CITATION: Genstar Development Partnership v. The Roman Catholic Episcopal Corporation of the Diocese of Hamilton, 2018 ONSC 4119
COURT FILE NO.: CV-17-570177
DATE: 20181001

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Genstar Development Partnership, Applicant

AND:

The Roman Catholic Episcopal Corporation of the Diocese of Hamilton in Ontario, Respondent

BEFORE: Pollak J.

COUNSEL: *Alan Merskey*, for the Applicant

Sean S. Carter, for the Respondent

HEARD: April 11, 2018, with final written submissions on July 3, 2018

ENDORSEMENT

[1] I have summarized the facts and circumstances surrounding the issues raised in this Application in my Endorsement dated June 14, 2018.

[2] The Applicant submits that it is entitled to exercise the right of the "Vendor" as defined in the Agreement of Purchase and Sale ("Agreement") to re-purchase the property ("the Right") from the Diocese as it is a "successor" or an "assignee" to the Vendor, Imasco. The Diocese submits that such successor status is not supported by the evidence in this Application and that rather, the Applicant, "Genstar Partnership" is an assignee of the rights of the Vendor. Further, as an assignee, it did not give notice of the assignment to the Diocese as required by statute. Further, in the alternative, the Diocese submits that if the Applicant is a successor to the Vendor, or if it was not required to give notice as alleged by the Diocese, it did not, through its failure to tender the correct Purchase Price, properly exercise its Right. Finally, in the further alternative, it is submitted that there is no persuasive evidence on the uniqueness of the Property to justify the remedy of specific performance.

[3] The Diocese submits that the evidence supports a finding that "Genstar Partnership" is not a successor of Imasco, but, at most, the (second) assignee of the Right. Imasco attempted to assign the Right to Genstar Development Company Limited ("Genstar Limited") in February 2000, which then attempted to assign the Right to Genstar Partnership in January 2001. It is emphasized that there is no evidence of any registration of any Right on title to the Property, or the registration of any conveyance of the Right. No notice was given to the Diocese on any alleged assignments of the Right.

[4] The Applicant has the burden of proving that it is a successor. If it is not a successor but is an assignee, pursuant to the *Conveyancing and Property Act*, R.S.O. 1990, c. C.34 (the "*Act*") it is required to provide notice to the Diocese with notice of the assignment to enforce its right to purchase the property as an assignee. No notice was given.

[5] In the alternative, the Diocese also submits that it is clear from the Agreement that the Right was crystalized upon a "triggering event" on August 31, 2008 when it was discoverable by the Applicant that the property in question was not developed for a church within 10 years of the date of the Agreement.

[6] The Applicant's evidence is that it did not have knowledge of this triggering event until it became aware of the request for proposals ("RFP") sent out by the Diocese for the potential sale of the property. This evidence is challenged by the Diocese.

[7] In the further alternative, the Diocese submits that the tenders by the Applicant during the 90-day period set out in the Agreement were deficient. The Applicant however, submits that there was an anticipatory breach by the Diocese and that it was therefore not obligated to tender. Before the closing, the Diocese advised the Applicant that "the Diocese is not prepared to sell the Property back to [Genstar] at this time." It is therefore submitted that deficiencies with the Applicant's tender are irrelevant. The Diocese's argument with respect to the invalid tender is that the Applicant did not perform its obligation to pay the correct Purchase Price.

[8] At the outset of the hearing, the parties were asked by the Court to address the issue of whether an Application was the appropriate way to resolve the issues in dispute. The Applicant submitted that an Application was appropriate and the Diocese maintained that the procedure had been chosen by the Applicant and it did not object to the continuation of the hearing in the form of an application, subject to the Court's jurisdiction to control its process.

[9] In response to the Court's Endorsement of June 14, 2018, further submissions on the issue of the appropriateness of the Application procedure for this dispute were made.

