

CANADA / JUDGMENT

Ambroziewicz v. Zhang

2022 BCSC 2109

COURT

Supreme Court of British Columbia

DECIDED

2 December 2022

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2022 BCSC 2109 Ambroziewicz v. Zhang

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ambroziewicz v. Zhang,

2022 BCSC 2109

Date: 20221202

Docket: S218816

Registry: Vancouver

Between:

Anne Nijola Ambroziewicz

Plaintiff

And

Hongxia Zhang and YVR Real Estate Advisors Ltd.

d.b.a. YVR International Realty

Defendants

Before: The Honourable Madam Justice Forth

Reasons for Judgment

Counsel for the Plaintiff:

S. Sidhu

The Defendant, appearing in person:

H. Zhang

The Defendant YVR Real Estate Advisors Ltd.:

No appearance

Place and Date of Hearing:

Vancouver, B.C.

August 17, 2022

Place and Date of Judgment:

Vancouver, B.C.

December 2, 2022

Introduction

- [1] On March 4, 2021, the plaintiff, Anne Nijola Ambroziewicz (also referred to as the "Seller"), agreed to sell a residence located at 4615 West 4th Avenue, Vancouver, British Columbia (the "Property") to the defendant, Hongxia Zhang (also referred to as the "Buyer"). In accordance with the terms of the contract of purchase and sale, the defendant paid a deposit of \$150,000 (the "Deposit") to her realtor's brokerage and co-defendant in this action, YVR Real Estate Advisors Ltd. d.b.a. YVR International Realty ("YVR").
- [2] The plaintiff claims that Ms. Zhang repudiated the contract, which was accepted, and as such the contract of purchase and sale was terminated. The plaintiff seeks payment of the Deposit, together with pre-judgment interest and all accrued interest, along with costs of this action.
- [3] Ms. Zhang acted on her own behalf at the application heard on August 17, 2022.

Relevant Facts

- [4] The salient terms of the contract of purchase and sale (the "Contract") provided:
- a) Ms. Zhang would purchase the Property for \$2,950,000 (the "Purchase Price");
 - b) Ms. Zhang would pay a deposit of \$150,000 on or before March 11, 2021 to YVR;
 - c) The completion and adjustment date would be April 26, 2021 (the "Completion Date");
 - d) Time is of the essence, and if the Buyer failed to pay the Purchase Price by the Completion Date, the Seller had the option to terminate the contract and in such circumstances the Deposit would be non-refundable and absolutely forfeited; and
 - e) There were no representations, warranties, guarantees, promises or agreements other than those set out in the Contract.

- [5] The Contract did not contain a force majeure clause.
- [6] The plaintiff engaged a notary, Filip de Sagher, to assist her with the sale of the Property. Ms. Zhang retained a lawyer, Dick Eng of Bell Alliance LLP, to assist her with the purchase.
- [7] On April 22, 2021, four days prior to the Completion Date, Mr. Eng advised Mr. de Sagher that Ms. Zhang wished to delay completion of the Contract until she became a permanent resident of Canada. Ms. Zhang was seeking to avoid paying the provincial tax which is levied against foreign nationals acquiring residential real estate in Metro Vancouver (the "Foreign Buyer Tax"). The Buyer declined to extend the Completion Date.
- [8] On April 23, 2021, Mr. Eng emailed Mr. de Sagher (the "April 23 Email") confirming that Ms. Zhang was not able to complete the purchase of the Property, stating:

I confirm that my client will not be able to complete the purchase of the subject property on the currently scheduled April 26 completion date. Therefore, I will not be preparing or sending any closing documents to you.

I trust your client will take such steps as she is able to mitigate potential loss or damage arising as a result of my client's failure to complete the purchase of the property.

