

Relisting of property before closing date did not amount to a repudiation of agreement of purchase and sale (*Zoleta v. Singh and RE/MAX Twin City Realty*)

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20 November 2023

If a buyer determines that they may not be able to complete a binding agreement to purchase a property by the agreed-upon completion date, they may wish to seek an extension of the completion date, an abatement of the purchase price, or other amendments to the terms of the deal. An issue that may arise in such circumstances is whether the buyer commits an “anticipatory breach” of the agreement, thereby relieving the seller of any continuing obligations to complete the transaction.

The decision of *Zoleta v. Singh and RE/MAX Twin City Realty*, 2023 ONSC 5898 (CanLII), illustrates the difference between a mere request for an amendment to the agreement by way of abatement or extension and conduct that amounts to an anticipatory breach.

In February 2022, the buyer agreed to purchase a property in Kitchener, Ontario, from the sellers for \$1,150,000.00, with a completion date of 30 June 2022, and payment of a deposit of \$50,000. The Agreement of Purchase and Sale (APS) between the parties did not contain any conditions.

On 23 June 2022, a week before the scheduled completion date, the buyer’s real estate lawyer wrote to the sellers’ real estate lawyer and stated as follows: “We have been advised by our clients that the property has been appraised by \$355,000.00 less than the purchase price, therefore, our clients require the abatement for the same.”

The sellers were not willing to agree to an abatement of the purchase price. Their lawyer responded on 24 June 2022, stating that failure to close by the buyer on 30 June 2022, would be a breach of the APS and the sellers would be pursuing damages.

As the sellers had entered into a concurrent agreement to purchase a new property in Calgary, for which they were relying on the proceeds of the sale of the Kitchener property to close, they were very concerned about the buyer’s capacity to complete the transaction as scheduled.

On 24 June 2022, the sellers relisted the Kitchener property for sale. However, they did not enter into any new sale agreements prior to 30 June 2022, and they attended at their real estate lawyer’s office to sign the closing documents in relation to the existing sale if the buyer was able to close on that date. In the interests of transparency, the sellers advised the buyer’s real estate agent by text message that the property was being relisted for sale. The buyer’s agent did not respond or raise any objections.

On the scheduled completion date, 30 June 2022, the sellers advised the buyer’s lawyer that they would consent to an extension, as requested, upon the buyer paying a further non-refundable deposit of \$50,000.00. The buyer then raised, for the first time, an issue with the re-listing of the property by the sellers and

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asserted that the APS was “null and void” because the sellers had re-listed the property for sale. The buyer refused to close the transaction.

The sellers subsequently resold the property for \$350,000 less than the buyer had agreed to pay due to the then-current market conditions. They sued the buyer for damages and moved for summary judgment.

The main defence raised by the buyer was that the sellers had “sabotaged” the transaction and his ability to get financing due to the re-listing of the property for sale prior to the agreed-upon completion date. For their part, the sellers argued that the buyer had committed anticipatory breach of the APS by demanding a \$350,000 abatement.

As stated by the Court of Appeal for Ontario, in *Spirent Communications of Ottawa Limited v. Quake Technologies (Canada) Inc.*, 2008 ONCA 92 at paragraph 37, “an anticipatory breach sufficient to justify the termination of a contract occurs when one party, whether by express language or conduct, repudiates the contract or evinces an intention not to be bound by the contract before performance is due.” The test is objective, and is based upon establishing:

1. Conduct which amounts to a total rejection of the obligations of the contract
2. Lack of justification for such conduct
3. Acceptance of the repudiation by the innocent party within a reasonable time.

If the other party to the contract does not accept the anticipatory breach, the contract remains alive for the benefit of all parties: *Guarantee Co of North America v. Gordon Capital Corp.*, 1999 CanLII 664 (SCC), [1999] 3 SCR 423, at paragraph 40.

The motion judge found that the use of the word “require” by the buyer’s lawyer in his letter of 23 June 2022 (“our clients require the abatement for the same”) was synonymous with a demand rather than a request and unequivocally communicated that the buyer would not be completing the purchase of the property unless the sellers agreed to an abatement of \$355,000.

The sellers did not accept the buyer’s repudiation and, by their subsequent correspondence they expressed an intention to affirm the APS with a view to completing their sale of the property as scheduled.

The act of re-listing the property for sale did not, in the motion judge’s view, clearly evidence an intention on the sellers’ part not to be bound by the APS. In that regard, the sellers gave notice to the buyer that they wanted to close on the completion date but that they were re-listing the property for sale in the event that he would not affirm his intention to close. They further agreed to provide an extension on terms that were not accepted. It was only after those negotiations failed that the buyer took the position that re-listing the property for sale rendered the APS null and void.

Taken as a totality, the sellers’ actions unequivocally suggested that they remained committed to completing their sale of the property to the buyer as scheduled and had not repudiated the agreement.

The sellers sought damages in the amount of \$345,121.98, which includes the carrying cost of the property in the amount of \$9,962.00, costs incurred by them in the amount of \$4,934.98 to extend their scheduled purchase transaction, as well as loss of sale value in the amount of \$330,225.00 (net of real estate commission).

Courts have routinely accepted the differential in price as a valid means of calculating a seller’s damages following the resale of the subject property. In the case at hand, the court found in favour of the sellers based upon the lower sale price and carrying costs.

The case arose during the context of a general market meltdown in a previously overheated Ontario real estate market, and there are likely many similar disputes ongoing. The case shows that a party seeking to renegotiate the terms of a binding agreement before the closing date should take care to ensure that the request for new terms should not be framed as an absolute demand which would give rise to an anticipatory breach of contract. A PDF version is available for download [here](#).

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