

KEEPING CURRENT

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Buyers bound to agreement of purchase and sale negotiated by family friend

By James R.G. Cook

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Buyers who rely on real estate services provided by a family friend would do well to ensure that they are fully aware of the consequences of entering into a binding agreement of purchase and sale before they do so, as demonstrated by the predicament of the defendants in *Pomata Investment v. Yang*, [2021 ONSC 6786 \(CanLII\)](#).

In September 2016, the defendants entered into an Agreement of Purchase and Sale (APS) for the purchase of a pre-construction residential property in Vaughan, Ontario from the plaintiff for \$2,199,900. The defendants subsequently requested additional extras, options and upgrades increasing the total price to \$2,214,813.70.

The closing was scheduled to take place in April 2018. However, approximately six weeks before the closing date, the defendants advised the plaintiff that they would be unable to close the transaction.

The plaintiff accepted the defendants' anticipatory breach and sold the property to another buyer in January 2019 for \$1,500,000. The plaintiff then sought

forfeiture of the defendants' \$150,000 deposit and damages for breach of contract of \$616,601.13, reflecting the lower sale price obtained from the second buyer.

In October 2021, the plaintiff brought a motion for summary judgment. In response, the defendants claimed that at the time the APS was negotiated, the plaintiff knew that the defendants did not have the financial ability to close the transaction and were relying upon the APS being assigned to another buyer before closing with any resulting profits paid to the defendants.

In this regard, the defendants claimed that they were introduced to the property, and the opportunity to "flip" the property for profit, by their longstanding family friend, who was an active real estate agent in the Chinese community in the Greater Toronto Area for many years.

The defendants say that a meeting occurred at the plaintiff's sales office, attended by their family friend, where they specifically said that they did not have the ability to close on an almost

\$2.2 million property and that they were orally reassured by the plaintiff that the property would be assigned to another buyer before closing. The defendants did not speak English, nor did the seller's agent. Accordingly, it was unclear to the court how *any* conversations would have occurred unless the family friend was acting as translator while the APS was discussed and signed.

The defendants originally took the position that their family friend was also acting as the plaintiff's authorized representative. However, they later admitted that at no time did he act as the plaintiff's agent in any legal capacity. On the contrary, the plaintiff had retained its own sales agent at a different brokerage.

A real estate agent has a fiduciary duty to their own principal, owing the highest obligation for full disclosure and fair dealing: *S.G. Investments Group Ltd. v Avison Young Commercial Real Estate (Ontario) Inc.*, [2016 ONSC 2272 \(CanLII\)](#). Given that the defendants had retained and relied upon their family friend as their real estate agent, his actions (or inactions) did not bind the plaintiff seller.

The defendants' evidence was that their family friend advised them that since the real estate market was "hot" (at the time), they could make money by entering into the APS and assigning it to a third party before closing for a profit, despite their limited financial resources. As well, the defendants testified that their friend guaranteed the property would be assigned to another purchaser at the time of closing.

The court was puzzled that the defendants had not raised any issue of misrepresentation—be it innocent, negligent or fraudulent—in responding to the motion for summary judgment. Instead, they advanced the "head-scratching position"

that the alleged untranslated back and forth between themselves, their friend, and the plaintiff's agent somehow constituted an oral contract.

The court noted however that neither the plaintiff's real estate agent nor the defendants' family friend provided any evidence for the motion or were examined as witnesses.

On a motion for summary judgment, the court is entitled to proceed on the basis that the responding parties have placed all relevant evidence in the record. In the circumstances, the court drew adverse inferences against the defendants as a result of the lack of evidence supporting their position. In the face of the clear and unambiguous language in the APS, they were under both a legal and evidentiary onus to "lead trump or risk losing" the motion, and they failed to do so.

The plaintiff's evidence was that by the spring of 2018, the real estate market had cooled considerably since the time that the APS was signed more than two years earlier. The plaintiff produced a schedule of nine comparable properties sold in the general vicinity of the property from February 2018 to October 2018, and the average sale price for those nine properties was \$1,475,750.00, approximately \$24,250.00 less than the resale value of the property. In the circumstances, the court accepted that the \$1,500,000.00 price received on the sale to a second buyer was reasonable and consistent with market conditions at the time. The defendants failed to prove otherwise.

The plaintiff had complied with all terms and obligations under the APS, gave every required notice to the defendants, and granted the defendants' requests for extras, options and



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upgrades as those requests were received, and the defendants were in clear breach of the obligation to complete the purchase. The plaintiff was therefore entitled to forfeiture of the deposit and judgment in the amount claimed.

The court noted that the defendants may have a meritorious claim to pursue against their family friend but this was not a reason to delay judgment for the plaintiff seller.

The case is another cautionary tale for many who have only experienced increasing real estate property values. As the court noted, markets can change suddenly, and where there are opportunities for significant gains, there are also risks of very significant financial losses. Entering into a binding agreement to purchase a property without having the financial resources to complete the purchase is rarely a wise decision.

Contact us

If you have a litigation matter and are in need of legal advice, please contact James Cook, at 416.865.6628 or jcook@grllp.com.

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