Claim No: 407785

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Braid v. Destiny Homes Inc., 2012 NSSM 62

BETWEEN:

LEANNA NORMA BRAID and ADAM KIRIL McCANNEL

Claimants

- and -

DESTINY HOMES INCORPORATED and DESTINY DEVELOPMENT INC.

Defendants

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on November 20, 2012

Decision rendered on November 30, 2012

APPEARANCES

For the Claimants	self-represented
For the Defendants	Greg Hammond, co-owner Michelle Grace, co-owner

BY THE COURT:

[1] The Claimants are a couple who live in the Antigonish area.

[2] The Defendant companies are both owned by Greg Hammond and Michelle Grace. It would appeal that Destiny Development Inc. is the company most directly implicated in these events, but for reasons which will be made clear below, the related company also became involved.

[3] This is a dispute over the sale of a house structure that was to be removed from a property owned by the Defendant, Destiny Development Inc. The Claimants had planned to have it moved from its location in Ingramport to a lot which they owned in Antigonish County.

[4] Moving a full-sized house is no simple matter. It is technically complicated and expensive. In fact, in a situation such as this, the cost of moving the structure dwarfs the cost of purchasing it.

[5] The Defendant, Destiny Development Inc. is developing its five-acre site on St. Margaret's Bay Road. The plan is for several multi-unit condominium buildings to be built. In order to do that, the existing homes either have to be demolished or moved. The owners of the company decided to try and salvage some value by selling the structure to someone who would remove it from the land.

[6] The Defendant, Destiny Development Inc. advertised the home in question, which bears the municipal address of 7990 St. Margaret's Bay Road,

for sale on the popular website kijiji. The Claimants saw the ad and got in touch with Mr. Hammond (initially), leading to an eventual agreement dated March 9, 2012. The purchase price for the house was agreed to be $6,000.00.

[7] The written agreement appears to have been drafted by Ms. Braid, likely without any input from a lawyer. I am not being critical, as the agreement is fairly clear and covers most of the bases that one would expect to see covered.

[8] The agreement consists of some twelve paragraphs. For my purposes, the most significant paragraph was the following:

> 4. Once it is confirmed that the house can be moved, as indicated in #2, the move shall occur within two weeks of road closures being lifted in all relevant counties en route from 7990 St. Margaret's Bay Road, NS, to 2457 Highway 337, Antigonish Harbour, NS, but not before.

[9] The owners of the Defendants testified, and this evidence was not in any dispute by the Claimants, that it was a vital term of the contract from their point of view that the building be removed as soon as possible. Because of the time of year, it was well understood by everyone that there were weight restrictions on certain roads, because of the soft conditions that follow a winter thaw. It is also true that the date when the roads open changes from year to year. As such, when this agreement was entered into, the parties did not know precisely when it would be possible to move the house.

[10] The reason that the Defendants were in such a rush to have the house moved was that they were already building the first condo building on the site, and this house was blocking access to certain services. As such, the longer the

house stayed in place the more delay there would be in completing the condominium building and potentially offering units for sale to the public.

[11] In legal terms, one would have to say that time was “of the essence.” It is also agreed that roads were opened by April 16, 2012, and that the date before which the house was to be removed became April 30, 2012.

[12] To make a long story short, the Claimants had a great deal of difficulty with their house moving contractor, who had earlier confirmed that it was available and could do the job. It became impossible to arrange for it to move the house before April 30, and at some point this contractor became utterly unresponsive and unreliable. The Claimants produced evidence showing some seventy-four phone calls to this contractor trying to get it to commit to a date and carry through with the move.

[13] Despite time having been of the essence in the contract, the Defendants appear to have accepted almost immediately that the house was not going to be moved until the third week of May at the earliest. There was nothing about their response to the situation that suggested that they were attempting to take advantage of the Claimants and their misfortune.

[14] At some point, the Claimants confirmed that the contractor would be on site May 21, 2012 to commence the process of preparing the house for removal. It is apparently a several day process, where the house must be disconnected from the foundation and otherwise made suitable to be lifted onto a large flatbed. The Defendants did not take any position at that time that they regarded the Claimants to be in breach of contract.