- [9] Later on April 23, 2021, David Cayley, litigation counsel for the plaintiff, wrote to Mr. Eng taking the position that the April 23 Email constituted a repudiation of the Contract, which the plaintiff accepted, and that the Contract was now terminated. Mr. Cayley further stated:

Pursuant to the terms of the contract, my client is entitled to recover the deposit of \$150,000.00. I understand it was paid in trust to YVR International Realty, the brokerage representing your client my client hereby makes formal demand for the release of the deposit.

- [10] Ms. Zhang did not pay the Purchase Price on the Completion date.
- [11] On April 28, 2021, Mr. Cayley wrote to Mr. Eng again demanding the release of the Deposit.
- [12] On September 9, 2021, Mr. Cayley wrote to Mr. Eng advising that the plaintiff had since sold the Property to another purchaser, and that the plaintiff was not seeking any damages in excess of the Deposit. A third demand was made for the release of the Deposit.
- [13] By October 4, 2021, Mr. Eng was no longer acting for Ms. Zhang. Ms. Zhang contacted Mr. Cayley raising the issue of force majeure. Mr. Cayley responded on the same day referencing the Court of Appeal decision in *Tang v. Zhang*, 2013 BCCA 52.

Procedural History

- [14] On October 13, 2021, the notice of civil claim was filed.

- [15] On November 2, 2021, Ms. Zhang filed a response to civil claim. She claimed that the Deposit was not a true deposit and that she did not repudiate the Contract but made continuous efforts to complete the Contract. She claimed the main reason she did not complete the Contract was due to COVID-19, which prohibited her from entering Canada. She asserts this is a force majeure.
- [16] On November 17, 2021, YVR filed a response to civil claim, setting out that it held the Deposit as a stakeholder under s. 28 of the Real Estate Services Act, S.B.C. 2004, c. 42, and took no position on the substantive relief as between the plaintiff and Ms. Zhang.
- [17] On December 6, 2021, the plaintiff served her list of documents and copies of the listed documents on the defendants. Notice was given that the plaintiff would be filing an application for summary judgment or summary trial.
- [18] On January 28, 2021, the plaintiff demanded that the defendants provide their lists of documents. Plaintiff's counsel advised that "I encourage you to promptly take whatever pre-hearing steps you consider warranted".
- [19] On June 29, 2022, the plaintiff filed the notice of application seeking the return of the Deposit. The hearing was originally set for July 27, 2022, but later re-scheduled, by consent, for August 17, 2022.
- [20] On July 7, 2022, YVR filed an application response taking no position on the substantive relief sought, provided no order for costs were made against it. YVR advised that it would not be participating in the application and would not be attending on the hearing date.
- [21] On July 11, 2022, Ms. Zhang filed an application response denying that she repudiated the Contract and arguing that she attempted to make the deal happen.

Issues

[22] The application materials and submissions raise the following issues:

1. Is the matter appropriate to be resolved by a summary disposition?
2. Is the plaintiff entitled to the Deposit?
3. Does Ms. Zhang have any applicable defences?

Position of the Parties

Position of the Plaintiff

- [23] The plaintiff submits that this matter is suitable for a summary hearing since there is no dispute respecting the underlying facts and the law is clear that, on a buyer's repudiation of a contract, the deposit is retained by the seller.

[24] The plaintiff argues that the April 23 Email constituted an anticipatory repudiation of the contract. In the alternative, Ms. Zhang failed to pay the Purchase Price on the Completion Date which constituted a repudiation of the Contract.

[25] The plaintiff disputes that there was an agreement to extend the Completion Date.

Position of Ms. Zhang

[26] Ms. Zhang made no submissions on the appropriateness of this being heard by a summary procedure.

[27] Ms. Zhang claims she was misled by her relator that the Foreign Buyer Tax would not apply if she had been granted a Confirmation of Permanent Residence. She claims she did not learn until after she paid the Deposit, but before the Completion Date, that she needed to be in Canada before the Completion Date to avoid the Foreign Buyer Tax. Ms. Zhang explained that since she was in Hong Kong she had to apply for a travel exemption, which was refused by Immigration, Refugees and Citizenship Canada ("IRCC"). As a result, she was not able to be in Canada at the time of the Completion Date.

