SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Seeley v. Powell*, 2024 NSSM 24

Date: 20240318
Docket: 528303
Registry: Halifax

Between:

Lynes Seeley

Claimant

-and-

Kim Powell

Defendant

Adjudicator: Eric K. Slone

Heard: March 7, 2024

Counsel: Kent Rodgers, for the Claimant
Defendant, self-represented

By the Court:

[1] The claim and counterclaim arise from an aborted residential real estate transaction. The Claimant seeks the return of his $10,000.00 deposit, while the Defendant seeks to retain the deposit and claims that she has incurred other damages as a consequence of the failed transaction, all totalling $25,000.00.

[2] On June 25, 2023, the Claimant put in an offer to purchase the subject property in Lower Sackville, Nova Scotia, at a price of $495,000.00. The agreement is unremarkable in terms of the conditions that it contained. The Claimant was entitled to conduct a home inspection and to be satisfied with its results. A Property Disclosure Statement was also to be provided by the vendor.

[3] One unusual provision of the agreement was the uncertain closing date. The precise wording of the clause, was:

> This agreement shall be completed on or before the first day of August 2023 (the closing date). Upon completion vacant possession of the property shall be given to the buyer unless otherwise provided as follows:
>
> Buyer acknowledges the closing date may need to be extended due to occupancy date at the seller's new residence, and agrees to accommodate a reasonable extension up to a maximum of 45 days.

[4] This flexibility was necessary for the Defendant because of the uncertainty as to when she could get into a new residence which was still under construction.

[5] Eventually, on July 29, 2023, an amendment to the Agreement of Purchase and Sale was entered into, which established August 8, 2023 as the firm closing date.

[6] As is customary in real estate transactions, at paragraph 11.3 it was provided that:

> Time shall, in all respects, be of the essence in this Agreement. In the event of a written agreement of extension, time shall continue to be of the essence. Failure to act within the time required constitutes a breach of the contract.

[7] So, there is no doubt that, at least by the time the amendment was entered into, a firm closing date of August 8, 2023 was established, and time was of the essence. There was nothing inherent in the setting of the August 8 closing date that suggested that the Defendant was entitled to unilaterally extend it further.

[8] In the meantime, on June 29, 2023, the home inspection was conducted. The

home inspection report was not placed into evidence, but according to the Claimant it did contain a caution about a small amount of wetness in the basement. The property disclosure statement had also made the following comment:

> Had water come in the workshop once when we had a really bad rainstorm. Did some maintenance; never had an issue again.

[9] The Claimant testified that he was considering backing out of the transaction when he found out that there had been some water, but he agreed with the Defendant that he could do some investigation involving pulling up some of the basement floor to determine whether the problem was serious enough to deter him from going ahead.

[10] There is some significant disagreement between the parties about what was agreed to concerning this additional investigation. Much friction resulted, which was never resolved. Too much time was spent exploring this issue at the trial, and it does not impress me as having much direct relevance. The bottom line is that the Claimant did not exercise the option to terminate the transaction on account of the unsatisfactory home inspection.

[11] Whatever happened or did not happen on July 9, 2023, by the end of the day there was still a binding contract. The Claimant knew and must be taken to have accepted that there was minor wetness in the basement that he would be inheriting and would have to remedy at his own expense upon taking title to the property.

[12] Then, on July 21, 2023, the skies opened up and Nova Scotia experienced what was described at the time as a once in a century rainstorm. The amount of rain that fell broke all recent records, and anecdotally, at least, it is well-known that basements all across the Halifax region were flooding to varying degrees, and insurance company phones were ringing off the hooks with claims.

[13] That is not to say that every basement in the region flooded, but the storm had the effect of revealing weaknesses in the drainage system of homes such as the one in question here.

[14] It was unclear at that time how severe the damage was to the subject property. The Defendant testified that she noticed that there was some water coming into her basement that completely soaked the floor and was wicking up the walls. She called her insurance company and initiated a claim. On July 22, her young adult son and some of his friends helped out by ripping up and disposing of the sub-floor in the basement and cutting out the lower 2 feet of drywall to prevent water from wicking up any further. In the days that followed, the insurance company sent in some restoration specialists who set up fans and a

dehumidifier in an effort to prevent further damage and to mitigate the growth of mould. They also sprayed some substance to prevent mould growth.

[15] In the meantime the Defendant was also pushing her insurance company to settle the claim so she would know what type of money she would have in order to repair the damage. She retained a gentleman named Kyle Godsoe who did some work on the outside around the foundation, and who was proposing to put in a weeping tile drainage system on the inside of the basement.

[16] It was while this was going on that the Defendant set the August 8 closing date. When asked on cross-examination why she felt confident that she could close on August 8, she said that she had expected that her insurance claim would be settled by then, because it should have been treated as a priority claim given that a property sale depended on it. As time went on, it became apparent to the Defendant that the August 8 date could not be met, and on August 4 she instructed her lawyer, Katie Williams, to communicate with the Claimant's lawyer, Kent Rodgers, to request an extension of the closing date to August 15.

