

CITATION: Yamada v. Joseph-Walker, 2023 ONSC 1725
COURT FILE NO.: CV-22-520-00
DATE: 2023 03 16

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

MINORU YAMADA; SAYOKO
YAMADA

Plaintiffs

- and -

JANINA JOSEPH-WALKER

Defendant

)
) *Brian P. Pilley*, for the Plaintiffs
)
)
)
)

)
)
) Defendant as Self-Represented
) Party
)
)

) **HEARD:** February 14, 2023 by
) video-conference

REASONS FOR JUDGMENT

Emery J.

[1] Minoru Yamada and Sayoko Yamada are the owners of a property at 806 Indian Road in Toronto. They bring this motion for summary judgment on the claims made in the action they have commenced against the defendant Janine Joseph-Walker. Those claims in large part seek judgment for the deposits they

say she has forfeited by repudiating the Agreement of Purchase and Sale as buyer of the property.

Summary of the facts

[2] The Yamadas listed the property for sale under an exclusive listing agreement with Mr. Alan Chang, a real estate agent. Soon after, the Yamadas entered an agreement of purchase and sale when they accepted the offer of Ms. Joseph-Walker to purchase the property on July 19, 2021 (the “APS”). The APS provided that Ms. Joseph-Walker would pay \$1,720,000 for the property, and that the sale was to close on September 30, 2021.

[3] Schedule A to the APS provided that the buyer agreed to pay up to 30% of the purchase price, including all deposits to the brokerage, by certified cheque on closing. The Yamadas agreed to take back a first mortgage for the balance at 3.5% per year for two years.

[4] The APS required Ms. Joseph-Walker to pay a deposit of \$10,000 on submitting the offer to purchase 806 Indian Road. She was required to pay a further \$30,000 deposit within three days of waiving the conditions under the APS. Both of those deposits were paid to Mr. Chang’s brokerage, Ipro Realty Ltd., in trust.

[5] The APS expressly provided that time shall in all respects be of the essence, provided the time for doing or completing any matter could be extended or abridged by agreement.

[6] The Yamadas were represented by their lawyer, Peggy Jor, throughout this transaction.

[7] As September 30, 2021 was a statutory holiday, the Yamadas agreed through Ms. Jor to extend the closing date to October 1, 2021. By an amendment to the APS, the closing date was further extended to October 4, 2021 at the request of Ms. Joseph-Walker. Despite her representations, Ms. Joseph-Walker did not have sufficient funds to close on October 4, 2021. As a result of discussions between Ms. Jor and Ms. Joseph-Walker's lawyer, Yi Zhou, the closing date was extended yet again to October 19, 2021.

[8] Regrettably, Ms. Joseph-Walker was not ready, willing and able to complete her purchase of 806 Indian Road on October 19, 2021. In an amendment agreement dated October 20, 2021 for the final extension to October 26, 2021, Ms. Joseph-Walker agreed to pay two additional deposits of \$10,000 and \$3,000 respectively. These further deposits were paid and are currently held in Ms. Jor's trust account. In all, Ms. Joseph-Walker paid deposits totalling \$53,000 under the terms of the APS, as amended.

[9] Ms. Joseph-Walker could not complete the transaction on October 26, 2021 because she could not assemble sufficient funds to perform her part of the bargain. Ms. Jor sent a letter dated October 28, 2021 to give notice in writing to Ms. Joseph-Walker that the Yamadas were taking the position that the APS was at an end.

[10] The following month, Ms. Joseph-Walker made an attempt to revive the sale. She had her lawyer Yi Zhou send an email to Ms. Jor on November 23, 2021 proposing an extension to close on December 15, and for which Ms. Joseph-Walker would pay another \$15,000 deposit. Ms. Jor responded to Mr. Zhou by stating that the term “to extend the closing” was a misnomer, and that the APS was null and void due to the buyer’s breach of the APS.

[11] Ms. Joseph-Walker subsequently made a proposal through her lawyer that she would pay a further \$50,000 to reactivate the APS, which would then close on February 17, 2022. Ultimately, the parties entered an Amendment to the APS on January 21, 2022 that, upon the payment by Ms. Joseph-Walker of an additional deposit of \$50,000 within two business days, the APS would be deemed to be reinstated.

