SUPREME COURT OF NOVA SCOTIA
Citation: *Caines v. Cheevers,* 2010 NSSC 435

Date: 20101123
Docket: Hfx No. 288435
Registry: Halifax

Between:

Elizabeth Caines

Plaintiff

v.

Frank Cheevers

Defendant

Docket: Hfx No. 286894
Registry: Halifax

Between:

Elizabeth Caines

Plaintiff

v.

Frank Cheevers, carrying on business as Frank Cheevers Construction and Electrical Services, and Paul Cheevers

Defendants

Judge:	The Honourable Justice M. Heather Robertson
Heard:	May 17, 18, 19 and June 15 and 16, 2010, in Halifax, Nova Scotia
Written Decision:	November 23, 2010
Counsel:	Tim Hill, David Moorhouse and Ian Sinclair, articled clerk, for Elizabeth Caines David A. Grant, for Frank Cheevers

Robertson, J.:

[1] The plaintiff seeks damages for her losses for an alleged fundamental breach by the defendants of a building contract for the construction of her personal residence at Braemar Drive in Dartmouth, Nova Scotia. The plaintiff served the defendants jointly and severally. The defendant Frank Cheevers, carries on business as Frank Cheevers Construction and Electrical Services. His son Paul Cheevers was the principal builder.

[2] The plaintiff entered a default judgment in the amount of $60,722.40 on November 14, 2007, with the remaining damages and costs to be assessed at a later date. Subsequently, the defendant Frank Cheevers obtained an order setting aside the default order against him alone. This trial was therefore held with respect to the claim against Frank Cheevers.

[3] The plaintiff also claims damages from Frank Cheevers, in a separate action, for damages arising as a consequence to purchase her cottage property at Porter's Lake. This is therefore a concurrent trial on both these claims.

[4] The Court heard the evidence of the plaintiff Elizabeth Caines, her lawyer David G. Coles, Q.C., who explained to the Court that he had a romantic relationship with the plaintiff and took particular interest in the planning of her new home and the negotiations with the defendants during construction progress.

[5] The Court also heard the evidence of Paul Cheevers the original builder, Dean Melendy the final builder, Richard MacMillan the area building inspector, Krista Taverner and her husband James Inch, both engineers who provided services to the Cheevers.

[6] From their evidence the following finding of facts emerged.

[7] The plaintiff Elizabeth Caines owned three properties: a house on Bow Street in Dartmouth, the lot of land at 95 Braemar Drive, and a summer residence property at Porter’s Lake, which had a small cabin on it and sufficient acreage to support a possible subdivision of these lands.

[8] In February 2007, she met with Frank and Paul Cheevers to discuss her proposed plans, to sell both the Bow Street property and the cottage property at

Porter's Lake to fund the construction of her new home on the lands she owned at Braemar Drive.

[9] The Cheevers were interested in acquiring the Porter's Lake property for their own plan of a future subdivision and residential house building. They contemplated that the sale and transfer of this property to them for $168,000 would be a credit to the plaintiff, and applied to the construction cost of her new home. The plaintiff expected that her home on Braemar Drive would be completed at a total cost of $263,157.89 plus $36,842.11 (HST) for a total of $300,000 on or before August 31, 2007, at a net cost to her of $132,000.

[10] Originally, the Cheevers had presented the plaintiff with a draft agreement of purchase and sale for her purchase of Lot 1 Braemar Drive in Dartmouth, for a total purchase price of $300,000 which appeared to contemplate a turnkey transaction were the defendants were to acquire title to Lot 1 Braemar Drive, build the house and sell it back to the plaintiff.

[11] This agreement which had some inherent problems was never executed and the plaintiff then relied on her solicitor David G. Coles, Q.C., to draft an agreement between herself and the defendants for the construction of the home on Braemar Drive. Mr. Coles also then acted on her behalf for the sale of the Porter's Lake lands to the Cheevers, to give effect to her building and financing plans.

[12] The agreement for the construction of the Braemar Drive home is dated May 28, 2007 (Exhibit 1,Volume I, Tab 3) and amended in late August 2007 (Exhibit 1, Volume I, Tab 8). It was executed by the parties, Paul Cheevers for the defendant Frank Cheevers Construction and Electrical Services and Elizabeth Caines in her personal capacity.

[13] This is the operative document and its' schedules set forth the description of the lands, the specification and scope of the project, the building plans and lastly the contract price and schedule of payments.

