COURT OF APPEAL FOR ONTARIO

CITATION: Himidan v. Farquharson, 2019 ONCA 575
DATE: 20190708
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2019 ONCA 575 (CanLII)

Huscroft, Trotter and Zarnett JJ.A.

BETWEEN

Dr. Sharifa Himidan

Plaintiff/Defendant by Counterclaim
(Appellant)

and

Emma Louise Farquharson and Sheehan Patrick Burns

Defendants/Plaintiffs by Counterclaim
(Respondents)

Tanya Pagliaroli and Bethany McKoy, for the appellant

Courtney Raphael and Brian Chung, for the respondents

Heard: June 27, 2019

On appeal from the judgment of Justice Heather McArthur of the Superior Court of Justice, dated November 16, 2018.

Zarnett J.A.:

[1] At the conclusion of argument the court dismissed the appeal with reasons to follow. These are those reasons.

[2] The appellant agreed to sell her home at 45 Moore Avenue, Toronto to the respondents. Between the signing of the Agreement of Purchase and Sale

("APS") and the date the sale was to close, the neighbouring property owners asserted that the appellant did not own all of what appeared visually to be the driveway of 45 Moore Avenue. The neighbours pursued that assertion, including by fencing off a two-foot-wide strip of the 26-foot-long driveway they claimed encroached on their property. The appellant disputed the neighbours' assertion, but could not resolve the dispute before the closing date. It is the subject of outstanding litigation between the appellant and the neighbours.

[3] The respondents refused to close the purchase under the APS, on the basis that the appellant could not convey clear title to the entire driveway. The appellant commenced an action for damages for the failure to close. The respondents counterclaimed for return of their deposit. The parties each moved for summary judgment to dismiss the claims against them and for judgment on their own claims.

[4] The motion judge found in favour of the respondents. In her view the APS represented that the appellant owned all of what was visually apparent as the functioning private driveway of 45 Moore Avenue at the time the APS was executed. She found that there was a defect in the appellant's title due to the dispute over whether a two-foot-wide strip of the driveway was owned by the appellant and could be conveyed to the respondents. And she found that the defect was significant enough to entitle the respondents to refuse to close.

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[5] The appellant raises the following grounds of appeal:

a) The motion judge misinterpreted the APS. Properly interpreted, the appellant only agreed to sell her home with a seven-foot-wide driveway. That the driveway was nine feet wide when the APS was signed, and that the neighbour claimed two feet of that width, were irrelevant to the appellant's obligations and the respondents' rights under the APS. There was no title defect in what the appellant had actually agreed to sell.

b) In any event, the title defect of a two-foot discrepancy in the width of the driveway was not significant enough to permit the respondents to refuse to close.

[6] In considering these issues, the appellant argues that the motion judge's determinations are reviewable on a correctness standard. In any event, she says the motion judge made palpable and overriding errors in arriving at her interpretation of the APS.

The Standard of Review

[7] I reject the appellant's submission that a correctness standard of review should apply. The interpretation of a contract is generally subject to a deferential standard of review because it typically involves issues of mixed fact and law; only where an extricable error of law is involved is a correctness standard applied:

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Sattva Capital Corp. v. Creston Moly Corp., 2014 SCC 53, [2014] 2 S.C.R. 633, at paras. 50, 52-55. In my view no such error has been identified.

[8] Nor is this a case attracting a correctness standard of review because the APS in part uses a standard form. This is not a case of a standard form contract entered into under circumstances where there is no relevant factual matrix, such as a contract of adhesion. Some of the disputed clauses of the APS are not part of the pre-printed standard form contract, but were added as Schedules. And there is a factual matrix concerning the matter that is specific to these parties and assists in interpreting the APS. A deferential standard of review is thus applicable: *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co*., 2016 SCC 37, [2016] 2 S.C.R. 23, at para. 48.

The Interpretation of the APS

[9] Prior to executing the APS with the respondents, the appellant had listed her home for sale. The property was advertised as having a recently upgraded heated private driveway and a garage. The respondents viewed the property before submitting an offer. At that time, the property visually appeared to include a driveway leading, unobstructed, to the garage, and a fence at the edge of the driveway separating it from the neighbours' property.

[10] The APS which resulted from the respondents' offer provided for the sale of 45 Moore Avenue for $1,905,000. It described the subject property as having a

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frontage of 24 feet and a depth of 95 (irregular) feet. The driveway is mentioned in two schedules to the APS.

[11] Schedule D is a 1987 survey of the property which shows, among other things, a private driveway of 26 feet by seven feet.

[12] Schedule B contains a clause which states that the respondents accept that "there is a mutual right of way registered on title to the subject property as per the attached survey (between the houses)." It also provides that the respondents accept that the survey "may not show the current location of all structures, fences landscaping, decks etc.", and that they will not object with respect to that.

