

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)	
)	
TRACY CHAN WU and CUONG QUOC)	
LIANG)	
)	
Applicants)	
)	Wendy Greenspoon-Soer, for the Applicants
– and –)	
)	
NWOYIBO B. CHARLES and RE/MAX)	
GOLD REALTY INC.)	
)	Mbong Elvira Akinyemi, for the
)	Respondent, Charles
)	
Respondents)	Re/Max Gold Realty Inc., Not Appearing
)	
)	
)	HEARD: February 9, 2024

2024 ONSC 947 (CanLII)

REASONS FOR DECISION

HEALEY, J.:

Nature of the Application

- [1] The applicants (the “sellers”) seek:
- (a) A declaration that the respondent, Nwoyibo B. Charles (the “buyer”) has breached the Agreement of Purchase and Sale dated April 15, 2022 (the “APS”) to purchase the property municipally known as 280 Woodgate Pines Drive, Vaughan, Ontario;
 - (b) A declaration that the deposit of \$150,000 paid by the buyer, together with any interest accrued thereon, be forfeited to the sellers;
 - (c) An order directing the respondent Re/Max Gold Realty Inc., Brokerage (“Re/Max”) to release the deposit being held in trust to the sellers; and

- (d) Costs.

Issues

- [2] This court is asked to determine the following issues:
 - (a) Whether this matter is properly brought before the court by way of application;
 - (b) Whether the buyer raise defences or arguments that require this application to be converted to an action, and whether, as the buyer requests, the buyer's agent should be added as a party;
 - (c) Whether the buyer breached the APS; and
 - (d) Whether the sellers are entitled to forfeiture and release of the deposit.

Evidence

- [3] The evidence required to determine the issues raised by the application is not in dispute, with two exceptions that are easy to resolve on the basis of the record.
- [4] The subject matter of this application is the APS bearing the date of April 15, 2022, for a purchase price of \$3.2M. It was prepared on an OREA Form 100 containing standard clauses, such as time being of the essence. Its terms required a deposit of \$150,000 by cheque payable to Re/Max upon acceptance. The completion date was August 15, 2022. It provided a requisition deadline of August 2, 2022. No financing terms were included.
- [5] The APS expressly states that the buyer acknowledges having the opportunity to include a requirement for a property inspection report, and that the buyer will not be obtaining a property inspection or property inspection report. Its terms permitted the buyer to have the right to re-visit the property twice prior to closing, with the second of such visits to occur during the week before closing.
- [6] Schedule B to the APS includes an acknowledgement that the buyer's lender may be required to have an appraiser access the property before closing, with the sellers agreeing to provide access to the dwelling and any outbuildings for such purposes.
- [7] The APS contains an acknowledgement that the parties' consent and agree to the use of electronic signatures with respect to the APS and any other documents respecting this transaction.
- [8] The buyer's sales agent was Rohit Dogra. The listing brokerage was Re/Max, which is holding the deposit in trust. Re/Max takes no position on this motion. Although the buyer's evidence suggests that she believes that Dogra is associated with the listing brokerage, the APS shows that Dogra is associated with a different brokerage, being Re/Max Real Estate Centre Inc.

