

CANADA / JUDGMENT

Massah et al v. Chudinsky et al

2006 BCSC 255

COURT

Supreme Court of British Columbia

DECIDED

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2006 BCSC 255 Massah et al v. Chudinsky et al

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Massah et al v. Chudinsky et al,

2006 BCSC 255

Date: 20060214

Docket: L051204

Registry: Vancouver

Between:

VAHID MASSAH and TALAT GOLI MASSAH

PETITIONERS

And:

ALEXANDER CHUDINSKY and MASTERS REALTY (2000) INC.

dba RE/MAX MASTERS REALTY

RESPONDENTS

Before: The Honourable Madam Justice Morrison

Reasons for Judgment

Counsel for the Petitioners

Cam McKechnie

Counsel for the Respondent, Alexander Chudinsky

John Douglas Shields

Date and Place of Hearing:

November 3, 2005

Vancouver, B.C.

- [1] This is an application by the petitioners for the return of a deposit of \$45,000.00 paid to the respondents, Masters Realty (2000) Inc. doing business as Re/Max Masters Realty ("Re/Max"). This deposit was paid in trust pursuant to an offer to purchase with regard to property in West Vancouver, British Columbia located at 1275 Gordon Avenue. The sale did not complete, and the deposit remains in trust with the respondent realtor.
- [2] The vendor on the offer to purchase is the respondent, Alexander Chudinsky. Mr. Chudinsky had claimed a builders lien and in early 2005, he obtained a court order giving him conduct of the sale of the property in foreclosure proceedings.
- [3] The premises involve a partially completed residence. On February 21, 2005, the petitioners viewed the premises. The next day, February 22, they made an offer to purchase on certain terms and conditions, the purchase price being \$900,000.00. The terms included payment of a deposit of \$45,000.00 to be held in trust by Re/Max. The offer was accepted, subject to approval by the court.
- [4] It was a term of the agreement that the premises would be conveyed to the petitioners in "substantially the same condition at the Possession Date as when viewed by the Buyer on February 21, 2005."
- [5] On April 4, 2005 a flood occurred at the premises, with some damage to the premises. The extent of the damage is in dispute. On that same date, the court approved the agreement and fixed a closing date of April 14, 2005. The order approving the sale provided as follows:
 - 2. on registration of a certified copy of this Order in the Lower Mainland land title office, together with a letter from the applicant's solicitors authorizing its registration, and a letter from the solicitor for the Homeowner Protection Office confirming that home warranty insurance has been arranged by or on behalf of the [petitioners] covering the home constructed on the Lands as required by Section 22 of the BC Homeowner Protection Act... the premises would be conveyed to the petitioners.
- [6] The court order also approved a backup offer by a third party, in the event that this sale did not complete on April 14. The premises would then be sold to the third party on April 29, 2005, subject to similar conditions.
- [7] The petitioners allege that they attempted to obtain new home warranty insurance on the premises but were unable to do so before the closing date of April 14, partly because of the flood damage to the partially completed home.

- [8] Under the Homeowner Protection Act, S.B.C. 1998, c. 31, there are provisions that give consumer protection for new home buyers. The purposes of this Act are set out in s. 2 of the Act and they include strengthening consumer protection for buyers of new homes and improving the quality of residential construction.
- [9] Section 20 of the Act stipulates that "an owner builder" is not required to obtain home warranty insurance.
- [10] Section 21 of the Act stipulates that an owner builder must, before selling a home that is not covered by home warranty insurance provide to a prospective purchaser a disclosure notice in the prescribed form, stating that the home is not covered by home warranty insurance.
- [11] Section 22(1) states as follows: "A person must not build, offer for sale or sell a new home unless the new home is covered by home warranty insurance provided by a warranty provider." That section goes on to explain that the coverage is provided for defects in material and labour for a period of at least two years after the date on which the warranty begins. It also covers defects in the building envelope, etc.
- [12] Section 22 of the Homeowner Protection Act puts the obligation on the seller of the new home to ensure that home warranty insurance coverage is provided. However, the order of the Master of April 4 provided that the sale of the property to the petitioners would occur on registration of a certified copy of the order of the Master, together with a letter from Mr. Chudinsky's solicitors authorizing its registration, plus a letter from the solicitor for the Homeowner Protection Office ("HPO") confirming that home warranty insurance had been arranged by or on behalf of the petitioners, the purchasers in effect, not the vendors.
- [13] What was not before the court was the information that a flood had occurred at the premises around that same date of the order. The petitioners say the flood left the premises in a condition different from the condition that the premises were in on February 21, 2005, the date of inspection of the property by the purchasers.
- [14] Presumably none of the parties who appeared before the court on April 4 were aware of the flood or damage. Certainly there was no mention of it in court proceedings or in the affidavit material at that time.
- [15] A transcript of a portion of the proceedings before the Master on April 4 has been placed in evidence. Mr. Bury was then counsel for Mr. Chudinsky. The realtor for Mr. and Mrs. Massah, Keith Finney, appeared as agent for the Massahs. There was also the backup offer of \$911,000.00 on the property in the event that the Massah sale did not go through, and the realtor for those purchasers, the Robinsons, also appeared as an agent.
- [16] A portion of those proceedings sheds some light:

MR. BURY: (Counsel for Mr. Chudinsky)

...

