IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Knox v. Maple Leaf Homes, 2002 NSSC 275

Date: 20021219
Docket: SH 154845
Registry: Halifax

Between:

Ronald B. Knox

Plaintiff

v.

Maple Leaf Homes;
Birchill Home Sales Ltd.; Brian Charlton;
Dennis Liveley; and Richard Murtha

Defendants

Judge:	The Honourable Justice Arthur J. LeBlanc
Heard:	February 25, 26, 27, 28 March 1, May 21, 22, 23 24, 2002, in Halifax, Nova Scotia
Counsel:	Alexander S. Beveridge, for R. Murtha G. Michael Owen, for Burchill Home Sales Ltd. Ronald B. Knox, for self

By the Court:

[1] The Defendants, Birchill Home Sales and Richard A. Murtha seek a non-suit in an action commenced against them by the Plaintiff, Ronald Knox.

[2] Mr. Knox, who is unrepresented, claims damages from the Defendants for breach of contract, negligence, fraud, coercion and theft, in relation to his purchase of a modular home from Birchill in October, 1998. Mr. Murtha was Mr. Knox's lawyer with respect to the purchase.

FACTS

[3] By contract dated October 1, 1998, Mr. Knox agreed to buy a modular home ("the house") from Birchill. The price was listed in the contract as $76,200 plus HST of $11,430, for a total of $87,639. Birchill agreed to accept a trade-in of Mr. Knox's mobile home as a credit in the amount of $30,000. There were also credits for GST rebate ($1920.00) and PST rebate ($1143.00), and a discount of $567.00. Thus the balance due was $54,000. The house would be built by Maple Leaf Homes. The estimated closing date was December 4, 1998. The Birchill representative with whom Mr. Knox primarily dealt was a salesman, Dean Downey.

[4] The contract was subject to several conditions, namely:

- Bank and CMHC approval
- Birchill management approval
- HRM approval
- Lawyer approval

[5] In the contract Birchill agreed to deliver the house, provide an onsite crane, finish plumbing and electrical work, see to the excavation and foundation preparation, provide a location certificate and building permits, install steps with landings at both exits, clear the lot, provide a warranty, do drywalling (labour and materials), and provide and install the bathroom fixtures. The contract also stated "all building materials to finish basement provided by Birchill outside walls only. Basement plugs & outlets (12 total) by Birchill." The final notation under the list of services included was "carpet and underlay basement".

[6] The excavation was to be done by Dennis Lively Excavators. The description of the excavation work in the contract was "dig, backfill with on site material, gravel driveway. Water & sewer connections."

[7] The contract stated that finish work would be done by the purchaser. Mr. Knox's obligations in this respect were set out in Schedule "A", which stated, in part:

> Details of finish work provided by customer. (Main floor)
> Carpet and or cushion floor labour (seaming etc.)
> All initial crackfilling & nailpops due to stress.
> Basement steps installed (materials provided).

Installation of kneewall windows

[8] Schedule “A” also made Mr. Knox responsible for repairs to roof shingles, installing intermodular doors and door frames, adjustments to doors installed at the factory, and laying sods. Birchill would provide the sods.

[9] On November 18, 1998, Darlene Knox, the Plaintiff’s spouse and a Third Party in this action, paid a deposit of $5,000.00 to Birchill.

[10] Before the house was delivered, it became necessary for Mr. Knox to switch lots. The new lot, it appeared, required fill. By an addendum to the contract dated December 1, 1998, Mr. Knox agreed to pay for up to $900.00 worth of fill at $45.00 per load. Birchill estimated that about 20 loads would be required.

[11] The house was delivered on December 29, 1998, after Dennis Lively did the excavation and installed the footings. There was no cutout for a back basement door in the foundation.

[12] As it happened, the house was not ready until the end of January. Mr. Knox moved into the house with his family several days before the closing, at the end of January or beginning of February, after finishing the basement. This led to a dispute between the parties, with Birchill threatening to hold Mr. Murtha personally responsible for the early move-in. Mr. Knox maintains that Dean Downey actually told him to move in early, and that Mr. Murtha advised him to do so if Birchill approved. While Mr. Knox says he was pressured by Mr. Downey to move in early, he agreed that there was no reason he had to move out of his mobile home. Several days after he moved in, Dean Downey called Mr. Knox and told him that he was trespassing, but that there would be no problems if the closing happened soon.

[13] On February 5, 1999, Mr. Murtha wrote to Brian Charlton, Birchill's lawyer, and set out the following deficiencies:

> 1. The gravel driveway is not acceptable. It is clearly uneven with a number of potholes and areas that have no gravel whatsoever. This must be corrected.
>
> 2. There are four electrical receptacles not working. The basement light does not work in the entrance from upstairs. Each of these electrical matters perhaps are simple corrections which can be done without difficulty by your firm electrician.
>
> 3. The upstairs toilet has a defective crack in it. It will most likely have to be replaced. The downstairs toilet has no seat cover.

