Claim No. SCCH 279340

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: Peters v. Roza, 2007 NSSM 102

BETWEEN:

TERRY PETERS

Claimant

- and -

JOPEPH A. ROZA, ALISON M. GILLIS, FRANCIS F. GILLIS AND ALICE I. GILLIS

Defendant

DECISION AND ORDER

Adjudicator: David T.R. Parker

Heard: July 31, 2007

Decision: November 13 , 2007

This matter came before the Small Claims Court at Halifax, Nova Scotia, on the 31st day of July, A.D. 2007.

The parties appeared. Service of the Pleadings was in accordance with the Rules and Regulations of the *Small Claims Court Act* and the matter proceeded without objections or preliminary motions from either party.

The claim was for $4,480.80 resulting from the “non-disclosure of the special assessment pertaining to a real estate transaction.”

This case involved the purchase of a condominium unit by the Claimant from the Defendant Gillis.

The Claimant made an offer to purchase the Defendant Gillis’ condominium unit in an Agreement of Purchase and Sale dated August 8, 2006.

The Purchase and Sale Agreement in clause 11(a) stated, “That there are not special assessments contemplated by the condominium corporation.”

The Defendant Gillis counter offered on August 21, 2006 and included as part of that counter offer was the statement:

> "Clause 11(c) to make purchaser aware of a special assessment in condominium building upgrades in the near future."

There were other changes in the counter offer as well. This counter offer was rejected by the Claimant.

A subsequent offer was made on August 22, 2006, by the Claimant to the Defendant Gillis. In that offer the Claimant or his agent inserted under clause 5(b) the following wording in large bold print:

"BUYER IS AWARE THERE IS NO SPECIAL ASSESSMENT AT THE TIME OF SALE OF THIS BUILDING. IF SO TO BE PAID OUT BY SELLER ON OR BEFORE CLOSING."

The offer in the August 22, 2006, Purchase and Sale Agreement also had clause 11(c) which referred to the seller (Defendant Gillis) represents and warrants that "there are not special assessments contemplated by the condominium."

The Purchase and Sale Agreement also requires the seller (Gillis) to provide the buyer (Claimant) "an estoppel certificate prepared and executed in accordance with the C*ondominium Act* of Nova Scotia and the bylaws of the condominium corporation in respect of the common expenses of the seller and any default in payment thereof within 10 days of acceptance of this agreement. The buyer shall have 10 days from the receive whereof to review and find this certificate to their satisfaction, failing which this agreement shall become null and void and deposit herein shall be returned to the buyer without interest or penalty…"

The offer of August 22, 2006, was accepted by the Defendant Gillis on even date. A property condition disclosure statement was provided to the Claimant and initialled by the Claimant/Purchaser on August 23, 2006.

The closing was to take place and did take place on September 15, 2006.

The Defendant Gillis' solicitor sent a copy of the Estoppel Certificate out to the Defendant Roza, a solicitor, by way of letter dated September 7, 2006.

In part the Estoppel Certificate stated:

"(1) Specific assessment that are known to be forthcoming in the current fiscal year – see reserve fund study – The Board of Directors will be calling a special general meeting before the end of 2006 to discuss with owners the possibility of funding for windows and siding.

(2) Major capital expenditures that planned by the Corporation.
Yes _X_ No ____

The Claimant was not provided with the Estoppel Certificate prior to the closing on September 15, 2006.

On November 7, 2006, the Claimant received a notice of a general meeting of the condominium board of directors to discuss major building repairs.

A meeting was held on November 15, 2006, wherein the owners authorized the board of directors to proceed with contracting out for repairs which would be funding by way of a special assessment levied to each unit.

The special assessment related to the Claimant's condominium unit was $4,480.80.

In May of 2005, Alison Gillis was a board member and unit owner of the condominium.

On October 11, 2005, the Defendant Alison Gillis tendered her resignation from the board.

On June 29, 2006, the board under "New Business' provide an update to its members in regard to repair and replacement of windows and siding on the building.

Analysis

The Claimant is claiming that the Defendants Gillis failed to disclose information about the special assessment that was inevitably coming and if the Claimant had been aware of this he would have renegotiated a purchase price or not purchased the property. The Claimant also claims the Defendant Solicitor had a duty to disclose that a special assessment was in the works as it were when he obtained the Estoppel Certificate.

The Claimant said he was aware that in the Counter Offer that was ultimately rejected by him there was a specific reference about a special assessment. The notation specifically stated in the counter offer "To make purchaser aware of a special assessment of condominium building upgrades in the near future."

It would appear after that counter offer was rejected by the Claimant and that he inserted in a further offer if there was a special assessment it would be paid out by the seller. As it turns out at the time of closing there was no special assessment. It is not conceivable that the Claimant was not aware of a special assessment for upgrades in the near future when he was clearly made aware of it in the previous counter offer by the Defendant Gillis. The Claimant's daughter

was his real estate agent and he said, “I cannot recall my daughter telling me there was a special assessment. Possibly she neglected to tell me about it.” In fact at the time of the closing there was no special assessment.

The question then becomes does the representation and warranty in the second Purchase and Sale Agreement bind the Defendant. There is no doubt that the Defendant Gillis was aware there were repairs that would be undertaken in the future. The Defendant Gillis however would not know at the time she accepted the Defendant’s offer that the corporation was going to approve a special assessment. In fact even during the November meetings at the board they were not sure how this was going to be handled. Therefore I can conclude, and do conclude, that the Defendant Gillis could not possibly warrant something that the board had not contemplated on how to deal with repairs to the unit. The only thing that the Defendant knew about was that there were going to be repairs. The question then becomes should these future repairs have been disclosed. It seems to me that it is up to the buyer to make inquiries and this is even more so when the buyer has the right to have the unit inspected. This is not a case of a latent defect that the buyer was not aware of and the seller was aware.

With respect to the Defendant Roza, the Claimant argues that Mr. Roza should have advised him of what was contained in the Estoppel Certificate. Mr. Roza argues that the Estoppel Certificate does not state that a special assessment is in place.

The purpose of the Estoppel Certificate under the Purchase and Sale Agreement is to ensure there is no default in payments by the seller relating to the common expenses. There is no default noted and there has been no assessment made against the unit at the time the certificate was issued. Whether or not major capital expenditures are planned is not going to affect the deal. The Claimant had not made that a condition of his offer.

For all these reasons the Claimant against the Defendants is dismissed.

Dated at Halifax, this 13 day of November, 2007.

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David T.R. Parker
Small Claims Court Adjudicator