

PROFESSIONAL COURT REPORTERS INC.

Court File No. 04-CV-277412 CP

SUPERIOR COURT OF JUSTICE

B E T W E E N:

SOLLY LEWIS and HERSL KALIF

Plaintiffs

- and -

CANTERTROT INVESTMENTS LIMITED, SANDOR HOFSTEDTER,
MARK SAMUEL MANDELBAUM, GEORGE HOFSTEDTER, LARRY FROM,
ALEX LEWIN, HELEN GORENDER and NORMAN HILL REALTY INC.

Defendants

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This is the Examination of a Witness Pursuant to Rule 39.03
of HERSL KALIF herein, taken verbatim before PROFESSIONAL
COURT REPORTERS INC., 4950 Yonge Street, Suite 802, North
York, Ontario, M2N 6K1, on the 15th day of June, 2005.

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A P P E A R A N C E S:

S.S. MARR, ESQ.) - for the Plaintiffs
V. KATZ, ESQ.)

A.I. SCHEIN, ESQ.) - for the Defendants
S. NADLER, ESQ.)

PROFESSIONAL COURT REPORTERS INC.

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HERSL KALIF, Affirmed

EXAMINATION BY MR. NADLER:

1. Q. Good morning. Could I get your name for the record?

A. Pardon me?

2. Q. Can I get your name for the record?

A. Hersl Kalif.

3. Q. And you currently reside at 745 New Westminister in Thornhill?

A. Correct.

4. Q. In what suite?

A. Apartment 202.

5. Q. How old are you?

A. 67.

6. Q. Are you still working? Are you retired?

A. I'm retired.

7. Q. For how many years?

A. Two years ago.

8. Q. And prior to your retirement, what was your occupation?

A. Mechanic.

9. Q. How long have you worked as a mechanic?

A. Maybe 45 years.

10. Q. Did you own your own auto body shop?

A. No, no.

11. Q. And I understand that your wife's name is Mary Kalif?

A. Yes.

12. Q. And is she retired?

A. Yes.

13. Q. What did she do for work?

A. She used to cook.

14. Q. For a catering company? A restaurant?

A. A restaurant in Bay Company. She used to, but she quit a long time ago. Health problem.

15. Q. Can you describe to me your educational background?

A. I finished grade 9.

16. Q. In what country?

A. Israel.

17. Q. In Israel. And your wife? Did she go to school?

A. Yes. I think she finished grade 9 also. I think so. I'm not sure now.

18. Q. Is your wife also from Israel?

A. Yes. We grow there. We born in Iraq.

19. Q. You were born in Iraq?

A. Yes.

20. Q. And you were raised in Israel?

A. Yes.

21. Q. And when did both of you emigrate to Canada?

A. 1966.

22. Q. Have you ever served as a member of the board of this building?

A. No.

MR. NADLER: Mr. Marr, if I could ask you to show the witness tab B of Mr. Lewis' affidavit?

BY MR. NADLER:

23. Q. I take it this is an excerpt of the Agreement of Purchase and Sale that you and your wife signed in respect of your unit in this building; is that right?

A. Right.

24. Q. And you signed this in around February 2002; is that right?

A. Correct.

25. Q. But I take it the balance of your Agreement of Purchase and Sale would be similar, at least in the form, to the one attached at tab A -- the one contained at tab A?

MR. MARR: That's my understanding, counsel, yes.

My understanding is that all the purchasers signed an agreement in the same form, subject to the differences that are typed in or handwritten.

BY MR. NADLER:

26. Q. Was this the first time that you and your wife purchased a condominium unit?

A. Yes.

27. Q. Prior to then, you lived in a house; is that right?

A. Yes.

28. Q. And why were you and your wife looking to purchase a condominium?

A. I was going to retire in 2003, and I had a mortgage on 164 Gailcrest Circle where I used to live. So, I thought the money that I make, it will be enough for me to pay the condominium.

29. Q. In other words, you were able to afford the condominium more readily than purchasing a house?

A. Yes. Because I figure out the money I'm going to make, I have to pay the mortgage. This way, whatever is left, I bought the condominium cash. So, I won't have difficulty to carry it. I'm not working now, and my wife's not working.

30. Q. And that's also reflected in the fact that a condominium -- the purchase price for a condominium would have been cheaper than to buy a house? In other words, you were able to pay for your condominium in cash; is that right? The whole thing?

A. Yes.

31. Q. Not take out any mortgage?

A. No.

32. Q. Right. You would not have been able to do that with a house; is that right?

A. No.

33. Q. Okay. At the time that you purchased this condominium unit, prior to then, were you looking at other condominium buildings in the city?

