

CANADA / JUDGMENT

Akram v. Kaler

2020 BCSC 1571

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Supreme Court of British Columbia

DECIDED

26 October 2020

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2020 BCSC 1571 Akram v. Kaler

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Akram v. Kaler,

2020 BCSC 1571

Date: 20201026

Docket: S177030

Registry: New Westminster

Between:

Nadia Akram, Farhat Begum, Farwa Akram

Plaintiffs

And

Amandeep Kaler, Saroja Kaler

Defendants

Before: The Honourable Madam Justice Norell

Reasons for Judgment

Counsel for the Plaintiffs:

R. Gill

Counsel for the Defendants:

D. Kamachi

Place and Dates of Hearing:

New Westminster, B.C.

March 13 and September 11, 2020

Place and Date of Judgment:

New Westminster, B.C.

October 26, 2020

[1] The plaintiffs apply pursuant to Rule 9-7 of the Supreme Court Civil Rules, B.C. Reg. 168/2009, the summary trial rule, for the following orders:

- a) specific performance of a contract of purchase and sale of property dated November 1, 2015 (the "Contract");
- b) in the alternative, damages in lieu of specific performance, and an order for an appraisal to be done to assess the damages;
- c) in the further alternative, damages for breach of the Contract; and
- d) in the further alternative, damages for breach of an agreement dated December 7, 2017 (the "Settlement Agreement").

[2] An initial issue is whether this is an appropriate case to be decided by summary trial. I will discuss the evidence regarding the chronology of events before turning to the analysis. Some of the evidence filed in this application is not admissible. I will identify that evidence as I discuss the events.

Evidence

The Contract and agency relationship

- [3] The defendants or "sellers", Mr. and Ms. Kaler, are the registered owners of a residential property on 15th Ave. in Surrey, B.C. (the "Property"). There is a house on the Property, but it is vacant and dilapidated.
- [4] On November 1, 2015, the plaintiffs or "purchasers", Ms. Nadia Akram and Ms. Begum, entered into the Contract to purchase the Property from the Kalers for \$520,000. On November 11, 2015, Ms. Begum, assigned her interest in the Contract to the plaintiff, Ms. Farwa Akram, for \$10,001.
- [5] The Contract included terms that:
 - a) the completion date was December 7, 2015;
 - b) the Contract was "subject to" clauses in favour of the purchasers which could be removed by November 5, 2015. One of the subject clauses was obtaining financing;

- c) within 24 hours of the subject clauses being removed, the purchasers were to pay a deposit of \$10,000 in trust to Team 3000 Realty Ltd.; and
 - d) time was of the essence.
- [6] The Contract and other documents signed on November 1, 2015 contain clauses concerning the relationship of the parties to the realtor involved, Mr. Tariq Bajwa of Team 3000 Realty Ltd ("Mr. Bajwa"). These are:
- a) in the Contract, a clause which states that the purchasers have an agency relationship with Mr. Bajwa;
 - b) a document dated November 1, 2015 and entitled "Disclosure of Remuneration", which under the sub-heading "Disclosure of commission when acting for one party", that states Mr. Bajwa anticipates receiving a commission of \$13,000 from the sellers with respect to real estate services provided to the sellers or on their behalf in relation to the Property. This document is signed by the purchasers and they are identified as the "client";
 - c) a document dated November 1, 2015 and entitled "Seller's Fee Agreement (Buyer and Seller not Represented)" that states the sellers will pay \$13,000 to Team 3000 Realty Ltd., and that neither the brokerage nor Mr. Bajwa are acting for either the sellers or purchasers and do not owe any agency duties to the sellers or purchasers. This document is signed by the sellers.
- [7] Mr. Kaler states that on November 1, 2015, Mr. Bajwa knocked on the door of their home. This is not the Property, but a different address. Mr. Bajwa told the Kalers that he had buyers for the Property. Mr. Kaler asked Mr. Bajwa how he knew where they lived and Mr. Bajwa advised he had found them through a Land Title Office search. Mr. Bajwa presented the Kalers with the Contract. Mr. Kaler states Mr. Bajwa started to become aggressive with his sales pitch and increased the offer from \$518,000 to \$520,000. Mr. Kaler states he and his wife felt pressured by Mr. Bajwa. After about 1.5 hours, the Kalers signed the Contract.

Subject clauses removal

- [8] Mr. Kaler states that on November 5, 2015, he called Mr. Bajwa and asked if the purchasers had removed all the subjects. Mr. Bajwa asked Mr. Kaler to give the purchasers additional time to secure financing. Mr. Kaler told Mr. Bajwa that he and his wife were not prepared to extend the subjects' removal date. Mr. Bajwa said he would discuss this with the purchasers and get back to him. Mr. Kaler states that on November 7, 2015, Mr. Bajwa came to their home and advised that the purchasers had removed the subjects and actually did so before the November 5, 2015 deadline.

