CITATION: 2511899 Ontario Inc. v. 2221465 Ontario Inc., 2024 ONSC 4159
COURT FILE NO.: CV-16-565210
DATE: 20240724

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
2511899 ONTARIO INC. Plaintiff	*Jonathan Rosenstein*, for the Plaintiff
– and –	
2221465 ONTARIO INC, and 2518929 ONTARIO INC. Defendants	*Shawn Tock*, for the Defendants
	HEARD: May 14-17, 2024 and May 20-23, 2024

JUSTICE POLLAK

REASONS FOR DECISION

[1] This was originally an application for damages for the alleged breach of an Agreement of Purchase and Sale ("APS"), which was subsequently converted into a trial.

[2] The Plaintiff, 2511899 Ontario Inc., is a numbered company that entered into an APS to purchase a gas station from the Defendants, 2221465 Ontario Inc. (the "Seller"), whose principles are Alex Shcolyar ("Alex") and his son Gil Shcolyar ("Gil").

[3] The Seller is in the business of buying, improving and selling gas stations. Alex testified that they have owned approximately 150 stations.

[4] Both parties retained Mr. Mirza Chaudry ("Mirza") as a dual real estate agent. All negotiations took place through him, as the agent for both parties.

[5] The Seller bought a gas station located on Derry Road in 2012, and obtained a site plan and building permit for the gas station.

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[6] In 2016, the Seller told real estate agents, including Mirza, about the gas station it had for sale.

[7] Mirza advised his friend Mr. Masud Raja ("Masud"), a business consultant, about the Property. Masud has a large group of investors as he has many years of expertise in the acquisition, development, and resale of gas stations.

[8] Three of Masud's investors were interested in the gas station: a foreign investor, Mehrouz Shababi ("Mehrouz"), a local gas station operator, Tahir Mehmood Raja, who is Masud's younger brother, and a local investor, Noreen Asghar.

[9] Masud's investor group, through the Plaintiff corporation as their "investment vehicle", advised Mirza that they were interested in making an offer to buy the Property.

[10] Mirza testified that he discussed potential terms of that offer with Alex prior to making a formal offer. One of the terms discussed in advance, according to both Mirza and Alex, was the absence of a financing condition, and a stipulation that Petrogold (another company owned by Alex and Gil) would provide most of the purchase financing by way of a Vendor Take-Back Mortgage (VTB).

[11] The important terms of the APS were:

a. *Purchase price*: $3,500,000

b. *Closing Date*: September 30, 2016

c. *Time of the Essence*: The pre-printed portion of the standard APS provides that "*time shall in all respect be of the essence hereof*".

d. *Financing Clause*:

i. The parties noted explicitly that there would be no financing condition. Instead, the Seller would finance the majority of the purchase price.

ii. Buyer had proposed that "Seller will provide a VTB of remaining amount". Because the Buyer was to pay a total of $700,000 at closing, the evidence was that the "remaining amount" was $2,800,000.

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iii. In its counteroffer, the Seller changed this to "Seller will provide a VTB of **$1,800,000**". There is a minor factual dispute over who *proposed* the change from "remaining" to "$1,800,000": Mirza testified that it was Alex who proposed it, while Alex testified in chief that it was Mirza's idea.

iv. Mirza testified, and Alex agreed, that the change was to accommodate the fact that:

1. The existing mortgage on the property (the "Caledonia Mortgage") with a balance of $1,000,000 was on title;

2. The parties thought that it could be assigned to the Plaintiff; and

3. Assignment would reduce the amount which the Seller would have to provide by way of VTB.

e. *Vacant Possession*: The Seller confirmed that the only impediment to vacant possession was a tenant, whose lease would expire at the end of 2016.

f. *Environmental*:

i. Seller acknowledged that the property is free of contamination "as per the latest MOE standard and acceptable to the bank (BMO or RBC)"

ii. This warranty was separate and apart from the obligation to deliver a "Clean Phase II Environment Report".

g. *Lawyer Review Clause*: the parties agreed that the Buyer had a ten-day period from acceptance in which to get out of the deal. If the clause was not waived within 10 days, the APS automatically lapses.

