

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Moore v. Deol*,
2024 BCSC 311

Date: 20240223
Docket: S134754
Registry: Kelowna

Between:

Georganna Elizabeth Moore and John Bela Szabo

Plaintiffs

And

Rajveer Deol

Defendant

Before: The Honourable Justice B. Smith

Reasons for Judgment

Counsel for the Plaintiffs:

M.E.A. Danielson

Counsel for the Defendant:

M.B.J. Stainsby

Place and Date of Hearing:

Kelowna, B.C.
January 12, 2024

Place and Date of Judgment:

Kelowna, B.C.
February 23, 2024

INTRODUCTION

[1] This case involves a collapsed real estate deal.

[2] The plaintiffs are the former owners of property at 165 Leathead Road in Kelowna, British Columbia (the “Property”). In March 2022, the plaintiffs and the defendant entered into an agreement of purchase and sale for the Property (the “Contract”). The defendant did not take steps necessary to complete the transaction. The plaintiffs terminated the Contract and then sold the Property at a much lower price than provided for in the Contract.

[3] The plaintiffs claim damages of \$1,460,761.68, including forfeiture of the defendant’s \$100,000 deposit, on account of damages, and costs.

[4] The plaintiffs apply for summary trial pursuant to Rule 9-7 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Rules*]. The defendant opposes the application for summary trial. If the matter is determined to be suitable for summary trial, the defendant opposes the plaintiffs’ claim and makes a counterclaim, which the plaintiffs oppose.

[5] For the reasons that follow, I dismiss the plaintiffs’ application for summary trial.

FACTUAL BACKGROUND

The Property

[6] The Property was located near the intersection of Leathead Road and Montgomery Road. There was a single-family residence on the Property. The plaintiffs lived in the residence. The plaintiffs wanted to sell the Property. The defendant wanted to acquire the Property for development.

The realtors

[7] The parties were represented by licensed realtors. The plaintiffs were represented by Amanda Tak of Vantage West Realty Inc. (“Vantage West”). The

defendant was represented by Aman Kandola of MacDonald Realty – Kelowna (“MacDonald Realty”).

160 Leathead

[8] There was a small irregular shaped property in front of the Property (“160 Leathead”). 160 Leathead was located between the Property and Leathead Road. 160 Leathead was owned by the City of Kelowna (the “City”). The City had at some point, about 25 years before the events at issue, offered to sell 160 Leathead to the plaintiffs.

The listing

[9] In March 2022, the plaintiffs engaged Ms. Tak to list and sell the Property.

[10] On March 15, 2022, Ms. Tak listed the Property for sale for \$1,000,000 (the “Original Listing Price”). The listing document included the Original Listing Price and indicated offers to purchase would be reviewed on March 19, 2022.

[11] The listing document included the following information:

Incredible development opportunity!!! This one of a kind flat .27 acre lot is 120 ft of frontage by over 97 ft of depth. There is a 3 bedroom 1 bathroom home on the property. Home is “AS IS WHERE IS”, value is in the land only. This unique opportunity is unheard of and rarely found in this area, it’s pretty much 2 lots in one! This property only shares property lines with one additional property and then borders Leathead, Montgomery and a huge bonus a laneway as well. Property currently allows for a carriage house to be built but the city highly encourages this property to be to be re-zoned for higher density and would have the options of re-zoning to either “C4” (mixed-use commercial/residential zone) or “UC4” (mixed-use commercial/residential zone). Priced to sell! An opportunity this rarely comes along so developers start your engines this is what you have been looking for.
City file available upon request. No showings until an accepted offer. Offers to be reviewed Saturday March 19, 2022. Square footage is approximate and has been measured from the exterior of the home & room measurements generated from Matterport. The dimensions and room measurements as advertised or provided are approximate only and should be verified by the purchaser if important and not relied upon without independent verification.

