COURT OF APPEAL FOR ONTARIO

CITATION: VanderMolen Homes Inc. v. Mani, 2025 ONCA 45
DATE: 20250123
DOCKET: COA-24-CV-0606

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Sossin, Madsen and Pomerance JJ.A.

BETWEEN

VanderMolen Homes Inc.

Plaintiff (Respondent)

and

Rennichan K. Mani and Seeniya Joseph

Defendants (Appellants)

Michael Simaan, for the appellants

Jack Masterman, for the respondent

Heard: December 19, 2024

On appeal from the judgment of Justice Evelyn M. ten Cate of the Superior Court of Justice dated May 6, 2024, with reasons reported at 2024 ONSC 2617.

REASONS FOR DECISION

OVERVIEW

[1] The appellants are a couple who sought to purchase an under-construction home located in Exeter, Ontario from the respondent, VanderMolen Homes Inc. The deal fell through. The question at the summary judgment motion and now on

appeal is whether the parties had a binding contract, and if so, what damages are owed for its breach.

[2] On January 13, 2022, the appellants entered into an agreement of purchase and sale for the property. They agreed to pay $937,400 and paid a $5,000 deposit upon signing. The closing date was scheduled for August 31, 2022.

[3] The agreement of purchase and sale was conditional upon the fulfillment of certain conditions. The deadline to confirm fulfilment of the conditions was on January 20, 2022, and a second deposit in the amount of $88,740 was due upon removal of all conditions.

[4] On January 20, 2022, the appellants offered to extend the conditional terms to January 26, 2022. The extension offer was irrevocable until 11:59 p.m. on January 21, 2022, failing which it would become null and void. The respondent signed the confirmation of acceptance one day after the deadline, on January 22, 2022. On January 26, 2022, the appellants signed a waiver of the conditions and paid the second deposit.

[5] In May and June 2022, the respondent texted the appellants' number on file regarding interior design selections, with no response. The appellants alleged they heard nothing for six months and assumed the deal was not proceeding. However, there is no evidence that they contacted the respondent to request the return of their deposits or indicate that they did not intend to complete the purchase.

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[6] On August 12, 2022, the respondent reached out to one of the appellants, Mr. Mani, about a pre-delivery inspection. Mr. Mani did not indicate that the deal would not be closed. The pre-delivery inspection was subsequently scheduled for August 17, 2022, but cancelled by the appellants the day it was set to occur.

[7] On August 17, 2022, a lawyer helping the appellants informed the respondent's real estate counsel that the appellants would not complete the purchase. This was confirmed again on August 29, 2022, and the appellants requested that the property be listed for sale to lessen damages. The respondent subsequently retained a realtor to list the property. Two conditional offers fell through until the property was purchased by a third party for $705,000. That transaction closed on October 11, 2023.

[8] The respondent brought a summary judgment motion, seeking damages for breach of contract. The respondent sought the difference between the price in the original agreement and the ultimate sale price, minus the deposits paid by the appellants. They also sought damages for "carrying charges" (e.g., property taxes, utilities, and maintenance costs) between the original closing date and the ultimate closing date with the third party.

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Decision below

[9] The motion judge agreed with the respondent that the appellants breached the agreement for purchase and sale. She granted the motion for summary judgment after determining the following three issues:

1. Whether there was a genuine issue requiring a trial;
2. Whether the respondent missing the deadline to accept the extension offer was fatal to the contract since it contained a “time is of the essence” clause; and
3. If the contract survived, what would be the appropriate amount of damages payable?

No genuine issue requiring trial

[10] The appellants did not argue there were genuine issues requiring a trial because they intended to bring a cross motion for summary judgment seeking the return of their deposits. The motion judge found, considering r. 20.04(2.1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, that she could reach a just and fair determination on the merits based on the evidence before her, which included transcripts of cross-examinations and relevant documentation.

