

CITATION: Ebadi v. Foster et. al., 2024 ONSC 559
COURT FILE NO.: CV-22-88958
DATE: 2024/01/26

SUPERIOR COURT OF JUSTICE, ONTARIO

RE: YUSUF EBADI AND HASINA EBADI, Plaintiffs

AND:

MR. AND MRS. FOSTER AND OAKWOOD (also known as Navan Realty Inc.), Defendants

BEFORE: C. Macleod RSJ

COUNSEL: Julius Dawn, for the defendants (moving parties)

Yusuf Ebadi, in person, plaintiff (responding party)

HEARD: January 23, 2024

DECISION AND REASONS

[1] This was an undertakings and refusals motion scheduled pursuant to a case management order made on November 29, 2023.

Background and nature of the action

[2] This court proceeding arises from a failed real estate transaction. The plaintiffs allege that the agreement collapsed because the vendors (the Fosters) misled them about a condition to which the Fosters were bound and would have required the purchaser to have Oakwood build a custom home on the lot. The Fosters apparently returned the lot they had purchased to Oakwood and could not conclude the agreement to sell the land to the plaintiffs.

[3] The plaintiffs claim \$257,000 which is the extra amount they allege they had to pay to purchase a similar lot. They also claim relatively minor amounts for wasted legal fees, increased interest costs and refinancing costs (they had increased a mortgage on another property to close the transaction) and increased construction costs because of the delay in purchasing a replacement property. The total amount in dispute is 315,456.00.

[4] Needless to say, the defendants dispute the claim. Not surprisingly they plead that the plaintiffs have failed to properly name the parties but that aside, they have a detailed statement of defence and counterclaim. Amongst their defences, the defendants plead that the plaintiff was well aware of the requirement to build with Oakwood, that the plaintiff (at least Mr. Ebadi) had been negotiating with Oakwood himself, knew the Fosters were bound by a condition to build a custom

home and knew they were working with Oakwood to find a new buyer for their lot because they could not afford the construction. The defendants plead that the plaintiff surreptitiously removed the condition to build with Oakwood from the draft Agreement of Purchase and Sale. In the counterclaim (which is simply a claim for substantial indemnity costs) they allege the plaintiff made false representations and knowingly attempted to cause the Fosters to breach their contract with Oakwood.

The motion

[5] As noted above, the motion before the court is a motion by the defendants to compel answers refused on discovery and to compel the plaintiff to answer undertakings. It is not a complex motion and the number of questions in issue is not large.

[6] I provided oral rulings during the motion but I indicated I would reduce the decision to writing and also deal with costs. The refusals and undertakings chart required by Rule 37.10 (10) was uploaded to Caselines.¹ It was also provided to the plaintiff as part of the motion materials.

[7] In response to the motion, the plaintiff prepared a very detailed 240 page response which includes many documents in answer to his undertakings.² The document shows a reasonably sophisticated understanding of what Mr. Dawn is asking for and substantial capacity in document organization and assembly. It includes, for example, extracts from discovery transcripts, an affidavit deposing to the answers provided and exhibits attaching the documents referred to in his answers. The document is lengthier than it needs to be because part of the document focuses on attempting to argue the merits of the claim.

[8] This motion is about evidence and the relevance of questions and not about providing evidence that is not responsive to discovery questions. Nevertheless, I commend the plaintiff for being organized and presenting his oral arguments in a very professional tone.

[9] A great deal of information has been provided despite the plaintiff's argument that it is disproportionate because the most significant portion of his claim for damages is simply the additional cost of purchasing an alternative property.

Issues in Dispute and my Rulings

[10] Issue no. 1 in the refusals chart and nos. 1 – 3 in the undertakings chart cover questions that were directed to the issue of whether the plaintiff had the funds to close the purchase of lot 37. They were also directed to the source of the funds because the plaintiff is claiming the costs associated with refinancing a property and increasing the mortgage. On discovery the plaintiff had been asked to identify how much was advanced by CIBC under the new mortgage, how much was transferred from a TFSA and what were the other sources of funds pooled in his bank account to close the transaction.

¹ Section B-10, document 6, page B-10-32 in Caselines

² Section B-2, document 1, page B-2-1 in Caselines

[11] The plaintiff refused to answer Q. 107 & 109 but he had given an undertaking at Q. 87 to provide proof of the loan, at Q. 119 to provide a bank statement for the relevant period of time and at Q. 141 to provide documents for the sale of his townhouse.

