

CITATION: Forest Hill Homes v Ou, 2019 ONSC 4332
COURT FILE NO.: CV-18-609163
DATE: 20190718

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Forest Hill Homes (Cornell Rouge) Limited, Plaintiff

– AND –

Peimian Ou also known as Peter Ou and Ying Wu, Defendants

BEFORE: E.M. Morgan J.

COUNSEL: *Shane Greaves*, for the Plaintiff

Shahzad Siddiqui, for the Defendants

HEARD: July 17, 2019

SUMMARY JUDGMENT MOTION

[1] This matter arises from an aborted real estate transaction. Plaintiff was to be the vendor and the Defendants were to be the purchasers. The Defendants failed to close. The Plaintiff has sued for damages and now seeks summary judgment under Rule 20.01 of the *Rules of Civil Procedure*.

[2] On November 19, 2016, the Defendants agreed to purchase from the Plaintiff a home to be built by the Plaintiff on Lot 4, Plan 65M-4513 in a subdivision known as Cornell Rouge in Markham, Ontario (the “Property”). The purchase price under the Agreement of Purchase and Sale (“APS”) was \$1,699,990.00. With various adjustments described in the APS, the total price came to \$1,729,820.99. The Defendants provided a number of deposits, and ultimately the balance due on closing was \$1,590,820.99.

[3] At the closing date for the transaction, the Plaintiff was ready, willing and able to close the deal. The Defendants, however, did not have the necessary funds and so were not in a position to close.

[4] The Defendants raise four points in defense of their failure to close: i) frustration/force majeure, ii) delay by the Plaintiff, iii) misrepresentation by the Plaintiff’s sales agent, and iv) a bribe demanded by and paid to the Plaintiff’s agent. Each of these will be addressed in turn.

[5] Defendants' counsel submits that the Defendants' performance of their obligations under the APS was made impossible by a drastic and unforeseeable drop in the real estate market which made it impossible for them to obtain the financing they needed. I note that the onus is on the party claiming frustration of a contract: *Bang v Sebastian*, 2018 ONSC 6226, at paras 27, 30. Despite this, the Defendants have not obtained any appraisal of the Property, nor have they submitted any other real estate market evidence. They simply say they could not get financing, and they subjectively attribute this to a change in the market.

[6] Even if there were evidence to support the Defendants' assertion, there is nothing about a change in the market that amounts to an unforeseen event that substantially changes the agreement. This was confirmed in *Paradise Homes North West Inc. v Sidhu*, 2019 ONSC 1600, at para 11, where the court reasoned that a change in the market is not the kind of radical change that transforms the nature of the contract:

In this case, the defendant defaulted because he was not able to borrow the amount of money he required to close the deal.... While he states that he was unable to borrow the money because the market prices fell and that this was unforeseen and such a radical change that it completely changed the nature of the APS. I do not find that to be the case. The contract was not rendered totally different from what the parties had intended. The parties had intended that 10 Truro Circle would be sold by the plaintiff to the defendant for the agreed-upon amount of \$819,990. The contract did not change and was not altered.

[7] There is nothing in the record to support the Defendants' assertion that something has occurred that frustrated the contract and made it impossible to perform as agreed.

[8] As for the delay allegation, the Defendants contend that the excessive delay on the Plaintiff's part in setting the final closing date undermined the enforceability of the APS. The tentative closing date stated on the APS was May 23, 2018. Under the terms of the APS, however, the Plaintiff was entitled to set a final closing date at its own discretion, so long as it was not after January 18, 2019. As it turned out, the final closing date was set for October 22, 2018.

[9] In other words, the Plaintiff was within its contractual rights to set the final closing date when it did. This was not undue delay. And in any case, the longer time until closing did nothing to prejudice the Defendants. They admitted in cross-examination that they had not obtained a mortgage and so could not have closed on the original tentative date of May 23, 2018. There is nothing in the record to support the Defendants' delay argument.

[10] Turning to the allegation of misrepresentation, the Defendants argue that the Plaintiff's sales agent misrepresented the sale to them. The alleged misrepresentation is that the sales agent described the deal to them as "the opportunity of a lifetime". This was supposedly said to the Defendants by the sales agent on November 19, 2016, the one and only day that the Defendants met the agent and the day that they signed the APS.

