CITATION: *Caivan (Renaud) Inc. v. Khan et al.* , 2024 ONSC 1986
COURT FILE NO.: CV-23-00093634-0000
DATE: 20240405

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
CAIVAN (RENAUD) INC.	Caroline Bedard, for the Plaintiff
Plaintiff	
– and –	
MAROOF KHAN and MUJAHID KHAN	No one appearing
Defendants	
	HEARD: March 7, 2024

REASONS FOR JUDGMENT

K. MCVEY J.

[1] The plaintiff, Caivan (Renaud) Inc., moves for default judgment against the defendants, Maroof Khan and Mujahid Khan. The plaintiff seeks damages of $101,382.10 plus pre- and post-judgment interest flowing from the defendants' failure to close on a real estate transaction in August 2023. In support of the relief sought, the plaintiff filed an affidavit from Brian Creech, Executive Vice-President of Finance for Caivan Development Corporation ("CDC"). At the relevant time, Mr. Creech was responsible for the overall financial management of the plaintiff corporation.

Background

[2] The plaintiff is a corporation incorporated pursuant to the laws of Ontario that carries on business as a developer and home builder in Ottawa, Ontario. On September 9, 2021, the parties

entered into an Agreement of Purchase and Sale (the "Agreement") of a new-build townhome known municipally as 204 Falsetto Street, Ottawa (the "Property"). The initial purchase price of the home, after incentives, was $729,990.01, including HST. By way of an amendment to the Agreement subsequently signed by the parties, the purchase price was adjusted to $739,936.99, including HST. The new purchase price reflected certain options and upgrades purchased by the defendants.

[3] Deposits totaling $55,000 were due in instalments according to a set schedule in the Agreement. The defendants paid those deposits on time. The remaining balance of the purchase price was due on the closing date of October 25, 2022. Pursuant to the terms of the Agreement, the closing date was ultimately extended to August 24, 2023.

[4] To close the transaction, the terms of the Agreement required that the defendants retain a lawyer in good standing with the Law Society of Ontario no later than sixty days before the closing date and that they provide the lawyer's name and contact information to the plaintiff.

[5] As of August 21, 2023, three days before the closing date, the defendants had not provided the contact information for a qualified lawyer to assist with the transaction. By letter dated August 21, 2023, lawyers for the plaintiff reminded the defendants of their obligations pursuant to the Agreement and the consequences associated with non-compliance.

[6] On August 24, 2023, the plaintiff was ready, willing, and able to close. The defendants had taken no steps to finalize the transaction. By letter dated August 24, 2023, lawyers for the plaintiff advised the defendants that 1) the Agreement had been terminated; and 2) the Property would be re-listed for sale, and the defendants would be responsible for any associated financial losses.

[7] On August 25, 2023, counsel for the defendants contacted lawyers for the plaintiff and requested an extension of the closing date to September 15, 2023. On August 29, 2023, counsel for the plaintiff responded and offered to revive the Agreement with the defendants subject to various terms. An assistant from the law firm representing the defendants acknowledged receipt by email the same day. The defendants never responded to the plaintiff's offer to revive the

Agreement. On September 8, 2023, the same law firm advised the lawyers for the plaintiff that they were no longer representing the defendants.

[8] The plaintiff immediately began to mitigate its damages by taking steps to resell the Property.

[9] The plaintiff conducted a review of current pricing for similar properties in the same development as well as other developments in other areas of Ottawa. This included a review of recent sale prices of other comparable properties belonging to the plaintiff, as well as similar properties belonging to other builders.

[10] On or around September 15, 2023, the plaintiff's sales team remarketed the Property for an asking price of $659,990.00. The sales team did not circulate the asking price to the public in the hopes that a prospective purchaser might extend a better offer. Effectively, the plaintiff's sales team used the sale price as a reference guide.

[11] On September 28, 2023, the plaintiff's sales team sent an email promoting the Property to a list of approximately thirty thousand recipients. The plaintiff entertained offers on September 30, 2023. The sales team received twenty-five submissions, but it did not reach a final deal with any of the prospective purchasers. On October 11, 2023, the plaintiff received an offer of $600,000 for the Property. The plaintiff accepted the offer on October 12, 2023, as it was comparable to the sale prices for similar properties recently sold in the area.

[12] On October 20, 2023, the plaintiff issued a statement of claim against the defendants. The plaintiff served the defendants with a copy of the statement of claim on November 1, 2023. Both defendants were served by leaving a copy of the statement of claim with Ms. Khan, the wife of Mujahid Kahn, who verbally confirmed that both defendants resided at the address, and by sending a copy to both defendants by regular mail to the same address.

