

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Arista Homes (Richmond Hill) Inc.)	
)	
Plaintiff)	
)	<i>Wei Jiang, for the plaintiff</i>
– and –)	
)	
)	
Joseph Martin Rodin)	
)	
Defendant)	
)	<i>Leonard Sussman, for the defendant</i>
)	
)	
)	Heard May 27, 2022
)	by video conference, at Newmarket

S.T. BALE J.

1. Arista Homes (Richmond Hill) Inc. moves for summary judgment in an action arising from a failed real estate transaction.

Background facts

2. On June 28, 2017, Joseph Rodin agreed to purchase, and Arista Homes agreed to build and sell, a home on the lot known municipally as 24 Mallery Street, Richmond Hill, Ontario. The home was to be a three-bedroom model with computer loft.

3. On March 28, 2018, the parties entered into a new agreement to accommodate a change from the three-bedroom with loft model to a four-bedroom model.

4. The agreement was not completed on the scheduled closing date of July 18, 2019. Arista’s position is that it was ready, willing and able to complete the agreement, but that Mr. Rodin was not.

5. Mr. Rodin says that the home to be built was represented to have a walk-out basement, rather than the walk-up basement which it had when built. He also says that the home, as built, had only three bedrooms rather than the four for which the parties had contracted. He also says that he signed the March 28, 2018 agreement under duress.

Analysis

Walk-out basement

6. Mr. Rodin says that a walk-out basement was “a significant and exceptional feature that [he] was seeking.” He says that at the time of his purchase, Arista represented that the home would have a walk-out basement and that he was presented with marketing documentation which

reinforced that representation. He says that the original agreement of purchase and sale expressly provided for a walk-out basement.

7. Mr. Rodin says that he was first told that the home would not have a walk-out basement on March 28, 2017, at which time a new purchase agreement was suddenly presented to him. He says that he was “absolutely overwhelmed with this sudden and shocking revelation”, that he asked for an opportunity to speak with a lawyer but was told that unless he signed on the spot, his deposit money would be forfeited and the home would be sold to another purchaser. He says that he then signed the agreement “under circumstances of extreme duress and manipulation.”

8. Both walk-out and walk-up basements have an exit to the backyard from the basement. For a walk-out basement, the lot grading conditions need to slope downward from the front of the property to the rear, with a sufficient slope that the basement exits directly to the backyard without requiring stairs. For a walk-up basement, the backyard is also accessible from the basement; however, steps up are required to reach grade level.

9. Mr. Rodin did not produce a copy of the marketing documentation supporting his claim that at the time of sale, Arista represented that the home would have a walk-out basement or explain his failure to do so. Franco Crispino is Arista’s vice-president of sales and marketing. His evidence is that Arista did not market any lots in the development as guaranteed to have a walk-out basement, because final grading approval had not been obtained. He produced a copy of the marketing brochure used by Arista at the time of the sale to Mr. Rodin – it lists the features of the homes to be built but does not mention a walk-out or walk-up basement.

10. Contrary to what Mr. Rodin says, the original agreement of purchase and sale did not provide for a walk-out basement. It did, however, contain the following proviso:

The Purchaser hereby acknowledges that complete engineering data in respect of the Municipally approved final grading of the Property may not, as yet, be complete and accordingly, it may not be possible to construct a Dwelling With a walk-out basement or rear deck where so indicated in this Agreement or vice versa. In the event this Agreement calls for a walk-out basement or rear deck and such is not possible or reasonable in the Vendor's opinion or in the event this Agreement does not call for a walk-out basement or rear deck and such is required, pursuant to final approved grading and engineering plans, the Purchaser shall accept a credit in the Purchase Price, or pay the additional cost involved in constructing such walk-out basement or rear deck, as the case may be (such costs shall be absolutely determined by Declaration sworn on the part of the vendor).

Accordingly, even if the agreement had provided for a walk-out basement, Rodin’s remedy would have been a credit to the purchase price.

