CITATION: Winch v. He, 2019 ONSC 5874
COURT FILE NO.: 18-77484
DATE: October 10, 2019

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
SUSAN WINCH and **THOMAS O'BRIEN** Plaintiffs/Moving parties	Miriam Vale Peters for the Plaintiffs/Moving parties
– and –	
GORDON HE Defendant/Respondent	Acting for himself
- and –	
ALEXANDER REALTY CENTRES INC., O/A KELLER WILLIAMS REALTY CENTRES, FARANAZ WINCH, GARY SEMENIUK and **GINA SEMENIUK** Third parties	No one appearing for third parties
	HEARD: August 22, 2019

JUSTICE SALLY GOMERY

Overview

[1] On April 5, 2017, Susan Winch and Thomas O'Brien accepted an offer by Gordon He to purchase a residential property they owned in Georgina, Ontario. Unfortunately, Mr. He was unable to obtain financing for the purchase and failed to close the transaction on the closing date. Ms. Winch and Mr. O'Brien sold the property to another buyer in May 2018, but for a lower price. They sued Mr. He for the difference in price as well as other costs they say they incurred as a result

of his alleged breach of contract. Mr. He issued a statement of defence and began a third party claim against the real estate agents who represented the parties in the sale.

[2] Ms. Winch and Mr. O'Brien (the "plaintiffs") now move for summary judgment against Mr. He. They argue that there is no genuine issue for trial. They contend that the issues in the main action are distinct from the issues in the third-party action.

[3] Mr. He argues that the plaintiffs hid the true condition of the property, failed to answer a requisition for confirmation of clear title and were in fact unable to convey clear title to the property in August 2017. He asks that the court dismiss the motion for summary judgment on the basis that it cannot fairly determine these issues without a full trial.

[4] The three questions I must address on the motion are:

(1) Is this an appropriate case for summary judgment?

(2) If so, have the plaintiffs proved their claim for breach of contract against Mr. He?

(3) What damages have the plaintiffs incurred as a result of Mr. He's failure to close the purchase?

[5] For the reasons that follow, I conclude that the plaintiffs are entitled to summary judgment on the action. Mr. He breached a binding offer to purchase he made to them, and order him to pay them $146,671.22 in damages.

Reasons

(1) Is this an appropriate case for summary judgment?

[6] I conclude that this is an appropriate case for summary judgment.

[7] Rule 20.04(2) states that the court shall grant summary judgment if it "is satisfied that there is no genuine issue requiring a trial". Judges should not assume that every case should go to a full trial, but instead should consider what procedures will permit a fair adjudication of the issues, bearing in mind the goal of securing the just, most expeditious, and least expensive determination

of every civil proceeding on its merits.[1] Subrules 20.04(2.1) and (2.2) give a judge the power, in the context of a summary judgment motion, to weigh evidence, evaluate the credibility of deponents, and draw reasonable inferences from the evidence.

[8] There are two circumstances where a case should not be decided by way of summary judgment motion. The first is where a decision cannot fairly be made without a full trial. In a complex case or one involving competing narratives, it may be in the interests of justice for the court to hear from witnesses directly and for the parties to develop a more complete evidentiary record. The second is where a summary judgment will not resolve all of the claims in the litigation. A partial summary judgment motion is "a rare procedure that is reserved for an issue or issues that may be readily bifurcated from those in the main action."[2] Deciding only part of a case on a summary judgment motion may not hasten the resolution of the litigation as a whole, may increase the costs for all parties, and may risk inconsistent findings of fact when the balance of the action eventually go to trial.[3]

[9] This case does not fall within either of these two categories.

[10] The evidence on the motion consists of an affidavit sworn by Ms. Winch on January 28, 2019, an affidavit sworn by Mr. He on June 25, 2019, and an affidavit sworn by Elisha Kelly, the plaintiffs' real estate lawyer, on July 8, 2019. No cross-examinations or examinations for discovery have been conducted.

