SUPREME COURT OF NOVA SCOTIA
Citation: *Jackson v. Fritz*, 2024 NSSC 13

Date: 20240112
Docket: 525964
Registry: Kentville

Between:

Peter Jackson and Sara Jackson

Applicants

v.

Derick Thomas Owen Fritz

Respondent

Judge: The Honourable Justice Gail L. Gatchalian

Heard: January 2, 2024, in Kentville, Nova Scotia

Counsel: Nicholas Moore, for the Applicants
Derick Fritz, Self-Represented

By the Court:

Introduction

[1] The Applicants, Peter Jackson and Sarah Jackson, agreed to sell their property to the Respondent, Derek Thomas Owen Fritz. The Jacksons say that Mr. Fritz breached the Agreement of Purchase and Sale when he failed to pay the balance of the purchase price on the closing date. The Jacksons later sold their property for $50,000 less than the agreed upon purchase price. They seek an award of $50,000 against Mr. Fritz. The Jackson say that the $2000 deposit paid by Mr. Fritz was forfeited by Mr. Fritz and should not be credited against the award of damages.

[2] In his Notice of Contest, Mr. Fritz's response is that:

1. The Jacksons breached the agreement first by "re-listing" the property before the closing date.
2. The Jacksons did not act in good faith with Mr. Fritz to try to extend the closing date or to ensure that the sale could proceed.
3. The Jacksons were deceitful in their responses to Mr. Fritz.

[3] The Jacksons were represented by counsel at the hearing. Mr. Fritz represented himself. The Jacksons filed an affidavit of Peter Jackson sworn on August 11, 2023. Mr. Fritz relied on his affidavit sworn on November 30, 2023.

The Jacksons filed rebuttal affidavits: an affidavit of Mr. Jackson sworn on December 5, 2023, and an affidavit of Richard Matheson, the Jacksons' realtor, sworn on December 4, 2023. The witnesses were cross-examined on their affidavits at the hearing.

[4] I will address each of Mr. Fritz's arguments in turn.

Relisting of Property Before Closing Date

[5] The relevant facts are not in dispute.

[6] Under the Agreement of Purchase and Sale between the parties, Mr. Fritz agreed to pay $405,000 for the Jacksons' property located at 2262 Highway 221 in Dempsey's Corner, Nova Scotia. Mr. Fritz agreed to pay a $2,000 deposit. The agreed closing date was September 30, 2022. On July 5, 2022, Mr. Fritz confirmed in writing that all buyer conditions, including financing, had been satisfied and that the "Agreement of Purchase and Sale is now confirmed SOLD." The agreement was not conditional on Mr. Fritz selling his property.

[7] In reality, Mr. Fritz needed his own property to sell in order to be able to buy the Jacksons' property. He thought that his property would sell. Unfortunately, the sale of his property fell through on July 15, 2022. He relisted his property on July 20, 2022. After 30 days on the market with no acceptable offers, Mr. Fritz

informed the Jacksons of his situation and that he would not have the finances necessary to complete the purchase of the Jacksons' property if his property did not sell. He raised the possibility of extending the closing date.

[8] On September 9, 2022, the Jacksons offered to extend the closing date by six months in exchange for a payment of $15,000 as security within two days, and monthly non-refundable payments of $2500. Mr. Fritz could not pay the $15,000 within two days, and rejected the proposal. He did not make a counter-proposal to extend the closing date.

[9] On September 22, 2022, Mr. Fritz's lawyer informed the Jacksons' lawyer that his property had not yet sold and his financing was contingent on the sale of his property. On September 23, 2022, the Jacksons changed the status of their property from "sold" to "for sale" in the Multiple Listing System ("MLS system"). When Mr. Fritz's realtor questioned the change, the Jacksons' realtor responded in writing and included communication from the Jacksons' lawyer that the Jacksons were simply taking steps to mitigate their potential losses, but that the Jacksons had every intention of honouring the current agreement.

[10] Before the closing date, the Jacksons executed and provided to Mr. Fritz's lawyer all documents required to complete the sale, including a deed conveying the

property to Mr. Fritz. Mr. Fritz did not provide the purchase funds to the Jacksons on the closing date. On September 30, 2022, Mr. Fritz, through his lawyer, informed the Jacksons that he would not be able to complete the purchase of the property as his property had not yet sold. Mr. Fritz's lawyer returned the closing documents to the Jacksons by letter dated October 6, 2022.