[12] The defendant deposes that he reviewed the listing document prior to deciding to make an offer to purchase the Property and that:

8. When I first read the Listing, I thought this was a great opportunity for development and exactly what I had been looking for. It was listed as having the option of rezoning to either C4 or UC4 and was in the Rutland Urban centre. It also said that it was “pretty much 2 lots in one,” which seemed perfect for development as a mixed use building.

The March 17 Email

[13] On March 17, 2022 at 3:12 p.m. Ms. Tak emailed Mr. Kandola:

Hi Aman,

I hope all is well I just wanted to send over the information for 165 Leathead as per your request.

This property is an incredible development opportunity as not only do you not find much listed like this but even in the area, it’s a rare find.

The lot is a flat .27 acre lot with 120 ft of frontage by over 97 ft of depth. There is a 3 bedroom 1 bathroom home on the property. Home is “AS IS WHERE IS”, value is in the land only. This property borders Montgomery, Leathead and a laneway then one property on the other side. There is a small chunk between this property and Leathead Rd which is vacant and owned by the city. The city did at one time offer it to my clients to purchase. Property currently allows for a carriage house to be built but the city highly encourages this property to be re-zoned for higher density and would have the options of re-zoning to either “C4” (mixed-use commercial/residential zone) or “UC4” (mixed-use commercial/residential zone).

We have priced it to move it quickly. The most recent and best comp in my opinion was 425 Leathead Rd which was a .22 acre lot, with 71 ft of frontage and 137 ft of frontage and no laneway which sold for \$1,030,000.

The sellers have lived there for over 30 years. They will be re-locating to Alberta and have asked for 60 days for completion and possession. No showings until there is an accepted offer.

Sellers have said they will review offers this Saturday March 19 at 10am so please submit no later than 8am that morning.

Kind regards

Amanda Tak

The March 19 Texts

[14] On March 19 beginning at 12:07 a.m. the following text message exchange occurred between Mr. Kandola (AK) and Ms. Tak (AT):

AK: Hey, I have the other done and sent off a couple hours ago just waiting for signatures. I should have the other to you in the morning. I’ll try to get it to you before 8am

Emailed you the offer now.

I crossed out part a) of the assignment restriction so that they can move it into a hold co or add someone to the contract if they decide to.

Part B is left in, as we have no intention to assign for profit or flip the property.

AT: Good received thank you Alan
*aman

[15] On March 19 beginning at 7:31 a.m. the following text message exchange occurred between Ms. Tak and Mr. Kandola:

AT: I just sent you some interesting information that your client might appreciate

AK: Got it thank you
How many others did you end up receiving including ours?

AT: 4 in Toal
*total

I have someone calling me now potentially a last minute one

AK: Ok. Thanks

AT You bet
Did you get my email?

Pretty exciting stuff about the potentials of the two properties together I would say

You would buy 160 Leathead at the assess value from the city which is assessed at 126K

do you want to re-submit or have you put in your max?

AK: Let me talk to them

AT: Sounds good

AK: We are re-writing our offer
I will send it shortly

AT: If it helps you could verbally tell me I can write it in

AK: Okay. Can you give me a call? I tried calling and it didn't ring

AT: New price 1.8

AK: \$2 million

AT: Thank you!
New price 2.2 million

AK: Ok, one sec
\$2.45

AT: Roger that

The March 19 Emails

[16] On March 19, 2022 at 12:44 a.m. Mr. Kandola emailed Ms. Tak:

Hello Amanda,

Offer attached below for 165 Leathead Road along with the notice to sellers regarding assignment terms.

Cheers,

[17] On March 19, 2022 at 8:58 a.m. Ms. Tak emailed Mr. Kandola:

Hi Aman

I reached out to an architect because I was curious to know what density you could build since the city couldn't confirm what was there. As I mentioned in my email, the small plot 160 Leathead is owned by the city and had offered it to my clients to purchase in the past. This is the update I got from an architect if you could work through the easement on the small plot and purchase it from the city.

