COURT OF APPEAL FOR ONTARIO

CITATION: Correa v. Valstar Homes (Oakville Sixth Line) Inc., 2025 ONCA 156
DATE: 20250227
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Sossin, Favreau and Monahan JJ.A.

BETWEEN

Ivy Zeena Correa and Alwin Correa

Plaintiffs (Appellants)

and

Valstar Homes (Oakville Sixth Line) Inc.

Defendant (Respondent)

Paul H. Starkman and Calvin Zhang, for the appellants

William A. Chalmers, for the respondent

Heard: February 24, 2025

On appeal from the order of Justice Marvin Kurz of the Superior Court of Justice dated June 21, 2024, with reasons reported at 2024 ONSC 3616.

REASONS FOR DECISION

[1] This is an appeal from the order of the motion judge, dated June 21, 2024, issued in connection with a summary judgment motion heard May 14 and 24, 2024. The motion judge concluded there was no genuine issue requiring a trial, dismissed the motion for summary judgment brought by the appellants, Ivy Zeena Correa and Alwin Correa, who were the plaintiffs in the action, and granted

summary judgment to the respondent, Valstar Homes (Oakville Sixth Line) Inc. (“Valstar”), the defendant in the action, dismissing the action against it.

[2] The appellants raise a number of grounds of appeal. In large part, these amount to an attempt to relitigate the motion. At the hearing, we dismissed the appeal for reasons to follow. These are our reasons.

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BACKGROUND

[3] On February 16, 2020, the appellant spouses entered into an Agreement of Purchase and Sale (the “APS) to purchase a newly built home in Oakville from the respondent Valstar. The APS set a closing date of “no later than 5:00 p.m.” on January 27, 2021, and provided that “[t]his date may be amended by mutual agreement and/or extended by the Vendor.” The APS included a “time is of the essence” clause.

[4] On December 2, 2020, Valstar extended the closing date to April 20, 2021. On that day, the appellants had difficulty securing funds for the closing. They requested a one-day extension of the closing date, but Valstar refused the request. They claimed that the institution they sought financing from tried to conduct an inspection earlier in the day on April 20, 2021, which was a condition of the financing, but was prevented from doing so. The appellants ended up obtaining alternative, private financing and deposited the money required for the closing into their solicitor’s bank account. Their solicitor wired the funding to Valstar’s solicitor

at 4:52 p.m., but the funds did not arrive until 5:09 p.m. Valstar terminated the APS, invoking the “time is of the essence” clause. Subsequently, Valstar offered to “revive” the APS if the appellants paid an additional $100,000 plus $13,000 HST. They justified the request by claiming the value of the property had increased since the APS was signed. The appellants agreed and closed the transaction the next day.

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[5] On May 17, 2022, the appellants issued their statement of claim against Valstar for $130,000. They alleged that they agreed to Valstar’s price increase under protest.

[6] The appellants moved for summary judgment against Valstar. Valstar did not bring a cross-motion for summary judgment, but argued that summary judgment should be granted in its favour, dismissing the action.

DECISION BELOW

[7] The motion judge dismissed the appellants’ motion and granted summary judgment to Valstar, dismissing the action. The motion judge found there was no genuine issue requiring a trial. The motion judge noted that it was open to him to grant judgment in favour of a responding party, even if that party had not brought a formal motion, citing *King Lofts Toronto I Ltd. v. Emmons*, 2014 ONCA 215, 40 R.P.R. (5th) 26; *Whalen v. Hilier* (2001), 53 O.R. (3d) 550 (C.A.); and Gnyś v. Narbutt, 2016 ONSC 2594 (Div. Ct.).

[8] The motion judge determined that Valstar was entitled to treat the APS as terminated at 5:01 p.m. on April 20, 2021. He rejected the appellants' argument that Valstar acted in bad faith and accepted that Valstar was entitled to rely on the "time is of the essence" clause in treating the APS as terminated. The motion judge relied on *3 Gill Homes Inc. v. 5009796 Ontario Inc. (c.o.b. Kassar Homes)*, 2024 ONCA 6, 491 D.L.R. (4th) 499, for his analysis of the "time is of the essence clause". In that case, this court stated, at para. 24, quoting *Di Millo v. 2099232 Ontario Inc., 2018 ONCA 1051*, 430 D.L.R. (4th) 296, at para. 31, "[t]he phrase 'time is of the essence' means that a time limit in an agreement is essential such that breach of the time limit will permit the innocent party to terminate the contract."