[11] The Ontario Court of Appeal considered a similar type of ‘misrepresentation’ argument in *Hembruff v Ontario (Municipal Employees Retirement Board)*, 2005 CarswellOnt 5646, and concluded that a statement not presented as fact could not constitute an actionable misrepresentation. At para 76 of *Hembruff*, the Court indicated:

It is, of course, well settled that a representation, to be of effect in law, should be in respect of an ascertainable fact as distinguished from a mere matter of opinion. A representation which amounts merely to a statement of opinion, judgment, probability or expectation, or is vague and indefinite in its nature and terms, or is merely a loose, conjectural or exaggerated statement, goes for nothing, though it may not be true, for a man is not justified in placing reliance on it.

[12] In a case strikingly similar to the case at bar, this court in *Dodd v RBC Dominion Securities Inc.*, 2007 CarswellOnt 4630 had to consider the plaintiff’s claim of misrepresentation arising from the pitch of an investment advisor that a stock deal was the “opportunity of a lifetime”. At para 85 of *Dodd*, the court held that this statement was “at best a subjective opinion, which did not convey objective facts or information.”

[13] In addition, the APS contains an “entire agreement clause” which would apply here. There is nothing about the sales agent’s representation that would have taken this statement outside of the contract or that amounts to an assertion of fact on which a purchaser in the Defendants’ position would reasonably rely. The supposed misrepresentation is at most a statement of opinion, and more likely it falls into the category of “mere puffery”: see *Carlill v Carbolic Smoke Ball Co.*, [1893] 1 QB 256 (CA).

[14] Finally, the Defendants say that they paid bribes to the sales agent in order to be able to jump the queue of potential purchasers and sign the APS quickly. This, they contend, excuses their non-closing and puts an end to the reciprocal obligations contained in the APS. That said, there is no authority for the proposition that a person who pays a bribe can have the contract rescinded as a result; rather, the cases show that it is the defrauded principal of the agent who took the bribe – i.e. the Plaintiff here – who can have to contract rescinded due to the bribe: *Banque Indosuez v Canadian Overseas Airlines Ltd.*, 1990 CarswellBC 1687, at para 120 (BC SC).

[15] The authorities on damages state that damages “for breach of contract should place the plaintiff in the monetary position that it would have been in had the purchaser not breached the Agreement of Purchase and Sale.”: *Bang v Sebastian*, 2018 ONSC 6226, at para 39-40. The loss of the bargain, or loss of the value of the sale (contract price minus market value of the land), is therefore the largest portion of the damages calculation: *100 Main Street East Ltd. v WB Sullivan Construction*, 1978 Carswell Ont 1459, at para 55 (Ont CA). This refers to the market value as of the closing date, *DHMK Properties Inc. v 2296608 Ontario Inc.*, 2017 ONCA 961, at para 15, which must be established by appraisal: *River Oaks Convenience Plaza Inc. v Al-Qauasmi*, 2009 Carswell Ont 1153 (SCJ) at para 6.

[16] In the case at bar, the appraised market value is \$1,050,000. This is in the record in the form of an affidavit and appraisal report by Toivo Heinsaar, an accredited appraiser with 20 years' experience.

[17] As indicated, the total purchase price under the APS was \$1,729,820.99. Subtracting deposits, the balance due on closing was \$1,590,820.99. The loss of bargain is the difference between these two figures: \$540,820.99. On top of that the Plaintiff adds a number of ancillary expenses legitimately claimed under the APS (realty taxes, gas, utilities, insurance premiums, etc.), for a total loss of \$554,308.41.

[18] The APS provides that the Plaintiff can charge interest in the amount of 20% of the purchase price if the Defendants fail to pay the balance due on closing. The Defendants state that this is excessively onerous and as a consequence ought not be enforceable. Defendants' counsel submits that the exorbitant rate of interest was never drawn to the Defendants attention, which would be required if this kind of surprisingly onerous term is to be enforced.

[19] It has been four decades since the Ontario Court of Appeal held that a surprisingly onerous term of a contract may be unenforceable if it cannot be presumed that the non-drafting party had actually agreed to it: *Tilden Rent-a-Car v Clendenning*, (1978), 83 DLR (3d) 400. As Dubin CJO put it, at 408-9:

In many cases the parties seeking to rely upon the terms of the contract know or ought to know that the signature of a party to the contract does not represent the true intention of the signer, and that the party signing is unaware of the stringent and onerous provisions which the standard form contains. Under such circumstances, I am of the opinion that the party seeking to rely on such terms should not be able to do so in the absence of first having taken reasonable measures to draw such terms to the attention of the other party, and, in the absence of such reasonable measures, it is not necessary for the party denying knowledge of such terms to prove either fraud, misrepresentation or non est factum.

