

**CITATION:** Bowie v. Bhandari, 2023 ONSC 3129  
**COURT FILE NO.:** CV-22-00689315-0000  
**DATE:** 20230523

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** JANET BOWIE

**AND:**

RAMESH BHANDARI and SUDHA DHUNGANA

**BEFORE:** Justice Chalmers

**COUNSEL:** *G. Weedon*, for the Plaintiff/Moving Party

*G. Manoharan*, for the Defendants/Responding Parties

**HEARD:** May 19, 2023

**ENDORSEMENT**

**Overview and Background Facts**

[1] This action arises out of a failed residential real estate transaction.

[2] The Plaintiff was the owner of the house located at 5 Mid Pines Road in Toronto (the Property). On May 6, 2022, the Plaintiff and the Defendants entered into an Agreement of Purchase and Sale for the Property. The purchase price was \$1,080,000. The closing date was August 11, 2022. There were no conditions. In particular, there was no condition that the sale was conditional on the sale of the Defendants' property.

[3] The Defendants paid a deposit of \$40,000. The deposit was paid to the listing brokerage, RE/MAX Realtron Realty Inc. The deposit remains in trust with the brokerage.

[4] In late July 2022, the Defendants advised that they were having difficulty financing the agreement, because the sale of their property at 32 Tremely Crescent had fallen through. The Defendants sought an extension of the closing. The Plaintiff was prepared to extend the completion date on terms. The Defendants rejected the terms of the extension offer. The Defendants also sought an amendment to the agreement to reduce the purchase price by \$100,000. The Plaintiff did not agree to the reduction of the purchase price.

[5] On August 3, 2022, the Defendants advised that they would be unable to complete the transaction. Counsel for the Plaintiff advised that the Plaintiff held the Defendants in default for anticipatory and fundamental breach of the agreement. The parties accepted the anticipatory breach. The contract was terminated.

[6] The Plaintiff relisted the Property for sale on MLS. There were no offers. On August 29, 2022, the asking price was reduced to \$1,095,000. There were limited viewings or interest in the Property. The sale price was further reduced to \$1,045,000 on September 6, 2022. Again, after receiving little interest at this price, the price of the Property was reduced to \$995,000 on September 13, 2022.

[7] On September 28, 2022, the Plaintiff received an offer to purchase the Property for \$950,000. This offer was rejected by the Plaintiff. On September 30, 2022, the Plaintiff received an offer to purchase for \$920,000. This offer was also rejected. On the same day the Plaintiff received an offer in the amount of \$960,000. The Plaintiff made a counteroffer in the amount of \$963,000. The counteroffer was accepted.

[8] The second agreement to sell the Property had a closing date of November 8, 2022. The agreement was successfully completed, and the transaction closed on November 8, 2022.

[9] The Plaintiff claims damages in the amount of the difference between the sale price of the Property to the Defendants and the sale price in the second agreement, in the amount of \$117,000. In addition., the Plaintiff seeks the carrying costs for the period between August 11, 2022 and November 8, 2022, in the amount of \$5,654.52. The Plaintiff has provided evidence with respect to these costs that would not have been incurred if the first transaction had closed.

[10] The Plaintiff commenced this action by Statement of Claim issued on October 27, 2022. The Defendants brought a third-party claim against the party who failed to close the sale of its property at 32 Tremely Crescent. The third-party in turn brought fourth-party proceedings against its real estate agent and broker. The third and fourth parties have defended the third- and fourth-party claims. Importantly neither the third nor fourth party defended the main action.

[11] The Plaintiff brings this motion for Summary Judgment. Although the third and fourth parties were advised of this motion, neither filed any materials nor attended the motion. At the commencement of the oral hearing, counsel advised that the Defendants do not dispute the fact that they breached the Agreement of Purchase and Sale. The Defendants also do not take the position that the Plaintiff failed to take proper steps to mitigate her damages, or that the damages claimed are unreasonable.

### **The Issues**

[12] Although the Defendants do not dispute liability or damages, they advance the following arguments:

- a. This is not an appropriate case for summary judgment; and,
- b. If summary judgment is granted, there ought to be a stay of execution until after the third- and fourth-party claims are resolved.

