

**Date: 2001/12/11**  
**Docket: S.SN. No. 111641**

**IN THE SUPREME COURT OF NOVA SCOTIA**  
**[Cite as: *Shelley v. Shelley*, 2001 NSSC 193]**

**BETWEEN:**

**MARY SHELLEY**

**PLAINTIFF**

**- and -**

**TERRANCE SHELLEY, Jr., of East Bay, Cape Breton**  
**Regional Municipality, Province of Nova Scotia**

**DEFENDANT**

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**D E C I S I O N**

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**HEARD BEFORE:**                   **The Honourable Justice David W. Gruchy**

**PLACE HEARD:**                   **Sydney, Nova Scotia**

**DATE HEARD:**                   **December 10 & 11, 2001**

**DECISION:**                       **December 11, 2001 (Orally)**

**WRITTEN RELEASE:**           **December 17, 2001**

**COUNSEL:**                       **Darlene MacRury for the plaintiff**

**M. Joseph Rizzetto for the defendant**

**GRUCHY, J. (Orally):**

- [1] This is an action on a cheque for \$15,000.00. The cheque was given to the plaintiff by the defendant, the plaintiff's brother, in partial payment for a house and property previously owned by the plaintiff. The cheque was post-dated for approximately one year.
- [2] The statement of claim by which this action was commenced, instead of merely pleading the cheque presentment and dishonour, set forth the details of the transaction giving rise to the cheque. Accordingly, and in accordance with the defence the entire transaction has been examined by the evidence adduced before me.
- [3] The plaintiff had owned a property for some years and which consisted of land and dwelling at East Bay immediately adjacent to property of the defendant. In 1998 the plaintiff decided to sell the property and listed it for sale. When the defendant and the parties' mother, Clara Shelley, realized the property was for sale, they approached the plaintiff and eventually an oral agreement was worked out whereby they agreed to buy and the plaintiff agreed to sell the property. There was some confusion about the exact purchase price. I find as a fact, however, that the purchase price agreed upon by Clara Shelley the defendant and the plaintiff was \$40,000.00.
- [4] The plaintiff testified that when the price was established and the sale of the property was to proceed the three of them (with the plaintiff's friend, Douglas Wall, in attendance) met in the house to be sold. Clara Shelley gave the plaintiff \$10,000.00 in cash. The defendant had prepared a cheque for \$10,000.00 payable to the plaintiff but in her previous married name, Mary Hudgin. This cheque was not negotiable by the plaintiff as she had reverted to her maiden name, Shelley after a divorce. Therefore the plaintiff and the defendant went to the bank upon which the cheque was drawn and the defendant obtained \$10,000.00 in cash which he paid to the plaintiff. It was agreed by the parties that the defendant and Clara would pay the balance of the \$40,000.00 over a period of time but no definite dates were set. About a month later the plaintiff again attended at the property. The defendant and Clara Shelley each gave the plaintiff \$2,500.00. Between the defendant and Clara Shelley they then owed the plaintiff \$15,000.00. The defendant gave the plaintiff a cheque for \$15,000.00 post-dated for approximately one year. The plaintiff testified the defendant assured her that funds would be available when the cheque was presented for payment. The defendant testified it was given as security only.

- [5] The plaintiff had arranged the preparation, execution and delivery of the deed to convey the property. Some time later the plaintiff testified she heard from her mother that the defendant was not going to pay the balance owing and at that time Clara Shelley gave the plaintiff an additional \$2,500.00. The plaintiff testified that was a total of all funds received from the defendant.
- [6] In June, 1999, at or subsequent to the date of the cheque, the plaintiff attempted to negotiate the cheque but the bank refused to honour it. The plaintiff then contacted Clara Shelley but no further payments were received by her.
- [7] The defendant testified that in addition to the initial \$10,000.00 he paid the plaintiff, together with the \$10,000.00 cash paid by Clara Shelley, he made other payments to her of roughly \$5,000.00, \$8,000.00 and \$2,000.00. He could neither say when he made those payments nor was he precise as to the amounts paid. That is, he claimed that in total he had paid the plaintiff \$25,000.00 which sum included the amount purportedly secured by the post-dated cheque.
- [8] The defendant testified that the cheque for \$15,000.00 was given merely as security for the promise to pay that amount in various installments and he said those payments were duly made, as I have already described.

