CITATION: *2651171 Ontario Inc. v. Brey,* 2021 ONSC 1492
COURT FILE NO.: CV-19-81716
DATE:2021/03/01

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
2651171 ONTARIO INC.	)	
Plaintiff	)	J.F. Lalonde for Plaintiff
– and –	)	
PATRICK BREY and GRAPEVINE REALTY	)	Miriam Vale Peters for Defendant Patrick Brey
Defendants	)	No one appearing for Grapevine Realty

HEARD: February 9, 2021

DECISION ON SUMMARY JUDGMENT MOTIONS

Justice Sally Gomery:

[1] In July 2019, the defendant Patrick Brey ("Brey") accepted an offer by the plaintiff 2651171 Ontario Ltd. ("265")[1] to purchase a property marketed as a residential fourplex. The sale ultimately failed to close, and 265 sued Brey and the listing agent, the defendant Grapevine Realty, for breach of contract and misrepresentation. Brey denied any liability and counterclaimed. It also cross-claimed against Grapevine Realty the listing agent ("Grapevine"), and began a third-party claim against Ryan Rogers, his real estate agent ("Rogers").

[1] The plaintiff was incorrectly identified as 2651171 Ontario Inc. in the style of cause, although its name is 2651171 Ontario Ltd. The parties agree that this should be corrected. In these reasons, I have anticipated the consent order that will issue correcting the style of cause.

[2] In duelling motions for summary judgment, 265 and Brey now each seek judgment in their favour. 265 seeks the return of its $25,000 deposit, costs it incurred in relation to the failed sale, and dismissal of Brey's counterclaim. Brey says he is entitled to keep the deposit and to have 265 pay damages in the range of $64,000 to $76,000. Grapevine and Rogers took no position on the motions.

[3] For the reasons that follow, I find that it is appropriate to adjudicate the claim and counterclaim by way of summary judgment. I conclude that 265's claims should be dismissed, and that Brey's counterclaim should be allowed, although not for the full amount of damages sought, and taking into account his retention of the deposit

Facts

[4] The facts giving rise to the action are uncontroversial.

[5] On July 16, 2019, 265 made a written offer to Brey to purchase the property at 469-471 Wilbrod Street in Ottawa (the "Property") for $1,610,000. 265 made the offer using the standard Ontario Real Estate Association (OREA) form, the terms of which I will explore further below.

[6] In the listing posted by Grapevine, the Property was described as a fourplex with two 1-bedroom units and two 3-bedroom units. Brey lived in one of the units and leased the other three. Each unit had its own civic address, and the Property was assessed by the Municipal Property Assessment Corporation and insured as a fourplex.

[7] Brey received three other offers for the Property the same day. The offer by 265 was the highest. It was also the only offer that was not conditional on the purchaser obtaining financing and receiving a copy of the leases for the units within two or three days of acceptance of the offer (although it did require that Brey provide 265 with a copy of all leases and contact information for all tenants at some point prior to closing). As acknowledged in cross-examination by 265's principal Tony Ricciuti ("Ricciuti"), 265's offer also did not include a condition pursuant to which it could verify the present use of the Property.

[8] 265's offer did contain an inspection condition in Schedule A. It required 265 to deliver notice to Brey by July 26, 2019 that it had inspected the Property or waived its right to do so,

failing which the offer would be null and void and 265's $25,000 deposit would be returned to him in full.

[9] Brey accepted 265's offer. This gave rise to a contract between the parties (the "Purchase Agreement")265's waiver of conditions on July 26. The purchase was set to close on October 1st, 2019.

[10] On July 26, 265 e-mailed a waiver of conditions to Rogers pursuant to Schedule A of the offer. Three days later, Brey sent a copy of the leases with the tenants on the Property to Rogers. There were six leases rather than four because each of the three occupants of the basement unit had a separate lease. Rogers did not pass the leases on to 265 immediately.

[11] On September 16, the real estate lawyer hired by 265, Lyne LeMesurier ("LeMesurier"), completed a title search on the Property. As there was nothing on title except for a mortgage, she did not send a requisition letter to Brey as a result of the search.

