

ONTARIO  
SUPERIOR COURT OF JUSTICE

BETWEEN: )  
My Linh Trinh and Brandi Trinh )  
Applicants ) *Tjana Potkonjak*, for the applicants  
– and – )  
2627641 Ontario Inc. )  
and Tesa Real Estate Inc. ) *Mobina Basiri*, for the respondents  
Respondents )  
AND BETWEEN: )  
2627641 Ontario Inc. )  
and Tesa Real Estate Inc. )  
Applicants ) *Mobina Basiri*, for the applicants  
– and – )  
My Linh Trinh and Brandi Trinh ) *Tjana Potkonjak*, for the respondents  
Respondents )  
Heard: May 24, 2024,  
by video conference, at Barrie

REASONS FOR DECISION

S.T. BALE J.

**Introduction**

1. On March 23, 2018, Payam Katebian entered into a pre-construction agreement to purchase a condominium unit from 1000 Elgin East C Inc. On March 31, 2018, the agreement was amended to substitute 2627641 Ontario Inc. (“262Ont.”) for Katebian as purchaser.
2. The agreement contained the following provisions relevant to the issues to be determined in these proceedings:
  - that the amount to be paid by the purchaser to the vendor for development charges would not exceed \$8,000 plus tax;

- that a final deposit of \$28,945 would be paid to the vendor on interim occupancy; and
- that any assignment of the agreement of purchase and sale would require the vendor's consent.

3. On May 10, 2023, My Linh Trinh and Brandi Trinh ("Trinh") entered into an agreement with 262Ont. for the assignment of its interest in the agreement of purchase and sale. The assignment agreement provided:

- that the assignees would pay a deposit of \$37,750 to the assignor;
- that the assignees would assume the agreement of purchase and sale in its entirety, including all rights, regulations and obligations, upon receipt of the vendor's consent to the assignment;
- that unless the assignor gave written notice to the assignee no later than May 31, 2023 that the vendor's approval had been obtained, the assignment agreement would be null and void and the assignees' deposit would be returned to them;
- that the assignment closing date would be June 1, 2023, provided that vendor approval was received;
- that the assignees would pay the final deposit of \$28,945 required by the agreement of purchase and sale between the assignor and the vendor, "upon the acceptance of this assignment of agreement of purchase and sale by the builder/vendor";
- that the assignor and assignee would work diligently toward obtaining Elgin East's consent to assignment, as quickly as possible; and
- that time would in all respects be of the essence.

4. The assignment agreement was not completed. Trinh argues that the agreement became null and void because of 262Ont.'s failure to obtain the vendor's consent within the time provided. 262Ont. argues that it was not required to provide the consent until Trinh paid the final deposit to Elgin East, and that Trinh's failure to make the payment was a breach of the agreement. Trinh claims a return of its deposit of \$37,500. 262Ont. claims forfeiture of the deposit, and damages for breach of contract. The damages claimed are \$4,341.75, being the difference between Trinh's purchase price and the price paid by a third party under a subsequent assignment agreement.

#### **Additional facts**

5. On June 1, 2023, a legal assistant in the office of 262Ont.'s lawyer emailed Trinh's lawyer informing him of the terms upon which Elgin East would consent to the assignment. One of those terms was that the assignee would not be entitled to the benefit of the \$8,000 cap on the amount to be paid to Elgin for development charges. Another was "payment of additional deposit in the amount of \$28,945.00 ...." Trinh's lawyer responded that he would seek his clients' instructions.

6. On June 5, 2023, Trinh's lawyer wrote to the legal assistant requesting clarification with respect to the proposed removal of the cap. Not having received clarification, he wrote again on June 8: "Please ask the builder what the uncapped Levies will be." The response received was: "The rest of the closing cost would be as per a normal real estate transaction." Understandably dissatisfied with that response, Trinh's lawyer wrote again saying, "Please ask the builder what

the uncapped Levies will be.” At 262Ont.’s request, the closing date was then extended to June 12, 2023 to allow time for the information to be provided.

