CITATION: City Star Roofers Inc. v. 2169462 Ontario Limited, 2022 ONSC 1407
DIVISIONAL COURT FILE NO.: 307/21
DATE: 20220309

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

Lococo, Matheson and Copeland JJ.

BETWEEN:	
CITY STAR ROOFERS INC. Plaintiff (Appellant)	Steven Shoemaker, for the Plaintiff (Appellant)
– **and** –	
2169462 ONTARIO LIMITED and ORMONT HOLDINGS INC. Defendants (Respondent)	David Morawetz and John Lo Faso, for the Defendant (Respondent), 2169462 Ontario Limited
	HEARD at Toronto: February 24, 2022, by video conference

R.A. Lococo J.

REASONS FOR JUDGMENT

I. Introduction

[1] The appellant City Star Roofers Inc. appeals from the judgment of Justice Elizabeth M. Stewart of the Superior Court of Justice dated April 6, 2021, with reasons reported at 2021 ONSC 2552. In her decision, Stewart J. granted summary judgment to the respondent 2169462 Ontario Limited and dismissed the appellant's action.

[2] After the hearing of the appeal, and despite the able submissions of appellant's counsel, the parties were advised of the court's decision to dismiss the appeal, with written reasons to follow. These are the reasons for that decision.

II. Background

[3] Under a construction contract dated May 10, 2016, the appellant agreed to carry out roof construction work at a commercial building owned by the respondent. The contract price was approximately $215,000. A dispute arose about the quality of the appellant's work. After paying the appellant approximately $193,000, the respondent withheld payment of the balance of the contract price, being approximately $22,000. The appellant registered a construction lien in the amount of $106,692 and commenced an action against the respondent. The respondent defended the action and counterclaimed. The construction lien was vacated after the respondent paid $133,366 into court.

[4] The respondent hired an engineering firm to assess the appellant's work. In the engineer's February 2017 report, several alleged deficiencies were identified.

[5] After a mediation at which both parties were represented by counsel, the parties entered into Minutes of Settlement dated February 28, 2020. The parties agreed that the appellant would remediate certain deficiencies identified in the engineer's report by April 30, 2020, later extended to May 31, 2020. Upon the deficiencies' remediation to the satisfaction of the engineer, $30,000 of the monies paid into court would be paid to the appellant and the balance would be paid to the respondent. The Minutes of Settlement also provided that if the appellant did not remedy the deficiencies by the deadline, all the money paid into court would be paid to the respondent and the proceedings would be dismissed in their entirety.

[6] After the mediation, the appellant attended at the building site to address the deficiencies. The engineer conducted inspections and delivered reports dated April 25, July 11 and July 31, 2020. The appellant was not given prior notice of the inspections and was not present when they were performed. The July reports identified certain deficiencies that the engineer said had not been rectified, requiring additional remedial work, estimated to cost $10,000.

[7] The appellant's position was that any required remedial work had been performed by the original April 30 deadline. The appellant also took issue with the estimate of $10,000 to remedy the alleged deficiencies, estimating the cost of doing so at $2,500, without admitting that any remedial work was required.

[8] The respondent brought a summary judgment motion, seeking payment of the funds paid into court and dismissal of the action, in accordance with the terms of the Minutes of Settlement. The respondent relied on r. 20.04(2)(a) (no genuine issue requiring a trial) and r. 49.09(a) (failure to comply with the terms of an accepted offer) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. The appellant disputed that there were any remaining deficiencies. By way of cross-motion, the appellant argued that the court should grant relief from forfeiture of the $30,000 held in court that would otherwise be payable to the appellant.

[9] In her Reasons for Judgment, the motion judge found that the appellant failed to fulfil its obligations under the Minutes of Settlement. She therefore found that the respondent was entitled

to enforce the monetary remedy stipulated in the Minutes of Settlement, that is, the release to the respondent of the $30,000 held in court that the appellant would otherwise have received.

[10] The motion judge also declined to exercise her discretion to relieve the appellant from forfeiture of the stipulated amount of $30.000. In doing so, the motion judge characterized the stipulated remedy as "an agreed-upon forfeiture, and not a penalty": see Reasons for Judgment, at para. 30. The motion judge also found that there was "no unconscionability … or other inequity that would justify relieving the [appellant] of the consequences of its breach": at para. 33.

[11] Accordingly, the motion judge granted summary judgment to the respondent, dismissed the action and counterclaim, and ordered that the funds held in court be paid to the respondent.

III. Court's jurisdiction and standard of review

[12] The appellant appeals from Stewart J.'s judgment, alleging various errors of fact and law, as outlined further below.

[13] The Divisional Court has jurisdiction to hear this appeal under s. 71(1) of the *Construction Act*, R.S.O. 1990, c. C.30, as it read on June 29, 2018: see also s. 87.3(1).