[9] Ms. Nadia Akram states that on November 5, 2015, the purchasers removed the subjects and made a deposit of \$10,000 to Team Realty Ltd. She produced an addendum which removed the subjects and is dated November 5, 2015, but not bank evidence of the deposit within 24 hours of the subjects' removal.

[10] Neither the plaintiffs nor defendants filed an affidavit from Mr. Bajwa.

Extension addendum

[11] Mr. Kaler states that the purchasers were unable to complete the sale under the Contract and sought to extend the closing date. On November 7, 2015, the purchasers and the sellers executed an addendum to the Contract. It appears from the document that Mr. Bajwa witnessed the signatures, but there is no direct evidence of this. The Contract addendum states:

1. The buyer and seller both parties are not represented by the realtor. The buyer and sellers has been advise to take legal independent about this contract.
2. The buyer will pay \$1300 Thirteen hundred to sellers to extend the completion date to January 15, 2016 and possession on January 16, 2016.
3. All other terms and conditions will remain same.

[12] There is a dispute regarding when the \$1,300 had to be paid. Ms. Nadia Akram states that the understanding was that the purchasers would pay the additional \$1,300 at the time of completion. Mr. Kaler states that the plaintiffs never paid this amount and therefore did not complete the sale. Ms. Nadia Akram swore a second affidavit in these proceedings in response to Mr. Kaler's affidavit and appended portions of Mr. Kaler's examination for discovery evidence, where in summary, he states he was under the impression that the purchasers were to pay the \$1,300 for the mortgage payment on the Property by a date discussed verbally, and which he acknowledges was not in the written addendum. The mortgage payment was due in the middle of December. Mr. Kaler states Mr. Bajwa was involved in this discussion. Again, I note there was no affidavit filed from him.

Alleged failure to fulfil extension addendum or alleged repudiation of Contract

[13] Mr. Kaler states in the examination for discovery evidence attached to Ms. Akram's affidavit that when he did not receive the \$1,300 by December 7, 2015 (I note that this is the original closing date), he deemed the purchasers to be in breach of the Contract, and he told his counsel to advise that the Kalers had not received the money and they could not go through with the sale. When it was put to him that he in fact intended to repudiate the Contract, he said he did not know "what the legalese is".

[14] On December 8, 2015, counsel for the Kalers wrote to the purchasers, care of Mr. Bajwa, stating:

The Kalers have now asked that we write to confirm that they intend to repudiate the contract. The buyers should seek to mitigate their damages. The buyers have refused to respond or negotiate a settlement in this matter despite the fact that they requested an offer from our clients. Please have the realtors arrange to release the deposit, and our clients will co-operate fully in its release.

Contract financing and completion date

- [15] On December 23, 2015, the Scotia Mortgage Corporation approved Ms. Nadia Akram and Ms. Farwa Akram for mortgage financing on the Property in the amount of \$416,000, the conditions of which were agreed by the Akrams on January 4, 2016.
- [16] On January 12 and 13, 2016, the Akrams' notary tendered the documents required for completing the sale and confirmed his clients were in a position to complete the sale. On January 15, 2016, the Akrams' notary wrote to the Kalers' counsel confirming his clients were ready, able and willing to complete the transaction. On January 18, 2016, counsel wrote to the notary advising he was no longer acting for the Kalers and was not in a position to accept service of any documents. Ms. Nadia Akram and the notary, Ms. Saira Khan, confirm these events in their affidavits.
- [17] The sale of the Property did not complete.

Alleged uniqueness of property

- [18] Ms. Nadia Akram states that the Property is unique to the plaintiffs because:
- a) it is in close proximity to family members; and in a later affidavit, she also "submits that the South Surrey property was intended to be a residential property for us";
 - b) the price was affordable but the property increased significantly in value since then and is now unaffordable; and
 - c) she did not find any other comparable houses in the area of the Property for the price of the Property as agreed between the parties.
- [19] Mr. Kaler states that during the week of November 23, 2015, a property developer who had previously inquired about the Property advised him that Mr. Bajwa was inquiring about selling the Property to the developer immediately after completion. This is hearsay, and also not attributed, and not admissible on this application. Again, there is no affidavit from Mr. Bajwa.
- [20] Mr. Kaler also states that the plaintiffs have told him that they do not qualify for financing and that another property was purchased.

