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CALGARY, ALBERTA

Court of Queen's Bench of Alberta

Citation: Centurion Mortgage Capital Corporation v The Bridges Steps Limited Partnership (Giustini Bridges Inc), 2019 ABQB 276

Date:
Docket: 1701 08644
Registry: Calgary

Between:

Centurion Mortgage Capital Corporation

Plaintiff

- and -

**The Bridges Steps Limited Partnership, by its general partner, Giustini Bridges Inc.,
Giustini Bridges Inc., Assured Developments Ltd., Giustini Development Corporation,
SBG Investment Corp., 1670749 Alberta Ltd., 1670759 Alberta Ltd., Canterra Custom
Homes Inc., and Jordan Giustini**

Defendants

**Decision
of the
Honourable Madam Justice B.E. Romaine**

I. Introduction

[1] This was an application by the plaintiff secured creditor, Centurion Mortgage Capital Corporation, in insolvency proceedings involving The Bridges Steps Limited Partnership and Giustini Bridges Inc together with other related defendants (the Debtors). Centurion holds a mortgage on certain lands on which the Debtors intended to develop a 122 unit condominium project. At the time of the application, only a below-grade parking structure had been constructed.

- [2] The matter started with Centurion's application seeking, among other relief:
- a) an order approving and accepting Centurion's offer to purchase the land from the Debtors for its appraised value;
 - b) a direction that Centurion was not required to pay the purchase price, but could set it off against the amount outstanding under its mortgage;
 - c) a vesting order; and
 - d) an order assigning certain purchase contracts for condominium units to Centurion.

[3] The application also sought approval of the Receiver's activities and its fees and disbursements and an order discharging the Receiver.

[4] The application for the order assigning the purchase contracts to Centurion was vigorously opposed by a number of purchase contract holders (the Holders), on the basis that the Debtors' failure to perform its obligation to complete the project in a timely manner constituted a repudiatory breach that entitled them to terminate the contracts. They thus submit that the terminated contracts could not be assigned to Centurion, and applied for an order declaring that:

- a) the purchase contracts have been repudiated and voided by the Debtors and are not enforceable against the Holders;
- b) the purchase contracts are not assignable to Centurion;
- c) the Debtors have failed to complete construction of the project; and
- d) the Holders are entitled to the immediate return of their deposits.

[5] After the first hearing, I allowed the parties to make further written submissions, as counsel for Centurion indicated that it had not had sufficient time to respond to the submissions of the Holders. The Holders had a very short time before the application was heard to file their submissions.

[6] By the time of the second hearing, Centurion had amended the form of order that it was seeking. The application still sought an order assigning the purchase contracts to Centurion. However, the amended application sought a declaration stating that the purchase contracts were not in default or in breach as a result of a) the insolvency of the Debtors; b) the appointment of the Receiver over the mortgaged lands; c) the "effluxion of time from the proposed occupancy date in each respective Purchase Contract to the date three (3) years hereof or such other date as may be directed by the Court"; and d) "the relief of any forfeiture arising from such event".

[7] Since there was no opposition to the application to transfer the mortgaged lands to Centurion or to the proposed set off, and since the proposed transfer without the inclusion of the purchase contracts met the oft-cited factors to be considered by the Court when a sale within a receivership is proposed as set out in *Royal Bank v Soundair Corp.*, (1991) 1 CBR (3d) , I approved the transfer and set-off.

[8] On that issue, Centurion submitted that the receivership was limited to the preservation of the property, but it does not appear to be limited in that manner in the order. Centurion also submitted that since the receivership was granted in the context of a concurrent foreclosure action, the Soundair principles do not apply, and that I do not require a recommendation from the Receiver to approve this sale. I do not accept this submission. It was clear that I was asked to

approve the sale under the authority of the receivership proceedings. However, in the unique circumstances of this case, I did not require the Receiver's recommendation.

