

CANADA / JUDGMENT

Bray Leasing Ltd. v. Johnson

2005 BCSC 342

COURT

Supreme Court of British Columbia

DECIDED

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2005 BCSC 342 Bray Leasing Ltd. v. Johnson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bray Leasing Ltd. v. Johnson,

2005 BCSC 342

Date: 20050310

Docket: S83057

Registry: New Westminster

Between:

Bray Leasing Ltd.

Plaintiff

And

Dean Warren Johnson and Lois Marie Wickert

Defendants

Before: The Honourable Mr. Justice Melnick

Reasons for Judgment

Counsel for the Plaintiff:

J. Michael Le Dressay

Counsel for the Defendants:

Donald S. Boyle

Date and Place of Hearing:

March 1, 2005

Vancouver, B.C.

- [1] This is an application by the defendants pursuant to Rule 18A to dismiss the claim of the plaintiff for specific performance of an agreement for the purchase and sale of land. In the alternative, the defendants seek the cancellation of the certificate pending litigation registered by the plaintiff against their property.

I. Background

- [2] The defendants, Lois Marie Wickert ("Ms. Wickert") and her son Dean Warren Johnson ("Mr. Johnson"), own a home and property in Surrey. The property is capable of being subdivided into three lots with the home remaining on one of the lots. For some years now, they have been attempting to subdivide the property. Their neighbours, Mr. and Mrs. Russell, also wish to subdivide their property although the result would be two lots, their home on one of the parcels.
- [3] Initially, the defendants tried to effect the subdivision on their own. In June 1997, they applied to the City of Surrey to rezone their property to accommodate the subdivision. Included in that application was an application to also rezone the Russells' property. The rezoning application has not yet received final approval from Surrey.
- [4] The original application included three equal sized lots on the defendants' property. In June 2000, the defendants obtained preliminary layout approval ("PLA"). This approval contemplated the three equal sized lots on the defendants' property and was subject to certain conditions. One of those conditions was that the defendants had to "...remove all structural and amenity items associated with [certain] secondary suites" located in the home on the defendants property and which had, apparently, been the subject of a number of complaints. In other words, the City of Surrey said that it would give its approval to the subdivision, all other usual and specific conditions being met, provided that the defendants got rid of their two illegal suites.
- [5] Ultimately, the defendants decided to sell the unsubdivided lots as a development opportunity. That is, they sold the property on the basis that the purchaser would be responsible for doing the work, and paying the costs associated with, taking the balance of the steps necessary to obtain registration of the subdivision plan. The Russells were interested in having their son-in-law take advantage of this development opportunity. The son-in-law owns the plaintiff company, Bray Leasing Ltd. ("Bray Leasing"). Apparently, the preference of Surrey was to have the subdivision of both parcels of property proceed at the same time.

- [6] Ms. Wickert's brother, Harland Gustafson ("Mr. Gustafson"), is a realtor. With the agreement of the parties, he acted as agent for both the vendors and purchaser in drawing up the contract of purchase and sale between the parties which is dated March 24, 2003. The agreement provided for the registration of an official subdivision plan of the property not later than July 15, 2003. Upon registration, the defendants agreed to convey to Bray Leasing two newly created lots each having a frontage of approximately 31.0 meters. In fact, the then existing PLA provided for lots each having a frontage of 35.4 meters. However, when the defendants decided to sell to Bray Leasing, they decided to retain a somewhat larger portion of property for the lot upon which their home would be located. Thus, at the time of execution of the agreement of purchase and sale, Mr. Gustafson drew new lot lines, and wrote the new width of the lots, on the plan which showed equal lot sizes for the three lots. Mr. Gustafson apparently did not say to William Bray ("Mr. Bray"), the principal of Bray Leasing, that the existing PLA that had been approved contained dimensions other than what Bray Leasing had agreed to purchase. Subsequently, on April 14, 2003, the parties signed a document by which they amended the agreement of purchase and sale. The amended agreement provides, in part, as follows:
5. Should there be any unforeseen delays caused by the City of Surrey preventing registering the official subdivision plan the vendor agrees to a reasonable extension of the completion date.
- [7] Further, at that time, a condition in the original contract was removed so as to create what was described as "a firm and binding contract". The realtor was authorized to release a \$10,000 deposit held in trust to the realtor, to the vendors.
- [8] Thus, from April 14, 2003, the parties had the following obligations to each other: Bray Leasing was to take all steps necessary to register the official subdivision plan; the plan was to be registered by July 15, 2003 subject to unforeseen delays caused by Surrey; the defendants were to remove the structural and amenity items associated with their illegal suites; and, there was an amending agreement which provided for the payment of \$100,000 of the \$175,000 purchase price (the \$10,000 deposit already being released to the defendants) upon registration of the official subdivision plan. The amending agreement further provided for the final \$65,000 to be paid "completing all deficiencies on the dwelling, out buildings or landscaping" required by Surrey. Realistically, however, whatever that entailed had to be done in order to obtain Surrey's final approval prior to registering the subdivision plan.
- [9] It is clear that the July 15, 2003 deadline was completely unrealistic. Bray Leasing did not pursue the steps required of it to obtain registration of the official subdivision plan with sufficient dispatch. I do not accept that any fault can be laid at the feet of the defendants because of the change in lot sizes. That was part of the due diligence obligation of Bray Leasing. An inquiry, carried out at an early date, would have quickly revealed the problem which, when it did come to the attention of Bray Leasing, was expeditiously dealt with by the defendants at the request of Bray Leasing. However, the second reason the official subdivision plan could not have been registered by July 15, 2003 was because the defendants

