Claim No: SCCH - 470666

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: Country Living Estates Seniors' Residence Limited v. Tubo, 2018 NSSM 10

BETWEEN:

COUNTRY LIVING ESTATES SENIORS' RESIDENCE LIMITED

Claimant

- and -

MAXROXAS TUBO and ISA TUBO

Defendants

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Halifax, Nova Scotia on February 6, 2018 and February 20, 2018

Decision rendered on February 22, 2018

APPEARANCES

For the Claimant	Gordon Warnica Owner
For the Defendants	self-represented

BY THE COURT:

[1] This is a claim and counterclaim arising out of an agreement by the Defendants to rent, with an option to purchase, a building at 2540 Prospect Road in Hatchett Lake, Nova Scotia.

[2] There are two documents both signed on October 9, 2014. One is a lease whereby the Defendants agreed to occupy a part of the property as their principal residence. The stated term in that document was for occupancy commencing on December 1, 2014, and continuing for a fixed duration of 59 months ending on October 31, 2019. Rent was to be $2,500.00 per month, with the Defendants responsible for their own utilities.

[3] The second document was an option to purchase whereby the Defendants were granted the option of purchasing the property, subject to certain terms. They paid a $10,000.00 deposit, and agreed to remit a monthly sum of $500.00 to the Claimant as an instalment toward the purchase price. This additional $500.00 was referred to in the agreement as "equity premiums," and was in addition to the rent payable under the lease.

[4] Essentially, the Defendants were engaging in a commercial transaction that was designed to enable them to operate a seniors’ residence in this purpose-built building in which they would also reside. They had five years to make it work.

[5] Neither of the two documents would make sense alone. They can only be understood as two halves of a whole transaction.

[6] The Defendants were enthusiastic people and experienced healthcare providers. What the evidence before me also clearly established was that they were not experienced in operating a business, and they clearly took on far more than they were capable of doing. This is not to sell short their capabilities, but they also had family issues, including a special needs child, which challenged them.

[7] The long and the short of it is that the Defendants never attracted sufficient clients to support the enterprise. Indeed, they only ever had one fully paying client. They fell behind in their rent, and worked well beyond their intention in trying to bring the property up to the standard that would have made it an attractive seniors' residence. The Defendants blame the Claimant's representative, Gordon Warnica, for not having properly oriented them to the peculiarities of the building. To give but one example, they ran into a problem with water quality which they believed to be a serious problem, but which appears to have been caused by their failure to understand the need to put water softening salts in the system. Once that was pointed out and corrected, the water problems vanished.

[8] Mr. Warnica, on behalf of the Claimant company, was highly motivated to help the Defendants in their endeavor. The last thing he wanted was for the agreements to fail. I do not find that any fault can be placed on Mr. Warnica or the Claimant company.

[9] It is simply the case that the Defendants were too ambitious and could not accomplish what they had intended or hoped.

[10] The principal claim is for arrears of rent. The counterclaim is for a return of all deposits, as well as other relief for the efforts that the Defendants put into improving the property.

[11] On the question of whether rents are collectible under the lease, the issue arises as to whether or not this matter ought to have been brought under the *Residential Tenancies Act*. In fact, Mr. Warnica did attempt to use Residential Tenancies procedures, but ran up against the one-year limitation when for a time he was unsure of the Defendants' whereabouts and could not serve them with papers. No longer having that as a potential remedy, he commenced the claim here. The Defendants have suggested that this Court has no jurisdiction.

[12] I find that the transaction, as documented in the lease and option to purchase, and viewed as a whole, is actually a commercial or quasi-commercial transaction that falls outside the *Residential Tenancies Act*. I find that this Court has jurisdiction to deal with monetary claims arising under these documents.

[13] Part of what the Claimant has sought in this claim is a release from the Defendants that would remove the option to purchase from title. The Defendants were not obliged to, but had the right to register the option to purchase. Despite the fact that the transaction has fallen completely apart, that registration remains in place, preventing the Claimant from being able to sell the property to someone else. As I openly stated at the hearing, I have no jurisdiction to deal with the title to the subject property because the *Small Claims Court Act* is very specific that no claims may be entertained regarding an interest in land. Nevertheless, it is hoped that a resolution of the financial issues will make clear to the parties what ought to be done to allow them all to move on.

[14] There is no dispute that the Defendants stopped paying rent as of February 2016, and remained in occupancy for a further nine months. At the stated rent of $2,500.00 per month, this would add up to $22,500.00.

[15] The Defendants testified, and this did not seem to be contradicted, that Mr. Warnica agreed in February 2016 to reduce the rent by $500.00 per month. If that side agreement is given effect, the arrears of rent amount to nine months at $2,000.00 for a total of $18,000..00.

[16] Although there's an argument to be made that this reduction was contingent on the Defendants actually paying their rent, I believe it is enforceable as the Defendants were still trying to make a go of it during those months, and they always recognized that they were in arrears. As such, I find that the arrears of rent owing is $18,000.00.

[17] The legal status of the $10,000.00 initial deposit, and the $500.00 instalments totalling $7,000.00, is that either these deposits are to be forfeited, or they are to be returned to the Defendants upon the failure of the transaction to be completed, for any reason. The option to purchase document is silent as to the status of these deposits.

[18] In the law there is a legal presumption against forfeiture. That presumption exists because forfeiture is inherently harsh and often unfair, although if clear language dictates that forfeiture has been agreed to, the court will usually enforce it. In the case here, it would have been easy to include a term in the documents that would have forfeited the deposits on a failure of the

transaction to complete, but the parties did not include such a clause. As such, I find that the deposits stand to the credit of the Defendants, and ought to be returned to them. This means that the $17,000.00 is offset against the $18,000.00 of rent arrears, with the result that the Defendants owe to the Claimant the net sum of $1,000.00.

[19] As to the balance of the counterclaim, as I have already observed, I do not believe that the Defendants have established any legal breaches by the Claimant or Mr. Warnica, and unfortunately they are not able to recover anything for all the work they put in on the property, such as painting, nor for all of the undoubted aggravation and disappointment that they suffered as a result of this arrangement not having come to fruition.

[20] As such, there will be a judgment for the Claimant in the net amount of $1,000.00. In the exercise of my discretion, I allow nothing for costs as both parties have been substantially successful.

[21] As alluded to above, this financial reckoning should allow both parties to move on. Although this Court has no jurisdiction to order the Defendants to remove their registration on title, it is clear to this Court that there is nothing remaining to be protected and the Defendants ought to do the right thing and release the title. If they fail to do so, they expose themselves to further legal actions by the Claimant which can only be harmful to them.

Eric K. Slone, Adjudicator