CITATION: [redacted] v. [redacted] 2017 ONSC 7602
COURT FILE NO.: CV-17-132256
DATE: 20171219

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:		
[redacted]	Plaintiff	Paul Gemmink, for the Plaintiff
– and –		
[redacted]	Defendant	Dheeraj Bhatia, for the Defendant
		HEARD: December 14, 2017

REASONS FOR DECISION

CHARNEY J.:

Introduction

[1] The plaintiff brings this motion for partial summary judgment with respect to a failed real estate transaction. The plaintiff was the vendor, the defendant the purchaser. The issue on this motion for summary judgment is whether the purchaser repudiated the contract by anticipatory breach and thereby forfeits the $60,000 deposit.

Facts

[2] On March 22, 2017, the plaintiff (the vendor) and the defendant (the purchaser) entered into an agreement of purchase and sale (APS) whereby the plaintiff was to sell the defendant a property in Richmond Hill (the property) for $1,910,000. The closing date was August 14, 2017.

[3] The deposit provided by the purchaser was $60,000. The deposit is being held in trust by the real estate company.

[4] The lot size indicated in the APS is 54.17 feet of frontage by 120.99 feet deep.

[5] On June 26, 2017 counsel for the purchaser wrote to counsel for the vendor alleging that the vendor had misrepresented the lot size in the APS. This letter is pivotal to the whole case, and I will therefore quote substantial portions:

> 1) ...
>
> 2) The Agreement between our client and the seller provides for a lot size with a frontage of 54.17 ft. and a depth of 120.99 ft. Thus, it was specifically represented by the seller in the Agreement that the subject property has the said lot size. The buyer relied on the said representation of the seller and entered into the Agreement.
>
> 3) The Multiple Listing Service ("MLS") lists for the sale of the property also represents to the public that the lot size is 54.17 and 190.99 ft.
>
> 4) However, the true lot size as stated on the Municipal Property Assessment Corporation ("MPAC") provides for a frontage of 54.17 ft. and a depth of 109.91 ft. A copy thereof is attached hereto for you reading perusal. Thus, the listing brokerage listed as well as the salesperson, Terry Nicolaou are equally responsible for misrepresentation to the buyer.
>
> 5) Therefore, the seller as well as the listing brokerage and the salesperson have misrepresented the true lot size of the subject property. Although our client is not obliged to communicate his intended use of the property to the seller; as per Schedule A in the Agreement, it is clear that the buyer had an intention to apply for the Committee of Adjustments and other procedures in order to redevelop another property on the subject property land.
>
> 6) However, considering the misrepresentation from the seller, the listing brokerage and the salesperson, the buyer is not able to proceed to develop what our client had intended on the land, since what our client had originally contracted for does not exist.
>
> 7) Further, the lot size misrepresentation is a material and substantial point, which goes to affect the subject matter of the contract. Accordingly, but for such misdescription, our client would not have entered into the contract at all.
>
> 8) Additionally, case law has established that where an inaccurate statement as to the property's lot size is a substantial overstatement, the purchaser is entitled to rescind the contract...

9) Notwithstanding the seller's errors made on the lot size, the subject property does not have a clear title. Accordingly, the seller has failed to comply with clause 10 of the Agreement...

10) Clause 10 of the Agreement provides that if there is an Encumbrance, Charge, and/or lien registered on the title of the property and the seller fails or refuses to remove the same, the Agreement should automatically be at an end and the deposit must be returned without interest or deduction. The Agreement is thus null and void for this reason as well.

11) Accordingly, the seller has failed to possess a clear title of the subject property and follow the requirements of the Agreement between the parties, since:

    1) There is a Notice registered as LT...

    2) There is a No Sec Interest registered as YR...

    3) There is a Charge registered as YR...

12) In addition, the seller has failed to comply with clause 12 of the Agreement...

13) Even if the Agreement had been valid, our client would not be able to accept the seller's lawyer's personal undertaking, since the charge registered on title falls outside the scope of the clause 12 of the agreement since there is a private mortgage on the property.

14) Therefore, the Agreement is null and void and the seller has three business days from the date of this letter to provide for the complete return of the buyer's deposit of $60,000.

15) Please be advised that if the seller does not comply with this letter and provide for the full return of the deposit to the buyer within three business days, the buyer will pursue further legal action and seek costs in addition to the deposit against the seller as well as the listing brokerage and salesperson.

