

**CITATION:** Marmak Holdings v. Iris Capital, 2023 ONSC 5410  
**COURT FILE NO.:** CV-19-142636-0000  
**DATE:** 20230926

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:** )  
)  
MARMAK HOLDINGS INC )  
) M. Kersten, for the Plaintiff  
Plaintiff )  
)  
– and – )  
)  
IRIS CAPITAL INC ETC. INC, EDDY ) M. Drudi, for the Defendant  
MASTROGIUSEPPE, ROBERT )  
MASTROGIUSEPPE )  
)  
Defendants )  
)  
– and – )  
)  
CBRE LIMITED )  
)  
Defendant to Counterclaim (non party) )  
)  
– and – )  
)  
MARMAK HOLDINGS INC )  
)  
Defendant to Counterclaim )  
)  
) **HEARD:** August 4, 2023

2023 ONSC 5410 (CanLII)

**REASONS ON SUMMARY JUDGMENT MOTION**

**McCarthy J.**

**Background**

[1] The Plaintiff vendor moves for summary judgment, seeking an order that it is entitled to recover the sum of \$250,000, representing half of a \$500,000 deposit owed by the Defendant purchaser Iris Capital Inc. (“Iris”) pursuant to an Agreement of Purchase and

Sale dated August 20, 2019 (“the APS”) in respect of a property known as 31-35 Maplecrete Road, Vaughan Ontario (“the Property”).

- [2] The Plaintiff owned the Property jointly under a joint venture agreement (JV) with another entity Mileta Maplecrete Holdings Ltd. (“Mileta”). The \$250,000 amount was paid by Iris to the real estate broker CBRE on or about August 21, 2019 as a first deposit (“the first deposit”). The first deposit was subsequently paid into court pending the determination of rights of the parties under the APS.
- [3] Iris waived the closing conditions on or about October 3, 2019, but did not furnish the second deposit of \$250,000. The next day, Iris advised the Plaintiff that it would not be proceeding to close the APS. The Property was subsequently listed for sale under a consent order of the court and sold to another buyer on June 17, 2020, for \$200,000 in excess of the \$9 million sale price under the APS.

### **The Plaintiff’s Position**

- [4] The Plaintiff seeks partial summary judgment for payment to it of the first deposit. It asserts that, having waived the conditions on October 3, 2019, Iris was obliged to both pay the second deposit and to proceed with closing the APS. By not doing so, Iris repudiated the APS. By operation of the APS, the first deposit was forfeited and must be paid out to the Plaintiff. There is no genuine issue requiring a trial of that issue.

### **The Defendant’s Position**

- [5] The Defendant Iris contends that summary judgment is not appropriate as there are triable issues. Moreover, partial summary judgment should be granted only in the rarest of cases. Finally, the Defendant asserts that the evidence establishes that there was no enforceable agreement; accordingly, it follows that the first deposit must be returned to Iris.

### **Summary Judgment**

- [6] The court shall grant summary judgment to a plaintiff if it is satisfied that there is no genuine issue requiring a trial with respect to a defence: r. 20.04(2)(a), *Rules of Civil Procedure*, R.O.O. 1990, Reg. 194.
- [7] The court may employ certain prescribed powers in the summary judgment exercise:
  - (a) weighing evidence;
  - (b) evaluating the credibility of a deponent; and
  - (c) drawing any reasonable inference from the evidence;

but the court must also consider whether it is in the interest of justice for such powers to be exercised only at a trial: see r. 20.04(2.1).

- [8] For assistance, a judge may order that oral evidence be presented by one or more of the parties: see r. 20.04(2.2).
- [9] The leading case on the purpose of, and approach to, summary judgment comes from the Supreme Court of Canada in *Hryniak v. Mauldin*, [2014] S.C.J. No. 7, 2014 SCC 7 (“*Hryniak*”). The Supreme Court encouraged the use of a summary judgment to resolve cases in an expeditious manner provided that the process can achieve a fair and just adjudication.
- [10] Subsequently, however, the Ontario Court of Appeal, while acknowledging that *Hryniak* called for a shift away from the formerly restrictive use of summary judgment, emphasized the overriding principle that summary judgment is only appropriate where such a motion allows for a fair process and a just adjudication. Trials are not to be viewed as a resolution of last resort. Summary judgment remains the exception, not the rule. (See *Mason v. Perras Mongenais*, [2018] O.J. No. 6381, 2018 ONCA 978).
- [11] Partial summary judgment ought only to be granted in cases where the issue on which judgment is sought is clearly severable from the balance of the case. If this principle is not followed, there is a very real possibility of a trial result that is inconsistent with the outcome of the summary judgment motion on essentially the same claim. (See *Butera v. Chown, Cairns LLP*, 2017 ONCA 783, [2017] O.J. No. 5267 at para. 26.)