[20] I am not convinced that a party in the Plaintiff's position – a subdivision builder with a standard form of contract for each of its purchasers – can enforce a surprisingly onerous and unexpected term in that contract without at least drawing it to the other party's attention. The record indicates that indeed the high interest rate was not called to the Defendants' attention, and there is nothing to suggest that the Defendants, who signed the APS on the same day that it was presented to them and without any legal advice, understood or were cognizant of this term.

[21] As this court stated in *Aviscar Inc v Muthukumar*, 2009 CarswellOnt 4003, at para 23, "The law is that if a person signs a contract without reading it, that person is bound by the terms of the contract. That is the general rule. There are exceptions if the signing person can establish that there was fraud, misrepresentation, or there was a very onerous term that a reasonable person would not expect to be in the contract." In my view, this is one of those cases that falls into the latter category.

[22] Further, the fact that the Plaintiff is not seeking to enforce it to its fullest extent does not, in my view, counter the fact that it was not agreed to and is therefore unenforceable. A party cannot try to sneak an onerous term by the other contracting party and then as if make up for it by only asking for part of the onerous relief. The clause is either enforceable or it is not. To the extent that interest is owed to the Plaintiff on any unpaid amount, the interest rates prevailing from time to time under the *Courts of Justice Act* apply.

[23] Finally, Defendants' counsel submits that the Plaintiff has failed in its duty to mitigate its losses. The Plaintiff states that the Property has been listed for sale ever since the aborted closing with the Defendants, but so far it has not sold.

[24] This court has stated that, "The onus is...on the defendant to show, if he can, that if the plaintiff had taken certain reasonable mitigating steps, the damages would be lower": *Degner v Cabral*, 2019 ONSC 1610, at para 53. There is no such evidence in the record before me. In *Gamoff v Hu*, 2018 ONSC 2172, at paras 35, 37, it was indicated that where mitigation efforts involve listing a property for sale, the party challenging those efforts must put before the court evidence that demonstrates that the price at which the property was listed was unreasonable. The Defendants here provided no expert evidence regarding the price at which they say the Property should have been listed.

[25] What the Defendants point to in terms of the Plaintiff's supposed failure to mitigate is their own offer to close the deal for \$1,290,000 on the designated closing date. That, however, is no evidence of lack of mitigation on the Plaintiff's part, since there is no evidence to suggest that the Defendants really could have closed on that basis. Indeed, in cross-examination the Defendants admitted that they did not have the funds to actually make this payment. In other words, the Plaintiff was within its rights to consider that this was not a credible mitigation offer.

[26] The Defendants are liable to the Plaintiff for breach of contract. They shall pay damages to the Plaintiff in the amount of \$554,308.41, plus pre and post-judgment interest from October 22, 2018 at the rates authorized by the *Courts of Justice Act*.

[27] Having been successful in obtaining judgment on all of its points except for the interest rate under the APS, the Plaintiff is entitled to most of its costs. Plaintiff's counsel has submitted a Costs Outline in which it seeks \$11,215.17 on a partial indemnity basis, including disbursements and tax. Defendant's counsel has submitted a Costs Outline in which they would seek \$5,761.00.

[28] The award of costs is, of course, discretionary under s. 133 of the *Courts of Justice Act*. That discretion is generally to be exercised in accordance with the criteria set out in Rule 57.01. Although the parties are relatively far apart, the Plaintiff's request does not strike me as unduly high. Counsel prepared the evidentiary record, researched and drafted a factum, reviewed the opposing side's materials, and cross-examined the Defendants' affiant. Rules 57.01(1)(c) and (d) direct me to take into account both the complexity and the importance of the issues to the respective parties.

[29] Given that the Plaintiff was unsuccessful in a part of its claim, I will reduce the costs from what it requested and round it down. The Defendants shall pay the Plaintiff costs in the amount of \$9,000, inclusive of all fees, disbursements, and HST.

Morgan J.

Date: July 18, 2019