- [9] The first disputed evidentiary issue is whether the buyer signed the APS. At paragraph 29 of her responding affidavit, the buyer asserts that she never signed an agreement of purchase and sale for the purchase of the sellers' property on April 15, 2022 for the price of \$3.2M.
- [10] The face of the APS contains the initials "NC" in all spots where changes were made. The initial offer from the buyer appears to have been for \$2.988M with a \$100,000 deposit. The offer appears to have been signed back by the sellers at \$3.2M, and the deposit increased to \$150,000. Each of these changes has been initialed. Further, the initials "NC" appear at the bottom of each page, and the signature "Nwoyibo B. Charles" appears on the signing page beside the date of April 15, 2022. The date beside the sellers' signatures is April 16, 2022. Finally, the buyer's signature appears under the confirmation of acceptance, which provides: "notwithstanding anything contained herein to the contrary, I confirm this Agreement with all changes both typed and written was finally accepted by all parties at 7:00 p.m. this 16th day of April, 2022".
- [11] In addition to these signatures, the buyer's own evidence confirms that she signed the APS. At paragraphs 20 and 25 of her affidavit she asserts that her agent put in "about four" different offers, and that she signed and docu-initialed the last one at the top of her emails, later realizing that she had signed for \$3.2M instead of the listed price.
- [12] The buyer also alleges that her agent did not give her an opportunity to read the offer. Her affidavit indicates that she did not read the offer, as she asserts that it was only later that she came to understand the terms of the offer, alleging that she "inadvertently signed" because her agent directed her only to the page on the electronic signature boxes. The buyer provides no compelling evidence to explain why she did not take the time to read all of the documents delivered to her by her agent.
- [13] While this is not a motion for summary judgment, the admissions made by the buyer in her affidavit demonstrate that there would be no genuine issue requiring a trial with respect to whether the buyer signed the APS. This issue can be resolved on the basis of the affidavits in the record before me.
- [14] The second disputed evidentiary issue is the buyer's assertion that her agent inserted various price changes in multiple offers, without her knowledge, and that the sellers were aware of Dogra's duplicity in his dealings with respect to the offers. There is no evidence presented by the buyer to support this allegation. In support of this submission, the buyer's counsel pointed to answers provided by the seller Liang during his cross-examination. Yet his answers do not support such a conclusion. There is also no evidence of multiple offers. There is only evidence of an offer, counter-offer and acceptance. Far from supporting that there were "multiple" or "four" offers, the buyer's own evidence, being the emails sent to her by Dogra, show that only one offer of purchase and sale and one counter-offer were delivered to her on April 16, 2022.
- [15] The entirety of the buyer's argument rests on her assertion that this transaction was tainted by Dogra's failure to carry out her instructions: showing her a house she could not afford,

failing to give her a 10-day “cooling off” period, releasing the deposit, and not inserting financing or inspection clauses. She is presented as the victim of an unscrupulous agent; Dogra’s version of events is unknown. The buyer states that it was only on April 19 that she learned from Dogra that she had made a firm deal that was not conditional on either a property inspection nor her ability to obtain financing or the sale of her own property. However, the buyer’s entire argument overlooks the fact that she appears to have never read any of the documents sent to her for her signature, and that she now pleads with the court to have the sellers pay the price for her carelessness. Her evidence on cross-examination was that she signed them while driving in her car.

- [16] The buyer raises multiple complaints in her evidence about the services and advice provided to her by Dogra and his conduct throughout this transaction, which I will discuss further, but she makes no viable allegations about the sellers’ conduct other than to allege that they sold their home to her for more than its appraised value. She has presented no evidence that the fair market value of the property was less than \$3.2M on April 15, 2022.
- [17] Shortly after signing the APS, the buyer requested to be released from her bargain and sought reimbursement of the deposit. She originally did this in May 2022 by going to the property unannounced and without Dogra, speaking directly to the sellers. This is the first time that she had any direct communication with the sellers.
- [18] The next month, the seller Wu and her daughter both received handwritten letters from the buyer, requesting that she be released from the transaction and citing health reasons for her financial inability to close the purchase.
- [19] The buyer continued these efforts throughout the summer leading up to the closing date. In July, the sellers’ solicitor, Korman, received correspondence from the buyer’s solicitor, Krume, requesting to terminate the APS and a return of the deposit. Further communications were exchanged between solicitors, with the buyer requesting that another purchaser take over the APS along with an abatement in price.
- [20] On August 3, Korman provided Krume with a statement of adjustments, as well as a parcel register, property tax bill and a name search for the sellers. A requisition letter had never been sent by Krume, even though the deadline for a title search had passed the previous day.
- [21] On August 5, the buyer sent an appraiser to the property. That same date, Korman delivered an extensive letter to Krume summarizing the buyer’s various efforts to persuade the sellers from holding her to her bargain, the lack of support in the law for the positions being advanced on behalf of the buyer, and the financial repercussions to the buyer of failing to close the transaction. The letter also noted that the appraisal was being taken as a positive sign that the buyer intended to complete the transaction. However, the letter also requested written notice in advance of the closing date in the event that the buyer did not intend to complete the transaction in order to avoid the sellers incurring additional damages arising from preparing to vacate the property for closing.

