

Buyers' liability to sellers in aborted real estate closings – Part 1

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26 March 2021

"The factual background to this summary judgment motion is a sad story that has frequently been retold in courtrooms across the land with the same tragic ending."

So begins Ontario Superior Court Justice Paul Perell in the latest summary judgment decision obtained by the seller of a property against a buyer who couldn't complete the purchase after entering into a binding Agreement of Purchase and Sale: *Deco Homes (Richmond Hill) Inc. v. Serikov*, 2021 ONSC 2079 (CanLII).

The defendant buyer had agreed to purchase a property in the Town of Richmond Hill from the plaintiff for \$1,248,380. Deposits were duly paid and the completion date was scheduled for 15 March 2019. Shortly before closing, the buyer's intended mortgage lender obtained an appraisal indicating that the property was worth \$300,000 less than the purchase price. The lender would not agree to advance that amount, leaving the buyer scrambling to try and negotiate a vendor take back mortgage with the seller or find alternative financing. The buyer could not arrange to make up the shortfall and the transaction failed to close.

The seller subsequently resold the property for \$980,800 and sued the buyer for the shortfall of \$268,415.30 and associated expenses.

The buyer simply had no defence to the seller's claim. The only complaint the buyer could raise was that the seller had not agreed to accept a vendor take back mortgage for the balance of the agreed-upon purchase price rather than the full price on closing. While the seller could have elected to do so, there is generally no obligation on a seller's part to accept revised terms from a buyer to purchase a property at a lower price: *Azzarello v. Shawaqi*, 2019 ONCA 820.

Justice Perell had no issue with the seller's efforts to resell the property for its current market price. As a result, the seller obtained judgment, and was entitled to retain the deposit of \$120,915.30 and an additional \$154,164.26 in damages against the buyer.

The case bears the hallmarks of dozens of others that arose from a real estate market correction in the Greater Toronto Area in mid-2017, when property values were suddenly reassessed by potential lenders and buyers could no longer obtain as much financing from their preferred bank as they had anticipated. In these cases, buyers have attempted to justify their failure to close on a variety of unsuccessful grounds:

- The failure of the seller to properly re-market the property for a certain time to obtain a better price: *Gamoff v. Hu*, 2018 ONSC 2172 (CanLII); *Madison Homes v. Yiman Shi*, 2020 ONSC 7810 (CanLII); *Degner v. Cabral*, 2019 ONSC 1610 (CanLII);
- An allegedly concocted "bidding war" aimed to artificially inflate the value of the property: *Miller v. Wang*, 2018 ONSC 7668 (CanLII);
- The failure of the buyer to provide clear title due to a right-of-way for a neighbour's sewer and water lines, when the right-of-way could have been discovered and requisitioned in a timely way, and were not: *Winch v. He*, 2019 ONSC 5874 (CanLII);
- The alleged failure of agreements of purchase and sale to comply with the subdivision control provisions of the *Planning Act*, even though the buyer had agreed to purchase the abutting lands: *Malik v. Attia*, 2020 ONCA 787, aff'd 2019 ONSC 4395;
- The lack of opportunity for a lawyer to review a warning in the agreement of purchase and sale concerning water and the vapour barriers: *Country Wide Homes Upper Thornhill Estates v. Ge*, 2020 ONCA 400;
- After a seller agreed to an extension to a new date to be agreed upon by both parties, the buyer could not unilaterally set a new closing date on half-a-business day's notice: *Malatinszky v. Miri*, 2020 ONSC 16;

- Alleged failure to properly tender by the seller: *Azzarello v. Shawqi*, 2019 ONCA 820;
- The failure of the buyer to pay an administration fee to the seller to obtain an extension: *Mohsin v. Empire Communities (Mount Pleasant) Ltd.* 2019 ONSC 852;

In rare cases, buyers have resisted summary judgment when they have raised genuine issues regarding the real estate market and price at which the property could be sold for: *Marshall v. Meirik*, 2021 ONSC 1687 (CanLII). In another case, the buyer successfully argued for the purposes of defeating summary judgment that an alleged misdescription as to the lot size was a matter to be determined at trial: *Dunning v. Eftekhar*, 2019 ONSC 5536 (CanLII). Even in such cases, however, one expects that the only issue to be determined will be the amount of damages to which the seller is ultimately entitled.

Overall, the jurisprudence is overwhelming in favour of the sellers and buyers should be extremely wary about entering into a binding agreement of purchase and sale for a price where they are relying on mortgage financing from one lender for a majority of the purchase price. If something happens to the market during the period leading up to closing, and the appraised value of the property is significantly lower than the purchase price, a single mortgage may not be sufficient and secondary sources of financing may have to be arranged on an urgent basis. There is generally no obligation on the part of a seller to revise the terms of sale, lower the purchase price, or grant an extension. If a buyer fails to complete the purchase on the agreed-upon date they may well be facing a claim for not only loss of the deposit but hundreds of thousands of dollars in damages. A PDF version is available to download [here](#).

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