

CITATION: Kisliuk v Algai, 2023 ONSC 1841
COURT FILE NO.: CV-22-00683107
DATE: 20230320

SUPERIOR COURT OF JUSTICE - ONTARIO

RE:

BORIS KISLIUK

Plaintiff

AND:

**MAYTAL ALGAI and SIGNATURE REALTY INC. O/A ROYAL LEPAGE
SIGNATURE REALTY, BROKERAGE**

Defendants

BEFORE: Justice Papageorgiou

COUNSEL: Andrew Francis for the Plaintiff

READ: March 20, 2023

DECISION

Nature of the Motion

[1] The plaintiff brings a motion for default judgment pursuant to r. 19.08.

[2] He claims \$220,992.18 in damages as against the defendant Maytal Algai (“Ms. Algai”) for breach of contract and an Order against the defendant Signature Realty Inc. (the “Realtor”) directing it to release a deposit in the amount of \$75,000 which it holds in trust.

[3] For the reasons that follow, I am awarding the plaintiff damages in the amount of \$218,138.93 and directing the Realtor to release the deposit funds to the plaintiff, to be credited against this Judgment.

Nature of the Action

[4] The action arises out of a failed Agreement of Purchase and Sale executed by the plaintiff and Ms. Algai on March 6, 2022 (the “APS”) concerning 368 Highcliffe Drive, in the City of Thornhill, in the Province of Ontario (the “Property”). Ms. Algai was the purchaser, the plaintiff was the seller, and the deposit in the amount of \$75,000 was paid to the Realtor, who was the listing broker.

Service

[5] The plaintiff issued a Statement of Claim on July 12, 2022 but Ms. Algai failed to defend the action.

[6] On August 4, 2022, Ms. Algai was noted in default.

[7] The plaintiff has filed affidavits of service which shows that he served Ms. Algai with the Statement of Claim personally on July 12, 2022, and the Motion Record seeking default judgment on January 9, 2023 by ordinary mail at the same address where she was served personally with the Statement of Claim.

Consequences of noting in default

[8] Pursuant to r. 19.02, having not defended the proceeding, the Defendants are deemed to admit the truth of all allegations of fact made in the Statement of Claim.

[9] 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.

[10] As well, the plaintiff must still prove its damages.

The test on a motion for default judgment

[11] 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, entitled it to judgement on the pleaded claim?

The deemed admissions

[12] The Statement of Claim contains the following deemed admissions:

- Pursuant to the APS Ms. Algai agreed to purchase the Property for \$1,960,000. The closing date for the APS was initially June 1, 2022 but was extended to June 13, 2022 at Ms. Algai's request. Ms. Algai agreed to pay an extension fee in the amount of \$1,847, which remains unpaid. (Statement of Claim, para 5)
- Ms. Algai paid \$75,000 in deposits as required by the APS. (Statement of Claim, para 6 & 7)
- The plaintiff was ready willing and able to complete the APS but Ms. Algai failed to deliver the agreed-upon purchase price by June 13, 2022. (Statement of Claim, paras 11-13)

[13] The deemed admissions are sufficient to establish liability on the part of Ms. Algai.

Loss of Bargain

[14] The vendor bears the initial onus of proving his loss of bargain. The onus then shifts to the purchaser to show, if he can, that the damages could have been reduced by reasonable mitigating steps. In *100 Main Street Ltd. v. W.B. Sullivan Construction Ltd.* (1978), 88 D.L.R. (3d) 1 (Ont. C.A.), at p. 23, the leading case on mitigation, Morden J.A. stated:

As I have said, with respect to the issue of mitigation, the onus is on the defendant. However, the onus on the defendant to prove failure to mitigate does not relieve the plaintiff from proving an obvious element in the calculation of his damages. *McGregor on Damages, supra*, in para. 212, p. 149, puts the matter this way:

The onus of proof on the issue of mitigation is on the defendant. If he fails to show that the plaintiff ought reasonably to have taken certain mitigating steps, then the normal measure will apply.

Included in the “normal measure” is the difference between the contract price and the market price. Thus, I think that the proper course is for the plaintiff, in presenting its case, to adduce evidence of the contract price and of the market price or resale price upon which he relies in establishing the loss of bargain. The onus is then on the defendant to show, if he can, that if the plaintiff had taken certain reasonable mitigating steps the damages would be lower.

[15] What is reasonable is a question of fact to be decided on the basis of all relevant market circumstances: *100 Main Street*, at para. 73.

[16] The plaintiff relisted the Property on July 14, 2022 in order to mitigate his damages.

[17] On August 30, 2022, the plaintiff resold the Property for \$1,800,000 with a closing date of November 30, 2022. This was the highest offer received. The new buyer initially offered \$1,780,000 and after negotiations back and forth, the new buyer increased their offer to \$1,800,000 which offer the plaintiff accepted.

[18] Thus, the plaintiff claims that he sustained a loss in the amount of \$160,000 on the resale of the Property, which represents the difference between the purchase price of \$1,960,000 in the APS and the price thereafter obtained by the plaintiff on the resale.

