CITATION: Schneeberg v. Talon International Development Inc., 2010 ONSC 5559
COURT FILE NO.: CV-09-391665
DATE: 2010 10 12

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
RICHARD E. SCHNEEBERG	)	
	)	*David M. Goodman*, Counsel for the
Applicant	)	Applicant
	)	
	)	
- and -	)	
	)	
TALON INTERNATIONAL DEVELOPMENT INC.	)	
	)	
	)	
Respondent	)	*Mark A. Klaiman*, Counsel for the
	)	Respondent
	)	
	)	
	)	
	)	**HEARD:** September 28, 2010

S. CHAPNIK J.

REASONS FOR DECISION

INTRODUCTION

[1] This case raises the question whether a builder who sells condominium units can unilaterally extend the closing date.

[2] The applicant, as purchaser, and the respondent, as vendor, entered into an Agreement of Purchase and Sale dated August 27, 2004 ("the Agreement") for a condominium hotel unit in the Trump International Towers to be developed by the respondent.

[3] Pursuant to the Agreement, the applicant has paid deposits totalling $212,700.00 to the respondent's solicitors in trust. The purchase price was $709,000.00.

[4] The applicant seeks a declaration that the respondent is in breach of the terms of the Agreement that deal with the closing date, and an order requiring the respondent to return all deposits paid by the applicant for the unit in question.

THE AGREEMENT

[5] The terms of the Agreement that are relevant to the matter of the closing date and any extensions to it are, as follows:

> 2(a) The Purchaser shall assume occupancy of the Unit, subject to the terms of the Hotel Use Maintenance Agreement described in sub-paragraph 4(b) herein on March 20, 2009, or such extended or accelerated date pursuant to the terms hereof that the Unit is substantially completed by the Vendor for occupancy by the Purchaser in accordance with Paragraph 13 hereof (the "Closing Date");
>
> 2(b) the transfer of title to the Unit shall be completed on the later of the Closing Date or a date established by the Vendor in accordance with Paragraph 13 hereof (the "Unit Transfer Date");
>
> 13.(a) The transaction of purchase and sale shall be completed on the Closing Date or any extension thereof as may be permitted under this Agreement, at which time vacant possession of the unit will be given to the Purchaser. The Vendor shall be entitled upon giving at least sixty (60) days written notice to the Purchaser or his solicitor to accelerate the Closing Date provided the Unit is substantially complete and fit for occupancy on such earlier date.
>
> Upon registration of the Condominium, the Vendor's solicitor shall not less than ten (10) days after registration of the Condominium Documents designate a date as the Unit Transfer Date by delivery of written notice of such date to the Purchaser or his/her solicitor.
>
> 20. If the Vendor shall be unable to complete the Unit for occupancy by the Closing Date, as may be extended from time to time pursuant to this Agreement, then, unless the parties hereto otherwise agree in writing, the Purchaser shall have the right to terminate this Agreement by notice in writing to the Vendor or the Vendor's Solicitor and all monies to the extent provided for in Paragraph 19 hereof, shall be returned to the Purchaser and this Agreement shall be terminated and the Vendor shall not be liable to the Purchaser for any damages arising as a result thereof and shall have no further obligation hereunder. If the Unit is substantially completed for occupancy by the Closing Date or any acceleration/extension thereof in accordance with this Agreement, this transaction shall be completed on such date notwithstanding that the Vendor has not fully completed the Unit or the common elements and the Vendor shall complete such outstanding work required by this Agreement within a reasonable

> time after the Closing Date, having regard to weather conditions and the availability of labour and materials. The Unit shall be deemed to be substantially completed when the interior work has been finished to permit occupancy. The Purchaser acknowledges that failure to complete the common elements on or before the Closing Date shall not be deemed to be a failure to complete the Unit. (emphasis added throughout)

[6] It is noted that there is no "time of the essence" clause in the Agreement.

THE FACTS

[7] By letter dated November 15, 2006, the vendor advised the purchaser that the expected occupancy would be available no later than December 31, 2010 and, in any event, no later than twenty-four months from the tentative closing of March 20, 2009. Enclosed in the respondent's letter of November 15, 2006 was a proposed amendment to the Agreement which the applicant did not sign, stating:

> If the Vendor shall be unable to provide occupancy on the Closing Date for any reason whatsoever, the Vendor may extend the Closing Date one or more times as may be required by the Vendor, all extensions in the aggregate not to exceed twenty-four (24) months.

The applicant refused to sign the proposed amendment.

[8] On or about April 24, 2008, the applicant advised the respondent in writing that he wished to terminate the Agreement due to his poor financial position. He clearly wanted to terminate the Agreement for his own reasons.

[9] A few months later, in November, 2008, the respondent sent the applicant notification of an extension to November 1, 2010, of the "tentative closing date" (i.e. the occupancy date) of March 20, 2009. The respondent rejected this proposal on August 14, 2009 and questioned the respondent's right to unilaterally extend the closing.

THE POSITION OF THE PARTIES

[10] The applicant contends that he gave the respondent notice of termination in accordance with his rights under the Agreement, and particularly paragraph 20 thereof. Accordingly, he is entitled to the return of his deposits and a declaration that the Agreement is null and void. The respondent is in breach of the contract as it was unable to complete the unit for occupancy by the closing date and the respondent cannot extend the date unilaterally.

