CITATION: Zoleta v. Singh and RE/MAX Twin City Realty, 2023 ONSC 5898
COURT FILE NO.: CV-22-951
DATE: 2023/10/20

SUPERIOR COURT OF JUSTICE-ONTARIO

RE: DONNA ZOLETA and RONALD ZOLETA, Plaintiffs

AND:

LOVESIKANDER SINGH and RE/MAX TWIN CITY REALTY INC., Defendants

BEFORE: Gibson J.

COUNSEL: Benjamin Jeffries, Counsel for the Plaintiffs

Muhammad Zafar, Counsel for the Defendant Lovesikander Singh

Christopher Tucker, Counsel for the Defendant RE/MAX Twin City Realty Inc.

HEARD: July 4, 2023

ENDORSEMENT

Overview

[1] In early 2022, there was a market meltdown in the overheated real estate market in Waterloo Region. The volatility of the market caused significant disruption to the plans and expectations of many. The parties to this action are amongst these people.

[2] This is a breach of contract claim arising from an aborted real estate transaction during this period.

[3] This action arises from an agreement between the vendor Plaintiffs, Donna Pontaoe Zoleta and Ronald Allan Anupol Zoleta ("the Plaintiffs") and the purchaser Defendant, Lovesikander Singh ("Singh"), pursuant to which Singh agreed to purchase the property known municipally as 27 Lemonbalm Street, Kitchener, Ontario ("the Property"). The agreement between the parties is contained in an OREA Agreement of Purchase and Sale dated February 26, 2022 ("the APS").

[4] The APS provided for a sale price of $1,150,000.00 and a completion date of June 30, 2022.

The APS did not contain any conditions.

[5] Mr. Singh paid a deposit in the amount of $50,000.00 pursuant to the APS. The deposit moneys are currently held in trust by the listing agent Defendant, Re/Max Twin City Realty Inc. ("Re/Max").

[6] When the market precipitously declined, an appraisal report for lenders was prepared in June 2022 which indicated that the market value of the property was around $790,000, an amount significantly below the purchase price specified in the APS. The purchaser, Mr. Singh, sought a large abatement in the sale price. The Plaintiff vendors refused. Singh was then unable to secure financing, and he failed to complete his purchase of the Property as scheduled. On the afternoon of the scheduled closing date, Singh alleged that the Plaintiffs had breached the operative agreement when they relisted the Property on the Multiple Listing Service ("MLS") six days earlier.

[7] The Plaintiffs deny having repudiated the agreement when they relisted the Property for sale. Alternatively, the Plaintiffs maintain that, if the Court finds that they repudiated the agreement by relisting the Property for sale, this repudiation was not accepted by Singh.

[8] The Plaintiffs seek summary judgment based on Singh's failure to complete his purchase of the Property. They claim damages in the amount of $345,121,98, comprised of: $330,225 for loss of sale value; $9,962 for carrying costs; and $4,934.98 for costs to extend the purchase of their new home in Calgary.

[9] Singh resists, saying that the Plaintiffs failed to complete the deal by relisting the Property prior to the closing date, which caused Singh not to get mortgage financing to close the deal. He alleges that they did this in concert with Re/Max, and contends that this rendered the deal "null and void." The Plaintiffs, he submits, also improperly refused a request for an extension to close the deal. He insists that the matter is not amenable to summary judgment because there remain genuine issues for trial.

[10] Mr. Singh seeks dismissal of the summary judgment motion, and return of his deposit of $50,000 from Re/Max. Singh has crossclaimed and counterclaimed for the deposit, and for $25,000 in legal fees as a result of the termination of the legal fees and the action, and for contribution and

indemnity from Re/Max.

[11] Re/Max has interpleaded with respect to the deposit, and defended against the crossclaim, denying all allegations made by Singh.

Summary of Facts

[12] On June 23, 2022, the Plaintiffs' real estate lawyer, Bryan Mayes ("Mayes"), received a letter from Singh's real estate lawyer, Sanjeev Kumar Chadha ("Chadha"), stating as follows:

> Please be advised that we act for the purchaser in the above transaction and we understand that you represent the vendors.
>
> We have been advised by our clients that the property has been appraised by $355,000.00 less than the purchase price, therefore, our clients require the abatement for the same.
>
> We trust the foregoing to be satisfactory.

