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April 7, 2007

No protection for conversion projects

In September 2002, Marianne Logger signed an agreement to buy a new condominium unit at the prestigious Chateau Royale project on James St. S., in Hamilton.

She gave the builder, Bear Inc., a deposit of $7,808.

The agreement of purchase and sale set a tentative closing date of May 1, 2003, but allowed the builder to extend that date by not more than 18 months.

Three months after the agreement was signed, the builder wrote to extend the occupancy closing to July 1, 2003 and in March, 2003, the builder again extended occupancy to August 31, 2003.

In June 2003, in anticipation of closing, Logger selected some extras and upgrades.

She paid the builder an additional $7,383, bringing her total payments and deposit to $15,191.

Since the condominium was partly a conversion and renovation of an existing structure, her deposits were not protected by the Ontario New Home Warranties Plan Act, or any other government legislation.

Further letters arrived from the builder extending closing to Dec. 15, 2003, then March 14, 2004, then June 15, 2004 and finally August 15, 2004.

The August date came and went, but the building was still not finished. Based on the builder's promises, Logger gave notice to her landlord that she would be out of her rented apartment at the end of September.

Another extension letter arrived in October 2004, setting a "confirmed" closing date of Oct. 31, 2004.

Logger vacated her apartment, and loaded a moving truck with all her furniture and belongings. When she called the builder, she was told that the unit was still not ready and she was forced to store her belongings with relatives and move into a hotel.

In January 2005, the builder's lawyer wrote Logger's lawyer to say that the new closing date was Jan. 24.

Relying on numerous promises by the builder, Logger arranged mortgage financing and made arrangements to move.

Four days before the projected closing date, Logger inspected the unit and found it far from complete.

When the builder was unable to provide occupancy on the final extension of the closing date, Logger decided that she would not agree to any more extensions and terminated the agreement.

By this time, the closing date was long past the 18-month time limit, which the builder had written into the sale contract, and the builder could not unilaterally impose an extension.

Logger was unable to obtain the return of her deposit monies and the money prepaid for upgrades, so she sued the builder in Superior Court.

Logger's trial took place over two days last December before Justice David S. Crane in Hamilton.

His decision was released in early February this year.

After hearing evidence, the judge ruled that when the defendant failed to deliver the completed unit on Jan. 24, 2005, it was in breach of the purchase contract. He found that the purchaser was ready, willing and able to close the transaction on Jan. 24, 2005, and the builder was not.

Under the terms of the agreement, if the purchaser defaulted, the builder was entitled to retain the cost of the extras. This is a standard clause used in many builder offers.

In this case, the purchaser was not in default, and the judge ruled that it would be unconscionable for the builder to retain unit 307 with the cabinets and appliances paid for by the purchaser.

"It would be unfair to the extreme," he wrote.

Justice Crane ruled that the builder had to return to the plaintiff all the money that she had paid, which were "denied to her by the defendant's breach of the agreement..."

"The defendant," wrote the judge, "was in effect, holding the plaintiff hostage in that she had given up her lease of her prior home, was in very temporary and unsatisfactory accommodations provided to her by the defendant... The plaintiff's trust in the defendant was abused."

I spoke to Marianne Logger last week to see if she had received her deposit back, along with any court costs to which she may be entitled.

She told me that two weeks after the trial, she learned that the owner of the builder's company had died, and to date she has not received any money at all.

In my experience, most builders who convert older buildings into condominium units are responsible and reliable. Unfortunately, however, successive Ontario governments have not seen fit to extend the warranty program and its successful deposit protection plan to buyers of converted and retrofit dwellings.

I've often tried to find a public policy rationale for denying buyers of these types of units the protection of the new home warranty, and the accompanying protection for their deposits. Sadly, I have never been able to figure out why one class of consumer is entitled to protection and one class isn't.

Last month, I had a lengthy telephone interview with Gerry Phillips, the Minister of Government Services, who is charged with oversight of Ontario's home warranty program. He told me that the purpose of the legislation is consumer protection.

