

CITATION: Karasik v. 1945087 Ontario Inc., 2020 ONSC 7940
COURT FILE NO.: CV-19-630024-00CP
DATE: 2020/12/17

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:)	
)	
NATALIA KARASIK and DANIEL)	
BURTMAN)	<i>Jordan Goldblatt and Michael Darcy for the</i>
Plaintiffs)	Plaintiffs
- and -)	
)	
1945087 ONTARIO INC., 1945086)	<i>Monique Jilesen, Paul-Erik Veel and Derek</i>
ONTARIO INC., LIBERTY)	<i>Knoke for the Defendants 1945087 Ontario</i>
DEVELOPMENT CORPORATION and)	Inc. and 1945086 Ontario Inc.
1834371 ONTARIO INC.)	
Defendants)	<i>Micheal Simaan for the Defendants Liberty</i>
)	Development Corporation and 1834371
)	Ontario Inc.
Proceeding under the <i>Class Proceedings</i> <i>Act, 1992</i>)	HEARD: In writing
)	

PERELL, J.

REASONS FOR DECISION

[1] On October 29, 2019, Natalia Karasik and Daniel Burtman commenced a proposed class action under the *Class Proceedings Act, 1992*,¹ against 1945087 Ontario Inc., 1945086 Ontario Inc., Liberty Development Corporation and 1834371 Ontario Inc.

[2] On consent the parties now move for a discontinuance of the action.

[3] The background to the motion is as follows:

a. Cosmos Towers was a three-tower condominium development project of approximately 1,100 residential units to be built in Vaughn, Ontario on lands owned by 1834371 Ontario Inc. 1945086 Ontario Inc. was the vendor of the units in Towers A and B, and 1945087 Ontario Inc. was the vendor of the units in Tower III. Liberty Developments Corporation (“Liberty”) provided management services for the project.

b. On April 30, 2016, Mr. Burtman signed a standard form pre-construction agreement

¹ S.O. 1992, c. 6.

to purchase a unit in Tower A.

c. On September 15, 2016, Ms. Karasik signed a standard form pre-construction agreement to purchase a unit in Tower III.

d. The agreements each contained an addendum required by the Tarion Warranty Corporation. Among other things, the Tarion Addendum set out a series of “Early Termination Conditions” which set out the obligations of the vendors and the purchasers. One of those conditions (Early Termination Condition #2) stated:

Condition #2

Description of the Early Termination Condition:

The Purchase Agreement is conditional upon receipt by the Vendor of confirmation that financing for the project on terms satisfactory to the Vendor has been arranged.

The Approving Authority (as that term is defined in Schedule A) is: n/a, the determination of the Vendor in its sole, absolute and unfettered discretion.

e. On April 4, 2018, Liberty and the Vendors advised purchasers that they had been unable to obtain satisfactory construction financing to complete the Project. Relying on Early Termination Condition #2, the Vendors then cancelled the Agreements.

f. On August 30, 2018, Mr. Burtman and 604 other purchasers (not including Ms. Karasik) brought an application against the Vendors and Liberty asserting that Early Termination Condition #2 was null and void or, alternatively, not enforceable.

g. On April 29, 2019, Justice Penny dismissed the Application. In doing so, he found that the Vendors had acted in good faith.

h. On October 29, 2019, Mr. Burtman and Ms. Karasik brought this action on behalf of two proposed classes; *i.e.*

- 1) a class consisting of all purchasers who entered into Agreements with the Vendors for the purchase of one or more Cosmos Tower condominium units on terms that, in all material respects except price, were the same as the Plaintiffs’ Agreements (*i.e.*, the “Entire Purchase Class”); or
- 2) alternatively, in the event the Applicant Group’s claims are found to be *res judicata* or an abuse of process, Karasik brings this proceeding on behalf of the Entire Purchase Class, less the Applicant Group (*i.e.*, the “Alternative Class”).

i. Mr. Burtman’s and Ms. Karasik’s claim was based on the allegation that the Vendors did not make commercially reasonable efforts to obtain financing for the Project. The Plaintiffs claimed that the Vendors’ decision to invoke Early Termination Condition #2 and cancel the Agreements was not made in good faith and was in breach of contract.

