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Closing date extension request denied

Edwards-Decoito sued Maple View for damages and return of her deposit

An Ontario Court judge in Newmarket has ruled that a builder should have allowed a homebuyer a short extension of the closing date when her financing fell through at the last moment.

Back in May 2002, Andrea Edwards-Decoito signed an agreement to purchase 140 Del Francesco Way in Vaughan from Maple View Building Corp., a division of Grand Valley Homes. She paid a deposit of $12,250 against a purchase price of $244,990.

The scheduled closing date was Feb. 28, 2003, and the agreement contained the standard Tarion Warranty Corp. schedule allowing the builder to extend for a further 240 days, until late October 2003.

Grand Valley encountered considerable difficulties in developing the project, and when the extension time ran out, it tried to cancel 15 house deals in the subdivision including the Decoito house.

A number of purchasers complained to the new home warranty program, which then intervened and demanded that Maple View extend the closing dates.

In July 2003, a settlement agreement was reached and the closing dates were extended. Edwards-Decoito's closing date was eventually set by the builder for Dec. 22, 2003.

In the meantime, Edwards-Decoito contacted a mortgage broker who arranged financing with MCAP Mortgage Corp. For some unknown reason, MCAP decided not to advance funds, and the broker went to ING Mortgage Group. On the day scheduled for closing, ING also decided not to advance funds.

Another mortgage broker became involved, and on the following day he found a new lender, which would be in a position to advance funds on Jan. 5, 2004. Since Maple View's offices were going to be closed over the holidays, Edwards-Decoito's lawyer's law clerk wrote to the builder's lawyer asking for an extension to Jan 5.

The reply was that the builder had terminated the deal due to the delay and the $12,250 deposit was forfeited.

But the builder's lawyer did request a copy of the mortgage commitment showing the ability to close Jan. 5.

The house was relisted for sale and sold for about $50,000 more than the price Decoito had agreed to pay.

Edwards-Decoito sued Maple View for damages and return of the deposit, and the trial took place over four days this past November. Justice John Jenkins found the parties by their conduct, if not specifically in writing, agreed to extend the closing date to Dec. 22 and then Dec. 23, 2003.

He also stated that had her lawyer requested a closing date of Jan. 5, 2004, and presumably sent along the new mortgage commitment, the extension "would have been probably granted," although the judge's basis for that conclusion is not clearly set out.

The judge found that Edwards-Decoito had acted reasonably and properly in her efforts to complete the transaction, but he was quite critical of her real estate agent, her original mortgage broker, her lawyer and the lawyer's law clerk.

Jenkins found that Edwards-Decoito's problems started with her real estate agent who allegedly attempted to obtain extra money to which he was not entitled. He also criticized her mortgage broker who found two lenders who backed out at the last minute. He noted that her lawyer and the lawyer's law clerk failed to protect her properly by obtaining a closing date extension beyond Dec. 23, 2004.

Last month in this column I wrote about the Court of Appeal's decision in the 2005 Loblaw Properties case, where Loblaw was a week late in delivering a deposit to the sellers of a large parcel of land. The appeal court ruled that Loblaw was in breach of the "time of the essence" clause in the offer and the deal was dead.

No reference in the Edwards-Decoito decision was made to the Loblaw Properties case. Since Edwards-Decoito's lawyer and the builder's lawyer had exchanged correspondence about various extensions for closing, the court did not base its decision on the "time of the essence" provision.

It was clear from the evidence that Edwards-Decoito was in a position to close with her financing in order on Jan. 5, 2004. The judge ruled that although Maple View consented to the "adjournment" of one day to Dec. 23, 2003, "they ought to have agreed to an extension to Jan. 5, 2004."

That rather startling statement is a clear message from the Ontario Court that builders or at least this builder should be flexible when a purchaser is ready to close but genuinely needs a brief extension. The statement is surprising because it was made without supporting reasons or prior case law.

In the end, the court awarded Edwards-Decoito the return of her $12,250 deposit plus interest. She was denied damages to compensate her for the loss of the house.

