CITATION: Vaill v. Homes by Lux Inc., 2024 ONSC 6951
COURT FILE NO.: CV-22-00678947-0000
DATE: 2024-12-12

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: SEAN VAILL and ZINA NELKU, Plaintiffs

AND:

HOMES BY LUX INC. and PETER LUX, Defendants

BEFORE: Parghi J.

COUNSEL: *Patrick Di Monte*, for the Plaintiffs

Steven Carlstrom, for the Defendants

HEARD: September 27, 2024

ENDORSEMENT

Background

[1] The Plaintiffs allege breach of contract arising from a renovation to their home. They seek three forms of relief. First, they seek an amendment to their Statement of Claim to allow them to seek Certificates of Pending Litigation ("CPLs") on 38 Clonmore, which is owned by Mr. Lux's spouse, and 37 Anndale, which is owned and occupied by Mr. Lux and his spouse. Second, they seek CPLs on both those properties. Third, they seek a Mareva injunction order that $250,000.00 in proceeds from the sale of 12 Clondale, which was owned by Mr. Lux and his spouse until it was sold in August 2024, be held in trust by the solicitor for the Defendants pending an agreement of the parties or a further court order.

[2] The Plaintiffs advise that they have adjourned the portion of their motion seeking relief in respect of the Defendants' outstanding answers to undertakings and questions taken under advisement. They further advise that the motion to amend the damages sought in the Statement of Claim from $250,000.00 to $300,000.00 is proceeding on consent.

[3] For the reasons below, I do not grant the CPLs or Mareva injunction, but do so without prejudice to the Plaintiffs' right to renew their motion seeking this relief in the future. I make additional orders as detailed below.

The Motion

[4] I have significant concerns about the conduct of the Defendants. These concerns underlie my decision on this motion.

[5] The Plaintiffs initially moved for a CPL on 12 Clonmore. They understood that 12 Clonmore was going to be sold on August 29, 2024. It was not until a case conference held before Justice Centa on August 28, 2024 that the Defendants advised the Plaintiffs, for the first time, that the property had in fact been sold on August 14, 2024.

[6] In my view, the Defendants acted improperly in withholding this information from the Plaintiffs. The Defendants were well aware that the Plaintiffs were seeking a CPL on 12 Clonmore. They were aware that their own real estate agent had communicated an August 29, 2024 date of sale to the Plaintiffs. The change in the date of sale was clearly material. It should have been communicated to the Plaintiffs. Instead, the Defendants told the Plaintiffs only after the sale was a *fait accompli*. They told the Plaintiffs at the case conference itself, and not any sooner.

[7] I am also gravely concerned that the Defendants have not complied with the Endorsement of Justice Centa from that case conference. The Endorsement required that the Defendants provide the Plaintiffs with an account reconciliation in respect of the renovation project. In ordering the account reconciliation, Justice Centa required the following:

> The defendants must provide a detailed answer in spreadsheet form, along with narrative explanations as required, setting out the original estimates, actual costs, labour costs, material costs, and any credits to account for the $272,000 in cash provided by the plaintiffs to the defendants … on or before September 11, 2024.

[8] The Defendants have not produced this account reconciliation. They offer no explanation for their failure to do so.

[9] The Plaintiffs voice concern that construction materials and labour that they paid for may have been diverted to home renovation projects being carried out by Homes by Lux on other properties in the neighbourhood. They say, and I agree, that the account reconciliation may indicate whether there was any such "cross-pollination" of labour and material, and, in turn, may support a constructive trust claim on those other properties. To the extent that those properties include 38 Clonmore and 37 Anndale, as the Plaintiffs claim, this may support a request for a CPL against those two properties.

[10] The Defendants assert that a CPL on 38 Clonmore and 37 Anndale should not be granted because the Plaintiffs have not shown that they have an interest in either property. In making this argument, they seek to benefit from their failure to comply with the Endorsement of Justice Centa. The account reconciliation may evidence the Plaintiffs' interest in one or both of these properties. The Defendants were required by court order to have produced the account reconciliation by now. They have not done so. They now seek to benefit from their improper conduct.

[11] Likewise, the Defendants state that the Plaintiffs have not demonstrated a strong *prima facie* case that they have been overcharged. However, the information contained in the account reconciliation may be relevant to this allegation.

[12] Based on the record before me, however, which does not contain the account reconciliation, I am unable to grant the relief sought by the Plaintiffs.

[13] To obtain CPLs on 38 Clonmore and 37 Anndale, the Plaintiffs must demonstrate a triable issue that they have an interest in those properties. Based on the record before me, the Plaintiffs have not demonstrated any such interest. However, if the account reconciliation owed to them by the Defendants indicates that they funded labour or materials used on construction at 38 Clonmore or 37 Anndale, then it may help to establish an interest in those properties.