[13] The Plaintiffs, who, based on the APS, had entered into an agreement to purchase a new property in Calgary, were not willing to agree to an abatement of the purchase price, as demanded by Singh or at all, and on June 24, 2022, the Plaintiffs, through their real estate lawyer, wrote to Singh's real estate lawyer, affirming the agreement in the APS, and saying as follows:

> We are in receipt of your letter dated June 23, 2022. Our Clients will not be entertaining an abatement to the purchase price. I kindly remind your Clients that they have entered into a firm Agreement of Purchase and Sale. Failure to close on June 30, 2022 shall constitute a breach of the Agreement and our Client will be pursuing damages.

[14] The Plaintiffs had entered into an agreement to purchase a new property in Calgary, for which they would require the proceeds of the sale of the Property to close. The Plaintiffs, after receiving Chadha's letter of June 23, 2022, were very concerned about Singh's capacity to complete the

transaction as scheduled, and, on June 24, 2022, they relisted the Property for sale on what they described as a "pre-emptive basis".

[15] The Plaintiffs, despite having relisted the Property for sale on June 24, 2022, insist that they remained intent on completing their sale to Singh as scheduled on June 30, 2022. To that end, they did not enter into any new agreements in respect of the Property prior to June 30, 2022, and they attended at their real estate lawyer's office prior to June 30, 2022, to sign the closing documents in relation to the sale to Singh. The Plaintiffs say that, in the interests of transparency, they advised the individual defendant, Singh, that the Property was being relisted for sale by text message sent by the Plaintiffs' real estate agent, Anurag Sharma ("Sharma"), to Singh's real estate agent on June 24, 2022. Singh's agent did not respond to Sharma's message, and nor did Singh raise any objection to the relisting of the Property, and on June 27, 2022, Sharma followed up with Singh's real estate agent to inquire if Singh was intending to close the transaction as scheduled.

[16] On June 28, 2022, two days before the scheduled closing date, a law clerk in Mayes' office contacted Chadha to inquire as to the status of this closing. On June 29, 2022, Chadha advised that he had not received instructions from Singh, and nor did he have any mortgage instructions.

[17] On June 26, 2022, Singh was advised by his mortgage broker that his application for financing had been denied on the basis that the Property had been listed for sale on June 24, 2022. Singh, despite being aware that the Property had been relisted for sale, did not raise any objection to the listing, and nor did he ask the Plaintiffs to remove the listing.

[18] On June 29, 2022, Singh, through his real estate agent, requested a 15-day extension of the scheduled closing date. On June 30, 2022, Singh, through his real estate lawyer, requested a 21-day extension of the scheduled closing date. Alternatively, Singh advised that he would be "agreeable" to signing a Mutual Release. An email to this effect was sent at 11:20 a.m. on June 30, 2022, the scheduled closing date.

[19] On June 30, 2022, Singh, through his real estate lawyer, sent a requisition letter to the Plaintiffs' real estate lawyer. This letter was sent by facsimile at 11:35 a.m. on June 30, 2022. Among other things, the requisition letter directed the Plaintiffs' solicitor to engross the Transfer in Singh's name and to message it to his solicitor.

[20] At 11:32 a.m. on June 30, 2022, the Plaintiffs, through their real estate lawyer, advised that they would consent to an extension, as requested, upon Singh paying a further non-refundable deposit of $50,000.00. Only after receiving the email sent at 11:32 a.m. on June 30, 2022, did Singh raise, for the first time, an issue with the re-listing of the Property. By email sent at 12:17 p.m. on June 30, 2022, Singh, through his real estate lawyer asserted – for the first time – that the Agreement was "null and void" because the Plaintiffs had re-listed the Property on MLS.

[21] Thereafter Singh refused to close the transaction on June 30, 2022.

[22] The Plaintiffs promptly resold the Property. Unfortunately, based on the then-current market conditions, they realized $350,000.00 less than Singh had agreed in the APS to pay. The Plaintiffs claim damages in the amount of $345,121.98, calculated as follows: loss of sale value: $330,225.00 (net of real estate commission); carrying costs: $9,962.00; and cost to extend their purchase: $4,934.98.

[23] Singh had defended the action on the bases that: he did not repudiate the APS; the Plaintiffs re-listing the property for sale before the closing date for the APS rendered the contract null and void; the Plaintiffs were not ready, willing and able to close the APS; the Plaintiffs and Re/Max conspired to hide the true value of the Property from Singh when it was listed for sale; and that the Plaintiffs and Re/Max conspired to hide the fact that the Property was re-listed for a lower price.

