CITATION: Wang v. Mattamy Corporation, 2019 ONSC 6675
COURT FILE NO.: CV-18-611091 (Toronto)
MOTION HEARD: 2019 10 08

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Wen Wang and Wei Li

v.

Mattamy Corporation, Mattamy Homes Limited and Mattamy (Preserve) Limited

BEFORE: MASTER R. A. MUIR

COUNSEL: Wen Wang and Wei Li in person
Michael A. Currie for the defendants

REASONS FOR DECISION

[1] This motion is brought by the defendants. They see an order setting aside their noting in default. They also request that this action be stayed in favour of an arbitration proceeding purportedly agreed to by the parties. The defendants rely on the provisions of the *Arbitration Act, 1991*, SO 1991, c.17 (the "Arbitration Act"). The plaintiffs are opposed.

BACKGROUND

[2] This action arises out of a pre-construction agreement of purchase and sale dated February 11, 2017 (the "APS"). The plaintiffs were purchasers and the defendant Mattamy (Preserve) Limited was the vendor.

[3] The APS did not close, and the defendants retained the plaintiffs' deposit. The defendants took the position that the plaintiffs had breached the terms of the APS. The plaintiffs then commenced this action on December 18, 2018. The plaintiffs seek a declaration that the APS has been "rescinded" and claim for the return of the deposit along with other damages.

[4] A copy of the statement of claim was provided to the defendants' lawyer. On December 19, 2018, the defendants' lawyer wrote to the former lawyer for the plaintiffs advising that the defendants would not be defending this action because the APS contained an arbitration clause. The plaintiffs' former lawyer responded by advising that the plaintiffs would not be discontinuing this action and did not agree that the arbitration provision was applicable in the circumstances of this dispute.

[5] After some delay, the defendants ultimately delivered a notice of arbitration and a motion record seeking a stay of this action. These documents were provided to the plaintiffs' former lawyer on March 20, 2019. It appears that the plaintiffs themselves received copies of these documents shortly thereafter.

[6] The plaintiffs served a notice of intention to act in person on or about April 9, 2019. On April 11, 2019, the plaintiffs had the defendants noted in default without providing any further notice to the defendants.

[7] The plaintiffs advised the defendants of the noting in default on April 21, 2019. The defendants immediately advised the plaintiffs of their intention to move to set aside the noting in default. Their motion to set aside the noting in default was served on May 16, 2019 with an initial return date of June 20, 2019. This motion was then adjourned to be heard by me as a long motion on October 8, 2019.

NOTING IN DEFAULT

[8] The law in relation to setting aside a noting in default is well settled. The bar is not a high one. Such orders are routinely granted given the court's preference that civil disputes be decided on their merits. The court may consider such factors as the behaviour or the parties, the length of and reasons for any delay, the complexity and value of the claim and prejudice to the parties. See *Nobosoft Corp. v. No Borders Inc.*, 2007 ONCA 444 at paragraphs 3 and 6-7.

[9] In my view, the defendants have clearly met their onus on this part of the motion. The noting in default should be set aside.

[10] The defendants made it clear immediately after the statement of claim was served that they intended to dispute the court's jurisdiction based on the arbitration clause in the APS. That is why they did not immediately serve a defence. There was some delay by the defendants in serving their motion record seeking a stay order. However, that material was eventually served in late March 2019 prior to the noting in default.

[11] It is true that the motion record was not filed with the court prior to the noting in default but the intention of the defendants to seek a stay order was clear from the beginning. This motion was brought promptly after the defendants learned of the noting in default. The plaintiffs are making a significant claim for damages. Their claims should be determined on the merits. There is no evidence that the plaintiffs will be prejudiced if the noting in default is set aside. It is therefore just in the circumstances of this action that the noting in default be set aside.

