IN THE SUPREME COURT OF NOVA SCOTIA
Citation: *Gilbert v. Fotherby*, 2007 NSSC 211

Date: 20070704
Docket: SH 269046
Registry: Halifax

Between:

Raymond G. Gilbert and Priscilla E. Gilbert

Plaintiffs

v.

Lynne Fotherby and Brian Fotherby

Defendants

Judge:	The Honourable Justice M. Heather Robertson
Heard:	May 1, 14 and 16, 2007, in Halifax, Nova Scotia
Written Decision:	July 4, 2007
Counsel:	Brian F. Bailey and Angela Walker, for the plaintiffs Lynne Fotherby and Brian Fotherby, self-represented defendants

Robertson, J.:

[1] The plaintiffs Raymond and Priscilla Gilbert seek a summary judgment pursuant to *Rule* 13 of the *Civil Procedure Rules* against the defendants Lynne and Brian Fotherby, in an action for breach of a "Lease to Own/Purchase Agreement" (the "Agreement").

BACKGROUND

[2] The plaintiffs are husband and wife. They are owners of the property located at 1440 Main Street, Eastern Passage, Halifax County, Nova Scotia (the "Property").

[3] The plaintiffs value the Property at approximately $195,000. The Property is subject to a first mortgage with the Royal Bank Tacoma Drive, Dartmouth, Nova Scotia with a balance payable of approximately $23,000.

[4] The defendants are also husband and wife.

[5] The plaintiffs entered into an Agreement with the defendant, Lynn Fotherby, on March 19, 2006. The terms of the Agreement were proposed and drafted by Lynn Fotherby.

[6] The Agreement stipulated that the defendant Lynn Fotherby could occupy the Property upon a down payment of $3100 and ongoing monthly payments of $1550 to the plaintiffs on the first of each month. The monthly payments due and owning to the plaintiffs pursuant to the Agreement were to be applied (exclusive of interest, HST, and taxes) to the principal of the agreed purchase price for the Property of $189,000.

[7] The Agreement further provided that the defendant Lynn Fotherby was to obtain financing for 75% of the total purchase price of the Property in due course to complete the sale of the Property to the defendant Lynn Fotherby.

[8] The defendant Lynn Fotherby took possession of the Property on April 1, 2006 and paid the $3100 fee to Mr. Richard Comeau the real estate agent. The defendant Brian Fotherby also moved into the Property. The defendant further paid $1550 in two cheques for rent for the month of May 2006. However, the

defendant Lynn Fotherby has made no further payments from June 1, 2006 to present.

[9] On July 1, 2006, the plaintiffs served on the defendants at the Property a Notice to Quit the Property. The defendants refused to leave and remain in the Property to this day.

PROCEEDINGS

[10] On July 28, 2006 an action was commenced against the defendants by the plaintiffs.

[11] On December 21, 2006 the plaintiffs applied under the provision of the *Residential Tenancies Act* to have the defendants ordered out of the Property and to obtain an order for rent money that was to be paid and remained outstanding and unpaid.

[12] The defendants attended the tenancies hearing and claimed that the Tenancies Officer had no jurisdiction to hear the case because of this outstanding matter before the Supreme Court. The defendants also advised that they had made application for a default judgment on their counterclaim because a defence had never been filed. The Tenancies Officer adjourned the hearing and requested that counsel advise her of the court matter.

[13] A defence to the counterclaim was filed on January 19, 2007. The parties attended before this Court on January 25, 2007, for a application made by the defendants for summary judgment on the filed counterclaim. The application was dismissed.

[14] The current application for summary judgment was made by the plaintiffs on January 22, 2007.

RELIEF SOUGHT

[15] The plaintiffs seek an order for judgment against the defendants on the grounds that there is no arguable issue to be tried in respect of the defence filed by the defendants pursuant to *C.P.R.* 13.01(b); for judgment against the defendants on the ground that there is no arguable issue to be tried in respect of the counterclaim

filed by the defendants pursuant to *C.P.R.* 13.01 (a) and 13.05; that the defendants immediately relinquish possession of 1440 Main Street, Eastern Passage, County of Halifax, Province of Nova Scotia to the plaintiffs pursuant to *C.P.R.* 13.02 (k); and an Interlocutory Recovery Order pursuant to *C.P.R.* 48.04 to order the defendants to immediately relinquish possession of 1440 Main Street, Eastern Passage, County of Halifax, Province of Nova Scotia to the plaintiffs; and costs of the application. The defendants resist the application seeking reconsideration of its original application for summary judgment or in the alternative that the application be dismissed so that the matter can proceed to trial.

[16] Plaintiffs' counsel has submitted the following authorities in support of their claim for repudiation of contract: *White v. E.B.F. Manuafacturing Ltd.*, [2005] CarswellNS 554 (CA); *Canada Egg Products Ltd. v. Canadian Doughnut Co. Ltd.*,[1955] S.C.R. 398; *Wallace v. Lawrence*, [2002] CarswellNS 117 (CA); *Tupper v. Wheeler*, [2005] CarswellNS 194 (CA), in support of their application to strike the counterclaim for defamation as their pleadings are defective. I have considered these authorities in my deliberations.