Purchase of a different property

- [21] On April 29, 2016, Ms. Nadia Akram (for a 40% interest), Ms. Farwa Akram (for a 1% interest) and Mr. Muhammad Ahmed Bajwa (for a 59% interest) purchased a residential property in Langley for \$550,000. A mortgage was registered on the Langley property in favour of Scotia Mortgage Corporation. The Langley property may have been sold on November 7, 2018 for \$800,000, but this was not proved by admissible evidence.
- [22] Ms. Nadia Akram states the Langley property was purchased as an investment property, and that they could not afford any similar properties in South Surrey "due to the rapid increase in property prices in the South Surrey area". In a previous affidavit, she also stated that due to "the exponential increase in market prices of the vibrant property market in Lower Mainland", they could not afford any similar property. There is no evidence that Ms. Nadia Akram is qualified to make such statements. Her opinion regarding the state of the real estate market is not admissible evidence.
- [23] Similarly, Ms. Nadia Akram attaches to her affidavit documents for "similar properties in the same area of the Property". These are listings which appear to have been provided by Mr. Bajwa with listing and sale prices of approximately one million dollars. The documents are hearsay and Ms. Nadia Akram is not qualified to express any opinion as to whether these are comparable properties. Again, this evidence is not admissible.

Initial litigation

- [24] In January 2016, the purchasers commenced this action seeking: specific performance of the Contract; in the alternative, damages in lieu of specific performance; and in the further alternative, damages for breach of the Contract. In May 2016, the Kalers filed a response to civil claim alleging the purchasers could not complete and sought the extension addendum, and never paid the \$1,300 in order to extend the closing date in the Contract. The Kalers pleaded they were ready, willing and able to complete under the Contract. The Kalers also filed a counterclaim claiming the return of the \$10,000 deposit and other damages for the purchasers' alleged failure to complete.
- [25] A year later, in October 2017, the purchasers filed a response to counterclaim repeating their allegations that it was the defendants who repudiated the Contract and refused to complete. In November 2017, Ms. Farwa Akram was added as a plaintiff and the notice of civil claim amended to plead the assignment of the Contract. In November 2017, the defendants filed an amended response to civil claim pleading that: the Contract was not properly assigned; the plaintiffs failed to tender closing documents; in the alternative, the plaintiffs have failed to mitigate; specific performance is not a suitable remedy as there is nothing unique regarding the Property and the plaintiffs lost their right to seek specific performance, when on or about April 29, 2016, the plaintiffs purchased an alternate comparable property at a price of \$550,000; if the plaintiffs are entitled to damages, they are limited to the difference between the \$520,000 and the \$550,000 paid for the alternate comparable property; the

plaintiffs do not remain ready, willing and able to complete because the mortgage financing that the plaintiffs obtained was used to fund the purchase of the other property; and it would be unjust to allow the plaintiffs to benefit from the increase in both properties when only one was purchased.

Settlement Agreement

[26] By a document dated December 7, 2017, but executed by the plaintiffs on January 29, 2018 and the defendants on February 20, 2018, all of the parties entered into the Settlement Agreement to settle this action. The terms included:

- a) The parties mutually release each other from any liability in this action;
- b) Clause 2 which states:

The Parties in the Action will cause their solicitors to have entered a consent dismissal order of the claim and counterclaim within the Action as if tried on the merits on a without costs basis [up to here in type print] after the successful sale of the Property [these last words added in handwriting and initialed].

- c) Schedule A to the Settlement Agreement which states:
 - 1. The Kalers shall list the property for sale.
 - 2. The Kalers shall not accept any offer less than \$850,000.
 - 3. The first \$520,000 of the sale proceeds shall go to the Kalers.
 - 4. The remainder of the net sale proceeds shall be split 50/50 between the Kalers on one side and Akrams/Begum on the other.
 - 5. Net sale proceeds means [terms for sharing of expenses of the Property and addressing the deposit].

Listings and further negotiations between the parties

[27] Ms. Nadia Akram states that the defendants did not consistently list the Property and breached the Settlement Agreement.

[28] Mr. Kaler states that after the Settlement Agreement, and in consultation with and with the approval of the plaintiffs, the defendants consulted a realtor and the Property was listed for sale on March 21, 2018. A Multiple Listing Service ("MLS") document shows the listing price was \$948,000 with an expiry date of May 21, 2018. It appears from the MLS document that the realtor was Mr. Onkar Bhatti, but there is no affidavit from him.

[29] The Property did not sell. Mr. Kaler states that he and the plaintiffs asked the realtor why the Property did not sell. The realtor advised them that the listing price may be too high. The realtor also advised, and the plaintiffs and he agreed, that should they still wish to sell the Property, the Kalers should not immediately re-list the Property because it may make the

sellers appear desperate and encourage low offers. The realtor's advice is not admissible for the truth of the opinion, but is relevant to Mr. Kaler's and the plaintiffs', if they were present for the conversations, states of mind.

