

Court File No. CV-19-630024-00CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

NATALIA KARASIK and DANIEL BURTMAN

Plaintiffs

and

1945087 ONTARIO INC., 1945086 ONTARIO INC., LIBERTY
DEVELOPMENT CORPORATION and 1834371 ONTARIO INC.

Defendants

Proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6

MOVING PARTIES' FACTUM

December 2, 2020

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PART I - OVERVIEW

1. This is a consent motion to approve the discontinuance of a putative class proceeding.
2. A discontinuance at this stage will not prejudice the putative class. The matter has not been certified, and the putative class members have not been notified of the proceeding. The limitation period has been suspended since the Statement of Claim was issued in October 2019. Counsel for the Plaintiffs undertakes to publish a notice on their firm's website advising putative class members that the proceeding has been discontinued, with copies of the pleadings and any Order granted, for at least 90 days.
3. The Plaintiffs, therefore, request that the discontinuance be approved.

PART II - FACTS

The Project

4. Cosmos Towers was a condominium development project to be built in Vaughn, Ontario. It was to consist of three towers (Tower A, Tower B, and Tower III), and house approximately 1,100 residential condominium units.¹
5. The Defendant 1945086 Ontario Inc. was the vendor of the condominium units in Towers A and B. The Defendant 1945085 Ontario Inc. was the vendor of the units in Tower III (collectively, the "**Vendors**").²

¹ Motion Record of the Moving Parties, at Tab 2, Affidavit of Daniel Burtman, at paragraphs 2 and 6 ("**Burtman Affidavit**").

6. The Defendant Liberty Developments Corporation (“**Liberty**”) was engaged by the Vendors to provide management services with respect to the development of the Project.³

7. The Defendant 1834371 Ontario Inc. (“**183**”) owned the lands on which Cosmos Towers was to be built.⁴

The Agreements

8. On or about April 30, 2016, the Plaintiff Daniel Burtman (“**Burtman**”) entered into an Agreement of Purchase and Sale with the Defendant 1945086 Ontario Inc. to acquire a pre-construction condominium unit in Tower A.⁵

9. Likewise, on or about September 15, 2016, the Plaintiff Karasik entered in an Agreement of Purchase and Sale with the Defendant 1945087 Ontario Inc. to acquire a pre-construction condominium unit in Tower III.⁶

10. The Agreements each contained an addendum required by the Tarion Warranty Corporation (the “**Tarion Addendum**”). The Tarion Addendum was included in each Agreement of Purchase and Sale entered into for the Project.⁷

11. Among other things, the Tarion Addendum set out a series of “Early Termination Conditions” which provided that the obligations of the Vendors and the Purchasers were

² Burtman Affidavit, at para 3.

³ Burtman Affidavit, at para 4.

⁴ Burtman Affidavit, at para 5.

⁵ Burtman Affidavit at para 7. See also Exhibit “B” to the Burtman Affidavit.

⁶ Burtman Affidavit at para 9. See also Exhibit “C” to the Burtman Affidavit.

⁷ Burtman Affidavit at paras 8 and 9.

subject to the satisfaction or waiver of certain conditions. One of those conditions (Early Termination Condition #2) provided that:

Condition #2

Description of the Early Termination Condition: The Purchase Agreement is conditional upon receipt by the Vendor of confirmation that financing for the project on terms satisfactory to the Vendor has been arranged.

The Approving Authority (as that term is defined in Schedule A) is: n/a, the determination of the Vendor in its sole, absolute and unfettered discretion.

