Court of Queen's Bench of Alberta

Citation: Lee v. Pointe of View Developments (Encore) Inc., 2010 ABQB 558

Date:
Docket: 0901 11869, 1001 01809
Registry: Calgary

Between:

Docket: 0901 11869

Corinna Lee and Pro Law Inc. and Darlene Lee

Applicants

- and -

Pointe of View Developments (Encore) Inc. and Pointe of View Marketing and Management Inc.

Respondents

And Between:

Docket: 1001 01809

General Investments Corp., Criterion Residences Inc., Christina Belseck, Marshall Cohen, David Cohen, Martin Amando, Madge Amando, Mark De Castro, Jennifer De Castro, Malcolm Chow, Kay Chow, Carol Chow, Saeed Shah, Joel Goldberg, Luise Kinsman, Ken Squirrell, 1298028 Alberta Corp., Jennifer Dear, Anna Law, Kent Law, Robin Kausner, Angela Louie, Felix Tam, Timothy Grieve, Jeffrey Grieve, Denise Grieve, Amita Sarkar, Ryan Bielefeld, Laura Bielefeld, Donna Simonson, Vernon Simonson, Tyler Knight, Farouk Dhanidina, Daniel Sharp, Kent Carter, Oleksiy Morozov, Natalya Morozova, Wilson Ma, Mathew McLeod, Wendy Lee and Hommel Abeng

Applicants

- and -

Pointe of View Developments (Encore) Inc. and Pointe of View Marketing and Management Inc.

Respondents

Reasons for Judgment
of the
Honourable Mr. Justice A.D. Macleod

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[1] These two actions were brought by purchasers of thirty condominium units which have been under construction in the Calgary beltline at 4th Street and 10th Avenue S.W. These units were purchased at various times between January and August, 2007 and for different prices. These proceedings were commenced by Originating Notice and the Applicants seek a declaration as to their rights under Rule 410 of the *Alberta Rules of Court*. They also invoke the *Condominium Property Act* R.S.A. 2000, c. C-22 and in particular, s. 67. Section 66 specifically provides that an application under the *Act* shall be by Originating Notice. Following the hearing of these special applications on May 17, 2010 counsel submitted supplementary briefs on the question of assignability. I am grateful for all their submissions.

[2] All of the purchasers entered into essentially the same standard form contract.

[3] Clause 30 of the Standard Terms and Conditions provided that:

> ... this Agreement shall enure to the benefit of and be binding upon the parties and their respective heirs, executors, administrators, successors and permitted assigns.

While paragraph 27 restricted the rights of purchasers to assign their agreements to third parties the agreements were otherwise silent on the assignment right of the developer, Resiance Corporation, the General Partner for the Gateway Gaslight Square Limited Partnership. The project was known as the Gateway Midtown Condominium Project (the Project).

[4] At the times of these transactions the Project was far from completion. Construction was underway in January 2007 and various dates of completion had been communicated to the purchasers ranging from late 2008 to early 2010. There was no drop-dead possession date in any of the agreements but clause 9 of the agreements stated as follows:

> 9. A condition to the obligations of both parties to complete the purchase and sale contemplated by this Agreement is registration of the Condominium Plan (to the extent required to create separate titles for the Unit and the Parking Unit) within a reasonable period of time taking into account a construction period, depending on phasing, which could last up to 2 ½ years. If this condition is not met or satisfied by the Vendor using commercially reasonable efforts, the obligations of purchase and sale under this Agreement may be terminated and upon 60 days' notice the Purchaser shall, if then in occupation of all or any part of the Property, vacate the Property and all monies paid by the Purchaser, except for Interim Occupancy Rent (as defined in section 5 of the Standard Terms and Conditions), shall be returned to the Purchaser without interest. For clarity, interim occupancy rent shall continue to be payable and the tenancy-at-will provisions contained in sections 5 and 6 of the Standard Terms and Conditions shall continue to

> govern the Purchaser's occupancy of the Property. This condition may not be waived by either party.

[5] Clause 33 of the Standard Terms and Conditions states that time is of the essence.

[6] On or about August 20, 2008 Resiance sent a notice to the purchasers advising them that due to "dramatic cost escalations, unabated for the last 3 years" construction on the Project had been suspended.

