Gore Plaza Inc. v. Singh, 2007 CanLII 56530 (ON S.C.)

PDF Format
Date: 2007-12-21
Docket: 06-CV-003967-00
URL: http://www.canlii.org/en/on/onsc/doc/2007/2007canlii56530/2007canlii56530.html

Reflex Record (noteup and cited decisions)

COURT FILE NO.: 06-CV-003967-00
DATE: 20071221

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: THE GORE PLAZA INC. (Applicant) v. FAUJA SINGH BAINS IN TRUST FOR HARMINDER SINGH (Respondent)

BEFORE: Thomas J.

COUNSEL: Alistair Riswick, for the Applicant

Jerome H. Stanleigh, for the Respondent

HEARD: November 29, 2007

E N D O R S E M E N T

[1] Gore Plaza Inc., the Applicant, developed a commercial condominium complex at the intersection of the Gore Road and Ebenezer Road in the City of Brampton. The complex consisted of 84 units on two levels.

[2] On June 14, 2005, the Applicant and Harminder Singh, the Respondent, entered into an agreement of purchase and sale in which Mr. Singh agreed to purchase two of the units, numbers 16 and 17. An add-on to the Agreement was that the owner of unit 16 would acquire exclusive use of the

common element 400 square foot patio adjacent to unit 16. The total purchase price was $1,074,320.00.

[3] The Agreement of Purchase and Sale provided that units 16 and 17 would be used for a “travel agency plus any non-restricted uses”. The Respondent paid three deposits between June 14 and September 1, 2005 totalling $322,296.00. The Respondent took possession of units 16 and 17 on or about November 16, 2005 under an Interim Occupancy Agreement as provided in the Agreement of Purchase and Sale. The total monthly rent for the two units was $3,984.88.

[4] Registration of the Declaration and the Plan for the condominium complex required the approval of the City of Brampton. Shortly before the registration of the condominium complex, the City of Brampton took the position that the right of the owner of unit 16 to have exclusive use of the common element patio area adjacent to unit 16 could not be shown on the Description in the Plan. Although the Applicant did not agree with the amendment of the Description to delete reference to the right of the owner of unit 16 to have exclusive use of the common element patio area adjacent to unit 16 from the Description, it agreed to make the amendment in order that the Plan and the Declaration, which confirmed the exclusive use in Schedule F to the Declaration and remained unchanged, could be registered.

[5] There was a meeting held on July 20, 2006, to discuss the pending sale of the two condominium units to the Respondent. Pritam Singh, Vice President of the Applicant and two other representatives, were present on behalf of the Applicant. Harminder Singh and another person attended on behalf of the Respondent. During the meeting, Harminder Singh was informed about the problem the Applicant was experiencing with the City of Brampton. The Applicant told the Respondent they expected to resolve the problem soon, but if it had not been resolved by the closing date for the two units, the Applicant would abate the purchase price by $30,000.00. ($75.00 per square foot).

[6] After the Description in the Plan was amended, the Declaration and the Plan were registered. A unit transfer date was scheduled for August 1, 2006. On that date the Respondent was to take title to the two units and to pay the remainder of the money payable under the Agreement of Purchase and Sale to the Applicant.

[7] On July 24, 2006, the Applicant’s real estate lawyer wrote to the Respondent’s solicitor enclosing a Statement of Adjustments for the August 1 closing date and confirming the $30,000.00 abatement in the purchase price due to the deletion in the Description of the right of the owner of unit 16 to exclusive use of the patio adjacent to the unit. The Respondent’s lawyer was informed that the change was necessary in order to comply with applicable municipal requirements as contemplated by paragraph 27 of the Agreement of Purchase and Sale.

[8] The Respondent’s solicitor wrote to the Applicant’s real estate lawyer on July 25, 2006, and stated as follows:

> I have reviewed the matter of the exclusive patio space not being available due to the City of Brampton requirement with my client.
>
> The 400 square foot patio space was extremely important to my client as he had a tenant that was going to operate a restaurant but upon telling them that the patio is not available they have advised that they will not be proceeding with the plans to operate a restaurant.
>
> The patio is very important for any licensed establishment and the failure to provide a patio severely limits the rental income potential. My client purchased this property for investment purposes.
>
> As such the failure is a major breach of the contract and my client will not be proceeding with the purchase.

