

COURT OF APPEAL FOR ONTARIO

CITATION: Eyelet Investment Corp. v. Zhou, 2026 ONCA 453

DATE: 20260622

DOCKET: COA-25-CV-1112

Copeland, Monahan and Gomery JJ.A.

BETWEEN

Eyelet Investment Corp. c.o.b. as Treasure Hill Homes

Plaintiff (Appellant)

and

Lin Zhou

Defendant (Respondent)

Gavin J. Tighe and S. Michael Citak, for the appellant

Chad M. Leddy, James H. Omran and Sandra Hsia, for the respondent

Heard: May 20, 2026

On appeal from the order of Justice Nathalie Des Rosiers of the Superior Court of Justice, dated July 29, 2025, with reasons reported at 2025 ONSC 4434.

REASONS FOR DECISION

[1] This appeal arises out of a failed residential real estate transaction.

[2] The respondent agreed to buy a home in a development built by the appellant for \$1,680,151.38 and paid deposits amounting to \$127,500. The scheduled closing date was September 28, 2017. On September 11, 2017, the

respondent's counsel told counsel for the appellant that the respondent was terminating the agreement of purchase and sale (the "APS"). The appellant advised that it would treat the termination as an anticipatory breach and take steps to mitigate its damages. The appellant ultimately sold the property six months later for \$1,300,000, approximately \$380,000 less than the contract price with the respondent.

[3] The appellant brought a claim for breach of contract, seeking damages of \$253,981.97, which was the difference between the APS price and the ultimate sale price six months later, plus carrying costs, less the deposit paid by the respondent. The motion judge dismissed the appellant's motion for summary judgment and dismissed the claim on the basis that the appellant had failed to mitigate its damages.

The reasons of the motion judge

[4] The motion judge recognized that the respondent, as the party who failed to perform the contract, bore the burden of proving that the appellant failed to make reasonable efforts to mitigate and that mitigation was possible, citing *Southcott Estates Inc. v. Toronto Catholic District School Board*, 2012 SCC 51, [2012] 2 S.C.R. 675, at para. 24.

[5] The appellant took the position before the motion judge that it did not want to “flood” the market with homes for which agreements of purchase and sale were terminated, and that it should have complete discretion to determine which house to put forward on the market at what time.

[6] The motion judge noted that the appellant failed to list the property on the Multiple Listing Service (“MLS”). She found that failure to list on MLS was not necessarily a failure to mitigate damages, but described it as a “troubling” factor that gave rise to the need for the appellant to show a reasonable alternative marketing strategy for the property.

[7] The motion judge found that the appellant’s evidence about its marketing strategy for the property was insufficient because it failed to provide any records or details about its efforts to market the particular property. The appellant’s affiant did not recall what efforts were made to market the particular property after the termination of the APS, but instead testified about the appellant’s usual marketing practices. The appellant’s usual practices included sending “email blasts” to past interested buyers and a list of real estate agents, putting up signs or billboards advertising the development or specific homes, and using social media to invite prospective buyers to visit the development.

[8] However, the appellant provided no records or details about the implementation of these marketing strategies during the six-month period between

the termination of the APS and the sale of the property to a different buyer, with respect to either the particular property or other properties in the development.

[9] The motion judge found that more particularized evidence of the appellant's marketing strategy was required. As a result, she drew an adverse inference against the appellant:

I find it appropriate to draw an adverse inference from the failure to keep records (or provide them) of the marketing strategies, email blasts or other outreach efforts with respect to this particular property or others at various times during the six-month period from the date of the breach until the sale.

...

To summarize, [the appellant] did not have records of its marketing efforts for the Property. It is not reversing the burden of proof to require minimum record-keeping on the part of a plaintiff subject to a mitigation obligation. The evidence before me is that [the appellant] developed a marketing strategy to protect the value of the entirety of its inventory. It had no specific strategy for the resale of the Property at issue in these proceedings. Its strategy might have been successful if it had yielded a price for the Property that approximated its fair market value at the time of the breach in September 2017, but it was not.

[The respondent] has raised several reasons why [the appellant's] mitigation efforts were flawed. Because of the lack of records, I draw the negative inference that there was a delay in marketing the Property and a failure to sufficiently market this particular property to constitute reasonable mitigation efforts.

[10] The motion judge found that the appellant chose to delay marketing the property because it was concerned about depressing prices in the development and imperiling other closings. The motion judge accepted that in some circumstances, such a delay might be reasonable, but in the absence of any records about the appellant's marketing efforts for the property, the record did not support a finding that the appellant took reasonable steps to mitigate its damages.

