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Have mortgage financing in place prior to closing

Back in November 2005, Nahid Eskandapour signed an agreement with Lebovic Enterprises Ltd. to buy a new home on Colony Rd. in Richmond Hill. The closing was originally scheduled for Feb. 14, 2006, but was extended several times until the final date of May 5 that year.

The agreement of purchase and sale was prepared on a standard form of what was then the Greater Toronto Home Builders' Association. It provided for forfeiture of the purchaser's deposit in the event of default, and that the house was deemed to be completed when the interior work was substantially completed so that it "reasonably shall be occupied."

The Town of Richmond Hill issued a residential occupancy permit on April 24, 2006.

The floor plan of the home showed the laundry room on the second floor. When the buyer inspected the house in April before the scheduled closing, she discovered no laundry room there, but that a rough-in for a laundry room was located in the basement.

When the builder discovered its mistake, it quickly altered the house to locate the laundry room on the second floor. It was completed by May 2.

The following day, the purchaser's lawyer requested that the closing dated be extended to May 9 so that Eskandapour could finalize financing, but by that date, the purchaser had still not signed the required Certificate of Completion and Inspection, nor had she delivered the closing documents or funds.

Two weeks later, on May 23, the builder advised that it considered that the agreement was at an end due to the purchaser's default, and that her deposit was forfeited.

Apparently, Eskandapour had experienced a delay in obtaining a mortgage. On June 14, her lawyer wrote the builder's lawyer to advise that mortgage instructions had been obtained. He asked that the transaction be resurrected.

Lebovic declined to close the transaction and resold the house to another buyer. Eskandapour sued the builder for return of the deposit, damages of $20,000, and an order forcing it to close the transaction.

In her lawsuit, it was Eskandapour's position that based on her inspection of the house in April, the house was "not liveable" without laundry facilities.

That, she argued, entitled her to refuse to sign the completion certificate and to refuse to come up with the balance of the purchase price.

Lebovic responded that the buyer was in default on both counts, and it was entitled to forfeit her deposit.

In April of this year, Lebovic applied to Justice Anne Mullins in Ontario Superior Court in Newmarket for an order dismissing the plaintiff's claims without going to trial, on the basis that the facts were not in dispute and that there was no genuine issue for trial.

Mullins agreed. She dismissed the buyer's claim and awarded the builder $7,500 in costs.

In her written decision, the judge concluded that "the second floor laundry facility contemplated by the floor plan was constructed by the closing dates."

"The plaintiff," she wrote, "has produced no evidence to challenge the defendant's evidence that it recognized and rectified this deficiency in a timely fashion."

The judge found that by June 14, the buyer was prepared to close the transaction with no continuing concern expressed over the formerly "unliveable" state of the premises.

Mullins noted, "The absence of laundry facilities in a home would make its occupancy inconvenient. Reasonably considered, the home was, nonetheless, ready to 'be occupied' and 'substantially complete,' within the meaning of the obligations of the parties as expressed in this Agreement of Purchase and Sale."

Two lessons emerge from the Eskandapour case.

First: Builder purchase agreements always favour builders. On closing, the issue is not whether the house is complete to the satisfaction of the buyer, but whether it is complete according to the terms of the agreement.

Second: Buyers should always have their mortgage financing arranged well in advance to avoid the risk of not having the funds on closing.

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Eskandapour v. Lebovic Enterprises Limited, 2009 CanLII 22552 (ON S.C.)

Print: PDF Format
Date: 2009-04-28
Docket: CV-09-040835-00
URL: http://www.canlii.org/en/on/onsc/doc/2009/2009canlii22552/2009canlii22552.html
Noteup: Search for decisions citing this decision

NEWMARKET COURT FILE NO.: CV-09-040835-00

DATE: 2009/04/28

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E EN:	)	
	)	
NAHID ESKANDAPOUR	)))	Hoosein Niroomand, for the Plaintiff
	)	
Plaintiff	)	
	)	
- and -	)	
	)	
	)	
LEBOVIC ENTERPRISES LIMITED	)))	Anastasia Makrigiannis, for the Defendant
	)	
Defendant	))	
	)	
	)	**HEARD:** Thursday April 09, 2009

REASONS FOR JUDGMENT

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MULLINS J.