The two properties on Leathead fell within the urban centre and policy allows for up to 4 storeys (OCP May 4.7).

The gross property size is – 15,514SF (1,441m²).

You should be designing based on the draft zoning bylaw as the City will not support any projects that have not achieved 3rd reading by the time the new zoning is adopted (anticipated mid to late summer). Since the assembly exceeds the minimum 1,200m² lot area, we recommend design for the CU4 zone (Rutland Urban Centre). This zone allows for the following:

- i. FAR or 1.6 for 4 storeys with a bonus opportunity (requires cash as outlined in the draft zoning bylaw) of .5 for a total maximum of 2.1 FAR = 32,579SF of saleable area
- ii. Max height is 4 storeys with a bonus opportunity to 6 storeys (again, requires cash as outlined in the draft zoning bylaw). Bonus for UC4 is estimated to cost \$20/sm² of property = \$28,820. I've attached the bonus cost calculations sheet from the draft zoning FYI).
- iii. With the high FAR and location, there would be options to mix ground oriented [townhomes] or commercial with residential above.
- iv. Assuming 8 units/floor with 5 storeys of apartments = 40 units @ 750SF/ea = 30,000SF
- v. Approximately 2,500SF remaining for entry level units (could be 2,500SF commercial or 3, 833SF townhomes).

A parking solution would include 2 storeys of parking in order to accommodate the spaces required (1 parkade below with a mix of surface parking with townhomes/commercial).

One major item to note is that there is an assessment illustrated on the City map viewer that extends the full width of the properties between both addresses. This would seriously impact realizing the densities above as it would require using both lots. It would be of benefit to determine if that easement can be eliminated if developing both properties together or what the City's vision is for the smaller lot at 160 (i.e. is there a road dedication/re-alignment required along Leathead).

If the easement can be eliminated, the location and new OCP/zoning makes the property attractive from a high density opportunity.

Kind regards,

Amanda Tak

[18] On March 19, 2022 at 11:23 a.m. Ms. Tak emailed Mr. Kandola:

Please see attached below with changes as discussed.

The affidavit material does not identify the attachment referred to.

The original offers and the ensuing bidding war

[19] On the morning of March 19, 2022, Ms. Tak received four offers to purchase the Property, including one from the defendant who, through Mr. Kandola, offered to purchase the Property for \$1,300,000. The three other offers ranged between \$900,000 and \$1,100,000.

[20] There then ensued a bidding war. Ms. Tak spent much of March 19, 2022 on the phone or texting with realtors, including Mr. Kandola, whose clients were engaged in the bidding war. Ms. Tak deposes:

20. On March 19, 2022, I spent the day on the phone with several real estate agents, including Kandola, Geoff Hayes, and Stephanie Guillaume as their clients had got into a bidding war for the Property. I would describe the situation as a "frenzy" as agents kept calling me with their prices and the offers for the Property kept climbing. I was given permission from the agents involved, including Kandola, to speak openly so that all agents could be kept in the loop about what had become something like an auction. Most of my discussions with agents that day occurred by telephone rather than by text.

[21] Ms. Tak further deposes that:

21. Ultimately, there were three parties left who advised me of the updated amounts their clients were willing to offer:

- a) Stephanie Guillaume of eXp Realty, on behalf of [name omitted] I do not recall the amounts associated with her client's increased offers, and I do not have any text messages from her regarding the matter. I believe my discussions with her that day occurred over the phone only; and
- b) Geoff Hayes of Royal LePage Kelowna, on behalf [name omitted]. Attached and marked as Exhibit "L" to this Affidavit is a copy of my text messages exchanged with Geoff Hayes on March 19, 2022 which show that his client offered to pay \$1.8 million and then \$2.2 million for the Property, but that his client backed out once Deol put his offer of \$2.45 million for the Property.

