IN THE SUPREME COURT OF NOVA SCOTIA

Citation: *Johnson v. Greater Corp .Condominiums Inc.*, 2002 NSSC 245

Date: 20021114
Docket: SH 173807
Registry: Halifax

Between:

Kenneth Johnson et al

Plaintiff

v.

Greater Corp. Condominiums Inc.

Defendant

Judge: The Honourable Justice M. Heather Robertson

Heard: October 15, 2002, in Halifax, Nova Scotia

Counsel: Colin D. Bryson, for the plaintiff
Tim Hill, for the defendant

By the Court:

[1] This is an application for summary judgment in the amount of $18,264.51, plus costs for pre-judgment interest pursuant to *Civil Procedure Rules* 13 in an action commenced by the plaintiff for the breach of a purchase agreement for a condominium unit of the defendant, Greater Corp. Condominiums Inc.

[2] The agreement of purchase was entered into between the parties on June 6, 2000 and was scheduled to close on January 23, 2001. The purchase price was $128,900 including HST with the plaintiff to assign the applicable HST rebate to the defendant. By agreement, the closing date was delayed to February 19, 2001, to accommodate the issuance for an occupancy permit

and acceptance for registration of the condominium complex, with the Registrar of Condominiums.

[3] Two subsequent delays in the closing of the transaction occurred, when disputes arising between the parties were settled by vendor purchaser applications. The first, heard on March 28, 2001, determined that an upward adjustment in the purchase price was not warranted, when the plaintiff was unable to assign a HST rebate, as the unit was to be rented and not occupied by them. The second application was heard May 1, 2002 and by a written decision dated May 8, 2001, Justice Goodfellow held that the purchaser was not entitled to a railing for a "balcony" on their ground floor unit. The agreement was held to be binding and the court ordered that the closing should proceed without delay. The defendant solicitor by letter dated may 10, 2001, notified the plaintiff's solicitor that he had instructions to appeal Justice Goodfellow's decision and wrote "The offer to resolve this by returning your client's deposit is still open." By letter dated June 1, 2002, the plaintiff's solicitor wrote back confirming that the defendant was not prepared to close as ordered and intended to appeal Justice Goodfellow's decision. He then set out his client's options of declaring the contract at an end and commencing a suit for damages or specific performance. He went on to say that "unless the transaction closes by the close of business on June 8, 2001, this deal is at an end and my clients will seek damages." He chose this date as it was the day following the expiration of the appeal period. The transaction did not close on June 8, 2001 nor did the defendant appeal. The plaintiff subsequently learned that the property was sold on June 14, 2001, for $139,900, including HST plus the assignment of the HST rebate to the defendant.

[4] The plaintiff sued for damages which included:

(a) the return of the deposit of $5,000;

(b) damages of $11,000 representing the difference between the fair market value of the property as of the date of breach and the contract price for the property;

(c) damages of $2,264.51 for a three-month interest penalty occasioned when the plaintiff took out mortgage financing on another property in anticipation of the February 19, 2002 closing date to fund the purchase of this unit. He re-paid the mortgage upon the defendant's refusal to close.

(d) pre-judgment interest on items (a) and (b) from the date of breach; and

(e) costs.

[5] *Civil Procedures Rule* 13 provides for an application for summary judgment. The relevant portions of the *Rule* are as follows:

13.01. After the close of pleadings, any party may apply to the court for judgment on the ground that:

(a) there is no arguable issue to be tried with respect to the claim or any part thereof;

(b) there is no arguable issue to be tried with respect to the defence or any part thereof; or

(c) the only arguable issue to be tried is as to the amount of any damages claimed.

13.02. On the hearing of an application under rule 13.01, the court may on such terms as it thinks just,

(b) grant judgment for any party on the claim or any part thereof;

(j) award costs;

(k) grant any other order or judgment as it thinks just.

[6] An application for summary judgment will only be granted where the plaintiff has put forward sufficient evidence to prove its case and where the defendant has not demonstrated that there is a real issue to be tried.

