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Condo battle ends after 14 years

Can a buyer back out of the purchase of a condominium unit and get a refund of the deposit if there are municipal work orders against the building?

Last year, after an incredible 14 years of litigation, the Ontario Court of Appeal awarded two purchasers the return of their $5,000 deposit, adding the unusual footnote: "After 14 years, we trust that this case is finally at an end."

It all began in May 1992, when Angelo and Luciana Boschetti entered into an agreement of purchase and sale for Rosa Sanzo's condominium unit in North York.

The agreement contained this clause, which is in common use in Toronto but is jarringly ungrammatical: "Vendor warrants that there are no outstanding work orders registered against the property, and if so, will be complied with at his own expense, on or before closing."

One of the printed standard clauses in the offer stated that if the purchaser submitted an objection to title or to an outstanding work order that the vendor could or would not remove, the agreement would come to an end and the deposit money would be returned.

A work order is an enforceable demand by a municipality or other authority requiring a property owner to comply with bylaws governing building standards, zoning, health, fire code and similar regulations.

Within the appropriate time limit, the purchaser's lawyer, Patrick Di Monte, requested proof that there were no work orders outstanding, and the seller's lawyer replied, "Please satisfy yourself."

In fact, however, there were numerous work orders against the whole building. The condominium's financial statements for the year ending Sept. 30, 1991, disclosed that there were a number of work orders requiring repairs to the garage, balconies and stairwells.

On May 12, 1992, five weeks before the scheduled closing, a municipal inspection of the building listed 32 defects.

With its reserve fund substantially in the red, the condominium corporation did not have enough money to pay for capital projects.

The board decided to move slowly with the necessary repairs, as funds became available, but did implement a special assessment to bring in some of the required money.

The seller rejected the buyers' request to return the deposit and unwind the deal. In response, the buyers sued for return of the deposit and the seller sued for more than $20,000 in losses resulting from the aborted sale.

In December 2003, more than 11 years after the scheduled closing, the case finally came to trial before Justice Blenus Wright in Toronto.

In his ruling, he stated, "The plaintiffs contracted for a unit in a building in which the vendor represented that there were no outstanding work orders. Some work orders may have been excused but there were outstanding work orders from an inspection three years earlier in 1989. The plaintiffs would be buying a unit in a building in which the common elements were in a continuing state of disrepair."

"In my view," wrote the judge, "on the closing date the purchasers did not get what they bargained for and if they closed the transaction they would have been faced with an uncertain financial picture. As it was, the purchasers were denied mortgage financing from the TD Bank."

As Di Monte stated in his letter of June 23, 1992, to (the seller's lawyer) Capone, "In view of the substantial work orders, the financial institution, the Toronto-Dominion, will not advance a red nickel."

Justice Wright said that the plaintiffs were within their rights to refuse to close. The agreement was void and the Boschettis were to get back their deposit and court costs.

The vendor appealed and the case was heard by three judges of the Court of Appeal last summer.

In dismissing the appeal, the court said that the decision of the trial judge was clearly supported by the evidence, and the purchasers were entitled to their $5,000 back, plus $4,000 in costs for the appeal.

No explanation is given in either court decision for the lengthy delay. After both sides paid legal fees for a trial and appeal over the course of 14 years, nobody really came out a winner financially.

Some worthwhile lessons emerge from the litigation:

- If you are selling a house or condominium unit subject to work orders, never state that there are none.
- Sellers should carefully direct their attention to all of the clauses in an offer. If the agent presents an offer, he or she is obliged to explain it. Better yet, review the offer with a lawyer before signing it.
- If you're going to certify that there are no work orders, make sure the grammar in the offer is reasonably correct.
- When the costs of litigation exceed the amount of money at stake, it's time for a reality check.

Bob Aaron is a Toronto real estate lawyer. www.aaron.ca *©Aaron & Aaron. All Rights Reserved.*

Date: 2003-12-19
Docket: 93-CQ-33497

DATE: 20031219

ONTARIO

B E T W E E N:	)	
	))	
ANGELO BOSCHETTI and LUCIANA BOSCHETTI Plaintiffs	))))	*Patrick Di Monte* for the plaintiff
- and - ROSA SANZO and STARCITY REALTY LIMITED	)))))))	*Pellegrino Capone* for the defendant Sanzo
Defendants	))	Heard: December 16, 2003

BLENUS WRIGHT J.:

[1] The plaintiffs claim for the return of a $5,000 deposit paid on an aborted agreement of purchase and sale of a condominium unit.

