

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Helen ██████████, Plaintiff

**AND:**

Ali ██████████, Defendant

**BEFORE:** Master P. Tamara Sugunasiri

**COUNSEL:** Sherman, B., Counsel for the Defendant/Moving Party  
Gemink, P. and Catania, H., Counsel for the Plaintiff

**HEARD:** March 7, 2019

**FURTHER WRITTEN SUBMISSIONS:** April 18 and May 6, 2019

**REASONS FOR DECISION**

**Overview:**

- [1] In March of 2017 Helen ██████████ agreed to sell her property to Ali ██████████. Mr. ██████████ paid a \$60,000 deposit upon signing the Agreement of Purchase and Sale (“APS”). Prior to closing, Mr. Sobhani complained that Ms. ██████████ misrepresented the lot size and did not have clear title to convey. Ultimately he refused to close the transaction. Ms. ██████████ sued Mr. ██████████ for anticipatory breach of the APS. She alleged that Mr. ██████████ forfeited his deposit and caused her additional damages for failing to close. Ms. ██████████ had been relying on the sale of her house to fund the purchase of another.
- [2] On December 19, 2017, Justice Charney granted Ms. ██████████ partial summary judgment. He found that Mr. ██████████ breached the APS and forfeited his deposit. He sent the only remaining issue of damages to trial.
- [3] Having been found liable for breach of contract, Mr. ██████████ retained new counsel and seeks to amend his Statement of Defence. He proposes to plead that the APS is void because of the “doctrine of frustration, impossibility and force majeure.” He also seeks to counterclaim against Ms. ██████████ for damages and re-payment of his deposit.
- [4] I dismiss Mr. ██████████’s motion. It is too late for him to raise liability issues. Justice Charney determined liability on a summary judgment motion where parties must put their

best foot forward. Having new counsel and fresh eyes is not an exceptional circumstance that warrants re-litigation of liability. Justice is served in this case by honouring finality.

**Analysis:**

- [5] To decide whether or not Mr. ██████████ can amend his Statement of Defence, I consider two issues:
- a. Is the proposed Defence estopped by *res judicata* or issue estoppel?
  - b. Are there exceptional circumstances that allow Mr. Sobhani to re-litigate the issue of liability?

**A. Is the proposed Defence estopped by *res judicata* or issue estoppel?**

- [6] I do not give leave to Mr. ██████████ to add the proposed defences and counterclaim. They are estopped by the doctrine of *res judicata* and issue estoppel.
- [7] *Res judicata* and issue estoppel are part and parcel of the same principle that actions, or issues within an action should not be litigated more than once between the same parties. Justice Corbett recently explained the concept as follows:

It is axiomatic that a thing, once decided, may not be relitigated. This principle is known as *res judicata*, a Latin phrase that translates as "the thing has been adjudicated". *Res judicata* includes "cause of action estoppel" which precludes relitigation of the same issue between the same parties. But the principle against relitigation goes further than this. It also covers claims that were not advanced, but should have been dealt with in prior litigation.<sup>1</sup>

- [8] Similarly, when a right, question or fact distinctly put in issue is determined by a Court as a ground of recovery or answer to a claim set up, it cannot be re-tried in a subsequent suit or proceeding between the same parties though for a different cause of action.<sup>2</sup> Issue estoppel simply means that once a material fact such as a contract is found to exist or not to exist by a court of competent jurisdiction, the same issue cannot be re-litigated in subsequent proceedings between the same parties.<sup>3</sup>
- [9] The "prior litigation" in the case at bar, is the summary judgment motion. The subsequent litigation is what remains. Whether it is cause of action estoppel or issue estoppel that applies, both preclude the amendments sought. Justice Charney finally determined the issue of liability, determined that there was a valid contract, and concluded that Mr. ██████████ breached it. What is left is an adjudication of remedy. Mr. ██████████'s wishes to

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<sup>1</sup> *Peoples Trust Co v Atas*, 2018 ONSC 58 at para 45.

<sup>2</sup> *McIntosh v Parent*, [1924] 4 DLR 420 at 422 at cited in *Boardman v Pizza*, 2002 CarswellOnt 2175 at para 36 (SCJ).

<sup>3</sup> *Danyluk v Ainsworth Technologies Inc.*, [2001] 2 SCR 460 as cited in *Boardman ibid.* at para. 39.

raise new defences to Ms. [redacted]'s allegations of breach and challenges the validity of the APS. He wishes to argue that there was no breach because Ms. [redacted] frustrated the APS which made it void. These defences arise from the same factual matrix that Justice Charney has already adjudicated on. "Parties are not permitted to bring fresh litigations because of new views they may entertain of the law of the case..."<sup>4</sup>

- [10] The Court of Appeal also reminds us in *Upper v Upper*,<sup>5</sup> that re-litigation is barred even where there has been advertence, negligence or accident. In the present case, though not in evidence, Mr. Sherman is new counsel for Mr. [redacted] and is valiantly trying to introduce a new theory of the case. Unfortunately, it is simply too late.
- [11] Finally, I disagree with Mr. Sobhani's submission that Justice Charney left room for other defences on the issue of liability. He said no such thing nor can it be inferred from his reasons for decision. On the contrary, Justice Charney clearly sent only the issue of damages to trial.

**B. Are there exceptional circumstances that allow Mr. Sobhani to re-litigate the issue of liability?**

- [12] Justice Sutherland explains in *Boardman supra* that the doctrines of *res judicata* and issue estoppel are "judge made law" and as such, there is always discretion for the court to allow relitigation in the proper case. Such discretion is only exercised in exceptional circumstances. Some of the factors to consider are whether there has been an intervening change in the law; whether a court in a different intervening action finds a point of law taken in the prior decision to be wrong; or whether there are new material facts that have come to light that could not have been discovered before with reasonable diligence.<sup>6</sup> None of those factors exist here.
- [13] Mr. [redacted] raises access to justice issues – namely that it would be unfair for him to bear the burden of a large judgment without being able to raise the proposed defences. Finality is also an access to justice issue. It is fundamentally important to our justice system that matters come to an end unless appealed. In this case, Mr. [redacted] had sufficient opportunity to raise all of the defences available to him. Indeed summary judgment motions required the parties to put their best foot forward. He did not appeal Justice Charney's decision. If Mr. [redacted] did not receive the legal advice that he needed, that is not a reason to force Ms. Nicolaou to relitigate the validity of the APS or defend a counterclaim premised on the same material facts. Mr. [redacted] has other remedies to address shortcomings in legal advice.
- [14] In sum, Mr. [redacted]'s proposed amendments are barred by the doctrine of *res judicata* and he has not provided any persuasive basis to allow him to relitigate the issue of

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<sup>44</sup> See *Boardman supra* citing the SCC in *Maynard v Maynard* (1950), [1951] SCR 346 at *Boardman* para 26.

<sup>5</sup> *Upper v Upper*, [1933] OR 1 at 7.

<sup>6</sup> *Boardman, supra* at paras. 44-46.

contract validity or his liability under the APS. Justice Charney made it clear that all that remains to be decided in this case is the issue of damages.

[15] I dismiss Mr. [REDACTED]'s motion for the foregoing reasons.

**Costs:**

[16] The parties provided me with costs outlines. They are similar. Ms. [REDACTED] was successful in resisting the motion and is entitled to partial indemnity costs. Taking into account that her counsel spent some additional time making the supplementary submissions that I requested, Mr. [REDACTED] shall pay her the sum of \$3200 inclusive of disbursements and HST within 30 days of today's date.

Original signed  
Master P.T.Sugunasiri

**Date:** July 9, 2019