[11] The evidence on Mr. He's alleged contractual breach and the plaintiffs' alleged damages is straightforward. The success or failure of the plaintiffs' claim hinges on the terms of the written contract between the parties and the record of the parties' communications at the time. This evidence is not controversial. A full trial is not needed to evaluate conflicting versions of events. With respect to damages, the main question is whether the plaintiffs have proved their losses and

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[1] *Hryniak v. Mauldin*, 2014 SCC 7 ("*Hryniak*").
[2] *Butera v. Chown, Cairns LLP*, 2017 ONCA 783 ("*Butera*"), at para. 34.
[3] See, notably, *Corchis v. KPMG Peat Marwick Thorne*, [2002] O.J. No. 1437 (C.A.), at para. 3. Post-*Hryniak* Court of Appeal decisions citing this same concern include *Baywood Homes Partnership v. Haditaghi*, 2014 ONCA 450. (CanLII), 120 O.R. (3d) 438 and in *Canadian Imperial Bank of Commerce v. Deloitte & Touche*, 2016 ONCA 922 (CanLII), 133 O.R. (3d) 561.

whether Mr. He has established that they failed to mitigate their damages. These are again arguments that can be assessed on the record currently before the court.

[12] The issues in the main action are factually and legally distinct from the issues in the third-party claim. The third-party defendants have not defended to the main action and took no position on this motion. As set out in paragraph 23 of the third-party claim, Mr. He asserts that he would not have made the offer absent the agents' misrepresentations about the value and condition of the property, and other breaches of their legal duties to him. He is not alleging that his failure to complete the purchase was due to any acts or omissions by the plaintiffs or their representatives, or that the plaintiffs are responsible for the agents' acts or omissions.

[13] In these circumstances, there is no risk of inconsistent findings if summary judgment on the main claim is granted. The focus of the evidence on the third-party claim, and the findings that a judge will have to make on it, relate to what occurred before Mr. He made the offer to purchase, and not whether he breached the terms of the offer or what losses this caused to the plaintiffs.

(2) Have the plaintiffs proved their claim for breach of contract against Mr. He?

[14] I conclude that Mr. He breached his contract with the plaintiffs by failing to close the transaction on August 15, 2017.

Relevant facts

[15] The facts giving rise to the breach of contract are not controversial.

[16] Mr. He made a written offer to purchase the plaintiffs' residential property at 9 King Street, in Georgina Ontario, for $568,888, on April 5, 2017. This offer was made using the standard Ontario Real Estate Association Agreement of Purchase and Sale form. This was Mr. He's second offer to purchase the property. His first offer was for a slightly lower price and included all of the standard terms on the OREA form. In submitting the second offer, Mr. He struck the clause on the form giving him a period of time to inspect the property and terminate the agreement if he was not satisfied with its condition. He also struck the clause requiring the plaintiffs to deliver vacant possession of the property.

[17] The plaintiffs accepted Mr. He's second offer, giving rise to a contract between the parties. The next day, Mr. He provided a deposit of $25,000 to Keller Williams Realty, which was representing both parties to the sale. Subject to any adjustments, he was to provide the balance of the price, or $543,888, on July 4, 2017. Although they were not, pursuant to the contract terms, required to do so, the plaintiffs gave notice to a tenant living on the property that he must vacate within 60 days. As a result, the tenant moved out of the property at the end of June 2017.

[18] On June 30, 2017, Mr. He's agent Mr. Semeniuk wrote an email to the plaintiffs' agent requesting an extension of the closing date to August 15, 2017. According to the email, Mr. He wanted more time "so that he can both fully secure as much financing as possible and top up with personal money or otherwise find some private money to close the sale". Mr. He's agent stated that he was not going to back out of the deal but simply needed more time "to get things together", noting that an appraisal of the property had been "weak".

[19] The plaintiffs agreed to the requested extension and, on July 3, 2017, the parties signed an amendment modifying the contract so that the closing date was August 15.

[20] On August 8, 2017, Mr. He sent Mr. Semeniuk an email saying that he had been unable to obtain financing for the purchase due to the poor condition of the property. He asked his agent to approach the plaintiffs with an offer of a reduced purchase price of $510,000 and a two-year vendor take-back mortgage of $150,000. Mr. Semeniuk forwarded the email to the plaintiffs, who did not accept the revised terms.

