CITATION: Shirzad v. Hussain et al., 2024 ONSC 5172
COURT FILE NO.: CV-22-167
DATE: 2024-09-19

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
FARHAD SHIRZAD	A. Thakkar, Counsel for the Plaintiff
Plaintiff	
- and -	
NARIESA HUSSAIN, AMERNAUTH PUNU, AND ANGELLA SEWPERSAUD	D. Paul, Counsel for Defendants, Nariesa Hussain and Amernauth Punu
	D. Thrasher, Counsel for Defendant, Angella Sewpersaud – Not appearing on this motion
Defendants	
	HEARD: August 15, 2024

REASONS FOR DECISION:
MOTION TO SET ASIDE NOTING IN DEFAULT

THE HONOURABLE JUSTICE L. C. SHEARD

Overview

[1] There were two motions filed with the court:

1) The plaintiff's motion for default judgment against the defendants, Nariesa Hussain and Amernauth Punu; and

2) The defendants' motion to set aside their noting in default on September 6, 2022.

[2] The defendants' motion was heard by me on August 15, 2024 and the plaintiff's motion was scheduled to proceed as a long motion at a later date; I am not seized of that motion.

[3] By way of brief Endorsement dated August 16, 2024, I dismissed the defendants' motion, with reasons to follow. These are my reasons.

Background

The Agreement of Purchase and Sale

[4] The plaintiff, Farhad Shirzad ("the Seller"), entered into an agreement of purchase and sale ("the APS") with the defendants, Nariesa Hussain ("Hussain") and Amernauth Punu ("Panu") (collectively, "the Buyers"), in respect of 122 Citrine Drive, Bradford, Ontario (the "Property").

[5] As per the APS, the purchase price was $2,275,000; the closing date was to have been August 1, 2022; and, within 24 hours of the Seller's acceptance of the Buyers' offer, the Buyers were to submit a deposit of $100,000 (the "Deposit").

[6] The Buyers' offer was submitted on April 11, 2022, and was accepted by the Seller on April 13, 2022. As per the APS, the Deposit was due within 24 hours of April 13, 2022.

[7] The Buyers did not pay the Deposit and the Buyers did not complete the purchase of the Property.

[8] In oral submissions on this motion, counsel for the Seller alluded to negotiations between the parties after the Buyers failed to pay the Deposit. However, evidence respecting the negotiations, if any, was not before me on this motion.

[9] It is unchallenged that the Seller ultimately sold the Property to a different buyer and at a price significantly lower than contemplated by the APS. The Seller sued the Buyers for the losses allegedly incurred by reason of the Buyers' breach of the APS.

The Litigation

Service of the Statement of Claim

[10] On their motion, the Buyers begin by asserting that the Statement of Claim was not served on Hussain on August 9, 2022. As for Punu, the Buyers assert that although service of the Claim was effected on August 11, 2022 in accordance with the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the "*Rules*"), the Claim did not come to Punu's attention until September 15, 2022, nine days after the Buyers were noted in default.

[11] The Seller denies the Buyers' assertion that the Statement of Claim was not served on Hussain, relying on the affidavit of service of the Seller's process server, Laurie Levine, that the Claim was personally served on Hussain.

[12] As for Punu, the Seller relies on the affidavit of service of a different process server, Ashley Shepherd, that she served Punu on August 11, 2022 by leaving a copy of the Statement of Claim with an adult person at his home.

[13] In his affidavit on the Buyers' motion, Punu asserts that from June or July 2022, he and Hussain were living with Punu's mother, Durpattie Punu ("Mrs. Punu"), at 12 Dean Street, Brampton, Ontario. Punu acknowledges that, as set out in Ms. Shepherd's affidavit of service, a process server did attend 12 Dean Court on August 11, 2022, and left a copy of the Statement of Claim with Mrs. Punu.

[14] Punu acknowledges that the Statement of Claim was properly served but asserts that Mrs. Punu forgot to tell him about it and that it did not come to his attention until September 15, 2022.

