Claim No. SY 229607
Date:20051114

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as 3061942 Nova Scotia Ltd. v. Matz, 2005 NSSM 23

BETWEEN:

3061942 NOVA SCOTIA LIMITED and ALEXANDER MATZ

Claimants

- And -

VAUGHNE REALTY LIMITEED-LIMITEE and RICHARD LEBLANC

Defendants

Adjudicator David TR Parker
Heard: September 16, 2005
Decision: November 14, 2005

Counsel: S. Clifford Hood, Q.C., for the Claimant
Raymond B. Jacquard, for the Defendant

DECISION

This matter came before the Small Claims Court of Yarmouth and Province of Nova Scotia on the 16th day of September, A.D. 2005. The matter was first commenced in the Supreme Court of Nova Scotia on August 31, 2004, and the Originating Notice and Statement of Claim was subsequently amended on September 15, 2004. The Action was subsequently transferred to the Small Claims Court pursuant to an election to do so by the Claimant 3061942 Nova Scotia Limited.

Service was in accordance with the Rules and Regulations of the Small Claims Court.

The pleadings of the Claimant assert that the Claimant "Matz" on February 2, 2004, made a deposit on behalf of 3061492 Nova Scotia Ltd. To the Defendants pursuant to the terms of an Agreement of Purchase and Sale, which agreement was not completed by the parties. The Claimants then made a written request for the return of the funds on August 13, 2004. The Defendants are refusing to return the $10,000.00 deposit and the Claimants are requesting a

return of the funds from the Defendants as realtors, brokers and trustees of the funds. The Claimants also are seeking general damages against the Defendant Vaughne Realty Limited-Limitee["Vaughne Realty"] for breach of trust and/or breach of contract.

The Defendants in the pleadings stated that Vaughne Realty, as seller entered into a purchase and sale agreement dated April 14, 2004, to sell to the Claimant company a certain piece or parcel of property located in Yarmouth, Nova Scotia, for $1,250,000.00 and that the Claimant company submitted a $10,000 deposit as part of the Agreement.

The Defendants further state the closing date was initially set to take place on June 30, 2004. The Defendant goes on to state, under the terms of the agreement of purchase and sale dated April 14, 2004, it was "stipulated that if the Buyer does not complete the agreement in accordance with the terms thereof, the $10,000.00 deposit was to be forfeited in addition to any other claim which the seller may have." The Defendants asserts the Claimant Company "failed to complete the said agreement in accordance with the terms of the agreement by refusing to complete and close the transaction."

There is no claim here for liquidated damages the claim is strictly related to forfeiture of the deposit. There was no foundation in the evidence that the $10,000.00 amount was determined to be the amount of loss the Defendant would incur if there was a collapse of the sale.

Facts:

" 3061492 Nova Scotia Limited entered into a standard form agreement of purchase and sale and the Defendant Vaughne Realty, the Defendant, was both the seller and the listing brokerage firm.

" The agreement was entered into by the parties on February 2, 2004.

" The purchase and sale agreement required a deposit of $10,000.00 and a further deposit of $90,000.00 on or before February 14, 2004.

" The agreement was also subject to the buyer being able to obtain approval for a first mortgage in a principal amount of approximately $812,500.00 (or 65% of the purchase price) at an interest rate not to exceed 9%. The financing shall be deemed to be arranged unless the seller or the seller's agent is notified to the contrary, in writing, on or before February 27, 2004. If notice to the contrary is received, either party shall be at liberty to terminate this contract and deposit to be returned to the buyer without interest or penalty.

" The closing date was set for April 1, 2004.

" Clause 14 of the said agreement stated:

> "It is understood and agreed that if the buyer does not complete this agreement in accordance with the terms thereof, he/she will forfeit the above deposit in addition to any other claim which the seller may have against the buyer for his/her failure to so complete."

" The Claimant Company paid $10,000.00 deposit to the Defendant Company.

" The purchase price was $1,250,000.00 for the said property.

" A subsequent amendment to the purchase and sale agreement was entered into between the parties on February 24, 2004, which stated in part:
"The buyer and seller agree to the following amendments:
Clause 1b (Financing clause) shall be amended to read…on or before March 12, 2004.
Clause 2 (closing date) shall be amended to read on or before May 3, 2004.
Clause 1a shall be amended to read on or before March 3, 2004."

" A further purchase and sale agreement between the same parties was executed on April 14, 2004.

" The previous agreement and this April 14, 2004, agreement involved the same property except the deposit was restricted to $10,000.00 not $10,000.00 and an additional $90,000.00 at some future date.

" The closing for the second agreement was to take place on June 30, 2004, and was subject to the buyer (3061492 Nova Scotia Limited) being able to obtain approval for a first mortgage in a principal amount of approximately $937,500.00 or 75% of the purchase price at an interest rate not to exceed 7%. The time allocated to obtain financing was June 15, 2004, if the buyer was not notified that by that date financing was deemed to be arranged.

" The forfeiture clause in the April 14, 2005, agreement remained the same.

" The Plaintiff, Alexander Matz executed the February 2, 2004, agreement and its amendment and his spouse executed the April 14, 2004, agreement.

" The $10,000.00 on the first agreement was never returned and there was no further $10,000.00 amount advanced when the second agreement of April 14, 2004, was executed. The initial $10,000.00 remained with the listing brokerage.

