

CITATION: Kinariwala v. Ruiz, 2024 ONSC 7188

COURT FILE NO.: CV-23-842

DATE: 2024/12/23

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Hardik Bharkumar Kinariwala, Plaintiff

AND:

Deborah Del Socorro Ruiz a.k.a. Deborah Ruiz, Defendant

BEFORE: The Honourable Mr. Justice G. E. Taylor

COUNSEL: Siddharth S. Joshi, Counsel for the Plaintiff

Stephen Gadbois, Counsel for the Defendant

HEARD: November 26, 2024

ENDORSEMENT

Introduction

[1] This is a motion for summary judgment arising out of a failed real estate transaction. By way of an Agreement of Purchase and Sale dated May 3, 2022 (“the APS”), the plaintiff agreed to sell, and the defendant agreed to buy, real property located at 1572 Buckingham Drive, Windsor, Ontario (“the Property”). The purchase price was \$465,000.00. The closing date was originally June 16, 2022 but was extended to June 23, 2022. The defendant failed to complete the APS on the extended closing date.

[2] The plaintiff re-listed the Property and sold it on March 24, 2023 for \$340,000.00. The plaintiff then commenced the present action claiming damages of the difference in the purchase price in the APS and the eventual selling price, plus the costs of maintaining the Property from the extended closing day to the eventual selling date.

Facts

[3] In the Statement of Defence, the defendant admitted the following facts pleaded in the Statement of Claim:

- a) The plaintiff was the owner of the Property;
- b) On or about May 3, 2022 the defendant entered into the APS to purchase the Property from the plaintiff;
- c) The purchase price for the Property was \$465,000.00;
- d) The deposit was \$10,000.00;
- e) The closing date was June 16, 2022;
- f) There were no conditions in the APS;
- g) The defendant failed to complete the APS on June 23, 2022;
- h) On or about July 6, 2023 (*sic*), the defendant's solicitor confirmed the defendant's breach of the APS; [the actual date of the email is July 6, 2022].

[4] Absent from the APS was a term that it was conditional on the defendant being able to obtain financing for the purchase. On or about June 6, 2022, the parties executed an Amendment to the APS ("the Amendment"), extending the closing date to June 23, 2022. In the Amendment, the defendant agreed that if she failed to close the APS on June 23, 2022, the deposit would be forfeited in partial satisfaction of damages, and the plaintiff would be able to claim further damages from the defendant.

[5] In an email dated July 6, 2022, the defendant's solicitor wrote:

She [the defendant] just has no choice but to not go through with the sale with these 3 mortgages. She wanted to but did not realize the effect of doing so until today. I

apologize for my client but she just has no option to go forward. Not closing is the better evil then (*sic*) closing under these circumstances. She only decided to go through with the sale initially because the bank employee told her verbally that she qualified for a mortgage only to find out that the bank declined to go through with the commitment because of the downturn in the real estate market.

[6] The deposit of \$10,000.00 was released to the plaintiff.

[7] The plaintiff did not immediately re-list the Property for sale after learning of the defendant's breach of the APS. The plaintiff's evidence is that he spoke to the real estate agent who said that the market was not behaving well, which he understood to mean a lot of deals were not going through. The agent recommended waiting for a bit.

[8] On July 7, 2022, the plaintiff listed the Property with Airbnb. After two short term rentals, the plaintiff received an offer to rent the Property for 99 days, which was accepted. The Property was rented through Airbnb from July 10, 2022 to March 22, 2023 for a total of 183 nights. During this period the plaintiff received net rental income from the Property in the amount of \$10,492.48.

[9] The plaintiff re-listed the Property for sale in November 2022 for a period of approximately one month. During this period, two offers were received, one for \$275,000.00 and one for \$250,989.00. On the advice of the real estate agent, the Property was then removed from the market and re-listed for sale in January 2023.

[10] After the Property was re-listed for sale in January 2023, three more offers were received. Between January 23, 2023 and January 25, 2023, the plaintiff received three offers for the sale and purchase of the Property ranging between \$260,000.00 and \$300,000.00. None of those offers were accepted by the plaintiff.

[11] The plaintiff entered into an Agreement of Purchase and Sale dated January 25, 2023 for the sale of the Property for \$340,000.00 ("the Second APS"). The Second APS was completed on March 24, 2023.

