CITATION: 2023 ONSC 3391
COURT FILE NO.: CV-22-090
DATE: 2023 06 05

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
BLUEROBIN INC.	)	
Applicant	)	Errol Treslan, for the applicant
– and –	)	
ABRAHAM KILIAN and KILIAN HOLDINGS INC.	)	Abraham Kilian (Abrie), on his own behalf and on behalf of Kilian Holdings Inc.
Respondents	)	
	)	**HEARD:** February 8, 2023

REASONS FOR JUDGMENT

RAHMAN, J.

1. Introduction

[1] The respondents entered into an agreement of purchase and sale (APS) with the applicant to buy a commercial property located at 548 Princess Street, Georgian Bluffs. The purchase price was $1,575,000. The respondents provided a deposit of $100,000 to the applicant's lawyer in trust. Two days before the sale was to close, the respondents' lawyer told the applicant's lawyer that his clients might need to extend the closing date by a few days. The day before the closing date, the respondents' lawyer confirmed that his clients did not have their financing in place. He asked the applicant's lawyer whether the closing could be extended into the following week. Between March 31 and April 11, 2022, the parties exchanged correspondence attempting to negotiate an extension. The applicant did not agree to an extension. On April 11, 2022, the applicant notified the respondents that it was re-listing the property and that it would pursue any available remedies

against the respondents. The applicant ultimately found another buyer and re-sold the property for $35,000 less than the price it had negotiated with the respondents.

[2] The applicant applies for a declaration that the respondents breached the APS by failing to close the transaction according to the APS. It seeks an order forfeiting the deposit to the applicant. The applicant says that although there were negotiations between the applicant and respondents, there was never an agreement to extend the closing date. Moreover, the fact that the agreement of purchase and sale does not explicitly provide for forfeiture of the deposit does not matter. The applicant argues that the law entitles it to forfeiture of the whole deposit and that it does not have to show that it suffered damages.

[3] The respondents oppose the application for forfeiture. The respondents argue that the APS does not provide for forfeiture of the deposit, and so the respondents never agreed that would be a consequence of their failure to close the sale. The respondents also assert that there was an agreement to extend the closing date. The respondents argue that they accepted an offer that the applicant made to extend the closing date. The respondents contend that the applicant never retracted that offer, so the respondents' acceptance of it created an agreement for an extension. The respondents also made several arguments that are best described as organized pseudo-legal commercial arguments.[1] Among those arguments, the respondents argue that they have a claim for trespass against the applicant that ought to have been heard instead of this application.

[4] For the reasons that follow, the application is granted. There was no agreement between the parties to extend the closing date. The respondents did not accept the applicant's offer in time for it to be binding. The fact that the APS did not provide for forfeiture of the deposit is of no moment. The law is clear. A seller is entitled to keep the deposit if the buyer defaults, subject to the buyer establishing that it is entitled to relief from forfeiture. There is no basis to order relief from forfeiture here because the amount of forfeiture is not disproportionate to the damages suffered, nor would it be unconscionable for the applicant to retain the deposit.

[1] This term originated in the decision of *Meads v. Meads*, 2012 ABQB 571.

2. Facts

[5] Though the respondents maintain that an agreement was reached regarding an extension, there is no real dispute about the facts. As I will explain, the real dispute is the legal effect of the respondents' purported acceptance of what they say was a valid and still open offer to extend.

2.1. The agreement of purchase and sale

[6] The applicant originally entered into the APS with the respondent, Abraham Kilian (who prefers to be called Abrie), and a yet to be incorporated holding company, for the property at 548 Princess Street in the Municipality of Georgian Bluffs on December 3, 2021. The closing date for the transaction was January 31, 2022. The agreement was conditional on financing until December 23, 2021. The APS required the respondents to provide a $100,000 deposit. However, because the APS was conditional on the respondents obtaining financing, the deposit was not provided immediately. On December 23, 2021, the parties amended the APS to extend the date for the respondents to obtain financing to January 12, 2022. The closing date for the transaction was also extended to March 31, 2022. Because the deposit had still not been paid, the parties agreed that the respondent would pay a $5,000 non-refundable payment if the respondent could not fulfil the financing condition.

[7] On January 12, 2022, Abrie delivered a notice of fulfillment of the financing condition, making the agreement final and binding. The respondents delivered the $100,000 deposit in two installments of $50,000 each on January 12 and 13, 2022.

[8] The parties made a few other amendments to the APS after January 12, none of which are consequential to this application.

