CITATION: Eyelet Investments Corp. v. Lin Zhou, 2025 ONSC 4434

COURT FILE NO.: CV19-00620962

DATE: July 29, 2025

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
Eyelet Investment Corp, c.o.b. as Treasure Hill Homes	)	Serdal Mikael Citak and Dara Hirbod, for the Plaintiff
	)	
PLAINTIFF	)	
	)	
– and –	)	
	)	
	)	Sandra Hsia for the Defendant
Lin Zhou	)	
	)	
DEFENDANT		
	)	
	)	
	)	**Heard: April 29, 2025**

DES ROSIERS J.

REASONS

Overview

[1] This is a motion for summary judgment brought by the plaintiff, Treasure Hill Homes, to recover damages arising from an abandoned agreement of purchase and sale for a home in Aurora.

[2] The defendant, Ms. Zhou, admits that she did not complete the purchase. Her position is that the plaintiff has failed to mitigate its damages.

[3] It is not disputed that:

- Ms. Zhou executed an Agreement of Purchase and Sale to purchase the Property, 12 Mike Boshevski Court in Aurora. The Property is part of one of several projects developed by Treasure Hill Homes.

- After upgrades and extras, the final purchase price was $1,680,151.38. Ms. Zhou paid a total sum of $127,500.00 in deposits.

- The scheduled closing date was September 28, 2017.

- On September 11, 2017, Ms. Zhou's counsel told counsel for Treasure Hill Homes that Ms. Zhou was terminating the Agreement of Purchase and Sale.

- Treasure Hill Homes advised that this termination was an anticipatory breach of the Agreement of Purchase and Sale and that Treasure Hill Homes would take steps to mitigate its damages.

- The Property was not advertised on the Multi Listing Service (MLS).

- On March 29, 2018, more than six months after the termination of the Agreement of Purchase and Sale, Treasure Hill Homes received an offer from a third-party buyer, a real estate agent, to purchase the Property for $1,300,000.00. It accepted the offer.

- Both parties have provided expert appraiser reports of the fair market value of the Property at the date of breach, September 11, 2017, and at the date of the resale on March 29, 2018:

Date of appraisal	Treasure Hill Homes' expert	Ms. Zhou's expert
Sept. 11, 2017	$1,555,000	$1,570,000
March 29, 2018	$1,395,000	$1,470,000

[4] Treasure Hill Homes is seeking damages of $253,981.97. The damages represent the discrepancy between the price agreed by Ms Zhou and the price obtained for the Property in March 2018, plus the carrying costs, after deducting the deposits paid by Ms. Zhou.

[5] Ms. Zhou admits that she did not complete the purchase transaction but maintains that Treasure Hill Homes has not reasonably mitigated its damages. In particular, she claims that:

a) Treasure Hill Homes chose not to list the Property on the MLS.

b) No documentary evidence exists on its efforts to advertise or market the Property.

c) The resale of the Property appears to be an internal sale amongst real estate agents.

d) Treasure Hill Homes resold the Property after more than six months of knowing that Ms. Zhou would not close the purchase transaction, in a downward-trending market.

e) The resale price was lower than the appraised market value. Treasure Hill Homes appraised the fair market value at the resale to be $1,395,000.00. Ms. Zhou's appraisal at the time of resale is $1,470,000.00. The accepted offer was for $1,300,000.

[6] Treasure Hill Homes argues that Ms. Zhou has not established that a listing on MLS would have yielded a better result. It maintains that the resale was an arms-length sale and that the appraiser experts' reports are irrelevant because the market established the resale price. It argues that it was appropriate for it to delay or soft-pedal the sale of the home because Treasure Hill homes did not want to flood the market with several properties and risk jeopardizing upcoming closings or lowering its inventory price. It argues that it followed its usual practice in dealing with a declining market.

[7] The issues in dispute are whether Treasure Hill Homes mitigated its damages and what damages it is entitled to.

[8] The parties did not debate whether this motion should proceed as a summary judgment motion. However, Ms. Zhou urged the court to appoint an appraiser to further evaluate the property if damages were to be awarded. I conclude that I can reach a fair and just determination on the motion's merits without hearing *viva voce* evidence or requesting further appraisals.

[9] The parties do not dispute that Ms. Zhou has forfeited her deposits and that her deposits should be credited against any damages arising from the anticipatory breach.

[10] For the reasons below, I find that this is an appropriate case to determine on a summary judgment motion. I conclude that Treasure Hill Homes did not reasonably mitigate its damages because it did not disclose nor identify what specific marketing steps it took to resell the Property. Treasure Hill Homes chose a strategy to protect the value of

its entire inventory by aggressively marketing or putting other properties ahead of Ms. Zhou's on the open market.

