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No penalties for late closing if buyer agrees to new deadline

Amended agreement restarts countdown for any compensation

But refusing extension may give builder right to back out of deal

An unhappy client came into my office last week and wanted to know if he could get compensation, since the new house he was buying was not going to be ready by day 240 after the originally scheduled closing date.

Could the builder back out of the deal, he wanted to know, or would the builder have to pay my client $100 a day for every day he was late?

My client had read the delayed closing information on the Tarion Warranty Corp. website (http://www.tarion.com) and was confused by it.

In a nutshell, I explained that, by law, every agreement of purchase and sale for a new home or condominium contains a section that allows the builder to extend the scheduled closing date by up to 120 days.

If the house is not completed by then, the purchaser has 10 days to terminate the transaction and receive a refund of all deposit money paid.

If the purchaser does not terminate, the transaction is automatically extended for up to an additional 120 days.

If the house still isn't finished by day 240 and the parties don't agree otherwise, the transaction dies.

In counting time, delays due to events beyond the builders control, such as strikes, fires, flood or acts of God, stop the clock from ticking.

No compensation is payable to a purchaser for a major delay of between 16 and 120 days, or for a minor delay of up to 15 days, if proper notice is given 65 days advance notice for a major delay, and 15 days for a minor delay.

The builder can also delay possession of a new home by up to five days without notice or compensation even on the scheduled closing day.

If the delay exceeds 120 days for any reason, a purchaser can claim compensation of up to $100 a day up to a maximum of $5,000 with proper receipts, or $80 a day to the same maximum without proof of direct expenses caused by the delay.

But there's a big if in all of this. The right to compensation does not arise if the purchaser agrees to an extension in writing.

In my client's case, the builder had asked him to come in to the sales office to sign an amendment to the agreement, which set a new closing date.

In this case, I told him, the 120/240 day clock is reset and then starts running all over again from the new closing date.

Instead of the deadline being in September, the new outer limit for his closing date was in the middle of 2006, and he didn't realize it.

Since he had already agreed to the extension, there could be no compensation.

The warranty regulations do not require the builder to inform the purchaser that the extension clock starts running again if both parties agree to a new closing date.

That's what happened to Joseph and Eleanor Yue, who purchased a new home in Waterloo in June 2002, with a scheduled closing of Nov. 25, 2002.

Due to construction delays, the builder later gave notice that the new closing date would be March 25, 2003, but the notice was shorter than the required 65 days.

In November 2002, the builder and purchasers signed an amendment to the agreement, changing the location of the lot the house was to be built on, and amending the closing date to March 25, 2003.

The transaction closed on time, on March 25, 2003.

After closing, the purchasers submitted a claim to the warranty corporation for $5,000 for delayed closing costs, declaring they did not receive the required 65-day advance notice of the 120-day extension.

In March of this year, a three-judge panel of the Divisional Court upheld the original decision of the Licence Appeal Tribunal and turned down the Yue claim.

Even though the Yues may not have received the full 65-day notice, they waived their rights to compensation when they signed an amendment to the agreement, moving the closing date to March 25, 2003.

I told my client the same thing last week.

Since he did not reserve the right to claim compensation when he agreed to delay the closing of his house, he was not entitled to compensation until 120 days after the new date, sometime next year.

Next time, he told me, he will either refuse to sign an amendment and risk losing the house, or sign an amendment extending closing, but reserve his rights to claim compensation.

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2005 CanLII 9335 (ON S.C.D.C.)
Citation: *Yue v. Ontario (New Home Warranty Program)*, 2005 CanLII 9335 (ON S.C.D.C.)
Date: *2005-03-15*
Docket: *190/04*

[ ]

COURT FILE NO.: 190/04

DATE: 20050315

ONTARIO

DIVISIONAL COURT

O'DRISCOLL, CAPUTO AND SWINTON JJ.

B E T W E E N:	)	
	)	
JOSEPH D. YUE AND ELEANOR I. C. YUE	)	*Joseph Yue*,
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- and -	)	
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	)	
	)	*Carol Street*, for the Respondent
	)	
Respondent	)	
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	)	**HEARD at Toronto:** March 15, 2005

O'Driscoll J.: (Orally)

[1] The appellants appeal to the Divisional Court under the provisions of s.11 of the *Licence Appeal Tribunal Act,* 1999, . which provides:

11. A party to a proceeding before the Tribunal relating to a matter under any of the following Acts may appeal from its decision or order to the Divisional Court in accordance with the rules of court:

. . . . . .

Ontario New Home Warranties Plan Act.

[2] The decision under appeal is from a Tribunal decision, dated March 18, 2004 after a hearing on March 12, 2004.

[3] The decision before the Tribunal came from the Program. It stated:

"This is considered a non-valid delayed closing claim for $5,000.00 based on the documentation/information provided by both you and your builder. The proper requirements were met as outlined in the *Ontario New Home Warranties Plan Act* by way of a signed Amendment to Agreement.

The home closed on March 25, 2003 as noted in the signed Amendment to Agreement.

Therefore, you are not entitled to any delayed closing costs as there was no delay according to the Amendment to Agreement."

[4] On February 4, 2004, there was a pre-hearing by the Tribunal. The March 18, 2004 decision states:

"A pre-hearing in this matter was heard before the Tribunal on February 4, 2004. Pursuant to that pre-hearing the Vice-Chair at the pre-hearing issued an order stating that the only issue for determination at the hearing is "whether the Applicants are entitled to advance a claim for delayed closing" and that if the Tribunal finds in favour of the Applicants on that issue, the matter shall be referred back to the Program to review "the specifics of the Applicants' claim and make a determination regarding the Applicants' entitlement". This decision therefore does not address the question of quantum but only whether or not the Tribunal considers the Applicants to have a valid claim for breach of warranty under s. 13(1)(c) of the Act as read with section 17.(1) and (3) of Regulation 892 of the Act."

