Case Name:

Metropolitan Toronto Condominium Corp. No. 1101 v. Ontario New Home Warranty

Between
Metropolitan Toronto Condominium Corporation No. 1101 and
Metropolitan Toronto Condominium Corporation No. 1120,
applicants/appellants, and
Ontario New Home Warranty Program, respondent/respondent, and
Concord Square Limited, added party/respondent

[2003] O.J. No. 5145
Court File No. 756/02

Ontario Superior Court of Justice
Divisional Court
Dunnet, Jennings and C. Campbell JJ.

Heard: December 15, 2003.
Judgment: December 17, 2003.
(17 paras.)

Counsel:

Irving Marks and Barbara Green, for the applicants (appellants).
Laurence A. Pattillo and David Outerbridge, for the respondent (respondent).
Lloyd Cadsby, for the added party.

The following judgment was delivered by

¶ 1 **THE COURT** (endorsement):— The condominium corporations appeal to the Divisional Court from the order of the Licence Appeal Tribunal, dated November 28, 2002, disallowing their claims.

¶ 2 The appellants submit that the Tribunal erred by failing to hold that they are entitled to enforce the warranty claims against the Ontario New Home Warranty Program, despite the releases they executed with the builder, Concord Square Limited.

¶ 3 The appellants also raise issues with respect to the Tribunal's interpretation of the releases, the May 28, 1998 letter signed by the builder, and issue estoppel. They submit, however, that if the releases are enforceable, there is no need for this Court to deal with the other issues.

¶ 4 The parties concede that the claim was made within the two-year common element warranty period.

¶ 5 The appellants submit that in Mandos v. Ontario New Home Warranty Program, [1995] O.J. No. 3647, the Court of Appeal determined that warranties within the meaning of s. 13(1) of the Ontario New Home Warranties Plan Act, R.S.O. 1990, c. O-31 continue in force, irrespective of any agreement by the parties to the contrary.

¶ 6 The oral endorsement of the Court of Appeal in Mandos is as follows:

> The Ontario New Home Warranties Plan Act, R.S.O. 1990, c. O-31 is remedial legislation

> and should be given a fair and liberal interpretation. Subsection 13(6) of the Act is a difficult subsection to construe. However, we believe that the interpretation given to it by counsel for the respondents is a proper one, i.e., that the warranties contained in s. 13(1) continue in force, irrespective of any agreement by the parties to the contrary. This interpretation, in our opinion, achieves a fair and just result. The Corporation is desirous that builders and owners should settle their differences, and s. 13(1) of the Regulations contemplates that if such a settlement is made, it will not affect the Corporation's rights of subrogation. When a mutual release is executed between an owner and a builder, it is quite possible, as in the present case, that there may be defects which could not be discovered by reasonable inspection. If it is the intention of the legislature that a release should be a bar to any action by an owner for breach of the warranties in s. 13(1), then, in our opinion, the legislation should clearly so provide and owners should be warned of the dangers of entering into a release.
>
> For these reasons, the appeal will be dismissed. The costs of the respondents will be fixed at $4,000.

¶ 7 The appellants assert that in Mandos, the Court was interpreting the meaning of the statute and any factual differences between that case and the present case are irrelevant.

¶ 8 We respectfully disagree. In its decision, the Court refers to the possibility that there may be defects, as was the case with Mr. and Mrs. Mandos, which were not discoverable at the time the releases were executed. In Mandos, a settlement was made with an owner by a contractor, not in pursuit of a warranty claim, but in the context of the settlement of a construction lien debt action. The release was executed before a warranty claim was made and before the expiration of the statutory warranties prescribed by the Act.

¶ 9 The situation here is significantly different. The Program was advised of the warranties raised by the claim based upon a detailed engineering report and within the limitation period. Discussions followed between the builder and the appellants concerning repairs. Ten months after the claim was filed, the appellants and the builder entered into a letter of understanding where the issue of the releases was addressed.

¶ 10 Several months later, the releases were executed by sophisticated and informed members of the corporations' boards, in exchange for financial consideration and the remedying of deficiencies. They were advised throughout by their solicitor, who participated in the drafting of the releases. We conclude, therefore, that s. 13(6) of the Act does not apply in this case.

¶ 11 We agree with the comments of the Tribunal in Darling (Re), [1994] O.C.R.A.T.D. No. 5 at para. 27:

> The facts in the case of Mr. Darling are exactly the opposite. He knew his rights, had received all required documentation, and was paid a substantial amount to satisfy his claim. If this Tribunal were to find that the Mandos case holds that under Section 13(6) of the Act, parties may not pursue amicable settlements which included waiving any further rights under the Ontario New Home Warranties Plan Act, the unacceptable result would be that every single dispute between a homeowner and builder would have to [be] resolved by this Tribunal. It goes without saying that if parties could [not] reach settlements whereby one party is indemnified and the other party receives a Release, that [sic] no amicable settlements would be possible. The whole thrust of our judicial process, however, is one which allows the parties to freely settle disputes where they can. Were it to be otherwise, every man, woman and child in Canada would have to be a judge to settle all the disputes that arose. That plainly is not the intention of Mandos and of the Act. The Act itself speaks often of settlements as something to be encouraged.

¶ 12 As the statute is consumer protection legislation, one of its aims is to reduce the burden of litigation on the consumer by providing a quick, summary procedure for resolving warranty claims at less expense than litigation.

¶ 13 The overarching goal of the Act is to encourage the resolution of disputes and to streamline the process for achieving such resolution. Discussions leading to the settlements of claims are an inherent part of that process.

¶ 14 It would, therefore, be contrary to the purposes of the Act to construe s. 13(6) as barring settlements by denying effect to the releases that form an essential part of settlement agreements.

¶ 15 There is no issue that the statutory granting of the warranties themselves cannot be waived. There is nothing in the legislative scheme created by the Act, however, that limits the ability of a vendor and a warranty claimant from settling a properly filed warranty claim in exchange for a release and such a release should be enforceable, unless it would be unconscionable due to the existence of some vitiating factor.

¶ 16 Accordingly, we find that the decision of the Tribunal as to the enforceability of the warranty claims against the Program was correct. In view of this finding, it is not necessary for us to deal with the other issues raised by the appellants.

¶ 17 The appeal is dismissed with costs fixed at $15,000 payable to the Program and $15,000 payable to Concord Square Limited, inclusive of disbursements and GST.

DUNNET J.
JENNINGS J.
C. CAMPBELL J.

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