- [22] On August 9, Korman tendered all required closing documents on Krumeh, indicating that the sellers remained ready, willing, and able to close.
- [23] On or about August 10, the buyer was told that the appraisal report came in at \$2.75M.
- [24] There was no response to the tender from Krumeh. Korman wrote again on August 12 reiterating that the sellers were ready to close, were vacating the property, and that the sellers will be forced to commence an action for forfeiture of the deposit and all damages to which they are legally entitled, including legal fees.
- [25] Korman received a letter from the buyer directly on August 12. The buyer restated that she would be unable to close the transaction, in part due to her inability to obtain financing. She again requested the return of the deposit and a two-month extension for closing, failing which, she wrote, there would be no option but to resolve the matter in court.
- [26] That same day, Krumeh wrote to Korman requesting an extended closing date of August 31, 2022, and a renegotiation of the purchase price. He indicated that the buyer was making efforts to obtain financing, even though the buyer's letter indicated that she had exhausted her financing efforts.
- [27] Korman sent an email to Krumeh on the closing date, offering the buyer a one-time extension of the APS subject to various terms, which remained open for acceptance until August 17, 2020 at 4:00 p.m. The buyer rejected the extension offer, and provided a counter-offer for an extended closing date of two weeks and a reduction in the purchase price. The counter-offer was rejected by the sellers. Korman reiterated that the sellers' original extension offer remained open until August 17, 2022. Krumeh did not respond.
- [28] The property has not yet been sold, and so the sellers' damage claim has not crystallized.
- [29] The buyer made a complaint to RECO about Dogra. RECO acknowledged receiving her complaint on September 9, 2022. No evidence was provided about the outcome of that complaint.

Jurisdiction of the Court

- [30] The authority to bring a proceeding by application where the relief claimed is the determination of rights that depend on the interpretation of a contract is found in subrule 14.05(3)(d).
- [31] Further, under subrule 14.05(3)(h), an application may be brought where it is unlikely that there will be any material facts in dispute requiring a trial.
- [32] For reasons that will be explained, the buyer's complaints about Dogra's professional conduct do not alter the fact that she is bound by the APS. While she may have remedies against Dogra if she can prove that he induced her to purchase this property through misrepresentation, negligence or fraud, the APS is not vitiated by his conduct. The sellers are innocent; it is not for them to shoulder any of the consequences of the actions of either

the buyer or her agent. The binding nature of the APS is unaffected by the fact that an appraisal completed months after the APS was finalized indicated the property was then valued at \$450,000 less than the purchase price.

- [33] As previously outlined, there are no facts in dispute as between the buyer and the sellers that would impact on the interpretation of the APS, and no credibility issues where the sellers are concerned.
- [34] An application can provide an expeditious, cost-effective and fair way of determining a contractual dispute: *Parc Downsview Park Inc. v. Penguin Properties Inc.*, 2018 ONCA 666, leave to appeal refused 2019 CarswellOnt 5575, 2019 CarswellOnt 5576 (S.C.C.).
- [35] As counsel for the sellers points out in her factum, reported cases have permitted the issue of forfeiture of a deposit to proceed on affidavit evidence under r. 20.04: *Sansalone v. Qiu*, 2022 ONSC 286. See also *Dar v. The Yards Corporation*, 2018 ONSC 5043, aff'd 2019 ONCA 362. By analogy, proceeding by way of affidavits to determine the issues of whether the buyer breached the APS and whether the deposit should be forfeited is a fair and proportionate approach in the circumstances of this case.