[15] Punu says that Mrs. Punu was an "elderly and sickly person in her sixties", whose native language is Guyanese Creole and who "very likely" did not understand what was said to her by the process server. To support his assertion that Mrs. Punu was "sickly", Punu filed a letter from the Kennedy Medical Clinic stating that Mrs. Punu had been a patient at that clinic since 2019 and was "being followed by Cardiology". He also provided a list of medications prescribed to Mrs. Punu which, Punu asserts, affect her memory.

[16] Hussain asserts that Ms. Levine swore a false affidavit, when she stated that she had served the Statement of Claim personally on Hussain on August 9, 2022, by leaving a copy with Hussain at her home in Kleinberg, Ontario. Hussain asserts that as of August 2022 she was residing with Punu at 12 Dean Street and, also, that she is certain that she was not at the Kleinberg address on August 9, 2022, because that is her birthday and she spent it with Punu at the Dean Street address.

[17] Hussein asserts that the Statement of Claim first came to her attention on September 15, 2022, when her mother, who was living at the Kleinberg property, gave her a copy of the Claim that had been served at that address on August 9, 2022.

Buyers do not Defend and are Noted in Default

[18] In reliance upon the affidavits of service sworn by Ms. Levine and Ms. Shepherd, the Seller submitted a Requisitions to the Local Registrar, requiring that the Buyers be noted in default, which was completed on September 6, 2022.

[19] In August 2023, the Seller sought to amend his Statement of Claim to add a third defendant, Angella Sewpersaud. The Amended Statement of Claim alleges that there was a

fraudulent conveyance of a property registered to Punu and Angella Sewpersaud as co-owners, to Angella Sewpersaud, as sole owner. A "courtesy copy" of the Seller's motion was served upon the Sellers.

[20] In their affidavits filed in support of their motion, Punu and Hussain both acknowledge that they were served with the Statement of Claim in August 2023, by the Seller's counsel, whereupon they contacted a lawyer, Mr. Satish Mandalagiri, to have him represent the Buyers.

[21] The Seller's evidence is that on or about August 29, 2023:

a) counsel for the Seller received a voicemail message from a lawyer, Satish Mandalagiri, who advised that he was calling on behalf of the Buyers. He inquired whether the Buyers had been noted in default and was advised that they had been;

b) Seller's counsel advised Mr. Mandalagiri that the Seller would be willing to set aside the noting in default, provided the Buyers served a Statement of Defence within 30 days;

c) the Buyers did not serve a Statement of Defence within 30 days, or at all; and

d) on October 2, 2023, the Seller's counsel spoke with Mr. Mandalagiri, who advised that he was unable to contact the Buyers.

Seller's Motion to Amend Statement of Claim

[22] The Seller's motion to add Angella Sewpersaud as a defendant was scheduled to be heard on or about March 20, 2024. In advance of that date, (current) counsel for the Buyers sought to serve a Notice of Intent to Defend on behalf of the Buyers. He was advised that the Buyers already had been noted in default.

[23] On March 22, 2024, the Seller's motion to amend the Claim was heard. Counsel for the Buyers attended the motion. The amendment was granted on consent of all present. At no time did the Buyers or their lawyer raise any issue with respect to the manner of service of the original Statement of Claim or dispute that service had been validly made.

Buyers' Motion to set aside Noting in Default

[24] The Buyers brought this motion, dated April 4, 2024, to set aside the noting in default.

[25] The Seller submits that this motion is the first time that the Buyers ever disputed that service of the Statement of Claim had been effected on Hussain on August 9, 2022 or that service of the Claim was not properly effected on Punu on August 11, 2022, and that the Buyers were improperly noted in default on September 6, 2022.

[26] The Seller says that the Buyers' first allegations respecting service were in their affidavits, filed in April 2024. The Seller submits that had the Buyers raised the issue of service at any time prior to April 2024, the Sellers could have, and would have, re-served the Statement of Claim and, again, noted the Buyers in default.

[27] The Buyers' motion to set aside the noting in default came before the court on June 28, 2024, but was not reached. On that date, the motions judge ordered that the motion be adjourned to July 5, 2024, the return date of the Seller's motion for default judgment.

