

**CITATION:** Naeem v. Bowmanville Lakebreeze West Village Ltd., 2023 ONSC 4558  
**OSHAWA COURT FILE NO.:** CV-2118/19  
**DATE:** 20230809

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Shireen Naeem, Plaintiff

**AND:**

Bowmanville Lakebreeze West Village Ltd., Defendant

**BEFORE:** The Honourable Madam Justice J. Cameron

**COUNSEL:** J. Daniel McConville, Counsel for the Plaintiff

Michael A. Cohen, Counsel for the Defendant

**HEARD:** June 19, 2023

**RULING ON MOTION**

**Overview:**

- [1] The Plaintiff seeks summary judgment for relief from forfeiture of a deposit she paid to the Defendant pursuant to an Agreement of Purchase and Sale of a new home. It is the Plaintiff's position that the Defendant refused the Plaintiff's requests to complete the agreement and then took the position that she had breached the agreement. The Defendant submits that the Plaintiff breached the agreement by failing to close as a result of her inability to secure financing.
- [2] The Plaintiff seeks the return of her deposit plus interest.

**The Facts:**

- [3] The Plaintiff, Shireen Naeem entered into an Agreement of Purchase and Sale ("APS") with the Defendant, Bowmanville Lakebreeze West Village, to purchase a home at 39 Larkin Lane in Bowmanville, Ontario on April 18, 2016. The home was to be built by the Defendant who is a builder and vendor of residential homes (hereinafter, the "Defendant" or "Vendor").
- [4] The terms of the APS included:
- (a) A purchase price of \$629,900;
  - (b) A deposit of \$82,916.19 which included décor and structural upgrades;

- (c) A requirement that the Defendant comply with certain conditions if it sought to change closing dates;
- (d) A closing date of September 14, 2017; and
- (e) An outside closing date of January 14, 2019.

- [5] The first tentative closing date agreed to was September 14, 2017. The second tentative closing date was January 12, 2018. The “firm” closing agreed upon was May 14, 2018 and the “delayed” closing date was January 4, 2019. The APS included a detailed Tarion addendum that outlined the mechanism with respect to allowances for changing the closing date. The Defendant delayed the closing date with proper notice to the Plaintiff twice. However, the Defendant needed to change the “firm” closing date of May 14, 2018 to a “delayed” closing date of March 21, 2019. This was beyond the “delayed” closing date stipulated in the APS of January 14, 2019. Notice was given to the Plaintiff on May 2, 2018, well beyond the required notice period.
- [6] On August 27, 2018 a representative of the Defendant left a voicemail for the Plaintiff advising her that her dates were being moved. The Defendant’s representative then sent an email asking the Plaintiff to call them regarding her new closing date. The Plaintiff’s son returned the call. He was advised by the Defendant’s representative that the Plaintiff could send in a request for a preferred closing date. The son asked if the Plaintiff could get her deposit back and he was told someone would call them back. According to the Plaintiff, no one ever called back with a response.
- [7] On August 28, 2018 the Plaintiff emailed the Vendor asking for a closing date of April 30 or the first week of May 2019. On August 29, 2018, the Defendant’s representative emailed back saying that the latest possible closing date was April 23, 2019 indicating that this was the latest date in order to “stay in the delayed compensation eligibility.” They then sent an email attaching a draft amendment to the APS for the Plaintiff to sign. According to the APS, the Plaintiff was already entitled to delayed compensation eligibility as the closing date was beyond the “firm” closing date. This was a misstatement.
- [8] Regardless, the Plaintiff signed the amendment delaying the closing date to April 23, 2019. The Plaintiff was not told, nor was she aware, that she did not have to sign the amendment and that the APS was voidable at this juncture. She did not seek out legal advice prior to signing the amendment.
- [9] On April 12, 2019 the Plaintiff asked the Defendant if the APS could be amended to add two new parties, her son and daughter-in-law. The Defendant reminded the Plaintiff that the closing date of April 23, 2019 was approaching. The Plaintiff responded on the closing date asking to add three new parties to the APS and to delete herself from the APS entirely. The Defendant refused and advised that they were terminating the APS. The Plaintiff attempted to reinstate the APS on May 16, 2019 but the Defendant advised that the APS had been terminated and the deposit had been forfeited.
- [10] The Defendant suffered no damages as a result of the termination of the APS.

