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Docket: CI 23-01-40823
(Winnipeg Centre)
Indexed as: Pollichieni v. 6685821 Manitoba Inc.
Cited as: 2025 MBKB 77

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

ANTONIO POLLICHIENI,)	
)	<u>Jesse A. Gietz</u>
plaintiff,)	for the plaintiff
)	
- and -)	
)	
)	<u>Kevin D. Toyne</u>
6685821 MANITOBA INC.,)	for the defendant
)	
defendant.)	
)	
)	JUDGMENT DELIVERED:
)	June 12, 2025

HARRIS J.

INTRODUCTION

[1] The plaintiff moves for summary judgment on his claim that the defendant breached a contract, arising from a public auction, to purchase a building owned by the plaintiff. He claims for the contract price, special damages incurred as he attempted to sell the property, interest and costs.

[2] The defendant says that despite his acknowledgement that he understood that he was the successful bidder, there is no evidence of the auctioneer accepting

the defendant's offer and therefore, there is no contract. Alternatively, he says the facts entitle him to rescission or there was a fundamental breach. If these defences fail, he submits that the measure of damage does not begin with the contract price, but a lesser amount based on a subsequent listing price. Further, he alleges that the plaintiff failed to properly mitigate his damage or alternatively, that the evidence with respect to the plaintiff's mitigation is insufficient to permit the court to make a proper assessment and that a trial of that issue is required (see rule 20.03(3) of Manitoba, *Court of King's Bench Rules*, M.R. 553/88 (KBR)).

[3] Summary judgment motions are governed by KBR 20, the relevant portions of which provide as follows:

**Summary judgment motion
20.01(1)**

A party may bring a motion, with supporting affidavit material or other evidence, for summary judgment on all or some of the issues raised in the pleadings in the action.

**CONDUCT OF SUMMARY
JUDGMENT MOTION**

Responding evidence

20.02 In response to affidavit material or other evidence supporting a motion for summary judgment, a responding party may not rest on the mere allegations or denials of the party's pleadings, but must set out, in affidavit material or other evidence, specific facts showing

**Motion de jugement
sommaire**

20.01(1)

Une partie peut demander, par voie de motion appuyée d'un affidavit ou d'autres éléments de preuve, un jugement sommaire sur la totalité ou une partie des questions soulevées par la procédure écrite de l'action.

**AUDITION DE LA MOTION
DE JUGEMENT SOMMAIRE**

Preuve de l'intimé

20.02 Lorsqu'une motion de jugement sommaire est appuyée d'un affidavit ou d'autres éléments de preuve, la partie intimée ne peut se contenter des simples allégations ou dénégations contenues dans ses actes de procédure. Elle doit préciser, au moyen d'un affidavit

that there is a genuine issue requiring a trial.

ou d'autres éléments de preuve, des faits spécifiques qui démontrent l'existence d'une véritable question litigieuse justifiant la tenue d'un procès.

Granting summary judgment
20.03(1) The judge must grant summary judgment if he or she is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence.

Prononcé du jugement sommaire
20.03(1)

S'il est convaincu qu'une demande ou une défense ne soulève pas de question litigieuse justifiant la tenue d'un procès, le juge rend un jugement sommaire.

Powers of judge
20.03(2) When making a determination under subrule (1), the judge must consider the evidence submitted by the parties and he or she may exercise any of the following powers in order to determine if there is a genuine issue requiring a trial: (a) weighing the evidence; (b) evaluating the credibility of a deponent; (c) drawing any reasonable inference from the evidence; unless it is in the interests of justice for these powers to be exercised only at trial.

Pouvoirs du juge
20.03(2) Pour prendre sa décision sous le régime du paragraphe (1), le juge prend en compte les éléments de preuve présentés par les parties et peut, sauf si l'intérêt de la justice commande que ces pouvoirs ne soient exercés qu'au procès, exercer les pouvoirs qui suivent pour décider si une véritable question litigieuse justifie la tenue d'un procès : a) apprécier la preuve; b) évaluer la crédibilité d'un déposé; c) tirer des conclusions raisonnables de la preuve.

