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Is Deleting a Loft a "Material Change"?

In *Gallow v. HPH (Broadview) Ltd*., the buyer agreed to purchase a yet-unbuilt condominium unit from a builder. The floor plan, which she received only about a month after she signed, showed the unit to be a stacked townhouse on three levels, consisting of "2 Bedroom + Loft Plus Roof Deck". The loft feature was important to the buyer because both she and her partner worked from home and needed separate office spaces.

As construction proceeded, however, the buyer noticed various changes were being made to the layout. At one point the builder's president advised her, *via* email, that there was "a change to the roof-top stair enclosure for all units as a result of the building permitting process", and that the size of the loft would be "reduced accordingly."

Concerned, the buyer asked for an accurate revised floor plan; even after numerous requests she never received one. Then, while choosing her finishes for the unit, she was asked to sign a document acknowledging that the "attached" floor plan was final and superseded all prior versions, but there was no copy attached. As such, she deleted the acknowledgment before signing for her finishes.

As construction neared completion it became evident that – in stark contrast to the original floor plan – the unit had been built essentially without a useable loft. Its finished width was only 3' 9", and the rooftop terrace was also much smaller than originally planned.

The buyer accordingly refused to close, claiming that the completed unit was not what she had bargained for, and that she would not have bought it had she known of the loft's actual finished size. She also pointed out that the builder had not given her a written "notice of material change" in a Disclosure Statement as required by the *Condominium Act, 1998*.

The builder refuted the claim that there had been a "material change" concerning the loft; it also relied on the fact that the size reduction had essentially been made at the request of the municipality, and had been specifically permitted under the agreement.

In considering these facts, the court pointed out that s. 74 of the *Condominium Act, 1998* defines "material change" as taking into account the views of a "reasonable purchaser, on an objective basis", and involves consideration of whether it was likely a purchaser would not have entered into the agreement had he or she known of the change.

Here, the buyer had consistently indicated that she would not have agreed to buy the unit had she known the loft area would be so substantially changed as to be effectively eliminated. Furthermore, the builder had been aware all along that the buyer chose the layout with a home-office use in mind, and that the loft feature had been an enticement. Also, the builder's representative had repeatedly ignored the buyer's questions about what was happening during construction, and on four occasions failed to answer her point-blank questions. This failure to provide a revised floor plan pointed to a lack of honesty about what was happening.

In its order in the buyer's favour, the court declared that the reduction in the loft was a material change, that the builder had failed to give notice of as required by the Act, and that the buyer was entitled to rescind the agreement and have her $80,000 deposit returned. See *Gallow v. HPH (Broadview) Ltd*., 2013 (ONSC).

Can « Time is of the Essence » Be Implicit?

In a recent Ontario case, the buyer agreed to purchase a commercial property, consisting of a Petro-Canada gas bar and convenience store, together with three other tenanted buildings (housing a McDonald's, a Tim Horton's, and a Service Canada office, among other things). Its agreement with the seller initially provided for a June 1st closing date, and indicated that "time is of the essence". However, subsequent negotiations resulted in a series of five amending agreements that extended the closing date; all five indicated that time continued to be of the essence.

The deal did not close on the last of the contemplated dates, and the parties failed to reach any further amending agreements in writing. Nonetheless, over the following weeks they continued to negotiate; in doing so they proceeded as if the transaction was still valid, overlooked the lapse of various requisition dates, and set new future closing dates. The last and final one was for August 3rd; however – quite importantly – the documentation setting that date did not specify that "time is of the essence", an omission which later became a key issue between the parties.

In the days leading up to August 3rd the parties each conducted themselves as agreed: inventory was taken the day before, and the buyer provided a significant cash float and inquired about delivering further funds. However, the morning of closing the bank financing temporarily fell through. The seller, claiming the August 3rd date was firm, refused to close in escrow or extend

further, and instead tried to tender its documents as evidence of its willingness to close. Ultimately, the deal fell through.

The buyer still wanted to proceed, and asked the court for an order for specific performance, forcing the deal to go ahead.

In doing so, the buyer first had to resist the seller's claim that time was of the essence in the deal, and that given the buyer's failure to close on August 3rd, the seller was entitled to the usual remedy as innocent party: to treat the contract as at an end and sue the buyer for damages.

