Claim No: 277629

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: French v. Short, 2007 NSSM 21

BETWEEN:

RENEE FRENCH

Claimant

- and -

MAXINE SHORT and GREG SHORT

Defendants

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on June 5, 2007

Decision rendered on June 7, 2007

APPEARANCES

For the Claimant - Jeffrey Hoyt, Barrister & Solicitor

For the Defendants - self-represented

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[1] The Claimant sues for a deficiency on the resale of a mobile home following an abortive sale.

[2] In or before the fall of 2006 the Claimant placed her mobile home at 22 Campbell Avenue in Dartmouth on the market through a real estate agent, James Knox of Exit Realty Optimum.

[3] The Defendants were in the market for such a property. While driving around Dartmouth on October 22, 2006 they spotted it and immediately called Mr. Knox to obtain an appointment to see it. That was arranged the same day. The Defendants liked what they saw and with the assistance of Mr. Knox, representing both parties under a limited dual agency, drew up an Agreement of Purchase and Sale, offering to pay $49,900.00 for the mobile home. The offer was presented and accepted that very evening.

[4] The one term of that offer that is key to this case is the inspection condition, which reads:

> 3. (a) This agreement is subject to the Buyer at his/her expense having the property inspected by inspector(s) of the Buyer's choice, and the inspection(s) meeting the Buyer's satisfaction. The inspection(s) shall be deemed to be satisfactory unless the Seller or the Seller's agent is notified to the contrary in writing on or before (date) [handwritten] October 27/06. If said notice to the contrary is being provided it shall be accompanied by a copy of the written inspection report, following which either party shall be at liberty to terminate this contract and the Buyer's deposit shall be returned in full without interest or penalty.

[5] There was also a financing clause and other usual conditions. The closing was set for November 15, 2006. As explained at the hearing, such short times are not uncommon in transactions involving mobile homes because there is no land being conveyed, and no title search to be done.

[6] The Defendants did not put a deposit down until the following day, by which time their bank had already agreed to finance the transaction. A cheque for $500 was delivered to Mr. Knox's office on October 23.

[7] Significant to the Defendants' defence is the fact that they were not provided by Mr. Knox with a copy of the Agreement of Purchase and Sale at the time they signed it, or at any time thereafter. Unbeknownst to them a copy had been supplied to their bank, which required it for the financing file. Mr. Knox stated at the trial that he had a copy in the file for them, but he conceded that the Defendants had never been given the document. In fact, they did not see it until many months later when they asked their bank for a copy.

[8] After learning that their offer had been accepted, the Defendants moved quickly to arrange for an inspection. The inspector met with the Defendants and with Mr. Knox on the afternoon of October 26, 2006. The inspection disclosed some problems. The most serious was a leaking oil tank which had created an oil spill of undetermined extent. The mobile was also missing required tie-downs. Other lesser problems were noted.

[9] I find on all of the evidence that the Defendants were conflicted when they learned of the problems, at least initially and in Mr. Knox's presence. They knew that they had the right to back out of the deal, without necessarily knowing precisely how to do it. They also knew that the seller might be prepared to fix the problems at her own expense, in which case the deal could go forward.

[10] The events of the next 24 hours are a bit murky. Mr. Knox testified that he explained to the Defendants their options and made it clear to them that if they wanted to cancel the deal that they would have to give the required written notice. He also testified that, as far as he was concerned, the Defendants appeared to be still committed to the purchase. As such, he drew up an amending agreement that would have required the seller to fix the problems at her own expense as a condition of the deal. The Defendants were not inclined to sign it so he left a copy with them in case they changed their mind.

[11] The Defendants' version of events is slightly different. They claim that Mr. Knox never explained to them that they had to terminate the deal in writing. They understood that he was trying to convince them to sign the amending agreement, which they were unwilling to do because they were considering getting out of the deal entirely. Because they did not have a copy of the Agreement, they had no way of knowing the strict terms respecting termination.

[12] Were it strictly necessary to do so, I would make findings of fact as to what occurred between Mr. Knox and the Defendants on October 26th. I refrain from doing so because I believe that such a finding would be essentially irrelevant to this claim. Whether or not the Defendants knew or were told that they had to give notice in writing does not assist them in their case against the Claimant, Ms. French, who was not a party to these discussions. And whether or not the agent, Mr. Knox, knew or believed that the Defendants were intent on backing out of the deal, would not assist the Defendants. A real estate agent in these circumstances, acting for both parties, owes legal duties to both parties, but is neither party's agent for all

purposes. In other words, for purposes of this case, if the agent misconducted himself toward the Defendants, he did so on his own account and the Claimant does not have to suffer the consequences for the agent's misconduct, if it occurred. And I emphasize that I have neither found that he did, nor that he did not misconduct himself.