had not done what they were obligated to do under the terms of the agreement. Really all they did do was unhook the kitchen stoves and stop renting the premises. They made no other apparent efforts to convert the premises back to a single family dwelling nor did they call for an inspection to satisfy Surrey that they had done that which Surrey had required them to do as a condition of approving the PLA.

- [10] A PLA approving all of the lots with their appropriate sizes was approved by Surrey only on July 28, 2003. Later, on August 11, 2003, Ms. Wickert complained to Mr. Gustafson about the failure of Bray Leasing to complete on July 15th. Mr. Gustafson responded that he had covered that problem with the addendum, presumably referring to the new proviso that reasonable delay could be accepted if it was the fault of Surrey. In this case, of course, there is no evidence whatsoever that anything was the fault of Surrey.
- [11] Subsequently, on August 18, 2003, Ms. Wickert was asked by Mr. Gustafson and his manager, Mr. Geoff Lloyd ("Mr. Lloyd") to execute a further amendment to extend the completion date to December 18, 2003. Ms. Wickert refused. Later, on August 30, 2003, Ms. Wickert advised both Mr. Gustafson and Mr. Lloyd that she was prepared to carry on, but that she regarded the agreement at an end and wanted to negotiate a new contract. Mr. Lloyd conveyed the message that they were not prepared to speak with her any further. Neither the defendants, Mr. Gustafson or Mr. Lloyd made any attempt to communicate with Bray Leasing at that point that Ms. Wickert regarded the contract at an end. Thus, Bray Leasing continued to work toward the registration of the official subdivision plan.
- [12] Thus, after August 30, 2003, Bray Leasing caused the following steps to be taken:
- a) on September 11, 2003, a pre-design package was submitted to the Surrey Engineering Department for its review;
 - b) on September 22, 2003, a "key plan circulation" was submitted to the Surrey Engineering Department for its review;
 - c) on October 3, 2003, Mr. Michael Helle ("Mr. Helle") technologist with Coastland Engineering & Surveying Ltd. ("Coastland"), on the instructions of Bray Leasing, attended a pre-design meeting held at the site of the property with representatives of Surrey's Engineering Department;
 - d) on October 8, 2003, a 15 per cent park fee letter was submitted to Surrey;
 - e) on October 8, 2003, legal and surveying packages were sent out to a notary public and to a surveyor with a view to completion of legal documentation and plans;
 - f) on October 8, 2003, Mr. Helle issued instructions to individuals to complete arborist and building design guideline consulting works;
 - g) on October 16, 2003, Mr. Helle submitted an arborist plan and report to Surrey;

h) on October 25, 2003, Mr. Helle submitted lot grading plans to Surrey's Planning Department; and

i) on November 3, 2003, Mr. Helle submitted formal design plans to Surrey's Engineering Department.

[13] In all, Bray Leasing has expended \$20,232.00 in fees and costs in pursuing the registerable official subdivision plan. From the above list, it is evident that the majority of this money was expended after July 15, 2003.

[14] However, on November 3, 2003, Mr. Bray, on behalf of Bray Leasing, advised Mr. Helle not to further pursue the matter because Bray Leasing had received a without prejudice letter dated October 10, 2003 advising that the defendants considered their agreement with Bray Leasing to be terminated. I observe that if the defendants had intended the letter to terminate their relationship, one would have expected it to be a with prejudice letter. However, that aside, in that letter the defendants gave as reasons for their terminating the contract:

- 1) the completion date of July 15, 2003 had passed with no written addendum in place with respect to the new completion date;
- 2) Surrey was not the cause of any delays that had occurred;
- 3) Bray Leasing had forwarded incorrect dimensions for the lot layout to Surrey and Coastland following the execution of the original agreement and, had that not been so, the PLA could have been corrected earlier than July 11, 2003; and
- 4) Bray Leasing had failed to provide them with copies of applications in a timely manner as required by the agreement.

They further advised that, as Bray Leasing had failed to comply with the terms of the agreement, the deposit was forfeit and the agreement null and void.

