Condo Purchaser Fights for Return of Deposit After Rescinding Agreement of Purchase and Sale

In a recent case, Yim v. Talon, the purchasers of a new condominium unit were successful in getting a court order requiring the developer/vendor to return the deposits previously paid, after the Court found that the purchasers had properly rescinded the agreement of purchase and sale.

The purchasers had paid deposits totalling $172,000 pursuant to an agreement of purchase and sale entered into in 2007 for the purchase of a hotel condominium unit (the "**Purchase Agreement**").

Shortly before the interim occupancy closing, the vendor provided the purchasers with the Hotel Unit Maintenance Agreement, which was one of the closing documents. After reviewing this agreement, the purchasers' lawyer wrote to the vendor's lawyer giving notice that the purchasers were terminating the Purchase Agreement on the basis that the Hotel Unit Maintenance Agreement contained terms that were materially different from what was indicated in the Disclosure Statement delivered to the purchasers when they entered into the Purchase Agreement, and that there were substantial differences in the projected expenses. In this letter the purchasers' lawyer also requested the return of the deposit. The next day the purchasers sent an e-mail to a representative of the vendor advising that the purchasers were exercising their right under Section 74 of the Condominium Act (the "**Act**") to rescind the Purchase Agreement as a result of a material change.

In the event of a material change, Section 74 of the Act allows a purchaser of a new condominium unit to rescind the agreement of purchase and sale within 10 days after the date that the purchaser receives a revised disclosure statement or the date that the purchaser becomes aware of a material change where a revised disclosure statement has not been delivered. Within 10 days after receipt of a notice of rescission, the vendor has the option to bring an application in Superior Court for a determination as to whether the change was in fact a material change. If the vendor does not make such an application then the purchaser is entitled to a refund of the deposit.

In this case, the vendor challenged the validity of the purchasers' notice of rescission on the basis that:

- the letter from the purchasers' lawyer clearly terminated the Purchase Agreement but did not make any mention of rescission;
- the e-mail from the purchasers was not a valid notice as the Purchase Agreement specifically required that all notices were to be given by hand-delivery, mail or fax;
- there was no material change; and
- the notice was out of time.

The vendor took the position that as the purchasers had terminated the Purchase Agreement, the deposit was forfeited and could be retained by the vendor as liquidated damages.

After noting that "*the Condominium Act is a piece of consumer protection legislation, and as such, should be interpreted liberally and broadly*", the Court held that Section 74 of the Act does not impose any requirement for a purchaser to use the word "rescission" in the purchaser's written notice of rescission. The Court then determined that the request for the return of the deposit in the letter from the purchasers' lawyer, together with the e-mail that the purchasers sent to the vendor's representative, constituted strong evidence that it was the purchasers' intention to rescind the Purchase Agreement on the basis of a material change. The Court further held that the notice of rescission had been given within the requisite time frame as it was given within 10 days of receiving the revised Hotel Unit Maintenance Agreement.

"I find that there are no statutory requirements for the form of the notice of rescission under the Act, other than that it is in writing. . . .I also find that the Act does not require perfection, only a certain degree of clarity. As long as the notice fulfills the statutory requirements and makes clear the purchaser's intention to undo or unmake the agreement, such as by requesting the return of their deposit, the notice should be considered sufficient."

The Judge did note that she was not making any decision as to whether the changes were actually material changes, as that was not the issue of the application. Having determined that the content of the notice was valid and that the notice was served within the requisite time frame, The Court ordered that the purchasers were entitled to the return of their deposit, together with interest.

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On the same date that the above decision was delivered, the Court also delivered its decision in the case of Harvey v. Talon. In that case against the same vendor the Court also determined that an e-mail letter sent by the purchaser to a representative of the vendor constituted a valid notice of rescission. In that case the purchaser's letter did not mention rescission, but gave notice that the agreement of purchase and sale was being terminated and requested that the deposit be returned.

The developer is appealing both of these decisions.