

CITATION: Gwyer v. Hymers, 2023 ONSC 3225
COURT FILE NO.: CV-22-675
DATE: 2023/05/30

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
David Joel Gwyer and Trisha Lynne Gwyer)
) Jarvis K. Postnikoff, for the Plaintiffs
Plaintiffs)
)
– and –)
)
Ryan S. A. Hymers and Melissa P. Hymers) Jennifer Vrancic, for the Defendants
)
Defendants)
)
)
) **HEARD:** April 17, 2023

2023 ONSC 3225 (CanLII)

THE HONOURABLE JUSTICE D. J. GORDON

REASONS FOR DECISION

[1] The parties entered into an agreement of purchase and sale regarding certain residential property in the Region of Waterloo on February 10, 2022. The transaction was to be completed on May 31, 2022. Such did not occur. The vendors subsequently commenced this action against the purchasers, seeking a damage award for breach of contract. The statement of claim also named the real estate brokerage firm regarding the deposit; however, such claim was discontinued when the deposit funds were paid over to the plaintiffs solicitor, in trust.

[2] In their notice of motion, the plaintiffs seek summary judgment against the defendants for:

- a) \$553,699.92, said to represent the difference between the contract price and sale price of \$525,000.00 plus ancillary expense and pre-judgment interest;
- b) \$50,000.00, being the deposit;
- c) post-judgment interest; and
- d) costs.

[3] Liability is admitted. The only issues in dispute pertain to damages and whether this is an appropriate case for summary judgment.

Factual Background

[4] The plaintiffs listed their property for sale with Right at Home Realty on February 10, 2022, at \$1,299,999.00. According to the listing agreement, an open house was to occur on February 13, 2022 and offers would be reviewed on February 17, 2022. At the time, the real estate market was active, sale prices were escalating, and multiple offers were being presented, often in excess of the listing price.

[5] Several hours after the listing was posted to the multiple listing system, the defendants, through their real estate agent, presented a pre-emptive offer of \$1,650,000.00 with a closing date of June 30, 2022. The plaintiffs countered at \$1,725,000.00 and closing on May 31, 2022. The defendants accepted those terms. A binding contract was established. The deposit of \$50,000.00 was delivered to the listing broker.

[6] The defendants were not in a position to complete the transaction as scheduled. On May 19, 2022 their solicitor delivered an email to the plaintiffs solicitor requesting an extension of the

closing date to June 16, 2022. Negotiations followed. The parties were unable to reach an agreement. In result, the transaction was not completed.

[7] The defendants received a mortgage commitment on June 3, 2022 that they say would have allowed the transaction to close; however, this commitment was not communicated to the plaintiffs. Nor did the defendants make any attempt to revive the agreement.

[8] By the Spring of 2022, the residential real estate market was changing. Mortgage interest rates were increasing. Sale prices were declining.

[9] The plaintiffs re-listed their property at the original price of \$1,299,000.00. An offer to purchase was received on August 8, 2022 for \$1,075,000.00. The plaintiffs countered at \$1,200,000.00. The purchasers accepted. The transaction closed on September 9, 2022.

Litigation History

[10] The statement of claim was issued on June 24, 2022. By that date, the plaintiffs had re-listed the property, but it had not been sold. The plaintiffs claimed entitlement to the deposit of \$50,000.00, damages for breach of contract of \$1,000,000.00, interest and costs.

[11] The statement of defence was delivered on August 18, 2022. The defendants acknowledged that the plaintiffs had been ready, willing, and able to complete the transaction and that they were unable to close on May 31, 2022. The defendants refer to the negotiations to extend closing, saying they were willing to accept the plaintiff's terms except with respect to the further deposit being non-refundable. The defendants allege the plaintiffs unreasonably rejected extension terms resulting in the failure of completion. They also allege the plaintiffs

failed to mitigate damages, in particular by not agreeing to extend closing that would have resulted in a sale at the higher market price and no loss. In result, the defendants requested the action be dismissed with costs.