STAY OF PROCEEDINGS

[12] Section 7 of the Arbitration Act reads, in part, as follows:

> **7** (1) If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding.
>
> (2) However, the court may refuse to stay the proceeding in any of the following cases:
>
> 1. A party entered into the arbitration agreement while under a legal incapacity.
> 2. The arbitration agreement is invalid.
> 3. The subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law.
> 4. The motion was brought with undue delay.
> 5. The matter is a proper one for default or summary judgment.
>
> (3) An arbitration of the dispute may be commenced and continued while the motion is before the court.
>
> (4) If the court refuses to stay the proceeding,
>
> (a) no arbitration of the dispute shall be commenced; and
>
> (b) an arbitration that has been commenced shall not be continued, and anything done in connection with the arbitration before the court made its decision is without effect.
>
> (5) The court may stay the proceeding with respect to the matters dealt with in the arbitration agreement and allow it to continue with respect to other matters if it finds that,
>
> (a) the agreement deals with only some of the matters in respect of which the proceeding was commenced; and
>
> (b) it is reasonable to separate the matters dealt with in the agreement from the other matters.

[13] The law in relation to a stay of proceedings in favour of arbitration has been thoroughly reviewed by my colleague Master Jolley in her recent decision in *Evans v. Mattamy Homes Ltd.*, 2019 ONSC 3883 (Master). It is important to note that Master Jolley's decision in *Evans* involves the same defendants as this action and the same development and sales process. The language in the subject APS in this action setting out the

agreement to arbitrate was also the same as the arbitration agreement before Master Jolley. Many of the arguments made by the plaintiffs on this motion were the same arguments considered by Master Jolley. Ultimately, Master Jolley made an order staying the court action in *Evans*.

[14] Paragraphs 6 and 7 of Master Jolley's decision in *Evans* read as follows:

> 6 In summary, a stay of an action is mandatory unless one of the exceptions in subsection 7(2) of the Act applies, in which case the court has discretion to refuse the stay.
>
> 7 The enactment of the Act in 1991 represented a policy shift that encouraged parties to resort to arbitration where they had contractually agreed to do so by directing the court generally not to intervene and by establishing a presumptive stay of court proceedings in favour of arbitration (Ontario Hydro v. Denison Mines Ltd. 1992 CarswellOnt 3497, referenced in Telus Communications Inc. v. Wellman 2019 SCC 19 ("Wellman") at paragraph 49). The plaintiffs do not challenge the legislative policy but argue that it is premised on there being a valid agreement to arbitrate to which the parties should be held. The plaintiffs have the onus under subsection 7(2) of demonstrating that the arbitration provision is unconscionable or procured as a result of undue influence and therefore invalid, and of demonstrating that the court should exercise its discretion to refuse to stay the action as a result.

[15] The important points that emerge from Master Jolley's decision are that the legislature has made a policy decision to promote arbitration where the parties have contractually agreed on that form of dispute resolution. The Arbitration Act provides for a presumptive stay of court proceedings in favour of arbitration. A stay of the action is mandatory unless one of the exceptions applies. The onus is on the party seeking to avoid the arbitration clause.

[16] I have carefully considered the evidence before me on this motion and the submissions of the parties. In my view, this action should be stayed in favour of arbitration.

[17] The plaintiffs attended a sales event organized by the defendants in February 2017. On February 11, 2017, the plaintiffs agreed to the APS which contained the following arbitration provision:

> The Purchaser and the Vendor agree that any claim, dispute, or controversy (whether in contract, tort, or otherwise, whether pre-existing, present or future, and including statutory, common law, intentional tort and equitable claims) that the Vendor may have against the Purchaser or that the Purchaser may have against the Vendor, its agents, employees, principals, successors, assigns, affiliates arising from or relating to this Agreement, its interpretation, or the breach, termination or validity thereof, the relationships which result from this Agreement (including, to the full extent permitted by applicable law, relationships with third parties who are not signatories to this Agreement), the Purchaser's