[22] On March 19, 2022, the plaintiffs accepted the defendant's written offer to purchase the Property for \$2,450,000.

The Contract

[23] The Contract provides in part:

1. **PURCHASE PRICE:** The Purchase Price of the Property will be *\$2,450,000 Two Million Four Hundred Fifty Thousand DOLLARS* (Purchase Price).

The italicized portion of the above was handwritten under the heading and the initials of the defendant, as buyer, appears directly next to it; while the initials of the plaintiffs, as sellers, appears directly under it. The defendant's initial offer of "\$1,300,000 One Million Three Hundred Thousand" was scratched out.

2. **DEPOSIT:** A deposit of \$100,000 which will form part of the Purchase Price, will be paid within 24 hours of acceptance unless agreed as follows:
48 hours after final acceptance not including weekends and holidays.

As March 19, 2022 was a Saturday, this meant the defendant had to pay the deposit by midnight on Tuesday, March 22, 2022.

[24] On March 22, 2022, the defendant made two payments of \$50,000 each, the first payment at 11:54 a.m., the second at 11:55 a.m. (collectively, the "Deposit").

3. **TERMS AND CONDITIONS:** The purchase and sale of the Property includes the following terms and is subject to the following conditions:

The Buyer and Seller hereby agree that this offer is unconditional, that the Buyer has agreed to waive all conditions and once accepted, this agreement will immediately become firm and binding.

The italicized portion of the above was handwritten under the heading and the initials of the defendant, as buyer, and the plaintiffs, as sellers, appears directly under it.

4. **COMPLETION:** The sale will be completed on June 30, yr. 2022 (Completion Date) at the appropriate Land Title Office.

[...]

10. **TENDER:** Tender or payment of monies by the Buyer to the Seller will be by certified cheque, bank draft, wire transfer or Lawyer's/Notary's or real estate brokerage's trust cheque.

[...]

12. **TIME:** Time will be of the essence hereof, and unless the balance of the payment is paid and such formal agreements to pay the balance as may be necessary is entered into on or before the Completion Date, the Seller may, at the Seller's option, terminate this Contract, and, in such event, the amount paid by the Buyer will be non-refundable and absolutely forfeited to the Seller, subject to the provisions under the *Real Estate Services Act*, on account of damages, without prejudice to the Seller's other remedies.

[...]

18. **REPRESENTATIONS AND WARRANTIES:** There are no representations, warranties, guarantees, promises or agreements other than those set out in this Contract and the representations contained in the Property Disclosure Statement if incorporated into and forming part of this Contract, all of which will survive the completion of the sale.

Counsel for the plaintiffs describes the above as the "entire agreement clause".

23. **THIS IS A LEGAL DOCUMENT, READ THIS ENTIRE DOCUMENT AND INFORMATION PAGE BEFORE YOU SIGN.**

[25] The Contract had no subject conditions, and the defendant agreed to purchase the Property on an "as is where is" basis.

The Post-Contract Emails

[26] On March 22, 2022 , Mr. Kandola emailed Johannes Saufferer of the City:

Hello Johannes,

I am a realtor at MacDonald Realty Kelowna. Recently one of my clients purchased 165 Leathead Road. The neighbouring property is 160 Leathead and I believe is owned by the city.

The listing realtor told us that the city was wanting to sell this property to the owner of 165 Leathead Road. I want to know if the city is still wanting to sell this property, at what price, and how we go about the purchasing process?

I look forward to hearing from you.

Cheers,

[27] On March 22, 2022, Whitney Purvis of the City emailed Mr. Kandola:

Hello Aman,

Thanks for reaching out. We would need to circulate this request to purchase 160 Leathead Rd to the internal and external departments to see if the land is excess and available for purchase. The process on the circulation would be around 3 weeks (especially as we head into spring break).

