

Court File No. CV-19-00630024-00CP

***ONTARIO***  
**SUPERIOR COURT OF JUSTICE**  
**COMMERCIAL LIST**

B E T W 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

**STATEMENT OF DEFENCE OF 1945086 ONTARIO INC. AND 1945087  
ONTARIO INC.**

1. Except as hereinafter expressly admitted, the defendants, 1945086 Ontario Inc. and 1945087 Ontario Inc. (collectively, the “**Vendors**”), deny each and every allegation contained in the statement of claim and put the Plaintiffs to the strict proof thereof.

**The Parties**

2. The Vendors are registered builders and vendors under the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, c. O.31.

3. The defendant, Liberty Development Corporation (“**Liberty**”), is a real estate development manager of commercial, office, and residential buildings in the Greater Toronto Area.

4. The defendant, 1834371 Ontario Inc. (“**183**”), is the owner of property located near Highway 7 and Maplecrete Road in the City of Vaughan, Ontario (the “**Lands**”).

5. The proposed representative Plaintiff, Natalia Karasik, entered into an agreement of purchase and sale (“**APS**”) with the Vendor, 1945087 Ontario Inc., on September 26, 2016 for a condominium unit in a building to be built in the City of Vaughan, Ontario (the “**City**”). The development in which Ms. Karasik purchased a unit was merchandized as “Cosmos Towers III”.

6. The proposed representative Plaintiff, Daniel Burtman, entered into an APS with the Vendor, 1945086 Ontario Inc., on April 30, 2016, for a condominium unit in a building to be built in the City. The development in which Mr. Burtman purchased was merchandized as “Cosmos Towers A”.

### **The Agreements of Purchase and Sale**

7. Each of the Vendors entered into their respective Builder and Vendor Agreements with Tarion Warranty Corporation (“**Tarion**”). The agreements granted the Vendors registration under the *Ontario New Home Warranties Plan Act*, and thereby authorized them to construct and sell new homes.

8. The APS were not contracts of adhesion. Ms. Karasik requested specific changes to the APS, through her counsel, before going “firm” at the end of the legislated “cooling period”. Mr. Burtman had access to counsel and was represented at all material times by a licensed real estate agent.

9. Furthermore, vendors are required, pursuant to regulations under the Act (O. Reg. 165/08), to include a Tarion addendum when entering into an APS with a purchaser for a new condominium

unit. The applicable Tarion addendum forms part of the APS. In this case, the Vendors were required to and did include the “Tarion - Condominium Form Addendum (Tentative Occupancy Date)” (the “**Tarion Addendum**”) in each APS.

10. The Tarion Addendum was contained in the APS for the sale of each residential unit to the Plaintiffs. The Early Termination Conditions Appendix in the Tarion Addendum, which was contained in the APS, included “Condition #2”, which provides (the “**Financing Condition**”):

**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.

**Financing and Development of the Project**

11. In the Spring of 2016, the Vendors met with various financial institutions for financing of the project.

12. In the Fall of 2016, RBC agreed to lead a consortium of proposed financial institutions to facilitate the group lending of over \$300 million in financing to the Vendors (the “**Lending Group**”).

13. Until the Vendors determined that financing on terms satisfactory to the Vendors could not be arranged, the Vendors had every intention of completing the project and took all appropriate development steps to do so. Each of the Vendors were preparing for the development and construction of their respective buildings.

14. In May 2017, the Vendors signed a Term Sheet with RBC, as the lead bank for the proposed Lending Group, for credit facilities in an amount of over \$300 million, based upon the estimated

construction costs. The Term Sheet estimated that the hard construction costs would be over \$250 million. Furthermore, the financing contained several conditions, including a condition of a cash equity contribution of over \$40 million.

15. The project was financially viable based upon the financing commitment, the equity commitment, and the then-estimated construction costs. The Vendors had every intention of proceeding with the project based upon the financing commitment.

16. During the course of 2017 and 2018, the Vendors continued to proceed in the normal course with the development of the project. However, construction costs in the industry grew materially.

17. As a result of this significant unforeseen industry increase in costs, an updated construction budget was necessary.

18. In March 2018, following the increase in construction costs and the resulting updated construction budget, RBC, on behalf of the Lending Group, advised the Vendors that the overall viability of the project from a financing perspective was impacted. As a result, the Lending Group changed the original terms upon which they proposed to lend. RBC on behalf of the Lending Group advised that it would not recommend approval for financing without an additional minimum \$50 million equity injection, and as a result the Lending Group was not prepared to proceed with financing the project.

