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Buyer Conceals Property Flip; Ordered to Disgorge Over $2 Million in Profit

In a recent Ontario Court of Appeal case called *Meridian Credit Union Ltd. v. Baig*, the court held that a buyer of a commercial property was personally liable in damages for failing to disclose to the seller his intent to "flip" the property immediately and make a sizeable profit.

The commercial property was being sold by a court-appointed Receiver. The buyer, Baig, agreed to purchase it "in trust for a corporation to be incorporated" for $6.2 million. Unbeknownst to the Receiver, Baig had made prior arrangements with an unrelated company named Yellowstone Property Consultants Corp. to immediately re-sell/direct title to the property to Yellowstone for $9 million, netting Baig about $2.8 million in profit.

Baig did not disclose the second agreement to the Receiver, who assumed that Yellowstone was a company incorporated by Baig specifically for their transaction. Neither Baig nor his lawyer corrected the Receiver's misapprehension.

The Agreement between Baig and the Receiver did not prevent Baig from re-selling the property. It did prohibit him from assigning his interest under the Agreement without the Receiver's consent. The Receiver could arbitrarily refuse such consent unless the assignee was the "corporation to be incorporated" for purposes of the Agreement.

The Receiver became aware of Baig's re-sale scheme through certain documents prepared by Baig's lawyer: The deal had been structured so that the transfer from the Receiver would go directly to Yellowstone, in order to avoid the double payment of land transfer tax.

Having discovered the completed second sale, the Receiver assigned its cause of action against Baig to Meridian (which had not recouped the full amount owed to it from the borrower in the receivership). Meridian then brought a court action for an accounting of Baig's profit on the second, $9 million, transaction or alternatively asked the court to hold Baig liable for $2.1 million in damages for breach of contract and fraudulent misrepresentation.

Meridian was successful before a Motions Court judge, who found a clear case of fraudulent misrepresentation on Baig's part and directed a trial to determine damages. On later appeal, the court confirmed the Motion judge's ruling.

The elements of fraudulent misrepresentation by Baig had been proven: Either personally or through his lawyer, Baig had made active efforts to hide his pre-arranged agreement to sell the land to Yellowstone and had misrepresented both Yellowstone's corporate nature and its exact role in that transaction. Indeed, he had personally signed misleading documentation prepared by his lawyer, even though he knew it was false and did so knowing that the Receiver would rely on the information given. The court pointed out that in certain circumstances, silence and half-truths could amount to a misrepresentation in law.

The Appeal Court also found that the misrepresentations prejudiced the Receiver, since it had an obligation to obtain court approval before selling the property and would not have recommended Baig's offer had it known about Yellowstone's more lucrative one. Also, by relying on Baig's misrepresentations, the Receiver lost the chance to negotiate a higher price with Baig or with any other potential buyer.

Baig was held personally liable for his misrepresentations to the Receiver, and for actively hiding the agreement to sell to Yellowstone. The Court found that Baig made fraudulent representations in his personal capacity, and thus implicitly viewed the corporate veil as having no application. Damages were to be assessed. See: *Meridian Credit Union Ltd. v. Baig*, 2016 (ONCA).

Seller's Lawyer Verbally Extends Closing Date Indefinitely; Buyer's $230,000 Deposit Returned

A purchaser agreed to pay $913,000 for a unit in a hotel condominium called Trump International Hotel & Tower, which was under development at that time. Under the purchase agreement, the buyer was to pay a series of deposits over a roughly two-year period. To this end, the buyer had paid almost $230,000 in pre-closing deposits.

However, upon reviewing the Statement of Adjustments prepared by the seller, the buyer realized that the common expenses for his unit were shown as $2,500 per month, which was about 40% higher than the amount promised at the deal-signing stage. Since he considered this a "material change" to the Disclosure Statement within the meaning of the *Condominium Act, 1998*, he requested a Revised Disclosure Statement within 15 days, as he was entitled to do under that legislation.