[9] After hearing arguments on the motion but before releasing his decision, the motion judge requested further submissions from counsel regarding potential inconsistencies with the closing time in the APS. He raised this issue because Valstar's offer extending the firm closing date to April 20, 2021, did not refer to a specific time of day for closing. In his decision, the motion judge accepted Valstar's argument that the time for closing was 5:00 p.m. because apparent contractual inconsistencies should be read reasonably in order to give meaning to each provision (citing *Maher v. Great Atlantic & Pacific Co. of Canada*, 2010 ONCA 415, 266 O.A.C. 173, at para. 43). He noted that the solicitors for both parties acted under the understanding that the time for closing was 5:00 p.m. The motion judge also rejected the appellants' reliance on *More v. 1362279 Ontario Ltd. (c.o.b. Seiko*

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Homes), 2023 ONCA 527, where this court upheld a motion judge's refusal to rely on the "time is of the essence clause" because the agreement between the parties in that case lacked an actual time for closing.

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[10] The motion judge determined that Valstar did not impose an improper penalty in connection with the revised APS. He found that the "revival fee" of $100,000 plus HST was part of an entirely new contract, and therefore rejected the appellants' reliance on the common law doctrine regarding the unenforceability of a penalty clause.

[11] The motion judge determined that the appellants did not enter into the revived APS under economic duress. Applying the test for economic duress set out by this court in *Kawartha Capital Corp. v. 1723766 Ontario Ltd*., 2020 ONCA 763, 454 D.L.R. (4th) 553, the motion judge highlighted that the appellants "failed to prove sufficient indices of economic duress." The motion judge noted that the appellants did not protest during the time of contracting, they benefitted from independent legal advice, and any economic pressure exerted by Valstar was not illegitimate because they were entitled to enforce the "time is of the essence" clause in the original APS.

ISSUES

[12] The appellants raise the following issues:

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1. Did the motion judge err in applying the decision of the Supreme Court in *Sattva Capital Corp. v. Creston Moly Corp.,* 2014 SCC 53, [2014] 2 S.C.R. 633?
2. Did the motion judge err in concluding that the “time is of the essence” clause applied to the closing of the transaction on April 20, 2021?
3. Did the motion judge fail to consider and conclude that the terms of the APS, with respect to the closing time, are ambiguous and should be interpreted against the respondent in accordance with the doctrine of *contra proferentem*?
4. Did the motion judge err by failing to analyze the respondent’s conduct in terminating the APS as being unreasonable, unfair and unjust in the circumstances?
5. Did the motion judge fail to conclude that the payment of $100,000 plus HST paid by the appellants to revive the APS is an impermissible penalty?
6. Did the motion judge fail to conclude that the appellants were under economic compulsion or duress when they paid the $100,000 plus HST to the respondent to revive the APS?

ANALYSIS

[13] The motion judge’s findings on questions of fact and mixed questions of fact and law are entitled to deference. Errors of law or extricable errors of law are reviewed on a standard of correctness. The key question raised by the various

grounds of appeal advanced by the appellants is whether the motion judge made a palpable and overriding error with respect to those findings or made an extricable error of law, such as an error in principle or misconstruing or failing to consider a required element of the applicable legal test: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.

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[14] We are not persuaded that the motion judge committed a reversible error in his analysis or conclusions in any of the six issues set out above.

[15] First, while the motion judge did not expressly refer to *Sattva*, there is no requirement that the motion judge cite the applicable authority; rather, the judge is required to apply the correct legal principles. As the Supreme Court in *Sattva* makes clear, the goal of contractual interpretation is ascertaining the objective intention of the parties, which is an “inherently fact specific” exercise: at paras. 54-55. We do not accept that the motion judge’s analysis of the APS is inconsistent with the principles of *Sattva*.

