COURT OF APPEAL FOR ONTARIO

CITATION: Chen v. Brookfield Residential (Ontario) Limited, 2022 ONCA 887
DATE: 20221220
DOCKET: C70421 (C70437)

Paciocco, Harvison Young and Thorburn JJ.A.

BETWEEN

Chang Jiu Chen

Plaintiff/Defendant by Counterclaim (Appellant)

and

Brookfield Residential (Ontario) Limited

Defendant/Plaintiff by Counterclaim (Respondent)

DOCKET: C70437

AND BETWEEN

Brookfield Residential (Ontario) Limited

Moving Party (Respondent)

and

Chang Jiu Chen

Responding Party (Appellant)

Terry Corsianos, for the appellant Chang Jiu Chen

Neil G. Wilson and Roshni Khemraj, for the respondent Brookfield Residential (Ontario) Limited

Heard: December 9, 2022

On appeal from the order of Justice Myrna L. Lack of the Superior Court of Justice, dated February 15, 2022.

REASONS FOR DECISION

A. FACTS

[1] The appellant, Chang Jiu Chen, agreed to purchase a luxury detached single-family home, structured as a condominium, with joint ownership of the common elements from the respondent, Brookfield Residential (Ontario) Limited. The common elements included a parkette. The condominium community was to have automated entry/exit gates.

[2] On January 19, 2017, the parties entered into the Agreement of Purchase and Sale ("Agreement"). The Agreement stipulated that non-completion of the common elements before the occupancy dates would not be deemed a failure to complete the unit. On November 10, 2017, the respondent's solicitor notified the appellant's solicitor that the condominium declaration had been registered and the closing date was set for December 11, 2017. By that point, market conditions had changed, and the value of the home had declined significantly.

[3] On November 24, 2017, the appellant notified the respondent that it wanted either a mutual release from the transaction or a postponement, saying "at this time I don't have the ability to close the deal due to low appraisal value". After the respondents offered a brief extension, the appellant advised the respondent that it wanted a "cancellation of the deal".

[4] On December 7, 2017, the appellant provided what it purported to be a "written notice of rescission" (the "Notice of Rescission") pursuant to s. 74(6) of the *Condominium Act, 1998*, S.O. 1998, c. 19 ("the Act"), claiming that the "amenities" had not been completed as set out in the disclosure statement. The "amenities" referred to were the parkette and entry/exit gates. The appellant represented that this non-completion constituted a material change which justified rescission.

[5] The respondent replied on the same day, advising the appellant that it was terminating the Agreement due to his anticipatory breach, his deposit would be forfeited, and it was reserving its right to recover losses. As such, the transaction did not close as scheduled.

[6] The appellant issued a Statement of Claim on January 18, 2018, seeking a return of his deposit and damages. The respondent defended and counterclaimed for damages. On January 30, 2018, it issued an Application seeking a declaration that there was no "material change" to the information in the property's disclosure statement and claiming the damages set out in the Counterclaim.

[7] The parkette and gates were completed by September 12, 2018, and the respondent re-sold the property in October 2018 at a lower price than the price the appellant had agreed to pay.

[8] The appellant withdrew his Claim.

[9] The respondent brought a motion for summary judgment on its Counterclaim for damages resulting from the appellant's failure to complete the Agreement. The

appellant resisted the motion for summary judgment and sought to reinstate his Claim. The motion judge allowed the appellant to reinstate his Claim. In a consolidated action, the motion judge granted the respondent's motion for summary judgment and dismissed the appellant's Claim.

[10] The appellant seeks an order setting aside the motion judge's judgment against him and a return of his deposit monies and accrued interest. In the alternative, the appellant seeks leave to amend his pleading to claim that the respondent breached the Agreement by reselling the property after it had accepted the appellant's anticipatory breach. As a further alternative, he seeks relief from forfeiture.

B. ISSUES

[11] The appellant submits the motion judge erred in holding that:

1. The Notice of Rescission was invalid, as the failure to complete the entrance/exit gates and the parkette could not amount to a "material change" within the meaning of s. 74(2)(d) of the Act, as such the appellant was not entitled to rescind the Agreement;
2. The appellant anticipatorily breached the Agreement which allowed the respondent to terminate the Agreement; and
3. The respondent was not precluded from retaining the deposit and seeking damages by virtue of the delay in filing its application or the failure to mitigate its losses.

C. ANALYSIS

[12] For the reasons that follow, we find that the motion judge made no error in holding that (i) the appellant's Notice of Rescission was invalid; (ii) the appellant anticipatorily breached the contract; and (iii) the respondent was therefore entitled to retain the deposit and seek damages arising from the contractual breach.

[13] It is well-established that the Act is consumer protection legislation: *Harvey v. Talon International Inc.*, 2017 ONCA 267, 137 O.R. (3d) 184, at paras. 62-63. Section 74 of the Act furthers this goal by imposing a continuing obligation on the seller of condominium property to disclose to purchasers when there is a "material change" to the information contained in a disclosure statement required by s. 72 of the Act. If the changes are material, s. 74(6) allows the purchaser to rescind the purchase and sale agreement by delivering a notice of rescission under s. 74(7).

[14] The motion judge determined that the appellant was not entitled to rescind the Agreement and his Notice of Rescission was invalid because "[t]he failure of [the respondent] to complete the parkette and entry/exit gates for closing was not a 'material change'… within the meaning of s. 74". She further held that the appellant's purported rescission constituted an anticipatory breach of the contract, which entitled the respondent to terminate the agreement.

[15] For the reasons that follow, we agree with the motion judge's conclusions on these two issues which are dispositive of this appeal.