7. On June 9, 2023, Trinh’s lawyer wrote again saying that he needed to know the amount of the development charges: “your client had an agreement that those levies [development charges] will be capped. The builder is now saying that the assignee does not get the benefit of the cap. What I need to know is exactly how much the levies are so that I know how far above the cap they will be.”

8. On June 12, 2023, the legal assistant responded: “I have provided all of the builder’s responses, it is up to you to review the APS with your client. Have you reviewed Schedule B of the Tarion Addendum? All of the fees are in there.” In response, Trinh’s lawyer pointed out that the amount of the development charges was not in the agreement, and again asked that they be obtained from the vendor. The legal assistant responded by agreeing that the charges were not set out in the agreement and asked whether Trinh’s lawyer wished to extend until the following day. Trinh’s lawyer responded that his client would have her agent speak to 262Ont’s agent about extending the time for fulfillment of the condition. The assignment agreement was then amended, this time to provide for a closing date of June 14, 2023, provided that builder approval was received.

9. Neither the requested information nor Elgin East’s consent to the assignment were provided by June 14, 2023. On that date, Trinh’s agent sent the following text to 262Ont.’s agent: “My client has declined, will only go with 100%. Doesn’t want any unknown on closing. 102 sold for 800 with rooftop terrace and end unit, she had seen that before. Will do the release tomorrow.” What the agent meant by “will only go with 100%” is in dispute.

10. On the morning of June 18, 2023, Trinh’s agent emailed 262Ont.’s agent advising that Trinh would be signing a release and that it would then be automatically sent to him for his client’s signature. However, rather than sign the release, 262Ont. requested that Trinh sign a further amendment of the assignment agreement. The proposed amendment provided for an extension of the closing date to June 23, 2023. In addition, it provided the following in relation to the issue of the development charges:

The Assignor agrees to pay any uncapped levies above and beyond \$8,000 to the Assignee upon the completion date of the original agreement of purchase and sale with funds held in trust by the assignee's lawyer for an amount of \$3,600 to be adjusted and held back from the proceeds of the completion of the firm assignment of agreement of purchase and sale. Furthermore, in the event the uncapped levies exceed \$3,600, the Assignor shall take a personal undertaking to cover the balance upon the completion of the original agreement of purchase and sale.

11. Trinh was unwilling to sign the proposed amending agreement and maintained their position that they were entitled to a return of their deposit because of 262Ont.’s failure to obtain Elgin East’s consent within the time provided in the assignment agreement and subsequent amendments.

## **Analysis**

12. The issue to be decided is whether,

- as argued by Trinh, the assignment agreement became null and void as a result of 262Ont.'s failure to obtain the vendor's consent within the time provided; or
- as argued by 262Ont., it was not required to provide the consent until Trinh paid the final deposit to Elgin East, and that Trinh's failure to make the payment was a breach of the agreement.

13. For the following reasons, I do not accept 262Ont.'s argument.

14. First, the assignment agreement provided that the assignees would pay the final deposit of \$28,945 required by the agreement of purchase and sale directly to the vendor, "upon the acceptance of this assignment of agreement of purchase and sale by the builder/vendor." I see no argument to support 262Ont.'s position that Trinh was required to pay the deposit in the absence of Elgin East's consent. Trinh had no contractual relationship with Elgin, and the assignment agreement was subject to termination, in the absence of Elgin's consent. In addition, there is no evidence that Elgin was even given a copy of the assignment agreement, let alone accepted it.

15. Second, I am not satisfied that Trinh's willingness to pay the deposit in accordance with the assignment agreement was ever in issue. In support of its position, 262Ont. relies on an affidavit sworn by its real estate agent in which he says that Trinh's agent "confirmed that they wanted the Assignor to advance the additional deposit, as they said they wanted 100% of the conditions covered by the assignor." He then goes on to say, without any indication of the source of his information, that the parties "were unable to obtain the consent of the Vendor as the Assignees failed to advance the 5% deposit of \$28,945.00, thereby breaching the Assignment Agreement." He does not comment on the fact that immediately after Trinh's agent texted "[m]y client has declined, will only go with 100%", he continues, "[d]oesn't want any unknown on closing." "[A]ny unknown on closing" could only refer to the uncapped and unknown development charges, and not to the fixed amount of the deposit which was known back on May 10, 2023, when the assignment agreement was initially signed.

