CITATION: Wang v. Mattamy Corporation, 2020 ONSC 7012
DIVISIONAL COURT FILE NO.: 123/20
DATE: 20201117

SUPERIOR COURT OF JUSTICE – ONTARIO
DIVISIONAL COURT

RE: WEN WANG AND WIE LI, Appellants

AND:

MATTAMY CORPORATION, MATTAMY HOMES LIMITED AND MATTAMY (PRESERVE) LIMITED, Respondents

BEFORE: Penny J.

COUNSEL: *Wen Wang and Wie Li* on their own behalf

Michael A. Currie for the Respondents

HEARD: In writing

ENDORSEMENT

OVERVIEW AND ISSUES

[1] This is a motion by the plaintiffs seeking an extension of time to file their appeal to the Divisional Court (and, if granted, to further extend the time to perfect their appeal). The plaintiffs wish to appeal decisions of Master Muir, most importantly, the decision of the Master dated November 21, 2019. In this decision, Master Muir stayed the plaintiffs' action in favour of arbitration to which the parties had agreed in an agreement of purchase and sale between the plaintiffs and the defendant Mattamy (Preserve) Limited.

[2] The test on a motion to extend time to appeal is well settled. The overarching principle is whether the justice of the case requires that an extension be given. While each case depends on its own circumstances, the important relevant factors which the court must consider include:

(a) whether the moving party formed a *bona fide* intention to appeal within the relevant time period;

(b) the length of the delay and the explanation for the delay in filing;

(c) any prejudice to the responding parties caused, perpetuated or exacerbated by the delay; and

(d) the merits of the proposed appeal.

[3] The main issues on this motion are:

(1) whether the appeal has merit; and

(2) whether the plaintiffs have explained and justified their delay in filing their appeal.

[4] For the reasons that follow, the motion to extend time is dismissed.

BACKGROUND

[5] The defendants are homebuilders; each are affiliated with the other. The plaintiffs entered into an agreement of purchase and sale (APS) with Mattamy (Preserve) Limited to purchase a pre-construction home on February 11, 2017.

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 In their action, the plaintiffs seek a declaration that the APS has been "rescinded" and claim the return of their deposit along with other damages.

[7] 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 file a defence to the action because the APS contained an arbitration clause. The plaintiffs' lawyer responded, advising that they would not discontinue the action and did not agree that the arbitration provision was applicable.

[8] The defendants ultimately delivered a notice of arbitration and a motion seeking a stay of the action. This was delivered to the plaintiffs' lawyer on March 20, 2019. The plaintiffs served a notice of intention to act in person on April 9, 2019. On April 11, 2019, the plaintiffs noted the defendants in default without providing any notice. The plaintiffs advised the defendants of their actions on April 21, 2019. The defendants immediately advised the plaintiffs of their intention to move to set aside the noting in default. That motion was served on May 16, 2019 with an initial return date of June 20, 2019. The motion was then adjourned to be heard as a long motion by Master Muir on October 8, 2019.

[9] Regarding setting aside the noting in default, Master Muir applied *Nobosoft Corp. v. No Borders Inc.*, 2007 ONCA 444, and considered factors such as the behaviour of the parties, the length of and reason for any delay, the complexity and value of the claim and prejudice to the parties. He found that the defendants had clearly met their onus and set aside the noting in default.

[10] Master Muir then considered s. 7 of the *Arbitration Act, 1991*, S.O. 1991, c.17 and the arbitration provision contained in the APS. He found that the language of the arbitration provision was "very broad" and included "any possible claims the parties may have against one another" in respect of the APS, whether in contract, tort or otherwise. He concluded that the arbitration provision 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. He also found that the language used in the arbitration agreement is very clear: arbitration "shall

be the exclusive forum for the determination of disputes"; and, the plaintiffs "agreed that they would not bring a claim in any court".

[11] The arbitration provision in the APS states:

> 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 or may have against the Purchaser or that the Purchaser may have against the Vendor, its agents, employees, principles, 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 in (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 ARBITRATION pursuant to the Arbitration 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 or 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.

[12] The Master observed that much of the argument made by the plaintiffs on the motion related to the underlying merits of the litigation. He further observed that while the actions of the defendants in removing a bay window or securing the occupancy permit may or may not have been a breach of the APS or, while issues with respect to the execution of the APS may or may not be grounds for terminating the APS, those issues were not before the court on the motion. The only issue was whether the parties' dispute was to be dealt with by arbitration or an action in the Superior Court of Justice.

[13] Master Muir considered the mandatory nature of s. 7(1) (the court "shall… stay the proceeding") and considered whether any of the exceptions under s. 7(2) had been made out. He concluded they had not. In the end, the Master concluded that there was nothing unfair about the arbitration clause. It was consistent with public policy supporting agreements for dispute resolution by way of arbitration rather than through the courts. He found the plaintiffs were educated and sophisticated purchasers and that there was no evidence that the defendants had "taken advantage" of the plaintiffs. For these reasons, Master Muir granted the defendants' motion and stayed the action "pursuant to section 7 of the Arbitration Act."

ANALYSIS

Merits of the Appeal

[14] The main issue raised by the plaintiffs' motion is the effect of s. 7(6) of the *Arbitration Act*. Section 7(6) provides:

> There is no appeal from the court's decision.