Should the land be deemed excess then our mandate is to sell at fair market value (either through looking to direct comparable sales – in this case the contract for the adjacent land would be the most applicable information as the land will be consolidated in to achieve its highest and best use). Steps to move forward:

- PSA between parties – subject to:
 - Council approval on the disposition (typically 30-45 days after PSA is signed)
 - Sign off on the consolidation of the lands into the adjacent parcel as I don't believe the land conforms to bylaw (this timing is really on the buyer and how fast they move forward)
 - Due-diligence period for the buyer (if necessary)
- Completion/registration

Please let me know if you want us to move forward with the request.

Thank you and have a great day.

[28] On March 25, 2022, Mr. Kandola emailed Ms. Purvis:

Hi Whitney,

Yes can you please go forward with the request to purchase 160 Leathead road.

Thank you,

[29] On March 25, 2022, Ms. Purvis emailed Mr. Kandola:

Good morning Aman,

I will circulate the request and hope to have a response to you by mid-April.

Thank you and have a great day,

[30] On April 20, 2022, Mr. Kandola emailed Ms. Purvis:

Hi Whitney,

Just following up on this. Were you able to figure out if the city is wanting to sell 160 Leathead Rd to my client?

[31] On April 21, 2022, Ms. Purvis emailed Mr. Kandola:

Hi Aman,

I am just waiting on one more response before we can review and have a response to you. I followed up again today and hope to hear back soon.

[32] On April 26, 2022, Mr. Kandola emailed Ms. Purvis:

Sounds good, thank you.

[33] On April 27, 2022, at 11:24 a.m., Ms. Purvis emailed Mr. Kandola:

Good morning Aman,

After consulting various departments and stakeholders, it has been determined that this lot would be fully encumbered by utility and road SRWs and their associated infrastructure. As such, we are recommending that the City of Kelowna does not pursue the disposition of 160 Leathead Rd.

[34] On April 27, 2022 at 12:39 p.m. Mr. Kandola emailed Ms. Purvis:

Hi Whitney,

Thanks for getting back to me. What are the SRWs? are they just related to the laneway behind the property? Would it not be possible to relocate the utility services or when the property is redeveloped that we build those utility services back onto the property? That way the property can be redeveloped and more housing can be provided in the area, while the city's utility infrastructure there will still exist there as well and is not affected.

Please let me know your thoughts on this.

Cheers,

[35] On April 27, 2022 at 2:26 p.m. Ms. Purvis emailed Mr. Kandola:

Good afternoon Aman,

The SRWs are primarily utilities which bisect the lot. The largest utility is a 150mm watermain that belongs to Rutland Water Works (RWW) (in blue) followed by a Fortis gas main (yellow). In addition there is a power line easement along the south edge and Shaw/Telus have infrastructure on the west portion of the lot. The City would also require a dedication to maintain 5.15m from the existing curb along Leathead and would require a 2.5m dedication along Leathead and would require a 2.5m dedication along Montgomery.

[map omitted]

I was advised by RWW that if the disposition was to go ahead they would require the watermain (which provides an important looping connection between Montgomery and Donhauser Rd for water quality and fire protection purposes) to be moved which would be a fairly expensive task. This is because they don't allow their watermains to be located on private property.

Relocating and protecting the utilities present would be at your clients cost in addition to purchasing the land at fair market value.

I expect that this would be cost prohibitive to purchasing the lot. However, if your client disagrees after costing the relocation and protection of the utilities, we can continue the conversation.

The June 6, 2022 telephone call

[36] Ms. Tak deposes that on June 6, 2022, she received a telephone call from Mr. Kandola, who told her:

- the defendant would probably be unable to complete the purchase of the Property on the Completion Date;
- the defendant was about 30 years old and had been relying on funds from his family which did not work out and consequently he was unable to obtain financing to complete the transaction;
- he would discuss with the defendant whether he could find anyone to “take over” the Contract; and
- the defendant was still going to try to complete the transaction but it was unlikely that he would be able to do so.