A. No. Just through the ad, and I saw the building, because I live around there, and I liked the location, because my wife's not driving. So, I decided to go there.

34. Q. Okay. So, prior to then, you lived in a house nearby?

A. Yes.

35. Q. But the location of this building was better than where your house was located?

A. No, no.

36. Q. It was around the same type of ---

A. Same area.

37. Q. But you were looking in that area?

A. I was looking in that area, Promenade, and this, and that.

38. Q. So, because it's close to the Promenade Mall,

you ---

A. Yes.

39. Q. --- you and your wife could walk to easily?

A. Yes.

40. Q. It's also close to public transportation?

A. Yes. Both direction. Promenade and ---

41. Q. For buses?

A. Both direction goes to the Promenade. So, we are not far from there -- each other.

42. Q. And that was important to you? Was that important to you, to live near the Promenade Mall?

A. No, not really. But we find that brand new building. We prefer brand new building.

43. Q. But it was important to you -- but you found this building attractive because it was within walking distance to the Promenade Mall; is that right?

A. No. Because it's brand new. That's the only reason I took it.

44. Q. Well, there are a lot of brand new buildings in the city. You could have gone to Etobicoke. There are brand new buildings, I'm sure, being constructed there.

A. I was looking better for me for the budget, how much I can afford to pay. I can't go more than I can pay. Whatever left the money, that's what I bought the condominium. If it was more, I wouldn't buy it.

45. Q. But once again, this building was the only building that you looked at; is that right?

A. Yes.

46. Q. You didn't compare any other buildings ---

A. No.

47. Q. --- as far as purchase price, or what you have you?

A. No.

48. Q. No.

A. The price was right for me.

49. Q. And you grabbed it?

A. Yes.

50. Q. And it was also right next to where you were living previously?

A. Yes.

51. Q. And you were comfortable in that environment -- in your surroundings?

A. Yes.

52. Q. Yes. Anything else attract you to this building? The layout of your unit? The view from your unit?

A. No. Not much, no.

53. Q. So, the purchase price of your unit was very important to you; is that right?

A. Yes.

54. Q. At the time you bought your unit, did you have any friends or family living in the building?

A. No. After my daughter got divorced, she come to that building. She bought a unit there, because she wanted to live beside me, because she have a daughter.

55. Q. Do you personally know if any of the other 120 unit owners had friends or family living in the building at the time they decided to buy their units?

A. No.

56. Q. And I assume that you would not personally know why each of the other 120 unit owners decided to buy their units; is that right?

A. Pardon me?

57. Q. You would not personally know why each of the other 120 unit owners decided to buy their units?

A. No.

58. Q. And I take it, therefore, you don't know to what extent, or whether maintenance fees influenced each of the other 120 buyers to buy their units?

MR. MARR: He doesn't ---

MR. NADLER: Let me repeat the question.

MR. MARR: Listen carefully. If you don't understand, tell him that. Just listen to his question.

MR. NADLER: That's perfectly right.

BY MR. NADLER:

59. Q. I take it that you would not know to what extent or whether maintenance fees influenced each of the other unit owners in the building to buy their units?

A. When they buy it?

60. Q. Yes.

A. No, I don't.

61. Q. If I could ask you to turn, please, to tab E of the Motion Record? By the way, do you recognize this document at tab E?

A. No.

62. Q. You don't recognize the document at tab E?

Okay, well ---

MR. MARR: Wait. He only looked at the first page. Let him look at the whole document.

MR. NADLER: I thought when he said no, that he answered my question.

MR. MARR: Well, he had only -- I'm telling you he had only looked at page 1. Now I'm showing him page 40. I'd like him to look through it. He's just asking if you recognize it, if you've seen it.

Look at each page, Mr. Kalif, before you answer.

THE DEPONENT: I'm not sure.

BY MR. NADLER:

63. Q. Okay. Well, he's not sure as to whether he recognizes the budget statement found at tab E. I take it, therefore, you don't know whether or not you received this document?

A. I could receive it, but at that time I was working, and my wife, she used to look on all those things. I wasn't involved with it until I finished working in February 2003. Then I start to get involved and to check the things around.

MR. MARR: If it assists at all, I can tell you that Mr. Kalif's document that he's given to me includes the disclosure. There's no dispute that this witness got it. It's in his possession, if that helps. They're two different things, but I'm just making it clear ---

MR. NADLER: I think you're trying to give evidence here that the witness himself is not prepared to give.

MR. MARR: No. You asked him if he recognized it. You didn't ask him if he had it in his possession.