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h. *Initial Deposit*: A $100,000 deposit was paid to Mirza prior to acceptance.

i. Additional Deposit: Sch A. provides

> Buyer and seller acknowledge that buyer will provide an **additional deposit of $100,000** to the Seller after waiving the lawyer review clause. The additional deposit will the used towards the purchase price of the property and will be registered on the property by the buyer (referred to as the second deposit below).

[12] The parties then amended the APS. The parties agree that the First Amendment to the APS:

- extended the closing date from September 30, 2016 to October 30, 2016;
- changed the address of the property in the APS from 1175 Derry Road East to 1165 and 1175 Derry Road East;
- included a financing clause for the first time (the "Financing Clause"); and
- triggered the payment of the second deposit.

[13] The second deposit was either not accepted or received by the Defendant. The Plaintiff claims that Alex refused to accept the funds and that he demanded more money to close the sale.

[14] The financing clause provides:

> Seller and Buyer acknowledge that buyer will provide $700,000 in total as down payment. Seller will arrange the remaining as first mortgage on third party mortgage conditions and as VTB combine totalling $2,800,000. VTB will be at 8% annual interest for one year fully open. Interest of VTB will be payable at the maturity date.

[15] The Seller submits that its only obligation was to arrange a first mortgage, and that "arranging" includes making introductions to lenders.

[16] I find that as the parties agreed that there was to be no financing condition and testified that the Buyer needed to pay only $700,000 of the purchase price at closing, the words "arrange the remaining" must mean that it was the responsibility of the Seller to provide the remaining financing, through third party mortgages and/or VTB, to ensure that all of that required financing was available at closing.

[17] I do not accept the Defendant's submission that its only obligation to "arrange financing" was fulfilled by providing the Plaintiff with contact information for potential lenders. Alex attended at least one meeting with the Plaintiff's representative and a mortgage broker to discuss

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the sale and he made other attempts to secure financing as well. However, the lenders did not agree to finance the sale. The Plaintiff, through the parties' joint agent Mirza, sought to extend the closing date by submitting a second proposed amendment dated November 1, 2016 (the "Second Proposed Amendment").

[18] The Second Proposed Amendment was not accepted by the Defendant.

[19] The Second Proposed Amendment also contained a term that required the Plaintiff to remit a payment of $600,000 to the Defendant on or before November 10, 2016. The evidence shows that on November 1, 2016, Alex sent a text to Mirza, advising "we discuss that they pay 600k now […] This is not an amendment."

[20] The sale did not close on October 31, 2016. The Plaintiff did not have real estate counsel and did not tender on the Defendant on the closing date of October 31, 2016.

[21] The Plaintiff submits that there is no evidence that the Defendant was "ready, desirous, prompt and eager" to close on October 31, 2016. The Defendant's evidence is that the closing also required its own solicitor to make preparations. The only obligation of the Plaintiff at closing was to pay the $700,000. The remaining obligations were those of the Defendant to provide required financing at closing.

[22] Gil testified that in order to grant a VTB mortgage, a "VTB agreement" would have to be prepared, and that such was not prepared by the Defendant. I find that because the Plaintiff did not have any financing, the Defendant's obligation at closing was to provide a $2.8 million VTB mortgage.

[23] As well, the APS required that title be conveyed "free and clear", but the Caledonia Mortgage remained on title on October 30, 2016. There is no evidence that any preparations had been made – or that the Defendant was ready to have *that* mortgage discharged from title. The only evidence on that issue was that the Defendant was able to discharge that mortgage when the gas station was subsequently sold.

[24] After the Plaintiff's failure to close the transaction on October 30, 2016, or to extend the transaction by amendment, the Defendant contacted another buyer for the gas station, the former defendant 2518929 Ontario Inc. (the "New Buyer"). The New Buyer was operated by Noor and Amin Nawzorada, with whom Alex and Gil testified they had a lengthy professional relationship.