[9] However, I dismissed the application to assign the purchase contracts to Centurion, on the basis that the vendor, Giustini Bridges Inc as General Partner for and on behalf of Bridges Steps Limited Partnership, has breached the purchase contracts by failing to complete the units by the occupancy date stipulated in the contracts, or any properly extended occupancy date within a reasonable period of time. Breach of this condition, which goes to the root of the contracts and deprives the Holders of their entire benefit, is a repudiatory breach that entitles the Holders to terminate the contracts.

[10] I allowed counsel for Centurion and the Debtors to seek instructions on whether they wished to proceed with the purchase and sale, given my decision on the purchase contracts. Counsel later confirmed that the sale would proceed.

II. Relevant Facts

A. Procedural Issues

[11] There were a number of complexities with respect to the application. Centurion applied for and obtained an order appointing a Receiver with respect to the mortgaged lands on July 25, 2017. The application was made pursuant to section 49 of the *Law of Property Act*, RSA 2000, c L-7, section 13(2) of the *Judicature Act*, RSA 2000, c J-2 and section 54 of the *Builders' Lien Act*, RSA 2000, c B-7. The Receiver was granted the powers necessary to preserve the property and assets of the Debtors and to manage and operate the lands and the construction of the project, including the power to terminate the purchase contracts.

[12] The receivership order included a stay of all proceedings except with the consent of the Receiver or with leave of the Court, except with respect to the action itself. The Court was advised that the application had been made further to a commercial foreclosure procedure.

[13] Under the same action number, Centurion obtained a redemption and listing order from a Master on November 27, 2017. This order was amended by consent on January 5, 2018, and the property was listed for sale commencing January 20, 2018 by an agent retained by Centurion. The sales process was extended from time to time, with the listing order finally expiring on about October 21, 2018. None of the offers received were considered to be commercially reasonable by the listing agent and Centurion.

[14] This led to the application under the receivership to have Centurion purchase the lands in a form of credit bid, setting off the purchase price against the amount it is owed.

[15] The updated appraisal that informs the purchase price of the land indicates that the appraised value of the property, which is the purchase price offered by Centurion, does not take into account any value relating to the purchase contracts. The appraiser assumed that there would be a new marketing period for the condominiums, thus giving no value to the existing purchase contracts. The appraiser commented that "the enforceability of the [purchase] contracts is in doubt, given the length of time that has passed between the signing of those contracts, the initial intended occupancy date and the current status of the project".

[16] Eighty-one purchase contracts and one conditional sale contract have been entered into with respect to the condominium project. Most of these contracts were signed in 2013. The

purchasers were required to provide a minimum deposit of 5% of the total purchase price of the unit on execution of the contract, either by cash or bond. Deposits of \$2.6 million were originally held by a law firm, and were insured by an Alberta Condominium Deposit Protection Insurance Policy through Aviva Insurance Company of Canada. Deposits of \$2.3 million were paid to the Debtors when the project reached a stage where the funds were releasable under the terms of the policy. Under the policy, the insurer has indemnified the Holders against the loss of their deposits where the loss is incurred as a result of the failure of the Debtors to complete the construction of the units and to repay the deposits.

[17] The Receiver in its First Report dated April 10, 2018 noted the following with respect to the purchase contracts:

- a) Following the issuance of the receivership order, multiple purchasers contacted the Receiver and indicated that they did not intend to close on their respective purchase contracts.
- b) The Receiver advised the purchasers that the purchase contracts “remain valid contracts despite the receivership and the Receiver is not in a position to address the Purchaser Contracts until the Judicial Sales Process...has concluded”.
- c) A deposit of approximately \$30,000 was paid into court as a result of litigation proceedings commenced against the Debtors by a purchaser prior to the date of receivership. The Receiver understood that the deposit was being held by the court and accordingly, the purchaser would have no claim against Aviva.
- d) The law firm continues to hold the remaining deposits of approximately \$239,000 until further direction is provided by the Receiver and/or the Court.

