IN THE SUPREME COURT OF NOVA SCOTIA
Citation: French v. Checkmate Home Inspections Inc., 2008 NSSC 297

Date: 20080527
Docket: SH 284897A
Registry: Halifax

Between:

Justin French

Appellant

v.

Checkmate Home Inspections Inc.

Respondent

Judge:	The Honourable Justice M. Heather Robertson
Heard:	May 27, 2008, in Halifax, Nova Scotia
Written Decision:	October 9, 2008 **(Orally: May 27, 2008)**
Counsel:	Patrick J. Eagan, for the appellant Joseph A.Chedrawe, for the respondent

Robertson, J.: (Orally)

[1] This is a Small Claims Court Appeal in the matter of Justin French and Checkmate Home Inspections Inc., with Mr. Patrick Eagan appearing for Mr. French and Joseph Chedrawe appearing for Checkmate Home Inspections Inc. The appellant, Justin French, appeals the decision of the Small Claims Court adjudicator, Gregg Knudsen, dated 19 July, 2007. The claim arose out of an agreement of purchase and sale for the property located at 7158 Highway Number 329, at East River Road, in the Municipality of Chester.

[2] The statement of facts as set out in the brief of the respondent are not in dispute by the appellant and those facts recorded at paras. 1-10 of the respondent's brief are as follows:

1. On April 11, 2006, an Agreement of Purchase and Sale was entered into between the purchaser, the Appellant, Justin French, and the vendor, Sanford Lampl [the "Vendor"], for the purchase of 7158 Highway #329, East River Road in the Municipality of Chester [the "Property"]. The closing date was set for July 31, 2006. Clause 3(a) of the Agreement of Purchase and Sale provided that the agreement was subject to the Appellant having the property inspected.

2. The Appellant received a copy of a Property Condition Disclosure Statement prepared by the Vendor and dated March 17, 2005. In this document, the Vendor, among other things, did not indicate any structural problems from unrepaired damage leakage or dampness to the walls or any damage due to wind, fire, water, etc. A second disclosure statement, dated April 14, 2006, is a faxed copy of the first with a notation (presumably from the Vendor) indicating "same conditions".

3. On April 18, 2006, the Appellant hired the Respondent, through its president and principal, Mr. Phil Brun, to inspect the Property. Mr. Brun prepared a report which was sent to the Appellant and which did not describe any problems with respect to the wood siding that required attention. The report did describe other concerns.

4. On May 25, 2006, the Vendor returned to the Property after having been in South Carolina and upon arrival discovered that a squirrel had chewed through a hole in the siding which revealed wood rot in the siding.

5. The Vendor notified the Appellant and recommended he come and look at the Property. The Appellant did and found that there was indeed wood rot. Contractors confirmed that it was wood rot.

6. In mid-July 2006, Mr. Brun attended at the property with the Appellant and observed holes in the siding which he testified were not present when he conducted the inspection.

7. The Appellant was advised by his real estate agent that these were conditions in existence prior to the inspection and could have been made an issue to be addressed at that time. His real estate agent advised him that his only options were to close or to terminate the agreement and forfeit his $20,000 deposit. The Appellant could not recall discussing the issue with his lawyer. He attempted to renegotiate with the Vendor through his real estate agent, who represented both parties, but not through his lawyer.

8. On July 31, 2006, the Appellant proceeded with the closing of the Agreement.

9. On March 15, 2007, the Appellant commenced a claim against the Respondent in Small Claims Court seeking damages in the amount of $21,933.60 plus interest and costs.

10. The matter was heard by Adjudicator Gregg W. Knudsen on May 1, 2007 during a five hour hearing which ended just before midnight.

[3] I would like to thank counsel for their briefs and the case law cited. I have considered all of the authorities cited and will particularly reference a few in my decision.