THE AGREEMENT

[17] The document is entitle Lease To Own/Purchase Agreement, executed between the parties on March 18, 2006. The clauses relevant to this application are as follows:

ARTICLE 1

LEASE TO OWN/PURCHASE AND SALE OF REAL PROPERTY

1.01 Lease To Own/Purchase and Sale.

Seller hereby agrees to sell and convey and Purchaser hereby agrees to purchase, upon the subject to the terms, conditions, stipulations and agreements hereinafter set forth, the Real Property, together with all improvements, hereditaments and appurtenances thereto.

ARTICLE II

DEPOSIT(S), DISPOSITION OF DEPOSITS, CLOSING, CLOSING DATE, PROPERTY TAXES

2.01 Deposits, Disposition of Deposits

At the time of the acceptance of signing of this agreement, and payment of deposit, Purchaser will be given full access to the property for the purpose of moving in and/or setting up store and signage. The Purchaser will pay a deposit of $3100.00, by way of cheque dated March 24, 2006 to the Seller, as a deposit towards the Purchase Price. This deposit is refundable to the Purchaser at such time as final mortgage(s) is obtained and the Purchase is completed or at such other time as this agreement is ended.

2.02 Closing Date.

Closing date for this agreement will be set at April, 1, 2006. Upon closing date the purchaser will begin making lease to own payments as outlined in "Schedule A" and will continue to make these scheduled payments until such time as the Purchaser has arranged final mortgage(s) and the Purchase price is completed.

PURCHASE PRICE, HST, FEES, TERMS, CHANGES, RIGHTS

3.01 Purchase Price. The purchase price for this property shall be One Hundred and Eighty Nine Thousand Dollars ($189,000.00) plus HST if/as applicable.

3.04 Terms of Payments.

This Lease to Own/Purchase Agreement has a term of two years from closing date with an option to pay out at any time with no penalties. The Purchaser will make monthly lease to own payments and it is agreed that after deductions for interest, property taxes, HST, and insurance, and other if listed below, that the remaining portion of the payment will be put towards the purchase price of the property, reducing the amount owed for the purchase at a gradual rate.

It is agreed upon between the Seller and the Purchaser, and the Seller's acting agent, that the Seller's acting agent will seek financing to the amount of 75% of the remaining and current purchase price for the Purchaser during the term of this Lease To Own/Purchase agreement. If the Seller's acting agent is able to obtain this for the Purchaser, the Seller agrees to hold a second mortgage for the remaining 25% with no interest for the first year.

3.05 Changes to Property

During the terms of this agreement the Purchaser has the right to make changes and improvements to the property but at their own expense. The Purchaser agrees

to notify the Seller before any major changes or improvements of a structural nature are initiated and shall seek the approval of the Seller for same.

3.06 Rights to Sell

During the terms of this agreement, or at the end of the term, the Purchaser has the right to arrange and sell any portion of the property providing the amount he receives for the sale of any portion is paid to the Seller as payment of the balance of the full purchase price owing. Seller agrees to provide warranty deed to Purchaser upon receipt of full balance owing on the property.

SCHEDULE A: Lease to Own Terms for purchase of
The Purchaser and the Seller agree to the following terms:

Down Payment: $3100.00

Monthly Lease Payments $1550.00 Plus HST - as applicable

Each monthly lease payment will include principal and interest at a rate of 6.5% same as a regular mortgage.

The actual amount from each monthly lease payment that will be put towards deduction of the principal purchase is the balance that remains after deductions have been made for property tax, insurance and HST. Other deductions if any will be listed here: Interest at 6.5%. First monthly payment will be due on May 1, 2006

It is understood that the Purchaser is responsible for their own content insurance.

Purchaser is allowed by the Seller to sublease all or any part of property during the terms of this agreement so long as Purchaser still maintains full responsibility of this agreement at all times, according to Schedule B.

At the end of this lease to own/purchase agreement the balance of the purchase price will become payable.

It is understood that the Purchaser will be seeking a mortgage for 75% of the remaining purchase price. If the Purchaser obtains this first mortgage and the Seller decides to hold a second mortgage for the remaining 25% it shall be with no interest so that more of the monthly payment will go towards the principal balance, for one year.

It is also understood that the Purchaser would like to ensure that the combined monthly payments between first and second mortgages will be in the same amount range as this lease to own payment.

Schedule "B"

1- Occupancy will not be granted until the full deposit has been received by way of certified cheque or cash.

2- The Property owner retains the right to take control of the premises if payment in full is not received within 30 days from the due date.

3- Any leasing or subletting of space must have the written approval of the Property owner.

4- This agreement will be subject to lawyers review by both parties within 3 business days of signing.