Converting to an Action and Adding Dogra as a Party

- [36] The primary reason for not acceding to the buyers' request to convert this to an action is that there is no conflicting evidence as between the buyers and sellers, as previously stated.
- [37] The relief sought in this application does not affect any rights that the buyer may have against Dogra. There is nothing to prevent her from issuing a claim against him, should she choose to do so, provided that she commence her action within the two-year limitation period from the time that her cause of action arose.
- [38] However, this application should not be held up by such a step, should the buyer decide to take it, as none of the defences that she raises in her responding affidavit provide a legally acceptable justification for the buyer to not close the transaction.
- [39] The buyer asserts that she signed the APS before reading it, and "by accident". The defence of *non est factum* is not available to a party who did not exercise reasonable care by failing to read a document before signing it: *Gold Leaf Garden Products Ltd. v. Pioneer Flower Farms Ltd.*, 2015 ONCA 365, at para. 8. Further, although the buyer's evidence is contradictory about whether she knew what she was signing, the emails sent to her by Dogra indicate that he was sending an Agreement of Purchase and Sale, or a "Counter", referring to a counter-offer. It is staggering that she would place her signature on a document that, if she is to be believed, she failed to comprehend despite knowing that she was dealing with a property of this value. She did so, as she states in her affidavit, even after she had been warned "to be careful and that real estate agents are sharks and I should shine my eyes".
- [40] By her own admission, the buyer was prepared to submit an offer for \$3.050M. The buyer obviously knew that she was purchasing real estate. It is entirely another question whether

all the terms of the offer and counter-offer and their legal effect were explained to her adequately by Dogra, but the answer to that does not affect the sellers' rights under the APS.

- [41] The buyer's evidence is that she was pressured into signing the APS. All details provided by her regarding this alleged pressure are directed toward the conduct of Dogra; she makes no such allegations of the sellers. The buyer also fails to say what she understood may happen if she did not sign the APS, and what Dogra did to pressure her into signing. In *Sansalone*, where the buyer also cited undue influence but failed to articulate what she "understood may happen if [s]he failed to sign", such a defence was not successful.
- [42] Undue influence requires the person so asserting to prove: (1) an improvident bargain; and (2) inequality in bargaining power: *Toscano v. Toscano*, 2015 ONSC 487 at para. 18.
- [43] This could never be characterized as an improvident bargain. The buyer's evidence is that she knew the list price and knew that the sellers had asked for more than that during the negotiations. The purchase price that she agreed to was only slightly more than \$200,000 over the asking price. The appraisal, completed almost four months after the date of the APS, may reflect a decline in the real estate market but does not form the basis for a defence.
- [44] Nor was there any inequality in bargaining power as between sellers and buyer, as will be discussed in the section of these Reasons dealing with forfeiture of the deposit.

Breach of the APS

- [45] It is obvious that the buyer, both personally and through Krumeh, had already committed several anticipatory breaches of the contract before the scheduled closing date by communicating her inability to close the deal on the closing date: *Rahbar et al. v. Parvizi et al.*, 2022 ONSC 2136, at para. 24.
- [46] However, by failing to submit the required documents and the funds due on the day of closing, the buyer repudiated the APS. Up to and including the closing date, there was never any doubt about the sellers' willingness and ability to uphold their end of the bargain. Despite repeated communication from the buyer or her lawyer that she was unable to finance the transaction and would be unable to close the transaction, the sellers continued to treat the deal as alive, even moving out of the property on the weekend before the closing date. They had tendered days before the closing date. There is no ambiguity in the evidence about whether they were ready, willing and able to close on August 15, 2022.
- [47] The sellers offered to revive the APS through the extension offer. The buyer rejected this offer and thus failed to cure her breach of the APS.
- [48] All evidence leads to the inevitable conclusion that the sellers accepted the buyer's repudiation, treated the contract at an end, as is their right, and began an action for damages resulting from the breach. The buyer had been repeatedly warned that this would be the outcome if she failed to close the transaction.

