IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Gillis v. New Glasgow (Town), 2008 NSSC 46

Date: 20080212
Docket: SP 260696
Registry: Pictou

Between:

Allan M. Gillis and AMG Development Incorporated

Plaintiffs

v.

Town of New Glasgow, a Municipal Corporation, Office at New Glasgow, County of Pictou, Province of Nova Scotia

Defendant
(Plaintiff by Counterclaim)

Judge:	The Honourable Justice John D. Murphy
Heard:	Summary Judgment Application November 19, 2007, in Halifax, Nova Scotia
Final Written Submissions:	December 17, 2007
Written Decision:	February 14, 2008 *{Oral decision rendered February 12, 2008, Halifax, N. S.}*
Counsel:	Roseanne M. Skoke, for the Plaintiffs David A. Graves, Q.C., for the Defendant

By the Court:

[1] This is an Interlocutory Application for Summary Judgment brought by the Defendant with respect to both a claim and counterclaim.

FACTS

[2] The Plaintiffs' claim against the Defendant Municipality is set out in the Statement of Claim filed February 17, 2006. The claim arises from events following a request for proposals for development of the former Westside School Property in New Glasgow which the Defendant issued in the summer of 2003. The Plaintiffs responded and provided a proposal for a condominium development on the site. The parties had extensive dealings, negotiations, and exchanges of documentation until July-August of 2005 when the Defendant Town executed and delivered to the Plaintiffs a deed for the subject property, and when an Amended Development Agreement was signed and registered. Construction did not commence within the period contemplated by the Development Agreement, and the Plaintiffs conveyed the property to a third party.

[3] In this action, the Plaintiffs allege that the Defendant is responsible for the failure of the proposed condominium development, and claim against the Defendant for breach of contract, negligence, wilful misrepresentation and damages to professional reputation. The Plaintiffs claim to have suffered loss as a result of the Defendant's conduct throughout the parties' negotiations and dealings, which commenced after the Plaintiffs submitted their original proposal in September of 2003.

[4] The Defendant denies any responsibility to the Plaintiffs, and counterclaims based upon Plaintiffs' alleged breach of contract and conversion, seeking:

(1) Payment of $6,500.00, being the amount of the deposit in connection with purchase of the property;

(2) Losses the Defendant says it incurred when the Plaintiffs did not continue the development of the property.

[5] The Defendant brought this Application for Summary Judgment seeking dismissal of the Plaintiffs' action, and judgment on the counterclaim for the amount of the deposit and additional damages to be assessed.

[6] The detailed facts are set out in the pleadings, and in the briefs and affidavits filed by the parties. In particular, they are summarized in the Defendant (Applicant)'s brief at paragraphs 1 to 41, and in the Affidavit of the Plaintiff, Mr. Gillis, at paragraphs 7 to 54.

[7] The principal facts may be highlighted as follows. The Defendant Town's request for proposals required potential developers to provide information about the type of project intended, to include an offer for the purchase of the property, and to provide a certified cheque in the amount of ten per cent of the proposed purchase price. According to the Defendant, the request for proposals contemplated the successful bidder requesting re-zoning, the Town entering a Development Agreement with the developer subject to the re-zoning, and the parties negotiating a Purchase and Sale Agreement.

[8] The Plaintiffs' proposal, submitted September 2, 2003, included an offer to purchase the property for $65,000.00 and was accompanied by a $6,500.00 deposit cheque.

[9] The Plaintiffs' proposal was successful, it was advanced to the Town's Citizens' Advisory Committee, and on or about September 15, 2003, the Plaintiffs were advised to proceed with the re-zoning request and application for development permit. At that time, the Defendant advised the Plaintiffs that the Defendant did not accept some of the provisions in the Plaintiffs' offer to purchase the property.

[10] A Development Agreement was executed between the parties in April of 2004, and after some discussion, the property purchase agreement which the Plaintiffs had previously proposed was not appended to the Development Agreement, as the Town had not agreed to all of the terms. That 2004 Development Agreement was not filed or recorded, as contemplated by the *Municipal Government Act* S.N.S. 1998, c. 18.

