SUPREME COURT OF NOVA SCOTIA

Citation: *Creelman v. Rocking Chair Haven Real Estate Ltd.*, 2014 NSSC 454

Date: 20140630
Docket: Truro No. 426160
Registry: Truro

Between:

Edwin Creelman and Louise Creelman

Applicants

v.

Rocking Chair Haven Real Estate Limited

Respondent

DECISION

Judge:	The Honourable Justice E. Van den Eynden
Heard:	June 6, 2014, in Truro, Nova Scotia
Oral Decision:	June 30, 2014
Written Release:	January 7, 2015
Counsel:	Peter Lederman, Q.C., Solicitor for the Applicants Ronald Chisholm, Solicitor for the Respondent

By the Court:

Introduction

[1] This is an application by Edwin Creelman and Louise Creelman (herein the "Applicants"). They brought this application forward as a result of Rocking Chair Haven Real Estate Limited (herein the "Respondent") taking the position the agreement between the parties for the purchase of property was null and void. The Respondent asserted the Applicants were required to give up vacant possession of the property as a result of breaches which the Respondent maintained had occurred and were not remedied in compliance with the agreement.

[2] The Applicants seek a finding they are not in default of the agreement. They seek relief pursuant to Section 4 of the **Vendor's and Purchaser's Act;** which provision is self-explanatory. It allows a vendor/purchaser of any interest in land to make an application to the Court to determine any question connected with the subject contract.

[3] Alternatively, if found in default, the Applicants seek equitable relief from forfeiture. In other words, they should not lose the subject property in light of an alleged default.

[4] Finally, the Applicants seek an order that they be left in quiet occupation. The application also references relief respecting the setting of the remaining amount owing under the agreement. The evidence did not focus on such relief. If this still needs clarification, I will address at the end of my decision.

[5] Affidavits were filed by the parties. Ms. Creelman was cross-examined as was Mr. Collins. Mr. Collins is the president of the Respondent company. I had the benefit of listening to the cross-examination. Counsel filed pre-trial and post-trial submissions. I thank counsel for their submissions. I found them very helpful. I reviewed all the evidence carefully, including the submissions.

[6] In the event a transcript of my decision is requested I do reserve my right to make any edits to my decision and to expand on any authorities I may refer to. Any edits will in no way alter the substance of my decision.

[7] This is an important issue to the parties. Rendering a timely oral decision is warranted. It was not a situation that should be delayed for the writing of perhaps a more extensive written decision.

[8] I am going to next turn to just very briefly provide an overview of the position of the parties.

Position of the Applicants

[9] The position of the Applicants is that they are not in default of the agreement. If they are in default, the Respondent, through Mr. Collins the President, acquiesced in any breaches. If they are in default, as an alternative argument, that default is not material and they should be granted equitable relief against forfeiture.

Position of the Respondent

[10] The Respondent argues that the Applicants are in default of several of their obligations under the agreement. In particular, their obligation to pay taxes, insurance, to abstain from any illegal activity, and overall, their payment history was poor. Tardy monthly payments, etc.

[11] The Respondent argues the contract terms are express. If the Applicants are in default and have not remedied their default within the grace period provided under the agreement, the agreement is null and void and the Applicants must give up vacant possession. The Respondent asserts that is required under the provisions of the agreement.

[12] On behalf of the Respondent, Mr. Chisholm argues the contract terms should be given their plain and ordinary meaning. The parties intention (under the agreement) is to be respected by the Court. Contractual terms cannot simply be overwritten or rewritten based on equitable principles.

[13] Both counsel have referred me to relevant case law in their respective briefs which I have considered carefully.

Issues

[14] The issues to be determined are:

(a) Whether the Applicants are, in fact, in breach of any of the terms of the contract;

(b) If so, has the Respondent acquiesced or essentially waived any of those particular breaches; and

(c) If there are breaches should the Applicants have the benefit of equitable relief respecting what I would call a rather harsh and blunt remedy of treating the agreement as null and void and order up vacant possession?