Issues

[11] The issues are:

- Is this a case for summary judgment?
- Has Treasure Hill Homes mitigated its damages arising from the failed sale of the Property?
- What damages is Treasure Hill Homes entitled to?

Is this a case for summary judgment ?

[12] In *Hryniak* v. *Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, the Supreme Court of Canada established a road map outlining how a motions judge should approach a motion for summary judgment.

[13] The Supreme Court indicated that judges should first determine if there is a genuine issue requiring trial based only on the evidence before them, without using the new fact-finding powers. There is no genuine issue requiring a trial when a court is able to reach a fair and just determination on the merits of the motion. This will be the case where the process:

> (1) allows the court to make necessary findings of fact,
>
> (2) allows the court to apply the law to the facts, and
>
> (3) is a proportionate, more expeditious, and less expensive means to achieve a just result: *Hryniak*, at para. 49;

[14] Courts have granted summary judgment in cases involving aborted real estate transactions: *Zoleta* v. *Singh and RE/MAX Twin City Realty*, 2023 ONSC 5898; *Rosehaven Homes et al.* v. *Aluko et al.*, 2022 ONSC 1227, 40 R.P.R. (6th) 280, at para. 97, aff'd 2022 ONCA 817.

[15] This is a case where summary judgment is appropriate. The credibility of the parties is not in issue. The parties agree on the main facts of the case. Their dispute concerns the reasonableness of the mitigation efforts deployed, and the level of information and scrutiny that a developer owes to a party who defaulted on an Agreement of Purchase and Sale.

[16] I also find it appropriate to draw an adverse inference if a party chooses not to adduce evidence: *S.N.S. Industrial Products Limited* v. *Omron Canada Inc*., 2018 ONCA 278, at para. 5.

Has Treasure Hill Homes mitigated its damages?

[17] Where it is alleged that a plaintiff has failed to mitigate, the defendant bears the burden of proving that the plaintiff has failed to make reasonable efforts to mitigate and that mitigation was possible: *Southcott Estates Inc.* v. *Toronto Catholic District School Board*, 2012 SCC 51 (CanLII), [2012] 2 SCR 675.

[18] What is reasonable mitigation is a question of fact to be determined based on relevant market circumstances. Mitigation efforts must be reasonable, but they need not be flawless: *Azzarello* v. *Shawqi*, 2018 ONSC 5414, 439 D.L.R. (4th) 127, at para. 56, rev'd in part, 2019 ONCA 820, 439 D.L.R. (4th) 127.

[19] Treasure Hill Homes argues that the court ought not look behind the fact that a *bona fide* purchaser made an offer on March 29, 2018. Even if the purchaser was a real estate agent, she was not linked to Treasure Hill Homes.

[20] Treasure Hill Homes suggests that the evidence of the appraisers is irrelevant. It provided it out of an abundance of caution, but is not relying on it. It argues that Ms. Zhou has the burden of showing that the mitigation efforts were unreasonable, and that she ought to have brought expert evidence of a flawed marketing strategy, and that putting the house on MLS would have yielded some benefits. She has not met her burden because she has not provided such evidence.

[21] Ms. Zhou's position is that she could not adduce expert evidence because Treasure Hill did not have any information on the marketing done for the particular Property, and minimal information about its general marketing strategy. This case raises the issue whether a developer faced with several abandoned real estate deals must disclose its marketing strategy for the various properties and whether it must explain why it chose to put one house, as opposed to another on the open market. I note also that Ms. Zhou did provide evidence of several comparable homes listed on MLS, including 15 Mike Boshevski initially listed for $1,799,000 that sold 10 months later for $1,430,000.

[22] In *100 Main Street Ltd.* v. *W.B. Sullivan Construction Ltd. (1978)*, 1978 CanLII 1630 (ON CA), 20 O.R. (2d) 401, the Ontario Court of Appeal found that "the damages should have been calculated on the basis of finding the *highest price obtainable* within a *reasonable time* after the contractual date for completion following the *making of all reasonable efforts* to sell the property commencing on that date" (emphasis added).

[23] Ms. Zhou asserts several mitigation failures on the part of Treasure Hill Homes that I review in order: a) the decision not to list the property on MLS; b) the lack of details and documentary evidence of the marketing plan for the property or the project; c) the sale to a real estate agent; d) the delay in the resale efforts and e) the resale at a price below the fair market value assessment.

