

KEEPING CURRENT

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Limitation Period bars claim for breach of Assignment of Agreement of Purchase and Sale

By James R.G. Cook

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In Ontario, there is a general two-year limitation period for claims relating to a breach of contract which starts on the day when a plaintiff discovers that damage from a breach occurred and knows that a legal proceeding would be an appropriate means to seek a remedy. There is a general presumption that the limitation period starts as of the date that "performance was due" meaning the date on which the breach of contract occurred.

For claims involving breach of a residential property Agreement of Purchase and Sale (APS), the scheduled closing date is often when performance was due since title to the property was supposed to have been transferred on that date. There may be circumstances when another date would serve as the starting point for the limitation period, but in most cases it would be prudent for a plaintiff to commence an action within two years of the scheduled completion date, if not earlier.

The consequences of missing the limitation period were demonstrated in the Ontario Superior Court of Justice decisions in *9383859 Canada Ltd. v.*

Saeed, in which an aborted assignment transaction led to two motions concerning the limitation period: [2020 ONSC 4883 \(CanLII\)](#) and a second decision released on November 8, 2022 [not yet on CanLII].

In 2016, the buyer under an APS (Saeed) for a property in Markham, Ontario, assigned her rights to a numbered company, 9383859 Canada Ltd. (938 Canada), that was owned by an experienced buyer and seller of real estate. The scheduled completion date in the APS was May 5, 2016. However, the transaction did not close. The property was then resold to other buyers. 938 Canada's owner learned about the resale on May 18, 2016.

The assignor, Saeed, sued the sellers and the new buyers for breach of the APS and sought to obtain title to the property by way of specific performance. 938 Canada's owner provided information to Saeed's counsel to assist in the litigation. On July 27, 2018, the court dismissed Saeed's action for specific performance: *Saeed v. Gunarajah*, [2018 ONSC 4590 \(CanLII\)](#). The court noted that the evidence was overwhelming that the sale was a genuine, arm's length transaction.

On September 17, 2019, 938 Canada commenced its own action against several parties, including Saeed, the sellers, and their respective lawyers. Amongst other allegations, 938 Canada claimed that it was denied the opportunity to pay the sellers \$5,000 to extend the closing date. 938 Canada claimed that Saeed and the transaction lawyers had failed to communicate with its lawyer at the time of closing. However, 938 Canada did not sue its own lawyer.

The various defendants subsequently brought motions to dismiss 938 Canada's claims.

In the first motion, the defendant lawyers brought a motion to dismiss the action on the grounds that it disclosed no reasonable cause of action, and was statute-barred. The motion judge agreed with the lawyers that there was no tenable cause of action by 938 Canada against the other parties' lawyers and dismissed the action: *9383859 Canada Ltd. v. Saeed*, [2020 ONSC 4883 \(CanLII\)](#).

On the issue of the limitation period, the motion judge noted that the [Limitations Act, 2002](#) creates a presumption that a claim is discovered within two years of the damage occurring unless there is evidence to the contrary. There was no evidence to the contrary in this case. Thus, the claims against the lawyers were statute-barred.

A second motion to dismiss was brought by Saeed and the remaining defendants.

In response to this motion, 938 Canada's owner argued that Saeed or her lawyer had asked him to wait for the specific performance decision before commencing its own separate action. He further claimed that after he learned about the dismissal of Saeed's action in July 2018, her lawyer neither cooperated nor provided any information on how to commence its action. He said that it took him almost one year to file a statement of claim on September 17, 2019, as he was 'running from

courthouse to courthouse' to find out the court file number and understand the procedures involved.

In the motion judge's view, the key date for the limitation period defence was May 5, 2016, since that was the scheduled completion date of the APS when the transaction failed to close.

The evidence was that 938 Canada's owner had contemporaneous knowledge of the failed closing. 938 Canada's owner was at the office of Saeed's real estate lawyer on May 5, 2016, the day of the failed closing, and he told his own lawyer about the failed closing on the following day. He further deposed that he had formed the intention to complete the transaction himself on May 5, 2016, and told his lawyers a few days later that he would be proceeding to do so.

Compounding this evidence was the fact that in June 2016, 938 Canada's owner had assisted Saeed in the action she had commenced against the sellers for breach of the APS and challenging the resale.

The motion judge found that 938 Canada had not rebutted the presumption that the limitation period started as of the date performance was due.

Further, there was no question that 938 Canada was aware that a legal proceeding would be an appropriate means to seek to remedy its loss. 938 Canada knew that Saeed had commenced a claim based on the sellers' alleged breach of the APS and had participated in the preparation of that claim by providing documentary evidence and answering any questions that Saeed's litigation lawyer had with respect to 938 Canada's involvement in the failed transaction.

The court rejected 938 Canada's argument that

the limitation period did not start to run until the July 2018 decision which dismissed Saeed's action. Whatever its reasons for waiting, 938 Canadas had actual knowledge of the breach of the APS and of the subsequent sale to another purchaser, but did not commence its own action until more than three years after having sufficient knowledge to do so.

The court therefore determined that the two-year limitation period began to run on either May 5, 2016, or May 16, 2016, and that 938 Canada's action was commenced well beyond the expiry of the limitation period.

The decision affirms that it will be difficult for a plaintiff to show that the limitation period for breach of an APS did not commence as of the completion date, at the latest. The starting date could even be earlier if a breach giving rise to a remedy for damages occurred before the scheduled completion date. There is an obligation on parties to use reasonable diligence to investigate and assess whether a legal proceeding would be appropriate and to commence an action within two years of the date that they have sufficient information to do so.

Contact us

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact James Cook, at 416.865.6628 or jcook@grllp.com.

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