[15] Before getting into specific findings in my decision I want to provide an overview of the facts. I am not going to rehash all the evidence; only what I see as the key points.

Overview of Facts

[16] The parties entered into an agreement which had a commencement date of January 1, 2007. Although the agreement is not as clear as it could be and although it is labelled a lease to purchase agreement; it is more like a long term agreement of purchase and sale. There are many provisions in the agreement which lend itself to that conclusion. I am not going to refer to them all but I will refer to a couple of paragraphs in the agreement which draw you to the conclusion that this is not a lease agreement. This is a long term agreement of purchase and sale regardless of what label the parties attach to it. I am going to refer to paragraph 9 and 12. Paragraph 9 states:

> The purchaser shall assume all ownership responsibilities from January 1, 2007 as though the purchaser already owned the property. Not to limit the foregoing this shall include the responsibility to perform and to pay for major structural repairs on the property.

Paragraph 12 states:

> Upon taking possession of the property the purchaser shall be deemed to be a purchaser in possession and not a tenant. The parties agree that this shall not constitute a residential tenancy under the **Residential Tenancies Act**….

In my view it is more like an agreement of long term purchase and sale. That said, nothing really turns on this conclusion in the end result.

[17] The purchase time line was approximately ten years. The Applicants are well into their eighth year and really almost on the home stretch of paying off their obligation to the Respondent.

[18] All monthly payments are up-to-date. The Applicants also paid two deposits of $5,000.00. So, in addition to their required payments under the terms of the agreement (made on a monthly basis) they paid $10,000.00 in deposits. They carried out substantial renovations and upgrades to the property over the past number of years. Those renovations and upgrades are spelled out in Ms. Creelman's affidavit at paragraph 7. They included a new roof, steel doors, new chimney, oil tank, new flooring, new windows, new sump pumps, water pump; painted the interior and the exterior, etc.

[19] In short, the Applicants have invested a lot in the property which they were acquiring under the terms of the agreement. Although legal title has not yet passed to them because the payments have not been completed under the agreement, they certainly treated this property as their home, in which they made substantial investments. To lose it at this stage would be a significant event. To do so would require obviously clear breaches of the contract.

[20] I also note there were changes to this agreement from its original form. Some of those changes were not reduced to writing. There were oral agreements. At times the arrangements were somewhat fluid between the parties. These changes were not tracked as they probably should have been.

[21] I refer to the original agreement requiring the Respondent to pay the taxes and insurance and to seek reimbursement from the Applicants. That eventually evolved into the Applicants paying the taxes direct and insuring the property direct.

[22] I note the Respondent refused to accept any cheques although that was an express requirement under the agreement. I refer to paragraph six of the agreement which states:

> The purchaser shall furnish the vendor with a series of post-dated cheques for the monthly lease payments.

The agreement itself contemplated cheques; however, Mr. Collins in his evidence was unequivocal; he does not accept cheques and he does not give receipts. He puts his cash in the bank and his bank records are a sufficient record. (The Respondent's bank records were not produced at trial.)

[23] I have taken into consideration Mr. Collins wanting cash payments and simply flatly refusing to give any receipts which would have been the best record of payments and will refer more extensively to this in my decision.

[24] Dealing with the facts surrounding the insurance; there really was no issue or no significant issue until December, 2013. The Applicants were late in making a monthly payment. Mr. Creelman works in Ontario and Ms. Creelman provided an explanation as to why he was late getting home to make a deposit. The monthly insurance payment did not clear their chequing account. The Court understands the insurer then required a year's payment in advance. The Applicants could not make that payment. Eventually the insurance lapsed somewhere around the end of December of 2013. It was reinstated in late January, 2014. So there was a period of approximately two or three weeks, more or less, that the property was uninsured.

[25] The Applicants promptly informed the Respondent about the problems with the insurance. They were told to address the problem. They were not advised at that time that it would be treated as a default. Diligent efforts were made to obtain new insurance. New insurance was arranged but that did not occur until late January, 2014.