2.2. The respondents request an extension

[9] On March 29, 2022, the respondents' lawyer sent the applicant's lawyer the following email giving the applicant a "heads up" that his clients may need to request a short extension of the closing:

> The purchasers are getting some funding for a commercial mortgage from RBC. I have been chasing them but as of now, I still don't have instructions. Just a heads up, I may need to request a few days extension of closing.

[10] The next day, March 30, 2022, the respondents' lawyer followed up with a second email. In it he explained that his clients' financing had been delayed. He asked the applicant's lawyer whether it would be possible to extend the closing to "early next week." The respondents lawyer explained that as soon financing was in place, "we can move the closing forward."

[11] The applicant's lawyer responded to this request for an extension on March 31, the day the transaction was to have closed. The applicant was standing firm on the closing date. The applicant's lawyer's email made clear that if the respondents did not complete the transaction that day, the applicant would consider the respondents to be in default and would re-list the property.

[12] The applicant's position eventually eased somewhat. Over the course of the following 11 days, the parties exchanged email correspondence negotiating the terms of an extension of the closing date.

2.3. The respondents' attempt to negotiate an extension

[13] Between April 1 and April 11, 2022, the parties discussed various offers to extend the closing date.

[14] On April 1, 2022, the respondents' lawyer wrote back to the applicant and her lawyer. He attached a letter written by Abrie to Lynn Robinson, an officer and director of the applicant. In the letter, Abrie asked to be able to sit down with Ms Robinson to discuss an "amicable solution."

[15] On April 1, the applicant's lawyer offered an extension to April 30, 2022 with various terms attached, including paying rent for April. The offer required the respondents' written confirmation that day, and delivery of cheques described in the offer by Monday, April 4. The respondents did not respond by the deadline set out in the April 1 offer.

[16] At 3:51 pm on April 4, the respondents' lawyer emailed the applicant's lawyers explaining that his client had delivered four cheques to him and that "the purchaser will accept the vendor's offer of Friday last, which I know has been replaced by a new offer today,[2] if it could be revisited" [emphasis added]. The applicant's lawyer responded to the respondents' lawyer the same day at

[2] Neither party filed any correspondence explaining what this new offer was.

4:32 pm. The email made clear that the applicant was not necessarily agreeing to the extension. The applicant's lawyer prefaced the email with the following caveat: "Before I ask my client whether she will agree to the extension I want to make absolutely clear what the extension terms are." The email then re-stated the terms of the earlier April 1 offer and asked if the respondents would accept the terms. The respondents' lawyer explained he would discuss the offer with his clients. He then forwarded the email to his clients.

[17] On the morning of April 5, the applicant's lawyer emailed the respondent's lawyer explaining that his client would agree to an extension but on different terms than those which had been proposed on April 1. The new extension offer required the respondents to pay a $2,500 extension fee by 5:00 pm that day and it required the transaction to close by noon on April 8.

[18] The respondents' lawyer emailed the applicant's lawyer back on April 6. He explained that funding from the bank would be available "in a week or two." He proposed a different resolution which would include partial payment and a vendor take-back mortgage. He also provided an example of how the resolution would work, but clarified that his example did not constitute an offer:

> Would your client consider a partial payment, close the deal and hold a VTB for a month at least or whatever time frame suits the vendor? Certainly a good interest rate would generate a decent return to the vendor, better than what the vendor could invest for and expect. That would allow the purchaser time to get BC straightened out. For example (this is not an offer at this time from the purchaser), if the statement of adjustments has $1,474,845 due on closing, and if the purchasers paid $100,000 down, interest per month at 10% on the balance would be $11,457 per month roughly. That is a good return. Just a thought.

[19] The applicant's lawyer responded to the respondents' lawyer explaining his understanding of what the respondents were willing to accept, based on a realtor's email. The applicant set out the proposal and added an extra condition requiring a per diem payment until the transaction closed. The entirety of his email is set out below:

> Andrew, I am informed by an email from the realtor that your clients are prepared to agree as follows: 1. The existing deposit to be released to my client on Friday and to be retained by my client no matter what; 2. The transaction to close on or prior to April 29, 2022 and provided it closes, the deposit to be applied on account of the original purchase price; 3. To the extent that my client has received any April rent, that remains my client's.

> The additional requirement that my client has is that she receive a per diem return on the money that she otherwise would have in hand if the deal had closed. My client has calculated this amount based on the rate of return you have suggested to be $400 per day from this coming Friday until closing to be added as an adjustment on completion. Thus if the deal closes your client is only paying the per diem in addition to what your client would otherwise have paid. That is extremely fair. Please review this with your client and indicate whether there is agreement to these terms. Regards, Rob.