The Project is Cancelled

12. On April 4, 2018, Liberty and the Vendors advised purchasers that they had been unable to obtain satisfactory construction financing to complete the Project. Relying on Early Termination Condition #2, the Vendors then terminated the Agreements.⁸

The Application

13. On August 30, 2018, Burtman and 604 other purchasers (*i.e.*, the “Applicant Group”) brought an application against the Vendors and Liberty asserting that Early Termination Condition #2 was null and void or, alternatively, not enforceable (the “**Application**”).⁹

14. Karasik was not a member of the Applicant Group.¹⁰

15. On April 29, 2019, the Honourable Justice Penny dismissed the Application, finding that the clause was not unenforceable. In his decision, Justice Penny specifically

⁸ Burtman Affidavit at paras 10 to 12.

⁹ Burtman Affidavit at para 13.

¹⁰ Burtman Affidavit at para 15.

noted that the issue of the reasonableness and good faith of the Vendors' termination in reliance on Early Termination Condition #2 was not engaged by the Application.¹¹

The Class Proceeding

16. This proceeding was commenced as a putative class proceeding by Statement of Claim issued October 29, 2019.

17. The proceeding has been brought on behalf of two proposed classes:

- (a) Burtman and Karasik bring this proceeding on behalf of a class consisting of all purchasers who entered into Agreements with the Vendors for the purchase of one or more Cosmos Tower condominium units on terms that, in all material respects except price, were the same as the Plaintiffs' Agreements (*i.e.*, the "Entire Purchase Class"); or
- (b) Alternatively, in the event the Applicant Group's claims are found to be *res judicata* or an abuse of process, Karasik brings this proceeding on behalf of the Entire Purchase Class, less the Applicant Group (*i.e.*, the "Alternative Class").

18. At its core, the Plaintiffs' claim is based on the allegation that the Vendors did not make commercially reasonable efforts to obtain financing for the Project. They allege that if the Vendors had made such efforts, they would have been able to obtain satisfactory financing. Accordingly, the Plaintiffs claim that the Vendors' decision to invoke Early

¹¹ Burtman Affidavit at para 14.

Termination Condition #2 and cancel the Agreements was not made in good faith and was in breach of contract.

19. The Plaintiffs also claim that Liberty and 183 assisted or encouraged the Vendors to breach the Agreements and conspired with them to wrongfully terminate the Agreements so as to benefit from Toronto's rising condo prices.

Conduct of the Proceeding to Date

20. On November 1, 2019, counsel for the Plaintiffs served the Statement of Claim on the Defendants. Enclosed with the pleading was a letter from counsel (written on without prejudice basis), advising that:

Our clients understand that you have not been obliged to produce information related to the issue that we propose to litigate, nor would you be required to do so until a certification of the proceeding. Nevertheless, we would request that you immediately produce to us all of the documents in your possession, including but not limited to any correspondence, emails, term sheets, memoranda, and loan agreements, relating to your efforts to obtain construction financing for the Cosmos Towers project.

Our hope is that by you deciding to make immediate production, we can better advise our clients as to the merit of the proposed proceeding. We note that we will not seek appointment of a case management judge until we hear back from you in this request.¹²

21. On May 20, 2020, Justice Perell established a timetable for the parties to complete the steps necessary for a certification motion (the "**Timetable**").¹³

22. In accordance with the Timetable, the Defendants delivered their Statements of Defence on July 17, 2020.¹⁴

¹² Burtman Affidavit at para 17.

¹³ Burtman Affidavit at para 20.

23. On August 7, 2020, a settlement meeting was held between counsel for all parties, in which counsel reviewed certain documents related to the claim. The contents of that meeting and the documents reviewed are subject to settlement privilege.¹⁵

24. Shortly thereafter, the parties agreed to a without costs discontinuance of the proceeding, pending Court approval.¹⁶

Notice to the Potential Class Members

25. To date, no steps have been taken to notify potential class members of the proceeding or publicize the Statement of Claim once it had been issued.¹⁷

26. If this motion is granted, Plaintiffs' counsel intends to publish a notice on their firm's website advising potential class members that the proceeding has been discontinued, with copies of the pleadings and any Order granted (the "**Notice**"). A copy of the Notice is appended to this factum as Schedule "C". The Notice will remain published on the "Class Action" section of Adair Goldblatt Bieber's website for at least 90 days following the date of any discontinuance.¹⁸

PART III - ISSUE

27. The only issue before the Court is whether to approve the discontinuance of this proceeding and, if so, on what terms.

