

CITATION: 1420041 Ontario Inc. v. 1 King West Inc., 2010 ONSC 876
COURT FILE NO.: 05-CV-300372PD3
DATE: 20100219

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 1420041 ONTARIO INC., Plaintiff

AND:

1 KING WEST INC., Defendant

BEFORE: Stewart J.

COUNSEL: *Paul D. Guy*, Counsel, for the Plaintiff

P. M. Conway, Counsel, for the Defendant

HEARD: October 7, 2009

ENDORSEMENT

[1] 1 King West Inc. has brought this motion to strike or stay this action (the “Individual Action”) brought against it by 1420041 Ontario Inc.

[2] In support of its argument for a stay, 1 King West Inc. relies on Rule 21.02(3) of the *Rules of Civil Procedure*. It argues that the Individual Action duplicates another proceeding pending before this Court, namely: *Toronto Standard Condominium Corporation No. 1703 v. 1 King West, et al.*, Court File No. 07-CV-329252PD1 (the “Condo Action”). It is also argued that 1420041 Ontario Inc. lacks the necessary legal capacity to pursue an action on its own for the relief it seeks as a result of the effect of section 23(1) of the *Condominium Act*, S.O. 1998, c.19, as amended.

Background

[3] 1420041 Ontario Inc. agreed to purchase from 1 King West Inc. several units on the 15th floor of the building at the corner of King and Yonge Streets in Toronto. Four units were finished and furnished in accordance with the requirements of the Rental Manager for participation in the short term rental program offered by it. An additional four units were to be finished as a single commercial office space in accordance with 1420041 Ontario Inc.’s instructions and specifications.

[4] Some of the finishes requested by 1420041 Ontario Inc. are claimed by 1 King West Inc. to be “extras” to the purchase price, requiring an increase to the original purchase price. 1420041 Ontario Inc. has declined to pay any extra cost, maintaining that its finishing requirements were part of what was negotiated in the original contracts of purchase and sale and

are therefore included in the price. As the date for occupancy closing approached, 1420041 Ontario Inc. also alleged that the workmanship in the units was generally shoddy. It claimed a holdback of \$385,000.00 for these alleged deficiencies.

[5] 1 King West Inc. agreed to close the transaction and resolve the dispute with 1420041 Ontario Inc. by way of this Individual Action.

[6] On November 15, 2006 1420041 Ontario Inc. commenced the Individual Action. 1 King West Inc. delivered a Statement of Defence, disputing all claims and relying on the terms of the Agreements of Purchase and Sale. Amended pleadings were served and filed to address certain additional issues raised in the Individual Action.

[7] In March 2007, Toronto Standard Condominium Corporation No. 1703 ("TSCC 1703") commenced the Condo Action which claims damages, on its own behalf and on behalf of all unit owners, against 1 King West Inc. and certain other defendants for alleged breach of warranty to all purchasers of units and alleged construction deficiencies. 1420041 Ontario Inc. is among the unit owners on behalf of whom TSCC 1703 is pursuing the Condo Action.

[8] Prior to issuing the claim, and in compliance with the requirements of the *Condominium Act*, 1998, TSCC 1703 issued notices to all unit owners advising of its intention to commence the Condo Action and to sue on its own behalf and on behalf of all unit owners in respect of alleged deficiencies to the common elements. TSCC 1703 advised unit owners that it intended to bring a claim on their behalf for damages for alleged construction deficiencies in their individual units, and that individual unit owners could opt out of the Condo Action in respect of their units.

[9] In response to a demand for particulars served by 1 King West Inc. in the Condo Action, TSCC 1703 has stated that the claim on behalf of unit owners was asserted on behalf of all of the unit owners, including 1420041 Ontario Inc.

[10] In 2008, 1 King West Inc. took the position that the Individual Action duplicated the Condo Action and therefore should be stayed. Although 1 King West Inc. had threatened to bring a motion to stay the Individual Action, documentary discovery in it nevertheless was completed. 1 King West Inc. also completed its oral examination for discovery of a representative of 1420041 Ontario Inc. At present, 1420041 Ontario Inc. is attempting to complete its examination for discovery of 1 King West Inc.'s representatives. 1 King West Inc. now has moved to stay 1420041 Ontario Inc.'s action on grounds outlined above.

[11] 1 King West Inc. notes that on the examination for discovery of a representative of 1420041 Ontario Inc. in the Individual Action, some of the complaints and claims with respect to its units include alleged deficiencies in the exterior doors and windows of the units which 1 King West Inc. says are part of the common elements of the building and therefore part of the subject matter of the Condo Action. Further documentary production with respect to what 1 King West Inc. says are common elements has been requested by 1420041 Ontario Inc. 1 King West Inc. therefore asserts that the Individual Action for damages with respect to construction deficiencies in its units is duplicative of the claim for damages in respect of unit deficiencies asserted by TSCC 1703.