In response, the buyer took the position that there was no actual written agreement specifying an August 3rd closing; rather this date had been informally agreed as part of a series of mutual extensions, each of which had essentially waived the "time is of the essence" element.

The court agreed with the buyer: the "time is of the essence" aspect had indeed been waived during negotiations. Also, while conceding that the essentiality of time could sometimes be inferred from the circumstances surrounding an extension, the court in this case found nothing to suggest that it continued to be part of this deal or that, because of the circumstances, it had been implicitly renewed. For example, the fact that inventory was taken a day before closing, as required by a clause in the agreement, did not make time of the essence; this was not a determinative step that affirmatively required the deal to close the next day.

Next, the court turned to the merits of the buyer's request for specific performance. It accepted evidence that the property was special since it provided the buyer with a good opportunity to carry on a business while having good tenants in the other buildings. It noted the buyer had also put a great deal of effort into obtaining the property, and had agreed to pay $215,000 more than the initial $3.8 million asking price. Overall, an order of specific performance would not be unjust in this case, and the court granted partial summary judgment on the issue accordingly. See *2329131 Ontario Inc. v. Carlyle Development Corp.*, 2013 (ONSC).

Can Tenant Renege on Landlord's Relocation Deal?

Since 2007, the tenant had been operating a hot yoga studio in a space it leased from the landlord. When the landlord started making plans in 2013 to redevelop the building, it asked the tenant to vacate and sign a surrender of lease, requiring it to move into a replacement space that was available from a landlord-affiliated company. In exchange, the landlord would pay the tenant several inducement payments, consisting of $50,000 up-front, plus $212,000 once additional documentation was signed.

The tenant agreed, signed a new lease, and moved into the replacement premises as required. A month later, at the landlord's request it signed an estoppel certificate, confirming various aspects of the new arrangement. It also specifically agreed to be obligated to comply with all laws, by-laws and regulations relating to the premises.

Shortly after, the tenant realized that it could not operate a hot yoga studio in the new space until certain zoning and building code requirements were complied with. These included the installation of wheelchair access and a sprinkler system, and increased parking. Only some of these issues could be resolved with the landlord.

Meanwhile, as news of the tenant's move to the new premises started to spread to its customers; the tenant immediately began to see a consistent reduction in revenues. While it never expressed concern to the landlord, the tenant began to have second thoughts about having agreed to change locations.

After initially attempting to force the landlord to take on full responsibility for the remaining zoning/building code issues, the tenant advised the landlord that it was rescinding the surrender of the original lease, and that it would not be bound by the replacement lease it had signed. The tenant returned the keys, which the landlord refused to accept. After further unsuccessful negotiations, the landlord locked out the tenant.

The tenant then asked the court for an interim injunction allowing it to continue to operate in the original space, pending a full trial.

The court refused to grant the injunction. The tenant was simply not entitled to rescind either the surrender of the original lease or the replacement lease. It had signed the estoppel certificate agreeing to conform to all building code and zoning requirements, so there was no real issue about whether the lease obligations were enforceable in light of the problems discovered after-the-fact. In any case, the tenant could have easily confirmed the state of those zoning/building code requirements prior to signing.

Also, the court noted that the tenant had already spent most of the landlord's inducement money, and indeed had done so after telling the landlord that the building code/zoning problems made the replacement premises unsuitable. The tenant simply could not take the monetary benefit of the agreement and still ask to have it rescinded.

Finally, applying the legal test for an injunction, the court concluded that even if there was a serious issue to be tried here, the tenant would not suffer irreparable harm. Despite the tenant's claim that the high ceilings, maple hardwood flooring and large windows made the original space "irreplaceable", the court observed:

With due respect, and without putting too fine a point on the matter, the entire transaction between the parties demonstrates that the Premises was eminently replaceable. Charming as the woodwork may have been, all it took to induce the Tenant to move to the Replacement Premises was money.

As such, the court concluded that any injury to the tenant arising from the move could likewise be compensated with cash. The tenant was ordered to leave the premises immediately; the landlord was ordered to pay the balance of the inducement payments that it had promised. See *2454 Bloor Street West Ltd. v. 2107733 Ontario Inc. (c.o.b. Moksha Yoga Studio)*, 2013 (ONSC).