[4] There will be no genuine issue requiring a trial where a fair and just adjudication of the issues in an action can be made on the hearing of the motion.

That will be so if the summary judgment process:

- (a) allows the judge to make the necessary findings of fact;
- (b) allows the judge to apply the law to the facts; and

(c) is a proportionate, more expeditious and less expensive means to achieve a just result. (***Howardson v. 7273887 Manitoba Inc. et al.***, 2021 MBQB 148 (CanLII) at para. 15, referring to ***Hryniak v. Mauldin***, 2014 SCC 7, [2014] 1 S.C.R. 87 at paras. 49 and 50)

[5] If the moving party meets the evidential burden of establishing that there is no genuine issue requiring a trial, the responding party must meet its evidential burden of establishing “that the record, the facts, or the law preclude a fair disposition ... or that there is a genuine issue requiring a trial”. If the responding party fails to establish why a trial is required, summary judgment will be granted. (***Dakota Ojibway Child and Family Services et al. v. MBH***, 2019 MBCA 91 at paras. 108 and 109)

[6] The main issues are whether there was a binding contract and if so, what is the measure of damages, and did the plaintiff take appropriate steps to mitigate his damages. Both parties have put their best foot forward through affidavits, cross-examinations on those affidavits, written briefs and oral presentations fully canvassing all the issues. While initially opposing the plaintiff’s request for a summary judgment motion, the defendant argued that summary judgment can and should be granted in its favour and the court should only direct any issues not capable of resolution by summary judgment to be determined at a trial.

[7] As I will explain, I am satisfied the plaintiff has met his burden of establishing there was a binding contract for the sale of the subject property and that the starting point for assessing his loss is the contract price. I am further

satisfied that the plaintiff failed to adequately mitigate his damages when he declined an offer to buy the property for \$175,000, and that his damages for the breach are limited to the difference between the contract price and \$175,000.

FACTS

[8] The mortgagors of property owned by the plaintiff in the R.M. of St. Laurent, Manitoba defaulted on the mortgage entitling the plaintiff, as the mortgagee, to sell the property. He obtained an Order for Sale of the property under ***The Real Property Act***, C.C.S.M. c. R30 and elected to sell the property by a Public Auction, which was held on May 3, 2023. A copy of the Public Auction sale conditions and all schedules thereto were made available for public viewing and read aloud to those in attendance prior to the commencement of the auction, as follows:

- a) The Purchaser shall obtain vacant possession of the Property at the Purchaser's own expense;
- b) The Purchaser shall be deemed to have relied on the Purchaser's own inspection and knowledge of the Property, its true condition, possible liabilities and the title thereto independent of any representations by or on behalf of the Plaintiff, and no error, misstatement or mistake shall annul this sale nor shall any compensation be allowed to the Purchaser in respect thereof;
- c) The highest bidder shall be the Purchaser;
- d) The balance of the purchase price together with interest thereon at the rate of 14% per annum from the date of the sale shall be due and payable to the Mortgagee's solicitor within thirty (30) days from the date of the sale;
- e) If the Purchaser shall fail to pay the balance of the purchase price and interest thereon within the time set forth above, the deposit shall be absolutely forfeited to the Mortgagee who may thereupon sue the Purchaser for the balance of the purchase price and interest and resell the Property in such manner and on such terms as the Mortgagee shall think fit and any deficiency which may result from such resale after deducting all

costs, charges, and expenses attending to such resale shall be borne by the Purchaser and shall be recoverable by the Mortgagee as and for liquidated damages. It shall not be necessary for the Mortgagee to tender a Transfer of Land to the Purchaser in order to have recourse to these remedies;

