Close the Sale or Pony Up ONCA Clarifies the Legal Relationship between Deposits

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Background and Ontario Superior Court Decision

On June 23, 2017, Salvatore Benedetto ("**Benedetto**" or the "**Appellant**") made an offer to purchase three adjacent houses located in Toronto (the "**Properties**") from 2453912 Ontario Inc. (the "**Vendor**" or the "**Respondent**") for $7 million. Following Benedetto's offer, the Vendor took the properties off the market.

On July 10, 2017, the Vendor accepted Benedetto's offer. The parties then entered into an Agreement of Purchase and Sale (the "**Agreement**"), which Benedetto signed as the "Buyer - Salvatore Benedetto *In Trust For* A Company to be Incorporated without any Personal liabilities". In total, Benedetto personally paid deposits totaling $100,000 (collectively, the "**Deposit**") to Re/Max West Realty Inc., Brokerage ("**Re/Max**") in relation to the three Properties.

On September 14, 2017 - two weeks before the scheduled closing date – Benedetto advised the Vendor that he had decided not to proceed with the transaction and had not incorporated a company to adopt the Agreement. Benedetto then requested that the Vendor return his Deposit. When the Vendor refused to return the Deposit, Benedetto brought an Action. In response, the Vendor brought a motion for summary judgment.

At the motion, and in support of his request for the return of the $100,000 Deposit, Benedetto relied on section 21(4) of the *OBCA*, which states:

If expressly so provided in the oral or written contract … a person who purported to act in the name of or on behalf of the corporation before it came into existence is not in any event bound by the contract or entitled to the benefits thereof.

Benedetto argued that because he entered into the Agreement on behalf of a company that had yet to be incorporated, and stipulated that he was doing so without personal liability, the Deposit and accrued interest must be returned to him, even though he failed to close the transaction.

For its part, the Vendor argued that it is common knowledge at law and in business that a purchaser's failure to close a real estate transaction results in the loss of the purchaser's deposit, unless the parties expressly bargain and contract otherwise. The Vendor also reasoned that a deposit is **not** a pre-incorporation contract, and therefore not subject to the exclusion of personal liability contemplated by section 21(4) of the *OBCA*.

In the motion judge's view, Benedetto's position, if accepted, would be commercially unreasonable, as it would render the Deposit meaningless and leave the Vendor with nothing in exchange for, among other things, having taken the Properties off the market for an extended period of time. As a result, the motion judge granted the Vendor's

motion for summary judgment, dismissed Benedetto's claim for judgment, and directed Re/Max to release the Deposit, plus interest, to the Vendor.

Court of Appeal Analysis and Decision

Benedetto appealed the motion judge's decision on the basis that the judge erred in his interpretation of section 21(4) of the *OBCA* and the Agreement.

At the Court of Appeal, the Court unanimously confirmed that deposits exist separately from agreements of purchase and sale as "…an ancient invention of the law designed to motivate contracting parties to carry through with their bargains." The Court also affirmed that typically, a purchaser who breaches an agreement of purchase and sale by failing to complete a purchase **will** be held liable to the vendor. However, the Court acknowledged that where a contract is executed on behalf of a company that has yet to be incorporated by a person acting as a promoter or fiduciary, the rules surrounding liability for deposits become more complex, as section 21(4), when invoked, acts as an opt-out from that liability.

Turning to the application of section 21(4) to Benedetto's Deposit, the Court of Appeal agreed with the motion judge's holding that a forfeited deposit does **not** constitute damages for breach of contract, but stands for the performance of the contract. Therefore, a purchaser's obligations under an agreement of purchase and sale are separate and apart from the obligation incurred by the payor of a deposit.

The Court also found that while the Benedetto and the Vendor could have contracted however they wished in respect of the Deposit, the Agreement contained **no express terms** concerning the Deposit. As a result, the Court of Appeal found the motion judge's interpretation of the phrase "without any personal liabilities" as applicable to the Agreement as a whole, but **not** the Deposit to be entirely reasonable. To find otherwise would render the Deposit meaningless and leave the Vendor without any remedy in the face of Benedetto's failure to purchase the Properties.

In the result, the Court of Appeal dismissed Benedetto's appeal and ordered costs in the amount of $10,000 payable to the Vendor.

Implications

Benedetto and the Ontario Superior Court's earlier decision represent the current state of the law in Ontario with respect to both the treatment of deposits paid as security for real estate transactions and section 21 of the *OBCA*. The decisions should serve as a cautionary tale to real estate investors and would-be purchasers - particularly those attempting to purchase property on behalf of corporate entities in the pre-incorporation phase, as well as their financial and legal advisors.

By

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