[7] The defendant amended its defence on September 14, 2002, on the basis that the demand to close and election made by the plaintiff was unreasonable and itself constituted a repudiation of the agreement of purchase and sale. The defendant also takes issue with the amount of damages claimed and failure of the plaintiff to mitigate their damages.

[8] With respect to the timing of the proposed June 8th closing, the defendant says that the letter of June 1st was received by their solicitor on June 4, 2001, but not discussed with them until June 5th, as the solicitor was unavailable.

[9] The evidence of Michael Quigley, Assistant General Manager of the defendant company is that three days remaining was not sufficient time to complete a closing on June 8, 2001, as a further inspection of the unit by the purchasers would be required and updates to closing adjustments made as well as preparation of the requisite conveyancing documents.

[10] Mr. Quigley stated that on June 5, 2001, he received instructions from his boss, Mr. Vince MacDonald of Greater Homes and conveyed to their solicitor Tim Hill that they would not be appealing the decision of Justice Goodfellow. He acknowledged that an inspection of the unit had been completed in April 2001 and that the only deficiency identified by the purchaser was the disputed "balcony" railing. He also acknowledged that all the closing documents had been delivered to the plaintiff's solicitor by letter with enclosures, dated April 4, 2001 and that the only recalculation of closing adjustments was that of a condominium fee that would take less than 10 minutes to complete. He acknowledged that he became aware that the closing would not take place between June 5 and June 7, 2001. He stated that the defendant was too busy with other closings and did not have enough time to complete this transaction.

[11] I am satisfied that the plaintiff has a clear and valid claim for damages against the defendant. Having decided not to appeal Justice Goodfellow's ruling, the defendant had an obligation to close the transaction without delay. The closing documents had been delivered. No further inspection was required. The only outstanding matter was an adjustment of the monthly common expense, a simple calculation. Three days was more than enough time to complete this transaction. The defendant merely chose not to do so. Later in the same month they were able to sell the unit at a significant increase in price.

[12] I find that the defendant has not met the burden of presenting a reasonably arguable defence in respect of this claim.

[13] With respect to the matter of damages, the plaintiff has reviewed this area of well settled law, citing Di Castri's *The Law of Vendor and Purchaser* (1989) at page 18-26:

> Subject to the possible application of the anomalous rule in *Bain v. Fothergill*, the measure of damages in contract, where a purchaser is entitled to substantial damages for loss of his bargain, is the difference between the contract price and

> the market value of the land, at the date of the breach, normally, the date fixed for completion. On the proper facts, damages may include those consequential expenses flowing naturally from the breach and within the contemplation of the parties.
>
> Where there is no difference between the contract price and the market value of the land at the date of the vendor's breach, damages appear to be at large.
>
> Where the resale price is in excess of the original sale price, the fact that the original purchaser was buying for his own use is irrelevant; what he intended to do with the property does not affect the question of damages, which must be fixed in relation to the pecuniary loss suffered in terms of the market value as represented by the resale price on a sale effected by the vendor.

And at page 18-28:

> Where a purchaser is rightfully entitled to damages for breach of contract because his vendor has wrongfully resold the property, the resale price is *prima facie* evidence at market value, and the measure of damages is the difference between a purchase and resale prices.

[14] The plaintiff is first entitled to the return of their deposit. Further, they are entitled to the increase in property value. This is the difference between the contract price $128,900 and the market value of the property as of the day of the breach. The defendant sold the property one week later and therefore the resale price of $139,900 is *prima facie* evidence of the market value. This represents an increase of $11,000. HST paid by the defendant to the government is not relevant to the calculation of the increased purchase price of this unit. Finally, the plaintiff was under no duty to mitigate by purchasing another property.

[15] The plaintiff is also entitled to the consequential loss relating to the interest penalty of $2,264.51 they were required to pay the bank of the repayment of the arranged financing for the closing. I agree that this is a loss that would not have been incurred had the defendant not breached the agreement.

[16] Pre-judgment interest shall be calculated at the rate of 4%.

[17] I award costs to the plaintiff in the amount of $2,500 including disbursements.

J.