11. I do not accept that Mr. Rodin was first advised on March 28, 2017 that the home would not have a walk-out basement or that the second agreement was suddenly thrust on him that same date. He had requested the change from a three-bedroom to a four-bedroom home on February 20, 2018. On February 27, 2018, Arista advised him that the change could be accommodated at an additional charge of \$7,500 plus HST. At the same time, he was advised that a new agreement would have to be signed and that it was no longer possible for the home to have a walk-out basement. This advice was confirmed by email the same day:

Good Afternoon Mr. Rodin,

I hope all is well. As we discussed earlier today Arista is able to make the change from the 3-bedroom to a 4-bedroom at your request. As I have also mentioned we will require to go for a permit revision. And in order to move forward there will be a charge of \$7,500.00 + HST for this revision.

Should you decide to proceed we will require a new agreement to be drawn up by sales.

In addition I have also mentioned that this lot is no longer a walk-out. I have spoken to our V.P of Sales and Marketing and cc Franco Crispino on this email who will be able to discuss further with you.

Kindly advise how you would like to move forward.

12. Mr. Crispino's evidence is that Rodin did contact him and that he told him that because of the final grading approval, only a walk-up basement was possible "to which he did not object." In any event, Rodin had between the email of February 27, 2018 and the signing of the new agreement on March 28, 2018 to consult with a lawyer concerning the walk-out, if he wished to do so.

13. Arista's position is that Rodin did not raise any concerns about the lack of a walk-out basement at the time the agreement was signed. The agreement contained a handwritten acknowledgement, initialed by Mr. Rodin, which provided: "Purchaser accepts walk-up condition in lieu of walk-out condition." His argument that he was afraid of losing his deposit if he did not sign the new agreement makes no sense – had he not signed it, he would not have been in default of the original agreement and would have had additional time to obtain legal advice. As a real estate agent, he would have known that.

14. On May 25, 2019, Mr. Rodin wrote to Arista confirming a meeting that had been held several weeks earlier in which the parties had discussed the possibility of Arista providing financing by way of a take-back mortgage. By that time, there had been a downturn in the real estate market. On May 27, 2019, Rodin exchanged email messages with Mr. Crispino. It is clear from those emails that Rodin was unable to finance the purchase himself and felt the only option was for Arista to provide the financing. Ultimately, Crispino and Rodin were unable to come to terms. Of note is the fact that in the many emails from Rodin to Crispino, there is no mention of the basement issue.

15. In the circumstances described, I find that Rodin knew, before March 28, 2017, that the purpose of the meeting was for him to sign an amended agreement providing for a four-bedroom home and that the home, as built, would not have a walk-out basement. I do not accept that he signed the agreement under duress.

Whether the home, as built, had four bedrooms

16. Mr. Rodin says that several days prior to closing, he attended at the property to perform the New Home Warranty inspection. He says that he entered the property only to discover that the home, as built, had only three bedrooms. He says that the Arista representative who was present confirmed that the home had been constructed as a three-bedroom with loft model, that head office would be notified of the problem and that if any changes were made to the construction, he would be notified, and a further inspection would be arranged. He goes on to say that he was never notified that the home would be changed to a four-bedroom model and that no further inspection was arranged.

17. In support of his position that the home, as built, had only three bedrooms, Mr. Rodin relies on an MPAC report which indicates that 24 Mallery Street is a three-bedroom home. However, Mr. Crispino explains that it is likely that the MPAC report was based on the original building permit application and was not updated after the property was changed from a three-bedroom to a four-bedroom model. I see that as a reasonable explanation, given the following evidence.

18. The Arista representative who met with Mr. Rodin for the New Home Warranty inspection was Devi Cristini. Her evidence is that the home had been built as a four-bedroom home as of the date of the inspection. She says that she walked through the property with Mr. Rodin and a woman she believed to be his wife, and that any issues they had with the condition of the home were recorded on the Tarion pre-delivery inspection form. Three of the issues related to the condition of the fourth bedroom. Her evidence is corroborated by a copy of the inspection form which includes the following statement signed by Rodin: "I have inspected my new home and I agree that the descriptions of the items listed on this form are accurate." Cristini also says that she attended at the property on July 18, 2019 for the final inspection but that Rodin failed to attend. Rodin has not denied that he signed the inspection form or explained its references to the fourth bedroom.