> purchase or use of the Real Property and/or the Dwelling or related purchase or the subdivision services (and any of the foregoing being a "Claim") SHALL BE RESOLVED EXCLUSIVELY AND FINALLY BY BINDING ARBITRATION pursuant to the Arbitrations Act, 1991 (Ontario), as amended or replaced from time to time. Such arbitration shall be the exclusive forum for the resolution of any Claim by the Purchaser against the Vendor, and the Purchaser hereby agrees that it will not bring or participate in a Claim in any court whether directly, indirectly, by counterclaim or otherwise. In addition, THE PURCHASER SHALL NOT BE ENTITLED TO JOIN OR CONSOLIDATE CLAIMS BY OTHER PURCHASERS, OR ARBITRATE A CLAIM AS A REPRESENTATIVE OF A CLASS ACTION OR PARTICIPATE AS A MEMBER OF ANY CLASS ACTION WITH RESPECT TO ANY CLAIM.

[18] The language of this provision is very broad. It includes any possible claims the parties may have against one another in respect of the APS whether in contract, tort or otherwise. It is certainly broad enough to include the claims being advanced by the plaintiffs in this action for the return of their deposit and damages for breach of contract and misrepresentation.

[19] The language used in the arbitration agreement is very clear. Arbitration shall be the exclusive forum for the determination of disputes. The plaintiffs agreed that they would not bring a claim in any court.

[20] Much of the argument made by the plaintiffs on this motion related to the underlying merits of the litigation. They alleged that the defendants fundamentally breached the APS by removing a second-floor bay window without the consent of the plaintiffs. They questioned the way the defendants obtained an occupancy permit and whether the permit was valid. The plaintiffs also took issue with certain technical deficiencies with the execution of the APS.

[21] The actions of the defendants in removing the bay window and securing the occupancy permit may or may not have been a breach of the APS. The issues with respect to the execution of the APS may or may not be grounds for terminating the APS. However, those issues are not before the court on this motion. The issue on this motion is whether the parties' dispute will be dealt with by arbitration or litigation in this court. The merits of the plaintiffs' claim are for another day. Regardless of the outcome of this motion, the plaintiffs will have an opportunity to pursue their claims.

[22] The plaintiffs have also advanced arguments to suggest that the arbitration provision is invalid as it was secured by reason of undue influence and that the arbitration agreement is unconscionable. I am not satisfied that the plaintiffs have provided evidence to meet the high test to demonstrate undue influence or unconscionability.

[23] To establish undue influence, the plaintiffs must demonstrate that they were coerced by the defendants or the defendants abused their power to get the plaintiffs to agree to the arbitration provision. The plaintiffs must show that they had no realistic alternative but to submit to the arbitration agreement. See *Evans* at paragraph 50.

[24] The evidence on this motion does not reach that level. The pre-construction purchase process may give rise to a sense of urgency on the part of potential purchasers. With the competitive market and high demand that prevailed at the time, purchasers needed to act with some alacrity if they wanted to secure their preferred lot before someone else agreed to purchase the property. However, the plaintiffs had many weeks before the sales event to research their purchase. They could have asked for a copy of the form of agreement they would be expected to sign. The plaintiffs were present at the sales event for more than six hours before they signed the APS. They had an opportunity to review the APS with the defendants' representatives. They could have sought legal advice. They were advised in writing on several occasions that the APS would be final and legally binding.

[25] Moreover, after the initial execution of the APS, the plaintiffs executed amending agreements affirming the terms of the APS on three additional occasions in the following 12 months. It was not until many months after the APS was signed that the plaintiffs took issue with the arbitration provision or otherwise complained about the process that resulted in the APS. The plaintiffs argued that they were never advised that the APS did not include a "cooling-off" provision. Regardless of whether the defendants had a duty to provide this advice, the plaintiffs' actions demonstrate that they would not have invoked such a clause in any event.

