COURT FILE NO.: 07-CV-329252PD1
DATE: 20071218

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
TORONTO STANDARD CONDOMINIUM CORPORATION NO. 1703	)	*Mark H. Arnold*, for the Plaintiff/Respondent
	)	
Plaintiff	)	
	)	
- and -	)	
	)	
1 KING WEST INC., KING WEST DEVELOPMENTS INC., ELLISDON CORPORATION, PROJECTCORE INC., STANFORD DOWNEY ARCHITECT INC., YOLLES PARTNERSHIP INC., CBM GROUP LTD., RAYMOND KWOK & ASSOCIATES ENGINEERING LTD., and CITY OF TORONTO	)	*Patricia M. Conway/David Erlt*, for the Defendants/Moving Party 1 King West Inc.,
Defendants	)	
	)	**HEARD:** December 10, 2007

Somers, J.

REASONS FOR JUDGMENT

[1] This motion is brought by counsel on behalf of 1 King West Inc. The same counsel represent the defendants King West Developments Inc. and Projectcore Inc. but they played no part in these proceedings. The remaining named defendants also took no interest in the subject of this motion and they were not represented.

[2] The motion is brought pursuant to the provisions of Rule 21.01(1)(a)(b) for an order declaring that the plaintiff is without legal capacity to commence or continue a portion of the action pursuant to which it makes a plea for a declaration that this defendant did not comply with a ruling of the Ontario Securities Commission (the "Commission") and claiming damages thereby.

[3] This situation arises under the following circumstances. The plaintiff is a condominium corporation. The building with which it is concerned is located at 1 King Street West near its intersection with Yonge Street in the City of Toronto (the plaintiff is hereinafter referred to as "TSCC 1703"). It has commenced an action against all of the defendants for *inter alia* damages and negligence and breach of warranty regarding alleged construction deficiencies. The building is a high-rise condominium which contains five hundred and seventy-two (572) residential units. This defendant, 1 King West Inc. ("1 King West") is a developer and the declarant of TSCC 1703.

[4] A director of the 1 King West, one Harry Stinson ("Stinson") was solely responsible for the marketing and sale of units in the project. It was marketed by him as a possible investment in which the purchasers rather than taking residence in the unit they purchased could hold them as rental units for which he would also act as a rental manager after each individual unit was sold. It was contemplated that these would be rentals for a short term period. It was proposed by Stinson that there would be created a rental program entered into by those prospective purchasers who chose to become participants. There was to be a pooling of rental revenues divided among the members based on certain criteria. It is important to note that this was not a required condition of purchasing units but it is clear that participation was being made available to prospective purchasers as an inducement to have them invest.

[5] Apparently, Stinson was offering prospective purchasers a guaranteed rate of return to those who chose to become involved in the pool. He continued with this practice even after he was asked to stop doing so. This prompted the Commission to take the view that soliciting prospective purchasers to opt into the rental pool where a rate of return was guaranteed was in fact an investment and ordered Stinson to cease and desist from making sales based on these inducements.

[6] 1 King West removed Stinson from his position as a director and then sought a ruling from the Commission exempting the rent pooling project from the Commission's requirements. In doing so, it undertook to make full disclosure in a form approved by the Commission to be delivered to all purchasers and notifying them that they would have a right of recission within ten (10) days of receipt of the Notice.

[7] The ruling dated November 22, 2004 accepted the concept of the rental pooling agreement on certain terms. Paragraph 11 of the ruling reads:

> "Each owner of a Residential Unit will be entitled but not obligated, to enter into a rental management agreement (the "Rental Management Agreement") with the

> Commercial Condominium or such other manager as may be appointed by the Condominium Corporation (in such capacity the Rental Manager). By entering into a Rental Management Agreement, owners of Residential Units will become entitled to participate in a short-term rental management program (the "Rental Program")."