[18] At the hearing, the Receiver commented that it had not obtained a legal opinion with respect to the validity of the purchase contracts, but had assumed that they were valid, as they had been characterized as part of the property of the Debtors at the time of the receivership.

[19] At the first hearing, thirteen Holders represented by counsel filed a brief opposing the assignment of the purchase contracts to Centurion. In addition, ten or more Holders appeared without counsel, some of whom spoke opposing the application. At the second hearing, the group presented by counsel had expanded to nineteen Holders, and a number of self-represented Holders were also in attendance.

[20] While the action proceeded as both foreclosure proceedings and a receivership, it is clear that the application before the Court for approval of the offer was under the aegis of the receivership proceedings, as the judicial listing authorized by the redemption order had expired.

[21] Centurion conceded that the application to assign the purchase contracts must also be considered to be made pursuant to the receivership proceedings, as this relief would not be possible to obtain in a commercial foreclosure action.

B. The Purchase Contracts

[22] As noted, most of the purchase contracts at issue were executed in 2013. They provide that the units will be substantially completed “on or about December 31, 2015”, defined as the “Occupancy Date”, provided that the vendor “shall be at liberty to....extend or postpone the Occupancy Date to another date so specified by the Vendor”.

[23] The purchase contracts further provide at para 7 that:

(a) the vendor shall give written *confirmation* of the Occupancy Date to the purchaser not less than 35 days prior to the Occupancy Date, but that on seven days' notice to the purchaser, the vendor "shall be at liberty to extend the Occupancy Date for up to sixty (60) days or any portion thereof;" and

(b) "...if for any reason beyond the Vendor's reasonable control (*and not for financial reasons*)", the vendor is not able to substantially complete the unit by the Occupancy Date or the extended date as set out under a), the vendor may extend or postpone the Occupancy Date "*for such reasonable period to allow the Vendor to obtain such Permit or approval or substantially complete the Unit.*" (emphasis added)

[24] The purchase contracts provide that time shall be of the essence. They also provide that the vendor may assign the contract before closing "in its sole discretion".

[25] On November 24, 2015, the Debtors wrote to the Holders, advising as follows:

When will the project be completed? We expect a 14-16 month build time.

The project should be completed by late Spring/Summer 2017.

[26] In 2016, the Debtors required some of the Holders to be re-approved for financing and to provide an additional deposit.

[27] On February 23, 2017, the Debtors advised the Holders that:

...the STEPS Bridgeland Management team has decided to remove and replace [x] Construction as General Contractor...

We are happy to report that ITC Construction has taken over control of the site now, and will recommence construction on or about March 1, 2017...**We will provide a more detailed schedule to completion after ITC resumes construction** [emphasis added].

[28] On April 12, 2017, the Debtors advised the Holders that:

...recommencement of construction on the STEPS Bridgeland project had been delayed due to regulatory approval of the construction contract from the project's lender and its syndicated partners.

It is expected that the constructions will recommence within the next 30 days. **We will be sending out a letter to each of you as soon as the construction recommences with adjusted possession dates.** (emphasis added)

[29] The Debtors did not pay interest on the mortgage to Centurion in March or April, 2017. Ultimately, the Debtors failed to make these interest payments from March through July, 2017. They failed to remedy this default and Centurion took steps to have the Receiver appointed in July 2017.

[30] On November 22, 2018, counsel for some of the Holders advised the Debtors, Centurion and Aviva that the Debtors, through their failures, had repudiated the purchase contracts and had therefore failed to complete the project. They demanded a return of their deposits.

[31] With respect to whether these Debtors extended or postponed the Occupancy Date in accordance with the contracts, their right to do so was governed by section 4, which enabled them to do so “to another date as specified”. No such specific date was ever provided prior to the repudiation of the contracts. The correspondence in 2015 and 2017 did not provide a specified Occupancy Date.