[28] Ms. Zhang attempted to negotiate with the Seller an extension of time. She acknowledges that the Seller did not agree to the time extension offered by her real estate agent on April 26, 2021.

[29] Ms. Zhang further confirmed that no new contract of purchase and sale was entered into. Ms. Zhang's position is that she tried her best to buy the Property. She argued that the plaintiff extended the Completion Date to the end of August, but agreed there were no signed documents showing the extension of the Completion Date.

[30] Ms. Zhang submits that she did not breach the Contract but that force majeure applies since, due to COVID-19, the Canadian border was closed to immigrants.

Issue 1: Is the matter appropriate to be resolved by a summary disposition?

Analysis

[31] This is an application for summary judgment pursuant to Rule 9-6 of the Supreme Court Civil Rules [Rules]. Pursuant to subrule (5)(a), I must pronounce judgment if I am satisfied that there is no genuine issue for trial with respect to the plaintiff's claim. I may pronounce judgment if I am satisfied that the only genuine issue is a question of law: subrule (5)(c).

[32] Summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely, and just adjudication of claims: *Hryniak v. Mauldin*, 2014 SCC 7 at para. 5; *Crest Realty Westside Ltd. v. W & W Parker Enterprises Ltd.*, 2015 BCCA 447 at para. 30.

[33] As stated in *Hryniak* 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.

- [34] The main point of contention between the parties relates to the interpretation of the Contract. There are no issues of credibility and the only disputed fact is whether the plaintiff agreed to extend the Completion Date: *Gichuru v. Pallai*, 2013 BCCA 60 at paras. 30-31. Ms. Zhang conceded that there was no written evidence supporting that the parties agreed to an extension. She also agreed no further agreement was made. The various correspondence relied on by Ms. Zhang made no reference to an agreement to provide an extension. Ms. Zhang agreed she did not speak directly with the plaintiff. In my view, the evidence is clear that no such extension was granted.
- [35] I am persuaded that this matter can and should be resolved by way of a summary determination. I accept that there are no material facts in issue and the dispute between the parties is a matter of law that is settled by authoritative jurisprudence: *Haghdust v. British Columbia Lottery Corp*, 2011 BCSC 1627 at para. 16.

Issue 2: Is the plaintiff entitled to the Deposit?

Legal Principles

- [36] The law on the entitlement to deposits in real estate transactions is settled and the Court of Appeal in *Tang* set out the five general principles:
- [30] In conclusion, I suggest that the following general principles may be stated with regard to deposits in the present context:
1. On a general level, the question of whether a deposit or other payment made to a seller in advance of the completion of a purchase is forfeited to the seller upon the buyer's repudiation of the contract, is a matter of contractual intention;
 2. Where the parties use the word "deposit" to describe such a payment, that word should in the absence of a contrary provision be given its normal meaning in law;
 3. A true deposit is an ancient invention of the law designed to motivate contracting parties to carry through with their bargains. Consistent with its purpose, a deposit is generally forfeited by a buyer who repudiates the contract, and is not dependant on proof of damages by the other party. If the contract is performed, the deposit is applied to the purchase price;