[12] Ms. Joseph-Walker failed to pay the additional deposit of \$50,000. Consequently, the Yamadas had their lawyer write to Ms. Joseph-Walker on

January 27, 2022, to confirm that she was in breach of the Amendment to the APS, and to request that she consent to the release of the deposits paid to date.

[13] Ms. Joseph-Walker alleges in her responding affidavit that she held a 17 minute telephone call with Mrs. Yamada on February 13, 2022 in which Mrs. Yamada agreed that they “were OK with receiving” an additional deposit of \$11,622.83. Ms. Joseph-Walker goes on to state that the Yamadas advised her that they were “OK” with closing on February 17, 2022. Ms. Joseph-Walker submits that this verbal agreement creates a genuine issue that requires a trial to determine if the APS was resurrected on varied terms.

[14] The Yamadas commenced this action on February 15, 2022.

[15] Ms. Joseph-Walker commenced a separate action in Toronto on April 28, 2022 naming the Yamadas, Mr. Chang and his brokerage, IRPO Realty Ltd. as defendants (the “Toronto action”). In the Toronto action, Ms. Joseph-Walker seeks specific performance of the APS to compel the Yamada’s to transfer 806 Indian Road to her. In that action, she obtained a Certificate of Pending Litigation (the “CPL”) with leave from Associate Judge McGraw dated May 4, 2022. Ms. Joseph-Walker has registered this CPL against title to the property.

[16] Ms. Joseph-Walker also seeks damages for fraud, negligence and breach of fiduciary duty in the Toronto action against Mr. Chang as she alleges that he was acting in a conflict of interest at all material times.

Issues and law

[17] The two main issues to decide on this motion are these:

A. Is this case appropriate to be decided on a motion for summary judgment; and

B. Is there a genuine issue for trial that the Agreement of Purchase and Sale came to an end on January 26, 2022?

A. Is this an appropriate case for summary judgment?

[18] The Supreme Court of Canada set out the principles the court is to apply on motions for summary judgment in *Hryniak v. Mauldin*, 2014 SCC 7. In *Mayers v. Khan*, 2017 ONSC 200 (aff'd at 2017 ONCA 524), Glustein J. summarized the *Hryniak* principles as follows:

i) Summary judgment must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims. It is no longer merely a means to weed out unmeritorious claims but rather a "legitimate alternative means for adjudicating and resolving legal disputes" (*Hryniak*, at paras. 5 and 36);

ii) An issue should be resolved on a motion for summary judgment if the motion affords a process that allows the judge to make the necessary findings of fact, apply the law to those facts, and is a proportionate, more expeditious and less expensive process to achieve a just result than going to trial (*Hryniak*, at paras. 4 and 49);

iii) On a motion for summary judgment, the judge must first determine if there is a genuine issue requiring a trial based only on the evidence before the judge and without using the judge's fact-finding powers. If there appears to be a genuine issue requiring a trial, the judge should then determine if the need for a trial can be avoided by using the powers under Rules 20.04(2.1) and (2.2) (Hryniak, at para. 66); and

iv) The standard for determining whether summary judgment will provide a fair and just adjudication is not whether the procedure is as exhaustive as a trial, but rather "whether it gives the judge confidence that [the judge] can find the necessary facts and apply the relevant legal principles so as to resolve the dispute" (Hryniak, at para. 50). A judge must be confident that he or she can fairly resolve the dispute (Hryniak, at para. 57).

[19] On a motion for summary judgment, each party is required to put their best foot forward. A self-serving affidavit is not sufficient to create a genuine issue for trial in the absence of detailed facts and supporting evidence. See *Guarantee Co. of North America v. Gordon Capital Corp.*, 1999 CanLII 664 (SCC) at para. 31, and *Grewal v. Khaira et al.*, 2021 ONSC 4908, at para 25.