- [30] Mr. Kaler states that the parties then agreed to re-list the Property on July 5, 2018, after a brief break. An MLS document shows the Property was listed on July 10, 2018 for \$947,000 with an expiry date of September 10, 2018. The listing is again with Mr. Onkar Bhatti.
- [31] Again, the Property did not sell. Mr. Kaler states that when the listing expired in September 2018, the plaintiffs and he discussed and consulted with local developers to see if there was any interest in purchasing the Property for development. Mr. Kaler states there was no interest in purchasing the Property at the price range on which the plaintiffs were insisting.
- [32] Mr. Kaler states that the plaintiffs, and he and his wife, agreed to hold off on re-listing the Property while they discussed the possibility of lowering the minimum acceptable price for the Property under the Settlement Agreement. The parties could not agree on a lowered price.
- [33] Mr. Kaler states that on November 24, 2018, the parties agreed that the Settlement Agreement would be amended such that there would be no minimum selling price and Mr. Kaler and his wife would pay the plaintiffs \$100,000 out of the proceeds once the Property sold. Mr. Kaler states this was a verbal agreement made among the parties without lawyers. When the plaintiffs subsequently had their counsel draft the agreement, it stated the \$100,000 was payable immediately. The Kalers did not execute the written draft agreement.
- [34] Mr. Kaler states that the plaintiffs then asked his wife and him to hold off on re-listing the Property while the plaintiffs attempted to obtain financing to purchase the Property themselves. After approximately three months of discussing a purchase price, the plaintiffs advised him that they were unable to qualify for financing.
- [35] Mr. Kaler states that the parties agreed to again list the Property, and the defendants did so on March 12, 2019 with a listing price of \$889,900, and with the listing expiring on June 30, 2019. An MLS document indicates that the listing agent was now Mr. Bob Harika. I have assumed this Mr. Harika is the same as Mr. Bhupinder Harika who swore an affidavit and identified himself as the listing agent.
- [36] Mr. Kaler states that on June 19, 2019, the plaintiffs alleged in a letter from their counsel that the Settlement Agreement was breached. The letter from counsel for the plaintiffs to counsel for the defendants states:

Further to our previous correspondence and telephone discussions, I write to confirm the following below.

The parties do not require trial dates to be scheduled in this matter as the parties have already come to an agreement regarding all matters. I have attached an executed copy of this agreement to this correspondence.

However, my clients have advised me that the Defendants have not followed through with the terms of the agreement. Specifically, the property is not listed for sale. Therefore, my clients have instructed me to schedule this matter for a hearing (via application) in July to enforce the agreement that was signed by the parties.

[Bolding and italics in original. Underlining added.]

[37] There were further negotiations directly between the parties without the involvement of counsel. There is a dispute as to what, if any, agreement was reached. Ms. Nadia Akram states that on July 23, 2019, "the plaintiffs and the defendants discussed and agreed to lower the selling price to less than \$850,000 but the defendants did not relist the property as agreed". Mr. Kaler does not address this alleged agreement between the parties in his affidavit.

[38] On January 6, 2020, the Kalers listed the Property again, at a price of \$815,000 and with the listing expiring on May 30, 2020. Mr. Kaler states that they were not successful in receiving any offers in four months. The listing agent was Mr. Harika.

[39] As related above, in his first affidavit, Mr. Kaler states that he met with the plaintiffs but did not identify if he met with all or some of them. He also did not specify dates or places of the meetings. In his second affidavit filed later in these proceedings, he states that since signing the Settlement Agreement, he would meet with a man named Muhammad who claimed to hold a power of attorney for Ms. Akram and to have the authority to speak for the plaintiffs to settle this matter. Their meetings were at a Tim Hortons without lawyers, and with a view to addressing: which realtor to use to sell the Property; how long the gaps in listing suggested by the realtor should be; and whether to lower the listing price.

[40] Mr. Kaler also recounts conversations that the realtor (not identified) had with "us" regarding the CPL on the Property. The "us" appears to be just him and his wife, but this is not clear. If offered for the truth, this is hearsay opinion evidence from an insufficiently identified source. However, one of the realtors, Mr. Bhupinder Harika, swore an affidavit regarding the CPL, so I will refer below to Mr. Harika's evidence.

Resumption of litigation

[41] In January 2020, the notice of civil claim was further amended to claim that the parties entered into the Settlement Agreement, and that the defendants subsequently breached the Settlement Agreement by only listing the Property for sale for brief periods of time and therefore "it is null and void". The claim for relief was expanded to include, in the alternative, damages related to the breach of the Settlement Agreement.

