

[2] The Defendant denies that he owes any damages to the Plaintiff. Firstly, he argues the Agreement was adopted by a corporation, the result of which is that he ceased to be bound by or entitled to benefit from the Agreement. Secondly, he argues that the Plaintiff is not entitled to damages because of a failure to take reasonable steps to mitigate. Finally, the Defendant argues that the Plaintiff has failed to prove certain of the damages claimed.

[3] For the reasons that follow I allow the motion, in part, and grant judgment in favour of the Plaintiff.

Facts

[4] The Plaintiff was the registered owner of a property municipally known as 225 Cumming Street, Thunder Bay, Ontario (the “Property”).

[5] The Defendant, along with his father, Nels Moxness, are shareholders of various corporations that own properties used for low-income housing.

[6] The Plaintiff engaged the services of a realtor to assist in selling the Property. The realtor represented that he had interested buyers to approach without having to list the Property. The Plaintiff says it was interested in this approach as it was supposed to result in the Property being sold quicker, and with a reduced commission.

[7] The Defendant became aware of the Property through his broker he was working with.

[8] In November 2022, the Plaintiff received two offers to purchase the property. One offer was from the Defendant, who offered to purchase the Property for \$1,300,000 “...on behalf of a

corp to be formed.”. The second offer was from 2834908 Ontario Ltd. (“283 Ontario”), who offered to purchase the Property for \$1,100,000.

[9] The 283 offer was unconditional. The Plaintiff provided a counteroffer to the Defendant dealing with conditions of the offer. The Defendant accepted the counteroffer. The Defendant’s offer and acceptance of the counteroffer was made without viewing the Property. The Defendant paid a \$5,000 deposit.

[10] The parties began the due diligence process. The Defendant arranged to attend the Property on November 22, 2022, for inspection, but subsequently advised he was unable to attend. The Plaintiff’s position is that this gave rise to questions as to the Defendant’s commitment to closing the transaction as contemplated by the Agreement. The Plaintiff’s realtor reached out to 283 to see if they were still interested in the Property, which they were, but they refused to move on their price.

[11] The Defendant made subsequent arrangements to inspect the property in December 2022. Following inspection by the Defendant and his real estate agent he attempted to renegotiate the price of the offer down to \$1,200,000 and move the closing date from February 15, 2023, to April 1st, 2023. The Plaintiff rejected these efforts.

[12] On December 9, 2022, the Defendant provided the Plaintiff with a Notice of Fulfillment of Condition(s). The Defendant paid a further deposit of \$15,000.

[13] The Defendant retained Cardinal Law to incorporate the corporation to be the purchaser of the Property. On January 4, 2023, 1000404343 Ontario Inc. (the “Corporation”) was incorporated

at the request of the Defendant, for the purpose of being the purchaser of the Property. The sole director of the Corporation was the Defendant's father (Nels).

[14] On January 26, 2023, the Defendant (through counsel) requested a 60-day extension of the closing date to perform an appraisal. The Defendant says that the appraisal was required to allow him to obtain the necessary financing for the purchase. The Plaintiff refused the request. The Plaintiff's realtor and lawyer offered to assist the Defendant in obtaining an appraisal within the allotted timelines, but he refused. The Defendant says that a comprehensive appraisal was required, and the Plaintiff provided no reason for refusing his extension request. The Defendant persisted in his request for an extension, and the Plaintiff persisted in its denial.

[15] The Plaintiff remained nervous about the Defendant's intention to complete the purchase, as contemplated. The Plaintiff's realtor obtained confirmation from 283 that it remained interested in the Property and were prepared to increase their offer to \$1,200,000.

[16] On February 9, 2023, the Defendant informed the Plaintiff that in light of the refusal of the extension of the closing date, he was not able to close on the transaction. A return of the deposit and release from the Agreement was requested by the Defendant. The Plaintiff did not agree.

[17] On February 9, 2023, the Plaintiff signed an Agreement of Purchase and Sale with 283 (dated February 3, 2023) that was conditional upon the Defendant failing to close the sale as originally contemplated.

[18] The Defendant failed to close the purchase on February 15th. The Plaintiff says that the date came and went without hearing any word from the Defendant or his agents. The Plaintiff

immediately chose to proceed with the purchase by 283. The Plaintiff says that this was to ensure a speedy sale and mitigate any damages realized as a result of the Defendant's failure to close the deal. That sale closed on March 3, 2023, merely weeks following the contemplated closing date with the Defendant.

