COURT OF APPEAL FOR ONTARIO

CITATION: Constantine Enterprises Inc. v. Mizrahi (128 Hazelton) Inc., 2025 ONCA 710
DATE: 20251017
DOCKET: COA-25-CV-0659

Rouleau, Sossin and Pomerance JJ.A.

BETWEEN

Constantine Enterprises Inc.

Applicant (Respondent)

and

Mizrahi (128 Hazelton) Inc. and Mizrahi 128 Hazelton Retail Inc.

Respondents (Respondents)

Michael O'Brien and Nick Morrow, for the appellant David Berry

Alan Merskey and Laura Cloutier, for the respondent Constantine Enterprises Inc.

James Renihan and Lauren Archibald, for the respondent KSV Restructuring Inc., in its capacity as court-appointed receiver of Mizrahi (128 Hazelton) Inc. and Mizrahi 128 Hazelton Retail Inc.

Heard and rendered orally: October 7, 2025

On appeal from the order of Justice Peter J. Osborne of the Superior Court of Justice, dated May 6, 2025, with reasons reported at 2025 ONSC 2073.

REASONS FOR DECISION

[1] The appellant was party to an agreement of purchase and sale for a condominium unit in a building that, prior to completion, went into receivership.

[2] The receiver for the project determined that, in order to maximize recovery of assets, the best course of action was to disclaim the appellant's purchase agreement.

[3] The appellant opposed the motion, relying principally on a supplementary agreement he had entered into with the developer of the building and the developer's president, who was also one of its two directors.

[4] The motion judge found the supplementary agreement unenforceable as against the receiver because the agreement of purchase and sale that postdated the supplementary agreement contained an entire agreement clause. As a result, the disclaimer order was granted.

[5] The appellant appeals the order disclaiming his agreement of purchase and sale on three principal bases.

[6] In his oral submissions, the appellant argued, principally, that the motion judge failed to consider and apply the governing test for determining whether an entire agreement clause is enforceable, set out in *Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at paras. 122-123. He also argued that the motion judge failed to consider whether public policy considerations applied in the circumstances, such that the court ought not to enforce the entire agreement clause as against his client.

[7] In his factum, the appellant also argued that the motion judge erred in his application of the disclaimer test, specifically whether the equities favoured the disclaimer.

[8] We are not convinced by these arguments.

[9] Although the motion judge did not specifically refer to *Tercon*, a fair reading of his reasons show that he was fully aware of the surrounding circumstances, and he was satisfied that, in effect, nothing detracted from the clear words of the entire agreement clause.

[10] In substance, the motion judge conducted the analysis required by *Tercon*. Absent an error, his interpretation of the contract is entitled to deference.

[11] We see no error in the motion judge's analysis and no basis to interfere with his findings and conclusions.

[12] In our view, there is no overriding policy reason not to hold the appellant to the contractual terms of the agreement of purchase and sale that he entered into.

[13] There is also no basis in equity not to enforce the clause. The motion judge considered the equities and found that they did not override the agreement's terms and the usual law applicable in insolvency proceedings. At para. 125, he set out as follows:

> I fully recognize the unfortunate effect of the result on [the appellant]. Without question, he has paid a substantial

> sum towards the purchase of Unit 901. However, his position is no different from that of other unsecured creditors who advance money, goods or services to a debtor who subsequently becomes insolvent and is put into receivership. The ordinary hierarchy of creditor interests applies, and there is nothing in the evidence here to justify a departure from that hierarchy.

[14] As for the test for granting a disclaimer, again, the motion judge applied the correct test. He considered all of the circumstances and concluded that the equities did not support preferring the appellant's debt over that of other creditors. He did not, as the appellant suggests, err in accounting for the secret nature of the supplementary agreement.

[15] The secretive nature of the supplementary agreement was unusual, and it was in the motion judge's discretion to take this fact into account in assessing the overall equities of the case when deciding whether the disclaimer was appropriate.

[16] For these reasons, the appeal is dismissed with costs to the receiver fixed in the all-inclusive amount of $19,500.

L. Sossin J.A.