TAB 5

2054476 Ontario Inc. v. 514052 Ontario Limited
2009 CanLII 2037 (ON S.C.)

Milton A. Davis, C.S.
Davis Moldaver LLP

Practice Gems:
Best Practices for Tendering in Real Estate Transactions
Protecting Your Client When the Other Side Refuses to Close

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2054476 Ontario Inc. v. 514052 Ontario Limited, 2009 CanLII 2037 (ON S.C.)

COURT FILE NO.: CV-06-0233-00
DATE: 20090122

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	
2054476 ONTARIO INC., 2000768 ONTARIO INC. and 2054288 ONTARIO INC.	Angus T. McKinnon, Matthew Diskin, for the Plaintiffs (Deal 1) David Rubin, Sophia E. Zaidi, for the Plaintiffs (Deal 3)
Plaintiffs	
- and -	
514052 ONTARIO LIMITED and 1176847 ONTARIO LIMITED	Paul Pape, Jonathan Rosenstein, for the Defendants (Plaintiffs by counterclaim)
Defendants	
- and -	
514052 ONTARIO LIMITED and 1176847 ONTARIO LIMITED	

Plaintiffs By Counterclaim	)	
- and -	)	
2054476 ONTARIO INC., and 2000768 ONTARIO INC.	)	
Defendants By Counterclaim	)	
	)	**HEARD:** January 7, 8, 9, 10, 11, 14, 15, 16, 17, 18, 2008 Oral Submissions, February 20 and 22, 2008

REASONS FOR JUDGMENT

Dunn J.

[1] In these two actions tried together the plaintiffs claim specific performance of certain real property transactions as purchasers. The defendants counterclaim for forfeiture of the deposits and a declaration that the transactions are at an end. The agreements in question were two out of a series of four between the parties, with the initial agreement of purchase and sale executed in June 2001 with closing anticipated in November of that year. The properties in question are located off Airport Road and bordering the Mimico Creek in Mississauga. They were sold as vacant land and the agreement required the vendor to perform certain work to ensure the availability of building permits on closing.

[2] It would be trite to say that the vendor ran into certain difficulties in performing its obligations under the agreements. As a consequence, there were delays in the closing dates and the agreements were amended from time to time with respect to closing and with respect to the satisfaction of the conditions. In order to distinguish the deals conveniently, the parties referred to them as Deals 1 through 4. Each of the transactions was evidenced by a separate agreement of purchase and sale.

[3] The Deal 4 transaction was completed in early May 2004 after a number of extensions and amendments. Deal 2 was completed on September 17, 2004 with a substantial holdback for incomplete work, the performance of which was the obligation of the vendor.

[4] Although urged by the defendant to treat the transactions as one, clearly they are separate contracts and to an extent were treated differently by the parties as to amendments and closing dates, etc. They have differing obligations and differing rights are conferred by them and as a consequence must be treated as individual contracts. At the same time, they cannot be viewed logically in isolation.

[5] It is clear that the vendor was anxious to close the transactions. The

evidence establishes that on at least one prior occasion he had attempted to precipitate the closing by tendering or threatening tender on the purchaser. The prior tender (or threat) was clearly premature as the vendor had not completed its obligations under the agreement. On December 10, 2004, the vendor 'tendered' on the purchasers. The transactions did not close.

ISSUES

[6] The plaintiff purchasers for the Deal 1 and Deal 3 transactions ask the court for specific performance of the vendor's obligation and the conveyance of each of the parcels of land in question pursuant to those agreements. The vendor, on the other hand, seeks a declaration that the deposits of the purchasers are forfeit and that the vendor is free to dispose of the land as it sees fit. Also at issue is whether or not the vendor has established in law an appropriate tender of his documents and obligations entitling this court to conclude that the plaintiffs are in breach of their obligations under the agreements. In addition to asking for specific performance with respect to each of Deals 1 and 3, the plaintiffs request an abatement of the purchase price with respect to a conservation setback. The purchasers also request a further construction costs abatement in the amount of $498,563, being the increase in construction costs for the proposed building of the plaintiff over the period of time during which the closing date was delayed by the failure of the defendant to perform its obligations.

[7] In the event the claim of the purchasers is unsuccessful for specific performance, the purchasers request a return of the deposit or relief from forfeiture.