[37] Ms. Tak's evidence about the June 6, 2022 telephone call is undisputed.

[38] Ms. Tak deposes that after the June 6, 2022 telephone call, she provided Mr. Kandola with the name of a mortgage broker to see if there were other financing options available to the defendant. Ms. Tak and Mr. Kandola also discussed the prospect of a vendor-take-back mortgage. Mr. Kandola continued to update Ms. Tak about a potential assignment of the Contract by the defendant before the completion date. The defendant never formally requested to extend the completion date.

Steps taken by the plaintiffs' conveyancing lawyer

[39] In June 2022, the plaintiff's engaged conveyancing lawyer, Brian Stephenson, of the law firm Pushor Mitchell LLP ("Pushor Mitchell").

[40] On or about June 23, 2022, Pushor Mitchell received from MacDonald Realty conveyancing instructions (the "Instruction Report"), and a copy of the Contract. The Instruction Report indicated that lawyer, Shivaun Eberle, of the law firm Doak Sherriff LLP was the conveyancing lawyer for the defendant.

[41] On June 27, 2022, Mr. Stephenson emailed Ms. Eberle:

I am reaching out with respect to the above noted transaction as our office has not yet received Vendor documents for signing with our clients.

Please note that our client remains ready, willing and able to complete their obligations under the Contract of Purchase and Sale.

If you are able to update us with the status of the file on your end and your client's ability to comply with the terms of the Contract of Purchase and Sale that would be much appreciated.

(the "First Stephenson Email")

[42] Mr. Stephenson received no response from Ms. Eberle.

[43] At 4:52 p.m. on the Completion Date, Mr. Stephenson emailed Ms. Eberle:

With respect to the above noted matter please be advised that our clients remain ready, willing and able to complete their obligations under the Contract.

Given the time of day and lack of correspondence from your office on this matter, we presume your client is not intending to complete.

We recommend the release of the deposit to our clients as a result of your client's failure to meet their obligations and in light of your client's duty to mitigate the damages incurred.

We will be seeking instruction from our clients as to next actions.

(the "Second Stephenson Email").

[44] By letter dated July 5, 2022, the plaintiffs advised the defendant that they were electing to terminate the contract pursuant to the termination clause and demanded that the defendant consent to the release of the Deposit. To date, the defendant has refused to consent to the release of the Deposit to the plaintiffs.

[45] In July 2022 the plaintiffs moved to Alberta.

[46] In July 2022, after the plaintiffs terminated the Contract, they relisted the Property for sale with a list price of \$1,500,000. On September 23, 2022, having received no offers to buy the Property, the plaintiffs reduced the list price to \$1,250,000. On October 13, 2022, still having received no offers to purchase the Property, the plaintiffs further reduced the list price to \$1,000,000.

[47] On October 13, 2022 the plaintiffs agreed to sell the Property to a new purchaser for \$1,000,000. On November 18, 2022, that transaction completed.

POSITION OF THE PARTIES

The plaintiffs' position

[48] The plaintiffs' position is that the matter is suitable for summary trial. The plaintiffs submit the defendant breached the Contract, in consequence of which they terminated the Contract, and mitigated their damages. The plaintiffs claim damages for breach of the Contract, an order that the deposit paid by the defendant is absolutely forfeited to them on account of damages, an order that MacDonald Realty forthwith pay the deposit to them care of Pushor Mitchell LLP, in trust, court ordered interest, and costs.

The defendant's position

[49] The defendant's position is that there are significant intervening facts which make the matter unsuitable for summary trial and premature for determination. The defendant submits he did not breach the Contract. The defendant asserts the plaintiffs, through Ms. Tak, misrepresented a number of key elements during the listing, negotiations and sale at the heart of this matter.

[50] The defendant admits he entered into the Contract, but claims he did so as a result of alleged misrepresentations by the plaintiffs.

[51] The defendant denies breaching the Contract, and denies that the plaintiffs were ready, willing and able to complete their obligations under the Contract.