[13] The defendants did not defend the action.

[14] On November 8, 2023, Mujahid Khan contacted the lawyers for the plaintiff via email and indicated that he and his brother wished to speak with them about their options. Lawyers for the plaintiff responded on December 12, 2023, indicating that the deadline to file a defence was December 7, 2023, and they inquired as to the defendants' intentions. The plaintiff did not receive a response.

[15] The plaintiff noted the defendants in default on January 10, 2024.

[16] On February 12, 2024, lawyers for the plaintiff emailed Mujahid Khan at the same email address he used on November 8, 2023, advising him of the default judgment motion scheduled for March 7, 2024. Mr. Khan did not respond.

[17] Although a defendant noted in default is not entitled to notice of a motion for default judgment, the Court may still order otherwise: *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 19.02(3) (the "*Rules*"). Materials filed in support of a default judgment may at times raise questions about the adequacy of service of the originating statement of claim. Serving the defaulting party with the motion materials, though not presumptively required by the *Rules*, and providing proof of such service, can satisfy a Court that the defaulting party is aware of the claim and the motion for default judgment: *Elekta Ltd. v Rodkin*, 2012 ONSC 2062, at para. 10; *Casa Manila Inc. v Iannuccilli*, 2018 ONSC 7083, at paras. 11-12.

[18] Though the plaintiff did not formally serve the default judgment motion materials on the defendants, I am satisfied that they are aware of the proceedings and have nonetheless opted not to file a defence. First, both defendants were properly served in accordance with the *Rules*. When Ms. Khan accepted service, she confirmed that both defendants resided at the address. Second, Mujahid Khan contacted the lawyers for the plaintiff via email approximately one week after he was served with the statement of claim. In his email, Mr. Khan refers to an earlier verbal conversation he had with the lawyer and confirms that he wishes to discuss the options with his brother. I am satisfied based on the affidavits of service, the email correspondence, and the fact that the defendants lived together and are brothers, that they were both aware of the plaintiff's action. Third, lawyers for the plaintiff advised Mujahid Khan on February 12, 2024, via email of

the motion date of March 7, 2024, and the relief they intended to seek. The email address used was the same email address used by Mujahid Khan to contact the plaintiff's lawyers in 2023. In the circumstances, I find it unnecessary to order that the defendants be served with the motion materials.

Analysis

[19] The plaintiff now seeks default judgment against the defendants pursuant to r. 19.05 of the *Rules*. The plaintiff seeks to recover its financial losses associated with the defendants' failure to close on the Property. Pursuant to r. 19.02(1)(a), the defendants are deemed to have admitted the truth of the following allegations as set out in the originating statement of claim:

- That on September 9, 2021, the defendants entered into an Agreement of Purchase and Sale for the Property;
- The final purchase price of the Property was $739,936.99 of which $63,887 consisted of HST on the transaction;
- The final closing date on the Property was August 24, 2023;
- The terms of the Agreement required that the defendants retain a qualified lawyer on or before the 60th calendar day prior to the completion of the sale and provide their lawyer's contact information to the plaintiff;
- The defendants repeatedly failed to provide the name and contact information of their lawyer;
- On August 24, 2023, the plaintiff was ready, willing, and able to close on the transaction; and
- The defendants failed to take any steps towards closing the transaction: they did not provide the name or contact information of a lawyer and they did not transfer any closing funds or closing documents to the plaintiff.

The Issues

[20] Do the facts as admitted entitle the plaintiff to judgment pursuant to r. 19.06? First, the court must be satisfied based on the deemed admissions that the defendants breached the Agreement as plead in the statement of claim. If so, the court must then determine the quantum of damages to which the plaintiff is entitled.

[21] If the facts based on the admitted allegations do not entitle the plaintiff to default judgment, then the plaintiff must adduce admissible evidence, which when combined with the deemed admissions, forms a sufficient evidentiary foundation for the relief sought. Conclusions of law, or mixed fact and law, are not deemed admitted by virtue of r. 19.02(1) where a defendant has been noted in default: *Paul's Transport Inc. v. Immediate Logistics Ltd*, 2022 ONCA 573.