[20] The Court of Appeal explained in *Broadgrain Commodities Inc. v. Continental Casualty Company*, 2018 ONCA 438 that on a summary judgment motion, the court will assume that all necessary evidence has been tendered. A motions judge is entitled to presume that the evidentiary record is complete and there will be no further evidence at trial. A motions judge is not required to resort to the enhanced powers provided by subrules 20.04(2.1) and (2.2) to backfill a party's evidentiary shortcomings.

[21] The anticipation of a party to have better evidence at trial will not defeat a motion for summary judgment: *Van Nispen v. McCarron & Chobotiuk Financial Services Inc.*, 2020 ONCA 146, at para. 4.

[22] Subject to the doctrine of surrounding circumstances, collateral agreements that are not in writing and inconsistent with the terms of a written agreement, are not admissible by operation of the parol evidence rule: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, at p. 59.

[23] This action is framed in contract. The nature and history of the agreement between the Yamadas to sell and Ms. Joseph-Walker to purchase 806 Indian Road are set out in the contractual documents attached as exhibits to the affidavits filed by the parties. These affidavits provide clear evidence that enable the court to make the necessary findings of fact on which to apply the law for a fair and just disposition of the case on its merits.

[24] Ms. Joseph-Walker has filed an affidavit dated February 7, 2023 in which she states that she has been a victim of misrepresentations and breach of a fiduciary duty by Mr. Chang. She claims that Mr. Chang developed a personal “vendetta” against her, leading to his refusal to facilitate extensions to the APS. These are allegations she has also made against Mr. Chang in the Toronto action. Ms. Joseph-Walker does not state in her affidavit that she intends to bring a motion

for the Toronto action to be consolidated with this action, or that they be heard together.

[25] Given that Ms. Joseph-Walker has commenced a separate proceeding against various parties concerning the same subject matter, the court should undertake the analysis of whether the issues in this action and the other action are intertwined: *Spiridakis v. Li*, 2021 ONCA 35, at paras 13-15. This means the court should give due consideration as to whether the claims made by Ms. Joseph-Walker in the Toronto action are severable from the claims of the Yamadas in this action.

[26] Ms. Joseph-Walker has led no evidence of any wrongdoing by either Mr. or Mrs. Yamada in this case, or evidence of any wrong-doing alleged against them in the Toronto action. It is readily apparent that the Yamada claim and the issues in the Toronto action are not intertwined. There is no risk of an inconsistent verdict.

[27] Ms. Joseph-Walker has not put her best foot forward and such an approach cannot defeat a summary judgment motion. The amounts claimed by the Yamadas are funds that Ms. Joseph-Walker has paid on deposit pursuant to an agreement she has not performed. They are separate and distinct from any claims that Ms. Joseph-Walker may have against Mr. Chang or his real estate

brokerage. In the absence of evidence against the Yamadas, there is no connection between any cause of action she is asserting in the Toronto action and her defence of this action.

[28] On the evidentiary record filed, I am confident that I am able to find the necessary facts on which to apply relevant legal principles to adjudicate the Yamada claim fairly on its merits.

B. Is there a genuine issue requiring a trial?

[29] The evidence in support of the motion is set out in the affidavit of Sayoko Yamada on behalf of herself and her husband, Minoru. Mr. and Mrs. Yamada are 79 and 74 years old respectively. They were born in Japan and came to Canada in 1967. English is their second language.

[30] The Yamadas purchased the property at 806 Indian Road in 1992 as an investment property. The building consists of two rental units. Mrs. Yamada explains in her affidavit that management of the rental property had become difficult because of their age and the distance of the property from their own residence, and they decided to sell.

[31] After Ms. Joseph-Walker failed to close the transaction on three occasions in October 2021, Peggy Jor wrote to Yi Zhou to declare the APS terminated on October 28, 2021. Specifically, Ms. Jor wrote as follows:

Re: YAMADA S/T AVENUE DEVELOPMENTS INC./JOSEPH-WALKER 806
Indian Rd. Toronto

Due to the breach of the Agreement of Purchase and Sale on the part of the Purchaser on the closing date as extended on at least two occasions, the contract is at an end. The Vendors hereby exercise their right to forfeit the deposit and may proceed to re-sell the property at their absolute discretion and to claim for any losses or expenses they may incur as result of your client's breach of contract.