[14] The standards of review for appeals are set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.

[15] On questions of law, the standard is correctness: *Housen*, at para. 8. On questions of fact, the standard is palpable and overriding error: at para. 10.

[16] On questions of mixed fact and law, the standard is correctness where there is an extricable legal principle. Otherwise, the standard of review on questions of mixed fact and law is palpable and overriding error, including with respect to the application of the correct legal principles to the evidence: at paras. 36-37.

[17] A palpable and overriding error is "an obvious error that is sufficiently significant to vitiate the challenged finding": *Longo v. MacLaren Art Centre Inc.*, 2014 ONCA 526, 323 O.A.C. 246, at para. 39.

IV. Legal principles – relief from forfeiture

[18] On appeal, the appellant maintained its position that it had complied with the terms of the Minutes of Settlement by rectifying any construction deficiencies by the required deadline. However, the focus of the appellant's submissions on appeal related to the motion judge's finding that the appellant was not entitled to relief from forfeiture.

[19] Pursuant to s. 98 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, a court may grant relief against penalties and forfeitures, on such terms as to compensation or otherwise as are considered just.

[20] In *Peachtree II Associates – Dallas L.P. v 857486 Ontario Ltd.* (2005), 76 O.R. (3d) 362 (C.A.), leave to appeal denied, [2005] S.C.C.A. No. 420, Sharpe J.A. provided a useful summary of the law relating to the enforceability of penalties and forfeitures, both at common law and in equity. He referred to such provisions as "stipulated remedy clauses", under which the parties agree in advance on the monetary or other consequences of a breach, should one occur: see *Peachtree*, at para. 1.

[21] By way of brief summary, a stipulated remedy clause may be characterized as a penalty (the payment of a sum of money) or a forfeiture (the loss of a right, property or money, often being held as security or part payment): *Peachtree*, at paras. 22 and 31. At common law, a stipulated remedy will be treated as an unenforceable penalty if, determined at the time of contract formation, it is "extravagant and unconscionable in amount" compared to the greatest conceivable loss upon breach; however, the remedy will be enforced if it is a genuine attempt to pre-estimate damages upon breach: at para. 24. If the stipulated remedy is a forfeiture, it will be enforced in equity when it is not unconscionable to do so, determined at the time of breach: at paras. 25-26. Sharpe J.A. went on to note the strong judicial preference for classifying a stipulated remedy clause as a forfeiture rather than a penalty, when faced with a choice: at para. 31. He also noted that courts should, whenever possible, favour analysis based on equitable principles and unconscionability over the strict common law rules relating to penalty clauses: at para. 32.

[22] The principles set out in *Peachtree* were also summarized in *Chilikoff v. West Capital Placer Inc.*, 2016 ONSC 6354, at paras. 12-13, a decision that Stewart J. relied on in her Reasons for Judgment in this case. In *Chilikoff*, at para. 14, Kristjanson J. also added to the list of relevant factors "the general organizing principle of good faith in contract law, and the duty of honest performance" as set out by the Supreme Court of Canada in *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, at para. 93.

[23] More recently, the Ontario Court of Appeal has restated the test for determining whether relief from forfeiture should be granted, in the following terms. The party seeking relief from forfeiture is required to establish that (i) the forfeited sum was out of proportion to the damages suffered by the other party upon breach, and (ii) it would be unconscionable for the other party to retain the money: see *Redstone Enterprises Ltd. v. Simple Technology Inc.*, 2017 ONCA 282, 413 D.L.R. (4th) 272, at paras. 10 and 15, citing *Varajao v. Azish*, 2015 ONCA 218, at para. 11.

[24] In *Redstone*, at para. 25, the Court of Appeal also indicated that "the finding of unconscionability must be an exceptional one, strongly compelled on the facts of the case." At para. 30, the court also made the following comments with respect to the indicia of unconscionability:

> The list of the indicia of unconscionability is never closed, especially since they are context-specific. But the cases suggest several useful factors such as inequality of bargaining power, a substantially unfair bargain, the relative sophistication of the parties, the existence of *bona fide* negotiations, the nature of the relationship between the parties, the gravity of the breach, and the conduct of the parties.

V. Analysis and conclusion

[25] As set out in the appellant's factum and counsel's oral submissions, the appellant submits that the motion judge erred in applying the equitable principles relating to relief from forfeiture and unconscionability by, among other things, failing to consider (i) the conduct of the parties, (ii) the gravity of the breach, and (iii) the disparity between the forfeited amount and the damage caused by the breach.