[4] In his notice of appeal, counsel for Justin French sets out the following grounds of appeal that the learned adjudicator erred by making errors in law or failure to follow the requirements of natural justice, the particulars of which follow:

a) the learned Adjudicator erred in law or breached the requirements of natural justice in determining, at paragraph (57) of the decision, that it was necessary for the Appellant to have requested or proposed in writing (i.e. pursuant to the *Statute of Frauds*) that the Vendor of the property renegotiate the purchase price on account of the discovery of rot

subsequent to the release of all conditions precedent to completion of the sale of the property.

b) the learned Adjudicator erred in law or breached the requirements of natural justice, as a consequence of his error as described in paragraph a) above, in determining that there was "no attempt made by [the Appellant] to alter the present agreement [of purchase and sale];

c) the learned Adjudicator erred in law or breached the requirements of natural justice in determining, at paragraph (58) of the decision, that the "primary inducement" for the Appellant to "suffer a loss in the form of an opportunity to negotiate the purchase price [of the property] was "on a balance of probabilities" ... "the intervention of the real estate agent", rather than the negligent misrepresentation of the Respondent;

d) the learned Adjudicator erred in law or breached the requirements of natural justice in determining that the Appellant was 90% liable for his losses, which decision was, with respect, based on an erroneous determination that the situation in the case at bar was "analogous" to that examined by Glube, J. (as she then was) in *JD Irving Ltd. v. Western Plumbing and Heating Ltd.* (1979) 34 N.S.R. (2d) 285;

e) the learned Adjudicator erred in law or breached the requirements of natural justice in determining the amount that the Appellant's damages claim should be reduced on account of betterment. The Appellant submits that evidence existed before the Court, which evidence was admitted in the submissions to the Adjudicator of both counsel for the Appellant and the Respondent, with respect to the age of the siding being approximately ten (10) years. Further, evidence of the Appellant's expert witness, whose evidence was wholly accepted by the learned Adjudicator, was also before the Court which attested to the necessity of immediate replacement of the siding to prevent further rot damage.

[5] The appeal was commenced by the appellant pursuant to s. 32(1)(b) of the *Small Claims Court Act*, R.S.N.S. 1989, c. 430, which reads in part:

32(1) A party to proceedings before the Court may appeal to the Supreme Court from an order or determination of an adjudicator on the ground of ...

(b) error of law;

(c) failure to follow the requirements of natural justice,

by filing with the Prothonotary of the Supreme Court a notice of appeal.

[6] The leading case in Nova Scotia on Small Claims Court appeals is *Brett Motors Leasing Ltd. v. Welsford*, [1999] N.S.J. No. 466 (S.C.). Saunders, J. (as he then was) said at para. 14:

> One should bear in mind that the jurisdiction of this Court is confined to questions of law which must rest upon findings of fact as found by the adjudicator. I do not have the authority to go outside the facts as found by the adjudicator and determine from the evidence my own findings of fact. "Error of law" is not defined but precedent offers useful guidance as to where a superior court will intervene to redress reversible error. Examples would include where a statute has been misinterpreted; or when a party has been denied the benefit of statutory provisions under legislation pertaining to the case; or where there has been a clear error on the part of the adjudicator in the interpretation of documents or other evidence; or where the adjudicator has failed to appreciate a valid legal defence; or where there is no evidence to support the conclusions reached; or where the adjudicator has clearly misapplied the evidence in material respects thereby producing an unjust result; or where the adjudicator has failed to apply the appropriate legal principles to the proven facts. In such instances this Court has intervened either to overturn the decision or to impose some other remedy, such as remitting the case for further consideration.

[7] The onus is on the appellant to establish the learned adjudicator committed an error in law or failed to follow the requirements of natural justice.

[8] Counsel for the respondent, Checkmate Home Inspections Inc., submits the appellant has not demonstrated that the adjudicator clearly erred in his interpretation of documents or *viva voce* evidence or failed to apply the appropriate legal principles to the facts of the case when he rendered his decision, largely in favour of the respondent.

[9] Counsel for the appellant distilled the grounds of appeal into three arguments, which I will deal with now.