[49] The buyer breached the APS.

Relief from Forfeiture

- [50] Where a buyer breaches the APS, they may attempt to pursue relief from forfeiture of the deposit money. The power to grant relief from forfeiture pursuant to S. 98 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 is an equitable remedy and is purely discretionary: *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994], 2. S.C.R. 490 (S.C.C.). To succeed, the buyer must satisfy the following two-part test: (1) the forfeited deposit is out of proportion to the damages suffered; and (2) it would be unconscionable for the seller to retain the deposit: *Mouralian v. Grouleau*, 2022 ONSC 2925, at para. 9.
- [51] A finding of unconscionability “must be an exceptional one, strongly compelled on the facts of the case”: *Mouralian*, at para. 10, citing *Redstone Enterprises Ltd. v. Simple Technology Inc.*, 2017 ONCA 282, at para. 25.
- [52] It is the sellers’ position that their damages will be considerable because of a decline in the real estate market after April 2022. They have not offered evidence of this fact. The only evidence that the court has of subsequent value is the buyer’s appraisal. That appraisal is sufficient to conclude that the market was in decline in the four months between the date of the APS and the closing date. Further, the correspondence delivered by Korman prior to the closing date lists various bases for the sellers’ future damage claim including home staging, moving and storage costs and additional legal fees. I am not satisfied that the deposit is out of proportion to the damages suffered by the sellers.
- [53] In *Redstone*, at para. 18, the Court of Appeal directed that “the analysis of unconscionability requires the court to step back and consider the full commercial context”.
- [54] The deposit in this case comprised 4.7% of the purchase price. It is not a disproportionate deposit amount that can be considered unconscionable. Cases in which courts have concluded that a 5% deposit is typical for a residential real estate transaction, and not disproportionate, include *Mouralian*, at para. 14, and *Rahbar*, at para. 59.
- [55] The court is required to look at all indicia of unconscionability. While not a sophisticated purchaser, the buyer admitted on cross-examination that she was a not a first-time homeowner. There are several references in her evidence to her own home and requiring her husband’s consent to sell. She also admitted that she knew that the property was outside of her budget, but went to view it nonetheless. She admitted that she signed an agreement for a property knowing at the time that she could not afford it.
- [56] During her cross-examination the buyer made the sweeping allegation that Dogra, the respondent brokerage, and the sellers were lying and deceitful. There is no evidence to back up this allegation with respect to Re/Max or the sellers.
- [57] The buyer also asserts that her deposit should not be forfeited because the APS did not contain terms that she purportedly told Dogra must be included, including making the APS conditional on financing and an inspection. This again is not due to any act or omission on

the part of the sellers. There are certainly red flags concerning Dogra's conduct – not inserting any financing conditions for a buyer who was clearly not in a position to present a clean offer, and accompanying the buyer to the bank to get her deposit certified, if that is what occurred. But I leave this to another court on another day, as Dogra's behavior does not affect the buyer's contractual obligations.

