



PURCHASE AGREEMENTS:

Return of a Buyer Deposit: What and What Not to Do

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In *1418885 Ontario Ltd. v. 2193139 Ontario Limited*, 2017 ONSC 3632, the buyer (as plaintiff) sued for the return of a \$150,000 deposit paid under an Agreement of Purchase and Sale for the purchase of a commercial/residential escarpment property featuring a pub-style restaurant with two outdoor patios, a 9-hole golf course, 12 residential apartments, a two-story home and a banquet hall. The plaintiff argued that the Agreement of Purchase and Sale had been properly terminated under the terms of the Agreement of Purchase and Sale and it was entitled to the deposit because it had submitted a requisition that the vendor failed to rectify, namely that the present use of the property could not be lawfully continued.

The seller (as defendant) had agreed to sell the property to the plaintiff with a closing date scheduled for June 15, 2016. Under the Agreement of Purchase and Sale (the “APS”) the plaintiff was allowed until five days prior to June 15, 2016 to be satisfied that the use of the property could be lawfully continued. The APS also contained the standard paragraphs stating that if within the specified time any valid objection was made to the fact that the present use may not lawfully be continued, and which seller was unable or unwilling to remove, remedy or satisfy, and which buyer will not waive, the Agreement was at an end and all deposits shall be returned.

On May 30th, 2016, after finding that zoning prohibited the use of the property for the advertised residential tenancies, the plaintiff’s solicitor requisitioned for the vendor’s solicitor to amend the local zoning bylaw to permit the current use to continue legally after closing. The solicitor for the defendant did not agree to this amendment. The plaintiff’s real estate agent also contacted the local zoning authority for further confirmation that the rooms could not be legally used for residential tenancies. The zoning authority replied that it would have to be satisfied that the residential tenancies had been legally established through municipal building permits and that there were no related records of approval for the tenancies.



On June 9, 2016, the purchaser's solicitor made another attempt at resolving this zoning illegality issue and advised the defendant's solicitor that if income information regarding the golf course and tenants was received, regardless of the present uses not being able to legally continue, the purchaser would close. The vendor's solicitor did not provide this requested income information. Understandably the purchaser's solicitor did not close the transaction and sued for the return of the deposit. The motion judge concluded that absent waiver, the plaintiff had properly terminated the APS and was entitled to the deposit as the defendant had been unable or unwilling to remedy or satisfy the plaintiff's concern regarding the present use of the property. However, the motion judge also found that the plaintiff had waived their objection and as a result granted summary judgment in favor of the defendant.

On Appeal, the Judge found that none of the facts established that purchaser had "an unequivocal and conscious intention" to abandon the deficiency of not being able to continue the present use. The appeals judge found that the purchaser solicitor's request for an amendment to the local zoning by-law to permit residential apartment use to continue legally after closing was an attempt to cure the deficiency, but since the defendant never obtained the amendment the deficiency was not cured. The appeals judge also found that the purchaser being prepared to continue with the purchase, despite its concerns related to the current use, if the respondent provided satisfactory rental and golf course income documentation, only suggested that "it might have been prepared to waive the deficiency if it received another benefit or advantage, but that never happened".

The appeals judge also emphasized that the purchaser proceeding right up the date of closing as if it would close the transaction did not amount to "an unequivocal act constituting waiver", it was merely the action of a party "placing itself in a position to close the transaction, if in the end result, it decided to waive the deficiency, or some other solution came about". Under the terms of the APS, given the deficiency, the APS came to an end and the deposits had to be returned. This decision brings greater certainty to real estate transactions as it clarifies and confirms the terms of the Agreement of Purchase and Sale and provides a greater understanding of when a party waives its rights, namely that the party waiving must have an "unequivocal and conscious intention" to abandon a deficiency.