19. The Financing Condition in the APS did not require an injection of equity or additional equity by the Vendors. In any event, the Vendors state that an additional injection of a minimum of \$50 million in equity financing was not commercially reasonable or financially viable.

20. As a result, the Vendors did not receive confirmation of financing for the project on terms satisfactory to the Vendors, and the Financing Condition under the APS was therefore not met.

### **Termination of the APS**

21. On April 4, 2018, the Vendors gave notice to the Plaintiffs that the Financing Condition was not satisfied or waived, and the APS was terminated:

...Early Termination Condition #2 has not been satisfied nor waived within the required period under the Purchase Agreement despite us having taken all commercially reasonable steps to satisfy same.

...

...the Purchase Agreement is hereby terminated.

...

...in the next 10 days will be a cheque representing reimbursement of all deposit monies paid by you together with any interest as prescribed by the *Condominium Act, 1998*.

22. On the same day, Liberty, as the development manager for each of the Vendors, sent a letter to the Plaintiffs, notifying them that the Vendors had terminated the APS because the Vendors did not obtain financing for the project on satisfactory terms.

23. At all times, the Vendors acted in good faith and in a *bona fide* manner and took all commercially reasonable steps to obtain financing on terms satisfactory to the Vendors for the project.

24. The Vendors deny that the reason for the termination of the APS was related to the increasing prices of condominium units or increased profits of the Vendors. As a result of significant unforeseen industry increases in construction costs and the consequent inability to obtain financing on terms satisfactory to the Vendors, the APS was terminated.

25. In accordance with the notice from the Vendors, the Plaintiffs each received a cheque representing reimbursement of all deposit monies paid by them with interest as prescribed by the *Condominium Act, 1998*, S.O. 1998, c. 19.

### **Tarion's Review**

26. In April 2018, Tarion began an entire review of the Vendors' termination of the APS.

27. Following the Vendors' cooperation in the six-month review, Tarion was satisfied and concluded that no action was required.

### **The Application**

28. On August 30, 2018, Mr. Burtman, a Plaintiff in this action, and 603 other applicants (representing 452 units in the project) (collectively, the "**Applicants**") commenced an application in the Superior Court of Justice seeking (the "**Application**"):

(a) An order declaring the Financing Condition null and void, or alternatively unenforceable; and

(b) An order declaring that, by cancelling the APS based on the Financing Condition, the Vendors breached the APS because the Financing Condition was void and unenforceable.

29. On April 29, 2019, Penny J. dismissed the Application in its entirety, including the allegation of breach of contract. The issued and entered order, to which the Applicants consented, provided that the entire Application was dismissed against the Vendors, 183, and Liberty without costs.

30. On October 25, 2019, the Plaintiffs commenced a putative class action alleging breach of contract.

**The Tarion Addendum is the Entire Agreement between the Parties**

31. The Vendors deny that there are any implied terms of the agreement. The Vendors deny that there was an express term in the APS that prevented the Vendors from concluding that the Financing Condition was not met in the manner alleged in the statement of claim.

32. The Vendors rely upon the Entire Agreement clause in s. 45 of the Tarion Addendum:

There is no oral and/or written representation, warranty, collateral Agreement or condition affecting this Agreement or the Unit, or supported hereby, except as set forth herein in writing. The Purchaser acknowledges that the new home industry is multi-faceted and complex and that while sales personnel or agents are knowledgeable about most issues regarding the purchase and construction of a new home, they cannot be expected to know all aspects in detail. Accordingly, the Purchaser acknowledges that no representations have been made to the Purchaser by the sales personnel or agents, upon which the Purchaser has relied upon, and which were material or instrumental to the Purchaser's decision to purchase this Unit, except as are set forth herein in writing. There is no representation, warranty, collateral agreement or condition affecting this Agreement or the Unit, or supported hereby, except as set forth herein in writing. The Purchaser is encouraged to have this Agreement reviewed by the Purchaser's solicitor prior to signing same.

**No Breach of Contract and No Breach of the Duty of Good Faith**

33. The Vendors deny that they breached the APS or any duty of good faith. The Vendors deny that they failed to act in good faith or in a commercially reasonable manner when they concluded that the Financing Condition was not satisfied.