[10] The Applicant urged this Court to proceed with the Application on the basis of the evidence on the Application record and that it be permitted to provide further evidence to support its status to exercise the Right to buy the property if the Court rules that it has not proven that it is a successor of the "Vendor" as defined by the Agreement.

[11] The Applicant relies on jurisprudence stating that an Application should be converted to a trial only in circumstances where there was significant conflict in material evidence. The Applicant acknowledges that "the evidentiary record lacks certain potentially relevant information with respect to the "succession issue". It attributes the absence of this lack of evidence to the alleged failure of the Respondent to raise legal arguments on its failure to prove its status as a successor to the Vendor in a timely manner.

[12] As an alternative position the Applicant urges the Court to adopt a hybrid procedure based on a recent decision of this Court in the case of *TMJ Hygiene Service Corporation v. Aces Capital Inc.*, 2018 ONSC 1572. It proposes as follows:

> "[33] Recent case law provides support and guidance for the provision of supplementary evidence on a discrete issue in the case of an application. In TMJ Hygiene Service Corporation v. Aces Capital Inc., Justice Monahan considered concurrent claims for rescission of contract and negligent misrepresentation. The rescission claim was decided by way of application, but Justice Monahan was unable to decide the accompanying tort claim on the record. The respondents in that case submitted that the tort claim could only be addressed in the context of an action. Justice Monahan disagreed, instead ordering a summary judgment mini-trial pursuant to Rule 20. Notwithstanding that the parties had already filed relevant affidavit evidence, cross-examined on those affidavits, and fully argued the tort claim in their written and oral submissions, Justice Monahan crafted a solution which provided for:
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> (a) the application record to be accepted as the record on the mini-trial;
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> (b) the Option/Right of filing one additional affidavit, as well as a factum, for each party;
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> (c) minutes of cross-examination in court on any fresh affidavit; and
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> (d) 45 minutes of oral argument in court for each party."

[13] The Applicant submits that on the basis of the "culture shift" identified in the *Hryniak v. Mauldin, et al* 2014 SCC 7, [2014] S.C.R. 87 case, emphasizing proportional procedures tailored to the needs of the particular case, that if it were to provide supplementary evidence on the Transfer Agreement, such would assist the Court to make a determination on the issues. The Applicant proposes to deliver this evidence either by affidavit provided within one month or less of the Court's decision on the current issue, or by evidence-in-chief in Court at the earliest opportunity, in both cases subject to cross-examination in Court.

[14] The Diocese refers to the criteria to determine if a trial of issues as set out at paragraph 20 of the Court's endorsement, submitting that the Application procedure is appropriate but objects to the introduction of new evidence after the Court's ruling on the Applicant's status as a successor to the Vendor.

[15] The Diocese emphasizes that its arguments on the Applicant's failure to provide it is a successor to the Vendor were raised 10 weeks before the hearing and that the Applicant did not request any adjournment to address this issue, but wanted to proceed with the hearing of the Application. It is submitted that it would be unfair for the Applicant to "shore up" its case with new evidence. Such evidence should have been filed as part of the Applicant's case. This is particularly prejudicial.

[16] The Diocese continues to take no position on the appropriateness of the Application procedure, submitting that it did not choose the procedure and the Court should do whatever it feels is appropriate in the circumstances of this case.

[17] The Applicant now withdraws its request for damages, acknowledging the difficulty with such relief, asking the Court to award only the remedy of specific performance. It acknowledges that the legal positions taken by the parties are complex, but urges the Court to decide the issues on the basis of the evidentiary record before it.

[18] The Applicant emphasizes that the uncertainty noted by the Court is not based on credibility concerns of witnesses or other conflicting evidence, but an evidentiary "gap" in the record.

[19] The Applicant also submits that with respect to the first branch of the "Sekhon Test", referred to by the Court, the record is complete and undisputed on the issues of Delay and Tender.