[12] On September 17, LeMesurier received a copy of the six leases from Rogers. That same day, she requested records with respect to the Property, including any outstanding work orders, deficiency notices or correction orders, from the City of Ottawa, the Electrical Safety Authority and Ottawa Fire Services,

[13] 265 had applied to TD Canada Trust ("TD") for financing for its purchase of the Property. On September 24, having received a copy of the leases, TD advised Ricciuti that it considered the Property to be a rooming house. This made financing more difficult to obtain.

[14] Having failed to persuaded TD that the Property should not be considered a rooming house, on September 25 LeMesurier wrote to Brey's lawyer, Louis Guertin ("Guertin"), seeking a two-week extension to the closing date so that 265 would have more time to arrange for financing.

[15] On September 26, LeMesurier received the 2019 compliance report she had requested from the City nine days earlier. In the section entitled "Conformity of Present Use with the Listed Permitted Uses", the box next to "Conformity cannot be verified" was ticked. A note underneath read as follows:

> There are no building permit records to establish a four unit apartment dwelling, low-rise unit at this location. Our building permit records indicate a three-unit dwelling.

[16] The 2019 report also mentioned that a previous owner of the Property had not arranged for all required inspections in connection with a building permit issued for the construction of a rear addition in 1974. The report did not, however, indicate that there were any outstanding work orders with respect to the permit.

[17] Immediately after receiving the new compliance report, LeMesurier wrote a letter to Guertin, requisitioning a copy of permits and final inspections from the City allowing the use of the property as a fourplex as well as inspection reports relating to the renovations performed forty-five years earlier.

[18] On September 27, Guertin responded to LeMesurier's September 25 and September 26 letters. He offered a ten-day extension to close the purchase, subject to 265's payment of a further $25,000 deposit and *per diem* interest. He declined to respond to the September 26 requisitions on the basis that they were not made within the deadline specified in the Purchase Agreement.

[19] On September 30, Guertin advised LeMesurier that Brey was no longer willing to extend the closing date, because Riccuiti had been "aware that the property enjoyed legal non-conforming use". He said that Brey remained ready to close the next day. LeMesurier responded with a letter denying that Brey was in a position to convey what it had promised to sell in the Purchase Agreement. She suggested that the parties enter into a mutual release and that 265's $25,000 deposit should be returned.

[20] 265 did not close the purchase October 1st. Brey accepted an offer for the Property by another buyer on November 12, 2019 and sold it to that buyer for $1,575,000 on December 4, 2019.

[21] 265 began this action under r. 76 on October 17, 2019. In it, he seeks the return of its $25,000 deposit from Grapevine and $10,000 from Brey for breach of contract or negligent misrepresentation.

[22] Brey filed a statement of defence, crossclaim and counterclaim on December 11, 2019, seeking an order that Grapevine transfer the $25,000 deposit to him, and damages for breach of contract in the amount of at least $45,000 against 265.

[23] Brey filed a further statement of defence and crossclaim on June 9, 2020. In this pleading, he seeks contribution and indemnity from Grapevine for any damages he might be ordered to pay to 265. Two days later, Brey served a third-party claim on Rogers for the same relief.

[24] Grapevine and Rogers are represented by counsel but did not participate in these motions or take any position with respect to them.

Is this an appropriate case for summary judgment?

[25] 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". Both parties contend that resolution of their claims by summary judgment is appropriate based on the amounts at issue, the absence of any need to make findings of credibility and the sufficiency of the evidence in the record.

[26] Based on the plain wording of Rule 20.04(2)(b), "the court maintains its discretion to refuse summary judgment where the test for summary judgment is not met, notwithstanding the agreement of the parties"; *Combined Air Mechanical Services Inc. v. Flesch*,2011 ONCA 764 (CanLII), at para. 41. A judge may decide that the interests of justice require a trial, even if the parties think otherwise.

[27] In the circumstances of this case, however, I agree with the parties that resolution by summary judgment is appropriate.

[28] In *Hryniak v. Mauldin*, 2014 SCC 7, the Supreme Court of Canada held that judges should not assume that every case should go to a full trial. They should instead 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.