¹⁴ Burtman Affidavit at para 21.

¹⁵ Burtman Affidavit at para 22.

¹⁶ Burtman Affidavit at paras 23-24.

¹⁷ Burtman Affidavit at para 27 and 28.

¹⁸ Burtman Affidavit at para 27.

PART IV - LAW AND ANALYSIS

28. Section 29 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the “**CPA**”)

provides that a class proceeding may only be discontinued with approval of the Court:

29(1) A proceeding under the Act may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate.

29(2) In approving a discontinuance or abandonment, or in dismissing a proceeding for delay, other than under section 29.1, the court shall consider whether notice should be give under section 19, and whether such notice should include,

- (a) an account of the conduct of the proceeding;
- (b) a statement of the result of the proceeding;
- (c) any other prescribed information; and
- (d) any other information the court considers appropriate.

29. Motions to discontinue a class proceeding are to be carefully scrutinized. Among other things, the Court is to consider: (i) whether the proceeding was commenced for an improper purpose; (ii) whether, if necessary, there is a viable replacement party so that the putative class members are not prejudice, or (iii) whether the Plaintiffs, the putative class members, or the Defendants will be prejudice.¹⁹

30. Of these considerations, the chief concern is that the discontinuance will not prejudice putative class members, or that such prejudices can be mitigated. Indeed, a

¹⁹ *Arbutnot v. Whirlpool Canada LP*, 2020 ONSC 1949 at para 14 (*Whirlpool*); *Barrett v. 390996 Ontario Limited*, 2020 ONSC 740 at para 7 (*Barrett*).

discontinuance does not need to be beneficial to or in the best interests of the putative class; it must simply not prejudice their interests.²⁰

31. Approving the discontinuance of this proceeding will not prejudice the interests of the putative class.

32. For one, the putative class members have not been notified of this proceeding. They are likely oblivious to the claim and cannot be said to have relied on the action. This alone appears to have been sufficient in *Whirlpool* and *Barrett* for the Court to conclude that a discontinuance would not prejudice the putative classes. As the Court held in both cases:

In the immediate case, there is no prospect of the putative Class Members, who are oblivious of the action even having been started, being prejudiced. There is no sense in which any of the putative Class Members can be said to have been relying upon this action.²¹

33. Likewise, there is still ample time for putative class members to commence individual proceedings before the limitation period expires. The causes of action giving rise to this proceeding occurred no earlier than April 4, 2018, when the Defendants terminated the Agreements. Pursuant to section 28(1) of the *CPA*, that limitation period has been suspended since the Statement of Claim was issued on October 29, 2019. Accordingly, putative class members have at least five months within which to commence individual claims, should they choose to do so. Again, the discontinuance of this proceeding (of which the class is unaware) will not prejudice putative class members.

²⁰ *Winter v. C.R. Bard*, 2020 ONSC 3532 at paras 19-20.

²¹ *Whirlpool*, *supra* at para 15; *Barrett*, *supra* at para 7.

34. Finally, there is no evidence that the proceeding was commenced for an improper purpose, and no suggestion that a discontinuance will prejudice any of the parties; indeed, the Plaintiffs and Defendants each consent to the relief sought.

PART V – RELIEF SOUGHT

35. The Plaintiffs respectfully request that this motion be granted and that the proceeding be discontinued, without costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of December, 2020.



