S.C.A. No. 02608

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Hallett, Matthews and Chipman, JJ.A.

Cite as: Sinclair v. Brady, 1993 NSCA 62

BETWEEN:

BARRY ALVIN SINCLAIR and ALICE DARLENE RECTOR appellants Paul Graham	)	E. Anne MacDonald for the appellants for the respondents
- and -	)	
THOMAS BRADY and MOUNTAIN VIEW DEVELOPMENTS LIMITED, a body corporate respondents	)	Appeal Heard: January 15, 1993 Appeal Delivered: January 15, 1993

THE COURT: Appeal dismissed with costs to the respondents set at 40% of that awarded by the trial judge, that is $400.00 plus disbursements per oral reasons for judgment of Matthews, J.A.; Hallett and Chipman, JJ.A. concurring.

MATTHEWS, J.A.:

The issue on this appeal concerns a claim for the return of a deposit paid under the provisions of an agreement of purchase and sale.

The respondent, Mountain View Developments Limited, is the owner of a residential subdivision situate in the town of New Glasgow. The respondent, Brady, is the principal shareholder and manager of Mountain View. Following negotiations over some six months the appellants and Mountain View, on November 27, 1987, entered into an agreement of purchase and sale for a certain lot in the subdivision. The terms of the agreement included the selling price of the lot at $18,000.00, payable by way of a deposit of $5,000.00 at time of signing and the balance on closing, May 31, 1988. The agreement also contained the following standard clauses:

> "Liability of Purchaser
>
> 8. It is understood and agreed that the rights of the Vendor are not limited to the deposit herein described and that if the Purchaser does not complete this Agreement in accordance with the terms hereof, the Purchaser shall forfeit the above deposit in addition to any other claim which the Vendor may have against the Purchaser for failure to so complete.
>
> Oral Statements etc.
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> 9. It is agreed that there are no representations, warranties, collateral agreements or conditions affecting this Agreement or the property herein described except as specifically expressed herein.
>
> Time of Essence
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> 10. Time shall in all respects be of the essence hereof, provided that the time for doing or completing any matter described herein may be extended or abridged by an agreement in writing signed by the parties hereto or by their respective solicitors, who are hereby expressly appointed or authorized to give such extension or abridgement agreement. In the event of such extension or abridgement agreement, time shall continue to be of the essence hereof."

At trial the appellant's alleged, **inter alia**, misrepresentation and fraud on the part of the respondent, Brady. They also sought to introduce oral evidence of a collateral agreement.

The trial judge, in decision dated December 5, 1991, after setting out the relevant

evidence and applicable law, found that the terms of the agreement were "clear and unambiguous".

After additional comments including rejection of the plaintiffs' (appellants') submission that the defendants (respondents) had not lived up to the terms of the agreement, the trial judge continued:

> "In conclusion, I find that there was no misrepresentation or fraud on behalf of the vendors and if there was a valid collateral agreement, the plaintiffs did not live up to the terms of that agreement. The plaintiffs were not ready and willing to complete the contract. They did not make reasonable efforts to close so they are therefore precluded from receiving the equitable relief that they seek."

She dismissed the action with costs to the defendants, which she set at $1000.00.

We have studied the evidence, the trial judge's decision, the factums of counsel and heard oral argument. In our unanimous opinion the trial judge did not err in concluding that the claim should be dismissed. On the facts presented at trial, the appellants did not have a case permitting a claim for unjust enrichment or for relief from forfeiture of the deposit by reason of equitable principles. See **Dunlop Pneumatic Tyre Co. v. New Garage & Motor Co.**, [1915] A.C. 79.

We dismiss the appeal with costs to the respondents which we set at 40% of that awarded by the trial judge, that is, $400.00 plus disbursements.

J.A.

Concurred in:

Hallett, J.A.

Chipman, J.A.