SUPREME COURT OF NOVA SCOTIA

Citation: Christopher v. United Gulf Developments Ltd., 2009 NSSC 41

Date:20090212
Docket: Hfx No. 296534
Registry: Halifax

Between:

Terry Christopher and Elizabeth Christopher

Plaintiffs/Defendants
By Counterclaim

- and -

United Gulf Developments Limited, a body corporate
with an office in Halifax, Province of Nova Scotia

Defendant/Plaintiff
By Counterclaim

Judge:	The Honourable Justice Kevin Coady
Heard:	January 16, 2009, in Halifax, Nova Scotia
Decision:	February 12, 2009
Counsel:	John Keith, for the plaintiffs David Farrar, QC, for the defendant

By the Court:

[1] This Application was heard in Chambers on January 16, 2009. It is an application brought by the Christophers seeking an order for Summary Judgment against United Gulf Developments Limited(United Gulf), pursuant to **Civil Procedure Rule 13.01** (1972 Rules) and s. 4 of the Vendors and **Purchasers Act**.

[2] In 2006 United Gulf were developing Phase 7 of the Glen Arbour Subdivision. The Christophers' were interested in purchasing a lot in that area. On January 13, 2007 the parties entered into an agreement of Purchase and Sale for lot 714.

[3] The Agreement of Purchase and Sale included the following terms which are relevant to this application:

> 1. The Vendor agrees to sell and the Purchaser agrees to purchase the property identified as Lot 714 on Schedule "A" attached, located in Phase 7 Glen Arbour Subdivision, Halifax Regional Municipality and the Province of Nova Scotia (hereinafter called the "Property") for the sum of TWO HUNDRED AND FIFTY THOUSAND Dollars ($250,000.00) plus HST in the amount of TWO HUNDRED EIGHTY FIVE THOUSAND Dollars ($285,000.00).
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> 2. The Purchaser submits this Agreement with FIFTY THOUSAND Dollars ($50,000.00), cash or cheque, payable to the Vendor as a deposit to be held

pending completion of this Agreement and to be credited on account of the purchase money of the Closing Date.

4. This Agreement shall be completed on or before AUGUST 16, 2007, (hereinafter called the "Closing Date"). It is agreed that if the Purchaser is in default under the Agreement or does not complete this Agreement in accordance with the terms hereof, then the Vendor, in its sole and absolute discretion, shall be entitled to terminate this Agreement and the Purchaser shall forfeit its deposit in addition to any other claims or remedies which the Vendor may have against the Purchaser for their failure to so complete.

12. The Purchaser acknowledges that the Property has not yet been endorsed for subdivision approval by the Planning Department of HRM and that should endorsement of the Property not be received by the closing date that the Vendor has the option to terminate the agreement and return the deposit to the Purchaser or unilaterally extend the closing date for a period of up to 180 days. In the event subdivision approval is not received within 180 days the agreement may be extended by the Vendor for an additional 180 days. The parties agree that regardless of any closing date extension exercised by the Vendor the Property shall close within 30 days of receiving endorsement from HRM for subdivision approval.

18. Time shall in all respects be of the essence in this Agreement. In the event of a written agreement of extension, time shall continue to be of the essence.

21. There shall be no amendment to this Agreement unless agreed to in writing by the parties. Notwithstanding anything contained in this Agreement, the Purchaser acknowledges and agrees that the Vendor is the owner of the Property and shall have the right to prepare, amend and revise this Agreement of Purchase and Sale, including protective covenants and building restrictions, at any time in order for the Property to incorporate requirements for the development and scheme of the subdivision as the Vendor deems appropriate in its sole and absolute discretion up to and including the Closing Date.

[4] It is not disputed that the Christophers increased the deposit to $150,000.00 as of May 31, 2007. They did this in return for a reduced purchase price. It is the

deposit that drives this litigation. The Christophers allege that United Gulf breached the agreement and that they are entitled to a return of their deposit. United Gulf alleges that the Christopher's breached the agreement and must forfeit the deposit.

[5] The Christophers' evidence is set forth in two affidavits filed September 26, 2008 and December 23, 2008. They assert as follows:

- In the fall of 2006 they decided to buy a lot on which they could build their own house.

- United Gulf's agent showed them several lots in the new Phase 7. They settled on lot 714 because it was "located near a stream of water and was one of the largest non-water lots in the area".

- They signed an agreement of Purchase and Sale on January 13, 2007 for Lot 714 which was scheduled to close on August 16, 2007, subject to subdivision approval.

- The subdivision approval was not in place for August 16, 2007 and United Gulf extended the closing by 180 days or until February 12, 2008.