[2] The defendant Sanzo counterclaims for damages as a result of the aborted sale.

[3] The defendant Starcity Realty Limited was the real estate agent which holds the $5,000 deposit in trust.

[4] No witnesses were called by the parties to give evidence. Counsel for the parties made submissions based on the documents filed.

[5] Counsel for the defendant Sanzo relies on the case of *Jasinski v. Trinchini*, [1994] O.J. No. 576, which he submits is the exact same fact situation and, therefore, the result should be the same as in that case.

[6] In *Jasinski*, MacPherson J. dismissed the plaintiff s claim for the return of deposit and allowed the defendant s counterclaim for damages as the result of the plaintiff s failure to close the real estate transaction.

[7] The *Jasinski* case involved an aborted agreement of purchase and sale of a condominium unit in the same condominium building as in the present case. The *Jasinski* transaction was two years earlier in 1990.

[8] Counsel for the plaintiffs submits that the facts of the present case are distinguishable from the *Jasinski* case, and, therefore, the result should be different, resulting in the return of the plaintiffs $5,000 deposit and the dismissal of the counterclaim.

FACTS

[9] On May 1, 1992, the parties entered into an agreement of purchase and sale for the defendant s condominium unit which transaction was to close June 22, 1992.

[10] There are two pertinent clauses in the agreement of purchase and sale. The first clause is part of paragraph 2 of the agreement of purchase and sale which reads:

VENDOR WARRANTS THAT there are no outstanding work orders registered against the property, and if so, will be complied with at his own expense, on or before closing.

[11] The second clause deals with the time within which to make objections to title or to any outstanding work orders. Part of paragraph 9 of the agreement of purchase and sale reads:

If within that time he shall furnish Vendor in writing with any valid objection to title or to any outstanding work order which Vendor shall be unable to remove, remedy or satisfy and which Purchaser will not waive, this Agreement, notwithstanding any intervening acts or negotiations in respect of such objections, shall be null and void and all deposit monies paid by Purchaser hereunder shall be refunded without interest or deduction and Vendor and the Vendor s Agent shall not be liable for any costs or damages. Save as to any valid objections so made within such time and except for any objection going to the root of the title, Purchaser shall be conclusively deemed to have accepted the title of Vendor to the real property.

[12] There is no dispute that plaintiffs lawyer requisitioned within time, evidence that there are no work orders outstanding . The response from the defendant s lawyer was, Please satisfy yourself.

[13] The Condominium Corporation sent a Notice to Unit Owners dated September 10, 1991, which reads in part:

We enclose herewith the budget for the fiscal year starting October 1st 1991 to September 30th 1992 along with the maintenance fee schedule for each apartment.

This budget reflects a 7% increase in maintenance fees over last year.

You will notice that our operating expenses were in line with last years budget and that this year we will not have to deal with the large deficit that was accrued from 1990.

Our problem is the insufficiency of funds available for capital replacements and until this work is completed we will be faced with high maintenance fees. The Board of Directors has resisted from heavily increasing maintenance fees, with some luck we may be allowed the time to bring the building to an adequate maintenance standard that is acceptable to the City of North York and a standard that we are reasonably happy with.

At this point in time we have very little cash to continue with capital projects and without a special assessment and we will have to bide our time until reserves accumulate to continue with major projects. Your response to our questionnaire indicated that you were evenly divided on agreeing to continue paying a separate assessment for the capital projects now so we shall proceed slowly as originally planned.

Please try to conserve and cut back on costs, particularly hydro and garbage. By separating some garbage and compacting the rest we are saved the expense of special pick ups which cost $80.00/dump. If you plan on renovating your apartment don t leave the garbage for us to dispose of. When you go to work or take a vacation turn off the lights and air conditioner.

