

Court of Queen's Bench of Alberta

Citation: Sunderji v. Germain Residences Ltd., 2012 ABQB 115

Date: 20120309
Docket: 1001 10642
Registry: Calgary

Between:

Dinmohamed Sunderji

Plaintiff (Appellant)

- and -

Germain Residences Ltd.

Defendant (Respondent)

**Memorandum of Decision
of the
Honourable Mr. Justice W.P. Sullivan**

INTRODUCTION

[1] The parties to this action are real estate speculators.

[2] The Defendant Germain Residences Ltd. develops condominium projects. On June 2, 2007, the Plaintiff entered into a purchase agreement with the Defendant in respect of the purchase of a suite in the condominium project known as "Le Germain Residences" which were to be built on 9th Avenue in Calgary. The agreed purchase price was \$2,226,000 including GST. The deposit was \$445,200. The original possession date was set for June 21, 2010 but the developer postponed the possession date to June 28, 2010. There were several reasons for delay from time to time, the final reason given, being a delay in obtaining an occupancy permit from the City of Calgary.

[3] The Plaintiff Dinmohamed Sunderji relies on clause 28 of the Purchase and Sale Agreement, “the time of essence clause”:

Time is of the essence of this Contract. No extension of the time permitted or agreed to by the Vendor shall be held or construed to be or effect a waiver of this provision.

[4] The Defendant relies on clause 6, the “possession and closing paragraph”:

The estimated possession date for the Unit is October 1, 2009 which date is an estimate only. The Vendor does not guarantee that possession will be available on the estimated possession. The actual possession date (the “Possession Date”) **shall be established conclusively by the Vendor by notice in writing to the Purchase at least 30 days prior to the Possession Date. If for any reason the Vendor is subsequently unable to grant possession on the Possession Date, the Possession Date shall be postponed from time to time to the date on which the Vendor advises the Purchaser that possession is actually available.**

THE DECISION OF THE MASTER

[5] This is an appeal from the Master. The Master in deciding in favour of the Defendant said amongst other things:

... I agree with Mr. Younggren that the Court today must review the entire agreement. It’s a matter of determining the meaning of the contract by having regard to all of the agreement, not just portions of it, not just clauses taken in isolation.

The material clauses, as counsel has indicated, clause 6 called the possession clause, clause 24, the whole agreement clause, and clause 28, time of the essence clause. ...

Now, I’ll turn momentarily to the law. The *Bowlen (Bowlen v. Digger Excavating (1993) 2001 ABCA 214*) decision is a fine example of the Alberta Court of Appeal recognizing the importance of “Time is of the essence”. They strictly enforce that because there is no provision for extension of closing. There is nothing that allowed either party to extend other than by agreement. The decision makes perfect sense and is logical having regard to the legal history of time is of the essence clauses.

[6] The Master agreed with the position of the Defendant Germain Residences Ltd. that they had an option to postpone the possession date if for any reason the vendor is subsequently unable to grant possession on the possession date. The possession date shall be postponed from time to

time to the date in which the vendor advises the purchaser that possession is actually available. In his conclusion, the learned Master stated “that is the broad right that the vendor has and exercised properly in this case” and he dismissed the claim of the plaintiff.

STANDARD OF REVIEW

[7] This is an interpretation of a contract. A question of law. Therefore the standard of review is correctness.

CONCLUSION

[8] I agree that the Master has correctly analysed the facts and the law and therefore the appeal is dismissed.

REASONS

[9] Pursuant to the Agreement of Purchase and Sale, the Plaintiff agreed to purchase the condominium unit \$2,226,000 and agreed to and did pay over \$445,200 by way of a deposit to purchase the subject property. In his Affidavit filed on July 22, 2010, Dinmohamed Sunderji among other things states as follows:

I anticipated that the possession date would be on or about October 1, 2009 as indicated in paragraph 6(a) of the Purchase Agreement. However, I did understand that the actual possession date was in the conclusive control of Germain Residence as indicated later in that paragraph. [p. 2, para. 4]

[10] It is clear that the Plaintiff was experienced in the real estate investment market and that the Plaintiff understood that the actual possession date was not in his control and would be set within the exclusive control of Defendant.

[11] It is understood by both parties that Germain determined that the original possession date would be June 21, 2010 but was required to postpone it due to a delay in obtaining an occupancy permit from the City of Calgary. The Plaintiff knew that he would not be able to receive possession of the property without the occupancy permit and in fact had made arrangements for taking possession and paying for the property in his absence. The delay of the closing date from June 21st to June 28th was not within the control of the developer and in any event, the developer had the ability to postpone the possession date.

[12] This matter is before me as an appeal from the Master on the record without any new evidence being tendered. I am satisfied that the learned Master identified the appropriate legal standard, applied that standard to the law and kept to the correct conclusion

[13] The appeal is dismissed.

Heard on the 15th day of February, 2012.

Dated at the City of Calgary, Alberta this 9th day of March, 2012.

W.P. Sullivan
J.C.Q.B.A.

Appearances:

David F. Younggren, Q.C.
for the Plaintiff/Appellant

Roger F. Smith
for the Defendant/Respondent