

CITATION: *Mattamy (Jock River) Ltd. v. Ishola*, 2024 ONSC 6231
COURT FILE NO.: CV-24-00095237-0000
DATE: 20241112

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)	
)	
MATTAMY (JOCK RIVER) LTD.)	Caroline Bedard, for the Plaintiff
)	
Plaintiff)	
)	
– and –)	
)	
MORUF ABIODUN OLATUNJI ISHOLA)	No one appearing
)	
Defendant)	
)	
)	
)	
)	HEARD: September 25, 2024

2024 ONSC 6231 (CanLII)

REASONS FOR JUDGMENT

K. MCVEY J.

[1] The plaintiff, Mattamy (Jock River) Ltd., moves for default judgment against the defendant, Moruf Abiodun Olatunji Ishola. The plaintiff is a property developer and homebuilder in Ottawa. The plaintiff seeks damages of \$87,714.49 plus pre- and post-judgment interest flowing from the defendant’s failure to close on a real estate transaction in February 2024. In support of the relief sought, the plaintiff filed an affidavit and a supplementary affidavit from Michael Winiarz, Vice-President of Marketing and Sales for Ottawa Mattamy Holmes Ltd. At the relevant time, Mr. Winiarz was responsible for supervising and directing the sale of new homes for the plaintiff corporation. Mr. Winiarz instructed the plaintiff’s real estate solicitors in respect of the contract giving rise to this action.

Background

[2] On or about October 17, 2022, the parties entered into an Agreement of Purchase and Sale (the “Agreement”) for real property known municipally as 25 Stitch Mews, Ottawa, Ontario (the “Property”). The final purchase price was \$538,709.00, inclusive of HST. The transaction was scheduled to close on February 8, 2024.

[3] Pursuant to the Agreement, the defendant was to pay deposits in instalments. The defendant paid a total of \$14,000 in deposits, but subsequently defaulted on his obligation to make payments due from December 17, 2022 onward. The plaintiff’s solicitors sent the defendant a letter dated May 19, 2023, advising him that he had defaulted under the Agreement. The defendant did not respond.

[4] On December 18, 2023, the plaintiff’s solicitors wrote to the defendant a second time, requesting payment of all outstanding deposits. The defendant did not respond, nor did he make any of the required payments.

[5] On January 11, 2024, the plaintiff’s solicitors wrote to the defendant via mail, courier, and email, advising the defendant that the Agreement was terminated, and that it would remarket the property to mitigate its damages.

[6] On January 27, 2024, the plaintiff re-sold the Property for a final purchase price of \$462,830.00, including HST. The sale closed on April 25, 2024.

[7] The plaintiff commenced an action on April 2, 2024. The plaintiff served the defendant with the statement of claim on April 16, 2024. The defendant did not defend the action. On May 30, 2024, the plaintiff wrote to the defendant via email and mail, advising him that if he did not file a statement of defence by June 7, 2024, the plaintiff would note the defendant in default and move for default judgment. The defendant did not respond.

[8] The plaintiff provided the defendant one further opportunity to file a defence via letter dated June 12, 2024, in which it extended the deadline to file to June 21, 2024. The defendant did not respond or defend the action.

[9] The plaintiff noted the defendant in default on July 9, 2024. On August 27, 2024, the plaintiff's solicitors advised the defendant via email that he had been noted in default and that the plaintiff would be scheduling a motion for default judgment. The defendant did not respond. The plaintiff subsequently served the defendant with a courtesy copy of the notice of motion and motion record.

Analysis

[10] The plaintiff now seeks default judgment against the defendant pursuant to r. 19.05 of the *Rules*. The plaintiff seeks to recover its financial losses associated with the defendant's failure to close on the Property. Pursuant to r. 19.02(1)(a), the defendant is deemed to have admitted the truth of the following allegations as set out in the originating statement of claim:

- That on or about October 17, 2022, the defendant entered into an Agreement of Purchase and Sale for the Property;
- The final purchase price of the Property was \$538,709.00, inclusive of HST;
- The final closing date on the Property was February 8, 2024;
- The defendant defaulted under the Agreement by failing to pay \$18,000 in deposits owing under the Agreement; and
- On January 27, 2024, the plaintiff resold the Property for a final purchase price of \$462,830.00, inclusive of HST.

The Issues

[11] Do the facts as admitted entitle the plaintiff to judgment pursuant to r. 19.06? First, the court must be satisfied based on the deemed admissions that the defendant breached the Agreement as plead in the statement of claim. If so, the court must then determine the quantum of damages to which the plaintiff is entitled.

[12] If the facts based on the admitted allegations do not entitle the plaintiff to default judgment, then the plaintiff must adduce admissible evidence, which when combined with the deemed admissions, forms a sufficient evidentiary foundation for the relief sought. Conclusions of law, or mixed fact and law, are not deemed admitted by virtue of r. 19.02(1) where a defendant has been noted in default: *Paul's Transport Inc. v. Immediate Logistics Ltd*, 2022 ONCA 573.