" The Claimant's Counsel sent a memo to the Defendant's Counsel dated March 24, 2004, stating:
"I wish to confirm that this purchase is on hold due to the fact that financing hasn't been approved. I understand that your client is aware of same and I will advise you further once I hear from my client."
"The sale never took place.

" No closing documentation was tendered on the Claimant or its solicitor.

Both parties accepted the fact that the financing was not available pursuant to the first agreement. This is also reflected in the Defendant's pleadings as the reference is to the April 14, 2004, agreement upon which they are making their assertions for keeping the $10,000.00

deposit.

The Defendant is not going to be successful in retaining the deposit for five reasons. Some reasons are of more import than others but they all have been determinative in reaching a conclusion in this case.

First Reason

The first agreement fell by the wayside because financing as envisaged by the agreement did not occur. Both parties were aware of this and although there was no written notification by the seller to the buyer advising of no financing both parties accepted verbal notification.

The same situation existed in respect to the April 14th or second agreement of purchase and sale. Both principals were aware that financing was an issue and it was never achieved as required by the agreement. I noted here there was a letter of interest from League Savings and Mortgage dated May 17, 2004, which was prior to the June 15, 2004 notification regarding financing approval date, in the contract. However this was not approval of financing or commitment from League Savings nor was it in the amount of financing required by the Claimant purchaser as reflected in the April 14th agreement. A second letter dated June 21, 2004, from the Defendant company directed to Phillip J. Star, Q.C., the Claimant's solicitor and Martin Pink, Q.C., the Defendant's solicitor also approves financing from the Defendant itself. However, this does not coincide with the Claimant's request for financing in the second agreement. This letter is also reflective of the fact that the Defendants were aware financing under the second agreement was still not in place after the June 15, 2004, deadline.

Second Reason

Once of the principals of the Defendants Company acknowledged in his testimony that the only reason for the second agreement was to see if the Defendant could obtain financing for the Claimant company through its contacts in Halifax.

Richard LeBlanc stated: "I called up (Dr. Laura Gainariu Matz) saying I was coming with the second agreement. I was always welcomed into Matz's house. I told Mrs. Matz we needed a new agreement to get new financing; I probable used words 'for financing purposes' as we were going to a new lender."

The testimony dovetails with what Dr. Laura Gainariu Matz said in her testimony. She said "Ray Nelson was to get financing for us that was the purpose of the second agreement. I told Richard LeBlanc I was not a signing officer of the company and he said the contract was needed just to try to get financing and Ray Nelson is traveling today to get financing in Halifax."

This, of course, is one of the requirements that financial institutions require in order to determine financing that is an executed purchase and sale agreement. There are also other determiners, like credit checks on the borrowers but an executed purchase and sale agreement is a primary requirement. Therefore the purpose of the second agreement was strictly to see if financing could be obtained not to lock the Claimants into a penalty or into a liquated claim if the

Defendants were not notified in writing of no financing or even if the Claimant failed to complete the purchase.

Third Reason

Dr. Laura Gainariu Matz had no authority to bind the company. Dr. Alexander Matz is the only recorded director and officer of the Claimant company. He is the one that signed the first agreement on behalf of his company presumably and his partner Dr. Laura Gainariu Matz told the Defendant that she was not a signing officer of the company when she signed the second agreement. At that time the Defendant was only interested in obtaining financing for the Claimant Company not whether or not the Claimant would be bound by the terms of the second agreement. Further the Defendant cannot bind a party to an agreement where the party was never part of the agreement from the beginning.

Fourth Reason

There never was a deposit of $10,000.00 submitted by the buyer in the second agreement. The $10,000.00 deposit was part of the first agreement and should have technically been returned after the collapse of the first agreement. This was not done and now no one knows whether Dr. Alexander Matz as the directing arm of the numbered company would advance $10,000.00 in a properly executed second agreement.

Fifth Reason

There was no tendering of documents by the Defendants on the date of closing. There is no evidence before me that would suggest that the Claimant had said do not tender the documents. This was not a complete deal and while it may be old fashion, tendering of documents or money as the case may be goes to show that the party tendering wanted to close the deal and if the other party refuses then the tendering party has his remedies. In this case there was no tendering of documents by the Claimant which leads to the conclusion that the Defendant was not relying on the purchase and sale agreement and/or it was not prepared to enforce its rights against the Claimant. I have read the case sited by *Counsel Syl-Nor Realties Ltd. V. Keramaris*, 1973 N.S.J. No. 139 and the subsequent Appeals Court ruling found at [1974] N.S.J. No. 210. In that particular case the one party had dispensed with the necessity of tender. This is not the case here, although both parties knew that the deal was not going to close.

The lawyers that represented the parties did not seem to be in the loop when the second agreement came about and possibly if they had been these issues could have been addressed and more certainty as to an outcome would have prevailed instead of resulting in a dispute as is the case here. However, notwithstanding that, the Defendant shall return the $10,000.00 to the Claimant Company. Neither Alexander Matz nor Richard LeBlanc should be a party to this action and should not be included in the Order.

I do note that Vaughne Realty Limited-Limitee has undergone a name change since this action was started and if necessary in noting that in the Order, the Claimant can make a motion to this Court.

DATED at Yarmouth, on the 14th day of November, 2005.

David T.R. Parker
Adjudicator of the Small Claims Court