CITATION: Ali et al. v. Patel et al., 2024 ONSC 3505
COURT FILE NO.: CV-23-907
DATE: 2024-06-24

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
Asad ALI, and Kifayyat ALI	)	
	)	Shaneka Shaw Taylor, for the Plaintiffs
Plaintiffs	)	
	)	
– and –	)	
	)	
Aashish PATEL and Arpita PATEL	)	Kristine Holder, for the Defendants
	)	
Defendants	)	
	)	
	)	
	)	**HEARD:** January 9, 2024

THE HONOURABLE JUSTICE ANTONIANI

AMENDED DECISION ON MOTION FOR SUMMARY JUDGMENT

OVERVIEW

[1] This motion for summary judgment arises from a failed residential real estate deal. The amount in issue is the $50,000 deposit which the Defendant purchaser (the "Purchaser") offered to pay the Plaintiff vendor (the "Vendor") on arriving at a binding agreement. After the Purchaser declined to complete the transaction, the Vendor's house remained on the market and in one week was sold again, for $25,000 less than what the Purchaser had agreed to pay. The closing date remained the same.

[2] As is the case with most negotiations and agreements of purchase and sale in relation to residential real estate, the interaction between the Vendor and the Purchaser was entirely in writing, via their agents. Negotiations took place on June 5, 6, and 7, 2023.

[3] The parties agreed to have the claim determined by summary judgment under rr. 20.04(2) (a) and (b) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194:

> The court shall grant summary judgment if,
>
> (a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or

(b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.

[4] The test for summary judgment was stated by the Supreme Court of Canada decision of *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 49:

> There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

[5] I agree that this is an appropriate matter in which to grant summary judgment.

The Hearing of the Motion- Fresh Evidence :

[6] After completion of oral submissions, the parties were invited to provide me with written submissions on the issue of whether or not there was a binding agreement of purchase and sale.

[7] The Vendor delivered written submissions first. Along with submissions, the Vendor included fresh evidence. The fresh evidence is an additional affidavit from the real estate agent who had acted for the Vendor on the sale.

[8] The real estate agent's affidavit includes photos of text messages and emails that were exchanged between the Vendor and Purchaser agents, along with copies of documentation which had been attached to the communications. Some of these documents had been referred to in the materials at the motion, or by counsel in oral submissions, but copies had not been included in the original materials.

[9] In their reply written submissions, the Purchaser did not take issue with the fresh evidence. In fact, they relied on it in their own submissions. I asked the Purchaser to indicate their position on the fresh evidence, and they replied that they are "neither consenting nor opposing." At the same time, counsel was clear that they do not request an additional attendance before me.

[10] Despite the irregularity of introducing fresh evidence with final submissions, I find that the Purchaser has accepted and acknowledged the veracity of the fresh evidence, and I do not find that it is in the interests of the parties that they incur further costs in pursuing the resolution of this matter by requiring any further steps to be taken.

[11] Further, I find that the additional documentary evidence is consistent factually with the submissions of the parties at the hearing, and it provides an accurate account of what transpired. I have relied on the communications included in the fresh evidence.

Decision

[12] The facts are undisputed, but for the conclusion as to whether the combination of actions, communications and documents exchanged resulted in a binding agreement for the purchase and sale of the Vendor's residence.

[13] For the reasons that follow, I find that no binding contract existed because the Vendor treated Schedule B as a necessary part of a purchase and sale agreement and they required that it be initialled and signed as part of the negotiation process. Their own evidence indicates a binding contract would not have been reached until the signing, with Schedule B, was done. Since that did not happen in this case, I must conclude that no binding contract existed between the Vendor and Purchaser for the sale of the Vendor's residence.

Sequence of Events

[14] The Purchaser made an unconditional offer to purchase the Vendor's property on June 5, 2023. The offer was irrevocable until 11:59 pm on June 6. The offer to purchase contained an Offer Summary Document, an Offer of Purchase and Sale, and a Schedule A.

[15] On the evening of June 6, the Vendor sent the offer back by email, signed. Each of the price, deposit, closing date, and Schedule A remained unchanged. The only changes were the addition of a notation on the first page of the agreement indicating that the agreement now included a "Schedule B", and a Schedule B was attached.