The deal did not close on the scheduled

date, despite repeated e-mail attempts by the buyer's lawyer to get a satisfactory response from the seller's lawyer with respect to issue of the common element increase. A voicemail from the seller's lawyer on the closing date advised the buyer's lawyer that the matter could be delayed "a few days" to allow the common expenses issue to be "sorted out"; however, several additional weeks went by, with little correspondence exchanged and no real movement on the deal. As the court explained:

> *[The seller's lawyer] extended the closing date to an indefinite date in the future, "until we sort this out". He took no steps whatsoever to sort things out. He never established a new closing date. He did not even communicate with the plaintiffs' lawyer until after the deadline for closing had expired*

Finally, after two more months had elapsed without a meaningful reply from the seller's lawyer about the common expenses, the buyer demanded the return of his $230,000 deposit. When the request was refused, the buyer sued.

The court sided with the buyer. Viewed objectively, the seller's lawyer had given an unambiguous assurance that the closing was being extended to some unspecified future date, and the buyer had relied and acted on this assurance to his detriment. For example, were it not for the seller's lawyer's verbal extension, the buyer would have been in breach of the condominium purchase contract by failing to close on the specified date.

Also, the buyer's legal rights in this scenario had been curtailed by the seller's own conduct. Faced with a "material change" under the *Condominium Act, 1998*, the buyer would normally have had 10 days to take certain steps (including rescinding the agreement or obtaining a court determination), starting from the date the seller gave either a formal notice of change or the requested Revised Disclosure Statement. Since neither were provided by the seller here, the buyer's rights to take remedial steps were never engaged.

The court held that once the original closing date had lapsed, the deal was at an end and the buyer had no obligation to close the transaction thereafter. No new date had been set, and neither party had tendered on the other (which would have shown that they were ready, willing and able to close the transaction on the scheduled date).

The deal collapsed through no fault of the buyer, who had simply raised a valid concern about the increase in the common expenses. The buyer was therefore entitled to the return of the entire $230,000 in deposits paid, plus interest of over $8,000. See: *Ram v. Talon International Inc.*, 2015 (ONSC).

Lender Fails to Provide Discharge Statement: Power of Sale Nullified

A borrower owned a commercial property against which five collateral mortgages, in varying amounts totaling over $3 million, had been registered in favour of a lender.

The mortgages went into default, triggering the lender's power of sale. To that end, the lender issued a Notice of Sale respecting each of the five mortgages, and negotiated a conditional agreement to sell the property to another party. That first deal fell through, however.

Shortly after, the borrower advised that it wanted to redeem the mortgage and had the funds to do so. The borrower asked the lender for a mortgage discharge statement, but lender – assuming it was a stalling tactic designed to delay the power of sale – never provided one. Instead, and having already given the required Notices, the lender simply continued to take steps under its power of sale, negotiating a second deal to sell the property to a third party.

The borrower then went to court in advance of the intended closing date, asking for a declaration that the lender's agreement to sell the property was null and void and that the mortgages could be redeemed and discharged.

The court granted the borrower's request. It held that on the date that the lender's sale agreement with the third party was executed, the lender's right to enforce its mortgage remedies had actually been suspended under certain provisions of the *Mortgages Act*. Those provisions are triggered when a lender "without reasonable excuse" fails to provide a mortgage discharge statement within 15 days of receiving the borrower's request to do so; moreover, the state of suspension continues until the statement is supplied.

This was precisely what had happened here. The court observed that the preparation of a mortgage discharge statement is a relatively straightforward matter, and a lender must have a compelling reason to refuse to provide one if requested. This will mainly occur where the request is not made in good faith.

In the case at hand however, the lender had no "reasonable excuse" to withhold or fail to supply the mortgage discharge statement. Although the lender may have been skeptical that the borrower had sufficient financing to pay off the mortgage, it only asked for proof after the 15-day period specified in the *Mortgages Act* had already expired, and only after the borrower asked for a mortgage discharge statement a second time. In fact, the evidence tendered to the court confirmed that the borrower had sufficient funds at the time of the first request and had made the request in good faith.

The court surmised that the lender's refusal to supply the mortgage discharge statement was actually driven more by its desire to sell the property pursuant to its power of sale than to allow the borrower to redeem the mortgage.

The court accordingly declared the sale agreement between the lender and the third party to be a nullity; it ordered the borrower to pay the $3,365,000 into court and directed that the mortgages were to be discharged pursuant to certain other provisions of the *Mortgages Act*. See: *1414391 Ontario Ltd. v. Graff*, 2015 (ONSC).