Based on this case, it appears that builders who keep a purchaser's deposit and resell at a higher price when the purchaser needs a short closing delay risk the wrath of a court somewhere down the line.

The plaintiff's counsel, Harvey Ash, recently told me that the decision has not been appealed. The parties are now making costs submissions to the court. Ash was the successful lawyer for Edwards-DeCoito at trial. He was not her real estate lawyer in the aborted transaction.

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ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E EN:	)	
	)	
ANDREA EDWARDS-DECOITO	)))	Harvey J. Ash, for the Plaintiff
	)	
Plaintiff	)	
	)	
- and -	)	
	)	
	)	
MAPLE VIEW BUILDING CORPORATION	)))	Wendy H. Greenspoon, for the Defendant
	)	
Defendant	))	
	)	
	)	**HEARD:** November 7-10, 2005

REASONS FOR JUDGMENT

JENKINS J.

[1] Andrea Edwards-Decoito (Decoito) brings this action against Maple View Building Corporation (Maple View) for the sum of $50,000 representing damages arising from her aborted purchase of 140 Del Francesco Way in the City of Vaughan.

[2] Maple View resists this action on the basis that Decoito forfeited her deposit of $12,250 plus interest and was unable to close the transaction on the extended closing date of December 23, 2003.

OVERVIEW

[3] Decoito is a 41 year single mother of two children ages 21 and 14. She was residing with her children in a rented apartment and desired to purchase a home. She attended Grade 13 in a secondary school in Ontario, went to a Community college earning a certificate of occupational therapy becoming an occupational therapy assistant and psychotherapy assistant. She contacted an acquaintance of hers Cleveland Lewis a real estate agent, and after some negotiations, entered into an agreement of purchase and sale to purchase a residence at 140 Del Francesco Way in the City of Vaughan. This agreement provided for a total deposit of $12,500, at a price of $244,990 with a closing date of February 28, 2003. The Agreement of Purchase and Sale is dated May 13, 2002, at Exhibit 2, Tab 1, Schedule D , Paragraph 5, which provides the following:

EXTENTION AND TERMINATION

(i) If the Vendor cannot close the transaction by the Closing Date in the Agreement because additional time is required for construction of the dwelling, the Vendor shall extend the Closing Date one or more times as may be required by the Vendor by notice in writing to the Purchaser as soon as reasonably possible and in any event prior to the Closing Date or extended Closing Date, all extensions in the aggregate not to exceed 120 days. However, the Vendor shall not extend Closing if the parties have specifically agreed in writing that the Vendor cannot, and the Purchaser does not waive this covenant.

(ii) The Vendor shall take all reasonable steps to construct the dwelling without delay.

(iii) If the Closing Date in the Agreement has been extended for 120 days and the Vendor still requires further time for construction of the dwelling, unless subsequent to the closing Date in the Agreement the parties otherwise agree, the Purchaser may terminate the Agreement within the 10 days immediately after the 120 days have elapsed by delivering or mailing notice in writing to the Vendor at the address shown above (which notice may also be given between solicitors), and upon the giving of such notice this Agreement shall be at an end and all sums paid by the Purchaser shall be retuned without interest or deduction. However, if the Purchaser does not terminate as above, closing shall be deemed to be extended to a date 5 days following completion of the dwelling as required by the Agreement but, unless the parties otherwise agree, not later than a further 120 days after the initial 120 day period. If by this further time the dwelling is not constructed in accordance with the Agreement and if the parties do not otherwise agree, the Agreement shall be at an end and all sums paid by the Purchaser shall be returned without deduction and there shall be no further rights between the parties unless the Vendor is in breach of his covenant in 5 (ii) above to construct without delay. If the Agreement is so ended, interest shall be payable on all sums paid by the Purchaser, for the period commencing 120 days after the Closing Date in the Agreement at a rate 1% below the rate paid by the Province of Ontario Savings Office savings account as of the date on which the Agreement ended.