16) If the seller agrees, the seller will be saved the blushes (sic) in the legal proceedings. The seller's agent, as a relative of the seller will also be saved from personal proceedings and a complaint from RECO where they would have to explain misleading the terms of the Agreement they had represented.

[6] Counsel for the vendor replied on June 28, 2017 stating:

> The Agreement of Purchase and Sale indicates that the frontage of the property is 54.17 feet and the depth is 120.99 feet. These are the actual dimensions of the property as per the survey which is attached for your references. The Multiple Listing Service is not part of the Agreement of Purchase and Sale and is therefore immaterial. Accordingly, my client denies that it made any misrepresentations regarding the dimensions of the property....
>
> Your client's position that the title to the property is not clear is premature and without merit. As you have not submitted your letter of requisitions, you have not provided my client with an opportunity to respond to any alleged title deficiencies which my client denies. My client is willing and able to provide your client with good title to the property in accordance with the terms of the Agreement of Purchase and Sale. The private mortgage can be discharged on closing....
>
> Your client's position that the Agreement of Purchase and Sale is void, is invalid and without any legal basis. It is clear that your client has no intention of completing this transaction. Accordingly, your letter and your client's conduct constitutes an anticipatory breach of the Agreement of Purchase and Sale. My client accepts your client's breach and accordingly, the Agreement of Purchase and Sale is at an end. As tender would be futile, it is unnecessary. Your client's deposit is now forfeited without prejudice to my client's claim for damages and costs against your client....

[7] There is no dispute that the survey included with the letter of June 28, 2017 confirmed that the property size was 54.17 feet by 120.99 feet (16.51 metres by 36.88 metres), as stated in the APS.

[8] The purchaser's counsel responded on June 28, 2017, advising that the purchaser continued to dispute the dimensions of the property because the survey was "outdated" since it was dated November 12, 1984. The letter also states: "this survey is immaterial considering that it is only provided upon us and our client now and not during the process of the transaction." Counsel for the purchaser reiterated his position that the lot size was only 109.1 feet deep on the basis of the MPAC profile. The letter concluded:

> Your client has contracted to sell a property with a lot size that does not exist. Therefore, considering your client's fraudulent intentions, your client is in breach of contract. As such, your client has two business days to provide for the complete return of the seller's deposit of $60,000. If your client does not comply with this letter and provide the full return of the deposit to our client within two business days, our client will pursue further legal action and seek costs in addition to the deposit against your client, the client's listing brokerage, and the listing agent. Additionally, if

> this deposit is not returned within two business days, a Caution will be registered on your client's property.

[9] Additional correspondence was traded between counsel for the parties on June 30, 2017, July 4, 2017, July 6, 2017, July 7, 2017, and July 11, 2017. There is little to be gained by reviewing this correspondence in detail. To summarize: the vendor's counsel continued to assert that the property dimensions were as shown on the survey and the APS, while the purchaser's counsel continued to assert that the dimensions on the APS were a misrepresentation and that the true dimensions were those stated on the MPAC profile.

[10] In addition, the vendor's counsel continued to assert that the purchaser's conduct, and in particular the letter of June 26, 2017, constituted an anticipatory breach of the APS, while the purchaser's counsel took the position that it was the vendor who had breached the APS by misrepresenting the lot dimensions. The purchaser's counsel continued to demand the immediate return of the deposit.

[11] Significantly, counsel for the vendor advised counsel for the purchaser in an email dated July 6, 2017 that the vendor:

> is prepared to agree to allow your client to reinstate the agreement of purchase and sale on the same terms and conditions that already exist in return for an acknowledgement by your client that the size of the lot is not at issue with respect to the closing and that there has been no misrepresentation by her or anyone on her behalf concerning the size of the lot.

[12] Counsel for the purchaser replied on July 7, 2017, reiterating the purchaser's position that "it is beyond dispute that the lot size of the subject property as represented to the buyer in the agreement is incorrect" and that the vendor "is guilty of misrepresentation" and "wrongdoing".

[13] In an effort to resolve the issue the vendor's daughter contacted MPAC and sent MPAC a copy of the survey. On July 21, 2017, MPAC corrected its property profile to correspond with the dimensions on the survey, and on July 21, 2017 emailed the vendor's daughter to advise her of the correction to the MPAC profile.

[14] On that same day, counsel for the vendor emailed a copy of the MPAC correspondence to counsel for the purchaser. At the hearing of this motion the purchaser's counsel denied having received this email.

