

No failure to mitigate by sellers in failed real estate transaction (Singh and Kaur v. Feneich)

Litigation | Litigation & Dispute Resolution | Real Estate | Transactions

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Cases arising from failed residential real estate transactions in a falling market continue to affirm that a buyer who breaches an agreement to purchase a property may be liable for substantial damages. Often, a buyer will argue that a seller has failed to mitigate by taking appropriate steps to re-list the property and find another buyer for the same price. The onus is on the party making such an argument, and it cannot be based on speculation, as demonstrated by the summary judgment motion decision in *Singh and Kaur v. Feneich*, 2024 ONSC 5776 (CanLII).

The case arose from a failed transaction in which the plaintiff sellers agreed to sell a property to the defendant buyer for \$1,250,000. The closing date was set for early August 2022. However, notwithstanding several extensions to the closing date, the defendant was unable to secure the necessary financing and the transaction failed to close.

The sellers re-listed the property in 2022 and accepted an offer of \$965,000, significantly less than the agreed-upon purchase price with the defendant. They sued for damages and brought a motion for summary judgment based on the well-established principles for motions in similar cases such as *Arista Homes (Kleinburg) Inc. v. Sarah Igbiniedion*, 2019 ONSC 7086, at paragraph 16.

In response to the motion, the defendant conceded that she breached the terms of the Agreement of Purchase and Sale (APS) with the sellers and that she was liable for reasonable damages flowing from the breach, but she disputed the sellers' calculations for the damages sought. Further, the defendant argued that the sellers had failed to adequately mitigate their losses by obtaining a higher sale price for the property.

The motion judge referred to the framework for assessing damages arising from a failed real estate transaction set out in *Goldstein v. Goldar*, 2018 ONSC 608, at paragraph 25: "The damages amount will be the difference between the price under the Agreement and the price of the new sale of the property once it closes, plus any additional carrying costs incurred by the Vendor in mitigating her loss and dealing with the Purchaser's breach."

The defendant challenged both the sellers' conduct in failing to consider another offer to purchase made by the defendant after the breach of the APS in August 2022, and the date to be used for calculation of the damages. In that regard, the defendant's evidence was that she had made a further offer to purchase in January 2023, with a proposed closing date of February 2023 that ought to be used for the calculation of damages.

In mitigating losses following a buyer's failure to complete a transaction, a seller is not expected to pursue every possible avenue in an effort to reduce the loss. Rather, the seller is required to take all reasonable steps in an effort to mitigate the loss caused by the defendant buyer's breach: *Briscoe-Montgomery v. Kelly*, 2014 ONSC 4240, at paragraph 16.

The sellers' evidence was that they relied on the recommendations of their real estate broker following the failure of the transaction to close in August 2022. They faced the unexpected burden and challenge of carrying two properties and accepted a reasonable offer.

The defendant did not file any independent, objective evidence in support of her position that the sellers failed to mitigate their damages in the form of evidence from a real estate broker as to reasonable listing prices for the property during the re-listing period or as to the nature of the real estate market in late 2022 and early 2023. The defendant's attempt to characterize the sellers' conduct as unreasonable in the market conditions was rejected as being pure speculation.

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As to the date and calculation of damages, the motion judge relied on the propositions for the assessment of damages for breach of an APS summarized by the Court of Appeal for Ontario in *642947 Ontario Ltd. v. Fleischer*, 2001 CanLII 8623 (ON CA) at paragraph 41:

- The court is to consider context, including “the plaintiff’s duty to take reasonable steps to avoid [their] loss”;
- The nature of the property and the type of market in which the plaintiff is required to re-list and sell the property are both relevant;
- Specific considerations apply in a falling market; and
- A plaintiff who retains the property solely for the purpose of speculation will be entitled to damages assessed as of the original (i.e., failed) closing date.

Taking into account these propositions, the motion judge found that the sellers acted reasonably in their efforts to mitigate their losses, including keeping their property on the market when two deals fell through between August 2022 and March 2023.

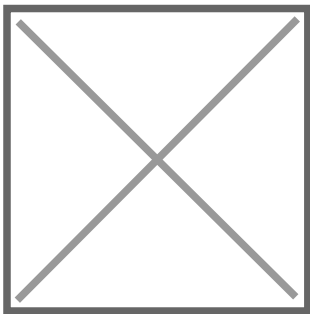
Lastly, the court found no evidence to support a finding that the defendant was financially in a position to purchase the property in February 2023, had the sellers accepted her January 2023 offer.

Damages were accordingly assessed at \$366,513, based upon (1) the difference of \$287,500 between the purchase price agreed upon with the defendant (\$1,252,500) and the price for which the property was ultimately sold (\$965,000); (2) the carrying costs for utilities, property insurance premiums, property taxes, and mortgage interest incurred between the late August 2022 closing date with the defendant and the March 2023 date on which the sale of the property to another individual was completed, totaling \$31,906; and (3) interest, in the amount of \$47,107, the sellers were required to pay towards the financing of the new build home they had agreed to purchase in 2021.

The decision underscores the importance of securing reliable financing and understanding the legal obligations of both purchasers and sellers before making a firm and binding commitment on a real estate purchase. Prospective buyers of a property must appreciate that they need to be fully prepared to close a transaction on the agreed-upon date, failing which they may not only lose the deposit but be faced with a claim for significant damages based upon the current market value of the property. In a rising market, the seller may be able to obtain a higher price but in a falling market the price difference may result in damages well in the hundreds of thousands. The seller may also claim additional carrying costs and expenses for maintaining the property which are recoverable as part of the damages. A PDF version is available to download [here](#).

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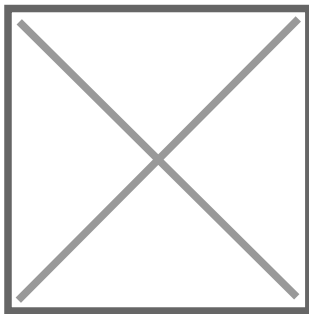


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