

**CITATION:** Winning v. 2483852 Ontario Inc., 2025 ONSC 3953  
**COURT FILE NO.:** CV-23-00706510-0000  
**DATE:** 20250704

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

**BETWEEN:** )  
 )  
DARLENE WINNING ) *Alexander Hora*, for the Plaintiff  
Plaintiff )  
 )  
– and – )  
 )  
2483852 ONTARIO INC., RAMESH ) *Jason Huang-Kung*, for the Defendants  
GAWRI and RE/MAX HALLMARK ARI )  
ZADEGAN GROUP REALTY )  
 )  
Defendants )  
 )  
 ) **HEARD:** June 4, 2025

2025 ONSC 3953 (CanLII)

**REASONS FOR JUDGEMENT**

**PAPAGEORGIU J.**

**Overview**

[1] On November 24, 2020, the Plaintiff entered into an agreement of purchase and sale with Rom Management Inc. whereby the Plaintiff agreed to purchase a pre-construction condominium in Blue Mountain for \$719,000. The APS is subject to the Tarion Warranty.

[2] On January 10, 2022, the Plaintiff entered into an Assignment Agreement with the defendants 2483852 Ontario Inc. and Ramesh Gawri whereby they agreed to an assignment of the APS. The Assignment. The Defendants paid a \$70,000 deposit which was the same amount that the Plaintiff paid the Vendor as per the APS.

[3] The Assignment Agreement was subject to the consent of the Vendor.

[4] The Plaintiff says that the Defendants anticipatorily breached and/or breached the Assignment Agreement by failing to reasonably agree to the terms set out by the Vendor to its consent. It moves for summary judgment. The only relief it seeks is that it be permitted to keep the \$70,000 deposit paid by the Defendants.

[5] The Defendants say that the Plaintiff breached the Assignment Agreement by failing to obtain the consent of the Vendor in a timely manner, and that this resulted in the Vendor seeking terms related to the Plaintiff's delay that the Defendants had not agreed to in the Assignment Agreement. They also say that the Vendor consent provided by the Vendor imposed terms outside the Assignment Agreement that the Defendants had never agreed to. Thus, they say that the Plaintiffs failed to meet the condition precedent and the deal is null and void.

[6] The Defendants also move for summary judgment dismissing this claim and seek an order returning the \$70,000 deposit to the Defendants.

### **Decision**

[7] For the reasons that follow, I grant the Defendants' summary judgment dismissing this claim and order that the \$70,000 deposit be repaid to the Defendants.

### **Issues**

- Issue 1: Did the Plaintiff seek the Vendor's consent in a timely manner and if not, does this constitute a breach that entitled the Defendants to terminate the Assignment Agreement?
- Issue 2: Did the Defendants anticipatorily breach or breach the Assignment Agreement?
- Issue 3: Did the Defendants breach the Assignment Agreement by failing to reasonably cooperate in obtaining the Vendor's consent?
- Issue 4: Did the Plaintiff fail to mitigate?
- Issue 5: Are the Defendants entitled to the return of the \$70,000 deposit?

### **Analysis**

#### **The Summary Judgment Test**

[8] In accordance with r. 20.04(2) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the "*Rules*"), the court shall grant summary judgment if:

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

[9] In determining whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties, and a judge may exercise any of the following powers under r. 20.04(2.1): (1) weighing the evidence; (2) evaluating the credibility of a deponent; and (3) drawing any reasonable inference from the evidence.

[10] The Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 49, explained:

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.

[11] In order to defeat a motion for summary judgment, the responding party must put forward some evidence to show that there is a genuine issue requiring a trial. A responding party cannot rest solely on allegations in a pleading. Each side must “put their best foot forward” with respect to the existence or non-existence of material issues to be tried: *Mazza v. Ornge Corporate Services Inc.*, 2016 ONCA 753, at para. 9. Furthermore, “a summary judgment motion cannot be defeated by vague references as to what may be adduced if the matter is allowed to proceed to trial”: *Diao v. Zhao*, 2017 ONSC 5511, at para. 18.