[25] On November 5, 2016, the Defendant entered into a new APS for the gas station with the New Buyer (the "New Agreement"). The New Agreement was also for a purchase price of $3,500,000 and had a closing date of December 15, 2016.

[26] Despite having entered into the New Agreement, Alex met with Mirza and representatives of the Plaintiff at a Starbucks on November 8, 2016 in an effort to resolve their dispute (the "Starbucks meeting"). The parties could not agree. They retained counsel and further offers to resolve the dispute were exchanged.

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[27] The parties were still unable to agree on terms to close the transaction, and on January 4, 2017, the Defendant entered into another APS with the New Buyer (the "January Agreement"). The sale to the New Buyer closed on January 20, 2017.

[28] Alex and Gil testified that, in their view, after October 30, 2016, when there was no closing, the APS was no longer in effect, and they were permitted to sell the gas station to the New Buyer.

[29] Alex was asked, in chief and on cross, when he first told Mirza that the Seller was taking the position that the APS had been terminated as a result of the Buyer's failure to close the transaction on October 30. Alex testified that he first advised Mirza that the Defendant considered the APS to be terminated *after* the Starbucks meeting, which took place on November 8, 2016.

[30] The parties agree that the APS, as amended, provided for a closing on October 30, 2016 and that there was no closing on October 30, 2016. Further, neither party tendered or prepared to close.

[31] The evidence supports a finding that either the parties agreed not to attempt to close and/or that neither party was willing to close. As a result, time was no longer of the essence and either party could reinstate time of the essence on reasonable notice.

[32] The Plaintiff submits that the effect of the absence of financing, Alex would have to pay $300,000 in order to sell it to the Buyers.

[33] The Plaintiff submits that it was not required to tender or to prepare to close on October 30, 2016. Further, it argues that even if it had been in breach on October 30, 2016, as the Defendant submits, the APS did not come to an end on that date because the Defendant was also not ready, willing and able to close.

[34] However, on the basis of the evidence I have referred to above, I find that there is no evidence that the Seller was ready and willing to close.

[35] The Defendant's position is that the plaintiff breached the APS by failing to remit the Second Deposit and failing to close on October 31, 2016.

[36] The Plaintiff submits that as a result time was no longer of the essence and that the Defendant therefore had no right to terminate the APS on November 9, 2016. Defendant's counsel wrote a letter dated November 9, 2016 to the Plaintiff repudiating the APS, on the basis of the Plaintiff's failure to close and the failure to pay the additional deposit.

[37] In the case of *Domicile Developments Inc. v. MacTavish* (1999), 175 D.L.R. (4th) 334 (C.A.), at para. 12, the Court of Appeal cautioned that when the "innocent" party declares that an APS is terminated because of the failure of the other party to close, the "innocent" party had better be sure that it is right; because:

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> a party who is not ready to close on the agreed date and who subsequently terminates the transaction without having set a new closing date and without having reinstated time of the essence will itself breach or repudiate the agreement.

[38] I find that as the Seller was not ready to close, it was in breach of the APS. Either party therefore had the right to restore, time is of the essence and set a new closing date on reasonable notice to the other.

[39] The Defendant denies that there was an oral agreement between the parties to not attempt to close on the Closing Date, and that any such agreement could not be enforceable for lack of consideration and as a result of the term of the APS that required all amendments to be in writing. It submits that time always remained of the essence, and that if it was not, it was never properly reinstated by the Plaintiff, rendering the transaction null and void. Finally, it is submitted that the Plaintiff has not suffered any damages and failed to take any steps to mitigate its damages.

The Additional Deposit (Second Deposit)

[40] In addition to its reliance on the Plaintiff's failure to close on October 31, 2016, the Seller relies on the fact that the APS required that the Additional Deposit of $100,000 be paid *on the same day* that the Lawyer Review Clause was waived and that it was never deposited into the Sellers own account.