If he's serious about it, he might consider why his government offers no protection to buyers like Marianne Logger.

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Logger v. Bear Inc., 2007 CanLII 2656 (ON S.C.)

Date: 2007-02-07
Docket: 05-18547SR

Decisions cited

- Hunter engineering co. v. Syncrude canada ltd., 1989 CanLII 129 (S.C.C.) [1989] 1 S.C.R. 426 (1989), 57 D.L.R. (4th) 321 [1989] 3 W.W.R. 385 (1989), 35 B.C.L.R. (2d) 145

COURT FILE NO.: 05-18547SR

DATE: 20070207

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
MARIANNE LOGGER	))	**David Crow, counsel on behalf of the Plaintiff**
	)	
Plaintiff	)	
	)	
- and -	)	
	)	
	)	
BEAR INC.	)))	**Derek Collins, counsel on behalf of the Defendants**
	)	
Defendant	))	
	)	
	)	**HEARD: December 19 & 20,2006** **(at Hamilton)**

CRANE, J.

[1] This is an action brought by the plaintiff, under Simplified Procedure, to repudiate a contract for the purchase and sale of a condominium unit. The plaintiff seeks the return of monies paid to the defendant in the sum of $15,191.

[2] On 8 September 2002, the plaintiff entered into an Agreement of Purchase and Sale with the defendant to acquire ownership of Unit 307 of a new project under construction, named Chateau Royale, located on James Street South in the City of Hamilton. The plaintiff provided the down payment, as stipulated in the Agreement, of $7,808. Tentative closing date was to be 1 May, 2003 pursuant to clause 2(a). The Agreement, by clause 14, allowed the defendant to select a closing date up to 18 months (but not later) from the aforesaid date.

[3] By letter dated 20 December 2002, signed by Peter Koczer, the defendant wrote to amend paragraph 2(a) of the Agreement of Purchase and Sale providing for the closing and occupancy of the unit on July 1, 2003. The defendant sent a similar letter dated March 21, 2003 that *it is confirmed pursuant to paragraph 14 of the Agreement of Purchase and Sale*

that the confirmed closing date shall be August 31, 2003 . The letter states further that *all other terms and provisions of the Agreement shall remain the same and time shall continue to be of the essence* . In June, 2003 the plaintiff made her choices and Up-Grades for Unit 307 and paid the defendant the sum of $7,383.00 on 7 June 2003. By letter dated 26 June 2003 the defendant wrote to the plaintiff again that *pursuant to paragraph 14 of the Agreement of Purchase and Sale, the closing date shall be December 15, 2003, or sooner. Again, all other terms, including time of the essence are to remain in place* . By letter dated 22 October, 2003 the defendant sent the plaintiff a similar letter stating that *the closing date shall be March 14th, 2004 or sooner* . On January 26, 2004 the defendant sent the plaintiff a similar letter, this time stating that the closing date *shall be around June 15, 2004* . Again the same clause as the other letters as to all other provisions of the Agreement including time of the essence shall remain. It is to be noted that this last date took the defendant to the full extent of clause 14 of 18 months. By letter dated 22 June, 2004 the defendant sent a letter to the plaintiff stating *that pursuant to paragraph 14 of the Agreement of Purchase and Sale, the Closing Date with respect to the above-noted transaction shall be August 15, 2004* . The same subsequent sentence as to the provisions and time of the essence was included.

[4] On the strength of representations from representatives of the defendant, the plaintiff gave notice under her lease of 60 days and pursuant to that notice was required to vacate her apartment not later than 30 September, 2004. By letter dated 4 October, 2004 the solicitor for the defendant wrote to the plaintiff s solicitor to advise *that the CONFIRMED CLOSING DATE for your client s unit shall be OCTOBER 31, 2004 PURSUANT TO PARAGRAPH 14 OF THE AGREEMENT OF PURCHASE AND SALE* .