[14] The contract required a builder's lien hold back of 10 percent, a certificate of deposit guarantee from the Atlantic Home Warranty Corporation and also referenced the credit to the construction costs of the proceeds of sale of the Porter's Lake property to the defendants.

[15] The construction did not proceed as contemplated. By July 12, 2007, not even site excavation had been completed, although Paul Cheevers had offered some reasons why there was delay, shown in a series of emails commencing on July 17 (Exhibit 1, Volume I, Tabs 19-24).

[16] At a meeting on July 31, 2007, between both Cheevers and the plaintiff's solicitor David Coles, discussion ensued about the impossibility of completion by August 31, 2007 and a new date for completion was set – October 15, 2007.

[17] Mr. Coles prepared an amended agreement and forwarded it to the defendants on August 1, 2007, for their signature. He also emailed Frank Cheevers on that date to summarize their understandings (Exhibit 1, Volume I, Tab 24). Frank Cheevers finally signed the agreement later in August.

[18] The agreement recited the fact that the contractor had encountered site conditions not anticipated, before commencement of construction. It had been determined that the most cost effective way to deal with the site was to dig a deeper hole to secure good footings for the foundation resulting in a deeper excavation and higher foundation walls, that required further engineered plans.

[19] By this amended contract, the defendants agreed to bear the costs of certain extras relating to the extended height of the foundation, cost of rebar and additional concrete costs for required greater foundation wall thickness. By that document, the parties agreed to complete the sale of the Porter's Lake property "at the earliest date convenient to the contractor." The potential value in the Porter's Lake property for the Cheevers was cited as the reason they were prepared to pay for these additional costs on the Braemar building, according to Paul Cheevers' testimony.

[20] On August 30, 2007, Frank Cheevers' real estate agent provided the plaintiff with an agreement of purchase and sale for the Porter's Lake property (Exhibit 1, Volume I, Tab 5) providing for a September 10, 2007 closing date and with the clause making the agreement subject to Frank Cheevers obtaining financing deleted. The plaintiff accepted the agreement.

[21] During this time the plaintiff then divorced was living with her parents awaiting completion of her new home. The contractors also agreed to provide her with living accommodations – a two-bedroom apartment at Albro Lake Road in

Dartmouth or an accommodation allowance of $1,000 per month until completion. This latter option was chosen by the plaintiff.

[22] By October 15, 2007, there was a foundation built on the site, but no further construction had commenced. The foundation was not yet backfilled nor the necessary internal bracing installed to allow the backfilling.

[23] The plaintiff had sought assurances that once excavation began, there would be no delays and the construction would continue. Mr. Coles emailed an ultimatum to Paul Cheevers on October 12, 2007 (Exhibit 1, Volume I, Tab 40).

> From: David Coles
> To: Paul
> Date: 10/12/2007 3:45:40 PM
> Subject: Re: Liza's house
>
> Mr. Paul Cheevers,
>
> When we met on Monday at my office you committed that you would have the engineering done for the bracing and take steps to arrange for the bracing work forthwith to permit backfilling to take place early next week. You committed to attend at my office on Friday Oct 12 with proof that windows and doors have been secured and that root trusses can be manufactured and delivered to the site on five days notice. You agreed to provide confirmation as to the availability of sub trades and a work schedule leading to completion by mid December. I advised Liza had additional storage costs and will have accommodation and other charges now that the second contractual completion date of October 15 can clearly not be met. You said you would contact your father to arrange for a transfer of title so that the Porter's Lake land sale could close.
>
> Despite my reminder e-mail of yesterday you have not indicated when you would meet in my office today. You have not attended at my office or given me the courtesy of advising you could not attend. It appears this was yet another commitment by you which was not kept. Having heard nothing I have now accepted an outside appointment.
>
> If you intend to deal with the matter in good faith and provide information and commitments which can be relied upon such that Liza may agree to continue the construction please confirm that you will assemble the information and meet to discuss arrangements. I require confirmation by noon on Monday Oct 15 that you will attend at such a meeting at my office at a specific time prior to 5:00 Oct 16. Absent such confirmation and a successful meeting I see no practical alternative

> under the circumstances to my seeking instructions from Liza on Oct 17 in respect to legal recourse.
>
> Please refrain from attempting to communicate directly with my client Ms. Caines at this time. I look forward to your response.
>
> David G. Coles Q.C.

