COURT OF APPEAL FOR ONTARIO

CITATION: Azzarello v. Shawqi, 2019 ONCA 820
DATE: 20191015
DOCKET: C65977

Feldman, Paciocco and Fairburn JJ.A.

BETWEEN

Mark Azzarello, Eliza Azzarello

Plaintiffs (Respondents)

and

Ahmed Sabri Shawqi

Defendant (Appellant)

Shahzad Siddiqui, for the appellant

Peter D. Woloshyn, for the respondents

Heard: May 14, 2019

On appeal from the order of Justice Sandra Nishikawa of the Superior Court of Justice, dated September 14, 2018, with reasons reported at 2018 ONSC 5414.

Feldman J.A.:

[1] The appellant was the purchaser under an agreement of purchase and sale of a residence in Mississauga. He failed to close on the date set for closing, received a number of extensions, but failed to close on any of the extended dates. The respondent vendors relisted the property and ultimately sold it for less than the price that the appellant had agreed to pay. In the action by the respondents for damages for breach of the agreement, the summary judgment

motion judge awarded the difference in price to the respondent vendors, together with a number of consequential loss items. She also ordered that the deposit of $75,000 paid by the appellant purchaser be forfeited and not credited toward the damage award.

[2] On this appeal, the appellant's position is that the motion judge erred by failing to find that the respondents are not entitled to any damages because they failed to tender properly and were not ready, willing and able to close, and by finding that the respondents reasonably mitigated their damages. He also says that the motion judge erred by failing to credit the forfeited deposit toward the damages.

[3] For the reasons that follow, I would allow the appeal on the deposit issue only. The amount of the forfeited deposit must be credited toward the damage award.

Facts

[4] The respondents listed their home for sale on March 19, 2017 during a very "hot" real estate market in the Greater Toronto Area. They listed the property at $1,398,000, received multiple offers, and accepted the appellant's offer of $1,555,000 on March 27, 2017 to close on June 28, 2017. The appellant paid a deposit of $75,000.

[5] The respondents had agreed on March 8, 2017 to buy a new home near Hamilton, Ontario for $1,375,000 to close on June 1, 2017. They took out a bridge loan to complete that purchase and conduct some renovations on the new home.

[6] On May 30, 2017, the respondents' real estate lawyer, Mr. John Peter Ferreira, received a requisition letter and other documents from Mr. Joshua David, as the appellant's real estate lawyer, which he answered the following day.

[7] On June 19, 2017, Mr. Ferreira sent Mr. David a closing package by courier. However, on June 26, 2017, two days before the date set for closing, Mr. Ferreira received a call from Ms. Sarah Razzouk, who advised that she was taking over from Mr. David and would be representing the appellant on the purchase. On the same day, Ms. Razzouk wrote to Mr. Ferreira requesting an extension of the closing until July 7, 2017 and advising that she would pick up the closing package from Mr. David's office.

[8] On June 28, 2017, Ms. Razzouk sent another letter requesting a further extension to July 10, 2017. On June 29, 2017, Ms. Razzouk sent a requisition letter to Mr. Ferreira together with some vendor documents.

[9] On July 1, 2017, the respondents agreed to extend the closing to July 10, 2017, on the condition that the appellant pay the interest on their mortgage, line

of credit and bridge loan. These terms were accepted in a letter from Ms. Razzouk.

[10] On July 7, 2017, Mr. Ferreira faxed to Ms. Razzouk a revised statement of adjustments, a direction and a request for an update on the status of the closing. On July 10, 2017, Ms. Razzouk faxed a message that stated: “please be advised that I do not have mortgage instructions as of yet. As such we will require an extension until July 13, 2017.” She sent a follow-up fax later in the day indicating that she did not have instructions and: “[a]s of yet I do not know when. Client is not communicating with us anymore.”

[11] Mr. Ferreira made an offer on behalf of the respondents to extend the closing date to July 13, 2017, on terms that included payment of the respondents’ costs and a further $75,000 deposit to be received by 4:00 pm on July 11, 2017, failing which the appellant would be deemed to be in breach of the agreement. No response was received to this offer.

