COURT OF APPEAL FOR ONTARIO

CITATION: C & K Mortgage Services Inc. v. Camilla Court Homes Inc., 2020 ONCA 817
DATE: 20201217
DOCKET: C68751

Strathy C.J.O., Huscroft and Roberts JJ.A.

BETWEEN

C & K Mortgage Services Inc.

Applicant (Respondent)

and

Camilla Court Homes Inc. and Elite Homes Inc.

Respondents (Respondents)

Richard Macklin and Wei Jiang, for the appellant Yong Yeow Tan

David Preger, for the respondent C & K Mortgage Services Inc.

Eric Golden, for the receiver of the respondents Camilla Court Homes Inc. and Elite Home Inc.

Heard by videoconference: December 7, 2020

On appeal from the order of Justice Bernadette Dietrich of the Superior Court of Justice, dated August 27, 2020, with reasons reported at 2020 ONSC 5071, 82 C.B.R. (6th) 289.

REASONS FOR DECISION

[1] This is an appeal from the decision of the motion judge, dismissing the appellant's motion for an order directing that the court-appointed receiver of Elite Homes Inc. and Camilla Court Homes Inc., Rosen Goldberg Inc., refrain from disclaiming the agreement of purchase and sale ("APS") between the appellant and Elite Homes and requiring the APS to be completed.

[2] The appeal in this matter was dismissed on December 8, 2020 with reasons to follow. These are the reasons.

BACKGROUND

[3] The appellant, the interested party Mr. Yong Yeow "Jereemy" Tan, entered into the APS to purchase a residential unit ("the Mateo Property") for $1,758,000 in a condominium project being built by Elite Homes. He paid a deposit of $500,000, but only $100,000 of that was paid in trust to the real estate broker. The remaining $400,000 was paid directly to Elite Homes, ostensibly to assist the builder in timely completion of construction.

[4] At the time of the sale, the property was subject to a first mortgage given by the respondent owner, Camilla Court, to the respondent mortgagee, C&K Mortgage Services Inc. The mortgagee agreed to provide partial discharges of the $4.55 million loan for individual house sales from the project, provided that it received 100% of the net proceeds, less commission, fees, and taxes, and not less than $1.75 million per home.

[5] The APS was made without the knowledge or authorization of C&K Mortgages. It provided, at clause 41 of Schedule A, that the agreement is "subordinate to and postponed to any mortgage(s) arranged by the Vendor".

[6] Closing was to take place on April 30, 2020 but was extended to June 26, 2020. On June 10, 2020, Elite Homes informed C&K Mortgages that it would be seeking a discharge of the mortgage to complete the sale of the property to the appellant, and that proceeds from the $1,758,000 sale would be short $400,000, because Elite Homes had used the appellant's $400,000 deposit to fund ongoing construction and development activity.

The decision to appoint a receiver

[7] C&K Mortgages applied to have a receiver appointed over the assets of Camilla Court and Elite Homes and a hearing was held before Conway J. on June 18, 2020. The matter was adjourned to July 2, 2020, but Conway J. made an interim order that had the effect of freezing the status quo. Consequently, the APS could not be closed on the scheduled date, June 26, 2020.

[8] The application proceeded on July 2, 2020 and the appellant was represented by counsel at the hearing. Conway J. found that the first mortgage could not be paid in full from the sale proceeds and that there were additional construction liens registered on title. She appointed a receiver to finance the remaining construction and to market and sell the properties, taking account of the

interests of the various stakeholders. The appointment of the receiver precluded the closing of the sale of the property to the appellant.

[9] The appellant did not appeal the order of Conway J. Subsequently, the receiver decided to disclaim the APS.

The decision of the motion judge

[10] This is the backdrop against which this appeal must be understood. The appellant sought an order requiring the receiver to complete the APS rather than disclaim it. The appellant asserted that he had an equitable or proprietary interest in the Mateo Property of $500,000, the amount he paid as a deposit.

