Date: 19970916 Docket: CA 135733

NOVA SCOTIA COURT OF APPEAL
Cite as: Chagnon v. Spiropolous, 1997 NSCA 131

Chipman, Roscoe and Bateman, JJ.A.

BETWEEN:	)	
	)	
GASTON CHAGNON and GASTON CHAGNON PROPERTY LTD.	)	W. Michael Cooke, Q.C., Michael I. Iosipescu and Peter M. S. Bryson
Appellants	)	for the Appellants
	)	
- and -	)	
	)	
ARTHUR SPIROPOLOUS)		John D. MacIsaac, Q.C.
	)	for the Respondent
	)	
Respondent	)	
	)	
	)	
	)	Appeal Heard:
	)	September 16, 1997
	)	
	)	
	)	Judgment Delivered:
	)	September 16, 1997

THE COURT: The appeal is dismissed with costs which are fixed at $9.000.00, plus disbursements as per oral reasons for judgment of Chipman, J.A.; Roscoe and Bateman, JJ.A., concurring.

The reasons for judgment of the Court were delivered orally by:

CHIPMAN, J.A.:

The principal issue in this appeal is whether the respondent made a valid tender of monies due by him on a mortgage made in favour of the appellant on certain property, pursuant to a loan agreement.

In resolving that issue in the respondent's favour, the trial judge found that there was neither a requirement in the loan agreement that the respondent could not mortgage his interest in the property to another, nor that the respondent in fact did so by way of an equitable mortgage.

In order to succeed on the principal issue, the appellants must satisfy us that the trial judge erred in both of these findings.

It is not necessary to decide whether the trial judge erred in finding that the respondent did not place an equitable mortgage on the property.

We are satisfied that the trial judge did not err when he found that there was no term of the loan agreement prohibiting the respondent from giving a mortgage. His finding was based on the conclusion that a term in another earlier agreement between the parties respecting the property could not be implied in the loan agreement.

The trial judge said:

> A separate Loan Agreement was executed by Chagnon and Spiropoulos on April 23, 1991. No mention is made of the Co-Tenancy Agreement in this Loan Agreement. None should be read in. These are experienced businessmen who negotiated cautiously, and with counsel. Had they intended that the Loan Agreement would be subject to the terms negotiated in 1988 in the Co-Tenancy Agreement, such a provision could easily have been incorporated.
>
> The terms of the Loan Agreement are clear. The loan was secured by a mortgage on Spiropoulos' half interest in the Fort Massey Apartments. Although the rate of interest specified in the Loan Agreement is different than that included in the mortgage, this was an oversight. As a protection, in case Spiropoulos failed to repay the mortgage on its due date Chagnon took the unusual step of requiring Spiropoulos to execute a warranty deed conveying a 23 percent interest in the premises, such deed to be held in escrow by Chagnon's lawyer.
>
> I have already found that Spiropoulos attended at

> Iosipescu's office on April 15, 1992 and made a full and lawful tender of the mortgage debt. I also find that Chagnon had no proper basis in law for refusing tender. Other than the reported conversation between Iosipescu and Wolfson, Chagnon had no proof that Spiropoulos had "hypothecated" or encumbered his interest. There was no requirement in the Loan Agreement that Spiropoulos disclose his source of funds...

We refer to the passage in **The Law of Contract in Canada** by Fridman, Third Edition, at p. 475:

> . . . There has to be strong evidence to support the conclusion that the implication of a term is permissible in the circumstances. It would seem that there are three main instances when this may be done: (i) when it is reasonably necessary, having regard to the surrounding circumstances; and in particular the previous course of dealing between the parties, if any; (ii) when there is an operative trade or business usage or custom that may be said to govern the relationship of the parties; and (iii) when some statute of its own motion implies a term into the kind of contract that is in question.

It is not necessary to consider the fresh evidence tendered at the beginning of the hearing as it does not bear on the resolution of the issues before us.

We are not satisfied that the trial judge made any error in resolving the various subsidiary issues dealt with by him.

The appeal is dismissed with costs which, in the circumstances, we fix at $9,000.00, plus disbursements.

Chipman, J.A.

Concurred in:

Roscoe, J.A.

Bateman, J.A.