CITATION: Tran v. 863195 Ontario Limited, 2024 ONSC 5423
BARRIE COURT FILE NO.: CV-23-662
DATE: 20241002

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: LORNA TRAN and ANDREW GHOSH-YOUMANS, Plaintiffs

AND:

863195 ONTARIO LIMITED a/o BRIARWOOD DEVELOPMENT GROUP, Defendant

BEFORE: The Hon. Mr. Justice R.E. Charney

COUNSEL: James S. G. Macdonald, Counsel for the Plaintiffs

Helen Richards and Gordon Vance, Counsel for the Defendant

HEARD: October 1, 2024

CASE CONFERENCE ENDORSEMENT

Issue

[1] This case involves an action by the Plaintiffs against a home builder for breach of contract. The Plaintiffs allege that they entered into an Agreement of Purchase and Sale (APS) with the Defendant (Briarwood) on January 19, 2020, to purchase a home being built by the Defendant for $531,980. On August 22, 2022, the Defendant requested the Plaintiffs execute an Addendum/Amendment to the APS that would increase the purchase price of the Property by $175,000. The Plaintiffs' position is that the proposed price increase was a repudiation of the APS by the Defendant. The Plaintiffs seek specific performance or damages for to the monetary equivalent of the market value of the Property had the APS been completed.

[2] The Plaintiffs issued a Statement of Claim on April 27, 2023.

[3] In its Statement of Defence, the Defendant alleges:

> 14. Briarwood followed up with the Plaintiffs on two separate occasions, on January 28, 2022 and on May 10, 2022, to advise that the unavoidable delay was ongoing. In its communication of May 10, 2022, Briarwood offered the Plaintiffs a release from the APS in exchange for the return of their deposit moneys.

> 15. In or about August 2022, Briarwood presented the Plaintiffs with two non-exhaustive options: (1) an amendment to the APS to increase the purchase price, such as to make construction financially viable; or (2) a release from the APS, in exchange for a return of the Plaintiffs' deposit moneys and compensation.
>
> 16. Briarwood made it clear that these were options that existed outside the bounds of the parties' agreement. Briarwood did not impose any timeline on the Plaintiffs to respond, nor did it in any way pressure them to do so. The Plaintiffs did not accept either option. As such, the APS remains in full force and effect.

[4] The Plaintiffs have brought a motion for summary judgment. In support of their motion for summary judgment, the Plaintiff Lorna Tran has filed an affidavit which reviews the correspondence and conversations between the Plaintiffs and the Defendant relating to the alleged repudiation of the APS. Her Affidavit states:

> 28. On June 20, 2022, I received an email from Cassandra D'Onofrio, on behalf of the Defendant, which stated that:
>
> > "[a]s per our last courtesy update, construction has begun for Phase A; we are moving, but we are moving slowly. As you are all aware, Phase A has been effected by the strike in addition to the existing pandemic related delays we were already facing, even with this, we have determined the rough timeline of which lots we will be starting and ending with:
> >
> > Please note: The following information is subject to change depending on the availability of trades and material supply
> >
> > As is stands, we have begun digging Lot 33 - Lot 63 first, Lots 64 – 80 will follow after that, and Lots 11 – 32 will be the final set,
> >
> > Our team is continuing to monitor the labour and material shortages that we are currently facing and have determined that there will be no closings for Phase A occurring this year, we are estimating that we will begin closings for Phase A in the Spring of 2023.
> >
> > With this new development, it's clear we are not in a position to determine final closing dates for Phase A purchasers at this time but hopefully his provides a bit more insight for you all.
> >
> > We are frustrated with the delays we have been facing in Stayner and understand that you must be feeling the same. We understand that this email isn't the positive news you were hoping to hear but this is the situation as it stands. We want to work with you and move through

> this together. Again, we are able to offer a Mutual Release with a full deposit return to anyone who wishes to do so…"

[5] Ms. Tran's Affidavit also references a telephone conversation she had with Briarwood representatives on August 11, 2023. Her Affidavit alleges:

> During the call, the Briarwood Representatives advised that we had two options with respect to the APS, namely:
>
> a. Execute an Addendum/ Amendment to the APS before the Defendant would take further steps to satisfy its obligations under the APS. This Addendum/ Amendment to the APS would increase the purchase price by $175,000; or
>
> b. If we did not agree to sign the aforementioned Addendum/ Amendment to the APS, that the APS would be terminated and that we would be required to execute a Mutual Release.

