CITATION: McKenzie et al v. The Block et al, 2023 ONSC 2444
COURT FILE NO.: CV-22-321
DATE: 2023-04-21

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
Patricia Althea McKenzie and Richard D.P. Allen	)	Wendy A. Greenspoon-Soer, counsel for the Applicants
Plaintiffs	)	
	)	
– and –	)	
	)	
The Block, Inc. and Sorbara, Schumacher, McCann LLP	)	Carol A. Dirks, counsel for the Responding Parties
Defendants	)	
	)	
	)	**HEARD:** February 9, 2023

THE HONOURABLE JUSTICE M.J. VALENTE

JUDGMENT ON APPLICATION

Introduction

[1] The Applicants, Patricia Althea McKenzie ('McKenzie') and Richard D.P. Allen ('Allen') (collectively referred to as the 'Applicants') are joint purchasers of the condominium unit municipally known as Suite G-311, 275 Larch Street, in the city of Waterloo (the 'Property'). The Respondent, The Block, Inc. ('The Block') is the developer vendor of the Property.

[2] The Applicants and The Block entered into an agreement of purchase and sale for the Property on November 28, 2016, with a purchase price of $362,999 (the 'Agreement'). The Applicants paid multiple deposits in installments totalling $54,449.90 (the 'Deposit'). The deposit was paid to the Respondent, Sorbara, Schumacher, McCann LLP ('Sorbara'), in trust as escrow agents and the lawyers for The Block.

[3] The Applicants seek a declaration that they validly terminated the Agreement in accordance with paragraph 8 of the Occupancy License, dated August 7, 2019 (the 'License') and that they are entitled to the return of the Deposit together with related relief.

Summary of the Facts

[4] The Agreement was subject to new home warranty conditions, the terms of which were included as a Tarion Addendum (the 'Addendum') to the Agreement. The Addendum provided May 2, 2022 as the outside occupancy date by which The Block must provide occupancy, after which the Applicants could terminate the Agreement (the 'Outside Occupancy Date').

[5] The occupancy closing for the Property was completed on August 8, 2019, (the 'Occupancy Closing') at which time the Applicants signed the documents for the Occupancy Closing, including the License and a rental guarantee document.

[6] Pursuant to the License, the Applicants entered into a lease-back program with The Block pending The Block obtaining all necessary registrations for the transfer of the Property's title to the Applicants. Pursuant to the lease-back program, The Block paid the Applicants, a rental guarantee fee of $1,775.00 per month and the Applicants paid The Block monthly occupancy fees of $1,2011.11. The lease-back program commenced on September 1, 2019, and according to the terms of the License, was to terminate upon the transfer of the title to the Property.

[7] On June 2, 2021, The Block delivered written notice to the Applicants along with all other purchasers of the condominium units that the condominium declaration was to be registered very shortly, followed by final closings.

[8] On August 27, 2021, The Block registered the required declaration and on August 31, 2021 Sorbara sent notice of the registration to all the purchasers of the condominium units, including the Applicants, and advised that the transfer of title to all the condominium units was scheduled for September 15, 2021.

[9] In the meantime, on August 27, 2021, at 6:49 pm and without knowledge of The Block's registration of the Declaration, the Applicants delivered notice to terminate the Agreement

pursuant to section 8 of the License. The Applicants' lawyers' email of termination to Sorbara, read in part as follows:

> As it has now been two years since Occupancy Closing, the Purchaser wishes to terminate the Agreement by giving a sixty (60) days notice of same. Please advise as to the next steps.

[10] The Block did not consent to terminate the Agreement and required the Applicants to take title to the Property on September 15, 2021 but the transaction was not completed.

[11] On September 15, 2021, and after tendering on the Applicants, The Block notified the Applicants that it took the position that the Applicants had breached the Agreement, the Deposit was forfeited, and it was relisting the Property for sale.

[12] The Property was listed on January 14, 2022, and sold over asking price for $500,000, including HST with transfer of title occurring on February 17, 2022.

