

SUPERIOR COURT OF JUSTICE - ONTARIO

08 196 130

RE: Ying Kwan also known as Crystal Kwan and Yi Huan Chen (Plaintiffs)

- and -

33 Charles Street East Inc., Jardine Hills Realty Inc. and Sammy S. T. Hung
(Defendants)

BEFORE: Justice Beth Allen

COUNSEL: *Richard P. Quance*, for the Plaintiffs
Irving Marks and Carla Lubell, for the Defendant 33 Charles Street East Inc.
Amelia Leckey, for the Defendants Jardine Hills Realty Inc. and Sammy S.T.
Hung

ENDORSEMENT

RELIEF SOUGHT

[1] The Defendant 33 Charles Street East Inc. ("33 Charles") brings a motion for summary judgment under Rule 20 seeking to dismiss the Action and the Cross-Claim against 33 Charles on the basis there is no genuine issue for trial.

[2] 33 Charles settled the motion with the Defendants Jardine Hills Realty ("Jardine") and Sammy S.T. Hung ("Hung") on the basis that the Cross-Claim will be dismissed without costs if the Plaintiffs' action is dismissed.

[3] At the motion during oral argument the Plaintiffs consented to the dismissal of their claim for specific performance.

THE LAW ON SUMMARY JUDGMENT

[4] The relevant parts of Rule 20 are:

20.01 (1) A plaintiff may, after the defendant has delivered a statement of defence or served a notice of motion, move with supporting affidavit material or other evidence for summary judgment on all or part of the claim in the statement of claim.

...

20.04 (1) In response to affidavit material or other evidence supporting a motion for summary judgment, a responding party may not rest on the mere allegations or denials of the party's pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue for trial.

(2) Where the court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the court shall grant summary judgment accordingly.

[5] The test to succeed in obtaining summary judgment is well settled. The motions judge will grant summary judgment if the moving party succeeds in establishing there is no genuine issue for trial. If the moving party demonstrates a genuine issue, it is for the trial court to dispose of the issue.

[6] Where a defendant moves for summary judgment, the plaintiff must through affidavit evidence, adduce evidence of material facts that require a trial to assess credibility, weigh evidence and draw factual inferences. The moving party has the legal burden to prove there is no genuine issue for trial. The evidentiary burden is then on the party seeking to resist judgment to establish evidence of a triable issue. [*Aguonie v. Galion Solid Waste Management Material Inc.* (1998), 38 O.R. (3d) 161 (C.A.) at para. 11; *Soper v. Southcott*, [1998] O.J. No. 2700 (C.A.) at para. 14]

[7] The party resisting judgment must go beyond mere reliance on the allegations or denials set out in their pleadings, and must present the court with coherent evidence and a set of facts showing there is a real issue for trial. If the evidence on the motion satisfies the court there is no issue of fact that must be resolved at trial, the requirements of Rule 20 have been met. [*Irving Ungernam Ltd. v. Galanis* (1991), 4 O.R. (3d) 545 (C.A.) p.p. 574-575; *Aguonie, supra.* at 11; and *Kreutner v. Waterloo Oxford Co-operative Inc.*, [2000] O.J. No. 3031 (C.A.), at para. 10]. The motions court is entitled to assume the evidence contained in the record is all the evidence the parties would rely on if the matter proceeded to trial. [*1061590 Ontario Ltd. v. Ontario Jockey Club* (1995), 21 O.R. (3d) 547 at 557 (C.A.), and *Dawson v. Rexcraft Storage and Warehouse Inc.* [1998] O.J. 3240 (C.A.) at para. 18].

BACKGROUND

[8] The Plaintiffs, Ying Kwan ("Kwan") and Yi Huan Chen ("Chen") brought a claim against 33 Charles and the other Defendants, Jardine Hills Realty ("Jardine") and Sammy S.T. Hung ("Hung") for relief including damages, the return of their deposit and a declaration that the agreements of purchase and sale ("the Agreements") are valid and enforceable. The Plaintiffs' claim arises out of their purchase of ten condominium units in a project developed by 33 Charles called Casa Condominium ("the Project"). Hung introduced the Plaintiffs to the Project and through his brokerage firm, Jardine, acted as an agent for Kwan and Chen in the purchase and sale transactions. 33 Charles retained the brokerage firm Milborne Real Estate Inc. ("Milborne") as its listing agent for the Project.

