

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

KRISTIYAN TODOROV

Plaintiff

and

BRANDY LANE CORPORATION and WYLDEWOOD CREEK INC.

Defendants

STATEMENT OF DEFENCE

1. Except as hereinafter expressly admitted, the Defendants, Brandy Lane Corporation (“**Brandy Lane**”) and Wyldewood Creek Inc. (“**Wyldewood Creek**”), deny each and every allegation contained in the Statement of Claim and put the Plaintiff to the strict proof thereof.

THE PARTIES

2. Wyldewood Creek is a real estate development company incorporated pursuant to the laws of the Province of Ontario that advertised, promoted, and sold units in the proposed Wyldewood Creek development (the “**Project**”) located at a property in the Town of Collingwood (the “**Town**”).

3. Wyldewood Creek is a part of a group of real estate development companies related to Brandy Lane, which itself is a real estate development management company incorporated pursuant to the laws of the Province of Ontario. Brandy Lane had no contractual relationship or other relationship with any of the Purchasers (as defined below).

4. The Plaintiff, Kristiyan Todorov, is an individual residing in the Province of Ontario and was a purchaser of a condominium unit in the Project. The Plaintiff is a mortgage broker.

THE WYLDEWOOD CREEK PROJECT

5. The planning of the Project commenced in 2018. The Project was intended to be a 167-unit, six building residential condominium project, though the proposed number of units fluctuated during the lifetime of the project. From the outset of the Project, Wyldewood Creek worked to advance applications for the official plan amendment and zoning by-law amendment and the application for site plan approval with the Town.

6. On or about October 29, 2018, Wyldewood Creek submitted its pre-consultation application letter to the Town to commence the site plan approval process. On November 8, 2018, Wyldewood Creek met with the Town at the pre-consultation meeting and received comments from the Town with respect to the proposed Project. The Town was supportive of the Project, and no major impediments were raised in the meeting or included in the comment sheet.

7. During the development process, the site plan approval process was delayed by the imposition of significant modifications by the Town as well as the Nottawasaga Valley Conservation Authority (the “NVCA”). As a result of the delays caused by these and other unanticipated issues caused by the municipal authorities, including delays caused by the election of a new Town Council and, as set out below, the replacement of the Town’s Director of Planning, the development of the Project was significantly delayed.

8. The delay was not attributable to any errors or omissions on the part of Wyldewood Creek. Wyldewood Creek did all of the required due diligence, continued to monitor the feasibility of the Project, and abided by all instructions provided by the Town and its Director of Planning.

9. Despite Wyldewood Creek having been informed by the Town's previous Director of Planning, Nancy Farar, prior to the commencement of marketing the Project, that the approval process would take the same amount of time as other projects undertaken by other Brandy Lane companies (i.e. approximately 14 months), the approvals process for the Project took significantly longer than any of those other projects. This was despite Wyldewood Creek doing its due diligence and abiding by all instructions provided by the Town and its Director of Planning.

10. Wyldewood Creek began marketing the Project began in the fall of 2019, and sales started shortly thereafter, in early 2020.

THE AGREEMENTS OF PURCHASE AND SALE

11. Wyldewood Creek entered into 165 Agreements of Purchase and Sale for condominium units in the Project, with various purchasers, including the Plaintiff (the "**Purchasers**"). These agreements, including an Agreement of Purchase and Sale with the Plaintiff dated April 13, 2019, (the "**Agreements**") were standard form agreements with terms which included, *inter alia*, the payment of deposits (the "**Deposits**") and the inclusion of the Tarion Addendum (the "**Addendum**").

12. The Addendum is a statutory addendum to any Agreement of Purchase and Sale for newly constructed homes in Ontario, governed by the Ontario *New Home Warranties Plan Act* ("**NHWPA**") through its designated agent, Tarion Warranty Corporation. The Addendums in the Agreements include a condition permitting Wyldewood Creek to terminate the Agreements if they cannot obtain mortgage financing for the construction of the project on such terms and conditions as are satisfactory to Wyldewood Creek in its sole discretion (the "**Financing Condition**"). The original date for the Financing Condition was November 30, 2020 (the "**Condition Date**").

