

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Tolamika Ventures Ltd. v. 1338642 B.C. Ltd.*,
2024 BCSC 564

Date: 20240408
Docket: S39592
Registry: Chilliwack

Between:

Tolamika Ventures Ltd.

Plaintiff

And

1338642 B.C. Ltd.

Defendant

Before: The Honourable Justice C. Ross

Reasons for Judgment

Counsel for the Plaintiff:

J.L. Zacharias
R. Thomas

Counsel for the Defendant:

D. Moonje

Place and Date of Trial/Hearing:

Chilliwack, B.C.
February 21, 2024

Place and Date of Judgment:

Chilliwack, B.C.
April 8, 2024

Introduction

[1] This is a summary trial brought by the plaintiff, Tolamika Ventures Ltd., (“Tolamika”) for damages from a breach of contract arising from the failure of the defendant, 1338642 B.C. Ltd. (“1338642” and “Buyer”), to complete the purchase of a property. It is common ground that this matter is suitable for summary trial and that 1338642 breached the contract for purchase and sale.

[2] The sole issue is whether Tolamika should have mitigated its loss following the breach by accepting an offer from 1338642 made in July 2022. The parties have agreed that, if the court is satisfied that Tolamika’s conduct was reasonable in all of the circumstances, \$556,910.96 is the appropriate amount to quantify the loss. If the court concludes that Tolamika failed to mitigate its loss, the amount to quantify the loss is \$ 311,559.27

Facts

[3] Tolamika was the owner of the lands and premises known as 48563 Yale Road, Chilliwack B.C. (the “Property”). Thomas Degroot is a director of Tolamika. The Property had four dwellings on it, three of which were non-conforming.

[4] Tolamika listed the Property for sale on January 28, 2022, in the amount of \$2,290,000. On January 29, 2022, Tolamika received an offer from a prospective buyer to purchase the Property for \$2,290,000 subject to various conditions.

[5] On January 31, 2022, Tolamika received an offer from 1338642 to purchase the Property for \$2,225,000 (the “Offer”). The Offer waived several conditions including, subject to financing and subject to professional inspection.

[6] The parties entered into a contract for the purchase and sale of the Property dated January 31, 2022 (the “Purchase Agreement”). The material terms of the Purchase Agreement included:

- a) Purchase price of \$2,225,000;
- b) Deposit of \$100,000 to be paid within 24 hours of acceptance;

- c) The Buyer waives the financing clause;
- d) The Buyer waives the inspection clause and accepts the Property “as is”;
- e) Completion date of May 31, 2022; and
- f) Date of possession June 1, 2022.

[7] 1338642 paid the \$100,000 to Tolamika on February 1, 2022 as required by the Purchase Agreement.

[8] An appraisal of the Property dated February 22, 2022 was prepared. The appraisal estimated the market value of the Property to be \$ 2,225,000. However, this opinion was subject to qualification. First, it assumed that all four homes on the Property were legal and authorized; however, three of the four dwellings were non-conforming. The value was supported by an estimate of rents received from all four dwellings on the site. No access was provided to the appraiser to two of the four dwellings.

[9] Jagjit Singh Gill, who is an officer and director of 1338642, deposed that when the company made the offer to purchase, they assumed that the rental income from the four houses on the site would be considered by a conventional funder. However, the non-conforming buildings proved to be an impediment to obtaining financing. They sought and received an extension from Tolamika to try to find financing on workable terms.

[10] The parties entered into an addendum agreement dated May 13, 2022 to amend the Purchase Agreement (the “1st Amendment”). The material terms of the 1st Amendment included an extension of the completion date to June 16, 2022 and corresponding changes to the dates for adjustments and possession.

[11] The parties entered a further addendum agreement dated June 10, 2022 (the “2nd Amendment”). The material terms of the 2nd Amendment extended the completion date to July 7, 2022 with corresponding extensions to the dates for

adjustments and possession. The Buyer agreed to pay a second deposit of \$50,000 directly to Tolamika on June 13, 2022.

[12] The further deposit was paid, bringing the total deposit to \$150,000, which Tolamika continues to hold.

[13] 1138642 failed to complete the purchase by any of the completion dates. It offered to forfeit the deposit to satisfy its obligations, but Tolamika did not accept.

[14] On July 5, 2022, 1138642 offered to purchase the Property for \$1,950,000 with a closing date of July 27, 2023. Mr. Gill deposed that the company was ready; willing and able to complete at that price and at that time. Tolamika rejected this offer on July 7, 2022.

[15] 1138642 made a second offer on July 12, 2022, the material terms of which were:

- a) Purchase price \$1,950,000;
- b) Vendor to take back a mortgage of 70% loan to value on the purchase price at interest at 5% per annum, 2-year term with provision for early payout without penalty;
- c) Closing date to be addressed once mortgage documentation is in place; and
- d) Confirmation that all the houses are empty.

[16] Tolamika did not respond directly to the July 12, 2022 offer. On August 3, 2022, Tolamika's legal counsel wrote to counsel for 1138642 stating that it was ready, willing, and able to close and insisting that the purchase close on the original terms. Counsel advised that if the necessary documents and funds were not received by August 8, 2022, Tolamika would re-list the Property.