Analysis – Motions for Summary Judgment

[15] Rule 20.04(2)(a) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 ("*Rules*"), provides: "The court shall grant summary judgment if the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence."

[16] Rule 20.04(2.1) sets out the court's powers on a motion for summary judgment:

> In determining under clause (2)(a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:
>
> 1. Weighing the evidence.
>
> 2. Evaluating the credibility of a deponent.
>
> 3. Drawing any reasonable inference from the evidence.

[17] These powers were extensively reviewed by the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7 (CanLII), where it laid out a two-part roadmap for summary judgment motions at para. 66:

> On a motion for summary judgment under Rule 20.04, the judge should first determine if there is a genuine issue requiring trial based only on the evidence before her, *without* using the new fact-finding powers. There will be no genuine issue requiring a trial if the summary judgment process provides her with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure, under Rule 20.04(2)(a). If there appears to be a genuine issue requiring a trial, she should then determine if the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2). She may, at her discretion, use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if they will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

[18] Even with these extended powers, a motion for summary judgment is appropriate only if the material provided on the motion "gives the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute" (*Hryniak*, at para. 50).

[19] In *Hryniak*, the Supreme Court held (at para. 49) that there will be no genuine issue for trial when the summary judgment 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."

[20] To defeat a motion for summary judgment, the responding party must put forward some evidence to show that there is a genuine issue requiring a trial. A responding party may not rest on mere allegations or denials of the party's pleadings, but must set out—in affidavit material or other evidence—specific facts establishing a genuine issue requiring a trial.

[21] The motion judge is entitled to assume that the record contains all of the evidence that would be introduced by both parties at trial. A summary judgment motion cannot be defeated by vague references as to what may be adduced if the matter is allowed to proceed to trial.

[22] Pursuant to Rule 20.02(1), affidavits may be made on information and belief, but the court may, if appropriate, draw an adverse inference from a party's failure to provide evidence of any person having personal knowledge of contested facts.

[23] Where summary judgment is refused or is granted only in part, Rule 20.05 provides that "the court may make an order specifying what material facts are not in dispute and defining the issues to be tried and order that the action proceed to trial expeditiously" and give directions or impose such terms as are just.

[24] It is now well settled that "both parties on a summary judgment motion have an obligation to put their best foot forward" (see *Mazza v. Ornge Corporate Services Inc.*, 2016 ONCA 753 (CanLII) at para. 9). Given the onus placed on the moving party to provide supporting affidavit or other evidence under Rule 20.01, "it is not just the responding party who has an obligation to 'lead trump or risk losing'" (see *Ipex Inc. v. Lubrizol Advanced Materials Canada*, 2015 ONSC 6580 (CanLII) at para. 28).

[25] A plaintiff bringing a motion for summary judgment does not thereby reverse the onus of proof or alleviate his onus to prove the elements of the breach of contract alleged or damages claimed. See for example, *Sanzone v. Schechter*, 2016 ONCA 566 (CanLII) at paras. 30-32, confirming the initial evidentiary obligation borne by the moving party (in that case the defendant) on a summary judgment motion.

[26] While Rule 20.04 provides the court hearing a summary judgment motion with "enhanced forensic tools" to deal with conflicting evidence on factual matters, the court should employ these tools and decide a motion for summary judgment only if it can do so fairly: *Eastwood Square Kitchener Inc. v. Value Village Stores, Inc.*, 2017 ONSC 832 (CanLII) at paras. 3-6 (and cases cited therein).

[27] In the present case the plaintiff's allegation that the defendant's conduct constituted an anticipatory breach of the APS is based exclusively on the correspondence from his counsel. There is no factual dispute regarding the authenticity or the content of that correspondence, and no issues requiring a trial in that regard. The only dispute relates to the legal significance of the language employed by counsel in that correspondence, and that is a question of law, not evidence. This is therefore an appropriate case in which to decide the issue of anticipatory breach on the basis of a summary judgment motion.

Lot Size

[28] The only real factual dispute in this case is whether the dimensions stated in the APS were incorrect. Given that this is the vendor's motion for summary judgment, the initial onus falls on the vendor to prove that the lot size is that set out in the APS.

[29] The plaintiff relies on the dimensions set out in the 1984 survey prepared by Ontario Land Surveyors and registered under the *Land Titles Act*, R.S.O. 1990, c. L.5, s. 145. The dimensions stated in this survey are the same as those stated in the APS. This survey meets the plaintiff's initial evidentiary onus.