[29] Depending on the circumstances, a summary judgment motion may be the appropriate vehicle for adjudication of claims arising from a failed real estate deal like this one. In *Winch v. He*, 2019 ONSC 5874, for example, I found that the facts were not complex and did not involve

competing narratives. There was accordingly no need for the court to hear from witnesses directly or for the parties to develop a more complete evidentiary record.

[30] As noted in *Brar v. Smith*, 2014 ONSC 5030 (CanLII), s. 3 of the *Vendors and Purchaser's Act*, R.S.O., 1990 c.v.2, permits a vendor or purchaser of real property to proceed by application to this Court for the resolution of any claim for compensation or any other question arising from a contract except a question relating to the validity of the contract. The legislator has therefore recognized that, in many real estate disputes, the procedural trappings of a full trial may not be required. This is because, in an application under s. 3, resolution of the parties' claims depends primarily on the interpretation of their contract and other documents. Although 265 proceeded by way of action rather than application, that is the main issue in this case as well.

[31] A potential wrinkle arises from Brey's claims against Grapevine and Rogers. Partial summary judgment should generally be avoided. I conclude, however, that these claims should not stand in the way of proceeding by summary judgment.

[32] First of all, the only crossclaim that has been properly brought by Brey against Grapevine is the one filed in December 2019. The further pleading in 2020 was delivered, without leave, after pleadings closed and without any indication that it was intended to amend the original defence and crossclaim.

[33] In the original crossclaim, the only relief sought by Brey against Grapevine was the transfer of 265's deposit. By the time this motion was heard, the deposit had already been transferred, in trust, to Brey's solicitor. As a result, Brey abandoned the crossclaim when these motions were heard.

[34] This leaves Brey's third party claim against Rogers. It does not give rise to concern with respect to the adjudication of the claims in contract, as neither Grapevine nor Rogers were party to the Purchase Agreement. The third-party claim could make summary judgment inappropriate if I had to determine 265's claim for misrepresentation. For reasons I will explain below, however, I do not need to consider the merits of the misrepresentation claim.

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

Was 265 entitled to walk away from the purchase?

[36] In addition to the inspection condition already reproduced above, the Purchase Agreement contained terms allowing 265 to raise objections through a requisition process. If those objections were not answered to 265's satisfaction or waived by 265, it could terminate the Agreement.

[37] Para. 10 of the Purchase Agreement provided, in part, as follows:

> If within the specified times referred to in paragraph 8 any valid objection to title or to any outstanding work order or deficiency notice, or to the fact the said present use may not lawfully be continued … and which Seller is unable or unwilling to remove, remedy or satisfy … and which Buyer will not waive, this Agreement notwithstanding any intermediate acts or negotiations in respect of such objections, shall be at an end and all monies paid shall be returned without interest or deduction and Seller, Listing Brokerage and Co-operating Brokerage shall not be liable for any costs or damages. Save as to any valid objection so made by such day and except for any objection going to the root of the title, Buyer shall be conclusively deemed to have accepted Seller's title to the property. [Emphasis added.]

[38] The process for 265 to raise objections is set out in para. 8:

> **8. TITLE SEARCH:** Buyer shall be allowed until 6:00 p.m. on the 16th day of September, 2019 (Requisition Date) to examine the title to the property at Buyer's own expense and until the earlier of: (i) thirty days from the later of the Requisition Date or the date on which the conditions in this Agreement are fulfilled or otherwise waived or; (ii) five days prior to completion, to satisfy Buyer that there are no outstanding work orders or deficiency notices affecting the property, and that its present use ("Residential Fourplex") may be lawfully continued and that the principal building may be insured against risk of fire.

[39] Based on the concluding sentence of para. 10, if 265 failed to raise objections within the timelines set out in para. 8, it could not rely on such issues to terminate the Purchase Agreement unless the objection went to the root of title.

Did 265's objection go to the root of title?

[40] In para. 5 of its reply factum, 265 stated unequivocally that: "This is not a "root of title" case. The plaintiff does not plead nor allege that the illegal use (residential fourplex) went to the root of title."