[20] The respondents' lawyer responded to this email, asking if the $400 per day payment was in lieu of the originally proposed $2,500 payment. The applicant's lawyer responded that it was.

[21] The respondents' lawyer emailed back on April 7 explaining that his clients "are working with BC to ensure that all the issues have been sorted out today." He said that he would get back to applicant's counsel.

[22] The next day, applicant's counsel's office followed up with the respondents' lawyer and asked if the respondent would be sending anything that day. The respondents' lawyer wrote back explaining that the respondents would not hear back from the bank until Monday, April 11. He asked if the applicant would be willing to keep the extension offer open until then. The court was not provided with any correspondence between this email of April 8 and the applicant's letter on April 11, described below.

[23] On April 11, 2022, the applicant's litigation counsel wrote to the respondent's lawyer explaining that because the transaction had not closed, the applicant would be re-listing the property.

[24] On April 14, 2022, the applicant entered into an APS with a new purchaser. The transaction was set to close on April 22.

[25] On April 19, 2022, the respondents' lawyer emailed the applicant's lawyer saying that his clients "will be in funds and able to close by April 27 2022." He asked if the applicant would extend the closing date to accommodate the respondents. The applicant's lawyer's office responded to this request on April 22. They explained that the property had already been re-listed and sold. They also explained that they took the position that the respondents' deposit should be forfeited and that they would be releasing the deposit to their client.

[26] On April 25, 2022, Abrie wrote to the applicant's lawyer's office in response to the April 22 letter. Abrie alleged that the applicant was "in breach of the agreement," and that if the funds were released to the applicant, "you will be in breach of trust and will be named in litigation to follow."

[27] The applicant then initiated these proceedings, causing this application to be issued on June 22, 2022.

3. Analysis

3.1. The respondents' position on the application

[28] Before explaining my reasons for granting the application, I will explain the unusual way the hearing unfolded in court.

[29] Th individual respondent, Abrie, made submissions on his own behalf and on behalf of his holding company.[3] At the outset of the hearing, Abrie filed a sheaf of documents that included his legal claim for trespass, his submissions, and several exhibits and "articles." I permitted him to file these hard copies in court because they had not been accepted by the trial office. Many of those documents were titled "notice of trespass with statements of claim attached." The "articles" and exhibits were more relevant to the hearing, although many were already part of the applicant's record.

[30] As mentioned above, much of Abrie's oral argument was focussed on what has come to be known as organized pseudo-legal commercial arguments (OPCA). I refer to them as OPCA because of the language used and the remedies claimed within the documents. The allegations of trespass and the references to appearances before "the presiding magistrate of the abrie kilian court at the court of owen sound" are examples of OPCA language. I set out the text of a portion of the "claim" below:

> i, claim that the woman, Lynn Robinson, the man Errol Treslan, the man Rob Robinson and the woman Jill Sampson, after being noticed, do and does knowingly trespass upon

[3] It is unclear to me whether Abrie had previously been given leave to represent the company pursuant to Rule 15.01(2) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. However, since it is apparent that the corporate respondent is a holding company that was created for the real estate transaction, if leave has not been granted, I grant leave after the fact.

> i, i claim that the trespass comes by way of theft: administrates property without right or consent, and this trespasses do and does cause financial loss, loss of property, loss of enjoyment and stress.

[31] As I explained to Abrie during the hearing, the arguments made in his "claim" are not recognized by Canadian courts, and making such arguments were unhelpful to him, especially if he had a viable legal argument to oppose the application. Abrie did not take the court's direction. As a result, the hearing itself did not go smoothly.

[32] Abrie insisted on presenting his submissions first because he said he had a claim in trespass that he wanted to pursue. He even refused my initial request and subsequent direction to sit down to permit applicant's counsel to make submissions. He insisted that any orders I made (such as directing him to be seated) had to be in writing and that he would charge $100 for each such order and $1 per minute. He eventually agreed to sit down. After applicant's counsel made his submissions, I was eventually able to draw out the two legal arguments on Abrie's behalf that I deal with below. The court's concern was that if Abrie had a proper legal defence, it would get lost in the gibberish submissions that he wanted the court to focus on. I should add here that, apart from initially not following the court's direction, Abrie was respectful in his dealings with the court and opposing counsel, and I accept the possibility that he may sincerely believe his version of the law, even if he is mistaken about it. The arguments that I have set out in the overview, and that I will set out below, were the only two legal arguments that Abrie made. And as I will set out below, I will also deal with the question of whether the respondents are entitled to relief against forfeiture. That issue was not raised during the hearing but was one which Abrie could have raised to oppose forfeiture.