[11] In the alternative, if the Court finds ambiguity in the Agreement as a whole, the principle of *contra proferentem* would apply. Finally, the fact that in November, 2006, about two years after the execution of the Agreement, the respondent attempted to amend its terms confirms that

the respondent had a problem with the wording of the Agreement in regard to the closing date and any extensions to it.

[12] The respondent states that, at all times, it intended to complete the project and he complied with the terms of the Agreement. Those terms contemplate extensions and delays, reflecting the parties' intentions at the time and commercial reality. The closing date of March 20, 2009 was tentative, based on substantial completion of the unit, and there was no "time of the essence" clause. Moreover, the applicant, by his actions in accepting extensions without complaint effectively waived his right to terminate the Agreement on this very basis.

THE LAW

[13] It is well-settled law that Agreements for large buildings such as this represent a negotiated commercial document that should be construed in accordance with sound commercial principles and good business sense. As well, the contract should be construed as a whole with effect given to all of its provisions. *Hillis Oil & Sales Ltd. v. Wynn's Canada Ltd.*, [1986] 1 S.C.R. 57.

[14] In circumstances where the Court is unable to resolve a contradiction or ambiguity in the terms of a contract, it will be construed against its author pursuant to the *contra proferentem* rule. *Consolidated – Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co*., [1981] S.C.R. 888, p. 901.

ANALYSIS

[15] Under the *Condominium Act,* purchasers of proposed residential condominium units may take possession of or occupy a unit prior to the delivery of a deed or transfer. Therefore, closing is a two-step process. In this case, section 2(a) of the Agreement specifically stipulates occupancy on March 20, 2009 or such extended or accelerated date "pursuant to the terms hereof" based on substantial completion.

[16] Indeed, the Agreement contemplates an extension of the closing date in a number of places " as "may be permitted by the Agreement"; however, it is common ground that there are no terms in the Agreement that pertain to the granting of or process involved in extending the closing date.

[17] Both parties relied on the reasoning in the case of *Scanlon v. Castlepoint Development Corp.*, [1992] 11 O.R. (3d) 744 (C.A.). The Appeal Court in that case allowed the developer's appeal, upheld the Agreement and dismissed the purchaser's application for a declaration that the Agreement of Purchase and Sale was null and void.

[18] In *Scanlon, supra*, the Court recognized that agreements of purchase and sale in such cases are "routinely structured so as to permit occupancy closing dates to be extended in the event of construction delays". That may be so, but the core decision in *Scanlon* is rooted in contract and particularly, in the express language included in paragraph 22 thereof. That

provision explicitly permitted the vendor extensions for closing from time to time, if completion of the unit was delayed for any cause "of any kind whatsoever".

[19] In the case before me, the property in question comprised a 15,000 square foot lot to be developed as a joint hotel and condominium project with 700,000 buildable square feet. In such cases, construction is routinely delayed for innumerable reasons.

[20] However, any particular residential Agreement represents a contract that must be construed according to its terms, and there is no term in the subject Agreement that specifically permits the occupancy closing date to be extended in the event of construction delays. The Agreement simply allows extensions "pursuant to these terms" and there are none. As noted, this distinguishes it from the *Scanlon* case in which the operative clause specifically provided for extensions by the vendor on the grounds of delay or for any cause "whatsoever".

[21] In light of this, the Court in *Scanlon* found, in the circumstances, a manifest intention of the parties to provide a means of extending the closing date in the event of unforeseeable delay.

[22] That is not the situation here. Not only does the Agreement in the within case not give the respondent a unilateral right to extend the occupancy date, but paragraph 20 gives the purchaser a right to terminate the Agreement if the vendor is unable to complete the unit for occupancy by the original closing date of March 20, 2009. The right is not absolute since the provision also contains the words "as may be extended from time to time pursuant to the Agreement". As above noted, however, those words are somewhat inane as nothing in the Agreement permits or describes an extension procedure. There are no means of extending the closing date in the event of unforeseeable delay.

[23] Upon reviewing the provisions of the particular contract before me in their entirety, I find that while the parties contemplated some extensions, they also specifically gave the purchaser a right to terminate the Agreement, absent written consent of the parties to extend the closing. The respondent could not unilaterally extend after March 20, 2009. This conclusion gains some support from the fact that the respondent attempted to have the applicant agree to amend the Agreement to make time of the essence and to permit it to extend the closing date.

[24] If, on the other hand, there is some ambiguity in the Agreement as a whole, the contract must be construed against the respondent in accordance with the *contra proferentem* rule.

[25] The factual circumstances do not substantiate a finding of anticipatory breach of contract or waiver by the applicant of his right to terminate the Agreement. The motives of the applicant in seeking rescission are irrelevant and do not affect his proper legal and contractual rights. In the absence of the written consent of the applicant to extend, the respondent breached the Agreement terms when it did not provide occupancy on or before March 20, 2009.

CONCLUSION

[26] The application is allowed pursuant to Rule 14.05(3)(d) of the *Rules of Civil Procedure*. A declaration shall issue that the Agreement of Purchase and Sale has been properly terminated by the purchaser and is null and void. Order to go that the respondent is required to return all monies paid by the applicant by way of deposits for the unit in question, together with statutory interest under the *Condominium Act*, within 30 days.

[27] Costs to the applicant in the all-inclusive sum of $7,000.00, as agreed between counsel, payable forthwith.

_____

Sandra Chapnik

Released: 2010 10 12

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