- [58] This was a strictly commercial transaction between strangers, both represented by separate real estate agents from different brokerages. Again, there is nothing about the sellers' conduct, nor that of their agent, that can be pointed to as demonstrating an inequality in bargaining power or a lack of *bona fide* negotiations. The buyer admitted that she had no communication with the sellers before seeing the property, or as the offers were being exchanged. She admitted that the sellers were not present when she signed, nor did she have any communication with them when she went to the bank to withdraw the deposit. She has provided no evidence of promises, representations or inducements made by the sellers. She admitted that Dogra was the only one who told her that nothing would be done with the deposit without her instructions. Even the sellers' terms in their offer of the extension agreement were reasonable given the many instances of the buyer indicating that she was unable to close, which terms even included a price reduction of \$50,000. In the context of a residential real estate transaction, there was nothing unconscionable about this transaction as between vendors and purchaser.
- [59] The buyer has also submitted evidence of her personal circumstances, including that she earned the money for the deposit while working as a nurse during the Covid-19 pandemic, that she has four children, and that she cannot afford to lose this money. Despite my sympathy for the buyer's circumstances, these are not considerations that can tip the balance in favour of a finding of unconscionability.
- [60] There is no basis to relieve against forfeiture.
- [61] It is well established law that where a buyer fails to fulfill their obligations pursuant to an APS, the deposit is forfeited to the seller without having to prove any damages: *Azzarello v. Shawqi*, 2019 ONCA 820 at para. 45. In *Benedetto v. 2453912 Ontario Inc.*, 2019 ONCA 149, at para. 6, citing *H.W. Liebig Co. v. Leading Investments Ltd.*, 1986 CarswellOnt 671 (SCC), at para. 33, the court stated that forfeiture of the deposit serves as compensation "for lost opportunity in having taken the property off the market in the interim, as well as the loss in bargaining power resulting from the vendor having revealed to the market the price at which the vendor had been willing to sell."
- [62] Although the buyer's lawyer focused her submissions on the fact that the sellers had not presented evidence of damages, evidence of damages is only a consideration in the analysis of whether relief from forfeiture should be granted.
- [63] The law compels the conclusion that the deposit of \$150,000 be forfeited to the sellers.

Trial of an Issue on Damages

- [64] The application seeks a trial on the issue of damages arising from the buyer's breach. During argument, counsel advised that her clients may have second thoughts about proceeding with a trial due to litigation fatigue. She requested that the application be adjourned *sine die*.
- [65] Despite this being rather good news for the buyer, her counsel opposed this relief because of the buyer's request to convert the application to an action and add Dogra.
- [66] It is appropriate to adjourn this relief if the sellers do not wish to pursue it now because there is currently no claim against Dogra. However, it is also not appropriate to have the potential for it hanging over the buyer's head indefinitely, particularly because she will need to have a resolution on damages to fully quantify a potential claim against Dogra.
- [67] Accordingly, this court imposes a deadline on the sellers to decide whether they want to pursue the trial of the issue. Given the court's systemic delay in having this application heard, it is appropriate that a streamlined, expedited process be followed to have the trial heard. While not being ordered at this time, it is my view that a summary trial process should be followed if the sellers wish to proceed.

Order

- [68] This court orders and declares:
- (a) The respondent Nwoyibo B. Charles breached the APS; and,
 - (b) The deposit monies paid by the respondent in the amount of \$150,00 together with any accrued interest are hereby forfeited to the applicants.
- [69] This court orders and directs:
- (a) The respondent Re/Max shall release to the applicants the deposit being held in trust;
 - (b) The applicants shall communicate to the respondent Nwoyibo B. Charles, no later than August 31, 2024, their decision about whether they will be pursuing damages. Unless the applicants bring a motion to extend that deadline, if the deadline is not met by the applicants, the respondent may bring a motion on notice to stay or dismiss the balance of the application pursuant to r. 60.12.
 - (c) If the applicants decide to pursue damages, within 5 days after notice is given the parties shall confer to set a timetable and discuss process for the steps in the action. If the parties are unable to reach agreement, the applicants shall arrange a 30-minute virtual case conference before a judge to have a timetable imposed.

[70] The contents of the draft order submitted by counsel is acceptable, subject to it being amended to reflect the additional orders made in this ruling.

Costs

[71] If the parties are unable to agree on the costs of the application and hearing, they may submit written submissions to the court, no longer than 5 pages, double spaced, plus a Bill of Costs and any authorities relied on. The applicants' submissions are due by February 16, the respondents by February 23, and reply, if any, by February 27. All submissions are to be delivered directly to my judicial assistant at the email from which this endorsement will have been sent, as well as being required to be filed in the Civil JSO portal.

Madam Justice S.E. Healey

Released: February 12, 2024