IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: Camelot Homes Inc. v. Robertson, 2011 NSSM 58

2011 Claim No. 347618

BETWEEN:

Name: **CAMELOT HOMES INCORPORATED**

Claimant

- and -

Name: **LORRAINE ROBERTSON**

Defendant

Hearing Date June 7, 2011; Last Written Submission on September 2, 2011
Appearances: Claimant - Matthew Conrad, Barrister and Solicitor
Defendant - Self Represented

DECISION and ORDER

[1] This case involves a claim for 30% of the contract price on a signed agreement, terminated within approximately a week of the signing of the agreement.

Background

[2] The Claimant sells and installs steel roofing systems in Nova Scotia. The Claimant has an office and warehouse facility in Halifax. It advertises in the newspaper and does direct mailings to attract potential customers.

[3] The evidence here indicated that the parties entered into a written contract on or about March 10, 2011, for a total contract price of $40,250.00. A deposit of $500.00 was provided at that time (although apparently the cheque was subsequently cancelled). The contract was to supply labour and materials to re-

roof the Defendant's building in Margaree Valley, Inverness County, Nova Scotia. The building is used as a home for special care operated as a for-profit enterprise by the Defendant.

[4] On the morning of March 11th, approximately 12 hours after the contract was signed, Mr. Colin Brothers, President of the Claimant company, called Ms. Robertson to tell her that the Claimant would be shortly delivering the materials for the roof. At that point she indicated that she did not yet have financing in place. She testified that in that call she told him he was not to deliver the materials. There then followed some further telephone discussions, the upshot of which was that Ms. Robertson sent a letter under date of March 18th cancelling the contract. This appears to have been sent on March 22 according to the Canada Post registration receipt.

[5] The claim is based on the following provision in the contract which reads:

> *In the event the Buyer breaches the Contract the Buyer agrees to pay the Contractor thirty percent (30%) of the Total Contract Price as liquidated damages.*

[6] The Total Contract Price was $ 40,250.00 and 30% of that figure, less the $500.00 deposit, yields the claim amount of $ 11,575.00.

[7] Counsel for the Claimant submits that it is a simple case of contract, and the Court should uphold the contract and order payment based on the clear language of the contract. Further, he indicates that the 30% is, on the evidence, a genuine pre-estimate of damages and, accordingly, the amount is due and owing.

[8] The Defendant pleads that the agreement was conditional on financing, which was never received, and as well, that the Claimant was negligent or even fraudulent in respect of the issue regarding the slope of the roof and whether the warranty covered the roof

[9] While not pleaded by the Defendant, I raised the issue of the potential application of the *Direct Sellers Regulation Act, R.S.N.S. 1989, c. 129,* and received written submissions from the parties on that issue.

[10] The issues in this case are:

(a) Whether the *Direct Sellers Licensing Act,* R.S.N.S. 1989, c. 129, applies to the transaction. On August 15th, I wrote to the parties requesting submissions on that question;

(b) Whether the 30% claimed is a penalty clause or a genuine pre-estimate of damages, or is otherwise unconscionable;

(c) Whether there was a material misrepresentation in respect of the warranty given that a substantial portion of the building is less than 4/12 Pitch.

(d) Whether there was a condition regarding financing, which would entitle the Defendant to cancel the contract.

Direct Sellers Regulation Act, R.S.N.S. 1989, c. 129

[11] By letter dated August 15th, I invited written submissions as to the potential application of this Act. In part, my letter stated:

> *In reviewing the file and potential law applicable to this case, I have reviewed the provisions of the Direct Sellers' Regulation Act, R.S.N.S. 1989, c. 129 as well as the Direct Sellers Regulation, N.S. Reg 93/76. As I recall, I had mentioned the possible application of this Act at the hearing and was told by counsel for the Claimant that it not apply. On review, I am of the opinion that it may well apply.*
>
> *However, before making any firm conclusions on the issue, natural justice and procedural fairness require that I first raise the issue with the parties so that they may make comment if they wish. That is the purpose of this letter. I recognize and note that it is somewhat unusual to be raising this at this stage and I regret that I had not earlier raised it for the parties' consideration. However, if the Act applies it is a significant legal issue which I have a duty to recognize and deal with.*
>
> *As a starting point, I would refer you each to s.2(d) of the Direct Sellers' Regulation Act, which defines "direct selling" as follows:*

> *2 (d) "direct selling" means selling or offering for sale or soliciting orders for future delivery of goods or services* ***where the first person-to-person contact is made by the salesperson outside of a retail outlet****... and includes sales resulting from a solicitation by a non-retailer to attend a place where selling, offering for sale or the solicitation of orders for the future delivery of goods or services occurs and sales conducted by a multi-level marketing wholesaler, a multi-level marketing distributor and the sale of hearing aids regardless of the circumstances of the sale;*
>
> [Emphasis supplied]

[12] I received responses from both parties. The Defendant's position is that the transaction here does fall under the Act. Therefore she was entitled to cancel.