THE PROJECT IS FURTHER DELAYED

13. In early 2020, soon after the majority of the pre-sale condominium units in the Wyldewood Project had been sold, Ontario was hit with the first wave of the COVID-19 pandemic. The advent of the COVID-19 pandemic had a significant impact on the Project, as it led to further delays in the ongoing processes whereby Wyldewood Creek was seeking approval from the Town and other government authorities.

14. On or about October 29, 2020, Wyldewood Creek delivered a letter to each of the Purchasers advising them of further delays in the progress of the Project as a result of the COVID-19 pandemic. Wyldewood Creek also advised that they projected occupancy for the Project starting at the end of 2022, but that it was impossible to accurately predict these dates until construction started.

15. On or about November 23, 2020, Wyldewood Creek delivered a letter to each of the Purchasers advising that it would be unable to meet the First Tentative Occupancy Date as defined in the Addendums. In this letter, Wyldewood Creek extended the First Tentative Occupancy Date and set December 30, 2022 as a Tentative Occupancy Date.

16. By April 2021, Wyldewood Creek had finished significant revisions to the Project's plans and approvals processes to comply with new conditions imposed by the NVCA. However, and despite some progress, the Project remained in a difficult position.

17. On or about April 24, 2021, Wyldewood Creek learned that the Town was considering passing a by-law freezing the issuance of building permits due to concerns that there was insufficient water capacity to service the growth that the Town had experienced. This came as a shock to Wyldewood Creek.

18. On April 26, 2021, the Town passed an Interim Control By-Law (“**ICBL**”) freezing the issuance of any building permits in the Town. The ICBL had the effect of preventing Wyldewood Creek from obtaining building permits required before commencing construction. This obviously posed a significant impediment to Wyldewood Creek’s ability to proceed with the Project.

19. After the ICBL was passed, there were significant personnel changes in the role of the Town’s Director of Planning. These changes caused further delays as the new Director of Planning was brought up to speed on all the ongoing planning matters.

20. On or about May 25, 2021, Wyldewood Creek delivered a letter to each of the Purchasers updating them on the status of the Project. In this letter, Wyldewood Creek described the history of delays in the Project and provided information about the ICBL. In this letter, Wyldewood Creek made it clear that there was simply no way to predict if or when the Project might be completed, and that construction might not even start for years. Wyldewood Creek made it clear that it was continuing to assess the overall viability of the Project.

21. In this letter, Wyldewood Creek also set out the options that were available to the Purchasers. They could “wait and watch what transpires in these next few months”, in which case Wyldewood Creek’s representatives would reach out to provide documents for their review and signature, or they could rescind the Agreements and receive the full repayment of their Deposits.

THE EXTENSION OF THE CONDITION DATE

22. On or about June 21, 2021, a representative of Wyldewood Creek delivered draft amending agreements to the Purchasers. The draft agreements, which were executed by each of the Purchasers for their respective Agreements, provided that the Condition Date would be extended to November 30, 2021 (the “**Extension Agreements**” and each an “**Extension Agreement**”). The

Extension Agreements permitted Wyldewood Creek to terminate the Agreements at any time prior to November 30, 2021, if satisfactory financing could not be obtained (the “**Extended Condition Date**”).

23. Subsequent to the Purchasers’ execution of the Extension Agreements, Wyldewood Creek made significant and renewed efforts to push for the Project to receive all of the necessary approvals, including an exemption from the ICBL, so that the Project would not have to be cancelled before the Extended Condition Date. Wyldewood Creek had made a formal request to the Town for an exemption from the ICBL, which was rejected. Wyldewood Creek also wrote to the Premier of Ontario seeking intervention, which effort was not successful. Wyldewood Creek communicated directly and regularly with the Town in an effort to expedite the Project’s approvals notwithstanding the ICBL. These efforts were all rebuffed.

24. Before the expiry of the Extended Condition Date, on November 29, 2021, Wyldewood Creek advised the Purchasers that as a result of the ICBL moratorium, the Project would be cancelled and the Agreements were therefore terminated pursuant to the Financing Condition.

NO CLAIM AGAINST BRANDY LANE

25. The Defendants plead that Brandy Lane is not a party to any of the Agreements and has no contractual or other relationship with any of the Purchasers. As such, Brandy Lane owes no contractual or other obligations or duties to the Purchasers. The Defendants deny that Brandy Lane is the “undisclosed principal” of Wyldewood Creek or that Wyldewood Creek is the “bare trustee” of Brandy Lane, as pleaded in the Statement of Claim.