[41] Despite this, in his oral submissions at the hearing, 265's lawyer argued that Brey's illegal use of the property as a fourplex allowed 265 to avoid the Agreement even if it failed to requisition information in relation to the use within the deadlines provided in the Agreement, because the illegal use was "fundamental" to title. This is effectively a root of title argument by another name.

[42] Leaving aside, for a moment, the fairness of permitting 265 to rely on an argument that was not advanced in its statement of claim and repudiated in its written argument, I do not find that the potentially unlawful use of the Property as a fourplex or the lack of a record of inspection regarding renovations made forty-five years earlier are issues going to the root of title.

[43] In *Jorian Properties v. Zellenrath*, 1984 CanLII 2178 (ONCA), the Court of Appeal held a misrepresentation about the number of units being sold in a rental property does not give rise to a fundamental breach of the contract. As Zuber JA wrote for the majority:

> It is apparent that the property in question was usable as a rental property, although to a lesser extent than bargained for. Had the transaction closed, the diminished rental value unquestionably would have been the basis of a claim for damages. In the circumstances it does not appear that the conveyance of a property which could be used as a triplex rather than a five-plex would have deprived the plaintiff of substantially the whole benefit which the parties intended it should obtain pursuant to the contract. [Emphasis added.]

[44] Based on this analysis, even if I concluded that the Property could not lawfully be used as a fourplex, this would not go to the root of title.

[45] Likewise, in *Brar v Smith*, the judge rejected a root of title argument, finding at para. 59 that the seller's illegal use of the property "is not a defect going to the root of title and the principle of *caveat emptor* applies".

[46] Finally, in *567 College Street Inc. v. 2329005 Ontario Inc.*, 2019 ONSC 7346 (CanLII), Justice O'Brien thoroughly reviewed the authorities on the root of title exception. In *567 College*, the buyer discovered, after having entered into an agreement to purchase a property used for a mixture of commercial and residential uses, that the third floor had been converted improperly to apartments by a previous owner. It refused to complete the purchase and the seller sued to keep the buyer's deposit and for its out-of-pocket expenses related to the aborted transaction.

[47] The buyer argued, among other things, that the illegal use of the property for residential units went to the root of title. O'Brien J. noted at paras. 20*ff* that a matter that goes to the root of tile involves "a total failure of consideration", where "the purchaser would receive nothing at all, not even possession of the property". Relying on *Brar v. Smith* and other authorities, he concluded that zoning and by-law violations are matters involving land use, and do not go to the root of title.

[48] 256 relies on *1854822 Ontario Inc. v. Martins Estate*, 2013 ONSC 4310. In that decision, issued on an urgent basis four days before a real estate purchase was set to close, Wilson J. concluded that an open building permit went to the root of title and permitted the buyer to require that the work set out in the permit be performed or the situation otherwise resolved. On the uncontested evidence before her, a garage on the property needed to be demolished and rebuilt at an approximate cost of $110,000. There was a risk of future litigation and exposure to further costs as a result of the open permit. In the particular circumstances, Wilson J. held that it was not a minor defect but affected the buyer's ability to enjoy the property.

[49] In *567 College*, a case factually similar to this one, O'Brien J. concluded that *1854822 Ontario Inc.* was distinguishable on its facts. I reach the same conclusion in this case. As of the date that the Purchase Agreement was supposed to close, there was no indication that the City of Ottawa had any intention of taking any action with respect to the renovation done decades earlier or with respect to the use of the Property as a fourplex. There is no evidence, as there was in *1854822 Ontario Inc*., that 265 would have likely faced any real risk of litigation or additional costs as a result of any issues with the Property.

[50] Notwithstanding 265's position in this litigation that the information that its lawyer obtained about the Property on September 26 raised fundamental issues, 265 apparently took no steps to withdraw the request it made a day earlier to extend the date of closing. It appears that it remained prepared to close had it been able to obtain financing. This makes sense as, based on the evidence, Brey was able to "convey substantially what the purchaser contracted to get"; *Stefanovska v. Kok*, 1990 CanLII 6848 (ONSC), at para. 15). Nor was the marketability of the Property affected by the issues; *Royt v. Goldenberg*, 2006 CanLII 29932 (ONSC), at para. 15. I infer this because Brey was able to sell the Property very quickly to another purchaser for almost the same price offered by 265.

