CITATION: Osajie v. Alile, 2025 ONSC 1209
COURT FILE NO.: CV-22-00688817-0000
DATE: 20250224

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Benny Osajie and Joy Osajie

AND:

Eevine Alile

BEFORE: J.T. Akbarali J.

COUNSEL: *Gregory Weedon and Monica Bui*, for the plaintiffs

Olubunmi Ogunniyi, for the defendant

HEARD: February 5, 2025

ENDORSEMENT

Overview

[1] The plaintiffs and defendant entered into an agreement of purchase and sale ("APS") under which the defendant was to purchase a property owned by the plaintiffs for $960,000. The transaction did not close. There is no dispute that the parties entered into an APS, and that the defendant declined to close the transaction.

[2] On this summary judgment motion, the plaintiffs seek damages for breach of contract. The defendant denies liability, on the basis that she had the right to rescind the agreement due to an alleged misrepresentation as to square footage of the property made by the plaintiffs' real estate agent that she argues induced her to enter into the APS, and also due to the plaintiffs' alleged breaches of the agreement.

[3] The defendant has commenced a counterclaim against the plaintiffs that raises the same issues that she raises in her defence of the plaintiffs' proceeding. It alleges negligent and reckless misrepresentation "on the part of the plaintiffs and their agent."

[4] The relief sought on the plaintiffs' motion for summary judgment includes a dismissal of the counterclaim.

Issues

[5] This motion requires me to determine the following issues:

a. Should this summary judgment motion be converted into a summary trial, as the defendant argues?

b. If the matter proceeds as a summary judgment motion, is there a genuine issue requiring a trial with respect to the respondent's claims that she was entitled to rescind the APS because:

i. the defendant was induced to enter into the APS as a result of the plaintiffs' real estate agent's misrepresentations of the square footage of the property;

ii. the plaintiffs breached the agreement by failing to deliver the property in a clean and orderly condition; or

iii. the plaintiffs breached the agreement by failing to deliver the property with a basement tenant?

[6] I consider these issues in turn.

Should this motion be converted into a summary trial?

[7] The defendant argues that the motion for summary judgment ought to be converted into a summary trial because:

a. important evidence from the defendant's real estate agent (who is also her spouse) is not before the court on the summary judgment motion but will be on a summary trial;

b. there is a risk of inconsistent verdicts if the summary judgment motion proceeds before the trial of the defendant's counterclaim;

c. there is no evidence that a summary judgment motion is more cost-effective than a summary trial would be; and

d. the defendant has sought leave to amend her statement of defence and counterclaim to add the plaintiff's realtor and his brokerage as defendants to the counterclaim.

[8] I decline to convert the motion into a summary trial for the following reasons:

a. this summary judgment motion was scheduled 22 months ago, with the consent of the defendant's then-counsel. The parties having incurred the expense and delay of preparing this summary judgment motion for argument, there is no proportionality in converting it to a summary trial at this stage;

b. the parties appeared in civil practice court on five occasions in connection with this motion. The first time the defendant sought an order converting this motion to a

summary trial was on January 7, 2025, less than a month before the scheduled hearing of this motion.

c. At the January 7, 2025 attendance, Justice Chalmers was asked, but declined, to convert the motion into a summary trial. He held that there had been no material change in circumstances since the matter was first heard in civil practice court in March 2023, when the summary judgment motion was agreed to. The defendant's attempt to get me to order the conversion of this motion into a summary trial is a collateral attack on the order of Chalmers J.

d. I do not accept the defendant's allegation that she was unable to place the evidence of her realtor (who, I repeat, is also her spouse) before the court. The defendant, having failed to do what I would have expected and adduce an affidavit from her spouse, attempted to cross-examine her spouse in aid of the motion, after all the other cross-examinations were concluded. Predictably, the plaintiffs did not consent. The plaintiffs indicated they would be willing to consider consenting to the late filing of an affidavit from the spouse, and suggested the defendant schedule a case conference to obtain directions and an amendment to the court-ordered timetable so she could adduce his evidence. The defendant took no such steps. Any prejudice from the lack of evidence from the defendant's spouse is of her own making.

