COURT OF APPEAL FOR ONTARIO

CITATION: Preiano v. Cirillo, 2024 ONCA 206
DATE: 20240321
DOCKET: COA-22-CV-0281

Roberts, Sossin and Dawe JJ.A.

BETWEEN

Sonia Preiano and Gianluca Preiano

Plaintiffs (Respondents)

and

Antonia Cirillo by her litigation guardian, Grace Cirillo and The Estate of Giuseppe Cirillo

Defendants (Appellants)

Grace Cirillo, acting in person as Estate Trustee for the appellant, The Estate of Giuseppe Cirillo, and as Litigation Guardian for the appellant, Antonia Cirillo

Tyler H. McLean, for the respondents

Heard: in writing[1]

On appeal from the judgment of Justice Jamie K. Trimble of the Superior Court of Justice, dated August 29, 2022, with reasons reported at 2022 ONSC 4945.

REASONS FOR DECISION

[1] These proceedings arise out of a failed real estate transaction in which the late Giuseppe Cirillo and his wife, Antonia Cirillo, agreed to sell their home to the

[1] This appeal originally came for a hearing on December 21, 2023. As set out in our earlier endorsement of December 21, 2023, we dismissed the respondents' motion to quash the appeal and, with the parties' agreement, adjourned the appeal, to be heard in writing. We allowed the parties to make further written submissions that we have received and reviewed.

respondents, Sonia and Gianluca Preiano, for $480,000. The sale was not completed on the scheduled closing date of November 20, 2013, because the appellants refused to close the transaction. The respondents brought an action for specific performance, or in the alternative, damages.

[2] The trial judge allowed the respondents' action on two bases. First, he determined that Ms. Cirillo, the appellants' daughter, did not have standing to act as a representative for her mother and her father's estate without a lawyer, and struck the appellants' statement of defence. Second, on the merits, he found that the appellants had breached the agreement of purchase and sale. He declined to grant specific performance and awarded $1 million in damages to the respondents, less their $25,000 deposit that he ordered the real estate agent to return to them. He awarded the respondents prejudgment interest in the amount of $111,309.65 and their costs of the action on a substantial indemnity basis in the amount of $136,971.02.

[3] The appellants appeal on two grounds: 1) the trial judge erred in determining after trial that Ms. Cirillo had no standing to represent the appellants and in striking the appellants' statement of defence; 2) the trial judge erred in his assessment of damages, including his determination that the respondents were not required to mitigate.

[4] These reasons explain why we allow the appeal in part.

A. ANALYSIS

(i) Ms. Cirillo's standing

[5] The trial judge erred in concluding that he could strike the appellants' statement of defence and grant summary judgment in the circumstances of this case on the basis that Ms. Cirillo, the appellants' daughter, had "no status to act in this litigation for either of the elder Cirillos" because she was not a lawyer. The trial judge made this determination on his own initiative following the trial and after Ms. Cirillo had been permitted to represent the appellants and make submissions on their behalf throughout the trial. There is no evidence that Ms. Cirillo's standing was challenged by the respondents prior to the trial, nor by any presiding judge in the long history of these proceedings. It was within the trial judge's discretion under r. 2.03 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 to dispense with compliance with the provisions of r. 15.01(1), which required the appellants to be represented by a lawyer, and to allow Ms. Cirillo to represent the appellants. Accordingly, at this very late stage of the proceedings, his failure to exercise his discretion and his conclusion that Ms. Cirillo lacked standing amounted to procedural unfairness.

[6] If that were the only basis for the trial judge's decision, we would order a new trial. However, it was an alternative basis. As his reasons demonstrate, the trial judge primarily based his judgment on his determination of the merits of the

action after thoroughly reviewing the evidence and the submissions of the parties. His judgment on the merits was not tainted by his error regarding Ms. Cirillo's standing. As a result, no trial unfairness, prejudice, or miscarriage of justice resulted from the trial judge's error. Nor did his error affect the outcome of his decision on the issue of the appellants' breach of the agreement of purchase and sale.

[7] The appellants do not appeal the trial judge's decision on the merits that the appellants breached the agreement of purchase and sale by failing to close the transaction. The appellants do not point to any reversible error in the trial judge's factual and credibility findings, which are anchored firmly in the evidence and fully ground his conclusion that the appellants breached the agreement. Nor do they point to any error in his findings as a result of the standing error discussed above. There is no basis to order a new trial.

(ii) Damages

[8] We come to a different conclusion with respect to the trial judge's assessment of the respondents' damages. The trial judge erred in law by awarding $975,000 in damages ($1 million less their deposit of $25,000) to the respondents.

[9] The trial judge awarded the respondents damages in the amount of $975,000 for two reasons. First, he accepted the appraisal expert's evidence that

$1 million represented the difference between the contract price and the fair market value of the subject property at the time of trial. Second, while he acknowledged that the respondents had made no attempt to mitigate their damages, the trial judge concluded that they did not need to mitigate because "[t]hey had a reasonable and fair chance of obtaining specific performance, although they did not get it."