(iv) Notwithstanding any provision to the contrary contained in it, the Agreement shall not be terminated by the Vendor by reason of failure to complete the dwelling as specified in the Agreement within a period of time or by a date specified in the Agreement, extended as above, unless the Purchaser consents to the termination in writing or the Agreement is ended pursuant to 5 (iii) above.

(v) Where there is conflict or ambiguity between the Agreement and this Addendum, this Addendum shall prevail.

[4] Cleveland Lewis, recommended a lawyer Mukesh Bhardwaj to handle the transaction, whose assistant Geetha Narayan is a law clerk. She holds a lawyer s licence in India. Lloyd J. Pollack, Q.C. was the lawyer at Garfinkle, Biderman representing Maple View. His law clerk was Josie Commisso.

[5] Grand Valley encountered considerable difficulties in developing Phase II of this project, which included Decoito s property. Pursuant to a letter dated November 1, 2002 from Pat Della Rocca, the administrative co-ordinator for Maple View, it extended the closing date by 240 days pursuant to the Agreement of Purchase and Sale, Schedule D paragraph 5.

[6] Maple View purported to cancel 15 real estate transactions in their Phase II development and to rebate the deposits to the Purchasers. This however, spawned complaints by those Purchasers to the Ontario New Home Warranty Program, who intervened and demanded that Maple View extend the closing dates. A settlement agreement was entered into between the Ontario New Home Warranty Program and Maple View in July 2003 to achieve this purpose.

[7] To arrange for mortgage financing Decoito contacted Shamira Lalani, who is a mortgage broker with MoneyPlus Mortgages & Loans Corporation. Lalani arranged for mortgage financing with MCAP Mortgage Corporation. On August 14, 2003, Della Rocca wrote to Decoito informing her that her house would not be ready on October 26, 2003, and it would be necessary to set a new extended closing date. She further indicated that a Maple View Sales Representative would be contacting her to arrange a convenient time for her to attend at the Sales Office to sign the Amendment.

[8] During this period of time Decoito s contact with her lawyer was with Geetha Narayan the law clerk who had corresponded with Josie Commisso the Vendor s law clerk. Narayan was also in contact with MoneyPlus Mortgages and Loans Company to receive instructions for the loans since Mukesh Bhardwaj was going to represent the mortgage lender on this transaction.

[9] On December 12, 2003, Decoito received a telephone message from Della Rocca informing her that her home was ready for occupancy and that the closing date would be on December 22, 2003.

[10] On December the 17, 2003, Lloyd Pollack forwarded to Mukesh Bhardwaj the closing documents including an Amendment Agreement purporting to change the closing date to December 22, 2003.

[11] Decoito was anxious to have this transaction closed before Christmas since she was having difficulty with her landlord. She contacted Della Rocca on numerous occasions to expedite the closing. Della Rocca arranged with their builders to assist Decoito by working on her house instead of one previously scheduled in order to assist on this closing. In December 2003 Decoito learned from Shamira Lalani, for some unexplained reason that MCAP Mortgage Corporation would not advance funds. Shamira Lalani then contacted and arranged for financing with the ING Mortgage Group.

[12] On December 22, 2003, Geetha Narayan discovered that ING was not going to advance funds and were withdrawing as a mortgagee. She had received the closing documents from Lloyd Pollack, one of which is at Exhibit 2, Tab 22, which purports to be an acknowledgment and release agreeing to the closing date.

[13] The Amendment to the Agreement (Exhibit 1, Volume 2, Tab 53) specifies that the Agreement of Purchase and Sale closing date is extended to December 22, 2003, and all other terms and conditions in the agreement shall remain as stated therein . This document was signed only by Decoito, on December 23, 2003

[14] On December 22, 2003, when Geetha Narayan learned that ING had withdrawn it s mortgage financing, she immediately contacted Lloyd Pollack requesting an adjournment until December 23, 2003. She also contacted Sarbjeet Singh, a mortgage broker who assured her that he could arrange very expeditious financing.