[12] Plaintiffs counsel served a motion for summary judgment with a placeholder return date of December 31, 2022. Also served was the affidavit of David Joel Gwyer, sworn November 22, 2022. In response, defendants counsel served an affidavit of Ryan S. A. Hymers, sworn January 13, 2023. Plaintiffs counsel served a reply affidavit of David Joel Gwyer, sworn February 2, 2023.

[13] Cross-Examination of Mr. Hymers on his affidavit took place on February 27, 2023. Counsel for the defendants did not seek to cross-examine Mr. Gwyer.

[14] A hearing date was subsequently arranged for April 17, 2023 as a long motion.

Issues

[15] The issues raised involve the assessment of damages, mitigation and whether this is an appropriate case for summary judgment or whether a trial is required

Positions of the Parties – Briefly Stated

i) Plaintiffs

[16] On behalf of the plaintiffs, Mr. Postnikoff submits this is an appropriate case for summary judgment. As liability is admitted by the defendants, he says the damages can be assessed by reference to the evidence, essentially documentary in nature. Damages are said to be the

difference between the contract price and the subsequent sale price together with ancillary expense and pre-judgment interest.

[17] Mr. Postikoff argues there was no obligation to extend the closing date and, regardless, the plaintiffs made numerous attempts to accommodate the defendants request, without success. He further submits there was no evidence to suggest the defendants would have been in funds and able to complete the transaction had the closing been extended.

[18] Lastly, Mr. Postikoff argues the subsequent sale price may be used to calculate damages as there is no obligation to provide opinion evidence as to market value in the circumstances of this case. He also relies on the cross-examination of Mr. Hymers and says the defendants complaint was restricted to the failure to extend closing.

ii) Defendants

[19] On behalf of the defendants, Ms. Vrancic submits there is an inadequate evidentiary record on which to assess damages and, hence, a trial is required.

[20] With respect to damages, Ms. Vrancic argues such must be determined on the basis of a finding as to the highest price obtainable within a reasonable time period after the contractual date for closing following reasonable efforts to sell the property. She says the evidence does not address these requirements.

[21] Ms. Vrancic also identified what are described as errors in the ancillary expenses and pre-judgement interest calculations, or a lack of evidentiary foundation.

[22] As to mitigation, Ms. Vrancic focused on the failure to extend closing. While acknowledging there was no contractual obligation to extend, she submits the plaintiffs acted unreasonably. In this regard, Ms. Vrancic referred to the dramatic decline in the real estate market. An extension, she said, would have allowed the transaction to be completed with no loss to the plaintiffs and minimal risk it would not have been completed.

Discussion and Analysis

i) Summary Judgement

[23] Pursuant to Rule 24.02 (2), *Rules of Civil Procedure*, the court shall grant summary judgement if it is satisfied there is no genuine issue requiring a trial. In this case, the onus is on the plaintiff. The burden of proof is a balance of probabilities.

[24] The principles pertaining to summary judgement are well known since *Hyrniak v. Mauldin*, 2014 SCC 7. There will be no genuine issue requiring a trial if the summary judgement process provides the motions judge the evidence to fairly and justly adjudicate the dispute and in a timely, affordable, and proportionate procedure.

[25] If the plaintiffs discharge their evidentiary burden, the onus shifts to the defendants to prove there is genuine issue requiring a trial.

[26] Despite changes to summary judgement resulting from *Hyrniak*, the evidentiary requirements in Rule 24.02 remain the same. Parties must “put their best foot forward”. They are prohibited from saying “more and better evidence will (or may) be available at trial”. The court is entitled to assume the record contains all of the evidence the parties would present at

trial. See: *Pizza Pizza Ltd. v. Gillespie* (1990), 75 O.R. (2d) 225 (Ont. Gen. Div.); *Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 164 D. L. R. (4th) 257 (Ont. C.A.); *New Solutions Extrusion Corporation v. Gauthier*, 2010 ONSC 1037; and *Nine-North Logistics Inc. v. Atkinson*, 2014 ONSC 7243.

ii) Mitigation

[27] There is a connection between the assessment of damages and mitigation; however, I choose to address mitigation first as the only complaint raised by the defendants on this issue was the failure to extend the closing date. Any complaint regarding the sale price will be considered in the assessment of damages.