- In August, 2007 United Gulf's agent advised them that the boundaries of Lot 714 had to be changed, that the lot would be reduced in size and would be described as Lot 715. They refused to accept the changes.

- On August 28, 2007 United Gulf's agent advised them that closing the original agreement was not an option and put forth two alternatives. They could purchase the new Lot 715 for $25,000.00 off the agreement price. In the alternative they could purchase Lots 714 and 715 for $385,000.00 plus taxes.

- That they refused to accept these options and conveyed same to United Gulf's agent.

- On October 29, 2007 their solicitor wrote to United Gulf asking them to comply with the terms of the agreement. They state they did not receive a response.

- On February 8, 2008 they were informed by United Gulf's agent that further changes needed to be made to the new Lot 714.

- That as of February 10, 2008 subdivision approval was not in place and United Gulf extended the closing date for a further 180 days or until August 10, 2008.

- In March, 2008 they advised United Gulf that they did not accept the changes, that they considered the agreement at an end and requested return of the deposit.

- On May 28, 2008 they started this action seeking, *inter alia*, return of the deposit.

- On June 18, 2008 counsel for United Gulf inquired whether they were prepared to close on the original agreement.

- On June 20, 2008 their counsel confirmed that United Gulf had repudiated the agreement and sought return of the deposit.

- On July 23, 2008 United Gulf filed its defence together with a counterclaim seeking specific performance of the agreement.

- On August 18, 2008 United Gulf's solicitor indicated a willingness to close on August 29, 2008. No closing documents were received as of August 29, 2008. Subdivision approval was not in place on that date.

- On December 11, 2008 United Gulf's solicitor sent closing documents for Lot 714 suggesting a closing date of December 19, 2008. This Lot was 500 square metres smaller than the Lot described in the agreement.

- On December 19, 2008 their counsel returned the closing documents indicating that United Gulf had repudiated the agreement.

[6] It should be noted at this juncture that the Christophers' counsel acknowledged that the Lot size in the December 19, 2008 proposed closing would be saved by paragraph 21 of the Agreement. He argued that such is of no

consequence as the agreement was at an end as of August 10, 2008, and, in any case United Gulf breached that Agreement in August, 2007.

[7] United Gulf's evidence is set forth in the affidavit of Navid Saberi filed on December 30, 2008. He is the President of United Gulf and asserts as follows:

- As of the date of the agreement United Gulf had not received subdivision approval for Phase 7 of the Glen Arbour Subdivision.

- As a result of a number of planning issues United Gulf had not received final subdivision approval as of August 16, 2007. It therefore extended the closing date by 180 days to February 10, 2008.

- In the summer of 2007 surveys suggested that the boundaries of the property would have to be altered because of the brook.

- Pursuant to paragraph 21 of the agreement United Gulf had the absolute right to "prepare, amend and revise the agreement" in order to make the property conform to requirements for the development scheme of the subdivision.

- On August 28, 2007 United Gulf's agent wrote to the Christophers to propose some available options regarding the lot reconfigurations suggested in the new surveys.

- The parties then entered into a course of negotiations regarding the proposed reconfiguration of the property but the Christophers were unwilling to accept any amendments to the agreement "and that being the case it remained unchanged".

- The parties were unable to agree on any written amendments to the agreement as required by paragraph 21. Consequently the lot remained as originally configured "subject to United Gulf's right to amend and revise the agreement in order to ensure the property conformed to requirements for the development scheme of the subdivision."

- In February, 2008 it was evident that subdivision approval would not be in place by the February 10, 2008 closing date. Accordingly closing was set over for a further 180 days or until August 10, 2008.

- On March 28, 2008 and March 31, 2008 the Christophers requested a return of the deposit.

- On May 27, 2008 the Christophers filed this action alleging a fundamental breach by United Gulf by reconfiguring the property and seeking a return of the deposit.

- On June 18, 2008 United Gulf advised the Christophers that they were prepared to close under the original terms of the agreement.

- On June 20, 2008 the Christophers responded advising they took the position that United Gulf had repudiated the agreement and that they did not intend to close on the agreement.

- On June 23, 2008 United Gulf filed a defence and counterclaim seeking specific performance or, alternatively, forfeiture of the deposit.

- Subdivision approval was granted on November 6, 2008. Lot 714 was approved with a reduced size of 504 square meters from that envisaged in the original agreement but allowed by paragraph 21.

- United Gulf denies breaching the agreement and allege that the Christophers' letter of June 20, 2008 amounted to a breach.

[8] There are two broad issues at play in this application. One relates to time and whether the agreement was at an end as of August 10, 2008 thereby requiring a return of the deposit. In other words, United Gulf breached the agreement as it was not in a position to close as set forth in the agreement. The second issue relates to whether either United Gulf or the Christophers breached the agreement before August 10, 2008. These issues must be analyzed within the framework of an application for Summary Judgment.

