CITATION: Lazy Dolphin Development Inc. v. Pathmanathan, 2025 ONSC 3677
COURT FILE NO.: CV-24-00715125-0000
DATE: 20250619

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
LAZY DOLPHIN DEVELOPMENT INC.	)	*David Altshuller*, for the Plaintiff
	)	
Plaintiff	)	
	)	
– and –	)	
	)	
SENTHILRUBAN PATHMANATHAN	)	
	)	
Defendant	)	
	)	
	)	**HEARD:** In Writing

PAPAGEORGIOU J.

Overview

[1] The defendant agreed to purchase property owned by the plaintiff for $1,176,490 with upgrades in the amount of $15,461. The agreement was to close on July 24, 2023, but the defendant sought and obtained extensions to complete the agreement as well as a reduction in price such that the agreement was to close on October 10, 2023 at the price of $1,126,490.

[2] The defendant failed to close on the amended date of closing at the reduced price.

[3] The plaintiff sued and now moves for default judgment.

Decision

[4] For the reasons that follow I grant default judgment.

The Issues

[5] The main issues are:

- Issue 1: Do the materials provide a basis for a finding of liability?
- Issue 2: If so, what are the damages to which the plaintiff is entitled?

Analysis

Issue 1: Do the materials provide a basis for a finding of liability?

Consequences of noting in default

[6] Pursuant to r. 19.02, having not defended the proceeding, a defendant is deemed to admit the truth of all allegations of fact made in the Statement of Claim.

[7] However, pursuant to r. 19.06 a plaintiff is not entitled to judgment on a motion for judgment or at a trial merely because the facts alleged in the statement of claim are deemed to be admitted, unless the facts entitle the plaintiff to judgment.

[8] In particular, r. 19.05 provides that a motion for judgment which involves unliquidated damages shall be supported by evidence given by affidavit.

The test on a motion for default judgment

[9] The test on a motion for default judgement was set out in *Elekta Ltd. v. Rodkin*, 2012 CarswellOnt 2928 (ONSC) as follows: A. What deemed admissions of fact flow from the facts pleaded in the Statement of Claim? B. Do those deemed admissions of fact entitle the plaintiff, as a matter of law, to judgement on the claim? C. If they do not, has the plaintiff adduced admissible evidence which, when combined with the deemed admissions, entitle it to judgement on the pleaded claim?

[10] I am satisfied that the plaintiff has established liability based upon the following deemed admissions in the Statement of Claim and affidavit evidence filed:

- The parties entered into an agreement of purchase and sale.
- The plaintiff was ready willing and able to close.
- The defendant failed to deliver closing documents and funds on closing, thus breaching the agreement.

Issue 2: What are the damages to which the plaintiff is entitled?

Difference between resale and original price in the Agreement

[11] When the plaintiff calculated its damages in its materials, it began with the original purchase price which was $1,176,490, instead of the reduced price of $1,126,490. There were also

adjustments in the amount of $15,461. As well, there are deposit funds that must be credited in the amount of $144,820.

[12] Damages are intended to place the innocent party in the same position she would have been in if the breach had not occurred. Ordinarily, this would mean that the damages are to be calculated based upon the reduced price because had the breach not occurred in this case, the purchaser would have closed paying the reduced price.

[13] However, the plaintiff is correct that the damages assessment begins with the original purchase price based upon s. 72 of the agreement which provided as follows:

> If the Purchaser has received a credit or reduction against the Purchase Price in order to induce the completion of this transaction, accelerate the Closing Date or change/modify any critical dates or other Addendum information or other details of this transaction or to change or alter the construction specification of the Dwelling Unit and thereafter the Purchaser fails to complete this transaction, all damages shall be assessed as if such credit or reduction had not been granted.

[14] The plaintiff relisted the property and sold it for $925,990, which sale closed on December 21, 2023. Therefore, I agree that the plaintiff is entitled to the difference between the original sale price of $1,176,490 plus the adjustments in the amount of $15,461 minus the deposit in the amount of $144,820 minus the relisted price of $925,990.