[10] The first and most important is, “Did the learned Adjudicator err in finding that the ‘primary inducement’ to complete the closing of the property purchase was

the intervention of the appellant's realtor in providing advice to the appellant that, if the appellant terminated the Agreement of Purchase and Sale (the 'Agreement') after having released the inspection condition to the Agreement, he risked losing his deposit of $20,000.00?"

[11] The appellant cites para. 57 of the adjudicator's decision. It reads:

> It is trite law that any contract dealing with the sale of real property must be in writing to be enforceable. There is no evidence of any written attempt to amend or terminate the Agreement after discovery of the rot. There is no evidence of a written rejection from the Vendor contemporaneous with the closing of the hearing. I find the letter from Mr. Lampl tendered in evidence of little consequence given that it is dated many months after the closing. Therefore, I find there was no attempt made by him to alter the present agreement. If his evidence is correct, his decision while understandable was not only the result of the report but also the result of the advice received from his real estate agent. He ought to have done more, such as consulted counsel.

[12] The appellant says, therefore, the adjudicator disregarded the appellant's actual evidence of an attempt to renegotiate. In this regard, the adjudicator made certain findings of fact. They can be found in paras. 51-59 of his decision. In my view, he did not assert that as a matter of law the Statute of Frauds must be adhered to respecting any amendment to the Agreement of Purchase and Sale being in writing and, absent this, no negotiations were made.

[13] The adjudicator, in his findings, reveals that he was aware of the oral representation by the purchaser respecting a reduction in the purchase price for the amount of the replacement siding due to rot. The adjudicator did not entirely disregard the vendor's e-mail (which was an exhibit to the Small Claims Court hearing), although he found it to be of little relevance because it was dated almost a year after the closing.

[14] As a finding of fact, the adjudicator determined that on all the evidence before him, the appellant made little effort to have the vendor account for the rot by an adjustment in the purchase price, and then chose to accept the real estate agent's advice that if they contested the issue and failed to close, he would be in danger of losing his $20,000 deposit. The appellant, after the fact, looked for redress from the respondent for its failure to recognize the rot issue in its report.

However, it was the vendor who, on arriving back from his winter home in the United States, found the rot and made the appellant aware of the problem.

[15] In his amended summary report, the adjudicator addresses this finding in paras. 9-11, explaining on his analysis of the evidence and his findings of fact, he found a reliance on the real estate agent's advice that he must close or risk his deposit, which he attributed to be a substantial reliance in the order of 90% and he found that to be fatal to proving negligent misrepresentation as against the home inspector. Reliance involves a factual analysis.

[16] With respect to the appellant's argument that the adjudicator found as a finding of fact "could have created a latent defect" to provide the appellant with legal leverage to either void the agreement and get his deposit back or reopen the agreement to account for the rot in a reduction of the purchase price, the appellant argues that the adjudicator misapplied the law relating to latent defect and innocent misrepresentation, and the appellant challenges the adjudicator's reliance on *Bryson v. Egerton et al*., [1999] B.C.J. No. 1581 (S.C.).

[17] In reviewing the adjudicator's decision, it is obvious to me he based his decision on the principles of negligent misstatement and the principles of reliance, not on innocent misrepresentation. A speculative comment made by the adjudicator at para. 55 of his decision, wherein he states:

> ... I cannot speculate how this issue would have progressed but suffice it to say that is a matter about which he ought to have sought legal advice.

[18] I find no error of law here and agree with the respondent, that in any event the property condition disclosure statements would constitute representations. (*Thompson v. Schofield*, [2005] N.S.J. No. 66 (S.C.)). Although innocent misrepresentation was not the legal principle on which the decision turned, the adjudicator's reference to *Bryson v. Egerton, supra*, did not constitute a misapplication of the relevant legal principles and thus an error in law. I would refer you to *Bryson v. Egerton* at p. 14 at paras. 73-76, and in particular para. 74. I believe that by signing the property disclosure statement, the vendor can make and did make a positive misrepresentation of an existing fact. The fact that the options available on this particular property disclosure statement - item six i.e., to acknowledge a water problem by answering: "No, Yes or Don't Know" is relevant and analogous to the *Bryson v. Egerton* case in that respect.