[22] When the damages are unliquidated as in this case, in accordance with r. 19.05(2), the motion shall be supported by affidavit evidence. The court must be satisfied by the evidence filed that the facts entitle the plaintiff to judgment including facts substantiating the calculation of the requested damages. Moreover, where a plaintiff seeks default judgment in the context of an aborted sale of real estate, the plaintiff must also satisfy the court that they made reasonable efforts to resell the property for fair market value in a timely manner: *Madison Homes Cornell Rouge Ltd. v. Ng*, 2021 ONSC 3104.

Liability

[23] I am satisfied that the defendants breached the terms of their agreement with the plaintiff. The Agreement required that the defendants retain a qualified lawyer on or before the 60th calendar day prior to the completion of the sale and to provide that individual's contact information to the plaintiff. The defendants' failure to do so constituted a default under the Agreement. Moreover, the defendants took no active steps towards closing the transaction.

[24] I will now assess the damages to which the plaintiff is entitled.

Damages

[25] In all proceedings where a plaintiff seeks damages with respect to a breach of an agreement of purchase and sale, the plaintiff must prove the quantum of damages to which it is entitled: *Madison Homes,* at para. 18. Damages in this context are the difference between the contract price and the price of the new sale of the property, plus any related costs associated with the breach: *Goldstein v. Goldar*, 2018 ONSC 608, at para. 25.

[26] Further, in the context of a failed real estate transaction, the plaintiff must prove that its efforts to resell were "reasonable and timely": *Madison Homes*, at para. 18; *100 Main Street Ltd., v. W.B. Sullivan Construction Ltd*. (1978), 88 D.L.R. (3d) 1 (Ont. C.A.), at p. 23. The innocent party has a duty to mitigate: *Rosehaven Homes Ltd. v. Aluko*, [2022] O.J. No. 838, at para. 71.

[27] When assessing whether the innocent party took reasonable steps to minimize the losses incurred, the court may consider: the circumstances of the real estate market at the time; how long it took for the innocent party to place the property for sale; how long the property was for sale before it sold; how the property was marketed; at what price the property was relisted for sale; how the property was exposed for sale; whether there were any price reductions or other offers to purchase the property; and, how many other offers were made and their particulars: *Rosehaven Homes Ltd*, at para. 73. The onus lies on the innocent party to prove on a balance of probabilities that the damages sought are reasonable and flow from the breach claimed: *Rosehaven Homes Ltd*., at para. 74.

[28] I am satisfied that the plaintiff made reasonable efforts to resell the property for fair market value in a timely manner. The only delay after the aborted completion date was due to the defendants' request to have the Agreement revived. The real estate market in Ottawa in 2021, when the parties first entered the Agreement, was a seller's market. By September 2023, when the plaintiff had to resell the Property due to the defendants' breach, the market had taken a significant downturn. The plaintiff remarketed the Property almost immediately and exposed it to over thirty thousand prospective purchasers. Though the plaintiff initially received twenty-five submissions on the Property, they did not immediately resell the Property to the highest bidder. They waited for a higher offer. The plaintiff exercised due diligence in conducting a detailed review of recently sold homes, both in the plaintiff's local development and others. The plaintiff sold the home on October 12, 2023, for $600,000, approximately one month after the plaintiff's learned that the Agreement with the defendants would not be revived. In my view, the plaintiff acted with prudence and dispatch.

[29] Having found that the plaintiff fulfilled its duty to mitigate, I am prepared to assess the damages as the difference between the purchase price in the Agreement and the ultimate resale price of the Property. The contract price of the Property exclusive of HST was $676,050. The resale price of the Property exclusive of HST was $552,212. This creates a shortfall of $123,838.00, excluding HST.

[30] The plaintiff also seeks the following ancillary damages flowing from the breach of agreement:

- $495 plus HST for photography expenses associated with remarketing the Property
- $15,000 plus HST for real estate commissions associated with reselling the Property
- $920 plus HST for legal fees

[31] I am satisfied that these costs flow from the defendants' failure to close the transaction and are reasonable in the circumstances.

[32] A reduced HST rate of 11.5% will apply to account for features of the new housing HST rebate scheme and the agreement of purchase of sale. The total damages will be deducted by $55,000 to account for the deposits paid by the defendants.

Conclusion

[33] For the above reasons, default judgment is granted in favor of the plaintiff against the defendants, on a joint and several basis, in the amount of $101,382.10, plus prejudgment interest accruing from August 24, 2023, in accordance with the *Courts of Justice Act*, R.S.O., 1990, c. C.43, s. 128.

[34] I fix additional costs payable at a partial indemnity rate in the amount of $2500, inclusive of HST.

Justice K. McVey

Released: April 5, 2024

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