Issues to be Determined

[13] The Applicants submit three alternative arguments in support of their position that they are entitled to the return of the Deposit. These arguments are as follows:

1. Section 8 of the License entitles the Applicants to terminate the Agreement.
2. The Block's failure to invoke section 79(3) of the *Condominium Act*, 1998, c 19 (the '*Act'*)
3. The Applicants are entitled to relief from forfeiture.

Position of the Parties and Analysis

1. Section 8 of the Licence

[14] The Block submits that section 8 of the License does not provide the Applicants with the unilateral right to terminate the Agreement. As a preliminary argument in support of its position, The Block submits that the circumstances stipulated in the Addendum for termination and early

termination of the Agreement supersede any other provision, including section 8 of the License. In particular, The Block relies on paragraph 14 of the Agreement and section 13 of the Addendum.

[15] Paragraph 14 of the Agreement states in part that:

> … under no circumstances shall the purchaser be entitled to terminate the transaction or otherwise rescind this Agreement as a result thereof other than in accordance with the Tarion Addendum.

[16] Section 13 of the Addendum states:

> The addendum forms part of the Purchase Agreement. The Vendor and Purchaser agree that they shall not include any provision in the Purchase Agreement or any amendment to the Purchase Agreement in any other document… that derogates from, conflicts with of is inconsistent with the provisions of this Addendum except when this Addendum expressly permits the parties to agree or consent to an alternative agreement. The provisions of this Addendum prevail over any such provision.

[17] Section 3 of the Addendum provides the Purchaser with the right to terminate the Agreement and the return of the Deposit in the event that the condominium unit is not completed by the Outside Occupancy Date. The parties are in agreement that the provisions of section 3 are not relevant to this case. Section 6 of the Addendum provides for a number of circumstances that may give rise to the early termination of the Agreement by either the vendor or the purchaser. The Block submits that none of the enumerated circumstances in section 6 are applicable the matter before the court and I agree.

[18] The Block also submits that save for sections 3 and 6 of the Addendum, there are no other provisions that allow for the Applicants' termination of the Agreement.

[19] For their part, however, the Applicants point to section 10 of the Addendum which states in part:

> a) The Vendor and the Purchaser may terminate the Purchase Agreement by mutual written agreement. Such written mutual agreement may specify how monies paid by the Purchaser, including deposit(s) and monies for upgrades and extras are the be allocated if not repaid in full.

The Applicants rely on section 8 of the License as the parties' mutual written agreement to terminate the Agreement where The Block is unable to transfer title of the Property to them within twenty-four months after the Outside Occupancy Date. The Applicants' interpretation of section 8 of the License requires an analysis of the provision.

[20] The text of section 8 of the License states:

> If the Vendor for any reason whatsoever is unable to register the Condominium Documents and therefore is unable to deliver a registerable transfer to the purchaser within twenty-four (24) months after the occupancy date, the Purchaser or Vendor shall have the right after such twenty-four (24) month period to give sixty (60) days written notice to the other, of an intention to terminate the Occupancy License and the Agreement. If the Vendor and Purchaser consent to the termination, the Purchaser shall give up vacant possession and pay the Occupancy Fee to such date, after which the Agreement and Occupancy License shall be terminated and all moneys paid to the Vendor on account of the purchase price shall be returned to the Purchaser together with interest required by the Act, subject however, to any repair… If the Vendor and Purchaser do not consent to termination, the provisions of section 79(3) of the Act may be invoked by the Vendor.

[21] It is conceded by the parties that section 8 of the License was authored by The Block and is not a standard provision found in a license agreement.

[22] The Applicants rely on the use of the modal verb "shall" in support of their argument that they have the absolute right to terminate the License and the Agreement and it is the obligation of The Block to reimburse to them the Deposit where it fails to transfer title within twenty-four months after the Outside Occupancy Date. The Applicants further submit that their right and The Block's obligation have no meaning if The Block's consent to the termination of the License is required, and in any event, there is no basis for The Block to withhold consent if it is unable to transfer title within the prescribed time frame.