OVERVIEW OF EVIDENCE

[8] The evidence presented at this trial concerning the various difficulties the vendor ran into in performing its obligations illustrate many of the pitfalls that can occur for a developer in attempting to obtain the necessary municipal and other approvals for the development and sale of land. It appears that whatever could go wrong did go wrong affecting numerous delays in the ability of the vendor to close. By September 2004 the vendor's main problem in complying with its obligations was its inability to lift an "H" designation, that is a holding designation on the property as a result of the municipal requirement for a rechannelization of Mimico Creek which backed on part of the property. A certificate from the Toronto Regional Conservation Authority (TRCA) was required to release the "H" designation and the TRCA required a letter of compliance from a professional engineer "outlining that all works had been done in accordance with the subject permit". Among other things, the TRCA required a certain grading and other work abutting the creek to be completed.

[9] As of May 3, 2004, the Deal 1 closing date was extended until the later of June 30, 2004 or seven days after the TRCA and the Transportation and Works Department of the City of Mississauga had approved the completion of the rechannelization works and the Planning and Building Department of the City of

Mississauga has advised in writing of its receipt of such clearances. Deal 3's closing date was extended to the earlier of August 6, 2004 or seven days after the vendor's certified substantial completion of the vendor's obligations.

[10] The vendor made valiant efforts to meet with this criteria.

[11] The closing date of August 6, 2004 for Deal 3 land passed by without either party formally agreeing to extend that date.

[12] On September 4, the purchasers advised the vendor that it was entitled to and required an abatement of the purchase price as provided for in the agreements. The purchasers had been told that, as a result of this conservation setback, they would be entitled to less developable square feet for construction on the lands.

[13] By early December 2004, it appears from the evidence that both parties anticipated that the closing of Deals 1 and 3 was reasonably imminent and on December 3, 2004 the vendor advised the City Planning and Building Department ("Planning and Building") that the rechannelization works deficiencies had been rectified. Planning and Building then advised that it would commence the preparation of a report to counsel and a drafting of the amending by-law to remove the "H" designation. As a consequence of all this, on that day the vendor's solicitor unilaterally fixed December 10, 2004 as the closing date for both Deal 1 and Deal 3 transactions. At the time the vendor was aware that not all of the required site servicing work was complete notwithstanding the vendor's advice to the planning department.

[14] It appears that the purchasers attempted to meet the December 10, 2004 closing date set by the vendor. Again the vendor's ability to set a closing date depended upon "the provision by TRCA and TWD approval of the completion of rechannelization works and the Planning and Building Department of the City of Mississauga has advised in writing of its receipt of such clearances".

[15] The vendor's solicitor faxed documents to the purchaser on December 8, 2004, including draft closing documents and the statement of adjustment for each of Deals 1 and 3.

[16] On receipt, the purchasers' solicitor attempted to reach the vendor's solicitor by telephone. She was unable to do so and left a voicemail message advising of deficiencies in the documents and the statement of adjustments. The vendor's solicitor does not recall receiving this message. He did not return the call.

[17] In considering the evidence of each of the solicitors, I must say that I found that I had some ability to feel secure in the dates and time details given by the purchasers' solicitor, Ms. Green. She spoke with certainty of events and was assisted by what appeared to be fairly extensive notes or dockets. On the other hand, Mr. Saltzman did not appear to have the benefit of extensive dockets and during his testimony his evidence reflected the deterioration of certainty that time

causes to us all.

[18] The following communications took place between the parties on December 10, 2004 as outlined in the written submissions of the plaintiff in respect of Deal 1:

i) 9:18 A.M. - Mr. Saltzman faxed executed versions of the closing documents to Ms. Green and a Redirection re Funds;

ii) 9:42 A.M. - Ms. Green faxed a letter outlining the basis for the purchasers' claim to abatements. Mr. Saltzman's evidence is that this fax did not come to his attention until late afternoon;

iii) 10:00 a.m. (approximately) - Ms. Green sends 'before and after' plans by taxi to Mr. Saltzman showing the loss of developable square feet;

iv) Mid-morning - Ms. Green commences telephoning Mr. Saltzman in an effort to discuss the errors in the Statement of Adjustments, the abatement requests and the need for separate mortgage discharge statements. She testified that she left six telephone messages. Mr. Saltzman testified that he did not recall receiving those messages;

v) 2:15 P.M. - Mr. Saltzman forwarded invoices for commissions paid on the transactions purporting to show the correct deposit figures (but ignoring the Deal #4 deposit). Ms. Green testified that this was responsive to a request in one of her voicemails concerning the Deal #3 deposit. Mr. Saltzman acknowledged on cross-examination that this was possible.