[24] On these same bases, Singh has crossclaimed and counterclaimed for the deposit, and for $25,000 in legal fees as a result of the termination of the APS and the action, and for contribution and indemnity from Re/Max. Singh pleads that the Plaintiffs re-listing the Property for sale frustrated his efforts to secure financing.

[25] Singh submits that he made all efforts to fulfill his obligations under the APS and endeavored to arrange funds from all possible avenues, but due to the unlawful conduct of the Plaintiffs, his efforts were "sabotaged by the Plaintiffs with the joint hands of real estate agent of the Brokerage by re-listing the property." He says that the request for abatement in price and extension for closing date did not permit the Plaintiffs to violate the contract and re-list the Property on MLS for sale prior to the original closing date without consent. This led a prospective lender to decline to provide a mortgage. He alleges bad faith on the part of the Plaintiffs and contends that after selling the property

to someone else at a reduced price, the Plaintiffs' claim for "self-created damages with the help of the Brokerage" is misleading and ill-founded.

[26] Singh submits that the delay in obtaining the necessary funds was due to circumstances beyond his control, and that he had no intention of engaging in anticipatory breach of the contract. The actions of the Plaintiffs in re-listing the Property prior to the closing date specified in the APS demonstrates that they were not ready, willing and able to perform their part of the contract.

[27] Singh seeks dismissal of the summary judgment motion, return to him of the deposit of $50,000 by Re/Max, and damages because of the Plaintiffs' breach of contractual obligations.

[28] Re/Max has interpleaded with respect to the deposit, and defended against the crossclaim, denying all allegations of Singh.

Issues

[29] The issues to be determined by this Court are as follows:

i. Is this an appropriate case for summary judgment?

ii. Did the individual defendant, Singh, repudiate the agreement in the APS when he insisted on an abatement of $355,000.00 on June 23, 2022, and if so, was the repudiation accepted by the Plaintiffs?

iii. Did the Plaintiffs repudiate the Agreement when they re-listed the Property for sale on MLS on June 24, 2022, and if so, was the repudiation accepted by the individual defendant, Singh?

iv. If the Court should find that the Plaintiffs did not repudiate the Agreement or, alternatively, any such repudiation was not accepted by Singh, did the Plaintiffs have a duty to agree to an extension?

v. Has Singh established a conspiracy? and,

vi. What are the Plaintiffs' damages, if any?

Law and Analysis

Issue no. 1: Is this an appropriate case for summary judgment?

[30] Rule 20.04(2)(a) of the *Rules of Civil Procedure* provides that a Court shall grant summary judgment if the Court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence.

[31] Rule 20.04(2.1) of the *Rules of Civil Procedure* goes on to state as follows:

> In determining under clause (2)(a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interests of justice for such powers to be exercised only at trial:
>
> 1. Weighing the evidence.
> 2. Evaluating the credibility of a deponent.
> 3. Drawing any reasonable inference from the evidence.

[32] In *Hryniak v. Mauldin*, 2014 SCC 7, at paragraph 66, the Supreme Court of Canada held that on a motion for summary judgment, a Court should first determine if there is a genuine issue requiring a trial based only on the evidence in the motion record, without using the fact-finding powers as outlined in Rule 20. The analysis of whether there is a genuine issue requiring a trial should be done by reviewing the factual record and granting a summary judgment if there is sufficient evidence to fairly and justly adjudicate the dispute and a summary judgment would be a timely, affordable and proportionate procedure.

[33] Then, if there appears to be a genuine issue requiring a trial, a Court should determine if the need for a trial can be avoided by using the powers under Rule 20.04(2.1) and (2.2). A Court may, at its discretion, use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if they will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

[34] The Supreme Court of Canada encouraged the use of summary judgment motions to resolve cases in an expeditious manner where that the motion can achieve a fair and just adjudication.

[35] In *Fernandes v. Araujo*, 2014 ONSC 6432, at paragraph 46, the Court summarized the *Hryniak v. Mauldin* approach as follows:

> The Court on a motion for summary judgment should undertake the following analysis:
>
> 1) The court will assume that the parties have placed before it, in some form, all of the evidence that will be available for trial;
>
> 2) On the basis of this record, the court decides whether it can make the necessary findings of fact, apply the law to the facts, and thereby achieve a fair and just adjudication of the case on the merits;
>
> 3) If the court cannot grant judgment on the motion, the court should:
>
> a. Decide those issues that can be decided in accordance with the principles described in 2), above;
>
> b. Identify the additional steps that will be required to complete the record to enable the court to decide any remaining issues;
>
> c. In the absence of compelling reasons to the contrary, the court should seize itself of the further steps required to bring the matter to a conclusion.
>
> ...[T]he test is now whether the court's appreciation of the case is sufficient to rule on the merits fairly and justly without a trial, rather than the formal trial being the yardstick by which the requirements of fairness and justice are measured.