19. Noelle Simons, Arista's construction administrator, gave evidence that the property had been converted from a three-bedroom with loft to a four-bedroom model. She produced copies of purchase orders dated April 24, May 10 and May 15, 2019 to subtrades for the work required for the conversion.

20. On November 4, 2019, the home was sold to a third-party purchaser. The agreement provided that the home is a four-bedroom model.

21. On this evidence, I am satisfied that the home was a four-bedroom model prior to the date of closing.

Damages

22. Arista's damages for loss of bargain are \$136,464.22, made up as follows:

Original sale price	\$1,217,798.00
Less: sale price on resale	(940,000.00)
Less: deposits and extras paid by defendant	<u>(141,333.78)</u>
Damages for loss of bargain	\$136,464.22

23. In addition, Arista incurred the following carrying costs as a result of Mr. Rodin's failure to complete the agreement:

Municipal taxes	\$881.51
Utilities (electricity)	465.14
Utilities (water)	104.63
Utilities (gas)	<u>874.17</u>
Total carrying costs	\$2,325.45

Mitigation

24. “Where it is alleged that the plaintiff has failed to mitigate, the burden of proof is on the defendant, who needs to prove both that the plaintiff has failed to make reasonable efforts to mitigate and that mitigation was possible”: *Southcott Estates Inc. v. Toronto Catholic District School Board*, 2012 SCC 51, at para. 24 (citations omitted).

25. Mr. Rodin says that Arista “deliberately elected not to mitigate its damages” and that, in fact it “deliberately manufactured the ‘loss of bargain’ that [it] is claiming in these proceedings.” He says that Arista did not list the property for sale on MLS or otherwise advertise the property for sale. He says that Arista “kept the availability of the Property obscured from the general public, the real estate community and prospective buyers.” He says that he is a real estate agent and that he “knows” that had the home been listed on MLS, it would have been sold on a much earlier date and for a much higher price. There are several difficulties with this argument.

26. First, Arista is in the business of building and selling homes. It has its own sales system and does not rely upon the MLS system. Mr. Rodin’s evidence would suggest that Arista does not know its own business and could make more money by selling homes on MLS. I am not prepared to accept that proposition based solely upon his say so.

27. Second, it simply isn’t true that Arista failed to advertise the property and kept it obscured from the general public. The Arista's Richlands sales center was operated and staffed by real estate agents from Re/max Premier, who had expertise in selling new construction homes such as this one. The sales centre is located close to the intersection of Leslie Street and Elgin Mills Road, in Richmond Hill. The location sees a lot of traffic and the sales center is highly visible.

28. In October 2019, Arista and the other builders of the Richlands development coordinated a marketing campaign aimed at selling homes (unbuilt) as well as inventory homes (already built, including units from other failed closings). Between the four builders, there were between thirty and forty inventory townhomes. The marketing campaign involved a "Grand Opening" event on October 26, 2019. Campaign marketing included email “blasts” to Arista’s registrant database of approximately 35,000 registrants. Email blasts were sent on seven occasions between August 17, 2019 and October 28, 2019. As part of the campaign, Arista agreed to pay real estate agents who brought in purchasers a commission of 2.5%.

29. Mr. Rodin says that Arista elected to “blow off the Property for a price that was far less than the fair market value of the Property.” In support of his position, he produced a GeoWarehouse report. He says that the report confirms that between July and November 2019, similar homes sold for well in excess of \$1,000,000 with some having sold for more than \$1,200,000. He says that the median sale price of the properties included in the report was \$1,090,302. In particular, he points to 35 Mallery Street which he says sold on November 29, 2019 for about \$80,000 more than the resale price of 24 Mallery.