[8] Paragraph 22 of the ruling stresses that there is no direct tie-in between the purchase of a unit and the participation of the purchaser in the program other than that a purchase qualifies the purchaser to become a member. It reads as follows:

> "The purchase prices for which the Corporation offers Residential Units for sale to Initial Purchasers will not change as a result of the Rental Program such that there will be no premium or discount to such sale prices for Initial Purchasers who participate in the Rental Program".

[9] The ruling of the Commission then went on to provide that in addition to the delivery of the usual disclosure statements required by the provisions of the *Condominium Act*, 1998, 1 King West would be required to deliver a separate memorandum to existing purchasers and to prospective Initial Purchasers before they enter into an Agreement of Purchase and Sale. This disclosure memorandum was to be known as the Rental Management Disclosure Memorandum. The ruling continued to set out in detail what the memorandum should contain. It provided that the purchasers would have a right of action with respect to these disclosure statements Paragraph 26 reads:

> "Initial Purchasers of Residential Units and each subsequent purchaser of a Residential Unit will be provided with a contractual right of action as defined in *Commission Rule 14-501. Definitions* with respect to the disclosure contained in Rental Management Disclosure Memorandum save and except that such right of action shall:
>
> (a) be for damages and not include a right of action for recision
>
> (b) be exercisable on notice against the certifying entity not later than 180 days after the earlier of the date the purchaser closes his/her or its purchase transaction or takes possession of the Residential Unit.

[10] The Commission Rule 14.501 Definition provides that the term "contractual right of action" means a right of action against a person or company for recission or damages that is available to an investor to whom an offering memorandum containing a misrepresentation is delivered by or on behalf of the seller or securities referred to in the memorandum."

[11] The position taken by 1 King West is that it like all condominium corporations is formed by the unit owners each of whom owns its individual unit or units. The unit owner in addition has the right to share equally in the use of the common elements such as grounds, hallways and other facilities. It submits that the Corporation has no right of ownership of the individual units. The plaintiff argues that it has the statutory right to commence such an action on behalf of

individual units relying on Section 23(1) of *The Condominium Act 1998* S.O. 1998, C.19. Section 23(1) reads as follows:

> "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 of which the action is brought."

This action is based upon allegations that those responsible for the construction of the subject building were negligent in carrying out its construction and are as well being sued for breach of warranty arising therefrom. It is alleged that there were deficiencies in the construction and reconstruction of the subject building. Counsel for the applicant concedes that none of the claims arising from those allegations are sought to be struck out. This is without in any way conceding that there is substance to those allegations. 1 King West does agree that the Condominium Corporation has the right to bring action and make claims based on them. The two paragraphs which the applicant attacks are paragraphs 1(b) and (c) of the Statement of Claim which read as follows:

> "1. The plaintiff claims on its own behalf and on behalf of the unit owners as against the defendants 1 King West Inc. and King West Developments Inc...
>
> b) A declaration that the defendant 1 King West Inc. failed to adequately comply with the ruling of the Ontario Securities Commission dated November 22, 2004 by not complying with paragraphs 22, 23, 24 and 25 of the Ruling and that the right of action and other relief provided to purchasers of condominium units as set out in paragraphs 25 and 26 of the Ruling have not yet begun to run.
>
> c) Damages sustained by individual and unit purchasers pursuant to the previous sub-paragraph with respect to the Ruling of the Ontario Securities Commission dated November 22, 2004 estimated in the amount of an additional $10,000,000.00.

12) After reciting the history of the institution of the Rental Management Program, the intervention of the Commission, the application to the Commission for an exemption of its prospectus provisions and the Ruling of the Commission, the plaintiff alleges in paragraph 26 of the Statement of Claim

> "the plaintiff pleads that 1 King West Inc. has failed to comply with all of the conditions in the aforesaid Ruling and the time has not yet begun to run against the right of action and other relief granted to purchasers or condominium units as set out in paragraph 25 and 26 of the Ruling."

13) Paragraph 27 reads "the plaintiff further pleads that the damages sustained by individual unit purchasers with respect to the aforesaid Ruling is an additional $10,000,000.00."

