

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Allen v. Perry Lake Developments Inc.*, 2023 NSSM 31

Date: 20230714

Claim: No. SCT520654

Registry: Truro

Between:

Mark Allen and Rachel Sullivan

CLAIMANTS

and

Perry Lake Developments Inc.

DEFENDANT

Adjudicator: Julien S. Matte, Adjudicator

Heard: May 23, 2023 (via teleconference)

Appearance: Ms. Sullivan self-represented for the Claimants
Mr. Gibson, self-represented for the Defendant

Matte, Adjudicator,

1. Building a house from the ground up is a complicated endeavour at the best time, add in a hurricane and the lingering effects of a pandemic and it is a wonder that the parties were able to get as far as they did. After agreeing to the terms as laid in a comprehensive standard form agreement with the Claimants paying a \$10,000.00 deposit, construction began with an initial anticipated closing date of September 16, 2022.
2. For the reasons that follow, amendments to the closing date were agreed to by the parties with the last date being November 14, 2022. On November 15th, 2022 the Claimants gave notice of termination of the parties' agreement on the basis that the Defendant had not obtained a final inspection report or occupancy permit by the last agreed date of closing. The Claimants ask for the return of the deposit, costs for trips to Nova Scotia in the fall of 2022, legal fees and costs.
3. The Defendant asserts that the only outstanding issue preventing the Defendant from obtaining a final inspection report and occupancy permit was having the home's electricity hooked to the power grid. The Defendant says given the then recent hurricane and associated power issues, there were delays in scheduling power hookups.
4. The Defendant says that it is the Claimants who breached the agreement causing the Defendant damages. The Defendants claim the deposit, its costs for maintaining the house before it could be sold as well as any loss incurred from the difference in the sale costs and price.

Liability

5. By their actions, the Claimants assert that they were entitled to rescind the agreement because of the final missed closing date. Rescission is an equitable remedy that is meant to put the contracting parties back in the positions they were in before entering into the contract. As an equitable remedy, it is only available in certain circumstances. The primary set of circumstances that can give rise to the remedy of rescission is fraud. If one party fraudulently induces another into the agreement as proven by evidence showing a material misrepresentation relied on by the aggrieved party, rescission can be a fair resolution. (See *Urban Mechanical Contracting Ltd. v. Zurich*, 2022 ONCA 589 (CanLII) at paras 35-37). Where the circumstances do not meet the legal requirements for rescission, a party may still be entitled to damages in accordance with the principles of contract law. Whether there has been a breach of contract turns on the terms of the parties' agreement as well as their actions.

6. The Agreement of Purchase and Sale for New Construction ("Agreement") was negotiated and signed on March 4, 2022 with the acceptance of the Defendant's counter offer to build the Claimant a home for \$459,100 with a closing date of September 16, 2022. On August 16, 2022, the closing date was changed to September 22, 2022. On September 12, 2022 the Defendant proposed a new closing date of September 27, 2022 but the Claimants did not provide a signed response. On October 7, 2022 the parties agreed to a new closing of October 26, 2022. The explanation provided read, in part, "The recent hurricane has put N S Power behind schedule for inspections and connections". October 25, 2022 the Defendant sought an extension of the closing date to November 14, 2022

which provided the explanation that “ N S Power had put all inspections and connections on hold until further notice.” The amendment was accepted by the Claimants on November 7, 2022.

7. The last page of the Agreement is the “Termination of Agreement of Purchase and Sale and Release of Deposit” form. At the hearing, the Claimant acknowledge that the reason for the termination was that the Defendant had failed to ask for another amendment to extent the closing date and therefore since the inspection and occupancy permit were not provided, the Claimant’s were entitled to terminate the agreement.

8. The Claimants acknowledge that clause 7.1 Delays, entitled the Defendant to obtain amendments as needed including for “causes beyond the reasonable control of the [Defendant]”. The Claimant suggests that their right to terminate flows directly from the Defendant’s failure to issue another amendment to extend the closing date.

9. The Claimant also argued that the reason for the delay in closing was not NS Power but rather the Defendant. According to evidence of conversation between the parties’ respective realtors, the Claimants initially refused to sign the October 25 amendment because they felt that NS Power had not put inspections on hold. A copy of an October 11, 2022 email from NS Power notes however, “Thank you for your patience as we focused on emergency storm repairs following Hurricane Fiona. Over the next two weeks, we will prioritize and rebook work that had been cancelled.”