[36] The onus is on the moving party to show that there is no genuine issue requiring a trial. However, the responding party must "lead trump or risk losing". The responding party may not rest on the allegations or denials in the pleadings, but must present by way of affidavit or other evidence, specific facts and coherent organized evidence demonstrating a genuine issue. The motion judge is entitled to assume that the record contains all evidence that the parties will present if there is a trial: *Paradise Homes North West Inc. v. Sidhu*, 2019 ONSC 1600, at paragraph 16.

[37] Further guidance on the application of these principles has recently been given by Brown J.A. for the Court in *Moffitt v. TD Canada Trust*, 2023 ONCA 349.

[38] Recent jurisprudence indicates that breach of contract claims arising from aborted real estate transactions are amenable to summary judgment: see *Forest Hill Homes v. Ou*, 2019 ONSC 4332, *Paradise Homes North West Inc. v. Sidhu*, 2019 ONSC 1600, *Rosehaven Homes et al. v. Aluko*, 2022 ONSC 1227 (upheld by the Court of Appeal at 2022 ONCA 817).

[39] I consider that this is an appropriate case to be considered for summary judgment. The Plaintiffs and the individual Defendant, Singh, each allege that the operative Agreement of Purchase and Sale was breached by the other party. The underlying circumstances leading up to the termination of the Agreement are not in dispute. The Court is tasked, at the first instance, with determining, based on the largely settled factual circumstances, which of the parties breached the agreement. Thereafter, there are residual issues relating to damages and mitigation which, based on recent jurisprudence, are equally well suited for disposition by summary judgment.

[40] I consider that, on the basis of this record, I can make the necessary findings of fact, apply the law to the facts, and thereby achieve a fair and just adjudication of the case on the merits.

Issue no. 2: Did the individual defendant, Singh, repudiate the Agreement when he insisted on an abatement of $355,000.00 on June 23, 2022, and if so, was the repudiation accepted by the Plaintiffs?

[41] The law of anticipatory breach and repudiation is well settled.

[42] Repudiation occurs when a party clearly, quite plainly, evidences an intention not to be bound by the contract. For an anticipatory breach to be established, the Court must find: 1. Conduct which amounts to a total rejection of the obligations of the contract; 2. Lack of justification for such conduct; and 3. Acceptance of the repudiation by the innocent party within a reasonable time. If the other party to the contract does not accept the anticipatory breach, the contract remains alive for the benefit of all parties: *Guarantee Co of North America v. Gordon Capital Corp*, [1999] 3 SCR 423, at paragraph 40.

[43] An anticipatory breach of contract occurs when one party to a contract, by express language or conduct, or as a matter of implication from what it has said or done, repudiates its contractual obligations before they fall due. A party is only excused from performing his or her obligations under a contract if the anticipatory breach is so serious that it amounts to an anticipatory repudiation of the contract. Anticipatory repudiation occurs where a party to a contract gives notice before an obligation is due that it intends to breach that obligation. Not all breaches amount to a repudiation of the contract. It is well settled that only a fundamental breach gives the innocent party the right to treat the agreement in question as at an end, and, further, that a fundamental breach is one which deprives the innocent party of substantially the whole benefit of the contract: *Spirent Communications of Ottawa Ltd. v. Quake Technologies (Canada) Inc.*, 2008 ONCA 92, at paragraph 35.

[44] An anticipatory breach sufficient to justify the termination of a contract occurs when one party, whether by express language or conduct, repudiates the contract or evinces an intention not to be bound by the contract before performance is due: *Spirent Communications*, at paragraph 37.

[45] The test for whether a party has repudiated a contract is objective. The question is whether a reasonable person would find that the breaching party no longer intends to be bound by the contract in question. When determining whether such an intention has been evinced, the reviewing Court should rely on much the same analysis as it does in respect of claims of fundamental breach. That is, in determining whether the party in breach had repudiated or shown an intention not to be bound by the contract before performance is due, the court asks whether the breach deprives the innocent party of substantially the whole benefit of the contract: *Spirent Communications*, at paragraph 37.