[11] There are no terms of the Agreement between Mr. Fritz and the Jacksons that govern how the property must be listed on the MLS system. The Jacksons did not breach the Agreement when they changed the status of the property from "sold" to "for sale" in the MLS system.

[12] Mr. Fritz was not relieved from performing his contractual obligation to pay the balance of the purchase price on the closing date simply because the Jacksons changed the status of the property in order to try and mitigate their damages should Mr. Fritz be unable to complete the purchase on the closing date.

Negotiating an Extension of the Closing Date

[13] Because Mr. Fritz represented himself, I will assume that when he claimed that the Jacksons did not act in good faith to try and extend the closing date that Mr. Fritz is alleging that the Jacksons breached the duty to exercise contractual discretion in good faith: see *Bhasin v. Hrynew*, 2014 SCC 71. Such a breach must

be linked to the Jacksons' performance of the contract: see *Callow Inc. v. Zollinger*, 2020 SCC 45 at paras.37, 49 and 51 and *Mike's Clothing Limited v. Kentville (Town)*, 2023 NSCA 22 at paras.39-44. The Agreement does not provide for extension of the closing date. The allegation made by Mr. Fritz is not linked to the Jacksons' performance of the contract. Moreover, the evidence is that the Jacksons did act in good faith. They made a proposal to Mr. Fritz to extend the closing date. Mr. Fritz did not make a counter-proposal.

Alleged Deceitful Responses

[14] Because Mr. Fritz represented himself, I will assume that when he claimed that the Jacksons were deceitful in their responses to him that Mr. Fritz is alleging that the Jacksons breached the duty to act honestly in the performance of the contract: see *Bhasin*. Mr. Fritz does not allege deceitful conduct on the part of the Jacksons in his affidavit. His argument appears to be that the Jacksons mislead him when they proposed an extension of the closing date in exchange for payment of security in the amount of $15,000 by representing that they had moved when Mr. Fritz alleges that they had not moved. Again, the Agreement does not provide for extension of the closing date. The allegation of deceit made by Mr. Fritz is not linked to the Jacksons' performance of the contract. Mr. Fritz's argument that the Jacksons were deceitful has no merit.

Breach of Contract

[15] Mr. Fritz's failure to provide the Jacksons with the balance of the purchase price on the closing date was a breach of the contract between the parties. Clause 1.1 requires that the balance of the purchase price be paid on closing. The Jacksons were ready, willing and able to close on September 30, 2022. The reason the agreement did not close was because Mr. Fritz did not have the funds to complete the sale on the date of closing.

[16] See *Azzarello v. Shawqi*, 2019 ONCA 820 at para.30.

What are the Damages

[17] The Jacksons relisted their property and eventually sold it on January 16, 2023 for $355,000. Mr. Jackson attached the agreement of purchase and sale and a copy of the statement of receipts and disbursements related to this sale to his first affidavit.

[18] The Jacksons relisted and sold their property within a reasonable period of time after the breach. The Jacksons are entitled to expectation damages – the difference between the price under the Agreement and the price of the new sale of the property once it closed: see *Azzarello* at para.21. Due to Mr. Fritz's breach of contract, the Jacksons suffered a loss of $50,000.

[19] Mr. Fritz did not argue that the Jacksons failed to mitigate their damages.

[20] The Jacksons are entitled to $50,000 in expectation damages

Should the Deposit be Credited

[21] The Jacksons conceded that the common law requires that a deposit be credited towards the damages, unless otherwise provided for in the contract: see *Azzarello, supra* at paras.24-25, 43 and 50-53. The Jacksons argue that I should reach the opposite result in this case, based on the particular language of their Agreement with Mr. Fritz.

[22] In *Azzarello*, the language of Ontario's standard agreement of purchase and sale was at issue. That standard agreement provided that the deposit was "to be held in trust pending completion or other termination of this Agreement and to be credited towards the Purchase Price on completion": at para.24. Feldman J.A. noted that the standard agreement specifically provided for the disposition of the deposit upon completion of the agreement, but did not specifically state what would happen to the deposit if there was an "other termination" of the agreement: at para.43. As noted by Feldman J.A., it is well-established that when a buyer repudiates the agreement and fails to close the transaction, the deposit is forfeited,

without proof of any damage suffered by the vendor, unless the parties bargained to the contrary: at paras.45-46.