[12] On the appellant’s side, he applied for a mortgage at both TD Bank and Scotiabank but was declined. He then advised his real estate agent that he would not be able to purchase the property. The motion judge noted that the appellant claimed that he was contacted by ICICI Bank to advise that they were investigating a mortgage fraud. He alleges that the mortgage agent working with his real estate agent had submitted fraudulent documents to apply for a

mortgage in his name, and that ICICI Bank had advised him that he would be participating in the fraud if he obtained a mortgage from any institution where fraudulent documents had been submitted.

[13] After the purchase did not close on July 10, the respondents re-listed the property for sale at the original list price of $1,398.000. As the respondents had moved to their new home, their old home was empty and had to be staged for showing purposes.

[14] On July 27, 2017, Mr. Ferreira received a letter dated July 24, 2017 from a lawyer, Mr. Constantine, that stated he was acting for the appellant and that the appellant had received a mortgage approval from the CIBC. However, he wanted a 10% reduction in the purchase price based on an appraisal of the property.

[15] Mr. Ferreira responded on August 11, 2017, requesting the appellant's position on a potential resolution of the matter. No response was received.

[16] On September 5, 2017, the respondents lowered the list price to $1,349,000, and on September 6, 2017, they entered into a conditional agreement of purchase and sale with a new purchaser, which was confirmed on September 15, 2017, for the price of $1,280,000 to close on November 15, 2017.

The decision of the motion judge

[17] The motion judge identified the following four issues: did the appellant breach the agreement? If so, what damages are the respondents entitled to? Is

the deposit forfeited to the respondents? Is the appellant entitled to relief from forfeiture?

[18] The appellant's position was that he was unable to close because of fraudulent activity perpetrated in his name by the mortgage broker who worked with his real estate agent. The appellant also denied that he retained either Mr. David or Ms. Razzouk or that he applied for a mortgage to CIBC. He claimed that he wanted to purchase the property for cash but at a lower price. He argued that the alleged fraud constituted a genuine issue for trial. He also argued that the respondents were not ready, willing and able to close because they failed to tender valid, signed documents, and that they failed to mitigate their damages by selling the property to him at a reduced price.

[19] The motion judge rejected the appellant's position and found that the appellant breached the agreement of purchase and sale by failing to close on July 10, 2017, and the allegations of fraud against the mortgage broker and real estate agent did not excuse that failure. The motion judge also found no evidence that a cash offer was ever communicated to the respondents.

[20] The motion judge rejected the tender argument on a number of grounds. Although the tender package contained a Direction re Funds that was signed by Mr. Ferreira rather than by the respondents, that document could have been replaced with one signed by the respondents, had the appellant asked before

closing. The appellant cannot rely on any such alleged defence when he was not able to close and when he was taking the position that there was no one upon whom to tender because the two lawyers who were communicating with Mr. Ferreira were not actually his lawyers. The motion judge found that the transaction did not close not because of any problem with the tender but because the appellant did not have the funds to complete the transaction.

[21] On the issue of the quantum of damages, the motion judge stated the rule from *Goldstein v. Goldar*, 2018 ONSC 608, at para. 25, as follows:

> The damages amount will be the difference between the price under the Agreement and the price of the new sale of the property once it closes, plus any additional carrying costs incurred by the Vendor in mitigating her loss and dealing with the Purchasers' breach.

[22] The difference between the agreed price and the ultimate sale price was $275,000. The motion judge also awarded damages for the cost of the staging, legal fees, carrying costs of the property and interest on the line of credit, for a total of $308,688.31.

[23] On the issue of mitigation, the motion judge found that the respondents took reasonable steps to mitigate. After they re-listed the property, they did not accept the first offer but held out for a higher price and were able to obtain one.

[24] The final issue was the disposition of the deposit. The agreement of purchase and sale included the standard preprinted form language providing that

the deposit was "to be held in trust pending completion or other termination of this Agreement and to be credited towards the Purchase Price on completion."

[25] Because the agreement was not completed, the questions were whether the deposit was to be forfeited to the respondents in addition to the damages, and was the appellant entitled to relief from forfeiture. The motion judge found that the deposit was forfeited but not to be credited against the damages owed. She then considered whether the appellant was entitled to relief from forfeiture and concluded that he was not. She therefore ordered the appellant to pay the damages plus forfeit the deposit.