5- Property owner has until May 26, 2006 to move personal property from the garage.

This document is attached to and forms part of the original lease signed on March 18, 2006

THE EVIDENCE

[18] In support of the application plaintiffs' counsel filed the affidavit of Raymond and Priscilla Gilbert dated January 22, 2007, the affidavit of Richard and Kim Clark dated March 6, 2007 who leased a portion of the first floor of the premises to carry on a dog rooming business and the affidavit of Norman Hill dated February 27, 2007. Mr. Hill is a barrister and solicitor, who acted for the plaintiffs with respect to the Lease To Own/Purchase Agreement. Mr. Gilbert, Mr. Clark and Mr. Hill were cross examined on their affidavits by the Fotherbys. Mr. Richard Comeau, the real estate agent involved in the transaction was subpoenaed with the Court's earlier permission and was examined by both parties. Lynn Fotherby filed her own affidavit in response to the application and was cross examined on it.

[19] The Fotherbys are self-represented and had earlier consulted with four lawyers during these proceedings and say they were unable to obtain legal counsel

stating in their correspondence to the Court that they "are left with the feeling there are 'outside influences' that are preventing us from getting legal counsel."

[20] The Fotherbys in their evidence agree that they executed the Lease to Own/Purchase Agreement and in fact dictated the terms of the Agreement.

[21] In their written brief the Fotherbys explained the time lines for these events as they had planned it. They submitted:

> In March 2006, Fotherby found that the property 1440 Main Rd was listed for sale by Exit Realty, under the realtor named Richard Comeau. She met with Richard Comeau to discuss terms of purchasing.
>
> The property needed work to be done to facilitate getting a mortgage and to facilitate the operations of the Fotherby business. Since it was already spring and Fotherby wanted to get started immediately on rennovations (sic) to complete the building and have it on display before the end of summer, it was agreed that the purchase would be done thru (sic) a Lease to Own/Purchase Agreement.
>
> By doing it this way, Fotherby could take possession immediately, begin doing the work and before the end of 90 days the building would be up to code, Fotherby business would be open, the mortgage would be arranged and the deed transfer would be finalized.
>
> The realtor, Richard Comeau, presented this to the sellers, Raymond and Priscilla Gilbert and they agreed to this type of purchase arrangement. Richard Comeau agreed to assist Fotherby by using the list of the improvements to create a market evaluation and submit it with the mortgage application.

[22] The Fotherbys' evidence is that they wanted to spend money on the property improving it and secure 75% financing on the improved value of the property. They allege that Mr. Comeau had undertaken to make a valuation of the property based on the increased value, after renovations. Mr. Comeau's evidence was that he facilitated the Fotherbys filling out mortgage application forms, which resulted in the Royal Bank approving financing at 65% of the purchase price of $189,000 at 8.9% interest rate. He testified that the Royal Bank would only entertain what is known as a "purchase and repair mortgage" if the Fotherbys provided three quotations for the work to be done. He testified that he communicated this to the Fotherbys who failed to provide the information to the Royal Bank. The Royal Bank's reply dated July 13, 2006 to the Fotherbys is shown as Exhibit 7 to Lynn

Fotherby's affidavit. The mortgage commitment remained open until May 12, 2006. The letter indicates the Bank did not hear from the Fotherbys and the file was cancelled.

[23] In cross examination Mr. Comeau agreed that although the Fotherbys were able to receive a property valuation estimate prepared by Ron Bitar, dated July 18, 2006 (Exhibit 10 to the Fotherbys' affidavit) showing a potential market value of $230,000 to $235,000 if all the listed repairs were completed, he had never undertaken such an evaluation himself. He reiterated that the original financing with the Royal Bank could not have been increased unless quotations for the value of the work to be done were submitted and they were not.

[24] In the meantime the Fotherbys failed to pay the lease payments on June 1 and July 1, 2006, despite repeated requests by Mr. Comeau. The Fotherbys proposed an amendment to the Lease To Own/Purchase Agreement dated May 31, 2006. The Gilberts did not agree to the amendment and it was never signed. It however proposed the payment of bi-weekly rent payments.

> Dated: May 31, 2006
>
> This is an Amendment to Schedule A, which formed part of the Lease To Own/Purchase Agreement dated March 18, 2006 between Priscilla Gilbert and Raymond Gilbert and Lynne Fotherby for property known as 1440 Main Rd, Eastern Passage, Nova Scotia.
>
> This amendment is considered agreed to, if signed by all parties, and will change the scheduled Monthly Payments from $1550.00 per month to Bi Weekly payments of $775.00 and the payments of such will be made as outlined in Schedule of payments listed in this document.
>
> Considerations:
>
> 1. The Lease to Own/Purchase Agreement is for two years = 24 months.
>
> 2. Total number of monthly payments originally agreed to is 24 months @ 1550.00/mth = 37200.00
>
> With this new bi weekly schedule:
>
> | Year | Payments spread out over | Total amount to pay for year |
> |---|---|---|

2006:	8 months (May - Dec)	$12400.00
2007:	12 months (Jan - Dec)	$18600.00
2008:	4 months (Jan - Apr)	$ 6200.00
Total payments:	24 months	$37200.00

There are three pages following this one that outline the schedule payment dates and signatures of agreement are to be signed on the last page of this document.