[12] No one took the position that this matter is not appropriate for summary judgment. Most of the facts in the record required to decide this matter are uncontradicted. I am satisfied that the record before me has permitted me to find facts, make any necessary credibility findings, and make necessary inferences to decide this matter; in all the circumstances, proceeding by way of application is appropriate and constitutes a proportionate and fair process, and is appropriate.

**Issue 1: Did the Plaintiff seek the Vendor’s consent in a timely manner and if not, does this constitute a breach that entitled the Defendants to terminate the Assignment Agreement?**

[13] I conclude that the Plaintiff breached the Assignment Agreement by failing to seek the Vendor’s consent to the Assignment Agreement “forthwith” as required.

[14] Paragraph 15 of the Assignment Agreement made it conditional on the Vendor’s consent:

APPROVAL OF THE AGREEMENT: In the event that consent to this Assignment is required to be given by the seller in the Agreement of Purchase and Sale attached hereto in Schedule C, the Assignor will apply, at the sole expense of the Assignor, **forthwith** for the requisite consent, and if such consent is refused, then this agreement shall be null and void and the deposit monies paid hereunder shall be refunded without interest or other penalty to the Assignee [Emphasis added].

[15] Schedule A of the Assignment Agreement provides that where the consent is not obtained, the Assignment Agreement becomes null and void and the deposit shall be returned.

[16] Paragraph 13 of the Assignment Agreement also provides that:

Time shall in all respects be of the essence hereof provided that the time for doing or completing any matter provided for herein may be extended or abridged by an agreement in writing signed by the Assignor and Assignee or their respective lawyers....

[17] Following the Assignment Agreement the Defendants did transfer the \$70,000 deposit to the Plaintiff.

[18] In her affidavit, the Plaintiff indicates that she initially had difficulty dealing with the Vendor as there were various administrative hurdles to overcome. There were no details provided of what these were or any communications substantiating that the Plaintiff sought the consent sooner. There is no email from the Plaintiff to the Vendor showing when she first sought the consent, and she does not even indicate when precisely she first sought that consent. Further, the first email from the Plaintiff to the Defendants regarding this issue is dated April 23, 2023 when she wrote to the Defendants indicating:

We are in the process of obtaining the Assignment documents from the building, however, they require the below information to proceed:

“Please provide us with the name of the Assignee, date of Birth, Address for Service.”

[19] This supports the conclusion that the Plaintiff did not seek the consent earlier, and even if she did, she failed to seek the documents required by the Vendor from the Defendants “forthwith” to get the ball rolling until April 2023, some 15 months after the Assignment Agreement.

[20] The Defendants provided this information on May 5, 2023.

[21] On May 19, 2023, the Plaintiff provided the Defendants with documents that the Vendor wanted signed in exchange for its consent. This included a consent agreement entitled "Assignment of Agreement of Purchase and Sale", which was a tri-partite agreement between the Vendor, the Plaintiff and the Defendants together with a separate document called “Waiver” (the “Vendor Consent Documents”).

[22] At the time the parties entered into the Assignment Agreement in January 2022, the First Tentative Closing Date in the Tarion Statement of Critical Dates of September 6, 2022 had not yet passed. By the time the Plaintiff obtained the Vendor Consent Documents, the First Tentative Closing Date had passed and the Plaintiff was entitled to delayed compensation. Part of the Vendor Consent Documents included a term that the delay compensation would be waived. It also included a term requiring mortgage pre-approval, which is reasonable.

[23] On May 29, 2023, the Defendants replied that they were waiting for the mortgage pre-approval letter and once they had it, they would forward all requested documents.

[24] On May 31, 2023 the Defendants provided a copy of a pre-approval letter in the amount of \$684,000 from Beaver Mortgage and Financial Group Inc. and indicated that it was not sufficient

to close the deal as it currently stands because the market had changed since the Defendants had first entered into the Assignment Agreement.

[25] By the time the Plaintiff had sought the Vendor consent, the prime interest rate had increased from .25 % on March 2, 2022 when the Assignment Agreement had been entered into to 4.57 % on June 7, 2023.

