SRLaw
Schneider Ruggiero LLP

Mortgage and Real Property Law Report

Vol. 23, No. 5 • November 2017

A Legal Newsletter for the Mortgage and Real Estate Industries

Entire Agreement Clause Enforced, Nullifying Alleged Representation by Realtor

The buyer of a residential townhouse entered into an agreement of purchase and sale with the seller/developer. The agreement called for the buyer to submit three deposits, with the third one to be paid by way of cheque dated 120 days following the date on which the agreement was signed.

However that third deposit, for $12,000, was never submitted. The buyer later claimed that under a verbal agreement with the real estate agent – who was a dual agent acting for both buyer and seller – it had been agreed that the third deposit was unnecessary. Instead, he would be required only to submit two deposits totaling $14,000, representing five percent of the purchase price. He claimed this verbal agreement was the "actual" agreement between himself and the seller, essentially supplanting the written one he had initially signed.

The issue came to a head when, more than a year after the agreement date and nine months after the third deposit would have been due, the seller advised that it required the final deposit had to be paid within five days. Otherwise, the seller stated it would consider the buyer to be in breach of the strict wording of the agreement, and it would exercise its right to terminate the agreement.

After the third deposit was not paid by this deadline, the seller terminated the agreement. In turn, the buyer sued for specific performance of the contact, and for summary judgment in his favour.

Before the court, and in addition to raising the alleged verbal agreement between him and the real estate agent, the buyer noted that after the deadline for the third deposit, the seller had twice extended the occupancy date, but failed to follow the agreed procedure for doing so. He claimed this deviation from the strict wording of the agreement was one that affected their overall contractual relationship. To allow the seller to later insist on the strict wording of the initial agreement would put the buyer in an unfair position.

The court disagreed with this reasoning and found for the seller. The buyer had not proven the existence of an agreement between him and the real estate agent to waive the strict requirements relating to the third deposit. There was no "promissory estoppel" preventing the seller from insisting on payment. Nor had the buyer proven reliance, to his detriment, on the alleged representation.

Plus, the seller's extension of the agreement on two occasions, and its failure to insist on the third deposit, were not indications that it intended to disregard the agreement provisions that called for the deposit to be paid. The court found that the seller was simply unaware that the buyer had never paid the third deposit as required.

In any event, the wording of the contract was clear: It contained an "entire agreement" clause, the legal effect of which was to foreclose the buyer from relying on the supposed verbal agreement with the real estate agent. Such "entire agreement" clauses cover even those representations made before the agreement is signed, and in the court's words are intended to lift and distill the parties' bargain from the "muck of negotiations". The court also noted that the buyer had reviewed the agreement with a lawyer, before signing it.

Simply put: By failing to submit the third deposit, the buyer was in default of the agreement, leaving the seller free to terminate the deal and keep the two initial deposits. See: *Kitchen v. Silver Heights Developments Inc.*, 2017 ONSC 3932.

Can Court Examine Buyers' Bank Statements to Assess Validity of Personal Cheque as Deposit?

In a recent case called *Preiano v. Cirillo*, the buyers were interested in purchasing the sellers' home. They submitted a $25,000 personal cheque to the sellers' real estate agent, advising that it would be replaced with a certified cheque once the sellers accepted the agreement. The real estate agent held onto the cheque, and did not attempt to deposit it.

The next day, the sellers did accept the agreement, which by its terms required the buyers to submit their deposit within the next 24 hours. It also included a "time is of the essence" clause (which in law obliges the parties to complete their part of the bargain strictly within the times stipulated, otherwise the agreement will be considered breached).

However, the buyers submitted the certified cheque almost two hours late: it was tendered just under 26 hours after the seller accepted, and not within 24 hours as required. Still, the sellers waited until six days before the closing date to advise that, due to the missed deadline, they considered that there was no valid agreement. They offered to return the buyers' $25,000 deposit.

When the matter initially went to court to settle the dispute, a motion judge dismissed the buyers' action for specific performance of the agreement.

The buyers successfully appealed. The Court of Appeal found the motion judge had wrongly concluded that the agreement had lapsed because of the buyers' failure to submit the deposit on time. This error derived from the judge's finding, based on bank statements, that the buyers had insufficient funds in to cover the $25,000 personal cheque at the time it was tendered. The motion judge had therefore concluded that the cheque was "not capable of yielding funds upon negotiation," if it had been presented to the bank.