[19] The Defendant does not dispute that the Plaintiff is entitled to retain the \$20,000 paid by him as a deposit. He does dispute that any further amounts are owed by him.

Legal Framework - Summary Judgment

[20] At a case conference held July 3, 2024, I ordered this matter to proceed by summary judgment. The Defendant's counsel expressed some concern about the inability to cross-examine the affiants for the Plaintiff in a summary judgment procedure under the *Simplified Rules*. He felt that a summary trial was the better approach. Given that there are no significant factual disputes and the issues to be determined relate to the application of the facts to the law, I felt that this matter could be dealt with appropriately in a half-day motion. I gave leave to conduct limited examinations as no discoveries had been held, and despite there being no provision in the *Rules* for cross-examination on affidavits, this was felt to be an approach that best furthered the purpose of the *Rules*.

[21] There is no dispute as to the applicable legal principles relative to summary judgment. Rule 20 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, sets out the parameters of the summary judgment rule. Rule 20.04(2) provides that the court shall grant summary judgment if,

- (a) the court is satisfied there is no genuine issue requiring a trial with respect to a claim or defence; or

(b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.

[22] In *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, the Supreme Court of Canada considered the application of the summary judgment rule. It concluded the following at paras. 49–50:

[49] 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 judgment. 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.

[50] These principles are interconnected and all speak to whether summary judgment will provide a fair and just adjudication. When a summary judgment motion allows the judge to find the necessary facts and resolve the dispute, proceeding to trial would generally not be proportionate, timely or cost effective. Similarly, a process that does not give a judge confidence in her conclusions can never be the proportionate way to resolve a dispute. It bears reiterating that the standard for fairness is not whether the procedure is as exhaustive as a trial, but whether it gives the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute.

Analysis

Was there a breach of the Agreement for which damages may be sought?

[23] The Plaintiff argues that the Defendant's liability is established by his anticipatory breach of the Agreement and his failure to close on the Closing Date stipulated in the Agreement. The Defendant does not dispute that the Agreement was not closed as contemplated. The failure to do so entitles the Plaintiff to seek damages. The real questions are who may the Plaintiff seek damages from, and in what amount?

Is the Defendant liable, or is the Corporation liable?

[24] The Defendant argues that he entered into the Agreement “on behalf of a corp to be formed”. It is further argued that the corporation was subsequently formed and is the party liable to the Plaintiff for damages (if any) arising out of the failure to close the sale of the Property.

[25] There is no dispute that the Agreement was a pre-incorporation contract, which is legislated by s. 21 of the *Ontario Business Corporations Act*, R.S.O. 1990, c. B.16. (the “*OBCA*”).

[26] Section 21(1) of the *OBCA* provides that a person who enters into a contract on behalf of a corporation before it is formed is personally bound by the contract, subject to certain exceptions.

[27] Section 21(2) of the *OBCA* provides for the exception relied upon by the Defendant. It states:

21(2) A corporation may, within a reasonable time after it comes into existence, by any action or conduct signifying its intention to be bound thereby, adopt an oral or written contract made before it came into existence in its name or on its behalf, and upon such adoption,

- (a) the corporation is bound by the contract and is entitled to the benefits thereof as if the corporation had been in existence at the date of the contract and had been a party thereto; and
- (b) a person who purported to act in the name of or on behalf of the corporation ceases...to be bound by or entitled to the benefits of the contract.

[28] Pre-incorporation contracts were addressed by the Ontario Court of Appeal in *Sherwood Design Services Inc. v. 872935 Ontario Ltd.*, 1998 CanLII 3116 (ON CA), 39 O.R. (3d) 576, [1998] O.J. No. 1611. At pp. 9-10, Abella J.A. (as she then was) acknowledged the practical purpose of pre-incorporation contracts when she said:

Individuals may negotiate an agreement in which one or the other, or both, do not wish to incur personal liability. Importantly, one side agrees to forgo security and deal with a shell company. The corporate vehicle to replace the parties may not be immediately available, but it is agreed that once it is in place and adopts the agreement, the individuals on that side of the agreement will have no remaining liability. There is, in those circumstances, no reliance on the individual's covenant, except in the interim.

