

COURT OF APPEAL FOR ONTARIO

CITATION: M.T. Johnstone Construction Ltd. v. Rashidi, 2024 ONCA 670

DATE: 20240909

DOCKET: COA-23-CV-1385

Pepall, Miller and Wilson JJ.A.

BETWEEN

M.T. Johnstone Construction Ltd.

Plaintiff
(Respondent)

and

Wasif Rashidi a.k.a. Rashidi Wasif

Defendant
(Appellant)

Wasif Rashidi, acting in person

Michael McCluskey, for the respondent

Heard: September 3, 2024

On appeal from the order of Justice Helen A. Rady of the Superior Court of Justice, dated November 21, 2023, with reasons at 2023 ONSC 6592.

REASONS FOR DECISION

[1] The morning of the appeal, the appellant sought an adjournment on the basis of ill-health. Specifically, he informed the court that he had high blood pressure and a diabetic condition, and that he was experiencing a high heart rate. No documentation was provided in support of his request. The respondent

opposed the request, noting the appellant had made a similar request prior to the initially scheduled hearing of the underlying motion for summary judgment, leading to an adjournment.

[2] We denied the request for an adjournment and gave the appellant the option of proceeding either on the basis of oral submissions or in writing, relying on the appeal materials filed.

[3] The appellant chose not to proceed with oral submissions, and the respondent consented to having the matter heard in writing. The appeal was accordingly heard on the basis of the parties' written submissions. As explained below, the appeal is dismissed.

Factual overview

[4] The appellant entered into an Agreement of Purchase and Sale for a residential property in Mount Brydges, Ontario, with a purchase price of \$998,230 (the "APS").

[5] The appellant was unable to obtain financing and on the closing date, September 1, 2022, advised he would not complete the purchase. He received a one-day extension but remained unable to close. There was no financing condition in the APS.

[6] The respondent relisted the property at the original list price. After 30 days without receiving an offer, it relisted the property at the reduced price of \$950,000.

On November 30, 2022, the property was sold for \$815,000, following an initial offer of \$800,000. The sale closed on January 20, 2023.

[7] The respondent was successful on a motion for summary judgment and was awarded \$151,470.65 in damages. The damage award consisted of \$102,150.44, representing the difference between the pre-tax sale price less the appellant's \$60,000 deposit, plus an additional \$49,320.21, representing the respondent's carrying costs, interest, and sale expenses connected with its efforts to mitigate damages by reselling the home. The respondent was also awarded costs of \$14,826.67.

Analysis

[8] The appellant advances several grounds of appeal, none of which have merit.

[9] The appellant's main argument is that he was promised orally by his realtor that he would be able to assign the APS, but the respondent would not honour this obligation. This argument failed in the court below, as the motion judge found that the realtor was acting as agent for the appellant and not the respondent, and accordingly any representation by the realtor – of which no evidence had been provided – could not bind the respondent. The APS did provide for the assignment of the agreement, but it required the consent of the respondent and a \$20,000

assignment fee. The appellant did not satisfy either of the two conditions. The motion judge made no error in finding there was no genuine issue for trial.

[10] The appellant's other main ground is that the motion judge erred in finding the respondent had properly mitigated its damages. The appellant bore the burden of proving that the respondent's efforts were unreasonable. The motion judge made no error in finding that the appellant had not satisfied this onus, and in holding that the respondent had acted reasonably to mitigate its damages.

[11] The appellant's remaining arguments are also unsuccessful. The motion judge made no error in rejecting the argument that the APS was frustrated by a change in the economy, and there was no credibility to, or evidence to support, an allegation of bias against the motion judge.

DISPOSITION

[12] The appeal is dismissed. The appellant is awarded its costs of the appeal in the amount of \$11,000 inclusive of disbursements and HST.

"S.E. Pepall J.A."

"B.W. Miller J.A."

"D.A. Wilson J.A."