

Court rejects cancelled Cosmos condo buyers' application to void contracts



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Buyers of Liberty Developments' cancelled Cosmos condos have lost their application to have their purchase agreements declared unlawful by an Ontario Superior Court of Justice.

In his ruling, Justice Michael Penny sided with the developers but found that voiding the contract would not be in the purchasers' or the developers' best interest.



Two years after purchasing units in the Cosmos condos project near Vaughan Metropolitan Centre, buyers received refunds and letters telling them the project had been cancelled "solely due to the inability to secure satisfactory construction financing." (Bernard Weil / Toronto Star File)

The buyers had hoped that a legal victory would clear the way for them to seek compensation for having the project cancelled two years after they paid tens of thousands of dollars in deposits. Even though they had their deposits refunded, many of the buyers say they have been left behind on the property ladder because the cost of homes soared in the Toronto region during that period.

Ted Charney, the lawyer representing 605 buyers of 454 condos, would not comment on the outcome. Buyers would not comment on Tuesday, saying they need time to speak with their lawyer and consider their options.

Charney argued in court last week that the purchase agreements were unlawful because they included language that exceeded the legal conditions under which a developer is allowed to terminate that contract.

Condo vendors — in this case numbered companies that share the same address as Liberty Developments — can legally terminate a project on the basis of “having taken all commercially reasonable steps” to obtain satisfactory financing under the termination conditions in the Tarion addendum attached to the purchase agreements on new homes. Tarion is the home-building industry’s regulator.

The Cosmos contracts included an additional clause conferring “sole, absolute and unfettered discretion” on the vendor. Charney argued the condo vendors included that language to give them broader latitude to cancel beyond the legally allowed financing condition.

Monique Jilesen, the lawyer for Liberty and the three numbered companies, said the “unfettered discretion” provision in the contract was not attached to the financing condition and that it could not be used to undermine the vendors’ obligation “to take all commercially reasonable steps ... to arrange satisfactory financing.”

In a written decision on Monday, Penny agreed that the “unfettered discretion” proviso does not give the vendors the ability to terminate the agreement beyond the permitted financing condition.

Eliminating the satisfactory financing condition because of the “unfettered discretion” clause, could put “the vendors in a position where they would be obliged to proceed with a potentially uneconomic project and risk bankruptcy,” wrote Penny.

“Becoming mired in a condominium project in bankruptcy or under receivership ... could not possibly be in purchasers’ interest, as it would put them in a far worse situation than they ended up in as a result of early termination,” he said.

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