SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Dixon v. Philpitt*, 2022 NSSM 51

Date: 20220817
Docket: SCCH 514753
Registry: Halifax

Between:

Deborah Rebecca Dixon

Claimant

- and -

Joan Philpitt

Defendants

REASONS FOR DECISION AND ORDER

Adjudicator: Eric K. Slone

Heard: August 10, 2022 via zoom in Halifax, Nova Scotia

Appearances: For the Claimant, self-represented

For the Defendants, self-represented

BY THE COURT:

[1] Deborah Dixon ("Deborah") and Joan Philpitt ("Joan") are sisters. In late 2020 they agreed to buy a house together, with two separate and approximately equal units, in which they could live.

[2] The property they settled on was a duplex in Stillwater Lake, Nova Scotia. Deborah testified that it was necessary, for personal reasons, for her to have the upper unit of any property they might buy. Joan did not dispute that. However, the property in question had tenants living in the downstairs unit which would not be available immediately on closing. Also, it appears, that the bottom unit was in slightly rougher shape than the top unit.

[3] They did not come to the purchase with equal resources. Deborah was expecting money from the sale of her own house and had at least $55,000.00 to contribute toward the down-payment. Joan had precisely $33,000.00.

[4] As is common with such arrangements between family members, there was no explicit agreement (not even verbally) on how the equity would be divided in the event that this partnership did not work out. And the partnership did not work out. Within about two months there was a personal falling out that appears to have created a permanent rift between the sisters.

[5] If there is a silver lining in this saga, it is the fact that the real estate market boomed in the roughly eighteen months of their ownership, and both parties received a significant profit on their investment.

[6] The house was sold recently, and the equity divided 50/50 with an agreed-upon holdback of $25,000.00 to be divided subject to the assessment of this court as to their respective entitlements. Deborah says that she should receive $19,500.00 and $5,500.00 should go to Joan. Joan argues that the money should be equally split.

[7] Both parties testified and supplied documents and various proposed calculations. However, before embarking on my own elementary accounting, I will address some threshold issues:

a. What was the implied agreement as to their investments?

b. Did Deborah agree at the outset to pay an extra $5,000.00 - which would not be accounted for - in order to sweeten their initial offer to

purchase the property?

c. Did Deborah agree to pay additional closing costs (legal fees, deed transfer costs etc.) - also without being accounted for?

d. What credits, if any, are both parties entitled to claim to account for the improvements they made to their respective units?

e. What credits, if any, are either of the parties entitled to claim for expenses that they made that were to the benefit of the property as a whole?

What was the implied agreement as to their investments?

[8] As already mentioned, there was minimal discussion about what would happen upon a sale of the property. The sisters were, at the time, on good terms. Deborah candidly admitted that she was hoping to stay in this living arrangement for the rest of her life and did not pay attention to protecting her investment. She never imagined that she would be extricating herself from the arrangement in about 18 months' time.

[9] In the absence of an express agreement, the court will imply terms by asking the question: what would these people likely have agreed to had they turned their minds to the question at the time? As described by the Supreme Court of Canada in *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, 1987 CanLII 55 (SCC), [1987] 1 S.C.R. 711 (p. 775):

> "terms may be implied in a contract: (1) based on custom or usage; (2) as the legal incidents of a particular class or kind of contract; or (3) based on the presumed intention of the parties where the implied term must be necessary "to give business efficacy to a contract or as otherwise meeting the 'officious bystander' test as a term which the parties would say, if questioned, that they had obviously assumed".

[10] Here, I find that had Deborah and Joan been asked at the time what would become of their initial investments, they would have said that it was understood that each of them would be entitled to get out their original investment, after which profits (or losses) would be divided 50-50.

[11] That formula is simply more probable than the proposition that there would be no accounting for the initial investments.

[12] This still begs the question as to what advances or expenditures would count toward the initial investments.

Did Deborah agree at the outset to pay an extra $5,000.00 - which would not be accounted for - in order to sweeten their initial offer to purchase the property?