> Please forward the deposit monies paid as well as the occupancy fees paid by my client at your earliest convenience.

[9] The Applicant's real estate lawyer replied to the Respondent's solicitor in a letter dated July 28, 2006. He acknowledged receipt of the solicitor's letter dated July 25 and denied that the failure to provide an exclusive use of the common element patio constituted a major breach of the Agreement of Purchase and Sale. He insisted that the Respondent was obliged to complete the transaction on August 1, 2006. The letter confirmed the right of the Respondent to use the patio space because the contractual right which the Respondent received to exclusive use of the common element patio space adjacent to unit 16 was preserved in the Declaration which was not changed.

[10] On July 31, 2006, the Respondent's lawyer wrote to the Applicant's real estate lawyer. He acknowledged the lawyer's response in a letter dated July 28, 2006, and added as follows:

> Unfortunately, this all being done at the last minute as my client was not informed by Mr. Chana (the contractor) about this situation until July 20, 2006.
>
> My client wishes to review the matter with litigation counsel and has an urgent matter in India to attend to, so I suggest the closing be postponed for 30 days. In the meantime, my client will be responsible for an additional month of interim occupancy payment.

[11] On August 2, 2006, the Applicant's real estate lawyer wrote to the Respondent's solicitor confirming that the transaction did not close on August 1, 2006, as scheduled. He advised that the failure to complete the transaction constituted a default by the Respondent and that the Respondent was required to remedy the default and complete the transaction by August 14, 2006, otherwise the Applicant will terminate the Agreement and retain the deposit.

[12] The Respondent's solicitor did not respond to the letter dated August 2. Accordingly the Applicant's real estate lawyer wrote to the Respondent's solicitor on August 15 advising that the Applicant "hereby terminates the above noted transaction due to your client's failure to remedy the default as set out in the default letter". He added that the Applicant would be retaining the deposit money.

[13] The Applicant's real estate lawyer received a letter dated September 18, 2006, from legal counsel of the City of Brampton following their meeting on September 14. Legal counsel for the City of Brampton agreed that the discrepancy between Schedule F of the Declaration which describes an exclusive use common element (the patio) for the benefit of the owners of unit 16 and the Plan (the Description) was an error curable by an amendment to the Description which would not require approval by the City of Brampton.

[14] On September 22, 2006, the Applicant's litigation counsel faxed a letter to the Respondent's solicitor advising he had instructions to institute legal proceedings against the Respondent for breach of the Agreement of Purchase and Sale. The counsel added as follows:

> Before doing so, we are instructed to offer your client the opportunity to reconstitute the Agreement of Purchase and Sale and complete the purchase of the two units in accordance with the terms thereof. We can advise you that the issue with respect to the way in which the patio adjacent to your client's unit is described in the condominium documents is being resolved. The city has apparently changed its position and, subject to final confirmation from the Director of Titles, the condominium Description will be amended shortly in order to show the patio. Final confirmation from the Director Titles is expected within the next two weeks and a sale to your client would have to be closed within a reasonable period of time thereafter.

[15] On October 2, 2006, the Respondent's solicitor wrote to the Applicant's litigation counsel advising his client was prepared to complete the transaction. The letter stated:

> Please be advised that I have had an opportunity to discuss the matter with my client and am advised that once there is evidence that the 400 square foot outside patio has been approved by the city and my client will own this area as part of the premises being purchased from yours, they agree to complete the transaction.

[16] On October 17, 2006, the Applicant's real estate lawyer wrote to the Respondent's solicitor as follows:

> Please be advised the Condominium Description for Peel Standard Condominium Plan No. 1773 has been amended by Order of the Director of Titles registered as Instrument No. PR1153244 on October 16, 2006 amending the Description to include the patio as an exclusive use common element appurtenant to your client's unit.
>
> We will forward you a copy of the amended Plan sheet showing the exclusive area once available from the Land Registry Office.
>
> We have been provided with a copy of your correspondence to Messrs Capos Sgro LLP dated October 2, 2006 confirming your client's agreement to complete the transaction. In furtherance of same, we are setting a unit transfer date of October 31, 2006 with adjustments to be as of that date. A revised Statement of Adjustments will be forwarded to you in the very near future.