By way of this letter, we would ask that the realtor release the deposit monies to our office immediately.

Yours very truly,

PEGGY JOR.

[32] On this evidence, I find as a fact that:

- a. Ms. Joseph-Walker had insufficient funds to complete the purchase under the APS on October 26, 2021;
- b. Ms. Jor gave notice to Mr. Zhou in writing on October 28, 2021 that the Yamadas were treating the APS at an end; and
- c. The APS had come to an end under its terms by that date.

[33] Ms. Joseph-Walker remained interested in purchasing the property despite the termination of the APS. She instructed Yi Zhou to write to Ms. Jor to

invite the Yamadas to revive the transaction by making the following proposal on December 20, 2021:

I confirm the following:

1. My client offers to make a further deposit of \$50,000.00 to be credited to the balance of the purchase price on closing.
2. My client offers to pay 3 months upfront mortgage payments on closing.
3. The closing shall be on January 17, 2022.

YI Zhou

[34] On this evidence, I find as a fact that Ms. Joseph-Walker was the party who proposed that she make a further deposit of \$50,000 in order to revive or reinstate the APS. This proposal led to the agreement of the parties to amend the APS on January 21, 2022 (the "Amendment") which contained the following clause:

INSERT:

2. COMPLETION DATE: This Agreement shall be completed by no later than 6:00 pm on the 17th day of February 2022. Upon completion, vacant possession of the property shall be given to the Buyer unless otherwise provided for in this Agreement.

The Buyer agrees to pay a further sum of Fifty Thousand Dollars (\$50,000,00), by certified cheque or direct deposit to the Seller's lawyer, within two business days after acceptance of this amendment, as an additional deposit to be held in trust pending completion or other termination of this Agreement. This amount is to be credited towards the purchase price on completion of this transaction. Upon receipt of such further deposit by the seller's ~~xxxx~~ lawyer, the original agreement of Purchase and Sale shall be deemed to have been reinstated and the sellers' closing package delivered to the Buyers' lawyer by email on October 3, 2021, is likewise deemed complete and satisfactory.

[35] Ms. Joseph-Walker raises the argument in her responding materials and in submissions that Mr. Chang knew that the Yamadas would have agreed to a lesser sum for the further deposit. However, there is no evidence in the record that Mr. Chang had that knowledge. Even if he did, and even if by not advising Ms. Joseph-Walker he breached a duty he owed to her, any breach by Mr. Chang is no defence to the Yamadas' claim. In any event, Ms. Joseph-Walker states in paragraph 27 of her affidavit that she "reluctantly agreed" to pay a further deposit in that amount. This evidence is inconsistent with the allegations at paras. 21 and 22 of her statement of defence that she never agreed to this term.

[36] I find as a fact on this evidence that Ms. Joseph-Walker agreed as follows:

- a. to pay a further deposit of \$50,000 to the sellers' lawyer within two business days of January 21, 2022;
- b. upon receipt of that further deposit, the original APS "shall be deemed to have been reinstated"; and
- c. the closing date would then be February 17, 2022.

[37] Time was of the essence with respect to the language used in para. 4 of the Amendment to the APS. That document required Ms. Joseph-Walker to pay an additional \$50,000 deposit within two business days. This Amendment to the APS therefore required Ms. Joseph-Walker to pay this additional deposit by

January 26, 2022 to reinstate the APS. If she did not make the payment, and with time of the essence, that provision expired on the due date.

[38] There is no evidence given in Ms. Joseph-Walker's affidavit or in any email she has attached as an exhibit that she disputes the deadline by which she agreed to pay the deposit. She candidly admits that she did not pay the deposit by January 26, 2022.

[39] Ms. Joseph-Walker attaches a bank draft dated January 27, 2022 in the amount of \$11,622.83 to her lawyer's office, in trust as exhibit H to her affidavit. These were the only funds she could assemble as of that date because of her own circumstances. Ms. Joseph-Walker implies in her evidence that Mrs. Yamada was "OK" with receiving this lesser deposit, and that she would have her lawyer Yi Zhou send it to the Yamadas or as they may direct. However, Ms. Joseph-Walker makes the admission in paragraph 25 of her statement of defence that her lawyer could not send these funds as Mr. Chang and the Yamadas would not accept them. There is no evidence before the court that this bank draft was ever sent.