[21] On August 15, 2017, Mr. He requested a further extension to October 15, 2017 to complete the purchase. The plaintiffs refused this request. Mr. He did not pay the balance of the purchase price on that day and the sale did not close.

Have the plaintiffs proved the breach of contract?

[22] In his affidavit, Mr. He does not deny that he failed to complete the purchase of the property as required under the terms of his April 5, 2017 offer, because he could not get financing on reasonable terms. He alleges that Mr. Semeniuk and the plaintiffs' agent misrepresented the condition of the house on the property and the value of the land. He accuses his agent of pressuring

him to make a higher offer and of failing to explain the implications of removing the due diligence clause from the standard OREA form. None of these allegations give rise to a defence of the plaintiffs' claim for breach of contract.

[23] Mr. He makes one allegation that could conceivably give rise to a defence. The property was sold in May 2018 to another purchaser. Prior to the close of that sale, the purchaser discovered that a neighbour had sewer and water lines that ran through the property that were not indicated on the survey or on title. When the purchaser raised this issue, the plaintiffs provided them with an abatement of $3000 in the price payable for the property, in consideration of the neighbour's right of way.

[24] Given the existence of the neighbour's right of way, Mr. He argues that the plaintiffs were not in a position to deliver clear title in August 2017 and therefore cannot claim damages for his failure to complete the purchase.

[25] The problem with this argument is that, further to the terms of the OREA offer to purchase form signed by the parties, it was Mr. He's responsibility to research the title and to raise any objections in a timely way. This is consistent with s. 4(b) of the *Vendors and Purchasers Act*, which provides that the purchaser of property shall search title at their own expense and make any objections in writing within 30 days of the making of the contract.[4] The vendor then has 30 days to remove any objection made to the title. If the vendor is unable or unwilling to remove an objection that the purchaser is unwilling to waive, the vendor may cancel the contract and return the purchaser's deposit.

[26] Mr. He took some steps prior to May 5, 2017 (that is, within 30 days of the formation of his contract with the plaintiffs) to research the title to the property. After the plaintiffs accepted his offer, he asked his real estate agent for guidance on what he should do by way of due diligence. Mr. Semeniuk suggested that he retain a real estate lawyer to obtain a copy of the survey. Later that week, Mr. He went to the town hall to obtain the survey himself. He was told that the plaintiffs

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[4] R.S.O. 1990, ch. V.2.

had the original. On April 20, 2017, his lawyer's office requested a copy of the survey, which was eventually provided in electronic form on June 2, 2017.

[27] After the thirty-day period, Mr. He's lawyer later sent a letter of requisition to the plaintiffs' solicitor, asking for, among other things, confirmation that there were no encumbrances on the property. In response, the solicitor stated that the purchaser should satisfy himself.

[28] In argument on the motion, Mr. He suggested that the plaintiffs hid the survey to conceal the fact that they could not convey clear title. He contended that the plaintiffs did not answer the letter of requisition in a satisfactory way and that, had he known about the encroachment, he never would have made an offer for the property.

[29] I cannot see how the plaintiffs' failure to provide a copy of the survey earlier would have assisted Mr. He, since the encumbrance was apparently not mentioned on it. The onus in any event was on Mr. He to conduct a title search in a timely way within the 30 days after his offer was accepted. The plaintiffs were entitled, in the circumstances, to answer the requisition letter as they did. Having failed to raise any objection within this time period, he cannot now avoid his contractual liability based on the encumbrance discovered by a later purchaser.

[30] As admitted by Mr. He at the hearing, the reason he failed to complete the purchase of the property had nothing to do with a lack of information from the plaintiffs. He simply could not arrange for financing and, having made an unconditional offer, had little leverage once he discovered that the property was not worth as much as he had thought. By failing to close the deal, Mr. He breached his contract with the plaintiffs and became liable for damages they suffered as a result.

(3) What damages have the plaintiffs incurred as a result of Mr. He's failure to close the purchase?

Relevant facts

[31] The evidence with respect to damages is again uncontroversial.

[32] After Mr. He failed to complete the purchase, the plaintiffs put the property back on the market at its original listing price of $499,900. They took it off the market on November 30, 2017, having received no offers. As of that date, I infer that they also found a tenant to rent the property again, since they apparently received monthly rent from December 1st, 2017 forward.