4. The deposit constitutes an exception to the usual rule that a sum subject to forfeiture on the breach of a contract is an unlawful penalty unless it represents a genuine pre-estimate of damages. However, where the deposit is of such an amount that the seller's retention of it would be penal or unconscionable, the court may relieve against forfeiture, as codified by the Law and Equity Act;
 5. A contractual term that a deposit will be forfeited "on account of damages" on the buyer's failure to complete does not alter the nature of a deposit, but may be construed to mean that if damages are proven, the deposit will be applied against ("on account of") them. If no damages are shown, the deposit is nevertheless forfeitable, subject always to the expression of a contrary intention.
- [37] I accept that the Deposit of \$150,000 on a purchase price of \$2.9 million is "well within the permissible range of deposits and an acceptable amount intended to motivate a contracting party to carry through with their bargain": *Palkovics v. Barta*, 2013 BCCA 181 at para. 16. I note this is approximately 5 percent of the purchase price, which is a reasonable amount.
- [38] Ms. Zhang argues that she would have faced a very significant tax penalty if she proceeded with the purchase since she would have had to pay the Foreign Buyer Tax. The purchaser in *Wilkie v. Jeong*, 2017 BCSC 2131, faced the same consequence. The Court found that:
- [40] However, the imposition of the Foreign Buyer Tax did not destroy the basis for the Contract. It did not radically change the nature of the parties' contractual obligations and performance of the Contract would not result in something different from that which was undertaken by the parties. To the contrary, the fundamental purpose of the Contract, namely, the transfer of title to the property in exchange for the purchase price, was entirely unaffected. The supervening event caused hardship to Ms. Jeong because it gave rise to an unexpected ancillary obligation to a third party, but it did not change the nature of her fundamental contractual obligation or undermine the foundation of the Contract.
- [39] The same reasoning applies here. Ms. Zhang claims she was told the Foreign Buyer Tax did not apply to her situation when in fact it did. I make no finding whether she did receive that advice from her real estate agent since that party is not before the Court. Even if she did receive that advice, it does not change the nature of her contractual obligation to the plaintiff.
- [40] The plaintiff claims there was an anticipatory repudiation of the Contract. The test for anticipatory repudiation is objective. A contract is terminated by repudiation only when a party's actions demonstrate a "clear and unequivocal" intention to refuse to perform the contract: *Turcotte v. Godine*, 2022 BCCA 24 at para. 51.

[41] The April 23 Email was clear that Ms. Zhang would not be paying the Purchase Price on the Completion Date. The language used and the intention expressed by Mr. Eng in the email was clear and unequivocal. I accept that the April 23 Email sent by Mr. Eng, as agent for Ms. Zhang, constituted an anticipatory repudiation of the Contract. The plaintiff, through counsel, immediately accepted the repudiation.

[42] The consequences of accepting the repudiation are clear and were summarized in *Dosanjh v. Liang*, 2014 BCSC 162 at para. 50:

- A party to a contract has two alternatives if the other party repudiates the contract: the innocent party may accept the repudiation or affirm the contract.
- If the innocent party accepts the repudiation, the contract is at an end, both parties are relieved of their obligations under it, and the innocent party may sue for damages immediately without waiting for the time that the contract should have been performed.
- If the innocent party affirms the contract, the contract remains alive in all respects for both parties, and the risk exists that the party beginning as the innocent party will subsequently commit a breach of its own.
- If the innocent party wishes to accept the repudiation, he or she must make his or her election known.
- Once made, the election is irrevocable.

[43] I accept that the Contract was terminated on April 23, 2021, on the acceptance of the repudiation.

[44] I further accept that Ms. Zhang did not pay the Purchase Price on the Completion Date as required by the terms of the Contract, a fact which Ms. Zhang does not dispute. The Contract states that "time is of the essence" and that failure to pay the Purchase Price allowed the plaintiff to declare the Contract as terminated.

Issue 3: Does Ms. Zhang have any applicable defences?

[45] Ms. Zhang claims that her inability to complete the Contract was due to forces outside of her control, namely the COVID-19 pandemic, which prevented her from being able to come to Canada before the Completion Date. She asserts this was a force majeure, being an extraordinary event or circumstance beyond the control of the parties.

[46] Ms. Zhang concedes that there was no force majeure clause in the Contract. There is no basis for reading in such a clause. It is essential that the Court apply the words in the Contract and not apply a clause that could have been included but was not. Since the Contract contained no force majeure clause, this defence must fail.

