CITATION: Madison Homes v. Yiman Shi 2020 ONSC **7810**
COURT FILE NO.: CV-19-00612772-0000
DATE: 20201215

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
MADISON HOMES CORNELL ROUGE LIMITED	)	Shane Greaves. for the Plaintiff
	)	
Plaintiff	)	
	)	
– and –	)	David Yi Gong Wang, for the Defendant
	)	
	)	
YIMAN SHI and LE XIN	)	
Defendants	)	
	)	
	)	
	)	
	)	**HEARD:** December 1, 2020

PAPAGEORGIOU J.

Nature of the Case and Motion

[1] This is a motion for summary judgment brought by the plaintiff, the vendor of property located within a residential subdivision known as Cornell Rouge in Markham Ontario (the "Property") against the defendants, who entered into an agreement of purchase and sale dated October 11, 2016 (the "APS") to purchase the Property. As set out below, the plaintiff claims that the defendant breached the APS by failing to complete the transaction.

[2] The defendants do not dispute liability. They admit that the scheduled closing date was October 30, 2018, that there was an extension until November 9, 2018, that the plaintiff was ready, willing and able to close, and that the defendants did not close. However, they argue that there are genuine issues as to damages and mitigation which requires a trial.

2020 ONSC 7810 (CanLII)

[3] I find that there is no genuine issue requiring a trial. The defendants are required to put their best foot forward and yet have led no evidence to dispute the damages or to put into question the plaintiff's mitigation efforts.

[4] For the reasons that follow I am granting the plaintiff summary judgment in the amount of $353,582.28.

The Issues

[5] In arriving at the above decision, I have considered the following issues:

a. What is the test on a summary judgment motion?

b. Did the plaintiff mitigate its damages?

c. What are the plaintiff's damages?

d. Is the plaintiff entitled to the contract rate of 20 % as pre-judgment interest.

What is the test on a summary judgment motion?

[6] In accordance with Rule 20.04(2), of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the "Rules"), the court shall grant summary judgment if:

> (a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or
>
> (b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.

[7] In determining whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and a judge may exercise any of the following powers under Rule 20.04(2.1): (1) weighing the evidence; (2) evaluating the credibility of a deponent; and (3) drawing any reasonable inference from the evidence.

[8] The Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 49, succinctly explained when there will be no genuine issue for trial:

2020 ONSC 7810 (CanLII)

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

[9] In order to defeat a motion for summary judgment, the responding party must put forward some evidence to show that there is a genuine issue requiring a trial. A responding party on a summary judgment motion cannot rest solely on allegations in a pleading. Each side must "put their best foot forward" with respect to the existence or non-existence of material issues to be tried: *Mazza v. Ornge Corporate Services Inc.*, 2016 ONCA 753, 62 B.L.R. (5th) 211, at para. 9.

[10] "The motion judge is entitled to presume that the evidentiary record is complete and there will be nothing further if the issue were to go to trial": *Tim Ludwig Professional Corporation v. BDO Canada LLP*, 2017 ONCA 292, 137 O.R. (3d) 570, at para. 54. "A summary judgment motion cannot be defeated by vague references as to what may be adduced if the matter is allowed to proceed to trial": *Diao v. Zhao*, 2017 ONSC 5511, at para. 18.

[11] I have determined that there is no genuine issue requiring a trial based on the evidence filed on the motion, much of which is uncontroverted. There is sufficient evidence to fairly and justly adjudicate the issues in dispute, and a summary judgment motion is an affordable and proportionate procedure.

Did the plaintiff mitigate her damages?

[12] The vendor bears the initial onus of proving his loss. The onus then shifts to the purchaser to show, if he can, that the damages could have been reduced by reasonable mitigating steps. In *100 Main Street Ltd. v. W.B. Sullivan Construction Ltd.* (1978), 88 D.L.R. (3d) 1 (Ont. C.A.), at p. 23, the leading case on mitigation, Morden J.A. stated:

> As I have said, with respect to the issue of mitigation, the onus is on the defendant. However, the onus on the defendant to prove failure to mitigate does not relieve the plaintiff from proving an obvious element in the calculation of his damages. *McGregor on Damages*, *supra*, in para. 212, p. 149, puts the matter this way:

2020 ONSC 7810 (CanLII)

> The onus of proof on the issue of mitigation is on the defendant. If he fails to show that the plaintiff ought reasonably to have taken certain mitigating steps, then the normal measure will apply.
>
> Included in the "normal measure" is the difference between the contract price and the market price. Thus, I think that the proper course is for the plaintiff, in presenting its case, to adduce evidence of the contract price and of the market price or resale price upon which he relies in establishing the loss of bargain. The onus is then on the defendant to show, if he can, that if the plaintiff had taken certain reasonable mitigating steps the damages would be lower.

