CITATION: Gleason v. Mitchell, 2025 ONSC 2919
BARRIE COURT FILE NO.: CV-23-00001960-0000
DATE: 20250515

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
JOSHUA GLEASON and BREANNE HOOK Plaintiffs/Defendants by Counterclaim	Matthew Stubbs, for the Plaintiffs/Defendants by Counterclaim
– and –	
ANITA MITCHELL and KELLER WILLIAMS EXPERIENCE REALTY, BROKERAGE Defendant/Plaintiff by Counterclaim	Mark Vernon, for the Defendant/Plaintiff by Counterclaim, Anita Mitchell
– and –	
JAMES WIEGAND and JONATHAN WALLACE Third Parties	Sabrina Lucenti for the Third Party, James Wiegand
	HEARD: April 23, 2025

REASONS ON MOTION FOR SUMMARY JUDGMENT

McCARTHY J.

The Motion

[1] The Defendant/Plaintiff by Counterclaim, Anita Mitchell, ("the Defendant") moves for partial summary judgment on the claim of the Plaintiffs/Defendants by counterclaim, Joshua Gleason and Breanne Hook ("The Plaintiffs"). The motion is opposed by the Plaintiffs. The Defendant, Keller Williams Experience Realty, Brokerage, did not respond

to the motion. The third-party defendant, James Wiegand ("Wiegand"), supports the motion of the moving party but did not file any material.

Background

[2] The competing claims arise out of a failed agreement of purchase and sale (the "APS") of a property and accompanying business named Covered Bridges Kennels (the "business") located at 301 Concession 4 East, Tiny, Ontario (the "property"). Under that APS, the Defendant was the vendor, and the Plaintiffs were the purchasers. Throughout the negotiations, the Defendant retained commercial realtor Jonathan Wallace as her agent.

[3] On May 8, 2022, Michael Gleason, the commercial realty agent acting for the Plaintiffs, delivered an offer to purchase the property containing the following terms:

i) Purchase price of $3.7 million;
ii) $10,000 deposit due upon execution;
iii) $90,000 deposit upon fulfilment or removal of all conditions;
iv) The transfer of chattels including a commercial oven, grooming table and tub, and all other equipment in the kennels;
v) A vendor take back mortgage ("VTB") in the amount of $1 million at 7 percent interest for a term of 5 years; and
vi) A closing date of August 24, 2022.

[4] The Defendant retained Wiegand to review the offer and provide her with legal advice. The Defendant proposed certain amendments to the offer, which were accepted by the Plaintiffs on May 12, 2022.

[5] On June 16, 2022, the Plaintiffs proposed a further amendment to the APS, which had the effect of removing certain conditions and reducing the VTB to $555,000. These proposed amendments were accepted by the Defendant on June 17, 2022.

[6] On July 12, 2022, the Plaintiffs proposed a further amendment to the APS, which removed the condition for the sale of their other property and reduced the VTB to $525,000. With the Defendant's acceptance of these amendments on July 15, 2022, the APS became an unconditional, firm agreement.

[7] With the waiver of all the conditions came the second deposit of $90,000, which when added to the initial deposit accompanying the offer, totalled $100,000.

[8] Between July 15 and August 23, 2022, neither the Plaintiffs or their agent, nor the Defendant's solicitor or agent, raised any issue about the sufficiency of the terms of the APS.

[9] The evidence establishes that, in the lead up to the scheduled closing date, the Defendant was ready, willing, and able to complete the sale of the property.

[10] On August 23, 2022, the day before the scheduled closing, lawyers acting on behalf of the Plaintiffs wrote to the Defendant's solicitors claiming that there was "not *consensus ad idem* as it pertains to this transaction thereby rendering the APS void *ab initio*."

[11] On the closing date, the Defendant's solicitors received further correspondence from the Plaintiffs' lawyer confirming their previously stated position:

> As indicated in Mr. Valler's letter to your office, our client takes the position that there was no meeting of the minds on this matter, and furthermore that your client was in breach of her obligations that were actually set out in that Agreement.