[11] After the Development Agreement was signed in 2004, the Plaintiffs began marketing the proposed condominiums, and entered into agreements with potential purchasers and persons interested in financing the project.

[12] In or about February-March 2005 discussions concerning purchase terms for the property were revived, and correspondence and conversations ensued among the parties and their counsel concerning purchase and sale arrangements, including closing date, migration, development commencement date and a re-purchase option in favour of the Defendant. Extensive discussion took place concerning the extent to which terms in the original September 2003 Purchase Proposal by the Plaintiffs would be included in the Purchase and Sale Agreement.

[13] Eventually, by July 12, 2005, negotiations ended and the parties agreed to proceed with the purchase. Final terms included the $65,000.00 purchase price initially proposed, a requirement that the project be commenced within a year of recording the Development Agreement, and a repurchase option for the Town.

[14] A deed for the property was executed July 29, 2005, the Option Agreement was executed July 30, 2005, and the parties executed an Amended version of the Development Agreement, which was registered August 16, 2005.

[15] The Plaintiffs did not commence construction and in August 2006 sold the property to a third party.

[16] The Defendant had not transacted the deposit cheque which had been provided with the original purchase offer, and the Plaintiffs obtained a refund of the deposit amount from the bank, on the basis that the original cheque had been lost, which was not the case.

[17] The Plaintiffs' claim is based upon allegations that the Defendant breached its contractual obligations and acted negligently in the course of its dealings with the Plaintiffs, particularly with respect to negotiations and delays finalizing arrangements for the purchase of the property. In its Statement of Claim, the Plaintiffs allege, in paragraph 13, that during December 2003, the Defendant accepted the Development Proposal and their Offer to Purchase, and represented that the transaction would close and the real property be conveyed. The Plaintiffs say that their causes of action arise because the Defendant failed to record the original Development Agreement, delayed closing the transaction to convey the property, and improperly used other negotiating tactics including unilaterally insisting in 2005 that the Plaintiffs give a repurchase option. The Plaintiffs maintain the Defendant failed to fulfill its contractual obligation, did not act with due diligence and was negligent.

[18] The Defendant's position is there is no genuine issue of material fact requiring trial, and that the Plaintiffs' claims alleging breach of contract, negligence and other causes of action have no real chance of success. The Defendant submits that there was no agreement to convey the property until July of 2005. The Defendant maintains that the facts cannot support the Plaintiffs' position that an agreement to sell the property was concluded in September 2003, because according to the Town, essential terms remained to be negotiated, and the parties were required to enter into an agreement of purchase and sale. The Defendant also maintains that acceptance of the Plaintiffs'

development proposal and execution of the Development Agreement in April 2004 did not give rise to any implied term, as alleged by the Plaintiffs, whereby the Defendant committed to convey the property so that construction could begin by April 5, 2005. Alternatively the Defendant says that even if arrangements between the parties included any express or implied terms respecting conveyance of the property to allow commencement of construction by April 5, 2005, those arrangements were amended by mutual agreement when the Amended Development Agreement and Deed were executed during July-August 2005.

"Wilful Misrepresentation" and "Damages to Plaintiffs' Professional Reputation"

[19] I agree with the position advanced by the Defendant that the Plaintiffs' claim for "damages to professional reputation" is not an independent head of damage, but requires liability on some other basis. Similarly, the Plaintiffs' claim for "wilful misrepresentation" is subsumed in any cause of action based upon breach of contract or negligence. Accordingly, the availability of the summary judgment remedy will be determined in the context of causes of actions based upon alleged breach of contract and negligence.

TEST FOR SUMMARY JUDGMENT

[20] The Defendant (Applicant) summarizes the test for summary judgment at paragraphs 42 to 56 of its brief. The authorities referenced by the Plaintiffs in their response brief at paragraphs 26 to 38 do not suggest a test which differs in principle.

