CITATION: Metropolitan Toronto Condominium Corporation No. 1272 v. Beach Development (Phase II) Corporation, 2011 ONCA 667
DATE: 20111024
DOCKET: C53082

2011 ONCA 667 (CanLII)

COURT OF APPEAL FOR ONTARIO

MacPherson, LaForme and Epstein JJ.A.

BETWEEN

Metropolitan Toronto Condominium Corporation No. 1272
Metropolitan Toronto Condominium Corporation No. 1342 and
Metropolitan Toronto Condominium Corporation No. 1500

Applicants (Appellants)

and

Beach Development (Phase II) Corporation, Beach Development (Phase III) Corporation, Beach Development (Phase IV) Corporation, and EMM Financial Corporation

Respondents (Respondents in Appeal)

Michael Spears, for the appellants

Richard Macklin, for the respondents

Heard and released orally: October 21, 2011

On appeal from the judgment of Justice M.A. Penny of the Superior Court of Justice, dated November 16, 2010.

ENDORSEMENT

[1] The appellants are three condominium corporations linked by two things. First, the ground floor of each building that houses the condominium units is freehold space occupied by commercial and retail establishments. Second, each corporation finds itself in the position where, as matters now stand, there is no agreement requiring the occupants of the ground floor to share the costs of the facilities and services they share with the appellants. As a result, say the appellants, each time money must be spent on a shared facility or service, they must either persuade the respondent EMM Financial Corporation ("EMM"), the entity that owns the freehold, to pay its fair share or litigate the matter. The appellants submit that this is expensive and otherwise completely unworkable.

[2] As a result of reaching an impasse in attempting to negotiate cost-sharing agreements, known as reciprocal agreements, the appellants commenced this application against the respondent corporations, each of which was involved with the development of the project. The three Beach Development respondents are the declarants of each of the three condominium developments. EMM was the initial developer that, in the course of advancing the project, conveyed the land to the declarants and subsequently bought it back in order to proceed with the retail/commercial element of the venture on the ground floor.

[3] The appellants applied for relief under s. 135 of the *Condominium Act, 1998*, S.O. 1998, c. 19, seeking (1) a declaration that the respondents acted oppressively in not providing for a cost-sharing agreement, and (2) an order that EMM pay them its share of

2011 ONCA 667 (CanLII)

the operating costs of all shared facilities, from the date of registration of the appellants, forward.

2011 ONCA 667 (CanLII)

[4] The application judge dismissed the application primarily on the basis of his conclusion that the appellants failed to satisfy the test for oppression.

[5] Section 135 of the *Condominium Act*, is similar to the oppression provisions under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, and the *Ontario Business Corporations Act*, R.S.O. 1990, c. B.16. It provides as follows:

> 135. (1) An owner, a corporation, a declarant or a mortgagee of a unit may make an application to the Superior Court of Justice for an Order under this section.
>
> (2) On an application, if the court determines that the conduct of an owner, a corporation, a declarant or a mortgagee of a unit is or threatens to be oppressive or unfairly prejudicial to the applicant or unfairly disregards the interests of the applicant, it may make an order to rectify the matter.
>
> (3) On an application, the judge may make any order the judge deems proper including,
>
> > (a) an order prohibiting the conduct referred to in the application; and
> >
> > (b) an order requiring the payment of compensation.

[6] As established in *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560, the test for oppression has two parts. The claimant must demonstrate that there has been a breach of its reasonable expectations and that, considered in the

commercial context, the conduct complained of amounts to "oppression", "unfair prejudice" or "unfair disregard".

Reasonable Expectations

[7] The application judge rejected the appellants' argument that their reasonable expectations were not met primarily on the basis of the representations and agreements that accompanied the condominium unit purchase and sale transactions.

[8] We find no fault with his analysis or his conclusions.

[9] The statutorily mandated proposed condominiums' governing documents, which are designed to detail what condominium purchasers should reasonably expect, make no reference to any cost-sharing agreement between the appellants and the declarants. While these documents specifically refer to the sharing of facilities and services, this reference alone does not support a finding that those who ultimately decided to purchase a condominium unit could reasonably expect that there would be a cost-sharing agreement when none was mentioned.

[10] As well, in our view, the application judge properly rejected the appellants' contention that commercial practice was such that buyers of condominium units would reasonably expect that there would be a reciprocal agreement. In addition to other difficulties this argument may have, it is clear that the existence of such a commercial practice was not supported by the evidence.

2011 ONCA 667 (CanLII)

[11] The appellants' argument based on breach of fiduciary duty must also fail. The failure to include a cost-sharing agreement – a decision involving the operation of the overall development – was made between EMM and the declarants. No fiduciary relationship between the parties could be said to exist and we do not accept the suggestion that the declarants had an obligation to revisit that situation once they were in the position to start selling units.

2011 ONCA 667 (CanLII)

Oppressive Conduct

[12] In addition to our view that the application judge correctly held that the appellants had not established that it was reasonable, in these circumstances to expect that there would be a cost-sharing agreement, we also concur with the application judge's finding that there was no oppressive conduct. The evidence supports the finding that the decision that cost-sharing agreements would not be included in the mixed-use development was a considered business decision of the respondents and was fully disclosed in circumstances where the unit purchasers of the appellants were represented by counsel.

[13] Appellants' counsel forcefully argued that to leave the appellants at the mercy of the respondents and future costly litigation is, in itself oppressive. While we understand the appellants' concern about the choices available to them in terms of managing disputes over the costs associated with the shared facilities and services, we are of the view that the oppression remedy is simply not available as one of those choices. This is not a case of an oppressor utilizing a superior bargaining position to coerce unfavourable terms

from a weaker party or acting behind the weaker parties' back. Rather, it is a case in which the appellants voluntarily purchased their condominium units in the full knowledge and disclosure of the rights and obligations associated with their transaction.

2011 ONCA 667 (CanLII)

Disposition

[14] For these reasons the appeal is dismissed.

[15] The respondents are entitled to their costs in the amount of $10,000 inclusive of disbursements and all applicable taxes.

"J.C. MacPherson J.A."

"H.S. LaForme J.A."

"G.J. Epstein J.A."