[9] Summary Judgment is governed by **Civil Procedure Rule 13.01** (1972 Rules) which states:

> 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.

[10] The applicable test on a motion for summary judgment was settled in two decisions of the Supreme Court of Canada: *Guarantee Co. Of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 and *Hercules Management Ltd. v. Ernest & Young*, [1997] 2 S.C.R. 165. Both decisions have been accepted and applied in Nova Scotia. In those two cases, the Supreme Court explained that an application for summary judgment involves a two-step analysis:

> (i) The applicant must demonstrate that there is no genuine issue of material fact requiring trial.
>
> If the applicant meets this first burden, the analysis can proceed to the second step:

(ii) The respondent has to establish that his defence has a real chance of success.

[11] For summary judgment to be granted, the respondent must fail to establish that his defence has a real chance of success.

[12] In *Guarantee Co.of North America v. Gordon Capital Corporation*, *supra*, the Supreme Court of Canada defined the applicable test:

> 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 judgment is a proper question for consideration by the court. See *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 (S.C.C.) at para.15; *Dawson v. Rexcraft Storage & Warehouse Inc*. (1998), 164 D.L.R. (4th) 257 (Ont. C.A.) at pp. 267-68; *Irving Ungerman Ltd. v. Galaris* (1991), 4 O.R. (3d) 545 (Ont. 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. (*Guarantee Co.*, at para.27)

[13] This test was first applied in Nova Scotia in *Binder v Royal Bank of Canada*, 2003, NSSC 174, aff'd 2005 NSCA 94. In that case, Justice Moir applied and commented on the test set out by the Supreme Court of Canada in the above cases. At paragraph 7 of his decision Justice Moir made the following comment:

> Now any party may apply for summary judgment. And, the express standard picks up something of the approach adopted by the courts under the old rule. Now, the application is made on the ground that "there is no arguable issue to be tried with respect to the claim": 13.01(a) or "there is no arguable issue to be tried with respect to the defence": 13.01(b). In my opinion, no substantive distinction can be made between "no genuine issue for trial" and "no arguable issue to be tried". Thus, the approach adopted by the Supreme Court of Canada in *Hercules* and in *Guarantee Co., of North America* applies to summary judgment applications before this Court. The applicant must meet a threshold. Generally, that threshold is met when the case is such that the Court should properly inquire into the presence or absence of a genuine issue (*Hercules*, para. 5 and 15), which I would equate with a reasonably arguable issue. Specifically, the threshold is met in cases where "there is no genuine issue of *material fact* requiring trial" (*Guarantee Co. Of North America*, para. 27, emphasis added). Once the threshold is met, the respondent is required to show a real chance of success in its claim or defence. This is not much different from the approach we are used to and, like it, this approach places incentive on both parties to produce evidence justifying their positions.

[14] The authority cited above requires the Christophers to first establish that there is no issue of fact to be determined at trial. Should they meet that burden, United Gulf must establish that its defence has a real chance of success.

[15] The Nova Scotia Court of Appeal in *Oceanus Marine Inc. v. Saunders*, [1996] N.S.J. No. 301 advanced the following principles relating to summary judgment:

- The burden on a respondent is not a heavy one, namely to raise an arguable issue to be tried.

- The chambers judge is not permitted to determine matters of fact or law which are in dispute as matters of controversy are to be left for trial.

- Matters to be left for trial include the determination of disputed facts, difficult questions about drawing proper factual inferences, and the resolution of complex legal issues.

- Affidavit evidence, documentary productions and pleadings may be relied upon by a respondent to demonstrate that there is an arguable issue to be tried.

[16] United Gulf argues that the Christophers breached the agreement as a result of their letter of June 20, 2008 which stated:

> "Your client has previously repudiated the agreement. My clients are not prepared to now return to an agreement which has been repudiated. My clients position was made clear when it filed the Statement of Claim."

[17] This letter followed United Gulf's letter of June 18, 2008 which stated:

> "While United Gulf has made some suggestions to your client about reconfiguring Lot 714, they now confirm they will close under the original terms of the agreement of January 17, 2007."

[18] United Gulf takes the position that they had not repudiated the agreement and were prepared to close as originally envisaged. They argue that the proposals of August 28, 2007 were nothing more than suggestions.

