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DEFAULTING PURCHASERS:

How to keep Your Deposit

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Abstract

A vendor who has good and marketable title is entitled to retain the deposit for the sale of land, without being required to prove that he suffered any damages, if a purchaser unreasonably defaults on an agreement of purchase and sale.

Full Article

The case, *Gajasinghe v. Dewar*, 2007 Carswell Ont 5738 (Ont. S.C.J.), cautions purchasers against expecting a return of their deposit after unreasonably defaulting on an agreement of purchase and sale. If a purchaser's actions are found to be unreasonable, the vendor will be entitled to keep the deposit paid even if the vendor subsequently suffers no damages by selling the property to a third party.

In the above case, the purchaser refused to close on the scheduled closing date on the basis that there was a cloud on title in the form of threatened litigation by a neighbour. A survey of the property delivered by the vendor to the purchaser at the time of the execution of the purchase agreement showed that a corner of an attached garage encroached onto the seller's neighbour's property. On the closing date, the purchaser requisitioned an encroachment agreement or a court declaration that the vendor had title by adverse possession. The seller could not produce these items for closing. After failing to close the transaction, the vendor sold the property to a third party and the purchaser filed an action for the return of the deposit paid.

The issue the court confronted was whether the purchaser was entitled to refuse to close the deal, and, if not, whether the purchaser was entitled to relief from forfeiture of her deposit.

To establish the purchaser was entitled to refuse to close, the purchaser/plaintiff had to establish that the title to the property had a cloud over it or that the title would have exposed her to a reasonable threat of litigation. However, the court found that the purchaser was not entitled to refuse to close because there was no real and substantial threat of litigation posed by the neighbour, and if there was, it would have been idle or frivolous.

To establish a right to forfeiture, the court had to consider the following: firstly, were the actions of the purchaser reasonable in the circumstances; secondly, was the object of the right of forfeiture (the deposit) essentially to secure the payment of money; and thirdly, was there a substantial disparity between the value of the property



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forfeited and the damage caused by the vendor by the breach. The court concluded that the purchaser had not acted in a manner consistent with that of a bona fide purchaser since she waited until the closing date to requisition the encroachment. The purchaser's actions, the deposit, and the fact that a non-defaulting vendor is entitled to retain the deposit without proof of damages, even where the damages he or she suffers is less than the amount of the deposit or even where the vendor is able to obtain a higher price on selling it to a new purchaser, led the court to conclude that the vendor was entitled to retain the deposit.

In closing, if a transaction fails to close, the purchaser will be entitled to relief from forfeiture only if his or her actions were reasonable in the circumstances. However, if the purchaser is found not to have acted in a manner consistent with a bona fide purchaser intent on closing the transaction, a vendor with good and marketable title will be entitled to retain the deposit paid by the purchaser for the land even if the vendor suffers no damage due to the purchaser's default.