

COURT OF APPEAL FOR ONTARIO

CITATION: Arista Homes (Richmond Hill) Inc. v. Rahnama, 2022 ONCA 759

DATE: 20221107

DOCKET: C70200

Fairburn A.C.J.O., Doherty and Lauwers JJ.A.

BETWEEN

Arista Homes (Richmond Hill) Inc.

Plaintiff (Appellant)

and

Eddie Ardeshir Rahnama

Defendant (Respondent)

Richard Macklin and Wei Jiang, for the appellant

Robert D. Malen, for the respondent

Heard: October 31, 2022

On appeal from the judgment of Justice Jill C. Cameron of the Superior Court of Justice, dated December 7, 2021, with reasons reported at 2021 ONSC 8060.

REASONS FOR DECISION

[1] This is an appeal and cross-appeal. Following oral argument, we allowed the appeal and dismissed the cross-appeal with reasons to follow. These are our reasons.

[2] The parties entered into an Agreement of Purchase and Sale (“APS”) for a home to be built by the appellant. The respondent failed to close the transaction on the closing date.

[3] The appellant sued the respondent following the failed real estate transaction and brought a motion for summary judgment, seeking damages flowing from the breach of the APS, including loss of bargain damages. The respondent claimed that the agreement had been frustrated on the basis that, although not reflected in the APS, he had acted as an agent for a third party. He said that he had verbally communicated this to the appellant when the APS was entered into. According to the respondent, the third party was unable to close in accordance with the APS as a result of circumstances beyond the third party’s (and the respondent’s) control.

[4] The motion judge rejected the respondent’s claim of agency. She found that he was in fact the purchaser and that he was responsible for the failure to close. That finding is not in dispute on appeal.

[5] What is in dispute is how the motion judge calculated the damages arising from the failure to close: loss of bargain damages. The appellant maintains that

the motion judge erred in calculating those damages by relying upon expert evidence, rather than by comparing the sale price as reflected in the APS with the actual sale price of the property when it was ultimately sold to an arm's length third party in a sale that was not found to be improvident.

[6] The appellant maintains that its primary argument before the motion judge was that the loss of bargain damages should be determined by assessing the difference in price between the price as reflected in the APS and the price later obtained through a *bona fide* sale to the third party. According to the appellant, the expert evidence was only advanced in the alternative, should the motion judge find a frailty in the ultimate sale to the third party.

[7] Although the respondent cannot recall the appellant advancing what is now said to have been its primary argument before the motion judge, he is not prepared to say that it was not advanced. At the same time, the respondent contends that the absence of any reference in the motion judge's reasons to that primary argument demonstrates that it was not raised. He argues that it does not fall to the appellant to advance the position for the first time on appeal.

[8] We are satisfied that this argument was before the motion judge. We base this conclusion on the fact that the appellant's primary position reflects the application of well-settled principles of law for calculating loss of bargain damages.

[9] Where a purchaser fails to close a real estate transaction and the vendor takes reasonable steps to sell the property in an arm's length sale to a third party in mitigation of damages, and there is nothing improvident about the sale, the difference between the two sale prices will be used to calculate the damages: *642947 Ontario Ltd. v. Fleischer* (2001), 56 O.R. (3d) 417 (C.A.) at para. 41; *100 Main Street Ltd. v. W.B. Sullivan Construction Ltd.* (1978), 20 O.R. (2d) 401 (C.A.), at para. 55. In such circumstances, there will be no need for expert evidence: *Marshall v. Meirik*, 2021 ONSC 1687, at para. 30, aff'd 2022 ONCA 275.

[10] That is this case. The motion judge's reasons make clear that she accepted that the appellant acted reasonably to mitigate damages. While the property was not listed for resale in the immediate wake of the respondent having reneged on the agreement, the motion judge made clear that the value of the property rose between the time of the repudiation and the actual sale, meaning that any delay in selling the property worked to mitigate the loss.

[11] As for the cross-appeal, the respondent argues that the motion judge erred by imposing a 12 percent pre-judgment and post-judgment interest rate. We do not accept this position. This rate had been contracted for in the APS. The motion judge's discretionary decision not to set aside the contracted upon amount is owed deference.

[12] Having regard to our conclusion as it relates to loss of bargain damages, the respondent is ordered to pay to the appellant damages in the amount of \$141,013.93 net of deposits, plus pre-judgment interest at 12% per annum. This reflects the difference in value between the failed APS and the re-sale price.

[13] The respondent also claims that the motion judge should have deducted the amount of interest earned on the deposit given by him at the time of entering into the APS. It is said that it defies all logic that the deposit would not have been invested in an account bearing at least a three percent interest rate.

[14] We do not accept this position. There is no evidence to support it. In any event, under the APS, the deposit became the vendors upon default.

[15] The motion judge ordered that the appellant was entitled to partial indemnity costs of \$39,989 less a cost consequence of \$8,500, payable to the respondent who beat his offer to settle. Given that the appellant is successful on appeal as it relates to the issue involving loss of bargain damages, the respondent has no longer beaten his offer to settle. Therefore, the respondent is no longer entitled to the \$8,500. As a result, the appellant is entitled to its partial indemnity costs of \$39,989 without deduction, plus partial indemnity costs from the date of the unbeaten offer to settle to the date of trial, which amounts to \$8,174.99. Therefore, the cost award below is set aside and an award of \$48,163.99 is substituted.

[16] The appeal is allowed. The cross-appeal is dismissed. The appellant is entitled to costs for this appeal in the amount of \$12,500, all inclusive.

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PLauwers J.A.