[21] **Civil Procedure Rule 13.01(a)** provides that any party may apply to the court for summary judgment on the ground that there is no arguable issue to be tried. The case law including **Hercules Management's Ltd. v. Ernst & Young**, [1997] 2 S.C.R. 165; and **Cherubini Metals Works Ltd. v. Nova Scotia (Attorney General)** (2007), N.S.C.A. 38, indicates that the court must decide whether there is a genuine issue for trial. Summary judgment is appropriate where a defendant shows there is no genuine issue of material fact requiring a trial, and a responding plaintiff fails to establish that its claim is one with a real chance of success.

[22] The authorities indicate that if the law, when applied to the undisputed facts, demonstrates that the plaintiff's action has no real chance of success, then the

defendant will be entitled to summary judgment. The Defendant says that there is no material fact in dispute, and that the Plaintiffs have no real chance of succeeding when the law is applied to the circumstances of the case.

The Breach of Contract Claim

[23] With respect to the breach of contract claim, the Defendant's position is that there was no agreement to sell the property before July 2005. Specifically, the Defendant claims that essential terms of the sale – including the closing date, the terms of the option to repurchase and the details of property migration – were not agreed prior to the finalization of the sale in July 2005. The Defendant also argues that the action is barred by the *Statute of Frauds* R.S.N.S. 1989, c. 442. The Plaintiffs' response appears to be related to the alleged failure of the Defendant to meet its obligations to file the Development Agreement so as to "give the Agreement 'effect' as setforth [*sic*] in the legislation." This position appears to be put forward primarily in order to preserve the Plaintiffs' negligence claim. At paragraph 30 of their reply brief, the Plaintiffs say that the Town's failure to implement the December 2003 decision of Council to sell the Property, and its breach of a statutory requirement in the *Municipal Government Act* to file the Development Agreement at the Registry, give rise to a cause of action in negligence. I will not address these primary arguments in detail before considering the alternative position advanced by the Defendant.

[24] In the alternative, the Defendant submits that if there had been an agreement in existence before July 2005, it would have been "varied and rendered unenforceable by the negotiation of a new agreement between the parties." In Paragraph 29 of its Defence and Counterclaim, the Town advances the following position:

> **Estoppel/Waiver/Variation**
>
> The Town states that the Developers, by entering into the Purchase and Sale Agreement and otherwise taking steps to close the sale of the property and continue under the Development Agreement, acquiesced to any prior delay in the finalization of the agreements between the parties and are therefore estopped from bringing this action. In addition, the Town says that the parties substituted a new agreement for

> an earlier one and the original agreement, if any, ceased to be enforceable. The Town pleads and relies upon the doctrines of estoppel, waiver and variation.

Variation

[25] G. L. Fridman in The Law of Contract in Canada, 5th ed. describes "variation" as a method of "changing the original duty to perform created by a contract...".[1] He describes the effect of variation as follows:

> In cases of variation what happens is that, by mutual agreement, for the benefit or convenience of both parties, there is a later alteration of an original agreement. Hence, a unilateral variation, even if permitted by the original contract, must be accepted by the other party with full knowledge and consent, and must be made for valid consideration, if it is to be valid....[2]

[26] Variation, like the companion doctrine of waiver, requires a later express agreement between the parties that affects the earlier transaction.[3] In addition, writes Fridman,

> where the original agreement has been varied by the later one, then, to the extent to which such variation is operative, the first agreement must now be considered to have been completely changed in respect of the variation in question.
>
> ...
>
> A contract which varies an earlier agreement will be valid to the extent to which it is itself an enforceable agreement.... The question in each instance is what was the intention of the parties when they made their *second* agreement. If variation was their

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[1] G.H.L. Fridman, *The Law of Contract in Canada*, 5th edn. (2006), p. 561.

[2] *Ibid.*, p. 562.

[3] *Ibid.*

> ultimate intention, they must follow the same rules as to form as applied to the original contract.[4]

[27] The Defendant refers to **Whitford v. Toronto-Dominion Bank** (1986), 71 N.S.R. (2d) 408 (S.C.T.D.), where Burchell J. agreed that "where two parties substitute a new contract for an earlier one, the original contract ceases to be enforceable."[5] The Defendant submits that the Agreement of Sale was negotiated between March and July, 2005, and that the Plaintiff, Mr. Gillis, executed an Amended Development Agreement at or about the same time. As such, any existing contract was varied by the 2005 negotiations. Even if there had been an implied term that the conveyance would take place by April 5, 2005, the Defendant says, this term would be varied by the subsequent agreements, for which the Plaintiffs received consideration. The Defendant says negotiations concluded in July 2005, and the property was conveyed at that time. The Plaintiffs do not provide any direct response to these claims, and I find that the Defendant's position is sound.