- f) The Purchaser acknowledges and agrees that there are no representations and/or warranties made by the Mortgagee or anyone acting on the Mortgagee's behalf as to the condition of, or title to, or use of, zoning of, or with respect to any other matter or things in connection with the Property or the buildings located upon the lands... The Purchaser acknowledges that the land is sold on an "as is, where is" basis...;
- g) The Purchaser acknowledges that he/she has relied entirely upon their own inspection and investigation with respect to quantity, quality and the value of the Property; and
- h) The Purchaser acknowledges that any fixtures or chattels which may remain on the premises are to be taken by the Purchaser at the Purchaser's own risk completely, without representation or warranty of any kind from the Mortgagee as to title, or state of repair of any such fixtures and chattels. All fixtures and chattels are to be sold on an "as is, where is" basis...

[9] The defendant was the highest bidder matching the reserve bid of \$267,803.19. According to the Declaration of Auctioneer, he declared that the property sold to the defendant for that price. The President of the defendant, Li Peng Yu, understood that he was the successful bidder.

[10] In accordance with paragraph 7 of the Auction Sale Conditions, Mr. Yu began travel to Winnipeg to take the required deposit cheque to the office of the plaintiff's lawyer. On the way to Winnipeg, he stopped by the subject property where he observed the mortgagors removing items from the building. While he spoke to the persons there, he did not try to stop them from moving the items, nor did he alert the police. It should be noted that he also stopped at the building prior to attending the auction, where he first noticed the previous owners removing

items from the property. He did not take steps in any way, at any time, to stop this from happening, nor did he raise the issue prior to the auction. He deposed in his affidavit that he would not have submitted a bid had he known that the previous owners were actively removing fixtures, but it is clear that he did so despite that knowledge.

[11] Mr. Yu proceeded to the lawyer's office where he first raised the issue of the owners removing fixtures. He says he was advised by the lawyer that the lawyer could not address the issue. At that point, he decided not to leave his deposit cheque. Stopping by the property again on his return to St. Laurent that day, he noted that a number of fixtures had been removed, including a walk-in cooler, a walk-in freezer, hot water tank and small appliances.

[12] As the defendant did not provide the required deposit or the balance of funds within 30 days in accordance with the conditions of the auction, the plaintiff commenced this claim and instructed his counsel to conduct a second Public Auction, which took place on July 25, 2023. At this auction, no bids meeting the reserve bid of \$215,000 were received. The plaintiff then took several other steps to attempt to sell the property, none of which were successful. To date, the property has not been sold.

ANALYSIS

Was there a Contract?

[13] The plaintiff says that there was a binding contract between the parties which was created upon the auctioneer's declaration that the property was sold.

[14] He relies upon a copy of the Declaration of Auctioneer wherein the auctioneer “solemnly declares” that he “declared the property sold to 6685821 Manitoba Inc., the President of which corporation is Li Peng Yu, for \$267,803.19, being the highest bidder...” as well as Mr. Yu’s evidence that he understood that he was the successful bidder and that he was the purchaser of the building.

[15] The defendant says that there is no admissible evidence that there was a sale in accordance with subsection 59(b) of *The Sale of Goods Act*, C.C.S.M. c. S10:

Auction sales

59 In case of a sale by auction,

...

(b) a sale is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner; and until the announcement is made any bidder may retract his bid;

Ventes aux enchères

59 Dans le cas d'une vente aux enchères:

...

b) une vente est conclue lorsque l'encanteur l'annonce par la tombée du marteau ou de toute autre façon usuelle et, jusqu'à ce que cette annonce soit faite, tout enchérisseur peut retirer son enchère;

(see also *Olympic Building Systems Ltd. v. Total Leisure R.V. Manufacturing Ltd. et al.*, 1999 CanLII 4192 (MB CA) (at paras. 23 and 24)

[16] The defendant also argues that subsection 58(1) of *The Manitoba Evidence Act*, C.C.S.M. c. E150 renders the Declaration of Auctioneer inadmissible as it is a photocopy and not an original:

Admissibility of documentary evidence as to facts in issue

58(1) In any legal proceedings where direct oral evidence as to a fact would be admissible, any statement made by a person in a document and tending to establish that fact is, on production of the original document, admissible as evidence of that fact,

(a) if the maker of the statement either

(i) had personal knowledge of the matters dealt with by the statement; or

(ii) where the document in question is, or forms part of, a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and

(b) subject to subsection (2), if the maker of the statement is called as a witness in the proceedings.