[41] Mirza testified that at or about the time that he prepared the First Amendment (which had the effect of waiving the Lawyer Review Clause), he asked Tahir to provide him with $100,000, so that he could pay the additional deposit. He testified that Alex told him that he did not want the additional deposit of $100,000 because he wanted more money, which he would need for an upcoming closing.

[42] The evidence was that Alex needed $600,000 to purchase the Kennedy Road property. If the sale of Derry Road had closed on October 31, 2016, Alex would have had the required $600,000. At trial, Alex testified that he wanted to avoid any risk that might prevent a sale of the gas station. He admitted he rushed the sale to the New Buyer before the Plaintiff could seek a CPL in January of 2017. Had Alex accepted the Additional Deposit, the APS provided that the additional deposit would have to be registered on title, which would adversely affect a sale to the New Buyer.

[43] Tahir testified that Mirza asked him for the $100,000, and that he prepared a cheque for $100,000, drawn on the account of Good Guys Gas Bar, the business he owned with Noreen Asghar, payable to the Sellers lawyer and that he gave it to Mirza. Tahir produced a photocopy of a cheque stub, showing that cheque #137 had been prepared for that purpose as well as a copy of the Good Guys Gas Bar bank statement for that month. The statement provided that there were sufficient funds in the account to pay for the $100,000 cheque; and that cheques numbered before 137 and after 137 were negotiated in that month.

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[44] Alex testified that he asked for the Additional Deposit a number of times and was told by Mirza that it was coming. Gil testified that he heard such a conversation on a telephone call between Alex and Mirza. However, at discovery, Alex had no recollection of his conversation with Mirza. As the evidence at the examination for discovery was given much closer in time to the event, I find that Buyer did attempt to pay this deposit to the Seller.

[45] There is no written communication between the parties regarding this deposit.

[46] I agree that unless time was of the essence to pay the $100,000, then the failure to pay the Additional Deposit, even if there was no agreement to defer it, would not affect the rights of the parties. The failure to pay was not a fundamental breach and was not pleaded as such.

[47] Further, in any event, Tahir testified that Mirza, as a dual agent, told him the Defendant did not want the Additional Deposit. Mirza who was acting as the Defendant's agent, made a representation on which the Plaintiff was entitled to rely, and did rely. As a consequence, there was either an agreement to change the parties' obligations, or the Defendant is estopped from enforcing compliance with the payment provision.

[48] Shortly after the Starbucks meeting, the Plaintiff sent a letter, from litigation counsel, to the Defendant's solicitor, advising of its concern that the Defendant was in the process of selling the gas station to another party and rejecting the repudiation of the APS.

[49] The Defendant thereafter made several attempts to propose new terms on which the Sale could be completed. I agree that such negotiations are legally irrelevant to the obligations of the parties.

[50] On November 14, 2016 the Plaintiff advised that it would be seeking an immediate CPL. The Defendant requested a pause to see if a settlement could be reached. On December 2, the Plaintiff insisted that counsel cooperate in scheduling the CPL motion hearing. The Seller's lawyer advised that a settlement was imminent.

[51] From late December 2016 until January 20, 2017, Mirza continually asked for updates on the negotiation to resolve the dispute, with no response from Alex. On January 4, 2017, the Seller entered into a second APS with the New Buyer, to close on January 15, 2017

[52] On January 18, the Plaintiff again insisted on a CPL on consent, failing which it would be sought in Court on an urgent basis. Alex then wrote to the New Buyer advising "See how urgent we have to close the property". A few minutes later, he gave instructions to his lawyer to set up a meeting several days later with the Plaintiff, a meeting he had previously discussed with Mirza.

[53] On January 20, 2017, the Seller closed the sale of the gas station to the New Buyer, notwithstanding that outside financing (from a company called Mijar) was not yet available, and notwithstanding that they had adjourned the January 15 closing because they wanted to wait for Mijar to advance financing before closing.

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[54] At trial, Alex admitted that he changed his plans because he was concerned that the Plaintiff might be successful in its motion for a CPL, and wanted to make sure that he had disposed of the Property before that could happen.