vi) 2:55 P.M. - Ms. Green forwards letter from Laurentian Bank's solicitor confirming that the purchasers were in funds. She had advised that lawyer that "logistically" the closing would not likely happen that day.

vii) 3:40 P.M. - Ms. Green sends a fax with hand-written comments on the Statements of Adjustments, a request for individual mortgage statements, executed copies of the Deal #1 purchaser's closing documents and a Direction re Title in respect to Deal #1.

viii) 4:23 P.M. - Ms. Green sends two memoranda to Mr. Saltzman quantifying the purchaser's abatement claim. Her evidence was that this fax was to be sent earlier in the day but due to secretarial inadvertence it was not sent on time.

ix) 5:32 p.m. - Mr. Saltzman faxes, advising the transactions are at an end.

[19] It is clear from the evidence produced at trial that the specific amounts of abatements to which the plaintiffs were entitled were requested by the plaintiffs shortly prior to December 10th closing day. This request was ignored by the defendant. It appears, in fact, there was no attempt by the defendant's counsel to contact the plaintiffs' counsel in response to telephone messages left to address the deficiencies the plaintiffs felt were apparent.

[20] From his evidence given at trial, the vendor's solicitor had instructions from his client to either close the deals or abort them. The performance of the vendor's obligations under the various contracts was costly and time consuming and the closing dates had been delayed time and time again. In the meantime, evidence at trial indicated that the value of the property had greatly increased. Although I have no direct evidence at trial on this point, it is clear that the vendor was fed up with the

delays and wanted the deal either closed or terminated. The instructions to the vendor's solicitor were that he was not to negotiate the request for abatements, contrary to the vendor's contractual obligation to do so.

[21] As part of the closing documentation, the vendor's solicitor delivered a statement of adjustments for each of Deals 1 and 3. The statement of adjustments in question, I find, were improperly calculated to include:

(a) The vendor added to the purchase price certain development charge credits. These were not properly included at the time of closing. They were to be credited at the time the vendor applied for building permits;

(b) The statement failed to credit the purchasers' deposit of some $300,000;

(c) The statement of adjustments failed to credit the purchasers for interest on the deposit pursuant to the agreement of purchase and sale;

(d) No holdback was proposed or allowed with respect to incomplete work. Although the vendor's evidence at trial indicated a willingness to do this, that willingness was not apparent from the vendor's solicitor's "take it or leave it" attitude on December 10, 2004;

(e) The vendor sought on closing as additional monies the release of holdback fund from the prior completed Deal 2, even though the cost of lateral connections covered by the holdback were still in dispute and other work was not completed; and

(f) The redirection of funds delivered for closing required the payment to the vendor of more money than the balance due on closing properly allowed.

[22] None of these anomalies are minor. All might very well have been resolved between the solicitors who act for the respective parties. However, such a resolution would take some communication. I find on the evidence presented to me that the vendor declined to communicate with the purchaser's solicitor. The clear message was sent to the purchasers that they must close on the vendor's terms or the transaction would be aborted.

[23] I agree with the position taken by the purchasers at trial that at the so-called date of closing, December 10, 2004, the vendor was not able to provide the title to the property that he had agreed to provide to the purchaser in the agreement. While Building and Planning had advised by letter that they would commence preparing a report to lift the "H" designation, the evidence is clear, however, that TRCA had not provided its unqualified approval to do so. Indeed, the evidence shows that Planning and Building confirmed some two or three weeks later that the TRCA certification was still outstanding. It was not supplied until January 21, 2005.

[24] The vendor's solicitor, obviously acting pursuant to his client's instructions, advised the purchaser at 5:32 p.m. on December 10 that the transactions were at an end. Based on the evidence that I heard and the conclusions delineated above, he had no legal right to do so. That declaration I find to be an anticipatory breach of the agreements.