[13] The Court of Appeal has stated that the duty to mitigate only requires the plaintiff "to take reasonable steps": *Saramia Crescent General Partner Inc. v. Delco Wire and Cable Limited*, 2018 ONCA 519, at para. 80. The plaintiff need not take all possible steps to reduce its loss: *DHMK Properties Inc. v. 2296608 Ontario Inc.*, 2017 ONSC 2432, at para. 73. What is reasonable is a question of fact to be decided on the basis of all relevant market circumstances: *100 Main Street*, at para. 73.

The plaintiff's resale of the Property

[14] The total amount payable pursuant to the APS was $1,717,224.57, and with the extended closing was scheduled to close on November 9, 2018. The plaintiff filed affidavit evidence from a certified appraiser who appraised the value of the Property as at the date of closing to be $1.2 million. The plaintiff waited several months to list the Property for resale in the hopes that the market would rebound. When the plaintiff had assessed that the market was improving, in May 2019, it listed the Property and then sold it on May 24, 2019 for a purchase price of $1,242,964.11 (the "Total Resale Price"). I note that it sold the Property for more than the appraised value.

[15] In their factum, the defendants argue that the plaintiff should have attempted to resell the property in March 2018 when the defendants first advised the plaintiff that they would not be able to close the APS in October 2018. The defendants have provided me with no authority for the proposition that the plaintiff was required to walk away from a firm APS and resell prior to default. It is trite that where a contract is repudiated, the innocent party may elect to terminate the contract and sue for damages or reject the repudiation and insist on performance. In this case, even though

2020 ONSC 7810 (CanLII)

the defendants may arguably have repudiated the APS, the plaintiff was entitled to insist on performance.

[16] The defendants also argued they would have purchased the Property for resale at the price of $1,215,000 if the plaintiff had made such an offer. Courts have held that there is no obligation on the vendor to resell the property to the defaulting party. Indeed, the Court of Appeal has held that this would not be a reasonable requirement:

> The duty to mitigate is derived from the proposition that the wronged party cannot recover from the defaulting party for the losses that could reasonably have been avoided… It cannot be reasonable for a vendor to be obliged to reduce the loss it claims from the defaulting party by reselling the property to that party, then suing him or her for the difference. This would offer no financial advantage to the defaulting party as that party would be obliged to pay the same amount, either way. Yet the defaulting party would secure a significant tactical and procedural advantage over the innocent vendor.
>
> The effect of endorsing the proposition advanced by the appellant would be to undermine the sanctity of the bargain by encouraging purchasers to default, particularly in a falling market, and to offer a lower price for the same property, leaving vendors with the risk and expense of recovering the balance of the original contract price in an action. The duty to mitigate does not go that far.
>
> *Azzarello v. Shawqi*, 2019 ONCA 820, at paras. 39-40.

[17] During the motion, the defendants argued that the plaintiff's appraisal evidence is insufficient. They say that they have been speaking with an appraiser and have obtained verbal confirmation of a discrepancy with the plaintiff's appraisal. The defendants also argue that there is no affidavit from the plaintiff's real estate agent which sets out how many times the Property was shown, and whether multiple offers were received. I note that the defendants chose not to cross examine the plaintiff. Courts have held that it is insufficient for a defendant to simply speculate that a higher price could have been obtained: *Degner v. Cabral*, 2019 ONSC 1610, at para. 67.

[18] The burden is on the defendants and they have not put their best foot forward to establish that the plaintiff failed to reasonably mitigate by accepting the Total Resale Price, for the following reasons:

2020 ONSC 7810 (CanLII)

a. The defendants have not provided any market valuation or expert report or evidence from a realtor regarding the value of the Property or any evidence that in this particular market, the plaintiff would have obtained a higher offer had it waited or taken any additional steps. In *Gamoff v. Hu*, 2018 ONSC 2172, at para. 37, the Court held that the purchaser could not rely upon vague assertions that the resale price was below market value and that expert evidence was required citing, at paras. 35-36, the decision in *Cuervo-Lorens v. Carpenter*, 2016 ONSC 4661, at para. 6, aff'd 2017 ONCA 109:

> …Of greater significance, however, in the context of a summary judgment motion, is the absence of evidence from a professional which opines that the shortcomings in the sale process alleged by the purchasers actually had any impact on the final sale price. It is not enough for the purchasers, upon whom the onus rests, to plainly and merely state, for example, that the six or seven day "delay" in the relisting of the property must have negatively affected its market price. The purchasers, it must be assumed, have put their "best foot forward" and it is lacking…. In the absence of a qualified appraiser's opinion that she did so, I am not convinced that a trial is required to determine whether she undersold the property. There is little better evidence of market value than the price at which the property actually sold following what appears to be appropriate and apparently motivated marketing.
>
> The decision of Paraveski J. was upheld by the Ontario Court of Appeal … where at paras. 2 and 3 the Court of appeal stated:
>
> …
>
> > The appellants did not file opinion evidence on the summary judgment motion indicating the steps taken on the resale were unreasonable or concerning the $50,000 price differential. In the absence of such evidence, we see no basis on which to interfere with the motion judge's decision to dismiss the action as against the vendor.

[19] In my view, in all the circumstances, the defendants have failed to raise any genuine issue with respect to the plaintiff's mitigation efforts which requires a trial.

What are the plaintiff's damages?

[20] There was very little, if any, evidence or argument made by the defendants which challenged the damages claimed.

2020 ONSC 7810 (CanLII)

[21] The plaintiff is entitled to be compensated for its loss of bargain, which means it is entitled to be put in the same position it would have been in had the APS been performed: *100 Main Street*, at pp. 22-23 and 55; *Forest Hill Homes v. Ou*, 2019 ONSC 4332, at para. 15; *Bang v. Sebastian*, 2018 ONSC 6226, at paras. 39-40. It is trite that damages for breach of contract must be reasonably foreseeable. The proper time at which damages should be calculated is generally the date of default, but the trial judge has discretion to choose another date on proper reasons, which must be set out: *100 Main Street*, at p. 22. In this case, there is no reason to depart from the general rule and as such, the date at which the plaintiff's damages should be calculated is November 9, 2018.

[22] I note that the heads of damages claimed by the plaintiff are the usual heads of damages which courts ordinarily award in such cases, and that the plaintiff provided documentary evidence for these: *100 Main Street*, at p. 17; *Briscoe-Montgomery v. Kelly*, 2014 ONSC 4240, at para. 23; *Arista Homes (Kleinburg) Inc. v. Sarah Igbinedion*, 2019 ONSC 7086, at para. 28.

Difference between APS purchase price and Third Party APS purchase price

[23] The plaintiff is entitled to the difference between the amount due on closing of the APS and the Total Resale Price, which is $1,593,224.57- $1,242,964.11= $350,260.46: *Forest Hill Homes (Cornell Rouge) Limited v. Wang*, 2020 ONSC 556, at para. 16; *Bang*, at para. 47.

Carrying costs

[24] In addition to the loss of bargain, vendors are entitled to damages that reasonably flow from the purchaser's failure to provide them with the closing funds on the scheduled closing date: *Bang*, at paras. 48, 53; *Ou*, at para. 17. The plaintiff claims carrying costs and expenses incurred in respect of the Property between November 9, 2018 and May 30, 2019 as follows:

TYPE	AMOUNT
Realty Taxes – 2019	$1,018.04
Gas - Enbridge	$1,041.97
Utilities – Alectra	$352.16

2020 ONSC 7810 (CanLII)

Total	$2,412.17

[25] The plaintiff has provided invoices for all of these amounts. The defendant did not challenge these amounts with any evidence or argue that they were unreasonable. I award these amounts.

Legal Fees

[26] The plaintiff also claimed $542.40 in legal costs which it had to pay again in respect of the resale. In my view such damages are reasonably foreseeable. See e.g. *Bang*, at para. 59, and *Degner*, at para. 69.

The Appraisal

[27] The plaintiff claimed $367.25 in respect of the appraisal it obtained. In my view, such damages are reasonably foreseeable and would be recoverable in any event as costs of this proceeding. See e.g. *Paradise Homes North West Inc. v. Sidhu*, 2019 ONSC 1600, at para. 8.

Real Estate Commission

[28] In the original APS, entered into in 2016, the real estate agent commission was $16,509.92 inclusive of HST. By the time of the failed APS the real estate market had cooled and the real estate agent charged commission in the amount of $30,375. The plaintiff claims the difference between the two in the amount of $13,865.08. In my view, these damages are not reasonably foreseeable. There is no reason why at the time the APS was entered into the defendants would have expected that if the APS failed to close, commission fees would almost double. The defendant references *Forest Hill Homes v. Ou*, 2020 ONSC 6321, at para. 60, in support of its argument that it should be entitled to increased commission costs, but it is not clear to me the basis upon which the commission was ordered in that case, whether it was increased commission and further it does not appear that the commission cost was challenged.