j. Mr. Burtman and Ms. Karasik also claimed that Liberty and 1834371 Ontario Inc. assisted or encouraged the Vendors to breach the Agreements and conspired with them to wrongfully terminate the Agreements.

k. On November 1, 2019, counsel for the Plaintiffs served the Statement of Claim. In

an accompanying letter, the Plaintiffs asked the Defendants to voluntarily produce documents, including correspondence, emails, term sheets, memoranda, and loan agreements, relating to the efforts to obtain construction financing for the Cosmos Towers project.

l. The documents were not voluntarily produced, and on May 20, 2020, at a case management conference, I established a timetable for the parties to complete the steps necessary for a certification motion.

m. In accordance with the Timetable, the Defendants delivered their Statements of Defence on July 17, 2020.

n. On August 7, 2020, a settlement meeting was held between counsel for all parties, in which counsel reviewed the documents related to the claim, and shortly thereafter, the parties agreed to a without costs discontinuance of the proceeding, pending Court approval.

o. To date, no steps have been taken to notify potential Class Members of the proceeding or to publicize the issuance of the Statement of Claim.

p. If the discontinuance motion is granted, Plaintiffs' counsel intends to publish a notice on the firm's website advising potential Class Members that the proceeding has been discontinued. A copy of the pleadings and any Order will be posted. The Notice will remain published on for at least 90 days following the date of any discontinuance.

[4] Section 29 of the *Class Proceedings Act, 1992* requires court approval for the discontinuance, abandonment, or settlement of a class action. Section 29 states:

Discontinuance, abandonment and settlement

29. (1) A proceeding commenced under this Act and a proceeding certified as a class proceeding under this Act may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate.

Settlement without court approval not binding

(2) A settlement of a class proceeding is not binding unless approved by the court.

Effect of settlement

(3) A settlement of a class proceeding that is approved by the court binds all class members.

Notice: dismissal, discontinuance, abandonment or settlement

(4) In dismissing a proceeding for delay or in approving a discontinuance, abandonment or settlement, the court shall consider whether notice should be given under section 19 and whether any notice should include,

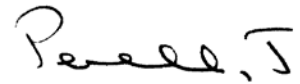
- (a) an account of the conduct of the proceeding;
- (b) a statement of the result of the proceeding; and
- (c) a description of any plan for distributing settlement funds.

[5] A motion for discontinuance should be carefully scrutinized, and the court should consider, among other things: whether the proceeding was commenced for an improper purpose; whether, if necessary, there is a viable replacement party so that putative class members are not prejudiced; or whether the plaintiff or the defendant will be prejudiced.²

[6] The fundamental concern on a motion for court approval of a discontinuance is that the interests of putative Class Members will not be prejudiced or that any prejudice is mitigated.³ The test for approving a discontinuance is different from the test for approving a settlement. A discontinuance of a class action does not have to be beneficial or in the best interests of the putative class members; whereas, a settlement must, in all circumstances, be fair, reasonable, and in the best interests of the class.⁴

[7] In the immediate case, I am satisfied that the Plaintiffs have met the test for a discontinuance.⁵ Approving the discontinuance of this proceeding will not prejudice the interests of the putative class in the immediate case. They have not been notified on the proceeding and are likely oblivious to its existence. They cannot be said to have relied on the action. If an individual Class Member desires to sue, it would appear that there is still time to do so before any claims are statute-barred.

[8] Order to go as requested. I have signed the Order.



Perell, J.

Released: December 17, 2020

² *Logan v. Canada (Minister of Health)*, [2003] O.J. No. 418 (S.C.J.), aff'd (2004), 71 O.R. (3d) 451 (C.A.).

³ *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees of) v. SNC-Lavalin Group Inc.*, 2012 ONSC 5288; *Frank v. Farlie, Turner & Co, LLC*, 2011 ONSC 7137; *Hudson v. Austin*, 2010 ONSC 2789.

⁴ *Frank v. Farlie, Turner & Co, LLC*, 2011 ONSC 7137

⁵ *Winter v. C.R. Bard*, 2020 ONSC 3532 at paras 19-20; *Arbuthnot v. Whirlpool Canada LP*, 2020 ONSC 1949; *Barrett v. 390996 Ontario Limited*, 2020 ONSC 740.

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Defendants

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