[25] I find that on the evidence that on December 10, 2004 the purchasers were in a position to tender on the vendor with respect to Deal 1. No complaint is made with respect to their documentation. This was sent as required to the vendor for the purpose of electronic registration. No funds were tendered, however, by the purchaser. I accept the evidence that the purchasers had the funds to close Deal 1 available notwithstanding the erroneous mortgage corporation letter indicating that the funds would be available at a later date and not on the day that the vendor attempted to set for closing. I conclude that the purchaser was ready, willing and able to perform its obligations according to the terms of the agreement with respect to Deal 1. However, I would distinguish it from Deal 3.

[26] The position taken by the vendor on December 10 with respect to the take it or leave it statement of adjustments also demands the conclusion that the vendor was not willing to live up to its obligations under the agreement of purchase and sale.

[27] Evidence was led at trial as to the unique character of the properties. The relative scarcity of M-zoned lands allowing outside storage and the particular location of these properties make it abundantly clear that they are unique and that a substitute is not readily available. Consequently, damages would not be appropriate. The plaintiff on Deal 1 is entitled to succeed with an order for specific performance.

THE DEAL 3 LANDS

[28] As noted above, the Deal 3 property requires special attention as distinguished from Deal 1 lands. With respect to the Deal 3 property the purchaser (assignee) was clearly not in a position to close the transaction on December 10, 2004. It was not in funds. It did not have its financing in place. At the same time, as noted above, the set date for closing for this transaction came and went without either party formally agreeing to extend it. Time appears to have ceased to be of the essence with respect to this property.

[29] At the same time, the vendor's solicitor required that the Deal 3 transaction be closed as well on December 10, 2004. The question arises: Was this an appropriate re-establishment of the time of essence requirement? I find on the evidence that it could have been so had the vendor on December 10 been in a position to complete the transaction as agreed. Unfortunately, as indicated by my conclusions above, the vendor was not in a position on December 10 to convey the property pursuant to its agreement to do so. At the very least, the "H" designation was still in place. The vendor had not fully serviced the Deal 3 properties nor had it

completed the works it was required to complete under its agreements with the City.

[30] In addition, no credit was allowed for the abatements that the purchaser was entitled to. I conclude that as of December 10 the vendor's failure to communicate with the solicitor for the purchaser and his failure to even consider the request for abatement albeit made late in the day leads to the inescapable conclusion that the vendor failed to bargain in good faith. Sympathetic as I may be to the situation the vendor found itself in, that does not excuse the requirement for it to do so. I conclude then in law that either party here, upon reasonable notice to the other, reschedule closing date for Deal 3.

[31] As a result of the incidents on December 10th, or non-incidents as the case may be, the vendor has clearly renounced the contract and has refused to close, calling the transaction at an end. I find that, as a result, the purchaser in Deal 3, like the purchaser in Deal 1, is relieved from the obligation to tender.

[32] It follows, as neither party was in a position to close Deal 3, that either party may re-institute the closing date on reasonable notice. Given the vendor's declaration that the transactions were at an end and my conclusions of anticipatory breach, the purchaser is entitled to specific performance of the Deal 3 agreement as well.

[33] In *Domicile Developments Inc. v. MacTavish* 1999 CanLII 3738 (ON C.A.), (1999), 45 O.R. (3d) 302 at 307 (C.A.), Laskin J.A., referring to the seminal decision in *King v. Urban & Country Transport Ltd.* (1973), 1 O.R. (2d) 449 at 454-56 (C.A.) stated the following:

> ...the purchaser was not in a position to close on the closing date; but the vendor was also in default and not entitled to rely on the time of the essence provision in the contract. Arnup J.A. resolved the stalemate by applying two propositions:
>
> 1. When time is of the essence and neither party is ready to close on the agreed date the agreement remains in effect.
> 2. Either party may reinstate time of the essence by setting a new date for closing and providing reasonable notice to the other party.
>
> An important corollary of Arnup J.A.'s second proposition is that a party who is not ready to close on the agreed date and who subsequently terminates the transaction without having set a new closing date and without having reinstated time of the essence will itself breach or repudiate the agreement.

