COURT OF APPEAL FOR ONTARIO

CITATION: ALYU Inc. v. Deca-Yorkville Building Group Inc., 2022 ONCA 834
DATE: 20221201
DOCKET: C70507

Benotto, Roberts and Harvison Young JJ.A.

BETWEEN

ALYU Inc.

Applicant
(Appellant)

and

Deca-Yorkville Building Group Inc. and Camrost Felcorp Inc.

Respondents
(Respondents)

Eli S. Lederman and Zachary Rosen, for the appellant

Symon Zucker and Nancy J. Tourgis, for the respondents

Heard: November 23, 2022

On appeal from the judgment of Justice William S. Chalmers of the Superior Court of Justice, dated March 9, 2022, with reasons reported at 2022 ONSC 5338.

REASONS FOR DECISION

[1] The appellant purchased two commercial units to be combined in a building that was under construction (the “Units”). The appellant argues that properly interpreted, the estimated measurements set out in the Agreement of Purchase

and Sale ("APS") were not intended to include a proportional amount of the common elements, such as washrooms. The application judge interpreted the language of the APS to include a portion of the common elements and dismissed the application.

[2] The appellant argues that the application judge erred in his interpretation of the APS. We do not agree.

[3] We see no basis for interfering with the application judge's findings for a number of reasons. It is common ground that contract interpretation is a matter of mixed fact and law and is governed by *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 SCR 633, at para. 50. In the absence of an extricable error of law, the standard of review is that of palpable and overriding error: *Corner Brook (City) v. Bailey*, 2021 SCC 29, 460 DLR (4th) 169, at para. 4. We see none.

[4] The application judge set out the authorities and principles with respect to matters of contractual interpretation which are not at issue in this appeal. He accurately stated that the objective of contractual interpretation is to ascertain the objective, mutual intentions of the parties at the time of the formation of the contract.

[5] In applying these principles, the application judge properly considered the agreement as a whole. He first noted that the Units' description in the APS did not support the appellant's position that the parties intended the purchase price to be

based solely on the Units' "usable areas", as it described them as "the condominium unit and 'the appurtenant common interest'": at para. 28 (emphasis added).

[6] The application judge also rejected the appellant's argument that the parties' previous negotiations on the seventh floor demonstrated an intention for the Units' "actual gross area" to be restricted only to their "actual usable area". In specific, he rejected the appellant's argument that an interpretation to include the common elements would lead to a commercial absurdity. In rejecting both these arguments, the application judge noted that the appellant had "no contemporaneous evidence to support this position": at para. 32. He noted that the appellant's own affidavit at trial stated that it decided to purchase the two units on the fourth floor (instead of the seventh as originally contemplated) for two primary reasons: 1) the space on the seventh floor was not large enough to accommodate ALYU; and 2) the lack of a terrace on the seventh floor.

[7] The application judge then turned his mind to the contract's reference in Clause 15 to the BOMA 1996 Standard setting out the method for the measurement of units. Both parties' surveyors stated that the BOMA 1996 Standard "requires the area of the unit to be grossed-up to take into account the common areas on the floor where the unit is located as well as the common areas in the building": at para. 34.

[8] We do not accept the appellant's argument that the BOMA 1996 Standard is ambiguous. Both parties' surveyors were in agreement regarding the BOMA 1996 Standard requirement. The appellant's surveyor stated in a letter to the appellant that the BOMA 1996 Standard is a "holistic" review that includes the common areas of the building. He further stated in the same letter that, "[the BOMA 1996 Standard] is a widely adopted Standard across North America that nearly every landlord uses": at para. 13. Contrary to the appellant's submissions, the application judge acknowledged that the BOMA 1996 Standard accords different ways to calculate area. However, after a thorough contextual review of the APS, he found that the appellant's proposed interpretation would ignore the parties' mutual intention to apply a "holistic" method to the measurement of the Units. We agree that to conclude otherwise would have the effect of "ignoring the words, 'BOMA 1996 Standard'": at para. 37.

[9] In closing, we agree with the application judge's concluding words at para. 40 of his reasons:

> The [APS] provides that the unit size is to be calculated on a gross basis in accordance with the BOMA 1996 Standard. The Standard requires the usable area of the unit to be grossed-up to take into account the floor and building common areas. I am satisfied that Deca's surveyor properly calculated the "actual gross area" in accordance with the BOMA 1996 Standard. The gross area was measured at 2,203 square feet. The purchase price was based on this measurement. ALYU is not entitled to any further refund of the purchase price.

[10] The appeal is dismissed. Costs to the respondent in the amount of $15,000 inclusive of disbursements and H.S.T.

"M.L. Benotto J.A."
"L.B. Roberts J.A."
"A. Harvison Young J.A."