

# Court of King's Bench of Alberta

**Citation: Nagorniuk v Prominent Homes Ltd, 2024 ABKB 57**

**Date:** 20240130  
**Docket:** 2203 16763  
**Registry:** Edmonton

Between:

**Oksana Nagorniuk**

Applicant

- and -

**Prominent Homes Ltd**

Respondent

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**Endorsement  
of  
Applications Judge B.W. Summers**

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[1] In morning chambers the Applicant applied for an order that the Respondent return to her the deposit of \$46,500.00 that she had paid to the Respondent with respect to her purchase of one-half of a duplex that was to be built by the Respondent. As there were competing affidavits and transcripts of cross examination on affidavits and undertakings and a transcript of cross examination on undertakings that I wanted to review, I asked each counsel to submit a brief memorandum of argument with the evidence material. I have now had the opportunity to review all of the evidence and the memoranda.

[2] The written agreement between the parties dated January 26, 2022 (“Agreement”) provided for a closing on September 12, 2022. Clause 15.1 of the Agreement provided that the contract was the entire agreement between the parties and any collateral or side agreement or representation or warranty was not a part of the contract unless it was made in writing.

[3] The Agreement did not close on September 12, 2022. The Respondent contended that the closing was actually supposed to have been 35 days after the Respondent provided notice to the Applicant and the Applicant would have known this because this was a new build and not the sale of an existing residence. The Respondent says that the form of contract used in this case was for the sale of an existing residence and this was a mistake.

[4] The Applicant requested that the Respondent return her deposit to her when she found out in September of 2022 that the sale would not close for a number of months.

[5] The evidence before me was that the Respondent would have returned the deposit to the Applicant, but the Respondent had already paid the realtor a commission of \$17,460.45. This commission was paid by the Respondent well before closing and well before there was any obligation to pay the realtor.

[6] The Respondent contends that the Applicant was estopped from requiring a closing date of September 12, 2022 because the realtor, as agent for the Applicant, had advised the Respondent in March of 2022 that the Applicant was agreeable to extending the closing date. The Respondent says that this was done when the Applicant agreed to a price increase from \$465,000.00 to \$499,000.00 because of increased construction costs.

[7] The Applicant testified that she had only agreed to the increased price, as reflected in the signed Addendum to the Agreement and that she never knew that the Respondent wanted to delay the closing date, nor did she ever agree to it.

[8] I find that the Applicant is not estopped from enforcing the closing date of September 12, 2022 set out in the Agreement. The purpose of Clause 15.1 of the Agreement is to prevent arguments, such as the one raised by the Respondent now. If the Respondent wanted a contractual agreement to change the closing date, it was required to seek it in writing. If it was in fact agreed to when the price was increased from \$465,000.00 to \$499,000.00, that should have been put in the Addendum. It was not put in the Addendum. In fact, the Addendum specifically stated: "All other terms and conditions in the contract remain unchanged."

[9] Furthermore, I find that the Respondent's payment to the realtor was gratuitous as there was no legal obligation on the part of the Respondent to pay the realtor when it did.

[10] The Respondent's contention that this proceeding should not have been brought by Originating Application because there were issues and evidence that made the case unsuitable for this type of proceeding is not accepted. This application dealt with the interpretation of a written agreement. I found that whatever the realtor may have said to the Respondent did not impact on the interpretation of the Agreement.

[11] The Applicant is entitled to judgment in the amount of \$46,500.00 plus interest. Pursuant to clause 12.1 of the Agreement, the Applicant is entitled to be paid costs of this proceeding on a solicitor and client basis.

Heard on the 8<sup>th</sup> day of December, 2023.

**Dated** at the City of Edmonton, Alberta this 30<sup>th</sup> day of January, 2024.

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**B.W. Summers**  
**A.J.C.K.B.A.**

**Appearances:**

Avnish Nanda  
Nanda & Company  
for the Applicant

Brian G. Doherty  
Doherty Schulhaus LLP  
for the Respondent