e. The defendant's counterclaim raises the same issues that she raises in defence of the plaintiffs' claim. There is no realistic possibility that summary judgment would be granted in the claim, but not in the counterclaim. The plaintiffs' motion seeks judgment on both.

f. The defendant's motion to add the plaintiffs' realtor and brokerage to the statement of claim is, in my view, a tactical step taken to try to delay the hearing of this motion. The notice of motion is dated January 27, 2025, nine days before the hearing of this motion that was scheduled 22 months before. The defendant claims that it was only on cross-examination of the plaintiffs and their realtor (who filed an affidavit on the motion) that she learned that the realtor may have acted without authority from the plaintiffs in making the alleged misrepresentations (which he denies making). I do not accept the defendant's argument. The statement of defence and counterclaim allege negligent and reckless misrepresentation on the part of the plaintiffs' realtor. It cannot be, in the face of a pleading that makes such allegations, that the defendant only learned of facts that led her to believe the realtor may have liability for the misrepresentations she alleges he made during the cross-examinations. Moreover, the cross-examinations took place in August and September 2024. There is no explanation given as to why a motion to add the realtor and his brokerage was only brought months later. I decline to give effect to this delay tactic.

Legal Principles Applicable to a Summary Judgment Motion

[9] There is no disagreement as to the principles that apply when determining when a matter can be resolved on a summary judgment motion. I am cognizant of the principles set out in *Hryniak v. Mauldin*, 2014 SCC 7. There will be no genuine issue requiring a trial when the judge can make the necessary findings of fact, apply the law to the facts, and the process is a proportionate, more expeditious, and less expensive means to achieve a just result: *Hryniak*, at para. 49.

[10] On a motion for summary judgment, the court is entitled to assume that the record contains all the evidence that the parties would adduce if the matter proceeded to trial: *Sweda Farms Ltd. v. Egg Farmers of Ontario*, 2014 ONS 1200, at paras. 26-27.

[11] Each party must put their best foot forward on a motion for summary judgment. As Centa J. warned in *1000425140 Ontario Inc. v. 1000176653 Ontario Inc. (2023)*, 2023 ONSC 6688, at para. 32:

> The defendants were required to put their best foot forward on this motion for summary judgment. Instead, they tendered virtually no first-hand evidence. Tactical decisions like this have consequences.

[12] With these principles I mind, I turn to the three claims that the defendant makes to argue that the there are genuine issues requiring a trial with respect to whether she had the right to rescind the APS. I note these are the same issues raised by her counterclaim.

The Alleged Misrepresentations

[13] The defendant alleges that the plaintiffs' realtor, Mr. Bindlish, induced her to enter into the APS by misrepresenting to her realtor (and spouse), Michael Elabor, the square footage of the property that the vendors were selling.

[14] The parties entered into the APS on March 12, 2022.

[15] In the defendant's telling of events, on March 11, 2022, before she made an offer on the property, Mr. Bindlish orally advised Mr. Elabor that the property was 1500-2000 square feet. In reliance on that representation, she made the offer. After the APS was signed, Mr. Elabor followed up by text message on March 15, 2022 to get the representation as to the square footage in writing. He did not get it in writing, but Mr. Bindlish again repeated the representation orally. Then about six weeks later, on June 14, 2022, just over two weeks before the scheduled closing, Mr. Elabor sought confirmation of the square footage by text again. The defendant places into evidence text messages between Mr. Bindlish and Mr. Elabor that she argues supports her narrative.

[16] Mr. Bindlish gave evidence on the motion. He denied having made any representation as to the square footage of the property.

[17] The documentary evidence reveals that the listing of the property does not include a statement as to the overall square footage of the property. Dimensions are included for the different rooms in the property. Added together, they amount to about 840 square feet. The listing also includes a statement that the buyer is to verify all the details of the listing.

[18] The APS includes several relevant clauses:

a. Para. 13 of the APS provides that the defendant acknowledges having had the opportunity to inspect the property. There is no dispute that she and Mr. Elabor physically visited the property and had the opportunity to observe its size for themselves.

b. Para. 26 of the APS is an entire agreement clause. It disavows any "representation, warranty, collateral agreement, or condition which affects the [APS] other than as expressed therein (in writing)."

c. Schedule B of the APS acknowledges that the plaintiffs made no representation or warranty with respect to matters including "measurements." In Schedule B, the defendant acknowledges that she has relied entirely on her own inspection and investigation with respect to the quantity, quality, and value of the property.

