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Mortgage and Real Property Law Report



Vol. 24, No. 3 • June 2018

A Legal Newsletter for the Mortgage and Real Estate Industries

After 4-Year Delay, Builder Hikes Condo Price by $225K

In *Jones v. 2341464 Ontario Inc*., the dispute was between the builder and the buyers of a condominium unit in downtown Toronto. At the time the buyers paid their $50,000 deposit toward the $650,000 purchase price, construction had not yet begun, and various permits and approvals were still needed. The Agreement included clauses allowing for delayed occupancy if needed.

As it turned out, a full four years lapsed before the builder was able to begin significant construction. Still, the buyers were willing to proceed with the deal, even after the builder advised of needed changes to the unit's layout which included eliminating the unit's balcony.

The turning-point in the parties' relationship came when the builder suddenly emailed the buyers, advising that although the unit was now nearly complete, it was terminating the original deal altogether. However, the builder was willing to offer the buyers the opportunity to purchase *the same unit* – but at an increased price of $875,000. The builder explained that the municipality-caused delays forced it to incur significant added costs, necessitating a higher price of $925,000 – less a $50,000 "discount" the builder was willing to offer to the buyers.

The builder purported to rely on two arguments: (1) that the original Agreement was actually ripe for formal termination almost four years earlier, in 2015, when the original occupancy date had come and gone; and (2) that the Agreement had been legally frustrated due to the inevitable delays, floor plan changes, and other circumstances beyond the builder's control. Either way, the builder felt it was now at liberty to re-sell the unit at will – even to the same buyers at a higher price.

Naturally the buyers objected, and sued the builder for specific performance of the original Agreement, at the original price.

The court sided with the buyers, declaring the Agreement valid and enforceable. Clearly, the anticipated construction timelines had not been met, due to circumstances beyond the builder's control. But the parties had amended the Agreement along the way, removing the builder's right to terminate for this reason. This meant that *only* the buyers were entitled to end the Agreement for delay, and they had never done so.

Turning to the builder's second argument: On these facts, there was also no frustration of the Agreement. It was not that the building permits and approvals could *never* be obtained; there had simply been some significant delays in doing so. Indeed, the building and unit were now almost complete.

More to the point, the builder could not demonstrate that the delays made it outright *impossible* to perform the contract, or that they gave rise to a new contract radically different from the original one. To the contrary, by offering to sell the same unit to the buyers at a higher price, the builder actually proved that it was not unable to sell a completed unit as the contract called for – even despite the floor plan changes. As the court observed: "This is a transparent indication from the [builder] that it is able to complete the transaction, but that it wishes to receive more money."

Having found the Agreement valid, the court considered whether specific performance was the appropriate remedy for the blameless buyers, who needed to show that: (1) the unit was unique; and (2) a substitute was not readily available. Even with the buyers' limited proof, the court was satisfied the threshold had been met. The unit was a full floor in a small Toronto building; given the four-year delay, it was unlikely that a comparable property with the same features, in the same price range, could be found. See: *Jones v. 2341464 Ontario Inc*., 2018 ONSC 717.

Sellers Oblivious to Former Grow-Op – Sale Still Void

The Ontario court recently voided an Agreement to sell a home that – unbeknownst to the sellers – had formerly been used for a marijuana grow operation.

The Agreement called for the intended buyer to submit a $30,000 deposit to the sellers, which he did. It also contained representations and warranties assuring the buyer that the property had never been used to grow marijuana or other drugs. Specifically, its "Illegal Substances Clause" stated: (1) that while the sellers owned the property, "the use of the property and buildings and structures thereon has not been for the growth or manufacture of any illegal substances;" and (2) that to the best of the sellers' own "knowledge and belief, the use of the property and the buildings and structures thereon has never been for the growth and manufacture of illegal substances."

At the time the sellers signed off on these two statements, they were both true: In the seven years they owned the home, they never operated a grow-op themselves, and understood it had never been used for this purpose before they purchased it.

Shortly before closing, however, the buyer did some research, and learned from the

Police that the property had indeed been used to grow 265 marijuana plants some 10 years earlier. After informing the sellers of his discovery, the buyer promptly advised that he was no longer willing to complete the deal. He demanded the return of his deposit.

The sellers sued, asking the court to affirm the validity of the contract, to declare the buyer's deposit forfeit to them, and to award them damages for the buyer's breach of the deal. In the meanwhile, they managed to sell the property to a new buyer, but for $87,000 less.

The court refused to make the buyer liable for the seller's losses, and declared the Agreement void.