[29] The Plaintiff acknowledges that the Agreement contemplates the Defendant purchasing the Property on behalf of a corporation to be subsequently formed. The Plaintiff's evidence is that its lawyer was under the impression that the Defendant intended to operate the Property through a corporation. The Plaintiff takes issue with the Defendant's claim that he has no liability for the aborted purchase of the Property because of the subsequent formation of the Corporation. The Plaintiff argues that no direction to assign the Agreement to any corporation was ever received from the Defendant. More significantly, at no point was it even communicated to the Plaintiff that the Corporation had been formed and was assuming liability for the terms of the Agreement. The Plaintiff argues that it was left to assume that the Defendant remained liable.

[30] In *Sherwood Design Services*, at page 9, Abella J.A. held that there is no requirement of formality to adopt the contract. A contract may be adopted by a corporation "by any action or conduct signifying its intention to be bound thereby." In that case, the adoption occurred by the delivery of a letter from the law firm that created the corporation to the opposite party to the contract, stating that the corporate defendant had been assigned as the corporation that would complete the transaction. The assigned corporate defendant was a "shelf" corporation that was incorporated by the law firm to assign to a client as required. The individual purchasers had not yet been named as directors or shareholders of the corporation when the letter was sent. When the

transaction was not completed, the corporate defendant was subsequently assigned by the purchaser's law firm to a different client.

[31] In the case at hand, there no was letter or communication of any nature or kind to the Plaintiff that the corporation had even been created. The Defendant takes the position that this is not fatal to his claim that the Corporation is liable to the Plaintiff. I note that the Corporation is not a party to this action.

[32] Relying on *Sherwood* and *Design Home Associates v. Raviv*, 2004 CanLII 46680 (ONSC), at para. 11, the Defendant takes the position that no requirement of a formal adoption of a pre-incorporation contract or of formal advice to the other party is required. The key requirement to a successful adoption is that a corporation *intends* to adopt the contract and that such intention is evidenced or can be evinced.

[33] In the present case, the Defendant argues that the sole purpose for the Corporation being incorporated was to purchase the Property. He argues that his instruction to his lawyer, combined with an email from the lawyer to him and his father, dated January 4, 2023, stating "...this is the corporation that will be used for the 224 Cumming St. transaction", is sufficient evidence of intention for adoption under s. 21(2) of the *OBCA*. As such, upon receipt of that January 4, 2023 email the Defendant ceased to be bound or entitled to the benefit of the contract. The Defendant argues that this is akin to the communication that was made in *Sherwood*, and it matters not that the communication was to him as opposed to the Plaintiff.

[34] I disagree with the position of the Defendant. The Defendant's argument is effectively that once the Corporation was formed based on instructions to a lawyer to create it for the purpose of

adopting the Agreement, and once the lawyer confirmed to the Defendant and his father that the Corporation had been created for this purpose, this was sufficient to fulfill the requirements of s. 21(2).

[35] This case is distinguishable from *Sherwood* and *Design Home Associates*. While I agree with the Defendant that the Corporation was not required to take any formal steps to either assign the Agreement or notify the Plaintiff, it needed to do *something* to signal the Corporation's intention to be bound by the Agreement. I find that the January 4, 2023, email from the lawyer to the Defendant was not sufficient.

[36] In *Sherwood*, it was found that the letter from the individual purchaser's lawyers to the vendor's lawyer indicating the company's intention to be bound by the contract was sufficient to adopt it. It was further found the given that a partner at the purchaser's law firm was the sole director of the corporation at the time the letter was sent, the purchaser's lawyers had authority to send the letter on behalf of the company.

[37] I find that unlike in *Sherwood*, the January 4, 2023, email correspondence between the Defendant and his lawyer was nothing more than mere identification of the corporate vehicle to be used for the Agreement. It was not a signification of the company's intention to be bound by, and accordingly to adopt the Agreement. There is no indication in the January 4, 2023, email correspondence that the lawyer was speaking on behalf of the corporation, and there is no evidence that she had authority to do so. The email correspondence is nothing more than the Defendant and his father's lawyer reporting back to him that a corporation had been created to use for the Agreement. There is no evidence of any act or conduct from the Corporation signaling *its* intention

to be bound. More than the Defendant's lawyer confirming that the Corporation was in place needed to happen for the Defendant to be relieved from his obligations under the Agreement.

