IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Balderston v. Brewer, 2005 NSSC 11

Date: 20050119
Docket: 236290
Registry: Sydney

Between:

Ira C. Balderston and Loretta D. Balderston (Vendors)

Plaintiffs

v.

Christena Brewer (Purchaser)

Defendant

Judge:	The Honourable Justice Frank Edwards
Heard:	January 10, 2005, in Sydney, Nova Scotia
Counsel:	William P. Burchell, Esq., for the plaintiff Christena Brewer, in person

By the Court:

[1] This is an application pursuant to Section 4 of the ***Vendors and Purchasers Act***, R.S.N.S. 1989 c. 487. The Applicant/Plaintiff Vendor seeks a determination that the Defendant Purchaser "has no legal basis upon which to resile from her agreement to purchase (the Vendor's property)." The Plaintiffs also seek an order for specific performance of the Agreement, and/or damages for breach of contract.

[2] The parties entered into an Agreement of Purchase and Sale on August 30, 2004. The agreed Closing Date was September 23, 2004. Pursuant to the Agreement the Plaintiff provided a metes and bounds description of the property to the Defendant. The lot size was 50' x 100'. The Defendant had 15 days to investigate title and make objection. The Defendant made no objection to title in the 15 day period.

[3] On the closing date (September 23) however, the Defendant's solicitor faxed the Plaintiff's solicitor. He noted the presence of a survey marker 80' from the front of the property and the fact that a neighbour's vehicle was parked just beyond the 80' survey marker. The Defendant's solicitor said that he would require a

statutory declaration from the Plaintiffs confirming that they had “exclusively occupied” the full 100' depth of the lot.

[4] The lawyers conferred and agreed to adjourn the closing until the following day pending receipt of the plot plan from the Defendant’s surveyor. The plot plan, prepared by Harvey Surveys, contained a notation that the 80' survey marker was in error. The Plaintiffs took the position that the notation of the error satisfied the Defendant’s concern and therefore the transaction should close. The Plaintiffs tendered the documents for closing on September 24. The Plaintiffs also refused to provide the requested statutory declaration.

[5] The Defendant responded in writing on September 30. At that time, the Defendant’s solicitor enclosed a copy of a survey plan provided to him by the neighbour, a Mr. Apesteguy. The latter had asserted his ownership of the 20' section of property on which his vehicle was parked. The plan itself is ambiguous in that the common (disputed) boundary is marked as being 80' (71.5' + 8.5') in length. But there is also a notation by a driveway running along the boundary which seems to contradict the noted 80' length. (The driveway itself is marked as 80' in length and stops well short – perhaps 20' – of the rear boundary.) In any

event, the Defendant indicated she did not wish to proceed with the transaction and requested the return of her deposit.

[6] On the basis of the evidence before me, it is not possible to conclusively determine whether or not there is an encroachment on the subject lot by Mr. Apesteguy's lot or whether the Plaintiffs' lot is 100' deep or 80' deep. Pursuant to the Agreement of Purchase and Sale, the Plaintiffs provided a metes and bounds description for a 50' x 100' lot. The Plaintiffs were therefore obliged by the Agreement to convey 100' (not 80') to the Defendant.

[7] The Plaintiffs insist upon adherence to the letter of the Agreement. They say that there was no objection to title within the 15 days mandated by the Agreement and therefore the Purchaser's objection was too late. Yet, by the letter of the Agreement, the Vendors were obliged to tender on September 23 but did not do so (albeit by oral agreement) until September 24. In any event, I am satisfied that the time limits in the Agreement are not determinative.

[8] The fact is that there is an apparent unresolved boundary dispute respecting the subject property. The Plaintiffs were wrong to dismiss the dispute out of hand

and insist upon closing. The Plaintiffs should have cooperated with the Defendant in seeking to resolve the dispute. At the very least, the Plaintiffs should have offered in writing to extend the closing date to allow the merits of the dispute to be investigated. The Defendant should not reasonably have been expected to complete the transaction while the boundary dispute was unresolved.

[9] I am dismissing the Application. I should add that this type of application is not typical of those usually brought under the ***Vendors and Purchasers Act***. Usually, the parties are agreed upon what the alleged defect in title is. The only issue is whether the alleged defect does or does not prevent the Vendor from conveying good title.

[10] In this case, the Plaintiff Vendors have really attempted to obtain summary judgement without having started an action. Chambers applications generally are not the appropriate forum for resolving issues of fact. This case, with its competing survey plans (and no in-person surveyor evidence) demonstrates why that is so.

[11] The parties will each bear their own costs. The Plaintiffs shall forthwith return the Defendant's deposit in full.

Order accordingly.

J.