14) The issue between the parties in this motion is whether or not an action brought alleging the failure of 1 King West to abide by the terms of the Ruling of the Commission can be considered (a) an action for damages and costs in respect of any damage to common elements, the assets of the Corporation or individual units, or (b) an action concerning a contract involving the common elements or a unit even though the Corporation was not a party to the contract. Both parties appear to be agreed that the word "damage" contained in sub-paragraph (a) of paragraph 23(1) of the *Act*, refers to physical damage, *Metropolitan Toronto Condominium Corporation No. 858 v. Tornet Construction Inc.*, [1994] O.J. No. 476. The question then becomes whether or not the present action has been brought "with respect to a contract involving the common elements or a unit". Unquestionably for the acquisition by the owners of each unit there has been a separate contract of Purchase and Sale. However as was made clear in the Commission's Ruling, each purchaser was entitled but not required to enter into a contract to participate in the rental management pool. Each such agreement was the subject matter of a separate agreement. The only connection between it and a corresponding purchase of the related unit is that acquisition of the unit entitled the purchaser to become a participant. The two appear to me to be severable, the one for the acquisition of realty and the second to be a form of investment.

15) In addition, under Section 23(1)(b) of *The Condominium Act*, the reference is to an action with respect to a contract. The pleading makes no reference to a contract but rather is based upon the directions of a government established regulatory body made to the plaintiff. Unquestionably the plaintiff has an obligation to follow and implement the instructions of the Commission but that obligation is owed to the Commission and to individual unit owners. It is not, in my view, owed to the Corporation. The Corporation being a creature of statute is limited in commencing any action to the type of actions described in this section. By the same token, only a unit owner who has contracted to enter the rental program may make such a claim. The plaintiff is not such a member.

16) In the *Metropolitan Toronto Condominium Corporation No. 858 v. Tornet Construction Inc.* case (*supra*) it was held in this court that the condominium corporation could not bring an action purportedly on behalf of unit holders against the developer on the grounds that he had deliberately or negligently misled prospective purchasers of units by failing to disclose to them that a subsidized public housing complex was to be built immediately next door. Matlow, J. said at paragraph six (6) of his reasons "the plaintiff alleges deception on the part of the defendant which caused the purchasers to pay more for their units than they would have otherwise have paid. The damage alleged is a notional one rather than a real one and the only damage or harm

that could have resulted was that the purchasers' respective economic worth." In the result he struck out the paragraph in the Statement of Claim which recited this particular ground for bringing action. I am of the same view in the case at bar. The Corporation itself has suffered no loss as a result of the alleged failure on the part of the defendant to abide by the ruling of the Commission. It follows, and I hereby order that the portion of the action described in paragraphs 1(b), 1(c), 24, 25 and 26 of the Statement of Claim which mainly plead for a declaration that the defendant did not comply with the ruling of the Ontario Securities Commission and claiming damages thereby are hereby struck out.

17) This defendant was successful in the result despite the strong response to the motion conducted by the plaintiff. I am of the view that this defendant should be awarded its costs on a partial indemnity basis payable forthwith. If the parties are unable to agree within two weeks of the date of these reasons as to the amount of such costs they may make brief submissions to me, in writing, thereafter.

Somers, J.

Released: December 18, 2007

COURT FILE NO.: 07-CV-329252PD1
DATE: 20071218

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

TORONTO STANDARD CONDOMINIUM CORPORATION NO. 1703

Plaintiff

- and -

1 KING WEST INC., KING WEST DEVELOPMENTS INC., ELLISDON CORPORATION, PROJECTCORE INC., STANFORD DOWNEY ARCHITECT INC., YOLLES PARTNERSHIP INC., CBM GROUP LTD., RAYMOND KWOK & ASSOCIATES ENGINEERING LTD., and CITY OF TORONTO

Defendants

REASONS FOR JUDGMENT

Somers, J.

Released: December 18, 2007