Paragraph -- section 22 of the Homeowner Protection Act provides that anybody who sells a new home must ensure that it is covered by new home warranty insurance. Well, in fact, this house is not. The builder, Mr. Atkinson, I don't know anything about him, but he's not here today and he doesn't have a solicitor. He's effectively gone. Mr. Chudinsky is not the builder. He doesn't have home warranty insurance.

So the Homeowner Protection Office appointed counsel, Mr. Boonstra of Kuhn & Company, long ago, and I've been dealing with Mr. Boonstra for the last couple of weeks in anticipation of this application, and he has said to me that the Homeowner Protection Office will not object to this breach of the section by Mr. Chudinsky, and by the way, by the previous party that had conduct prior to him, on condition that paragraph 2 of my order is amended as Your Honour sees it is, and, specifically, the second and third -- sorry, third, fourth and fifth lines have been added to the ordinary form of order.

The sale cannot complete, the Land Title Office will not allow it to complete without a letter from Mr. Boonstra, counsel for the HPO saying, "We allow it to complete," and the idea is that whoever is the successful bidder here today must then go to the Homeowner Protection Office and say, "I've now contracted with a builder who's licenced. I'm satisfying you, Homeowner Protection Office, that I have warranty insurance in place," and they will then provide me with the letter that I need to complete the sale.

THE COURT: Sorry, who does that?

MR. BURY: The successful bidder.

THE COURT: Has to go and --

Mr. BURY: Arrange new home warranty insurance. And both the parties who are here bidding through their agents are well aware of that and I'm told that both of them already have arrangements in place with licenced builders.

...

THE COURT: Well, this is a rather mundane question, there must be an amusing answer to it, but if you have a statute on the books that says you must not do something unless you do it this way, everybody just can agree to ignore that?

...

THE COURT: ... I mean, I'm looking at a statute that says you must not build, offer for sale, or sell it unless it's covered. So somebody, it doesn't matter to me who, but somebody's clearly in breach of this statute. Normally, when someone is in breach of a piece of legislation, they're either fined or imprisoned, or both. Well, I can't let it belong to "either" any more, I guess, but something along the lines of some penalty. Can you just contract your way out of breaking the law?

MR. BURY: No, I'm sure one cannot contract out of his obligation to comply with the law, but in this case, the party charged by the legislation, the Homeowner Protection Office, through its counsel, has said, "We will not object or take any steps to enforce our rights, penalty, imprisonment, or otherwise, against Mr. Chudinsky, as long as the court order which approves the sale gives us the protection we need to protect the public."

...

THE COURT: So they say, "Fine, we won't enforce this provision. We won't do anything about it if the following conditions are met."

MR. BURY: Correct, and the conditions are those in paragraph 2 of my draft vesting order, which Mr. Boonstra has approved.

...

THE COURT: ... I'm just curious in the overall scheme of things because if they do it for one person, presumably, they can do it for all people, and it's just interesting that there's a statute that creates a criminal offence that you can then bargain your way out of.

MR. BURY: A quasi-criminal offence, Your Honour. We have Federal, of course, to be criminal. And I can ensure the court that as regards financial institutions, banks and the like, there is a -- I can assure the court because HPO's counsel has assured me, there is an understanding in place. The Bank of Montreal is not an insured builder, but the HPO does not concern itself because they have a comfort level with large financial institutions that they will make appropriate arrangements. But like the Securities Act, like many statutes, Your Honour, I think, with respect, the HPO's taking a practical approach here, as opposed to a black letter approach.

...

THE COURT: Except that if -- in a more complicated way than usual, this is some sort of a conditional order, isn't it?

...

MR. BURY: It is, and that was my next point, Your Honour. Ordinarily, of course, the court will not approve a conditional order on a foreclosure proceeding. Indirectly, this is a conditional order because HPO has the ultimate upper hand. But I have been involved in foreclosure situations in which the court has approved conditional offers....

...

THE COURT: And these bidders are completely aware of all -- of what we just discussed and the potential problems, and --

Mr. BURY: Absolutely.

THE COURT: -- they might get an okay, they might not?

Mr. BURY: Correct. Both bidders, through their agents here today, have assured me that they have arrangements in place with licenced builders. They're confident that if they succeed, they will be able to satisfy the HPO.

THE COURT: So what happens to the deposit that these people are putting up, if I approve the sale and they go to the HPO and the HPO says no?

MR. BURY: That deposit will be refunded, it's my understanding, because the vendor will have failed to remove his condition precedent. Effectively, this is a vendor's condition precedent.

THE COURT: A vendor's condition precedent?

MR. BURY: I think it is. Ordinarily, one walks out of chambers --

THE COURT: I thought the obligation was on the purchaser to go and get this HPO clearance?