[32] Section 7 of the purchase contracts does not aid the Debtors. It allows a postponement of the Occupancy Date but not for financial reasons, and thus was not available to the Debtors. No new Occupancy Date can now be set, since, by reason of the Debtor’s circumstances it could only be postponed for financial reasons, which would not be allowed by the contracts. Any new Occupancy Date would be unreasonable, in any event, given the passage of time.

[33] Although the purchase contracts do not include a provision specifically allowing the Holders to terminate the contracts for delay, it is commercially unreasonable to interpret the contracts in such a way that would allow the Debtors to extend or postpone a specified Occupancy Date indefinitely, particularly after the expiration of the original date. These were contracts of adhesion, and must be construed in case of doubt against the grantor: *Shaw GMC Pontiac Hummer Ltd v Polaris Explorer Ltd*, 2009 ABCA 390. Commercial contracts of this type should be construed in accordance with sound commercial principles and good business sense: *Scanlon v Castlepoint Development Corp*, (1992) 11 OR (3d) 744.

[34] Read in the context of the contract as a whole, including the provision that time is of the essence, section 7 of the purchase contracts must be interpreted to mean that the vendor is allowed a reasonable period of time to complete the units only if it is unable to complete the units by the Occupancy Date or a properly specified extended date for reasons that do not include financial reasons. It is clear that the failure to complete the units, at least between April 2017 and the present, was caused by financial reasons, given the affidavit evidence of the Debtors, the failure to pay interest to Centurion, the numerous liens on the project, and the appointment of the Receiver.

[35] The deposits of the Holders who signed up in 2013 have been tied up for approximately five years with no benefit to purchasers and no indication of when the project will be completed. The Occupancy Date specified under the contracts expired more than 3 years ago. There is evidence of prejudice to many of these Holders: some have had to purchase alternate accommodations, some no longer qualify for financing under the new mortgage rules or because of changes in their employment or financial condition.

[36] While what constitutes a reasonable period of time is not fixed, but dependent upon the factual matrix within which a dispute arises (*Roberige v 1102940 Alberta Ltd*, 2012 ABQB 717 at para 56), this is clearly a case of unreasonable breach. The law will imply completion within a reasonable time: *Hagg v Steininger*, [1975] BCJ No 703.

[37] It is therefore apparent that the inability of the Debtors to complete the construction of the units within a reasonable time would allow the Holders of the purchase contracts to terminate them as a consequence of a repudiatory breach by the Debtors: *The Law of Contracts*, Second Edition, John D. McCamus, Irwin Law Inc, 2012 at page 676. The contracts are not enforceable against the Holders.

[38] The Debtors submit that, even if the contracts have been terminated, they may still be assigned, relying on *Fredrickson v Insurance Corp of British Columbia*, 1986 CanLii 1066 at

para 45. However, that case is not authority for the proposition that a terminated contract can be assigned, merely because terminated contracts are not listed among the types of contracts that cannot be assigned. Although under the contracts, the purchasers agreed to an assignment by the vendor, the contracts have been terminated and the purchaser can no longer be said to have consented to their assignment. Therefore, no right of assignment exists: HG Beale, ed, *Chitty on Contracts*, vol. 1, 29th ed (London: Sweet & Maxwell, 2015).

[39] The Debtors also submit that the Holders lack standing to seek final relief in the receivership action as they are not parties to the action and that relief of the kind sought by the Holders requires “a fulsome court process”, including pleadings, discovery and trial.

[40] This is disingenuous. Centurion in its amended application supported by the Debtors applied for declarations that would ensure that the contracts were valid and enforceable against the purchasers. These declarations, if granted, would have been a form of final relief without trial.

