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SUPERIOR COURT OF JUSTICE - ONTARIO

RE: The Residences of College Park Inc.

Applicant

- and -

Siavash Valizadeh and Martin Chandonnet

Respondents

BEFORE: Justice D.A. Wilson

COUNSEL: *A. Sanche*, for the applicant
E. Moaveni, for the respondent Mr. Valizadeh

DATE HEARD: June 3, 2008

ENDORSEMENT

[1] This is an application brought by the condominium The Residences of College Park Inc. ("College Park") against the respondent Siavash Valizadeh ("Valizadeh") seeking a declaration that the Condominium Agreement of Purchase and Sale be terminated and that an order issue granting to the Applicant a Writ of Possession concerning a unit at 763 Bay Street Suite 5001 in Toronto. Further, the application seeks an order declaring that the deposit money forwarded to the Applicant has been forfeited and a further order granting the Applicant damages of $150.000.00. The Respondent Valizadeh vociferously opposes the application. The Respondent Chandonnet is the tenant in the unit in dispute and no relief is sought against this individual and he did not attend the hearing.

THE BACKGROUND

[2] Much of the factual basis for this application is in dispute. However, some of the facts are agreed upon. On March 31, 2003, Valizadeh signed a purchase and sale agreement for the condominium which was to be built. The purchase price was $303,400.00 and deposits of $30,340.00 were made. The occupancy date was set out as March 15, 2005 but the agreement

stated that this was a "tentative" closing date only and stated that the vendor could extend this date for up to 2 years and the actual closing date thereafter, provided that notice in writing was made at least 120 days before the new closing date. Upon closing, Valizadeh was required to submit a mortgage to secure the principal sum of $273,060.00. The agreement further provided that upon the purchaser's default, the vendor at its option had the right to declare the agreement null and void and all deposit monies would become the property of the vendor who was also permitted to claim further damages in excess of the deposit monies.

[3] The tentative closing date was changed a number of times and eventually, the respondent was advised that the occupancy date would be December 8, 2006. By that time, Valizadeh had moved with his wife to Montreal, apparently for employment reasons. He was required to pay occupancy fees commencing in December 2006 as the unit was ready for occupancy. The respondent provided post-dated cheques and was granted interim occupancy by the applicant.

[4] At this point, there the details of what transpired are contentious.

Facts according to the applicant:

[5] College Park alleges that the condominium was registered and the unit transfer date of August 28, 2007 was selected. Valizadeh, through his solicitor, requested a number of extensions of the closing date which were acceded to by College Park.

[6] On September 27, 2007, Valizadeh, through his new counsel, advised that he had secured mortgage financing and requested a further extension until October 10, 2007. On October 11, 2007, the respondent's counsel again wrote to the solicitor for the applicant, referring to a conversation of that day, confirming that Valizadeh was agreeable to paying the full balance set out in the Statement of Adjustments, including occupancy fees, plus a reinstatement fee of $20,000, with a closing date of October 26, 2007. A further extension of the closing date to October 31 was requested and agreed to. On that date, counsel for Valizadeh advised counsel for the applicant that he had not received documentation concerning the mortgage from his client. On November 2, 2007, Valizadeh's solicitor advised that he was no longer representing the respondent.

[7] The respondent then retained his third counsel who sent a letter suggesting a closing date of November 19, 2007. Counsel for College Park then sent another Statement of Adjustments as of November 19, which included the $20,000 reinstatement fee and the disputed occupancy fees. Finally, on November 22, counsel advised that the transaction was terminated due to the respondent's failure to close the deal.

Facts according to the Respondent:

[8] On December 8, 2006, Valizadeh travelled from Montreal for the inspection of the unit. There were numerous deficiencies which in his view, made the unit unfit for occupancy. On April 17, 2007, the vendor sent a letter to the respondent advising that all deficiencies had been

remedied and requested occupancy fee payments for January through April of 2007, which Valizadeh refused to provide as the unit was not capable of being occupied. He rented the unit from May through October 2007 to the respondent Chandonnet and received monthly rent.

[9] Valizadeh received a Statement of Adjustments as of August 2007 which included the sum of $8,178.60 for the occupancy fees for the months January through April 2007. He disputed that he owed the fees for these months as it was not until April 2007 that the deficiencies were remedied to enable the unit to be occupied. Valizadeh relies on a letter from the vendor dated April 2, 2007 in support of his argument that he was only responsible for occupancy fees commencing May 1, 2007. However, that letter states that because he had already provided post-dated cheques for occupancy fees up to April 2007, the vendor was requesting additional cheques commencing May 2007. It does not state that the only occupancy fees the respondent was responsible for were those commencing May 2007.