3.2. The deposit is subject to forfeiture

[33] The law is clear that a seller is entitled to keep a deposit if the buyer defaults on its obligation to perform an agreement of purchase and sale. That entitlement exists even if the contract does not explicitly say that the deposit will be forfeited if the buyer defaults. The reason is due to the legal nature of the deposits. Deposits have an ancient origin. A deposit is not meant to simply be a way of compensating a seller for any damages that may arise from a buyer's failure to close a sale. Rather, it is meant to act as an incentive to perform the contract. This is apparent

from the fact that a seller may keep a deposit even if it suffers no damages. The Court of Appeal set out the foregoing principles in *Benedetto v. 2453912 Ontario Inc.*[4]:

> [5] Where a payer (usually the purchaser) gives a vendor a deposit to secure the performance of a contract for purchase and sale of real estate, the deposit is forfeit if the purchaser refuses to close the transaction, unless the parties bargained to the contrary: see *Howe v. Smith* (1884), 27 Ch. D. 89 (C.A.); *March Bothers & Wells v. Banton* (1911), 1911 CanLII 74 (SCC), 45 S.C.R. 338. In *Howe v. Smith*, Fry L.J. stated at p. 101:
>
> > Money paid as a deposit must, I conceive, be paid on some terms implied or expressed. In this case no terms are expressed and we must therefore inquire what terms are to be implied. The terms most naturally to be implied appear to me in the case of money paid on the signing of a contract to be that in the event of the contract being performed it shall be brought into account, but if the contract is not performed by the payer it shall remain the property of the payee. It is not merely a part payment, but is then also an earnest to bind the bargain so entered into, and creates by the fear of its forfeiture a motive in the payer to perform the rest of the contract.
>
> [6] The deposit stands as security for the purchaser's performance of the contract. The prospect of its forfeiture provides an incentive for the purchaser to complete the purchase. Should the purchaser not complete, the forfeiture of the deposit compensates the vendor for lost opportunity in having taken the property off the market in the interim, as well as the loss in bargaining power resulting from the vendor having revealed to the market the price at which the vendor had been willing to sell: *H.W. Liebig Co. v. Leading Investments Ltd.*, 1986 CanLII 45 (SCC), [1986] 1 S.C.R. 70, at pp. 86-87.
>
> [7] The motion judge provided a helpful summary of the law: a deposit is not part of the contract of purchase and sale, but "stands on its own as an 'ancient invention of the law designed to motivate contracting parties to carry through with their bargains', 'something which binds the contract and guarantees its performance', and is an 'earnest to bind the bargain so entered into, and creates by the fear of its forfeiture a motive in the payer to perform the rest of the contract'": see *Tang v. Zhang*, 2013 BCCA 52, 41 B.C.L.R. (5th) 69; *Comonsents Inc. v. Hetherington Welch Design Ltd.*, 2006 CanLII 33779 (Ont. S.C.); *Howe v. Smith*.

[34] Abrie makes two arguments opposing forfeiture of the deposit. First, he argues that the APS did not state that the deposit would be forfeited if the deal did not close. Second, Abrie argues that the applicant made an offer on April 1 that the respondents accepted on April 4. Abrie argues that the April 1 offer was never "rescinded," and therefore his acceptance of it through his lawyer on April 4 was binding.

[4] *Benedetto v. 2453912 Ontario Inc.*, 2019 ONCA 149, at paras 5-7.

[35] As the passages cited above from *Benedetto* make clear, a deposit may be forfeited even where the contract does not explicitly provide for it to be forfeited. It is implied that if the contract is not performed the deposit will be forfeited to the vendor. As explained in *Benedetto* above (at para. 7), that is because "a deposit is not part of the contract of purchase and sale, but stands on its own as an 'ancient invention of the law designed to motivate contracting parties to carry through with their bargains.'" This forfeiture of a deposit under an APS is subject only to the principle of relief from forfeiture discussed below.

[36] As for Abrie's second argument respecting his acceptance of the April 1 extension, there are two reasons it must fail. First, the offer was not accepted according to its terms. The April 1 offer made clear that it had to be accepted by "written confirmation" that day. There is no evidence that any such confirmation was sent on April 1. Second, although neither party included a revised offer in their materials, the April 4 email from the respondents' lawyer makes clear that, as of April 4, the applicant had revised its offer of April 1. The respondents' lawyer was clearly asking the applicant's lawyer for the indulgence of allowing his clients to accept the earlier offer when he wrote, "the purchaser will accept the vendor's offer of Friday last, which I know has been replaced by a new offer today, if it could be revisited." It is clear from this correspondence that the April 1 offer had not been accepted according to its terms, and had been replaced by different terms.