- [42] In February 2020, the plaintiffs filed this notice of application. They sought orders for: specific performance of the Contract; in the alternative, damages in lieu of specific performance along with an order for an appraisal; and in the further alternative, damages for "breach of contract". The plaintiffs also allege in the factual basis section of the notice of application that on July 23, 2019, the plaintiffs and the defendants agreed to lower the selling price to less than \$850,000 but the defendants did not re-list the Property as agreed.
- [43] The defendants filed a response to the application alleging that: the Settlement Agreement is the only governing agreement; the plaintiffs allege that the Settlement Agreement was breached and of no force and effect but at the same time affirmed the Settlement Agreement; and even if the Settlement Agreement is not the governing document, the matter is not suitable for summary trial.
- [44] On March 13, 2020, this matter first came on for hearing. Submissions began but were not completed as counsel had a misunderstanding as to whether the plaintiffs were seeking relief solely based on an alleged repudiation of the Contract, or were also in the alternative seeking relief for an alleged breach of the Settlement Agreement. The defendants thought it was only the former, and argued that the Settlement Agreement was the governing document. The application was adjourned to be reset with clarification of the relief sought and for submission of such further evidence as was required. Shortly thereafter, the COVID-19 pandemic intervened. As of the first hearing date, no offer to purchase the Property had been received.

Mr. Kaler's evidence regarding listing activity since March 2020

- [45] On May 4, 2020, the Kalers reduced the listing price to \$785,000. Mr. Kaler states that he and his wife have continued to list the Property and have received the following offers:
- a) May 28, 2020 for \$735,000
 - b) June 15, 2020 for \$700,000
 - c) July 8, 2020 for \$740,000
 - d) July 17, 2020 for \$735,000
 - e) July 22, 2020 for \$740,000
- [46] Mr. Kaler states that the plaintiffs would not remove the certificate of pending litigation ("CPL") they had filed to accommodate these offers. In June 2020, the plaintiffs located a buyer willing to purchase the Property for \$765,000, but again the plaintiffs would not remove the CPL. Mr. Kaler states that the plaintiffs have advised him on two occasions that they cannot afford to purchase the Property on any terms; and that they only want money from him. When and which of the plaintiffs said this (as opposed to the person identified as Muhammad) is not identified.

- [47] Mr. Bhupinder Harika, who has been a realtor for 17 years, states he was not the real estate agent initially involved with the listings. He became involved starting with the March 2019 listing. He was not successful in getting any offers in the first listing. Mr. Harika states he made the Kalers aware that: the house on the Property is a tear down and not liveable; the Property is the second property away from Highway 99; and the people viewing the Property were taking issue with the noise and bad condition of the Property. The Kalers agreed to re-list on January 6, 2020 for \$815,000. No offers were received in the next four months. On May 4, 2020, the listing price was reduced to \$785,000.
- [48] Mr. Harika states that the CPL has hindered potential offers. Mr. Harika states that he received an offer which was accepted by the Kalers for \$735,000, but it collapsed when the CPL would not be removed. Some potential purchasers only seemed interested because they assumed the CPL meant legal trouble and therefore the Property should be sold for significantly less than the asking price. He advised the Kalers that when the listing agreement expired, to leave gaps in between the listings as in his experience, immediately re-listing leads to low offers because the sellers are seen, sometimes incorrectly, as desperate. He also advised the Kalers that he thought the listing price was too high. As a result, the listing price was lowered. He has had six or seven realtors approach him who said they had interested buyers but did not want to submit a formal offer unless he could assure them that, as a condition of closing, the CPL would be removed. He could not give that assurance. For example, the latest offer of \$740,000 was submitted on the basis that the CPL would be removed. In Mr. Harika's opinion, based on the offers received and the marketing-to-date, the latest offer of \$740,000 is a reasonable indication of the market value of the Property. The dwelling is unlivable and the Property is only of interest to parties looking to tear down and rebuild, or otherwise develop the land. I note that some of Mr. Harika's affidavit is hearsay and to the extent that Mr. Harika's affidavit contains opinion, there is no expert report from him that meets the requirements of Rule 11-6(1) and Rule 9-7(5)(e).