[15] Sarbjeet Singh informed Decoita that Shamira Lalani was no longer with Mortgage Broker Clearing House and that she had made many mistakes in the past and that he would take care of this new financing arrangement. On December 23, 2003, he was able to arrange for new financing with Bridgewater Financing Services Limited who would be in a position to advance funds by January 5, 2004.

[16] Maple View was going to close it s office from December 23 to January 5 for their Christmas vacation. Geetha Narayan requested an adjournment of the closing until January 5 which would coincide with the new financing arrangement. Lloyd Pollack wrote Mukesh Bhardwaj a letter on December 23, 2003, which I duplicate as follows (see Exhibit 2, Tab 15):

> We acknowledge receipt of your facsimile transmission of this afternoon which we have reviewed with our client. Please fax to us a copy of your client s mortgage commitment together with whatever information you have from your client s mortgagee advising that funds are not available until January 5, 2004.
>
> Our client has instructed us to advise that the transaction must be completed today and no extensions will be granted. Our client is ready, willing and able to close this transaction today and you have advised that you are not in funds and therefore your client is not ready, willing and able to close. As a result, your client has breached the contract entitling our client to terminate same.
>
> In the event that this transaction does not close today, our client shall consider the Agreement of Purchase and Sale terminated as a result of your client s default, in which event the purchaser s deposit monies shall be forfeited as liquidated damages and not as penalty. In addition, our client shall reserve its rights to seek additional damages caused by your client s breach of contract.

Notwithstanding that information, Bhardwaj and Narayan expedited the execution of the documents, arranged for the new financing documents from Bridgewater and was in a position to close the transaction on January 5. Neither Bhardwaj or Narayan informed Decoito that Maple View were taking the position that the transaction was at an end. Decoito proceeded to make arrangements to move on January 5.

[17] Bhardwaj forwarded the closing documents on January 5, 2004 to Pollack including the arrangements for the financing. The documents were returned by Pollack who took the position that the transaction was at an end and the deposit had been forfeited.

[18] The house was re-listed by Maple View and re-sold at a price approximately $50,000 more than the price agreed upon with Decoito.

THE POSITION OF THE PARTIES

[19] Mr. Ash for Decoito argues:

1. That according to Paragraph 5 (iii), Schedule D , the deal was at an end either on August 14, 2003 or no later than October 26, 2003, since there were no written documents to extend the closing date beyond that date and therefore Decoito is entitled to the return of her deposit of $12,250 plus interest.

2. Alternatively, if the transaction had been revived by the actions of the parties the time of the essence clause was not communicated by Maple View to Decoito or her lawyers at any time. The first reference in writing to the fact that December 22, 2003 was to be a firm date in that the terms and conditions of the original agreement were to be utilized by the parties was in the Amending Agreement forwarded by Mr. Pollack to Mr. Bhardwaj on December 17. This document was not signed by Maple View. It was signed only by Decoito on December 23 after the date stipulated for closing passed.

3. A reasonable extension to January 5, 2004, ought to have been honoured by Maple View, since that was the first date after December 23 that they were back in business following their Christmas vacation, that it was reasonable under all the circumstances, that Maple View ought not to realize a $50,000 profit which included the deposit by its failure to agree to a reasonable extension.

4. Alternatively, Decoito was poorly represented by her lawyer, his law clerk, the mortgage broker, and her realtor. She was never informed by her lawyer or his law clerk that Maple View were taking the position on December 23, 2003, that the transaction had to close that date failing which she would loose her deposit and the opportunity to purchase the home, relying on the doctrine of relief from forfeiture, she ought to be entitled to the return of her deposit together with pre-judgment interest.

THE POSITION OF MAPLE VIEW

[20] Ms. Greenspoon argues that the adjournment to December 22 was made by Maple View to accommodate Decoito and to assist her in her move. By the actions of Decoito and Maple View both in correspondence, phone calls and faxes this was the new fixed date.