[55] On the basis of the above noted evidence, and the submissions made by the parties, I find the Defendants' position that the APS had been terminated as a result of the Plaintiff's failure to close cannot succeed. As the Defendant was also not ready, willing and able to close, it had no right to take such a position. I find that it was the Defendant who was in breach of the APS on the closing date because it had not arranged for sufficient financing, which was the Defendants obligation pursuant to the APS.

[56] The Plaintiff did not accept the Defendant's repudiation of the APS. However, the Defendant was able to sell the property to the New Buyer. The Plaintiff claims damages for breach of the APS by the Defendant. As I have found that Defendant was in breach of the APS, the Plaintiff is entitled to damages for that breach.

[57] The Defendant submits that the Plaintiff has suffered no damages and that if it has, it has failed to mitigate those damages.

[58] The Plaintiff argues that it ought to be entitled to the difference between the value of the Property at the date of purchase and the post-construction value of the Property. The New Buyer sold the newly renovated gas station in 2018 for $7,100,000. The Plaintiff relies on evidence which it seeks to introduce as to the construction costs spent by the New Buyer on the renovated property. The Plaintiff calculates its lost opportunity damages at $2,300,000.

[59] The Defendant submits that after the date of the breach, the onus is on the Plaintiff to satisfy this Court that a different date for the assessment of damages (i.e., not the closing date) would be appropriate.

[60] In the case of *Rosseau Group Inc v. 2528061 Ontario Inc.*, 2023 ONCA 814, the Court of Appeal held, at paras. 62-65:

> The normal measure of damages for a failed real estate purchase is the difference between the contract price and the market value of the land on the "assessment date". The assessment date is usually the date on which the purchase was scheduled to close. Although the court may set a later date if the party seeking damages satisfies certain criteria, the presumption is that damages are to be assessed as of the date of the breach. That presumption is not easily displaced; any deviation from it must be based on legal principle.
>
> There are several reasons why the normal measure is the presumptive, measure of the innocent party's damages and is not to be easily displaced.
>
> First, when a purchase contract is performed, the purchaser pays the purchase price on closing and obtains, on the same date, ownership of an asset. Damages are awarded on the principle that the innocent party, as nearly as possible, should

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> be put in the position it would have been in if the contract had been performed. Using, as the measure of damages, the difference between the purchase price and the land's market value on the closing date puts this principle into effect. The market value represents the financial equivalent of the asset itself.
>
> Second, commercial certainty is enhanced by a predictable damages methodology. This court has stated that an early, and predictable, date on which the innocent party's damages are crystallized promotes efficient behaviour and reduces uncertainty and speculation. Although made in the context of a sale of goods, the observation applies equally to the sale of land. [Citations omitted.]

[61] I agree with the Defendant's position that the evidence does not support the Plaintiff's position on the later date of the valuation of the gas station.

[62] The evidence provided by Tahir was that he wanted to keep the gas station on a long-term basis. Neither Noreen nor Shababi testified to provide evidence of their intentions. The Defendant submits that as the evidence is that the plaintiff purchaser was not a gas station speculator, but a long-term investor, the proper measure of damages is the value of the gas station at the date of the breach.

[63] Alternatively, the Defendant says that the evidence on which the Plaintiff relies is not probative or reliable. The Plaintiff has not provided evidence of the costs it would have incurred to rebuild the gas station, including the cost of borrowing. Rather, the Plaintiff relies on the evidence of the New Buyer regarding the construction financing obtained as the amount that it would have cost to rebuild the station.

[64] Further, this evidence is contained in a transcript of sworn evidence of the cross-examination of Noor Nawrozada, the representative and principle of the Defendant, 2518929 (the New Buyer) who has settled this action with the Plaintiff. The remaining Defendant had advised that it would be calling this witness as part of its case, however, it advised the Plaintiff that it was told that the witness is no longer in this Court's jurisdiction, approximately three weeks before this trial. The Plaintiff planned on relying on his evidence regarding the profit made from the purchase and renovation of the gas station that was the subject of the APS.

