COURT OF APPEAL FOR ONTARIO

CITATION: Tribute (Springwater) Limited v. Atif, 2021 ONCA 463
DATE: 20210625
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Strathy C.J.O., Feldman and van Rensburg JJ.A.

BETWEEN

Tribute (Springwater) Limited

Plaintiff (Respondent/
Appellant by way of cross-appeal)

and

Rashid Atif and Ansa Atif

Defendants (Appellants/
Respondents by way of cross-appeal)

Alex Flesias, for the appellants/respondents by way of cross-appeal

Caitlin Steven and Krista Chaytor, for the respondent/appellant by way of cross-appeal

Heard: May 21, 2021 by video conference

On appeal from the judgment of Justice Jane Ferguson of the Superior Court of Justice, dated August 11, 2020.

van Rensburg J.A.:

[1] This is an appeal from a summary judgment, awarding the respondent damages, interest, and costs for the appellants' failure to close a residential real estate transaction. The respondent cross-appeals the motion judge's order respecting the rate of prejudgment and postjudgment interest.

[2] For the reasons that follow, I would dismiss the appeal and cross-appeal.

A. FACTS

[3] On March 25, 2017, the appellants, Rashid and Ansa Atif, signed an agreement of purchase and sale ("APS") in relation to a new home to be built by the respondent, Tribute (Springwater) Limited ("Tribute"), in the "Stonemanor Woods" community in Springwater, Ontario. The purchase price was $1,115,490, with an initial deposit of $90,000. The Atifs paid a further deposit of $50,312.50 toward $335,134.13 in upgrades to the property. The Atifs failed to close on the extended closing date of December 17, 2018, and the APS was terminated by Tribute in January 2019.

[4] In February 2019, Tribute commenced an action in the Superior Court, claiming damages for breach of contract. In their statement of defence dated April 17, 2019, the Atifs (a) denied the allegations in the statement of claim; (b) expressly denied that they had breached the APS and pleaded that they had complied with their obligations; (c) pleaded that the property was not built to the agreed specifications for the ceiling height, and that the ceiling height was an essential term; and (d) pleaded that Tribute's damages were exaggerated and excessive.

[5] On November 2, 2019 Tribute resold the subject property for $985,000, and shortly thereafter moved for summary judgment. The motion judge granted

judgment for $383,636.47, with prejudgment interest fixed at $90,717.36, and costs of $20,000. The motion judge fixed the postjudgment interest rate at 4.45% per year.

[6] The damages of $383,636.47 consisted of the difference between the contract price and resale price (less real estate commission) of the home ($378,045.22), plus carrying costs and expenses incurred by Tribute for the period between the APS closing date and the resale closing date ($4,861.96), and Tribute's 15% administrative fee on such costs and expenses ($729.29).

[7] The prejudgment interest of $90,717.36 was calculated at the annual rate of prime plus 2% on the outstanding balance of the sale price ($1,318,523.22) from December 18, 2018 to December 18, 2019, and on the difference between the sale and resale prices ($378,045.22) from December 18, 2019 until the date of the hearing of the motion (August 10, 2020).

B. THE APPEAL

[8] The Atifs no longer dispute their liability for having breached the APS. Rather, they take issue with the amount of the judgment. The central issue in the appeal is mitigation. The Atifs say that the evidence was clear that Tribute had not taken reasonable steps to mitigate its damages, and they challenge Tribute's reliance on expert evidence that was inadmissible and deficient. They contend that the motion judge's reasons are insufficient because they do not address

mitigation. They also assert that the motion judge erred in awarding damages that exceeded the amount sought in the statement of claim.

[9] I will address these issues in turn.

C. DISCUSSION

[10] The question of mitigation arises because of the process that Tribute followed in reselling the property, and the fact that it was not resold for several months after the APS was terminated. The Atifs contend that Tribute's practice of selling directly through its own agents "internally" instead of by listing through an agent and advertising the property on the multiple listing service ("MLS") was unreasonable.

[11] I accept that mitigation was implicitly raised by the Atifs in their statement of defence – when they challenged the amount claimed by Tribute and pleaded that the damages were excessive. The efforts to mitigate were also specifically addressed in Tribute's motion materials. The main problem with this argument on appeal however is that the Atifs did not challenge Tribute's evidence through cross-examination or provide their own evidence to demonstrate that Tribute's efforts to resell the property were unreasonable, and that the damages could reasonably have been mitigated.

[12] Tribute relied on two affidavits with respect to the resale process. The affidavit of Mary Liolios, vice president of sales and marketing for Tribute,

deposed that the property had been listed internally at Tribute's sales office at a price of $999,990 inclusive of all upgrades. She explained why the property was only listed (at the same price) on the MLS in September 2019, when Tribute signed a listing agreement with an agent. Essentially, she indicated that Tribute marketed the property internally because it wanted to avoid the additional expense of paying commission on the sale, and to avoid a reduction in the value of the other new homes they were selling in the Stonemanor Woods community. She deposed that the property was sold in November 2019, with a closing date in December for $985,000. Ms. Liolios offered an opinion, supported by print-outs from zolo.ca and an MLS Home Price Index chart, that home values in the area had declined about $100,000 in 2019 from 2016-17 values.