[52] The defendant further submits that if he did breach the Contract, the plaintiffs suffered no loss, damage or expense, or failed to mitigate.

[53] The defendant further submits the contract is unconscionable. The defendant seeks rescission of the Contract and return of the Deposit.

LAW

Summary Trial

[54] The object of the *Rules* is to secure the just, speedy and inexpensive determination of every proceeding on its merits: Rule 1-3(1). This includes, so far as practicable, conducting the proceeding in ways that are proportionate to the amount involved in the proceeding, the importance of the issues in dispute, and the complexity of the proceeding: Rule 1-3(2).

[55] Rule 9-7 provides for summary trial. Sub-rule 9-7(15) states that on the hearing of a summary trial application the court may grant judgment in favour of a party, either on an issue or generally, unless the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or the court is of the opinion that it would be unjust to decide the issues on the application.

[56] In *Gichuru v. Pallai*, 2013 BCCA 60 [*Gichuru*], at paras. 30–32, Justice D. Smith said:

[30] In *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.), the court confirmed that the court under this rule “tries the issues raised by the pleadings on affidavits”, that “a triable issue or arguable defence will not always defeat a summary trial application”, and that “cases will be decided summarily if the court is able to find the facts necessary for that purpose, even though there may be disputed issues of fact and law” provided that the judge does not find “it is unjust to do so” (p. 211). In determining the latter issue (whether it would be unjust to proceed summarily), the Chief Justice identified a number of relevant factors to consider (at p. 215):

In deciding whether it will be unjust to give judgment the chambers judge is entitled to consider, inter alia, the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings and any other matters which arise for consideration on this important question.

[31] To this list has been added other factors including the cost of the litigation and the time of the summary trial, whether credibility is a critical factor in the determination of the dispute, whether the summary trial may create an unnecessary complexity in the resolution of the dispute, and whether the application would result in litigating in slices: *Dahl v. Royal Bank of Canada et al.*, 2005 BCSC 1263 at para. 12, upheld on appeal at 2006 BCCA 369.

[32] All parties to an action must come to a summary trial hearing prepared to prove their claim, or defence, as judgment may be granted in favour of any party, regardless of which party has brought the application, unless the judge concludes that he or she is unable to find the facts necessary to decide the issues or is of the view that it would be unjust to decide the issues in this manner. This requirement was underscored by Madam Justice Newbury in *Everest Canadian Properties Ltd. v. Mallmann*, 2008 BCCA 275:

[34] It is trite law that where an application for summary determination under Rule 18A is set down, the parties are obliged to take every reasonable step to put themselves in the best position possible. As this court noted in *Anglo Canadian Shipping Co. v. Pulp, Paper & Woodworkers of Canada, Local 8* (1988) 27 B.C.L.R. (2d) 378 (B.C.C.A.) at 382, a party cannot, by failing to take such steps, frustrate the benefits of the summary trial process. Where the application is brought by a plaintiff, the defendant may not simply insist on a full trial in hopes that with the benefit of viva voce evidence, ‘something might turn up’: see *Hamilton v. Sutherland* (1992), 68 B.C.L.R. (2d) 115, [1992] 5 W.W.R. 151 (B.C.C.A.) at paras. 66-7. The

same is true of a plaintiff where the defence has brought the R. 18A motion. [Emphasis added.]

DISCUSSION

Is the matter suitable for summary trial?

[57] The evidence on the application consists of affidavits from:

- The plaintiff, Georganna Moore;
- The defendant;
- Ms. Tak (two affidavits);
- Mr. Kandola;
- Mr. Stephenson; and
- A legal assistant to counsel for the plaintiffs.

The misrepresentation claims

Plaintiffs' Position

[58] The plaintiffs deny the misrepresentation claims.