Admissibilité des preuves documentaires de faits en litige

58(1) Dans toute poursuite judiciaire, lorsqu'une preuve orale directe d'un fait serait admissible, toute déclaration faite par une personne dans un document et qui tend à établir ce fait est, sur production du document original, admissible comme preuve de ce fait, si les conditions suivantes sont respectées:

a) l'auteur de la déclaration:

(i) soit avait une connaissance personnelle des affaires visées par la déclaration,

(ii) soit a fait la déclaration (dans la mesure où il n'a pas connaissance personnelle des affaires visées par la déclaration) dans l'exécution de ses fonctions d'enregistrer des renseignements qui lui sont fournis par une personne qui avait une connaissance personnelle de ces affaires ou qui aurait été justifiée d'avoir une telle connaissance, dans la mesure où le document en question est un registre présenté comme étant un registre continu ou comme en faisant partie;

b) sous réserve du paragraphe (2), si l'auteur de la déclaration est appelé à témoigner lors de la poursuite judiciaire.

[17] Associate Chief Justice Perlmutter considered the application of subsection

58(1) in *Koziey v. Koziey*, 2024 MBKB 5, wherein he concluded that copies of

notes attached to an affidavit were not admissible because the originals were not produced. The Court of Appeal noted that in the proceeding before Perlmutter ACJ., the issue was not well defined by the parties and the entirety of section 58 was not considered. In any event, the Court of Appeal did not find it necessary to address the appellant's submission that Perlmutter ACJ. erred in his interpretation and application of subsection 58(1) (*Koziey v. Koziey*, 2024 MBCA 78, at paras. 36 to 40).

[18] The circumstances surrounding the inclusion in evidence of the Declaration of Auctioneer are very different than the question of admissibility considered in *Koziey*. There, Perlmutter ACJ. was adjudicating an application for a declaration of trust and not a motion for summary judgment.

[19] Summary judgment motions rely on affidavits in which deponents swear as to their information and belief, and the source of that belief. Where necessary, a copy of the document upon which that information and belief is based is attached to the affidavit (see KBR 39.01(4)). In this case, the plaintiff's affidavit complies with KBR 39.01(4) and is admissible in these proceedings. Subsection 58(1) does not apply to an affidavit in a motion for summary judgment.

[20] Turning to the defendant's second point, the question which it raises is whether, in the absence of a literal "fall of the hammer", does the auctioneer's statement that "he declared the property sold to [the defendant] for \$267,803.19, being the highest bidder", satisfy the requirements of subsection 59(b) of *The Sale of Goods Act*.

[21] The evidence is that the auctioneer offered the property for sale and invited bids. The defendant made its bid, which was accepted by the auctioneer. The auctioneer then declared the defendant to be the successful bidder and made a solemn declaration as to these facts in his Declaration of Auctioneer. The defendant testified on cross-examination that he understood that he was the successful bidder and began travel to Winnipeg to provide his deposit to the plaintiff's lawyer in accordance with the auction terms. I am satisfied that when the auctioneer declared the defendant to be the successful bidder, he did so in compliance with subsection 59(b) of *The Sale of Goods Act*. At the point that the auctioneer declared the defendant to be the successful bidder, the contract was formed.

[22] The defendant also raised defences of rescission and fundamental breach, although these were not pursued in oral submissions. I will comment only briefly on both to explain why I agree that neither are available on the facts.