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SCHEDULE “A”

LIST OF AUTHORITIES

1. *Arbuthnot v. Whirlpool Canada LP*, 2020 ONSC 1949
2. *Barrett v. 390996 Ontario Limited*, 2020 ONSC 740
3. *Winter v. C.R. Bard*, 2020 ONSC 3532 at paras 19-20

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY - LAWS

n/a

SCHEDULE “C”

NOTICE OF DISCONTINUANCE OF PROPOSED CLASS PROCEEDING RE: COSMOS TOWER DEVELOPMENT PROJECT

Please read this Notice carefully as it may affect your legal rights.

By Order of the Ontario Superior Court of Justice, persons resident in Canada who entered into agreements of purchase and sale with 1945086 Ontario Inc. or 1945087 Ontario Inc. (the “Vendors”) to acquire pre-construction condominium units in the residential condominium development project known as “Cosmos Towers”, to be built in the City of Vaughan, Ontario, and whose agreements of purchase and sale (“Agreements”) were cancelled by notice delivered by the Vendors, the project manager Liberty Development Corporation (“Liberty”), or the land owner 1834371 Ontario Inc. (“183”), on or about April 4, 2018, are advised that:

On October 29, 2019, a proposed class proceeding was commenced against the Vendors, Liberty, and 183 (the “**Defendants**”) with respect to the cancellation of Agreements for condominium units in a residential development project known as “Cosmos Towers”, to be built in the City of Vaughan, Ontario (“**Cosmos Towers**” or the “**Project**”). In cancelling the Agreements, the Vendors notified purchasers that they did not receive confirmation of financing for the Project on satisfactory terms (“**Financing Condition**”), and the Financing Condition in the Agreements was therefore not met.

The Plaintiffs allege that the Vendors’ decision to cancel the Agreements was not made in good faith. In particular, the Plaintiffs allege that if the Vendors had made such efforts, they would have been able to obtain Project financing on terms satisfactory to the Vendors. Accordingly, the Plaintiffs claim that the Vendors’ decision to invoke the Financing Condition and cancel the Agreements was not made in good faith and in breach of contract. The Plaintiffs also claim that Liberty and 183 assisted or encouraged the Vendors to breach the Agreements and conspired with them to wrongfully terminate the Agreements so as to benefit from Toronto’s rising condo prices.

The proceeding was brought on behalf of all persons who entered into Agreements to acquire pre-construction condominium units in Cosmos Towers (the “**Entire Purchaser Class**”). The proceeding was also commenced on behalf of an alternative class of persons, consisting of the Entire Purchaser Class, less those persons who participated in an application before the Honourable Justice Penny to have the Financing Condition declared null and void (the “**Alternative Class**”).

Copies of the Statement of Claim, the Notice of Application, and the decision of Justice Penny can be accessed through the links below.

In August 2020, the Plaintiffs and their legal counsel (Adair Goldblatt Bieber LLP) decided that the class action will no longer be pursued. They filed motion materials with the Ontario Superior Court of Justice to obtain approval of the discontinuance. The discontinuance was approved by the Court and took effect on [XXXXXX].

Copies of the Plaintiffs' motion materials and the Court's Order can be accessed through the links below.

YOU SHOULD TAKE NOTICE that the limitation period for bringing a claim, if there is any time left within it, started to run again on [XXXXXXXX]. On the expiry of a limitation period, your right to sue may be extinguished.

PLEASE ALSO TAKE NOTICE that because the limitation period for bringing a claim has started to run again, if you wish to pursue a court claim against any of the Defendants in relation to the cancellation of the Agreements, you should issue a Notice of Action or Statement of Claim forthwith, if you have not already done so.

If you have any questions about the discontinuance or the recommencement of the running of the limitation period, please contact Adair Goldblatt Bieber LLP at:

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PUBLICATION OF THIS NOTICE HAS BEEN AUTHORIZED BY THE ONTARIO SUPERIOR COURT OF JUSTICE.

NATALIA KARASIK et al.
Plaintiffs

-and- 1945087 ONTARIO INC. et al.
Defendants

Court File No. CV-19-630024-00CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT
TORONTO

MOVING PARTIES' FACTUM

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