[6] The Defendant alleges that these references to Briarwood's communications with Ms. Tran should be struck from Ms. Tran's Affidavit as they are evidence of settlement negotiations. The Defendant argues:

> The Impugned Evidence includes emails and a description of a meeting between the parties where the Defendant made offers for early resolution of the dispute underlying this Action. This evidence ought not be placed before the trier of fact at the summary judgment motion.

[7] The Defendant argues that although the Plaintiffs had not yet commenced an action, the impugned statements were made by the Defendant when a "litigious dispute was a possibility within contemplation".

[8] The Plaintiffs argue that the statements referenced in Ms. Tran's Affidavit are evidence of the Defendant's repudiation of the APS. Until that time, the Plaintiffs believed that the Defendant would complete the home at the agreed price, albeit with some delays. There was no litigious dispute between the parties at the time that the referenced communications were made by the Defendant. Rather, the referenced communications were the repudiation of the APS that led to the litigation.

[9] Moreover, the Defendant expressly pleads and relies on these same statements in paras. 14 – 16 of its Statement of Defence. If any of these statements are covered by settlement privilege, such privilege was waived by the Defendant when it disclosed the communications in its Statement of Defence.

Procedural History

[10] On August 29, 2024, R.S.J. Edwards issued a case management order setting out a timetable for the hearing of the Plaintiffs' motion for summary judgment. An issue arose

whether the Defendant's challenge to paragraphs 28 to 36 of Ms. Tran's Affidavit should be heard in a separate motion before the summary judgment motion, or whether it should be dealt with as an issue by the judge hearing the summary judgment motion. R.S.J. Edwards schedule a further case conference for the purpose of addressing when the issue of settlement privilege would be dealt with. The timetable established by R.S.J. Edwards was subject to revision if a motion on the settlement privilege issue was deemed necessary.

[11] Accordingly, the only issue on this case conference was when the issue of the admissibility of paragraphs 28 to 36 of Ms. Tran's Affidavit should be heard.

Analysis

[12] Having conducted a case conference on this issue, I am satisfied that the issue of settlement privilege and the admissibility of certain paragraphs of Ms. Tran's Affidavit should be dealt with by the judge hearing the motion for summary judgment.

Timing of Motion to Strike Affidavits

[13] In *Holder v. Wray*, 2018 ONSC 6133, Emery J. reviewed a number of cases dealing with the question of whether a court should hear a motion to strike inadmissible paragraphs from an affidavit in advance of the main application or whether the admissibility of affidavit evidence is a question best left to the court that hears the application. He concluded, at para. 40:

> An advance ruling on striking all or parts of an affidavit can save the court the time of hearing and deciding evidentiary issues. A motion to strike can screen out evidence that is ultimately extraneous to the real issues between the parties, and that only increase the high cost of litigation. The motion to strike, used judiciously, provides the means by which to weed out frivolous or vexatious evidence that could require reply evidence, and might otherwise widen the scope of any cross-examination that is later found unnecessary. Although there are arguments for and against striking an affidavit in whole or in part prior to the main event, it is a discretionary order to make in the right circumstances. One "special reason" to make such an order in advance of the main hearing would be where the affidavit at issue is "clearly improper and it would inevitably give rise to extraordinary cost or difficulty for the other party." See *Allianz Global Risks* at paragraphs 18 and 19, and *Neighborhoods of Windfields Ltd. Partnership v. Death,* 2007 CanLII 31756.

