

NOVA SCOTIA COURT OF APPEAL

Citation: Meister v. Kodaysi, 2005 NSCA 15

Date: 20050127

Docket: C.A. No. 224016

Registry: Halifax

Between:

Neil Meister and Dianne Ryan-Meister

Appellants

v.

Tony Kodaysi

Respondent

Judges:

MacDonald, C.J.N.S., Roscoe and Fichaud, J.J.A.

Appeal Heard:

January 25, 2005, in Halifax, Nova Scotia

Held:

Appeal dismissed per reasons for judgment of Roscoe, J.A., MacDonald, C.J.N.S. and Fichaud, J.A. concurring

Counsel:

David G. Coles, for the appellants
J. Brian Church, Q.C., for the respondent

Reasons for judgment:

- [1] At the conclusion of the hearing the court announced that this appeal was dismissed with reasons to follow. These are the reasons.
- [2] This is an appeal from a decision of Justice Gregory M. Warner made following an application pursuant to s. 4 of the **Vendors and Purchasers Act**, R.S.N.S. 1989 c.487, declaring the agreement of purchase and sale between the appellants and respondent to be valid and binding. The decision under appeal is reported as 2004 NSSC 131; [2004] N.S.J. No. 258 (Q.L.).
- [3] The issue before the chambers judge concerned an agreement of purchase and sale signed on March 11, 2004, between the appellants as vendors and the respondent, Mr. Kodaysi, as purchaser, containing this financing clause:

This agreement is subject to the Buyer being able to obtain approval for a first mortgage in a principal amount of approximately _____ (or 75% of purchase price) at an interest rate not to exceed CURRENT RATE %. This financing shall be deemed to be arranged unless the Seller or the Seller's Agent is notified to the contrary, in writing, on or before (date) MARCH 18/2004. If said notice to the contrary is received, either party shall be at liberty to terminate this contract and deposit to be returned to the Buyer without interest or penalty.

- [4] On the day financing was deemed to have been arranged, unless notice to the contrary had been received, March 18, 2004, the real estate agent for the vendors, Mr. Thomas, contacted the purchaser's agent, Mr. Hobeiche to ask if financing had been arranged. Mr. Hobeiche faxed Mr. Thomas in part as follows:

On behalf of my client, Mr. Tony Kodaysi, I would like to inform you that most of the conditions in the Agreement of Purchase and Sale, March 11th, 2004 (including financing, inspection PCDS has been accomplished and my client is satisfied with it. I, myself, considered the transaction is firm deal.

- [5] Mr. Thomas was not satisfied with this response and insisted that Mr. Hobeiche provide confirmation of mortgage financing. Later that day, because of Mr. Thomas' persistence, Mr. Hobeiche faxed him a letter from a mortgage broker which indicated that financing was approved subject to three conditions. As indicated in Justice Warner's decision there were several further communications between the agents and the lawyers for the parties respecting the financing and extensions to the time allowed for obtaining financing. Eventually, on April 1 an unconditional financing approval letter from the Bank of Nova Scotia was forwarded to Mr. Thomas by Mr. Hobeiche. However, in the meantime, on March 29th, the vendors

had signed another agreement of purchase and sale. After receiving the fax with the Bank of Nova Scotia letter, Mr. Thomas replied:

Due to your clients advising my clients on March 18 of their inability to obtain unconditional financing, my clients have therefore decided to terminate the agreement on 14 Sugar Maple. We will be returning the deposit to your clients asap. A copy of the termination notice is attached. Additionally my clients' lawyer notified your clients' lawyer earlier today. I am also including original for clarity.

- [6] Justice Warner decided that the clause did not include a requirement that the buyer prove to the seller that he had mortgage approval, and found that Mr. Thomas was wrong to have interpreted the clause as obligating the purchaser to provide proof on March 18th that financing was arranged. He found that the first fax to Mr. Thomas communicated that the purchaser's financing had been approved and "the buyer thereafter could not get out of the agreement if his approved financing fell apart or was cancelled."
- [7] Although not necessary to resolve the issue, Justice Warner also went on to find, in the alternative, that the second letter sent to Mr. Thomas on March 18th indicating conditional approval was not "notice to the contrary" in accordance with the clause. The chambers judge made no finding as to whether there had been any agreements to grant extensions of the time for financing.
- [8] On appeal, the appellants submit that the chambers judge erred in his interpretation of the financing clause and in finding that no notice to the contrary had been given.
- [9] After reviewing the evidence, and considering the submissions of counsel, we are not persuaded that the chambers judge erred in his interpretation of the agreement or in his conclusion that the first letter of March 18 was notice to the vendors that the purchaser had arranged his financing. There is nothing equivocal about the statement: "...the conditions ... including financing... ha[ve] been accomplished and my client is satisfied with it...". It was clearly not notice that financing had not been arranged, but just the opposite. From that point the agreement was no longer subject to financing and the purchaser was at risk. He could no longer rely on lack of financing as a reason for not completing the transaction. The clause did not require the purchaser to prove that he had financing. In order to be relieved of the obligation to complete the deal, he was required to notify the vendor if financing was not arranged. In the absence of such notice, financing was deemed to be arranged.

- [10] It is not necessary to comment on the alternative findings of the chambers judge.
- [11] The appeal is dismissed with costs to the respondent in the amount of \$1500 plus disbursements.

Roscoe, J.A.

Concurred in:

MacDonald, C.J.N.S.

Fichaud, J.A.