[9] Hung executed the Agreements on the Plaintiffs' behalf under a Continuing Power of Attorney ("the Power of Attorney") for the ten units, purchased between September 3 and 29, 2005. Under the Agreements, deposits in the approximate amount of 25% of the purchase price were payable to 33 Charles for the Plaintiffs' respective units in accordance with a schedule stipulated under the Agreements ("the Schedule"). Under the Agreements, the Plaintiffs were required:

to deliver 100% of the deposits within 365 days following execution being no later than September 3 to September 29, 2006;

to apply for mortgage financing within five days following execution; and,

to provide to 33 Charles a receipt of mortgage approval and a copy of such approvals or other documentation evidencing the Plaintiffs' ability to complete the transactions as contemplated under the Agreements.

[10] It is not in dispute that the Plaintiffs failed to comply with the terms of the Agreements by failing to deliver deposit monies in accordance with the timelines in the Schedule. Some deposits were not for the full stipulated amount and some deposit cheques were returned N.S.F. By September 2006 when 100% of the deposits were due, the Plaintiffs had only paid 10% percent rather than the 25% required under the Agreements. Further, the Plaintiffs failed to deliver any mortgage approvals or other evidence of their ability to complete the transaction within the Schedule's timelines. Approval documentation that was delivered outside the timelines was deficient in that it failed to set out the full amount under the Agreement.

[11] 33 Charles sent out written notices to the Plaintiffs of their defaults under the Agreements by correspondence dated April 18, April 24 and November 13, 2006. By letter dated January 9, 2007, solicitors for 33 Charles notified the Plaintiffs once again about their default and set a deadline allowing the Plaintiffs to cure their defaults by January 15, 2007, failing which 33 Charles could pursue its remedies under the Agreements.

[12] The Plaintiffs failed to cure the defaults and by letter dated January 17, 2007, 33 Charles' solicitor gave notice that, effective January 16, 2007, the Agreements were terminated and of no force and effect; and that 33 Charles would retain, not as a penalty but as liquidated damages, the deposit monies and any monies paid for extras or changes to the units.

[13] The Plaintiffs claim Hung failed to properly advise them of their obligations under the Agreements. They assert he failed to properly explain certain documentation regarding the payment of deposits, to alert them about deposit payment schedules and properly inform them about the requirement for pre-mortgage authorizations. They further allege 33 Charles failed to provide adequate notice of default and invalidly terminated the Agreements.

ANALYSIS

[14] The test to succeed in obtaining summary judgment is an onerous one since success on such a motion means the other party will be denied their day in court. This type of order cannot

be lightly made. The courts have made it clear that the motions judge on a motion for summary judgment must "take a hard look at the evidence in determining whether there is, or is not, a genuine issue for trial" [*Ontario Jockey Club, supra*, at 36]. Further, the strength of the claim of the party who seeks to resist the motion should not be determinative of whether judgment is granted. The motions judge must only determine whether there is a genuine factual dispute between the parties. For the Ontario Court of Appeal, Borins, J.A. held:

"...[i]f there is a genuine issue with respect to material facts then, no matter how weak, or how strong, may appear the claim, or the defence, which has been attacked by the moving party, the case must be sent to trial. It is not for the motions judge to resolve the issue":

[*Dawson v. Rexcraft Storage & Warehouse Inc., supra*, at para. 28]

[15] The Plaintiffs raised the following issues as genuine issues for determination by the trial court.

Hung's Role as an Agent

[16] The Plaintiffs argue there is a genuine issue for trial as to whether Hung acted as agent for both the Plaintiffs and 33 Charles on the purchase and sale of the ten units. It is not in dispute that Hung introduced the Plaintiffs to 33 Charles and the Project and that Hung had acted in previous transactions involving 33 Charles. The Plaintiffs do not speak English and they submit they relied on Hung as their agent to communicate with 33 Charles, to relay information about their obligations back to them, advise them and to interpret documents for them. Both Chen and Kwan depose that they understood that Hung was also acting as agent for 33 Charles to arrange for entering into and completing the Agreements. Chen stated that 33 Charles was at all material times aware the Hung was acting for 33 Charles and for the Plaintiffs under the Power of Attorney. Both Chen and Kwan stated they arrived at that understanding through the wording of Schedule E to the Agreement which provides:

The Purchaser acknowledges that the Cooperating Broker has acted, and is acting as sub-agent of the vendor and will be compensated through the listing broker.