[14] Part of Note 4 of the Condominium Corporation s audited Financial Statements for the year ending September 30, 1991, reads:

Following an inspection of the building in 1989 on behalf of the City of North York, a number of work orders were issued under Property Standards By-law 28200. These required the Corporation to complete certain repairs to the garage, balconies and stairwells as well as miscellaneous other repairs all of which constitute reserve fund expenditures. At September 30, 1991, $573,809 had been spent on these repairs and management estimates that a further $154,000 will be needed to complete all of the repairs specified in the work orders. The repairs have been scheduled for completion in 1993.

To provide the case for payment of these repairs, the Corporation levied a special assessment amounting to $354,600 as described in Note 3. The balance of $373,209 is being funded by that portion of the monthly maintenance charge which is allocated to the reserve fund.

[15] The City of North York inspected the condominium building on May 12, 1992, listing 32 building defects.

[16] The Condominium Corporation provided the defendant with a copy of an Estoppel Certificate dated June 16, 1992. Paragraphs 4 and 7 of that certificate read:

4. The Corporation s Reserve Fund(s) amounts to $ - 72,851^00 as of Sept 30, 1992.

7. The Corporation is not presently considering any substantial addition, alteration or improvement to or renovation of the common elements or substantial change in the assets of the Corporation, namely:

City of North York Building By-laws $135,000^00 Approx.

[17] On June 19, 1992, Mr. Di Monte wrote the following letter to Mr. Capone:

I just received the estoppel certificate on this condominium unit. I am enclosing a copy of the estoppel certificate and the financial statements. Clearly there is a substantial problem. The reserve fund is in a negative balance of $72,000.00. Special assessment is in affect, see note four, and the building is in such bad state that hundreds and thousands of dollars is required to put it in good state. This presents two (2) problems.

1. My client was not advised of this and accordingly, it presents a fundamental breach of the agreement of purchase and sale; and

2. the Toronto-Dominion Bank, that had arranged the necessary financing, has indicated that they are not prepared to lend on the security of this condominium unit.

I am not sure why disclosure was not made and we refer to paragraph 11 of the agreement of purchase and sale. It is impossible to contemplate that your client did not know about all of these matters since they started since the problem started in 1989. In any event, my client has indicated that he is prepared to sign a mutual release, provided that the FIVE THOUSAND ($5,000.00) DOLLAR deposit is returned in full with interest and each side is to bear their own costs.

The *Jasinski* Case

[18] The pertinent clause in the agreement of purchase and sale reads:

VENDOR WARRANTS THAT THERE ARE WORK ORDERS OR DEFICIENCY NOTICES OUTSTANDING AGAINST THE PROPERTY AND WILL BE COMPLIED WITH AT HIS EXPENSE ON OR BEFORE CLOSING

[19] MacPherson J. made the following comments at various places throughout his reasons fur judgment:

The evidence of William Lewis, the manager of the complex in 1990 and today, which I found reliable and helpful, was that major repairs were required on the storage garage and some balconies and minor repairs were needed on stairwells, landings, stairwell windows, balcony guards, the swimming pool and lighting in the storage garage. The number and extent of the required repairs were not, according to Mr. Lewis, unusual for a building of this size and age. The estimated cost of all the repairs required by the work orders was $592,600. This is not, in my view, a trivial amount; however, it is also not an unusually high amount in a large multi-million dollar residential building.

The resident owners of the complex set about to comply with the work orders. There were two components to their response; one component dealt with the actual repairs, the other related to their financing.

The repairs were scheduled to take place over a two year period, with an emphasis on completing the major repairs before December 31, 1990 because of the commencement of the Goods and Services Tax on January 1, 1991. It is true that this meant that some, indeed many, of the work orders would still be outstanding on November 1, 1990, the scheduled closing date of the Jasinski-Trinchini transaction. However, in a large condominium project, unlike in a single dwelling, the regular existence of municipal work orders is the norm, not the exception. I find that the way in which the resident owners of the condominiums at 2825 Islington Ave. dealt with the scheduling of repairs was appropriate in the circumstances.

On the financial plane, the response of the resident owners was a three-pronged one reliance on a reserve fund of $88,273, the levy of a special assessment on all the owners to pay for the cost of the major capital-related repairs, and an increase in the autumn of 1990 in the monthly maintenance fees .