[33] On March 2, 2018, the plaintiffs listed it again, this time for the reduced price of $449,000. They eventually sold it for $425,000. After adjustments, including the abatement for the neighbour's right of way, the plaintiffs received $422,216.68 for the property, or $146,671.22 less than the price Mr. He promised to pay them.

[34] The plaintiffs claim a total of $154,243.53 in damages. This includes the difference in the purchase price, plus carrying costs such as property taxes ($2037.20), property insurance ($1275.07) and hydro ($413.23). It also includes lost rental income between July 1st and November 30, 2017 ($3500) and the costs of winterizing the property ($346.91).

What damages are the plaintiffs entitled to recover?

[35] Damages for breach of contract should place the plaintiff in the position they would have enjoyed but for the defendant's breach.[5]

[36] In a recent case, my colleague Justice Sanfilippo J. considered damages in case like this one.[6] He concluded that the seller was entitled to be compensated for the carrying costs and other expenses incurred between the date of the breach and the sale of the property to a new purchaser came forward, as well as to the difference between the price the defendant had promised to pay for property and what the vendor was paid by that purchaser.

[37] Using this approach, the plaintiffs are entitled to recover the difference between the price offered by Mr. He and the price they actually received for the property, as well as losses arising from carrying costs.

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[5] *100 Main Street East Ltd. v. W.B.Sullivan Construction Ltd.* (1978), 20 O.R. (2d) 401 (C.A.), at pp. 414-15.
[6] *Bang v. Sebastian*, 2018 ONSC 6226.

[38] The plaintiffs have not however satisfied me, however, that they incurred any loss as a result of their continued ownership of the property between August 15, 2017 and May 11, 2018.

[39] In her affidavit, Ms. Winch states that she and Mr. Brien gave notice to their tenant to vacate the property after they accepted Mr. He's offer. They did not have to do so, because the contract did not require them to deliver vacant possession. Mr. He's breach of contract therefore did not cause them to lose any rent. They lost rent because of their own decision to terminate the tenancy.

[40] As of December 1st, 2017, the plaintiffs resumed renting the property to their former tenant for $700 per month. They presumably continued this arrangement until they sold the property the following spring; if they had not, they would have claimed to have lost more than five months of rent.

[41] I conclude that the plaintiffs collected income for the property from the period from August 15, 2017 to May 11, 2018 which, by my rough calculation, offset their carrying costs. The costs claimed, aside from lost rent, amount to about $4000. This amount overstates the costs that could be attributable to Mr. He's breach of contract, because some of the property taxes, property insurance and hydro costs claimed were for the period between July 1st to August 15, 2017, before the breach occurred. The total pre-August 15 costs total just under $500, again by my rough calculation.

[42] As a result, the plaintiffs have not proved any loss aside from the difference in the price they received for the property in May 2018, and the price that Mr. He promised to pay. I therefore do not need to consider Mr. He's argument that the plaintiffs failed to mitigate their carrying costs by taking the property off the market between December 1st, 2017 and March 1st, 2018.

[43] Mr. He advances a second mitigation argument. He contends that, if the plaintiffs had accepted his revised offer of $510,000 on August 8, 2017, they would have received $85,000 more for the property than they were able to get in May 2018 from another purchaser. The plaintiffs were not obliged to renegotiate their contract with Mr. He, in anticipation of his potential breach. The terms of his revised offer were not in any event clearly better than the offer they later accepted, because it required them to finance part of the purchase price through a vendor take-back mortgage.

Conclusions

[44] The motion for summary judgment is allowed and judgment is granted to the plaintiffs in the action for $146,671.22 in damages.

[45] If the parties are unable to agree on costs, the plaintiffs may serve and submit a cost outline, along with a draft bill of costs, within the next 10 days. The defendant will have 10 days from the date of service of these materials to serve and submit his cost outline and draft bill of costs. Each cost outline must not exceed three pages in length.

Justice Sally Gomery

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Third parties

REASONS FOR JUDGMENT

Madame Justice S. Gomery

Released: October 10, 2019