[28] The plaintiffs had a duty to mitigate their loss by taking reasonable steps to avoid or limit their loss. See: *Michaels v. Red Deer College*, [1976] 2 S.C.R. 324 (S.C.C.), at p. 231; *Southcott Estates Inc. v. Toronto Catholic District School Board*, 2012 SCC 51, at para. 24; *Saramia Crescent General Partners Ince. V. Delco Wire and Cable Limited*, 2018 ONCA 519, at para. 80; and *Madison Homes v. Yiman Shi*, 2020 ONSC 7810, at para, 13.

[29] Numerous emails were exchanged between the real estate lawyers from May 19, 2022 to May 31, 2022. On June 1, 2022, the plaintiffs solicitor delivered a further email with a proposal to revive the agreement. There were also communications between the real estate agents. While proposals were exchanged, the parties were unable to reach an agreement to extend closing.

[30] The primary dispute pertained to the further deposit and whether such would be non-refundable or held in trust. Communications between solicitors, according to the evidence, was

conducted only by email. It is difficult to understand why there were no telephone discussions. Further efforts might have resolved the issue. It is concerning as the market was in decline.

[31] The agreement was not conditional by the defendants on financing. They owned their residence and an investment property. No evidence was presented as to their financial circumstances. The defendants consulted their mortgage broker at some point to address financing for this transaction. They were aware of the need to sell both existing properties. An agreement was entered into to sell the investment property on May 4, 2022 for \$845,000.00, closing May 30, 2022. The residence was not listed for sale until May 10, 2022. An agreement was entered into to sell it on May 30, 2022 for \$1,150,000.00, closing July 27, 2022. No explanation was provided for the delay in attempting to sell these properties.

[32] The defendants received a mortgage commitment from Fisgard Capital Corporation on June 2, 2022. Although received after the closing date, it was not communicated to the plaintiffs. Nor did the defendants make any attempt to revive the agreement with the plaintiffs.

[33] The mortgage commitment was for \$1,275,000.00 and would have been secured against the property being purchased and the defendants existing residence, including a term to pay down the mortgage on the sale of that residence.

[34] Mr. Hymers said the mortgage commitment would have put them in a position to close the transaction with the plaintiffs, had closing been extended. However, he does not provide financial calculations to support that statement. As well, the mortgage commitment was conditional, including a requirement for an appraisal of the property being purchased with a

stated value of \$1,725,000.00. Clearly, by June 2022 this amount no longer represented the market value of that property as all parties made reference to a decline in real estate prices.

[35] The defendants do not reveal whether the sale of their investment property and of their existing residence were completed. There is no evidence to demonstrate the defendants had the financial ability to complete the transaction with the plaintiffs at any point in time prior to the subsequent sale.

[36] In result, I am not persuaded the defendants could have completed the transaction had the requested extension been granted. Indeed, I conclude they could not.

[37] Regardless, there was no obligation on the plaintiffs to extend the closing date. See: *McKnight v. Morrison*, 2019 ONSC 552, at para. 56. This is a matter of contract and, in the absence of any terms permitting an extension, the defendants position regarding the failure to extend fails.

iii) Damages

[38] The plaintiffs are entitled to be compensated for their loss of bargain, namely, to be put in the position they would have been had the agreement with the defendants been completed on May 31, 2022. See: *100 Main Street East Ltd. v. W. B. Sullivan Construction Ltd.*, (1978), 20 O. R. (2d) 401 (Ont. C. A.), at para. 55; *Bang v. Sebastian*, 2018 ONSC 6226, at para. 40, affidavit 2019 ONCA 501; and *Madison Homes*, supra, at para. 21.

[39] In *100 Main Street East*, at para 73, Morden J. A. made reference to damages being calculated on the basis of a finding as to the highest price obtainable within a reasonable time

period after reasonable efforts to sell the property. At para. 81, he further indicated the measure of damages was the “difference between the contract price and the market price”, adding that the plaintiff was required to adduce evidence of “...the market price or resale price upon which he relies in establishing the loss of bargain”.