[59] Ms. Tak deposes that Mr. Kandola never told her he felt the listing for the Property was inaccurate:

- in the more than three months between when the plaintiffs accepted the defendant's offer and the completion date; or
- in their text communications or phone calls in June 2022, prior to the completion date, when Mr. Kandola informed her the defendant would probably be unable to complete the transaction on the completion date, but that he would consent to release the deposit.

[60] Ms. Tak deposes that she did not tell Mr. Kandola that 160 Leathead was for sale or make any guarantees that the City would sell it to the defendant for any particular price.

[61] Ms. Tak further deposes that she and Mr. Kandola communicated about zoning issues before the defendant submitted his offer.

[62] Ms. Tak admits sending Mr. Kandola the text which reads “[y]ou would buy 160 Leathead at the [excess] value from the city which is assessed at 126K”. She deposes that she made this statement in error, and that Ben Walker of the City actually told her that the City’s mandate was to sell lands which had been deemed “excess” at fair market value. She deposes: “I do not know why I made this error, but I did not do so deliberately. I suspect I simply confused the concepts of assessed value and fair market value in my haste to provide Kandola with information about 160 Leathead.”

Defendant’s Position

[63] The defendant alleges that during the course of negotiations and placing the deposit, the plaintiffs, through Ms. Tak, falsely misrepresented to the defendant, through Mr. Kandola, that the Property could be rezoned for a higher density development to accommodate a mixed-use building with the ground floor being commercial and the floors on top being residential (the “Development”). The defendant alleges that the plaintiffs further falsely misrepresented that 160 Leathead was available and could be incorporated into the Development.

[64] The defendant alleges that the plaintiffs knew or ought to have known that the defendant would reasonably rely on the alleged misrepresentations or be induced by them to enter into the Contract and pay the Deposit, or both.

[65] The defendant characterizes the plaintiffs’ alleged misrepresentations as fraudulent.

[66] The defendant submits that the defendant is entitled to damages and rescission of the Contract, or if the Contract is determined to be valid, that it is an unconscionable bargain which ought to be set aside, with a refund of the Deposit.

The matter is not suitable for summary trial

[67] For the most part, the matter is not factually or legally complex. Many findings of fact can be made by reference to the affidavits, and such material as the listing document, the Contract, the texts and emails, the Instruction Report, and miscellaneous documentation documenting the plaintiffs' expenses. There are no apparent novel issues of law. This favours summary trial.

[68] I am, however, satisfied that the matter is not suitable for summary trial, because based on the evidence on the application, I am unable to decide one of the central issues raised by the pleadings on the affidavits, namely the misrepresentation claims.

[69] The misrepresentation claims are at the core of the issues between the parties. Assessing the credibility of potential witnesses such as the defendant, Ms. Tak and Mr. Kandola will be a critical factor in the determination of the misrepresentation claims. In the circumstances, it would be unjust to decide the issues on the application by summary trial.

[70] In reaching my decision, I have also considered factors identified in *Gichuru*.

[71] The amount at issue is significant.

[72] There is no evidence of any prejudice likely to arise by reason of delay.

[73] The cost of taking the case forward to a conventional trial would likely not be disproportionate in relation to the amount involved.

[74] The matter is not urgent, although it has now been before the courts for more than eighteen months. The Court has previously granted an adjournment of the

plaintiffs' application, with the adjournment peremptory against the defendant, and costs to the plaintiffs. The plaintiffs have proceeded without delay.

[75] The cost of the litigation has undoubtedly already been significant. It will undoubtedly cost significantly more if it proceeds to a full trial.

[76] Finally, in my view, document production and examinations for discovery should occur in order to fully develop the facts concerning the misrepresentation claims. While there has already been some listing of documents, there has been none since the Amended Response to Civil Claim and Amended Counterclaim, and neither party has conducted examinations for discovery.

CONCLUSION

[77] The plaintiffs' application for summary trial is dismissed.

“B. Smith J.”

B. SMITH J.