[19] In *100 Main Street*, at para 65, Justice Morden adopted the views of *McGregor on Damages*, 13th ed. (1972), which states that the price at which the property has been resold affords good evidence of the market value. See also *Briscoe-Montgomery v. Kelly*, 2014 ONSC 4240, at para. 22, where the Court cited Rosenberg J. (as he then was) in *Victorian (Ontario) Inc. v. DeFreitas et al.*, [1991] 16 R.P.R. (2d) 55 where he states, at para. 20, “...in my view, there is no

better evidence to calculate the real damage suffered than the price that the plaintiff was able to obtain in the market for the resale for the home.”

[20] As well, the plaintiff has provided an appraisal of the Property from Bojun Richard Chen, who determined that the fair market value for the Property as at August 30, 2022 was \$1,800,000.

[21] Therefore I am satisfied that the plaintiff obtained the market value in reselling the Property and acted reasonably in mitigating his damages. I am also satisfied based upon the decreased price and the appraisal, that the real estate market had declined.

[22] I am thus satisfied that the plaintiff sustained damages for the loss of his bargain in the amount of \$160,000.

Additional Damages—Carrying Costs

[23] The plaintiff is entitled to be put in the same position he would have been in had the APS been performed: *100 Main Street*, at. pp. 22-23.

[24] The plaintiff claims that he incurred the following additional damages as a result of Ms. Algai’s failure to close the APS:

- Added real estate commissions in the amount of \$6,554: The commission payable pursuant to the original agreement was 2 %. The plaintiff explained that after the transaction failed to close, and the market had declined, and the commission had to be raised to 2.5 % so that agents would be interested in showing the Property. I am satisfied, based upon the evidence before me, that these additional commission fees were caused by the breach and were reasonably foreseeable.
- Labour and material costs in the amount of \$10,124.49 to paint, plaster, laminate the floors and repair the garage stairs to make the Property more marketable, and staging and photography expenses in the amount of \$597.77. The plaintiff explained that when the Property was originally sold it was tenanted and was sold on an “as is basis”. There had been pictures on the walls and furniture on the floor. When the APS failed to close, the tenants had already moved out. As well, the market had declined. The house needed cosmetic repairs to be marketed and sold at the highest possible price. I am satisfied that these additional costs were caused by Ms. Algai’s breach. It was reasonable to conduct repairs after the tenants moved out to obtain the highest price given the market decline.
- The plaintiff gave the new purchaser a credit of \$700 for repairs needed to the basement doors and electrical panels. I am satisfied that this additional cost, which was not required pursuant to the APS, was caused by Ms. Algai’s breach and was reasonably foreseeable.
- Appraisal costs of \$904. I am satisfied that this appraisal was required to determine the listing price and/or the market value of the Property before it was resold.

- Additional real estate solicitor fees in the amount of \$2,835.25. The plaintiff did not provide any explanation as to why additional solicitors fees were required. The plaintiff did not provide any evidence of prior real estate fees incurred. I am not satisfied based on the evidence before me that additional real estate solicitors fees were caused by Ms. Algai's breach.
- Additional interest on his mortgage in the amount of \$19,223.50. The plaintiff provided sufficient details of additional mortgage payments which had to be made from the date the APS failed to close (June 13, 2022) to the new closing date (November 30, 2022).
- Penalties and charges in connection with having to renew his mortgage at a higher rate in the amount of \$13,088.27. Because the APS did not close, the plaintiff had to renew his mortgage. When the Property was subsequently resold with a closing date of November 30, 2022, the plaintiff had to discharge that mortgage with a Prepayment Charge of \$13,088.27. I am satisfied that these additional charges were caused by Ms. Algai's breach and were reasonably foreseeable.
- Property taxes in the amount of \$3,287.20 and insurance in the amount of \$1,812.20 for the period from June 13, 2022 to November 30, 2022. I am satisfied that the plaintiff incurred these additional costs and that they were reasonably foreseeable.

[25] Therefore, I am awarding the plaintiff the following additional damages which I find were reasonably foreseeable consequences of Ms. Algai's breach: \$6,554 + \$10,124.49 + \$597.77 + \$904 + \$700 + \$19,223.50 + \$13,088.27 + \$3,287.20 + \$1,812.20 = \$56,291.43.

Conclusion

[26] Therefore, I calculate total damages as follows: \$160,000 (loss of bargain) + \$1,847.50 (extension fee) + \$56,291.43 (other reasonably foreseeable damages) = \$218,138.93.

The Deposit

[27] As a result of her breach, Ms. Algai has forfeited the \$75,000 deposit, the Realtor shall release this sum to the plaintiff and this amount shall be credited against the damages awarded: *Benedetto v. 2453912 Ontario Inc.*, 2019 ONCA 149, 86 B.L.R. (5th) 1, at para. 6.

Costs and Interest

[28] The plaintiff claims costs of the action and the motion in the amount of \$5,747.45. He has provided a bill of costs which set out the hourly rate and time charged both of which I find reasonable.

[29] He also claims prejudgment interest at the rates set out in the *Courts of Justice Act* from June 13, 2022, the date of Ms. Algai's failure to close. I am awarding this amount together with post-judgment interest at the same rate.

[30] The plaintiff may submit a Judgement in accordance with the above for my execution.

Justice Papageorgiou

Date: March 20, 2023