[40] These comments have been interpreted differently in subsequent decisions. For example, in *Holst v Singh*, 2018 ONSC 4220, at paras. 11-13, the motions judge directed a trial on the issue of damages as the plaintiff had only provided evidence as to the resale price and directing opinion evidence would be required as to the market value of the property. The defendants rely on this decision. However, in *Bang*, supra, at para. 46, the motions judge rejected that approach, saying there was no obligation for the plaintiffs to provide opinion evidence as the resale price was evidence of market value.

[41] The issue has now been clarified in *Arista Homes (Richmond Hill) Inc, v. Rahnama*, 2022 ONCA 759, at para. 9. With reference to *100 Main Street East* and other decisions, the panel indicated the difference between the contract price and the resale price will be used to calculate damages where the vendor takes reasonable steps to sell the property in an arms length sale to a third party and there is nothing improvident in the sale. No opinion evidence would be required in those circumstances.

[42] The plaintiffs evidence is relatively straightforward. They re-listed the property for sale when the transaction with the defendants was not completed on May 31, 2022. While the date of this event was not provided, such would have occurred prior to issuing the statement of claim on June 24, 2022, given the refence in this pleading at paras 10 and 11. Subsequently,

the plaintiffs received an offer to purchase on August 8, 2022. An agreement was negotiated at a sale price of \$1,200,000.00, closing September 9, 2022.

[43] While not raised in their evidence, statement of defence or factum, other than in a general manner, the position of the defendants advanced in submissions addressed the lack of evidence regarding market value, marketing efforts and interest from prospective purchasers. The plaintiffs took the opposing view, saying if there was any concern a mini-trial could be directed under Rule 20.04(2.2).

[44] I conclude there is no need for further evidence for the following reasons:

- a) the plaintiffs re-listed the property for sale promptly;
- b) an offer to purchase was received within a reasonable period of time;
- c) the decline in the real estate market and sale prices was well known at the time, and relied on by the defendants regarding the failure to extend closing;
- d) no evidence was presented by the defendants on this issue;
- e) when invited to comment on mitigation and damages at his cross-examination, Mr. Hymers only made reference to the failure to extend closing; and
- f) the defendants counsel chose not to cross-examine Mr. Gwyer.

[45] In result, I conclude the plaintiffs made appropriate efforts to sell the property, such sale occurred within a reasonable period of time and that the ultimate sale price was determined by the market. Fair market value is defined as the price a vendor is willing to accept and a buyer

is willing to pay on the open market and in an arms length transaction. Such is the case here. There is no evidence of an improvident sale.

[46] The plaintiffs are entitled to be compensated for the difference between the contract price of \$1,725,000.00 and the subsequent sale price of \$1,200,000.00, namely \$525,000.00. I so find.

[47] The plaintiffs also sought payment of the \$50,000.00 deposit held in trust in addition to the above amount. In her factum, Ms. Vrancic objected, saying the deposit is to be credited to any damage award, relying on *Bang v. Sebastian*, supra, at paras. 69-70; and *Azzorello v. Shawqi*, 2019 ONCA 820, at paras. 53-53. In oral submissions, Mr. Postnikoff acknowledged the correctness of that submission. He asks the \$50,000.00, currently in his trust account be paid out to the plaintiffs as a credit on the damage award. I agree.

[48] The plaintiffs further seek compensation for ancillary expense and pre-judgment interest, initially claimed as follows:

- a) legal fees and disbursements on aborted transaction of \$1,224.92;
- b) re-staging costs of \$2,406.90;
- c) pro-rated property taxes until closing of \$1,747.64;
- d) additional utility expense of \$2,317.31;
- e) payment for lawn and pool expense of \$675.00;
- f) airfare from Winnipeg of \$3,637.33 (the plaintiffs had moved at some point);

- g) airport parking of \$290.00; and
- h) pre-judgment interest, described as the loss of ability to earn income and invest the sale proceeds, of \$16,400.82 and said to be calculated using the appropriate interest rates under the *Courts of Justice Act*, as at October 30, 2022.