[25] Mr. and Mrs. Gilbert were cross examined by the Fotherbys. Mrs. Gilbert was not actively involved and really had no memory of these events.

[26] Mr. Gilbert testified that he met with the Fotherbys in early June and asked for the rent to which Mr. Fotherby replied "I will sell 2 kayaks and a bike and will be able to pay the rent."

[27] He confirmed that Richard Comeau did bring a back-up offer because the Fotherbys "were on their way out." He agreed that he was willing to take back a second mortgage for 25% of the purchase price for five years. He testified that he had nothing to do with financing but may have heard from Richard Comeau that they received mortgage approval before they moved into the premises on April 1, 2006.

[28] With respect to the Fotherbys' alternate terms Mr. Gilbert testified that the Fotherbys had asked him to take the second mortgage back with no interest for two years, and one year of no payments on the mortgage and he refused these proposed changed terms.

[29] Ultimately he said he delivered the Notice to Quit because they did not pay the rent.

[30] The Clarks, Gilberts and Richard Comeau all testified that they were not friends and did not know one another personally, other than in the real estate dealings described herein.

[31] In addition to asserting Mr. Comeau's failure to fully assist them with financing, the Fotherbys assert that Richard Comeau and the Gilberts conspired against them by actively seeking other purchasers for the property, Rick Clark and his wife Kim Clark.

[32] Mr. Clark was cross examined by the Fotherbys. His evidence is that he and his wife had looked at this property in August of 2005, but dropped the ideal of buying it because they were not happy with its value. Mrs. Clark had later contacted Mr. Comeau to see if he knew of any properties for lease and he suggested a sublease with the Fotherbys, who were looking for a first floor tenant. Mrs. Clark rented a portion of the premises for her dog grooming business, approximately 400 sq. ft.

[33] A dispute between the Fotherbys and the sub-tenant Clark subsequently arose over the completion of a leasehold improvement, a demising wall and the supply of an adequate hot water supply to the subleased premises. This later erupted into a physical altercation when the Clarks arranged to pay their rent to Landry MacGillivray in Trust, because they understood the Fotherbys had not been paying the $1550 lease payments on June 1 and July 1, as required under the Agreement. Criminal charges are pending relating to the alleged assault of Mr. Clark by Mr. Fotherby, in which it is alleged Mr. Clark suffered a broken arm.

[34] Mr. Comeau apparently told the Clarks of the Fotherbys' failure to meet their obligation under the Agreement. After the altercation the Clarks abandoned the premises.

[35] The Fotherbys blame Mr. Comeau and further allege that he actively solicited the Clarks as potential purchasers of the building. Mr. Comeau admitted that he had prepared what he referred to as a back-up offer which the plaintiffs the Gilberts and the Clarks executed on. The Clarks agreed to pay $184,000 for the property. The agreement, Exhibit 5 to this proceeding was "subject to the existing offer being terminated on or before July 12, 2006" i.e. the Fotherbys' Lease To Own/Purchase Agreement.

[36] Mr. Comeau's evidence is that once he knew the Fotherbys had failed to complete their financing and were in arrears in their lease payments, the Clarks suggested to him they were again interested in buying the property and he drafted the back-up offer for their signature.

[37] Mr. Comeau has played a pivotal role in this transaction. He acted as agent for the Gilberts in the sale of the property.

[38] He prepared the Fee Agreement, Exhibit 1 to these proceedings, which referred to himself as the buyers' agent, in which he was to be paid the sum of $3100 as a fee for securing the execution of the Least To Own/Purchase Agreement. The Fotherbys had no knowledge of this document, Mr. Comeau testified that he did not consider himself as the Fotherbys' agent as he had not had them sign a dual agency agreement.

[39] He acted as the Gilberts' rental agent in collecting the rent cheques from the Fotherbys in May, 2006. He attempted to collect rents in June and early July but testified the Fotherbys stated they were unable to pay and proposed an amendment to the Agreement, earlier referred to.

[40] Although he did not prepare the Lease To Own/Purchase Agreement, Mr. Comeau agreed he had prepared Schedule B to the Agreement in order to ensure the Gilberts retained control over the property. In particular, he testified that the failure to pay the lease payments meant that the Gilberts would be able to retake possession of the property, as provided by Clause 2 of Schedule.

> The property owner retains the right to take control of the premises if payment in full is not received within 30 days from the date due.

[41] He introduced Rick and Kim Clark to the Fotherbys to facilitate their lease of a portion of the first floor of the premises, although the Fotherbys prepared the commercial lease agreement Exhibit 3 to these proceedings.