[15] The Claimants attended at the site on May 16, and it appears at that time that they removed some of the items from the house, which under the contract they were entitled to do. The Claimants also noted that the power was still connected to the house, which became an issue at the trial.

[16] According to the Claimants, their moving contractor had failed to consider that May 21, 2012 was the Victoria Day holiday. The Claimants drove to the property on the 22nd of May, which was a Tuesday. It is not clear to me whether they expected that their contractor might be there, but in fact the contractor did not attend.

[17] The Claimants noticed that the electrical power was still connected to the house, which is a point to which I will return later.

[18] Relations between the parties were still civil at this time. The Claimants were obviously having a lot of trouble with their existing contractor, and on the recommendation of the Defendant, Greg Hammond, they contacted another contractor, Phil Liel, who indicated that he was prepared to move the house by June 15.

[19] By then, the Defendants were losing patience. In an e-mail dated May 28, 2012, Michelle Grace asked the Claimants for a "status update." The following day, in another e-mail Ms. Grace stated "if you are having problems with your contractor, Greg mentioned he was speaking with someone else who is interested in moving the house. Either way we need an update and a plan."

[20] On May 30, 2012, Ms. Braid e-mailed back and stated "I should be hearing from movers tomorrow and hopefully they will be on site this weekend. In the meantime I am working on a plan B with another guy in case the others fall through again. Will keep you posted."

[21] On Monday, June 4, 2012, Ms. Grace sent an e-mail asking for the "status as of today." It is undisputed that nothing concrete had yet been arranged.

[22] It was at or about this time that some confusion arose about the status of another individual, David Joy, who was also apparently interested in purchasing the structure. From the perspective of the Claimants, they were frustrated and concerned about their $6,000 which they had paid in full to the Defendants. Apparently, Mr. Joy had been willing to pay $10,000 for the structure. The Claimants were prepared to back out of their deal and allow the Defendants to sell to Mr. Joy so that they could get their money back. It appears that the Defendants came to believe that the Claimants were looking to sell directly to Mr. Joy and pocket the profits. I believe this was simply a misunderstanding on their part.

[23] It was on June 4, 2012 that an e-mail from Greg Hammond was sent to the Claimants, which I will quote in full:

> You have not adhered to your contractual obligations and now you have no rights to the building on our property. As expressed to you we needed the building moved within two weeks of the roads being opened. Bulletin number 2-12 states spring weight restrictions were lifted on April 16, 2012. As of today's date of June 4, 2012 you have not done so except to rip siding off the exterior leaving an unsightly mess and left (sic) which we asked you not to do. We are now incurring additional costs and will take any necessary action to minimize our additional expenses. Any attempt to

> gain access to our property by you or your representatives will be addressed severely unless we give permission for it to take place. We will be in communication when we have resolved this issue hopefully in a timely manner. [They then supplied the name and phone number of their lawyer.]

[24] Eventually, the Defendants sold the building to someone else. They have retained the Claimants' $6,000, as a set off against the considerable damages which they claim to have suffered. It is this $6,000 which the Claimants seek to recover in this claim. Their primary cause of action is said to be unjust enrichment. They also object to the fact that the Defendant sold the building which they say they owned.

[25] My analysis of the legal relationship is a little different.

[26] From a strict legal point of view, the Claimants never owned the structure. This is because under the law all attached structures belong to the owner of the land on which the structure sits. As such, the interest of the Claimants was not proprietary but was purely contractual. They paid valuable consideration for the right to remove a structure, which once removed would have become their property, because it would have been converted from "real" property to "personal" property.

[27] The rights and obligations of the parties are accordingly to be governed by the law of contract.

[28] As I mentioned earlier, the two-week time frame for removal of the structure was critical at the outset. Time was stated to be of the essence. This is similar to the kinds of provisions that prevail in contracts for the purchase and

sale of property, where a closing date is specified and unless the purchaser is able and willing to close on that date, the contract terminates. However, it is well understood that a provision such as a closing date or, as here, a removal date, can be waived or changed. To use the analogy of a closing date, where a party fails to close and the other party continues to treat the contract as alive, the law deems it that the date has been waived.