**The Positions of the Parties:**

- [11] The Plaintiff submits that she was deliberately misled by the Defendant's representative who did not tell her that the Defendant was in breach of the APS by setting an improper "delayed" closing date and that the requested amendment would alleviate the Defendant of that breach. The Plaintiff was not advised that signing the amendment was voluntary and that she could set a new closing date herself or accept the Defendant's repudiation of the APS and get her deposit back. As such, the Court should exercise its discretion to grant her relief from forfeiture. The forfeiture of the deposit is out of proportion to the damages suffered by the Defendant and allowing the Defendant to retain the deposit is unconscionable in the circumstances.
- [12] The Defendant submits that it did not breach the APS by moving the closing date as the Tarion addendum functions as a "guideline" and is not a binding agreement. The agreement would have been voidable by the Plaintiff but she chose to sign the amendment. The Defendant submits that the Plaintiff should have obtained legal advice as contemplated in the APS before signing the amendment. She voluntarily signed the amendment and is therefore estopped from making any argument that she should be relieved of her obligations. It is clear from her last minute request to add parties to the APS and remove herself that the Plaintiff was unable to close the transaction due to her financial situation. The Plaintiff did not attempt to reinstate the APS until well after being advised that the APS had been terminated. The Plaintiff has offered no evidence that she was able to close the deal on any of the prior closing dates. The delay of the closing date as agreed to in the amendment inured to the benefit of the Plaintiff due to her difficulty in financing.

**The Issue:**

- [13] On a motion for summary judgment, pursuant to Rule 20.04(2) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, the Court must be satisfied that there is no genuine issue requiring a trial. The moving party bears the legal burden of showing that there are no genuine issues for trial. There will be no genuine issue for trial where a judge can reach a fair and just determination on the merits of the motion. A judge can make such a determination where the process allows the judge to make necessary findings of fact; where the process allows the judge to apply the law to the facts; and where the process is a proportionate, more expeditious and less expensive means to achieve a just result. *Hryniak v. Mauldin*, 2014 1 S.C.R. 87, at para. 49.
- [14] I agree with the parties that this is a case that should be decided by way of summary judgment.
- [15] There are two issues for me to decide.
- (a) Did the Defendant breach the APS by moving the closing date beyond the "outside" closing date without adequate notice despite the Plaintiff having signed the amendment? and

(b) Is the Plaintiff entitled to relief from forfeiture of her deposit?

**The Law and Analysis:**

- [16] Courts have held that the Tarion addendum as used in this case functions as a “guideline” and parties are not precluded from amending the dates set out. Section 4(a) of the Tarion Addendum states “any amendment not in accordance with this section is voidable at the option of the Purchaser.” Therefore, a non-compliant amendment altering the closing date is not invalid but voidable. *Ingarra v. 301099 Ontario Limited (Previn Court Homes)*, 2020 ONCA 103 at para. 19; *5000933 Ontario Inc. v. Mahmood et al.*, 2022 ONSC 4726, at para. 41.
- [17] The position of the Defendant that the parties can agree to alter the closing date by virtue of a mutually agreeable amendment is correct. It is true that the Plaintiff could have sought legal advice and better understood her rights with respect to voiding the APS and getting her deposit returned. It is clear that at the time of the request to extend the closing date, the Plaintiff agreed to extend it. I do not have evidence before me that at this point in time the Plaintiff had the financial ability to close the deal. It is also clear that the Plaintiff was unable to close the deal due to her financial situation on the extended closing date of April 23, 2019.
- [18] However, prior to signing the amendment the Plaintiff’s son specifically asked if his mother could get her deposit back. He was told that a representative of the Defendant would call him back with an answer to that question. No answer was forthcoming. When prompted for her to request a closing date, the Plaintiff asked for April 30 or later. This request was denied and a new earlier date was set by the Defendant.
- [19] The evidence before me is that the Plaintiff was misled by a representative of the Defendant. She was told that she had to agree to a closing date of no later than April 23, 2019 or she would lose her eligibility for delayed compensation. She was not alerted to the fact that the notice period for a request by the Defendant to further delay the closing date had passed nor that the extension of the closing date rendered the contract voidable should she wish to do this. I appreciate that the Defendant is not required to give the Plaintiff legal advice but their conduct goes further than just making the request without explaining to the Plaintiff what her options were.
- [20] On August 28, 2018 the Plaintiff emailed the Vendor asking for a closing date of April 30 or the first week of May 2019. On August 29, 2018, the Defendant’s representative emailed back saying that the latest possible closing date was April 23, 2019 indicating that this was the latest date in order to “stay in the delayed compensation eligibility.” This was untrue. According to the APS, the Plaintiff was already entitled to delayed compensation eligibility as the closing date was beyond the “firm” closing date. They then sent an email attaching a draft amendment to the APS for the Plaintiff to sign.
- [21] In response to her request for a later than April 30, 2019 closing date, the representative of the Defendant should have told her she was entitled to a later date. Instead, they chose to mislead her. In fact, at this point, the Plaintiff was entitled to void the APS and get her

deposit back. In light of the failure to answer the Plaintiff's son's question about the possibility of getting the deposit back and the subsequent misstatement that the Plaintiff had to set a date by April 23, 2019 or she would not be eligible for a payment she was already eligible for, I find that the Defendant's representative deliberately misled the Plaintiff into thinking she had no choice but to set a new date.