THE CONSERVATION ABATEMENT

[34] Evidence was received at trial that the effect of the imposition by the municipality or conservation authorities of a conservation setback could be ameliorated through negotiation. Here the conservation setback being a no-build zone reduced the square footage of construction. Mr. Wyndham for the defence gave cogent evidence on this point. It was apparent from his evidence and the evidence from the purchasers generally that, in this case, the purchasers in their

planning application were denied any relief from the provisions of such a setback. It appears now that the vendor is complaining that the purchasers did not negotiate properly or hard enough with the municipality or the conservation authority. For our purposes, such evidence does not meet the standard that would entitle this court to give the defendant some relief on this point. The parties contemplated the possibility for such an abatement of the purchase price and provided for it in their written amended agreement.

[35] As the only evidence I have is the evidence produced by the purchasers with respect to the calculation of the conservation abatement and that evidence has not been challenged at trial, the plaintiffs will be entitled to the abatement as calculated on closing of both Deal 1 and 3.

ABATEMENT RE CONSTRUCTION COST INCREASES

[36] In one of the many amendments to the Agreement of Purchase and Sale, the parties agreed to delay closing from September 30, 2003 to April 30, 2004. The delay was again occasioned solely by the vendors' inability to complete its obligations. The purchasers, concerned that increased construction costs would have to be absorbed, required that the vender agree to compensate the purchasers for increased construction costs that might occur from September 30, 2003 to April 30, 2004.

[37] The Deal 1 purchaser made an attempt to calculate this abatement the day before December 10, 2004. Both Mr. Boparai and Ms. Green gave evidence at trial to justify the calculations that they had made. There was no evidence led from the vendor to contradict or challenge this method of calculation, although some criticism was argued by the defendant. The purchaser based the calculation on government data of the increased cost of construction between the third quarter of 2003 and the third quarter of 2004.

[38] The wording of the amendment must be considered carefully. It reads as follows:

> If the above sale transactions fail to close on September 30, 2003, the closing dates for all four transactions shall be extended to April 30, 2004 with the rights of the Purchasers to accelerate the closings on 30 days prior written notice to the Vendor and the Purchasers will receive an adjustment to the purchase price to re-imburse it for the increase in construction costs between this year and next. At that time of closing the Purchasers shall pay the entire balance of the purchase price subject to usual adjustments owing under all four deals by cash or certified cheques on closing and the V-T-B mortgage will not be then applicable to Deal #2.

[39] The Defendant argues that this amendment permitted at best, the plaintiff to claim a construction cost abatement as of April 30, 2004, not as of September 30, 2003, (ie) the third quarter of 2004 and that the parties did not contemplate an abatement beyond the anticipated closing date of April 30, 2004.

[40] In spite of defendants' compelling remarks I believe that the logical

interpretation of this amendment encompasses the obligation to pay increased constructions costs to the date of closing. The April 30, 2004 closing may again be delayed by reason of the vendors' lack of performance. I find that the purchaser was correct in calculating this abatement as of the third quarter of 2004.

[41] As a consequence and absent any other viable evidence, the purchaser should be entitled to abatement on the purchase price with respect to Deal 1 as calculated in the amount of $498,563.

CONCLUSIONS

[42] As a result of the incidents on December 10th, or non-incidents as the case may be, the vendor has clearly renounced the contract, calling the transaction at an end. As a result, I find that the purchasers in both Deal 1 and 3, are relieved from the obligation to tender. The purchaser of the Deal 3 lands is also entitled to an order for specific performance.

[43] As outlined above, the purchaser in Deal 1 is entitled to both a construction costs abatement and an abatement for the conservation setback. Unlike Deal 1, the purchaser of the Deal 3 property is not pursuing increased construction costs abatement at trial as indicated in counsel's written argument. The Deal 3 purchaser will be entitled only to an abatement for the reduction in the available floor area of buildable property resulting from the imposition of the ten metre conversation area setback.

[44] This matter took an unusual length of time to reach trial. Part of the time, I know, was used by counsel in a concerted effort to settle the matter on behalf of their clients. The delay, of course, has been compounded by the unusual length of time it has taken me to render this decision and for which I apologize. Health circumstances and an extremely busy court docket have conspired against us in this matter.

[45] I am not aware of any written offers that would change the usual obligation cast on a losing party to pay the successful party's costs. The parties may address me in writing with respect to costs, however, with the plaintiffs making their submissions on same within 30 days of the date of this judgment and the responding party or vendor making cost submissions within 15 days of receipt of the plaintiffs' submissions.

Dunn J.

Released: January 22, 2009

COURT FILE NO.: CV-06-0233-00
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