

Force majeure rejected, buyer pays price for lack of financing

By **James R.G. Cook**

Law360 Canada (December 6, 2024, 10:31 AM EST) -- The doctrines of *force majeure* and/or frustration are occasionally raised by buyers seeking to avoid liability under an otherwise binding agreement to complete the purchase of real estate. In such cases, the focus is on external events that occurred after the signing of the agreement and before the transaction was scheduled to be completed. However, if the underlying reason for a buyer's predicament is their failure to have sufficient financing in place, they will have difficult finding a way out based upon other developments.

This result was illustrated by the Ontario Superior Court of Justice decision of *Liddell v. Mousavi*, 2024 ONSC 6431, which arose after the defendant failed to complete the purchase of the plaintiffs' property in Burlington, Ont.

In February 2022, the parties entered into an Agreement of Purchase and Sale (APS) for the defendant's purchase of the plaintiffs' property for \$1,350,000, with an extended closing date scheduled for July 22, 2022. The APS did not have any financing or other conditions that needed to be waived.



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Leading up to the scheduled completion date, the defendant requested an extension, which was declined by the plaintiffs.

On the closing date, the defendant requested a 45-day extension. The defendant's lawyer advised that without an extension she would not be able to close. The plaintiffs declined the request for an extension. The plaintiffs were ready, willing and able to complete the transaction. However, the defendant failed to deliver the balance of the purchase price.

The plaintiffs then relisted the property for sale. They received one offer in November 2022, for under \$1,000,000, which they rejected. From January to March 2023, they exchanged offers with potential

buyers in a range of \$1,050,000 to \$1,125,000 which were not firmed up.

The plaintiffs ultimately sold the property in April 2023 for \$1,100,000. They sued the defendant for damages based on the lower sale price and brought a motion for summary judgment.

In response to the claim, the defendant argued that she should be relieved of her obligations under the APS.

In particular, she claimed that she inherited US\$565,592 in Afghanistan, held for her in the Afghanistan International Bank, which she intended to bring to Canada to purchase the property. However, as a result of the ongoing conflicts in Afghanistan and the subsequent withdrawal of American forces, which created a power vacuum and led to Taliban control, the banking system was suspended, and she was unable to get the funds. The defendant argued that these events frustrated the APS and were out of her control.

The defendant also claimed that the APS was frustrated because an agreement of purchase and sale that she had entered into to sell another property, which she owned in Hamilton, fell through, and she did not have money from that sale to close the APS.

Force majeure is a general description for a term in some contracts that protects a party from having to perform their obligations as a result of unexpected events such as civil wars or extreme weather events (sometimes described as "acts of God").

The motion judge noted, however, that the APS did not contain a written *force majeure* term and that neither of the parties' counsel had provided the court with any case where a *force majeure* clause was found to be an implied term of a contract. There was one recent case that determined that there is no common law right to claim relief from payment obligations by reason of *force majeure* and that it is a contractual remedy that turns on the specific wording of a contract: *Consolidated Fastfrate Inc. v. 2516295 Ontario Ltd.*, 2023 ONSC 1005.

In the circumstances, the motion judge reached the same conclusion that a *force majeure* clause is not a common law right and depends on the specific wording of a contract. Since there was no *force majeure* clause in the APS, the defendant could not rely on this doctrine to be relieved of her obligations thereunder.

The principle of frustration of contract arises where an unforeseeable event occurring after the formation of a contract renders the contract unable to be performed, but not where the event was the result of a voluntary act of the party seeking to rely on the doctrine: *Capital Quality Homes Ltd. v. Colwyn Construction Ltd.*, (1976), 9 O.R. (2d) 617, at paragraph 31.

In the case at hand, the defendant's obligation to purchase the property was unconditional and was not tied to her ability to finance the purchase with money from Afghanistan or from the sale of another property. She knew at the time of execution of the APS that the money was not in Canada and the sale of her other property was not yet completed. The money not being in Canada and the Hamilton property not being sold were therefore not unforeseeable supervening events, and they did not render the APS "a thing radically different from what was undertaken by the contract" as required by the jurisprudence (*Peter Kiewit Sons Co. of Canada v. Eakins Construction Ltd.*, [1960] S.C.R. 361.).

Lastly, the defendant argued that the plaintiffs ought to have provided an extension to close which would have mitigated their subsequent losses. However, where a prospective buyer is unable to close a transaction for the sale of land and seeks an extension because they are unable to obtain financing, a seller is entitled to refuse an extension of time to close the transaction: *Nguyen v. Zaza*, 2023 ONCA 34, at paragraph 16. The plaintiffs had in fact proposed terms for an extension that were not accepted by the defendant in any event.

As a result, the plaintiffs obtained judgment based on the usual measure of damages for such cases, reflecting the difference in sale price of \$250,000 and additional expenses of \$30,739, incurred during the time that it took to re-sell the property.

During the COVID-19 pandemic, many litigants attempted to raise doctrines such as *force majeure*

and frustration of contract in order to justify terminating a real estate transaction due to the change in their ability to obtain financing. Such arguments were routinely rejected since it was not the seller who was at fault for the buyer's inability to pay for the property. The case at hand is a further illustration of the consequences that may arise for a buyer in such circumstances.

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