[42] He drafted and delivered along with the plaintiff Raymond Gilbert the Notice to Quit to the Fotherbys on July 1, 2006.

[43] He prepared and had the Clarks and Gilberts sign the back-up offer to purchase the property, which the Clarks subsequently abandoned.

[44] He played a role in having the Clarks pay their $575 rental to Landry MacGillivray in Trust, when the Clarks became concerned they would be evicted along with the Fotherbys, who were then in arrears in their lease payments.

[45] While one might question Mr. Comeau's conduct in his dealing with the Clarks, Fotherbys and Gilberts he is not a party to this action and it is not alleged that by his conduct he caused the Fotherbys to renege in their agreement to pay $1550 on the first of each month commencing on May 1, 2006.

[46] Rather, the Fotherbys take the position in their defence that once the mortgage financing was arranged and they allege it was within two weeks of the Agreement being signed, no further payments were required under the Agreement until the closing of the transaction.

[47] Indeed with respect to the Fotherbys' allegation that Mr. Comeau failed to secure early "purchase and repair" financing, no such requirement is set out in the Agreement.

> DEFENCE
>
> Regarding Item #1 in Statement of Claim
>
> The Defendant, Lynne Fotherby entered into an agreement with the Plaintiffs to purchase the property at 1440 Main Rd. Eastern Passage, in the Halifax Regional Municipality to be her permanent residence and business location.
>
> Regarding Item #3 in Statement of Claim
>
> The Defendant, Lynne Fotherby has resided at 1440 Main Rd. Eastern Passage, in the Halifax Regional Municipality since the agreement began.
>
> Regarding Item #4 in Statement of Claim
>
> The agreement was a purchase agreement first and foremost to buy the property. The defendant, Lynne Fotherby to acquire a mortgage approval to complete the transaction. A mortgage approval was obtained within 2 weeks of the date of the agreement.
>
> The lease to own portion of the agreement was only meant as a fall back in case the defendant, Lynne Fotherby did not qualify for a mortgage. With this mortgage approved, the defendant, Lynne Fotherby was no longer responsible for lease payments because the transaction could have been completed. The

defendant Lynne Fotherby claims that this transaction was not completed due to the actions of the Plaintiffs and the acting real estate agent.

The terms of the purchase agreement were:

Purchase Price	189000
Plaintiffs hold 25% of 189,000:	47250
	141750
Less Down Payment	3100
Balance to complete purchase transaction	138650

Regarding Item #5 in Statement of Claim

the property of $3100.00 and then took possession of the property. The defendant, Lynne Fotherby also made a payment of $1550.00 on May 1, 2006.

Regarding Item #6 in Statement of Claim

The Defendant, Lynne Fotherby still resides and operates her business from the property location and claims that the agreement should not have been viewed as a lease since the mortgage approval was obtained two weeks after taking possession of the property, therefore proving her ability to complete the transaction and it is through the actions of the Plaintiffs and the real estate agent that the purchase agreement itself has not been completed.

Regarding Item #7 in Statement of Claim

The Defendant, Lynne Fotherby claims that the lease portion of the agreement including any and all clauses pertaining to a lease became null and void once the mortgage approval was obtained, and it is through the actions of the Plaintiffs and the real estate agent that the transaction for the purchase is not yet completed.

Regarding Item #8 in Statement of Claim

The Defendant, Lynn Fotherby claims that the only date that a payment would be due would be a closing date on the purchase agreement and as the Plaintiffs refuse to sell the property as agreed there has been no closing date set. Therefore there are no payments due.

Regarding Item #9 in Statement of Claim

Again the Defendant, Lynne Fotherby claims that there are no payments due and therefore she is not in default.

Regarding Item #10 in Statement of Claim

The Defendant, Lynne Fotherby continues to occupy the property as it is her primary residence and it is her business location, and will continue to do so until a decision on this issue is resolved through proper legal channels.

Regarding Item #11 in Statement of Claim

The Defendant Lynne Fotherby has not breached the terms of the agreement and it is the Plaintiffs who have breached the agreement by refusing to extend co-operation to allow the Defendant, Lynne Fotherby to compete the purchase transaction.

Regarding Item #12 in Statement of Claim

As the Defendant Lynne Fotherby is not in default of the agreement and is only attempting to complete the agreement it is her every right to reside at the property and allow others to be on the property. Therefore the Defendant Brian Fotherby is not trespassing on the Plaintiffs property.

Regarding Item 13 in Statement of Claim

The Plaintiffs have no right to demand lease payments of the ground that the Defendant, Lynne Fotherby has the documentation to show she can complete the purchase transaction and the Plaintiffs are refusing to sell.

Regarding Item 14 in Statement of Claim

The Defendant, Lynne Fotherby claims that the purchase transaction could have and should have been completed early on in the agreement and the Plaintiffs refuse to complete the agreement.