10. On November 14, 2022 correspondence between counsel for the parties indicates that the parties were ready to close on the property. Counsel for the

Claimant's position that closing could not go ahead without an occupancy permit (and power) was reasonable. However, the position that her clients were entitled to termination of the Agreement is the issue to be determined.

11. At the hearing, the Defendant testified that NS Power connected the home on November 28, 2022, and the Defendant received the final inspection and occupancy permit on December 1, 2022. In hindsight, the Claimants seemed to suggest that had the Defendant requested another 7.1 amendment to extend closing to December 2, 2022, the property would have closed without incident.

Findings

12. The Court finds that as a result of hurricane Fiona, power infrastructure in Nova Scotia was interrupted in the fall of 2022. As a result of the interruptions, the Defendant could not complete the parties' Agreement by November 14, 2022, as contemplated by the last amendment. The delays with respect to Nova Scotia Power were well known to the parties who had agreed to two previous extensions due to the same issue. Arguably, by their conduct, the parties agreed to extend the agreement until Nova Scotia Power came to connect the power as is required for any new property sale to close.

13. The delay in closing did not materially prejudice the Claimants, rather it was the Defendant who bore the continued costs associated with carrying the property because of power company delays. Nova Scotia Power's delay was the only reason the date of closing was changed. By the time the parties were signing the last extension, the last issue between them was the colour of the grass in the front yard. The house was not substantially complete, it was complete.

14. However, even if the Defendant's failure to request a further amendment was a breach of the Agreement, it did not entitle the Claimant's to terminate the Agreement. There was no evidence provided by any party suggesting any fraud or misrepresentation that induced the Claimant's to enter into the Agreement.

15. The Agreement signed between the parties is an agreement for the construction of a home. A task that was completed by the Defendant between March and October 2022. From foundation to framing and roof, windows, cladding, doors to the plumbing, electrical, heating, floors, finishing, bathrooms and kitchen.... the home was complete. All that was left was for Nova Scotia Power to hook up the power and paperwork to be provided to the Claimants all of which could have been done by December 1, 2022.

16. The Court finds that the Claimants suffered no damages as a result of the alleged breach. If a breach existed, the appropriate remedy was for the Claimants to request an extension of the closing date. A failure to request the extension does not give rise to a claim for rescission or damages in this case.

Counterclaim

17. The Defendant claim that the Claimant breached the Agreement by terminating it on November 15, 2022. The Defendant claims that by the time the Claimant's terminated the Agreement, the house was complete and all the remained was for Nova Scotia Power to hook it up to the power grid, something that occurred on November 28, 2022, which allowed the final inspection and occupancy permit to be issued by December 1,2022.

18. Other than issuing another amendment request prior to the November 15, 2022 Claimants' termination, there was nothing else that the Defendant could do to fulfill their side of the bargain.

19. The breach was not from the Defendant but rather from the Claimants who despite receiving exactly what they contracted for, simply walked away instead waiting for the coming paperwork and power.

Damages

20. Section 1.2 of the Agreement deals with the Deposit as follows:

It is understood and agreed that if the Buyer does not complete the Agreement in accordance with the terms thereof, the Buyer forfeits the deposit, in addition to any other claim which the Seller may have against the Buyer.

21. By terminating the Agreement without cause on November 15, 2022, the Claimants did not complete the Agreement and forfeited the deposit to the Defendant.

Other Claims

22. The Defendant sold the house to a third party for \$459,700 on Feb 7, 2023 mitigating his damages. However, despite the \$600 higher sale price, the Defendant testified that in order to secure the sale, he had to include an appliance credit, landscape the backyard and supply a garage door opener at a total cost of \$8,557.00 for a net loss of \$7,957.

23. The Defendant also claims costs associated with carrying the house from the date of the breach until the date of the sale. The costs claimed are for insurance,

heat and power, financing and maintenance. The Defendant claims a total of \$3650 per month for four months. Unfortunately, the Defendant provide very little evidence to support these claims. The Court accepts that the claims for these costs are reasonable in these circumstances. However, without any proof in the form of receipts, invoices or statements, the noted approximation are not sufficiently precise to be awarded.

24. The Court accepts that the Defendant incurred a minimum of \$6,000.00 in carrying costs.

Costs

25. The Defendant tendered an invoice from a process server detailing the costs of service of the Claimants in Ontario. The amount of \$914.60 is awarded.

Order

26. The Claim is dismissed. The Counterclaim is allowed.

27. The Claimants are to pay the Defendant the sum of \$14,871.60

Julien S. Matte, Adjudicator