Issues

[26] The appellant raises the following three issues:

1. Did the motion judge err in the application of the law of tender?
2. Did the motion judge err in the application of the duty to mitigate?
3. Did the motion judge err by failing to credit the deposit toward the damages?

Analysis

(1) Did the motion judge err in the application of the law of tender?

[27] The appellant submits that the respondents did not prove that they were ready, willing and able to close because they did not prove that all the signed

documents and the keys were available, nor had they formally tendered the documents and keys.

[28] The motion judge appeared to accept that there may have been technical flaws in the completeness of the respondents' documents, but this was of no moment in the face of the appellant's breach of the agreement. Whether there was any such flaw is not clear from the record, as Mr. Ferreira's letter to Mr. David dated June 28, 2017, though sent on June 19, 2017, indicates that enclosed were: the keys, Direction re Funds, Undertaking, UFFI/Warranties/Bill of Sale, Statutory Declaration, Statement of Adjustments, Solicitor's Undertaking, Mortgage Payout Statement and document Registration Agreement.

[29] In any event, the motion judge made no error in finding that the reason the transaction did not close was not from any inadequate documents from the seller, but because the appellant did not have the funds to complete the purchase.

[30] This court has recently explained the law that applies in these circumstances in *Di Millo v. 2099232 Ontario Inc.*, 2018 ONCA 1051, 430 D.L.R. (4th) 296, at paras. 45-49, leave to appeal refused, [2019] S.C.C.A. No. 50:

> For a party to be entitled to specific performance, the party must show he or she is ready, willing and able to close: *Time Development Group Inc. (In trust) v. Bitton*, 2018 ONSC 4384 (CanLII), at para. 53; see also *Norfolk v. Aikens* (1989), 1989 CanLII 245 (BC CA), 41 B.C.L.R. (2d) 145 (C.A.). While tender is the best evidence that a party is ready, willing and able to close, tender is not required from an innocent party enforcing his or her

contractual rights when the other party has clearly repudiated the agreement or has made it clear that they have no intention of closing the deal: *McCallum v. Zivojinovic* (1977), 1977 CanLII 1151 (ON CA), 16 O.R. (2d) 721 at p. 723 (C.A.); see also *Dacon Const. Ltd. v. Karkoulis*, 1964 CanLII 252 (ON SC), [1964] 2 O.R. 139 (Ont. H.C.).

In *McCallum*, at p. 723, this court explained that the renunciation of a contract may be express or implied:

> The renunciation of a contract may be express or implied. A party to a contract may state before the time for performance that he will not, or cannot, perform his obligations. This is tantamount to an express renunciation. On the other hand a renunciation will be implied if the conduct of a party is such as to lead a reasonable person to the conclusion that he will not perform, or will not be able to perform, when the time for performance arises.

The purchaser in *McCallum* made it clear that he did not intend to complete the transaction on the closing date and this renunciation relieved the vendors from the obligation to tender.

The principles around the requirement to tender are summarized succinctly by Perell J. in *Time Development Group* [2018 ONSC 4384], at paras. 56-57:

> Tender … is not a prerequisite to the innocent party enforcing his or her contractual rights. Tender is not required from an innocent party when the other party has clearly repudiated the agreement. Numerous cases have held that the law does not require what would be a meaningless or futile gesture. Moreover, when there is an anticipatory breach, the innocent party need not wait to the date for

> performance before commencing proceedings for damages or in the alternative for specific performance of the agreement. [Citations omitted.]
>
> Thus, when a party by words or conduct communicates a decision not to proceed to closing, the other party is released from any obligation to tender in order to prove he was ready, willing and able to close: see *Kirby v. Cameron*, 1961 CanLII 203 (ON CA), [1961] O.R. 757 (C.A.); *Kloepfer Wholesale Hardware v. Roy*, 1952 CanLII 8 (SCC), [1952] 2 S.C.R. 465.

[31] Because the appellant made it clear on the date of closing that he did not have the funds to close and took no steps to close, the respondents were relieved of their obligation to tender. I would not give effect to this ground of appeal.