[28] On July 5, 2024, the Buyers' motion, again, was not reached and was adjourned to the long motions list of August 6, 2024. The motions judge also adjourned the Seller's motion for default judgment to the long motions list of August 25, 2024. That the hearing date was to be vacated if the Buyers were successful on their motion to set aside the noting in default.

[29] A core ground of the Buyers' motion is their submission that they ought not to have been noted in default on September 6, 2022, because they did not have notice of the Claim until September 15, 2022 and that service was not effected until August 2023. For those reasons, the Buyers submit, the noting in default was invalid.

[30] At paragraph 24 of their factum, the Buyers also submit that they intended to defend the Claim in August 2023, when they "contacted" lawyer, Satish Mandalagiri, but that there was "a disruption in communications and the draft of the SOD was delayed" when each of Punu and Mr. Mandalagiri travelled out of Ontario. When Punu returned to Ontario and attended at Mr. Mandalagiri's office[1], he was told the file was in storage. In or around March 2024, the Buyers sought out other representation and retained their current counsel.

Cross-examination of Lavine

[31] The record before me on this motion includes a transcript of the cross-examination of Ms. Levine, on her affidavit of service sworn August 12, 2022, stating that she personally served the Statement of Claim on Hussain on August 9, 2022.

[32] The evidence put forth by the plaintiff is the usual Affidavit of Service completed by process servers. Ms. Levine's affidavit is sworn on August 12, 2022, and states that on August 9, 2022 at 3:15 p.m. she served Hussain with the Statement of Claim at 55 Tiburon Trail, Kleinberg, Ontario, L4H 3X3 by leaving a true copy with Hussain personally and that "I was able to identify the person by means of their verbal admission to me".

[33] The Buyers challenge the accuracy of this affidavit on these grounds:

[1] The Buyers did not offer dates on which Punu returned to Ontario or attended Mr. Mandalagiri's office.

a) that Ms. Lavine's statement that she identified Hussain because "**they** identified themselves to me", conflicts with the process server's Affidavit that service was effected on one person – i.e. Hussain (emphasis added);

b) that Hussain could not have been served at the Kleinberg address on August 9, 2022, because, Hussain asserts, she specifically recalls being elsewhere on that date, which is her birthday; and

c) when cross-examined on July 19, 2024, Ms. Levine, who by that date stated she had been a process server for 40 years, had no present recollection of who had answered the door on August 9, 2022, as it had been two years since service was effected.

[34] I note that while, on July 19, 2024, Ms. Levine had no present recollection of whether the person who answered the door was Hussain or whether she had asked the person who answered the door to have Hussain come to the door to be served, Ms. Levine stood by the accuracy of her affidavit of service and confirmed that she read it before signing it.

[35] There are two issues to be determined on this motion:

1. Was the Statement of Claim served on Punu? on Hussain? and, if so, when?
2. Have the Buyers met the test to set aside the noting in default?

Issue 1*:* Was the Statement of Claim served on Punu? on Hussain? and, if so, when?

i. Service on Punu

[36] The Buyers assert that as concerns Punu, the Statement of Claim did not come to his *attention* until after he was noted in default.

[37] I do not accept that submission. I find that service was valid and effected on Punu on August 11, 2022, in accordance with the *Rules* and that Punu was properly noted in default on September 6, 2022.

ii: Service on Hussain

[38] The Buyers assert that service was not effected on Hussain until August 2023, long after she had been noted in default.

[39] The Buyers submit that the evidence of Ms. Levine falls short of what is expected of a process server, relying on the decision of Price J. in *Helpfast Personnel Inc. v. Logistics Corporation and Allen Fracassi*, 2011 ONSC 2906 (CanLII). In that case, the process server had sworn an affidavit of service, stating that he had personally served the defendant, Allen Fracassi, on July 15, 2009 at 9:51 a.m. A little over a year later, the same process-server swore

a further, more detailed affidavit in which he stated that he had served the claim on July 14, 2009 at 4:58 p.m. by leaving a copy of the claim with Andrea Matina, a person who identified herself as the manager of the corporate defendant, and returned to that address the following day and served Mr. Fracassi personally.