[12] The APS did not close. The property remains unsold.

[13] The Plaintiffs issued their statement of claim in September 2023 seeking a declaration that the APS was void *ab initio,* a return of the deposit, damages for breach of contract, and damages for unjust enrichment.

[14] The Defendant duly defended, cross-claimed, and counterclaimed, seeking a declaration that the APS was valid and binding, an order for forfeiture of the deposit, and damages for breach of contract.

[15] The Defendant then issued a third-party claim against her broker and solicitor, alleging negligence on their part. Those third-party defendants are under a waiver of defence pending the disposition of this motion.

The Issues

[16] There are four issues for the court's determination:

a) Is this matter appropriate for partial summary judgment?
b) Was the APS firm, binding and enforceable?
c) Did the Plaintiffs breach the APS?
d) Is the Defendant entitled to judgment for the $100,000 deposit?

Summary Judgment

[17] In the ten years since the Supreme Court of Canada's decision in *Hryniak v. Mauldin,* 2014 SCC 7, [2014] 1 S.C.R. 87, the test for granting summary judgment has become well-known. At para. 49 of that seminal decision, the Court wrote:

> There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgement. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

Partial Summary Judgment

[18] In *Butera v. Chown, Cairns LLP*, 2017 ONCA 783, 137 O.R. (3d) 561, at para. 34, the Court of Appeal for Ontario addressed the problem of partial summary judgment (i.e., when the granting of the summary relief sought will not dispose of the entirety of the action):

> A motion for partial summary judgment should be considered to be a rare procedure that is reserved for an issue or issues that may be readily bifurcated from those in the main action and that may be dealt with expeditiously and in a cost-effective manner.

[19] In *Malik v. Attia*, 2020 ONCA 787, 29 R.P.R. (6th) 215, at para. 62, the Court of Appeal for Ontario outlined three considerations for a motions judge when determining whether partial summary judgment should be granted:

1) Will dividing the determination of the case into several parts prove to be less expensive for the parties?
2) Will partial summary judgment get the case in and out of the court system more quickly?
3) Will partial summary judgment lead to the possibility of inconsistent findings by multiple judges who might touch the divided case?

[20] This court has granted partial summary judgment on the discrete issue of the enforceability of a contractual term and where factual and legal issues in a main action are distinguishable from those in a third-party action: see *Ceridian Dayforce Corporation v. Daniel Wright*, 2017 ONSC 6763; and *Spiridakis v. Li*, 2020 ONSC 2173.

Discussion

[21] This is a proper case for summary judgment.

[22] I am as well placed as any trial judge would be to make the necessary factual findings on the evidence and to apply the relevant legal principles.

[23] As for granting partial summary judgment, I find that the three-part "test" in *Malik* has been satisfied.

[24] First, there can be little doubt that hiving off the issues of whether the APS was binding on the parties and whether the deposit was forfeited will save the parties money. There will be no need to call the solicitors or agents as witnesses. Direct and cross-examination of these witnesses would require preparation and trial time. There would also be the necessity of examining and cross-examining the opposing parties on their respective recollection of the negotiations and their views of the express and implied terms of the APS. The APS would need to be dissected, analyzed, and interpreted. Research and submissions on the validity of the contract would require additional time and effort.

[25] Second, partial summary judgment will get the parties in and out of court more quickly in both the main action and the third-party action. The Plaintiffs' claim will be entirely dismissed with only the counterclaim to proceed. The counterclaim seeks only damages for breach of contract. Moreover, should the APS be found to be valid and binding at the summary judgment stage, the principal issue in the third-party claims would be resolved, as there would be no basis for any claim that the Defendant received negligent advice on the APS or the amendments to its terms from either her agent or her solicitor. It would effectively bring an end to the third-party claim.