The Appeal Court concluded that the motion judge had gone too far in these conclusions, at least based on the evidence. Simply because the buyers admitted that the bank statement was authentic did not mean they also admitted to having insufficient funds to cover the personal cheque. As the Court observed:

> *There is no evidence that the bank would not have honoured the cheque, nor is there evidence in the record as to the [buyers'] financial capacity or their arrangements with the bank. There is evidence that within two days they were able to provide a bank draft in the appropriate amount.*

Having overturned the motion judge's ruling on the insufficiency of the buyers' deadline-compliant personal cheque, there was no longer a need to address the impact of the "time is of the essence" clause.

The action was sent back for a full trial, with the buyers being allowed to amend their claim to provide clearer circumstances surrounding the negotiation of the agreement and the delivery of the deposit. See: *Preiano v. Cirillo*, 2017 ONCA 615.

Letter of Intent Unenforceable; Merely an "Agreement to Agree"

A company named Eminence owned properties that it wanted to re-zone and develop into high-density apartment buildings. They approached Twelve Gates with an offer to make it an equity partner in its development plan; Twelve Gates would provide the funding to finance the equity portion of a construction loan, in exchange for a 60 percent interest in the properties.

In a Letter of Intent (LOI), Eminence offered Twelve Gates a 30-day period to conduct due diligence; after that, the agreement would "go firm" with Twelve Gates being required to invest over $13 million. The LOI provided for certain conditions to be filled, and required Twelve Gates to eventually waive the due diligence condition. If Twelve Gates chose not to do so, it could walk away from the project and have its $100,000 in deposits refunded.

The negotiations were complex, and took several months. The due diligence period was extended several times, and two amending agreements were signed. However, a dispute later arose as to the agreed terms.

Among other things, Twelve Gates claimed that Eminence had breached the LOI in several respects, including a failure to grant a mortgage on desirable terms. Twelve Gates also refused to waive certain conditions that were the subject of the due diligence portion of the LOI.

Ultimately, Eminence advised that it considered the LOI to be at an end, and declared Twelve Gates' deposit to be forfeited. Its stated reason was a loss of confidence in Twelve Gates' ability to provide financing for the projects.

This triggered Twelve Gates to take a drastic step: Without giving Eminence notice in advance, it obtained a Certificate of Pending Litigation (CPL) from the court, which restricted Eminence from dealing with its property pending the outcome of their dispute. Twelve Gates also launched a lawsuit claiming specific performance of the LOI. In response, Eminence brought a motion discharging the CPL to remove the restriction on dealing with the land.

The court was asked to step in to resolve the deadlock. Turning first to Twelve Gates' position, the court held that specific performance of the LOI was simply not appropriate on these facts. That court-imposed remedy could only be applied to those agreements for which all the terms had been settled, which was not the case here. The LOI was merely an "agreement to agree" or an "agreement to negotiate," which lacked the necessary certainty to be enforceable. Many essential terms of the LOI were still unresolved, including those relating to the mortgage.

As no legally-valid agreement was in place, by extension this meant that Twelve Gates fell short of meeting the onus to show that it had a "reasonable claim to an interest" in Eminence's lands, as the legal test for granting a CPL required.

This bolstered the court's other conclusions in Eminence's favour: The CPL had been improperly granted by the motion judge in the first place.

Twelve Gates had failed to make full and frank disclosure of the material facts in this complex series of negotiations, and had provided "a mere 18 exhibits" in support of its application for the CPL. For example, numerous emails that spoke to the issue of whether Eminence had been cooperative with Twelve Gates' due diligence efforts were missing. In the court's view, Twelve Gates' evidence fell far short of what the motion judge needed to properly assess whether the test for granting a CPL was met.

Also, since the motion for a CPL was brought without notice to Eminence, Twelve Gates was obliged to give a balanced presentation to the motion judge, including a fair outline of not only its own legal position, but Eminence's as well. Yet, the motion judge had been given only a brief and one-sided outline of Twelve Gates' claim.

The court accordingly rejected Twelve Gates' request for specific performance, and granted Eminence's motion to discharge the CPL. See: *Twelve Gates Capital Group Inc. v. Eminence Living Inc.*, 2017 ONSC 3506.