(a) Measure of damages for breach of contract

[10] The trial judge erred in awarding the respondents the difference between the contract price and the market value of the property at the time of trial. It is well-established that absent special circumstances, which we do not have here, the ordinary measure of damages arising from a breach of an agreement of purchase and sale is the difference between the contract price of the property and the value of the property as at the date of the breach of the agreement of purchase and sale: *Tribute (Springwater) Limited v. Atif*, 2021 ONCA 463, 33 R.P.R. (6th) 1, at para. 17; *Akelius Canada Ltd. v. 2436196 Ontario Inc.*, 2022 ONCA 259, 161 O.R. (3d) 469, at para. 22, leave to appeal refused, [2022] S.C.C.A. No. 183; and *The Rosseau Group Inc. v. 2528061 Ontario Inc.*, 2023 ONCA 814, at para. 62.

[11] The trial judge's legal error is reflected in para. 156 of his reasons:

> Damages in lieu of specific performance are assessed as at the date of trial (see: *Semelhago* [*v. Paramadevan,*

> [1996] 2 S.C.R. 415]; *Sivasubramaniam v. Mohammad*, 2018 ONSC 3073 [aff'd, 2019 ONCA 242]). They also represent the difference between the contract price and the fair market value of the time of trial. [Emphasis added.]

[12] The trial judge's application of the law is based on an erroneous interpretation of *Semelhago* and *Sivasubramaniam*. In *Sivasubramaniam*, the court awarded specific performance. In *Semelhago*, the court would have ordered specific performance, however, the plaintiffs elected to forego specific performance as a remedy and accept damages. As a result, the damages awarded were truly in lieu of the remedy of specific performance that the court was prepared to grant.

[13] Here, the trial judge expressly determined that the respondents were not entitled to specific performance. The evidence accepted by the trial judge is that the respondents wanted to purchase the appellants' home as a temporary residence for two or three years while they tore down and rebuilt a new house on their existing property. The trial judge found that subjectively and objectively the appellants' property was not unique because of the temporary nature of the respondents' intended tenure there. He also determined that damages would be an adequate remedy for the appellants' breach. As a result, he declined to award specific performance. He therefore turned to consider whether they were entitled to damages. He determined that they were. However, the damages were not

awarded in lieu of specific performance as he determined that they were not entitled to that remedy.

[14] As a result of the trial judge's legal error, his award of damages is incorrect and must be set aside. We are able to consider the issue afresh because we have an adequate evidentiary record.

[15] The contract price of the property was $480,000. According to the evidence of the respondents' appraisal expert, based on a drive-by evaluation and his assumption that the condition of the interior was "in average repair yet extremely dated," he opined the value of the property to be $550,000 as of August 21, 2013. His evidence was the only appraisal evidence before the court. While the appellants' position appeared to be that the property was worth between $480,000 and $500,000 as of August 21, 2013, it was not supported at trial by any admissible evidence.

[16] We agree with the respondents' alternative position that we should assess damages taking the August 21, 2013 appraised value into account and that we should follow the direction in *Wood v. Grand Valley Rway. Co.*, (1915) 51 S.C.R. 283, at p. 289, *per* Davies J., to do the best we can in assessing damages with the evidence we have. Although there is no appraised value of the property on the exact date of breach, the August 21, 2013 appraisal date is sufficient for the

purposes of assessing damages in this case. There is no evidence that property values went down between August and November 2013.

[17] Accordingly, we assess the respondents' damages, as the difference between the contract price and the value of the property at the date of breach, to be in the amount of $70,000. This amount is subject to a further $25,000 deduction to account for the return of the respondents' deposit.

(b) Mitigation

[18] The appellants submit that the respondents are not entitled to any damages because of their failure to take any mitigating steps to find a comparable property or make other arrangements for accommodation pending the renovation of their house. They say the trial judge erred in concluding that the respondents did not need to mitigate because they had a reasonable chance of obtaining specific performance.

[19] While the trial judge's conclusion appears inconsistent with his finding that specific performance was not available to the respondents as a remedy, this apparent inconsistency in his reasoning did not affect the result. This is because the appellants did not meet their onus to prove that the respondents failed to mitigate their damages.

[20] To meet their onus on a balance of probabilities that the respondents failed to mitigate their damages, the appellants had to establish not only that the respondents failed to take reasonable efforts to find a substitute, but also that a reasonable substitute could be found: *Southcott Estates Inc. v. Toronto Catholic District School Board*, 2012 SCC 51, [2012] 2 S.C.R. 675, at para. 45, *per* Karakatsanis J., for the majority. The appellants did not put forward any evidence that the respondents could have purchased or rented a comparable property. As a result, the appellants did not meet their onus to demonstrate that the respondents failed to mitigate their damages.

[21] Accordingly, the respondents are entitled to damages from the appellants in the amount of $45,000 ($70,000 less their $25,000 deposit held by the real estate agent that the trial judge ordered be returned to them).

B. DISPOSITION

[22] We allow the appeal in part. We set aside paras. 1, 2, and 4 of the judgment. We order that the appellants pay damages to the respondents in the amount of $45,000, plus prejudgment interest on that amount to be recalculated. The respondents are entitled to the return of their $25,000 deposit as per para. 3 of the judgment plus the accumulated interest in the real estate agent’s trust account.

[23] If the parties cannot otherwise agree on the disposition of the issues of prejudgment interest and costs of the appeal and the trial, they may deliver brief written submissions of no more than two pages, plus a cost outline, on or before March 28, 2024.

"L.B. Roberts J.A."
"L. Sossin J.A."
"J. Dawe J.A."