[23] It is also the Applicants' position that to the extent that section 8 of the License creates ambiguity, courts have found that where ambiguity exists in the interpretation of real estate contracts, such agreements should be interpreted *contra proferentem* (see: *Jo/Vi Ltd v. Balmoral Developments Inc*, 2014 ONSC 6803, at para 20-22). Because the License was drafted by The

Block, the Applicants submit that such interpretation would necessitate a finding against The Block and the return of the Deposit.

[24] The Block submits, however, that there is no reason to invoke the *contra proferentem* principle because section 8 does not create ambiguity. The *contra proferentem* doctrine is to be applied only when other rules of construction fail to enable the court to determine the meaning of the words in question. When it is relevant, the doctrine is applied to remove doubt, not to create doubt when the circumstances raise no difficulty.

[25] It is The Block's position that section 8 of the License is clear: it does not provide for an unliteral right to terminate but rather requires mutual consent to do so. There was no mutual agreement to terminate, and by its terms, section 8 imposes no obligation on The Block to consent.

[26] Contractual interpretation requires that an agreement be interpreted "with the court giving the ordinary meaning to the language and not straining to create ambiguity that does not exist" (see: *Melito Estate v. Melanson*, 2012 ONSC 24584, at para 64). If the language of a contract is capable of only one meaning, read objectively in the context of the contract as a whole and its surrounding circumstances, the court is required to give effect to that meaning (see: *Rhebergen v. Creston Veterinary Clinic Ltd*., 2014 BCCA 97 ('*Rhebergen'*), at para 73). Furthermore "a clause is not ambiguous simply because of a difference of opinion as to whether the hypothetical activity triggers the compensable provision" (see: *Rhebergen*, at para 74).

[27] It is my view that section 8 of the License is clear on its face and its interpretation is no place for the application of the *contra proferentem* rule. Section 8 does not give either party the right to terminate the License and Agreement upon the expire of a sixty-day notice period but rather the right to give sixty days written notice of the "intention to terminate" should title not be transferred within the stipulated period. The delivery of the intention to terminate triggers a dialogue between The Block and the Applicants to determine whether during the notice period the parties are in agreement to terminate their relationship. If the parties consent to the proposed termination, the License and Agreement are at end and the Deposit is reimbursed to the purchaser. On the other hand, if there is no consensus, pursuant to section 8, The Block, as vendor, may apply to this court under section 79(3) of the *Act* for an order terminating the Agreement. In the event

that the vendor does not avail itself of the relief prescribed by section 79(3) of the *Act*, and the parties remain in disagreement over the termination of their relationship, it is my opinion that the Agreement and License continue to be binding unless there are other available avenues to address the deadlock. No alternative means were pursued by The Block or the Applicants to overcome their impasse in the circumstances of this case.

[28] The Applicants ascribe no meaning to the stipulated consent of the vendor and purchaser to the termination of their relationship; they insist upon an absolute right to terminate. I reject this distorted interpretation of the provision. The consent of the parties is not inconsequential. Moreover, the consent of the parties is consistent with section 10(a) of the Addendum which provides that the parties may terminate the Agreement at any time by mutual agreement.

[29] Finally, the consent of vendor and purchaser is necessary to ensure commercial certainty. Otherwise in each instance where the vendor fails to transfer title within two years of the purchaser's occupancy date, the purchaser would be at liberty to rescind its contract should the real estate market fall; likewise, the vendor would be free to walk away from its obligations should the market rise. Surely such unpredictability is to be avoided.

[30] In summary, based on my interpretation of section 8 of the License and the Applicants' failure to complete the transaction in the absence of an agreement to terminate, the Applicants are in breach of the Agreement and cannot look to section 8 of the License or any provision in the Agreement or Addendum for the return of the Deposit.

2. The Block's failure to invoke section 79(3) of the *Act*

[31] The Applicants submit that they are entitled to the return of the Deposit because The Block failed to make application to the court for an order terminating the Agreement pursuant to section 79(3) of the *Act* as prescribed by section 8 of the License. The Applicants argue that had The Block made application for an order terminating the Agreement, then were the order granted, the Applicants would have had the Deposit returned to them over one year ago. Alternatively, were the Application dismissed, the Applicants would have completed the transaction and realized a profit just as The Block had done when it relisted the Property. In either scenario, the Applicants argue they have suffered a loss.