[38] *Design Home Associates* is also distinguishable. In that case it was found that a corporation was bound by the terms of a lease. At para. 11 of *Design Home Associates*, Karakatsanis J. (as she then was) held that a simple notification of intent is all that is required. Even though there was never formal notification of intent to be bound, there was evidence from which that intent could be inferred. There was a request that correspondence for the rent be sent to the corporation, there was payment of the rent by the corporation, and a request that the lease be assigned to the corporation. The trial judge found that all these actions signified the corporation's intent to be bound by the lease in place of the individual defendants. No evidence of any form of notification of intent by the Corporation is present in this case. For reasons set out in paragraph 37 herein, I find that the January 4th email does not satisfy this requirement.

[39] As the Corporation did not take any action or engage in any conduct to adopt the Agreement, the Defendant remains personally liable to the Plaintiff.

Did the Plaintiff do enough to mitigate damages?

[40] The difference between the Agreement price and ultimate sale price is \$100,000. After deducting the \$20,000 deposit the Plaintiff retained, the Plaintiff received \$80,000 less for the Property than it would have had the Agreement closed as anticipated.

[41] It is trite law that the Plaintiff is required to take reasonable steps to mitigate its loss prior to seeking compensation for any loss from the Defendant.

[42] The Defendant argues that the Plaintiff has failed to do so. The Plaintiff took no reasonable steps to make sure that it obtained fair market value for the Property, but rather offered the Property to a purchaser who was aware of the Plaintiff's motivation to complete a quick sale. The Plaintiff did not list the Property for sale or expose it to the open market. This, the Defendant argues, does not amount to reasonable steps to mitigate.

[43] On the unique facts of this case, I find that the Plaintiff was not required to formally list the Property to satisfy its obligation to mitigate, and that it did take sufficient steps to mitigate its damages.

[44] Neither party provided appraisal evidence as to the value of the Property. The Defendant took issue with the Plaintiff's reliance on its realtor's opinion of value. The realtor could be said to be a *participant expert*. However, there was no indication in his affidavit as to how he arrived at his opinion of value of \$1.1 – 1.3 million for the Property. For example, there were no comparables offered. I have disregarded his evidence of value.

[45] While I agree with the Defendant that listing the Property would normally be the most prudent course of action to ensure that the best price could be obtained, there are unique factors in this case that allow me to conclude that the Plaintiff's actions were nonetheless reasonable.

[46] Firstly, this was a Property that had not been listed when the Defendant offered to purchase it. The Plaintiff's strategy from the outset was not to list the Property to test the market as to value. The realtor contacted known interested parties (or their realtors) and they made their offers. A quick, reasonable sale appears to be what motivated the Plaintiff. The Plaintiff's evidence is also

that this was more economical, as his real estate commissions were less given that the Property was not listed.

[47] The Plaintiff continued that strategy when it became evident that the Defendant was not going to close the transaction. Rather than wait and see what happens and assume the risks associated with listing the Property, the Plaintiff acted immediately to secure an agreement with 283 to ensure a minimal gap in time for the sale of the Property. The Plaintiff negotiated with 283 to have it increase its price by \$100,000. The Plaintiff's quick action likely minimized the cost of operating the Property ongoing while it was being listed and sold and minimized the loss of income associated with vacant rentals. Not listing the Property also reduced the commissions payable to the realtor upon sale, although I do not know by how much.

[48] I also note that the ultimate sale price of \$1.2 million was what the Defendant attempted to reduce his offer to after he had had an opportunity to view the Property. Presumably he felt that \$1.2 million was more indicative of a fair price for the Property than the \$1.3 million he had offered.

[49] While there is a possibility that the price could have been higher if the Property was listed, there is also a possibility that the listing could result in the Property taking longer to sell, attracting a lower price, and incurring greater carrying and other costs. Without evidence as to value other than what two arms-length purchasers were willing to pay for the Property, this is all speculation at this point.

Has the Plaintiff proved its damages?

[50] In addition to the difference in sale price, the Plaintiff claims the following damages:

- a. Loss of rental income
- b. Legal fees
- c. Carrying costs

Loss of Rental Income:

[51] The Plaintiff claims that the Property had five vacant units at the time the Agreement was entered into, which the Defendant required remain empty until the deal was closed. The Plaintiff says that the average rent in the Property is \$702.00 per month, and the units remained vacant for three months. The Plaintiff claims a total loss of \$10,530.