[40] On January 27, 2022, Ms. Jor writes to Mr. Zhou to declare the reinstatement of the APS at an end. The entirety of the letter is set out to show the position Ms. Jor took on behalf of the Yamadas on that date:



[41] Ms. Joseph-Walker apologized to the Yamadas in an email dated January 28, 2022 that she had not had the funds delivered.

[42] Minoru Yamada writes back on January 29, 2022 at 6:57 p.m. to thank Ms. Joseph-Walker for her email. The email states: "While English is not our first

language, we can easily feel and trust your sincerity from your email.” Despite what Ms. Joseph-Walker may infer from this email, it does not contain language that can be construed as extending the date for payment of the additional deposit or changing the amount due.

[43] Not to be deterred, Yi Zhou writes to Ms. Jor on February 9, 2022 with a proposal to close the purchase on February 17, 2022:

Re: YAMADA S/T JOSEPH-WLAKER – 806 Indian Rd

My client is ready to complete the above transaction as scheduled on February 17, 2022.

Attached please find a mortgage commitment duly signed.

Kindly confirm that your clients are agreeable to complete this transaction on February 17, 2022.

I understand that your clients have retained litigation counsel in this matter. Please advise if we need to contact them to confirm the above closing.

Thank you.

Yi Zhou

[44] The letter from Yi Zhou stating that Ms. Joseph-Walker would be ready to complete the transaction on February 17, 2022 fails to acknowledge that Ms. Joseph-Walker did not pay the further deposit. It also ignores Ms. Jor’s letter of January 27, 2022 stating the APS was never reinstated as a result, and requesting release of the deposits.

[45] Despite the letter from Yi Zhou dated February 9, 2022, no letter or other evidence was given by Ms. Joseph-Walker that she tendered on Ms. Jor to show

that she was ready, willing and able to complete the purchase on February 17, 2022. Ms. Joseph-Walker candidly acknowledged that documents of this nature are not in her responding material.

[46] I would not give any weight to the representation of Ms. Joseph-Walker that Mrs. Yamada agreed to accept \$11,622.83. I do not find the statement in para. 40 of her affidavit that Mrs. Yamada advised her they would be “OK” to close the transaction on February 17, 2021 to be credible. Ms. Joseph-Walker has made bald assertions in each respect without any documents to prove or confirm these terms were agreed upon during her call with Mrs. Yamada on February 13, 2022. Those assertions are all the more suspect when viewed in the context of the legal position taken in writing by Ms. Jor that the APS was at an end.

[47] On this evidence, I find the following facts:

- a. Ms. Joseph-Walker failed to pay the further deposit of \$50,000 as required by the Amendment to the APS to reinstate it;
- b. Ms. Jor gave notice that the APS was at an end by virtue of that failure; and
- c. Ms. Joseph-Walker was not ready, willing and able to complete the transaction on February 17, 2022 in any event.

[48] In my view, there is no genuine issue requiring a trial about the termination of the APS for Ms. Joseph-Walker to purchase the property. That agreement came

to an end by its own terms. The Yamadas' lawyer made that position known to Ms. Joseph-Walker on October 28, 2021 in writing, and Ms. Joseph-Walker apparently accepted that position. This is evident from the Amendment to the APS where the clause for the closing date was deleted and another clause inserted with February 17, 2022, in its place.

[49] Time remained of the essence from the express clause to that effect in the Amendment, and by reference that all other terms of the APS remained the same. The Yamadas were ready to close on October 26, 2021 but Ms. Joseph-Walker was not. She therefore repudiated the APS at that time. Her attempt to reinstate the APS in January 2022 failed when she did not provide the additional deposit of \$50,000 pursuant to the Amendment, thereby repudiating that agreement as well.

[50] There is still the matter of the sum of \$53,000 that Ms. Joseph-Walker paid in deposits on the original APS.