[26] Unconscionability requires a similarly high threshold of proof. The transaction in question must be grossly unfair or improvident. The parties must have been denied an opportunity for independent advice. There must be an overwhelming imbalance in bargaining power and the other party must be shown to have knowingly taken advantage of this vulnerability. See *Evans* at paragraph 16.

[27] In my view, there is nothing unfair about the arbitration clause. It is consistent with public policy supporting agreements for dispute resolution by way of arbitration rather than through the courts. It is true that there will be some additional cost to the plaintiffs if this dispute is arbitrated rather than litigated. However, that cost, even accepting what is set out in the plaintiffs' reply responding motion record, appears modest when compared to the significant claims the plaintiffs are advancing and their economic circumstances. I note that the plaintiffs' evidence shows that they were able to set aside approximately $800,000.00 for this purchase by selling and mortgaging other properties. The additional cost of arbitration would not appear to present an obstacle to the plaintiffs.

[28] I also note that the plaintiffs appear to be educated and sophisticated purchasers. Ms. Wang has an accounting degree from Humber College. She studied and works in English. The plaintiffs have bought and sold real estate in the past including operating an investment property used to generate rental income. I do not view the fact that this was the plaintiffs' first purchase of a pre-construction property as significant. Any purchase of real property is a significant transaction. All agreements of purchase and sale contain detailed terms and conditions that require careful consideration.

[29] Finally, there is no evidence that the defendants took advantage of the plaintiffs. As set out above, the plaintiffs signed the APS after being told in advance about the nature of the sales process and the binding nature of the APS and after waiting at the sales event

for more than six hours. They did not complain about the process then or for many months after.

[30] The facts of this case can be distinguished from the facts before the court in *Heller v. Uber Technologies Inc.*, 2019 ONCA 1; leave to appeal granted, [2019] SCCA No. 58. In *Heller*, the Court of Appeal declared an arbitration provision to be unconscionable and invalid. The court in that case was dealing with an arbitration provision that required a US $14,500.00 initial filing fee and that the arbitration be conducted in the Netherlands. As well, the plaintiffs in *Heller* had claims amounting to a few hundred dollars on an individual basis, based on their limited earnings as Uber drivers. See *Heller* at paragraphs 58-59 and 73.

[31] The arbitration required by the APS in this action would be held in the Greater Toronto Area based on Ontario law. The additional cost would not be as great as it was in *Heller*. The plaintiffs' claim is far more significant than the individual claims in *Heller* and the plaintiffs appear to be able to afford any additional cost associated with arbitration.

[32] Finally, I see no other basis for excepting this claim from arbitration pursuant to section 7 of the Arbitration Act. The parties are not under a legal incapacity, the subject matter of the dispute is capable of being arbitrated under Ontario law and the defendants' motion was brought without undue delay. This is also not the sort of claim that could be easily resolved by way of summary judgment. It appears that the determination of the liability and damages issues in this dispute will require a significant amount of oral evidence and the assessment of the credibility of witnesses. This is not a straightforward claim that can be easily disposed of in a summary fashion.

CONCLUSION

[33] For these reasons, I have determined that the plaintiffs have failed to meet their burden to show that the arbitration provision is invalid. The language of the Arbitration Act is mandatory and contains a presumption in favour of arbitration agreements. This action is therefore stayed pursuant to section 7 of the Arbitration Act.

ORDER

[34] I therefore order as follows:

(a) the defendants' noting in default is hereby set aside; and,

(b) this action is hereby stayed pursuant to section 7 of the Arbitration Act.

[35] If the parties are unable to agree on the issue of the costs of this motion, they shall provide the court with brief submissions in writing. The defendants' submissions shall be delivered by December 20, 2019. The plaintiffs' submissions shall be delivered by

January 17, 2020. Any reply from the defendants shall be delivered by January 24, 2020. All costs submissions shall be filed with masters' administration, 393 University Avenue, Toronto, 6th floor.

Master R. A. Muir

Date: 2019 11 21