[52] The Defendant argues that the Plaintiff has not proved any of these damages. There is no evidence of the amount the vacant units would have commanded in rent or how they compare with the other units that are being rented out. Schedule “B” to the 283 Agreement of Purchase and Sale shows rent for some units as low as \$213 monthly, and as high as \$800 monthly. Further, the Agreement of Purchase and Sale with 283 contained a clause which had the same effect with respect to entering into new leases. Schedule “A” provided that the buyer agreed to assume the tenancies listed in Schedule “B”, which the seller represented as being the only tenancies. This effectively prevented the Plaintiff from renting any vacant units pending sale. The Defendant argues that even if the Plaintiff had accepted 283’s offer in November 2022, the units would have remained empty until that transaction closed February 3, 2023.

[53] I agree with the Defendant. The full amount of damages claimed are not damages flowing from the failure to complete the purchase. These are costs that the Plaintiff would have incurred by contracting with either of the two purchasers it marketed the Property to. At best, the Plaintiff would have a claim for the 2-week period between when the Agreement should have been completed and when the 283 agreement was completed. Having said this, I also agree with the Defendant that the amount is not properly proven. An “average” rent for the Property is not sufficient proof of what these units are able to attract when I have no evidence as to how this amount was calculated. Proof of this amount required the specific rent for the units.

Legal Fees:

[54] The Plaintiff claims legal fees for the repudiated real estate agreement in the amount of \$2,169.60 as of February 9, 2023. The Defendant denies that there should be any compensation for these fees.

[55] I also agree with the Defendant that the Plaintiff has failed to provide any evidence as to the legal fees it incurred. While I agree with the Plaintiff that it is reasonable to expect that additional fees would be incurred because of the Defendant’s failure to close the sale, it is the Plaintiff’s onus to prove the damages it suffered. The Plaintiff argues that the amount claimed is reasonable. Whether the amount claimed is reasonable is not possible for me to determine without knowing what was done by counsel for the Plaintiff and whether any of that work was used in the completion of the 283 sale and therefore not wasted costs. At a minimum, a copy of the invoice to the Plaintiff from the law firm should have been included. I find that these damages have not been proven and are not allowed.

Carrying Costs:

[56] The Plaintiff claims that it incurred “roughly” \$300 for the carrying costs of the building during the initial sale period. These costs are said to be on account of insurance, utilities, and upkeep.

[57] The Defendant argues that there is no evidence as to what these costs were. There is nothing other than a “ballpark” without any indication as to how this amount was arrived at. I agree. In the absence of such evidence, the Plaintiff has failed to prove these damages and is not entitled to them. Furthermore, the Plaintiff would have only been entitled to carrying costs from February 15, 2023, to March 3, 2023.

Order:

[58] I find that the Defendant is liable to the Plaintiff and shall pay the Plaintiff the sum of \$80,000 on account of damages suffered because of the Defendant’s failure to complete the Agreement.

[59] If the parties cannot agree as to costs, written submissions shall be provided as follows:

- a. The Plaintiff shall deliver its submissions, limited to 5 pages double-spaced (excluding Bill of Costs, offers, and caselaw) within 14 days of the date of these Reasons, failing which costs shall be deemed to have been resolved.
- b. The Defendant shall deliver a response, also limited to 5 pages double-spaced (excluding Bill of Costs, offers, and caselaw) within 14 days of receipt of the Plaintiff’s submissions; and
- c. Any reply shall be limited to 2 pages double-spaced and shall be delivered within 7 days of receipt of the Defendant’s submissions.

“Original signed by”
The Honourable Madam Justice T.J. Nieckarz

RELEASED: May 27, 2025

CITATION: Esquire Rose Investments Corp. v. Moxness, 2025 ONSC 3160
COURT FILE NO.: CV-23-257-00
DATE: 2025-05-27

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

ESQUIRE ROSE INVESTMENTS
CORPORATION

Plaintiff

- and -

MATTHEW MOXNESS

Defendant

**REASONS ON SUMMARY JUDGMENT
MOTION**

Nieckarz J.

Released: May 27, 2025