[32] Whereas the Applicants may have suffered a loss, I cannot accept their submission for three reasons. Firstly, pursuant to the clear wording of section 8 of the License, there is no obligation on The Block to invoke section 79(3) of the *Act* in the event that the parties do not consent to termination. The procedural remedy of section 79(3) is an option for the vendor but by no means mandatory. Secondly, an application to the court under this provision of the *Act* is available to The Block only where it has not registered the required declaration and description. On August 27, 2021, The Block registered the Declaration Amendment, and therefore, it could not have availed itself of section 79(3) under any circumstances. Thirdly, and finally, section 79(3) of the *Act* contemplates the vendor providing notice to the purchasers of all condominium units for an order terminating all agreements of purchase of sale. Clearly by its own terms, section 79(3) would not have been practical or efficient to address the dispute between the Applicants and The Block.

3. Relief from Forfeiture

[33] Although I may find that the Applicants have breached the Agreement (as I have indeed found), the Applicants argue that they are nonetheless entitled to relief from forfeiture, and on that basis, the Deposit should be reimbursed to them.

[34] Section 98 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, states that a court "may grant relief against penalties and forfeitures, on such terms as to compensation or otherwise as are considered just". The parties agree that in the context of a real estate transaction, the principles to be considered in determining a purchaser's entitlement to relief from forfeiture are: (1) whether the deposit is disproportionate to the damages suffered and (2) whether it would be unconscionable for the seller to retain the deposit (see: *Mouralian v. Grondeau*, 2022 ONSC 2925, at para 9)

[35] The Deposit was in the sum of $54,449,90. The Block asserts, however, that it incurred costs of some $63,669.45 as a result of the Applicants' failure to complete the transaction on September 15, 2021. For their part, the Applicants dispute many of The Block's damages as unsubstantiated or otherwise incurred on an elective or unexplained basis. I find that it is unnecessary for me to scrutinize The Block's losses because were I to allow all of its damages, The Block would have realized a net profit of $73,331.55, some $18,81.65 in excess of the Deposit. Furthermore, the differential in the ultimate purchase price of the Property is approximately three

times more than the Deposit and the final purchase price is some thirty-six percent more than the original price. Because of these facts, and this court's decision in *Rahbar et al v. Parvizi et al*, 2022 ONSC 2136 ('*Rahbar'*) which held where a vender sells property for a higher purchase price than that paid by the original purchaser, the deposit will be deemed out of proportion to the damages suffered, I find that the Deposit is out of proportion to the damages suffered by The Block. The question then becomes would it become unconscionable for The Block to forfeit the Deposit?

[36] The Court of Appeal in *Redstone Enterprises Ltd. v. Simple Technology Inc.*, 2017 ONCA, 282 ('*Redstone'*) found that deposits are designed to motivate contracting parties to complete their bargains and it is important that parties know with certainly that the terms of their contract will be enforced. For this reason, the Court of Appeal stated that a finding of unconscionability must be exceptional and strongly compelling on the facts of the case.

[37] Relevant factors for a determination of unconscionability include: (1) inequality of bargaining power; (2) a substantially unfair bargain; (3) the relative sophistication of the parties; (4) the existence of bona fide negotiations; (5) the nature of the relationships between the parties; (6) the gravity of the breach; and (7) the conduct of the parties (see: *Redstone*). The Court in *Rahbar* opined that the most pertinent of these factors are the gravity of the breach and the conduct of the parties (at para. 62).

[38] I accept The Block's submissions that this was a straightforward real estate transaction and there was no inequity in the bargaining power of either party. While the Applicants were presented with The Block's purchase terms, the vast majority of which were non-negotiable, they had the benefit of legal advice before confirming the Agreement during the statutory ten-day cooling period. The Applicants are also educated professionals who had no prior relationship with the principals of The Block and who purchased the Property as an investment. For all of these reasons, to my mind, the first five factors enumerated by the Court of Appeal in *Redstone* do not favour a finding of unconscionability.