[49] The total additional expenses and pre-judgment interest was calculated to be \$28,699.92.

[50] Ms. Vrancic raised objections regarding several items, namely:

- a) no justification provided for airfare and airport parking;
- b) utility costs include emails, not invoices for internet that is not a property utility expense;
- c) interac transfers provided regarding Mr. Cerovac and Mr. Dietrich without explanation or justification: and
- d) the pre-judgment interest rate used was incorrect.

[51] In response, Mr. Postnikoff clarified his clients claim as follows:

- a) utility expense is \$1,701.68 after deleting impugned items;
- b) interac transfers pertain to pool and lawn maintenance;
- c) airfare and airport parking were required for his clients to re-list the property and for the sale of same;

- d) pre-judgment interest was re-calculated at the correct rates for a total of \$14,202.71 as of April 17, 2023.

[52] The amended claim in this regard is now \$25,886.21.

[53] The plaintiffs are entitled to damages that reasonably flow from the defendants failure to complete the transaction on the scheduled date, including carrying costs and expenses to September 9, 2022. See: *Bang v. Sebastian*, supra, at paras. 48 and 53; and *Madison Homes v. Yiman Shi*, supra, at para. 24. They are also entitled to pre-judgment interest pursuant to the *Courts of Justice Act*.

[54] My assessment of these items is as follows:

- a) legal fees and disbursements of \$1,224.92 is approved;
- b) re-staging of \$2,406.90 is approved;
- c) property tax of \$1,747.64 is approved;
- d) revised utility of \$1,701.68 is approved;
- e) no invoices provided for lawn and pool maintenance provided, as required, and amount claimed is denied; and
- f) no explanation provided as to the necessity to attend in person to re-list and sell the property, such could have been accomplished electronically or by courier, and airfare and airport parking as claimed are denied.

[55] In result, I assess ancillary expenses at \$7,081.14 and, adding the loss of \$525,000.00, the plaintiffs are awarded judgment in the amount of \$532,081.14. Mr. Postnikoff is directed to pay the \$50,000.00 from his trust account to the plaintiffs, which amount is credited to the judgment, leaving \$482,081.14 owing by the defendants.

[56] The plaintiffs are also entitled to pre-judgment interest on \$1,200,000.00 from June 1, 2022 to September 9, 2022 and on \$482,081.14 from June 1, 2022 to the date hereof. Pre-judgment interest is not allowed on the \$50,000.00 deposit as such amount would or should have been placed in a special interest-bearing trust account with such interest payable to the plaintiffs. I anticipate counsel will be able to calculate pre-judgment interest.

[57] The plaintiffs are also entitled to post-judgment interest at the prescribed rate under the *Courts of Justice Act*.

Summary

[58] For these reasons, I conclude there is no genuine issue requiring a trial. The plaintiffs motion for summary judgment is granted and judgment is awarded in the amounts specified above.

[59] I expect counsel to resolve the issue of costs; failing which brief written submissions are to be exchanged and delivered to my chambers in Kitchener in the following manner:

- a) plaintiffs costs submissions within 30 days;
- b) defendants responding submissions within 15 days therefore;
- c) plaintiffs reply submissions, if any, within 7 days thereafter;

d) all cost submissions shall be forwarded to my attention by email, care of
Kitchener.SCJJA@ontario.ca.

[60] If no written submissions are received within the time periods specified, the issue of costs
will be considered settled and the file will be closed

D. J. Gordon, J

Released: May 30, 2023

CITATION: Gwyer v. Hymers, 2023 ONSC 3225
COURT FILE NO.: CV-22-675
DATE: 2023/05/30

ONTARIO
SUPERIOR COURT OF JUSTICE

David Joel Gwyer and Trisha Lynne Gwyer

– and –

Ryan S. A. Hymers and Melissa P. Hymers

REASONS FOR DECISION

D. J. Gordon, J

Released: May 30, 2023