The effect of the “time is of the essence” clause

[11] The motion judge cited this court’s judgment in *Di Millo v. 2099232 Ontario Inc.*, 2018 ONCA 1051, 430 D.L.R. (4th) 296, where the term “time is of the

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essence” in a commercial real estate contract was interpreted to mean that a time limit in the agreement is essential, such that a breach of that time limit will permit the innocent party to terminate or rescind the contract: at para. 31. The respondent accepted the appellants’ offer to extend the conditional terms of the agreement for purchase a sale a day after the extension offer was set to expire. The appellants argued that the extension offer was no longer capable of acceptance because the respondent did not expressly indicate that they wished to revive the agreement for purchase and sale. The appellants relied on *Firoozi v. 809963 Ontario Limited*, 2005 CanLII 56173 (Ont. S.C.), for the proposition that if waivers are not delivered on time, the contract is null and void.

[12] The motion judge did not find *Firoozi* applicable to the case. Instead, she found the case was analogous to *Coffey v. High*, 2024 ONSC 420. In *Coffey*, the parties entered into an agreement of purchase and sale of a cottage. The agreement required a deposit to be paid within 24 hours and stipulated that “time was of the essence.” The purchaser paid the deposit days after it was due, and the vendor accepted it. Five months later, the vendor argued that the agreement was void because the deposit was paid late. The court rejected the vendor’s argument and held that the effect of the repudiation depends on the election by the non-repudiating party. If the non-repudiating party treats the contract in full force and effect, it remains as such for both sides. If the non-repudiating party accepts the

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repudiation, then the contract is rescinded: at para. 45; see also *Nicolaou v. Sobhani*, 2017 ONSC 7602, 90 R.P.R. (5th) 97, at paras. 40-41.

[13] Based on the principles in *Coffey* and *Nicolaou*, the motion judge found the agreement of purchase and sale became binding on January 26, 2022, when the appellants delivered a waiver of conditions and paid the second deposit. She found the appellants anticipatorily breached the contract on August 17, 2022, when their lawyer indicated they were unable to complete the purchase.

[14] The appellants could have elected to terminate the agreement for purchase and sale when the respondent missed the extension offer deadline, but they continued to treat the agreement as being in full force and effect. For instance, the appellants never requested the return of their deposits prior to this litigation and their lawyer asked the respondent to list the property in order to "limit damages", demonstrating that they knew the agreement was still valid.

The appropriate quantum of damages

[15] The motion judge awarded expectation damages in the amount of $142,757.89. This totaled the loss on sale price ($232,400) plus property taxes ($1,164.97) and utilities ($2,932.92), less the deposits ($93,740.00). This was the amount required to put the respondent in the position it would have been in had the contract been performed as agreed.

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ISSUES

[16] The appellants raise three errors committed by the motion judge requiring appellate intervention:

1. Did the motion judge err in treating the expiry of a “conditional agreement” as analogous to the repudiation of a “firm and binding contract”?
2. Did the motion judge err in failing to appreciate that the expiry of the offer deadline ended the conditional agreement of purchase and sale?
3. Did the motion judge err in considering the parties’ subsequent conduct?

ANALYSIS

Standard of review

[17] The standard of review is not in dispute. The applicable standard of review for questions of law is correctness. Appellate interference is warranted where a motion judge has made an extricable error of law, such as the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor. Factual findings and findings of mixed fact and law are entitled to deference and are reviewable on a standard of palpable and overriding error: *Housen v. Nikolaisen,* 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 36.

[18] The question as to whether a binding contract was formed is a question of mixed fact and law, reviewable for palpable and overriding error unless there is an

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extricable error of law: *Farrell v. Riley*, 2024 ONCA 449, at para. 34, citing *Angus v. CDRW Holdings Ltd.*, 2023 BCCA 330, 53 R.P.R. (6th) 173, at paras. 31-36.

The trial judge did not err in finding the agreement was binding

[19] Regarding the first issue on appeal, the appellants argue that the motion judge failed to appreciate that the agreement of purchase and sale of the home never became a firm and binding contract because it was conditional. As such, they argue that the motion judge's reliance upon *Coffey* as an "analogous case" is misplaced because that case concerned a firm contract.

[20] We do not find this argument persuasive because the appellants subsequently delivered notice of fulfilment of conditions and paid the second deposit on January 26, 2022. The motion judge found the agreement of purchase and sale became binding on that date. For this reason, the motion judge appropriately distinguished *Firoozi* as that case dealt with an agreement of purchase and sale of a franchise that had several uncertainties, including a lack of resolution regarding the terms of the mortgage.