MR. BURY: It is, but the obligation on the vendor is to deliver a clear title, and this order is not a clear title, it's a conditional transfer, if one wishes. Now, I can't say I have any authority on that point, but that would be my advice. But we've contemplated that, too, Your Honour, and wish to make submissions which I think might address those concerns, as well.

THE COURT: I don't know if it's necessary....

[17] So the draft order prepared by counsel for Mr. Chudinsky was approved by the Master. Then the flooding intervened.

[18] The material filed indicates that the petitioners contacted the HPO on April 5, 2005, the day after the court appearance, to arrange for an inspection of the property. Both Mr. Massah and Mr. Chudinsky were present when the property was inspected. Mr. Chudinsky also arranged for a professional engineer to inspect the premises on April 8, 2005. The flooding had occurred when electrical power to the house had been cut off. A drainage sump with a submersible pump could not operate with no electricity. Flooding occurred during heavy rain. The parties differ as to the degree or seriousness of damage from the flooding. There was an observation report filed dated April 8, 2005 indicating another inspection was made on April 8, 2005 on behalf of Kamcon Construction at the behest of the petitioners.

[19] On April 12, 2005 the petitioners' realtor sent a letter to the lawyer for Mr. Chudinsky advising him that Mr. and Mrs. Massah were making every effort to satisfy the court condition with regard to the HPO and that the HPO had indeed inspected the subject property with both Mr. Massah and Mr. Chudinsky in attendance. As of April 12, the results of that inspection were still not known.

[20] On April 14, 2005, the closing date, Kamcon, the contractor for the Massahs, confirmed that deficiencies that had been noted would have to be rectified, that the HPO would have to re-inspect to determine if warranty coverage could be provided, and the obvious conclusion was that there was not the required home warranty insurance in place, as stipulated by the court order.

- [21] The position of the petitioners is that they were unaware that they would have to provide new home warranty insurance on the premises until the court hearing on April 4, 2005, and that their attempts to obtain that warranty insurance in the following ten days was not possible because of the intervening flooding that took place at the premises. Through no fault of their own, they were unable to complete the purchase of the property.
- [22] They are entitled to a return of their deposit.
- [23] There was an intervening event, which was not the fault of the petitioners. It would be unjust to hold them to the contract under such conditions.
- [24] The position of the respondent, Mr. Chudinsky is that the petitioners are not entitled to the return of the deposit. They agreed in the offer to purchase that they would lose the deposit if they did not complete the contract. The contract was approved by the court, and the provision for court approval was for the sole benefit of the vendor, Mr. Chudinsky, and not the petitioners.
- [25] Further, the respondent says that the petitioners knew of the home insurance issue before signing the contract and that they could have dealt with it as "owner builders". The contract provided that the deposit would be lost if the balance of the price was not paid. It was not, and the deposit should not be returned to the petitioners.

Conclusion

- [26] This is an unusual set of facts. It was not a term of the contract of purchase and sale of February 21, 2005 that the purchasers, the petitioners, would have to provide home warranty insurance. At that point in time, under s. 22 of the Homeowner Protection Act, that would be the responsibility of the vendor, Mr. Chudinsky.
- [27] However, counsel for Mr. Chudinsky was able to persuade the court at the hearing for court approval on April 4, 2005 that counsel for the HPO had assured him that there was an understanding in place, and that the draft order which was ultimately approved, would allow the sale to complete without problems for any of the parties.
- [28] The court, showing more than a touch of knowledgeable cynicism, asked what would happen to the deposit if the court approved the sale and then the purchasers go to the HPO "and the HPO says no". Counsel for Mr. Chudinsky assured the court that the deposit would be returned as it was the obligation of the vendor to deliver a clear title.
- [29] I agree.
- [30] The court order gave what amounts to a conditional order for sale. Through no fault of their own, the petitioners were unable to comply with a condition within the tight confines of ten days before the closing date. The intervening flood and damage were unforeseen complications.

- [31] The backup purchasers, the Robinsons, were able to complete the purchase for \$911,000.00 at some later date.
- [32] There is some evidence to indicate that the petitioners would be entitled to refuse to complete based on the fact that the premises were not in the same condition as they were when viewed on February 21, 2005.
- [33] In my view, the vendor was not entitled to impose an additional legal obligation on the petitioners to obtain home warranty insurance as part of the contract for sale of the property. There was no such provision in the contract of purchase and sale. The purpose of the agreement between the parties was the sale and purchase of the property. There was nothing in it with regard to obtaining homeowner protection insurance. There was an obligation by law on the vendor under s. 22 of the Homeowner Protection Act, however.
- [34] There will be an order declaring that the petitioners are entitled to the real estate deposit of \$45,000.00, and an order that the stakeholder, Masters Realty (2000) doing business as Re/Max Masters Realty pay the deposit to the petitioners forthwith.
- [35] Costs to the petitioners, scale 3.

"N. Morrison, J."

Madam Justice N. Morrison

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