Legally, the Clause had two aspects: It was both a "warranty" (*i.e.* a contractual promise that the item sold has a particular quality), and a "representation" stating the sellers' own beliefs about the property.

The warranty part of the Clause turned out to be false; this alone jeopardized the Agreement's validity. The representation aspect was also troublesome. True, the Clause reflected only the sellers' "knowledge and belief," so it was not a guarantee. But once the sellers learned (ironically, from the buyer) about their own home's history, they could no longer claim to believe it had never been a grow-op, as they stated in the Clause.

Admittedly, the sellers' misrepresentation was not fraudulent in nature. Still, the innocent buyer was entitled to rely on both the warranty and representation in the Clause, and had the right to rescind the whole Agreement if: (1) these turned out to be untrue; *and* (2) he could show that the misinformation was a material term of the contract, and one that induced him to enter into the deal in the first place.

The court found all these elements were present here. The buyer – a father of two who was reasonably concerned about the health of his family – had entered into the Agreement partly on the strength of the Clause, as any buyer would. The court noted that grow-ops were known to lead to mould and other health risks; the fact that the property was later sold for $87,000 less, with full disclosure of its history, proved that the sellers' misrepresentation as to the property's character was substantial and material.

The buyer was entitled to rescind the Agreement, and treat it as void. The sellers were ordered to return the deposit, with interest. See: *Beatty v. Wei*, 2017 ONSC 3478.

Estoppel Certificate Estops Tenant's Claim

A recent commercial tenancy decision illustrates the significance of Estoppel Certificates. In that case, the tenant inadvertently signed away the chance to get an injunction to block demolition of a building that it may have wanted to purchase for itself.

The tenant was Tilt, which operated a bar and game arcade on property it leased from the landlord. The lease contained a Right of First Refusal (ROFR); anytime the landlord received an acceptable offer to buy its premises, Tilt would have 24 hours to submit a competing bid.

The landlord did receive such an offer, for $6.3 million, from a corporation named Brunswick that intended to develop a hotel on the property. Brunswick also secured over $7 million in financing for the deal.

The landlord did not offer Tilt a ROFR; instead, it gave Tilt a notice of termination and asked it to vacate. Then, for its own protection and at Brunswick's lender's behest, the landlord asked Tilt to execute an "Estoppel Certificate". In that document Tilt attested to the existence of a valid lease and stated that it had no claims against the landlord, which was not in breach of the lease. Tilt executed this thinking it was merely needed to assign the lease to the new owner, Brunswick.

Realizing that it had not been offered the ROFR, and with Brunswick poised to start demolition for the hotel project, Tilt went to court for an injunction, pending a later trial to sort out the parties' various rights.

In evaluating whether to grant an injunction, the court applied established legal tests. Tilt needed to show there was a "serious issue to be tried," and that it would suffer "irreparable harm" if the injunction was refused. Tilt also had to show that any harm it would suffer by *not* getting an injunction would exceed the harm that Brunswick would suffer if the injunction were allowed.

All three of these elements were necessary for Tilt to succeed; the court found that none of them were present in this case.

The crux of the matter was the Estoppel Certificate, and the circumstances in which it was signed. There were numerous potential issues that the document raised – including its interpretation, impact, and legality – but none were tantamount to the "serious question to be tried" needed to support the injunction Tilt was requesting.

For example, the fact that Tilt signed the Estoppel Certificate thinking it was for a lease assignment was irrelevant to its purpose and effect: It was designed to prevent Tilt from later disclaiming the lease or asserting that the landlord was in breach of it. Tilt also signed it in circumstances where it must have known it would be relied on not just by the landlord, but by others as well.

In the face of that Estoppel Certificate, Tilt simply could not now come to court and claim that the landlord breached the lease (i.e. the ROFR) and use that allegation to support its injunction request. But for the existence of that Certificate, Tilt would have been successful. However, based solely on its legal effect, the Estoppel Certificate precluded the court from finding a "serious issue to be tried" for the purposes of justifying the injunction.

While this alone was enough to end the matter, the court added that Tilt had also failed to show it would suffer irreparable harm without an injunction. Any disadvantage or losses arising from the landlord's disregard of the ROFR could be compensated in damages. On the flip-side, the injunction would entirely halt Brunswick's business operations, and cause it to incur unforeseen costs because of the unexpected delay in demolition.

The court rejected Tilt's injunction bid to halt Brunswick's demolition pending trial. See: *1960529 Ontario Inc. v. 2077570 Ontario Inc.*, 2017 ONSC 5254.