4. In the downstairs part of the dwelling there are six doorway carpet bar that have never been provided or installed.

5. Backflow valve for basement not installed.

[14] The deficiencies set out in Mr. Murtha's letter were identical to those listed by Mr. Knox at a meeting with Mr. Murtha at the house on the closing date, which was entered as Exhibit 18. All of these deficiencies were rectified.

[15] The transaction closed on February 5, 1999. The final adjustments showed a total price of $87,716.25. Mr. Knox was credited the following amounts:

1. Credit for mobile home	29,899.19
2. Cash deposit	5,000.00
3. GST rebate	1,920.00
4. PST rebate	1,143.00
5. Discount	567.00
6. Electrical credit	379.00
7. Furnace credit	2,500.00
TOTAL CREDITS TO PURCHASER	$41,408.19

[16] Mr. Murtha retained $450.00 in trust for backfill and $1,000.00 for sodding that remained to be done.

THE NON-SUIT MOTION

[17] The Defendants have moved for a non-suit. Non-suit is provided for by Civil Procedure Rule 30.08:

> At the close of the plaintiff's case, the defendant may, without being called upon to elect whether he will call evidence, move for dismissal of the proceeding on the ground that upon the facts and the law no case has been made out.

[18] The test on a non-suit motion is whether the plaintiff has established a *prima facie* case, or, as it is sometimes described, "whether a jury, properly instructed on the law could, on the facts adduced, find in favour of the plaintiff": *MacDonell v. M & M Developments Ltd.* (1998), 165 N.S.R. (2d) 115 (C.A.). A trial judge considering whether to grant a non-suit must consider the sufficiency of the evidence, not weigh it or evaluate its believability. The question is whether the inference the plaintiff suggests *could* be drawn from the evidence if the trier of fact so chose: Sopinka et al., *The Law of Evidence in Canada* (2d edn.)(Butterworth's, 1999) at para. 5.4. The decision depends "on all the circumstances of the case, including the issues of fact and law raised by the pleadings": *J.W. Cowie Engineering Ltd. v. Allen*, [1982] N.S.J. No. 39 (S.C.A.D.) at para. 15.

THE CLAIM AGAINST BIRCHILL

[19] Mr. Knox's claim against Birchill includes allegations of fraud, theft, breach of contract and "coercion tactics". These claims revolve around several aspects of the written contract or of additions Mr. Knox claimed were agreed to orally. I will describe Mr. Knox's claims in relation to the furnace he wanted installed in the house, the supplies he says Birchill agreed to supply to finish the basement, the alleged agreement that Birchill would provide a back basement door in return for Mr. Knox paying for the extra fill, and the delay in the delivery and completion of the house.

The Furnace

[20] The specifications for the modular home provided for electric baseboard heating, and the contract did not refer to a furnace. However, the closing adjustments included a credit of $2,500.00 to Mr. Knox for a furnace. There is therefore some evidence that the parties had an understanding that an oil furnace would be going into the house and that Birchill would provide $2,500.00 towards its installation. It is clear from the closing adjustments that Birchill did in fact provide this credit.

[21] In direct examination Mr. Knox introduced into evidence a taped conversation with Dean Downey of Birchill in which he agreed to accept $2,500.00 from Birchill towards the furnace and cover the rest himself. In cross-examination, Mr. Knox could not remember if there was provision for a furnace in the original contract. He said he agreed to the electric heat being installed for an additional $400.00, but he was to get a furnace as part of the deal. He agreed that he had signed the schematic diagram of the house, and that it included the words “electric baseboard” under the term “heat”.

[22] I can see no evidence that would lead to the conclusion that Mr. Knox was entitled to require Birchill to pay the entire cost of a furnace. What evidence there is on this issue points to the opposite conclusion. I note as well that Mr. Knox accepted a furnace credit of $2,500.00 on closing.

The Basement Door and the Fill

[23] Mr. Knox claims he agreed with Dean Downey, the Birchill salesman, that he would pay for 20 loads of fill, at $45.00 per load, which was necessary to prepare the second lot. There is an addendum to the contract, dated

December 1, 1998, that states that it would cost “about $900.00 extra” to finish the new lot, and that the “extra cost is to be paid by purchaser.” Mr. Knox signed the addendum. He says the fill was never delivered.

[24] Mr. Knox also claims that he only agreed to pay for the fill on the condition that Birchill would cut out a back basement door in the foundation, which was not done. There is no indication of this on the addendum to the contract or in the contract itself.