[26] With respect to conduct of the parties and the gravity of the breach, the appellant says that the motion judge failed to take into account the appellant's reasonable course of conduct, including (i) attending to rectify alleged deficiencies in a timely manner, and (ii) offering to re-attend with his own engineer and immediately repairing any remaining deficiencies. The appellant further says that the motion judge failed to recognize the respondent's bad faith in not allowing the appellant to (i) be present when the respondent's engineer conducted their inspections, (ii) inspect the alleged deficiencies, or (iii) retain its own engineer to provide a report. With respect to the gravity of the breach and the disproportionate nature of the remedy, the appellate also notes the disparity between the disputed $30,000 and the cost of remediating deficiencies, being $10,000 (as estimated by the respondent's engineer) or considerably less (by the appellant's estimate).

[27] The appellant (in his factum) also relies on the disparity in amount to support its position that the stipulated remedy should be treated as an unenforceable penalty. In the appellant's submission, payment of the disputed $30,000 to the respondent would be an extravagant and unconscionable windfall that did not represent a genuine pre-estimate of damages. Therefore, the remedy is a penalty that is not enforceable at common law.

[28] In summary, the appellant says that if there were any unresolved deficiencies in its construction work (which it denies), the motion judge erred in enforcing the stipulated remedy in this case. According to the appellant, either (i) the requirement to release $30,000 to the respondent upon breach would be an unenforceable penalty or (ii) it would be unconscionable not to grant relief from forfeiture of that amount.

[29] I disagree.

[30] The question of whether the motion judge properly applied the law relating to stipulated remedies, including the law relating to penalties and relief from forfeiture, is a question of mixed fact and law. The errors that the appellant alleges relate to either the motion judge's findings of fact or her application of the facts to the law. I see no extricable error in principle in the motion judge's analysis nor any palpable and overriding error of fact or mixed fact and law.

[31] In her Reasons for Judgment, at para. 30, the motion judge found that the remedy stipulated in the Minutes of Settlement was "an agreed-upon forfeiture, and not a penalty." Consistent with that finding, she applied the equitable principles relating to relief from forfeiture and unconscionability in making her decision. In doing so, she followed the preferred course suggested in *Peachtree*, at paras. 31-32 in favour of classifying the stipulated remedy as a forfeiture rather than a penalty and applying equitable principles rather than strict common law rules.

[32] I see no reversible error in her characterization of the remedy upon breach as a forfeiture (the appellant's loss of entitlement to $30,000 of the $133,366 that the respondent previously paid into court) rather than a penalty (the obligation to pay a specified amount). She was aware of the disparity between the amount of the stipulated remedy and the engineer's estimate of "at least several thousands of dollars" to address the deficiencies (at para. 16) but in all the circumstances found no unconscionability.

[33] In reaching the latter conclusion, she was aware that the Minutes of Settlement were negotiated following mediation, under which some but not all the alleged deficiencies that the engineer identified would be remediated by an agreed deadline, with the engineer being the sole arbiter of compliance: at paras. 12-13. She found that the Minutes of Settlement "reflect a considered and voluntary agreement by the parties to adopt a practical solution to resolving their dispute" and "was arrived at using mediated negotiation with the assistance of counsel": at para. 21. She also noted that the agreed consequences of default "do not include any additional process for discussion, review, argument or arbitration" but rather designate the respondent's engineer as "the professional arbiter of whether the work done by [the appellant] satisfactorily corrected each agreed-upon deficiency": at para. 22. In addition, she notes that a finding of unconscionability "would require a party to establish an inequality of bargaining power and terms, in the context of a settlement, that are substantially unfair": at para. 31.

[34] In these circumstances, the motion judge did not make the "exceptional" finding of unconscionability, which must be "strongly compelled on the facts of the case": *Redstone*, at para. 25. The absence of compelling "indicia of conscionability", as discussed in *Redstone*, at para. 30, supports that conclusion. I see no extricable error of principle or palpable and overriding error in the motion's judge's analysis.

[35] In reaching that conclusion, I also took into account the appellant's submission, relying on *Bhasin* and other case law, that the respondent acted in bad faith (or, as alleged in the appellant's factum, did not come to court "with clean hands") with respect to the respondent's conduct and that of its engineer relating to the deficiency remediation process. While not the subject of specific comment by the motion judge, it was clear from her reasons (including at paras. 22 and 26) that she was aware that the appellant took issue with the fairness of the remediation process, including the role of the respondent's engineer as the sole arbiter of remediation. She nonetheless found that there was no unconscionability in all the circumstances. Once again, I see no reversible error in her analysis.

[36] The Notice of Appeal also alleges that the motion judge erred in law in failing to apply the appropriate principles that govern r. 20 of the *Rules of Civil Procedure*. However, this issue was not pursued in the appellant's written or oral submissions and therefore need not be addressed.

VI. Disposition

[37] Accordingly, I would dismiss the appeal.

[38] As agreed in advance by the parties, the respondent as the successful party is entitled to costs in the fixed amount of $7,500 all inclusive, payable by the appellant within 30 days.

Lococo J.

I agree

Matheson J.

I agree

Copeland J.

Date of Release: March 9, 2022

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