[16] More specifically, at 8:36 pm on June 6, 2023, the Vendor's agent sent an email to the Purchaser's agent indicating "Can you have you clients Initial schedule b and on the first page that there is a schedule B. Accepted offer and deposit info attached"[sic].

[17] In fact, the real estate agent did not attach Schedule B. The document did include a revision to the primary offer document, indicating that the deal was subject to "Schedule B, attached".

[18] A few minutes after sending the agreement, apparently upon realizing that she had failed to attach Schedule B, the agent re-sent the documents, this time attaching Schedule B. This second email reads "Sorry. Use this."

[19] There was no new irrevocable date proposed. The Vendor's agent also sent a text when she emailed the document, indicating that she had just forwarded the "accepted offer". It is evident that the Vendor believed that they had sold the property by accepting the offer, subject to the Purchaser initialling the change to the offer and signing Schedule B, and that they did not consider it to be a counteroffer.

[20] The Purchaser and their agent did not respond further that evening. For reasons unknown, the Purchaser had a change of heart overnight. The next morning, being June 7, 2023, the Purchaser advised their agent that they "will be unable to proceed with this property deal for unforeseen family reasons at this time." This information was communicated by the Purchaser's agent to the Vendor's agent.

[21] At 2:27 pm on June 7, 2023, the Purchaser sent a Mutual Release, signed, to the Vendor. The Vendor did not sign the release.

[22] Also on June 7 at 3:22 pm, the agent for the Vendor sent an email to the Purchaser's agent, which states: "If you could have your clients sign the termination since the deposit cheque was not provided. Requested by my broker." She also forwarded the same email to her clients/the Vendor.

[23] The "Termination of Agreement by Buyer" is OREA Form 125. It had been completed in part by the Vendor's agent, with words explaining the termination, as follows: "It has not been possible to fulfill the conditions pertaining to: offer for 55 Maitland St Kitchener ON N2R 1 V2 dated June 5 2023. Deposit not received."

[24] Neither the Purchaser nor the Vendor signed the Termination Agreement before the Vendor's agent sent a subsequent email on the same date, advising that her clients would hold the Purchaser liable for any loss or damages.

[25] The Vendor re-listed the property. One week later they entered into an agreement to sell the property for $25,000 less than what had been the offer from the Purchaser.

Analysis of the Transaction

[26] The MLS listing of the property for sale included a stipulation that all offers were required to include Schedule B. In my view, this emphasizes that the Vendor considered Schedule B to be an essential part of any agreement.

[27] Schedule B is a document that includes provisions which likely came into being as a result of the Covid-19 pandemic. It generally addresses what are "banking days" and how the parties would conclude the transaction in the event that banking institutions and registry offices were closed on the anticipated closing date, as well as a few other provisions relating to the timing and form of deposit that would be acceptable, and where the keys would be left.

[28] Counsel argued that I should take Judicial Notice of the fact that Schedule B is a standard inclusion in real estate transactions since the Covid-19 pandemic. I am not in a position to take judicial notice of this, and it was not an agreed fact. The Vendor simply added it into their subsequent written submissions.

[29] The only issue to be determined is whether the addition of the Schedule B in the final version of the agreement, and the demand from the Vendor that the Purchaser acknowledge the Schedule by signatures and initials, was a "counteroffer."

[30] By definition, a counteroffer is a non-acceptance of a previous offer: *Tang v. Rong,* 2021 ONSC 8058, at paras. 43-46. If it was a counteroffer, then there was no binding agreement, as the Purchaser did not initial and sign the changes or deliver the required $50,000 deposit.

[31] The Vendor argues that there was a binding agreement, and that they are entitled to the $50,000 deposit that should have been received within 24 hours of the conclusion of a binding agreement.

[32] The Vendor makes two arguments: first, that there was a binding agreement in place because Schedule B does not include essential elements of the contract. Second, that they first accepted the Purchaser's offer without attaching Schedule B, so that a binding agreement was struck, and their later communication which included Schedule B came after a contract already existed.

[33] At first blush, it would seem obvious that the addition of an entirely new schedule added to an agreement of purchase and sale of real estate must necessarily amount to a revision which would require acceptance. However, the situation here is unusual because Schedule B does not

address what would typically be considered necessary and essential clauses to find that there has been a meeting of the minds and the conclusion of a binding agreement.

