

Case Name:

1420041 Ontario Inc. v. 1 King West Inc.

Between

**1420041 Ontario Inc., Plaintiff,
(Respondent on the Motion), and
1 King West Inc., Defendant, (Moving Party on the Motion)**

[2010] O.J. No. 2895

2010 ONSC 3499

Court File Nos. 05-CV-300372PD3, 126/10

Ontario Superior Court of Justice
Divisional Court - Toronto, Ontario

S.E. Greer J.

Heard: May 17, 2010.

Judgment: June 17, 2010.

(29 paras.)

Counsel:

Paul D. Guy, Counsel for the Respondent.

Patricia M. Conway, Counsel for the Moving Party.

ENDORSEMENT

1 S.E. GREER J.:-- The Defendant, 1 King West Inc., ("the Defendant") moves for Leave to Appeal from the decision of Madam Justice Stewart ("the Motions Judge") dated February 19, 2010. In her decision, the Motions Judge refused to strike or stay the action brought against it by 142001 Ontario Inc. ("the Plaintiff"). The Defendant is the developer of a major condominium built at 1 King Street, West in the City of Toronto.

Some background facts

2 The Plaintiff purchased eight (8) units in Toronto Standard Condominium Corporation No. 1703 ("TSCC 1703") at the above address. The Defendant is the developer and declarant of TSCC

1703. Four (4) units were to be finished and furnished in accordance with the requirements of the Rental Manager for participation in a short term rental program offered by it in the condominium. Another four (4) were to be finished in accordance with the Plaintiff's instructions for use as a single commercial office space.

3 The Plaintiff asks for damages in the amount of \$670,000 for breach of contract and for an abatement in the purchase price for these eight (8) units because of what it says are deficiencies cause by "shoddy workmanship" on the part of the Defendant in the construction of the units and common elements. In addition to the deficiencies, the Plaintiff says that the finishes and "extras" with respect to certain of the units were included in the purchase price whereas the Defendant says they were not.

4 At closing, the Plaintiff declined to pay the \$40,000 for finishes and extras being asked for by the Defendant. It also held back \$385,000 for alleged deficiencies in the eight (8) units, being 15% of the original purchase price of the units. It claims that the aggregate square footage is not as was promised. In addition, the Plaintiff had purchased a ninth unit on the 17th floor. It held back 30% on this unit. The Defendant took this to be a breach of the agreement entitling it to terminate the agreement and forfeit the Plaintiff's deposits for that unit. The Plaintiff, on the other hand, asks for the delivery of that unit.

5 The Defendant refers to these legal actions by the Plaintiff as the "Individual Action," given that TSCC 1703 commenced its own action on March 9, 2007, claiming damages of \$16,000,000 against the Defendant and others involved in the construction. The deficiencies alleged by TSCC 1703 relate mainly to windows and exterior doors, of the individual units and common elements. This action is referred to as "the Condo Action".

The Defendant's Position

6 The Defendant claims that the Plaintiff lacks legal capacity to claim damages with respect to the TSCC 1703's common elements. It further claims that the Condo Action is another proceeding pending in Ontario between the same parties with the same subject matter. It therefore seeks Leave to Appeal the decision of the Motions Judge.

7 The Defendant says the questions on the Leave Motion are as follows:

- (a) Can a single unit owner in a condominium corporation assert a claim to recover damages for alleged deficiencies in the common elements of the corporation?
- (b) Where a condominium corporation has exercised its right under s. 23 of the *Condominium Act, 1998* ("the Act") to commence an action on behalf of all unit owners claiming to recover damages for unit deficiencies, can one of those unit owners maintain a separate action claiming damages for alleged deficiencies in his or her unit without opting out of the corporation's action?

8 The Defendant seeks Leave because it says there are conflicting decisions in this jurisdiction on (a) and there is good reason to doubt the correctness of (b), as noted above. Both grounds, say the Defendants, raise issues of importance beyond the concerns of the parties.

The Plaintiff's Position

9 The Plaintiff says that there is no basis upon which to grant Leave to Appeal and no conflicting decisions on the issues raised. Therefore, it says, there is no good reason to doubt the correctness of the Motions Judge's decision.

10 The action before the Court, says the Plaintiff, does not involve common elements, even if the parties are the same. In addition, even if it did, it is the Plaintiff's position that Section 23(1) of the Act does not give the condominium corporation exclusive standing to bring an action in regards to the common elements.

11 The Plaintiff relies on the Rule 21.01(3)(e) of the *Rules of Civil Procedure*, to show that there is no duplication, under that Rule. It reads:

A defendant may move before a judge to have an action stayed or dismissed on the ground that another proceeding is pending in Ontario or another jurisdiction between the same parties in respect of the same subject matter.

In addition, the Plaintiff says:

- (a) the within action and the Condo Action do not involve identical parties;
- (b) the within action and the Condo Action do not involve the identical subject matter;
- (c) that continuing the within action would not cause substantial prejudice;
- (d) a stay will cause the Plaintiff substantial prejudice.

The Plaintiff also says that the Defendant did not move promptly under Rule 21.02 with this action.

Rule 62.02(4)

12 Pursuant to Rule 62.02(4), leave to appeal from an interlocutory Order of a Judge shall not be granted unless:

- (a) there is a conflicting decision by another judge or court in Ontario or elsewhere on the matter involved in the proposed appeal and it is, in the opinion of the judge hearing the motion, desirable that leave to appeal be granted; or
- (b) there appears to the judge hearing the motion good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that, in his or her opinion, leave to appeal should be granted.