Additional Heads of Damage

[15] The plaintiff claims the usual additional heads of damages in respect of legal fees in the amount of $2,825 and commission on the resale in the amount of $42,749.55. I award these.

Interest Claim

[16] The only issue is whether or not the plaintiff is entitled to interest in respect of the original purchase and adjustments minus the deposit from the date of the original closing which was July 24, 2023 or from the date of the breach which is October 10, 2023.

[17] Ordinarily, it would be from the date of the breach.

[18] The plaintiff's argument is that this court should choose a different closing date for the calculation of the interest in accordance with *642947 Ontario Limited v. Fleischer et al.* (2001), 2001 CanLiII 8623 (CA).

[19] It is important to understand the facts of *Fleisher*. In that case the vendor owned property that it leased to a tenant. The tenant had a right of first refusal on any sale. The vendor sold the property to the purchaser who was a developer wishing to put together a land assembly and develop the property. The purchase price was $2,000,000. The tenant exercised its right of first refusal but then took steps to be released from that. The purchaser made another offer for $2,000,000 which the vendor accepted. Then the tenant obtained an injunction and as part of that injunction the closing date for the sale between the vendor and purchaser was extended by the judge who granted the injunction.

[20] Then the tenant ultimately decided it was not interested and discontinued the injunction proceedings. As part of granting leave to discontinue the judge fixed the closing date for the agreement to December 7, 1990.

[21] Then the purchaser decided it would not complete the sale because the market had declined significantly. The vendor did not relist the property. Rather, it advised the developer community that it was still on the market and re-leased it to the tenant. Therefore, the vendor held onto the property until the time of trial and damages were not assessed based upon the resale value but based upon assessment of the market value.

[22] The market value at the failed closing date of December 7, 1990 was $1,130,000. The vendor asserted that damages should be assessed based upon the market value at trial in 1994 which was 410,000. This would have resulted in a much higher damages calculation.

[23] The trial judge assessed the damages as at the failed closing date of December 7, 1990.

[24] In *Fleisher*, at para 41 the Court set out the following principles that it gleaned from *100 Main Street v. W.B. Sullivan Construction Ltd.* (1978) CanLII 1630 (ON CA) regarding the date for calculation of damages:

> [41] … (1) The basic principle for assessing damages for breach of contract applies: the award of damages should put the injured party as nearly as possible in the position it would have been in had the contract been performed.
>
> (2) Ordinarily courts give effect to this principle by assessing damages at the date the contract was to be performed, the date of closing. [See Note 1 at end of document]
>
> (3) The court, however, may choose a date different from the date of closing depending on the context. Three important contextual considerations are the plaintiff's duty to take reasonable steps to avoid its loss, the nature of the property and the nature of the market.
>
> (4) Assessing damages at the date of closing may not fairly compensate an innocent vendor who makes reasonable efforts to resell in a falling market. In some cases, the nature of the property -- for example an apartment building -- hampers the vendor's ability to resell quickly. Thus, if the vendor takes reasonable steps to sell from the date of breach and resells the property in some reasonable time after the

> breach, the court may award the vendor damages equal to the difference between the contract price and the resale price, instead of the difference between the contract price and the fair market value on the date of closing.
>
> (5) Therefore, as a general rule, in a falling market the court should award the vendor damages equal to the difference between the contract price and the "highest price obtainable within a reasonable time after the contractual date for completion following the making of reasonable efforts to sell the property commencing on that date" (at p. 421 O.R.).
>
> (6) Where, however, the vendor retains the property in order to speculate on the market, damages will be assessed at the date of closing.
>
> [42] Underlying these propositions is the simple notion of fairness. As Professor S.M. Waddams wrote in his text, The Law of Contracts, 4th ed. (Toronto: Canada Law Book, 1999), at p. 518, "[i]t is on general considerations of justice, therefore, that the choice of date must depend." The date for the assessment of damages is determined by what is fair on the facts of each case. See Rice v. Rawluk (1992), 1992 CanLII 7646 (ON SC), 8 O.R. (3d) 696 (Gen. Div.); Bitton v. Jakovljevic (1990), 1990 CanLII 6928 (ON SC), 75 O.R. (2d) 143, 13 R.P.R. (2d) 48 (H.C.J.).