[46] A repudiatory breach or an anticipatory repudiation of contract does not, in itself, terminate or discharge a contract. The innocent party, upon the repudiation of a contract, is faced with an election respecting any remaining contractual obligations, which determines the consequences of the other party's repudiation. The innocent party may choose to treat the contract as still being in force and effect, thereby affirming it and keeping alive the obligations of both parties. In the alternative, the innocent party may accept the repudiation, which has the effect of discharging both parties from their future obligations under the agreement. Where the innocent party to a repudiatory breach or an anticipatory repudiation wishes to be discharged from the contract, the election to disaffirm the

contract must be clearly and unequivocally communicated to the repudiating party within a reasonable time: *Zeifman Partners Inc. v. Aiello*, 2022 ONSC 611, at paragraph 108.

[47] By letter dated June 23, 2022, Singh, through his real estate lawyer, stated as follows:

> We have been advised by our clients that the property has been appraised for $355,000.00 less than the purchase price, therefore, our clients require the abatement for the same. [*emphasis added*].

[48] The Plaintiffs contend, and I agree, that Singh's lawyer's use of the word "require" was synonymous with a demand rather than a request, and his use of the word "require" unequivocally communicates that he will not complete his purchase of the property unless the Plaintiffs agreed to an abatement of $355,000.00.

[49] Singh, by this correspondence of June 23, 2022, evidenced an intention not to be bound by the agreement, thereby repudiating the contract.

[50] Through his lawyer, Singh clearly stated that he required an abatement of $355,000.00 from the purchase price. This is a clear statement that without such an abatement, Singh would not, or could not, close the APS. At no time subsequent did Singh state that he was able to close the APS.

[51] The Plaintiffs contend, and I accept, that they did not accept Singh's repudiation and, by their subsequent correspondence, including the subsequent correspondence sent on their behalf by their real estate agent and real estate lawyer, expressed an intention to affirm the agreement with a view to completing their sale of the Property as scheduled.

Issue no. 3: Did the Plaintiffs repudiate the Agreement when they re-listed the Property for sale on MLS on June 24, 2022, and if so, was the repudiation accepted by the individual defendant, Singh?

[52] Singh asserts that the Plaintiffs repudiated the Agreement when they re-listed the Property for sale on June 24, 2022. The Plaintiffs deny that they repudiated the Agreement, as alleged or at all. Further, or in the alternative, the Plaintiffs state that, if they did repudiate the Agreement, which is not admitted but expressly denied, the individual defendant, Singh, by his subsequent conduct

affirmed the Agreement, and it was only thereafter, when he was faced with his inability to complete the purchase of the Property that he returned in bad faith to the alleged repudiation and purported to accept it for the sake of obviating of his breach of the agreement.

[53] The Plaintiffs did not clearly evidence an intention not to be bound by the APS by listing the Property for sale. On June 23, 2022, the Plaintiffs gave notice to Singh, through the realtors, both that the Plaintiffs wanted Singh to close the contract on the closing date, and at the same time gave notice that the Plaintiffs would re-list the Property. On June 24, 2022 the Plaintiffs gave notice to Singh, through the realtors, that the Property was being re-listed that day, and asked for confirmation that Singh was still intent on closing the contract. On June 24, 2022 the Plaintiffs also advised Singh, through their lawyers, that the Plaintiffs were holding him to the terms of the APS, and that he was required to close on June 30, 2022. Singh is deemed to know what his realtor and lawyer each knew. In any event, Singh did not accept any alleged repudiation of the Plaintiffs in a reasonable time. Singh knew that the Property was being relisted for sale as of June 23, 2022. Singh engaged in negotiations with the Plaintiffs for an extension of the closing date for the contract on the date of closing, June 30, 2022. It is only after those negotiations failed that Singh took the position that re-listing the Property for sale rendered the contract null and void. This is not accepting the repudiation within a reasonable time.

[54] Also in any event, prior to June 30, 2022, the contract remained alive, and prior to that date, the Plaintiffs repeatedly evidenced their intention to close on the closing date. On June 28, 2022, the Plaintiffs, through their lawyer, advised Singh that they needed to know if Singh was able to close the contract on June 30, 2022. On June 29, the Plaintiffs, through their realtor, advised Singh that they had already met with their solicitor, and had signed all the documents ready for closing the contract.