2020 ONSC 7810 (CanLII)

MLS Listing Fee Agreement

[29] The defendants had purchased their home directly from the developer and as such there was no MLS Listing agreement fee in respect of the initial APS. The plaintiff says that because the market had cooled by the time of the failed closing (which is evidenced by the affidavit of the appraiser), it entered into the listing agreement and incurred this cost in order to expose the Property to more buyers and thereby obtain a better price. In my view, given that the defendants purchased the Property from the developer without the Property having been listed, it was not reasonably foreseeable that the developer would incur costs of an MLS Listing if the APS did not close.

IHGML Commission on Original Sale

[30] The plaintiff paid an internal sales agent a commission in the amount of $2,293.90 in respect of the APS. There was no evidence that the plaintiff had to pay this amount again. Accordingly, there is no evidence that the plaintiff incurred these damages as a result of the breach.

Interest

[31] Section 34 of the APS provided that any monies not paid to the plaintiff when due would accrue interest at the rate of 20 % per annum, compounded monthly:

> Any monies owing by the Purchaser not paid when due, shall accrue interest at the rate of twenty percent (20 %) per annum compounded monthly until paid.

[32] The plaintiff argues that technically it is entitled to this interest on the amount which the defendants were require to pay on closing, $1,593,224.57. However, the plaintiff is only claiming 20 % interest on the loss of bargain which has been calculated to be $350,260.46.

[33] The defendant argues that the interest provision is unenforceable as it is excessively onerous. I agree. In *Ou*, at paras. 19-20, Morgan J. held that a similar interest provision in a real estate sale agreement was unenforceable:

> 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

2020 ONSC 7810 (CanLII)

non-drafting party had actually agreed to it: *Tilden Rent-a-Car v. Clendenning*, (1978), 83 D.L.R. (3d) 400…

> 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 es factum.

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.

[34] Although this case is somewhat different than *Ou*, since there was evidence in that case that the interest provision was not drawn to the purchaser's attention, in my view, given that on its face the term is onerous, the absence of evidence that it was drawn to the defendants attention is fatal to the claim for this interest. The plaintiff is implicitly agreeing that the term is onerous and unenforceable given that it does not even claim the full interest which the provision would permit. If the provision is unreasonable and unenforceable, this is not cured by the plaintiff agreeing to apply the interest rate to a lesser sum. See also *Hon*, at paras. 62-65.

[35] I find that there is no genuine issue regarding liability, mitigation or damages which requires a trial.

[36] Therefore, I calculate and award total damages as follows:

TYPE	**AMOUNT**
Failure to Pay Balance Due on Closing	$350,260.46

2020 ONSC 7810 (CanLII)

Realty Taxes – 2019	$1,018.04
Gas - Enbridge	$1,041.97
Utilities – Alectra	$352.16
Appraisal	$367.25
Legal Costs	$542.40
Total	$353,582.28

2020 ONSC 7810 (CanLII)

The Deposit

[37] The plaintiff has retained the defendant's deposit in the amount of $100,000 as well as an HST rebate which it is entitled to and it has already credited such amounts against the damages. See *Azzarello,* at paras. 50-54, where the Court of Appeal confirms that this is the proper course. Further, and in any event, the defendants have not counterclaimed for return of the deposit and plead in paragraph 6 of the Statement of Defence that the deposit should be credited towards any damages sustained by the plaintiff.

Conclusion

[38] I am granting the plaintiff summary judgment in the amount of $353,582.28 plus prejudgment and post judgment interest from the date of the breach, November 9, 2020 at the rates in the *Courts of Justice Act*. If the parties cannot agree to the quantum of such interest, they may arrange a further hearing before me.

Costs

[39] I requested cost submissions at the end of the hearing subject to any Rule 49 offers which the parties may have exchanged. The plaintiff provided a Bill of Costs in the amount of $8,580.32. The defendant submitted that it was too high but did not suggest another figure. In my view, given that this matter was not complex and has been resolved without discoveries, affidavits of documents or even cross examinations, a fair and reasonable costs award is $7,500.

[40] I would ask the parties to advise me as to whether they have an agreement on prejudgment interest within 15 days, failing which they may make 1-page submissions each on the amount within 5 days thereafter. The parties may also direct a draft Order to my attention with respect to this matter.

Papageorgiou J.

Released: December 15, 2020

2020 ONSC 7810 (CanLII)

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Plaintiff

– and –

YIMAN SHI and LE XIN

Defendants

REASONS FOR JUDGMENT

Papageorgiou J.

Released: December 15, 2020

2020 ONSC 7810 (CanLII)