[40] In *Helpfast*, the process server admitted that he did not confirm that the person with whom he had left the claim on July 15, 2009 was Mr. Fracassi, but that it was his practice to identify the person he intends to serve by using the person's name and then "by their response and body language" becoming "comfortable that they are the correct person to serve" before handing over the documents and advising them of what he was doing.

[41] Relying on the process server's affidavits of service, the plaintiff obtained default judgment against Mr. Fracassi, which he sought to set aside. Mr. Fracassi denied that he was served with the claim and asserted that he did not even learn of the judgment until July 12, 2010.

[42] At para. 26 of his decision, Price J. stated that he doubted that the claim left with Ms. Matina on July 14, 2009 would not have come to the attention of Mr. Fracassi on July 15. However, following the (unreported) decision in *Capmor Financial Corporation v. Rajendra Naraine*,[2] Price J. held that the protocol followed by the process server was unsatisfactory in that he failed to record any description of the person he served or the manner in which the person identified himself to the process server.

[43] Neither *Helpfast* nor *Capmor* are binding upon this court and I decline to follow them. However, the facts here are also distinguishable from those in *Helpfast.*

[44] In this case, Ms. Levine's evidence was that when serving documents, her practice was to identify who she was and what she was doing, i.e., seeking to effect service. Unlike in *Helpfast*, where service was effected at a corporate office, in this case, service on Hussain took place at a private home. In my view, this fact significantly undermines the argument that Ms. Levine was (or could have been) mistaken when she identified Hussain as the person on whom she served the Claim.

[45] Separately, I find that the language used in Levine's affidavit of service to be in keeping with wording commonly found in affidavits of service filed and relied on in matters before this court. I do not agree with the Buyers' submission that the use of the word "they" conflicts with Levine's evidence that she served one person. I find no deficiencies in Levine's manner of service nor in her affidavit evidencing service.

[46] In my view, it is entirely unsurprising that Ms. Levine had no specific recollection of serving Hussain on August 9, 2022. However, I accept her evidence as to the practice she followed as a process server, her stated profession of 40 years, and that she followed that

[2] (ON S.C. File No. 04171/09)

practice when she served Hussain. In my view, it would be unreasonable and unworkable to expect a process server to make a note of the description of every person they served, and, in any event, such a description would likely be unhelpful except in cases in which the person served had distinctive characteristics.

[47] I note that Hussain did not submit an affidavit from her mother concerning how the Statement of Claim found its way inside the Kleinberg home, nor whether, or why, she did not tell Hussain on August 9, 2022, or shortly thereafter, that she had been served with the Statement of Claim.

[48] The evidence is undisputed that the Buyers first took issue in April 2024 with the service of the Claim. Based on the record before me, as between the evidence of Ms. Levine, a disinterested, professional process server, and the evidence of the Buyers, who are seeking to avoid the consequence (to Hussain, at least) of having been noted in default, I choose to accept the evidence of Ms. Levine.

[49] I also consider the Buyers' evidence that they were served with the Claim in August 2023 and yet, when the lawyer they had consulted was told that they had already been noted in default, their lawyer never questioned the Seller's counsel about how the Buyers could have been noted in default when service had only been effected in August 2023. It is reasonable to find, which I do, that had service of the Claim not been effected until August 2023, as the Buyers now allege, that issue would have been raised by the Buyers and/or Mr. Mandalagiri in August 2023.

Disposition of Issue 1:

[50] Having considered all the evidence presented, and for the reasons set out, I accept the Seller's evidence that service of the Statement of Claim was validly effected on Punu on August 11, 2022 and on Hussain on August 9, 2022.

Issue 2: Have the Buyers met the test to set aside a noting in default?

[51] The Buyers' motion is governed by r.19.03 and 19.08 of the *Rules*.

[52] In oral submissions, the parties agreed that the test to be applied on this motion, was found, in part, in the 2015 Ontario Court of Appeal Decision in *Intact Insurance Company v. Kisel*, 2015 ONCA 205 ("*Kisel*"), a motion to set aside a default judgment.