Estoppel

[28] On the basis of the alleged variation, the Defendant says the Plaintiffs are "estopped from claiming for breach of any earlier inconsistent contract." The Defendant seems to have attempted to combine estoppel with its arguments on variation, without fully substantiating the basis for estoppel. The Plaintiffs say there is no estoppel because,

> ...there was no new acceptance of terms, no acquiescence in the default, delay and negligence of the Town by the Plaintiff. The Plaintiff needed a deed to the land to proceed to development and the Towns [*sic.*] failure to close the transaction and to give effect to Councils [*sic.*] decision resulted in damages.

This submission by the Plaintiffs is not sustainable, given that the transaction did close, and closed without a claim for damages up to that time. The Defendant says

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[4] *Ibid.*, pp. 562-563.

[5] *Whitford* at para. 4, citing *Stark v. Abrose*, [1978] 2 S.C.R. 716; *Penman Manufacturing Co. v. Broadhead* (1892), 21 S.C.R. 713; and *Dutchzesan v. Bronfman* (1919), 48 D.L.R. 645 at 649.

there is "evidence of a variation of terms of any former agreement" in that there was "a variation of the commencement date of the Project, the variation of a closing date for the conveyance ... and the addition of a new term, the option agreement." The Plaintiffs allege that the option agreement "was a unilateral condition imposed by the Town that the Plaintiff readily accepted to close the transaction" and which was not exercised by the Town. The Defendant responds that the option was negotiated by the parties, just as the Plaintiffs' request for a new date to commence construction was negotiated.

[29] The Plaintiffs' position, it appears, is that the Council motion "to proceed to the sale of land, by Development Agreement" included an "implied term that the conveyance of land would be within the specified time frame within the Development Agreement." The Council motion referred to appears to date from December 2003. The Plaintiffs say there was no variation of the terms of this agreement, but rather the parties were "working to give effect to the Agreement." The Plaintiffs claim that it was the Defendant's failure to comply with the *Municipal Government Act* and to implement the Council decision that forced them to take legal action, adding that "it would be a grave injustice to allow the Defendant Town to escape liability from its contractual obligations because of their negligence in failing to give effect to the Development Agreement." The purpose of the conveyance in 2005, then, was merely "to implement and give effect to the implied term and condition as consented to by Council." This reasoning is very difficult to understand.

[30] The Defendant denies that the Development Agreement transferred ownership of the property, and denies that the December 2003 Council motion was a motion to sell the land; it was, the Defendant points out, a motion to enter into a Development Agreement. Even if the Development Agreement included an implied term that the property would be sold, the Defendant notes,

> ..it was not breached. The Plaintiff, as required by the RFP [request for proposals], did negotiate an agreement to purchase the Westside School Property from the Town in July 2005 and as a result the Town <u>did</u> convey the Westside School Property to the Plaintiffs. Even if the Plaintiffs are correct, the Town met its obligations under the suggested implied term.

[31] The Defendant summarizes at paragraph 45 of its supplemental reply brief:

> Most importantly, the agreement made between the parties in July of 2005 was a contract enforceable between the parties, whether or not it was contained within a Development Agreement. The parties were bound by the agreements that they negotiated for and concluded through their solicitors. The parties acted as though they were so bound, and the Plaintiffs did not indicate that they would not be bound by any former contract. The Plaintiffs accepted the conveyance of the Westside School Property in August of 2005 without any express reservations.

