

CITATION: DeBartolo et al. v. Icona Developments Inc., 2020 ONSC 8034
NEWMARKET COURT FILE NO.: CV-19-142706-00
DATE: 20201222

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Patricia DeBartolo, Melissa Leone, Robert M. Paniccia and The Applicants Listed
In Schedule A To This Application, Applicants

and

Icona Developments Inc., Steve Gupta, The Gupta Group Inc. and 1966711
Ontario Inc., Respondents

BEFORE: The Honourable Mr. Justice Phillip W. Sutherland

COUNSEL: John DeVellis, Ted Charney, Patrick Nelson, Caleb Edwards and James Omran
for the Applicants

Monique J. Jilesen, Andrew Parley and Vinayak Mishra, for the Respondents

HEARD: December 14, 2020 - virtual

ENDORSEMENT ON CONFERENCE

Introduction

- [1] The applicants commenced an application concerning a condominium development in the City of Vaughan. There are 450 applicants. The applicants allege that Icona Developments Inc. (Icona) improperly terminated their respective Agreements of Purchase and Sale for the purchase of condominium units and the other respondents are liable to the applicants in damages for negligence, breach of duty of care and misrepresentation.
- [2] The respondents have not yet responded to the application. The respondents wish to bring a motion to have the application converted into an action. The applicants oppose such a request. The issue on this conference is whether the respondents' motion should be heard by the court now or after the parties have completed the necessary steps in the application, and the issue of conversion to an action be heard during argument on the application.
- [3] The respondents have served and filed their motion material.
- [4] The respondents state that they need not serve any further material on the motion, nor do they intend to cross-examine the applicants on their responding material. The applicants have not responded to the motion. The applicants state that they would likely receive instructions to cross-examine Mr. Gupta on his affidavit in support of the motion.

- [5] This application is being case managed by me under the Civil Case Management Pilot Project-One Judge Model.

Position of the Parties

- [6] The respondents contend that it will be more efficient if the court determines whether the proceeding should continue as an application or an action before the proceeding progresses any further. The respondents contend that the application should proceed as an action for there are facts in dispute along with claims for damages based on negligence, breach of duty and misrepresentation. These claims will require a trial. The motion will not be that difficult to argue and can be done quickly and efficiently.
- [7] The applicants contend that there are no significant facts in dispute except the subjective view of Mr. Gupta on why the Agreements of Purchase and Sale were terminated. The applicants submit that to argue the motion now would result in duplication of work. Affidavits for the motion along with cross-examinations for the motion and then if the proceeding continues as an application, duplication on the application. The applicants argue, therefore, that the court would be in the best position to determine whether the application should continue or be converted into an action at the beginning of the application hearing. At that point, the court will have all the evidence before it. In addition, the applicants argue, rule 38.10 of the *Rules of Civil Procedure* permits the court on the hearing of the application to adjourn the application in whole or in part, or order a trial of the whole or any issue in the application to proceed to trial. Thus, the applicants contend, it is at the hearing of the application that the court is best situated to ascertain whether the application should proceed in whole or whether any issue should proceed to trial.

Analysis

- [8] The question for the court to determine is whether the respondents' motion should be heard now or at the time the application is ready for a hearing.
- [9] It is not for the court to determine now whether the respondents will be successful on the motion. If necessary, that determination will be made later.
- [10] For the reasons below, I conclude that the respondents' motion should be heard at the beginning of the application hearing, after all materials have been served and filed with the court and the court has the complete evidentiary record before it. The questions that the court has to answer on a motion for conversion of an application to an action requires that the court have a full and complete evidentiary record¹. As outlined by Kristjanson J. in *Fountain*

¹ See *Castillo v. Xela Enterprises Ltd.*, 2016 ONSC 6088 (Div. Ct.); *Cunningham v. Front of Yonge (Township)* 2004 CanLII 33344 (ONCA) and *2254069 Ontario Inc. v. Kim*, 2019 ONSC 4492. These cases illustrate the need for a full and complete record to ascertain whether an application should be converted to an action.

Assets Corp. v. First Global Corp., the principles to be considered in determining whether to convert an application to an action are:

- (a) An application should be used when there is no matter in dispute and when the issues to be determined do not go beyond the interpretation of a document;
- (b) A good reason to convert an application into an action is when the judge will hear the matter and cannot make a proper determination of the issues on the application record;
- (c) When issues of credibility are involved the matter should proceed by way of an action;
- (d) Whether material facts are in dispute;
- (e) The presence of complex issues that require expert evidence and/or weighing of evidence;
- (f) Whether there is a need for pleadings and discoveries; and
- (g) The importance and impact of the application and of the relief sought.²

[11] I also wish to note that this proceeding is being case managed in the One Judge Model. I will be the judge that will hear the application and set the timetable for the efficient progress of this proceeding. As such, I will have direct knowledge of the proceeding; all steps in the proceeding, as well as the position of all litigants. This Model facilitates the streamlining of proceedings, the lessening of duplication of work by the parties and the court, along with the elimination of inconsistent verdicts. The One Judge Model will require a shift in the mindset of all participants on the progress and final determination of a proceeding. The One Judge model will have the in-depth involvement of the court at all phases of the proceeding. This provides the court with the opportunity to manage not only how a proceeding will progress, but also the method of adjudication through directions of that One Judge. Hence, I am of the view that the necessity of converting an application into an action may have less practical significance.

[12] In any event, I agree with the applicants that given the likelihood of duplication of work, it is more efficient for the court to have the complete record before it determines if this application should proceed in whole or in part as an application, or that oral testimony is required through a trial on all or some of the issues of the application.

[13] I am not persuaded that it is beneficial nor an efficient use of judicial and the parties' resources to have the hearing of the respondents' motion at this time.

² 2017 ONSC 4780, at para.15.

[14] Accordingly, I adjourn the motion of the respondents to be brought back after all material has been filed in the application and all cross-examinations are complete. At the hearing of the application, the court then can ascertain how the proceeding will be heard. Again, as a case management proceeding, the parties can request a conference with me, at any time, as contemplated by the Case Management Rules and the Civil Case Management Pilot Project-One Judge Model Practice Direction dated January 3, 2019.

[15] Therefore, I make the following order:

- a. The respondents' motion is adjourned to a date to be fixed by me, all material in the application has been served and filed and cross-examinations are complete.
- b. Costs reserved to me.
- c. If the parties require assistance in finalizing a timetable for the respondents' response to the application and the conduct of cross-examination, either may request a conference call through my judicial assistant.



Justice P.W. Sutherland

Released: December 22, 2020