

Court of Queen's Bench of Alberta

Citation: Rodgers v. 1195911 Alberta Ltd., 2010 ABQB 267

Date: 20100419
Docket: 0903 13144
Registry: Edmonton

Between:

George Rodgers and Carol Rodgers

Plaintiffs

- and -

1195911 Alberta Ltd.

Defendant

**Memorandum of Decision
of
W. Breitkreuz, Master in Chambers**

[1] This lawsuit involves a commercial condominium transaction where the vendor sold property that was to close on December 20, 2008, but could not provide a registerable transfer at that time, so he obtained an extension from the purchaser plaintiffs to January 20, 2009.

[2] I will not recite all the facts. To a large extent they are in Mr. Culkin's letter to Mr. Joly dated June 10, 2009 attached as exhibit "E" to Mr. Rodgers' affidavit sworn on October 19, 2009.

[3] At the end of the application on Monday, January 25, 2010, I adjourned the application to allow the defendant to present evidence to show that the time elapsed between the possession date of December 20, 2008 and the time the application was heard is not an unreasonable passage of time between the target completion date and the provision of a registerable transfer by the defendant. I don't have a transcript of that application but I believe I made it reasonably clear

that the plaintiffs had proved what was necessary to succeed, and the onus was now on the defendant to show that the passage of time in these circumstances was not unreasonable.

[4] My decision in this regard is consistent with the Alberta Court of Appeal ruling relative to the burden of proof in summary judgment applications in *732311 Alberta Ltd. v. Paradise Day Spa*, 2003 ABCA 362, also found at (2004) 5 WWR 59. In that case the court said that once the plaintiff proves its cause of action on a balance of probabilities, the burden of proof shifts to the defendant to show that there is a genuine issue for trial.

[5] Mr. Culkin filed and served an affidavit of Lawrence Pals, an experienced land surveyor who swears in paragraph 4 that he is currently assisting the defendant to complete the documentation required for the subdivision of this condominium plan and that he is personally involved in the preparation of the documentation. Paragraphs 8, 9 and 10 deal with the specific development.

[6] In paragraph 8 he states:

“ ... that, assuming the approval process proceeded smoothly and no complications or delays were encountered in construction, approval might have been obtained in between eight and twelve months.”

[7] In paragraphs 9 and 10 he states the following:

9. “In this development, however, the process has taken longer than the optimistic minimum but an individual either familiar with the development process or who had made inquiries with informed sources would have anticipated that the development process can be protracted and drag out over a number of years.

10. In my opinion, based on my knowledge and experience in the field of land developing, the length of time that it has taken to obtain development approval for this sub-division and the condominium plans associated with it, while on the high side of the length of time that one might expect, is still within the time that a reasonable, well-informed person might expect.”

[8] There is no question about the surveyor’s credibility; after all he has not been cross-examined on the affidavit.

[9] However, I have several difficulties with the evidence:

1. He doesn’t overcome the presumption created by the defendant when he needed a one month extension from December 20, 2008 to January 20, 2009 that the process is virtually completed. In paragraph 8 Mr. Pals says that a smooth

approval process without complications should take eight to twelve months, but there is no date given as to when the approval process started. I can correctly surmise that the approval process started sometime before November 1, 2008 (the date of the purchase and sale contract) if the defendant was selling condominium units by that date, to close on December 20, 2008. So if we subtract a couple of months from November 1st, 2008 to the outside time required of 12 months as stated in paragraph 8 of Mr. Pals affidavit, takes us to September 1, 2009.

2. Paragraphs 9 and 10 of Mr. Pals affidavit do not deal in any specific manner with what difficulties have arisen that caused this process to be protracted to this stage. In paragraph 9 he says that if someone had made inquiries with informed sources he would have anticipated that the development process can be protracted and drag out over a number of years. That is far too general and vague to be helpful in this specific transaction. In paragraph 10 he says that a well-informed person could conclude that the passage of time in this case is still reasonable. But he doesn't tell us why, even though the defendant has been given an opportunity to present evidence from a well-informed person.

[10] In the circumstances I have concluded that the plaintiffs ought not to be required to wait any longer to recover their \$249,000.00. I have concluded that they need not await the outcome of a trial that I have decided has no reasonable prospect of success. Accordingly the plaintiffs' application is granted with costs which I will direct in the circumstances of this case ought to be one column higher than the amount of the claim; i.e., the plaintiffs are granted costs on column 4.

Heard on the 25th day of January, 2010 and the 31st day of March, 2010.

Dated at the City of Edmonton, Alberta this 19th day of April, 2010.

W. Breitkreuz
M.C.C.Q.B.A.

Appearances:

Crista Osualdini
McLennan Ross LLP
for the Plaintiffs

James Culkin
for the Defendant