MR. NADLER: Well, I'm asking him if he recalls ever having received it, and he's saying he can't recall that, and now you're trying to say

otherwise.

MR. MARR: No. I said that -- I said it's in his possession.

BY MR. NADLER:

64. Q. Okay. I take it, therefore, that given that you were working, and what have you, until 2003 ---

A. Yes.

65. Q. --- that you likely did not read this document until around that time?

A. It could be I read it. I can't remember.

66. Q. It could be that you read it, but you can't remember?

A. I have it probably for sure. If everybody have it in apartment the statement of the budget, everybody got in his door, but my wife taking care of it. She used to read it.

67. Q. So, she's the one ---

A. She went to the meeting. She went to this. I never been in a meeting in 2003. I never been in a meeting because I worked night. I used to work night shift.

68. Q. The Agreement of Purchase and Sale that you and your wife signed at tab B ---

A. I don't understand what he's saying.

MR. MARR: He's taking you back to this document,

the one you signed which you looked at earlier. He hasn't asked a question yet.

BY MR. NADLER:

69. Q. You signed this document in February 2002. My question to you now is did you read this document ---

A. When I purchased the unit?

70. Q. Yes.

A. Oh, yes.

71. Q. When you signed this document, did you read it?

A. Yes. Yes.

72. Q. Okay.

A. I didn't understand your question. When I bought it, yes.

73. Q. So, you read ---

A. I took it to the lawyer.

74. Q. You took it to the lawyer?

A. Yes.

75. Q. You had a lawyer?

A. Yes.

76. Q. Okay. And you read it?

A. The lawyer explained to me as much as he can.

77. Q. Okay. And I take it you needed some explanation, because English is not your first language; is

that right?

A. No.

78. Q. Okay. And ---

MR. MARR: No, English is not your first language. That's what you're saying?

THE DEPONENT: No.

MR. NADLER: That's what I heard him say.

BY MR. NADLER:

79. Q. So, even had you read it, it would not have made much sense to you?

A. I wouldn't say no, yes. I said a little bit I understand.

80. Q. A little bit you understand. Did you review the budget statement found at tab E with your lawyer?

A. Yes.

81. Q. Did you discuss that with him?

A. Yes. He said ---

MR. MARR: Don't tell him what he said to you. I won't let you answer that.

THE DEPONENT: Yes, okay.

MR. MARR: But you did review it with him. You can say that.

THE DEPONENT: Yes.

BY MR. NADLER:

82. Q. Okay. Now, this tab E document, this budget statement found at tab E, earlier you had mentioned, you can't say for certain, as to whether or not you received this budget statement.

A. Pardon me?

83. Q. Let me ask you the question a different way. I'm going to ask the question again. Did you receive the budget found at tab E of the Motion Record?

A. Yes.

84. Q. And when would that have been?

A. When I purchased the unit.

85. Q. Is that before you signed your Agreement of Purchase and Sale, or after you signed?

A. Before.

86. Q. Before. And who provided it to you?

A. Who gave it to me? The salesman. What's her name? Helen?

87. Q. Helen Gorender?

A. Yes, I understood. She's the only one there, I guess.

88. Q. Did you review this document in detail, or did you glance at it, or did you rely on your wife to look at it for you?

A. No, I rely on the lawyer.

89. Q. You relied on the lawyer to look at it for you?

A. That's right.

90. Q. Okay. I take it you would not personally know to what extent the other 120 buyers reviewed this document, whether they glanced at it, whether they reviewed it in detail, whether they didn't even look at it; you would not know?

A. No.

91. Q. Did you understand that given the title of the document found at page 39 of the Motion Record -- can I ask you, counsel, if you can assist the witness to find page 39 of the Motion Record?

MR. MARR: Yes.

MR. NADLER: Thank you.

BY MR. NADLER:

92. Q. Given the title, it says, "Budget statement for the common expenses for the year following registration of the condominium." Do you see that?

A. Yes.

93. Q. So, I take it that you understood from that title that the budget estimated what the common expenses would be during the first year only following registration?

A. Right.

94. Q. Okay. Did you also understand that if there was a deficiency in the first year, the developer would cover that deficiency?

A. Yes.

95. Q. Did you also understand that that guarantee related only to the first year? It covered only the first year. It did not cover any subsequent years?

A. Yes.

96. Q. Okay. Was any of what I just -- what we just went through, explained to you, that it was an estimate? The budget estimated the first year common expenses only, that there was a guarantee that covered only the first year? Was any of this explained to you by anybody?