COUNTERCLAIM

1. The Defendant, Lynne Fotherby is seeking a judgment that will allow her to complete the Purchase agreement with the following terms

Purchase Price	189,000
Plaintiffs hold 25% of 189,000	47,250 (held as second mortgage)
	141,750
Less Down Payment	3,100 (already paid by defendant)
Balance to complete purchase agreement	138650

- Closing date: 90 days from the date of the court order for the sale to continue

- Second mortgage held by Plaintiffs to have no payments due or interest charged for the first year.

2. The Defendant, Lynne Fotherby claims that the Plaintiffs have enacted contractual and active interference which caused the Defendant to experience financial loss in her business, damage to her reputation within the business community and damage her reputation in the community as a whole.

3. The Defendant, Lynne Fotherby claims that the Plaintiffs have caused these interferences, and are refusing the (sic) sell the property 1440 Main Rd, in order to create financial gain for themselves at the expense of the Defendant.

4. The Defendant, Lynne Fotherby is seeking reimbursement for losses resulting from the contractual interferences and other active interferences caused by Plaintiffs in the amount of $70,000.00

5. The Defendant, Lynne Fotherby claims costs and any further relief as the court allows.

[48] Following the Notice to Quit and termination of the Lease To Own/Purchase Agreement, the Fotherbys attempted to restore the contract by seeking mortgage financing on the property and offer a Home Trust Company's mortgage loan commitment dated July 28, 2006, as evidence of their capacity to close pursuant to the terms of the Agreement. The mortgage commitment is found as Exhibit 11 to the respondent Lynne Fotherbys' affidavit. This document contains a number of conditions outlined in Schedule "A":

> This Commitment is subject to:
>
> A satisfactory inspection by Home Trust Company, separate and apart from the appraisal.
>
> Satisfactory interview with the borrower(s) mortgagor(s) to be conducted at a mutually convenient time.
>
> Original Appraisal of the property, satisfactory to Home Trust Company, by Boutilier & Associates Ltd, addressed to Home Trust Company, or accompanied by a letter of transmittal from the appraiser, reflecting a minimum value of $235,000.00 and value based on a 60 to 90 day maximum marketing time. Also required is days on market (D.O.M.) for all comparables.

[49] The Fotherbys have not offered any evidence that an appraisal of the property was ever made, as per the requirements of the mortgage commitment from Home Trust Company.

[50] In his affidavit Norman Hill outlines the events that followed the issuance of the originating notice action and statement of claim filed on July 28, 2006. There was an exchange of correspondence with the Fotherbys' solicitor Matthew Moir, Exhibits E and F to Mr. Hill's affidavit, wherein Mr. Moir explained that the defendants' position was the plaintiffs were bound to complete the sale pursuant to the Agreement and that he expected to be retained by the Fotherbys. The defendants filed their defence on August 18, 2006 and served it on the plaintiffs' solicitor. They were unrepresented at this time.

[51] Mr. Hill states in his affidavit that the defendants phoned him on October 16, 2006, to discuss the possibility of closing on the sale of the property which they still resided in without payment of any rent. They followed up with a letter dated October 24, 2006, outlining new terms to their offer to purchase. Exhibit H to Norman Hill's affidavit.

> Lynne Fotherby
> 1440 Main Rd. Box 189
> Eastern Passage, NS B3G 1M6
> Ph: 463-7889
>
> October 27, 2006

Landry, McGillivray
Barristers and Solicitors
Suite 300 Quaker Landing
33 Octerloney Street Box 1200
Dartmouth NS B2Y 4B8

Attention: Norman B. Hill

With regards to our previous phone conversation I still have not received a reply from you regarding negotiations on the completion of the sale for 1440 Main Rd., Eastern Passage, NS

Therefore, I will take the first step. I've enclosed a list of adjustments to the purchase agreement that I feel would be appropriate in facilitating the closing of the property. I hope that your clients will find these figures satisfactory.

Due to the fact that I have not been able to complete improvements on the property as per orders from your clients, and now because of all the issues at hand, the mortgage from my lender will have to be based on the purchase price, not on a newly appraised value after improvements as I had originally planned to do.

If your clients are agreeable to the figures submitted with this letter then that leaves us with the task of solving the other matters we discussed.

Regarding the assault charges placed on my husband that resulted from obviously staged and planned events that occurred at the property. I am still of the opinion that all parties including your clients, their realtor, my tenant, and possibly even your firm all played a part in setting up scenarios, in which my husband had no other recourse than to defend himself. I still have to deal with all of this through legal process, and do intend on bringing out all the information of events that occurred and roles persons played in the course of the trials.

If your clients are able to obtain letters from all parties involved, that all of these events occurred due to misunderstandings as we discussed earlier, that would be fine.

If on the other hand (sic) your clients are not able to do this and are claiming they had no involvement or were misled in all of this by other parties, or that they no longer have a relationship with these parties due to what happened here, then I

would consider a letter from them stating this information suitable for negotiation to resolve this.