[26] The Defendants assert that had the Plaintiff applied for the Vendor's consent “**forthwith**”, as required under the Assignment Agreement, the Vendor would not have requested waivers of the delay closing compensation as a condition for consenting to the assignment. They also assert that the mortgage pre-approval required by the Vendor would have been easier to obtain because interest rates were significantly lower and because of general market conditions in 2022 compared to those in 2023.

[27] I agree that the Plaintiff’s failure to seek the Vendor’s consent for 15 months is a breach of the contractual requirement to do so “forthwith”. Fifteen months later cannot reasonably be considered forthwith.

[28] In real estate transactions, timing matters and can impact outcomes.

[29] In this case given the breach and the fact that time was of the essence, the Defendants, as the innocent party, were entitled to accept the repudiation within a reasonable time and treat the Assignment Agreement as at an end.

[30] However, for a time, they sought to find a solution through negotiations.

**Issue 2: Did the Defendants breach or anticipatorily breach the Assignment Agreement by failing to execute the Vendor Consent Documents?**

[31] I reject the argument that the Defendants anticipatorily breached or breached the Assignment Agreement.

[32] An anticipatory breach of contract occurs when a party indicates, through words or actions, before the performance of the contract is due, that they will not fulfill the contractual obligations.

[33] An anticipatory breach by a purchaser entitles the vendor to retain a deposit paid under an agreement of purchase and sale: *Hatami v. 1237144 Ontario Inc.*, 2018 ONCA 1061.

[34] As noted, apart from the requirement that the Defendants waive any claim to delayed closing compensation, the Vendor Consent Documents required the Defendants to provide a mortgage pre-approval form sufficient to close the purchase price transaction.

[35] It also contained the following additional objectionable term referenced by the Defendants in their affidavit materials:

(a) The requirement that the Defendants indemnify the Vendor from “all actions, costs, losses, charges, demands and expenses for and in respect of any such non-payment, non-observance or non-performance of the terms, covenants and conditions contained in the [APS] respectively reserved and contained on the part of the Assignor therein to be observed and performed” (the "Indemnity Provision").

[36] With respect to the waiver of the delayed compensation and the indemnity, the Vendor was imposing terms outside the Assignment Agreement and required the Defendants to give up rights they had under the Assignment Agreement because the Tarion Warranty, which imposed this delayed compensation, was a part of the APS. Therefore, this is a right the Defendants bargained for. Further, section 4 of the Assignment Agreement contains an Assignor covenant that specifically set out that the Plaintiff would not amend the APS without the Defendants’ written consent.

[37] The indemnity required by the Vendor is broadly worded. While it is unknown what kinds of claims that the Plaintiff may have had, if any, that is precisely the point. The Defendants would be agreeing to take on unknowable potential liabilities in a quantum also unknown. This was not contemplated by the Assignment Agreement.

[38] Indeed, there are Special Assignment provisions in Schedule “Z” to the APS that set out the type of terms that the Vendor could request in a vendor consent and the above two items are not set out there. Had they been, then there would be an argument that the Defendants implicitly agreed to this when they entered into the Assignment Agreement. Although this provision does say that the Vendor could impose “such conditions as the Vendor, in its discretion, may reasonably determine”, these additional terms (the waiver and the indemnity) are unreasonable provisions because they change the APS and eliminate a right under the Tarion Warranty.

[39] On May 19, 2023, when Sunny Gawri ("Sunny"), the Defendants' realtor, received a copy of the Vendor Consent Documents, he spoke with the Defendants about the waiver of delayed closing compensation. The Defendants indicated that such waiver was not part of the Assignment Agreement with the Plaintiff. The Defendants asked Sunny to try to negotiate the removal of the Waiver provision. There is an affidavit from Sunny.

[40] On the same day, Sunny says he called Jonathan Zadegan ("Jonathan") from Re/Max Hallmark Ari Zadegan Group Realty, the Plaintiff’s realtor, to discuss the Vendor Consent Documents, and in particular, that the Defendants were not agreeable to waiving their right to delayed closing compensation and that such waiver was not a requirement in the Assignment Agreement. Jonathan said he would look into it. Later that week, Jonathan spoke with Sunny again and advised Sunny that the Vendor was not prepared to remove the Waiver provision or make any other revisions to the Vendor Consent Documents. Sunny explained the same to the Defendants who indicated to Sunny that this was a "deal breaker". There is no specific reference in Sunny’s affidavit to having raised the indemnity issue, but the Vendor said he would not make any other changes in any event.