[13] The affidavit of William Ly, a qualified appraiser, provided two retrospective appraisals for the property. Using a direct comparison approach, he valued the property at $890,000 as of January 4, 2019 and $920,000 as of October 21, 2019.

[14] As a general rule, a plaintiff is not entitled to recover for losses which could have been avoided by taking reasonable steps. Where it is alleged that the plaintiff failed to mitigate damages, the onus is on the defendant to prove both that the plaintiff failed to make a reasonable efforts to mitigate, and that mitigation was possible: *Southcott Estates Inc. v. Toronto Catholic District School Board*, 2012 SCC 51, [2012] 2 S.C.R. 675, at paras. 24, 45.

[15] The Atifs assert that Tribute failed to mitigate its damages when, instead of listing the property on the MLS immediately, it listed the property internally for a period of nine months. They also contend that Ms. Liolios was not qualified to provide expert evidence, and that there were deficiencies in the appraisal evidence provided by Mr. Ly.[1]

[16] I would not give effect to these arguments.

[17] Typically damages in respect of a failed real estate transaction are determined based on the difference between the agreed sale price under the parties' agreement of purchase and sale and the market value of the property at the date set for closing. The court may choose a date for the assessment of damages other than the date set for closing, depending on the context, including the plaintiff's duty to take reasonable steps to avoid its loss, the nature of the property and the nature of the market: *100 Main Street East Ltd. v. W.B. Sullivan Construction Ltd.* (1978), 20 O.R. (2d) 401 (C.A.), at p. 421; *642947 Ontario Ltd. v. Fleischer* (2001), 56 O.R. (3d) 417 (C.A.), at para. 41. In this case the property was appraised at $890,000 close to the date set for closing and was sold 12 months later for $985,000, an amount that exceeded the appraised value around the time it was listed for sale.

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[1] The Atifs also assert that the expert opinion of Mr. Ly was deficient because it did not contain a signed acknowledgment of expert's duty. This argument is raised for the first time on appeal, and, in any event, an acknowledgment under r. 53.03 was contained in Tribute's materials on the summary judgment motion.

[18] The Atifs do not argue that the date for the calculation of damages was incorrect. Rather, they accept that damages were properly calculated based on the resale price, and included Tribute's carrying costs of the property until it was sold. The focus on appeal is on Tribute's delay in listing the property for sale on the MLS, which, according to the Atifs, constitutes a failure to mitigate.

[19] As I will explain, I would not give effect to the argument that there was a failure to mitigate. That said, Tribute's delay in listing the property with an agent and exposing it for sale on the MLS is relevant to the interest rate issue raised in the cross-appeal.

[20] While I agree that Ms. Liolios was not qualified to provide an expert opinion, Mr. Ly's evidence addresses the valuation of the property at two relevant dates: when the APS was terminated, and just before the property was resold. While the Atifs assert on appeal that Mr. Ly's appraisals do not mention the parameters used to establish a sample of potential comparables, and make no mention of how the extensive upgrades on the property might have affected his opinion of fair market value, these issues were not explored at first instance. As already noted, there were no cross-examinations on the affidavits, nor did the Atifs provide any appraisal evidence, or any evidence at all on the issue of mitigation. It is too late, on appeal, to take issue with matters that were not addressed when the action was pending in the court below. This goes some way

to explaining the brevity of the motion judge's reasons, and the fact that she did not address the question of mitigation.

[21] The appellants drew this court's attention to the reported decision in *Tribute (Springwater) Limited v. Sumera Anas*, 2020 ONSC 5277, in which the defendant (who is the appellant Rashid Atif's sister) was sued by Tribute for failing to close her purchase of the house that is located next door to the subject property. In that case, the court refused summary judgment in Tribute's favour after finding there was a genuine issue as to whether the damages were reasonably foreseeable and whether the upgrades were what the purchaser expected. The motion judge went on to say that she was "troubled by the plaintiff's mitigation efforts" in selling through one of its own agents rather than using the MLS, without an appraisal: at para. 26. She characterized Tribute's internal practice of doing the marketing through their own sales agents, not through MLS and without an appraisal, as not sufficient and self-serving: at para. 28.

[22] Each case falls to be determined on its own facts and the law and argument that is advanced. In the present case, on the evidence before the motion judge, there is no demonstrated error in the conclusion that there was no genuine issue requiring a trial. The Atifs do not take issue with the conclusion in their case that they were liable for breach of the APS. And, although I too am "troubled by" Tribute's decision to list the property internally rather than using a

listing agent and the MLS, the Atifs did not pursue the mitigation issue at first instance, nor was there evidence to suggest that a higher price would have been obtained if the property had been listed on the MLS as soon as the APS was terminated. Indeed, the evidence is to the contrary: the uncontradicted appraisal evidence of Mr. Ly indicated that the property was worth less in January 2019 (when the Atifs contend it should have been listed on the MLS) than in October 2019, while it was on the MLS. If the property had been listed earlier, at best Tribute might have avoided some of the carrying costs of the property (which was not argued before us) and some of the prejudgment interest (which I will address in dealing with the cross-appeal).