[53] At para.13 of *Kisel*, the court stated:

> When exercising its discretion to set aside a noting of default, a court should assess "the context and factual situation" of the case: *Bardmore*, at p. 284 O.R. It should **particularly consider such factors as the behaviour of the plaintiff and the defendant; the length of the defendant's delay; the reasons for the delay; and**

> **the complexity and value of the claim.** These factors are not exhaustive. See *Nobosoft Corp. v. No Borders Inc.*, [2007] O.J. No. 2378, 2007 ONCA 444, 225 O.A.C. 36, at para. 3; *Flintoff v. von Anhalt*, [2010] O.J. No. 4963, 2010 ONCA 786, at para. 7. Some decisions have also considered whether setting aside the noting of default would prejudice a party relying on it: see, *e.g.*, *Enbridge Gas Distribution Inc. v. 135 Marlee Holdings Inc.*, [2005] O.J. No. 4327, [2005] O.T.C. 891 (S.C.J.), at para. 8. **Only in extreme circumstances, however, should the court require a defendant who has been noted in default to demonstrate an arguable defence on the merits**: *Bardmore*, at p. 285 O.R. (emphasis added)

[54] In oral submissions, counsel for the parties also referred the court to the test set out in *Mountain View Farms Ltd. v. McQueen*, 2014 ONCA 194 (CanLII), which was also a motion to set aside a default judgment.

[55] In *Mountain View*, the court identified three factors to be considered by the court on a motion to set aside default judgement:

i. Whether the motion was brought promptly after the defendant learned of the default judgment;

ii. Whether there was a plausible excuse or explanation for the defendant's default in complying with the *Rules*; and

iii. Whether the facts establish that the defendant has an arguable defence on the merits.

[56] *Mountain View* identifies the court's "ultimate task" on the motion to set aside a default judgment to be a determination of "whether the interests of justice favour granting the order".

[57] At paragraph 51 of *Mountain View*, the court explains that in showing a defence on the merits, the defendant need not show that the defence will inevitably succeed, just that the defence "has an air of reality".

Analysis

Under r. 19.03, the court *may* set aside the noting in default. As observed the court in *Metropolitan Toronto Condominium Corporation No. 706 v. Bardmore Developments Ltd. (C.A.)*, 1991 CanLII 7095 (ON CA) ("*Bardmore*"), the relief is discretionary.

[58] Although not referred to by the parties, the recent decision of the Court of Appeal in *Franchetti v. Huggins*, 2022 ONCA 111 (CanLII) upheld the decision of the motion judge not to set aside the noting in default. The appellate court referenced *Kisel* and, at paras. 9 and 10 summarized the jurisprudence, and explained how to apply the test for setting aside a noting in default.

[59] Paragraphs 9 and 10 read as follows:

> [9] There are many cases discussing the criteria for setting aside a noting of default. See particularly Laskin J.A.'s detailed exposition in *Kisel,* at para. 13. To summarize the jurisprudence, the following factors have been found to be relevant in considering whether a noting of default should be set aside:
>
> (1) The parties' behaviour;
> (2) The length of the defendant's delay;
> (3) The reasons for the delay;
> (4) The complexity and value of the claim;
> (5) Whether setting aside the noting of default would prejudice a party relying on it;
> (6) The balance of prejudice as between the parties; and
> (7) Whether the defendant has an arguable defence on the merits.
>
> [10] These factors are not exhaustive nor are they to be applied as rigid rules. An arguable defence on the merits may justify the court in exercising its discretion to set aside a default judgment, and for that purpose it is sufficient for the defence to have an "air of reality": Mountain View Farms Ltd. v. McQueen, 2014 ONCA 194, 119 O.R. (3d) 561, at para. 51. However, perhaps because requests to set aside noting in default usually occur early in the litigation process, unlike this case, courts will rarely require a defendant who has been noted in default to show an arguable defence on the merits. In a case such as this one involving a significant delay, the moving party is required to show an arguable case on the merits.

[60] Set out below, I apply the factors referred in *Franchetti* to the facts in this case.

i) The behaviour of the Seller and the Buyers:

[61] I find that the Sellers acted appropriately and in good faith when they submitted a Requisition on September 2, 2022 to note the Buyers in default. By contrast, the Buyers failed to take any steps to defend the Claim until August 2023.

