

**IN THE DISTRICT COURT
AT MANUKAU**

**CIV-2015-092-000814
[2016] NZDC 19951**

BETWEEN TWIN TOWERS PROPERTY LIMITED
Plaintiff

AND SUSHIL KUMAR SAGGAR
Defendant

Hearing: On the Papers

Appearances: Ms B Hojabri for the Plaintiff

Judgment: 7 October 2016

**FURTHER DECISION OF JUDGE C S BLACKIE
On Summary Judgment Application**

[1] On 16 November 2015, I delivered a reserved decision on the plaintiff's application for a summary judgment. I held that the application for summary judgment by way of specific performance be granted but accepted that the defendant may need reasonable time to facilitate settlement arrangements.

[2] The plaintiff has now made application under Rules 7.12, 7.16 and 7.39 of the District Court Rules 2014, seeking that the Court:

- (a) Discharge the order for specific performance and
- (b) Declare that the plaintiff is entitled to cancel the agreement.

[3] This application is made without notice to the defendant.

[4] In submissions to the Court, counsel for the plaintiff refers to the original summary judgment order and to the supplementary order requiring the defendant to complete the purchase in respect of the apartment that he agreed to buy by the 31 March 2016.

[5] Counsel submits that the Court has jurisdiction to discharge the earlier orders and asked the Court to make supplementary declaration in respect of cancellation.

[6] As to the question of the Court's jurisdiction, it is well established that when a decree of specific performance is made:

- (a) The underlying contract is not merged with the judgment but becomes subject to the jurisdiction of the Court;
- (b) The Court may, if it considers just and equitable to do so, discharge the orders for specific performance previously made; and
- (c) On discharging the orders for specific performance, the Court will usually make orders rescinding the underlying contract.

[7] As to what amounts to "just and equitable" the remedy sought is discretionary. The ultimate issue is what is just and equitable to both parties in the circumstances of the particular case. Counsel for the plaintiff refers to a number of Court decisions.

[8] In *Pegasus Town Ltd v Wong* [2011] 11 NZCPR 524, an ex parte application for discharge of orders for specific performance was declined when it was sought without notice, because the Court required evidence of the failure by the defendant purchaser to comply with the orders for specific performance and surrounding circumstances in order to be satisfied that it was just they be discharged and that there was no prejudice or injustice to the defendant.

[9] In *Vincent Street Trustee Ltd v De Jongh* [2011] 11 NZCPR 794, the plaintiff successfully applied, without notice, for discharging the decree of specific performance and declaring it was entitled to cancel the underlying sale and purchase agreement. The Court found that the plaintiff's right to cancel was clear, given that it was obvious the defendants did not intend to perform their obligations under the agreement.

[10] Likewise, in *Shawyer v Thow*, HC Invercargill, CIV-2009-425-177, 29 August 2011, the Court discharged an order for specific performance and granted leave to the applicant to cancel the agreement for sale and purchase. The applicant had obtained summary judgment by way of specific performance against the respondent following a defended hearing. The applicant took steps to enforce the judgment but these steps failed to achieve any degree of performance on the part of the respondent. It was held the applicant was justly entitled to the order sought, given the respondent's failure to comply over lengthy amount of time.

[11] In the current case, the plaintiff contends:

- (a) That the defendant neglected/failed to settle in accordance with the agreement on 27 February 2015 and ignored a settlement notice subsequently issued by the plaintiff on 4 March 2015. Proceedings were commenced against the defendant on 19 March 2015;
- (b) Despite summary judgment by way of specific performance being entered against him as long ago as 14 December 2015, the defendant has not taken any real steps to meet his obligations;
- (c) The plaintiff has given the defendant every opportunity to comply with the orders or to, at least, provide evidence that he has made genuine efforts to secure finance to settle but, it would seem, that the defendant has, in reality, "buried his head in the sand". The plaintiff has not been able to get a substantive response from the defendant who consistently pleads impecuniosity but appears unwilling to provide any corroborating evidence to that effect.

[12] Counsel for the plaintiff now submits in the context of the District Court Rules 2014, that it would cause prejudice to the plaintiff in terms of additional delay and expense, if it was required to proceed with this matter on notice to defendant. Given the defendant has yet to pay the plaintiff's costs in relation to the successful summary judgment application, the plaintiff does not count on the defendant meeting any further expenses it incurs. On this basis, it is submitted that the application should proceed and be determined on a without notice basis.

Determination

[13] The relevant provisions relating to applications such as the present are as previously stated Rules 7.12, 7.16 and 7.39 of the District Court Rules 2014. In particular, the Court must have regard to the provisions of 7.39(3), which include being satisfied that it is in the interests of justice to require the application to be determined without notice to the defendant.

[14] Having considered the evidence adduced by the plaintiff, the memorandum of support and the cases which have been earlier referred to, I am satisfied that requiring the plaintiff to proceed on notice would cause undue delay or prejudice to the plaintiff and that it is in the interests of justice to require the application to be determined without any further delay.

[15] Further, enforcing the orders for specific performance against the defendant would be an exercise in futility. It is, therefore, just and equitable to discharge the orders and allow the plaintiff to cancel the agreement.

[16] The orders sought by the plaintiff are granted accordingly.

C S Blackie
District Court Judge