I do need a reply from you within 24 hours as I still have the potential to close this sale by the end of the month if we can work out a resolution to all the problems at hand. I have my broker, my lender and my lawyer all standing by waiting for approval of these negotiations so a timely reply from you is urgent.

Lynne Fotherby

Adjustments to Lease to Own/Purchase Agreement dated March 18, 2006
Between Priscilla Gilbert and Raymond Gilbert (sellers)
and Lynne Fotherby (buyer)

189,000 (purchase price)

122,000 (less money from lender)

67,000

10,000 (less rebate paid to purchaser on closing)

57,000

4,650 (less payments made by purchaser to seller to date, to be returned to purchaser)

52,350 (to be held as 2nd mortgage by seller 2yrs, no interest, no payments for 2yrs

[52] Mr. Hill's evidence was that in the interests of attempting to resolve the matter for his clients, the Gilberts, he wrote to the Fotherbys on a without prejudice basis, a letter dated October 25, Exhibit I to his affidavit wherein he stated:

My clients would be prepared to conclude this matter on the following basis:

1. You will complete the purchase of 1440 Main Road, Eastern Passage within 30 days on the following terms:

    a) Sale Price of $189,000.00;

b) You will obtain a first mortgage for 75% of the purchase price (141,750.00);

c) My client will hold a mortgage for 25% of the purchase price ($47,250.00) which would be repayable without interest in monthly installments of $500.00 with the balance due one year from the closing date. (This payment is calculated based on your first mortgage having principal and interest payments of approximately $1,050.00 - $141,750.00 @ 6.5%/20 years =$1,050.00/month - and both mortgage payments totalling $1,550.00 per month in accordance with the original agreement);

d) You would not receive credit for the deposits or rents paid, but would not be charged for the unpaid rent to date.

2. Neither party would receive any damages, "rebates", legal costs or other amounts;

3. All parties to the legal action would sign Consent Orders dismissing the action and counterclaim and would exchange mutual releases;

4. Obviously my clients can make no agreements with respect to the assault charges laid by your tenant which do not involve them.

If you can agree to resolve this matter on this basis and if you can conclude the transaction within the time limit specified, we will not proceed with our action which will otherwise result in you being removed from the property and being liable to my clients for the outstanding rents, legal costs and substantial damages.

This offer can only remain open for acceptance until 5:00pm on Friday, October 27th, 2006.

[53] He did not receive a reply to the letter. The Fotherbys' evidence was that the letter had been faxed to their phone number that did not receive faxes. They did not follow-up their own correspondence with a phone call to Mr. Hill.

[54] The defendants initiated a Chambers application in January 2007, as earlier outlined.

[55] Mr. Hill realizing that litigation would ensue withdrew as the solicitor of record and arranged for Mr. Brian Bailey to represent the Gilberts.

LAW AND ARGUMENT

[56] *C.P.R.* 13.01 provides:

> 13.01. After the close of pleadings, any party may apply to the court for judgment on the ground that:
>
> (a) there is no arguable issue to be tried with respect to the claim or any part thereof;
>
> (b) there is no arguable issue to be tried with respect to the defence or any part thereof; or
>
> (c) the only arguable issue to be tried is as to the amount of any damages claimed.

[57] The Supreme Court of Canada in *Guarantee Company of North America v. Gordon Capital*, [1999] 3 S.C.R. 423 set out the test for summary judgment as follow as in para. 27:

> ¶ 27 The appropriate test to be applied on a motion for summary judgment is satisfied when the applicant has shown that there is no genuine issue of material fact requiring trial, and therefore summary [page435] judgment is a proper question for consideration by the court. See Hercules Managements Ltd. v. Ernst & Young, [1997] 2 S.C.R. 165, at para. 15; Dawson v. Rexcraft Storage and Warehouse Inc. (1998), 164 D.L.R. (4th) 257 (Ont. C.A.), at pp. 267-68; Irving Ungerman Ltd. v. Galanis (1991), 4 O.R. (3d) 545 (C.A.), at pp. 550-51. Once the moving party has made this showing, the respondent must then "establish his claim as being one with a real chance of success" (Hercules, supra, at para. 15).

[58] The role of the chambers Judge on a summary judgment application has been set out in *Oceanus Marine Inc. v. Saunders* (1996), 153 N.S.R. (2d) 267 (C.A.) and in *Campbell v. Lienaux* (1988), 167 N.S.R. (2d) 196 (C.A.). In *Oceanus*, Pugsley, J.A. said at para. 20:

> ¶ 20 It was, with respect, not the function of the chambers judge, on an application for summary judgment, to determine matters of fact or law which

> were in dispute. Matters of controversy should be left for resolution at trial. (Irving Oil Ltd. v. Jos A. Likely Ltd. (1982), 42 N.B.R. (2d) 624)

[59] In *Handlex Groundhandling Services Inc. v. Midway Runway Specialists Inc.*, [2005] N.S.J. No. 108, LeBlanc, J. Said at para 17:

> ¶ 17 In Binder v. Royal Bank of Canada, [2003] N.S.J. No. 304 (S.C.) Moir J. stated at para. 7 that the Guarantee decision does not create a substantive difference between "no arguable issue to be tried" as in Nova Scotia's Rule 13) and " no genuine issue for trial" as phrased in Guarantee. This conclusion has found approval at the Court of Appeal. See United Gulf Developments Ltd. et al. v. Iskander et al. (2004), 222 N.S.R. (2d) 137 (C.A.) at para. 9.

