

**NOVA SCOTIA COURT OF APPEAL**

**Citation:** Tabensky v. Hope, 2008 NSCA 116

**Date:** 20081211

**Docket:** CA 298110

**Registry:** Halifax

**Between:**

Marie Tabensky

Appellant

v.

Donald Bernard Hope and Rosamond Hope

Respondents

**Judge(s):** MacDonald, C.J.N.S., Saunders and Fichaud, J.J.A.

**Appeal Heard:** December 11, 2008, in Halifax, Nova Scotia

**Written Judgment:** December 18, 2008

**Held:** Appeal is dismissed per reasons for judgment of Fichaud, J.A.;  
MacDonald, C.J.N.S. and Saunders, J.A. concurring.

**Counsel:** Adam Rodgers, for the appellant  
Gregory MacIsaac, for the respondent

**Reasons for judgment:**

[1] This appeal involves the application of the *Statute of Frauds* to a conveyance of land.

[2] Mr. and Mrs. Hope sued Ms. Tabensky claiming title to land at River Denys Basin in Inverness County. Ms. Tabensky's Defence included reference to the *Statute of Frauds* R.S.N.S. 1989, c. 442 (as amended S.N.S. 2001, c. 6, s. 126):

10 The Defendant pleads the *Statute of Frauds* which states that no action shall be brought upon any contract or sale of land, or any interest therein, unless the promise, agreement or contract, upon which the action is brought, or some memorandum or note thereof, is in writing, signed by the person sought to be charged therewith or by some other person thereunto by him lawfully authorized.

[3] The parties submitted a stated case to the trial judge with an Agreed Statement of Facts supplemented by joint exhibits and discovery extracts. The Agreed Statement said:

The parties agree as follows:

- 1) In 1982, John and Marie Tabensky, spouses of each other, purchased lands (see Tab 1) in River Denys Basin, Inverness County, Nova Scotia, from Donald and Pearl Dodds for \$2,000.00.
- 2) In 1983, Donald Bernard Hope and Rosamond Hope were invited to enter a partnership called, A Group of Friends. This agreement is as in Tab 2 herein.
- 3) In 1983, a deed was prepared and signed from John and Marie Tabensky to the partnership, "A Group of Friends", See Tab 3.
- 4) Marie Tabensky asserts this deed, TAB 3, was never delivered as she still has possession of it.
- 5) The Hope parties built a cottage without a building permit and have occupied this cottage since 1984.
- 6) Both parties paid taxes until recent years equally.

- 7) John Tabensky died in 2003.
- 8) Both parties asked Lorne MacDowell, Q.C., for an opinion as to their legal status and his opinion is attached as Tab 4.
- 9) For purposes of this litigation, the property is not large enough to subdivide.
- 10) Both parties have had appraisals and they are attached as Tab 5.
- 11) On August 11, 2005, a letter was sent to Donald and Rosamond Hope from Donnie Doucet (on behalf of Marie Tabensky) instructing the Hopes to remove their cottage from the property by November 2, 2005.
- 12) The parties seek the following questions:
  - a) Does the *Statute of Frauds* apply to eliminate the Hope interest?
  - b) Does the Hope party have a revocable license as per *Wyatt v. Franklin*?
  - c) Does the deed to a “Group of Friends” create an enforceable interest?
  - d) Does either party owe the other funds?
  - e) Costs.

[4] The 1983 deed cited in ¶ 3 of the Agreed Statement was an exhibit. This was a warranty deed signed by both John Tabensky and Marie Tabensky together described as “Grantor” to: “A joint partnership, known as a ‘Group of Friends’, John Tabensky, President and Donald Hope, Treasurer of Port Hawksbury in the County of Inverness and Province of Nova Scotia” described as “Grantee”. The deed says it is dated in April, 1983. The affidavit and witness statement attached to the deed were signed on April 11, 1983. The deed says the consideration is one dollar.

[5] The agreement cited in ¶ 2 of the Agreed Statement also was an exhibit. The Agreement was dated March 31, 1983, was signed by John and Marie Tabensky

and Donald and Rosamond Hope, and says that those parties established a partnership known as “A Group of Friends”. An attached Schedule “B”, incorporated into the Agreement, identifies one of the purposes of the partnership as “to acquire lands and property from time to time in the name of ‘A Group of Friends’”.