The Trinchinis responded by paying the entire special assessment of $2,442 before the closing date.

In short, my tentative conclusion is that both the owners of the condominium complex acting collectively and the Trinchinis took proper steps to comply with the work orders levied against their complex. Unless compliance is interpreted to mean discharge, I cannot see what more they could have done.

In summary, I find that the defendants have complied with the work orders against the condominium complex. The steps taken by the condominium owners collectively to repair the property to comply with the work orders and the steps taken by the Trinchinis to pay their share of the expenses connected to the repairs, were in my view, timely, full and fair.

In the instant case there is not just substantial compliance; there is, in my view, total compliance.

what is important is whether the financial steps taken by the owners collectively and the defendant vendors personally constituted compliance with the work orders. Reserve funds, special assessments, maintenance fees and warranties can all contribute to compliance.

Distinction Between the Jasinski Case and this Case

[20] 1. In the *Jasinski* case the vendor warranted that there were work orders or deficiency notices outstanding against the property.

In this case the vendor warranted that there are no outstanding work orders registered against the property. (Emphasis added)

In two places in his reasons MacPherson J. alludes to the possibility that his decision may have been different if the clause he was dealing with had been the same as the clause in this case.

At para.35, MacPherson J. stated: The language of the clause in the instant case is not as specific as discharge or no outstanding work orders.

At para.43 he said:

If there is not such language (no outstanding work orders , discharge , removal), if the language couples outstanding with compliance (this case) or satisfaction (Ahuntsic) then, in my view, it is appropriate and necessary to conduct a broader inquiry along the lines suggested by Roberts J. in Ahuntsic.

[21] 2. In the *Jasinski* case MacPherson J. said: In the instant case there is not just substantial compliance; there is, in my view, total compliance.

He based his conclusion on an existing reserve fund of $88,273, a special assessment on all of the owners which assessed amount of $2,442 was paid by the vendor before closing, an increase in the autumn of 1990 in the monthly maintenance fees and, a schedule to complete the major repairs before December 31, 1990.

The facts are entirely different in this case. The reserve fund will be in the red by $72,851 by September 30, 1992, the Condominium Corporation indicates it will continue to pay for repairs out of the reserve fund portion of maintenance fees which will increase the deficit in the reserve fund.

The unit owners responded to a questionnaire the results of which indicated that they, were evenly divided on agreeing to continue paying a separate assessment for the capital project now so we shall proceed slowly as originally planned.

The maintenance fees had already been increased by 7% for the fiscal year ending September 30, 1992.

The work orders resulting from the 1989 inspection were not scheduled for completion until 1993. The inspection of May 12, 1992 lists 32 defects. Granted, some of the defects may be some remaining from the 1989 inspection but probably after three years between inspections there are likely additional deficiencies in the building.

[22] 3. In *Jasinski*, MacPherson J. concluded:

On November 1, 1990 Mr. Jasinski could have received the property he desired at the price he agreed to pay. The continuation beyond November 1 of some work orders might have constituted at most, a minor administrative inconvenience and a small, perhaps even negligible, financial exposure.

That is not the scenario in this case. The plaintiffs contracted for a unit in a building in which the vendor represented that there were no outstanding work orders. Some work orders may have been excused but there were outstanding work orders from an inspection three years earlier in 1989. The plaintiffs would be buying a unit in a building in which the common elements were in a continuing state of disrepair.

The main reason for non-completion of the repairs was the lack of money. The reserve fund was in a debit balance and destined to go deeper in debt. Maintenance fees were increased by 7% for the year 1992. The unit owners having paid a special assessment in 1990 were evenly divided with respect to paying another special assessment.

This Condominium Corporation was in financial difficulty. If the reserve fund is depleted and in a negative balance and outstanding repairs are outstanding because of lack of money, where will the money come from to do future repairs to an aging building?

[23] In my view, on the closing date, the purchasers did not get what they bargained for and if they closed the transaction they would have been faced with an uncertain financial picture. As it was, the purchasers were denied mortgage financing from the TD Bank. As Mr. Di Monte stated in his letter of June 23, 1992, to Mr. Capone, In view of the substantial work orders, the financial institution, the Toronto-Dominion, will not advance a red nickel.