- [22] The Defendant seeks to hold the Plaintiff to the strictest terms of an agreement where they have deliberately misled her about what those terms are. Although this may not necessarily amount to a breach of the APS by the Defendant, it factors strongly into my analysis with respect to whether or not the Plaintiff should be relieved from forfeiting her deposit.
- [23] Section 98 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43 allows the Court to “grant relief against penalties and forfeitures, on such terms as to compensation or otherwise as are considered just.” This is a remedial section that should be given a fair, large and liberal interpretation. *Kozel v. The Personal Insurance Company*; 2014 ONCA 130, at para. 54-55 and *Trez Capital Limited v. Morrison*, 2019 ONSC 7115, at para. 24.
- [24] Relief from forfeiture refers to the Court's power to protect a person against a loss of interest or right because of a failure to perform a covenant or a condition in an agreement or contract. The remedy is equitable in nature and is purely discretionary. The power is predicated on the existence of circumstances in which enforcing a contractual right of forfeiture, although consistent with the terms of the contract, visits an inequitable consequence on the party that breached the contract. *Trez Capital*, at para. 25.
- [25] In the context of agreements of purchase and sale, Courts grant relief from forfeiture of deposits in cases where the deposit constitutes a penalty. A Court should consider whether the deposit is out of proportion to the damages suffered and whether the vendor retaining the deposit would be unconscionable. *Signal Chemicals Ltd. v. Dew Man Marine Trade Inc.*, 2011 ONSC 3951, at para. 13 and paras. 18-20; *Pleasant Developments Inc. v. Iyer*, 2006 CarswellOnt 2050 (Div. Ct.), at paras. 12-16. A finding of unconscionability must be exceptional and strongly compelled on the facts of the case. *Redstone Enterprises Ltd. v. Simple Technology Inc.*, 2017 ONCA 282, at para. 25
- [26] The concept of a deposit is an exception to the ordinary rule that a sum forfeited on the breach of a contract is an unlawful penalty unless it represents a genuine pre-estimate of damages. Deposits are designed to motivate contracting parties to complete their agreements. It is important that parties have certainty that the terms of their contract will be enforced. *Redstone*, at paras. 20 and 24.
- [27] The Ontario Court of Appeal in *Redstone* at para. 30 outlined the factors to be considered in determining if forfeiture would be unconscionable. Although not an exhaustive list, some of the factors to be considered are:
- a) The relative bargaining powers of the parties;
  - b) The relative sophistication of the parties;

- c) The existence of *bona fide* negotiations;
- d) The nature of the relationship between the parties;
- e) The gravity of the breach; and
- f) The conduct of the parties.

[28] The Defendant, a builder and vendor of residential homes, is in the business of negotiating agreements of purchase and sale with prospective homebuyers. The Plaintiff in this matter is a widow who worked two jobs while undergoing cancer treatment in order to save enough money to put the deposit down on a home for her family.


[29] The negotiations with respect to the extension of the closing date are tainted by the actions of the Defendant who failed to answer a direct question of the Plaintiff about the return of the deposit and then misstated the facts with respect to the period of eligibility and forged ahead with producing an amendment with a closing date contrary to that requested by the Plaintiff. These actions of the Defendant took place while knowing the APS voidable at the request of the Plaintiff without penalty. The Defendant, who suffered no loss as a result of the failure to close the transaction, now looks to strictly hold the Plaintiff to this same amendment. I find that it would be unconscionable to do so.

**Conclusion:**

[30] The Application for summary judgment is granted. The Defendant shall return the deposit in the amount of \$82,916.19 plus pre-judgment interest to the Plaintiff within 15 days of the release of this ruling.

**Costs:**

[31] If the parties cannot agree on the costs of this application, the Plaintiff may submit written submissions of no more than 2 pages plus costs outlines within 15 days of the release of this endorsement. The Defendant will have 15 days thereafter to respond with the same restrictions. There is no right of reply. If no submissions are received within the time period set out herein, there shall be no award of costs on this Application.

  
The Honourable Justice J. Cameron

**Date:** August 9, 2023