[6] The judge, Justice Edwards of the Nova Scotia Supreme Court, described the issue as “whether the April, 1983 deed conveys title to the Hopes and, if so, the nature of that title.” [2007 NSSC 214]

[7] The judge reviewed the evidence and found:

I am satisfied that the intent of the deed was to give effect to the factors the parties had set out just a few weeks earlier in Schedule B of the Joint Partnership Agreement. There is no question but that the Tebensky’s [*sic*] intended that the Hopes would become co-owners of the property.

[8] The judge concluded that the deed conveyed a one-half interest in the subject land to Donald Hope on behalf of himself and Rosamond Hope, and a one-half interest to Mr. and Mrs. Tabensky, that each couple had a joint tenancy *inter se*, and a tenancy in common with the other couple. He found that the deed was delivered. He said: “The April, 1983 deed, read in conjunction with the Joint Partnership Agreement, satisfies the requirements of the *Statute of Frauds*”. Mr. Tabensky had died and Ms. Tabensky had obtained his interest by survivorship of their joint tenancy. The judge ordered Ms. Tabensky to execute a confirmatory deed in registerable form conveying a 50 percent interest in the property to Mr. and Mrs. Hope.

[9] Ms. Tabensky appeals. Her Notice of Appeal states only one ground:

Justice Edwards erred in law in deciding that the 1983 deed signed by John Tabensky and Marie Tabensky to “a Partnership known as a Group of Friends”, met the requirements of the *Statute of Frauds* RSNS 1989, c. 442.

No amendment has been sought.

[10] I confine my reasons to this sole ground of appeal related to the *Statute of Frauds*. I make no comment on other matters mentioned in argument and offer no view on other aspects of the judge's decision.

[11] The *Statute of Frauds*, s. 7(d) says:

7 No action shall be brought

...

(d) upon any contract or sale of land or any interest therein . . .

unless the promise, agreement or contract upon which the action is brought, or some memorandum or note thereof, is in writing, signed by the person sought to be charged therewith or by some other person thereunto by him lawfully authorized.

[12] The application of the *Statute of Frauds*, its requirement for a memorandum signed by the party to be charged with the conveyance of land, and the doctrine of part performance were reviewed by (then) Justice Clarke in *Deacon v. Adams* (1982), 55 N.S.R. (2d) 218 (TD) at ¶ 42-45 and by Justice Hallett in *Carvery v. Fletcher* (1987), 76 N.S.R. (2d) 307 (TD) at ¶ 3-19. I will not repeat their comments.

[13] Briefly, the purpose of the *Statute of Frauds*' provision for land was to protect against perjured evidence to support a conveyance of land. A sufficient memorandum signed by the parties to be charged with the conveyance, in this case Mr. and Mrs. Tabensky, fulfills the purpose and satisfies the *Statute of Frauds*. To be sufficient, the signed memorandum may comprise multiple documents, need not itself be a contract or conveyance or be in any particular form, need not contain all the agreed terms, but must contain the contract's essential terms by identifying the parties, the property being conveyed and the consideration. Fridman, *The Law of Contract*, Carswell (4<sup>th</sup>) pp. 230-36; McCamus, *The Law of Contracts* (Irwin Law 2005), pp. 170-174.

[14] Mr. and Mrs. Tabensky signed the April 1983 deed of the subject property. They also signed the Partnership Agreement of March 31, 1983 confirming their intent to own lands together with Mr. and Mrs. Hope. The pertinent provisions of

the deed and agreement, summarized above, include the essential terms. In particular, to respond to a submission by the appellant, the Partnership Agreement identifies the four individuals who comprise the Group of Friends, the grantee in the deed. The trial judge made no error in his ruling that these documents were sufficient memoranda to satisfy the *Statute of Frauds*.

[15] I would dismiss the appeal without costs. The respondents' pleadings in the Supreme Court and factum to the Court of Appeal afforded little if any assistance to the court. As did the trial judge, I would leave each party to bear his or her own costs.

Fichaud, J.A.

Concurred in:

MacDonald, C.J.N.S.

Saunders, J.A.