COURT OF APPEAL FOR ONTARIO

CITATION: Whitby (Town) v. G & G 878996 LM Ltd., 2020 ONCA 654
DATE: 20201019
DOCKET: C66211

Hourigan, Trotter and Jamal JJ.A.

BETWEEN

The Corporation of the Town of Whitby

Applicant
(Respondent in Appeal)

and

G & G 878996 LM Ltd.

Respondent
(Appellant)

John A. Annen, for the appellant

R. Andrew Biggart and Natalia Sheikh for the respondent

Heard: October 13, 2020

On appeal from the order of Justice Myrna L. Lack of the Superior Court of Justice, dated October 26, 2018.

REASONS FOR DECISION

[1] The appellant, G&G 878996 LM Ltd. ("G&G"), owns a multi-story, mixed-use commercial/residential building in downtown Whitby with the municipal address of 123,125 and127 Brock Street South ("123"). On April 2, 2015, a fire occurred at an adjacent building, 121 Brock Street South ("121"), which resulted in 121 being

demolished, except for 121's wall adjoining G&G's property. This adjoining wall was eventually removed with the approval of the respondent, the Corporation of the Town of Whitby ("Whitby").

[2] Whitby's Chief Building Official ("CBO") later determined that 123's north wall, which had previously abutted 121, constituted an immediate danger to occupants and the public-at-large. Pursuant to her authority under s.15.10 of the *Building Code Act*, *1992*, S.O. 1992, c. 23, (the "Act"), the CBO issued two emergency orders dated November 30, 2017 and December 1, 2017, to eliminate the immediate danger posed by the exposed wall. Whitby then spent $335,089.86 to protect the public and effect repairs to terminate the danger.

[3] Following the issuing of an emergency order under s. 15.10 of the Act, a CBO must apply to a judge of the Superior Court to confirm the order. On such an application, the court must confirm, modify, or rescind the order. It must also determine whether the amounts spent to terminate the danger may be recovered in whole, in part, or not all. In the case at bar, the application judge confirmed the emergency orders and ordered that Whitby could recover from G&G its full costs in taking steps to terminate the immediate danger, as well as its costs of the application.

[4] The primary ground of appeal is that the application judge erred in failing to consider whether the doctrine of equitable set-off applied in determining whether

the amounts spent by Whitby were recoverable from G&G. G&G submits that equitable set-off is applicable because it has a claim against Whitby for failing to enforce an order it made against the owner of 121 to, among other things, repair the foundation walls, stone rubble footings and slab on grade that were exposed to the elements as a consequence of the fire and the building being demolished. It also submits that the application judge erred in law by approaching the case on the basis that it is analogous to an environmental damage claim. Finally, G&G submits that the application judge made her order based on an incomplete evidentiary record.

[5] Whitby makes two submissions in response. First, it argues that, pursuant to s. 15.10 (9) of the Act, the application judge's order is final and not subject to appeal. Second, it submits that this court should decline to consider G&G's equitable set-off argument because it was not raised before the application judge.

[6] We conclude that the appeal must be dismissed based on the second argument advanced by Whitby.

[7] We reject the argument that the application judge incorrectly analogized the case at bar to an environmental damage claim. The comments of the application judge in that regard were part of a dialogue with counsel and not part of her reasons. Regarding the evidentiary record, no complaint was made by G&G on the

return of the application about the state of the record. In any event, we are not satisfied that the record was insufficient for the application judge to make her order.

[8] Regarding the equitable set-off argument, we note that G&G commenced an action against its insurers, Whitby, and the current and former owners of 121. In its statement of clam, which was an exhibit to the affidavit filed by G&G on the application, it alleged various acts of negligence by Whitby. However, at the hearing of the application, G&G did not argue that it was entitled to an equitable set-off. In her oral submissions, the then counsel for G&G referenced the claim but offered no details about its quantity. Instead of arguing equitable set-off, she submitted that "[Whitby] should be estopped from collecting any of the funds expended on measures determining this perceived danger at that time."

[9] In our view, G&G did not properly raise the issue of equitable set-off below. Generally, this court will not entertain entirely new issues on appeal because it is unfair to force a party on an appeal to respond when they might have adduced evidence below had they known that the matter would be an issue on appeal: *Kaiman v. Graham*, 2009 ONCA 77, 245 O.A.C. 130, at para. 18. This concern is heightened in the present case where G&G is seeking an equitable remedy, and we have a wholly inadequate evidentiary record to assess the equities of the case. Further, G&G has not explained why equitable set-off was not raised on the application. It would be contrary to the interests of justice to allow G&G to introduce

this new argument on appeal. Consequently, it is unnecessary to consider Whitby's submission that the application judge's order is immune from appeal.

[10] The appeal is dismissed. G&G shall pay Whitby its costs of the appeal in the all-inclusive amount of $9,000.

"C.W. Hourigan J.A."
"Gary Trotter J.A."
"M. Jamal J.A."