[16] Second, the APS clearly stated that “the “Closing Date” or “Date of Closing” or “Closing” means no later than 5:00 p.m. on the 27th day of January 2021. When the date was extended to April 20, 2021, this did not alter or affect the 5:00 p.m. deadline for closing. There was no ambiguity in this regard. The appellants were advised by Valstar on the morning of April 20, 2021, that “this transaction must

close by 5:00 today," and this firm deadline was reiterated in the ongoing correspondence between the parties later that day.

[17] We reject the appellants' argument that since no time was stipulated in the contract, this case may be distinguished from *3 Gill Homes*. In this case, as the motion judge found, the APS did stipulate a closing time. Similarly, this case can be distinguished from *More*, the case relied upon by the appellants, where this court concluded a "time is of the essence" provision should not be enforced where no closing time was set out in a contract.

[18] The appellants argue that the APS was subject to the Addendum to Agreement of Purchase and Sale, which was not referred to by the motion judge, and which provided that the vendor could unilaterally declare a delayed closing date on notice to the purchaser, and also included provisions regarding the termination of the agreement. The Addendum refers to the date of closing but makes no reference to a specific closing time. The appellants argue that this lends further support to their position that the agreement between the parties was at best ambiguous as to the time of day by which closing had to occur. We do not accept that the Addendum introduced ambiguity into the closing time of 5:00 p.m. found to apply in the APS by the motion judge, as it sets out no alternative time of day for closing which conflicts with the APS. It was not an error for the motion judge not to refer specifically to the Addendum in his interpretation of the agreement between the parties.

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[19] Further, dealing with the third ground of appeal, as we have rejected the argument that there was ambiguity with respect to the closing time in the agreement, the doctrine of *contra proferentem* has no application in these circumstances.

[20] Fourth, we see no error with the motion judge's conclusion that the termination of the APS was not unreasonable, unfair or unjust.

[21] The motion judge quoted the passage from *3 Gill Homes*, at para. 17, "While the outcome for the respondent was indeed harsh, it was not unconscionable or unfair. The wording of the contract and the warnings provided by the respondent beforehand were clear."

[22] The motion judge then made a similar finding in this case, stating, at para. 65, "I understand that this finding may seem 'harsh', as the Court of Appeal described it in *3 Gill Homes*. It was open to Valstar to be more lenient with the Purchasers in light of their circumstances and intent to close on April 20, 2021. But even accepting that to be the case, I cannot find that Valstar acted wrongly by insisting on compliance with a contractual term to which the parties agreed. I see no reason here to rewrite the parties' bargain."

[23] Fifth, the appellants argue on this appeal, as they did before the motion judge, that the $113,000 payment to revive the APS represented Valstar's imposition of an improper penalty on them.

[24] The motion judge rejected this argument, concluding that the payment of $113,000, referred to as a “revival fee”, was a term of a new contract freely entered into by the parties after the termination of the original APS.

[25] We do not accept the characterization of the payment of $113,000 as a penalty, nor do we find the cases relied upon by the appellant, such as *Eurig Estate (Re),* [1998] 2 S.C.R. 565, which dealt with the definition of a tax, applicable. While a contract can provide for penalties or additional fees, in this case, it was open to the motion judge on the record to conclude a new contract had been entered into, and we see no basis for appellate interference with this finding.

[26] Sixth and finally, the motion judge committed no error in rejecting the appellants’ argument that they were subject to economic duress. He instructed himself on the test for this determination, set out by this court in *Kawartha*, and found on the record that this threshold had not been met. The motion judge found the appellants could have refused Valstar’s offer to revive the APS for the additional $113,000, and that they had the benefit of legal representation throughout. This finding is entitled to deference.

DISPOSITION

[27] For these reasons, we dismissed the appeal.

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[28] Valstar is entitled to costs of the appeal in the amount of $11,221.47, all inclusive.

"L. Sossin J.A."
"L. Favreau J.A."
"P.J. Monahan J.A."

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