34. The Vendors deny that they terminated the APS to enable them, or anyone associated with them, to profit unlawfully in the manner alleged in the statement of claim. The Vendors deny that the Plaintiffs were prohibited from pursuing their economic interests or business objectives.

35. The Vendors deny that they failed to perform the APS in good faith in the manner alleged in the statement of claim.

**No Unlawful Interference or Unlawful Act**

36. The Vendors deny that they were instructed, directed, advised, or induced by Liberty or 183 to conclude that the Financing Condition was not met in the manner alleged in the statement of claim. The Vendors deny that Liberty or 183 unlawfully interfered with the Vendors decision that the Financing Condition was not met.

**No Civil Conspiracy**

37. The Vendors deny that the statement of claim discloses a cause of action in civil conspiracy.

38. The Vendors in any event deny that they committed or are liable for unlawful means tort or the tort of civil conspiracy, whether by unlawful means or in any other manner whatsoever.

39. The Vendors deny that the Plaintiffs have suffered damages because of any unlawful means tort or any civil conspiracy.

**The Applicants are barred from pursuing this action**

40. With respect to Mr. Burtman, the allegations of breach of contract are *res judicata* and an abuse of process. The Applicants commenced a proceeding in the Superior Court that the Vendors, 183, and Liberty breached the contract by terminating the APS in reliance on the Financing Condition. Justice Penny dismissed the breach of contract claim. Mr Burtman's claims are *res judicata* and an abuse of process.

41. Regardless, even if the matter at issue in Mr. Burtman's statement of claim is not *res judicata* or an abuse of process, Mr. Burtman is estopped from raising it now. Cause of action



estoppel bars a subsequent lawsuit related to the same loss being advanced based on a different cause of action. The bad faith argument could have and should have been advanced by the Applicants in the Application. Mr. Burtman as an Applicant is barred from commencing a new claim with respect to the same loss.

42. As a result, Mr. Burtman is not a proper representative plaintiff as required by s. 5(1)(e) of the *Class Proceedings Act, 1992*.

### **Certification**

43. The Vendors deny that the statement of claim meets the requirements for certification under the *Class Proceeding Act, 1992*, S.O. 1992, c. 6.

### **Damages**

44. The Vendors deny that the Plaintiffs have suffered any loss or damages or that any claimed damages are recoverable at law. To the extent such damages are recoverable, the Plaintiffs each have a duty to mitigate and have failed to do so.

45. The Vendors deny that they acted in a high-handed manner or that they exhibited a callous disregard for the Plaintiffs. Even if the Vendors are liable for damages, which is denied, an award of punitive damages is not warranted.

### **The Exclusion Clause bars damages**

46. Even if the Vendors suffered damages (which is denied), the APS contains an exclusion clause that bars the purchasers from recovering damages. Section 22 of the APS states (the “**Exclusion Clause**”):

In the event that this Agreement is terminated and the Purchaser is entitled to the return of its deposits and interest thereon in accordance with the Act

and this Agreement, the Purchaser acknowledges that the Vendor and any undisclosed beneficiary, agent or other person or corporation, shall not be liable for any damages or costs whatsoever incurred by the Purchaser resulting from the termination of this Agreement including, without limitation, relocation costs, moving costs, professional fees and disbursements, opportunity costs, loss of bargain or other damages or costs incurred by the Purchaser, whether direct or indirect and the Purchaser further acknowledges that this provision may be pleaded by the Vendor as a complete defence to any claim, action or proceeding which may be made or brought against the Vendor and/or its agents and/or affiliates.

47. Consistent with the statutory regime, the Plaintiffs acknowledged and agreed that their damages are limited to a return of their deposits with interest upon a termination.

48. The Plaintiffs are not entitled to the difference in the market price for already-constructed real estate between 2016 and 2018. The Vendors deny that anything, including a breach of the APS (which is denied), prevented them from limiting their liability to exclude damages incidental on the termination of the contract.

49. The Exclusion Clause applies to the circumstances of the immediate case. It was not unconscionable at the time the APS were signed. There is no public policy reason that would override the Exclusion Clause. It is a complete defence to the claim advanced by the Plaintiffs for themselves and for the putative class members.

50. The Vendors ask that this action be dismissed with substantial indemnity costs.

July 17, 2020

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-and- 1945087 ONTARIO INC. et al

Defendants

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PROCEEDING COMMENCED AT TORONTO

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