[19] From these documents, I observe that it ought to have been clear to the defendant, and her realtor spouse, that the defendant was not entitled under the terms of the contract to rely on any representations that had been made, if indeed any had been made.

[20] In addition to the contractual and listing documents, I have had regard to the text message exchange between the realtors. It reveals the following statements were made:

a. On March 15, 2022, after the APS was signed, Mr. Elabor texted Mr. Bindlish to ask if he "had any idea" of the square footage of the property. The next day, Mr. Bindlish replied that he had no idea. Mr. Elabor responded, asking him to ask the owner because "I just want to have an idea."

b. On June 14, 2022, just over two weeks before closing, Mr. Elabor again texted Mr. Bindlish to ask that he text Mr. Elabor "the age and square feet of the property." Mr. Bindlish responded by telling him that he did not know that information. Mr. Elabor replied by alleging that Mr. Bindlish had said the established square footage was 1700. Mr. Bindlish again denied knowing, and said: "Your guess is as good as mine." Mr. Elabor then texted: "The way you acting right now I guess something is fishy." Mr. Bindlish told Mr. Elabor to do his due diligence and check the sources available to him. The following two texts were then sent (errors in originals):

i. Mr. Elabor: You lied to me about the square footage you said is 1500sq to 2000sq. Check previous listing that property is less down 1500sq. I don't know agent are given out false information. Good I know. 2 can play that game. Good

ii. Mr. Bindlish: That was the estimate that I received once again you have to check yourself all measurements and tax information is not to be relied on as I do not look at actual documents for that. thanks

[21] From these text messages, I make the following observations.

[22] If Mr. Bindlish had, on March 11, 2022, advised Mr. Elabor that the square footage of the property was 1500-2000 square feet as alleged, one would expect Mr. Elabor to confirm that specific information via text on March 15, 2022, not ask if Mr. Bindlish had "any idea" about it because Mr. Elabor wanted to "have an idea." Moreover, when Mr. Bindlish indicated he had no information about the square footage, one would have expected Mr. Elabor to reference Mr. Bindlish's (alleged) earlier representation that the property was 1500-2000 square feet. But he does not. Rather, Mr. Elabor falls silent on the topic for weeks.

[23] If, as the defendant claims, Mr. Elabor was trying to get the alleged representation as to square footage in writing, one would have expected Mr. Elabor to follow up on the text exchange, and not be satisfied with the (alleged) further oral representation made after the text message was sent. Moreover, it is unclear what the purpose of getting the representation in writing would be after the APS had been signed, given its clear terms disavowing any representations.

[24] The June text exchange, taken at its highest, suggests that at some point Mr. Bindlish may have given Mr. Elabor some kind of indication of square footage of the property, though even assuming the content of Mr. Elabor's texts to be true (which I do not for reasons I explain below), it is unclear whether the alleged representation was that the property was 1500-2000 sq feet or 1700 sq feet. In any case, there is absolutely nothing in the documents that lends any support to the defendant's assertion that the representation was made prior to her entering into the APS, and induced her to do so.

[25] The defendant has the additional problem that all of the evidence on which she relies to establish that a misrepresentation was made by Mr. Bindlish to Mr. Elabor is hearsay. While r. 39.01(4) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, permits affidavits that contain statements of the deponent's information and belief on a motion, if the source of the information and the fact of the belief are specified in the affidavit, the defendant's tactical decision not to offer direct evidence from Mr. Elabor affects the weight I am prepared to assign to the hearsay evidence offered by the defendant on this critical issue. I am not prepared to accept that the content of Mr. Elabor's text messages are true (although I accept that the text messages were sent as they appear to have been sent). Nor am I prepared to accept the truth of the content of the hearsay evidence the defendant offers in her affidavit that Mr. Bindlish misrepresented the square footage of the property to Mr. Elabor.