[41] There is no evidence from Jonathan or the Vendor disputing Sunny's evidence.

[42] After the real estate agents had their discussion, and the Vendor had indicated it would not change the Vendor Consent Documents the parties then began to negotiate the terms of the Assignment Agreement through counsel, which appear to me to have been a way of working around the Vendor's position with respect to the Vendor Consent Documents to see if a solution could be arrived at to address the Defendants concerns through amendments to the Assignment Agreement.

[43] There are some communications before me, but for the most part the substance of these negotiations have not been disclosed.

[44] On June 16, 2023, the Plaintiff wrote:

I understand the agents have discussed some potential options. My client requires a response.

In the event your client does not wish to accept either of the two very reasonable options presented by my client's realtor, by 6:00 next Tuesday, we anticipate that your client will be proceeding in accordance with the agreement as written.

Your client has the requirements for the builder to deliver the consent agreement. The assignment does not entitle your client to refuse to execute the builder's consent agreement. The deal is conditional on receipt of that document, not review of it. Withholding necessary information from the builder in order not to receipt that document will be viewed as bargaining in bad faith and default by your client.

Kindly speak with your client and advise them to respond as soon as possible so we may proceed. If my client does not hear back, she has advised that she will be forced to escalate this matter.

[45] On June 21, the Plaintiff wrote and said they believed they had received everything from the Defendants to proceed (apart from the signed Vendor Consent Documents) and that they would be proceeding based on the terms of the original Assignment Agreement.

[46] On June 22, 2023, the Defendants then wrote:

I have spoken with my client and neither option is a viable option. My client fails to meet the requirement of the builder consent (satisfactory financing) as he simply cannot qualify for the agreed upon assignment sale price as this deal was brokered almost two and a half years ago and market conditions have significantly changed.

...

My client proposes a revised assignment sale price of \$880,000.00. At this amount your client will still make a profit and this will allow for my client to close.

[47] This is the last written communication from the Defendants in the record.

[48] I note here that the Defendants' offer and these communications are arguably protected by litigation privilege, but the Plaintiff disclosed the Defendants' anyway in her affidavit, while at the same time not disclosing the offers that she had made which would have given the court better insight into whether any of her offers addressed the issues with the Vendor Consent Documents adequately. I draw an adverse inference here too.

[49] On the same day, the Plaintiff responded:

We will discuss this with our client.

I do not anticipate that the builder would reject the financing arrangements because the approval that was sent to us is sufficient to cover what is owed to the builder and the builder does not know the agreed upon assignment price.

....

Your client is in anticipatory breach of contract for refusing to close.

We will seek instructions from our client and revert back to you.

[50] Counsel for the Plaintiff then wrote to the Defendants on August 10, 2023:

“As explained, it is our client’s position that a very clear breach of the Assignment Agreement occurred with your client’s failure to supply the original vendor with the documents they requested.”

[51] In this letter the Plaintiff asserted that the \$70,000 deposit was forfeited but that she would accept \$50,000 to resolve the matter.

[52] I note here that there is no allegation that any of the many documents required by the Vendor were not provided, apart from the Defendants not signing the Vendor Consent Documents.

[53] In his affidavit the individual defendant, Ramesh Gawri (“Mr. Gawri”), explained that he tried to negotiate a reduction in price in part because of the increase in interest rates, and market conditions, but also because of the loss of the delayed closing compensation and the risk he would have to bear from indemnifying the Vendor for potential claims. This is not an unreasonable position.

[54] As noted above, the Defendants have also provided affidavit evidence from their real estate agent substantiating the concerns that the Defendants raised with him at the material time with

respect to the delayed compensation, and the conversations that he had with the Plaintiff's real estate agent to raise the issues and seek a resolution and that the Vendor would not change the documents. In argument, Plaintiff's counsel sought to undermine the real estate agent's affidavit because he is Mr. Gawri's son, but he did not cross-examine him. The mere fact that parties are related does not mean they are lying.

