

**CITATION:** Switzer et al. v. Petrie et al., 2023 ONSC 5115  
**COURT FILE NO.:** CV-22-00001095-0000  
**DATE:** 20230911

**SUPERIOR COURT OF JUSTICE – ONTARIO**

**RE:** LLOYD SWITZER and VIOLET JUNE SWITZER, Plaintiffs

**AND**

SCOTT PETRIE and KATHLEEN PETRIE, Defendants

**BEFORE:** Justice Spencer Nicholson

**COUNSEL:** M. Jantzi, for the Plaintiffs

W. Chapman, for the Defendants

**HEARD:** June 14, 2023

**REASONS ON SUMMARY JUDGMENT MOTION**

**NICHOLSON J.:**

- [1] The parties entered into an agreement of purchase and sale (“APS”) dated May 14, 2022 in respect of a residential property owned by the plaintiffs. The purchase price of the property was \$810,000. The defendants provided a \$15,000 deposit. The closing date was to be July 14, 2022.
- [2] On July 4, 2022, the defendants notified the plaintiffs that they would not be closing the sale “largely due to unforeseen consequences”.
- [3] The plaintiffs re-listed the property on July 5, 2022 for \$699,900. On July 19, 2022, the plaintiffs accepted an offer to purchase the property for \$600,000 from a third party. It was the only offer that they received on the property during the time it was re-listed. That transaction closed on August 19, 2022.
- [4] The plaintiffs commenced this action in relation for the difference between the agreed upon purchase price and the amount that they were able to re-sell the property. They also sought various fees incurred as a result of the aborted transaction, totalling \$2,302.11, plus interest and costs. Thus, the total claim is for \$212,302.11.
- [5] After the exchange of pleadings, the plaintiffs brought the within motion for summary judgment pursuant to rule 20 of the *Rules of Civil Procedure* on November 21, 2022. On December 9, 2022, the parties agreed to set the matter to a special appointment date of June 14, 2023. The endorsement setting that date required the standard Certificate of Readiness

setting out an agreed upon timetable for the various steps to be completed in order to keep the special appointment date.

- [6] The defendants' responding motion record is dated February 3, 2023 (delivered about a week later than the timetable provided). Cross-examinations were to be completed by May 5, 2023.
- [7] The affidavit of the defendant, Scott Petrie, indicates that on or around May 14, 2022, he and his spouse executed the APS, which included a closing date of July 14, 2022 and a purchase price of \$810,000. He indicates that prior to executing the APS, he was assured that he would be provided with a survey that would confirm the exact dimensions of the property. He was also assured that the plaintiffs would provide the specific dimensions of the building at the property. He indicates that subsequent to the execution of the APS but prior to the closing date, the defendants were advised that they would not be provided with a survey or the specific dimensions.
- [8] The defendant also deposes that prior to "entering the property" it was represented to him that the property was equipped with a fully functioning municipal sewage system. However, when he completed the first walk through of the property, he observed that the sewage system relied on a trash pump. This caused him to be concerned about the representations made with respect to the functionality of the municipal sewage system at the property.
- [9] Accordingly, on July 4, 2022, he advised the plaintiffs that they would not be proceeding with the closing.
- [10] Mr. Petrie then deposes as follows:

“10. I verily believe that the Plaintiffs hastily re-listed the Property for sale and did not make any offers for abatement of the purchase price in light of the aforementioned misrepresentations.

11. I further verily believe that merely fourteen (14) days following their re-listing of the Property, the Plaintiffs accepted an unreasonable and unfavourable low offer to sell the Property to an alternative third-party for the sale price of \$600,000.00, which was below fair market value.

12. I verily believe that the Plaintiffs, of their own accord, made an unsound and hasty decision, which resulted in the sale of the Property for \$600,000.00 and that the Plaintiff's own unsound financial decisions are the reason for any losses they may have incurred.

13. I verily believe that the Plaintiffs are currently attempting to recover financial losses incurred by them and caused by their hasty and unsound financial

decision to rapidly sell the Property and to accept an unfavourable low offer below fair market value.