[13] When the damages are unliquidated as in this case, in accordance with r. 19.05(2), the motion shall be supported by affidavit evidence. The court must be satisfied by the evidence filed that the facts entitle the plaintiff to judgment including facts substantiating the calculation of the requested damages. Moreover, where a plaintiff seeks default judgment in the context of an aborted sale of real estate, the plaintiff must also satisfy the court that they made reasonable efforts to resell the property for fair market value in a timely manner: *Madison Homes Cornell Rouge Ltd. v. Ng*, 2021 ONSC 3104.

Liability

[14] I am satisfied that the defendant breached the terms of the Agreement. The Agreement required the defendant to pay \$18,000 in deposits from December 17, 2022, onwards. He failed to do so despite being warned about the non-payment via letters dated May 19, 2023, and December 18, 2023.

[15] I will now assess the damages to which the plaintiff is entitled.

Damages

[16] In all proceedings where a plaintiff seeks damages with respect to a breach of an agreement of purchase and sale, the plaintiff must prove the quantum of damages to which it is entitled: *Madison Homes*, at para. 18. Damages in this context are the difference between the contract price and the price of the new sale of the property, plus any related costs associated with the breach: *Goldstein v. Goldar*, 2018 ONSC 608, at para. 25.

[17] Further, in the context of a failed real estate transaction, the plaintiff must prove that its efforts to resell were “reasonable and timely”: *Madison Homes*, at para. 18; *100 Main Street Ltd., v. W.B. Sullivan Construction Ltd.* (1978), 88 D.L.R. (3d) 1 (Ont. C.A.), at p. 23. The innocent party has a duty to mitigate: *Rosehaven Homes Ltd. v. Aluko*, [2022] O.J. No. 838, at para. 71.

[18] When assessing whether the innocent party took reasonable steps to minimize the losses incurred, the court may consider the circumstances of the real estate market at the time; how long it took for the innocent party to place the property for sale; how long the property was for sale before it sold; how the property was marketed; at what price the property was relisted for sale; how the property was exposed for sale; whether there were any price reductions or other offers to purchase the property; and, how many other offers were made and their particulars: *Rosehaven Homes Ltd.*, at para. 73. The onus lies on the innocent party to prove on a balance of probabilities that the damages sought are reasonable and flow from the breach claimed: *Rosehaven Homes Ltd.*, at para. 74.

[19] I am satisfied that the plaintiff made reasonable efforts to resell the property for fair market value in a timely manner. On January 22, 2024, the plaintiff remarketed the Property on MLS without delay after a consideration of recent sales in the area. The new listing price was \$459,990.00. The lower listing price as compared to the original purchase price in the Agreement reflected the significant downturn the real estate market experienced in Ottawa since the parties entered into the Agreement in 2022. The plaintiff also marketed the Property on its website and through its internal network of realtors.

[20] In late January 2024, the plaintiff received two offers on the Property. The first offer fell through due to financing. A second offer was made for the listing price of \$459,990.00. The plaintiff accepted the offer on February 1, 2024. The final purchase price after amendments was \$462,830.00.

[21] In my view, the plaintiff re-listed the Property at fair market value, on the open market, and accepted an offer for a reasonable price. I am satisfied that the plaintiff made appropriate efforts to mitigate its losses.

[22] Having found that the plaintiff fulfilled its duty to mitigate, I am prepared to assess the damages as the difference between the purchase price in the Agreement and the ultimate resale price of the Property. The contract price of the Property inclusive of HST was \$538,709.00. The resale price of the Property inclusive of HST was \$462,830.00. This creates a shortfall of \$75,879.00.

[23] The plaintiff also seeks the following ancillary damages:

- \$1,571.27, including HST, for legal fees associated with the resale of the Property
- \$24,264.22, including HST, for real estate fees associated with the resale of the Property

[24] I am satisfied that these costs flow from the defendant's failure to close the transaction and are reasonable in the circumstances.

[25] After deducting the \$14,000 paid in deposits by the defendant, the plaintiff is entitled to \$87,714.49 in damages.

Conclusion

[26] For the above reasons, default judgment is granted in favor of the plaintiff against the defendant, in the amount of \$87,714.49, plus prejudgment interest accruing from January 11, 2024, in accordance with the *Courts of Justice Act*, R.S.O., 1990, c. C.43, s. 128. Post-judgment interest shall also apply in accordance with the *Courts of Justice Act*.

[27] Regarding costs, the matter was straightforward in nature and the applicable law well-settled. I fix costs payable at a partial indemnity rate in the amount of \$3000, inclusive of HST and disbursements.

Justice K. McVey

Released: November 12, 2024

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