[17] Photocopies of Schedule E, entitled "Agency Disclosure", are filed as evidence by the Defendant. The paragraphs in Schedule E that are entitled "Sub-Agent" and "Single Agent" are stroked out. Under cross-examination Chen indicated she was not familiar with Schedule E.

[18] Hung's evidence and that of 33 Charles is contrary to that of Chen and Kwan. In his pleadings and on cross-examination, Hung asserted he acted under the Power of Attorney for Chen and Kwan and at no time did he act as agent for 33 Charles. Similarly, Michael Budovitch, an office manager for Milborne deposed that he at no time authorized Hung to make any representations on behalf of Milborne or 33 Charles and Maria Anthanasoulis, a principal for 33 Charles, stated Milborne was the exclusive agent for 33 Charles.

[19] 33 Charles argues that while the role Hung played might be in dispute based on what the Plaintiffs say, it is not a dispute on a fact material to the Plaintiffs' claim against 33 Charles. I

agree with that position. The Plaintiffs' remedy for any representations or misrepresentations by Hung on his role as agent is against Hung and not 33 Charles.

[20] I find therefore there is no genuine issue for trial on that issue as it pertains to the Plaintiffs' claim against 33 Charles.

Notice to Plaintiffs

[21] The Plaintiffs argue there is a genuine issue for trial as to whether 33 Charles complied with the notice requirements under the Agreements and whether the notice was adequate.

[22] 33 Charles purported to deliver three notice letters to each of Chen and Kwan, in April 2006, November 13, 2006 and January 9, 2007. As noted earlier, the January 9, 2007 letters gave notice that if the defaults were not cured by January 15, 2007, 33 Charles would exercise its rights under the Agreements to declare the Agreements terminated. The Purchaser Default clause at paragraph 27 of the Agreements provides that any default in payments must be cured forthwith failing which the Vendor has the unilateral right to terminate the Agreements. It is 33 Charles' position that written notice of monetary default is not required under the Agreements. Paragraph 27 provides:

Purchaser Default

27. (a) In the event that the Purchaser is in default with respect to any of his or her obligations contained in the Agreement or in the Occupancy Licence on or before the Unit Transfer Date and fails to remedy such default forthwith, if such default is a monetary default and/or pertains to the execution and delivery of documentation required to be given to the Vendor on the Closing Date, or within five (5) days of the Purchaser being so notified in writing with respect to any other non-monetary default, then the Vendor, in addition to (and without prejudice to) any other rights or remedies available to the Vendor (at law or in equity) may, at its sole option... unilaterally declare this Agreement and the Occupancy Licence to be terminated and of no further force or effect, whereupon all deposit monies theretofore paid, together with all monies paid for any extras or changes to the Unit, shall be retained by the Vendor as its liquidated damages, and not as a penalty, in addition to (and without prejudice to) any other rights or remedies available to the Vendor at law or in equity. [Emphasis added by Court].

[23] The Plaintiffs argue, notwithstanding Clause 27, 33 Charles did purport to give written notice of default and as such those notices were required to be delivered in accordance with the Notice Clause under the Agreements. The pertinent part of the Notice Clause at Paragraph 43 of the Agreement states in part:

Notice

43. Any notice given pursuant to the terms of this Agreement shall be deemed to have been properly given if it is in writing and is delivered by hand, ordinary pre-paid post or facsimile to the attention of the Purchaser or to the Purchaser's Solicitor to their

respective addresses indicated herein or to the address of the Unit after the Closing Date....[Emphasis added by Court].

[24] Clause 43 deems a notice given under the terms of the Agreements to be properly given if in writing, delivered by hand, by ordinary pre-paid post or facsimile to the attention of the Purchaser. The Plaintiffs say 33 Charles did not comply with that requirement. The notice letters dated January 9, 2007 to Chen and Kwan were sent not by the modes stipulated in Paragraph 43 but by registered mail, were not copied to their representative stipulated under the Power of Attorney and had been mailed to incorrect addresses and hence were not received by the Plaintiffs.