Mr. Awan's evidence regarding the further listing activity since March 2020

- [49] The plaintiffs filed an affidavit from Mr. Muhammad Akram Awan. He states that he has been given a power of attorney by his daughter, Ms. Farwa Akram, in these proceedings. The power of attorney is not attached to his affidavit. Nor is there any evidence of why Mr. Awan has a power of attorney, or an affidavit from Ms. Farwa Akram.
- [50] Mr. Awan states that he, along with the plaintiff Ms. Nadia Akram, met with Mr. Kaler regarding the offers presented this year. He states he and Ms. Nadia Akram have taken issue with the offers presented because they are:

far too low compared to what the market value of the Property was at the time the Defendants breached the contract. The Defendants have not followed the Settlement Agreement between the parties by failing to list the Property for sale consistently in this matter. As a result of their conduct, we were unable to capitalize on the strong Lower Mainland housing market.

- [51] Like the statements of Ms. Nadia Akram to the same effect, none of these statements regarding value are admissible evidence. There is no evidence that Mr. Awan is qualified to express an opinion on the value of the Property at any time, or the housing market generally. Mr. Awan makes similar comments in other paragraphs of his affidavit that "the market has weakened" and the value of the Property has "plummeted". He also states that "we" are not agreeable to accepting an offer below \$850,000. I also note here that Mr. Kaler, Ms. Nadia Akram and Mr. Awan made statements in their affidavits that the others breached the various agreements. I have considered this as relevant to their state of mind in terms of election of remedies. Whether there were any breaches are issues the Court decides.
- [52] Defence counsel points out that Mr. Awan's evidence is contrary to Ms. Nadia Akram's affidavit where she states that on July 23, 2019, the plaintiffs and the defendants discussed and agreed to lower the selling price to less than \$850,000. Plaintiffs' counsel points out that Ms. Nadia Akram does not state that the parties agreed to a split in proceeds if the Property was sold for less than \$850,000. Mr. Awan's affidavit indicates that it is not only the selling price, but the split below a price of \$850,000 that is in issue.
- [53] Mr. Awan states that the defendants have not shown "us" any written offers for the Property, but rather they have only been advised through counsel of a potential offer. He also states that they were never advised that the CPL was resulting in offers below the asking price or that the Property should be listed inconsistently to maximize the selling price. He states this is the first time that they have heard of this.

Position of Parties

- [54] This hearing resumed on September 11, 2020. In the interim, plaintiffs' counsel had forwarded a proposed amended notice of application and both parties provided further evidence on the Settlement Agreement. In the intervening time, several offers had been received for the Property, and evidence of this was also provided. At the hearing, there was still some lack of clarity regarding the claims, but this was eventually resolved with the parties both revising slightly their notices of application and responses. Both counsel were content to proceed on that basis.
- [55] The plaintiffs argue that the Settlement Agreement was subject to the Property being sold, as evidenced by Clause 2 which states that the consent dismissal order will not be entered until the Property is sold. The plaintiffs argue the intention of Clause 2 was to keep the underlying cause of action alive in case the Settlement Agreement failed. They allege the defendants have breached the Settlement Agreement, and therefore the action on the Contract has not been settled and the governing document is the Contract. As a result, the plaintiffs sue on the Contract for specific performance, and alternatively damages in lieu of specific performance or damages for breach of the Contract, and only in the alternative, damages for breach of the Settlement Agreement.

- [56] The defendants argue that the action on the Contract was settled and the Settlement Agreement is the governing document. The defendants argue Clause 2 only operated as security for the payment of the settlement funds. The defendants deny they breached the Settlement Agreement. In the June 19, 2019 letter, the plaintiffs did not accept the defendants' alleged repudiation of the Settlement Agreement, but rather confirmed the Settlement Agreement. Counsel refers to *Dosanjh v. Liang*, 2015 BCCA 18, and argues if the Settlement Agreement was breached by the defendants, the plaintiffs affirmed the Settlement Agreement and thus made an election as to remedies. Further, even if the Settlement Agreement is not the governing document, the defendants have a defence on the merits for the claim regarding the Contract. Even if there was a breach of the Contract, the plaintiffs have not shown that specific performance as opposed to damages should be granted as a remedy. Even if Clause 2 kept the underlying action on the Contract alive, it did not keep the remedy of specific performance alive. The defendants argue that the Settlement Agreement operates as a bar to the remedy of specific performance.
- [57] Although initially the defendants pleaded that the issues surrounding the Contract could not be determined by summary trial, at the hearing, both counsel advised they were of the view that the matter could be heard by summary trial. The defendants argued that if the Court finds that the Settlement Agreement is not the governing document, then the issues for specific performance and mitigation could be determined as the plaintiffs have closed their case and failed to meet the burden of proof. As will be discussed below, I have come to the opposite conclusion as to the appropriateness of this matter to be determined by summary trial.