[12] It is submitted on behalf of 1420041 Ontario Inc. that its Individual Action does not include claims with respect to common issues and that doors and windows are integral parts of the individual units owned by it.

Issues

- A. Does 1420041 Ontario Inc. have the necessary legal capacity to raise claims with respect to TSCC 1703's common elements?
- B. Is there another proceeding pending in Ontario between the same parties in respect of the same subject matter raised in this action?

Law and Discussion

Issue A: Does 1420041 Ontario Inc. have legal capacity to raise claims with respect to TSCC 1703's common elements?

[13] Section 23(1) of the *Condominium Act* provides that:

- (1) Subject to subsection (2), in addition to any other remedies that a corporation may have, a corporation may, on its own behalf and on behalf of an owner,
 - a. commence, maintain or settle an action for damages and costs in respect of any damage to common elements, the assets of the corporation or individual units; and
 - b. commence, maintain or settle an action with respect to a contract involving the common elements or a unit, even though the corporation was not a party to the contract in respect which the action is brought.

[14] Section 23(1) provides that the condominium corporation "may" commence an action with respect to common elements. The provision grants a condominium corporation standing to pursue an action in regard to property that it otherwise would not enjoy a due to the fact that the property is owned in common by the unit holders and not by the condominium corporation itself.

[15] The decisions in *Loader v. Rose Park Wellesley Investments Ltd.* (1980), 29 O.R. (2d) 381 and *York Condominium Corp. No. 148 v. Singular Investments Ltd.* (1977), 16 O.R. (2d) 31 interpreted the provisions of the *Condominium Act* then in force in the context of purported class actions brought by some unit holders. I see nothing in those decisions, each of which is based upon facts quite different from these, which operates to preclude a unit holder from pursuing an individual action for damages or other redress.

[16] *Hamilton v. Ball*, [2006] B.C.J. No. 1098 (B.C.C.A.) involved the interpretation of British Columbia's condominium legislation. Section 171(1) of the *Strata Property Act* contained language similar to that found in Ontario's *Condominium Act*, as follows:

The strata corporation may sue as representative of all owners, except any who are being sued, about any matter affecting the strata corporation, including any of the following matters:

- a. the interpretation of this Act, the regulations, the bylaws or the rules;
- b. the common property or common assets;
- c. the use or enjoyment of a strata lot;
- d. money owing, including money owing as a fine, under this Act, the regulations, the bylaws or the rules.

[17] The British Columbia Court of Appeal decided that this permissive rather than mandatory language did not give exclusive power to bring an action concerning common elements to the Strata Corporation. In so deciding, the Court stated (at p. 27):

As for the notion that individual owners should not be permitted to "circumvent" s.171 and sue directly for injury or damage to their interests in common property, I see nothing in the Act taking away that right, which I view not as statutorily created, but as a common law incident of the ownership of property unknown to the common law. Section 171 creates a mechanism by which a three-fourths majority of owners may use the strata corporation as their vehicle for suing and spread the expenses thereof. But in the words of Seaton J.A. in *Strata Plan No. VR 368 v. Marathon Realty Co.* (1982), 41 B.C.L.R. 155 at para. 14, "that is as far as the legislation goes". It would take much clearer language, in my respectful view to remove the right of individual owners to enforce their rights "on their own hook". Section 171 is not thereby "circumvented", but is simply inapplicable. Nor do I foresee that frivolous actions and multiple claims are likely to result, since the court retains the ability to make orders as to costs, and the owners who do take legal action must bear the expenses of the litigation themselves, like any other co-owners of property.

[18] In contrast to the Ontario and British Columbia legislation, section 12(6) of the Newfoundland and Labrador *Condominium Act* provides as follows:

“An action with respect to, arising from, or relating to a common element shall be brought by or against the corporation in its own name...”

[19] Accordingly, in *Kelly v. Reardon*, [2004] N.J. No. 30 (Nfld. P.C.S.C.) it was held that condominium corporations in Newfoundland and Labrador had exclusive jurisdiction in respect of claims involving common elements (at para. 20):

The legislation in this province allows only a condominium corporation to take action in the circumstances alleged by the plaintiffs herein. The use of the word “shall” in the context of the statutory scheme not only permits such an action by the corporation but restricts it to the corporation in a “common element” situation such as this.

[20] In my view, the language of the Ontario *Condominium Act*, 1998 merely grants a condominium corporation the ability to commence an action for damages and costs in respect of common elements. It does not hinder or remove the ability or legal capacity of an individual unit owner to maintain an individual action with respect to its own property in appropriate circumstances, nor does it necessarily preclude the possibility of individual action with respect to common elements.

