



Anticipatory Breach

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Abstract

When purchasing real estate in trust you must be extremely careful in order to properly set up the trust. If not, the court may invalidate the trust.

As well, if your words and actions show that you do not intend to fulfill your obligations under a purchase and sale agreement, you may be in anticipatory breach under the agreement and you will be allowing the other party to discharge its obligations under the contract.

Full Article

Ryan in Trust v. Kaukab, 2011 ONSC 6826 is an Ontario Superior Court of Justice decision whereby the purchaser of a house sued the seller for damages after the seller attempted to renege on an agreement of purchase and sale.

At the time the property was listed it was in a dilapidated state. It was listed for three months and each month the listing price was lowered due to a lack of buyer interest in the property.

Over the course of the three-month listing period, only two offers for the property were made. An offer was eventually accepted, and the seller and purchaser subsequently entered into an agreement of purchase and sale (the "Agreement").

The seller was married and made multiple representations to the listing agent that he had authorization from his wife to sell the property. He also conducted all the negotiations and dealings without the aid of his wife.

Due to the seller's representations and sole involvement in the transaction, the listing agent allowed him to sign the Agreement on his wife's behalf.

The purchaser decided to waive the remaining outstanding conditions in order to finalize the Agreement and the Agreement became fully executed.

The property was bought in trust for the buyer, a business partner and a corporation.



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The listing agent and the lawyer acting for the seller were both unable to contact the seller about the executed agreement and the waiver after repeated attempts to contact him by phone and mail.

After an attempt by the purchasers to obtain the property from the sellers in court (an action for specific performance), the sellers argued that there was no legal contract and that the wife of the seller had not been told about the Agreement so that her interest in the property could not be bound by it.

Further, the seller argued that the trust under which the Agreement was signed did not come into existence until after the Agreement was signed, thereby making the sale void by virtue of section 9 of the Statute of Frauds.

With respect to the trust matter, three certainties are required for the existence of a trust: certainty of intention to create a trust; identification of the subject matter or property of the trust; and the ability to identify the persons intended as beneficiaries.

The court found there was certainty of intention, because the name on the offer was that of the purchaser followed by the words "in trust" (e.g. Jim Ryan in Trust); the subject matter was the property at issue; and a there was a trust declaration that apportioned how beneficiary's interests would be apportioned.

The three certainties were known prior to the signing of the Agreement, therefore it follows that a valid trust was in existence at the time the Agreement was signed.

The purchaser argued that there was an anticipatory breach of the Agreement by the sellers.

An anticipatory breach occurs where one party to a contract repudiates the contract before performance is due. In other words, the party no longer wishes to fulfill their obligations under the contract. Repudiation may be by words or conduct. An anticipatory breach discharges the innocent party of its obligations under the contract and allows it to pursue damages without the need to show evidence that it was ready, willing and able to perform its obligations under the contract (i.e. there is no need to tender).

In this case, the court found that the seller had signed the Agreement on his wife's behalf, and later on, when he no longer wished to sell the property to the purchaser, attempted to use the fact that his wife had not signed as evidence that she never agreed to the Agreement.

The court did not accept this reasoning as the seller acted on behalf of his wife during the entire deal. Additionally, there was ample evidence that shortly after the agreement was signed the seller and his wife no longer wished to be bound by the agreement.