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CONTRACTS: BREACH AND DAMAGES

A Declining Real Estate Market – No Excuse Not to Close

By

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In *Lecco Ridge Developments Inc., v. Vaquero* 2022 ONSC 6547, Vaquero (the "Defendant") had agreed to purchase a property from Lecco Ridge Developments Inc. (the "Plaintiff"), a builder. Unfortunately, events didn't unfold as planned as the purchaser failed to produce the necessary funds on the scheduled closing date. Eventually, the builder sold the property to a different buyer, though for less money. This case is a good example for interesting discussion around the issue of damages incurred by a seller in a declining market.

The Plaintiff sued the Defendant for breach of the Agreement of Purchase and Sale (the "APS"), demanding forfeiture of the buyer's deposit and for damages. As for damages, the Plaintiff claimed the difference between the original purchase price and the eventual selling price of the property, less the forfeited deposit of \$50,000. Also, pursuant to the APS, the Plaintiff claimed interest charges of 15% per annum on all additional costs, loss and damages arising from the breach, plus an additional real estate commission and carrying costs for the property from the original closing date to the extended closing date, including taxes, utilities, insurance, and management expenses. The court weighed up the merits of each damage claimed by the Plaintiff to determine whether it should be granted.

In their defence, the buyer claimed they had failed to produce funds in question due to the decline in the real estate market that caused their lender to decline the loan required to close the deal. The buyer also argued that the terms of the APS were unenforceable as they were not understood by the Defendant as they were unaware of the consequences of default. The court determined the buyer would only be permitted to back out of the contract in the event of an unforeseeable event that "radically altered the contractual obligations," rendering it impossible for the Defendant to honour them. In the circumstances, a drop in the market was not deemed an unforeseeable event, even if the buyer was able to demonstrate evidence of a price drop, which they had not. Also, failing to qualify for financing was not considered an unforeseeable event, especially as the buyer had also removed the financing condition in the APS when they signed back their offer. Furthermore, the builder was not under any obligation to explain the terms of the APS to the buyer, nor to recommend its review with their own lawyer to understand the consequences of default. Last, there was no evidence the seller gave the buyer insufficient time to review the APS properly.



In assessing the damages, the court held that the seller was entitled to recover any reasonable damages that had foreseeably arisen from the breach of the contract. Accordingly, damages were awarded to the builder in the amount of the difference between the original price and the eventual selling price, less the deposit the court determined should be forfeited to the builder. In addition, the court awarded damages for carrying costs incurred by the seller for the period between the original closing date and the selling date for which there was proof. Damages for management fees were denied as the seller had failed to produce invoices to substantiate their claim.

In addition, the court ruled that because of the interest rate of 15% was onerous, the provisions in the APS stipulating this rate should have been brought to the buyer's attention, and there was no evidence this had been done. As a result, the builder could not charge a 15% interest rate on additional costs, loss and damages. And as for the real estate broker commission, the court agreed that as the seller had to relist the property on MLS, a further expense had been incurred and it awarded the seller damages to compensate for the additional commission.

In total, the seller was awarded \$26,500.00, that being the difference between the purchase price and the resale price less the deposit; \$24,936.28 plus HST for the increased real estate commission; several hundred dollars in carrying costs for utilities, taxes, and insurance fees to the new closing date; \$500.00 in legal fees and administrative costs, as well as pre- and post- judgment interest.

At De Francesca Law, we have significant experience in closing real estate deals when the market is in decline and major problems, such as securing financing are likely to arise. When acting on behalf of the seller, we will maintain pressure on the buyer to encourage them to stay in the deal, and when acting for the buyer, we have the expertise to navigate all the complexities of the transaction, to provide the breathing room for a successful conclusion. Therefore, before you make the decision not to close, consult with us first, so and we can assist to minimize any adverse consequences.