[20] The Applicant recognizes that the legal positions taken by the parties are complex and relies on recent jurisprudence suggesting that the second branch of the "Sekhon Test" is concerned with factual complexities rather than legal ones. In the case of *Hazineh v. McCallion*, 2012 ONSC 3833, the court stated that "the relevant question [in deciding whether to proceed by application] is not: how complex is this litigation? Rather the relevant question is: what is the nature of this litigation?" As well, it is submitted that the significance of the relief sought does not bar the Applicant from proceeding by way of Application.

[21] Finally, the Applicant submits that the exchange of pleadings and discovery would be of limited value because the legal positions of the parties are clear, there is an extensive record before the Court with very few factual issues which are disputed. A full discovery is not warranted.

[22] The Applicant argues that in this Application, subject to the provision of supplementary evidence by the Applicant, if needed, there is no reason that the dispute cannot be fully and fairly determined by Application.

[23] After consideration of these further submissions from the parties on whether this Court should exercise its discretion to order the trial of issues that are being dealt with in this Application, I agree with the submissions of the Applicant that this Court should proceed with the evidence on the record to decide this Application. In this regard, it is significant to note that the Applicant has now advised the Court that it is not seeking a damages remedy, but rather the only remedy sought is one of specific performance.

[24] I do, however, find that it would be unfair to allow the Applicant's alternate argument (if the Court finds that it did not introduce enough evidence to prove its status as "Vendor"), that it should be allowed to introduce further evidence pursuant to the suggested procedure I have noted above. The Applicant has never requested an adjournment and has consistently submitted that the Court should proceed on the present evidentiary record. It would, in my view, be improper to allow the Applicant, after receiving comments and a ruling from the Court, to introduce new

evidence after the completion of the hearing. The Diocese has the right to know the case it has to meet before the conclusion of the hearing.

[25] The Agreement provides the Right for the "Vendor" (defined as Imasco) to repurchase the Property from the Diocese. The Vendor's obligation is set out in paragraph 5 of the Agreement, as follows:

> 5. Prior to closing, the Purchaser will have no registrable interest in title to the Property and will not cause any document to be registered there against. The Purchaser acknowledges that the Vendor has entered into this Agreement in reliance on the Purchaser's commitment to develop the Property for a church and not to dispose of any part thereof prior to such development.
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> If the Property is not developed for a church within 10 years hereof or if the Property is not required for a church, the Vendor shall be notified thereof and be entitled to repurchase the Property within 90 days of such notification at a price equal to the herein purchase price multiplied by the increase in the Ontario Consumer Price Index between the date of closing hereunder and the date of repurchase.

[26] Pursuant to the Agreement, the Vendor had the right to be notified of a triggering event. The Diocese argues that the right to purchase was not conditional on getting notice. It is submitted that in September 2008, the right to purchase crystalized notwithstanding that no notice was given by the Diocese as required by the Agreement. In the alternative, the Diocese also submits that the Agreement provides that the Right was crystalized on the "triggering event" on August 31, 2008 when it was discoverable by the Applicant that the property in question was not developed for a church within 10 years of the Agreement of Purchase and Sale.

[27] The Applicant's evidence is that it did not have knowledge of this triggering event until it became aware of the RFP sent out by the Diocese for the potential sale of the property. This evidence is challenged by the Respondent. For the reasons that follow, it is not necessary for the Court to rule on the effect of the alleged delay by the Applicant in exercising the Right.