[10] Valizadeh deposes that his circumstances changed—his wife was no longer in Canada; he was the father of an infant boy; and he had purchased property in Montreal. As a result, he had difficulty securing a mortgage. He acknowledges that he requested numerous extensions of the closing date. On October 21, 2007, Valizadeh suffered a heart attack, something he attributes to the stress caused by "the demands of the vendor". He deposes that the short notice of the closing date was problematic as he did not have sufficient time to sell his property in Montreal to obtain mortgage financing.

[11] In his affidavit, Valizadeh swears that he contacted one Michael Labrier, the owner of the condominium, who advised him that if he agreed to pay a "reinstatement fee" of $50,000 he would grant him a further extension on the closing date. The statement of adjustments as of November 15, 2007 shows a reinstatement fee of $20,000 plus an administration fee of $742.00 plus the disputed occupancy fees for January through April of 2007 totalling $8,178.60.

[12] On December 3, 2007, Valizadeh attended at College Park to advise that he had been approved for a mortgage and asked to close the property or alternatively, to have his deposit returned. This was refused by Benjamin Rogowski who allegedly laughed at him and insulted him. Valizadeh deposes that the agreement is weighted in favour of the vendor who essentially made it impossible for him to close the deal by imposing the reinstatement fee and the occupancy fees for the months when the unit was not in a condition to be lived in. In his supplementary affidavit, he deposes that he attended in Toronto December 8, 2006 intending on moving into the unit, but it was in an unsafe and dirty condition and consequently, he and his family had to spend the night in a hotel. He provides examples of the disrespectful treatment he received at the hands of the representatives of the vendor. This is denied by Mr. Rogowski, who deposes that Valizadeh threatened him and indicated that he would do damage to the unit.

The agreement of purchase and sale

[13] This application is brought pursuant to Rule 14.05. I note that applications under this rule are permitted "where it is unlikely that there will be any material facts in dispute". It is obvious from reading the affidavit material filed by each side that there are matters in dispute. It

is, however, not disputed that the parties entered into a purchase and sale agreement which Valizadeh signed on March 31, 2003. While the Respondent complains that the agreement was unfair in that it favoured the vendor, there is no evidence before me that there was any undue pressure placed on him to sign the agreement. He could have had a solicitor review the agreement prior to signing it but it appears that he did not do so. He knew that the condominium had not been built and that the occupancy date in 2003 was anticipated to be two years down the road but the agreement clearly stated that the vendor could extend the tentative closing date for a further two years and the actual closing date thereafter, as long as written notice of at least 120 days was given. Paragraph 27 of the agreement set out that if the purchaser defaulted all deposit monies would become the property of the vendor, in addition to other remedies it might choose to pursue. Even if the respondent did not read or understand the agreement when he signed it in 2003, as alleged, he had a number of solicitors assisting him commencing in 2006 and he could have secured an opinion as to the consequences of not closing the deal.

[14] The respondent claims that one of the reasons he was unable to obtain mortgage financing is that the vendor did not give him sufficient notice of the closing date. This argument is not supported by the evidence. When Valizadeh signed the agreement, the earliest date for occupancy was in 2005. When College Park corresponded in 2004 to advise of the construction delays that would affect the occupancy date, the respondent had already moved to Montreal. In his affidavit, the respondent deposes that he relocated to Montreal for employment reasons and he purchased a property there, which later made it difficult for him to obtain mortgage financing. The respondent must have been aware when he purchased the Montreal property that once the condominium was built in Toronto, he would have to secure a mortgage for it. The fact that his personal circumstances changed is irrelevant to his obligations under the agreement.

[15] In December of 2006 when he attended for the inspection and anticipated moving in, he must have known that he needed to get financing in place. The respondent's arguments that he was not provided proper notice of the closing date is not supported by the evidence that was filed. In any event, it is conceded that the respondent requested and secured numerous extensions of the closing date, yet he failed to be in a position to close the deal — despite assurances, throughout September, October and November 2007 the respondent failed to secure the financing to enable him to complete the agreement. Counsel for the respondent takes issue with the occupancy charges for January-April, 2007 arguing that this "error" made the vendor's tender improper in addition to the $20,000 fee for re-instatement, counsel for the vendor argued that this was irrelevant. She referred to the letter from Valizadeh's then-counsel of October 11. 2007 in which Mr Blott stated,

> **"We have been advised by our client that he is agreeable to paying the full balance due on closing as set out in the Statement of Adjustments together with the outstanding interest and fees as well as the reinstatement fee of $20,000 with the only exception that the new closing date be October 26, 2007..."** (emphasis mine).