[11] The motion judge noted that the basic principle for assessing damages for breach of contract "is based on putting the injured party as nearly as possible in the position it would have been had the contract been performed." In general, that is done by assessing damages on the date the contract was to be performed, although it is open to a court to choose a different date if contextual considerations require it.

[12] She recognized that in real estate transactions, where a purchaser fails to close, the vendor takes reasonable steps to sell the property at arm's length, and there is nothing improvident about the sale, the measure of damages is usually the difference between the contract price and the resale price. However, she found that where the property is resold for below its appraised value and there is no record of what was done to market the property, it was not appropriate to use the sale price six months later as the true measure of the property's value. The motion judge held that because of the delay in the resale and the absence of evidence of

the appellant's marketing efforts, it was appropriate to use the date of the termination of the APS, September 11, 2017, to assess damages.

[13] Both the appellant and the respondent provided appraisals of the property's value as of September 11, 2017 and as of the date the property was sold six months later. All of those appraisals were higher than the ultimate sale price. Having found that the appropriate date to assess damages was September 11, 2017, the trial judge used appellant's appraisal of the value on that date, which was lower than the respondent's (i.e., more favourable to the appellant), to calculate the damages. After deducting the respondent's deposit from the difference between the price in the APS and the value of the property on September 11, 2017 based on the appellant's appraisal, the appellant suffered no damages. On this basis the motion judge dismissed the motion and the claim.

Analysis

[14] The appellant argues that the motion judge erred in finding that it failed to mitigate its damages. In particular, it argues that the motion judge reversed the onus on the respondent to establish failure to mitigate and erred by using an appraisal of the property's value as of the date of the respondent's breach (provided by the appellant) to calculate damages.

[15] We disagree.

[16] In the absence of an error of law, a motion judge's findings on damages and mitigation are questions of mixed fact and law entitled to deference on appeal: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 3, 8, and 26-36; *Hav-A-Kar Leasing Ltd. v. Vekselshtein*, 2012 ONCA 826, at para. 57; *Taylor v. 1103919 Alberta Ltd.*, 2015 ABCA 201, 19 Alta. L.R. (6th) 407, at para. 28; *Celestini v. Shoplogix Inc.*, 2023 ONCA 131, 166 O.R. (3d) 368, at para. 58.

[17] The motion judge did not reverse the burden on the respondent to prove that the appellant failed to take reasonable steps to mitigate. Rather, she reviewed the evidentiary record before her and concluded that the respondent met her burden to show that the appellant failed to take reasonable steps to mitigate its damages. This conclusion was based on (1) the appellant's failure to provide evidence about the marketing strategy for the particular property; (2) the delay in selling the property; and, (3) the fact the property sold below the value of the appraisals of both parties as of the date the APS was terminated and the date of the ultimate sale. The motion judge's findings were open to her on the record.

[18] We note, just by way of example, that in cross-examination, the appellant's affiant testified that he did not remember if other offers were made on the property between the date the respondent terminated the APS and the sale six months later. An undertaking was given to produce any other offers made during this time period. The appellant's response to the undertaking was: "Given the market conditions at

the time, not many offers were made for the subject property. The [appellant] does not have records in connection with such offers.”

[19] In light of the motion judge’s factual findings, we see no error in her finding that it was appropriate to assess damages based on the value of the property as of September 11, 2017, using the appellant’s appraisal.

[20] The appellant also argues that in light of the motion judge’s finding that the evidence it tendered on the issue of mitigation was insufficient, she erred in proceeding by way of summary judgment.

[21] This ground of appeal has no merit. Before the motion judge, both parties agreed the matter was appropriately determined by summary judgment. It is well-established that the parties to a summary judgment must put their best foot forward. A judge hearing a summary judgment motion is entitled to proceed on the basis that all of the relevant evidence has been placed before the court and there would be nothing further if the issue were to go to trial: *Broadgrain Commodities Inc. v. Continental Casualty Company*, 2018 ONCA 438, at para. 7. The fact that the appellant may have failed to put its best evidentiary foot forward does not retrospectively make proceeding by summary judgment inappropriate. The motion judge made no error in proceeding by summary judgment.

Disposition

[22] The appeal is dismissed. As agreed by the parties, the appellant shall pay costs of the appeal to the respondent in the amount of \$15,000, inclusive of disbursements and HST.

“J. Copeland J.A.”
“P.J. Monahan J.A.”
“S. Gomery J.A.”