[5] On page 15 of the Tribunal's reasons, the following is stated:

"The following are the facts found proven by the Tribunal.

1. The Applicants and the builder entered into a written Agreement of Purchase and Sale dated June 10, 2002 in terms whereof the builder was to construct a single family residence for the Applicants on Lot 72 situate at 708 Angler Way, Waterloo, Ontario.

2. The date of closing of the above transaction of purchase and sale was to be November 25, 2002, The transaction of purchase and sale relative to Lot 72 did not close.

3. By letter dated September 5, 2002 addressed by the builder to the Applicants at 236 Mary Anne Drive, Barrie, Ontario the date of closing of the transaction of purchase and sale of Lot 72 was extended to March 25, 2003.

4. On November 3, 2002, by way of a written and signed Agreement of Amendment, the Applicants and the builder agreed to the following amendments to the Agreement of Purchase and Sale dated June 10, 2002:

(a) Lot 68 situate at 716 Angler Way, Waterloo was to be substituted for Lot 72 situate at 708 Angler Way, Waterloo;

(b) The date of closing of the transaction relating to Lot 68 was to be March 25, 2003.

5. The transaction regarding the sale of Lot 68 by the builder to the Applicants closed on March 25, 2003.

[6] The Tribunal's reasons state at page 16:

"The onus of proof to prove their case on a balance of probabilities rest [sic] upon the Applicants.

The sole issue for decision is whether the Applicants have proven that they are entitled to compensation for delayed closing of their home pursuant to section 17 of Regulation 801 under the Act. The amount of compensation that the Applicants may be entitled to in the event of a proven delay in closing was not an issue dealt with at this hearing in view of the pre-hearing Order made on February 4, 2003. That pre-hearing Order is referred to under the heading of "Background" in this decision.

Briefly, the facts relevant to this decision are that the builder and the Applicants executed an Agreement of Purchase and Sale on June 10, 2002 relative to Lot 72. The closing date of that transaction was set for November 25, 2002. On September 5, 2002 the builder wrote to the Applicants at their address in Barrie, Ontario as contained in the Agreement of Purchase and Sale. In that letter the closing date was extended to March 25, 2003. The Applicants claim not to have received that letter until October 30, 2002. On November 3, 2002 they voluntarily entered into a written amendment to the June 10, 2002 Agreement of Purchase and Sale. That amendment dealt with Lot 68 being substituted for the deleted Lot 72. Additionally, the amendment set the date for closing of the sale of Lot 68 to be March 25, 2003. All other terms and conditions in the agreement pertaining to Lot 72 were to remain the same. The closing relative to Lot 68 closed on March 25, 2003.

On analysis of the evidence the Tribunal finds that the Applicants agreed to the above-noted amendments of November 3, 2002. The Tribunal also finds that at no time did the Applicants indicate, expressly or otherwise, that they reserved the right to claim compensation for a delay in closing. There is nothing, either express or implied, in section 17 of Regulation 892 that prohibits the parties agreeing to amend or change the date for closing as set out in the June 10, 2002 agreement. The amendment of November 3, clearly established a closing date for Lot 68. That date was March 25, 2003 and closing took place on March 25, 2003. At no stage did the Applicants contend that they acted under duress when executing the amendment of November 3, 2002 and that amendment established a new closing date of March 25, 2003. As the transaction closed on March 25, 2003, the Tribunal finds the Applicants have no legitimate claim that there was a delayed closing.

. . . . . .

The Tribunal finds that by executing the amendment of November 3, 2002 the Applicants consented to purchase a substituted Lot 68 and consented to close the transaction on March 25, 2003. By closing the Lot 68 transaction on March 25, 2003 the builder was not in breach of its agreement with the Applicants and the Applicants have no claim for delayed closing.

Therefore, by virtue of the authority vested in it under section 16(3) of the *Ontario New Home Warranties Plan Act,* the Tribunal directs the Ontario New Home Warranty Program to disallow the Applicants' claim."

[7] We see no error of fact or law in the findings of the Tribunal. As to the constitutional questions raised in this matter, the builder is not part of government. Therefore, he is not subject to the *Charter.* Moreover, there is no evidence that the Program or the Tribunal, in any way breached the *Charter.* Any other complaints raised by the appellants such as those referable to the *Negligence Act* and those referable to the *Sale of Goods Act* were not before the Tribunal and are not properly before us. For these reasons, the appeal is dismissed.

[8] With the concurrence of my colleagues, I have endorsed the back of the Appeal Book and Compendium as follows: "This appeal is dismissed for the oral reasons given and recorded this date. Costs of the appeal are fixed at $1,000.00, all inclusive, payable by the Appellants to the Respondent within 30 days of this date."

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O'DRISCOLL J.

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CAPUTO J.

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SWINTON J.

Date of Reasons for Judgment: March 15, 2005

Date of Release: March 22, 2005

COURT FILE NO.: 190/04

DATE: 20050315

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

O'DRISCOLL, CAPUTO AND SWINTON JJ.

B E T W E E N:

JOSEPH D. YUE AND ELEANOR I. C. YUE

Appellants

- and -

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

ORAL REASONS FOR JUDGMENT

O'DRISCOLL J.

Date of Reasons for Judgment: March 15, 2005

Date of Release: March 22, 2005