## Analysis and Discussion

### *Is this an appropriate case for summary judgment?*

[13] Rule 20 of the *Rules of Civil Procedure* provides that summary judgment shall be granted if the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence. There will be no genuine issue requiring a trial when the summary judgment process:

- a) allows the judge to make the necessary findings of fact;
- b) allows the judge to apply the law to the facts; and
- c) is a proportionate, more expeditious and less expensive means to achieve a just result: *Hryniak v. Mauldin*, 2014 SCC 7, at para. 49

[14] In *Scott v. Forjani*, 2021 ONSC 1996, Diamond J. held that, “*the overarching principle is proportionality. Summary judgment ought to be granted unless the added expense and delay of a trial is necessary for a fair and just adjudication of the case*”: at para. 14.

[15] Here, the Defendants admitted that they breached the Agreement of Purchase and Sale and that the damages claimed are fair and reasonable. It is my view that there are no genuine issues requiring a trial in the main action between the Plaintiff and Defendants.

[16] The Defendants argue that summary judgment should not be granted because this would result in partial summary judgment. The third and fourth-party claims will continue and therefore summary judgment will not result in the final determination of the matters in issue in the action.

[17] I am of the view that although the third and fourth-party claims will continue if summary judgment is granted, this is not a reason to not grant judgment in this case. As noted in *Hryniak v. Mauldin*, in the right circumstances, partial summary judgment may “significantly advance access to justice, and be the most proportionate, timely and cost-effective approach”: at para. 60.

[18] It is my view that summary judgment is appropriate in the circumstances of this case. There is no risk of duplicative proceedings, or inconsistent findings. The third and fourth parties did not defend the main action. As a result, the third and fourth parties will not be able to dispute the damages assessed in the main action. I am also of the view that the main action and the third and fourth-party actions are severable. The actions involve different real estate transactions, and different properties.

[19] If summary judgment is granted in the main action, the Plaintiff’s claim will be fully resolved. The Plaintiff will not be required to continue with the action. As noted in *Spiridakis v. Li*, (2020) ONSC 2173:

The first part of the action is reflected in the main claim. The second and third parts are reflected in the third party claim. In my view, the issues in the main action are clearly severable from the issues in the third party claim. They can be dealt with

expeditiously, justly and cost effectively on this motion. Indeed, it makes no sense to me to force the plaintiffs to “go along for the ride” while the third party claim is adjudicated. They would be forced to endure substantial, additional pre-trial procedures and a lengthy trial of issues that have nothing to do with them. Given the impact that the COVID 19 pandemic has had on the court system, that trial is likely to be at least two years down the road: at para. 81.

[20] Here, the Defendants have conceded the issues of liability and damages. I am satisfied that there are no genuine issues requiring a trial of the main action. The main action which arises out of the failed sale of the property at 5 Mid Pines Road, is severable from the third-party claim which involves the failed sale of the property at 32 Tremely Crescent. The main action and third-party action involve different Agreements of Purchase and Sale and different properties. The third and fourth parties did not defend the main action and therefore the assessment of the Plaintiff’s damages will not be litigated in the third- and fourth-party claims.

[21] I am satisfied that there is no risk of duplicative proceedings or inconsistent findings of fact. I grant summary judgment in favour of the Plaintiff in the amount of \$122,654.52.

*Is a stay of execution appropriate in the circumstances?*

[22] The Defendants argue that if summary judgment is granted in favour of the Plaintiff, this is an appropriate case to order a stay of the enforcement of the judgment pursuant to R. 20.08. The rule provides as follows:

Where it appears that the enforcement of a summary judgment ought to be stayed pending the determination of any other issue in the action or a counterclaim, crossclaim or third party claim, the court may so order on such terms as are just.

[23] Granting a stay of execution of a summary judgment pending the resolution of a third-party claim is an exercise of discretion. A stay may be appropriate if there is a risk that there could be some unfairness if execution is permitted of the summary judgment on part of an action when judgment may be rendered against a third party after trial in the same matter: *Zenith Aluminum Systems Ltd. v. 2335945 Ontario Inc.*, 2021 ONSC 1128, at para. 78.