[16] First, the appellant's Notice of Rescission is invalid on its face because the "material change" he identified does not meet the express statutory definition of a "material change" under s. 74. Section 74(1) requires the seller to deliver to the purchaser a notice or revised disclosure statement identifying any "material changes". Section 74(6) entitles the purchaser to rescind the agreement where there is a disclosed or undisclosed "material change". "Material change" is statutorily defined in s. 74(2) as:

> a change … that a reasonable purchaser, on an objective basis, would have regarded collectively as sufficiently important to the decision to purchase … that it is likely that the purchaser would not have entered into an agreement … or would have exercised the right to rescind such an agreement … if the disclosure statement had contained the change or series of changes, but does not include, … (d) a change in the schedule of the proposed commencement and completion dates for the amenities of which construction had not been completed.... [Emphasis added.]

[17] As noted by the motion judge, the alleged "material change" identified in the appellant's Notice of Rescission was the respondent's failure to complete the entrance and exit gates and the parkette before closing. We agree with her determination that the change was not a "material change" within the meaning of s. 74 of the Act because the gates and the parkette were amenities which are statutorily precluded from being material changes. Therefore, the appellant's purported Notice of Rescission was facially invalid as a matter of law.

[18] We further note that in *Lin v. Brookfield Homes (Ontario Limited)*, 2019 ONCA 706, at para. 9, this court held that

> "the non-construction, at [closing], of the parkette and entry and exit gates [in the same subdivision as in this case] – was not a material change in circumstances within the meaning of s. 74 of the *Condominium Act*."

[19] Second, the motion judge correctly held that the appellant's purported rescission was an anticipatory breach of the Agreement that entitled the respondent to terminate the Agreement.

[20] Prior to delivering his Notice of Rescission, the appellant advised the respondent that he would not be able to close "due to the low appraisal value" and requested "a cancellation of the deal". In so doing, the appellant explicitly communicated to the respondent that he did not intend to perform the contract. This constituted an anticipatory breach, and the respondent was therefore entitled to terminate the Agreement on this basis and sue for damages.

[21] In holding that this constituted an anticipatory breach, the motion judge held:

> Mr. Chen's notice of rescission was not "valid" or "objectively reasonable", but was invalid, on its face.
>
> …
>
> As well, Mr. Chen's delivery of the notice of rescission cannot be viewed as "reasonable and taken in good faith" when it is considered in the context of the correspondence that preceded it… The unfolding of events shows that Mr. Chen did not intend to perform the contract, irrespective of the parkette and gates.

[22] The case of *Jung v. Talon International*, 2019 ONCA 644, cited by the appellant, is distinguishable from this case on at least four grounds:

1. There was no prior correspondence from the purchaser indicating an inability to close. On the contrary, there was a clear intention to complete the transaction;
2. The notice of rescission did not amount to an anticipatory breach because the purchasers were simply trying to exercise their statutory rights under the Act;
3. Even if there were an anticipatory breach, it was waived when the vendor agreed to set a closing date; and
4. The purchaser's position was "reasonable and taken in good faith" and had an "objectively reasonable basis".

[23] Unlike *Jung*, the Notice of Rescission at bar, was not a *bona fide* attempt by the appellant to address what he believed to be a material change. Rather, it was a strategy to evade the agreement. The appellant's conduct prior to the purported rescission clearly demonstrated he was unwilling and unable to perform his contractual obligations. The finding that the appellant was not acting reasonably or in good faith in delivering the Notice of Rescission was available to the motion judge on the record before her.

[24] Furthermore, we do not accept the appellant's submission that a notice of rescission that was not provided in good faith qualifies as a "notice of rescission"

under s. 74(7) of the Act. This would create an absurd result by enabling purchasers to strategically use the rescission mechanism provided under the Act to side-step their otherwise valid contractual agreement, pressure vendors to negotiate releases or unjustifiably extend closing timelines. This could not have been the legislative intent: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 27.

[25] Nor do we agree with the appellant that the description of a "notice of rescission" articulated in *Harvey v. Talon International Inc.*, 2017 ONCA 267, 137 O.R. (3d) 184, at paras. 6 and 75, purports to be an exhaustive definition. There was no issue in that case relating to the reasonableness or good faith of the notice of rescission.

[26] We do not share the appellant's concern that recognizing a good faith requirement will enable sellers to ignore notices of rescission under the Act by claiming they are not being made in good faith. Sellers who do so run the risk of incurring liability for any resulting damages suffered by the purchasers.

[27] Given our conclusion that the motion judge was correct in concluding that the Notice of Rescission was invalid, the appellant anticipatorily breached of the Agreement, and the respondent was thereby entitled to terminate the Agreement and claim damages, it is unnecessary for us to consider the remainder of the appellant's submissions relating to the respondent's alleged non-compliance with s. 74(8) of the Act.

[28] Finally, and in the alternative, the appellant seeks leave to amend his pleading to claim damages for breach of contract resulting from the respondent's sale of the property to a third party and as a further alternative, leave to amend to plead relief from forfeiture. Neither of these two claims was pleaded or raised on the motion and it is not in the interest of justice to allow the claim to be amended to plead these causes of action now. Once the appellant repudiated the agreement and the respondent accepted the appellant's anticipatory breach and terminated the contract, the respondent was obliged to mitigate its damages by reselling the property. Moreover, the appellant's conduct made it clear that he had no intention of completing the sale.

D. CONCLUSION

[29] For the above reasons, the appeal is dismissed. Costs are awarded to the respondent in the amount of $15,000, all inclusive.

"David M. Paciocco J.A."
"Harvison Young J.A."
"J.A. Thorburn J.A."