30. In response, Arista retained an expert, Oksana Vialykh, who delivered a report commenting upon the reliability of the GeoWarehouse report produced by Mr. Rodin. In summary, Vialykh pointed out the following shortcomings in the report:

- it does not identify the size of the properties sold or their features, including finishes, number of stories, presence of finished basements, number of bedrooms and bathrooms, and landscaping standards;

- it includes not just townhouse dwellings but also semi-detached and detached residences, which would upwardly skew the prices;
- it shows closing dates, not contract dates;
- it includes sales of properties in what may be a more desirable neighbourhood;
- the search resulting in the report appears to have been deliberately restricted to transactions between \$1,000,000 and \$1,400,000, which resulted in the omission of at least three transactions in the neighbourhood that were less than \$1,000,000.

31. With respect to Ms. Vialykh's comment relating to the difference between closing dates and contract dates, the sale of 35 Mallery Street (specifically relied upon by Mr. Rodin) is a case in point. Although it closed on November 29, 2019, it was not a resale. Rather, the contract price had been established in the original pre-construction contract signed in June 2017. So, the sale price of 35 Mallery Street was simply a case of the purchasers honouring the contract and paying the sale price agreed upon before the downturn of the market.

32. In the result, I am not satisfied that the plaintiff failed to make reasonable efforts to mitigate or that the resale price was unreasonable.

Prejudgment and postjudgment interest

33. The agreement of purchase and sale provides that Arista has the right to recover from the purchaser all additional costs, losses and damages arising out of any default on the part of the purchaser, including interest at the rate of 12 per cent per year. Mr. Rodin argues that this provision is onerous and unusual and was not brought to his attention at the time the agreement was signed. In support of his position that Arista should not be able to recover interest at that rate, he relies upon *Tilden Rent-a-Car v. Clendenning* (1978), 18 O.R. (2d) 601, 1978 CanLii 1446 and *Forest Hill Homes v. Ou*, 2019 ONSC 4332.

34. In *Forest Hill Homes*, the builder's agreement of purchase and sale provided for an interest rate of 20 per cent per year if the purchasers failed to pay the balance due on closing. At para. 18, the court found that to be "excessively onerous" and unenforceable.

35. I am not sure at what point builder's interest rates become excessively onerous. However, in the absence of evidence to the contrary, I am not satisfied that a rate of 12 per cent per year is so onerous as to render it unfair to the purchaser. Mr. Rodin says that 12 per cent is more than what is ordinarily charged in the industry. He also says that he is a realtor and has never come across such a high interest rate in an agreement of purchase and sale. However, in the absence of any evidence of the interest rate provided for in other builder's agreements at the relevant time, I am not satisfied that 12 per cent is so onerous or unusual as to be unfair to the purchaser.

Disposition

36. Mr. Rodin did not object to the case being determined by way of summary judgment nor did he submit that there are genuine issues requiring a trial. Rather, he submitted that on the facts established by the evidence, Arista was in breach of contract and not entitled to judgment. Accordingly, I am required to grant judgment, if I am satisfied that is appropriate to do so: rule 20.04(2). For the reasons given, I am satisfied that it is appropriate to grant summary judgment to Arista in the amount of \$138,789.67, plus prejudgment interest at the rate of 12 per cent per year.

37. Arista's counsel shall submit a prejudgment interest calculation for my review. Interest on the sum of \$136,464.22 will be from July 18, 2019 (the date of breach) and on \$2,325.45 from February 12, 2020 (the date by which the carrying costs had been incurred).

38. If the parties are unable to agree on costs, I will consider brief written argument, provided that it is delivered to monica.mayer@ontario.ca, no later than October 26, 2022.

A handwritten signature in black ink, appearing to read "S. J. O'Connell", is located in the lower right quadrant of the page.

Released: October 12, 2022

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DATE: 20221012

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Arista Homes (Richmond Hill) Inc.

Plaintiff

– and –

Joseph Martin Rodin

Defendant

REASONS FOR JUDGMENT

S.T. BALE J.