[62] I find that the Seller was fair, appropriate, and acted in good faith in agreeing in August 2023 to set aside the noting in default provided that a Statement of Defence were delivered within 30 days. The Buyers did not act upon that significant accommodation but, as stated in an email sent by Mr. Mandalagiri to the Seller's lawyer, they had stopped communicating with their lawyer.

[63] The evidence is that Buyers' current lawyer contacted the Seller's counsel in mid-March 2024 and that the Buyers did not take meaningful steps to set aside the noting in default until April 2024.

[64] I find that the Buyers have failed to establish on this motion that they had any firm intention to defend the Claim between September 2022 and April 2024, and, as such, I find that the Buyers did not behave appropriately: *Bardmore*, and *Hart v. Kowall*, 1990 CarswellOnt 2717 (Gen. Div.), at para. 3.

ii) The length of the Buyers' delay:

[65] As noted under i), above, without reasonable explanation, the Buyer's delayed at least 18 months before taking any meaningful steps to set aside the noting in default and/or to defend the Claim.

iii) The reasons for the delay:

[66] The Buyers' offer no real explanation for the first period of delay: between August 9 or 11, 2022, or even from September 22, 2022, the date by which they acknowledge being aware of the Statement of Claim, and August 2023.

[67] The Buyers' explanation for the second period of delay: between when they consulted with Mr. Mandalagiri in August 2023 and when they retained their current lawyer in March or April 2024, also lacks meaningful explanation. For example, the Buyers offer no evidence that Punu was unable to communicate with Mr. Mandalagiri while either of them was out of the country, or why Hussain could not have provided instructions during that time, whereas the Seller's evidence supports a finding that Mr. Mandalagiri was unable to reach the Buyers.

[68] In August 2023, the Buyers were aware that they had been given a significant accommodation by the Seller, who was prepared to set aside the noting in default, provided only that a Statement of Defence was delivered within 30 days. Yet, the Buyers offer no valid explanation as to why they were unable to meet that generous deadline.

iv) The complexity and value of the Claim:

[69] The Claim is fairly straightforward: the Buyers entered into the APS and then failed to close the purchase. The evidence shows that it was not until June 21, 2022, that the Buyers' real estate agent confirmed that the Buyers would agree to the Sellers re-listing the Property. That evidence conflicts with the Buyers' assertion found in their draft Statement of Defence (filed on this motion), that when they failed to pay the Deposit, the APS became null and void.

[70] The Seller claims significant losses as a result of the Buyers' failure to complete the purchase. The Property was a single-family home. While the losses that flow from the breach of an APS may be significant, the nature of the losses are largely predictable and unlikely to be complicated.

iv) Prejudice to a party relying on the default:

[71] I accept that the Buyers will be prejudiced if the noting in default is not set aside. While the Seller will still have to prove damages, absent a Statement of Defence, he will not need to prove liability. I also accept that the Buyers may be found liable to pay a significant amount in damages to the Seller.

v) Whether setting aside the noting in default would prejudice a party relying on it;

[72] The Seller has brought a motion for default judgment, which has been placed on a long motions list for hearing. If the noting in default was set aside, the Seller's motion would not be able to proceed. That would delay the determination of the Seller's claim and the Seller would incur additional financial loss relating to the litigation, including costs relating to the Seller's motion. The latter is compensable, and payment of those costs could have been a term of the relief sought by the Buyers.

[73] The prejudice to the Seller caused by delay is difficult to predict and to quantify. If the noting in default were set aside and a tight litigation timetable imposed, it is inevitable that this action would not be ready for trial for many months, nor, likely, would it be reached in this calendar year. Given the demands on the court, it is possible that this claim might not be reached for trial until late in the next calendar year; a significant prejudice to the Seller.

vi) The balance of prejudice as between the parties;

[74] The Buyers appear to argue that the Seller's past willingness to set aside the noting in default, in return for a timely delivery of a Statement of Defence, is some evidence that to do so now, would not cause prejudice to the Seller.