[25] As a result of the lack of fill, Mr. Knox says, his house is lower than the other houses on the street and therefore water runs onto his property and up against his foundation. He says he had to replace the driveway on account of the flooding. Since the closing, Mr. Knox says he has bought five loads of fill and spread them himself. There is no evidence as to the amount of his expenditure.

[26] Since the fill was to be delivered at Mr. Knox’s expense, there is no financial loss to him as a result of it not being delivered.

[27] Despite his allegations about the elevation of the lot, Mr. Knox agreed that third-party inspections by a surveyor, Alan MacCulloch, had established that the elevation was satisfactory. Mr. Knox did not get a copy of the inspection report.

Basement Finishing Supplies

[28] Mr. Knox claims Birchill agreed to provide sufficient supplies to finish the basement. This appears to have been part of a "signing bonus" worth $2,000.00 that Mr. Knox says Birchill told him he would receive if he bought the house before Christmas, 1998. The contract states: "All building materials to finish basement provided by Birchill outside walls only." Mr. Knox says Birchill provided supplies worth less than $1,000.00. The wording of the contract appears to be clear: "outside walls only". He says that when he complained about this, Birchill told him to buy the remaining supplies and they would reimburse him.

[29] Mr. Knox also says the basement carpet was the wrong colour. When he and his wife decided to buy a modular home, they went to Birchill's sales office and discussed the specifications in detail, including such matters as the

colours of carpets and counter tops. However, he moved in and allowed the carpet to be installed. He did not list it as a deficiency on closing.

Delay and inspection failures

[30] Mr. Knox claims the closing was to be in December of 1998 and thus he has a claim for delay, as the closing did not in fact happen until February 5, 1999.

[31] The contract originally gave an "estimated closing date" of December 4, 1998. In cross-examination Mr. Knox acknowledged that he signed an amended contract on December 1, 1998 (that is, the addendum respecting the fill), and that no date of delivery was suggested at that time.

[32] In a taped conversation he introduced into evidence, Mr. Knox was told not to begin work on the basement until the electrician had installed the outlets and plugs. However, he began to put up the partitions before the electrical work was done and before Gerald Hebert arrived to install the vapour barrier.

[33] Mr. Knox says Birchill did not do the plumbing work properly, as the basement bathroom failed inspection. He also says the delivery of the air exchanger was delayed by a week.

THE CLAIM AGAINST MURTHA

[34] Mr. Knox's claims against Mr. Murtha include negligence or breach of contract in providing legal services for failing to ensure that Birchill fixed certain deficiencies upon closing, and for failing to follow Mr. Knox's instructions not to close the transaction. He also alleges theft, based on Mr. Murtha's refusal to hand over the money held in trust for items that remained to be completed on closing.

Solicitor's Liability

[35] A solicitor may be liable in contract or in tort for failure to provide adequate legal services: *Central Trust v. Rafuse* (1986), 31 D.L.R. (4th) 481 (S.C.C.) at 522. Solicitors are expected to have reasonable knowledge of the applicable or relevant law, and particularly, "sufficient knowledge of the fundamental issues or principles of law applicable to the particular work undertaken to enable him to perceive the need to ascertain the law on

relevant points": *Central Trust* at 524. The person complaining must demonstrate that the solicitor's failure to provide services caused damage or loss: *MacDonald v. Wedderburn* (1999), 175 N.S.R. (2d) 89 (S.C.). There is no liability if a solicitor is not instructed on a particular point: *Muise v. Whalen* (1998), 96 N.S.R. (2d) 298 (S.C.). In *Conrad v. Thompson-Sheppard*, [1998] N.S.J. No. 95 (S.C.) Gruchy J. wrote, at para. 12, that it "is imperative to look at the facts disclosed to the lawyer in evaluating the advice given by that lawyer."

Holdbacks

[36] Mr. Knox claims that Mr. Murtha was supposed to hold $2,500.00 out of the mortgage advance for appliances. He also says he instructed Mr. Murtha to hold back ten per cent of the price for deficiencies, and this was not done. Such a hold back was not part of the contract, and the *Mechanics' Lien Act* has no application here. That Act protects contractors and subcontractors; it does not protect a purchaser against breach of contract by a vendor. Short of some contractual or statutory basis for such a hold back, there is no legal basis for this aspect of Mr. Knox's claim.

Failure to follow directions

[37] Mr. Knox says Mr. Murtha told him his complaints about the depth of excavation and the shortage of supplies for the basement would be dealt with as deficiencies at closing. He says he complained to Mr. Murtha about Birchill's failure to cover the entire cost of the furnace, and says he demanded a 10 per cent hold back to cover deficiencies and reimbursement of his expenses. His complaint appears to be that Mr. Murtha did not deal with these alleged deficiencies. He says Mr. Murtha failed to deal with the problems raised by the wrong-coloured carpets and the signing bonus. He also says he provided Mr. Murtha with "Schedule B", a hand-drawn plan of the basement layout that he wanted added to the contract.