[19] United Gulf's agent e-mailed the Christopher's on August 28, 2007 (after the initial closing had passed) and made the following comments:

> "Terry I once again want to apologize for the frustration I have put you and Beth through. It was never my intent to mislead you on your purchase. All lots in this phase have been changed as a result of the tests unfortunately lot 714 had the most dramatic change. Let me begin by reviewing the original purchase lot 714 was offered at a selling price of $279,900.00 for 17741 sq.meters. This lot was sold to you at $250,000.00 due to the large deposits you were capable of paying, a good deal for both you and United Developments.
>
> Based on new surveys lot 714 has changed to lot 715 and the size has changed to 12,498.5 sq meters. United Gulf is prepared to reduce the selling price of this

> new lot for you by another $25,000.00 thus making the purchase price $225,000.00. This lot will still be the largest non water lot available in this phase.
>
> If you find this offer on lot 715 not to be in your favour, United Gulf will offer you the next lot (new lot 714) for a special price of $135,000.00 plus tax, this lot will not have a golf package. If you decide to take this offering your total size for both lots will be 19,909.3 sq Meters, your total cost for both lot 714 and 715 will be $385,000.00 plus tax."

[20] I am satisfied that United Gulf's position amounted to an breach of the agreement. The following factors would result in a property that was entirely different than the lot described in the original agreement:

- Lot 714 had the most dramatic change of all the lots in phase 7.

- The size of the reconfigured lot was reduced from 17,741 square meters to 12,498 square meters.

- In order to obtain what they originally bargained for, the Christopher's would have to pay $385,000.00.

- The price increase to $385,000.00 would provide the Christopher's with 2162 square meters more land than was agreed to for $250,000.00

[21] I am satisfied that these factors go to the root of the contract. In *Makowecki v. St. Martin* (1990), 107 A.R. 346 (Alta.Q.B.) the court commented:

> "What constitutes the essential terms and conditions in a contract for the sale of land has been the subject of much judicial comment. The key ingredients required are the parties, the land description and the price.

[22] A breach of the essential terms of a contract gives rise to the doctrine of repudiation. A party who has reasons to believe that the other party will not perform its obligation does not have to wait until performance is due in order to consider the contract rescinded. I am satisfied that the Christophers accepted the repudiation by United Gulf when in March 2008 they advised United Gulf that they were not prepared to accept the changes, that they considered the agreement at an end and requested return of the deposit.

[23] I am satisfied that paragraph 21 of the agreement does not permit the kinds of changes proposed by United Gulf on August 28, 2007.

[24] The Christophers have satisfied me that on the issue of the deposit there is no genuine issue of material fact requiring trial. Breach, repudiation and acceptance are clearly established. This meets the requirement for the first part of the test for Summary Judgment.

[25] United Gulf responded that they did not breach on August 28, 2007 and that the agreement was still alive. They describe the proposed options as mere suggestions to get the parties over a dispute. It is their position that they were ready, willing and able to close and that on June 20, 2008 the Christopher's signalled their intention to not close. United Gulf argues that the events after August 10, 2008 were efforts to reach a new agreement. I cannot accept that these factors demonstrate that there is a defence that has a real chance of success.

[26] In *Don Fry Scaffold Service Inc. v. Canadian Bonding Corps* (2004), C.L.R. (3d) 296 (Ont. S.C.J.) Rivard J. stated:

> "Although the onus remains on the moving party to satisfy the Court no genuine issue for trial exists, there is an obligation on the responding part to 'put their best foot forward'. A responding party cannot rely on bold denials, but must place

> before the Court facts which support the defence. It is where the Court concludes that a trial is unnecessary that a motion for summary judgment will succeed."

[27] The facts advanced by United Gulf do not support the defence they raise. They were not in a position to close on August 10, 2008 as they had not obtained subdivision approval. I do not accept the "bond" argument as it was never conveyed to the Christophers. Efforts to close after August 10, 2008 amount to nothing more than an effort to create a defence for their inability to close.

[28] On the basis of the contractual issue submissions and evidence I find there is no arguable issue for trial and summary judgment is granted in favour of the Christophers.

[29] I feel that it is required I say something about the "time" issue as it was the subject of submissions. The agreement contains a "time is of the essence" clause which applies to any extensions allowed under the agreement. United Gulf had a great deal of flexibility respecting the closing date. I am satisfied that they were unable to close within the life of the agreement. The agreement was at an end on August 10, 2008. Even if I were to accept United Gulf's position that they did not

breach, and that the agreement remained alive, they clearly failed to close as per the terms of the agreement.

[30] United Gulf did breach the agreement when they were unable to close before August 10, 2008. The Christopher's have established that closing on the agreement did not occur. United Gulf's only possible defence (the alleged Christopher's breach) is no longer available to them.

[31] The Christopher's application is granted. United Gulf will return the deposit.

[32] I will hear the parties on costs. Written submissions should be sufficient unless counsel require an appearance.

Coady, J.