[7] In November 2008 a further notice was sent out to the purchasers advising them that a receiver manager had been appointed and that the project was going to be sold and the purchasers' deposits, which would continue to be protected by the Alberta New Home Warranty program, would be held in trust by Judy K. Wong & Company, Resiance's counsel.

[8] On December 19, 2008 by an Order of this Court the Project was sold to Pointe of View Marketing and Management Inc. (POV). In April 2009, POV took possession and sent the following letter to the purchasers:

> We are pleased to inform you that by Court Order, Pointe of View Developments (Encore) Inc. ("Pointe of View") is now the owner of the Gateway Midtown project. Also by Court Order, your contract has been assumed by Pointe of View and will continue in accordance with its terms. Please be assured that as the purchaser, you are not required to take any further action at this time.
>
> Pointe of View has taken possession of the property and has recommended construction on the lower parkade levels. The schedule of development will be split into three phases: first, the parkade including the first floor retail level; second, the West Tower which is to be renamed Encore and third, the East Tower.
>
> Pointe of View will appoint a new home sales representative to the project in the near future. Once that has occurred, purchasers will be contacted to advise on the status of the project. In the interim, if you have any questions regarding the process under which your contract was assigned to Pointe of View, please contact your legal counsel.
>
> Thank you in advance for your understanding and continued patience during this transition.

The purchasers were not canvassed as to their views on the assignment and their affidavits all state that they would not have agreed to another developer taking over the project.

[9] On May 7, 2009 a number of parties appeared before McDonald J. (then of this Court) including counsel for the mortgagee CDPQ Mortgage Investment Corporation (Mr. Collins), counsel for Resiance and counsel for Alberta New Home Warranty. Ms. Chow, on behalf of Resiance, said at page 8 of the transcript:

> Ms. Chow: Yes. My Lord, as Mr. Collins has mentioned, I am the – part of the firm that is holding the deposits for the 82 contracts. The amount of the deposits in the – is in a little over the 2.5 million mark. I do just want to let the Court know that over the past probably six months or so I have been contacted by numerous purchasers. Now, many of them will be – are for contracts for which the deposits will be returned because Pointe of View is not assuming, but a number of them are the – from the purchasers who have contacts that Pointe of View is assuming.
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> There's been a wide range of communication, everything from just telephone calls inquiring as to the status of the contract, to letters from purchasers requesting deposits back, to calls saying, you know, "I – I never would have signed with Pointe of View," and then there are a few letters from counsel for the purchasers as well. So that's the – the background from which I'm working on right now. And I would say that in terms of letters and e-mails perhaps from purchasers, there would be in the range of ten to 15 or so, so that is a little bit more formal communication. Letters from counsel, probably about seven or – seven or eight or so. Sometimes it's just merely telephone calls from counsel as well.
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> So at this point in time I – I – I would like some perhaps direction from the Court on how to proceed. I understand Mr. Collins is requesting that all these deposits be transferred over, but in light of the concern of the purchasers, I'm – I'm wondering if – if – if it is appropriate at all that, you know, they be given notice so that they have an opportunity to be heard, or in light of the vesting order that is there, saying that all the contracts can be assumed, that this order that Mr. Collins is seeking is sufficient to just have them being served with the order and saying that any future concerns you can deal with Pointe of View directly.

Mr. Collins on behalf of the mortgagee said at page 9 commencing line 20:

> Mr. Collins: I mean, the – the – the contracts have been assigned, and – and just by way of background, My Lord, the – the – the basis upon which the contracts were assigned was if there were no restriction on assign-ability in the contract, then the vesting order declared that those contracts be assigned. And these contracts Mr. Graseffa has