[23] Feldman J.A. also held that it was inferred, based on the language of the contract, that the intent of the parties was that the deposit be applied to the purchase price, whether received on completion or as damages: at para.53. Feldman J.A. relied at para.51 on the decision of the trial judge in *Bang v. Sebastian*, 2018 ONSC 6226, affirmed on appeal on other grounds, 2019 ONCA 501, a case that involved substantially identical language to the language in *Azzarello*. In *Bang*, the trial judge found that the wording in the agreement clearly reflected the parties' intention that the deposit would be applied as a credit to the payment obligation owed by the buyer, whatever form that obligation might take: at para.71.

[24] Clause 1.1 of the Agreement between the Jacksons and Mr. Fritz contains almost identical language as the language at issue in *Azzarello*. Clause 1.1 states that the deposit is to be held in trust "pending completion or termination of this Agreement and ***to be credited towards the purchase price on completion***" [emphasis added]. However, unlike in *Azzarello*, Clause 1.2 of the Agreement between the parties specifically deals with what happens to the deposit if the buyer fails to comply with the terms of the Agreement:

> It is understood and agreed that if the buyer does not complete this agreement in accordance with the terms thereof, the buyer ***shall forfeit the deposit, in addition to any other claim which the seller may have against the buyer for the buyer's failure to complete*** …
>
> [emphasis added]

[25] The Jacksons assert that Clause 1.2 should be interpreted to mean that the parties intended the forfeited deposit to be separate from, and not applied to, any other claim they might have against Mr. Fritz. The Jacksons could not point to any case where the deposit was forfeited without crediting it toward the damages, although there are a number of cases where the opposite has occurred: see *Azzarello* at para.51, referring to the decision in *Bang*.

[26] In interpreting the parties' contract, I must give effect to the intentions of the parties by considering the words selected by the parties and the context in which the words have been used, which includes the surrounding circumstances that gave rise to the contract: see the decision of Warner J. in *R & D Holdings Ltd. v Buranello and French*, 2021 NSSC 359 at para.9, summarizing the fundamental principles of contractual interpretation set out by Geoff R. Hall in his text, *Canadian Contractual Interpretation Law*, third edition.

[27] The words used by the parties in this case and the context in which they were used lead me to conclude that they intended the forfeited deposit to be applied as a credit to the expectation damages owed by Mr. Fritz to the Jacksons.

[28] The analysis employed by Feldman J.A. applies equally to the language at issue here: it is clear from the words used in Clause 1.1 that the deposit is intended to be applied as a credit to the obligation owed by Mr. Fritz to the Jacksons, whatever form that obligation takes. Unlike the situation in *Azzarello,* I do not have to infer that the deposit is forfeited in the event that Mr. Fritz repudiates the Agreement because that result is stated explicitly in Clause 1.2. In my view, Clause 1.2 does not change what the parties intended by the language in Clause 1.1: that the deposit is to be applied as a credit to the obligation owed by Mr. Fritz to the Jacksons, should Mr. Fritz fail to complete the Agreement. The phrase "in addition to any other claim," in my view, simply confirms that the Jacksons' potential remedies are not limited to the forfeited deposit.

[29] The context in which the words were used supports my conclusion. The language in Clause 1.2 is part of a standard form contract and has been in use in Nova Scotia for many years: see, for example, *Smith v. Fearon*, 1988 CanLII 9767 (NSSC). In *Smith v. Fearon*, the buyer failed to close and the agreement of purchase and sale stated that the deposit was forfeited "in addition to any other

claim": at para.8. Nathanson J. credited the deposit to the difference in contracted prices, albeit without commenting on the meaning of the phrase "in addition to any other claim": at para.23. The parties did not, in my view, intend to depart from the common law when they used this standard form language in Clause 1.2 of the Agreement.

[30] The $2000 deposit paid by Mr. Fritz is to be credited against the expectation damages owed by him.

Conclusion

[31] The Application is granted. Mr. Fritz is ordered to pay the Jacksons $50,000 in expectation damages for breach of contract, less the $2000 deposit.

[32] The Jacksons are entitled to costs. If the parties cannot agree on the amount of costs, I will receive written submissions from the Jacksons within two weeks of this decision, and from Mr. Fritz within two weeks of the Jacksons' submissions.

Gatchalian, J.