COURT OF APPEAL FOR ONTARIO

CITATION: Switzer v. Petrie, 2024 ONCA 474
DATE: 20240612
DOCKET: COA-23-CV-1108

Miller, Zarnett and Copeland JJ.A.

BETWEEN

Lloyd Switzer and Violet June Switzer

Plaintiffs (Respondents)

and

Scott Petrie and Kathleen Petrie

Defendants (Appellants)

Rod R. Refcio and William T.J. Chapman, for the appellants

Matthew J. Jantzi, for the respondents

Heard: June 7, 2024

On appeal from the judgment of Justice Spencer Nicholson of the Superior Court of Justice, dated September 11, 2023, with reasons reported at 2023 ONSC 5115.

REASONS FOR DECISION

[1] This litigation arises from a failed residential real estate transaction. We dismissed the appellant purchasers' appeal at the conclusion of oral submissions, with reasons to follow. These are our reasons.

[2] The parties entered into an agreement of purchase and sale (the "APS") on May 14, 2022, for a purchase price of $810,000. The appellant purchasers provided a $15,000 deposit. The closing date was to be July 14, 2022, but on July 4, the appellant purchasers notified the respondent vendors that they would not be closing.

[3] The next day, the respondent vendors re-listed the property for $699,900, which was the listing price when the appellant purchasers made their offer of $810,000. On July 19, 2022, the respondent vendors accepted an offer to purchase of $600,000 from a third party. That transaction closed on August 19, 2022. It was the only offer the respondent vendors received after re-listing.

[4] The respondent vendors brought the action below seeking damages for breach of contract for the differential between the sale price in the APS and the sale price to the third-party purchaser, plus various transaction costs of the failed transaction.

[5] The respondent vendors were successful on a motion for summary judgment. The appellant purchasers did not dispute that they breached the APS. The only live issues were whether the respondent vendors mitigated their damages

and whether the matter was suitable for summary judgment. The appellant purchasers argued that the sale was improvident and faulted the respondent vendors for listing the property for re-sale below fair market value and accepting the first offer they received. The appellant purchasers also resisted the motion for summary judgement on the basis that the mitigation issue required a full trial.

[6] The motion judge found that a full trial was not necessary and granted summary judgment in favour of the respondent vendors. He was content that the price obtained on the third-party sale represented the fair market value.

[7] On appeal, the appellant purchasers renewed their argument that a trial of the issue was required and that the respondent vendors did not make reasonable efforts to mitigate their losses. We do not agree in either respect.

[8] First, with respect to the appropriateness of proceeding by way of motion for summary judgment, the motion judge made no error in determining that a trial was not necessary. It was open to the appellant purchasers on the summary judgment motion to lead expert evidence as to fair market value, or to adduce evidence as to the inadequacy of the respondent vendors' sale efforts including by cross-examination on affidavits. They did none of those things. Parties to a summary judgment motion are required to put their best foot forward, and a motion judge hearing a summary judgment motion is entitled to proceed on the basis that

the parties have put into the record all of the evidence that would be forthcoming at trial.

[9] The appellant purchasers also argued that the motion judge should have followed the process in *Marshall v. Meirik*, 2021 ONSC 1687, where the motion judge, due to the "unusual circumstances" of the third party re-sale, directed the parties to adduce further evidence about mitigation efforts in a mini-trial. In our view, the motion judge made no error in not adopting the process from *Marshall v. Meirik*. Contrary to the appellants' submissions *Marshall* does not stand for the principle that in any case where a purchaser resisting summary judgment submits, without evidence, that an inference of improvident sale could be drawn, the onus shifts to the vendor to lead evidence in a mini-trial to negate the inference. While the unique or unusual circumstances referred to in *Marshall* may ground a motion judge's discretionary decision to require further evidence, they do not obligate the motion judge to request further evidence nor do they reverse the onus. We see no reviewable error.

[10] Second, it was open for the motion judge to conclude that the appellant purchasers did not satisfy their onus of establishing that the sale was improvident. The motion judge did not err in declining to draw the inferences the appellant purchasers invited him to draw from the fact that the purchase price of the third-party sale was significantly below the price that the appellant purchasers were initially (but not ultimately) willing to pay, the timeline of the resale to a third party,

and the absence of any evidence of marketing efforts and negotiations with the third party purchasers in aid of securing a better price. The appellant purchasers are unable to point to any palpable and overriding error that would allow appellate interference.

DISPOSITION

[11] The appeal is dismissed. The respondents are awarded costs of the appeal in the amount of $5,000, inclusive of HST and disbursements, as agreed between the parties.

"B.W. Miller J.A."
"B. Zarnett J.A."
"J Copeland J.A."