[37] The bottom line is that the parties had ongoing discussions about extending the closing date. But they reached no agreement. The respondents were the ones seeking to vary the closing date, an essential term of the contract. The applicant never accepted any of the respondents' offers to vary the closing date. Therefore, the respondents were required to close on March 31, 2022, as the contract required. They did not, so they must forfeit the deposit subject to the equitable remedy of relief from forfeiture. I turn to that issue next.

3.3. Relief from forfeiture

[38] Section 98 of the *Courts of Justice Act*[5] provides that "[a] court may grant relief against penalties and forfeitures, on such terms as to compensation or otherwise as are considered just."

[5] *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 98.

In determining whether a party should be granted relief against forfeiture, a court must consider the following two-part test from *Stockloser v. Johnson*:[6]

> (1) whether the forfeited deposit was out of all proportion to the damages suffered; and
>
> (2) whether it would be unconscionable for the seller to retain the deposit.

[39] Regarding the first step of the test, I cannot find that the deposit was out of proportion to the damages suffered. This is not a case where the applicant suffered no damages. The applicant ended up selling the property to the new purchaser for $35,000 less than it had originally agreed to sell it to the respondents. The amount of the deposit is not so out of proportion to this loss that it should deprive the applicant of forfeiture of the deposit.

[40] Nor can I find that forfeiture in this case is unconscionable. In *Redstone Enterprises Ltd. v. Simple Technology Inc*.[7], the Court of Appeal observed that "the finding of unconscionability must be an exceptional one, strongly compelled on the facts of the case"[8] and that "the analysis of unconscionability requires the court to step back and consider the full commercial context."[9] As the Court stated, a court will consider several factors in deciding whether forfeiture is unconscionable:

> The list of the indicia of unconscionability is never closed, especially since they are context-specific. But the cases suggest several useful factors such as inequality of bargaining power, a substantially unfair bargain, the relative sophistication of the parties, the existence of *bona fide* negotiations, the nature of the relationship between the parties, the gravity of the breach and the conduct of the parties.[10]

[41] First, I note that in many cases where vendors suffered no damages, or did not prove damages, courts have found that forfeiture was not unconscionable. The applicant here did suffer damages. Second, the amount of the deposit in this case was not out of proportion to the purchase price. It represented less than 10% of the value of the transaction. Forfeiture of larger deposits have been found not to be unconscionable.[11] Third, there is nothing to suggest that the respondents

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[6] *Stockloser v. Johnson*, [1954] 1 All. E.R. 630 (C.A.).
[7] *Redstone Enterprises Ltd. v. Simple Technology Inc.*, 2017 ONCA 282.
[8] *Redstone*, at para 25.
[9] *Redstone*, at para 18.
[10] *Redstone*, at para 30.
[11] See for example *Wang v. 2426483 Ontario Limited*, 2020 ONSC 3368, at para 40; *Nawara v. Riverstone*, 2019 ONSC 111, at para 26.

were unsophisticated, or that there was inequality of bargaining power here. The respondent (Abrie) was also represented by counsel at the time the APS was signed. Fourth, the APS contained a financing condition specifically to permit the respondents time to obtain financing. The applicant agreed to extend the date. Yet the respondents ultimately could not close because their financing was not in place by March 31. Finally, the applicant did agree to try to negotiate an extension of the closing the date with the respondents. And it negotiated for several days past the original closing date. It had no obligation to do so. The respondents' responses to the applicant's offers were not timely. The applicant acted reasonably. In the circumstances, there is nothing unconscionable about the applicant retaining the deposit.

4. Conclusion and orders

[42] The application is granted. An order will issue declaring that the respondents breached the December 3, 2021 agreement of purchase and sale (as amended) with the applicant by failing to close the transaction on March 31, 2022. An order will issue forfeiting the $100,000 deposit to the applicant.

[43] The applicant is entitled to its costs of the application. The applicant seeks its costs on a partial indemnity basis in the amount of $6,772 inclusive. Given the nature of the application, counsel's level of experience, and the amount involved, I find that the amount the applicant requests is reasonable. I order that the respondents shall pay the applicant costs in the amount of $6,772 inclusive of HST and disbursements. The individual and corporate respondents are jointly and severally liable for costs, which are payable forthwith.

Rahman, J.

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