14. I verily believe that the Plaintiffs also made no reasonable effort to mitigate their damages and that they are subsequently attempting to recover the full extent of their losses from me.

15. I believe that it is in the best interest of the administration of justice that the complex issues raised in the within motion, not least the market conditions at the time and the extent of the Plaintiffs' own liability with respect to their incurred losses, need to be properly put before the court and litigated with input and assistance of qualified experts to be called as expert witnesses at trial.

16. I do verily believe that the losses suffered by the Plaintiffs, as claimed in this matter are excessive and require a full and proper trial proceedings to determine the proper quantum.”

[11] The plaintiffs served a request to admit (“RTA”) on March 21, 2023. Accompanying the request to admit was an email from plaintiffs’ counsel to counsel for the defendants stating:

“The purpose of the RTA is to eliminate the need to cross-examine your client on his affidavit, by admitting liability and narrowing the issue to mitigation. I think that’s the primary issue in dispute, but I welcome your thoughts.

If you think otherwise, then let me know so we can discuss a timetable for cross-examinations on the affidavits.”

[12] The defendants did not respond to the request to admit within 20 days. On April 25, 2023, 15 days out of time by my calculation, the defendants served a response to request to admit. The response admitted the following facts:

- The defendants breached the APS on July 4, 2022
- The plaintiffs re-listed the above property on July 5, 2022
- The plaintiffs resold the above property on July 19, 2022, to a third party for the sale price of \$600,000.00, which closed on August 19, 2022.

[13] I am unaware of any motion by the defendants to withdraw the other admissions that they were deemed to admit by their failure to respond in a timely fashion to the request to admit.

[14] In its responding factum, the defendants did not raise any of the issue surrounding the alleged failure of the plaintiffs to provide to them a survey or the sewage system. The factum states:

“The only issue before the Court is the quantification of the Plaintiffs’ damages, and the Defendants take the position that the aforesaid is a genuine issue for trial.”

- [15] Further, the defendants in their factum indicate that they do not dispute that they are liable for damages to the plaintiffs for the difference in value of the property as a result of the defendants’ failure to close the transaction. They also concede that they are liable for the \$2,302.11 in carrying costs incurred by the plaintiffs. They take the position that the damages crystallized on August 19, 2022. They take the position that the damages should be calculated as the difference between the purchase price stipulated in the APS of \$810,000 and the fair market value of the property on August 19, 2022.
- [16] However, the defendants take the position that the determination of the fair market value of the property on August 19, 2022 requires a trial, or at least a further step in this motion for summary judgment whereby I allow the parties to adduce expert evidence.

Legal Analysis:

- [17] Rule 20.04(2)(a) provides that the court *shall* grant summary judgment if there is no genuine issue requiring a trial. The purpose of the rule is to provide timely and affordable justice where in the particular circumstances of the case, it is fair and just to do so.
- [18] The parties appear to agree on the applicable legal test for summary judgment, from *Hryniak v. Mauldin*, 2014 SCC 7. There will be no genuine issue requiring a trial if the summary judgment process provides the motion judge with the evidence required to adjudicate the dispute in a fair and just manner and the process is a timely, affordable and proportionate procedure.
- [19] It is a two-step process. First, the motion judge must determine if there is a genuine issue requiring a trial based only on the evidence before him or her, without using the enhanced fact-finding powers provided for in rule 20.04(2.1). If there still appears to be a genuine issue requiring a trial, the motion judge moves to the second step to determine if the need for a trial can be avoided by using the powers under rule 20.04(2.1) and (2.2). The use of those powers will not be against the interest of justice if they will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.
- [20] Importantly, it is trite law on summary judgment motions that each party must put their best foot forward to establish whether or not there is a genuine issue requiring a trial. The motion judge is entitled to assume that the record includes all the evidence the parties would present at trial.
- [21] The moving party bears the onus of demonstrating that there is no genuine issue requiring a trial.