### **CREDIBILITY**

- [9] This factor is essential in my consideration herein. Nothing was in writing except the deed, the cheque and a "document" produced by Clara Shelley which she claimed was a record of the payments made.
- [10] My conclusions as to credibility: (a) as between the evidence of the plaintiff and that of the defendant, where there is any difference, I accept that of the plaintiff; (b) as between the evidence of the plaintiff and that of Clara Shelley, I accept that of the plaintiff.
- [11] While the plaintiff was at times confused in her testimony, I found her to have the appearance of honest reliability. I do not say the same for Clara Shelley whose evidence and demeanor I found to be evasive and, putting it mildly, fanciful.
- [12] I find as facts that Clara Shelley made payments of \$10,000.00 at the original transaction and the two additional payments of \$2,500.00 each. When she realized that the defendant did not intend to pay the full purchase price, she made the second payment of \$2,500.00, intending that to be credited against the \$15,000.00 balance secured by the cheque.

- [13] I find that the so-called "document" produced by Clara Shelley (Exhibit No. 5) and certain figures on it amount to nothing more than self-serving scribbles produced after the fact by this witness for the purpose of supporting the defendant's position herein. I reject this document as having any probative value whatsoever.
- [14] The defendant's testimony was also totally lacking in credibility or substance. I find as a fact that the defendant paid \$10,000.00 in cash at the time of the original transaction and \$2,500.00 subsequently, leaving then the balance owing by him and his mother of \$15,000.00. The purpose of the cheque was to pay to the plaintiff that balance. I reject totally his testimony that he made payments of \$8,000.00, \$5,000.00 and \$2,000.00 each. There is no credible evidence to support that statement.
- [15] In arriving at my adverse findings of credibility as against the defendant I note particularly that he had lied at the time of discovery when he said he had been unemployed for ten years when he had in fact been gainfully self-employed throughout that period. I found his credibility lacking when he gave his explanation to me that he and his mother could have paid the entire \$40,000.00 in cash as he had the money then available in cash. His explanations about keeping the money available for other reasons simply did not ring true and if they were true, the result was that he was taking advantage of his sister. The fact was that he had given the plaintiff the post-dated cheque and assured her that the money would be available at the bank when she presented it for payment.
- [16] Much was said during the trial and during submissions that the defendant and Clara Shelley bought and were to pay for the property equally. That may have been so but the arrangement between the defendant and his mother were of no legal concern to the plaintiff. The plaintiff spoke of intending to "repay" Clara Shelley \$2,500.00 when she cashed the defendant's cheque. That, of course, would only have reflected reality as, if the cheque had been honoured, the plaintiff would then have had and received a total of \$42,500.00 from the two of them.
- [17] The plaintiff has proven to my satisfaction that the cheque was duly presented for payment, was dishonoured and the defendant was given notice of such presentment and dishonour. The defendant has failed to prove that there was any agreement collateral to the cheque whereby the effect of the cheque was vitiated. Technically I have concluded that as Clara Shelley is not a party to this action the plaintiff is entitled to recovery of the full sum of \$15,000.00 from the defendant. That, however, would ignore the reality of

the situation and therefore with the agreement of the plaintiff, I reduce the claim to \$12,500.00 and order judgment against the defendant in that amount.

- [18] The plaintiff is entitled to prejudgment interest at the rate of six (6) per centum per annum on the amount of \$12,500.00 from the date of the dishonoured cheque.
- [19] I fix costs payable to the plaintiff in the amount of \$2,050.00 plus taxable disbursements, being based on the "amount involved" of \$12,500.00, Scale 3, plus \$300.00 for a previous application to set aside a default judgment.

J.