[17] On August 5, Mr. Rodgers on behalf of the Claimant wrote as follows:

> I understand that your client is continuing to have repairs completed and has requested an extension to the closing date to August 15.
>
> Our client wishes further clarification as to how the water infiltration issue is being resolved, prior to agreeing to any extension. He was previously advised that repairs were going to be completed on the exterior of the foundation, but has since been advised that is not the case.
>
> Can you please provide details of the repairs being completed so our client can make an informed decision regarding your client's request.

[18] On August 8, Ms. Williams on behalf of the Defendant responded at some length. She described the work being undertaken. The details are not important for the purposes of this decision. But one particular paragraph in Ms. Williams letter is significant:

> Our client has advised that throughout this process, Mr. Seeley has ripped up flooring that he did not have permission to, as well as removed drywall and panelling. Our client does not feel comfortable closing this transaction until we have an agreement in place regarding the insurance claim funds. Until we receive full and final settlement documents from the insurance company indicating what the claim amount is and what it is intended to cover, this cannot be finalized. I can assure you that our client is doing everything she can in order to have this insurance claim move as quickly and smoothly as possible. Kindly advise if your client is in agreement with extending to on or before August 16. (Emphasis

added)

[19] On August 11, Mr. Rodgers advised that the Claimant would not agree to extend the closing and elected to terminate the transaction and demand the return of his deposit.

Analysis

[20] The question as I see it is whether either the Claimant or the Defendant breached the contract, or alternatively whether the contract was frustrated.

[21] If the Claimant breached the agreement, he forfeits the deposit and answers to other damage claims. If the Defendant breached the contract, or if it was frustrated, in either case the Defendant cannot legally retain the deposit and has no recourse for her damages.

Contractual breach

[22] It is arguable from a legal standpoint that the contract was breached by the Defendant when she failed to close on August 8. Time was of the essence. The Defendant's obligation was to deliver what she had promised to deliver, and she did not (through no fault of her own).

[23] I see no plausible theory that would render the Claimant liable for breach of contract. Another way to view it is to ask the question: could the Defendant have forced the Claimant to close the transaction on August 8, or August 15? Would a Supreme Court judge have ordered specific performance? I very much doubt it, since what the Defendant herself would have been conveying was different from what she had initially contracted to convey.

[24] However, there is no need to resort to breach of contract claims because the more apt theory, as argued by the Claimant, is frustration.

Frustration

[25] The doctrine of frustration developed at common law to excuse parties from performing their contracts when performance has become impossible. It is a no-fault provision. Contracts which have been "frustrated" need not be performed. The doctrine of frustration allows for the legal termination of a contract due to unforeseen circumstances that prevent the achievement of its objectives, render its performance illegal, or make it practically impossible to execute. As put by the Supreme Court of Canada in *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, 2001 SCC 58 (CanLII)

> 53 Frustration occurs when a situation has arisen for which the parties made no provision in the contract and performance of the contract becomes "a thing radically different from that which was undertaken by the contract"*: Peter Kiewit Sons' Co. v. Eakins Construction Ltd.*, 1960 CanLII 37 (SCC), [1960] S.C.R. 361, per Judson J., at p. 368, quoting *Davis Contractors Ltd. v. Fareham Urban District Council*, [1956] A.C. 696 (H.L.), at p. 729.

[26] The case law is full of examples of frustrating events, many of which are more serious than what occurred here, but the underlying theory is the same. From the point of view of the Claimant, the house that he had contracted to purchase no longer existed in the condition it was before the flood.

[27] When he agreed to buy it, the house had evidence of a small amount of water incursion that the Claimant was prepared to accept. By the time the August 8 closing date came around, there was a home with a totally wet basement, with the floor and part of the walls ripped out. There was an insurance claim of unknown value which the Defendant never even offered to assign in full to the Claimant. The Claimant had no way of knowing at that time whether the insurance proceeds (or that part of them that the Defendant was willing to apply) would be sufficient to restore the property, and as such he had no way of knowing what his actual purchase cost would be, factoring in extra amounts that he might be required to spend.

[28] The statement by Ms. Williams that *"[o]ur client does not feel comfortable closing this transaction until we have an agreement in place regarding the insurance claim funds"* is telling. The expectation was that the Claimant would negotiate something further. Such an expectation is not consistent with a binding contract. While highly motivated parties might choose to negotiate further, the Claimant was under no obligation to negotiate.

[29] The inescapable fact was that the Defendant no longer was in a position to convey the house that she had agreed to sell. This is precisely what the doctrine of frustration is intended to capture.

[30] When a contract is frustrated, both parties are excused from performance. The Claimant is entitled to the return of his deposit, plus his costs.

ORDER

[31] It is ordered that the Defendant pay to the Claimant the sum of $10,000.00 plus costs in the amount of $308.60, for a total of $10,308.60.

[32] It is further ordered that the counterclaim be dismissed.

Eric K. Slone, Small Claims Court Adjudicator