Conclusion

[24] In my view it would be unfair to the purchasers to require them to close this transaction and have as their only remedy a claim for damages against the vendor.

[25] In my view, the plaintiffs, on the date for closing, would not get what they bargained for and were within their rights to refuse to close the transaction. Pursuant to paragraph 9 of the agreement of purchase and sale the agreement was null and void.

[26] The plaintiffs claim is allowed. Order to go requiring the defendant Starcity Realty Limited to pay out to the plaintiffs the deposit monies.

[27] The plaintiffs shall have their costs. If counsel are unable to agree on the amount of the costs they may provide me with written submissions.

Counterclaim

[28] It may be unfair to the defendant vendor not to have the benefit of this sale and lose money on the subsequent sale due to market downturn.

[29] MacPherson J. commented as follows at para.34 in the *Jasinski* case:

It is, of course, open to a prospective purchaser to guard against the existence of any work orders at the time of closing. A clause stating that all existing work orders must be discharged would suffice. So would a clause providing that the vendor warrants that on the closing date there will be no outstanding work orders against the property.

[30] The defendant may have a claim against the person who prepared the agreement of purchase and sale which represented that there were no outstanding work orders.

[31] Order to go dismissing the counterclaim. However, if my decision is wrong, the amount of the counterclaim is $20,142.63, made up of $16,000 lost because of a lower price on the sale September 15, 1993, $5,010 paid for maintenance fees, $1,152.24 taxes, and, $1,130.39 legal fees minus $3,150 rent received. There would be prejudgment interest on the amount due to the defendant on closing of $99,663.71 from June 22, 1992, to September 15, 1993, and on $16,000 from September 15, 1993, to the date of judgment.

[32] The amount would be reduced by the amount of the deposit which would be paid out to the defendant.

[33] The defendant would have her costs.

Blenus Wright J.

Released: December 19, 2003

cc

COURT FILE NO.: 93-CQ-33497

DATE: 20031219

B E T W E E N:

ANGELO BOSCHETTI and LUCIANA BOSCHETTI

Plaintiffs

- and -

ROSA SANZO and STARCITY REALTY LIMITED

Defendants

REASONS FOR JUDGMENT

BLENUS WRIGHT J.

Released: December 19, 2003

2006 CanLII 28088 (ON C.A.)

Boschetti v. Sanzo, 2006 CanLII 28088 (ON C.A.)

Date: 2006-08-17
Docket: C41213

DATE: 20060818

DOCKET: C41213

COURT OF APPEAL FOR ONTARIO

RE:		**ANGELO BOSCHETTI and LUCIANA BOSCHETTI (Plaintiffs/Respondents) and ROSA SANZO and STARCITY REALTY LIMITED (Defendants/Appellants)**
BEFORE:		**BORINS, JURIANSZ and LAFORME J.J.A.**
COUNSEL:		**Pellegrino Capone**
		for the appellants
		Patrick Di Monte
		for the respondent
HEARD & ENDORSED:		**August 17, 2006**

On appeal from the judgment of Justice Blenus Wright of the Superior Court of Justice dated December 19, 2003.

A P P E A L   B O O K   E N D O R S E M E N T

[1] The purchasers did not act capriciously or arbitrarily in invoking para. 9 of the agreement of purchase and sale when the vendor was unwilling or unable to comply with the outstanding work orders. In these circumstances, pursuant to para. 9 the agreement of purchase and sale was rendered null and void and the purchasers were entitled to the return of their deposit. The trial judge found that pursuant to para. 9 of the agreement of purchase and sale the agreement was null and void . In our view, this finding was clearly supported by the evidence. The trial judge made no palpable or overriding error in coming to this finding, and he made no error in law. The agreement of purchase and sale was null and void and the purchasers were entitled to the return of their deposit of $5,000.

[2] Therefore, the appeal is dismissed with costs fixed in the amount of $4,000 inclusive of disbursements and GST.

[3] After 14 years we trust that this case is finally at an end.

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