[55] Counsel for the Plaintiff also argued that the problems with the Vendor Consent Documents were not communicated at the time. He argued that the assertions in the affidavits noted above are after the fact and that there is nothing in the contemporaneous documents that support the argument that it was the Vendor Consent Documents that were a problem or that the parties discussed this. However, and notably, the Plaintiff had these specific affidavits from the Defendants and their real estate agent alleging these conversations, and she did not provide a supplementary affidavit disputing what they said about their having raised these issues. As noted, she also could have, but did not, provide an affidavit from her own real estate agent or the Vendor disputing the fact of these communications and the Vendor's position. And again, she conducted no cross-examinations.

[56] There is no evidence that the Plaintiff was unable to obtain evidence from her real estate agent or the Vendor. I draw an adverse inference.

[57] As well, in the Plaintiff's own affidavit she says that "negotiations regarding the **consent** and the [Assignment Agreement] continued through their realtors.". [Emphasis added]. It is unclear what consent they could have been talking about other than the Vendor Consent Documents. This corroborates that the Defendants' agent specifically raised issues related to the Vendor Consent Documents and the parties were trying to resolve them.

[58] The Assignment Agreement did not require the Defendants to sign whatever was put in front of them and agree to conditions imposed by the Vendor that were outside the terms of the Assignment Agreement and/or that were unreasonable. Raising issues about something that the Assignment Agreement did not require cannot be considered an anticipatory breach.

[59] With respect to the Plaintiff's argument that the issues raised were disingenuous and only raised so the Defendants could get out of the Assignment Agreement, I point out that in the midst of these communications, on May 31, 2023, the Defendants did provide a mortgage commitment which the Plaintiff agrees would have satisfied the Vendor. There is no evidence that other information required by the Vendor was not provided. As well, as noted there are no communications in the record where the Defendants raised any concerns until after the Vendor Consent Documents were delivered.

[60] It is not as if there is any evidence before me that anyone agreed to address the issues by obtaining the Vendor's agreement to change the objectionable terms, in particular the removal of the waiver of the delayed compensation.

[61] Proposing an abatement (even a large one) when the other party cannot fulfill a condition precedent can hardly be considered an anticipatory breach. The parties were exchanging offers and the Defendants' offer was in response to the Plaintiff's. Such negotiation cannot be considered words or actions, before the performance of the contract is due, that they will not fulfill the contractual obligations.

[62] I add that performance would only be due upon the provision of appropriate Vendor Consent Documents that complied with the Assignment Agreement, and these were never provided.

[63] Even if the Defendants expressed concerns about the market, interest rates, and suggested that this affected their ability to obtain a mortgage commitment and sought to negotiate an abatement, that does not mean that they could not rely upon the contractual rights they had when the documents the Vendor required them to sign were inconsistent with the Assignment Agreement. It does not mean that they could not raise market conditions and interest rates as part of the overall negotiation to seek a better deal when the Plaintiff could not fulfill the condition precedent.

[64] It was the Plaintiff who precipitously announced the termination of the Assignment Agreement immediately after the Defendants' counteroffer when it had not even provided Vendor Consent Documents that complied with the Assignment Agreement

[65] Finally even if the above communications could be interpreted to mean that the Defendants sought to terminate the Assignment Agreement and/or indicated they would not close, then in my view they would have been entitled to do that because the Plaintiff had failed to seek the Vendor consent "forthwith" as required, and time was of the essence as set out in s. 13 of the Assignment Agreement. As well, it was clear by that point that the Vendor was not prepared to provide any amendment to the Vendor Consent Documents or a consent consistent with the Assignment Agreement and so the Defendants were entitled to terminate in any event because the provision of that consent was a condition precedent to performance as I will elaborate on below.

[66] Indeed, in his affidavit, Mr. Gawri explained he "decided not to proceed with the [Assignment Agreement] because I did not agree to the terms and conditions required by the Vendor in the [Vendor Consent Documents]."