[32] In oral submissions, the appellant argued in the alternative that even if the appellant did repudiate the agreement, the respondents cannot recover damages because they never elected to either accept the repudiation or to insist on performance. The appellant cited *1179 Hunt Club Inc. v. Ottawa Medical Square Inc.*, 2018 ONSC 6200, in support of the proposition that the innocent party must elect. As that case was under appeal at the time, counsel suggested that the court consider the result of the appeal in that case.

[33] Since this appeal was argued, *Hunt Club* has been affirmed by this court: 2019 ONCA 700. However, *Hunt Club* does not assist the appellant. In *Hunt Club*, the vendor insisted on a certain closing date, and then neither party was able to close on that date. As a result, the agreement was at an end and the

purchaser was entitled to the return of the deposit. In this case, the vendor was ready, willing and able to close. It was the purchaser's lawyer who advised that the purchaser did not have the funds to close.

(2) Did the motion judge err in the application of the duty to mitigate?

[34] The appellant complains that the respondents did not entertain the offer he made after he failed to close in accordance with the agreement, to purchase the property for a 10% reduction in the purchase price; instead they resold the property for $1.28 million when they could have resold to him for just under $1.4 million.

[35] I observe first that this does not appear to be the argument on mitigation presented at the summary judgment motion. The motion judge analyzed the steps taken by the respondents to resell the property and found them to be reasonable.

[36] Second, it is unclear how this argument assists the appellant. His position in Mr. Constantine's letter and in this action, was that he was seeking a 10% price reduction based on an appraisal of the property – not that he would pay the reduced price and also continue to be obligated under the original agreement for the difference. Unless the respondents agreed to sell to the appellant for a 10% reduction, and at the same time released him from his obligation to pay the original price, the respondents could still sue the appellant for the difference.

[37] However, even if the appellant had made an offer to pay 10% less for the property and not be released from his obligation under the agreement of purchase and sale, I would reject the suggestion that the duty to mitigate obliges a vendor to accept an offer from the defaulting purchaser for less than the agreed price and then to have to sue the purchaser for the difference from the original agreed price.

[38] While a vendor may choose to accept such an offer, for example in a declining market, the vendor cannot be obliged to do so.

[39] The duty to mitigate is derived from the proposition that the wronged party cannot recover from the defaulting party for losses that could reasonably have been avoided: S.M. Waddams, *The Law of Contracts,* 7th ed. (Toronto: Thomson Reuters, 2017), at p. 529. It cannot be reasonable for a vendor to be obliged to reduce the loss it claims from the defaulting party by reselling the property to that party, then suing him or her for the difference. This would offer no financial advantage to the defaulting party as that party would be obliged to pay the same amount, either way. Yet the defaulting party would secure a significant tactical and procedural advantage over the innocent vendor.

[40] The effect of endorsing the proposition advanced by the appellant would be to undermine the sanctity of the bargain by encouraging purchasers to default, particularly in a falling market, and to offer a lower price for the same property,

leaving vendors with the risk and expense of recovering the balance of the original contract price in an action. The duty to mitigate does not go that far.

[41] I would not give effect to this ground of appeal.

(3) Did the motion judge err by failing to credit the deposit toward the damages?

[42] There are four possible outcomes of the agreement where the disposition of the deposit must be determined: 1) the agreement is completed according to its terms; 2) the vendor breaches the agreement; 3) the purchaser breaches the agreement but the vendor suffers no loss; 4) the purchaser breaches the agreement and the vendor suffers a loss and is entitled to damages.

[43] The agreement of purchase and sale specifically provides for the disposition of the deposit upon completion of the agreement: if the agreement is completed, the amount of the deposit is to be credited toward the purchase price. The agreement does not, however, specifically state what happens to the deposit when there is an “other termination” of the agreement.

[44] Where the vendor breaches the agreement, the deposit is returned to the purchaser. If the purchaser has suffered damages as a result of the vendor’s default, the purchaser may also sue to recover those damages or in an appropriate case, may sue for specific performance of the agreement.