[65] The Plaintiff's position is this hearsay evidence ought to be admitted under the principled exception to the hearsay rule. The Defendant objects to the admissibility of this evidence as the Plaintiff has not established that these out of court sworn statements meet the established legal requirements of necessity and reliability.

[66] The Defendant believes that Mr. Nawrozada is likely out of the country, but emphasizes that no steps were taken by either party to locate Mr. Nawrozada. There is no evidence that any steps were taken to confirm that the information given to the Defendant's counsel is accurate. I agree that as a result, the requirement of necessity has not been established.

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[67] The Plaintiff could have called an expert witness to testify on the value of the lost opportunity for the Plaintiff and expert opinion evidence on the value of the land either on the date of the breach of the APS or some other appropriate date.

[68] Further, I find that the "reliability" requirement has also not been met. As a result, the Plaintiff has not satisfied the second step of the principled exception.

[69] The Defendant also relies on the fact that the evidence was obtained during a cross-examination wherein the Plaintiff was attempting to establish facts that could have harmed the witness' (who was then a defendant) case, fostering a potential desire to tailor or fabricate his evidence, undermining his reliability.

[70] The remaining Defendant did not and will not have an opportunity to cross-examine the former Defendant on the proposed evidence.

[71] I find that the Defendant would be significantly prejudiced if the transcript were admitted for the truth of its contents and the Defendant was deprived of the opportunity to test that evidence.

[72] I find that this prejudice to the Defendant outweighs any prejudice to the Plaintiff, who did not make efforts to locate the witness and who, in my view, could have introduced other evidence to prove its damages, as I have referred to above.

[73] As well, this evidence in the transcript does not include the cost of the Plaintiff's potential borrowing or the deposits borrowing cost details, nor does it account for any differences of construction costs.

[74] An innocent purchaser is compensated for the loss of the market value of the purchase price of the property which takes into account the fact that the land can be developed.

[75] In the absence of evidence from the Plaintiff on its lost opportunity damages, I agree with the Defendant that damages must be calculated based on the market value of the gas station at the date of the breach, namely $3,500,000, as compared to the sale price of $3,500,000 to the New Buyer. The evidence is that the value of the land as at the date of the breach (the October 31, 2016 date) is $3,5000,000 as compared to the value of $3,500,000 on the date of the sale to the New Buyer of $3,500,00). I therefore find that the Plaintiff has not met its burden of proving it has suffered damages as a result of the Defendant's breach of the APS. I therefore dismiss the Plaintiff's claim for damages.

Mitigation

[76] Finally, the Defendant submits that even if the Plaintiff was entitled to damages, the evidence demonstrates that it took no steps to mitigate those damages by purchasing another gas station property. As I have found that the Plaintiff has not proven damages it is not necessary for this Court to adjudicate on this issue.

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Costs

[77] In light of the fact that I have found that it was the Defendant that breached the APS and that the Plaintiff would have been entitled to any damages it suffered, I find that is just and equitable, having regard to the factors set out in the *Rules* and in *Boucher v. Public Accountants Council (Ontario)* (2004), 71 O.R. (3d) 291 (C.A.), that each party bear its own costs of this litigation. I therefore make no cost award to either party.

[78] If the parties are unable to agree on the amount of costs to be paid to either party as a result of the consequences set out in the ***Rules* with respect to a consideration of offers to settle,** the Defendant may make submissions of no more than two pages, double spaced, served on the Plaintiff and uploaded to caselines with a copy to my assistant by 12 p.m. on August 2, 2024. The Plaintiff may make submissions of no more than two pages, double spaced, served on the Defendant and uploaded to caselines with a copy to my assistant by 12 p.m. on August 14, 2024. No reply submissions will be accepted. If the cost submissions are not received within this timeline and in the manner set out herein, the issue of costs will be considered as having been settled.

Justice Pollak

Released: July 24, 2024

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REASONS FOR DECISION

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