[13] Over the next day, Mr. Knox attempted to contact the Defendants, but it appeared that they were playing phone tag. At no time on the 27th did they speak. Mr. Knox believed that they were avoiding his calls. Maxine Short testified that the failure to connect was not deliberate; that they were out when he called and that they tried to call him back. I am prepared to accept that the failure to connect was not deliberate on anyone's part, but I view it as quite careless on the part of the Defendants that they did not make it their business to see or speak to Mr. Knox on that day, at all costs. They knew that October 27th was an important deadline. Instead of making it her business to see or speak to Mr. Knox, it appears that the only thing Ms. Short did on that day was to stop payment on the $500 deposit cheque.

[14] By the Defendants' own admission, over the next two days Mr. Knox tried to contact them, but they deliberately ducked his calls.

[15] On the following Monday, October 30th, Ms. Short sought legal advice, which I gather was just over the phone. The advice that she received was of limited value since the lawyer advising her did not have the agreement before him. In any event, it was already too late. Had any lawyer seen the agreement on or before October 27th he or she would have advised the

Defendants to give immediate written notice that they were backing out of the deal.

[16] Ms. Short testified that the advice she received was that if the inspection were unsatisfactory, the deal was automatically void. I do not believe that this is precisely what any lawyer would have told her, because every contract is different and would have to be interpreted according to the actual language used. This may have been Ms. Short's understanding, but if so it was incorrect. This contract required written notice, on or before October 27th, otherwise the inspection would be deemed to have been satisfactory.

[17] I believe that had the Defendants met or spoken directly to Mr. Knox on October 27th, it is highly likely that they would have been warned about the need to give written notice. As it was, they did not connect with Mr. Knox until the following Monday, October 30th. By then they had spoken to the lawyer and to another real estate agent, who advised them to sign a notice cancelling the contract. Such a document was prepared and sent on October 31st but was not accepted by the Claimant as it was out of time and thus legally ineffective.

[18] In the meantime, the Claimant had learned of the problems discovered during the inspection and very quickly had them investigated and fixed, at considerable cost. Had the Defendants been willing to proceed with the transaction, they would have received a mobile home in good condition, with tie-downs, a new oil tank and cleaned up spill site.

[19] November 15th came and went. It does not appear that there was any real communication between the parties in advance of that date. The Claimant through her lawyer was ready and willing to close on the closing date. The Defendants were not.

Application of legal principles

[20] The law of contract can work harshly at times, and this may be such an occasion. Judges and adjudicators are required to enforce contracts according to their wording, unless there is some ambiguity or uncertainty in the language, in which case a different result may occur. Where a contract requires a party to do something in a particular way, it is not enough for that party to say that they did it some other way. This contract required written notice on or before October 27, 2006, accompanied by a copy of the inspection report. Verbally advising the agent, if that is in fact what occurred, would not have been good enough. It had to be in writing.

[21] Courts can sometimes relieve against harsh or unusual conditions in a contract, such as where there is fine print on a standard form contract that would not have been anticipated and was not specifically brought to the other party's attention. I am sympathetic to the fact that the Defendants appear not to have appreciated that there was a particular way to give notice, but I can hardly find that this requirement qualifies as fine print or that it was in any way unusual. Clauses requiring written notice are the norm in real estate and similar deals. Written notice provides protection for both parties because it creates certainty. Any contract that allowed verbal notice would be the exception and would be a recipe for uncertainty, leading to further disputes and endless "he said, she said" controversies.

[22] In the end, the Defendants' apparent ignorance of their obligation does not change that obligation. The Claimant was entitled as at the end of October 27th to treat the deal as firm and binding. Indeed, she might have been within her rights to ignore the deficiencies and force the Defendants to accept the property in its then-current condition. To her credit, the Claimant spent the money and upgraded her property without hesitation. The Defendants could have had the benefit of that.

[23] The Defendants knew or ought to have known that their purported termination on October 31st was ineffective. By then they appeared to focus their energy and anger on Mr. Knox. On that very day Ms. Short wrote a long letter of complaint to the Nova Scotia Real Estate Commission. I do not know what, if anything, came out of that complaint. It does appear, however, that by then the Defendants had made up their mind not to proceed with the purchase to which they were legally bound, as I have found and as is clear from the wording of the contract and the events.

[24] By failing to do what they were contractually bound to do, the Defendants breached the contract. Had they sought proper legal advice between October 27th and November 15th, any lawyer would have advised them that they either had to close or run the risk of being responsible for damages. It is most unfortunate that they appear not to have taken advice and properly considered their options at that time.

Damages

[25] After an abortive sale, the obligation of an innocent party such as the Claimant is to make reasonable efforts to resell the property and mitigate the loss, as much as possible.

[26] The evidence of the Claimant was that the mobile remained on the market for several months and eventually was sold for $43,000, with a closing on March 30, 2007. I am satisfied that this was a reasonable effort. Surely had there been a better offer available, it would have arisen and the Claimant would have been happy to accept it. As such the loss to the Claimant is the difference between the two contract prices, namely $49,900.00 minus $43,000.00, being $6,900.00.

[27] In the result there will be judgment for $6,900.00 against the Defendants jointly. No interest is claimed. I also allow the filing fee of $160.00. No service fee was proved. The total judgment is therefore $7,060.00.

Eric K. Slone, Adjudicator