[41] As the parties are not at odds over the key facts in this matter, and as the Court has all of the necessary information before it to determine the validity of the contracts, there is no need for this issue to be deferred. Declarations of this kind relating to the enforceability and priority of claims against debtors and other issues relevant to the determination of assets in an estate are often made in receivership actions in a summary fashion when the evidence is sufficient to allow such a determination to be made. As noted by Centurion, this dispute is between the secured lender, Centurion and the Holders, the resolution of which is purely a matter of law and interpretation of the purchase contracts.

[42] With respect to the standing of the Holders, they have been joined as respondents in this application and they are certainly interested parties whose rights have been directly put in issue.

[43] Section 8 of the *Judicature Act* directs that the Court has a general jurisdiction to grant any remedy so as to avoid, if at all possible, multiple proceedings and to ensure that all matters between the parties are completely determined. *Gramaglia v Alberta (Government Services Minister)*, 2007 ABCA 93 at para 39. It is therefore appropriate to decide this issue within the receivership

[44] The Debtors also submit that the purchase contracts are not void because they are not unconscionable.

[45] I agree with the Holders that the appropriate test is not unconscionability. The Holders submit that the contracts are void under the *Consumer Protection Act*, RSA 2000, c C-26.3 and the *Condominium Property Act*, RSA 2000, c C-22. Neither of these statutes require that a contract be unconscionable in order for it to be voided.

[46] The Holders rely on section 6(3)(c) of the *Consumer Protection Act*, which states that it is an unfair practice for a supplier to include in a commercial transaction terms or conditions that are harsh, oppressive or excessively one-sided, and section 7(2), which allows a consumer who has entered a contract containing a term that constitutes unfair practice to cancel the transaction.

[47] The Holders submit that the purchase contracts are harsh, oppressive and excessively one-sided as they permit the developer to assign them with no corresponding right to the purchasers. By doing so, they lock the purchasers into an agreement whereby they can be forced to close on the units at some unknown future date that could be years or possibly decades away

regardless of their financial situation at closing and regardless of the time that has passed since the contracts were executed.

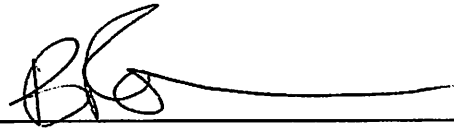
[48] Given my decision on the interpretation of the purchase contracts, it is not necessary that I consider whether the contracts contain terms that constitute unfair practice. If, however, I am incorrect in that interpretation, I would find that the Holders are entitled to cancel them pursuant to the *Consumer Protection Act*, or, alternatively, as a breach of the duty of fair dealing set out under section 11 of the *Condominium Property Act*.

[49] Those Holders represented by counsel at the hearing and those in attendance who opposed the relief sought by Centurion are entitled to have their purchase contracts considered terminated by the Debtors, the Receiver and Aviva. Other Holders may choose to terminate their contracts by notice to the Debtors, the Receiver and Aviva.

[50] Given that this decision may require further assistance by the Receiver, I adjourn the application to approve the Receiver's activities and fees and disbursements and to discharge the Receiver sine die.

Heard on the 13th day of December, 2018.

Dated at the City of Calgary, Alberta this 18th day of April, 2019.



B.E. Romaine
J.C.Q.B.A.

Appearances:

Ms Afshan Naveed
for the Applicant

Mr Josh Dial
for the all Respondents except Assured Developments Ltd

Mr Blair Carbert and Mr. Kevin Stenner
for the 19 Purchasers

Mr Harman Toor
for Brien and Diane Nguyen

Mr. Jonathan Selnes and Mr. Kelly Hannan
for Aviva Insurance Company of Canada

Luke Ratzlaff
Self Represented

Alexander HB Lam and Hiroko Kadowaki
Self Represented

Fatsum Woldobeghi
Self Represented

Doris Kwan
Self Represented

Andrea Lamond
Self Represented

Susan Colley
Self Represented

Hong Chen
Self Represented

Kelly Falconi
Self Represented

Mario Falconi
Self Represented

Terence Lee
Self Represented

Ron and Tracey Blow
Self Represented