[26] Thirdly, partial summary judgment on these issues will not result in inconsistent findings by multiple judges. With a finding that the APS was valid and binding, the need for the interpretation of the contract, analysis of the negotiations, consideration of the wording and terminology of the APS, and the testimony of those responsible for drafting and amending it, will be entirely unnecessary. The third-party claim will either be at an end or will be greatly simplified. Assessing damages in the counterclaim will be the sole remaining function of substance. Damages will not depend on the interpretation of the APS but on a consideration of the very much unrelated and distinct concepts of restitution, compensation, quantification, and mitigation. Neither the validity of the APS and the entitlement to the deposit in the main action, nor the issue of negligence on the part of the Defendant's agent or solicitor in the third-party action would need to be considered.

No Genuine Issue for Trial in the Main Action

[27] There is no genuine issue requiring a trial of the issue of the whether the APS was firm, binding and enforceable.

[28] The evidence cannot support a finding that the APS was void *ab initio*.

[29] The APS was executed on May 12, 2022, and was amended twice thereafter. It was drafted by the Plaintiffs' experienced realtor. Mr. Gleason admitted during his cross-examination that the APS contained all the essential terms with respect to the purchase of the property. At no time until the day before the scheduled closing did the Plaintiffs raise any issue about the adequacy of the terms in the APS. The lawyer and realtor for the Defendant also did not raise any issue of inadequacy.

[30] The Plaintiffs claim that they expected the contract to include a share purchase or corporate acquisition. That is not a tenable position. No reading of the APS could lend it even the slightest resemblance to a corporate acquisition or share purchase. It is a standard form Ontario Real Estate Association APS with a commercial heading. The APS certainly contemplated the purchase of the business along with the property; the chattels included in the purchase (the commercial oven, grooming table and tub, other equipment in the kennels, and built-in generators) were business-related. Within the schedules to the APS, there is an assignment of a value of $2.7 million to the "house and acreage" and $1 million to the value of the business. The schedules deal with manuals and keys, transfer of rights, and control over a website, phone number and social media accounts. All that said, there are no express terms about any share purchase or corporate acquisition. Paragraph 26 of the APS confirms that the entire agreement is in writing. The Defendant is not named as

a corporation or even under a trade or business name. The Plaintiffs could not have reasonably believed that the APS would be accompanied by a share purchase or corporate acquisition.

[31] The evidence supports that the essential terms of a contract for the sale of land were well in place on the date of closing: the parties, the property, and the price: see *McKenzie v. Walsh*, (1920) 61 S.C.R. 312, at p. 313. Nothing about corporate acquisition or share purchase was mentioned. The reason is simple: it was never contemplated, never agreed to, and never put in writing. There can be little doubt that the entire notion of void *ab initio* was raised at the eleventh hour by the Plaintiffs as an excuse not to close the deal.

[32] There is no requirement of a trial on the issue of the adequacy of the contract terms or whether there was a valid and binding contract between the parties.

[33] There is no requirement for a trial to make the finding that the Plaintiffs breached the APS by failing to close the transaction on the scheduled closing date.

[34] Even before the closing date, Mr. Valler's August 23, 2022 letter, stating that the APS was "void *ab initio*", constituted a repudiation of the contract. This repudiation was confirmed on the closing date when Ms. Mumberson advised that she was not retained to close the transaction on behalf of the Plaintiffs.

[35] Nevertheless, the Defendant cleaned the property, provided vacant possession, and tendered. There was no breach of the APS on her part. For their part, the Plaintiffs failed to tender and repudiated the APS.