[5] The plaintiff arranged and loaded a moving truck with her possessions and on calling to the defendant s office was advised that she could not move into the unit. A compromise was made for the plaintiff to leave some chattels at the unit. The plaintiff s relatives took in her belongings. At this juncture a representative of the defendant offered the plaintiff a room at the Connaught Hotel. The plaintiff accepted.

[6] The defendant, through its solicitor, wrote a further letter to the solicitor for the plaintiff dated 2 January 2005 stating the Interim Closing Date is January 24, 2005.

[7] The City of Hamilton Building Inspector, Mr. George Robis was called at trial and stated that Unit 307 of the Chateau Royale passed inspection for occupancy for the first time on 26 May 2005. Mr. Robis stated further that he was not asked to inspect Unit 307 in January of 2005 stating further that the defendant was working on that Unit during that time. On being asked whether persons could occupy units without the units passing inspection, his evidence was that he had issued two orders to vacate units. The plaintiff, in her evidence, stated that she would not occupy Unit 307 without the unit passing an Occupancy Inspection.

[8] Upon the numerous representations on behalf of the defendant, the plaintiff accepted that the closing date would be the 24th of January, 2005. She arranged mortgage financing and made arrangements to move. The plaintiff had the monies to close as of that date; ***Dmytryszn v. King*** [1935] O.W.N. 355 (C.A.).

[9] The plaintiff states in her evidence, which I accept as factual, that she inspected the building on or about the 20th of January 2005 and found the building far from complete. It is at this time that she contacted the Hamilton Building Inspector and was advised as above-noted.

[10] The solicitor for the plaintiff wrote to the defendant s solicitor by letter dated 25 January, 2005, the day following the last proposed closing date, that the property is not ready for occupancy and that the plaintiff will not agree to an extension.

[11] The plaintiff now sues for return of monies paid under the Agreement of Purchase and Sale. Should the Agreement be found to be terminated through no fault of the purchaser (plaintiff), the defendant defends the action on the basis of a set-off of expenses for temporary accommodation of the plaintiff against the plaintiff s claim for her deposit. The defendant also relies on clause 27 of the Agreement that upon the purchaser s default, the vendor may retain the extras purchased by the purchaser. The Up-Grades or extras are listed at Tab 14 of the Affidavit of Documents and amount to ordinary completion of the Unit with cabinets, plumbing faucets, electrical wiring and appliances in the sum of $7,383.00 inclusive of taxes.

[12] Mr. Peter Koczer gave evidence at trial. He stated that he is a Director of the defendant corporation and is the Project Manager of the Chateau Royale. In the course of his evidence Mr. Koczer produced a letter made Exhibit 5. He stated this is a letter of the defendant to the plaintiff dated 27 October, 2004 that cancels clause 21, the clause that provides that should the Agreement of Purchase and Sale be terminated, through no fault of the purchaser, deposit monies paid by the purchaser will be returned. This letter, I find, on the evidence of the plaintiff to have never been seen or sent to her and clearly not signed by her in order to effect an amendment of the Agreement of Purchase and Sale.

[13] On the issues of the availability of Unit 307 for closing and occupancy I reject Mr. Koczer s evidence, preferring the evidence of the plaintiff, noting that Mr. Koczer s evidence is in conflict with the other witnesses called at trial.

THE LAW

[14] The defendant s first six closing dates were within the clause 14 rights of the vendor under the Agreement of Purchase and Sale. The subsequent closing dates stipulated by the defendant in its letters, being 15 August, 15 September, 31 October 2004, and 24 January, 2005, were proposed amendments to the Agreement of Purchase and Sale which the plaintiff s conduct of acceptance amounted at law to a waiver of her rights to revocation. The 24 January 2005 date was a failure of the defendant to deliver its consideration under the Agreement.

[15] The 11th closing date of 16 March 2005 proposed by the defendant was after the plaintiff had, through her solicitor s letter, given notice of revocation.