[25] 33 Charles argues alternatively that the Notice Clause is permissive in that the proper mode of delivery is "deemed" rather than mandated.

[26] The Plaintiffs argue there is a valid issue for trial as to whether 33 Charles validly terminated the Agreements. That issue depends on a determination on the notice issue. That is, if written notice was not formally required under the Agreement, what effect if any did the fact that 33 Charles purported to give notice have on 33 Charles' rights under the Agreement? The Plaintiffs argue 33 Charles waived its right or is equitably estopped from strict compliance with its right to unilaterally terminate the Agreements and for that reason, the Agreements were not validly terminated.

[27] The Plaintiffs raise the further issue whether notice is properly given when it is sent by registered mail, and rather than being delivered to the designated address as with ordinary mail, is retained at a post office for retrieval by the addressee.

[28] 33 Charles submits it addressed the notices to the Plaintiffs in accordance with the information provided by Hung on the Agreement and 33 Charles had no other knowledge on this matter. The Plaintiffs submit on the contrary that 33 Charles made the original error with the addresses by furnishing incorrect addresses on the worksheets. There seems to be a credibility and factual issues here as to the source of the incorrect addresses, if indeed, any addresses were incorrect.

[29] I find the Plaintiffs have satisfied their burden to raise genuine issues for trial as to the adequacy of notice, whether 33 Charles waived its rights or is estopped and whether the termination of the Agreements was valid. Those issues together with the credibility and factual issues as to addresses for notice should be decided at trial.

Relief From Forfeiture

[30] It is not in dispute the Plaintiffs have paid about 10% of the purchase price under the Agreement, \$110,700 by Kwan and \$99,610 by Chen. All of the units, except one, that were to be purchased by the Plaintiffs, have been sold. The Plaintiffs filed evidence that the purchase price was \$705,800 more than the Plaintiffs' purchase price.

[31] The Plaintiffs argue under the circumstances the issue of whether the Plaintiffs are entitled to relief from forfeiture is a live issue for trial. Under section 98 of the *Courts of Justice*

Act. R.S.O. 1990. c.c-43, the Court has the discretion to grant relief from penalties and forfeitures. The Plaintiffs point to case authority that sets out the criteria to be considered: whether the conduct of the parties was reasonable; whether the object of the right of forfeiture was essentially to secure payment of money; and whether there was a substantial disparity between the value of the property forfeited and the damage caused to the vendor by the breach. The Plaintiffs submit that a court could find the Plaintiffs entitled to relief from forfeiture upon applying those criteria [*Liscumb v. Provenzano et al.* (1985), 51 O.R. (2d) 129 (Ont. H.C.J.); *Sheikh and Sheikh v. Sheffield Homes Ltd. et al.*, [1989] O.J. No. 2561 (Ont. H.C.J.)] The Plaintiffs submit a question to be decided by the court in this case is whether the amounts paid by the Plaintiffs represent a genuine deposit or a penalty or an excessive estimate of liquidated damages [*Loczal Holdings Ltd. v. Brassos Development Ltd.* (1980), A.J. No. 857 (Alta. C.A.)].

[32] 33 Charles argues the Plaintiffs are not entitled to relief from forfeiture because they have not acted reasonably in defaulting on the payments. They submit the deposits did not constitute penalties and Hung and the Plaintiffs had actual notice of their defaults and as such the deposits were deposits properly forfeited.

[33] I accept the Plaintiffs' position on this issue as well. I find the issue of relief from forfeiture is interconnected to the other issues regarding notice, the alleged waiver of 33 Charles's rights, and the validity of the termination of the Agreements, the determination of those issues potentially affecting the outcome on the relief from forfeiture issue. For that reason, the issue of relief from forfeiture is also a genuine issue best to be considered and determined at trial.

[34] For all the above reasons, I dismiss the 33 Charles' motion with costs.

[35] I also order the Plaintiffs' claim for specific performance dismissed.

ORDER

[36] Order accordingly.

COSTS

[37] If the parties do not succeed in settling costs, they shall deliver brief written submissions and a Cost Outline within 30 days of this Order. Counsel shall promptly advise the Court if they settle costs.

Allen J.

DATE: July 10, 2008