[55] There is little jurisprudence which speaks to whether a seller, who relists a subject property for sale, by so doing, repudiates an existing agreement to sell the same property. In *Vanderwal v. Anderson*, [1999] O.J. No. 2646, Justice MacDougall, sitting on the Divisional Court, heard an appeal of a Small Claims Court judgment. In *Vanderwal*, the Plaintiff sellers had entered into an agreement to sell their property to the Defendant buyer. While the initial agreement was conditional on the defendant buyer selling her property, the parties subsequently entered into an agreement extending

the closing date to February 4, 1997, and deleting the buyer's condition. On December 10, 1996, the defendant buyer, through her lawyer, advised that, despite having waived the said condition, she would not have the money to close the purchase transaction unless and until she could sell her existing property. The Plaintiff sellers, through their solicitor, responded on December 19, 1996, affirming the existing agreement and advising that they "stand ready to close the transaction as contracted on February 4, 1997". There was no further communication between the parties or their solicitors, and on January 16, 1997, the Plaintiff sellers re-listed the subject property for sale. Justice MacDougall allowed the Defendant buyer's appeal and dismissed the Plaintiff sellers' action. Justice MacDougall's decision is premised on finding that the Plaintiff sellers, by re-listing the property for sale without any further communication or notice to the defendant buyer, had abandoned the contract with the defendant buyer.

[56] I agree with the submission of the Plaintiffs that the *Vanderwal* decision, while informative, turns on its unique facts and is distinguishable. *Vanderwal* does not stand for the proposition that a seller, who re-lists his or her property for sale prior to the scheduled completion of an existing purchase and sale agreement, will have inevitably abandoned or repudiated the existing agreement. Rather, *Vanderwal* turns on the finding that the Plaintiff sellers, by re-listing the property for sale a month after the last correspondence between the parties and without any other notice to the defendant buyer, intimated an objective intention to no longer be bound by the original agreement. It is the absence of any communication which underscores Justice MacDougall's finding that the sellers abandoned the contract. In this way, *Vanderwal* is distinguishable.

[57] In the present case, the Plaintiffs, through their real estate agent, Sharma, communicated their intention to re-list the Property to the individual defendant, Singh, through his real estate agent. Specifically, on June 24, 2022, the same day that the Property was re-listed for sale, Sharma texted Singh's real estate agent, saying as follows: "Also listing Lemonbalm today".

[58] The Plaintiffs submit, and I agree, that notice to Singh's real estate agent was notice to Singh. By paragraph 3 of the APS, the individual defendant, Singh, appointed his real estate agent "as agent for the purposes of giving and receiving notices pursuant to this Agreement". In *McKee v. Montemarano*, 2008 CanLII 36163, at paras. 48-51, a case dealing the efficacy of a notice given to a real estate agent in connection with an Agreement of Purchase and Sale, Justice Howden found that

notice to an agent would, subject to any contrary express or implied agreement between the parties, be notice to the principal.

[59] Accordingly, the Plaintiffs submit, and I agree, that Singh was given express notice that they intended to re-list the Property for sale on June 24, 2022. In any event, Singh, himself, acknowledges that he was aware that the Property had been re-listed for sale by June 26, 2022, when he received the letter from his lender advising that his application for mortgage financing had been denied because the Property had been listed for sale on June 24, 2022.

[60] Unlike in *Vanderwal*, this is not a case of abandonment in which the Plaintiff sellers had decided to move on from the sale to the buyer. Rather, they re-listed the Property for sale on notice to Singh, "on a pre-emptive basis", while expressly affirming the agreement and noting their hope that the sale to Singh might be completed as scheduled. The Plaintiffs' real estate agent, Sharma, after notifying Singh's agent that the property was being re-listed for sale, followed up asking as follows: "Let me know if you buyers are still interests to close or not so plan accordingly".

[61] The Plaintiffs, through their real estate lawyer, also communicated an intention to complete the Agreement as scheduled by way of a letter sent on June 24, 2022, the same date that the Property was listed for sale, and, thereafter, in the resulting email correspondence with Singh's real estate lawyer.

[62] Whether the re-listing of a property for sale will constitute a repudiation or an abandonment of an existing agreement must, by necessity, turn on the underlying circumstances. The test for a repudiation, as stated in *Spirent Communications*, turns on whether a reasonable person would find that the breaching party, by their words or actions, has intimated that they no longer intend to bound by the contract in question.