[45] It is well-established by case law that when a purchaser repudiates the agreement and fails to close the transaction, the deposit is forfeited, without proof of any damage suffered by the vendor: see *Tang v. Zhang,* 2013 BCCA 52, 359 D.L.R. (4th) 104, at para. 30, approved by this court in *Redstone Enterprises Ltd., v. Simple Technology Inc.,* 2017 ONCA 282, 137 O.R. (3d) 374. Where the vendor suffers no loss, the vendor may nevertheless retain the deposit, subject to relief from forfeiture.

[46] This court recently restated the law regarding why a deposit is forfeited in *Benedetto v. 2453912 Ontario Inc.*, 2019 ONCA 149, 86 B.L.R. (5th) 1, at paras. 5-7:

> Where a payer (usually the purchaser) gives a vendor a deposit to secure the performance of a contract for purchase and sale of real estate, the deposit is forfeit if the purchaser refuses to close the transaction, unless the parties bargained to the contrary: see *Howe v. Smith* (1884), 27 Ch. D. 89 (C.A.); *March Bothers & Wells v. Banton* (1911), 1911 CanLII 74 (SCC), 45 S.C.R. 338. In *Howe v. Smith*, Fry L.J. stated at p. 101:
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> > Money paid as a deposit must, I conceive, be paid on some terms implied or expressed. In this case no terms are expressed and we must therefore inquire what terms are to be implied. The terms most naturally to be implied appear to me in the case of money paid on the signing of a contract to be that in the event of the contract being performed it shall be brought into account, but if the contract is not performed by the payer it shall remain the property of the payee. It is not merely a part

> payment, but is then also an earnest to bind the bargain so entered into, and creates by the fear of its forfeiture a motive in the payer to perform the rest of the contract.
>
> The deposit stands as security for the purchaser's performance of the contract. The prospect of its forfeiture provides an incentive for the purchaser to complete the purchase. Should the purchaser not complete, the forfeiture of the deposit compensates the vendor for lost opportunity in having taken the property off the market in the interim, as well as the loss in bargaining power resulting from the vendor having revealed to the market the price at which the vendor had been willing to sell: *H.W. Liebig Co. v. Leading Investments Ltd.*, 1986 CanLII 45 (SCC), [1986] 1 S.C.R. 70, at pp. 86-87.
>
> The motion judge provided a helpful summary of the law: a deposit is not part of the contract of purchase and sale, but "stands on its own as an 'ancient invention of the law designed to motivate contracting parties to carry through with their bargains', 'something which binds the contract and guarantees its performance', and is an 'earnest to bind the bargain so entered into, and creates by the fear of its forfeiture a motive in the payer to perform the rest of the contract'": see *Tang v. Zhang*, 2013 BCCA 52 (CanLII), 41 B.C.L.R. (5th) 69; *Comonsents Inc. v. Hetherington Welch Design Ltd.*, 2006 CanLII 33779 (Ont. S.C.); *Howe v. Smith*.

[47] However, forfeiture is always subject to the equitable remedy of relief from forfeiture. Section 98 of the *Courts of Justice Act,* R.S.O. 1990, c. C.43, provides that: "[a] court may grant relief against penalties and forfeitures, on such terms as to compensation or otherwise as are considered just." In *Stockloser v. Johnson*, [1954] 1 Q.B. 476 (C.A.), the English Court of Appeal set out the two pronged test that has been followed in Ontario for applying the relief from forfeiture

provision: 1) whether the forfeited deposit was out of all proportion to the damages suffered; and 2) whether it would be unconscionable for the seller to retain the deposit: *Redstone* at para. 15.

[48] Up to this point, I have discussed what happens to the deposit when the agreement is completed, when the vendor defaults and when the purchaser defaults but the vendor suffers no damage. The issue in this case arose when the vendor did suffer a loss because of the purchaser's breach; in that case, is the deposit treated as part payment and credited toward the damages, or is it retained in addition to the damages, subject to relief from forfeiture?

[49] In *Dobson v. Winton & Robbins Ltd.,* [1959] S.C.R. 775, where the purchaser defaulted and the vendor eventually resold the land for $5000 less than the agreed price, the Supreme Court stated at para. 14, without discussion:

> [t]he measure of damages in this case is the difference between the price provided for in the first contract, $75,000, and the price provided for in the second contract, $70,000. Counsel for the appellant admits that against the difference of $5,000 must be credited the deposit of $4,000; (Mayne on Damages, 11th ed., p. 234; 29 Hals., 2nd ed., p. 378).

