

COURT OF APPEAL FOR ONTARIO

CITATION: 2316796 Ontario Inc. v. Chetti, 2018 ONCA 336

DATE: 20180405

DOCKET: C62691

Strathy C.J.O., Roberts and Paciocco JJ.A.

BETWEEN

2316796 Ontario Inc.

Applicant  
(Respondent in Appeal)

and

John Chetti

Respondent  
(Appellant in Appeal)

Eric Sherkin, for the appellant

Tanya Walker and James Coristine, for the respondent

Heard and released orally: March 29, 2018

On appeal from the judgment of Justice Mario D. Faieta of the Superior Court of Justice, dated August 17, 2016.

REASONS FOR DECISION

[1] The application judge found that the appellant repudiated the Agreement of Purchase and Sale for the respondent's business. After granting rectification of the closing date, he found that the appellant had waived the deadline for closing, and for the delivery of the landlord's consent to the assignment of the lease and had

agreed to pay rent in the interim. He also found that the landlord ultimately delivered his consent in the form of a one-page handwritten document, which was signed by all parties in September 2014.

[2] Counsel for the appellant acknowledges that this is largely an appeal of the application judge's findings of fact, and that the standard of review requires a demonstration of palpable and overriding error in the application judge's assessment of the evidence.

[3] He makes two submissions: first, that the application judge erred in finding that the appellant waived the rectified date for closing. We do not accept that submission. The application judge identified the correct legal test for waiver and made findings of fact from which waiver could be inferred. These included the fact that the appellant went into possession of the premises and carried out renovations. In addition, there was evidence that the appellant acknowledged an obligation to pay rent pending closing. This evidence, and the appellant's own evidence, provided an ample basis for the application judge's finding of waiver.

[4] Second, the appellant argues that the one-page document signed by the parties was simply the landlord's conditional consent to the assignment, and that the conditions had not been met. Again, the application judge made findings of fact which informed his interpretation of the handwritten document. The application judge accepted the evidence of Mr. Varga for the respondent that the landlord was

prepared to consent to the assignment, provided the appellant paid rent as he had promised to do.

[5] The appellant has demonstrated no error in the application judge's conclusion on this issue.

[6] The appellant's ground of appeal relating to *Bulk Sales Act* compliance was not pursued in oral argument, and we did not call on the respondent to address it. In view of the appellant's repudiation of the agreement, we see no merit to this ground in any event.

[7] Costs to the respondent in the amount of \$9,250, all inclusive.

G.R. Sect. C.J.O.  
L.B. Roberts JA  
J.A.