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SUPERIOR COURT OF JUSTICE

B E T W E E N:

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WESTLAND CLUB INC. C.O.B. TREASURE HILL HOMES

Plaintiff

15

- and -

YUE LI

Defendant

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R E A S O N S F O R J U D G M E N T

BEFORE THE HONOURABLE JUSTICE M. KOEHNEN  
on July 29, 2022, at TORONTO, Ontario

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APPEARANCES:

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S. Brunswick  
J. Lake

Counsel for the Plaintiff  
Counsel for the Plaintiff

**SUPERIOR COURT OF JUSTICE**

**T A B L E O F C O N T E N T S**

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REASONS FOR SENTENCE

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**Legend**

[sic] - Indicates preceding word has been reproduced verbatim and is not a transcription error.

(ph) - Indicates preceding word has been spelled phonetically.

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Transcript Ordered:

August 4, 2022

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Transcript Completed:

August 4, 2022

Ordering Party Notified:

August 4, 2022

1.  
Reasons for Judgment  
Koehnen, J.

FRIDAY, JULY 29, 2022

R E A S O N S F O R J U D G M E N T

KOEHNEN, J. (Orally):

5 This is a motion for summary judgment arising out of the defendant's failure to complete the purchase of a residential property.

10 The defendant did not appear at today's motion. The motion was scheduled to be heard at 2:30. When the defendant did not appear I held the matter down until 2:45. It is now 2:50 p.m. as I begin these reasons.

15 There is no doubt in my mind that the defendant had notice of today's motion. This matter was originally scheduled as a summary judgment motion. It was then converted to a summary trial as a result of a case conference. The defendant did not appear at the pre-trial conference. The pre-trial conference judge then ordered that the matter proceed as a summary judgment motion rather than as a summary trial.

25 Approximately 20 minutes before the hearing was scheduled to begin, the defendant communicated with plaintiff's counsel, Mr. Brunswick, to ask whether the hearing could be adjourned so that settlement discussions could proceed.

30 MR. BRUNSWICK: Your Honour, she didn't ask for an adjournment. She simply asked if our client would be in a position - would be willing to talk

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settlement. I just wanted to point that out.  
Sorry.

THE COURT: No. Thank you very much, Mr.  
Brunswick. I appreciate that.

Approximately 20 minutes before the hearing was  
scheduled to begin, the defendant contacted Mr.  
Brunswick and asked whether they could engage in a  
settlement discussion. Mr. Brunswick responded  
that the motion was scheduled to begin within 20  
minutes and that he would be proceeding to argue  
the motion, but that arguing the motion did not  
necessarily preclude settlement discussions  
afterwards. In those circumstances, the defendant  
did not appear when the motion was scheduled to  
begin or by 2:50 p.m. when I began these reasons.

The dispute arises out of an agreement of purchase  
and sale that the defendant signed on November 7,  
2016 to purchase a house municipally known as 30  
Elmers Lane in the Township of King, Ontario for a  
purchase price of \$2,899,900. The purchase price  
was later increased to \$2,927,782.50 because the  
defendant had selected a number of extras and  
upgrades to the property. The defendant provided a  
deposit of \$250,000.

The purchase was originally scheduled to close on  
August 30, 2018.

The agreement of purchase and sale contains a  
number of salient provisions including the

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following:

5 (a) If the purchaser fails to deliver closing funds by 4:30 p.m. on the closing date, the purchaser waives tender and the vendor will not be required to establish that it could have effected tender on the purchaser;

10 (b) the purchaser acknowledges that no representations were made to the purchaser in relation to the purchase except as contained in the agreement of purchase and sale in writing;

15 (c) the purchaser was encouraged to have the agreement reviewed by her solicitor before signing it.

20 On or about August 14, 2018, the defendant, through her lawyer, asked to extend the closing date to September 25, 2018.

