

Buyer not to entitled purchaser's lien to recover deposit following builder's default

Land Title Act | Litigation | Litigation & Dispute Resolution | Ontario Planning Act | Real Estate

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Buyers of new homes sometimes enter into an Agreement of Purchase and Sale (APS) with the builder/developer of the proposed dwelling who doesn't own the underlying land at the time the agreement is made. In such cases, it is generally contemplated that the builder will acquire title to the land and build the home before the scheduled completion date. If that does not occur, however, the buyer may not be in a position to recover the deposit from the owners of the land, as demonstrated by *Howard v. 1880485 Ontario Inc.*, 2023 ONSC 920 (CanLII).

In February 2015, the plaintiff buyers entered into an APS with a builder operating as "Above All Building". Pursuant to the APS, Above All agreed to sell to the plaintiffs a lot in South Frontenac and to construct a home on the lot for \$794,000.

At the time of the APS, the registered owners of the lot were a numbered company (132 Ontario) and Magenta Waterfront Development Corporation.

In accordance with the APS, the plaintiffs paid deposits to Above All in the total amount of \$118,800.25, including monies for upgrades and extras. The plaintiffs did not have a separate written agreement with Magenta or 132 Ontario.

In July 2015, Above All entered into a separate APS to purchase the lot from Magenta and 132 Ontario. The three companies had also entered into a development agreement under which Above All would purchase a number of residential lots, including the lot at issue, so that Above All could design and construct homes on several lots. The development agreement provided that Magenta and 132 Ontario would transfer title to the lots to Above All once final condominium approval was received from the Township.

Pursuant to the plaintiffs' APS with Above All, a first Tentative Occupancy Date was scheduled for 30 November 2015. The Outside Occupancy Date was set for 29 March 2017, following which the plaintiffs could terminate the agreement if their home was not completed. If the APS was terminated in accordance with these terms, the plaintiffs were entitled to a full refund of all monies paid, including deposits and monies paid for upgrades and extras, plus interest.

Above All did not complete the house by 30 November 2015. The plaintiffs agreed to extend the closing date to 31 March 2016, then to 31 May 2016, and finally to 7 September 2016. As of 3 August 2016, only 47% of the house had been completed.

By 30 March 2017, the plaintiffs had had enough and they provided notice to Above All that they were terminating the APS due to Above All's failure to complete the home and provide occupancy by the Outside Occupancy Date.

The plaintiffs demanded a full refund, with interest, of all monies paid by them toward the purchase price. The plaintiffs were able to recover \$40,000 of the deposit, as a result of a claim made through the Taron Warrant Corporation.

Magenta and 132 Ontario eventually completed construction of the house and sold the property to another buyer in April 2020.

Before the sale of the property was completed, the plaintiffs registered notice of a "purchaser's lien" on the lot to secure recovery of the balance of their deposit paid pursuant to [section 71](#) of the [Land Titles Act](#), which provides as follows:

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Any person entitled to or interested in any unregistered estates, rights, interests or equities in registered land may protect the same from being impaired by any act of the registered owner by entering on the register such notices, cautions, inhibitions or other restrictions as are authorized by this Act or by the Director of Titles.

A "purchaser's lien" is an equitable remedy to protect the amount of the buyer's deposit as a form of security for monies paid under a binding contract of purchase and sale that gives rise to equitable title to the land to the extent of deposit payments: *Pan Canadian Mortgage Group III Inc. v. 0859811 B.C. Ltd.*, 2014 BCCA 113 (CanLII), at paragraph 32.

As long as the buyer is not the party in default of the agreement, the buyer may be able to claim the lien as a form of secured creditor. However, the key factor is that the buyer made the deposit payment to the vendor.

Unfortunately for the plaintiffs, they did not pay their deposit to a vendor of the property since they did not have a contract with the owners of the property—namely Magenta and 132 Ontario. Rather, the plaintiffs paid their deposit to Above All, who was not the owner of the lot.

The plaintiffs creatively argued that the deposit had added value to the property, creating a tangible financial benefit to Magenta and 132 Ontario. The uncontroverted evidence, however, was that after Above All had abandoned the project and breached the plaintiffs' APS, Magenta and 132 Ontario had incurred costs to remedy the faulty workmanship and to complete the house, in addition to paying carrying costs. Ultimately, when Magenta and 132 Ontario sold the property they had incurred a loss in completing and selling the house.

A further issue faced by the plaintiffs was that they had expressly agreed in the APS that no interest in land was created unless Above All met certain conditions, including compliance with the subdivision control provisions of Ontario's *Planning Act*. This never happened and instead, Magenta and 132 Ontario obtained final plan registration for the lot rather than Above All.

The plaintiffs' final salvo was that since there was a development agreement and an agreement of purchase and sale between Above All as purchaser and Magenta and 132 Ontario as vendors, there was evidence that the three companies were acting in concert to transfer the lot to the plaintiffs. The court rejected this argument due to the lack of any evidence adduced by way of cross-examination supporting any allegations of agency or acting in concert.

As a result, the court determined that the plaintiffs were not entitled to register a purchaser's lien on the lot and ruled that they were not entitled to recover the balance of their deposit from the proceeds of sale of the completed property.

The decision is a cautionary tale for buyers of homes to be constructed on vacant lots. If possible, buyers should attempt to confirm that the party with whom they are contracting has legal title to the land on which the dwelling is to be built or, alternatively, that they have some other recourse against the current owner in the event that the builder defaults on its obligations to complete the transaction. A PDF version is available to download [here](#).

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