[14] To obtain the Mareva injunction holding $250,000.00 in trust, the Plaintiffs must establish a strong *prima facie* case against the Defendants. The core of their action is that the renovation work was over budget and of poor quality. They state that they overpaid for the work done by Homes by Lux and are out-of-pocket for expenses incurred to remedy the deficiencies in the work.

[15] Based on the record before me, the Plaintiffs have not made out a strong *prima facie* case in this regard. The record does not enable me to identify the estimates provided by Homes by Lux for the labour and material costs associated with the project, or the actual costs of that labour and material. It does not enable me to compare those estimates against those actual costs. Nor does it let me assess whether or how the payments made by the Plaintiffs to Homes by Lux were applied against those expenses.

[16] Some of the evidence I require may be contained in the account reconciliation that the Defendants have failed to disclose. Of particular relevance, I suspect, is the information in the account reconciliation about precisely how the Plaintiffs' payments were applied. In my view, whether there is a strong *prima facie* case of overcharging and breach of contract is best assessed holistically, with the benefit of a complete record that contains the account reconciliation.

[17] The Defendants' failure to provide the account reconciliation has prejudiced the Plaintiffs' ability to demonstrate their entitlement to the relief they seek. It has deprived the court of the ability to consider these issues with the benefit of a complete evidentiary record. Perhaps most importantly, it reflects a disregard for orders of this court.

[18] The Defendants remain in breach of Justice Centa's order to provide the account reconciliation and are to remedy this by December 19, 2024.

[19] The Plaintiffs are at liberty to renew their motion seeking CPLs and a Mareva injunction in the future with the benefit of a more complete evidentiary record. If they require assistance in scheduling a renewed motion, they may contact my judicial assistant.

Costs

[20] The Plaintiffs seek their costs of this motion and the two case conferences. Justice Centa ruled that there was to be no costs award for the September 13, 2024 case conference, and accordingly I make no costs order in respect of that case conference. However, he left costs for the August 28, 2024 case conference to the judge hearing this motion.

[21] In exercising my discretion to fix costs under section 131 of the *Courts of Justice Act*, R.S.O. 1990, c C.43, I may consider the factors enumerated in rule 57.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg 194. These include the result achieved, the amounts claimed and recovered, the complexity and importance of the issues in the proceeding, the principle of

indemnity, the reasonable expectations of the unsuccessful party, and any other matter relevant to costs.

[22] In *Apotex Inc. v. Eli Lilly Canada Inc.*, 2022 ONCA 587, the Court of Appeal for Ontario restated the general principles to be applied when courts exercise their discretion to award costs. The Court held that, when assessing costs, a court is to undertake a critical examination of the relevant factors, as applied to the costs claimed, and then "step back and consider the result produced and question whether, in all the circumstances, the result is fair and reasonable".

[23] I grant the Plaintiffs costs from the August 28, 2024 case conference, fixed in the amount of $800.00. I consider this fair and reasonable. It is at that case conference that the Defendants disclosed, for the first time, that 12 Clonmore had been sold already. It was improper for the Defendants to have waited until the eleventh hour, and well after the sale took place, to disclose this information. Their conduct forced the Plaintiffs to revisit, at the last minute, the relief sought in this motion and the topics to be discussed at the case conference.

[24] Moreover, while the Plaintiffs were unsuccessful on this motion, they were hindered in their ability to establish their case by the Defendants' failure to produce the account reconciliation. Because of the Defendants' conduct, the Plaintiffs did not have the benefit of a complete record. Nor did the court. The result was a waste of time, effort, and judicial resources. In these circumstances, I consider it appropriate to impose a costs award against the Defendants of $5,000.00 in respect of the motion. I am hopeful that such a costs award will convey to the Defendants the need to comply with orders of this court. These orders are not advisory. They are mandatory. They should be treated as such.

Order Granted

[25] I grant the Plaintiffs' request to amend the Statement of Claim to allow them to seek CPLs on 38 Clonmore and 37 Anndale. I also grant their consent motion to amend the damages sought in the Statement of Claim to $300,000.00. The Plaintiffs are to provide the amended pleading and form of Order via email to my judicial assistant.

[26] I order the Defendants to provide the account reconciliation ordered by Justice Centa by no later than December 19, 2024.

[27] I order the Defendants to pay the Plaintiffs $5,800.00 in costs from the August 28, 2024 case conference and this motion, within 30 days of the date of this Endorsement.

[28] I decline to grant CPLs on 38 Clonmore and 37 Anndale or an order requiring that $250,000.00 in proceeds from the sale of 12 Clondale be held in trust by the solicitor for the Defendants. However, I do so without prejudice to the Plaintiffs' right to renew the motion seeking such relief in the future.

Parghi J.

Released: December 12, 2024