A. When I purchased the unit, I understand the first year, or whatever it is, yes.

97. Q. How did you come to that understanding?

A. Because it's common sense. Everything is going to go up. I thought it going to go up by 3 or 4 per cent, or 5 per cent. That's what I understand.

98. Q. So, you understood the maintenance fees would go up every year?

A. Yes.

99. Q. How did you come to that understanding, because prior, you were living in houses. You weren't living in a condominium.

A. Same thing in a house. They used to raise my taxes too, and the hydro. I understand that.

100. Q. So, you understood every year maintenance fees go up?

A. That's right.

101. Q. Okay. So, you understood, therefore, that this budget statement was merely a rough estimate of what the first year expenses would be?

A. What do you mean?

102. Q. You understood, from what you told me, that this budget statement provided only a rough estimate of what the first year expenses would be?

MR. MARR: That's not a fair question. You're putting words in his mouth. He didn't say "rough estimate". You did.

MR. NADLER: Well, that's my question.

MR. MARR: But you're suggesting that -- your question seems to be summarizing evidence he hasn't given. So, you can't ask him as if it comes out of his evidence. If you want to ask him that, ask him. But don't suggest that it comes out of his earlier evidence. He didn't use the word "rough estimate". You did.

MR. NADLER: My question was a follow up question. I find it conspicuous that you jumped in

with regard to that question, but I'm going to ask the question one more time.

MR. MARR: I'll jump in any time I think the question is improper.

MR. NADLER: That is your prerogative.

MR. MARR: Up until now, I didn't think it was.

MR. NADLER: That's your prerogative.

BY MR. NADLER:

103. Q. So, you understood, therefore, and this is my question, that the budget statement which provided an estimate of the first year's expenses was a rough estimate of what those expenses would be during the first year?

A. No. No, I don't.

104. Q. Did you ever have any discussions with that sales agent, Ms. Gorender, regarding your unit, regarding maintenance fees, regarding anything?

A. Yes. She told me \$0.32 a square foot including heat.

105. Q. But you understood that that \$0.32 was not a firm number? It was going to go up every year?

A. Yes.

106. Q. And what else did you discuss with Ms. Gorender? Did you have any other discussions with her?

A. Only according to whatever to buy the unit. I

wanted to know how much I pay every month, how much it will cost me, how much this, and that's what she told me, \$0.32 per square foot.

107. Q. Did your wife have any discussions with Ms. Gorender that you were not involved in?

A. No.

108. Q. Did you have your own real estate agent assist you and your wife in your purchase of this unit in the building?

A. No.

109. Q. And before buying your unit, did you have any discussions with anyone else regarding maintenance fees in a condominium building? Friends, family, accountant, et cetera?

A. No.

110. Q. And I take it you would not personally know what each of the other 120 buyers were advised regarding maintenance fees by anyone else?

A. No.

111. Q. And therefore, you would not personally know what each of the other 120 purchasers understood in their minds as to this budget statement at the time they decided to buy their units?

A. No.

112. Q. So, you would not know whether any of them

understood that the budget provided only a rough estimate of what the maintenance fees would be during the first year?

A. Say that again?

113. Q. So, you would not know whether any of the other buyers understood that this budget statement provided only a rough estimate of what the maintenance fees would be during the first year?

MR. MARR: He's already answered he doesn't know what they understood. So, there's no point to that follow up question.

BY MR. NADLER:

114. Q. Do you know what the ages are of the other unit owners? Do they vary from a certain age to a certain age?

A. Well, I think that half of them maybe are on fixed income. I believe.

115. Q. I'm sorry?

A. Maybe near -- probably they are -- some of them, they are on fixed income.

116. Q. No, but I'm asking you about ages. When you look in the elevator and you walk around, are some in their 20's, and some in their 70's?

A. They're old, young, and ---

117. Q. Old, young, et cetera? Okay.

MR. MARR: But just so that I'm clear what you said, I thought you said half were on fixed income?

Is that what you said?

THE DEPONENT: Yes. Yes. They are most of them on fixed income.

MR. MARR: You mean seniors?

THE DEPONENT: Yes. I believe. I saw them in the elevator.

MR. MARR: No, I don't think we actually heard what you said. That's all.

BY MR. NADLER:

118. Q. Have you done a survey among all the unit owners as to what their income level is every year to come to that conclusion?

A. No.

119. Q. So, you're just speculating?

A. Yes.

120. Q. Okay. You signed your Agreement of Purchase and Sale in February 2002?

A. Right.

121. Q. Do you recall when your transaction, your purchase, closed?

A. It was 6/6/2002.

122. Q. So, June 6th, 2002?

A. Yes.

MR. NADLER: Mr. Marr, I'm going to hand up a copy of the parcel register for the witness' unit.