[39] The Applicants argue, however, that a close scrutiny of The Block's conduct lead to only one conclusion and that is that forfeiture of the deposit would be unconscionable.

[40] Firstly, the Applicants point to the fact that in September 2020, The Block unilaterally set off the rental guarantee fees and the occupancy fees and again in April 2021, unilaterally terminated the differential payments. In my opinion, the set off of the two payments worked to the advantage of the Applicants and although the differential payment was terminated five months prior to closing, The Block confirmed that the differential of $563.99 per month was to be adjusted on the anticipated closing date. Further, whereas the Applicants object to The Block unilaterally debiting certain maintenance/cleaning charges from the differential payment in December 2020, the same criticism can be made of the Applicants who owed realty taxes on September 15, 2021 in excess of $4,700.

[41] The Applicants also paint The Block as deceitful vendors to the extend that at no time did it advise them prior to the proposed September 15th closing date that it was ready, willing and able to complete the transaction and that it was otherwise insisting on specific performance of the contact. The Applicants also assert that if The Block made its position known, they would have completed the purchase.

[42] While I do find that The Block was not always as responsive to the Applicants' communications as one might expect, its delayed responses primarily followed the aborted September closing. Otherwise, I find that prior to the proposed closing, The Block made its intentions regarding the completion of the Agreement clear to the Applicants. In particular:

1. On August 31, 2021, The Block sent notice of the required declaration to the Applicants and advised that the purchase completion date was scheduled for September 15, 2021. This fifteen-day notice period was in conformity with the terms of the Agreement.

2. On September 9, 2021, The Block advised the Applicants that "if the purchaser wants to terminate the APS, the Vendor requires that the Purchaser forfeit the Deposits. There is no right of termination of the APS, with notice or otherwise."

3. On September 15, 2021, The Block advised the Applicants that "the Vendor considers the Purchase Agreement and Occupancy License to remain in full force and effect and intends to exercise its rights under those agreements."

[43] Furthermore, I do not accept that the Applicants had any intention of completing the purchase or for that matter, had the means to do so. On cross-examination, McKenzie admitted that she and Allen "had no intention of closing and taking title to the unit on September 15". It is also clear on the record that although the Applicants had applied for financing in June 2021, they did not have the required funds to complete the purchase on September 15, 2021.

[44] Finally, the Applicants argue that The Block sold the Property "behind their backs" for a substantial profit. Again, I am unable to accept this position. By way of email on September 15, 2021, not only did The Block communicate its position that the Applicant had breached the Agreement, but it also advised them that it was proceeding to resell the property. Additionally, the fact that The Block sold the Property for more than the original purchase price is not unconscionable (see: *Kermati v. Ko*, 2021 ONSC 3682). Moreover, the Applicants must have known that the local real estate prices had increased since their purchase in 2016. The ultimate sale price of the Property could not have come as a surprise to them.

[45] Accordingly, I am unable to find that the circumstances of this case do not reach anywhere near the required level of exceptional and strongly compelling unconscionability. The Applicants request for relief from forfeiture is therefore denied.

Disposition

[46] For all the above noted reasons, the Applicants' request for a declaration that they validly terminated the Agreement and that they are entitled to the return of the Deposit together with related relief is dismissed.

Costs

[47] I would encourage the parties to agree on the issue of costs. In the unfortunate event, however, that they are unable to agree on the costs of the application, I am prepared to entertain cost submissions. The party seeking costs shall deliver costs submissions within fifteen (15) days of the release of this Decision and the responding party shall deliver responding costs submissions within ten (10) days of receipt of the submissions of the party seeking costs. Reply submissions,

if any, are to be delivered within five (5) days of receipt of the submissions on behalf of responding party. The initial and responding submissions are not to exceed five (5) pages doubled spaced excluding costs outlines, offers to settle and authorities. Any reply submissions are not to exceed two (2) pages. All submissions are to be sent to my attention via my Judicial Secretary by email to Kelly.Flanders@ontario.ca with a copy to the Kitchener.SCJJA@ontario.ca email address.

M.J. Valente

Released: April 21, 2023

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