[21] She argues that Maple View acted reasonably and fairly with Decoito in extending the closing date from December 22 to December 23. They expedited the construction of the house to accommodate Decoito s wishes since she had housing problems.

[22] Decoito s problems were with her representatives, namely her lawyer, his law clerk, her realtor and her mortgage broker. Their incompetence, carelessness or negligence ought not to be visited upon Maple View who did everything possible to accommodate Decoito in an early closing of the transaction and therefore are entitled to a forfeiture of the deposit.

THE LAW

[23] In the case of *Matthews v. McVeigh*, [1954] O.R. 278 (Ont. C.A.), the Ontario Court of Appeal held that although time was declared to be the essence of the Agreement, those provisions as to instalment payments were never actually carried out or insisted upon between the parties. Aylesworth J. at p.6 stated:

> In these circumstances I think it is quite clear that the stipulation in the agreement providing that time was to be of the essence was completely disregarded by both the appellants and the respondent and ceased to be of any effect upon the rights of the parties. I think the respondent had no right to treat the contract as terminated without first giving the appellants a reasonable time within which to make good their default, upon notice to them that time was again to be considered of the essence of the agreement and that unless the default were cured within such reasonable time she would consider the agreement at an end and herself free to deal with the property as she might be advised: see *Hutts v. Hancock*, [1954] O.R. 105, [1954] 1 D.L.R. 790, and the authorities therein collected.

[24] In the case of *Beacon Industrial Development Corp. v. G.C. Farm Supply Ltd.* (1981), 123 D.L.R. (3d) (Alta. Q.B.), Crossley J. held at p.3:

> merely making a new day for performance is not sufficient to make time again of the essence, even if that new day is a reasonable time in advance. The notice must in some way bring home to the defaulting party that time is again of the essence or being made of the essence. It is not, as I apprehended the situation, necessary to use express words stipulating time to be of the essence. It is sufficient, in my opinion, to bring home to the defaulting party that if the new day is not met the party serving the notice will treat the contract at an end.

[25] In the case of *Manotick Pool and Spa v. McKee,* [1996] O.J. No. 5442 (Ont. SM.Cl. Ct.), Gilbert Deputy J. at p.6 stated:

> The issue to be decided here is whether one party can unilaterally change the contract so as to make time of performance of the essence and thereafter if not performed as stipulated be entitled to rescind it.
>
> In cases where there is default in performance of the contract and the innocent party is still willing to complete, notice to complete must be given in such a manner so as to be clear and unambiguous in its terms with details of the new requirements being imposed. The notice stipulating the time to complete in the circumstances then and there prevailing and in keeping with the history of the matter must not be too short and unreasonable in order to be enforceable. *Rados v. Paconla Investments Ltd.* (1981) 20 R.P.R. 154 (B.C.S.C.); *Dobson v. Dobson* (1993) 29 R.P.R. (2d) 228 (Ont. Ct. Gen. Div.); *Beacon Industrial Development v. G.C. Farm Supply* (1981) 123 D.L.R. (3d) 467 (Alta. Q.B.).

[26] In the case of *Woodshire Estates Inc. v. Gregory,* [1993] O.J. No. 4235, Paisley J. found that there was no evidence to suggest the purchaser of a home agreed to an extension. He further found that the purchaser ought to have known that the closing date was wrong in the letter and that they were content to let the time period expire because they were having trouble selling their home. He therefore ruled that no punitive or exemplary damages were allowed.

[27] In the case of *Morris et al v. Cam-Nest Development Ltd.,* [1988] O.J. No. 720, 64 O.R. (2d) 475, MacFarland J. held that:

> Although neither party did anything on the original closing dates and neither was then ready to close, and although time was of the essence, the contract remained in force and either party could establish a new closing date, as the vendor did. In any event, both parties treated the rescheduled dates as the new closing dates, since the plaintiff s tendered on those dates.