[17] Again on October 17, 2006, the Applicant's real estate lawyer wrote to the Respondent's solicitor enclosing a copy of the Order and the amendment to the Description indicating that the owner of unit 16 has the benefit of an exclusive use of common element patio designated as P2, as noted thereon.

Further, there was an adjustment to the total purchase price. The total was revised. It was reduced to $1,071,815.45 because the total square footage of the two units was actually 4,619 square feet not 4,630 square feet as previously stated.

[18] The Applicant's real estate lawyer wrote to the Respondent's solicitor confirming the transaction was not closed on October 31, 2006, and advising that his client was in default and had to November 10, 2006, to remedy the default and complete the transaction.

He went on to advise that if the transaction is not completed on or before November 10, his client would terminate the Agreement of Purchase and Sale and retain the deposit money.

[19] On November 13, 2006, the Applicant's real estate lawyer wrote to the Respondent's solicitor advising that the Applicant terminated the Agreement due to the Respondent's failure to complete the transaction and that the Applicant intended to retain the deposit monies as liquidated damages.

[20] On November 21, 2006, the Applicant commenced an Application seeking an Order declaring that the Respondent was in default under the Agreement of Purchase and Sale dated June 14, 2005, and declaring that the deposit paid by the Respondent was forfeit and could be retained by the Applicant.

[21] The Application was initially returnable December 15, 2006. Subsequently, the Respondent's solicitor requested an adjournment and later the Respondent's litigation counsel asked for another adjournment. The matter was scheduled for a long motion before Justice Seppi on June 13, 2007.

[22] On June 13, 2007 the Respondent's litigation counsel appeared before Justice Seppi seeking an Order removing his firm as solicitors of record for the Respondent. The Respondent was present in court when Justice Seppi granted the Order. Thus, he was self-represented and sought another adjournment to retain new counsel. He produced a letter from his present counsel, Mr. Stanleigh, dated

June 13, 2007, addressed to the presiding judge. In that letter, Mr. Stanleigh advised that on or about June 1, 2007, he was consulted by Fauja Singh to provide a second opinion on the merits of the Application. He stated that he had not been able to review all of the material because Mr. Singh had not obtained all of it from his former counsel until very recently. Mr. Stanleigh requested an adjournment for a few weeks in order to properly prepare to represent the Respondent in his response to the Application. Mr. Stanleigh also advised that he had contacted counsel for the Applicant to notify him he was reviewing the file to give a second opinion.

[23] After hearing submissions, Justice Seppi made the following Endorsement:

> This matter appears on the long motion day after numerous delays occasioned by the Respondent or his previous counsel. He is now self-represented and seeks yet another delay in order to retain new counsel. The letter he has shown me from proposed counsel does not confirm a retainer although Mr. Singh claims he plans to retain Mr. Stanleigh today. The next long motions date availability is October 3, 2007, which presents far too long a delay in the circumstances of this case. The Applicant's material, which frames the issue clearly, is clear evidence of a default by the Respondent under the Agreement of Purchase and Sale dated June 14, 2005. Mr. Singh suggests the patio area included in the contract was not included at the proposed closing which is the basis of his defence. The Applicant's material clearly explains what happened in regard to the patio inclusion and the resultant extended closing to confirm the patio inclusion.
>
> To prevent delays and a continuation of the Respondent's default in filing material, there shall be an Order granting the relief claimed on account of the default in the Agreement. In the event that the Respondent does in fact have a valid defence there shall be a stay of this Order to permit the filing of a motion upon proper materials to set aside this Order before the stay is lifted.
>
> Order to go as per paragraphs 1 and 2 of the draft Judgment attached as appendix. Further Order that this Order shall be suspended and stayed for a period of twenty-one (21) days to permit the Respondent to file material and bring a motion to set aside the Order and to permit argument to include the Respondent's evidence, if filed. If no motion is brought and materials filed by the Respondent by July 5, 2007 at 4:30 p.m., this Order as per paragraphs 1 and 2 of the draft shall forthwith take effect. Costs to the Applicant are fixed at $9,066.76 which costs order is also stayed and subject to being vacated upon proper materials being filed by the Respondent within 21 days.