This comment is the clearest expression by the Defendant of a basis upon which to found estoppel. The principle of estoppel was set out in **Cumberland County (Municipality) v. Cumberland District Planning Commission** (1997), 163 N.S.R. (2d) 16 (S.C.), where J.M. MacDonald J. (as he then was) said:

> [54] The basic principles of the concept of estoppel are enunciated in S.M. Waddams' text *The Law of Contracts* (2nd Ed.), 1984 (Toronto-Canada Law Book) wherein the following analysis can be found at p. 143:
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> > The basic concept of estoppel is that a person is precluded from retracting a statement upon which another has relied. A definition that has been judicially approved is as follows:
> >
> > > Where one person ("the representor") has made a representation to another person ("the representee") in words, or by acts and conduct or (being under a duty to the representee to speak or act) by silence or in action, with the intention (actual or presumptive), and with the result, of inducing the representee on the faith of such representation to alter his position to his detriment, the representor, in any litigation which may afterwards take place between him and the representee, is estopped, as against the representee, from making, or attempting to establish by evidence, any averment substantially at variance with his former representation, if the representee at the proper time, and in the proper manner, objects thereto.

And further at p. 145 Waddams notes:

> One of the clearest instances of the injustice that would be caused by absolute refusal to recognize gratuitous promises arises in modifications of existing relationships. No difficulty arises where changes are made that might possibly be beneficial to both sides. The problem of absence of consideration arises, however, where a change is agreed that can only benefit one party.

[32] The authors of The Law Relating to Estoppel by Representation make the following comments about parties to negotiations:

> Where A and B are parties to a negotiation or transaction, and, in the course of the bargaining or dealings between them, A perceives that B is labouring under a mistake as to some matter vital to the contract or transaction, he may come under an obligation to undeceive B, at all events if the circumstances are such that his omission to do so must inevitably foster and perpetuate the delusion. In such cases silence is in effect a representation that the facts are as B mistakenly believes them to be, and A is accordingly estopped from afterwards averring, as against B, any other state of facts....[6]

[33] By continuing to deal with the Defendant, to the point where a final agreement was concluded in 2005, the Plaintiffs induced the Defendant to believe that the ongoing negotiations were not leading the parties toward legal action; in other words, it appears that the Plaintiffs allowed discussions to continue with the Defendant under the misapprehension that there would not be litigation arising out of the original Development Agreement. It does not appear to be disputed that both parties proceeded as if a final agreement were intended; that they may have proceeded in a haphazard way does not change that fact. By proceeding to the end of negotiations, it appears, the Plaintiffs misled the Defendant to believe that the parties were *ad idem*. Any estoppel does not arise from specific discussions in the course of negotiating, but from the very act of continuing to negotiate.

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[6] S. Bower and A.K. Turner, The Law Relating to Estoppel by Representation (London, 1977), p. 52.

Negligence Claim

[34] The estoppel principle applies in this case not only to the Plaintiffs' allegations based upon breach of contract, but also to the negligence aspects of the claim, all of which are grounded in events alleged to have occurred before the parties reached the July-August 2005 Agreements, upon which the Defendant is entitled to rely.

Summary Judgment: Plaintiffs' Claim

[35] The Defendant's Application for Summary Judgment should succeed. The Defendant has established the position advanced in paragraph 29 of its Defence and Counterclaim, and I accept the submissions it made in paragraphs 109 to 115 of its September 25, 2007 brief as well as those contained in sections 39 to 45 of its December 17, 2007 supplementary reply brief.

[36] Even if there had been an agreement for conveyance of the property prior to July 2005, it was varied and superseded by the new Development Agreement and Agreement of Purchase and Sale negotiated and executed at that time. Any prior terms, including any terms implying that a conveyance would take place before July of 2005, were varied by subsequent agreements. The Plaintiffs are estopped from claiming breach of any earlier inconsistent arrangement.

[37] The Amended Development Agreement was registered August 16, 2006 in accordance with any statutory requirement in Section 228 of the *Municipal Government Act*.

[38] The Plaintiffs have not established that the claim advanced in negligence has any real chance of success. Even if facts advanced by the Plaintiffs could have been the basis of a negligence claim, the allegations all relate to matters which occurred before the parties concluded the Amended Development Agreement and Purchase and Sale Agreement during July-August 2005, and they do not support a cause of action which survives the finalizing of those arrangements.

