

Increasing defaults signal rise in court cases

In the world of condo presales, lawyers are no longer closing real estate deals, but litigating them instead

Andrew Petrozzi

More rental units on the market may be one side effect of the increasing number of residential condominium presale buyers who now face legal action from developers after defaulting on purchase contracts.

The number of lawsuits being filed by developers in B.C. Supreme Court has steadily increased since January and includes dozens of individuals and several developers of projects in the Lower Mainland, the Fraser Valley and the Okanagan. A smaller number of lawsuits have also been filed by purchasers that allege a developer is in breach of contract for material changes to the project.

None of these allegations have been proven yet in court.

The coming legal battles are a sign of the times, according to Lang Michener LLP's Steve Michoulas, chair of the real estate subsection for Vancouver of the Canadian Bar Association, B.C. branch.

"There are just a lot of buyers that don't want to close their deals due to the change in prices over the past 12 months," he said. With prices continuing to moderate, there are a lot of buyers looking at their presale agreements and realizing the prices no longer reflect today's market reality.

"All of these cases are unfortunate and disappointing, and obviously there is sympathy that goes out to buyers in a tough spot, but generally speaking, the court's job is to enforce the law and enforce the contract," Michoulas said.

BIV found that Amacon's Morgan Heights development, at least two Onni Group of Companies developments, Rempel Development Group's Vibe project in Chilliwack and 160 Lakeshore Development Corp.'s project in Penticton have been particularly hard hit. These developers have seen multiple purchasers in single projects fail to close and, in some cases, buyers of multiple units in single developments default. Other developers such as Bastion Coast Homes Ltd. and Coast Development Partnership, Solterra (Streams) LP, Hemlock Drive Development LP and Ah Ten Holdings Ltd.; and Evo Developments Ltd. are also finding themselves in court.

There is no question there are going to be more lawsuits until a firm price level is established, according to Glenn Leung, a partner in McCarthy Tétrault LLP's real property and planning group, who is acting on behalf of developer clients.

"You've got some people who just can't get financing. They can't sell their other homes or their equity in their existing homes has decreased and they can't close," he said. "On the other end of the spectrum, you have a bunch of people who are speculators."

Some developers are starting to investigate the possibility of mass rentals of units that don't close in cases where numerous purchasers are defaulting in a single project, said Leung.

"A number of developers who have projects that have 50% to 60% of units that don't close, one option might be to rent them for a while until the market improves. That's one thing that some clients have come in and asked about the possibility of doing."

Tougher litigation

Another option for developers facing mass defaults in a single project is a more aggressive litigation campaign, Leung said. Developers have commitments to lenders and cannot afford to let purchasers walk away from contractual obligations. A hardship defence is unlikely to succeed for purchasers facing legal action, he said.

"People will advance defences as to why they didn't close. They will look for every possible legal reason, or potential legal reason, why the contract shouldn't be enforced against them," said Leung.

"The statement of defence won't say it's hardship because you can't win on that, but they will allege defaults by the developer under the contract or under the statutory regime, the Real Estate Development Marketing Act."

Leung believes judges will determine such suits on a case-by-case basis. Some will "scream out" to have the defence succeed because of the way the purchaser was treated and the individual circumstances, he acknowledged.

However, Leung suspects most of the defences raised will appear "desperate" and judges will know it.

"Courts are smart. They know why this happening. They know the circumstances to why this is happening. They are not going to be fooled," he said. His current advice to developers: make sure you build what you said you were going to build. Cutting corners and/or making material changes could cumulatively lead to the court finding in the purchaser's favour.

Developers need to communicate early and often with purchasers to make sure they understand their liability will not necessarily be limited to the amount of the deposit if they default, according to Leung. They also need to be sure purchasers are doing everything they can to sell their current home at a reasonable price and/or are pursuing all available sources of financing and assist them if possible. Helping assign buyers' contracts with the help of experienced realtors or sourcing potential tenants for purchasers can also help avoid a legal showdown, according to Leung.

"If market prices continue to decline, this problem is going to get worse until the projects that are on the books are finished or prices start going up again." •

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