Hrynew* 2014 SCC 71, [2014] 3 S.C.R. 494, at para. 66: the "organizing principle of good faith manifests itself through the existing doctrines about the types of situations and relationships in which the law requires, in certain respects, honest, candid, forthright or reasonable contractual performance."

Conclusion

[25] The appeal is dismissed.

[26] The appellant will pay costs in the amount of $7,500 to the respondent, inclusive of taxes and disbursements.

"Doherty J.A."
"C.W. Hourigan J.A."
"Fairburn J.A."