[1] The defendant moves for summary judgment dismissing the plaintiff s claims. The Statement of Claim seeks the return of a deposit of $20,000.00, exemplary damages of $20,000.00 and specific performance of an Agreement of Purchase and Sale of a residence located at 188 Colony Road, Richmond Hill, Ontario. The home has since been sold to another purchaser by the defendant and consequently, specific performance is not available. The defendant has relied upon Rule 76 in its pleading, to the effect that the claim ought properly to have been brought under the Simplified Procedure. The plaintiff has not elected to continue under the Simplified Procedure. The defendant, as moving party, relies upon rule 20.01 and not Rule 76 for summary judgment.

[2] The Agreement of Purchase and Sale was entered into by the plaintiff and the defendant on November 1, 2005. The sale was originally scheduled to close on February 14, 2006. The closing date was extended to April 15, 2006, then April 28, May 3, and May 5. On May 23, the defendant decreed that it considered the Agreement to have been breached by the plaintiff, the deposit forfeit and all obligations at an end.

[3] The Agreement is in a typical form of the Greater Toronto Home Builders Association. It contains a provision which excludes representations, collateral agreements and conditions. It provides for forfeiture of the deposit of the purchaser, in the event of a material default. Time is of the essence, according to paragraph 32.

[4] At paragraph 12, the Agreement stipulates that the dwelling shall be deemed to be completed when all interior work has been substantially completed so that the dwelling reasonably shall be occupied .

[5] The Municipality issued a Residential Occupancy Certificate on April 24, 2006.

[6] Paragraph 14 of the Agreement required the plaintiff to meet the vendor, inspect the premises and verify that the dwelling has been completed. Any deficient or incomplete work is to be listed on the form of a Certificate of Completion and Possession. The Certificate, when executed by the vendor, constitutes the vendor s only undertaking to remedy or complete the dwelling. It stipulates that such work shall be done as soon as is reasonably practicable.

[7] The plaintiff was represented by counsel throughout the period material to the events which transpired. The plaintiff had purchased the adjoining semi-detached property and in so doing had completed a Certificate of Completion and Possession.

[8] On May 3, 2006, the plaintiff requested, by letter from counsel, that the closing date be extended to May 9 to enable her to finalize her financing. The defendant refused. A brief extension to May 5 to accommodate the financing problem was considered by the defendant. On May 9 counsel for the defendant confirmed that the plaintiff had failed to sign the Certificate of Completion and Possession, and that it had not received closing documents or funds.

[9] On that same May 3 date, by separate letter, counsel for the plaintiff advised that his client had inspected the premises and found them to be unliveable. No details as to why the plaintiff considered the premises to be unliveable were proffered.

[10] A letter of May 12 announced to the defendant that the plaintiff was in funds to complete the transaction and requested an extension of closing to May 19. On May 18 counsel for the plaintiffs relayed a claim that there were no laundry room facilities in the premises.

[11] On June 14, the defendant was advised that plaintiff s counsel has received mortgage instructions. There is no mention by the plaintiff of any deficiencies or state of unliveability. The plaintiff requested a resurrection of the transaction.

[12] The plaintiff contends, correctly, it is conceded by the defendant, that the floor plan for the home showed the laundry room to be on the second floor. Upon inspection in April the plaintiff found that the laundry room had not been constructed. The rough-in for the laundry facilities was located in the basement, not the second floor.

[13] In the affidavit filed by the plaintiff in response to this motion, she says that the home was not liveable as there was no way she could move in to a home without laundry facilitates. She has back problems which prevent her from frequently going up and down stairs especially with laundry. She acknowledges that the defendant said the problem would be fixed. She says that an extension of closing to May 5 was suggested, which caused her to have to resubmit her mortgage application.