Counsel for the Applicant argued that this letter estopped the respondent from arguing that he disagreed with the occupancy charges of the reinstatement fee. Even if he had

disputed items in the Statement of Adjustments that was delivered, his solicitor's letter effectively was an offer to settle the issues between the vendor and the purchaser which was accepted by the vendor.

[16] In response to this argument, counsel for Valizadeh advised the Court that her client had never authorized his former counsel to send the letter and had not provided instructions to agree to pay the occupancy fees or the reinstatement fee. I note there is absolutely nothing in the affidavits sworn by Valizadeh suggesting that his former solicitor acted without instructions. The application materials, including the letter from Mr. Blott, were served in December 2007 and the respondent did not cross-examine on this point nor was any sworn evidence filed to dispute the contents of the letter of October 11, 2007. I reject the argument that the respondent did not provide instructions to his former counsel, as set out in the aforesaid letter. Even after Mr. Blott ceased acting for the respondent, he retained another solicitor who attempted to secure another closing date to enable Valizadeh to obtain financing. There was no suggestion in Mr. Vani's letter that the respondent was disputing the contents of Mr. Blott's letter. To the contrary, the information imparted was that Valizadeh was still attempting to get a mortgage and close the deal.

[17] It is the position of the respondent that he was treated unfairly by the representatives' of the vendor and the agreement was unfair to him. I cannot agree with this submission. On the evidence before me, Valizadeh agreed to purchase a condominium that would not be ready for occupancy for a substantial period of time from the date of the agreement. He chose to enter into the purchase and sale agreement, knowing the occupancy date was not certain. He had ample time to review the contents of the agreement with a lawyer after he signed it to familiarize himself with the provisions of it. He must have been aware of his obligations to secure financing for the unit and the change in his personal circumstances is irrelevant. In any event, he was granted numerous extensions by the vendor yet at the end of the day, he was unable to close the transaction because he could not or did not secure the requisite financing.

[18] A declaration shall issue that the condominium agreement of purchase and sale executed by the respondent on March 31, 2003 and by College Park on April 3, 2003 is terminated and a writ of possession in relation to 763 Bay Street, Unit 5001 in Toronto, Ontario shall be granted to the applicant. A further order shall issue declaring the applicant the attorney for the respondent Valizadeh in relation to the vacating, sale and possession of the unit and an order shall go permitting and appointing the applicant to execute any and all documents in furtherance of the termination of the aforesaid agreement, the possession of the purchased unit by the applicant by writ of possession and the release of the applicant by the respondent.

[19] Counsel for the applicant has requested an order that the respondent has forfeited any and all deposits. Section 98 of the *Courts of Justice Act* gives the court broad jurisdiction to grant relief against forfeiture on such terms as are considered just. The Court's power to grant relief from forfeiture is an equitable remedy and is purely discretionary. In the case at hand, the agreement of purchase and sale was signed in March of 2003 with an anticipated occupancy date of March 2005. While the agreement gave the vendor the "unilateral" right to extend the tentative closing date for up to 24 months, the unit was not ready for occupancy until December of 2006. According to the sworn evidence of the respondent, when he attended in Toronto on

that date, he could not move into the unit with his wife and son due to the numerous deficiencies. It was not until April of 2007 that the deficiencies had been remedied and the unit was rented.

[20] In my view, the imposition of an arbitrary "reinstatement fee" of $50,000.00 reduced to $40,000.00 then subsequently reduced to $20,000.00 on a purchaser who was in dire financial straits was inappropriate. It appears that this sum was added on at the whim of the vendor. The vendor has the benefit of the increase in the value of the unit, which continues to be rented to the respondent Chandonnet. There is no evidence before me of any damages suffered by the applicant as a result of the breach. It would be unconscionable, in my view, to permit the applicant to also have the deposit monies of the respondent. Forfeiture of the deposit would amount to a windfall for the Applicant. Consequently, I order that the deposit monies in the sum of $30,340.00 plus any accrued interest be returned to the respondent.

[21] In the materials, the applicant also requests an order granting the Applicant damages in the sum of $150,000.00. There is absolutely no evidence before me of any damages suffered by the Applicant as a result of the actions of the Respondent and I am unable to make a finding on this point. In argument, counsel for the Applicant suggested that the issue of damages be referred to a Master. In my view, the appropriate procedure is for section 1 (f) of the application to be referred to a Judge for a trial on the issue of damages and I so order.

[22] The Applicant has been successful and is entitled to its costs. If the parties cannot agree on costs. I will receive brief written submissions within one week of the release of my decision.

D.A. Wilson, J.

DATE: June 25, 2008

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