[25] The Court ultimately agreed with the trial judge’s assessment. The vendor had led no evidence about the “highest possible price obtainable in a reasonable time” after the closing date. The Court indicated that the vendor could not choose a date four years after the closing date when the market was at its lowest and expect the court to choose that date. They could have sought to sell it immediately after the failed closing and re-leasing it to the tenant was an impediment to sale. The court concluded that the proper inference was that the vendor decided to keep the property speculating that the market would improve but they had to take the risk of that speculation.

[26] The reasons the plaintiff cites in this case to choose the original closing date of July 24, 2023 as opposed to the amended closing date of October 10, 2023 are that: the plaintiff gave an extension in good faith to assist the defendant. Had it not given the extensions and the defendant failed to close on July 24, 2023 it would have received interest from July 24, 2023.

[27] As well, the plaintiff references the amendment agreement which contained the following provisions in respect of the extension of the closing date.

> (i) All adjustments, together with all utility charges for utility use and any account changes, are to remain as of the original closing date;
>
> (ii) In the event the transaction is not completed on the amended closing date, no further extensions will be granted and out client will hold your client responsible for any and all damages it occasions due to your clients' default;

(iii) All other terms of the Agreement of Purchase and Sale are to remain the same and time is to continue to be of the essence;

[28] I disagree that there are any circumstances that require the court, as a matter of fairness, to calculate interest on the purchase price from the original closing date. There is no falling market here. I disagree that either *100 Main Street* or *Fleisher* mean that broad principles of fairness undermine the general principle that parties are free to contract as they wish.

[29] The parties expressly set out their agreement as to the terms of the extension in their amendment agreement. They did not set out any agreement that in the event the defendant failed to close the extended closing date, interest would be payable from the original closing date.

[30] The provisions cited by the plaintiff cannot be read to mean this. These provisions do not even mention interest. Objectively, the parties did not intend interest to apply from the original closing date based upon the words they used. It was not within their reasonable expectations either because the plaintiff sought and obtained agreements from the defendant in exchange for the extension and the amendments it sought did not include any such provision. There is also no basis to imply such a term.

[31] The argument advanced here would mean that everytime a vendor agrees to an extension they could obtain damages based upon the original closing date, arguing fairness, without negotiating any such express agreement from the purchaser. The vendor is always able to seek such a term as part of such extension which the vendor is always able to seek as part of the terms of any extension. If a vendor fails to negotiate such a term, it is difficult to appreciate how it is unfair to calculate damages from the date of the extended closing date, which is how damages are usually calculated. A vendor who will seek this should specifically negotiate it.

[32] Therefore, interest on the original purchase price and adjustments minus the deposit are to be calculated from the date of the failed closing of October 10, 2023.

[33] Quite fairly to the purchaser, the plaintiff only claims interest on the commission and legal fees from the date of the closing of the resale on December 21, 2023, because that is when the plaintiff incurred those costs.

The Overall Damages Calculation

[34] Therefore, I calculate the damages as follows:

- Original Purchase Price: $1,176,490
- Add Extras: $15,461
- Deduct amount paid for deposits and extras: $144,820

- Add Solicitor Fees: $2,825
- Add Commission on Resale: $42,749.55
- Deduct the resale price of $925,990
- Total: $166,715.55

[35] To this I must add the 20 % interest calculated on the basis I have set out above which is $89,949.65 for a total of $256,665.20.

Costs

[36] The plaintiff requests costs on a partial indemnity basis in the amount of $8,684.73 which I find is fair and reasonable and which I grant.

Post Judgment Interest

[37] The contract rate of 20 % shall apply post judgment.

Papageorgiou

Released: June 19, 2025

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– and –

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REASONS FOR JUDGMENT

Papageorgiou J.

Released: June 19, 2025