[14] Emery J. adopted a hybrid approach and struck some offending paragraphs from the affidavits but deferred a decision about other impugned paragraphs to the judge hearing the application.

[15] In previous cases, I have followed this hybrid approach. In *Hunt v. Stassen*, 2019 ONSC 4466, I stated at paras. 10:

> Where the motion to strike is based on the relevance of the affidavit evidence it is often preferable to leave the question to the court hearing the application because relevance can often only be assessed in the context of the application as a whole. The judge who hears the application on its merits is usually best situated to make that determination.

[16] There are other cases, such as those described by Emery J., where screening inadmissible evidence at a preliminary stage will result in a more efficient use of parties' and the court's time and resources. For example, affidavits often contain inadmissible legal argument, opinions or comments on the legal position of the opposing party. "Legal argument and legal submissions belong in a factum and not an affidavit and may be struck out": *Gutierrez v. The Watchtower Bible and Tract Society of Canada et al*., 2019 ONSC 3069, at para. 27. Permitting such inadmissible argument, opinions or comments to remain in the affidavit until the application is heard presents the opposing party with the dilemma of having to choose between ignoring, responding to and/or cross-examining on the inadmissible paragraphs. None of these options is ideal. A pre-emptive motion to strike the offending paragraphs may be the more appropriate route because it permits the parties to limit their response or cross-examination to those parts of the affidavits that contain admissible evidence.

[17] If the inadmissible evidence accounts for one or two isolated paragraphs in an affidavit, it may be more efficient to wait and have the issue of admissibility determined by the court hearing the application or motion on its merits. In cases in which the affidavit is replete with inadmissible paragraphs, it may be fairer and more efficient to have the questions of admissibility determined in advance.

[18] This hybrid approach has been followed in more recent cases: *Humberplex Developments v. Attorney General for Ontario*, 2023 ONSC 2962, at paras. 10-14.

[19] Finally, I adopt the following summary by Perell J. in *Gutierrez*, at para. 35:

> By way of my own summary, in the majority of cases, rather than a pre-emptive motion to strike affidavits in whole or in part for non-compliance with the Rules of Civil Procedure, it is preferable that the judge or master hearing the substantive motion rule on the admissibility of the evidence. However, there is no absolute rule, and a pre-emptive motion may be appropriate where either efficiency or fairness require that disputes about the factual record be determined before the substantive motion. On a case-by-case basis, it will be for the judge or master hearing the pre-emptive motion to decide whether to strike the impugned material or to defer the issues of admissibility to the judge or master hearing the substantive motion.

[20] In the present case, the impugned paragraphs in Ms. Tran's Affidavit are not "clearly improper". The Plaintiffs argue that they are evidence of the Defendant's repudiation of the APS. The Defendant argues that they were offers to settle contemplated litigation. That

goes to the merits of the motion for summary judgment and is precisely the kind of issue that should be decided by the judge who hears the motion for summary judgment.

[21] In addition, even if these paragraphs are subject to settlement privilege, there is a real question as to whether the Defendant has waived any such privilege by including the same information in its Statement of Defence. There is no motion by the Defendant to amend its Statement of Defence. I do not see why the judge hearing the summary judgment motion should be permitted to read the Statement of Defence but not hear the Plaintiffs' version of the same communications. It will be up to the judge who hears the summary judgment motion to decide whether any of this is relevant evidence or inadmissible settlement discussions. If the latter, the judge will be able to disregard it.

Conclusion

[22] Based on the foregoing, the timetable established by R.S.J. Edwards in his Order of August 29, 2024 remains unchanged and the issue of settlement privilege and the admissibility of certain paragraphs of Ms. Tran's Affidavit will be dealt with by the judge hearing the motion for summary judgment.

Justice R.E. Charney

Date: October 2, 2024