[15] If it is determined that the arbitration provision applies to the issue that is raised in the proceeding, and thus s. 7 of the *Arbitration Act* is invoked, then s. 7(6) precludes any appeal from the decision rendered respecting the motion to stay: *Eggiman v. Martin,* 2019 ONCA 974 at para. 8. Thus, when a decision "falls squarely" within s. 7, it renders the decision "unappealable": *Radewych v. Brookfield Homes (Ontario) Ltd.*, 2007 ONCA 7212 at para. 4.

[16] Although it was not raised at the time before Master Muir, the plaintiffs now claim that Master Muir did not have jurisdiction to grant the stay. I do not agree. A Master has all the jurisdiction of a judge except in the seven expressed instances listed under rule 37.02(2). If masters are to be precluded from hearing motions, there must be an express exclusion in the rule or other provision that gives rise to the motion. There is no express exclusion in rule 37.02(2) or in the *Arbitration Act*. Master Muir had jurisdiction to make the order that he did. The principles of consistency and coherence support this conclusion. The "court", under the Rules of Civil Procedure, includes a master.

[17] In this case, Master Muir's decision "falls squarely" within the provisions of s. 7. Accordingly, it is not appropriate for the court to engage in an analysis of the Master's decision because any review of it is precluded by s. 7(6): *Eggiman*, at para. 10.

[18] Even if an analysis of Master Muir's decision were called for, the plaintiffs have not identified any error of law or palpable and overriding error of fact. The notice of appeal and the plaintiffs' factum simply repeat various arguments that they made before Master Muir. This is insufficient to make out a case for a meritorious appeal: *Wardlaw v. Wardlaw*, 2020 ONSC 286 at para. 5.

[19] For example, the plaintiffs complain that the defendants should not have been permitted to bring their motion for a stay while they were noted in default. Master Muir dealt with this, and did so correctly. The plaintiffs' noting in default, in the circumstances of this case, if it had been done by a lawyer, would have constituted sharp practice. In any event, the Master applied the correct test for setting aside a noting in default and granted the defendants' motion on this basis. Only then, having set aside the noting in default, did he turn to the next question of the effect of the arbitration agreement.

[20] The plaintiffs complain that they should have been entitled to a "cooling off" period under the APS akin to the protections under the *Consumer Protection Act.* Master Muir found on the evidence in the record that the plaintiffs had many weeks before the sales event to research their purchase and had the opportunity to seek legal advice. Moreover, the plaintiffs executed no less than three amending agreements over the following 12 months and raised no concerns about the

APS or the arbitration agreement during this period. The plaintiffs have neither alleged, nor shown, any error in law or palpable and overriding error of fact in this preliminary determination. Further, they are not precluded from raising these arguments with the arbitrator.

[21] The plaintiffs also complain that Master Muir should not have adjourned the original return date of June 20, 2019 because the defendants 'should have known' the motion would take more than two hours. That adjournment was granted exercising the Master's case management discretion. The defendants requested the adjournment because the plaintiffs filed affidavit evidence shortly before the return date of the hearing and the defendants wished to cross-examine. Master Muir took that opportunity to book the matter as a long motion, given the number and complexity of the issues. The plaintiffs have identified no error of law or palpable and overriding error of fact in the exercise of this discretion.

[22] The plaintiffs further complain about the cost award released on January 30, 2020. Again, the plaintiffs merely repeat submissions made, or make additional submissions that could have been made, on the merits before Master Muir. The matter of costs is highly discretionary. Absent a clear error in principle, the appellate court must defer to the discretion exercised by the court of first instance. The plaintiffs have not identified any error of law or principle, or palpable and overriding error of fact, in respect of the Master's disposition of costs.

[23] There is no merit to the plaintiffs' appeal. Therefore, it would be futile to grant leave for an extension of time. The plaintiffs' motion to extend time is therefore dismissed.

Delay

[24] This is sufficient to dispose of the plaintiffs' motion. I will nevertheless deal briefly with the defendants' second argument for why the extension of time should not be granted – unexplained delay.

[25] It is certainly true that the plaintiffs' initiation and prosecution of their appeal has not been done with alacrity. Nevertheless, it was not unreasonable for the plaintiffs to think they should await the Master's decision on costs before initiating their appeal. The plaintiffs filed a form of appeal within 30 days of that decision, thus indicating an intention to appeal. Had I not dismissed the plaintiffs' motion on the basis that it is manifestly without merit, I would not have been inclined to dismiss their motion solely on the basis of the time it has taken them to bring this matter to a head. I would not, however, have granted the plaintiffs' request for an additional 120 days, but would have insisted upon a much shorter time frame - 30 days - in which to perfect their appeal.

CONCLUSION

[26] The plaintiffs have not shown that their appeal is meritorious. This is an overwhelming consideration in the circumstances of this case and is a sufficient ground upon which to dismiss their motion for an extension of time to file and perfect their appeal. The plaintiffs' motion is therefore dismissed.

COSTS

[27] The plaintiffs, had they been successful on this motion, claimed almost $28,000. The defendants' cost summary sought $2,810.31 in partial indemnity costs.

[28] There is no reason why costs should not follow the event. The sum requested by the defendants, having prevailed on the motion, is entirely reasonable. Costs, therefore, are payable by the plaintiffs to the defendants forthwith in the amount of $2,810.31 inclusive of all fees, disbursements, and applicable taxes.

Penny J.

Date: November 17, 2020