[63] The Plaintiffs submit, and I agree, that their words and actions, taken as a totality, unequivocally suggest that they remained committed to completing their sale of the property to Singh as scheduled, and had not repudiated the agreement.

[64] Even if I were to accept that there is evidence of prejudice to Singh, which I do not, such prejudice must be assessed within the framework prescribed in *Spirent Communications*. When determining whether the breaching party has shown an intention not to be bound by the contract, the reviewing Court should rely on much the same analysis as it does in respect of claims of fundamental breach. There are five factors that can be considered when determining whether conduct has deprived the innocent party of substantially the whole benefit of the contract. The five factors are: (1) the ratio of the party's obligations not performed to that party's obligations as a whole; (2) the seriousness of the breach to the innocent party; (3) the likelihood of repetition of such breach; (4) the seriousness of the consequences of the breach; and (5) the relationship of the part of the obligation performed to the whole obligation: *Spirent Communications*, at paragraphs 36-37.

[65] In the present case the alleged prejudice should be considered when assessing the seriousness of the breach on the innocent party. Singh argues that this breach was of significant seriousness insofar as it undermined his ability to secure financing to complete the transaction. This assertion, though, fails when one considers that Singh's financing was – apparently – denied solely on the basis that the Property had been relisted for sale on June 24, 2022. Had Singh wanted to secure financing to complete the transaction, he might have asked the Plaintiffs, when he first became aware of the issue on June 26, 2022, to remove the listing. The removal of the MLS listing, based on the evidence before this Court, would have removed any impediment to Singh's financing and there would have been no actual prejudice to Singh.

[66] Moreover, even if one considered that the Plaintiffs, by re-listing the Property for sale, did repudiate the Agreement, Singh did not unequivocally accept the repudiation within a reasonable time. Rather, Singh, by his conduct leading up to the closing date, being June 30, 2022, affirmed the agreement. i. Singh requested an extension of the closing date through his real estate agent on June 29, 2022; ii. Singh requested that the parties agree to extend the closing date or, alternatively, that the parties sign a Mutual Release through his real estate lawyer at 11:20 a.m. on June 30, 2022; iii. At 11:35 a.m. on June 30, 2022, Singh, through his real estate lawyer, sent a requisition letter directing inter alia that the Transfer be engrossed to "Lovesikander Singh" and, further, that it be messaged to Singh's real estate lawyer.

[67] As of 11:35 a.m. on June 30, 2022, the scheduled closing date, Singh's conduct suggests unequivocally that he acknowledged the existence of a valid Agreement of Purchase and Sale as between him and the Plaintiffs. It was only thereafter, when the Plaintiffs, through their real estate lawyer, refused to sign a Mutual Release or to agree to extend the closing date without the payment of a further deposit, that Singh's real estate lawyer, for the first time, alleged that the Agreement was "null and void" as a consequence of the Plaintiffs having re-listed the Property for sale. I find that Singh failed to accept the Plaintiffs' alleged repudiation within a reasonable timeframe, and, rather, by his words and conduct, he affirmed the existence of an operative agreement of purchase and sale, until the afternoon of June 30, 2022, when, confronted by his own impending inability to complete the transaction as scheduled or to otherwise escape it by way of a mutual release, he began to argue that the Plaintiffs, themselves, breached the agreement.

Issue no. 4: If the Plaintiffs did not repudiate the Agreement or, alternatively, any such repudiation was not accepted by Singh, did the Plaintiffs have a duty to agree to an extension?

[68] Singh requested an extension of 15 days through his real estate agent on June 29, 2022. Thereafter, he requested an extension of 21 days through his real estate lawyer on June 30, 2022. The Plaintiffs, through their real estate lawyer, and despite their pending purchase transaction, advised that they would agree to a 21-day extension if Singh should pay a further non-refundable deposit of $50,000.00.

[69] It is well established that a party to a real estate transaction may, in the absence of any bad faith, insist on strict compliance with the agreed upon terms of the contract, and, accordingly, a party to such an agreement has no freestanding obligation to agree to an extension: *Deangelis v. Weldan Properties Inc.*, 2017 ONSC 4155, at paragraphs 34-42.

[70] There is no evidence that the Plaintiffs acted in bad faith and, accordingly, they had no obligation to agree to terms of the extension requested by Singh.

[71] Singh's nebulous claims that he could have raised the funds from other acquaintances who had money in their bank accounts are not germane, and moreover are not cogent.