[11] The motion judge concluded that the receivership order authorized the receiver to disclaim any contracts of the debtors, including the appellant's APS. She noted that the appellant's ability to vary the order was limited because he did not appeal the receivership order.

[12] The motion judge considered and rejected the appellant's argument that he had an equitable or proprietary interest in the Mateo Property created prior to Elite Homes' receivership. The appellant's claim was precluded by two provisions of Schedule A to the APS: (i) clause 27, which states that the APS does not create an interest in the real property and that the appellant shall have no interest in the real property until a Transfer/Deed of Land is registered in favour of the Purchaser; and (ii) clause 41 which, as noted above, provides that the APS is subordinate to

and postponed to any mortgage(s) arranged by the Vendor. The motion judge also rejected the appellant's argument that clauses 27 and 41 were inoperative because the APS had been terminated. She found that the APS had not been terminated. On the contrary, the appellant had attempted to complete the sale and on the motion sought an order of specific performance. Further, the receivership order provided specifically that the respondent's security over the property ranked in priority to the interests, if any, of the appellant purchaser.

[13] In short, the motion judge found that the appellant did not have an interest in the Mateo Property that would negate the legal priority of C&K Mortgages, nor did the equities justify subordinating the respondent's legal priority. If the receiver did not disclaim the order and instead completed the APS, the appellant would benefit at the expense of the respondent, whose interest in the property was secured.

DISCUSSION

[14] We see no errors of the motion judge that would justify the intervention of this court on appeal.

[15] Assuming that the appellant had a purchaser's lien on the property as a result of his payment of the money as a deposit, clause 27 operated to preclude him from obtaining an interest in the property and clause 41 rendered his interest subordinate to the mortgagee's.

[16] The appellant argues that the motion judge misapprehended his central argument. The appellant says that he argued the APS was not terminated but was breached when the receiver failed to close on June 26. This breach is said to free him from the effect of clause 27 of Schedule A to the APS.

[17] We disagree. The inability to close on the scheduled date did not mean that these clauses no longer applied but the rest of the contract did, such that the appellant could continue to seek an order for specific performance of the agreement.

[18] The motion judge properly distinguished the cases proffered by the appellant, including *Armadale Properties Ltd. v. 700 King Street (1997) Ltd.* (2001), 25 C.B.R. (4th) 198 (Ont. S.C.). In that case, the purchaser had paid the entire amount owing under the agreement by way of deposit, moved into the commercial unit prior to the closing date, and spent approximately $80,000 on improvements and moving expenses. In these circumstances, the court held that sale to a *bona fide* purchaser prior to the bankruptcy was valid and effectual and the receiver could not disclaim the contract. The court added that the equitable interest under the contract passed prior to the bankruptcy and the purchaser could have obtained an order for specific performance prior to the receivership.

[19] The facts of this case differ starkly. For whatever reason, the appellant agreed to pay a deposit of $500,000, significantly in excess of what would normally

be required, and only $100,000 of that amount was paid in trust (to the realtor's firm). The other $400,000 was given straight to the developer. There is no evidence as to what became of this deposit, and in particular no evidence that it went into the property the appellant sought to purchase.

[20] The bottom line is this: The appellant purchased land that was subject to a prior mortgage. The property could not be conveyed to him unless the mortgage was redeemed in accordance with its provisions, and that required a minimum discharge in the amount of $1.75 million. A purchaser's lien would put the appellant in no better position against the respondent mortgagee. The mortgage properly takes precedence.

[21] The appellant raises a number of additional issues in his factum, but in essence these arguments seek to relitigate arguments considered and rejected by the motion judge. We see no error in the reasons of the motion judge.

[22] Accordingly, the appeal is dismissed.

[23] The respondents are entitled to costs of the appeal. If the parties cannot agree on costs, they may make brief 2-3 page submissions to this court, along with their bills of costs, within 30 days of this decision.

G.R. Strathy CJO

I agree J. Hoy A. JA

I.B. Roberts JA.