[13] The property in question was listed for just under $300,000.00. At the time, in late 2020, many properties were selling for more than the listing price and the parties' agent advised them to go in with their best offer, or they would likely not stand a chance. Joan wanted to offer $315,000.00. Deborah feared that was not enough and wanted to offer $320,000.00. Joan testified that she was prepared to do this, but that Deborah would have to be fully responsible for the extra $5,000.00. Deborah testified that she understood that she would have to be the one fronting this extra money, because Joan had limited resources, but she did not intend to forfeit that money on an eventual reckoning.

[14] The discussions around this $5,000.00 were happening when the parties were under the pressure of a negotiation and it seems more probable to me that the discussions centered on the source of the money, and not on whether it would count toward Deborah's equity.

[15] Furthermore, Joan's position is tantamount to treating that $5,000.00 as a gift, or more accurately that Deborah was giving Joan a $2,500.00 gift to make the purchase happen.

[16] The law is inherently suspicious of gifts and places an onus on the recipient of a benefit to prove that the alleged donor had "donative intent." If there is no such donative intent, then any moneys advanced will be presumed to be in the nature of a loan.

[17] I find that Joan has failed to satisfy me that Deborah intended to make a gift of one-half of this $5,000.00 extra payment being put toward the purchase price. I find that Deborah is entitled to credit for her entire contribution toward the purchase price.

[18] The final purchase price was actually $319,000.00 because of a credit that was agreed to at the time. Other minor credits were agreed to along the way based on deficiencies noted by an inspector.

Did Deborah agree to pay additional closing costs (legal fees, deed transfer costs etc.) - also without being accounted for?

[19] The evidence was to the effect that the issue of closing costs did not arise until they were at the lawyer's office after the agreement had been signed, and the subject came up of what money would be needed to close. The issue of closing costs and in particular deed transfer tax had not been part of their calculations. These amounted to $6,188.00, which was a significant amount that they had not anticipated needing. Joan had already advanced $3,000.00 for the deposit and was adamant that she only had another $30,000.00. The pressure was on, and Deborah stepped up and said that she would cover those costs.

[20] The parties have a different version of what discussions took place about this money. Joan believes that Deborah was going to pay it, outright, and that it would not have to be accounted for. Deborah says that she was put on the spot, and merely agreed to increase the amount she was investing in order that the deal would be able to close.

[21] Once again, I place the legal onus on Joan to establish that this money (or more accurately half of it) was being, in effect, advanced as a gift. I find that this has not been proved.

[22] As such this portion of Deborah's investment counts toward her equity and should be credited to her on the sale.

What credits, if any, are both parties entitled to claim to account for the improvements they made to their respective units?

[23] There does seem to have been a discrepancy in the condition of the two units. The upper unit was vacant at closing, while the lower unit had tenants who would not be out for two more months. Deborah was able to set up her household immediately. Joan spent the first two months temporarily using the spare bedroom in the upstairs unit and started to move in when the tenants left.

[24] According to Joan, the upstairs was in much better condition than the downstairs. She presented a number of invoices for:

a. A new fridge
b. Replacement of moldy baseboards
c. Removal and replacement of carpets
d. A new range hood

e. A new stove
f. New thermostats and smoke detector
g. A paint job
h. A new bed
i. New curtains

[25] The total of all these invoices is $12,472.00.

[26] Many of the invoices for this work are from an entity called TNT Renovations, which is apparently a business name used by an individual named Todd who is a close personal friend of Joan.

[27] Deborah questions the legitimacy of the invoices, and in particular some of the charges.

[28] Todd was not called as a witness. Deborah testified that she does not like him and considers him untrustworthy, although she did not explain precisely why. It appears there is a history between them.

[29] As I see it, there are some suspicious aspects to these alleged expenditures.

[30] Joan testified that Todd insisted upon being paid cash for all of these invoices, and as such she could not show proof of payment. She said that Todd has always only dealt in cash. Although there is nothing illegal about doing cash business, it is widely understood that all-cash transactions are sometimes used to camouflage shady dealings.