26. The Defendants plead that the Plaintiff’s claims against Brandy Lane disclose no reasonable cause of action, may prejudice or delay the fair trial of the action, are scandalous,

frivolous or vexatious and/or an abuse of the process of the Court, and the Defendants hereby reserve the right to move to strike out those claims in their entirety.

NO BREACH OF CONTRACT

27. The Defendants fulfilled their contractual obligations to the Purchasers and consequently, there can be no claim for breach of contract.

28. The Defendants plead that the Extension Agreements are effective as amendments of the Agreements. Contrary to the Plaintiff's pleadings in the Statement of Claim, the terms of the Addendum are not statutory obligations of Wyldewood Creek. Once an agreement incorporating the Addendum is signed, the terms of the Addendum become contractual provisions subject to amendment by subsequent agreement. Wyldewood Creek therefore had the contractual right to cancel the Agreements, and the Project, at any time prior to the Extended Condition Date.

29. In the alternative, the Defendants plead that the execution of the Extension Agreements by the Purchasers constitutes a waiver. By executing the Extension Agreements, the Purchasers, in full knowledge of their rights arising from the original Condition Date, demonstrated a conscious and unequivocal intention to abandon those rights and to permit Wyldewood Creek to cancel the Agreements, and the Project, at any time prior to the Extended Condition Date.

NO UNJUST ENRICHMENT

30. The Defendants were not unjustly enriched at the Purchasers' expense and the Defendants were not deprived. Any funds held or other benefits obtained were pursuant to the Agreements, which the Plaintiff now seeks to enforce, and such Agreements therefore constitute the juristic reason for those benefits.

THE PLAINTIFF HAS SUFFERED NO DAMAGES

31. The Defendants deny that the Plaintiff (or the Purchasers) is entitled to any of the relief sought in the Statement of Claim. The Defendants further plead and rely upon the limitation of liability provisions in the Agreements, which limit Wyldewood Creek's liability to the return of Deposits as follows:

Notwithstanding anything contained to the contrary in this Agreement, but subject always to the Tarion Addendum, all rights, remedies and recourses of the Purchaser in connection with this Agreement and the transaction resulting therefrom (and whether arising, based or founded in contract, tort, equity or otherwise) for any default of the Vendor hereunder are limited solely to the return of the deposits paid by the Purchaser pursuant to this Agreement and the Purchaser shall have no remedy or claim whatsoever against the Vendor or its agents, nominees, trustees, directors, officers, shareholders or any other person, firm, corporation, partnership, limited partnership or other entity related to or associated with the Vendor for economic loss, expectation damages or any other damages whatsoever whether arising, based or founded in contract, tort, equity or otherwise. This provision may be pleaded by the Vendor and by its agents, nominees, trustees, directors, officers, shareholders or any other person, firm, corporation, partnership, limited partnership or other entity related to or associated with the Vendor as a complete defence to any such claim.

32. The Defendants plead that the Deposits were at all times held in trust by Wyldewood Creek's real estate solicitors, the law firm of Owens Wright LLP. The full amount of the Purchasers' respective Deposits were returned to the Purchasers (including the Plaintiff) after the cancellation of the Agreements and the Project. Therefore, any entitlement which the Purchasers could have had, which is denied, has in any event been satisfied.

33. In the alternative, the Defendants deny that the Plaintiff has suffered the damages as alleged in the Statement of Claim and put the Plaintiff to the strict proof thereof. The said damages are, in any event, excessive and too remote, and the Plaintiff has failed to mitigate such damages. If the Plaintiff has sustained any damages as alleged in the Statement of Claim, which is denied, those

damages are not caused or contributed to in whole or in part to any actionable act or omission on the part of the Defendants. Rather, the Plaintiff's damages were caused by his own conduct.

34. The Defendants deny that they behaved with a reckless, contemptuous or shameful disregard as pleaded in the Statement of Claim and plead that there is no basis for the Plaintiff's claim of punitive and exemplary damages.

35. The Defendants have no liability to the Plaintiff in respect of any cause of action alleged. The Plaintiff is therefore not entitled to an accounting or disgorgement, or any declarations as sought in the Statement of Claim.

36. The Defendants plead and rely upon the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, c. O.31 and the *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

37. The Defendants ask that this action be dismissed with costs.

March 27, 2024

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Court File No. CV-23-00709885-00CP

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