[16] I find that the defendant, on each letter stating a new stipulated closing date after the 18 month expiry under clause 14, was offering an amendment to the Agreement of Purchase and Sale to the plaintiff, who by her conduct, accepted each such proposal, each acceptance standing alone based on fresh representations. I find that there was no agreement, expressed in writing or implied by conduct, by which the plaintiff, as purchaser, granted an *infinitum* gratuity to the vendor to complete its project and provide consideration under the Agreement. Clearly, the initial promises of the defendant to have the plaintiff in the Unit by Christmas of 2004 and the extension to 24 January, 2005 exhausted even this plaintiff s patience with the defendant. I find on the evidence that the plaintiff satisfied the requirements of being ready, willing and able to effect the closing of the contract as of 24 January, 2005. ***Bates v. Island Cove Development Ltd.*** [2003] O.J. No. 4968.

[17] The defendant seeks to invoke clause 21 as a defence to the plaintiff s claim for return to her of monies paid for what the contract describes as extras (see above description). This defence requires a finding as to the nature of the breach by the defendant. The defendant failed to close the transaction and provide to the purchaser the very essence of the Agreement, namely, Unit 307 as a habitable unit in a condominium project known as Chateau Royale. In addition, in law a breach of *time is of the essence* clause is considered to go to the root of the contract. ***D.H.L.***

Lamont Lamont on Real Estate Conveyancing (Scarborough: Thomson, Looseleaf) at 19-3; ***Shelanu Inc. v. Print Three*** [2000] O.J. No. 1919 para. 32 *et seq.* There was a total failure or default by the vendor to provide its consideration under the contract. I find the breach of contract to go to the root or substance of the Agreement of Purchase and Sale. Accordingly, the exculpatory clause (cl. 21) cannot excuse a fundamental breach. See ***Canso Chemicals Ltd. v. Can. Westinghouse*** (1974), 54 D.L.R. (3d) 571 (N.S.C.A.); ***Kordas v. Stoke Seeds Ltd.*** [1992] O.J. No. 2221 (O.C.A.). In the alternative, I find it would be unconscionable in the circumstances of this case for the defendant to retain Unit 307 with cabinets and appliances paid for by the plaintiff with the Unit never occupied by her. It would be unfair to the extreme. The defendant will refund to the plaintiff those monies paid by the plaintiff for the Unit and denied to her by the defendant s breach of the Agreement under which the monies were in fact paid; ***Hunter Engineering Co. v. Syncrude Canada Ltd.*** 1989 CanLII 129 (S.C.C.), [1989] 1 S.C.R. 426. The defendant was in effect, holding the plaintiff hostage in that she had given up her lease of her prior home, was in very temporary and unsatisfactory accommodations provided to her by the defendant. There was a situation of decidedly weak bargaining position of the plaintiff vis vis the defendant, the latter having full knowledge of the futility or wishfulness of its proposed successive closing dates and accordingly having awareness of its risk of default. The plaintiff s trust in the defendant was abused.

THE JUDGMENT

[18] The plaintiff will have judgment pursuant to her Statement of Claim in the sum of $15,191. together with prejudgment interest pursuant to the ***Courts of Justice Act***. Costs are reserved to permit the parties to deliver written submissions. I allow 30 days for each party to serve and then file with me their respective submissions including replies.

[19] I request counsel to discuss the amount of prejudgment interest and should there be agreement, plaintiff s counsel may advise the sum with the submissions on costs. In the unlikely event that counsel cannot agree, then I shall require written submissions within 30 days from this date.

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CRANE, J.

Released: February 7, 2007

COURT FILE NO.: 05-18547SR

DATE: 20070207

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

MARIANNE LOGGER

Plaintiff

- and

BEAR INC.

Defendant

REASONS FOR JUDGMENT

CRANE, J.

DSC/sh

Released: **February 7, 2007**