[12] The plaintiff incurred expenses in relation to the Property between June 23, 2022 and the date of completion of the Second APS of \$21,608.99 as follows:

- a) Mortgage and Property Tax: \$18,538.24;
- b) Rental Hot Water Tank: \$627.57;
- c) Enwin (Electricity and Water): \$944.60;
- d) Enbridge (Natural Gas): \$572.33;
- e) Home Insurance: \$926.25.

[13] During the course of oral submissions, counsel for the plaintiff advised that the expense claims for Enwin, electricity and water and Enbridge, natural gas were not being pursued because of the inability to allocate those expenses to the Airbnb rentals.

[14] No expert evidence was presented on the motion with respect to the value of the Property on June 23, 2022.

Positions of the Parties

[15] The plaintiff's position is that the defendant has admitted that she breached the APS and therefore the only issue to be decided is damages. The plaintiff says that a trial is not necessary to determine the appropriate amount of damages.

[16] The defendant does not seriously dispute that she breached the APS. The defendant's position is that it was not reasonable for the plaintiff to fail to re-list the property for sale until November 2022, and then remove the Property from the market after listing it for a month or less. To remove the property from the market in December and then failing to re-list it until January 2023 was likewise unreasonable. The plaintiff has failed to mitigate his damages.

Is this an Appropriate Case for Summary Judgment

[17] In *Hryniak v. Mauldin*, [2014] 1 S.C.R. 87, the Supreme Court of Canada held that a trial is not required if summary judgment can achieve a fair and just adjudication, if it provides a process

that allows the judge to make necessary findings of fact, and is proportionate, more expeditious and less expensive means to achieve a just result than going to trial (para 4).

[18] In *Hryniak*, the court stated:

There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result. (para. 49)

[19] On a motion for summary judgment, a party must put his or her best foot forward. The court is entitled to assume that the parties have provided all of the relevant evidence that will be presented at the trial and that there will be no further evidence (*Prism Resources Inc. v. Detour Gold Corporation*, 2022 ONCA 326 at para 4; *Degner v. Cabral*, 2019 ONSC 1610 at para 36).

[20] In my opinion, there is sufficient evidence in the record on the motion to permit the necessary findings of fact to be made. The law is not in dispute. This action was commenced under Rule 76 of the *Rules of Civil Procedure*. The damages are slightly in excess of \$100,000.00 based on the best position of the plaintiff. It is therefore proportionate that this case be decided in a summary manner. A trial is not required to achieve a just result.

Liability

[21] The Statement of Defence alleges that the plaintiff represented the Property as being a successful Airbnb with an average monthly income of \$3,000.00. The Reply denies that there was any representation regarding future income from the Property. In her Responding Affidavit on the present motion, the defendant repeats the allegation that the plaintiff represented the income that the Property was capable of generating as an Airbnb but stated that the represented monthly income was \$3,500.00. However, it is not alleged that the defendant's failure to complete the purchase was as a result of any misrepresentation of the income that the Property was capable of generating. The defendant's Affidavit states: "Unfortunately, I was unable to obtain financing for the purchase". This is consistent with the email from the defendant's solicitor dated July 6, 2022.

[22] The email from the defendant's solicitor dated July 6, 2022 states that the defendant made the decision not to complete the APS because "not closing was the better evil" than closing with three mortgages.

[23] I therefore conclude that the failure to complete the APS was as a result of the defendant's inability or unwillingness to obtain financing to purchase the Property. A trial is not required to make this determination.

Damage

[24] The defendant does not seriously dispute that she breached the APS. The defendant's position is that it was not reasonable for the plaintiff to fail to re-list the property for sale until November 2022, and then remove the Property from the market after listing it for a month or less. To remove the property from the market in December and then failing to re-list it until January 2023 was likewise unreasonable. The plaintiff has failed to mitigate his damages.

[25] The defendant asserts that the Property would have sold for more than \$340,000 had it been listed for sale in July 2022. However, the defendant presented no evidence as to the value of the Property in July 2022. The defendant could have, and should have, presented expert evidence to support her position. The defendant cannot resist summary judgment being granted because she wants an opportunity to present expert evidence at trial. The defendant has not put her best foot forward.

[26] There is no dispute that the sale price for the Property was \$465,000.00. The evidence is clear that the plaintiff sold the Property in March 2023 for \$340,000.00 resulting in a loss to the plaintiff of \$125,000.00. The defendant's deposit of \$10,000.00 was forfeited in accordance with the June 6, 2022 amendment to the APS. Therefore, the net loss to the plaintiff is \$115,000. A trial is not required to make this determination.