[24] Mr. Stanleigh was retained by the Respondent on or about June 13, 2007. Mr. Stanleigh served and filed material within the 21 day period. However, it appears he somehow misunderstood Justice Seppi's Endorsement. He failed to bring a motion within the 21 days to set aside the Order. It appears he was under the false impression responding material had to be submitted by July 5, 2007, and that the Application was to return on October 2, 2007. He wrote to Mr. Riswick on August 29, 2007, requesting dates to cross-examine affiants in the Application Record. On September 4, 2007, Mr. Riswick advised that there was no motion pending and that Justice Seppi's Order was final because the 21 day stay period expired in the absence of a motion to set aside the Order.

[25] In the circumstances, Mr. Stanleigh brought a motion on behalf of the Respondent to set aside Justice Seppi's Order. It was adjourned several times on consent to accommodate the schedules of counsel. The motion was eventually heard on November 29, 2007.

Justice Seppi's Order

[26] In the Applicant's Factum, the Applicant took the position that Justice Seppi's Order was final because the Respondent had not brought a motion to set aside the Order within 21 days. However, during oral argument, Mr. Riswick, counsel for the Applicant, did not maintain that position. He confirmed that he received the Respondent's material prior to July 5, 2007, but did not receive the Notice of Motion to set aside Justice Seppi's Order until much later. He was aware that Mr. Stanleigh's position was that he failed to serve and file the Notice of Motion due to inadvertence. Apparently, Mr. Stanleigh misunderstood the Endorsement and believed that he was required to file the Respondent's material on or before July 5, 2007 and that the original Application was returnable October 2, 2007.

[27] In the circumstances, Mr. Riswick fairly stated that he was not prejudiced by the delay in receiving the Notice of Motion to set aside the Order of Justice Seppi and he focused on the merits of the Respondent's defence to the Application.

[28] Accordingly, I continue the stay of Justice Seppi's Order made on June 13, 2007 and set it aside (inclusive of the Costs Order).

Applicant's Position

[29] The position of the Applicant is that there was not a material change entitling the Respondent to terminate the Agreement of Purchase and Sale when the City of Brampton insisted upon an amendment to the Description in the Plan deleting the reference to the right of the owner of unit 16 to exclusive use of the common element patio adjacent to unit 16. The Applicant points out that Schedule F of the Declaration contains the exclusive use provision and the Declaration was not changed. The fact that the exclusive use patio area was not shown on the Description of the condominium was a technicality only. The right of the owner of unit 16 to the exclusive use of the patio area was clearly set out in Schedule F in the Condominium Declaration and was enforceable by the owner of that unit against the condominium corporation.

[30] In any event, paragraph 43 allows the Applicant to make changes requested by government authorities "unless any change, deletion, alteration or modification to the said plans and the specifications is material in nature and significantly affects the fundamental character, use or value of the unit".

[31] The Applicant submits that under the *Condominium Act* material change is defined to mean a change that a reasonable purchaser, on an objective basis, would have regarded as sufficiently important to the decision to purchase a unit that it is likely that the purchaser would not have entered into the Agreement of Purchase and Sale: *Condominium Act*, S.O. 1998, Chapter 19, Section 74(2). The Applicant submits on an objective basis the fact that the exclusive patio did not appear in the Plan for the condominium would not have affected the decision of the Respondent to purchase the unit.

[32] In his Affidavit sworn January 29, 2007, Pritam Singh stated that Harminder Singh told him at their July 20, 2006 meeting he was experiencing problems renting the units and he asked for their help. He advised that a realtor had been engaged to try to resell the units and he asked whether the Applicant's realtor could be used to assist in reselling the units. In particular, he asked for the right to expand the potential uses for the units to include a bank. Mr. Singh said that they would consider doing it if the purchaser obtained an offer to lease from the bank within 30 days.