Summary Judgment: Counterclaim - Deposit

[39] The test for summary judgment on a claim or a counterclaim echoes that applicable for summary judgment on a defence. It was recently reiterated by this court in **PricewaterhouseCoopers Inc. v. County Realty Ltd.**, [2006] N.S.J. No. 164 (S.C.), where the Court stated at paragraph 10:

> 10 The test for summary judgment in Nova Scotia is well established. In *Canadian Imperial Bank of Commerce v. Tench* (1990), 97 N.S.R. (2d) 325 (C.A.), Macdonald, J.A. stated at paragraph 9:
>
> The law is clear that a plaintiff is entitled to obtain summary judgment if he can prove his claim clearly and if the defendant is unable to set up a bona fide defence or raise an arguable issue to be tried – see *Bank of Nova Scotia v. Dombrowski* (1977), 23 N.S.R. (2d) 532, 32 A.P.R. 532...

[40] To prove its counterclaim, the Defendant relies on the following evidence which is contained in the affidavits submitted in support of this application, and which is not refuted:

- Mr. Gillis provided the Town with a deposit cheque from the Bank of Montreal on or about September 2, 2003. The cheque was in the amount of $6,500 and represented 10% of his offered purchase price for the Westside School Property.

- The Town did not transact the cheque at that time.

- In July of 2005, the Town agreed to sell the Property to Mr. Gillis for $65,000. The final amount advanced by Mr. Gillis at that time was $58,500, reflecting the $6,500 already advanced by Mr. Gillis in September of 2003.

- The deposit cheque was not transacted by the Town by February of 2006.

- The Bank of Montreal contacted Mr. Gillis in or around February of 2006 to inquire as to why the cheque had not been transacted. Mr. Gillis advised the Bank that the cheque was lost and had the deposit amount refunded to him.

- Mr. Gillis did not inform the Town that he had requested a refund of the deposit cheque.

- Mr. Gillis admitted on discovery that he had told the Bank the cheque was lost, which was untrue. He also admitted that he had requested a refund to himself and that he was not prepared to return the money.

[41] The sale of the property took place in July-August 2005, the entire purchase price was due at that time and the Plaintiffs had no legal right whatsoever to retain any part of the purchase price. No *bona fide* defence has been raised. The evidence indicated that the Plaintiffs misrepresented the circumstances to the Bank in order to obtain funds which belonged to the Defendant, and converted those funds for their own use. The Defendant shall have judgment for $6,500.00 on the counterclaim.

Summary Judgment: Counterclaim - Claim for Breach of Development and Conveyance Agreements

[42] I am not prepared to award summary judgment to the Defendant with respect to this aspect of the counterclaim. Although the evidence indicates the Plaintiffs did not commence the project within the time frame set out in the Development Agreement, the Town did not exercise its option to repurchase the property. The evidence provided does not establish that the Defendant suffered any loss, or that any damage it may have incurred is attributable to the causes alleged in the counterclaim, or that it could not have been mitigated. I am not satisfied that the Town can prove this aspect of the counterclaim clearly, and that the Plaintiffs are unable to set up a *bona fide* defence or raise an arguable issue to be tried.

CONCLUSION

[43] The Defendant is entitled to summary judgment with respect to the Plaintiffs' claim, and I order that the claim advanced by the Plaintiffs be dismissed.

[44] The Defendant shall have judgment against the Plaintiffs in amount $6,500.00 in respect of its counterclaim for the deposit relating to the purchase of the property.

The balance of the Defendant's Application for Summary Judgment on the counterclaim, that is for breach of the Development and Conveyance Agreements, is hereby dismissed.

[45] If the parties are unable to agree with respect to costs, they may make written submissions within 30 days of the date of this decision.

[46] The Order reflecting this decision should be drafted by the Defendant and submitted to Plaintiffs' counsel for consent as to form. If no objection to the draft order is made by Plaintiffs' counsel within 10 days of delivery, it may be sent to me for initialing. If the Defendant wishes to have the Order filed before costs are resolved, the Order should reserve the Court's jurisdiction to address costs.

J.