[13] The Claimant takes the position that the first person to person meeting (which took place in the Defendant's property) took place as a result of the Defendant's request. This was done through the first person to person contact being made by the Defendant when she called the Claimant and asked then to come to her property. The first person to person contact therefore was not made by the Claimant, and the Claimant is not a "direct seller"; therefore, the Act does not apply.

[14] In a separate decision involving the same Claimant and heard on the same evening, I have ruled that the Act does apply to the activities of the Claimant. In that case, ***Camelot Homes Incorporated v. Cochrane***, October 3, 2011, N.S.S.C.C., No. 347619, I found that the definition of "direct seller" does capture the activities of the Claimant and, based on the activities of the Claimant in this present case, I would have come to the same conclusion here.

[15] However, there is another provision that, in this case, makes that issue moot. I refer to Section 2 of the *Direct Sellers Regulations,* N.S. Reg. 93/76, which reads as follows:

> ***Exemptions***
>
> *2 (1) The Act does not apply to*
>
> *(a) a direct sales contract under which a person engaged in business for gain is the purchaser of goods or services to be used in or in respect of his business and not for resale;*

[16] The evidence was that the premises in respect of which the roof was to be installed, are used by the Defendant in a “business for gain” - the operation of a home for special care. As such, it follows that the Act simply does not apply by virtue of this section.

Penalty Clause

[17] I turn to the issue of whether the 30% amount is in the nature of a penalty or, alternatively, in all the circumstances here, is an unconscionable amount and should be set aside by the Court. I refer to the case of *Peachtree Associates v. 857486 Ontario,* 2005 CanLII 232216 (On CA) where Sharpe, J.A. discusses the traditional law regarding liquidated damages/penalty clauses as well as equity’s approach to unconscionable transactions and suggests a merger of the two concepts.

[18] The evidence provided here was far from satisfactory as to establish what the actual costs were and what would be the profit margin. The amount claimed is a substantial amount and in seeking such a substantial sum, the Claimant has the burden of showing the Court, through cogent and compelling evidence that the amount claimed is a genuine pre-estimate of its losses.

[19] Here, the contract in question was cancelled within approximately a week of being signed. Significantly, the evidence showed that the very next day after the signing the Claimant was told unequivocally that the materials were not to be delivered. Nevertheless, the Claimant did apparently send a delivery truck on March 18th which the Defendant refused.

[20] No doubt there were some out of pocket costs in respect of that aborted delivery. However, I was not provided with any evidence in respect of that.

[21] That leaves the anticipated profit margin on the contract. In my view, a profit margin of 30% should be strictly proven in order to satisfy the requirement that it be viewed by a court as a genuine pre-estimate of damages.

[22] I find the amount claimed is in the nature of a penalty and I would dismiss the claim on that basis.

Warranty - Roof Pitch

[23] The issue here relates to the pitch of the roof and whether the manufacturers warranty would have covered this roof.

[24] The manufacturer of the roofing material - Edco Products - makes it clear in its standard warranty documentation that its warranty does not apply to a roof having a pitch of less that 4/12.

[25] The same qualification is found in the Camelot Homes standard agreement as an item under Specifications where it states : “ANY SURFACE WITH LESS THAN A 4/12 PITCH IS NOT COVERED AGAINST LEAKAGE”.

[26] This matter was raised by the Defendant with the Claimant’s salesman, David Hill, on March 10th who told her that it was a 4/12 roof and that the warranty would apply. Subsequent examination verified that sizable portions of the roof were actually less than 4/12 and were in fact 2/12 pitch.

[27] Based on this, I would have to conclude that the warranty would not apply. It is of note that this warranty is intended to be a lifetime warranty for this steel roofing system.

[28] The issue of whether the warranty would apply is a material matter. The representative of the Claimant misstated an absolutely relevant fact - the actual pitch of the roof. He further misstated whether the warranty would apply. Whether this be characterized as negligent misrepresentation, breach of collateral contract, breach of fundamental term, or under some other legal characterization, it amounts to the same thing in my view. The Defendant is not bound by the contract and may, as she had done, cancel it with impunity.

Financing Condition

[29] Given my conclusions on the previous two issues, I do not intend to consider this issue.

ORDER

[30] It is hereby ordered that the claim be and is hereby dismissed.

[31] There will be no costs.

DATED at Halifax, Nova Scotia, this 3 day of October, 2011.

Michael J. O'Hara
Adjudicator