[51] It would be quite unfair to find in 265's favour based on a theory of the case that it disavowed in its reply factum. In any event, even if the root of title argument had not been withdrawn in the reply factum, I would reject it.

If 265's objection did not go to the root of title, was it raised in time?

[52] 265 contends that it was entitled to walk away from the purchase when Brey refused to respond to a letter it sent on September 26, 2019 asking for confirmation that the property could be legally used as a fourplex and that there were no outstanding inspections arising from renovations performed in 1971. It argues that, when Brey failed to respond, 265 had the option of waiving its objections or terminating the contract. It chose the latter.

[53] For the purpose of this argument, the critical question is whether 265's September 26 requisition was made within the deadline in the Purchase Agreement.

[54] Further to para. 8, 265 had "until the earlier of: (i) thirty days from the later of the Requisition Date or the date on which the conditions in this Agreement are fulfilled or otherwise waived or; (ii) five days prior to completion to satisfy [itself] that there are no outstanding work orders or deficiency notices affecting the property, and that its present use ("Residential Fourplex") [could] be lawfully continued and that the principal building [could] be insured against risk of fire".

[55] 265 argues that, read properly, this provision would give it until five days prior to the October 1st closing date to satisfy itself that there were no outstanding work or orders or deficiencies or any impediment to the Property's lawful use as a residential fourplex. It makes this argument based on reading only the underlined words in the following passage from para. 8:

> **Buyer shall be allowed until** 6:00 p.m. on the 16th day of September, 2019 (Requisition Date) to examine the title to the property at Buyer's own expense and until the earlier of: (i) thirty days from the later of the Requisition Date or the date on which the conditions in this Agreement are fulfilled or otherwise waived or; (ii) **five days prior to completion, to satisfy Buyer that there are no outstanding work orders or deficiency notices affecting the property, and that its present use ("Residential Fourplex") may be lawfully continued**… . [Emphasis added.]

[56] 265 urges me to accept this interpretation because para. 8 is in the Purchase Agreement for its sole benefit.

[57] I do not accept this argument. In *Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust*, 2007 ONCA 205, 85 O.R. (3d) 254 (C.A.), at para. 24, the Court of Appeal emphasized that a commercial contract should be interpreted "as a whole, in a manner that gives meaning to all of its terms and avoids an interpretation that would render one or more of its terms ineffective". The highly selective reading of para. 8 proposed by 265 flies in the face of this principle.

[58] Taking the whole sentence at issue in para. 8 into consideration, the deadline for 265 to satisfy itself was the earlier of two dates:

- five days prior to closing (September 26), per (ii); or
- 30 days from either the Requisition Date (September 16) or 30 days from the date that conditions were waived (July 26), whichever was later, per (i).

[59] Thirty days from the Requisition Date would be October 16, 2019. This would have placed the deadline after the closing date. Another principle set out by the Court of Appeal in *Ventas* is that commercial contracts must be interpreted "in a fashion that accords with sound commercial principles and good business sense, and that avoids a commercial absurdity". It would be absurd to interpret para. 8 as setting a deadline for 265 to raise objections that was later than the closing date. By that time, the sale would be complete, and title would be transferred.

[60] Setting aside this possibility, the remaining potential deadline further to (i) of para. 8 is 30 days from the date that conditions were waived, or August 26. This was earlier than September 26, the date derived from the formula in (ii). It was therefore, on a plain reading of the section, the deadline for 265 to satisfy itself that there were no outstanding work or orders or deficiencies or any impediment to the Property's lawful use as a residential fourplex.

[61] This finding resolves all contractual claims advanced by the parties. Further to para. 9 of the Purchase Agreement, Brey made no representation or warranty about the Property's lawful use

except as specifically provided in the Agreement. There was no term or condition in the Agreement that dealt with lawful use outside of paras. 8 and 10.