[26] In her evidence Ms. Creelman indicated that part of the problem in securing insurance was one insurer conducted a visual inspection of the property; and, as a result of some problems in the foundation wall and resulting water, insurance coverage was declined. Ms. Creelman indicated the problems with the foundation

were caused by the Respondent some years ago; which problems were not remedied. At least part of the problem, from Ms. Creelman's perspective, was as a result of this damage; which hindered her efforts somewhat. Eventually insurance was obtained from a carrier with no inspection being carried out.

[27] Turning to the taxes, again I point out that originally the obligation to pay and seek reimbursement was with the Respondent. That evolved into the Applicants paying direct. There was a 2013 payment that was paid late. The 2013 taxes were not paid until January 2014 and, in fact, both of the parties paid the taxes, so they have been paid twice. There is a credit sitting there approximately in the range of $600.00.

[28] The Creelmans questioned the 2007 payment of taxes because on the tax bill there was an arrear amount of $956.00. Although I have not been provided with what would have been the best evidence, the tax journals or the clear record of what was accumulated during what year, the Applicants thought they may have paid more than what they should have, but they paid that amount in any event.

[29] Ms. Creelman also indicates she believes she has paid the same taxes more than once. She paid cash. She did not have receipts because the Respondent would not provide any. From Ms. Creelman's perspective there could be a history

of overpayment of taxes. To avoid that on a go forward basis at some point the Applicants began paying taxes direct to the Municipality. Again, there was a lateness problem with 2013. That said, there is a live issue as to whether or not there are, in fact, any arrears. I have made some specific findings with respect to 2013 taxes which I later reference.

[30] I turn to the illegal activity. In 2010 Ms. Creelman was convicted of a criminal offence involving a marijuana grow operation. Mr. Collins, the President of the Respondent Company knew about that since 2010. Notwithstanding that stale time line of about four years, he still argues this is a breach of the contract, specifically paragraph 5 of the contract.

[31] The evidence, as I have noted, indicates there was some history of late payment. The Respondent indicates that some of the monthly payments were beyond the grace period of ten days. The Applicants assert that is not the case. They cannot prove that because they were not given any receipts. All we have is some records which were produced by Mr. Collins.

Specific Findings re: Breaches

[32] I now turn to my specific findings with respect to the alleged breaches. In doing so I will reiterate some of the facts, as obviously they are inextricably linked to my findings.

[33] Dealing first with the illegal activity and this alleged breach. I find there is absolutely no merit to this being articulated as a breach of the agreement. I say that because the date of that offence was September 21, 2009. The date of conviction was February 3, 2010. The Respondent knew about this offence for some four plus years and never treated it as a breach before. Under the provisions of the agreement itself, in particular paragraph 5, it is unclear as to what really is intended. Paragraph 5 reads:

> The purchaser shall observe all laws and restricted covenants effecting the property and residents in the property.

[34] Mr. Chisholm, on behalf of the Respondent, would argue this provision can capture any illegal offence whatsoever; and is certainly broad enough to capture the criminal offence.

[35] One could read this provision more narrowly (related to "effecting the property"). I question whether or not the parties intended every offence to be

captured. I think there is some ambiguity. If there is ambiguity with respect to this provision, I would decide that in favour of the Applicants. In any event, given the passage of time (four years from the alleged default or breach) I have determined the Respondent has waived or acquiesced in this being any type of a default which would trigger an entitlement to say that the agreement should be null and void and the Applicants should be forced to deliver up vacant possession.

[36] I want to deal next with the tax issue. There is a late payment; however, on the evidence there is certainly doubt whether there actually were arrears owing for 2013 taxes. I am not satisfied, on a balance of probabilities, that there were arrears owing. I find so because in some years the Creelmans paid cash and the Respondent has to take some responsibility in actually refusing to give receipts. We have the issue of the $956.00 arrear payment showing up in the records where the taxes are substantially less than that on a yearly basis. I accept Ms. Creelman's evidence when she says she paid some taxes twice but she cannot prove that because she does not have a receipt. So if in fact an annual tax bill was paid more than once and if, in fact, there was an overpayment of a portion of the $956.00, (regardless of there being a late payment), I am not satisfied when I look historically and collectively from the date the agreement was entered into until

now, there actually were arrears in 2013. (In other words, any overpayment in years prior to 2013 would satisfy 2013 taxes).