> appended the standard terms and conditions of those contracts in his affidavit. There's a restriction on the purchaser of those units to assign the contact, but no restriction on the ability of Resiance to assign the contracts.
>
> So what we've designed here is – is – is in paragraph 2 of the proposed form of order, My Lord, is that counsel for Resiance is to immediately provide notice to all of the purchasers that they've been assigned to Pointe of View, which is something that had to occur, in any event, and then paragraph 3 makes it very clear that they – they have all the rights that existed prior to the assignment, including the right to allege and seek a determination from the Court that they're entitled to treat the assigned agreement as being at an end and together with such other relief as the purchaser may seek and the Court may grant.
>
> So it seems to me that that is what happened. We're stating the obvious, but because we're dealing with individual purchasers, we wanted to make it clear that they understand that whatever rights they had when these contracts were in the hands of Resiance –
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> – continue through this process. And so if they wish to seek a declaration that the contract has been terminated, they're – they're entitled to do so. And it may – it may be that – that some or all of the purchasers elect to do that, or some or all do not
>
> Unfortunately, we don't have the benefit of Pointe of View here through counsel to – to advise of what they're going to do, but this – this is entirely designed to move this into Pointe of View's camp. That is to say they're going to have to deal these 82 people whose contracts have been assigned to them.

[10] The Order that was signed at the end of that hearing provided that the deposits be transferred to the trust accounts of counsel for POV and further provided that counsel for Resiance should immediately provide notice to all purchasers of the assigned agreements that the agreements had been assigned to POV and to forward the Purchasers a copy of the Order.

Paragraph 3 of the Order stated as follows:

> 3. Purchasers under Assigned Agreements continue to have all rights that existed prior to the assignment thereof under and pursuant to Assigned Agreements including, without limitation, the right to allege and seek a determination from the Court that such purchaser is entitled to treat the an (sic) Assigned Agreement as being at an end together with such other

relief as the purchaser may seek and the Court may order in respect of such determination.

[11] On December 4, 2009, counsel for many of the purchasers wrote to POV's counsel demanding return of the deposits. Counsel for two others had earlier made a similar demand in May 2009.

Position of the Purchasers

[12] The purchasers argue that they did not consent to the assignment of this project to POV. They argue that the obligation to build a condominium project cannot be assigned without the consent of the purchasers. They also argue that clause 9 gives them the right to terminate the contract because there is no firm completion date and the Condominium Plan is not yet registered. There are also arguments relating to whether or not the scope of the project has changed because there have been changes sought and received to the Land Use Bylaw by POV.

Position of POV

[13] POV argues that it is in the same position as the Vendor, Resiance. There has been a valid assignment at law. Furthermore, Clause 9 does not give the purchasers a right to terminate because a "reasonable period of time" has not passed. It submits that the parties were aware that there was no guaranteed possession date.

Are these contracts assignable?

[14] It is clear from the previous order of this Court that the purchasers are entitled to have their rights on this issue determined and if I find that these agreements require consent of the purchaser to be assigned then, absent that consent, they are at an end.

[15] In determining that issue we of course start with the words of the contracts. It is clear that clause 30 provides that the agreement shall enure to the benefit of "permitted assigns". This indicates to me that the parties contemplated assignment but only in cases where they are permitted by the contract or otherwise by the parties. Certainly clause 30 does not itself give permission.

[16] Typically the affidavits of the claimants provide that they were relying upon the developer Resiance to build their condominiums and would not have agreed to have POV do this. All expressed concern that under the circumstances of Resiance's insolvency they are mistrustful of POV's ability to complete the condominium in accordance with their expectations. None of the claimants have consented to POV's taking over the development; nor will they.

[17] POV argues that it is common in the building industry to sub-contract out many of the constituent elements of a development such as this. As long as the purchasers receive a product which complies with the specifications and terms of the agreement, they have no right to insist

on having these tasks performed by any particular entity. Moreover, POV points out that executory contracts do not automatically terminate upon insolvency.

[18] The general rule is that a party to a contract may assign rights but not liabilities so as to relieve himself of a contractual obligation. In other words, unless the purchasers in this case consent to the assignment to POV they would not be bound by it.

[19] There have been some inroads on this general rule. As Fridman says in *The Law of Contract in Canada* (5th ed.) (Toronto: Carswell, 2006) at page 696:

> However, it was recognized by more than one English case in the nineteenth century that there could be vicarious or substituted performance where no personal considerations influenced the choice of the original debtor or obligee. This development was summarized in the following sentence from the *Tolhurst* case.
>
> > there is a clear right to assign a contract where no services depending on individual skill or personal confidence are required.
>
> As was said by Hogg J. in the leading Ontario case of *Sullivan v. Gray*,
>
> > The law is well established that where the skill or knowledge or some other personal quality of a party with whom a contract has been made is a material ingredient of the contract, the contract can be performed by the contracting party alone, and not by an assignee.