[23] The Ontario Court of Appeal set out the four criteria required for rescission by mistake in *Canada Life Insurance Company of Canada v. Canada (Attorney General)*, 2018 ONCA 562 (CanLII), as follows (at para. 89):

The relief that CLICC seeks is more accurately described as rescission of a contract entered into by mistake. Accordingly, this court's decision in *Miller Paving Ltd. v. B. Gottardo Construction Ltd.* (2007), 86 O.R. (3d) 161, [2007] O.J. No. 2227, 2007 ONCA 422, 227 O.A.C. 45 governs. It requires the party seeking equitable rescission of a contract to establish that (a) the parties were under a common misapprehension as to the facts or their respective rights; (b) the misapprehension was fundamental; (c) the party seeking to set the contract aside was not itself at fault; and (d) one party will be unjustly enriched at the expense of the other if equitable relief is not granted (at paras. 23, 24, 26 and 31).

[24] The Auction Sale Conditions specifically stated that:

4. The Purchaser shall be deemed to have relied on the Purchaser's own inspection and knowledge of the Property, its true condition, possible liabilities and the title thereto independent of any representations by or on behalf of the Mortgagee and no error, misstatement or mistake shall annul this sale....

[25] Simply stated, there was no evidence of a common misapprehension as to the acts or the respective rights of the parties.

[26] Similarly, the claim of fundamental breach must fail. In ***Canada Western Bank et al. v Capitol Steel Corporation***, 2023 MBKB 121, Grammond J. referred, with approval, to ***Hunter Engineering Co. v. Syncrude Canada Ltd.***, 1989 SCC 129, [1989] 1 S.C.R. 426, where the court stated, citing ***Photo Production Ltd. v. Securicor Transport Ltd.***, [1980] A.C. 827 (H.L.), that (at p. 849):

... A fundamental breach occurs "Where the event resulting from the failure by one party to perform a primary obligation has the effect of depriving the other party of substantially the whole benefit which it was the intention of the parties that he should obtain from the contract". This is a restrictive definition and rightly so, I believe. As Lord Diplock points out, the usual remedy for breach of a "primary" contractual obligation (the thing bargained for) is a concomitant "secondary" obligation to pay damages. The other primary obligations of both parties yet unperformed remain in place. Fundamental breach represents an exception to this rule for it gives to the innocent party an additional remedy, an election to "put an end to all primary obligations of both parties remaining unperformed" (p. 849). It seems to me that this exceptional remedy should be available only in circumstances where the foundation of the contract has been undermined, where the very thing bargained for has not been provided.

[emphasis in original]

[27] The defendant was prepared to purchase the property for the bid price with the knowledge that the day before, the former owners had been removing items from the property. He knew that the property came with no warranties or

guarantees as to its state or condition. The foundation of the contract was not undermined in these circumstances. Following the auction, the defendant saw that the former owners were still removing items, but did nothing to stop them. He certainly cannot blame the plaintiff for any diminution of value after the sale.

[28] In these circumstances, fundamental breach is not open to the defendant.

DAMAGES

[29] The starting principle in a breach of contract claim is that the plaintiff is entitled to be compensated for losses naturally flowing from the breach, but the plaintiff is required to take all reasonable steps to mitigate the loss (*Red Deer College v. Michaels*, 1975 SCC 15, [1976] 2 S.C.R. 324). The innocent party is entitled to be put in the position they would have been had the contract not been breached and was performed (*Rosehaven Homes et al. v. Aluko et al.*, 2022 ONSC 1227 (CanLII), at para. 71). This right was stated in paragraph 10 of the Auction Sale Conditions which provides that if the purchaser fails to pay the balance of the purchase price, the mortgagee (the plaintiff) may sue for the balance of the purchase price. Accordingly, the starting point for damages is the contract price of \$267,803.19, the amount of the contract between the parties which was breached by the defendant.

[30] However, balanced against the plaintiff's right is the duty to mitigate his loss. The burden is on the defendant to prove both that the plaintiff has failed to make reasonable efforts to mitigate and that mitigation was possible.