[28] The evidence on the Applicant's status to exercise the Right to purchase the property is set out in Mr. Koke's affidavit as follows:

> 35. As stated at paragraph 2 of my Affidavit, Genstar [Partnership] is Imasco's successor. In 1998, Imasco was a North American conglomerate which carried on business in Canada and elsewhere under various trade names including Genstar Development Company. In late 1999 and early 2000, Imasco transferred various assets, including the transfer of assets from Imasco to Genstar in early 2000.
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> 36. On or about February 1, 2000, Imasco and Genstar Development Company Limited (GDCL), a corporation governed by the laws of Canada, entered into a Transfer Agreement pursuant to which Imasco transferred all of the "Transferred Assets", as defined in the Transfer Agreement, to GDCL. Transferred Assets included Imasco's real estate contracts. Attached as Exhibit

"T" is a copy of the **February 1, 2000 Transfer Agreement without the schedules which have been omitted due to volume.**

37. On or about January 15, 2001, Genstar Development Company (GDC), an unlimited liability corporation incorporated under the laws of the Province of Nova Scotia, entered into a Memorandum of Agreement with Stephen G. Raby, pursuant to which GDC, as managing partner, and Mr. Raby, as initial partner, acknowledged and confirmed the formation of a general partnership under the Partnership Act of Alberta to carry on business under the name Genstar Development Partnership (as referred to herein as Genstar). Under the Memorandum of Agreement, the business of Genstar [Partnership] was stated to be the acquisition of the GDCL shares and assets and the winding up of GDCL, among other things. Attached as Exhibit "U" is a copy of the January 15, 2001 Partnership Agreement.

38. On January 15, 2001, GDCL entered into a Transfer Agreement with Genstar [Partnership], pursuant to which GDCL transferred to Genstar [Partnership] all of the "Transferred Assets", as defined in the Transfer Agreement. Attached as Exhibit "V" is a copy of the January 15, 2001 Transfer Agreement.

39. To summarize, the chain of ownership is as follows:

Imasco

?

GDCL

?

Genstar [Partnership]

As such, Genstar [Partnership] is the legal successor to Imasco's contracts including the Sale Agreement.

[29] The Diocese relies on the following:

- On April 14, 2016 it received a Notice pursuant to s. 71 of the *Land Titles Act*, R.S.O. 1990, c. L.5. The s. 71 Notice stated that Genstar Titleco Limited is registering the Notice on behalf of Imasco Enterprises Inc. and its successors.

- On May 2, 2016 Diocese received a copy of a Caution registered on title to the property on April 28, 2016. In the Caution Mr. Koke asserts that Genstar Partnership by its managing partner, Genstar Development Company, was registering the Caution because the "nature of the interest is that the applicant [i.e. Genstar Partnership] has a proprietary interest in the land pursuant to the [Sale Contract] executed by the applicant's predecessor, Imasco Enterprises Inc ...".

- On May 24, 2016 correspondence is received by the Diocese attaching a draft Transfer which describes Genstar partnership as a company. There is no reference to any assignment or to Genstar Titleco Limited.

- Notwithstanding further correspondence between counsel for the Applicant and counsel for the Diocese with respect to whether there has been a "triggering event" pursuant to the Agreement there is no claim that Genstar Partnership is a successor of Imasco and not an assignee.

- On May 30, 2016 the Diocese advises the Applicant that it "does not recognize the validity of its right to re-purchase".

- On May 31, 2016 counsel for the Applicant advises that "Genstar Partnership is Imasco's successor".

[30] The Applicant relies on the Supreme Court of Canada decision in *National Trust Co. v. Mead*, [1990] 2 S.C.R. 410 wherein it was held that the term ""successor" "denotes another corporation which, through merger, amalgamation or some other type of legal succession, assumes the burdens and becomes vested with the rights of the first corporation."

[31] The Applicant argues that it is not necessary for it to prove that every burden and every right must be assumed by the successor in order to establish successor status. The Applicant argues that on February 1, 2000 Imasco effectively transferred its entire business of acquiring, developing and selling real estate to Genstar Development Company Limited. On January 15, 2001 the entire business was transferred to the Applicant.