[34] I find that the treatment of Schedule B by the Vendor as a necessary inclusion in any final agreement indicates that it was essential in their view, and I find their return of the agreement including the Schedule was a "counteroffer" which the Purchaser was free to back away from.

[35] I reject the Vendor's secondary argument that they first sent the accepted agreement back without the Schedule B, and therefore a binding agreement was entered into at that time. This was obviously done inadvertently, as is evident in the wording of the agent's follow up email.

[36] In their supplementary written submissions, the Vendor emphasizes that the first version of the agreement was sent to the Purchaser without Schedule B attached, and thereby argue that the deal binding upon their delivery of the accepted agreement without the attachment.

[37] This might be more persuasive if the facts were that the Vendor had factually simply and fully accepted the offer, and then later changed their mind and decided that they want to include a new Schedule, or additional provisions to the deal. The argument then would be that, in fact, there was no counteroffer and a binding offer was in place, and any events after could not impact on the already existing contract.

[38] That is not the fact of what happened here. The signed counteroffer was inadvertently sent without Schedule B. The email references Schedule B and asks that the Purchaser initial the first page of the offer document and sign Schedule B. To give effect to the Vendor's argument now would be to ignore that a contract exists upon a meeting of the minds.

[39] The test to determine if the parties reached a meeting of the minds is whether a reasonable person apprised of all the circumstances would believe the parties had reached an agreement: *Luo et al v Chen et al*, 2019 ONSC 680, at para. 30. The court may look beyond the formal written document, to the words and conduct of the parties, if all the essential terms have been agreed upon: *Luo*, at paras. 31-32.

[40] I find there was no meeting of the minds here. The conduct of the Vendor, being the inclusion of Schedule B in the MLS listing, coupled with the Vendor's decision to modify the Agreement of Purchase and Sale by including Schedule B, and sending it back to the Purchaser along with a requirement that the Purchaser acknowledge Schedule B by signing it, suggests that the Vendor viewed the inclusion of that Schedule as a necessary component of a binding agreement. The Purchaser did not sign or accept any agreement that included a Schedule B. Rather, the Purchaser resiled from the agreement after receiving the counteroffer with Schedule B included. Therefore, it cannot be said that the parties were *ad idem* on the essential terms of the agreement.

Conclusion

[41] The onus is on the Vendor/Applicant, to show, on a balance of probabilities, that a binding contract existed.

[42] I find on a balance of probabilities, that the returned agreement was a counteroffer, and that the Vendor viewed Schedule B as a necessary component of a concluded agreement.

[43] When the offer was inadvertently sent without Schedule B, the Vendor's agent re-sent the offer, attaching Schedule B with a request that the Purchaser sign Schedule B and initial the first page where it had been modified to indicate that Schedule B had been added.

[44] The counteroffer was never accepted or signed by the Purchaser. Therefore, no binding agreement was reached for the sale of the Vendor's property.

Costs

[45] I would urge the parties to agree on costs. If they are unable to do so, then costs submissions may be made as follows:

a. The Defendants shall serve and file their written costs submissions, not to exceed three pages, double-spaced, together with a draft bill of costs and copies of any pertinent offers, within 21 days of the release of these reasons; and

b. The Plaintiff shall serve and file its responding costs submissions of no more than three pages, double-spaced, together with a draft bill of costs and copies of any pertinent offers, within 30 days of the release of these reasons; and

c. The Defendant's reply costs submissions, if any, are to be served and filed within 35 days of the release of these reasons and are not to exceed two pages.

[46] If no costs submissions are received by the deadlines specified herein, the parties will be deemed to have resolved the issue of costs, and the issue will not be determined by me.

If the parties settle the question of costs or if a party does not intend to deliver submissions, counsel are requested to advise the court accordingly.

Justice S. Antoniani

Released: June 24, 2024

Corrigendum

1) Page 2 - Paragraph 7 – removed “which was provided without any comment or advance motion or consent from the court.”

2) Page 2 - Paragraph 10 – removed “without motion or consent in the context of a summary judgment motion” amended to read “with final submissions.”

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Plaintiffs

– and –

Aashish PATEL and Arpita PATEL

Defendants

REASONS FOR JUDGMENT

Antoniani, J

Released: June 24, 2024