[36] There is no genuine issue that any delay engendered by the Defendant prevented the Plaintiffs from securing an appraisal with which to secure financing sufficient for them to close. Nothing in the evidence supports this. On June 17, 2022, the Plaintiffs removed the financing condition from the APS. No arrangement was made to even have the appraiser attend the property until August 10, when he was three hours late and his attendance had to be rescheduled. The appraisal was completed on August 15, 2022. At no time before the scheduled closing date did the Plaintiffs advise the Defendant, her agent, or solicitor that their appraiser had insufficient time to conduct the appraisal or that an extension of time for the closing would be required. There is no evidence from the appraiser about his history of attending the property. On top of everything, the appraisal report is dated August 25, 2022 (one day after the closing!) and values the property at $1.55 million. Mr. Gleason advised that he was borrowing 100% of the purchase price to close the sale. How could the Plaintiffs have financed and closed the sale if they did not have an appraisal until the day after closing? They could not have. And with an appraised value for the property of $1.55 million, one can fairly infer that no lender was going to advance them sufficient funds to close the APS given that they required $2.9 million to close (in addition to the VTB).

[37] The Plaintiffs have tendered no evidence that they qualified or were approved for mortgage loans or had financing in place for the stipulated sale price. They produced no mortgage commitment or pre-approval letter from a lender. The only possible conclusion on the

evidence is that the Plaintiffs did not have the financing or the means to close the deal. It follows that the Plaintiffs were not willing and able to complete the APS. They chose repudiation.

Forfeiture of the Deposit

[38] There is no genuine issue of the Defendant's entitlement to forfeiture of the monies on deposit.

[39] When a purchaser repudiates an APS and fails to close the transaction, the deposit is forfeited without proof of any damage suffered by the vendor: see *Redstone Enterprises Ltd. v. Simple Technology Inc.*, 2017 ONCA 282, 137 O.R. (3d) 374.

[40] There was no agreement to the contrary between the parties. There is no suggestion and certainly no evidence of unconscionability. There is no claim by the Plaintiffs for relief from forfeiture. There is nothing to suggest inequality of bargaining power, frustrated contract, disproportionality of the deposit to the overall purchase price, or a substantially unfair bargain, any of which might serve as grounds for a finding of unconscionability and relief from forfeiture: see *Rahbar v. Parvizi*, 2023 ONCA 522, 485 D.L.R. (4th) 239, at para. 51.

[41] Nor is there any genuine issue of unjust enrichment. As explained by the Court of Appeal for Ontario in *Benedetto v. 2453912 Ontario Inc*., 2019 ONCA 149, 86 B.L.R. (5th) 1, at para. 6:

> The deposit stands as security for the purchaser's performance of the contract. The prospect of its forfeiture provides an incentive for the purchaser to complete the purchase. Should the purchaser not complete, the forfeiture of the deposit compensates the vendor for lost opportunity in having taken the property off the market in the interim, as well as the loss in bargaining power resulting from the vendor having revealed to the market the price at which the vendor had been willing to sell. [Citation omitted.]

[42] In *Rahbar*, at para. 59, the Court of Appeal for Ontario offered a practical reason for this rule in a volatile real estate market:

> [I]f purchasers were allowed to reclaim their deposits in a rising real estate market simply because vendors resold their property at a higher price it would eviscerate the very purpose of deposits.

[43] That logic fairly applies to the case at bar, which appears to feature a falling market. The property remains unsold even though it was listed for $2.999 million in July 2024. The Defendant is therefore facing not only the prospect of a loss of bargain but also carrying costs since August 2022, coupled with the costs of relisting the property.

Summary and Disposition

[44] For the foregoing reasons, the motion is allowed.

[45] Partial summary judgment is granted in favour of the Defendant.

[46] The Plaintiffs' action is wholly dismissed.

[47] The court declares that the Defendant had a firm and binding APS with the Plaintiffs for the property.

[48] The Plaintiffs breached the APS.

[49] The Plaintiffs' $100,000 deposit is forfeited to the Defendant and should be paid out to her forthwith.

[50] The issue of damages advanced in the counterclaim and any remaining issues in the third-party claim shall proceed to trial in the normal course.

[51] Should the parties be unable to agree on the issues of costs or pre-judgment interest, they make take out an appointment before me to address those issues through the trial-coordinator at Barrie.

[52] There shall be an order to go in accordance with the foregoing.

J.R. McCARTHY J.

Released: May 15, 2025