[19] The adjudicator's decision was properly based on negligent misstatement and the reliance requirements, the latter being a factual finding, one this Court will not interfere with. His finding the primary inducement to complete the closing was his reliance on the real estate agent's advice. In my view, the issue was correctly stated and no error in law has been made on the interpretation of the evidence before him.

[20] With respect to issue number two in the appellant's factum, I note we did not really discuss the *Irving* case in argument, but I wish to deal with it now. Issue number two was stated as, "Is the case at bar analogous to the situation faced by the Court in *J.D. Irving Ltd. v. Western Plumbing and Heating Ltd.* (1974), 34 N.S.R. (2d) 285, as maintained by the learned Adjudicator?"

[21] The appellant says in contrast to the facts found in the *Irving* case, the apportionment of liability against Dr. French rested not on his negligence, but solely on his failure to seek legal advice when he became aware of the rot. The appellant suggests the adjudicator's analysis should have focussed in greater depth on whether it was reasonable or not for Justin French to carry through with the closing in light of the fact he had released the "subject to inspection" clause.

[22] The adjudicator did in para. 59 find the facts were "markedly different" from the *Irving* case, however, he was observing that Glube, J. (as she then was) found the plaintiff was 90% liable when he failed to verify certain information contained in the negligent misstatement. I think this is the limited application of reference to the *Irving* case. I do not find the adjudicator's reference to the *Irving* case constitutes an error in law. Again, as he notes in his summary report at paras. 9-11, he considered the principles of tort law relating to reliance and found on the facts the appellant had failed to prove he relied on negligent misstatement of the home inspector's report (only to a mere 10%) in deciding whether to close or not. The failure to obtain legal advice was indicative of his lack of reliance on the report.

[23] These are findings of fact that must stand.

[24] With respect to issue number three, the matter of damages: "Did the learned Adjudicator err in determining that the Court-accepted damages of $21,933.60, (i.e. the cost to replace the siding), should be reduced by 2/3 on account of the principle of betterment? And, similarly, did the learned Adjudicator err in

considering that "the probability of [the Appellant's] success in successfully negotiating price [presumably of the home which he was purchasing] was 'a factor in calculating an amount respecting betterment'?"

[25] In determining the amount of damages, the adjudicator fixed the value to replace the siding at two-thirds of $21,933.60, having regard to its current state and the uncertainty of future litigation or negotiations. He dealt with this issue of betterment in para. 12 of the amended summary report. He says:

> With respect to the ground e), I mistakenly omitted reference to the submissions as to the age of the siding. I considered the age of the siding, which was ten years old. There was also *viva voce* evidence from Mr. Naugler that he life span of the siding is anywhere from 20 to 50 years. Specifically, his evidence was to the effect that siding carried a warranty of "20-25 years minimum" to as much as 50 years. The probability of success in successfully negotiating price was also a factor in calculating an amount respecting betterment and the Claimant's ability to use that information for negotiation or litigation. I reduced the value to one-third of the replacement costs to reflect all of these contingencies, and then to 10% of that amount to reflect the Claimant's partial reliance, as noted in paragraph 60-61 of the decision.

[26] The adjudicator was presented with this evidence as to the 20-25 year minimum warranty. I agree with the respondent and indeed with counsel for the appellant that an appropriate valuation would have been four-fifths of the amount sought, given that ten years of the warranty had expired.

[27] I would say the doctrine of betterment is an appropriate consideration and well established law, but here there was not sufficient evidence in this regard before the adjudicator, and I find the decision a little confusing in terms of expressing which factor he relied on. I think the appropriate assessment of damages is that of four-fifths of the amount sought. That figure would be $17,929.69. Therefore, as I am not altering the finding of liability made in the adjudicator's decision, 10% of that sum would be $1,792.96. This sum should be awarded to the appellant as damages in the case.

[28] In the result, I have disallowed the appeal on issue one and issue two, and made an alteration of damages as I have just stated with respect to issue three before the Court.

Justice M. Heather Robertson