[26] The defendant does not offer evidence that raises a question of credibility about whether the alleged representation was made. At most she offers evidence that she might have been able to offer evidence that raised a question of credibility, had she offered evidence from Mr. Elabor. That is not good enough on a summary judgment motion. She made a tactical choice not to lead Mr. Elabor's evidence. As I have already noted, tactical choices have consequences.

[27] The only conclusion that can be drawn from the evidence before me is that Mr. Bindlish made no representation as to the square footage of the property at any time before the APS was signed, and as such, no misrepresentation as to square footage of the property could have induced

the defendant to enter into the APS. In these circumstances, she was not entitled to rescind the APS based on the actual square footage of the property[1]. There is no genuine issue requiring a trial with respect to the alleged misrepresentation.

The Condition of the Property

[28] The defendant argues that the plaintiffs breached the APS by failing to deliver the property in "broom-swept condition" as required by the APS.

[29] The defendant deposes that she visited the property on June 16, 2022, and found "substantial damage" which was more than just "regular wear and tear." She offers photographs that she claims substantiate the poor condition of the property.

[30] The defendant complained about the condition of the property after she visited it. The plaintiffs subsequently undertook repairs and cleaning to the property. The plaintiffs offer photos of the condition of the property at closing.

[31] The defendant did not visit the property immediately prior to closing to confirm whether the necessary cleaning and repairs had been undertaken. On cross-examination, when shown the plaintiffs' photos of the condition of the property, the defendant refused to answer whether they depicted a property in the dilapidated condition that she alleged.

[32] The defendant's photographs show a property that requires some minor repairs, like affixing vent covers properly, replacing light switches, and adding door pulls to a cabinet. The photos show cleaning required in spaces that would have been mostly covered while occupied, like inside sink cabinets, or on flooring that was obviously underneath furniture.

[33] The plaintiffs make an argument about whether the requirement that the property be in "broom-swept condition" was a representation or a warranty. I need not delve into that question.

[34] The evidence before me establishes that the property was in broom-swept condition at the time of closing. It required cleaning and repairs as of June 16, 2022 when the defendant visited it, and that cleaning and those repairs were undertaken.

[1] For purposes of completeness, I note that there is no reliable evidence in the record which would allow me to determine the actual square footage of the property. The defendant produced handwritten measurements she deposes she and Mr. Elabor took during a visit to the property prior to the scheduled closing date. These were not disclosed until after the plaintiffs mitigated their losses by selling the property, and no longer had access to it to confirm or contest the defendant's measurements. I have concerns about the reliability of the measurements the defendant has produced, but there is no need to resolve this question.

[35] The property was in broom-swept condition at closing. There is no breach of the APS based on the condition of the property. Accordingly, the defendant was not entitled to rescind the APS based on the condition of the property.

The Tenant

[36] It is undisputed that there was a tenant renting in the basement of the property at the time the APS was signed.

[37] Schedule A of the APS provided as follows: "Buyer agreed to assume a lady Tenant renting a room in the basement on the closing date."

[38] The record includes a text exchange between Mr. Elabor and Mr. Bindlish on May 30, 2022, wherein Mr. Elabor advises he wants to book a visit to the property. Mr. Bindlish agrees, and then adds, "by the way that trouble tenant in the basement was removed so you won't have to worry about her." Mr. Elabor responds by saying, "OK, good"

[39] The defendant, in her affidavit, deposes the following with respect to the tenant:

a. Conditions were included in the APS which included that she would assume the tenant living in the basement of the property.

b. On June 21, 2022, her counsel wrote to the plaintiffs' real estate lawyer, confirming that the defendant was seeking a refund of her deposit due to the misrepresentation of the square footage, and further "the fact that both tenants that I was to assume had vacated" the property. It is not clear to me who the second tenant is.

c. In response to her counsel's letter, the defendant was advised that the tenants could not be forced to remain at the property.

d. On June 29, 2022, the defendant's counsel responded and indicated that the defendant was never aware that the tenants were moving.

[40] There is no record of any objection being raised to the absence of the tenant until June 21, 2022, although the information about the tenant leaving was relayed on May 30, 2022. There is no explanation for the defendant's claim that she was never aware that the tenants were moving when the text exchange clearly shows that the information was communicated on May 30, 2022. There is no explanation for how the defendant would not have known the tenant had vacated when she visited the property on June 16, 2022, where presumably it would have been obvious that the property was no longer tenanted.