[20] This case involves the sale of yet unbuilt condominiums. One would reasonably expect prospective buyers to canvass a number of show suites and evaluate the products of competing builders. The process may include a discussion with representatives of the builder and an assessment of the workmanship and quality of finishings in show suites which have been put together by the builder. While it is generally understood that much of the work will be sub-contracted, it is the builder or developer upon whom the purchaser relies to produce the finished product in accordance with the expectations which have been created in the mind of the purchaser.

[21] Moreover, the purchase of a home is a major decision and a personal one because it is probably going to be the purchaser's home for several years and we spend a lot of time in our homes. Purchasers want to know that the home, when built, will be to their taste.

[22] To suggest to a purchaser that if his chosen builder goes into receivership the responsibility for building her home can be passed on to an unknown builder would undoubtedly

meet with the response given by the Applicants here, which is to say, that we chose Resiance. Now that Resiance has gone into receivership we do not want to accept POV as our developer.

[23] I agree with the Applicants' position that contracts of the nature of those at issue in this case are entered into by purchasers who rely upon the skill, reputation and the ability of the builder to deliver a suitable product. The case law is clear that those contracts are not assignable without the purchaser's consent. (*Black Hawk Mining Inc. v. Manitoba (Provincial Assessor)*, 2002 MBCA 51, [2002] 7 W.W.R. 104 (Man. C.A.).

[24] Furthermore, this is not a case where one party to the contract is delegating performance of the contract to someone else and remaining liable to the purchaser. Here, the builder has gone into receivership and no longer has any possession or control over the project. In no meaningful way is it in a position to either ensure performance or be responsible for performance of its obligations.

[25] I am of the view that the contracts at issue here are not assignable without the consent of the purchasers. The purchasers have not consented and they have not acquiesced. No order of this Court has effected such an assignment without their consent.

[26] POV points to the decision of Master Laycock in *Delberke et al v. Pointe of View Marketing and Managment Inc. et al* (14 January 2010) Calgary, CVQ10DELBEKEM. In light of my conclusion that these contracts are not assignable without consent that decision is not helpful to POV.

[27] I also find that the requirement of clause 9 has not been met. By May 2010, the date of the application before me, almost three years had passed since the last sale at issue. I think the purchasers were free to terminate the agreement under that clause by giving 60 days notice to POV. POV has been advised that these Applicants wish to terminate their contract and more than 60 days has passed since that notice.

[28] In the result I hereby declare that the contracts between the parties before me are of such a nature that they are not assignable without the consent of the Applicant purchasers. That consent has not been obtained and the assignment has not been the subject of any acquiescence on the part of the Applicants. I declare that the contracts are at an end and that the Applicants are entitled to a return of their deposits.

[29] Paragraph 3 of the Order of MacDonald J. of May 2009 provided that the purchasers may seek relief before this Court and they have done so. They have been successful and I have ruled that they are entitled to their deposits back. Those deposits were transferred to POV's counsel's trust account subject to the right of the purchasers to take issue with the assignability which they have done. Since I have found that the contracts were not assignable without the consent of the purchasers, the purchasers have had the right to receive their deposits back by the date of this Court's order of May 7, 2009. They are entitled to interest on their deposits from that day to the date of receipt in accordance with the *Judgment Interest Act* R.S.A. 2000 c. J-1.

[30] The Applicants are entitled to costs which may be spoken to

Heard on the 17th day of May, 2010.
Dated at Calgary, Alberta this 2nd day of September, 2010.

A.D. Macleod
J.C.Q.B.A.

Appearances:

Robert Schuett
Dionne Levesque
for the Applicants, General Investments Corp. et al

Candice A. Ross
for the Applicants, Corinna Lee et al.

Michael D. Aasen
Jill W. Wilkie
for the Respondents, Pointe of View Developments (Encore) Inc. and Pointe of View Marketing and Management Inc.