[51] There can be no doubt that the APS came to an end when Ms. Joseph-Walker could not close by the completion date, as extended in October 2021. In *Azzarello v. Shawqui*, 2019 ONCA 820, the Court of Appeal (at para. 45) recognizes the general principle that if a purchaser repudiates the agreement and fails to close a transaction, the deposit is forfeited without the requirement of the

seller to prove damages caused by the breach. A deposit is not only part of the purchase price in the event the transaction completes, but also serves as security that motivates the buyer to complete the purchase. See also *Benedetto v. 2453912 Ontario Inc.*, 2019 ONCA 149, at paras. 5-7.

[52] Ms. Joseph-Walker did not make submissions with respect to relief from forfeiture because of her emphasis on the continuing existence of the APS and her interest that it be specifically performed. However, it is an issue that must be addressed for completeness.

[53] The state of the law relating to the forfeiture of a buyer's deposit upon failing to complete an Agreement of Purchase and Sale is subject to the equitable remedy of relief from forfeiture under s. 98 of the *Courts of Justice Act*. The Court of Appeal in *Redstone Enterprises Ltd. v. Simple Technology Inc.*, 2017 ONCA 28 (at para. 10) sets out the two-part test for determining whether relief from forfeiture should be allowed. The first part of the test requires the court to consider whether the amount subject to forfeiture would be out of proportion to the damages suffered by the sellers. On the second part, the court must consider whether it would be unconscionable for the seller to retain the deposit.

[54] In this case, the proportionality of the \$53,000 at issue is measured against the potential loss of bargain should the Yamadas sell the property for less

than the \$1,720,000 sale price. There is no way to know if the Yamadas would have suffered any loss on re-selling the property because Ms. Joseph-Walker had registered the CPL against title. She must bear the responsibility of that decision. I find that the amount of the deposit is less than 3.1% of the purchase price agreed upon, and therefore proportionate to the potential loss. See *Redstone*, and also *Varajao v. Azish*, ONCA 218 at paras 11 and 12, and *Rahbar v. Parvizi et al.*, 2022 ONSC 21 36, at para. 4 and 18.

[55] I also find that forfeiture of the deposit in this amount would not be unconscionable. Ms. Joseph-Walker prolonged a transaction that she could not complete for six months, thereby subjecting an elderly couple to the stress of extending closing dates for a sale that never closed. All the while, the sellers kept the property off the market to provide Ms. Joseph-Walker this opportunity: *Benedetto*, at para. 6.

[56] When the Amendment to the APS expired in January 2022, Ms. Joseph-Walker took further steps to tie up the Yamadas' ability to sell the property by registering the CPL. In view of these circumstances, it would not be unconscionable to allow the forfeiture of the deposits to the Yamadas.

Conclusion

[57] There is no genuine issue requiring a trial to find that the Agreement of Purchase and Sale came to an end on October 28, 2021, and was never re-instated. The motion for summary judgment is granted.

[58] This court declares that the Agreement of Purchase and Sale dated July 13, 2021 is at an end. The plaintiffs Minoru Yamada and Sayoko Yamada are entitled to release of the deposits totalling \$53,000, plus interest, held by Ipro Realty Inc. and Peggy Jor in trust. The defendant has forfeited those deposits to the plaintiffs, and she has no further interest or claim to them.

[59] I am not granting an Order to set aside the Order made by Associate Judge McGraw dated May 4, 2022, or an Order to discharge the CPL from title. Although the latter Order was requested in the notice of motion, it was not requested in the statement of claim. Under Rule 20.01 (1), a motion for summary judgment can be brought on a claim or defence. This relief was not part of the Yamadas' claim. As the Order was obtained in the Toronto action, the Yamadas are at liberty to bring a motion in that action based on the findings in this case.

Costs

[60] There was no offer to settle the motion. I heard submissions of behalf of the Yamadas seeking \$7,700 for the combined costs of the action and for the

motion, if successful. Ms. Joseph-Walker advised the court that she would seek \$1,750.

[61] In view of the overarching principle that costs must be fair and reasonable, I award costs in the amount of \$5,500 all inclusive to the Yamadas on a partial indemnity basis.



Emery J.

Released: March 16, 2023

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