[31] TNT does not have any online presence. It is not a registered business, and it did not charge HST. There is no reason to credit TNT with any qualifications or credentials to perform the work that it did.

[32] I am also slightly troubled by some of the supposed payments to TNT. For example, he charged a “delivery fee” of $250.00 for baseboards which he supposedly replaced. All of the major hardware and lumber suppliers will make free deliveries of building supplies. A similar fee was charged for carpeting, and $300.00 was charged for delivery of a range hood and stove - also which likely would have been delivered for free or for a nominal amount by the appliance store where the item was purchased.

[33] All together, these questionable items cause me to be suspicious of all of the TNT charges. I am left with the lingering suspicion that there is more to the story than was disclosed.

[34] Joan's claim for the cost of a new bed is based on her contention that Deborah was giving her a bed from her old house. I do not find there to be any binding agreement to supply Joan with a bed.

[35] Under the circumstances, I am reducing Joan's expenditures from the $12,472.00 put forward, to $10,000.00.

[36] That is not to say that Joan gets full credit for $10,000.00. The evidence was that Deborah also replaced appliances and flooring and had to handle rodent and flea infestations. She did not present invoices because she was not looking for credit, but she argues that Joan should not get credit for everything she spent either.

[37] I am prepared to give Joan a net $7,000.00 credit for improvements that she made, over and above those made by Deborah.

What credits, if any, are either of the parties entitled to claim for expenses that they made that were to the benefit of the property as a whole?

[38] It is clear that both parties paid some bills that benefitted the property as a whole, such as regular accounts for insurance, power and water. Joan says she paid for grass seed for the back lawn.

[39] There was a question as to who paid for the mortgage appraisal and the home inspection. The evidence is too murky to allow me to make any findings about these expenditures.

[40] In the end, I cannot determine if one of them paid substantially more than the other, but I am declining to attempt such an accounting in any event. In my view, the parties were lackadaisical in how they dealt with such bills at the time, and I cannot conclude that there was any express or implied understanding that they would try to equalize those payments in the future. I find that these expenses were not capital expenses that would be recognized in any future accounting.

Other credit

[41] Deborah has conceded a $2,500.00 credit to Joan for work that she did, and expenses she incurred, in helping Deborah get her previous house ready for sale. Joan did not comment on this and I will apply such a credit.

Accounting

[42] The purchase price for the property was $319,000.00, with a mortgage of $240,000.00. Joan contributed $33,000.00 while Deborah made up the difference required to close. The way this was reflected in the Statement of Adjustments was that Deborah contributed $55,000.00 by way of a bridge loan from the Credit Union which was also supplying the mortgage. This was necessary as the proceeds from the sale of her previous home were going to be delayed by a few days.

[43] This $88,000.00 supplied by the sisters was actually a bit more than needed to close, which left about $2,700.00 in a Credit Union account. It appears that this money was later used for some property expenses.

[44] Joan is entitled to credits of $7,000.00 (net) for improvements and $2,500.00 for her contributions to Deborah's previous property.

[45] Joan's investment is accordingly $42,500.00 as against Deborah's of $55,000.00, plus I am crediting Deborah with $200.00 for the cost of filing this claim, which benefited both of them. The discrepancy is $12,700.00.

[46] Deborah accordingly should receive $12,700.00 more than Joan out of the $25,000.00 held in trust. This is accomplished by designating $18,850.00 to Deborah and $6,150.00 to Joan. This is just slightly less than Deborah asked for in her Claim.

ORDER

[47] In the result, Deborah Rebecca Dixon is entitled to $18,850.00 out of the trust funds being held in connection with the parties' sale of 34 Grant Line in Stillwater Lake, while Joan Philpitt is entitled to $6,150.00 out of the said funds.

DATED at Halifax, Nova Scotia this 17th day of August 2022.

Eric K. Slone, Adjudicator