Analysis

13 I find on the facts before me that Leave to Appeal should be granted.

14 The parties disagree on whether there is a conflicting decision by another judge or court in Ontario or elsewhere, to prompt me to grant leave. The Defendant says there is and the Plaintiff says there is not. The difficulty is that there is no one case that seems directly on point. In the case at bar, there are really two matters at stake. One relates to the common elements issue and the other relates to the individual aspects of the Plaintiff's claim regarding the finishes and "extras" and the Defendant's re-taking of the unit on the 17th floor.

15 The Defendant acknowledges that the Condo Action was brought on by TCSS 1730 on behalf of all the unit owners in the building since it relates to the common elements of the building. The Plaintiff says that the doors and windows are integral parts of the individual units owned by it and that the Defendant does not have exclusive jurisdiction over these in any action.

16 The Motions Judge, sets out her analysis starting in paragraphs 13 to 32 of her decision. She finds in paragraph 15 that there is no case law, which prohibits or operates to preclude a unit holder from pursuing an individual action for "damages or other redress." She relies on a British Columbia Court of Appeal decision, *Hamilton v. Ball*, [2006] B.C.J. No. 1098 (B.C.C.A.) in support of that position.

17 The Motions Judge finds in paragraph 20 that the language of the Ontario Act, "... does not hinder or remove the ability or legal capacity of an individual unit owner to maintain an individual action with respect to its own property in appropriate circumstances, nor does it necessarily preclude the possibility of individual action with respect to common elements." In my view, there is reason to doubt the correctness of that finding when an action has been begun by the condominium corporation on behalf of all the owners with respect to the common elements, which are controlled by the corporation itself.

18 The Defendant points out that the exterior doors and windows in the building and the building's HVAC are not owned by individual unit owners whose units they service. They are jointly owned by all unit owners as tenants-in-common, it says.

19 The Defendant has had discovery in the Condo Action and says that many of the Plaintiff's complaints relate to these jointly owned elements. They say that the Plaintiff can opt out of TSCC's action or remain a part that action, but it cannot be part of two actions against the Defendant. If this is not done, says the Defendant, it would be duplication of the efforts, even though the Condo Action is against more than just this Defendant.

20 In addition, TSCC 1730 notified all unit owners through two separate Section 23 notices under the Act that it was its intention to sue on its own behalf and that of all unit owners with respect of alleged deficiencies to the common elements, and separately with respect to alleged construction deficiencies in their individual units.

21 If one ignores decisions from other jurisdictions with their own provincial condominium acts, and only looks at Ontario decisions, the Motions Judge's decision appears to conflict with other Ontario decisions relating to general principles involving condominium corporation common elements. For example, in *Metropolitan Toronto Condominium Corporation No. 539 v. Priene Ltd.* (1984), 48 O.R. (2d) 313 (Ont. Mast.), it was held in paragraph 5 that, "... a corporation may sue on its own behalf for damage to its property, that is, the common elements and other corporation assets, and the individual unit owners cannot sue for the damage." See also the decision of Master Glustein, *Toronto Standard Condominium Corporation No. 1703 v. 1 King West Inc. et al.*, 2008 CanLII 14181(Ont. S.C.), at para. 30, which follows that earlier decision.

22 The Defendant also points out that if TSCC 1703 is successful and obtains damages in its action, all unit owners, as tenants-in-common, are entitled to a share of the damages.

23 I am satisfied on the facts of this case, that there are conflicting decisions under Rule 62.02(4)(a) and in my opinion leave should be granted.

24 With respect to Rule 21.01(3)(c), the law is clear that a stay should only be ordered in the clearest of cases, where the party seeking the stay can clearly demonstrate that continuing the action would cause substantial prejudice or injustice to the moving party, and the stay would not cause injustice to the responding party. See: *Farris v. Staubach Ontario Inc.*, [2004] O.J. No. 1227 (Ont. S.C.J.) In my view, there is good reason to doubt the correctness of the finding of the Motion's Judge that the parties and the defendants are not the same in the two actions. The issue of deficiencies relating to the common elements is the same in both actions. The Defendant says that a stay could be granted with respect to that element only, if the Plaintiff does not wish to opt out of the TSCC 1730's action. This would leave the Plaintiff to continue with its own other personal claims against the Defendant.

25 If no stay is granted to the Defendant, this could lead to potentially inconsistent findings relating to the common elements. Separate damages assessments could lead to different pro rata values. There is also a possible double recovery if the Plaintiff remains in two actions respecting the common elements.

26 This is not just an issue personal to the parties involved. It has broad implications for all condominium corporations in the Province of Ontario.

27 The Defendant has also met the test in Rule 62.02(4)(b) and I grant Leave under that branch of the Rule as well.

Conclusion

28 For the reasons noted above, the Defendant's Motion for Leave is granted. With respect to the Costs, the Motions Judge awarded the Plaintiff \$4,500 in Costs, presumably inclusive of GST and disbursements. The Costs Order of the Motion's Judge is therefore set aside.

29 Costs of the Motion for Leave are left to the Panel hearing the Appeal.

S.E. GREER J.

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