(***Southcott Estates Inc. v. Toronto Catholic District School Board***, 2012 SCC 51, [2012] 2 S.C.R. 675, at paras. 23 and 24)

[31] Following the defendant's breach, the plaintiff took several steps to sell the property and mitigate his loss:

- (a) a second public auction was held on July 23, 2023 with a reserve bid of \$215,000. No bids were received and the auction was declared abortive,
- (b) on September 18, 2023, the plaintiff obtained an appraisal from Art McCoubrey, a Professional Appraiser, who provided an opinion that the market value of the property as of September 26th was \$157,000,
- (c) on September 26, 2013, the plaintiff received an opinion of market value prepared by L.J. Baron Realty dated September 26, 2023 assessing the market value to be \$180,000 to \$185,000,
- (d) on September 27, 2023, the property was listed for sale with Carpe Diem Realty at a price of \$215,000,
- (e) on or about October 17, 2023, the plaintiff received an offer to purchase for \$175,000. He turned this offer down as it was considerably below the price achieved at the first auction, below the opinion of value from L.J Baron Realty and below the asking price,
- (f) on November 22, 2023, the plaintiff reduced the price to \$214,500. It was further reduced to \$198,000 on December 30, 2023 and then

again to \$179,900. The plaintiff has not received further offers and the property has not been sold.

[32] The plaintiff submits that he did everything reasonably required of him to sell the property and mitigate his loss. He obtained a professional appraisal and opinion of value, put the property up for second auction, then for sale on the open market and reduced the asking price many times. He says it was reasonable for him to decline the only offer he received as it was below the price the property sold for at first auction, below the opinion of value, and below the asking price. As this decision was made in consultation with his real estate agent, he says it was a judgment call made on the advice of his agent and does not equate to failure to mitigate. He says that in hindsight, he should have accepted that offer, but his decision was reasonable at the time.

[33] In ***Prowse et al. v. Noroozi***, 2021 ONSC 3099 (CanLII), the plaintiffs and defendants had entered into an agreement for the sale and purchase of the plaintiffs' property for \$2,450,000. The defendants failed to close and the purchasers sued on the contract. Two years after the breach, the plaintiffs received an offer of \$1,600,000 which, after consultation with their real estate agent, they rejected. They then relisted the property for \$1,980,000, reducing the price twice before ultimately accepting an offer of \$1,600,000.

[34] Madam Justice McCarthy rejected the argument that the plaintiffs failed to mitigate when they rejected the first offer of \$1,600,000, concluding that they acted reasonably when they sought and followed the advice of their agents. In

the case at bar, the plaintiff says that he acted on the advice of his agent. However, I am unable to reconcile this with the fact that he had an opinion from L.J. Baron Realty that the value of the property was \$180,000 to \$185,000 and an appraisal from Art McCoubrey setting the value at \$157,000. The offer of \$175,000 was clearly in the range of these opinions. His explanation does not sufficiently demonstrate why the decision to reject the offer was reasonable. For example, an explanation from his agent may have assisted in demonstrating why it was reasonable. In my opinion, the offer of \$175,000 validates the McCoubrey and Baron opinions. Armed with the Baron and the McCoubrey opinions, the plaintiff did not act reasonably when he rejected an offer of \$175,000.

[35] Accordingly, the plaintiff is entitled to damages for breach of contract in the amount of \$92,803.19, representing the difference between the sale price of \$267,803.19 and \$175,000, representing the offer that he should have accepted to properly mitigate his damages. He is entitled to property tax arrears for the period from January 1, 2023 until October 17, 2023, the date of the \$175,000 offer. He is entitled to interest at the rate of 14 percent on both those amounts until October 17, 2023, in accordance with the auction sale conditions. He is also entitled to second auction fees in the amount of \$157.00, \$2,940.00 for the McCoubrey appraisal and \$315.00 for the Baron opinion of value.

[36] The plaintiff will also have his costs which, if not agreed upon, may be spoken to.

_____. J.