Respondent's Position

[33] In his Affidavit sworn June 15, 2007, Harminder Singh said that the exclusive use of the patio was the crucial element of his decision to enter into the Agreement. He alleged that he had a tenant who was interested in operating a restaurant/bar in the units, but when the tenant learned the patio was not available he advised he would not operate the restaurant/bar at the location. Harminder Singh said that he purchased the property as an investment and it was his intention to lease the property. The exclusive use patio was a substantial benefit to many different potential tenants, but primarily to a restaurant. He said he was advised by counsel that a restaurant was a permitted use and therefore conformed to the provisions of paragraph 9(e) of the Agreement. He added that he understood that once a restaurant was established he would have exclusivity from competition from any other restaurant within the condominium. He also contemplated having a small travel agency business there. In the

end, he deemed it appropriate to only build for a restaurant in the condo units. He concludes "that there is no possibility that I would have entered into this transaction had it not been for the exclusive use of the patio clause". He added that he terminated the Agreement for one reason only which was that the vendor could not keep its part of the bargain to provide him with exclusive use of the patio. He instructed his real estate lawyer to rescind and terminate the Agreement which was done on July 25, 2006. The Respondent further claims that he did not breach any agreement to revive the Agreement of Purchase and Sale. He maintains he did not instruct his counsel, Mr. Peter Verbeek that he would be willing to enter into new negotiations if he was able to obtain ownership of the patio area. He deposed as follows:

> I do not know why my counsel wrote his letter of October 2, 2006. I assume he thought he was acting in my best interests but this was not the case.

[34] Accordingly, the position of the Respondents is that there was a material change when the City of Brampton insisted that the right of the owner of unit 16 to have exclusive use of the common element patio adjacent to 16 must be deleted from the Description in the Plan. The Respondent submits there was a fundamental breach of the Agreement of Purchase and Sale and he is entitled to terminate the Agreement and receive his deposit monies and a refund of rent paid by the Respondent monthly pursuant to the Interim Occupancy Agreement.

Conclusion

[35] The Respondent agreed to purchase units 16 and 17 in this commercial condominium complex for more than $1,000,000.00. The combined square footage was 4,619 and the purchase price was based on $225.55 per square foot. The outside patio was approximately 400 square feet and the purchase price was based on $75.00 per square foot for a total of approximately $30,000.00. It was an add-on after the document was drawn.

[36] Pritam Singh, in his Affidavit sworn January 29, 2007 said that "at no time did Harminder Singh advise us of an existing lease for a proposed restaurant use". The Respondent does not dispute that he did not inform the Applicant's representatives during the meeting on July 20, 2006, that he had obtained an offer to lease the premises for use as a restaurant/bar. The Offer to Lease is dated July 17, 2006, three days before the meeting between Harminder Singh and the Applicant's representatives.

[37] It should be noted that the Declaration prohibited a number of restaurant uses in the subject units if there was already an existing similar restaurant in another unit in the complex. The permission of the owner of the existing restaurant would be necessary to permit the subsequent use. If the units were used for a non-excluded type of restaurant the use would not be exclusive.

[38] From the outset, the Applicant felt the City of Brampton erred in demanding that the right to exclusive use of the patio adjacent to unit 16 must be deleted from the Description in the Plan. The Applicant's solicitor's corresponded with the City of Brampton and eventually had a meeting with legal counsel to the City of Brampton on September 14. Legal counsel agreed with the Applicant's opinion and the Description was eventually amended to correspond with Schedule F of the Declaration.

[39] The original closing date for the two units was August 1, 2006. The Respondent declined to complete the transaction. Within some six weeks the Applicant had been notified by the City of Brampton that it would consent to an Amendment of the Description to include the right of the owner of unit 16 to exclusive use of the common element patio adjacent to unit 16. The result was that when the amendment was made to the Description in the Plan the discrepancy between Schedule F of the registered Declaration and the Description in the Plan would be cured.

[40] It was on September 22, 2006, that the Applicant's litigation counsel faxed a letter to the Respondent's solicitor advising he had instructions to institute legal proceedings against the Respondent for breach of the Agreement of Purchase and Sale. He added as follows:

> Before doing so, we are instructed to offer your client the opportunity to reconstitute the Agreement of Purchase and Sale and complete the purchase of the two units in accordance with the terms thereof. We can advise you that the issue with respect to the way in which the patio adjacent to your client's unit is described in the condominiums documents is being resolved. The city has apparently changed its position and subject to final confirmation from the Director of Titles, the condominium Description will be amended shortly in order to show the patio. Final confirmation from the Director of Titles is expected within the next two weeks and a sale to your client would have to be closed within a reasonable period of time thereafter.