[75] If I have stated the Buyers' position correctly on that point, I do not accept it. Firstly, the Buyers failed to act upon the Seller's offer and the window for doing so closed in early October 2023. Secondly, in communications with the Buyers' current lawyer in March 2024, counsel for the Seller made it clear that the Seller would no longer consent to set aside the noting in default.

[76] The Buyers' also submit that the Seller's willingness to wait until September 2024 for the hearing of his motion for default judgment is further indication that delay will not prejudice the Seller. I do not accept that submission. Scheduling of court proceedings to allow a responding party adequate opportunity to respond should not be seen as evidence that the accommodating party's client is not interested in the success of the proceeding.

[77] I find that the Buyers have had ample notice of the Statement of Claim and ample opportunity to defend it. They chose not to do so for 18 months. While the objective of determining a case on its merits is strong, the appellate court in *Franchetti* agreed with the comments made by the motion judge, at para. 17:

> [17] The motion judge was clearly disturbed by the appellants' behaviour. He said: "I agree that courts should strive to have matters determined on their merits and not be defeated by technical defaults, but parties are responsible for the[ir] actions, not only with respect to those actions upon which a cause of action arose, but thereafter as well." We agree.

[78] While, on its face, the balance of prejudice would favour the Buyers, it is the Buyers' own choices, not "technical defaults", that have put them in the position they face. As a result, I find that the balance of prejudice favours the Seller in this case.

(vi) Whether the Buyers have an arguable defence on the merits.

a) Buyers' assertion that the APS is void "ab initio"

[79] The Buyers have served a draft Statement of Defence. In it, the Buyers assert that although they signed the APS, it was not binding upon them unless and until they paid the $100,000 deposit.

[80] Paragraphs 8, 9, and 12 of the draft Defence read as follows:

> 8. The defendants submit that the "legal effect" of not paying the deposit within the stipulated time OF TWENTY FOUR HOURS, would make the Agreement of Purchase and Sale dated April 11, 2022 "null and void" "*ab initio*".
>
> 9. The defendants submit that as per the above-mentioned terms of the Agreement of Purchase and Sale dated April 11, 2022, the said APS is "null and void" and unenforceable by the plaintiff.
>
> 12. The defendants executed the APS on April 11, 2022, with the condition that "Upon acceptance shall mean that the Buyer is required to deliver the deposit to the Deposit Holder within 24 hours of the acceptance of this Agreement", whereas by April 12, 2022. The defendants had not accepted the APS, and had not paid the deposit of $100,000, rendering the APS null and void.

[81] Based on the above paragraphs, the Buyers appear to assert that they were required to "accept" their own offer to purchase and that when they failed to pay the Deposit within 24 hours of acceptance of the APS, the APS became null and void.

[82] The Seller disagrees with the Buyers' assertion; the Seller submits that by its terms, the APS became binding upon the parties when the Seller accepted the Buyers' offer, whether or not the Deposit was paid: *Pollard v. Perry*, 2022 ONSC 5168.

[83] I accept and agree with the Seller's submission on the law.

[84] The APS is the usual Ontario Real Estate Association form, containing the clauses usual to an agreement of purchase and sale of a residential property.

[85] Paragraph 1. of the APS provides that the Buyers' offer "shall be irrevocable by the Buyers until 11:59 p.m. on April 13, 2022, after which time, **if not accepted**, the offer would be null and void (emphasis added).

[86] The APS was signed by the seller on "04/13/2022".

[87] At paragraph 14 of their draft Statement of Defence, the Buyers plead that "the plaintiff has admitted in para. 14 of the Amended Statement of claim that "Notwithstanding this, the buyers repudiated the APS by failing to provide the deposit". At para. 15, the Buyers assert that the repudiation by the Buyers rendered the APS null and void.

[88] The Seller and the Buyers appear to agree that the Buyers repudiated the APS but disagree on the effect on the APS of the Buyers' repudiation. The Buyers seem to be asserting that when they repudiated the APS, the APS became "null and void ab initio" i.e. void from beginning, relieving the Buyers of any liability under the APS for damages caused by the Buyers' breach or repudiation. That is not my understanding of the law.