[17] Mr. Degroot deposed that he did not accept either of the offers because he had little to no confidence that 1138642 would be able to complete those offered

agreements given the history of failure to complete. With respect to the second offer, Mr. Degroot deposed that Tolamika was not a bank and did not view the offer as financially advantageous. He stated that he based his decision on what he knew of the real estate market at the time.

[18] On August 22, 2022, Tolamika relisted the Property at a price of \$1,949,900. The listing was for the period August 22, 2022 to December 31, 2022.

[19] Between August 22, 2022 and November 22, 2022, Tolamika did not receive any offers to purchase the Property.

[20] On November 22, 2022, Tolamika reduced the list price to \$1,799,900.

[21] On February 24, 2023, Tolamika received an offer to purchase the Property for \$1,600,000, which Tolamika accepted. The sale was completed on May 15, 2023.

Legal Principles

[22] The fundamental rule in assessing damages for breach of contract is that the plaintiff is to be placed in the position he would have been in if the contract had been performed, see *AME Distribution Inc. v. Wang*, 2018 BCSC 426 at para. 83.

[23] This principle is subject to the duty of the plaintiff to mitigate his loss. This principle is described by Justice Morley in *Zhao v. Purewal*, 2023 BCSC 1750 at para. 138:

Under this principle, damages are reduced to the extent that they were unnecessarily increased by a failure of the plaintiff to take reasonable steps to mitigate them. The standard is to take steps which an ordinarily reasonable and prudent person would take in the course of their own business. The onus is therefore on the defendant to show that there was a more reasonable course of action that would have reduced the loss.

[24] The plaintiff's conduct must be reasonable and based on reasonable criteria, but not judged with the benefit of hindsight, see *Mackenzie v. Dougherty*, 2017 BCSC 931 at para. 33 [*Mackenzie*]. Reasonable steps in mitigation may include an obligation to accept a subsequent offer from the defaulting party, see *Mackenzie* at

para. 31, and *Glenarda Developments Ltd. v. Pinheiro* (1998), 21 R.P.R. (3d) 209 (Ont. C.A.) at para. 4. A failure to acknowledge a declining real estate market has been found to be a failure to mitigate, see *Mackenzie* at para. 30.

Discussion

[25] As noted above, the essential question is whether the plaintiff, in all of the circumstances, took reasonable steps to mitigate its loss. The plaintiff's conduct with respect to mitigation must not be viewed through the lens of hindsight.

[26] In my view, the first relevant circumstance is that Tolamika is a commercial venture whose activities include buying and selling properties. At the time that Mr. Degroot was considering the July offers from 1138642, he was advised that the buyer was having difficulty raising the necessary financing to close. He was aware that 1138642 had increased the deposit from \$100,000 to \$150,000.

[27] Mr. Degroot stated in his examination for discovery that at the time these offers were put forward, he had discussions with his realtor who advised him that the market was declining and that they were not going to get \$2,225,000 if the Property had to be relisted. He agreed that when these offers were put forward, he was aware that the property was no longer worth \$2,225,000 because of current market conditions. When the Property was relisted shortly after on August 22, 2022, it was listed for \$1,949,900.

[28] Tolamika places emphasis on the February 22, 2022 appraisal as supporting its position with respect to the value of the Property. However, as noted above, the appraisal was subject to significant limitations which turned out to be relevant to the ability of the purchaser to obtain financing. In any event, the relevant time considerations for the present application are what Mr. Degroot believed about the value of the Property in July 2022 and whether this belief was reasonable.

[29] In that regard, as noted above, Mr. Degroot had received advice that the market had declined. At the time of the July offers, he believed that the Property was

no longer worth \$2,225,000. The best evidence of his estimate of the value of the Property at the time was, in my view, the August 2022 list price.

[30] In all of the circumstances, I find that it was not reasonable for Tolamika to refuse the July 5, 2022 offer. This was a commercial transaction. Mr. Degroot was aware that the market had declined and in fact, when he relisted the Property, it was at approximately the price of the July 5, 2022 offer. He stated that he didn't have any faith that the buyer would be able to close on the July offer. However, given the extremely short closing period, he had little to risk by tying the Property up until July 27, 2022, which was a month before the Property was re-listed.

[31] It is evident that Mr. Degroot was vexed with the buyers having tied up the Property and then failing to close despite extensions. However, in the circumstances that presented themselves in July 2022, it was nevertheless reasonable for Tolamika to accept the July 5, 2022 offer in order to mitigate its losses.

[32] Mr. Degroot was skeptical about 1138642's ability to close on the July 5, 2022 offer. However, I am satisfied that the offer was a bona fide offer and that 1138642 would have been in a position to close on the terms of that offer. I am satisfied that 1138642 has discharged its onus to establish that by refusing the July 5, 2022 offer, Tolamika failed to mitigate its damages.

[33] In the result, and consistent with the quantum agreed by the parties, I quantify Tolamika's loss at \$311,559.20.

"C. Ross J."