F. T. DEVELOPMENTS LIMITED (*Plaintiff*) ..... APPELLANT;

AND

HARRY M. SHERMAN and JOHN J. SHULMAN and E. MICHAEL LEWIN (*Defendants*) ..... RESPONDENTS.

1968
*Apr. 26, 29, 30
Oct. 1

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Real property—Sale of land—Specific performance—Offer to purchase conditional upon purchaser obtaining rezoning—Alleged oral agreement of waiver of rezoning condition not proved—No unilateral right to waive condition—No basis for estoppel against vendors.

The plaintiff company entered into an agreement to purchase certain land. Under the terms of the agreement the offer to purchase was conditional upon the purchaser obtaining rezoning of the property within a stipulated period. Prior to the expiration of this period the purchaser's solicitor notified the vendors' solicitor by letter of his client's inability to obtain the rezoning and he asked for an extension of time. There were subsequent negotiations but the extension was never granted. The day following the closing date the plaintiff's solicitor purported to waive the condition as to rezoning. The vendors' solicitor, who was himself one of the vendors, denied the right of the plaintiff to waive this condition.

An action by the plaintiff for specific performance was dismissed by the trial judge and this dismissal was affirmed by the Court of Appeal.

*PRESENT: Cartwright C.J. and Judson, Ritchie, Hall and Pigeon JJ.

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Both the trial judge and the Court of Appeal found that there was no extension of time and no agreement to waive the condition. The plaintiff appealed further to this Court.

Held: The appeal should be dismissed.

The findings of fact by the Courts below against the plaintiff's submission that there was an oral agreement of waiver of the rezoning condition should not be disturbed.

The plaintiff could not unilaterally waive the condition, and there was no basis for an estoppel against the defendants.

Turney et al. v. Zhilka, [1959] S.C.R. 578, followed.

APPEAL from a judgment of the Court of Appeal for Ontario dismissing an appeal from a judgment of Wilson J. Appeal dismissed.

J. T. Weir, Q.C., and *G. J. Smith,* for the plaintiff, appellant.

W. J. Smith, Q.C., for the defendants, respondents.

THE CHIEF JUSTICE:—I agree with the conclusion of my brother Judson and, subject to one reservation, with his reasons.

I do not find it necessary to decide whether, in the particular circumstances of this case, the appellant could have invoked the maxim, *quilibet potest renunciare juri pro se introducto,* waived unilaterally the condition as to obtaining a rezoning of the lands agreed to be purchased and elected to pay the purchase price in full in cash instead of giving back a mortgage to secure part of that price. On the evidence and the findings of fact made in the Courts below it cannot be said that the appellant declared such waiver and election until after the date set for closing the transaction had passed.

I would dispose of the appeal as proposed by my brother Judson.

The judgment of Judson, Ritchie, Hall and Pigeon JJ. was delivered by

JUDSON J.:—This is an action by a purchaser of land for specific performance. The trial judge dismissed the action. His dismissal was affirmed by the Court of Appeal for reasons substantially in accordance with those given at trial.

The property in question was owned by the defendants Harry M. Sherman and E. Michael Lewin, each having an undivided half interest. The other defendant, John J. Shulman, was a trustee for E. Michael Lewin. The contract was made on December 17, 1963. The property was a block of land in the Township of North York. The purchase price was $102,500, payable $2,500 as a deposit, $32,500 on closing, with a mortgage back for the balance of $67,500. The mortgage was to contain the privilege of paying part or all of the principal sum at any time without notice or bonus.

The agreement was subject to the following condition:

> This offer is conditional upon the Purchaser obtaining the rezoning of the said lands on a M-5 zoning basis. Such rezoning to be obtained within 6 months from the date of the acceptance of the Offer. Provided that should the rezoning be approved by the Municipality of the Township of North York, and should it be before the Municipal Board within a six-month period, a further extension for the approval of the Municipal Board will be given for a period of 90 days, if the Municipal Board has not had an opportunity of giving its approval prior to the said extension date.

It is agreed that "M-5" is a misdescription in this condition and that it should read "M-6". Nothing turns on this. It is also agreed that the closing date was June 17, 1964.