[41] As mentioned earlier, on October 2, 2006, the Respondent's solicitor wrote to the Applicant's litigation counsel advising that his client was prepared to complete the transaction. The Respondent's solicitor informed as follows:

> Please be advised that I have had an opportunity to discuss the matter with my client and am advised that once there is evidence that the 400 square foot outside patio has been approved by the city and my client will own this area as part of the premises being purchased from yours they agree to complete the transaction.

[42] Harminder Singh now claims he did not instruct his lawyer to inform the Applicant he would close the transaction once it was clear he owned the right to exclusive use of the common element patio adjacent to unit 16. He maintains that his solicitor had no authority to give such an undertaking and suggests that perhaps his solicitor believed he was acting in the Respondent's best interests.

[43] On October 17, 2006, the Applicant's real estate lawyer wrote to the Respondent's solicitor enclosing a copy of the Order and the Amendment to the Description indicating that the owner of unit 16 has the benefit of an exclusive use of a common element patio adjacent to unit 16.

[44] The new closing date was October 31, 2006. The Respondent's solicitor did not correspond with the Applicant's counsel. The transaction was not closed on October 31. The Applicant extended the closing date to November 10, 2006, but the Respondent's solicitor did not respond to the extension. On November 13, the Applicant's real estate lawyer advised the Respondent's solicitor that the Applicant had terminated the Agreement due to the Respondent's failure to complete the transaction and that the Applicant would be retaining the deposit as liquidated damages.

[45] I agree with the Applicant that there is no arguable case shown by the Respondent on the merits. Again, Harminder Singh, in his Affidavit sworn June 15, 2007, does not challenge what Pritam Singh stated in his Affidavit sworn January 29, 2007, about the Respondent's shaky position with respect to leasing units 16 and 17 when the matter was discussed at the July 20, 2006 meeting. There was no mention whatsoever by the Respondent that he obtained an offer to lease on July 17th from a person interested in operating a restaurant/bar in the units.

[46] The Respondent was obviously having difficulty in renting the units after taking Interim Occupancy in November 2005. They were still vacant as of the date of the meeting on July 20, 2006. It is my opinion that after the Applicant fairly disclosed the problem with the City of Brampton relating to the wording of the Description in the Plan, the Respondent's seized on that situation to create an excuse not to close under paragraph 43 of the Agreement of Purchase and Sale.

[47] The change in the Description directed by the City of Brampton was not, in my view, a material change permitting the Respondent to terminate the contract. I agree with the Applicant that having regard to the difficulties being experienced by the Respondent in leasing the units, the amendment to the Description in the Plan became a desperate excuse for not closing the transaction. Faced with the prospect of litigation, the Respondent informed his solicitor he would complete the transaction once

there was evidence his right to exclusive use of the common element patio was included in the Description by means of an amendment. The City of Brampton's error was cured promptly and the Respondent suffered no prejudice. However, ultimately, the Respondent did not close the deal.

[48] It is my conclusion that, having reviewed all of the circumstances, the Respondent did not have a valid reason to terminate the Agreement of Purchase and Sale. The Respondent breached the Agreement and the Applicant is entitled to retain the deposit monies and any interest earned thereon. Accordingly, an Order shall issue staying the Order of Justice Seppi dated June 13, 2007 and setting it aside and declaring that the Respondent is in default with respect to his obligations contained in the Agreement of Purchase and Sale dated June 14, 2005, and directing that the deposit money paid by the Respondent may be retained by the Applicant and should be paid over, with interest, to the Applicant by the solicitor holding the money in a designated trust account. Also, there shall be an Order for payment of costs to the Applicant by the Respondent as a result of the Respondent's breach of the Agreement.

[49] If counsel are not able to agree upon the matter of costs, they are entitled to make submissions in writing within 21 days of the release of this Endorsement.

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THOMAS J.

DATE: December 21, 2007

COURT FILE NO.: 06-CV-003967-00
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ENDORSEMENT

Thomas J.

DATE: December 21, 2007