[37] With respect to the issue of rendering receipts and the responsibility that the Respondent (Mr. Collins) bears; the agreement does not call for the issuance of receipts but it calls for cheques. It does not call for cash payments. To demand cash payments and not issue receipts is a risky practice. The best practice would be if you are going to be dealing with cash payments, you give receipts. Certainly the Respondent in this case would arguably be in a greater position of power with respect to this agreement and the Creelmans are left with trying to establish that they actually made payments when they were not given receipts. Again, I would hope that practice will change in the future. The failure to give receipts and demand cash has contributed to the lack of certainty.

[38] When I look at the evidence of obligations under the agreement shifting, the fact that I have accepted Ms. Creelman's testimony that she paid cash and paid for taxes double at least one year (probably the 2007 or 2008 years); there were no arrears owing in 2013.

[39] I turn to the issue of insurance. In the circumstances of this case I also find the lapse of insurance is not a breach of the contract such that it is a defaulting

term which would render the contract null and void and allow the Respondent to demand vacant possession. I say that for a number of reasons. In particular, I look at the history of the obligation. It was originally with the Respondent. It then shifted. There seems to have been some type of an oral agreement between the parties; but certainly the obligation shifted. The written agreement had some fluidity to it.

[40] I find that the Creelmans acted responsibility and diligently in addressing the problems with insurance. They were on that issue in a very responsible manner. They went to the Respondent and advised Mr. Collins what had occurred. They were directed by the Respondent to fix it; as this was not his problem; take care of it, or words to that effect. The Applicants made, as I said, diligent and prompt efforts to do just that.

[41] The best evidence is there was approximately a 30 day period (after the missed payment) before the insurance would lapse. In the Applicants efforts to obtain insurance, they had one company come out and do an inspection. I accept Ms. Creelman's evidence that because of the problems with the foundation and resulting water, the insurer declined to cover. Ms. Creelman, in her affidavit, gave evidence as to what was the cause of the problem. I accept her evidence; being that the damage was caused and not remedied by the Respondent. I accept that the

unremedied foundation damage was part of the delay in trying to get new insurance coverage in place.

[42] Given the fact that part of the problem in getting prompt replacement insurance can be tied to the Respondent, I certainly have taken this into consideration when determining whether or not there was a breach.

[43] I also want to comment on other provisions of the agreement which the Respondent has not complied with. I previously noted paragraph 6 which deals with the post-dated cheques. Also, there was a lot of evidence and argument on paragraph 15. That deals with the responsibility to forthwith register the property under the **Land Titles Act.** I understand now, some eight years hence executing the agreement, this is now kind of in the works. On one hand I can appreciate the Respondent's expectation for prompt and timely payment and not to have to chase the Applicants for money. I certainly appreciate that; however, you cannot pick and choose parts of the agreement. There are aspects of the agreement which Mr. Collins has not complied with as well.

[44] Also with respect to the insurance issue, when the lapse was brought to the attention of the Respondent he did not take the initial position this was a default.

The Respondent told the Applicants to get on it and deal with it, it was their problem. Which they did and obviously put insurance in place.

[45] I considered the totality of the evidence surrounding the agreement, the communications between the parties with respect to the termination of insurance, the efforts that were made to put it in place (notwithstanding under the written agreement it is the Respondent's responsibility). I do not think it was advanced by the Applicants whether or not the Respondent had some responsibility to make sure the property was insured. There could be some lingering responsibility there. Overall, I am not satisfied that the lapse of insurance of two to three weeks in the context of the facts of this case is a breach of the agreement. I so find that it is not.