## Discussion

- [12] I have considered this matter carefully. I have given it the hard look and scrutiny called for under the applicable rule and the governing case law.
- [13] This is not a simple case. Although framed as a straightforward repudiation and forfeit case by the Plaintiff, it is in fact multi-layered and complex. In my view, the following concerns and questions combine to leave several genuine issues that require a trial:
- a. Did the Plaintiff comply with the notice provisions of the JV agreement, both as far as timing of service and/or method of service and could Marmak sign as authorizing officer for Miletta?
  - b. Did Marmak backdate the signing of the APS? What effect if any did Miletta’s rejection of Iris’s offer have on the enforceability of the APS?
  - c. Is the APS unenforceable, either because Marmak did not have authority to sign it on behalf of Miletta or because the APS included terms which required the signing of a lease with a non-party or the extension of an oral lease with a non-party to the APS?
  - d. What was the true basis for Iris’s decision not to pay the second deposit and proceed with the transaction? Was Iris justified in failing to provide the second deposit and failing to close the APS after waiving the conditions on October 4, 2019?

- e. Did the Plaintiff properly accept the alleged repudiation and terminate the APS? If so, when? By relisting the Property, did the Plaintiff lose or waive any rights it had under the APS?
- f. Should the first deposit be forfeited to Marmak? Is relief from forfeiture available?
- g. If Iris repudiated the APS, what if any further damages are the Plaintiff entitled to? On what basis would they be calculated?
- h. Should partial summary judgment be granted on the first deposit when other outstanding issues may proceed to trial?
- i. Was there a misrepresentation made by the solicitor for the Plaintiff when she advised Miletta's solicitor on October 4, 2019, that Iris had not waived the condition and that the first deposit would be returned to Iris? Is the Plaintiff estopped from arguing repudiation and claiming the first deposit in these circumstances? What was the purpose and intention of that representation by the solicitor? What ramifications, if any, flow from it?
- j. By its conduct, did the Plaintiff waive the repudiation when it agreed to re-list the Property but delayed conveying its position on repudiation and termination of the APS until November 5, 2019?
- k. The evidence of a representative of Miletta would be of assistance to the court in determining whether there was an enforceable APS and whether Miletta has a stake in the litigation.
- l. What was the nature, context and content of the conversations between solicitors for the vendor and the purchaser (Moubarak and Salvatori) in and around the time of the alleged breach of the APS. Might that evidence shed light on the intentions and reasonable expectations of the parties at the time?

[14] These are live and triable issues. The determination of one or any of them in a just and fair manner requires *viva voce* evidence, tested by cross-examination, and assessed for credibility, reliability, and appropriate weight. This exercise cannot be fairly and justly conducted on a paper record. I cannot say with any confidence that I am as well placed as a trial judge to determine the issues.

[15] I am not of the view that a mini trial would be either a cost or a time saving alternative. The parties have conducted extensive out of court examinations. They have identified the issues. There is no indication that any key witness is deceased or unavailable. The parties should be in an excellent position to submit both an agreed set of facts and a joint document brief without formal proof. The parties should be permitted to call or compel the attendance of a broad range of witnesses. There is no jury trial here. An efficiently run and streamlined trial would require no more time or judicial resources than a mini trial.

[16] Finally, I am not satisfied that granting partial summary judgment would be appropriate. The statement of claim contains a lengthy list of orders and relief sought, including damages for loss of opportunity and lost profit. There was no confirmation that those issues have been abandoned or resolved. In light of this, summary judgment with or without a mini trial would not serve to finally dispose of the action before the court. This is not one of the rare cases where partial summary judgment should be allowed.

### **Disposition, Costs and The Way Forward**

[17] There are genuine issues in dispute requiring a trial. A trial of those issues is required.

[18] Because I have become familiar with both the background of the case and the issues involved, and because I have not embarked upon any fact finding, weighing of evidence, credibility assessments or drawing of inferences, it is appropriate for me to remain seized of the matter for trial purposes.

[19] The parties shall re-convene before me for a virtual case conference on a date to be assigned by the trial coordinator.

[20] At the case conference, the following questions, issues, and procedures shall be canvassed:

- a. Costs of the summary judgment motion
- b. Steps to be taken before the matter is ready for trial
- c. Length and mode of trial
- d. Trial dates
- e. A joint document brief
- f. Admissions and agreed set of facts
- g. Witnesses to be called at trial
- h. Dates for a judicial pre-trial

[21] For the reasons set out above, the motion for summary judgment is dismissed.

---

McCarthy J.

**Released:** September 26, 2023