

1989 CarswellOnt 3115
Ontario District Court

1803 Renaissance v. Asselstine

1989 CarswellOnt 3115, 14 A.C.W.S. (3d) 146

1803 Renaissance, (Applicant) and Asselstine, (Respondent)

Conant D.C.J.

Judgment: February 9, 1989

Docket: York M-175618/89

Counsel: *D. Roven*, for the applicant

P.H. Reinhardt, for the respondent

Subject: Property

Headnote

Landlord and tenant

R. G. Conant D.C.J., (Orally):

1 This is an application brought for termination and a Writ of Possession regarding unit 204 at 28 Cosburn Avenue in Toronto. This is brought under, having been adequately served, Section 105 of the Landlord and Tenant Act, and on the grounds in Section 110 where the Landlord bona fide requires possession of the residential premises.

2 It is an unusual set of circumstances in evidence; one that is certainly of interest to the counsel apart from their clients, and, certainly, to me as we see in the Motion Court so many applications of various degrees of merit or otherwise. However, this is unusual, and this is why I have spent some little time giving consideration to it.

3 Firstly, I am satisfied from the evidence of Ms. Paula Sidencrantz that under Section 110, she bona fide requires possession of the premises and, I believe this is not disputed to a large degree. However, it is on the record as having been disputed. I don't wish it to be seen otherwise.

4 Secondly, I am satisfied, and this is not argued to a large degree, that, as Judge Whealy said in *GODDARD v. DARRIGAN*, "It is my view that a purchaser under a binding agreement of purchase and sale has a proprietor interest in the premises of a sufficient nature to allow him to bring an application under Section 105, even before the sale has closed". In a manner of speaking, I agree with a decision of Judge Leach in *TOWNSEND v. BRIDGETT* at 60 O.R. (2nd) page 146. Thus, Ms. Sidencrantz is able to bring an application under Section 105 for her own possession if she were a bona fide purchaser by way of Offer of Purchase and Sale accepted by the vendor; and that is the key I am sure we all agree upon, that makes this application unusual and of interest.

5 Thus, we must look at the intent of the parties and the effect of the terms of the contract itself. As I read the document, Exhibit 3, which is the most recent labelled Agreement of Purchase and Sale, it allowed for a deposit of \$800 to be made last November and for \$800 per month occupancy fee to be paid on the first day of each month from February the first 1989 to October the first 1989. The purchaser shall pay the whole of the purchase price of \$120,000 less one half of the deposit and one half of each of the occupancy fees paid, i.e. \$400 of each of these payments of \$800, and these amounts are to be credited at the time of the purchase to the overall price.

6 However, clause 30 of the document states that "The purchaser may, at his sole option, terminate this agreement by notifying the vendor or their solicitors in writing at least sixty days prior to the closing date." So, upon notice of termination, which I

calculate can be given by the purchaser up to September the 9th 1989, the monthly payments of \$400 allowed if the deal closes are forfeited and the purchaser then has paid \$800 per month for the one-bedroom apartment.

7 A key, in my view, is that the vendor or owner, Renaissance, can, at no time, terminate the contract unless there are breaches of the covenants by the purchaser. In other words, the purchaser can terminate with relative impunity up to September the 9th, 1989.

8 On these terms, the agreement, in my view, is not an Offer of Purchase and Sale, but a lease with an option to purchase. The distinction between an option to purchase and an Agreement of Purchase and Sale is that the latter creates a mutual obligation on one party to sell and the other to purchase; whereas, an option merely gives the right to purchase within a limited time without imposing an obligation to purchase. The option is a right acquired by the contract to accept or reject the present offer within a reasonable time in the future, and creates only an equitable, not a possessory, interest. As well defined in *POLITZER* at 54 D.L.R. (3rd) at page 376 by the Supreme Court of Canada, also, I note an option to purchase becomes, by acceptance within the stipulated period and on the conditions, an Agreement of Purchase and Sale. Where there is a lease with an option to purchase, once the option to purchase is excersised, the Landlord and Tenant relationship between the parties ends and a binding contract is made for the sale and purchase of the property.

9 I noted an old case of *RAFFETY* back in 1897, Chancery 737, and a more recent case of *CANADIAN PETROFINA v. SAMUEL BERGER* of the Supreme Court of Canada which is 1962. In this case at bar, the "purchaser" in the agreement is not an actual purchaser under an Agreement of Purchase and Sale until the agreement is binding on both parties. Only then does she have the proper rights to bring an application under Section 105 and 110 of the Act. She will not have these rights until she excersises the option to purchase and the agreement becomes binding on both parties. Until then, it is merely a lease with a right to purchase within a certain time and under certain conditions which then will make the contract binding.

10 In this case, the acceptance may be made and the contract of Purchase and Sale made binding by her not terminating, which, in my view, it is a negative step, but, nevertheless, a premeditated step rather than in most instances where an actual notice must be given. In my view, one is no different from the other.

11 To capsualize, I find the unusual document labelled "The Agreement of Purchase and Sale" is, at this time, a lease with an option to purchase which binds the owner to sell, but does not bind Ms. Sidencrantz to purchase. Thus, I am of the view that Ms. Sidencrantz has no possessory interest in unit 204 until she has excersised her option. Therefore, she has no status to bring this application at this time and I must dismiss the application. I direct this dismissal does not prejudice or preclude her from bringing a similar or another application in the future when the legal circumstances may change to give her status.

12 — Note: a discussion of costs was held at this time.

13 I will award costs to the tenant fixed in the amount of \$250.