[67] He was entitled to do so because as I will explain below, once it was clear that the Plaintiff could not provide Vendor Consent Documents consistent with the Assignment Agreement, it was null and void.

[68] Therefore, they did not anticipatorily breach the Assignment Agreement by entering into negotiations or ultimately breach the Assignment Agreement by failing to execute the non-compliant Vendor Consent Documents.

**Issue 3: Did the Defendants breach the Assignment Agreement by failing to reasonably cooperate in obtaining the Vendor's consent?**

[69] I conclude that the Defendants did not breach the Assignment Agreement by failing to cooperate.

[70] Paragraph 16 of the Assignment Agreement requires the Defendants to cooperate with the Plaintiff:

16. AGREE TO CO-OPERATE: Except as otherwise expressed herein to the contrary, each of the Assignor and Assignee shall, without receiving additional consideration therefor, co-operate with and take such additional actions as may be required by the other party, acting reasonably, in order to carry out the purpose and intent of this Assignment.

[71] The Plaintiff argues that the Defendants' failure to sign the Vendor Consent Documents constituted a breach of the agreement to cooperate and that the Defendants cannot rely upon their own conduct in acting in such a way that the Vendor's consent could not be obtained.

[72] I reject this argument.

[73] The Plaintiff relies heavily upon *Douglas Holdings Inc. v. Ma*, 2024 ONSC 323 ("*Douglas Holdings*") where Vermette J. dealt with a similar, but also quite different situation.

[74] In *Douglas Holdings*, there was a pre-construction agreement of purchase and sale assigned to the defendant, Ms. Ma. After the assignment, she attempted to resile from the assignment on the basis that she could no longer afford the purchase because she had to travel to China where her father was sick and needed the deposit money for this. The vendor advised that if they could find another purchaser, they would let her out of the assignment but they could not find another purchaser.

[75] As in this case, the assignment agreement in *Douglas Holdings* had a provision that required the purchaser to obtain the vendor's consent to the assignment but in that case, it had to be obtained by a specific date, April 1, 2019. There was also a similarly worded provision requiring cooperation among the assignor and assignee to carry out the purpose of the assignment agreement.

[76] On January 26, 2019, the assignor wrote to the vendor to obtain its consent to the assignment. On January 28, 2019 the vendor confirmed that it saw no problem with consenting to the assignment. On February 21, 2019, the vendor provided a vendor's consent form for completion and signing by the assignor, assignee, and vendor which contained a number of clauses including the following three which were set out in the decision:

5. The vendor hereby consents to the within assignment from the assignor to the assignee.

9. The vendor warrants and confirms that the purchase price is in good standing and all deposits paid by the purchaser to date under paragraph 1 therein, totaling \$214,485 shall be credited to the Assignee on closing as part of the purchase price.

13. The assignee shall not further assign the purchase agreement without prior written consent of the vendor, which consent may be unreasonably or arbitrarily withheld in accordance with paragraph 18 of the purchase agreement.

[77] On February 22, 2019, the assignor then sent the vendor consent form to the lawyer who had acted for Ms. Ma. On March 8, 2019, the lawyer's office said that they had sent follow up emails to Ms. Ma, but she had not responded and they did not believe she was retaining them to continue on the matter. Later that day on March 8, 2019, the assignor sent Ms. Ma's real estate agent an email asking her to forward the vendor consent which he did on March 12, 2019.

[78] Ms. Ma then retained another lawyer but no one communicated with the assignor before the deadline of April 1, 2019 by when the assignor was to obtain the vendor's consent.

[79] Then, on April 1, 2019, the assignor sent a further email to Ms. Ma's real estate agent.

[80] Ms. Ma's new lawyer responded on April 4, 2019 and took the position that since the vendor consent was not obtained by April 1, 2019, the assignment agreement was null and void. In subsequent correspondence, Ms. Ma's new lawyer also advised that s. 13 of the vendor consent form was inconsistent with the assignment agreement because the assignment agreement provided that Ms. Ma would have a right to further assign the APS but s. 13 of the vendor consent said that the APS could not be further assigned.