[21] According to *Bawitko Investments Ltd. v. Kernels Popcorn Ltd.* (1991), 79 D.L.R. (4th) 97 (Ont. C.A.), which was relied upon in *Firoozi*, "when the original contract is incomplete because essential provisions … have not been settled or agreed upon; or the contract is too general or uncertain … or the understanding or intention of the parties … is that their legal obligations are to be deferred, the

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original or preliminary agreement cannot constitute an enforceable contract": at pp. 103-104. In this case, the motion judge found that the contract had been agreed upon as of January 26, 2022, and that the parties understood their specific obligations under the agreement of purchase and sale had crystallized at that point in time. We add that *Firoozi* also dealt with a condition precedent where fulfilment depended entirely upon the will of a third party (approval by the franchisor), which further undermines its applicability to this appeal.

[22] For these reasons, we reject the appellants' submission that the trial judge erred in finding the agreement between the parties was binding.

The trial judge did not err in finding that the contract had not been repudiated

[23] Regarding the second issue on appeal, the appellants argue that the expiry of the extension offer deadline ended the contract. Recall that on January 20, 2022, the appellants offered to extend the conditional terms to January 26, 2022. The extension offer was irrevocable until 11:59pm on January 21, 2022, failing which it would become null and void. The respondent signed the confirmation of acceptance one day later, on January 22, 2022. On January 26, 2022, the appellants signed the waiver of conditions and paid the further deposit of $88,740.

[24] The motion judge stated, at para. 44, "I therefore find that although the contract could have been terminated by the [appellants] at 12:00 midnight on

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January 21, 2022, after the [respondent] missed the deadline, they did not elect to treat the contract as at an end."

[25] While the expiry of the extension offer was a repudiation, the motion judge's finding that the appellants continued to perform under the contract instead of accepting the repudiation is entitled to deference. The case law clarifies that "a repudiatory breach does not automatically bring an end to a contract. Rather, it confers a right upon the innocent party to elect to treat the contract at an end thereby relieving the parties from further performance. As a general rule, the innocent party must make an election and communicate it to the repudiating party within a reasonable time": *Place Concorde East Limited Partnership v. Shelter Corp. of Canada Ltd.* (2006), 270 D.L.R. (4th) 181 (Ont. C.A), at para. 50, citing *Chapman v. Ginter*, [1968] S.C.R. 560, at p. 568. In this case, as the motion judge found, the parties treated the contractual obligations as ongoing and binding.

[26] We see no error in this aspect of the motion judge's analysis or conclusion.

The trial judge did not err in finding the evidence of subsequent conduct should be admitted

[27] Regarding the third issue on appeal, the appellants argue that the trial judge erred in admitting evidence of subsequent conduct in order to conclude that the parties treated the contractual obligations as ongoing and binding. Among such

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pieces of evidence, the request by the appellants' counsel to list the house for sale in August 2022 in order to lessen damages is particularly compelling.

[28] Evidence of subsequent conduct should only be admitted if the contract remains ambiguous after considering its text and factual matrix: *Shewchuk v. Blackmont Capital Inc.*, 2016 ONCA 912, 404 D.L.R. (4th) 512, at para. 46. In our view, the subsequent conduct was relevant here since the parties contested whether the missed deadline to accept the extension was fatal.

[29] We see no error in the motion judge considering this conduct since the conduct appeared consistent, mutual, close to the time of contracting, and not self-serving: see *SS&C Technologies Canada Corp. v. The Bank of New York Mellon Corporation*, 2024 ONCA 675, at para. 50. When these characteristics are present, subsequent conduct is, as here, "sometimes the best evidence of whether [the parties] objectively intended to form a contract."

DISPOSITION

[30] For the reasons set out above, the appeal is dismissed.

[31] The respondent is entitled to costs in the agreed upon amount of $10,000, all-inclusive.

"L. Sossin J.A."
"L. Madsen J.A."
"R. Pomerance J.A."

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