25 In response, the plaintiff's solicitors provided terms on which they would extend the closing to September 25.

30 On August 22, 2018, the purchaser's lawyer confirmed that the terms for the extension were acceptable but asked that the closing be further extended to October 8, 2018. The plaintiff declined to extend beyond September 25. The defendant accepted the extension terms and paid a further deposit of \$50,000 in connection with the extended closing.

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On September 6, 2018, the defendant's lawyer again wrote to the plaintiff's lawyer explaining that the defendant was having difficulty financing the purchase because of recently enacted regulations that imposed more stringent financing requirements. She wanted a 10 percent abatement in the purchase price. The plaintiff declined to extend an abatement of the purchase price.

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On September 24, 2018, the day before the extended closing, the defendant's lawyer wrote yet again asking to extend the closing to October 25 so that the defendant could sell some of her other properties to raise money for the closing. The plaintiff's lawyer responded with terms on which it would agree to extend the closing to October 25. Those terms included an additional deposit of \$100,000. The defendant responded with a request that the additional deposit be reduced to \$50,000. The plaintiff agreed and further extended the closing date to October 25, 2018.

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After this exchange, the defendant's lawyer advised that he was no longer representing her. On October 3, 2018, the plaintiff's lawyer wrote to the defendant directly noting that the defendant had failed to complete the purchase on the closing date and had failed to deliver the additional deposit that was required to extend the closing to October 25, 2018. The plaintiff advised that as a result of the defendant's default, the agreement of

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purchase and sale was terminated, all deposits were forfeited, and that the defendant would be held responsible for any damages suffered by the plaintiff as a result of the failure to close.

The plaintiff ultimately resold the property at 30 Elmers Lane for a resale purchase price of \$1,499,900. That is significantly less than the original purchase price. There had, however, been a material downturn in the real estate market since the original agreement was entered into. As noted, new financing regulations were put in place that made financing more difficult to obtain and that had a negative effect on real estate sales prices. The plaintiff has put evidence in its materials to demonstrate a general decline in the ability of vendors to obtain the sales prices they wanted for real estate at this time.

The plaintiff was put into a difficult position. It needed to determine how quickly to sell the property or how long to hold on to the property in the hopes of obtaining a higher sales price. The defendant did not sell the property precipitously. Although the agreement of purchase and sale was terminated in October of 2018, the plaintiff appreciated that the late fall and winter were not ideal periods in which to sell real estate. The plaintiff, therefore, relisted the property in the spring of 2019, spring being a generally more buoyant time for the real estate market. Even then the best price the plaintiff could obtain was the

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5 resale price of just shy of \$1.5 million. Although it might have been conceivable that the plaintiff could hold the property longer in the hopes of obtaining a higher sales price, the plaintiff would have borne all of the risk of doing so.

10 In my view, there is nothing in the record to suggest that the plaintiff behaved improvidently on the resale of the property.

15 I note generally, and particularly in relation to the resale, that the defendant has filed no materials on the motion for summary judgment. It is trite law that a party is expected to put its best foot forward on motions for summary judgment and that defendants cannot rely on mere allegations in their statement of defence to resist motions for summary judgment. That, however, appears to be what the defendant has done. There is no  
20 responding motion record and the defendant did not cross-examine the plaintiff on its motion record.

25 In those circumstances, the only evidentiary record before me is that of the plaintiff. There is nothing about that evidence that jumps out at one as being flawed or otherwise unreliable so as to make a court unwilling to grant the motion for summary judgment. The plaintiff has put forth a coherent explanation of the chronology and the  
30 circumstances that prevailed in the real estate market at the relevant time to explain the difference between the original purchase price and

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the resale price.

5 I note in this regard as well that it is the defendant who bears the burden of proof for any claim that the plaintiff has failed to mitigate its damages properly: see, for example, *McKnight v. Morrison*, 2019 ONSC 552 at paragraph 51.

10 Indeed, not only has the defendant failed to put forward any evidence that the plaintiff failed to mitigate its damages, the defendant's own correspondence through her lawyer referred to the current state of the real estate market and new financing requirements as being a reason for her inability to finance the property and to close the purchase within the original and extended time periods.