[81] Notably, the vendor in the *Douglas Homes* case gave evidence in the proceeding and said that the provision of s. 13 of the vendor consent would have been amended if Ms. Ma or her lawyer had simply asked. That is the vendor did not have any difficulty with amending the vendor consent to permit Ms. Ma to further assign the agreement.

[82] Justice Vermette concluded that the assignee could not rely on her own default in preventing the assignee from obtaining the vendor consent by the due date to get out of the assignment agreement. She held that the assignee had breached the contractual duty to cooperate and that had Ms. Ma complied with her obligation to cooperate and identified the problems she saw in the vendor consent form, they would have been cured and the assignment transaction would have closed. Therefore, Ms. Ma forfeited the deposit.

[83] There are a number of important distinctions between *Douglas Homes* and this case.

[84] First, Ms. Ma was avoiding communicating her concerns about the vendor consent form up until right after the deadline for the vendor consent passed and this appeared to be deliberate. Ms. Ma's conduct is why the assignor could not fulfil the condition to obtain the vendor's consent by the deadline.

[85] In the case before me, there is no issue as to the Defendants failing to communicate in a timely manner. They expressed their issues with the Vendor Consent Documents (at least the issues with the waiver of delayed compensation), provided the mortgage commitment and also engaged in negotiations.

[86] Second, in *Douglas Homes* the vendor consent form did not contain the kind of provisions that the Vendor in the case before me required, namely, the indemnity and the requirement that the Defendants give up rights that they have pursuant to the Tarion Warranty.

[87] Third, in the *Douglas Homes* case, the vendor gave evidence that the assignee's issue with the vendor consent form, regarding the ability of the assignee to further assign it, was not a problem and that he would have agreed to such an amendment.

[88] In this case, there is no evidence from the Vendor that it would agree to address the issues raised by the Defendants and no evidence that the Plaintiff would address such issues either.

[89] The Plaintiff was essentially requiring the Defendants to give up delayed compensation that they were entitled to and agree to an indemnity. It is unclear the legal basis upon which the Plaintiff could foist upon the Defendants the requirement that they forego rights that they had under the APS and Tarion Warranty and accept new and unknown liabilities by virtue of the indemnity.

[90] While I agree with Vermette J that cooperation in a building context applies equally to the satisfaction of vendor consent conditions in an Assignment Agreement the duty to cooperate is not so broad that it includes an obligation that the Defendants give up legal rights, take on additional risks or otherwise prejudice their own interests. Nor does the duty of good faith performance require a party to prejudice one party's interests in favour of another's: *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7 at para 112.

[91] The Plaintiff raises one final argument that the Defendants breached the duty to cooperate by not providing the mortgage commitment directly to the Vendor. Instead, they gave the mortgage commitment to the Plaintiff. I reject this argument. All previous information that the Defendants provided to the Vendor was through the Plaintiff. This was how they were doing things and the Defendants simply continued with their ongoing process. For example, the Plaintiff wrote asking for the Defendants' date of birth and address for service, and the Defendants emailed these directly to the Plaintiff who did not then suggest that the Defendants had to send this directly to the Vendor. Instead, she replied "Received with thanks!"

[92] There is no evidence of any contemporaneous communications at the time alleging that this was insufficient. That is, there are emails from the Plaintiff asking for the mortgage commitment and then the Defendants sending the mortgage commitment to the Plaintiff. Nowhere in these communications does the Plaintiff say that the mortgage commitment should be sent directly to the Vendor. Furthermore, the Plaintiff could have easily forwarded it along to the Vendor, particularly since she was communicating with the Vendor all along.

[93] Therefore, the Defendants did not breach their duty to cooperate.

**Issue 4: Did the Plaintiff fail to mitigate?**

[94] As noted, the Plaintiff paid \$70,000 in deposits to the Vendor based upon the APS schedule of payments. The deposit it collected from the Defendants was also \$70,000.

[95] As noted, the APS is subject to the Tarion Addendum.

[96] The Tarion Statement of Critical Dates lists January 4, 2024 as the outside closing date which was the final date for the Vendor to close the transaction. If it failed to do so, the purchaser (the Plaintiff or her assignee) is put to an election to either terminate the APS or negotiate a new closing date with the Vendor.