- [22] Judges of the Ontario Superior Court have concluded that failed real estate transactions are amenable to be resolved on summary judgment motions. The plaintiffs rely upon two such cases—*Holst v. Singh*, 2018 ONSC 4220 (CanLII) and *McKnight v. Morrison*, 2019 ONSC 552 (CanLII). It should be noted that in *Holst*, the motion judge required a trial of an issue on damages and awarded partial summary judgment. However, there is no dearth of cases in which judges have determined similar issues on summary judgment motions.
- [23] In both cases, I note that the defendants argued that there was a genuine issue requiring a trial with respect to whether the plaintiffs had properly mitigated their damages.
- [24] The ordinary measure of damages for breach of contract in the context of a failed real estate transaction is to put the innocent party in the position it would have occupied had the contract been performed and to assess the damages as at the date of the breach (see: *Akelius Canada Ltd., v. 2436169 Ontario Inc.*, 2022 ONCA 259 at para. 22.).
- [25] The plaintiffs have a duty to mitigate their damages. This includes taking all reasonable steps to mitigate their losses (see: *Holst*, at para. 7). However, it is important that the onus is upon the *defendants* to prove that the plaintiffs failed to mitigate their damages. The plaintiffs are not required to obtain the best possible price in re-selling their property. It is not a standard of perfection. Perrell J. stated in *Malatinsky v. Miri*, 2020 ONSC 16, at para. 82:
- [82] In assessing the innocent party’s efforts at mitigation, the courts are tolerant, and the innocent party need only be reasonable, not perfect; in deciding what is a reasonable way to mitigate the effects of a breach of contract, the innocent party is not to be held to too nice a standard; it need only act reasonably, using what it knows then, without hindsight, and it need not do anything risky.
- [26] Both parties refer me to *Marshall v. Meirik*, 2021 ONSC 1687, a decision of Kimmel J.. That case involved a summary judgment motion arising out of the purchasers’ failure to complete a transaction involving the plaintiffs’ lakefront cottage property. After being informed of the anticipated breach, the vendors relisted the property and it re-sold approximately one month later, for \$325,000 less than the purchasers had agreed to pay for the property. At the summary judgment motion, the defendants argued that the market value of the property was higher than what it was re-sold for.
- [27] Kimmel J. directed the parties to adduce further evidence and argument on the issue of damages and mitigation. Expert evidence was tendered. She was relying upon the enhanced fact-finding powers under rule 20.04 (2.1) and (2.2).
- [28] Kimmel J. noted that the case before her had several “unusual features”, including that:
- (a) The time in between the date of the APS and the new APS was approximately six weeks;

- (b) The plaintiffs conditionally re-sold the property within a month of the defendants' repudiation of the APS on August 17, 2017;
- (c) The sale price under the new APS was almost 18% lower than the sale price under the APS; and
- (d) The new APS closed earlier than the intended closing of the original APS.

[29] At para. 10 of her decision, Kimmel J. stated as follows:

[10] To be clear, my initial endorsement was not intended to be read as a general requirement that vendors who have re-sold a property are required to provide appraisal or expert evidence, in addition to the re-sale price, to establish the market value of the property to prove their damages. The decision to allow for this additional evidence of market value before deciding this summary judgment motion was a function of the unique circumstances of this case.

[30] Later, Kimmel J. considered whether an arm's length sale to a third party is *prima facie* evidence of the market value of the property on the date of that re-sale or whether expert appraisal evidence of market value as of the date of re-sale is required (at para. 30). She concluded as follows at paras. 33-34:

[33] The essence of the defendants' argument is that the best evidence of the market value of the Property is the higher price of \$1,850,000.00 that they offered to pay and that was accepted by the plaintiffs on August 4, 2017. They say that this higher market value is supported by the evidence the court has now received from their two experts. But that is not the test. The Court of Appeal in *100 Main Street* and the many cases that have followed it presumptively determined the market value to be the re-sale price, unless there are some unusual or special circumstances that might, for example, suggest a different damages assessment date and, with that different date a different market value for purposes of the damages calculation. None of this has been borne out on the further evidence submitted in this case.