[30] The defendant relies on the lot dimensions stated on the MPAC profile. The uncontradicted evidence of the plaintiff, however, is that MPAC acknowledged that its description was in error and on July 21, 2017, corrected its description to correspond to the survey site data. There is, therefore, no basis in the evidence to support the defendant's allegation that the 1984 survey produced by the vendor is incorrect or inaccurate.

[31] Accordingly, I find that the lot measurements as stated in the APS were correct, and that the lot measures 54.17 feet by 120.99 feet as stated in the 1984 survey and the APS. There was no misrepresentation by the vendor.

[32] A secondary dispute is whether the purchaser's counsel received the email sent by the vendors counsel on July 21, 2017, which attached the emailed correction from MPAC. I do not have to resolve this dispute in order to answer the legal questions presented by this motion for summary judgment. The question for me is whether the lot dimensions were correctly stated on the APS, and I have concluded that they were. That said, there is no suggestion that the email address on the email was incorrect, and if I had to make a finding on this question I would conclude that the email was sent.

Anticipatory Breach

[33] The central issue in this case is whether the purchaser's counsel's letter of June 26, 2017 constituted a repudiation and anticipatory breach of the APS by the purchaser.

Pleadings

[34] The first point raised by the defendant purchaser is that the plaintiff has failed to properly plead "anticipatory breach" in her Statement of Claim. The prayer for relief in the vendor's Statement of Claim and Notice of Motion seeks "a declaration that the defendant breached the agreement of purchase and sale". The purchaser argues that the vendor did not ask for a declaration that the purchaser "anticipatorily" breached the Agreement of Purchase and Sale.

[35] There is no merit to this position. Paragraphs 15 and 16 of the Statement of Claim specifically plead that the conduct of the defendant purchaser "constituted an anticipatory breach". It is trite law that pleadings must be read generously to allow for drafting deficiencies. If failure to specifically reference the word "anticipatory" in the prayer for relief is a drafting deficiency (and I am not persuaded that it is), there can be no question, reading the Statement of Claim as a whole, that anticipatory breach is the theory of the plaintiff's case.

Anticipatory Breach – Legal Principles

[36] The next issue is whether the letter of June 26, 2017 qualifies as an anticipatory breach.

[37] The law relating to anticipatory breach of contract was summarized by the Ontario Court of Appeal in *Spirent Communications of Ottawa Limited v. Quake Technologies (Canada) Inc.*, 2008 ONCA 92, at para. 37:

> An anticipatory breach sufficient to justify the termination of a contract occurs when one party, whether by express language or conduct, repudiates the contract or evinces an intention not to be bound by the contract before performance is due. See *Pompeani v. Bonik Inc.* (1997), 1997 CanLII 3653 (ON CA), 35 O.R. (3d) 417, [1997] O.J. No. 4174 (C.A.). To assess whether the party in breach has evinced such an intention, the court is to ask whether a reasonable person would conclude that the breaching party no longer intends to be bound by it. See *McCallum v. Zivojinovic* (1977), 1977 CanLII 1151 (ON CA), 16 O.R. (2d) 721, [1977] O.J. No. 2341 (C.A.). ...[I]n determining whether the party in breach had repudiated or shown an intention not to be bound by the contract before performance is due, the court asks whether the breach deprives the innocent party of substantially the whole benefit of the contract.

[38] In addition, the Ontario Court of Appeal held in *Remedy Drug Store Co. Inc. v. Farnham*, 2015 ONCA 576 at para. 47 that the test for anticipatory breach is an objective one based on a consideration of the surrounding circumstances: "a party can repudiate a contract without subjectively intending to do so." The Court (at para. 48) adopted this summary from Angela Swan, *Canadian Contract Law*, 3d ed. (Markham: LexisNexis Canada, 2012), at p. 618:

> The person (or his or her solicitor) may believe when the statement is made that he or she has an excuse for non-performance and that it is the other party who is in breach of the contract. The characterization of the statement as an "anticipatory breach" [or "repudiation"] will then be made when the dispute goes to trial.