[62] Both parties made extensive submissions about whether the Property was in fact being unlawfully used as a fourplex, whether the City had any outstanding work orders or deficiency notices with respect to it in September 2019, and 265's actual motivations for failing to close. None of this matters.

[63] 265 did not raise any issue with respect to the use of the Property by August 26. Had it done so and had Brey been unable or unwilling to remedy the problem, 265 would have had the option of waiving its objections or notifying Brey that the Agreement was terminated. Having failed to raise any objection within the deadline, 265 was "conclusively deemed to have accepted [Brey's] title to the property". It did not have the option of refusing to close the purchase without breaching the contract. Whatever 265's actual reason for failing to close the sale on October 1st, it is clear from a review of the terms of the contract that it was not entitled to do so.

(ii) Can 265 claim damages for fraudulent misrepresentation?

[64] In the alternative, 265 argues, based on *Brar v. Smith*, that it can recover damages based on Brey's fraudulent misrepresentation, in the real estate listing advertising the Property, that it could be lawfully used as a fourplex.

[65] I do not need to consider the merits of this argument because 265 has not advanced a claim for fraudulent misrepresentation in its statement of claim.

[66] In para. 1 of the statement of claim, 265 claims, as against Brey, "Damages for breach of contract and/or negligent misrepresentation in the amount of $10,000.00". In paras. 37 to 44, entitled "The Seller's Failure to Disclose and Misrepresentations", 265 alleges that Brey owed a duty of care to 265 based on a special relationship; that he represented the Property as being a fourplex and that there was one lease for each of the four units; and that he "acted negligently in making those representations because he knew or ought to have known that there was a three bedroom unit with three rooming house boarders"; and that 265 reasonably relied on Brey's representations and suffered foreseeable damages as a result of that reliance.

[67] This is clearly a pleading in negligence. There is no allegation, anywhere in the statement of claim, of any intentional wrongdoing or fraud by Brey, as would be required pursuant to r. 25.06(8). There is likewise no allusion whatsoever to a fraudulent misrepresentation claim either in 265's factum or its reply factum.

[68] 265's counsel argued at the hearing that, even if fraudulent misrepresentation was not explicitly pleaded, I could find Brey liable for reckless misrepresentation, which he contended is equivalent to intentional fraud. He pointed out that 265 alleged, at para. 37 of its statement of claim, that Brey was "reckless in respect of the non-conforming issues at all material times given his thirteen-year ownership of the property".

[69] There is no authority for the proposition that a garden-variety negligent misrepresentation by a seller allows a buyer to avoid a purchase agreement that includes a whole agreement clause and a provision that no representations are made beyond those in the agreement. The mere fact that the word "reckless" appears in a pleading does not open the door to advancing a claim in fraud that has not otherwise been pleaded.

[70] At the hearing, 265's counsel said that it learned about Brey's state of knowledge about the allegedly unlawful use of the Property as a fourplex only after the close of pleadings. It had the option, at that point, of seeking to amend its pleading. Having failed to do so, it cannot argue that it is entitled to recover on a theory of the case that was not advanced in its statement of claim and to which the defendant had no opportunity to respond in its defence.

[71] This suffices to dispose of 265's claim for fraudulent misrepresentation. Had the claim been properly advanced, however, I would have dismissed it in the absence of any credible evidence that Brey intentionally misled 265 and other potential purchasers about the lawful use of the Property or potential exposure as a result of the renovation of the Property forty-five years earlier.

What are Brey's damages?

[72] Where a buyer has failed to close on real property, the seller's damages generally consist of the price it would have obtained from the buyer, had the sale closed, and the price it obtained from a subsequent buyer, plus any additional carrying costs incurred by the seller in mitigating his

loss and dealing with the buyer's breach *Goldstein v. Goldar*, 2018 ONSC 608, at para. 25, cited approvingly in *Azzarello v. Shawqi*, 2019 ONCA 820 (CanLII) (ONCA), at para. 15.

[73] Brey seeks $35,000 for his direct loss on the sale, $615.85 in legal fees, $12,883.32 for other expenses incurred in connection with the aborted sale, and a loss of investment income of between $16,769.19 and $28,036.19. In addition to these damages, he would also like to keep 265's $25,000 deposit.