Conclusion

[46] I find that there are no breaches with respect to the illegal activity, the taxes or the insurance. Even if there were breaches, in this situation, I believe equitable principles would and should be engaged in the circumstances of this case. We are not rewriting the contract or overriding the contract. Again, I am repeating myself but I look at the contextual history of this agreement and the changes the parties have made to the agreement, the fact of no receipts and the poor documentary evidence we have which would confirm payment or no payment. In the overall

context, this is a situation which would cry out for equitable relief because the result sought by the Respondent is extremely harsh. It does not mean just because it is harsh that the Applicants are entitled to their remedy. I have considered the contract and I have considered the context of the facts. Even if there were breaches, which I have found on the facts there are not, I would engage equitable principles to protect against the forfeiture of the property and the request to deliver up vacant possession.

[47] As I have indicated, I understand the requirement to be paid and to be paid on time but the Applicants are in the home stretch of completing the terms of the agreement. After eight years there is something in the range of $15,000.00 remaining owing on the property. There is also an administration fee. Declaring the agreement null and void and ordering up vacant possession would be an unjust result in the circumstances of this case. (For clarity, because of my factual findings, in particular, no breach of the contract terms, I do not need to venture into the realm of equitable relief.)

[48] The Application is granted. The Applicants are not in default. The Order will also reflect the agreement remains valid and binding. It is not null and void. The Respondent is not entitled to vacant possession. The Applicants are entitled to ongoing quiet enjoyment of the property.

[49] I also say for the benefit of the Respondent and Mr. Collins, although the Applicants are successful in their application, the Respondent really still gets what it originally wanted. Mr. Collins indicated that all along he wanted to get paid under the terms of the agreement. Not so much getting return of the property; rather he wanted to get paid. In this result that continues. The obligation under the agreement continues. I expect given the experience the Creelman's have gone through, there will be perfect compliance with the agreement, as there should be. Both parties, and particularly the Creelmans, are abundantly aware of the risks of not paying in compliance with the agreement and on time within any grace period. For the Respondent's benefit, I expect the risks of any future breaches are remote, if not nil. If there are future breaches in compliance obviously there are future remedies available. I hope the parties will never find themselves in that position.

[50] Not that anything turns on this point; I expect that one of the drivers behind the Respondent's position was the unpaid truck repair bill. Although it was argued by Mr. Chisholm this does not form part of the agreement, it seems that the Respondent in his letter of January 27, 2014, certainly tried to tie those knots together. Mr. Collins certainly seems to refer to it as a default and the default (non-payment of truck repair bill) not being remedied and the home really being collateral for that bill.

[51] Again, nothing turns on the repair bill with respect to my finding that there is no default under the agreement. I simply refer to this as context. I expect it is a disappointment and a deep frustration to the Respondent not getting paid for a repair bill. I would hope that these issues are also addressed between the parties but I certainly make no rulings or decisions on this point.

[52] Counsel, Mr. Chisholm, has indicated that is not part of what I am being asked to address today, in particular that the failure to pay any repair bill is in fact a default under the agreement. Again, I just make the repair bill comments for context.

[53] Going forward, I say to the Applicants that prompt and timely payment is to be expected. I hope that will be the case. I do note that payment can be by cheque. That is provided under the agreement; the agreement stipulates payment by cheque. If the parties are going to pay by cash again I can only hope that Mr. Collins will issue receipts. If he does not, he accepts cash payment at his own risk.

[54] Mr. Lederman, turning to the relief under the application about the amount owing, based on my decision I did not see that as a point I needed to rule on; other than to say the payments under the agreement are required as per the schedule.

The Creelmans must continue to pay the taxes, continue to pay the insurance and honour the terms of that agreement. In light of these requirements I did not anticipate you needing any additional specific ruling.

[55] Mr. Lederman you can prepare the Order on the main issue.

Costs

[56] I will leave it to counsel to discuss and see if you can resolve the issue of costs between the two of you. If you cannot, I will retain jurisdiction to deal with costs. You can take that back on a Chambers matter or we can set a special time to do that after the regular chambers. I am certainly open to arranging a time that will be convenient to everybody to come back and deal with the cost issue.

Justice E. Van den Eynden

01/06/15