In the Court of Appeal of Alberta

Citation: Leasing Group Inc. v. Prospect Developments (2003) Inc., 2011 ABCA 83

Date: 20110317
Docket: 1001-0148-AC
Registry: Calgary

Between:

The Leasing Group Inc.

Respondent
(Plaintiff/Applicant)

- and -

Prospect Developments (2003) Inc.

Appellant
(Defendant/Respondent)

The Court:

The Honourable Mr. Justice Jack Watson
The Honourable Mr. Justice Frans Slatter
The Honourable Madam Justice Patricia Rowbotham

Memorandum of Judgment

Appeal from the Judgment by
The Honourable Madam Justice J. Strekaf
Dated the 19th day of April, 2010
Filed on the 26th day of May, 2010
(2010 ABQB 234, Docket: 0901-02583)

Memorandum of Judgment

The Court:

[1] This appeal was dismissed after the hearing with reasons to follow. These are the reasons. The appellant challenges a decision of a chambers judge granting a declaration that a real property purchase and sale agreement between the appellant and the respondent had become null and void by operation of paragraph 4 of the agreement: 2010 ABQB 234, 26 Alta. L.R. (5th) 33. The chambers judge also found that, by the operation of the same paragraph, the respondent was entitled to return of its deposit paid to the appellant. In so declaring, the chambers judge overruled a master's decision refusing the declaration and judgment for the return of the deposit.

[2] The chambers judge was satisfied that the issue between the parties came down to a question of law, namely the interpretation of the plain language of the initial agreement between the parties: see *e.g.* ***Dow Chemical Canada Inc. v. Shell Chemicals Canada Ltd.*** (2010), 477 A.R. 112, 2010 ABCA 126 at paras. 11-12, leave denied [2010] S.C.C.A. No. 234 (QL). The chambers judge found that there were no material issues of fact impeding her ability to determine the matter as a matter of law. She found that a summary decision of the matter would be fair under the *Alberta Rules of Court*: see *e.g.* ***Tottrup v. Clearwater (Municipal District No. 99)*** (2006), 401 A.R. 88, 2006 ABCA 380 at para. 11.

[3] Under the former *Rules*, the respondent, as a plaintiff seeking final judgment, had the burden of persuading the chambers judge that there were no genuine issues to be tried: see *e.g.* ***Canada (Attorney General) v. Lameman***, [2008] 1 S.C.R. 372, 2008 SCC 14 at para. 11. That required the respondent to demonstrate that its interpretation of the contract was correct, and that there was no disputed matter of fact material to that topic requiring adjudication by a trial judge: see *e.g.* ***Poliquin v. Devon Canada Corp.*** (2009), 454 A.R. 61, 2009 ABCA 216 at para. 13. Having done so, it fell to the appellant to show a genuine issue for trial, by putting a "best foot forward". We detect no error in the chamber's judge's description of the law under the former *Rules*.

[4] As noted, the dispute turned on paragraph 4 of the agreement, which is quoted at para. [4] of the chamber's judge's reasons. In sum, she found that the plain language of that paragraph required that the agreement for purchase and sale was conditional and that the agreement became null and void if Condominium Approval was not obtained on or before January 31, 2009. That Condominium Approval deadline could be extended, however, if the appellant provided "written notice to the [respondent] on or before January 15, 2009 [to extend the Condominium Approval deadline to "a date no later than January 31, 2010"]. The chamber's judge found no serious factual dispute that the appellant failed to provide that written notice by January 15, 2009. In fact, the notice was postmarked on January 23, 2009 and received by the respondent on January 29, 2009 and the appellant before us conceded this point. She did not err on this issue.

[5] The trial judge also found that it was irrelevant that the notice to extend was received by the respondent prior to January 31, 2009. This also was not error. Paragraph 4 did not provide a deadline

of January 31, 2009 for the notice, and there was no evidence that Condominium Approval existed before January 31, 2009. It is not disputed that time was of the essence in this contract: paragraph 17 of the agreement. The notice was not received under the terms of the agreement and the nullification and voiding of the agreement for purchase and sale necessarily followed.

[6] The appellant also argued to the chambers judge that the parties "mutually waived the provision that registration of the Re-division Plan would be accomplished by January 31, 2009." Paragraph 4 specifically provided that "the condition set out in this Section may not be waived at all, whether unilaterally by the Developer or by mutual agreement of the parties". In any event, although the appellant posed three points, the appellant did not provide the chambers judge with any evidence or basis for finding mutual waiver. The appellant has not pressed an argument of waiver before this Court.

[7] Central to the appellant's position is the contention that there is a difference of legal opinion as to what constitutes a "condition precedent" to a contract reflected in the respective reasons of Picard JA and Harradence JA in ***Kempling v. Hearthstone Manor Corporation*** (1996), 184 A.R. 321 (C.A.). The appellant therefore submits that a trial would be required to resolve that legal difference of opinion, placing emphasis on comments in the "pleadings strike" decision in ***Hunt v. Carey Canada Inc.***, [1990] 2 S.C.R. 959, 74 D.L.R. (4th) 321. More pertinent to the present situation is ***Lameman***, *supra*, dealing with summary judgment.

[8] This is not a situation where the debatable issue of law relates to the legal ambit of a set of circumstances such as an "evolving tort" situation. The legal principles relative to "true condition precedent" have been settled since the Supreme Court's decision in ***Turney v. Zhilka***, [1959] S.C.R. 578. It is their application to the particular contractual wording and background facts that was at issue in both ***Kempling*** and in this case.

[9] We find it unnecessary to further embroider the law as to conditions precedent in contracts in this case. In our view, this is a simple matter of interpreting the agreement as it was settled by the parties. In her declaration, the chambers judge used the wording "null and void" because that happened to be the language that the parties chose. But her declaration and judgment amount in reality to saying that the agreement should be concluded according to its own terms. The way that she found the contract was concluded was the one that arose under the undisputable circumstances.

[10] In a practical sense, one might say that the agreement was not nullified or voided in its entirety, because the duty of the appellant to refund the deposit to the respondent remained. What was cancelled under the terms of the agreement was the obligation of the respondent to buy and of the appellant to sell the subject real property, which was what the clause characterized as 'conditional'. That cancellation was part of the agreement just like the refund obligation was. Those terms came into effect because the factual triggers for doing so occurred.

[11] The upshot of the chambers judge's decision was that the plain language interpretation of the agreement, applied to the events, was to be enforced. The purchase and sale element was cancelled, and the respondent was to get its deposit back. There is no error in this result.

[12] The appeal is dismissed.

Appeal heard on March 9, 2011

Memorandum filed at Calgary, Alberta
this 17th day of March, 2011

Watson J.A.

Slatter J.A.

Rowbotham J.A.

Appearances:

C.D. Simard
for the Respondent

R.J. Simpson, Q.C.
for the Appellant