[38] Mr. Knox points to a letter to Mr. Murtha dated December 22, 1998 in which he directed Mr. Murtha's attention to the issues of fill and the basement door, the excavation, and the amount of finish work he had agreed to do. In another letter, dated January 28, 1999, Mr. Knox complained that Birchill had not lived up to the agreement with respect to the fill and the basement door, and had failed to provide the $2,000.00 he said they had agreed to put toward the materials for the basement. He said that about

$1,000.00 worth of material was provided, and that Dean Downey told him he would be reimbursed for the rest. He also informed Mr. Murtha that he wanted Birchill to pay the full cost of installing a furnace, not just the $2,500 allotted.

[39] Mr. Knox claims that he wanted the deficiencies corrected even if it meant delaying the closing. He says Mr. Murtha told him at the beginning of February that he had no choice but to agree to close within 24 hours. However, Mr. Knox agreed at trial that Mr. Murtha and his partner went to the house the day before closing, and he gave them a handwritten list of deficiencies. These appeared in Mr. Murtha's letter to Mr. Charlton on February 5, which Mr. Knox agreed Mr. Murtha had read to him. Mr. Knox said, however, that he did not remember being told the amount that was being sent to Mr. Charlton to close the transaction. Nor, he says, was he aware that the 10 per cent hold back he demanded was not being held back.

[40] Mr. Knox also alleged theft by Mr. Murtha, as Mr. Murtha would not hand over the money held in his trust account for items to be completed by Birchill. He agreed that Mr. Murtha had offered to return the money to a third party.

[41] Mr. Knox produced a series of letters that he said he wrote in February, 1999, informing Mr. Murtha of the more extensive list of deficiencies. Mr. Knox claims he sent a letter to Mr. Murtha on February 23, 1999, that contained a list of deficiencies more extensive than the one he provided the day before closing. Mr. Knox agreed that it was possible the letter was not sent. The same is true of a letter dated February 25. During Mr. Knox's cross-examination, Mr. Murtha's counsel suggested that the February letters were fabricated after the fact to create a paper trial. Mr. Knox denies this.

CONCLUSION

[42] At this stage it is my duty to decide whether any facts have been established - in the absence of contradictory evidence from the Defendants, of course - that could support a finding of liability against the Defendants if the trier of fact so chose at the end of trial. I must assume the truth of the evidence I have heard, without weighing it.

[43] To prove a breach of contract, Mr. Knox must provide evidence of the terms of the contract and of a breach of those terms by the Defendant. The terms of the written contract govern unless the Plaintiff shows reasons why parol

evidence should be introduced - usually due to ambiguity in the written document. Mr. Knox's claims in contract against Birchill rest heavily upon parol evidence. But it is not clear that he has provided sufficient evidence on the issues of the provision of supplies for the basement, delay, the lack of a back door, and the dispute over the furnace.

[44] One of Mr. Knox's claims does appear to rest upon the terms of the written contract. The contract required Birchill to have the lot excavated: "dig, backfill with on site material, gravel driveway, water & sewer connections". The addendum of December 1, 1998, stated that, due to the change to a new lot, about 20 loads of backfill were required, at a cost to Mr. Knox of up to $900.00. There is no indication that the original terms respecting backfilling were changed; as a result, it appears that Birchill was required to provide the 20 loads of fill, which Mr. Knox says was never delivered. This omission could allow a reasonable trier off act to conclude that Birchill breached the contract.

[45] As to the allegations against Mr. Murtha, it is clear from such cases as *Central Trust* and *Conrad* that he owed a duty to follow instructions clearly provided by Mr. Knox. The issue for me to decide is whether Mr. Knox has

provided sufficient evidence that he gave clear instructions that Mr. Murtha failed to follow. Mr. Knox testified that he instructed Mr. Murtha not to proceed with the closing unless certain deficiencies were remedied, including the delivery of fill. He claims that the transaction closed with no assurance from Birchill that the fill would be delivered, and that Murtha did not hold back sufficient funds to ensure that the deficiencies would be addressed. Assuming the veracity of Mr. Knox's testimony, this is sufficient evidence upon which a reasonable jury could conclude that Mr. Murtha failed to follow Mr. Knox's instructions.

DISPOSITION

[46] It appears that Mr. Knox's uncontradicted evidence is sufficient to support at least some of his allegations. While this is certainly not the case with all of his claims, it is not within my authority under Rule 30.08 to dismiss parts of an action; the Rule calls for a dismissal of the entire proceeding. If the Defendants wish to strike out portions of Mr. Knox's pleadings, they can apply under Rule 14.25. Accordingly, I deny the Defendants' motion for a non-suit.

J.