[60] The first question is whether there is a genuine issue of material fact requiring trial. If there is, the chambers judge is not to further consider the summary judgment application but must dismiss it.

[61] This case is one of breach of contract alleging that the defendants breached a material term of the contract, i.e. their obligation to make monthly lease to own payments, that the parties all at various times refer to as rent.

[62] The Agreement had a term of two years commencing on April 1, 2006 with lease to own payments commencing on May 1, 2006.

[63] Upon failure to pay the sum of $1550 owing on June 1 and July 1, the plaintiffs exercised their right to take possession of the property and treat the agreement at an end by serving the Notice to Quit on the defendants. Certainly with the issuance of the statement of claim dated July 28, the defendants knew the plaintiffs had treated the breach of contract terms as a repudiation.

[64] Any attempts to rekindle and change the Agreement were rejected by the plaintiffs. For one year the Fotherbys have occupied these premises rent free.

[65] The defendants rely on an interpretation of the contract that would suggest no lease payments were due after they secured mortgage financing. The Fotherbys authored this Agreement. It is clear on its face that monthly payments were to be made from May 1, 2006 onward and indeed they made the first payment although a little late and by presenting two cheques totalling $1550.

[66] It is not possible in my view to construe the contract in any other way. Indeed on the evidence that is before me it is clear that the Fotherbys were aware of this term and tried but failed to comply. They even suggested by weekly payments of $775 which were declined by the Gilberts. These arrangements were proposed after the Fotherbys had received correspondence from the Royal Bank approving a mortgage at 65% of the purchase price.

[67] If there were delays in securing alternate mortgage arrangements for 75% of the purchase price, not even this commitment made by Home Trust Company was acted upon by the Fotherbys, with respect to meeting the mortgage commitment deadline and the conditions of the offer.

[68] In any event the Fotherbys stood in breach of the lease payments from July 1 onward. Any reasonable interpretation of Schedule B Clause 2, wherein the "property owner retains the right to take control of the premises if payment in full is not received within 30 days of the due date" would logically refer to the monthly rent payments or payment on the balance of the purchase price at the closing, not later than March 31, 2008. This would not have relieved the Fotherbys of their obigation to pay rent under the Agreement.

[69] The Fotherbys continued to ask Mr. Comeau for time to pay the monthly lease payments and failed to make them.

[70] In my view, the plaintiffs clearly established the breach of essential terms of the Agreement, their election to treat the contract at an end and their entitlement consequentially to possession of the premises.

[71] Their dismay at Mr. Comeau's dealings with the Clarks in having a back-up offer to purchase ready or in securing their sub-tenancy agreement or being in any way involved in the tenancy dispute the Fotherbys had with the Clarks, does not amount to a viable defence with any likelihood of success at trial.

[72] Indeed their pleadings in the counterclaim alleging the plaintiffs by their actions have caused the defendants to "experience financial loss in her business, damage to her reputation within the business community and damage to her reputation in the community as a whole" are unspecified allegations which contain no facts, respecting the plaintiffs alleged acts or omissions, causing such loss.

[73] I have listened carefully to their evidence on cross examination. I have read their affidavits and pleadings. The best I can understand from them is that they are trying to advance an economic tort of business interference. However, there is nothing here to support such a claim. I see no suggestion of contractual interference in all that I have read and heard.

[74] Again the defendants' claim for an award of $70,000 as reimbursement for losses suffered is factually unsupported in pleadings and evidence.

[75] Accordingly, I grant judgment to the plaintiffs in the following:

1. Pursuant to *Civil Procedure Rule* 13.01(b) for judgment against the defendants on the ground that there is no arguable issue to be tried in respect of the defence filed by the defendants.

2. Pursuant to *Civil Procedure Rule* 13.01 (a) and *Rule* 13.05 for judgment against the defendants on the ground that there is no arguable issue to be tried in respect of the counterclaim filed by the defendants.

3. Pursuant to *Civil Procedure Rule* 13.02 (k), order the defendants to immediately relinquish possession of 1440 Main Street, Eastern Passage, County of Halifax, Province of Nova Scotia, to the plaintiffs.

COSTS IN THIS APPLICATION

[76] I will be happy to hear submissions in writing failing any agreement between the parties on the issue of costs.

Justice M. Heather Robertson