The decision not to list the property on MLS

[24] Several courts have identified that deciding not to list on the open market and opting for a private resale strategy raises concerns. In *Tribute (Springwater) Limited* v. *Sumera Anas*, 2020 ONSC 5277 (*Tribute*), Justice Steele expressed the view that not listing a property on MLS was “troubling”.

[25] The plaintiff seeks to distinguish the *Tribute* case as was done in *Pristine Homes (Belle Aire) Inc.* v. *Nur*, 2021 ONSC 6395 (*Pristine*). In *Pristine*, the court distinguished *Tribute* because there was evidence that Tribute did not list new homes on the MLS and only sold them directly through Tribute’s sales representatives or agents. In the *Pristine* case, as in the present case, some but not all resale homes were listed on the MLS.

[26] In *Pristine*, there was evidence of detailed marketing and sales efforts to resell properties, including a digital campaign and feature sheets with information about the subject property. In addition, the court found that the defendant had not led any evidence that the price obtained by the plaintiff for the Property was not commercially reasonable. In the present case, Ms. Zhou introduced evidence from an appraiser.

[27] The decision not to list the Property on MLS is not necessarily a failure to properly mitigate damages. However, it raises concerns that must be addressed through a proper, fully articulated alternative marketing strategy.

The lack of details or documentary evidence of the marketing strategy

[28] The evidence before me includes the affidavit and cross-examination of A. Botroni, legal counsel for Treasure Hill Homes. Mr. Botroni explains that he does not recall what was done for the subject property, but that in general, Treasure Hill Homes would do email blasts to past interested buyers and a comprehensive list of real estate agents. It would also put up signs or billboards advertising the development and use social media to invite prospective buyers to visit its inventory.

[29] Mr. Botroni explained that Treasure Hill Homes had 82 homes in the project. It was not prepared to “flood” the market with homes for which agreements of purchase and sale

had been terminated. The reason for the delay in putting the Property on the market was to avoid such flooding and price reduction. Treasure Hill Homes takes the position that it should have complete discretion to determine which house to put forward on the market and at what time.

[30] Ms. Zhou suggests that to meet its obligation to mitigate its damages, Treasure Hill Homes must document what they are doing by way of mitigation. According to her, it is not enough to describe vaguely what is usually done. In her view, Treasure Hill Homes ought to have provided details of what was done for this particular property and documented the selection process of which house would be put on the market at what time and which house would be listed on MLS or private sale and why.

[31] I agree with Ms. Zhou on this point. It is not unreasonable to require that a party who has the obligation to mitigate documents its efforts. Treasure Hill Homes chose to claim additional damages from Ms. Zhou in addition to her deposit. It must provide some information to the court to justify its damages.

[32] Treasure Hill Homes might have been reasonable in delaying selling the house even in a declining market. The decision not to list this particular property on the MLS may have been reasonable, but it requires explanation.

[33] The implications of Treasure Hill Homes' argument that the court should not look beyond the eventual sale to a third-party purchaser are that a home builder faced with the abandonment of an Agreement of purchase and sale does not have to explain nor show what it has done. If eventually a buyer arrives, no matter how late or how low the offer is, the defendant must pay the difference, unless the sale is truly improvident. In my view, this does not reflect the fairness and common sense basis of the duty to mitigate, which seeks to do justice between the parties in their particular circumstances: *Southcott Estates*, *supra.*

[34] I find it appropriate to draw an adverse inference from the failure to keep records (or provide them) of the marketing strategies, email blasts or other outreach efforts with respect to this particular property or others at various times during the six-month period from the date of the breach until the sale.

The resale to a real estate broker

[35] There is nothing inappropriate about reselling to a real estate broker provided that they are at arm's length. There is no evidence that this was not an arm's-length agreement.

The delay in reselling the Property

[36] Little is known about the efforts made to market or resell the Property. The evidence before me comes from the affidavit and cross-examination of Mr. Botroni. It reveals that Treasure Hill Homes was concerned about the diminished value of its homes. It resisted putting properties on the market, and on MLS, at reduced prices, to not put the remaining units that had to close at risk. It opted to market the units in tranches, starting with the ones it assessed as the most marketable. It is unclear why this particular property was treated in the way it was: in terms of timing or in terms of marketing strategy (private sale vs. MLS).

[37] I view this situation as similar to cases where a plaintiff decides not to resell the property immediately to see whether the market will turn in their favour. In such cases, courts assess the damage as the difference between the agreed-upon price and the market value at the time of the breach.