[32] A review of the supporting documentation, which is relied on by the Applicant however, does not disclose which of the "burdens and rights" have been transferred as schedules to the Agreements defining the "assumed assets and liabilities" have not been included in the record. The Applicant advised the Court that it has not provided these schedules because of the voluminous nature of the documents. When questioned by the Court with respect to how the Court can evaluate the extent and nature of the assets and liabilities that are being assumed in the Agreements without being able to examine the relevant documents, the Applicant did not request an adjournment to provide the Court with the necessary documents. Further, the Applicant never requested an adjournment to provide the Court with additional evidence on this issue.

[33] The Diocese relies on the Court of Appeal decision in Montreal Trust Co. of Canada v. Birmingham Lodge Ltd., which held that there is a difference between the terms "successor" and "assignee".

[34] On examination of the evidentiary record, I find that as it is lacking relevant documents, it is not possible for the Court to make a finding on the issue of successor status of the Applicant. It is only the "Vendor" as defined by the Agreement that can exercise the "Right".

[35] The alternative position of the Applicant is that it is an assignee. The Diocese challenges the Applicant's ability to exercise the Right as an assignee because it did not provide it with the required notice pursuant to the *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C.34

[36] The Applicant argues that even if it is an assignee and not a successor of Imasco it could still exercise the Right as an equitable assignee of the Right and that in such case, no Notice of the assignment to the Diocese is required. It submits that on the basis of the evidence, it is a valid equitable assignee of the Right.

[37] It relies on recent case law that a party's failure to comply with the requirements of legal assignment does not preclude the finding of an equitable assignment. Therefore, it is argued that the Applicant's lack of notice to the Diocese does not preclude the exercise of its Right.

[38] It is submitted that the intentions of the Vendor, Imasco, and later Genstar Development Company Limited ("GDCL"), to irrevocably transfer the Right are plainly evidenced by the Transfer Agreements between Imasco and GDCL, and subsequently between GDCL and Genstar. No further submission identifying the provisions of the documents relied on with respect to this issue have been made by the Applicant. I find that the considerations regarding the lack of a complete record, through the omission of the inclusion of relevant "schedules" to the Agreement are applicable. Without such relevant documentation, it is not possible for the Court to properly consider whether the corporate documents relied on support a finding of an equitable assignment of the Right.

[39] I therefore cannot accept the submissions of the Applicant that these intentions for an equitable assignment to irrevocably transfer the Right is plainly evident by the transfer agreements between Imasco and GDCL and subsequently between GDCL and Genstar. As the documents are incomplete, it is not possible to make findings with respect to the intentions of the parties.

[40] On the basis of the finding that the Applicant has not met its burden of proving it is a successor to the "Vendor", and that it is an equitable assignee which was not required to give notice to the Diocese of the assignment, the Application should be dismissed. Without having proved its status, the Applicant has not proven it had the right to exercise the Right, pursuant to the Agreement. There are further grounds for dismissal of this Application.

[41] In the further alternative, the Diocese submits that the attempts by the Applicant to exercise the Right during the 90-day period set out in the Agreement were deficient. The Diocese specifically put the Applicant to a tender. The Applicant however, submits that because there was an anticipatory breach by the Diocese it was not obligated to tender. It relies on the statement from the Diocese that "the Diocese is not prepared to sell the Property back to [Genstar] at this time." It is therefore submitted that deficiencies with the Applicant's tender are irrelevant.

[42] The evidence is that the position of the Diocese throughout was that it had no obligation to sell the property to the Applicant. There were numerous email exchanges between the parties with respect to the issue of whether the Diocese accepted the Applicant's position that it had the authority to exercise the Right pursuant to the Agreement. I do not find that the statement relied on by the Applicant, when considered in the context of the numerous communications between the parties with respect to the respective rights of the parties, establishes an anticipatory breach as argued by the Applicant.