15 In the foregoing circumstances, I am satisfied that the plaintiff is entitled to summary judgment in the amount of \$1,196,207.75.

20 That figure is arrived at as follows:

25 Original purchase price including extras and upgrades: \$2,927,782.50

Minus resale price: \$1,499,900

Plus additional costs incurred by the plaintiff:  
\$20,952.75

30 Minus defendant's deposits: \$250,000

Minus monies paid by defendant for extras: \$2627.50

Equals net damages: \$1,196,207.75.

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In addition, the agreement of purchase and sale provides that the plaintiff is entitled to interest on its damages at 1.25 percent per month or 15 percent per annum.

The plaintiff will be entitled to pre-judgment interest at the contractual rate of 15 percent per annum.

The plaintiff also seeks costs on a partial indemnity scale of \$14,418.62, including HST and disbursements. That strikes me as a reasonable sum given the amount of time and effort involved in bringing the matter to this stage. I therefore fix costs at \$14,418.62 payable by the defendant to the plaintiff.

Now, Mr. Brunswick, I have not referred to post-judgment interest. Let me hear you on post-judgment interest. And you're still on mute, so you'll have to unmute yourself.

MR. BRUNSWICK: Thank you. Probably it would have been better if I was muted, but that aside. You know, that's - 15 percent per annum seems to be a very heavy rate of interest to pay, but they did agree to pay it. So, on the one hand, I don't see why she shouldn't be burdened with the payment of the other interest but on the other hand, I understand that the post-judgment interest rate is substantially lower than the contractual rate. So, my humble submission would be I think she should - they should get the contractual rate - at the very

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5 least to make a compromise somewhere between the  
post-judgment rate and the contractual rate if that  
is the way the court would be inclined. That would  
be fair, in my submission, as an alternative,  
10 although I'd - I think somebody - people should  
live up to their contracts, and whether they can  
pay it or not, we'll see in the fullness of time.  
Those - that's really all I have to say. I'm not  
trying to be, you know, overbearing or create a  
15 problem for somebody but, you know, my client's the  
one that's left in the position with these  
defaulting purchasers, so I have to be somewhat,  
you know, empathetic to their position. Really  
that's all I have to say, Your Honour.

15 THE COURT: Thank you, Mr. Brunswick.

20 I'm inclined to award post-judgment interest at the  
rate of seven percent. This is a compromise  
between the contractual rate of interest of 15  
percent and the considerably lower statutory rate  
of post-judgment interest.

25 On the one hand, while it would be open to a court  
to order interest at 15 percent post-judgment, I  
have already awarded that sizeable rate for  
approximately three and a half years of pre-  
judgment interest. I am mindful of the fact that  
30 post-judgment interest has a partially compounding  
element to it in that it also runs on the pre-  
judgment interest that has been determined. It  
strikes me that awarding 15 percent interest on  
pre-judgment interest at 15 percent would come to

5 something more than the contractual rate agreed upon. At the same time, I appreciate that the plaintiff has a business to run. That business would ordinarily generate profit and the deprivation of the plaintiff of the funds that they would have earned from the sale of the property at its full initial sales price meant that the plaintiff either had to forego profit which could have been reinvested in the business, and on which it would have made money, or had to finance those funds in order to reinvest them. Putting all of those factors together, it strikes me that a post-judgment interest rate of seven percent is an acceptable balancing of interests of both sides.

20 FORM 2

CERTIFICATE OF TRANSCRIPT (SUBSECTION 5(2))

*Evidence Act*

25 I, Cale Harper, certify that this document is a true and accurate transcript of the recording of Westland Club Inc. C.O.B. Treasure Hill Homes v. Yue Li in the Superior Court of Justice held at 330 University Avenue, taken from Recording 4899 9-1 20220729 092426 10 KOEHNEM.dcr, which has been certified in Form 1.

30 August 4, 2022  
(Date)

  
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(Signature of Authorized Person(s))