Analysis

- [58] Pursuant to Rule 9-7(15)(a), the court may grant judgment on an issue or generally, on the hearing of a summary trial application, unless:
- (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
 - (ii) the court is of the opinion that it would be unjust to decide the issues on the application.
- [59] With respect to whether the court is able to find the facts necessary, conflicting affidavits are not necessarily fatal to the summary trial application. A judge cannot decide an issue solely because she prefers one affidavit over another without a basis for doing so. However, other evidence may provide that basis. This could be, for example, documentary evidence, or evidence of independent witnesses: *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 at 219, 36 C.P.C. (2d) 199 at 216 (C.A.) [*Inspiration Management*]; and *Cory v. Cory*, 2016 BCCA 409 at para. 10.

- [60] With respect to whether it is unjust to decide the issues, the court must exercise its discretion by considering factors including: the amount involved; the complexity of the matter; any urgency or prejudice from delay; the time and cost of the summary trial and a conventional trial; whether credibility is a significant issue; and whether the summary trial would introduce unnecessary complexity to the dispute or result in litigation in slices: *Inspiration Management*; and *Gichuru v. Pallai*, 2013 BCCA 60 [Gichuru] at paras. 28-31.
- [61] I have concluded that on the state of the evidence filed on this application, I cannot find the facts necessary to decide the issues of fact or law.
- [62] With respect to the Settlement Agreement, the first issue is what the terms of the agreement are, and more specifically the meaning of Clause 2. There is insufficient evidence of the factual matrix or surrounding circumstances required to interpret the Settlement Agreement. There is no evidence of how the handwritten portion of Clause 2 came into being. I received no case law as to whether Clause 2 creates a contingent agreement, or it operates solely as security as alleged by the defendants, or whether it is an election inconsistent with a claim for specific performance. The Settlement Agreement does not state: any dates when the Property must be listed; the date by which the Property must be sold; and what is to happen if the Property does not sell for at least \$850,000. There is no evidence of how the parties arrived at a figure of \$850,000 and what mutual information, if any, the parties had regarding the market.
- [63] The next issue, assuming the terms of the Settlement Agreement can be determined, is whether the Settlement Agreement was breached by the Kalers listing the Property in the manner that they did. The plaintiffs point out what they say are long periods of time when the Property was not listed. As to why there were these periods of time, there is conflicting evidence regarding the alleged discussions between the parties. Mr. Kaler gives evidence of discussions, without dates and times, with the "plaintiffs" and later states it was with a man named Muhammad. Mr. Awan states he met with Mr. Kaler but denies any conversations similar to what Mr. Kaler states. Again there are no times or dates of any meetings. Complicating this, Ms. Nadia Akram states the parties reached an agreement to amend the Settlement Agreement, raising the issue of whether there was such an agreement. Neither Mr. Awan nor Mr. Kaler provided any evidence regarding this. There is no written correspondence filed on the application which could provide some basis for preferring one version of events over the other. There is no evidence from the first realtor involved. It is not clear for which conversations, if any, Mr. Harika or the other realtor, were present.
- [64] The next issues are: to what "breach of agreement" the June 19, 2019 letter refers; whether this, as alleged by the defendants, is a confirmation of the Settlement Agreement; and further, whether it is an election that forecloses a claim for specific performance. Again, there was insufficient evidence of the surrounding circumstances to make a determination of these. The plaintiffs' counsel argues that the Settlement Agreement contains Clause 2, and affirmation of the Settlement Agreement means they can still argue Clause 2 means the Contract governs.