[41] In the defendant's factum, she states that one of the conditions of the agreement was that she would assume the tenant living in the basement. She made no additional argument, either in her factum or in her oral argument on the motion, as to why the absence of the tenant entitled her to rescind the APS. I conclude that this is not an argument that she seriously pursued.

[42] However, because she raises the tenancy in her counterclaim, and in view of the summary judgment sought dismissing the counterclaim, I consider the impact, if any, of the absence of the tenant before closing.

[43] The question is how to interpret the clause: "Buyer agreed to assume a lady Tenant renting a room in the basement on the closing date."

[44] The plaintiffs rely on *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, at para. 47, where the Supreme Court of Canada held (cites omitted):

> the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding"... To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract.

[45] In my view, the plain meaning of the clause is that the buyer was obligated to take possession with the tenant in the basement, not that the vendor was obligated to provide possession with the basement tenant. The clause was negotiated for the benefit of the vendor, and represented a departure from the most common clause, requiring vacant possession to be delivered on closing. The wording of the clause places no obligation on the vendor; the obligation is the buyer's only. That the defendant was relieved of an obligation under the agreement does not amount to a breach of the APS by the vendors.

[46] I thus conclude that the failure to provide the property with a tenant at closing was not a breach of the APS.

[47] The late-breaking complaint about the lack of the tenant, especially when seen in light of the misrepresentation claim and the claim the property was not in broom-swept condition, were the defendant's attempts to avoid a deal she came to regret, or that she could not finance.

Conclusion on Liability

[48] Based on the foregoing, I find that the defendant breached the APS by refusing to close, and had no justification for claiming rescission of the APS. The plaintiffs' claim is granted. The defendant's counterclaim is dismissed.

Damages

[49] The next question that arises is the quantum of damages. The defendant did not engage on the question of the quantum of the plaintiffs' damages, other than to allege, in a single paragraph, that there is a genuine issue requiring a trial "with respect to whether the subsequent lower re-sale price of the property by the Plaintiffs in a declining real estate market reflects the fair market value of the property based on the property's actual square footage…" This "argument" is no more than the defendant's musings. It is founded on nothing but speculation.

[50] Failure to mitigate is a matter for the defendant to prove: *Southcott Estates Inc. v. Toronto Catholic District School Board*, 2012 SCC 51, at para. 24. The defendant has not even attempted to prove any failure to mitigate.

[51] The evidence as to damages is set out in the plaintiffs' record. They relisted the property on July 5, 2022, just days after the transaction failed to close, on the same terms and conditions as before, including the list price of $959,900.

[52] After virtually no interest, based upon Mr. Bindlish's advice, the plaintiffs' reduced the listing price of the property, and then reduced it a second time when the first reduction did not garner the interest they had hoped for.

[53] The plaintiffs received an offer to purchase on September 6, 2022, and entered into negotiations. Ultimately, the highest offer received from that prospective purchaser was $795,000. Mr. Bindlish advised that the price was too low, so the plaintiffs refused the offer.

[54] Several weeks later, on September 28, 2022, the plaintiffs received another offer to purchase the property. After negotiations, and taking the advice of Mr. Bindlish, the plaintiffs agreed upon a sale price of $815,000.

[55] The plaintiffs' damages consist of the difference between the sale price in the APS and the price they were able to obtain for the property on the subsequent sale, together with their out of pocket expenses and carrying costs of the property between June 30, 2022 and December 14, 2022, the date the property's sale was concluded.

[56] The various carrying costs, such as utilities, and out of pocket costs, including legal fees in connection with the aborted sale, and the sale price differential are set out at para. 53 of Mr. Osajie's affidavit. I accept his calculation of losses.

[57] In total, the plaintiffs' losses are $157,396.19, before the application of the defendant's $30,000 deposit, which continues to be held in trust.

[58] The plaintiffs are entitled to the release of the $30,000 deposit, and the defendant shall be credited that amount as against the damages she owes the plaintiffs. After taking into account the deposit, the defendant owes $127,396.19 to the plaintiffs.