[97] The Plaintiff had the opportunity to terminate the APS because the Vendor had not closed by January 4, 2024. Had she terminated she would have received her \$70,000 deposit back from the Vendor. Instead of terminating, what she did is execute a revised APS on June 18, 2024 with the Vendor that extended all timelines into the future and which prolongs the Vendor's ability to deliver the unit.

[98] Therefore, the Plaintiff could have obtained the \$70,000 she seeks to keep from the Defendants from the Vendor had she simply terminated the APS as she was entitled.

[99] This is not really an issue of mitigation though because had I found that the Defendants breached the Assignment Agreement, the Plaintiff would have been entitled to the deposit which would have been forfeited, without any necessity of proving damages.

[100] It is, nevertheless, curious, that the Plaintiff did not terminate the APS given the claim it now advances against the Defendants which is only for the \$70,000 deposit.

**Issue 5: Are the Defendants entitled to return of the \$70,000 deposit?**

[101] The Defendants are entitled to return of the \$70,000 deposit.

[102] As set out in *Douglas Homes* at para 53:

A true condition precedent exists where the rights and obligations of the contracting parties under the contract depend on a future uncertain event, the happening of which is beyond the control of the parties and depends entirely on the will of a third party. Until the event occurs, neither party to the contract has a right to performance. See *THMR Development Inc. v. 1440254 Ontario Ltd.*, 2018 ONCA 954 at para 15.<sup>1</sup>

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<sup>1</sup> Vermette J. also noted that other parts of the contract could come into effect even before the condition precedent occurs such as the duty to cooperate.

[103] Like Vermette J in *Douglas Homes*, I conclude that the Vendor consent condition is a true condition precedent because it depended entirely on the will of the Vendor.

[104] The full text of Schedule A reads as follows:

Assignor and Assignee acknowledge and agree that this assignment of agreement of purchase and sale is conditional upon the Vendor/Builder's approval of **this assignment of agreement of purchase and sale**. **In the event the Vendor/Builder does not approve this assignment of agreement of purchase and sale**, this assignment agreement becomes null and void and the deposit shall be returned in full, without deduction to the Assignee. [Emphasis added]

[105] Until the Plaintiff obtained the Vendor's consent to **this Assignment Agreement**, she could not insist on performance. I have emphasized the word "Assignment Agreement" because contractually, the consent required is to the existing Assignment Agreement with all the rights that the Defendants had. There was no promise that they would sign documents that changed the existing Assignment Agreement.

[106] There is no evidence that the Vendor has ever consented to the Assignment Agreement as it was at any time because it imposed terms outside of the Assignment Agreement.

[107] There is no evidence that the Vendor was ever prepared to or would ever be prepared to consent to the Assignment Agreement as it was, because there is no evidence from the Vendor at all. Sunny gave specific evidence that the Vendor advised it was not prepared to amend the Vendor Consent Documents.

[108] There has been enough time for someone to have obtained the Vendor's consent in accordance with the Assignment Agreement and I note again that time is of the essence of the Assignment Agreement.

[109] In the circumstances, I infer that the Vendor was never, and is not, prepared to consent to the Assignment Agreement as it is without the Vendor Consent Documents being signed.

[110] Therefore, pursuant to Schedule A of the Assignment Agreement it is null and void and the deposit must be returned to the Defendants.

[111] I encourage the parties to settle their costs and I will give them some time to negotiate this. If they cannot agree the Defendants may make submissions within 10 days and the Plaintiff within 10 days thereafter.

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**Papageorgiou J.**

**Released:** July 4, 2025

**CITATION:** Winning v. 2483852 Ontario Inc., 2025 ONSC 3953  
**COURT FILE NO.:** CV-23-00706510-0000  
**DATE:** 20250704

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

DARLENE WINNING

Plaintiff

– and –

2483852 ONTARIO INC., RAMESH GAWRI and  
RE/MAX HALLMARK ARI ZADEGAN GROUP  
REALTY

Defendants

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**REASONS FOR JUDGEMENT**

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**Papageorgiou J.**

**Released:** July 4, 2025