[24] In exercising its discretion, the court is to consider the following factors:

- a. The connection of the issues between the main action and the third party proceeding;
- b. The risk of inconsistent findings in the third party proceeding;
- c. The merits of the third party proceeding (i.e. has it been brought for tactical reasons?);
- d. Have the Plaintiff’s actions in the main action been influenced by improper motives; and,

- e. What is the potential prejudice to the successful party on the motion for summary judgment if the stay is granted: *Pomata Investment v. Yang*, 2021 ONSC 6786, at para. 52.

[25] I am of the view that there is no connection between the issues in the main action and the third-party action. Although the Defendants are the same in both proceedings, the main action and third-party claim involve different real estate transactions, and different properties. The only common issue is the assessment of damages in the main action which will affect the assessment of damages in the third-party claim. The third and fourth parties did not defend the main action and therefore those parties are not disputing the assessment of damages in the main action. As a result, there is no common issue or connection between the proceedings.

[26] As noted above, I am satisfied that there is no risk of inconsistent findings.

[27] I am not in a position to determine the merits of the third-party claim. The third-party claim is not before me on this motion and there is no evidence with respect to why the sale of the Defendants' property located at 32 Tremely Crescent did not close. I have no information that would allow me to determine the Defendants' likelihood of success on the third-party claim.

[28] There is no evidence before me to suggest that the Plaintiff's actions in the main action have been influenced by improper motives.

[29] I am satisfied that there is prejudice to the Plaintiff if a stay is granted. The third- and fourth-party proceedings are at an early stage in the litigation. It may be some time before the claims are resolved. It is my view that it would be unfair and prejudicial to require the Plaintiff to wait for the proceedings to be completed before she is entitled to enforce the judgment. The Defendants' ability to pay the judgment may deteriorate over time.

[30] Counsel for the Defendants argues that if a stay is not granted, they will suffer a financial hardship. No evidence was put forward with respect to the Defendants' financial circumstances. In the absence of evidence, I am unable to make a determination of financial hardship on the Defendants if a stay is not granted.

[31] I am satisfied that a stay is not appropriate in this case. The Plaintiff entered into an Agreement of Purchase and Sale which did not include any conditions. In particular, the Defendants did not make the agreement conditional on the sale of their home. The Plaintiff suffered a loss when the Defendants failed to close the transaction. The Plaintiff did not do anything wrong, and she is entitled to the damages awarded on this motion. I am not prepared to stay the Plaintiff's right to execute on their judgment for an undetermined amount of time as the third- and fourth-party claims are prosecuted.

### ***Costs***

[32] The Plaintiff is successful on this motion and action and is entitled to her costs.

[33] The Plaintiff filed a cost outline in which she seeks her costs in the amount of \$20,328.39 on a partial indemnity basis. The Defendants filed a cost outline which provides that if they had been successful on the motion, they would have sought their partial indemnity costs in the amount of \$6,838.08, inclusive of counsel fee, disbursements and H.S.T.

[34] I have considered the factors set out in R. 57.01. I am satisfied that this action was relatively straightforward. The issues were not overly complex. The Defendants conceded the issues of liability and damages for this motion, which significantly shortened the argument at the oral hearing. I have also considered the issue of proportionality. The amount in issue, although of importance to the parties, is relatively modest. The action was commenced pursuant to the *Rules of Simplified Procedure*.

[35] I award costs to the Plaintiff fixed in the amount of \$12,500 inclusive of counsel fee, disbursements and H.S.T. I am satisfied that a cost award in this amount is fair and reasonable and within the expectation of the parties to pay. I am also satisfied that the cost award is proportionate to the amount in issue: *Boucher v. Public Accountants' Council for the Province of Ontario* [2004] O.J. No. 2634 (ON CA).

### **Disposition**

[36] For the reasons set out above, I make the following order:

- a. I grant summary judgment in favour of the Plaintiff in the amount of \$122,654.52, plus pre-judgment interest in accordance with the *Courts of Justice Act* and costs fixed in the amount of \$12,500 inclusive of counsel fee, disbursements and H.S.T.,
- b. The deposit in the amount of \$40,000, plus accrued interest shall be released to the Plaintiff within 14 days of the date of this endorsement. The amount paid to the Plaintiff shall be set off against the damages owing in paragraph 36 a. above, and
- c. I do not grant a stay of the execution of the summary judgment.

[37] I have signed the draft Order, filed.

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Chalmers J

**Date:** May 19, 2023