16. In response to 262Ont.'s agent's affidavit, Trinh's agent produced text messages between the two not included in the former's affidavit. In one of those texts he wrote: "this is a conditional sale based on builder approval as every assignment is. The builder said they are willing to approve the assignment based on certain conditions they have added. One being that they will not transfer the cap [on development charges]. My client declines this therefore there is no approval."

17. On June 21, 2023, 262Ont.'s lawyer wrote to Trinh's lawyer saying, "I am writing to formally notify you of your failure to fulfil your obligations under the Agreement dated May 9, 2023 regarding the assignment of the Property. Specifically, you have not completed the assignment within the agreed-upon time frame, which was set to close on June 14th, 2023." Of particular note, the current allegation of breaching the agreement by failing to pay the final deposit to Elgin East is nowhere to be found in the letter.

18. Trinh's evidence is that by this time she had "had enough" and no longer felt comfortable proceeding with the transaction.

19. Third, it is not clear that the "additional deposit" said to have been a condition imposed by Elgin East in June 2023 was one and the same as the final deposit referred to in the March 2018 agreement of purchase and sale, and which was to be paid to Elgin on interim occupancy. Payment of the final deposit upon interim occupancy was a pre-existing requirement and not an additional

one. I was provided with no evidence from Elgin of its requirements for acceptance of the proposed assignment, and the text from 262Ont.'s real estate agent to Trinh's lawyer advising of those requirements is hearsay.

20. The terms set out in 262Ont.'s email included that Elgin would "allow the assignment of the unit to be listed on MLS only after all of the within conditions have been satisfied, not before" (emphasis in original). The reference to "list[ing] on MLS" suggests that Elgin may not even have been aware of Trinh as the proposed assignee. There is no evidence that Elgin was aware.

21. The remaining issue is whether Trinh ought to have accepted the amending agreement proposed by 262Ont. on June 18, 2023. On this issue, 262Ont. relies on the provision of the original assignment agreement that 262Ont. and Trinh would work diligently toward obtaining the vendor's consent to the assignment. For the following reasons, I find that they were not required to do so.

22. First, pursuant to its terms, the assignment agreement became null and void, before the June 18 amendment was proposed. While the provision relied on by 262Ont. required Trinh to negotiate in good faith during the currency of the agreement, that obligation ceased when the time for vendor approval expired.

23. Second, accepting the June 18 amending agreement would have exposed Trinh to financial risk. If the proposed holdback was insufficient, Trinh would have to rely upon the personal undertaking of the assignor (assuming that in the final sentence of the relevant paragraph it was intended that the assignor would "give" rather than "take" a personal undertaking). They could not be required to do so.

### **Disposition**

24. In the result, I find that because 2627641 Ontario Inc. failed to obtain Elgin East C Inc.'s approval of the assignment agreement, the agreement is null and void, and My Linh Trinh and Brandi Trinh are entitled to a return of the \$37,500 deposit paid by them to Tesa Real Estate Inc.

25. As the successful parties, Trinh are entitled to their costs of the application. Trinh provided a bill of costs; 272Ont. did not.

26. Trinh's bill of costs shows fees of \$9,164.84, and disbursements of \$589.00, for a total of \$9,753.84, on a partial indemnity basis. However, those fees include preparing for and attending at an aborted hearing which took place on January 17, 2024. The difficulty with this is that the costs of January 17 were not reserved to this court. In fact, the endorsement of Verner J. provided that if the parties were unable to agree on costs, they were to provide her with bills of costs and written submissions.

27. I find a fair and reasonable costs award in the circumstances of this case to be \$8,500 for the consolidated applications.

"S.T. Bale J."

Released: November 26, 2024

CITATION: Trinh v. 262Ont. Ontario Inc., 2024 ONSC 6546  
COURT FILE NOS. CV-23-00005671-0000  
& CV-23-00004353-0000  
DATE: 20241126

*ONTARIO*

SUPERIOR COURT OF JUSTICE

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My Linh Trinh and Brandi Trinh

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– and –

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Respondents

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