[72] The evidence does not demonstrate that Singh could have closed.

Issue No. 5: Has Singh demonstrated a conspiracy?

[73] No conspiracy has been proven by Singh. Conspiracy is established when there is an agreement between two or more people to do an unlawful act, or to agree to do a lawful act by unlawful means with the predominate purpose of injuring someone. For the latter, they must have acted so that Singh should suffer damages. A plaintiff also must prove that he or she has suffered damages: *Merling v. Southam Inc*., 2001 CarswellOnt 3829, (S.C.J), paragraphs 5 and 6.

[74] There is no evidence which establishes any agreement between the Plaintiffs and Sharma to either do an unlawful act, or to injure Singh. At most, the allegations of conspiracy rest on a bald assertion. Singh has provided no evidence that a listing agent not telling a buyer about the "true value" of a property is unlawful, nor any evidence that a listing agent not telling a buyer the price that a property was listed for sale is unlawful. Singh has provided no evidence that Sharma was acting with the predominate purpose of injuring Singh.

[75] Further, Singh has also not established damages. Regarding the allegation that Sharma hid the true market value of the Property from Singh, Singh's own evidence is that he had no communication with Sharma at any material time. He had his own real estate agent. There is no evidence that Sharma was required to advise Singh about the market value of the property.

[76] Further, regarding the allegation that Sharma hid the relisting price from Singh, the evidence indicates that Sharma advised Singh that the Property was being re-listed. The price was available on MLS.

[77] The conspiracy claims advanced by Singh fail. Moreover, no damages have been proven.

Issue no. 6: What are the Plaintiffs' damages?

[78] The Plaintiffs resold the Property for $800,000.00, by an agreement dated July 3, 2022. The Plaintiffs' sale of the Property closed without issue on September 2, 2022. This resulting sale price was $5,000.00 higher than the value ascribed to the Property in the appraisal done in connection with Singh's application for mortgage financing ($795,000.00).

[79] The Plaintiffs are seeking damages in the amount of $345,121.98, which includes the carrying cost of the Property in the amount of $9,962.00, costs incurred by them in the amount of $4,934.98 to extend their scheduled purchase transaction, as well as loss of sale value in the amount of $330,225.00 (net of real estate commission).

[80] Courts have routinely accepted the differential in price as a valid means of calculating a plaintiff seller's damages following the resale of the subject property: see *Madison Homes v. Ng*, 2021 ONSC 3014, and *Forest Hill Homes (Cornell Rouge) Limited v. Wang*, 2020 ONSC 556. I consider that this is an appropriate measure in this case.

Conclusion

[81] There is no genuine issue requiring a trial. The relief requested by the Plaintiffs will be granted. The crossclaim and counterclaim are dismissed.

Order

[82] The Court grants summary judgment in favour of the Plaintiffs on the following terms:

i. judgment as against the Defendant, Lovesikander Singh, in the amount of $345,121.98;

ii. prejudgment interest in accordance with section 128 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;

iii. post-judgment interest in accordance with section 129 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;

iv. The Defendant Re/Max Twin City Realty Inc., shall pay the deposit in the amount of $50,000, together with all accrued interest thereon, to the Plaintiffs Donna Pontaoe Zoleta and Ronald Allan Anupol Zoleta;

v. The Counterclaim as against the Defendants to the Counterclaim, Donna Pontaoe Zoleta and Ronald Allan Anupol Zoleta, is dismissed; and,

vi. The Crossclaim as against the Defendant to Crossclaim Re/Max Twin City Realty Inc. is dismissed.

Costs

[83] The parties are encouraged to agree upon appropriate costs. If the parties are not able to agree on costs, they may make brief written submissions to me (maximum three pages double-spaced, plus a bill of costs) by email to my judicial assistant at mona.goodwin@ontario.ca and to Kitchener.SCJJA@ontario.ca. The Plaintiffs and Re/Max may have 14 days from the release of this decision to provide their submissions, with a copy to the Defendant Lovesikander Singh; the Defendant Singh a further 14 days to respond; and the Plaintiffs and Re/Max a further 7 days for a reply, if any. If no submissions are received within this timeframe, the parties will be deemed to have settled the issue of costs as between themselves. If I have not received any response or reply submissions within the specified timeframes after the Plaintiffs' and Re/Max's initial submissions, I will consider that the parties do not wish to make any further submissions, and will decide on the basis of the material that I have received.

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M. Gibson, J.

Date: October 20, 2023