Costs

[59] The three main purposes of modern costs rules are to indemnify successful litigants for the costs of litigation, to encourage settlement, and to discourage and sanction inappropriate behaviour by litigants: see *Fong v. Chan* (1999), 46 O.R. (3d) 330, at para. 22.

[60] Subject to the provisions of an act or the rules of this court, costs are in the discretion of the court, pursuant to s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. The court exercises its discretion considering the factors enumerated in r. 57.01 of the *Rules of Civil Procedure*, including the principle of indemnity, the reasonable expectations of the unsuccessful party, and

the complexity and importance of the issues. Overall, costs must be fair and reasonable: see *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (Ont. C.A.), at para. 38. A costs award should reflect what the court views as a fair and reasonable contribution by the unsuccessful party to the successful party rather than any exact measure of the actual costs to the successful litigant: see *Zesta Engineering Ltd. v. Cloutier* (2002), 21 C.C.E.L. (3d) 161 (Ont. C.A.), at para. 4.

[61] The plaintiffs are the successful parties on the motion, and in the action and counterclaim. They are presumptively entitled to their costs.

[62] The plaintiffs' bill of costs supports full indemnity costs of $37,920.18, all inclusive. On a substantial indemnity scale, the plaintiffs' costs are $30,723.49, all inclusive.

[63] The plaintiffs seek costs on a substantial indemnity scale throughout, arguing that the defendant accused them of fraudulent misrepresentation, and failed to prove any dishonesty. They argue that failing to prove fraud after alleging it warrants an award of substantial indemnity costs: *Bargman v. Rooney*, [1998] CarswellOnt 5113, at paras. 18-19.

[64] As I read the pleading, the defendant stopped just short of alleging fraud, likely to avoid the costs consequences the plaintiffs now seek. The allegations that the plaintiffs recklessly and knowingly misrepresented the square footage of the property come very close to allegations of fraud, but I am not prepared to award costs on an elevated scale throughout in view of the fact that the defendant restrained herself from actually making allegations of dishonesty.

[65] In the alternative, the plaintiffs seek costs on a partial indemnity scale up to the date of a r. 49 offer to settle they made, and substantial indemnity costs thereafter. The offer, dated December 1, 2023, was for $135,000 plus costs fixed at $7,500. Costs calculated on a partial indemnity scale up to the date of the offer, and a substantial indemnity scale thereafter, are $28,775.78, all inclusive.

[66] I am satisfied that the plaintiffs have done better than their offer to settle, and are entitled to costs on a partial indemnity scale up to the date of the offer, and on a substantial indemnity scale thereafter.

[67] In considering the quantum of costs that is fair and reasonable, I note the following:

a. The defendant's bill of costs shows costs on a partial indemnity scale of $31,519.06, all inclusive. Thus, the defendant's partial indemnity costs are greater than the plaintiffs' substantial indemnity costs. I conclude that the costs claimed by the plaintiffs are within the reasonable expectations of the defendant.

b. The defendant's conduct, including breaches of the court-ordered consent timetable, and last-minute attempts to convert the motion into a trial, resulted in multiple civil practice court attendances and additional work, all of which needlessly added to the plaintiffs' costs.

c. The defendant asserted various claims that required the plaintiffs to respond; those claims were then not developed by the defendant. As a result, the plaintiffs incurred unnecessary costs.

d. The plaintiffs' counsel attempted to minimize fees by delegating work to timekeepers with lower hourly rates when appropriate.

e. The issues in the action were important to both parties. The issues were of average complexity.

[68] In the result, I find that the plaintiffs' claim for costs is fair and reasonable. The defendant shall pay the plaintiffs' costs of the motion, action and counterclaim, fixed at $28,775.78, all inclusive, within thirty days.

[69] The plaintiffs have filed a draft judgment which calculates pre-judgment interest up to February 5, 2025. I am generally satisfied with the form of the order. However, pre-judgment interest should be calculated up to the date of these reasons. Counsel may provide me with a revised draft order (in word) with the corrected figure for signature.

J.T. Akbarali J.

Date: February 24, 2025