[89] The Seller asserts that upon the Buyers' repudiation, he was free to re-list and re-sell the property and to sue the Buyers for damages. In my view, the Seller's position is in keeping with well-accepted legal principles.

[90] In addition to the clear wording on the APS, the Seller also relies on well-accepted law that a promise made under seal (i.e. the signatures on the APS) is binding upon the parties: *Friedmann Neward Equity Developments Inc. v. Final Note Ltd*, 2000 SCC 34; *Restoule v. Canada (Attorney General)*, 2021 ONCA 779 at para.655; *Fast v. Nieuwesteeg*, 2006 CanLII 6082 (ON SC).

[91] For these reasons, with respect to the Buyers' liability for damages caused by their breach or repudiation of the APS, I find that the Buyers' draft Statement of Defence does not identify an arguable defence on the merits.

b) Buyers' assertion that the Seller is not entitled to damages claimed.

[92] In their draft Defence, the Buyers plead that the plaintiff has failed to mitigate his losses, asserting (at para. 17) that the plaintiff failed to provide an expert report opining as to the true value of the property on April 11, 2022, the date on which the APS was signed.

[93] At para. 18 of the draft Defence, the Buyers assert that the offer submitted by the Buyers was a result of a "bidding war" and asks: whether there were multiple offers for the Seller's "coveted" property.

[94] At para, 19 of the draft Defence the Buyers assert that there was "no explanation for the substantial upward increase in the consideration in the APS and this certainly constitutes a triable issue".

[95] In my view, the three paragraphs referenced above, do not present an arguable defence with respect to the issue of the Seller's damages.

Disposition

[96] For the reasons set out, I dismissed the Buyers' motion.

Costs

[97] At the conclusion of the motion, counsel agreed that the determination of costs could be made based on the Costs Outline delivered by the Seller's lawyer, prior to the hearing of this and the Buyers' Bill of Costs uploaded to CaseCenter in the course of the hearing.

[98] I have reviewed both documents.

[99] In their Bill of Costs, the Buyers show partial indemnity costs of $5,250, inclusive of HST. I note that the Bill of Costs does not include any claim for fees or disbursements relating to the cross-examination of Ms. Levine, nor any filing costs of the motion.

[100] In the Seller's Costs Outline, fees are shown at $7,322.74, inclusive of HST. The Seller also includes a disbursement for Westlaw of $312.80, for a total amount claimed of $7,510.42.

[101] The general principles applicable to party and party costs are well settled. Costs are discretionary. R. 57.01 of the *Rules of Civil Procedure* sets out factors I may consider in exercising my discretion. Overall, the objective is to fix an amount that is fair and reasonable, having regard for, among other things, the outcome of the proceeding and the expectations of the parties concerning the quantum of costs: *Boucher v. Public Accountants Council for the Province of Ontario,* [2004] O.J. No. 2634, 71 O.R. (3d) 291 (C.A.) at paras. 26, 38.

[102] Certain general principles have now been expressly articulated in subparagraphs (0.a) and (0.b) of r. 57.01, specifically, the principle of indemnity and the affirmative obligation to consider the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed.

[103] Here, the amounts claimed by the parties are similar and, in my view, both amounts are reasonable and fair. While I recognize that the Seller's costs are somewhat higher than those claimed by the Buyers, I find that the Seller's costs still fall within the range of what the Buyers, as the unsuccessful party, could reasonably expect to pay.

[104] Having considered the applicable principles, in the exercise of my discretion, I award the Seller (plaintiff) his costs of this motion in the all-inclusive amount sought: $7,510.42. These costs are awarded against the Buyers, jointly and severally, and are payable to the Seller within 30 days of the release of these reasons.

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L. Sheard J.

Released: September 19, 2024

CITATION: Shirzad v. Hussain et al., 2024 ONSC 5172
COURT FILE NO.: CV-22-167
DATE: 2024-09-19

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

FARHAD SHIRZAD

Plaintiff

- and –

NARIESA HUSSAIN, AMERNAUTH PUNU, AND ANGELLA SEWPERSAUD

Defendants

REASONS FOR DECISION

L. Sheard J.

Released: September 19, 2024