The same proposition is stated in Victor Di Castri, *The Law of Vendor and Purchaser*, 3rd ed. (Toronto: Thomson Reuters, 2016), vol. 2 at p. 17-25, in discussing when a deposit is recoverable by a defaulting purchaser: "[w]here the land is sold at a loss, [the vendor] is entitled to recover that loss, less the amount of the deposit."

[50] The issue of the treatment of the deposit where the vendor suffers a loss arose squarely in the recent summary judgment decision, *Bang v. Sebastian*, 2018 ONSC 6226, aff'd 2019 ONCA 501.[1] There, two deposits were paid totaling $35,000, on substantially identical language as in the agreement of purchase and sale in this case. Counsel for the vendor submitted that the deposit should be forfeited without crediting it to the damages for the loss, on the basis of the case law referred to above that says that the deposit is not just part payment but is held as security and is forfeited on breach of the agreement.

[51] The judge in that case rejected the vendor's argument. He pointed out that the vendor could point to no case where the deposit was forfeited without crediting it toward the damages, although there were a number of cases where the opposite had occurred: *Goldstein; Blonski v. Jarmakowicz and Kowalski*, 9 D.L.R. (2d) 66 (Ont. Supreme Court, High Court of Justice); and *Dobson*.

[52] He found that the result was dictated by the wording of the agreement of purchase and sale, at paras. 69 and 71:

> Real estate transactions routinely involve the payment of deposits. The proper application of the deposit in circumstances where the purchaser fails to complete the transaction is governed by the parties' agreement. Here, the wording of the Agreement of Purchase and Sale states expressly that the deposit is to be "credited

[1] This case was affirmed on appeal but on other grounds; no challenge to the treatment of the deposit was raised.

> towards the purchase price" on completion of the transaction.
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> […]
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> I find that the wording of the deposit term in the Agreement of Purchase and Sale clearly and unambiguously reflects the parties' intention that the deposit would be applied as a credit to the payment obligation owed by the purchaser defendant to the vendor plaintiffs on completion of the transaction. There is no difference to the use of the deposit in the event of termination of the agreement as opposed to its successful completion. Rather, it was intended to be applied as a credit to the obligation owed by the purchaser to the vendors: whatever form that obligation might take. I conclude that the $35,000 paid by the purchaser defendant is to be paid to the vendor plaintiffs and credited against the damages that they have proven

[53] I agree with this analysis. While the agreement only specifically calls for the deposit to be credited to the purchase price on completion of the agreement, the measure of damages is based on the difference between the purchase price and the lesser amount that the property sold for after the purchaser's default. In other words, it is based on the vendor receiving the purchase price that was bargained for. One can infer that the intent of the parties was that the deposit be applied to the purchase price whether received on completion or as damages.

[54] I also agree that the cases discussed above, including *Benedetto*, where the deposit is forfeited because it is not just part payment but also a security mechanism to incentivize the purchaser to complete the transaction, explain why the deposit is forfeited when the vendor suffers no loss. The respondents point to

one sentence in the *Benedetto* decision where the court states that "a forfeited deposit does not constitute damages for breach of contract but stands as security for the performance of the contract": at para. 14. That statement is part of the explanation for the forfeiture of the deposit where there is no loss. However, where there is a loss, the deposit is treated as part payment for the damages suffered as a result of the loss.

[55] The motion judge in the instant appeal erred in law by holding that the deposit be forfeited and not credited to the vendor's damages.

Conclusion

[56] I would dismiss the appeal on the issues respecting the appellant's breach of the agreement of purchase and sale, and the issue of mitigation, but allow the appeal on the quantum of damages by deducting the amount of the deposit, $75,000, from the damages award.

[57] As success was divided, I would order no costs of the appeal.

Released: "KF" OCT 15, 2019

"K. Feldman J.A."
"I agree. David M. Paciocco J.A."
"I agree. Fairburn J.A."