[34] I have determined the damage assessment date to be the date of the New APS. I find that the market value of the Property on the assessment date of September 20, 2017 was the arm's length negotiated purchase price under the New APS of \$1.525 million. I have not been presented with any evidence that would justify departing from the norm of accepting the purchase price under the New APS to be the market value of the Property on that day. Although the plaintiffs did not have to provide a market value opinion to establish this to be the market value of the Property, this determination is supported by the opinion of Ms. Dickinson, who testified that the market value of the Property was approximately \$1.5 million on both November 6 and September 20, 2017.

[31] On the issue of mitigation, Kimmel J. noted that the onus was on the defendant and requires "the identification of the failed mitigation efforts" (at para. 54). She referred to and relied upon *Malatinsky, supra*.

- [32] Ultimately, Kimmel J. made an award of damages in favour of the plaintiffs that is consistent with what the plaintiffs ask this court to do in the case at bar. She simply added an extra procedural step by relying on the enhanced fact-finding powers.
- [33] *Marshall* was appealed to the Ontario Court of Appeal (*Marshall v. Meirik*, 2022 ONCA 275). The Court upheld Kimmel J.’s decision. There was no discussion one way or another on the two-step procedure that she utilized to resolve the case before her.
- [34] Since *Marshall*, the Ontario Court of Appeal released *Arista Homes (Richmond Hill) Inc. v. Rahnama*, 2022 ONCA 759 (CanLII). The Court summarized the law at para. 9, as follows:

[9] Where a purchaser fails to close a real estate transaction and the vendor takes reasonable steps to sell the property in an arm’s length sale to a third party in mitigation of damages, and there is nothing improvident about the sale, the difference between the two sale prices will be used to calculate the damages: *642947 Ontario Ltd. v. Fleischer* (2001), 2001 CanLII 8623 (ON CA), 56 O.R. (3d) 417 (C.A.) at para. 41; *100 Main Street Ltd. v. W.B. Sullivan Construction Ltd.* (1978), 1978 CanLII 1630 (ON CA), 20 O.R. (2d) 401 (C.A.), at para. 55. In such circumstances, there will be no need for expert evidence: *Marshall v. Meirik*, 2021 ONSC 1687, at para. 30, aff’d 2022 ONCA 275.

Determination:

- [35] *Arista Homes* appears to be a complete answer to the defendants’ arguments in this case.
- [36] I find that this is an appropriate case in which to grant summary judgment. On the evidence before me, and the applicable legal principles, I can determine the matter in a fair and just manner, proportionate to the amount in issue and the lack of complexity of the case. In my view, this is a straight-forward breach of contract case perfectly amenable to resolution on a summary judgment motion. Furthermore, I find that I do not need to resort to the enhanced fact-finding powers to do so. This motion can be resolved on the legal presumptions that apply and the legal burdens that each party bears on a motion for summary judgment.
- [37] The defendant has admitted breaching the APS. The only issue therefore is the determination of damages, which incorporates the issue of mitigation.
- [38] While this case shares some of the “unusual characteristics” of the *Marshall* case, I am not prepared to embark upon the further inquiry that Kimmel J. conducted. I am not criticizing her approach. It is my view that I can make the necessary findings of fact from the record before me.