[23] I would also not give effect to the argument that the motion judge ought not to have granted judgment for an amount that exceeded Tribute's claim for damages in the statement of claim. Tribute claimed "damages in the amount of $200,000 for breach of contract, or such further or other amount as may be determined and particularized at or before trial". Rule 25.06(9)(b) provides that "the amounts and particulars of special damages need only be pleaded to the extent that they are known at the date of the pleading, but notice of any further amounts and particulars shall be delivered forthwith after they become known and, in any event, not less than ten days before trial". The statement of claim was issued before the property had been resold. The Atifs were provided with the amounts and particulars of Tribute's claim in compliance with r. 25.06. There was

no need for an amendment. Even if an amendment had been required, and the issue had been raised at first instance, there is no question that the amendment would have been permitted, as there is no evidence of prejudice to the Atifs: see r. 26.01; *McKnight v. Ontario (Transportation)*, 2018 ONSC 52, at para. 45. The Atifs were on notice throughout the summary judgment proceedings of the amount sought by Tribute and of the components of its claim.

D. THE CROSS-APPEAL

[24] In its cross-appeal Tribute seeks prejudgment and postjudgment interest at the rate provided for in the APS, and asks this court to increase the amount for prejudgment interest from $90,717.36 to $137,606.11. Tribute argues that the motion judge had no jurisdiction to depart from the contractual interest rate of prime plus 5%, when she substituted a rate equivalent to prime plus 2%, in awarding prejudgment interest and a rate of 4.45% for postjudgment interest.

[25] I disagree.

[26] Section 127 of the *Courts of Justice Act* ("*CJA*") provides for prejudgment and postjudgment interest at prescribed rates. A court "shall not" award prejudgment interest under s. 128 or postjudgment interest under s. 129 where "interest is payable by a right other than under" either statutory provision: ss. 128(4)(g) and 129(5). These provisions preclude the court from ordering prejudgment and postjudgment interest in accordance with the statutory interest

rates under the *CJA* if interest is otherwise payable in some other way (such as by virtue of a contract). Section 130(1) provides for the court's discretion to disallow interest under either s. 128 or s. 129, to allow interest at a rate higher or lower than provided under either section, or to allow interest for a period other than that provided in either section. Section 130(2) sets out the factors relevant to the exercise of such discretion.

[27] The motion judge reduced the interest rate, relying on her "inherent jurisdiction". Contrary to the respondent's argument, I do not agree that s. 130, which speaks to discretion to depart from prejudgment and postjudgment interest under ss. 128 and 129, is exhaustive of the court's discretion, and that there is no discretion to depart from a contractual rate of interest. In the exercise of the court's common law and equitable jurisdiction, the departure from a contractual rate of interest can be justified by "special circumstances": *Gyimah v. Bank of Nova Scotia*, 2013 ONCA 252, at para. 10; *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43, [2002] 2 S.C.R. 601, at paras. 46-50. The contractual rate of interest has also been disallowed in circumstances where it is "extremely onerous or unfair" and adequate notice of the contractual term was not provided: see *Tilden Rent-A-Car Co. v. Clendenning* (1978), 18 O.R. (2d) 601 (C.A.); *MacQuarie Equipment Finance Ltd. v. 2326695 Ontario Ltd. (Durham Drug Store)*, 2020 ONCA 139, at paras. 23, 37-38; *Forest Hill Homes v. Ou*, 2019 ONSC 4332, at paras. 19-20.

[28] There may be other circumstances that would justify an award of prejudgment or postjudgment interest at a rate other than the rate prescribed by the parties' contract, however we did not have the benefit of full argument on this issue. It is sufficient for the purpose of this cross-appeal that there were special circumstances to justify a departure from the contractual rate of interest in this case: Tribute did not expose the property to the market for nine months after it terminated the APS. During this period of inaction, interest accrued on the full outstanding purchase price, and carrying costs were incurred.

[29] In these circumstances I would not interfere with the motion judge's decision to award prejudgment interest at the prime rate, plus 2% per year and postjudgment interest at an annual rate of 4.45%.

E. DISPOSITION

[30] For these reasons I would dismiss the appeal and cross-appeal. The parties agreed that the successful party on appeal would be entitled to costs fixed at $6,000. Success is mixed, with the dismissal of both the appeal and the cross-appeal. In the event the parties are unable to resolve the issue of costs, they may file written costs submissions limited to three pages each within ten days of the date of these reasons.

Released: June 25, 2021 "G.R.S."

"K. van Rensburg J.A."
"I agree. G.R. Strathy C.J.O."

“I agree. K. Feldman J.A.”