[12] The plaintiff has provided a statement of adjustments which answers Q. 119 insofar as it shows the proceeds of sale. He has produced a TD mortgage discharge statement which show what it cost to pay off the TD mortgage and replace it with a higher CIBC mortgage but he has not produced the CIBC loan document to show how much he received on the new mortgage advance. That was an undertaking and has not been answered. **The plaintiff is to produce the loan documentation showing the amount of the mortgage advance.**

[13] In answer to Q. 119, the plaintiff has produced a redacted bank statement showing a transfer to his account of \$430,000 on March 22 and a withdrawal of \$429,497.31. Those are the funds transferred to his lawyer to close the transaction in question. The statement does not show the sources of the \$430,000. I was advised at the motion that the funds were first pooled in another bank account and then transferred. **The plaintiff is to produce the record of the other bank account identifying the sources of the funds making up the \$430,000. That will deal with both the refusals and the undertakings.**

[14] The balance of the questions, items 2 – 10 on the refusals chart and items 4 – 10 on the undertakings chart are said to relate to the claim for damages and to mitigation. Q. 296, 324, 345, 346, 347, 351, 352, 355, 395 and 408 were refused. The questions seek to clarify what other builders the plaintiff approached to build a similar home or are related to the search for alternative property. They are relevant to the claim as pleaded. **The plaintiff is to answer these questions.**

[15] **Undertakings number 6, 7 & 10 in the chart have been answered.** Undertakings no. 4 & 5 (Q. 328, 330, 331 & 427) relate to identifying the property in Richmond the plaintiff referred to in his pleading and his evidence. The plaintiff has answered that he does not recall the details of the lot in Richmond. If that is the plaintiff's answer, he fails to explain why he gave the undertaking and what efforts he made to locate the property. **This may be the subject of a follow up question.**

[16] Undertaking no. 8 (Q. 1399) was to produce time dockets from a lawyer. Mr. Ebadi has written to the lawyer but has received no response. **He has agreed to sign a direction and Mr. Dawn may inquire directly. That answers the undertaking.**

Additional Issues

[17] Mr. Ebadi provided certain information in the course of arguing the motion. This included explanations for documents that were not themselves self-explanatory. The problem with information provided in that way is that the answers are not in the discovery transcript, not sworn, and not in writing.

[18] Mr. Dawn seeks to ask follow up questions once he has all of the answers to undertakings. An alternative to this may be to simply provide a request to admit or to ask that pertinent information be provided by letter but I do not wish the parties to have to return for a further motion. While I urge both parties to cooperate to keep the costs from spiralling out of control, if Mr. Dawn

believes that further discovery is necessary, **I will authorize a further examination of no more than 2 hours.**

[19] The defendants also ask for a further and better affidavit of documents. I agree that an updated affidavit of documents should be provided and not all of the documents produced through the discovery process have been included in the affidavit of documents. On the other hand, the plaintiff has been examined on the availability of documents and could be cross examined on the affidavit of documents at the discovery. The affidavit of documents can be an important tool but it is not intended to be simply a make work project.

[20] In the circumstances of this case, the sufficiency of the affidavit of documents and whether or not there has been full disclosure of documents is better addressed after the discoveries are complete at a motion or a case conference prior to setting the matter down for trial. **I decline to order a further and better affidavit of documents at this time but this does not mean that it is not required.**

[21] I am advised that the plaintiff also seeks information from the defendants. Mr. Dawn points out that the case management order required that both parties bring discovery motions on January 23rd and that Mr. Ebadi has failed to do so.

[22] Mr. Ebadi has an explanation for why he did not do so but I will not rule today on whether or not I would permit him to bring a motion outside of the time provided in the timetable. I imagine that decision might hinge on both an explanation for the delay and the importance of the information that is being sought. Breach of the timetable might also be a consideration in awarding or withholding costs. I note that the action has not been set down for trial. Mr. Ebadi is aware that the plaintiff may file a trial record as soon as the plaintiff is ready for trial and has completed all the discovery that the plaintiff requires for that purpose.

[23] Also discussed with Mr. Ebadi in the course of the motion is the fact that discovery and fairness is not a matter of “tit for tat”. In other words, just because the plaintiff’s banking and loan information is made relevant by his damages claim, does not mean that he can request the same information from the defendants. I’ll show you mine if you show me yours has a certain attraction but it is not the test for relevance. The defendants are not seeking damages and (at least at a quick glance and without deciding the issue) I see nothing in the defence that makes Mr. & Mrs. Foster’s bank statements or loan documentation relevant.

[24] What I suggest is that Mr. Ebadi think clearly about what information he believes he requires and how it is relevant. He could write to Mr. Dawn to request that the defendants produce it voluntarily. If the defendants refuse a reasonable request for highly relevant information, that might also be a factor in considering whether to permit the motion.

Costs

[25] The defendants are entitled to costs of the motion. Some of the undertakings were only answered after the motion was launched. On the other hand, I consider the costs outline which discloses costs of over \$7,000 and the request for partial indemnity costs in the amount of \$4,463

to be disproportionate and unreasonable for the nature of the motion and the extent to which these answers appear to move the matter forward.

[26] On an earlier motion by the plaintiff (April 18, 2023) I reserved costs of the plaintiffs' motion to a subsequent motion or to the trial judge. That was a motion for a timetable and an affidavit of documents from the defendants. At the time, the defendants stated that they were waiting for a more complete affidavit of documents from the plaintiff.

[27] In consideration of the relative simplicity of this motion, the issues in dispute, the time it took to argue the motion and in consideration of the costs that were reserved on April 18, 2023, the costs of both motions are fixed at a net amount of \$1,400.00 to be paid by the plaintiff to the defendants.

Mr. Justice C. MacLeod

Date: January 26, 2024

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DECISION AND REASONS

MacLeod RSJ.

Released: January 26, 2024