COURT OF APPEAL FOR ONTARIO

CITATION: Skyline Real Estate Acquisitions (III) Inc. v. Peterborough Retail Portfolio LP, 2023 ONCA 236
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van Rensburg, Huscroft and George JJ.A.

BETWEEN

Skyline Real Estate Acquisitions (III) Inc.

Applicant
(Appellant)

and

Peterborough Retail Portfolio LP, by its General Partner,
Peterborough Retail Portfolio GP Inc.

Respondent
(Respondent)

Melvyn L. Solmon and Nancy J. Tourgis, for the appellant

Bradley Berg and Eric Leinveer, for the respondent

Heard: March 23, 2023

On appeal from the judgment of Justice William Black of the Superior Court of Justice, dated July 22, 2022.

REASONS FOR DECISION

[1] The appellant entered an agreement of purchase and sale with the respondent to acquire two shopping plazas in Peterborough for $70 million but refused to close, alleging that the respondent vendor failed to satisfy conditions

involving the tenancies of two key tenants, Walmart and Dollarama. The appellant purported to cancel the contract and sought the return of the $3.25 million deposit.

[2] The appellant brought an application for the return of the deposit. The application judge dismissed the application, finding that the appellant repudiated the contract and that the respondent was entitled to keep the deposit.

[3] The appellant argues that the application judge made numerous extricable errors of law in interpreting the relevant contractual documents, numerous palpable and overriding errors in determining whether the purchase and sale conditions were properly satisfied, and misstated and misapplied the test set out by the Supreme Court in *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7, 454 D.L.R. (4th) 1.

[4] We do not accept any of these grounds of appeal. The appeal is dismissed for the reasons that follow.

[5] The facts are set out in the decision below and need not be repeated here.

[6] The agreement required the respondent to provide “Threshold Estoppel” certificates from tenants including Walmart on or before the closing date, and in addition required the vendor to obtain and provide an extension of Dollarama’s lease, with the related Sobeys condition. As the application judge noted, these types of provisions generally “provide protection for a purchaser from genuinely unknown risks.” The application judge found that the respondent delivered no less

than three versions of the Walmart Estoppel Certificate and Dollarama Extension to the appellant, “which in substance gave it all of the assurances that could be obtained through technically compliant versions of the Walmart [Estoppel Certificate] and Dollarama Extension.” The application judge found, further, that the respondent “more than met its obligation to make commercially reasonable efforts relative to the APS and the Transaction”.

[7] The appellant acknowledges the respondent’s efforts and good faith actions but argues that the Walmart Estoppel Certificate and Dollarama Extension were conditions that had to be met strictly, and the failure to meet them strictly allowed the appellant to cancel the contract without penalty.

[8] The appellant’s submissions repeat arguments that were unsuccessful before the application judge and invite this court to make alternative findings. That is not our role on appeal.

[9] The appellant’s submissions overlook the nature of the parties’ obligations under the agreement, which were subject to reasonableness requirements. Moreover, s. 5.5 of the agreement specifically required each party to act in good faith:

> [5.5] … Each party shall act in good faith in determining whether or not a condition in its favour has been satisfied.

[10] The application judge found that the respondent provided the appellant with increasingly extensive information that, as noted above, in substance gave the

appellant all of the assurances that could be obtained through technically compliant versions of the Walmart Estoppel Certificate and Dollarama Extension. At the same time, the appellant failed to live up to its side of the agreement, as the application judge explained:

> The Purchaser, on the other hand, did not fulfil its obligations to act reasonably and in good faith. Having made demands for technical compliance with the Conditions, it refused to engage in a meaningful way in ongoing discussions or negotiations and refused even to clarify its purported concerns and objectives. It did so notwithstanding its knowledge of the negotiating stance of both Walmart and Dollarama; notwithstanding its knowledge that each would insist on certain items and limit the representations they would give; and, most importantly, notwithstanding that it was provided, particularly within the third and final versions of the Walmart EC and the Dollarama Extension, with information which ought to have allayed its purported concerns.

[11] These findings were open to the application judge on the extensive record before him and are not marred by any palpable and overriding error. There is ample support for his finding that the appellant relied on technical compliance issues in an attempt to get out of a purchase it no longer wanted to complete. This is not a matter of wrongly scrutinizing motive, as the appellant submits; it is simply a finding made in the context of determining that the appellant failed to meet its contractual duties to act reasonably and in good faith. There is no *Wastech* error.

[12] The application judge's interpretation of the contract is free of any extricable errors and is entitled to deference in this court. There is no basis for this court to intervene.

[13] The appeal is dismissed. The respondent is entitled to costs in the agreed amount of $75,000, all inclusive.

"K. van Rensburg J.A."
"Grant Huscroft J.A."
"J. George J.A."