[15] Bray Leasing responded by commencing this action for enforcement of the agreement, claiming that the delays in completing the subdivision were caused by the defendants in misrepresenting the terms of the PLA, that is the size of the lots, and failing to rectify deficiencies in the dwelling. Bray Leasing also asked for relief from forfeiture under the provisions of section 24 of the Law of Equity Act, R.S.B.C. 1996, c. 253.

II. Discussion

[16] The parties agreed to a completion date that was unrealistic in all of the circumstances. While this probably was not apparent to the defendants who had no experience with land subdivision, it should have been apparent both to Bray Leasing and to Mr. Gustafson, the dual agent. It was Mr. Gustafson, apparently, who inserted the date in the agreement. Bray Leasing is at fault for not undertaking appropriate due diligence after entering into the contract and for not pursuing, without delay, steps necessary to obtain the subdivision plan.

It should have been apparent to Bray Leasing that the contract could not be completed by July 15, 2003 and that the reason for that delay would be the pace at which it was able to supply information to, and satisfy the requirements of, Surrey. Bray Leasing should have sought an extension of the contract from the defendants prior to July 15, 2003. It should have kept in better communication with the defendants and provided them with evidence of the steps that were being taken to pursue the registration of the subdivision plan.

- [17] On the other hand, the defendants failed to live up to their obligations under the contract. They failed to remove the structural and amenity items associated with the suites. Further, they failed to communicate in a timely way to Bray Leasing their position that they regarded the contract at an end. I find that it was not sufficient to rely on a statement made to Mr. Gustafson, notwithstanding his status as a limited dual agent. They, therefore, put Bray Leasing in the position where it continued to expend substantial funds in pursuit of the subdivision plan without being aware of the defendant's position that they regarded the agreement at an end.
- [18] In my view, in all of the circumstances here, it would be patently unfair for me to order the contract between the parties to be terminated as a consequence of the default of Bray Leasing. Bray Leasing is in default, of course, but so are the defendants. Further, as noted, the defendants put Bray Leasing in the position of expending substantial funds by not advising them earlier of their position with respect to termination.
- [19] Section 24 of the Law and Equity Act provides:
24. The court may relieve against all penalties and forfeitures, and in granting the relief impose any terms as to costs, expenses, damages, compensations and all other matters that the court thinks fit.
- [20] Further, section 25 of the Law and Equity Act provides:
25. (1) Despite agreement to the contrary, if because of a default in payment of any money due under, or in the observance of a covenant contained in
- (a) a mortgage of land, or
 - (b) an agreement for sale of land,
- the payment of money or the doing of anything is or may be required at an earlier time than would be the case if the default had not occurred, then, in proceeding for the enforcement of rights under the instrument, the court may, before a final disposition of the proceeding, relieve any person from the consequence of the default.
- (2) In granting relief under subsection (1), the court may impose any terms as to costs, expenses, damages, compensations and all other matters that it considers appropriate.

[21] This is a case where equity calls for relief to be granted to Bray Leasing notwithstanding its default by not completing its obligations under the agreement for sale by July 15, 2003. In granting that relief, however, it is also just, in my view, to impose certain conditions. The conditions I would impose are as follows:

- 1) Bray Leasing must complete the registration of the subdivision plan within 62 days of the date of this judgment. That, to me, appears on the evidence to be a reasonable time limit because Mr. Gustafson originally requested of Ms. Wickert that the defendants sign an extension agreement to December 28, 2003. Presumably, therefore, Bray Leasing must have contemplated that it could complete the subdivision by then. This appears to accord with the timeline of work that was done as outlined in the affidavit of Mr. Helle. On November 3, 2002 Mr. Helle had submitted formal design plans to Surrey's Engineering Department. That was the day he was told to withhold doing further work. That left almost two months before what would have otherwise been the December 28, 2003 deadline for a completion date had defendants agreed to it.
- 2) The defendants will complete all requirements of Surrey with respect to the illegal suites and call for any inspection required to prove to Surrey that the work has been accomplished to its satisfaction all within 45 days of the date of this judgment.
- 3) Payment of the balance of the purchase price of \$165,000.00 shall include interest at 5% per annum from July 15, 2003 to date of payment.
- 4) If, because of the passage of time since November 3, 2003 there have been any changes in Surrey's requirements, or if any approvals have expired, so as to make the time requirements set by me for other parties unrealistic, there is liberty to apply.
- 5) Subject to the proceeding paragraph only, the full purchase price, including sufficient interest to the closing date, shall be deposited to the trust account of the solicitor of Bray Leasing not later than 31 days after the date of this judgment as a demonstration of the financial capacity of Bray Leasing to close the transaction and to provide comfort to the defendants that the contact will be completed within the time I have set.

III. Conclusion

[22] The defendants' application to dismiss the claim of Bray Leasing is dismissed. The claim of Bray Leasing for relief from forfeiture is allowed on the terms set out above. Bray Leasing is entitled to its costs of this application on scale 3.

"T.J. Melnick, J."

The Honourable Mr. Justice T.J. Melnick

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