It shows a different date of August 6th, 2002 as far as registration of the transfer.

MR. MARR: They're showing from the Land Registry Office that you closed August.

THE DEPONENT: Oh, yes. The closing was in August. I thought you said the moving.

BY MR. NADLER:

123. Q. So, you took possession of your unit in June?

A. Yes.

124. Q. And you closed in August?

A. Closed in August. That's right.

125. Q. And if you received an amended budget statement that showed a higher maintenance fee number prior to when you closed, would you have walked away from the deal? Let's say it went up 10 per cent?

MR. MARR: Don't answer that. I'm instructing him not to answer that. It's not relevant for the reasons I said in Mr. Lewis' examination. It's the same question.

REFUSAL NO. 1: To advise if Mr. Kalif received an amended budget statement that showed a higher maintenance fee number prior to when he closed, would he have walked away from the deal.

BY MR. NADLER:

126. Q. You'll agree with me that the market value of your unit is worth more today than what you paid for it?

MR. MARR: Don't answer that. That's not relevant for the certification motion.

REFUSAL NO. 2: To advise whether Mr. Kalif agrees that the market value of his unit is worth more today than what he paid for it.

BY MR. NADLER:

127. Q. Do you know what the value of your unit is today?

MR. MARR: Don't answer that.

REFUSAL NO. 3: To advise if Mr. Kalif knows what the value of his unit is today.

BY MR. NADLER:

128. Q. Could I ask you to turn to page 45 of the

Motion Record? And you'll see half way down under the heading "Notes to Schedule C", item number one says "concierge"?

MR. MARR: Do you see that?

THE DEPONENT: Yes.

MR. MARR: Okay. Wait for his question.

BY MR. NADLER:

129. Q. And it says that concierge will be for 12 hours a day, seven days a week? Do you see that?

MR. MARR: That's not quite what it says. It says this represents the cost of a concierge for 12 hours per day, seven days per week, at approximately \$13.00 per hour.

MR. NADLER: Okay. So, I think we're all in agreement that that's exactly what it says. I agree with you.

BY MR. NADLER:

130. Q. Were you aware at the time that you bought your unit that the budget provided for a fee for concierge of 12 hours a day?

A. Yes.

131. Q. I take it you would personally not know what any of the other -- what each of the other 120 buyers --

whether each of the other 120 buyers recognized that the budget provided only concierge service for 12 hours a day?

A. No.

132. Q. I'd ask you to turn to tab G of the Motion Record. It's a letter from Percel Inc. to H&R Developments dated June 20, 2002. Have you ever seen this letter before?

A. Yes.

133. Q. When?

A. They bring it to my house.

134. Q. Who brought it to your house?

A. The member of the board. They put in -- every door they put in letter. Percel give letter.

135. Q. I'm asking about this specific letter. Did members of the board put this in your mailbox? This specific letter?

A. I don't remember.

136. Q. Take a moment to look at the letter, and tell me if you ever recall having received that letter.

A. No.

137. Q. Okay. So, today is the first time you're looking at the letter?

MR. KATZ: He says he doesn't recall.

MR. NADLER: I'm asking him a follow up question.

BY MR. NADLER:

138. Q. Is today the first time that you have seen that letter?

A. Yes, I see it, but I don't remember I got it.

139. Q. Okay. Your maintenance fees for your unit went up?

A. Yes.

140. Q. Is there any reason why you didn't sell your unit?

MR. MARR: Don't answer that question.

REFUSAL NO. 4: To answer why Mr. Kalif did not sell his unit after the maintenance fees went up.

BY MR. NADLER:

141. Q. Is there anything that would have prevented you from selling your unit?

MR. MARR: Don't answer that question. It is not relevant to the issues on the motion.

MR. NADLER: Well, we all have our views in that regard.

REFUSAL NO. 5: To answer if there was anything that prevented Mr. Kalif from selling his unit.

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MR. NADLER: Subject to the refusals, I don't believe there were any undertakings given, those are my questions.

* * * * *

I hereby certify the foregoing to be the Examination of a witness pursuant to Rule 39.03 of HERSL KALIF herein, taken before the offices of PROFESSIONAL COURT REPORTERS INC. on the 15th day of June, 2005.

CERTIFIED CORRECT:

Shirley Chang,
Stenomask Verbatim Reporter

Photostatic copies of this transcript are not certified and have not been paid for unless they bear the original signature of Shirley Chang, and accordingly are in direct violation of Ontario Regulation 587/91 Courts of Justice Act, January 1, 1990.

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