[21] This conclusion, however, does not serve to displace the ability of the Court to exercise its discretion to grant a stay if it considers the requirements of Rule 21.01(3) have been met. Similarly, it does not affect the possible arguments available to a defendant as to the potentially serious costs consequences that should follow upon the determination of an action.

Issue B: Is there another proceeding pending in Ontario between the same parties in respect of the same subject matter raised in this action?

[22] Rule 21.01(3)(c) of the *Rules of Civil Procedure* provides that an action may be stayed on the ground that another proceeding is pending in Ontario between the same parties in respect of the same subject matter.

[23] A stay of proceedings should only be ordered in the clearest of cases, where the party seeking the stay can clearly demonstrate that (1) continuing the action would cause substantial prejudice or injustice to the moving party (not merely inconvenience and expense), and (2) the stay would not cause an injustice to the responding party (see: *Canadian Express Ltd. v. Blair* (1992), 11 O.R. (3d) 221. (Gen. Div.); *TDL Group Ltd. v. 1060284 Ontario Ltd.*, [2000] O.J. No. 4582 (S.C.J.)). As McNair J. stated in *Varnam v. Canada (Minister of National Health and Welfare)* (1987), 12 F.T.R. 34 at 36 (F.C.T.D.):

A stay of proceedings is never granted as a matter of course. The matter is one calling for the exercise of a judicial discretion in determining whether a stay should be ordered in the particular circumstances of the case. The power in stay should be exercised sparingly, and a stay will only be ordered in the clearest cases. In an order to justify a stay of proceedings two conditions must be met, one positive, and the other negative: (a) the Defendant must

satisfy the court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the court in some other way; and (b) the stay must not cause an injustice to the Plaintiff. On both the burden of proof is on the Defendant. Expense and inconvenience to a party or the prospect of the proceedings being abortive in the event of a successful appeal are not sufficient special circumstance in themselves for the granting of a stay.

[24] In my view, although there may be some degree of overlap between the Individual Action and the Condo Action advanced on behalf of, *inter alia*, 1420041 Ontario Inc. despite protestations to the contrary by 1420041 Ontario Inc., the “same parties and the same subject matter” precondition is not satisfied in this case. The Plaintiff in this Individual Action is 1420041 Ontario Inc. The Plaintiff in the Condo Action is TSCC 1703. Separate legal entities, even if they have a commonality of interest, are not the same parties (see: *Williams v. 963659 Ontario Ltd.*, [2004] O.J. No. 5789 (Ont. Div. Ct.)).

[25] Further, the Defendants in the two proceedings are quite different. 1 King West Inc. is the sole Defendant in this Individual Action, while it is just one of nine defendants in the Condo Action.

[26] In addition, the subject matter of the two proceedings is not the same. The Condo Action involves causes of action against 1 King West Inc. which include claims of negligence, and raises issues against it, such as alleged deterioration to the building foundation, which are not raised in this Individual Action.

[27] Similarly, this Individual Action involves issues of fact and law that are not raised in the Condo Action, such as the allegation of the existence of a collateral contract and the quality of the special custom finishes requested by 1420041 Ontario Inc.

[28] If any questions or demands for production in this action are considered by 1 King West to be irrelevant, improper or to extend beyond what is made relevant by the pleadings, any such concern may be dealt with by way of a motion before a Master.

[29] In addition, to be granted a stay 1 King West Inc. must also show that, were a stay denied, it would suffer substantial prejudice that is not merely inconvenience and expense. In this case, I consider any inconvenience and expense it may sustain is merely of the same variety that accompanies any lawsuit.

[30] Factors to be considered in determining prejudice include the likelihood and effect of the two matters proceeding in tandem in two different forums, the possibility and effect of different results, the potential for double recovery, and the effect of possible delay (see: *Farris v. Staubach Ontario Inc.*, [2004] O.J. No. 1227 (Ont. S.C.J.)).

[31] 1 King West Inc. argues that without a stay there is a risk of double recovery or inconsistent findings in these cases. I agree with the submission of counsel for 1420041 Ontario

Inc. that, if necessary, recovery in one proceeding can be raised in the other as a bar to double recovery and dealt with according to the applicable principle against double recovery. Although issue estoppel may or may not govern any common issues raised in the actions, I nevertheless consider that the risk of inconsistent findings is limited, and is not of sufficient magnitude to justify a stay.

[32] Accordingly, the requirements of Rule 21.01(3)(c) have not been met in this particular case.

Conclusion

[33] For these reasons, the motion for a stay is dismissed.

Costs

[34] If the parties cannot agree on the subject of costs, written submission may be delivered on behalf of the Plaintiff within 15 days of the date of release of this decision. Responding submissions may be delivered 10 days thereafter.

Stewart J.

Date: February 19, 2010