[14] The plaintiff explains that she refused to sign a form, presumably the Certificate of Completion and Possession called for under paragraph 14 of the Agreement, because it inaccurately reflected a myriad of deficiencies. Of the myriad of deficiencies to which she alludes, she identifies only that the exterior painting was extremely poor in quality and that the home was full of dust .

[15] The defendant attests, in a supplementary affidavit sworn March 26, 2009, that the laundry room was in fact, constructed on the second floor of the home, to remedy the deficiency, between April 27 and May 2, 2006. Documents are appended as exhibits to the affidavit of Harry Lebovic, which purport to confirm a work order and purchase extras, although the latter is dated May 2, 2005 and not, as one would expect, 2006. This is explained to be a typo.

[16] Evidently, the plaintiff did not return to the premises after the visit in April, when she discovered that the laundry facilities had not been installed on the second floor. She offers no evidence to contradict that of the defendant, that this deficiency was remedied in late April and early May, 2006. Notably as well, notwithstanding an undertaking given at the time of cross examination of the plaintiff, she has failed to produce any evidence that the absence of the laundry room on the second floor, caused or contributed to the delay in financing of the purchase. That there was delay in securing financing seems readily apparent, from the correspondence between counsel over May and June of 2006, which is marked as exhibits to the parties affidavits.

[17] There is no mention of any alleged deficiency regarding the laundry room in the plaintiffs request to resurrect the transaction on June 14. June 14 is the only letter which advises that mortgage instructions have been received by counsel for the plaintiff.

[18] In bringing this motion for summary judgment, the defendant must establish that there is no genuine issue for trial. While the motion judge is not to attempt to determine contested issues of material fact, or credibility issues as to material facts, he or she is entitled to take a hard look at the facts. The respondent to the motion is obliged to discharge an evidentiary burden beyond the bald assertion of facts.

[19] Herein, the plaintiff contends that the absence of a completed laundry room as of late April rendered the home unliveable . This she relies upon, to entitle her not to have signed the documentation called for under the Agreement, or to have to tendered sufficient funds to close the purchase on May 3 or May 5, 2006. She makes this contention, notwithstanding the issuance of a Certificate of Occupancy by the Municipality and paragraphs 12 and 14 of the Agreement.

[20] The defendant says that the plaintiff s failure to sign the Certificate and tender funds are material breaches, which entitled it to treat the plaintiff s deposit as forfeit.

[21] On a balance of probabilities, it may reasonably be concluded on the evidence tendered by the defendant/moving party, that the second floor laundry facility contemplated by the floor plan, was constructed by the closing dates to which there was mutual agreement.

[22] Beyond the assertion of the bald fact that the laundry room was not present on the second floor as of her visit in April, the plaintiff has produced no evidence to challenge the defendant s evidence that it recognized and rectified this deficiency in a timely fashion.

[23] On the balance of probabilities, it is also apparent that once counsel was in receipt of actual mortgage instructions by June 14, the plaintiff was prepared to close the transaction with no continuing concern expressed over the formerly unliveable state of the premises.

[24] The absence of laundry facilities in a home would make its occupancy inconvenient. Reasonably considered, the home was, nonetheless, ready to be occupied and substantially complete , within the meaning of the obligations of the parties as expressed in this Agreement of Purchase and Sale.

[25] The plaintiff was in default in failing to meet her obligations to sign the Certificate of Completion and Possession.

[26] Given the preponderance of evidence that the plaintiff failed to tender funds to close the purchase transaction on the date(s) agreed, she was in material default of the Agreement, within the meaning of Clause 30.

[27] The amount of the forfeited deposit is not insignificant. I find however, that there are no issues in this claim that withstand a good hard look and are genuinely triable.

[28] The motion of the defendant ought to be granted and the action dismissed. I so order.

[29] Having received the costs outline of the defendant and having heard submissions from both counsel as to costs, the defendant shall have costs fixed at $7,500.00.

Justice A. Mullins **Released:** April 28, 2009

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