- [39] First of all, the case law is clear that an arm's length sale to a third party is *prima facie* evidence of the market value of the property on the date of the re-sale. Although the plaintiffs bear the onus of proving their damages, this presumption shifts the burden upon the defendants to persuade the court that some aspect of the arm's length sale requires scrutiny.
- [40] In my view, it is too late to attend at the return date of a summary judgment motion without submitting at least some evidence to bring into question the arm's length sale. The defendants could have cross-examined the plaintiff on his affidavit to ferret out such evidence. I note that there is a certificate of non-attendance dated June 13, 2023. However, the time for conducting cross-examinations had long since expired under the timetable agreed upon and, in any event, the day prior to the scheduled special appointment motion was definitely not the time for such examinations to occur.
- [41] The defendants could have led expert evidence themselves regarding the fair market value which could have displaced the *prima facie* valuation. Instead, the defendants chose to submit an affidavit with bald assertions that the plaintiffs acted hastily and did not properly expose the property in the open market.
- [42] The defendants were obligated to put their best foot forward. On the other hand, the plaintiffs were entitled to rely on the arm's length sale to a third party as *prima facie* establishing the fair market value of the property as of the date of re-sale. They were not required to adduce any expert evidence.
- [43] It must be remembered that the price at which the property was originally listed was \$699,900. Thus, although the defendants were prepared to pay the sum of \$810,000 for the property, \$600,000 is not so out of proportion with the original list price as to, without more, lead to the conclusion that the sale was improvident. The plaintiffs did re-list the property on the open market at the same price--\$699,900. I am not prepared to speculate about how long the plaintiffs were required to wait before accepting an offer. No bright line need be articulated in my view. The fair market value at any given time is what a property will fetch when exposed to an open market in an arm's length transaction.
- [44] In short, there is no persuasive reason in this case to depart from the usual rule that an arm's length sale of a property establishes fair market value and I find that the fair market value of the subject property at the time of its re-sale on August 19, 2022 was \$600,000.
- [45] As the purchase price in the APS was \$810,000, the plaintiffs are entitled, subject to arguments about mitigation, to damages in the amount of \$210,000, being the difference between the purchase price and the price obtained in the provident sale, plus \$2,302.11 in related expenses.
- [46] The onus of proving that the plaintiffs failed to mitigate is upon the defendants. Again, the defendants could have conducted cross-examinations of the plaintiff to adduce some evidence that would cause the court to be concerned about the reasonableness of the

plaintiffs' efforts at mitigation. Simply pointing to what the defendants assert was a low price and a quick re-sale time is insufficient.

- [47] Again, on the evidence that I have, the defendants advised the plaintiffs that they were not going to close the transaction and requested that the plaintiffs mitigate their damages. The plaintiffs then re-listed the property with a real estate agent and accepted an arm's length offer on the property which on the evidence before me cannot be determined to be unreasonable. The defendants were required to "lead trump or risk losing". Other than bald allegations of a failure to mitigate, there is no evidence to support the defendants' arguments. On the other hand, the plaintiffs were not required to act perfectly, only reasonably. I find that re-listing the property and accepting the offer that they received was reasonable.
- [48] Accordingly, I find that the plaintiffs are entitled to the damages sought, which I fix in the amount of \$212,302.11. The plaintiffs are entitled to retain the \$15,000 deposit, plus any interest that has accrued on it, as a credit against the judgment.
- [49] In the draft judgment submitted with their motion materials, the plaintiffs used a pre-judgment interest rate of 0.5%. I do not know where that rate arose from, although I presume it is from the *Courts of Justice Act*, R.S.O., 1990, c. C.43. If the parties cannot agree on the pre-judgment interest rate, submissions regarding the interest rate can be made with costs submissions below.
- [50] The plaintiffs, as the successful party, are entitled to their costs. If the parties cannot resolve the issue of costs, the plaintiffs may serve and file written costs submissions, no longer than three pages in length double-spaced to my attention through the court office by no later than October 6, 2023 at 4:00 pm. Any relevant offers to settle should be included. The defendants' responding submissions, within the same parameters, are to be served and filed by no later than October 13, 2023 at 4:00 pm.
- [51] However, I encourage the parties to resolve costs. To that end, I note that I am not offended generally with the Bill of Costs submitted by the plaintiffs, although I am not foreclosing any arguments raised by the defendants on this issue.

*Summary judgment granted accordingly.*

**"Justice S. Nicholson"**  
Justice Spencer Nicholson

Date: September 11, 2023