

KEEPING CURRENT

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Buyer fails to prove property re-sold for improvident price following aborted transaction

By James R.G. Cook

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James R.G. Cook
Partner
416.865.6628
jcook@grllp.com

In collapsing real estate markets, buyers who fail to complete a purchase may face liability vastly exceeding any deposit they may have paid. In most cases, the seller will be able to seek damages based upon any difference between the unpaid purchase price and the amount realized upon a subsequent re-sale of the property. Ontario courts dealt with dozens of these types of claims arising from a market correction in 2017, which we discussed in [Buyers' liability to sellers in aborted real estate closings - Part 1](#) and [Part 2](#).

Given the market correction in Ontario that began in 2022 and continues at the time of writing, there will undoubtedly be dozens more cases arising from similar circumstances.

The Ontario Superior Court of Justice decision in *Switzer v. Petrie*, [2023 ONSC 5115 \(CanLII\)](#), arose out of a failed transaction in July 2022.

The defendant had entered into an Agreement of Purchase and Sale (APS) on May 14, 2022, for the purchase of the plaintiffs' residential property for

\$810,000, with a scheduled completion date of July 14, 2022.

On July 4, 2022, the defendants advised that they would not be able to complete the transaction due to "unforeseen circumstances." Among other things, they complained that they had not received a survey of the property and that they were concerned about the property's sewage system. However, it appears that neither of these issues had been addressed in the APS as conditions that would entitle them to terminate the transaction.

The plaintiffs promptly re-listed the property for sale for \$699,000, and eventually accepted an offer from another buyer for \$600,000, which closed on August 19, 2022. They sued the defendants for the difference and associated expenses, totalling \$212,302.11.

The plaintiffs brought a motion for summary judgment of their claim, which is common in these types of proceedings.

In response, the defendants abandoned their complaints about the property and took the legal position that the subsequent sale price agreed to by the plaintiffs was a genuine issue requiring a trial. In particular, they took issue with whether the price reflected the fair market value of the property in August 2022, when it was re-sold.

Since there was no question that the buyers had breached the APS and were liable, the only live issue before the court was damages and the sellers' potential failure to mitigate.

Neither party filed any appraisal evidence in support of their positions on the motion. Instead, the plaintiffs relied on the fact that they had sold the property to an arm's length buyer and there were no other offers made during the listing period.

The motion judge agreed with the sellers that the claim was amenable to summary judgment and did not require a full trial, referring to the general principle that where a purchaser fails to close a real estate transaction and the vendor takes reasonable steps to sell the property in an arm's length sale to a third party in mitigation of damages, the difference between the two sale prices will be used to calculate the damages: *642947 Ontario Ltd. v. Fleischer* (2001), [2001 CanLII 8623](#) (ON CA), at paragraph [41](#). In such circumstances, there will generally be no need for expert evidence: *Marshall v. Meirik*, [2021 ONSC 1687](#), at paragraph [30](#), aff'd [2022 ONCA 275](#).

The defendants referred to some of the facts surrounding the sale in order to argue that there were issues as to whether it was improvident, in particular the speed with which the property was re-sold for a much lower price. However, the motion judge was of the view that it was too late for the defendants to attend at a summary judgment motion without submitting at least

some evidence as to the value of the property to bring into question the arm's length sale. They had no appraisal or other market value evidence and did not cross-examine the plaintiffs on the sale process.

In responding to the summary judgment motion, the defendants were obligated to put their best foot forward. Conversely, in the motion judge's view, "the plaintiffs were entitled to rely on the arm's length sale to a third party as *prima facie* establishing the fair market value of the property as of the date of re-sale. They were not required to adduce any expert evidence."

The defendants also failed to establish any failure to mitigate on the plaintiffs' part. Upon being advised by the defendants that they were not going to close the transaction, the plaintiffs re-listed the property with a real estate agent and accepted an arm's length offer on the property. The price was not unreasonable.

In the result, the motion judge concluded that the fair market value of the property at the time of its re-sale in August 2022 was \$600,000 and there was no failure to properly mitigate. The plaintiff's summary judgment motion was [granted](#) and the court awarded damages of \$212,302.11. The deposit of \$15,000 was credited against the judgment. The plaintiffs will also be entitled to court costs in an amount to be determined.

The case is a fairly typical but cautionary tale for buyers who are facing a claim for damages following an aborted transaction. While circumstances may arise in which a buyer is financially unable to complete a purchase, in many situations the consequences of failing to close may be significant. The party breaching the APS takes on the risk of being exposed to damages based on the prevailing market conditions.



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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