The purchaser submitted requisitions on title and these were answered promptly. The vendors never submitted a draft deed or a statement of adjustments. The purchaser never submitted a draft mortgage. The purchaser was trying to obtain the necessary rezoning but it became apparent that this could not be obtained before the date of closing. On June 6, 1964, the purchaser's solicitor notified the vendors' solicitor of his client's inability to obtain the rezoning and he asked for an extension of six months. The extension was never granted.

Motek Fischtein, the secretary-treasurer of the plaintiff company, telephoned Sherman direct about June 11 and swore that he subsequently went to Sherman's office and had an interview with him. Sherman admitted the telephone call asking for an extension which was not granted and in the course of which Fischtein was advised that he, Sherman, was dealing with the plaintiff's solicitor, Mr. Wilson. Sherman had no recollection of the interview in the

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office. The plaintiff relies on the evidence of Fischtein as to what was said in Sherman's office to establish an agreement of waiver of the rezoning condition.

Following the letter of June 6, which had asked for the extension of time, there were a number of telephone conversations between Mr. Wilson, solicitor for the plaintiff, and Mr. Sherman, one the defendants who was a half-owner of the property and also solicitor for his other partner in the enterprise. Wilson was pressing for the extension and Sherman was not committing himself. He was saying that he could not get the consent of his other partner. The last of these conversations was on June 16, 1964. Sherman was still saying that he was not in a position to grant an extension of time although in fact he had been told earlier that his partner was unwilling to grant it. Wilson undoubtedly had the impression that Sherman would telephone him on the 17th for the purpose of saying whether or not the extension would be granted. There was no such call but on June 17, Sherman wrote to Wilson refusing an extension and claiming that the transaction was at an end.

Wilson received this letter on June 18, 1964, and he immediately sent a reply complaining that Sherman had promised to telephone on June 17 and had not done so. He denied Sherman's right to terminate the contract. He wished a new date to be set for closing and suggested July 3. Although he did not expressly say so in his letter, he was purporting to waive the condition as to rezoning. Sherman's reply on the following day, June 19, denied the right of the plaintiff to waive this condition.

On June 24, 1964, Wilson tendered an executed mortgage with interest running from June 17, 1964, and a cheque for the balance due pursuant to a statement of adjustments prepared by him and dated as of June 17, 1964, and, in the alternative, tendered a further cheque for the whole balance due under the contract including the amount to be secured by mortgage. The tender was not accepted. The following day the plaintiff issued its writ for specific performance.

Both the trial judge and the Court of Appeal have found that there was no extension of time and no agreement to waive the condition. The plaintiff sought to establish an

oral waiver from the evidence of Fischtein, who seems to have been the controlling force in the plaintiff company. The concurrent findings of fact against this submission are clear and they do not altogether depend upon an assessment of the credibility of Fischtein and Sherman. If there had been such an agreement, there would inevitably have been some reference to this in Wilson's letters to Sherman. There is no such reference. To me, the findings of fact of the trial judge and the Court of Appeal on this point cannot be disturbed.

The next question is whether there was a unilateral right to waive the condition. I do not think that there was. By its express terms the offer was conditional upon the purchaser obtaining rezoning of the lands on a named zoning basis. The condition was very carefully drawn. It provided for a term of six months from the date of acceptance together with a right to an extension in a certain event. The obligations of both parties under this contract were conditional upon the happening of these events. This depended upon the will of the Township of North York. The case is squarely within the decision of this Court in *Turney et al. v. Zhilka*[1].

For the first time in this litigation it was argued before us that there was an estoppel against the defendants. It was not pleaded. There is no basis for an estoppel in this case. There is no representation or promise on which it could be founded. There was in the conversation between Wilson and Sherman on June 16, 1964, a lack of frankness on the part of Sherman. This is a charitable description of his conduct. But he did not waive the condition or extend the time or promise to do so.

The appeal fails and must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Arnup, Foulds, Weir, Boeckh, Morris & Robinson, Toronto.

Solicitors for the defendants, respondents: Sherman & Midanik, Toronto.

[1] [1959] S.C.R. 578, 18 D.L.R. (2d) 447.