[47] The second defence Ms. Zhang raised was that the Contract was frustrated by her inability to move to Canada due to the COVID-19 Pandemic.

[48] The test for frustration was set out in *Folia v. Trelinski* (1997), 14 R.P.R. (3d) 5, 1997 CanLII 469 (B.C.S.C) and affirmed by the Court of Appeal in *KBK No. 138 Ventures Ltd. v. Canada Safeway Limited*, 2000 BCCA 295 at para. 14 [KBK]:

In order to find that the contract at issue has been frustrated the following criteria would have to be satisfied. The event in question must have occurred after the formation of the contract and cannot be self-induced. The contract must, as a result, be totally different from what the parties had intended. This difference must take into account the distinction between complete fruitlessness and mere inconvenience. The disruption must be permanent, not temporary or transient. The change must totally affect the nature, meaning, purpose, effect and consequences of the contract so far as concerns either or both parties. Finally, the act or event that brought about such radical change must not have been foreseeable.

[Emphasis in original]

[49] Where performance under the contract has merely become more onerous, expensive, or less remunerative, the test for frustration has not been met. It is not hardship, inconvenience, or material loss which calls the principle of frustration into play. There must be a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for: KBK at para. 13.

[50] In *Wilkie*, the claim of frustration was also advanced in the context of tax consequences arising from the Foreign Buyer Tax. The Court reviewed a number of authorities holding that unforeseen tax payments do not generally justify a finding of frustration, even if they result in the purchaser having inadequate funds to complete the transaction. At para. 38, the Court concluded:

That a lack of money to perform does not, generally, give rise to frustration is not surprising because, as noted, frustration arises from a supervening event that results in performance becoming a thing radically different from that which was undertaken. While a lack of money affects a party's ability to perform an obligation, it does not normally alter the nature or purpose of the obligation itself.

[51] In *Wilkie*, the Court found that the unforeseen tax consequences arising out of the Foreign Buyer Tax did not frustrate the impugned agreement. I make the same finding here. The application of the Foreign Buyer Tax to the transaction did not alter the "nature or purpose" of Ms. Zhang's contractual obligation. While it did make the Contract more expensive for Ms. Zhang, it did not render the Contract "radically different" from what it would have been had the tax not applied.

[52] I note that Ms. Zhang emphasized that she received erroneous advice regarding whether the Foreign Buyer Tax applied to her. Even if this was shown to be true, the consequence of her relying on such advice does not rest on the plaintiff's shoulders.

[53] I am persuaded that the Contract was not frustrated.

- [54] The plaintiff claims both accrued and pre-judgment interest on the Deposit held by YVR. Under the Court Order Interest Act, R.S.B.C. 1996, c. 79, pre-judgment interest is to be paid "from the date on which the cause of action arose" to the date of judgment. However, pursuant to the Contract, the funds should have been held by YVR in an interest-bearing trust account, including during the period contemplated under the Court Order Interest Act for calculating pre-judgment interest. Therefore, awarding both accrued and pre-judgment interest would allow for double recovery.
- [55] I am of the view that the plaintiff is entitled to accrued interest only, provided that, as required, YVR held the funds in an interest-bearing account.

Conclusion

- [56] The Contract was repudiated by Ms. Zhang and then terminated.
- [57] The Deposit paid by Ms. Zhang pursuant to the Contract is forfeited to the plaintiff. YVR shall pay the Deposit to the plaintiff, together with accrued interest.
- [58] If the amount of accrued interest is less than the amount payable for pre-judgment interest then Ms. Zhang will have to pay that additional amount.
- [59] Unless there is something I am unaware of, the plaintiff is entitled to costs assessed at Scale B. There will be no costs ordered against YVR.
- [60] Ms. Zhang's signature on the form of the order is dispensed with. Counsel for the plaintiff shall email a copy of the filed order to Ms. Zhang.

"Forth J."

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