[74] The amounts claimed by Brey for his direct loss, his legal fees and his expenses in connection with the sale are uncontested. He had made arrangements to move to Portugal after selling the Property and moved his furniture into storage. After 265 failed to close, he cancelled his trip abroad and moved the furniture back, as he was not sure how long it would take to find another buyer. Although he received another offer within weeks, he had to pay for rent and mortgage, property insurance and utilities on the Property until the sale closed in December. Brey's evidence about these costs was supported with invoices. He has accordingly proved that he incurred $47,883.32 in damages for his direct loss on the sale of the Property and expenses incurred in connection with the sale, including legal expenses.

[75] 265 argues that Brey should not be fully reimbursed for mortgage payments, because this presupposes that the payments applied purely to interest and did not reduce the amount he owed to the bank, and hence had to pay from the proceeds of sale, when the Property was sold in December. This argument in intuitively sound but speculative. Brey was not asked any questions on cross-examination about the payments, or in fact about any aspect of his damages claim. I will not discount Brey's damages to reflect the mere possibility that some portion of the mortgage payments might have reduced the principal amount owed to the lender.

[76] I come to a different conclusion on the damages claimed by Brey for loss of investment income. In his affidavit, he says that he intended to invest $1.3 million of the proceeds of sale to 265, and that he should recover the profits he would have made on this investment before his sale of the Property to another buyer. In support of his claim, he attached an email from Terry Parent, an investment advisor at CIBC Wood Gundy. I agree with 265 that the email is expert evidence that does not comply with r. 39.01(7) or r. 53.03(2.1). As a result, I find that Brey has not proved

that he would have generated investment income of up to $28,000 had the sale to 265 closed on October 1st.

[77] I am prepared to find, based on Brey's uncontradicted evidence on this issue, that he would have invested $1,300,000. While I have rejected the idea that he would have earned a significant income on this money, I do not think it is speculative to conclude that it would have generated interest. The *CJA* prejudgment interest rate between October 1st and December was 2%. I accordingly find that Brey is entitled to $4333.33, the interest that would have been generated on $1,300,000 that he would have invested for two months, had 265 not breached the Purchase Agreement.

[78] This leaves the question of who gets to keep the deposit. The Purchase Agreement states that the deposit is to be "credited towards the purchase price" on completion of the transaction. The Agreement does not address the use of the deposit if the transaction is not completed due to the purchaser's breach of contract.

[79] In its recent decision in *Azzarello*, a case involving a real estate agreement with the same language about the deposit as in this case, the Court of Appeal held as follows at para. 53:

> While the agreement only specifically calls for the deposit to be credited to the purchase price on completion of the agreement, the measure of damages is based on the difference between the purchase price and the lesser amount that the property sold for after the purchaser's default. In other words, it is based on the vendor receiving the purchase price that was bargained for. <u>One can infer that the intent of the parties was that the deposit be applied to the purchase price whether received on completion or as damages.</u> [Emphasis added.]

[80] The Court concluded at para. 54 that, where the purchaser had breached the contract by failing to close and the seller incurs damages as a result, "the deposit is treated as part payment for the damages suffered as a result of the loss".

[81] Brey is accordingly not entitled to keep 265's $25,000 deposit in addition to the other damages he is entitled to recover. He is entitled to keep the deposit as a portion of his damages and recover the balance from 265.

Disposition

[82] 265's motion for summary judgment and its claim against Brey and Grapevine are dismissed. Brey's motion for summary judgment and his counterclaim against 265 are granted. Brey is entitled to recover a total of $52,216.65 in damages, including recovery of 265's $25,000 deposit. If any interest has been earned on the deposit, this shall also be transferred to Brey and reduce the total amount payable by 265.

[83] If the parties are unable to agree on costs, Brey and 265 shall exchange and file costs outline within the next 21 days. Each outline shall be no longer than three pages in length, but draft bills of costs, any offers and other relevant documents may be attached. The costs submissions shall be filed by email to the case management office at MastersOfficeOttawa@ontario.ca.

Justice Sally Gomery

Released: March 1st, 2021

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