[13] Schedule B contains a further "driveway clause" by which the appellant represents, and the respondents accept, that: "the subject property driveway is owned by 45 Moore Avenue, but is subject to a right of way. The driveway functions as a private driveway."

[14] The width of the driveway as it visually appeared at the time of the APS was nine feet. The appellant argues that the motion judge erred in relying on the respondents' understanding that they were "getting" the driveway they visually saw. She argues that in approaching the matter that way she allowed the surrounding circumstances to overwhelm the text of the APS, contrary to *Sattva*,

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at para. 57. She argues that the text of the Schedules means the appellant was selling a property with a seven-foot-wide driveway.

[15] I disagree. The motion judge was entitled to interpret the words used in light of the factual matrix, in order to "deepen" her understanding of "the mutual and objective intentions of the parties as expressed in the words of the contract": *Sattva*, at paras. 57-58. On a fair reading of her decision, that is what she did.

[16] The physical and visual appearance of the property at the time of the contract were objective facts known to the parties, which are particularly useful in interpreting the meaning of the description of the property in an agreement to purchase a home. As this court noted in *LeMesurier v. Andrus* (1986), 54 O.R. (2d) 1 (C.A.), leave to appeal ref'd, [1986] 2 S.C.R. v, at p. 4:

> A reasonable person entering into the contract would assume that the purchase of "9 Dinnick Crescent…with private drive to the West" would include everything which to the eye appeared part of the driveway[.]

[17] The motion judge was entitled to find as she did, that "any reasonable person would assume that the driveway referred to in the APS as owned by 45 Moore would include what appeared to the eye to be the driveway", which was "not seven feet wide but nine."

[18] Interpreting the APS as including the driveway as it visually appeared at the time of contracting leads to no inconsistency with the wording of either Schedule. Schedule D containing the survey and the 1987 driveway dimensions

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does not assist the appellant because Schedule B primarily refers to it for the purpose of identifying a mutual right of way (which is not in issue) and expressly states that it may not show current locations of structures, fences, etc. Moreover, the dimensions provided on a 1987 survey, specifically not represented to be current, could not reasonably be taken to mean that what was being sold was only 7/9 of what appeared to the eye to be part of the driveway, or that the APS placed the risk of that occurring on the respondents.

[19] Schedule B's driveway clause does not assist the appellant because it confirms that the driveway is owned by the sale property and functions as a private driveway; those representations are inconsistent with the neighbours' assertion of ownership and what the appellant was able to convey. The statement about a right of way also does not help the appellant because the neighbours asserted ownership, not a right of way, over part of the driveway.

[20] A contract must be interpreted in accordance with sound commercial principles and good business sense: *Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust*, 2007 ONCA 205, 85 O.R. (3d) 254, at paras. 24, 50. On the appellant's argument, she was agreeing to sell only a seven-foot strip of the driveway. If the appellant's contentions against the neighbours are correct, namely that the appellant owned the other two-foot strip by adverse possession, then the APS was reserving that two-foot strip to her (because she was not including it in the sale). If the neighbours' assertion is right, then the appellant

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was selling a seven-foot strip of a nine-foot-wide driveway under circumstances in which the neighbours could block the other two feet, interfering with the functioning of the driveway as it appeared at the time of the APS. In either event, the appellant's proposed interpretation does not make commercial sense.

[21] Accordingly I see no error in the motion judge's finding that the there was a title defect in what the appellant had agreed to convey.

The Significance of the Defect

[22] The appellant argues that the motion judge relied on the respondents' subjective view of the driveway's importance in deciding that the title defect was significant enough to justify the respondents' refusal to close. But the respondents' view was relevant: *Kelly v. Semple*, 2010 ONSC 1020, at paras. 13-14. Further, there was abundant objective evidence of the title defect's significance. The neighbours wanted $200,000 in exchange for giving up their assertion of ownership over the two-foot strip. The appellant herself gave evidence that blocking the two-foot strip off with a fence interfered with the use of the driveway, both restricting the ability to open a car door and blocking access to the garage. When the appellant resold the property, the agreement of purchase and sale specifically disclosed the ongoing litigation with the neighbours over the driveway, and the sale price was negatively affected: the appellant realized an amount $145,000 less than that the respondents had agreed to pay.

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[23] There is no error in the motion judge's conclusion that the title defect was significant enough to permit the respondents to refuse to close. The respondents' reliance on it in refusing to close was neither arbitrary nor capricious: *LeMesurier*, at p. 7.

Conclusion

[24] The appeal is dismissed. In accordance with the agreement of the parties, the respondents are to have their costs of the appeal in the amount of $12,621.02, inclusive of disbursements and applicable taxes.

Released: "GTT" July 8, 2019

"B. Zarnett J.A."
"I agree. Grant Huscroft J.A."
"I agree. G.T. Trotter J.A."

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