[39] Similarly, the Ontario Court of Appeal in *Pompeani* adopts the following statement from Waddams, The Law of Contracts, 3rd ed., paras. 613-614:

> Repudiation can be by words or conduct evincing an intention not to be bound by the contract. It was held by the Privy Council in *Clausen v. Canada Timber & Lands, Ltd.* that such an intention may be evinced by a refusal to perform, even though the party refusing mistakenly thinks that he is exercising a contractual right. [Emphasis added]

[40] When confronted by an anticipatory repudiation or breach, the innocent party has a right to elect to terminate the agreement or accept the repudiation as discharging the agreement. The effect of exercising the right to terminate the agreement relieves the party

of any further obligation to perform its obligations under the contract and allows it to pursue damages for the breach of contract without the need to tender: *Pompeani; Bethco Ltd. v. Clareco Canada Ltd.* (1985), 1985 CanLII 2252 (ON CA), 52 O.R. (2d) 609, John D. McCamus, "The Law of Contracts 2nd Ed." Irwin Law, 2012, at 686.

[41] See also: *Place Concorde East Limited Partnership v. Shelter Corporation of Canada*, 2006 CanLII 16346; 270 DLR (4th) 181 (ON CA), at para. 50:

> Thus, a repudiatory breach does not automatically bring an end to a contract. Rather, it confers a right upon the innocent party to elect to treat the contract at an end thereby relieving the parties from further performance. As a general rule, the innocent party must make an election and communicate it to the repudiating party within a reasonable time: see *Chapman v. Ginter* 1968 CanLII 72 (SCC), [1968] S.C.R. 560 at 568. However, in some cases the election to treat the contract at an end will be found to have been sufficiently communicated by the innocent party's conduct: John D. McCamus, The Law of Contracts, (Toronto: Irwin Law Inc., 2005) at pp. 641-42.

[42] Finally, the analysis of Lederer J. in *Kalis v. Pepper*, 2015 ONSC 453 at paras. 10 to 12 is also relevant to the issues raised in this case:

> The question of who gets the deposit is answered by a determination of whether the defendants repudiated the contract:
>
> > [U]pon default or repudiation by the purchaser the vendor may retain the deposit as liquidated damages.
>
> (Victor Di Castri, The Law of Vendor and Purchaser, Volume 2, Carswell, at §805)
>
> When can it be said that a contract has been repudiated? It has been said that:
>
> > Repudiation is conduct that demonstrates that a contracting party has absolutely renounced its contractual obligations.
> >
> > ...
> >
> > A party to a contract repudiates by clearly stating that he or she does not intend to perform his or her obligations under the contract.
> >
> > (Paul Perell, Real Estate Transactions, 2nd edition, Canada Law Book at p. 340, [and cases cited therein]...
> >
> > ...

> For any action or statement to be relied on as repudiation, it must be clear, absolute and certain. Otherwise, any expressed uncertainty could be taken as repudiation and it would be impossible (or at least risky) for a party to a contract to express concerns or seek assistance from the other party to address such concerns lest it be taken as repudiation.

Analysis

[43] Counsel for the vendor argues that the purchaser's lawyer's letter dated June 26, 2017 indicated a clear and unequivocal intention to repudiate the APS. The letter accuses the vendor, the listing brokerage and the real estate agent of misrepresentation and paragraph 14 states: "Therefore, the Agreement is null and void and the seller has three business days from the date of this letter to provide for the complete return of the buyer's deposit of $60,000". The next two paragraphs threaten further legal action against the vendor and the real estate agent if the deposit is not immediately returned.

[44] Upon receipt of that letter counsel for the vendor immediately advised counsel for the purchaser that he was accepting the purchaser's anticipatory breach and the contract was therefore at end. He also advised that the vendor would not tender, and that the purchaser forfeited his deposit. If there was an anticipatory breach on the part of the purchaser, the vendor's position in this regard was consistent with the law.

[45] Counsel for the purchaser contends that, read as a whole, his letter of June 26, 2017 was not an unequivocal termination of the APS by the purchaser, but rather an effort to bring to the attention of the vendor the fact that the vendor had breached the APS. He relies on his letter of July 11, 2017, in which he denies that his client is in anticipatory breach of the APS, and states:

> Our client has not stated that our client will not close the transaction because our client is in breach of the contract. The situation is the reverse. It is your client who is in breach of the terms of the contract as your client has contracted to sell something that the seller does not own.

[46] The fundamental difficulty with this argument was that on June 26, 2017, the vendor had not breached the APS because the description of the property in the APS was accurate.