[38] In *642947 Ontario Ltd.* v. *Fleischer* (2001), 2001 CanLII 8623 (ON CA), 56 O.R. (3d) 417, the Ontario Court of Appeal notes that the basic principle for assessing damages for breach of contract is based on putting the injured party as nearly as possible in the position it would have been had the contract been performed. Ordinarily, courts give effect to this principle by assessing damages at the date the contract was to be performed,

which would be the date of closing. It is open to a court however to choose a date different from the date of closing if contextual considerations require it. The court further states that, where, "the vendor retains the property in order to speculate on the market, damages will be assessed as at the date of closing".

[39] In the present case, I find it appropriate to use the date of the termination of the contract, the date of the breach, that is, September 11, 2017.

The resale below the appraised market value

[40] A plaintiff does not require an appraisal before accepting a purchase offer on a property. It might be prudent to do so in anticipation of litigation about mitigation efforts. Nevertheless, if the plaintiff has evidence of its marketing efforts, courts will find that the market is the true measure of the value of a property.

[41] It is well-established that when a purchaser fails to close a real estate transaction and the vendor takes reasonable steps to sell the property in an arm's length sale to a third party in mitigation of damages, and there is nothing improvident about the sale, the difference between the two sale prices will be used to calculate the damages: *Arista Homes (Richmond Hill) Inc.* v*. Rahnama*, 2022 ONCA 759, at para. 9.

[42] As explained by Kimmel J. in *Marshall* v*. Meirik*, 2021 ONSC 1687, at para. 29, the resale price is presumptively the fair market value of the property. She referred to the words of the Nova Scotia Court of Appeal in *Royal Bank* v. *Marjen Investments Ltd*. (1998), 164 N.S.R. (2d) 293, 491 A.P.R. 293, 155 D.L.R. (4th) 538, 1998 NSCA 37, at para. 31:

> When the property has been resold, however, and, particularly, when subjected to *vigorous marketing efforts …* the Court should generally not depart from the selling price. Appraisal reports are a best guess, albeit by a person experienced in the real estate field. It is the market that actually determines the value of the property.

Emphasis added.

[43] In *Marshall*, the property had been listed on MLS. There was one offer that was increased.

[44] Reliance on the resale price depends on the existence of vigorous marketing efforts. In the present case, it is difficult to know whether sufficient marketing was done, since Treasure Hill Homes did not record what was done to market the Property.

[45] To summarize, Treasure Hill Homes did not have records of its marketing efforts for the Property. It is not reversing the burden of proof to require minimum record-keeping on the part of a plaintiff subject to a mitigation obligation. The evidence before me is that Treasure Hill Homes developed a marketing strategy to protect the value of the entirety of its inventory. It had no specific strategy for the resale of the Property at issue in these proceedings. Its strategy might have been successful if it had yielded a price for the Property that approximated its fair market value at the time of the breach in September 2017, but it was not.

[46] Ms. Zhou has raised several reasons why Treasure Hill Homes' mitigation efforts were flawed. Because of the lack of records, I draw the negative inference that there was a delay in marketing the Property and a failure to sufficiently market this particular property to constitute reasonable mitigation efforts.

[47] Treasure Hill Homes also argues that mitigation was not possible, that is, that no amount of marketing would have yielded a higher price in the market conditions of fall 2017 or spring 2018. It argues that it is Ms. Zhou’s burden to show that a higher price could have been achieved. Based on the evidence before me, I find that Ms. Zhou provided evidence of comparable homes in Aurora Views (the development project in question) marketed on MLS that sold in the six months from September 2017 to March 2018. This was sufficient to meet its burden in light of the lack of records of the marketing efforts deployed.

What damages is Treasure Hill Homes entitled to?

[48] In light of my conclusion that Treasure Hill Homes has failed to mitigate its damages, I decline to use the March 29, 2018, resale price as the appropriate measure to calculate the damages. Instead, I find that the appropriate assessment date for damages is the date of the breach, September 11, 2017.

[49] I use Treasure Hill Homes' expert appraisal report of the fair market value of the Property on September 2017, that is, $1,555,000, I calculate the damages in the following way:

Original purchase price:	$1,680,151.38
Fair market value at breach:	$1,555,000.00
Damages sustained:	$125,151.38
Less Original Deposit:	($127,500.00)
Total Damages:	$0.00

[50] The motion is dismissed.

Costs

[51] If parties cannot agree on costs, they may each provide submissions for three double-spaced pages, excluding bills of costs and offers to settle, by September 3, 2025.

Des Rosiers J.

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SUPERIOR COURT OF JUSTICE

BETWEEN:

Eyelet Investment Corp, c.o.b. as Treasure Hill Homes

Plaintiff

– and –

Lin Zhou

Defendant

REASONS FOR JUDGMENT

N. Des Rosiers J.

Released: July 29, 2025