- [65] With respect to the Contract, I cannot determine on the evidence what the role of the realtor Mr. Bajwa was and for whom, if anyone, he was acting as agent. There is no affidavit from Mr. Bajwa and he was part of discussions on at least two issues.
- [66] The first issue concerns whether the subjects were removed by the deadline of November 5, 2015. Mr. Kaler's evidence suggests he received conflicting information from Mr. Bajwa as to whether the subjects had been removed by the deadline. If the subjects were not removed by November 5, 2015, then the Contract was at an end, and this leads to questions regarding the basis upon which the extension addendum was made.
- [67] The second issue in which Mr. Bajwa had some involvement is the extension addendum. The written addendum does not state when the \$1,300 is to be paid, but only that the plaintiffs "will pay". Neither group of parties gave direct evidence in their affidavits that the payment was tied to a mortgage payment, however, Ms. Nadia Akram appended excerpts from Mr. Kaler's examination for discovery evidence where this appears to be the basis of the negotiation. Mr. Kaler states that Mr. Bajwa was a party to the conversations, but there is no affidavit from him. Again, there is insufficient evidence of the factual matrix of what the parties knew to interpret the contract and find the objective intention of the parties. To the extent the extension addendum may not have recorded the entire agreement between the parties, without surrounding independent evidence or cross-examination, there is no rational basis to prefer one version of events over another.
- [68] Assuming, but not finding, that the \$1,300 was to be paid on completion, the next issues on the Contract are: whether the defendants repudiated the agreement; and whether the plaintiffs were ready, willing and able to complete on January 15, 2016. On this issue, there is a letter from the defendants' counsel to two of the plaintiffs stating that they intend to repudiate the agreement. This letter does not refer to the \$1,300. Nor is there any evidence on the application of what was the nature of the negotiations between the parties referred to in the letter. In the examination for discovery evidence appended by Ms. Nadia Akram to her affidavit, Mr. Kaler states this was not his instruction to his lawyer. The mortgage financing and an affidavit from the notary with letters show the purchasers were able to complete at that time. The letters from the lawyer and the notary provide some independent evidence that may provide a basis to prefer one version of events over the other. However, given my overall findings on the appropriateness of the summary trial procedure, and to avoid the difficulties associated with litigation in slices, particularly any findings on credibility that may impact other issues, in my view it is not appropriate to determine this single issue.
- [69] If the Contract is the governing document, there are issues as to whether specific performance is available to the plaintiffs, and if so whether they are still able to complete. If specific performance is not available, and there is a breach of the Contract or the Settlement Agreement, there is no admissible evidence of the value of the Property at various times in the chronology of events that is needed in order to determine damages.

- [70] For all the reasons above, I am unable to find the facts necessary to determine the issues of fact and law. There are many issues, most of which are contingent on findings on other issues. There are conflicting affidavits without much detail and credibility is a key issue overall. For the most part, these issues cannot be resolved on a rational basis without cross-examination or some independent evidence. There is missing evidence from persons such as Mr. Bajwa who was present during important conversations. It is not at all clear who was present for certain key conversations.
- [71] I have considered whether there is any determination I could make on this application that would advance this litigation, and not prejudice or cause difficulties with any subsequent hearings. The parties provided written argument and case law regarding this issue: if the Contract is in force and is the governing agreement, and if it was repudiated by the defendants, whether the plaintiffs are entitled to specific performance. The defendants argued the evidence adduced by the plaintiffs was insufficient to establish that specific performance should be ordered, and the plaintiffs have closed their case. On this basis, the defendants request the Court to determine this issue on the summary trial. Ms. Nadia Akram stated the Property was unique because it was nearby to other family, and the plaintiffs could not find a comparable affordable property nearby. The defendants argued forcefully that there is no evidence as to why the Property was unique when the house is a teardown. The plaintiffs' counsel argued the plaintiffs' intentions were to tear down and rebuild, but that was not in evidence. The defendants also argued correctly that there is no evidence at all of what specific steps the plaintiffs took to find alternate comparable properties, and the evidence of "similar" properties is not admissible. Similarly, as for damages in lieu of specific performance, there is no admissible evidence that the Property was ever worth \$850,000.
- [72] A summary trial is a form of trial. The parties have an obligation to prepare and adduce all relevant evidence in their case, and the onus of proof for issues does not change: Gichuru at paras. 32-35. I note that the plaintiffs sought an appraisal to determine damages in lieu of specific performance. In my view, such an order would not be appropriate as the plaintiffs have a duty to produce all evidence they rely upon.
- [73] The Court would only need to determine the issue of specific performance if it first made a number of determinations including that the Settlement Agreement was not the governing document and the Contract was repudiated by the Kalers. While it may be appealing to the litigants to have a resolution of some issues, and I have carefully considered the arguments of the defendants that the plaintiffs have closed their case without proving their case for specific performance, I have concluded that summarily determining this issue would result in litigation in slices, and the risks inherent in determining only one issue amongst many. These are the risk of multiple appeals within one action, findings being made without the full factual context, and the risk of inconsistent findings with later determinations: Century Services Inc. v. LeRoy, 2014 BCSC 702 at para. 89. Further, given the outstanding issues that would have to be first determined, it would not advance the litigation.

[74] To the parties' credit, they tried to avoid the costs of lengthy litigation and settle this matter with the Settlement Agreement. Unfortunately, a number of issues subsequently arose and the parties appear now to have become firmly established in their positions, which has resulted in offers for purchase of the Property not being accepted. I note the action has twice been set for trial, and the dispute is five years old. Pursuant to Rule 9-7(17)(a), I direct that the parties attend a case planning conference at the earliest available opportunity, specifically with respect to addressing steps that may be taken toward a possible dispute resolution process, and failing that, setting this matter for trial.

"Norell J."

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Prepared on 25 October 2026 · Esheria