[47] Even if the purchaser did not intend to repudiate the APS and sincerely believed that the vendor was in breach of the APS when the purchaser demanded the return of his deposit, the test for anticipatory breach is an objective test. The purchaser's (or his solicitor's) mistaken belief that he was exercising a contractual right when he demanded the immediate return of his deposit does not excuse his repudiation of the APS.

[48] In addition the purchaser's counsel takes the position that paragraph 9 of the June 26, 2017 letter states: "Notwithstanding the seller's errors on the lot size, the subject property does not have clear title", and paragraph 11 of the letter lists three charges on title that had not been removed as of June 26, 2017. Counsel for the purchaser explained in oral

argument that paragraphs 9 and 11 meant "If you can prove that the lot size is correct, you are on notice that you will have to remove these charges by closing on August 14, 2017".

[49] In my view this argument is disingenuous; no reasonable person would interpret paragraphs 9 and 11 as proposed by counsel for the purchaser. Apart from being inconsistent with the ordinary and grammatical meaning of the words used, the proposed interpretation is entirely inconsistent with the context of the paragraphs and the demand for the immediate return of the purchaser's deposit.

[50] Read in its ordinary and grammatical sense, the purchaser's lawyer's letter of June 26, 2017 states that the APS is also null and void because, *inter alia*, the charges were on title as of June 26, 2017. As counsel for the vendor correctly pointed out in his reply of June 28, 2017, the purchaser's position that the title to the property is not clear was, on June 26, 2017, premature since the purchaser had not yet submitted his letter of requisitions or provided the vendor with an opportunity to respond to any alleged title deficiencies. Pursuant to the APS any charges on title had to be discharged on closing, and could not, therefore, render the APS null and void on June 26, 2017.

[51] Counsel for the purchaser also takes the position that the vendor breached the APS on August 14, 2017 – the scheduled closing date – because the vendor failed to remove the charges on title on or before that date. This position ignores the fact that the vendor had expressly accepted the purchaser's anticipatory breach, and from that moment was relieved of any further obligation to perform his obligations under the contract.

[52] In my view a reasonable person reading the June 26, 2017 letter from the purchaser's lawyer would conclude that the purchaser intended to repudiate the APS and to no longer be bound by its terms.

[53] The letter of June 26, 2017 does not ask the vendor to explain the alleged lot size discrepancy, and does not give the vendor a deadline to provide proof that the description of the property in the APS is accurate, even though the closing date was still almost two months away. Instead it demands an immediate return of the purchaser's deposit, a return that can only be claimed if the APS has been terminated.

[54] This interpretation is confirmed by the subsequent correspondence, in which the purchaser's lawyer continued to demand a return of the deposit, accuse the vendor and the vendor's agent of fraud and dishonesty, and threaten them with various legal actions. The purchaser's lawyer continued to dispute the dimensions set out in the registered survey for reasons that are, on their face, specious.

[55] Accordingly, the purchaser's conduct, and in particular the letter of June 26, 2017, constituted an anticipatory breach of the APS. That breach was accepted by the vendor on June 28, 2017.

Conclusion

[56] For the foregoing reasons the plaintiff's motion for partial summary judgment is allowed. The court finds that the defendant, Ali Sobhani, breached the APS on June 26, 2017 and has thereby forfeited his deposit of $60,000.

[57] Royal LePage Your Community Realty is directed to release to the plaintiff, Helen Nicolaou, the above referenced deposit of $60,000.

[58] As indicated above, this was a motion for partial summary judgment. The plaintiff still has an outstanding claim for additional damages that are not covered by the forfeited deposit and were not quantified at the hearing of this motion. The plaintiff acknowledges that the issue of damages above the amount of the deposit cannot be determined on this motion for summary judgment, and requests an order that the issue of such additional damages as may be claimed arising out of the defendant's breach of the APS proceed to trial in the normal course. It is so ordered.

[59] Counsel may return to me if there are any issues regarding how that trial will proceed. Such procedural issues, however, may have to wait until the plaintiff is able to properly quantify any such additional damages. Should the plaintiff proceed with such a claim, I am not seized.

Costs

[60] The plaintiff is presumptively entitled to costs on this motion. If the parties are unable to agree on costs, the plaintiff may provide written submissions of no more than three pages, not including costs outline and any offers to settle, within 30 days of the release of this decision, and the defendant may provide written submissions on the same terms within a further 20 days.

Justice R.E. Charney

Released: December 19, 2017