[43] With respect to the allegation of ineffective tenders, the evidence is that in both attempts at tender, the Applicant calculated the wrong Purchase Price. The Applicant argues that as its error was clearly minor, the Diocese had no right to refuse to close. I find that the error of approximately $20,000, even in the context of a purchase price in excess of $800,000 does not relieve the Applicant of its obligation to "tender" the proper purchase price. I do not find that the approximate $20,000 deficiency was so insignificant that the tender was valid. I also am of the view that the Diocese did not have an obligation to assist the Applicant by advising it of the error it had made and of the proper method of calculation of the purchase price. Further, the Applicant did not advise the Diocese during the time period mandated in the Agreement, that it was willing to pay the correct purchase price. The advice that it was prepared to pay the correct price was given to the Diocese after this Application commenced.

[44] The Applicant argues that even if the right to exercise the Right has somehow been triggered, strict compliance was not required under the circumstances. I disagree and find that the Diocese was entitled to require a proper tender of the correct purchase price. I also do not accept the submission that because of the duty of good faith by the Diocese that it had the obligation of advising the Applicant about the errors it had made in the proper calculation of the purchase price.

[45] Finally, the remedy sought is specific performance. In support of its position, the Applicant submits that specific performance is appropriate since (i) reconveyance was specifically agreed to by the parties as a remedy for the Diocese's breach and (ii) the Property is unique.

[46] The Applicant relies on the case of *Kahlen v Vogel Construction Ltd.*, 2006 CarswellOnt 780 (SCJ) wherein the Court held that specific performance was appropriate because the parties had specifically contracted for the reconveyance in the event of a breach.

[47] The Applicant submits that the parties agreed that it had the right to a reconveyance of the Property if the Diocese failed to develop the Property for a church. Specific performance is the only remedy that is consistent with the parties' intentions. Alternatively, it submits that the Property is unique. Specific performance will be ordered where the property in question is unique as a substitute is not readily available. The subdivision where the Property is located was fully developed and sold off in 2008. Therefore, the location of the Property is very desirable because of the significant appreciation of land value.

[48] The Applicant's alternative claim for damages has been withdrawn.

[49] The Diocese disagrees that the Applicant is entitled to specific performance because there is no sufficient evidence of uniqueness of the Property. The Property in question is an investment property to Genstar Partnership. It has not demonstrated that a replacement property is unavailable.

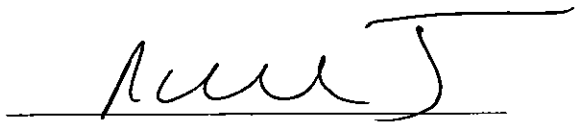
[50] The Applicant argues that although specific performance is ordered if the property is unique, as the parties have agreed that reconveyance is the appropriate remedy, specific performance can be appropriate in the event of a breach. I have, however, not found that there was a breach of the Agreement by the Diocese.

[51] I agree that the considerations of the court in *Kahlen* apply if there had been a breach of the Agreement. The evidence is that the parties specifically provided the Applicant with the right to re-purchase the property if the Diocese did not develop the property for a church within a certain period of time. The uncontradicted evidence surrounding the circumstances of the sale of the property to the Diocese supports the finding that it was the intent of the parties that specific performance be awarded if the property was not developed for use as a church. There is therefore no requirement for the Applicant to show specific uniqueness of the property.

[52] In conclusion, as stated above, this Application should be dismissed as the Applicant has failed to establish that it was a successor to the Vendor to the Right as defined in the Agreement. Rather, it was an assignee. Further, it failed to properly exercise the Right pursuant to the Agreement. As an assignee, it did not provide the Diocese the required notice by the *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C.34. For all of these reasons, the Application is therefore dismissed.

Costs

[53] If the parties are unable to agree on costs, they may make brief written submissions to me no longer than three pages in length. The Respondent's submissions are to be delivered by 12:00 p.m. on October 10, 2018, and the Applicant's submissions are to be delivered by 12:00 p.m. on October 17, 2018. Any reply submissions are to be delivered by 12:00 p.m. on October 24, 2018.



Pollak J.

Date: October 1, 2018