[28] In the case of *Craig et al v. Mohawk Metal Ltd.* (1976), 9 O.R. (2d) 716, Parker J. referred to the case of *Stockloser v. Johnson*, [1954] 1 Q.B. 476:

> The principles governing relief from forfeiture were considered. Two things are necessary before relief will be granted. First, the sum must be out of all proportion to the damage suffered, and secondly, it must be unconscionable for the vendor to retain the money.
>
> I find that the plaintiff was entitled to elect under the forfeiture clause to declare the agreement terminated and to accept the deposit. When one considers that the plaintiff company was a shell company speculating in land, that the value of the land was over one million dollars and the deposit which tied up the plaintiff s land was less than 2% of that amount, and that it was the defendant that repudiated the contract, the sum is not out of proportion to the damage suffered, nor is it unconscionable for the vendor to retain the money. A deposit may be forfeited without proof of damages.

FINDINGS

[29] I find that Decoito acted reasonably and properly in her efforts to complete this transaction. Her problems started with her real estate agent who according to her attempted to obtain extra money from her for which he was not entitled. She employed a mortgage broker namely Shamira Lalani who found mortgagees who withdrew from their financing commitment virtually at the last minute, December 22 and 23, 2003. Her lawyer Mukesh Bhardwaj and his law clerk Geetha Narayan failed to protect her properly in obtaining a closing date extension beyond December 23, 2004. She was not adequately and properly informed by her lawyer as to what was transpiring with respect to the closing.

[30] Mr. Pollack, in his letter of December 23, 2003, left the door open to the purchaser by stating in the first paragraph of his letter to fax a copy of the client s mortgage commitment. According to the evidence on December 23, 2003, later in the day, Mr. Singh was able to obtain a mortgage commitment from Bridgewater Finance. There was no evidence that this was communicated to Mr. Pollack.

[31] The significant issues are:

(i) Was the vendor being reasonable in not extending the closing date until January 5, 2004;

(ii) Was December 22, 2003 a proper date for closing since it had not been confirmed by the parties in writing; and

(iii) Given the overall dealings between the parties should Decoito be relieved from forfeiture of her deposit based on the authorities.

[32] I have no hesitation in finding that the parties by their conduct, agreed to the extension of the closing date to December 22, 2003. I further find that the closing date was extended to December 23, 2003. Decoito has established to my satisfaction that she was in a position to close this transaction on January 5, 2004, which is conceded by the defendant. I find that Maple View treated Decoito reasonably and fairly up to and including December 22, 2003. They advanced the construction date of her house to accommodate her including advancing the closing date to December 22, 2003 so that she could move before December 31, 2003.

[33] I find that had her lawyer Bhardwaj requested a closing date of January 5, 2004, it would have been probably granted. I find however, that although Maple View consented to the adjournment of one day to December 23, 2003, they ought to have agreed to an extension to January 5, 2004. Lloyd Pollack in his letter of December 23, 2003, did not close the door on a further extension by requesting a fax of a copy of Decoito s mortgage commitment together with whatever information you have from your clients mortgagee advising that funds are not available until January 5, 2004 .

[34] This is particularly relevant since Maple View were closed for the holidays from December 23, 2003 to January 5, 2005. They were clearly not prejudice in any way by this short extension except for the forfeiture of the deposit. They made a handsome profit on this transactions by their refusal to extend the closing date.

[35] Following the reasoning in the case of *Craig et al v. Mohawk Metal Ltd.* and *Stockloser v. Johnson.* I find that the forfeiture of the deposit is out of proportion to the damage that has been suffered and it would be unconscionable for Maple View to retain the money.

[36] Decoito acted reasonably and fairly throughout the entire transaction and no fault can be visited upon her for the failure to close. No evidence was adduced as to why the financing failed other than perhaps incompetent representation. The defendant would suffer no loss in the event that a deposit was returned (other than the deposit itself) in that the property was sold for a substantial sum of money more than the agreement with Decoito.

[37] Accordingly, there will be judgment for the plaintiff in the sum of $12,250 together with the accrued interests.

[38] I may be spoke to on the issue of costs.

Justice J.H. Jenkins

Released: November 28, 2005