COURT OF APPEAL FOR ONTARIO

CITATION: 5000933 Ontario Inc. v. Mahmood, 2023 ONCA 58
DATE: 20230125
DOCKET: COA-22-CV-0114

MacPherson, Hoy and Coroza JJ.A.

BETWEEN

5000933 Ontario Inc.

Applicant (Respondent)

and

Khalid Mahmood and Ume Kalsoom

Respondents (Appellants)

Obaidul Hoque and F.M. Sajid B. Hossain, for the appellants

Cameron D. Neil, for the respondent

Heard: January 23, 2023

On appeal from the order of Justice Byrdena MacNeil of the Superior Court of Justice, dated August 15, 2022, with reasons reported at 2022 ONSC 4726.

REASONS FOR DECISION

[1] The appellant Khalid Mahmood entered into an agreement of purchase and sale (the "Agreement") with the respondent to buy a new home to be built in a residential subdivision. Mr. Mahmood and his spouse, Ume Kalsoom, appealed the application judge's order declaring that Mr. Mahmood repudiated the

Agreement by failing to close and dismissing their counter-application for specific performance.

[2] At the conclusion of the hearing of this appeal, we dismissed the appeal, for reasons to follow. These are our reasons.

[3] Since the Agreement involved the construction of a new home, the Tarion Statement of Critical Dates and Addendum (the "Tarion Addendum") formed part of the Agreement. It provided for potential closing dates as follows: a "First Tentative Closing Date" of June 15, 2021; a "Second Tentative Closing Date" that could be as late as October 13, 2021; a "Firm Closing Date" that could be as late as February 10, 2022; and an "Outside Closing Date" that could be as late as October 13, 2022. It also provided that "Critical Dates" could change if there was an "Unavoidable Delay".

[4] The application judge held that the respondent had set a First Tentative Closing Date, a Second Tentative Closing Date, a Firm Closing Date, and extended the Firm Closing Date due to Unavoidable Delay in accordance with the Agreement to September 3, 2021. (But for the extension for Unavoidable Delay, the closing date would have been the Firm Closing Date of August 27, 2021.)

[5] The application judge further found that the respondent agreed to Mr. Mahmood's request to extend the closing date from September 3, 2021 to

September 10, 2021 and did not agree to the further extension requested by Mr. Mahmood, such that the closing date was September 10, 2021. Finally, the application judge found that Mr. Mahmood breached the Agreement by failing to close on September 10, 2021 and the respondent was entitled to terminate the Agreement. There is no dispute that the appellants did not have the funding needed to close on September 10, 2021.

[6] The appellants argued that the application judge committed three errors:

1. She erred in concluding that the respondent satisfied the requirements of the Agreement to extend the closing date beyond August 27, 2021 for Unavoidable Delay;
2. She did not conclude that the respondent's failure to deliver the occupancy permit to Mr Mahmood on or before September 10, 2021 barred it from terminating the Agreement; and
3. She did not find the respondent acted in bad faith by refusing to extend the closing date beyond September 10, 2021.

[7] There is no basis for this court to interfere with the application judge's order.

[8] The application judge specifically considered the requirements in the Agreement to change the Firm Closing Date as the result of an Unavoidable Delay and found that the COVID-19 pandemic and the resulting delay in the delivery of

the kitchen cabinetry relied upon by the respondent fell within the definition of "Unavoidable Delay" in the Agreement. She further found that the notice of Unavoidable Delay given by the respondent complied with the notice provisions in the Agreement.

[9] The application judge also found that the respondent was in possession of the occupancy permit on September 10, 2021 but did not have an obligation to deliver it to Mr. Mahmood. The Tarion Addendum incorporated the requirement of the *Ontario Building Code* that the respondent do so "[o]n or before Closing". The Tarion Addendum defines "Closing" to mean "the completion of the sale of the home including transfer of title to the home to the Purchaser". The application judge held that there was no "Closing" within the meaning of the Agreement and thus no breach by the respondent.

[10] These conclusions were based on the application judge's interpretation of the Agreement and her findings of fact. Both are entitled to deference. The appellants point to no error of law – extricable or otherwise – or palpable and overriding error of fact or mixed fact and law that would permit this court to interfere with these conclusions.

[11] Finally, the application judge found that the appellants did not adduce any evidence to support their argument that the respondent breached a duty of good faith. We agree.

[12] Accordingly, the appeal is dismissed. The respondent is entitled to its costs of the appeal, fixed in the amount of $5,000, inclusive of HST and disbursements.

"J.C. MacPherson J.A."
"Alexandra Hoy J.A."
"S. Coroza J.A."