

KEEPING CURRENT

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Seller did not repudiate agreement of purchase and sale notwithstanding missed deadline (*Vandermolen Homes Inc. v. Mani*)

By James R.G. Cook

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In cases where a buyer fails to complete the purchase of a property, they may try to argue that it was the seller who was in breach of the agreement due to missed deadlines. In such cases, the doctrine of repudiation of contract comes into play, which involves an objective assessment of the conduct of the parties, as demonstrated in *Vandermolen Homes Inc. v. Mani*, [2024 ONSC 2617 \(CanLII\)](#).

In January 2022, the defendant buyers signed an agreement of purchase and sale (APS) for the purchase of a single-family home in Exeter, Ontario from the plaintiff builder for \$937,400, with a scheduled completion date of August 31, 2022. The buyers paid a deposit of \$5,000 upon signing.

The APS was conditional upon approval by the buyers' lawyer and arrangement of suitable financing. The deadline for confirmation of the fulfillment of conditions was 6:00 pm on January 20, 2022. A further deposit of \$88,740 was due upon removal of the conditions.

On January 20, 2022, the buyers offered to extend the conditional terms to January 26, 2022. The offer to extend

was stated to irrevocable until 11:59 pm on January 21, 2022, failing which the offer to extend became null and void. The seller did not sign the confirmation of acceptance until January 22, 2022. On January 26, 2022, the buyers nevertheless signed a waiver of the conditions and paid the second deposit.

Nothing further occurred until May 2022, when the seller began to email and text the buyers regarding interior décor selections, with no response. A dispute subsequently arose over whether the buyers had received these emails and texts.

The buyers took the position that since they heard nothing from the seller for several months following January 26, 2022, they assumed the deal was not proceeding. However, there was no evidence that the buyers contacted the seller to request the return of their deposits or to notify them that they did not intend to complete the purchase during that time period.

On August 10, 2022, the seller's real estate lawyer wrote to the buyers' lawyer asking how they intended to take

title. On August 12, 2022, the seller spoke to one of the buyers regarding a pre-delivery inspection. The buyer advised that he needed to speak to his wife (the co-buyer) who was in India at the time. He gave no indication that the purchase would not be completed.

On August 17, 2022, the buyers contacted the seller and cancelled the pre-delivery inspection, which was scheduled for later that day. On the same day, the buyers' lawyer advised the seller for the first time that they would not be able to complete the purchase.

On August 29, 2022, the seller's lawyer spoke to and emailed the buyers' lawyer to confirm whether or not the buyers were going to complete the transaction. The buyers' lawyer confirmed that his clients were unable to close the transaction and requested that the property be re-listed so that "the damages can be lessened".

The seller retained a realtor and listed the property for sale for \$849,000, but there were no offers. In February 2023, the price was reduced to \$799,900, without success, and in April 2023, the listing price was dropped to \$749,900. While conditional offers were received, the property did not sell.

In September 2023, the price was reduced again to \$724,900 and the property was finally sold for \$705,000 in October 2023.

The seller sued the original buyers for damages of more than \$175,000 relating to their breach of the APS, and brought a motion for summary judgment, arguing that this was a straightforward case of buyers' remorse.

In response, the buyers took the position that the APS was "dead" when the conditions in the APS were not fulfilled by January 21, 2022. As a matter of law, they pointed to the term in the APS which stated "time is of the essence", which generally means that a time limit in an agreement

is essential, such that breach of the time limit will permit the innocent party to terminate, or rescind, the contract: *DiMillo v. 2099232 Ontario Inc.*, [2018 ONCA 1051](#) at paragraph 31.

Prior decisions have held that the effect of a party's repudiation of an agreement depends on the election by the non-repudiating (or "innocent") party as to whether or not to terminate the agreement. If that party treats the contract as still being in full force and effect, the contract remains in force and effect for both sides. However, if the non-repudiating party accepts the repudiation, the contract is terminated, and the parties are discharged from future obligation: *e.g. Coffey v. High*, [2024 ONSC 420 \(CanLII\)](#).

To determine whether the party in breach has an intention not to be bound by the agreement, the courts assess whether a reasonable person would conclude that the breaching party no longer intends to be bound by it: *Spirent Communications of Ottawa Limited v. Quake Technologies (Canada) Inc.*, [2008 ONCA 92 \(CanLII\)](#), at paragraph 37.

In the case at hand, the buyers argued that they had not expressly indicated that they wished to revive the APS after the deadline for waiving conditions. The court was not persuaded by this argument, however, given the buyers' own conduct in treating the APS as still being in force despite the deadline missed by the seller on January 21, 2022.

In that regard, the buyers delivered a waiver of conditions on January 26, 2022, and paid the second deposit by cheque, which was cashed by the seller without any protest from them. The seller continued to construct the home over the ensuing months and the buyers did not request the return of the deposits totaling almost \$100,000, prior to the commencement of the litigation. Viewed objectively through the

lens of a reasonable person, the buyers did not demonstrate that they no longer wished to be bound by the APS.

The court therefore concluded that the APS became binding on January 26, 2022. Although the APS could have been terminated by the buyers after the seller missed the deadline, they did not elect to treat it as at an end. Rather, they continued to treat the APS as being in full force and effect until August 17, 2022, when it was anticipatorily breached.

As for damages, the measure for contractual breach is generally “expectation loss,” namely the amount required to put the innocent party in the position it would have been in had the contract been performed as agreed: *Spiridakis v. Li*, [2020 ONSC 2173](#), at paragraphs [95 to 97](#), affirmed [2021 ONCA 359](#).

Although the buyers contended that the seller had failed to take appropriate steps in marketing the property for sale, they did not obtain an appraisal to challenge the price obtained by the seller. It is well-settled law that the onus of proof to establish a failure to mitigate is on the defendants (*Spiridakis*, at paragraph [100](#)). The buyers failed to meet this onus.

The seller was therefore entitled to the full difference of \$232,400.00 based upon the lower sale price of the home, along with property taxes and utilities paid during the relisting period, less the deposits paid. While this figure may seem high, the buyers are fortunate that the damages were not substantially greater. There have been many cases in Ontario in 2024 where the difference between the original contract price and the subsequent resale price obtained by a seller has been much larger due to the change in 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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