[29] Where time has ceased to be of the essence in a contract, either party has the right to revive this condition and make time once more of the essence, but only upon reasonable notice. What that means is that either party is entitled to specify a new critical date, which is within a reasonable time. It would be unreasonable to specify a date too soon or a date too far in the future. The purpose of notice is to allow the other party to get back on track with his or her obligations.

[30] This principal has been part of the law for a long time. In the 1948 Supreme Court of Canada case of *Hanson v. Cameron* [1949] 1 D.L.R. 16, [1949] S.C.R. 101, the following headnote lays out the clear proposition:

> Where time is to be of the essence in an agreement, an extension of time with respect to a particular instalment destroys the essentiality of time with respect to that instalment at least. Where the parties to an agreement for logging and sale of timber, in which time was to be of the essence, had paid no attention to the time as far as obligation to perform the contract was concerned, but later respondent had served a notice cancelling the agreement, held, the giving of the notice, though ineffective as such, was an admission on the part of respondent that she regarded the agreement as current and subsisting, and thereby indicated to appellant that the provision making time of the essence had been waived. The conduct of respondent had therefore been such that it justified the implication of an agreement waiving the provision making time of the essence.

[31] The facts of this case make it quite clear that the Defendants waived the April 30 moving date. It would have been within their rights to cancel the contract once the house was not moved by that date, and they would have been entitled to sue for damages, although not necessarily retain the entire $6,000, as that would have amounted to a forfeiture. Instead, probably for the best of intentions, they kept the contract alive without specifying a new “essential” date. Time marched on. New dates were mentioned but never nailed down. As late as May 30, the Defendants were still treating the contract as alive. It was not until June 4 that we see a firm position being taken to the effect that the contract was terminated.

[32] With all due respect to the Defendants and what I believe to have been their good faith, they did not give proper notice and were not entitled to terminate the contract when they did. At any time, they could have specified that time had once more become of the essence, and placed a reasonable date for removal. Had they done so, the Claimants would have been on notice that they had to do something by that date or face possible forfeiture of their money.

[33] The fact that the Claimants were having trouble getting a removal contractor was entirely their problem, and it would have been no defence for them to say that they made reasonable or even superhuman efforts to have the house removed. It was up to them at the outset to contract for removal, and their remedy (had they needed one) would have been against the contractor rather than against the Defendants in this case. But in the end, that is not how it played out.

[34] I have also considered the fact that the house was not disconnected from electrical power on either of May 16, 2012 or May 22, 2012. The Claimants argued that this was a breach of contract on the part of the Defendants. I accept the evidence to the effect that power could have been disconnected in a timely fashion, had the moving contractor actually begun work. So the Claimants cannot rely on this fact to support their claim, but as it turns out they do not need to.

[35] It may seem a little harsh to the Defendants, who I believe were acting in the utmost good faith, but one cannot follow up patient indulgence with a unilateral termination without proper notice. The law is very clear about this.

[36] In legal terms, it was the Defendants rather than the Claimants who breached the agreement, or more accurately they rescinded it. Under such a scenario, it is as if the contract had never come into existence. As such, the Claimants are entitled to have their money returned. The Defendants have doubtless incurred costs which could have been treated as damages, in the appropriate situation. However, by their own conduct, the contract became null and void and became no longer capable of supporting a claim for damages by the Defendants. As such, they cannot set off any of these damages against the purchase moneys which they received.

[37] The Claimants have asked for other consequential losses, in particular the cost of travelling to visit the site on a number of occasions. I am not prepared to allow these items. In my view, all of their extra visits were caused by their difficulties with their moving contractor, and have nothing to do with any of the positions taken by the Defendants.

[38] The Claimants are also entitled to their costs in the amount of $182.94 to issue the claim, plus $149.50 to serve it.

[39] It is appropriate that both Defendants be responsible for the money, since one of the corporate Defendants was named in the contract while the other was directed to be the payee on the cheque making the $6,000 payment.

Eric K. Slone, Adjudicator