Mitigation

[27] As of July 6, 2022, the plaintiff knew that the defendant was not going to complete the APS. The plaintiff could have immediately re-listed the property for sale. The only evidence on

the motion is that the plaintiff consulted with the real estate agent who recommended waiting for an unspecified period of time before re-listing the Property for sale because the market was not behaving well. Once the 99-day Airbnb rental offer was received the plaintiff essentially decided to keep the Property off the market until the end of the rental.

[28] The Property was listed for sale for the month of November 2022 but was removed from the market, again on the advice of the real estate agent. When the Property was re-listed in January 2023, it sold quickly for \$340,000.00.

[29] In *Saramia Crescent General Partner Inc v. Delco Wire and Cable Ltd*, 2018 ONCA 519, the court held that the defendant has the onus of proving that mitigation was possible and that the plaintiff failed to do so. Further, the duty to mitigate requires the plaintiff to take reasonable step to mitigate its loss, not any and all steps (para. 80).

[30] In *Degner v. Cabral*, 2019 ONSC 1610, it was held that when a failure to mitigate is alleged in an action for the breach of a contract for the sale of real property, the plaintiff/seller should introduce evidence of the resale price following the breach and then the onus shifts on the defendant to show that if certain steps had been taken the damages would have been less (para. 53).

[31] In this case, the plaintiff followed the advice of his real estate agent in not immediately listing the property for sale after the defendant's breach. He again followed his real estate agent's advice when he removed the Property from the market in November 2022 and then re-listed it for sale in January 2023. The plaintiff received a total of six offers to purchase the Property and accepted the highest. I find that the plaintiff acted reasonably in the circumstances. The defendant has not presented any admissible evidence that the Property would have sold for more than \$340,000 if it had been listed for sale in July 2022.

[32] I therefore find that the plaintiff suffered damages of \$125,000 as a result of the defendant's breach of the APS. The deposit of \$10,000 must then be deducted from this amount.

[33] The plaintiff also seeks to recover expenses that were incurred between the planned closing date and the final completing of the sale of the Property in March 2023. I find some of the expenses to be reasonable.

[34] In my view the expenses for hot water tank rental of \$627 and home insurance of \$926 are expenses that the plaintiff incurred as a result of the defendant's breach.

[35] The plaintiff seeks to include in his damages the sum of \$18,538 for mortgage and property tax payments. That amount is not separated into its component parts which would include mortgage interest, mortgage principle and taxes. It is the responsibility of the plaintiff to present evidence as to the amount of each of those expenses. I would have included as damages the amounts expended for interest and taxes but not for mortgage principle payments. Interest and taxes are expenses that the plaintiff incurred as a result of the defendant's breach. I assume that the mortgage principle payments increased the plaintiff's net proceeds from the ultimate sale. Because I am unable to quantify the amounts I would have included as damages I do not allow the plaintiff's claim for mortgage and taxes.

[36] The plaintiff also says he should not have to account for the Airbnb rental income received between June 23, 2022. I disagree. The plaintiff made a decision to postpone listing the Property for sale and to continue to rent it through Airbnb. I have found that decision to not be unreasonable. However, it seems to me that the plaintiff should account for the income earned before the Property was ultimately sold. The net amount of that income is \$10,492.

Conclusion

[37] Judgement shall issue in favour of the plaintiff for:

a) Loss on re-sale	\$125,000
b) Expenses for water tank rental and insurance	\$1,553
c) Total	\$126,553
d) Less: Deposit	\$10,000

- e) Less: Airbnb income \$10,492
- f) Net damages \$106,061
- g) Plus pre-judgment interest in accordance with the *Courts of Justice Act* from June 23, 2022 to the date of judgment.

[38] The parties are encouraged to resolve the issue of costs. If costs are not resolved, the parties may make written submission as to costs. Written submissions are to be limited to three pages exclusive of a Bill of Costs, Costs Outline and any relevant Offers to Settle and are to be filed electronically on Case Centre and delivered electronically to my attention to mona.goodwin@ontario.ca and Kitchener.SCJJA@ontario.ca. Plaintiff's submissions are to be submitted within 20 days of the release of this Endorsement. Defendant's submissions are to be submitted within 40 days of the release of this Endorsement. If written submissions are not filed within 45 days of the release of this Endorsement, it will be assumed that the issue of costs has been resolved.

G.E. Taylor J.

Date: December 23, 2024