[24] It is important to note that the defendants were in receipt of the original deposit of $60,000 paid to them on June 7, 2007. These funds were intended to cover the early construction costs. However, the defendant Frank Cheevers deposited the funds not to an air-marked building account for this project, but to his general account which as of June7, 2007, was in overdraft.

[25] The funds were never used to pay the account of Ocean Contractors, who installed the foundation or the account of Dennis Lively Construction and Backhoe Services Limited who did the site work. Both of these companies filed liens against the plaintiff's lands at Braemar Drive on October 15 and 17, 2007 respectively, the first in the amount of $40,000 and the latter in the amount of $21,090.

[26] As well, other suppliers of services to the property remained unpaid for engineering services provided by James Inch, P. Eng., and survey work provided by Thompson and Conn.

[27] On October 17, 2007, the plaintiff commenced an action against the defendants for breach of the building contract.

[28] Despite the filing of the lien claims, Mr. Coles continued to correspond with both Paul and Frank Cheevers to determine if they could complete the project by December 15, 2007, the last extended date to which the plaintiff was willing to agree.

[29] By a letter dated October 22, 2007, the plaintiff through her solicitor inquired of the defendants if they could still complete the project by December 15, 2007. Neither Paul or Frank Cheevers replied.

[30] In any event, the building contract was terminated on October 29, 2007 and the plaintiff hired Dean Melendy, a builder to complete the contract.

[31] On November 6, 2007, Frank Cheevers failed to complete the purchase of the Porter's Lake property, this being the last agreed extension of that closing date.

[32] Mr. Frank Cheevers' evidence was that because default judgments had been entered against him in October 2007, he was unable to obtain financing, despite that a financing clause had been excluded from the agreement. Mr. Frank Cheevers also testified that he thought he had secured a private source financing through Michael Argand, but that this gentleman backed out of the arrangement at the last moment and he was therefore unable to complete the purchase.

[33] The defendant Frank Cheevers has claimed that the termination of the building contract was not justified. He asserted that the delays experienced were due to unforeseen site conditions that were addressed in a timely fashion. He says that the plaintiff Elizabeth Caines acquiesced to the delays in commencing construction. He says that by mid October Paul Cheevers would have been able to complete the contract in a timely fashion if he had been allowed.

[34] Lastly, following termination the defendant challenges the calculation of damages.

[35] I cannot agree with this position. In my view, the plaintiff has made her case for the breach of both contracts. From the onset, both Paul and Frank Cheevers seemed almost cavalier in ignoring the construction time table. The original agreement was signed May 28th.

[36] Paul Cheevers by his own evidence was involved in other building projects that he wanted to complete before commencing construction on 95 Braemar Drive. He did not even apply for a building permit until July 6, 2007.

[37] I do not accept the assertion that the plaintiff acquiesced with the delays in construction. Indeed she was not usually informed of the reasons for the delay until she and her lawyer David Coles made repeated inquiries as to the lack of progress on the site. I accept the plaintiff's evidence that she did not agree to the delays in construction and relied on the defendants' representations in August that the building would be completed by October 15.

[38] It became obvious to her that once October 15 came to pass and liens were filed against the property, the defendants were not in a position to complete the contract, even by December 15, 2007. They had failed to respond meaningful to the proposal to do so. I am satisfied that the defendants were entirely incapable of completing this contract by reason of their inability to marshall the trades to complete the job and due to their lack of financial capacity to pay these trades. The defendants could never have completed this contract by December 15, 2007.

[39] The plaintiff in my view was fully justified in terminating the building contract and engaging Melendy Construction to complete the job.

[40] The plaintiff has relied on the following authorities: *Monett v. All Seasons Siding and Carpentry Ltd.* (1990), 102 N.S.R. (2d) 389 (N.S. County Crt.). A building contract can be terminated by an owner where the substantial breach of the contract by the builder amounts to a repudiation of the contract. This is such a case. Nor do I accept that the delay was inevitable and therefore should allow the builder to take an open-ended approach to the contract, when he clearly knew that the plaintiff had no residence and that time was of the essence, in the completion of this home. *Torbay (Town) v. Metropolitan Engineering and Construction Ltd.* (1980), 30 Nfld. & P.E.I.R. 298 (Nfld. S.C.T.D.). In consequence of the defendants' failure to fulfill this contract, liens were filed against the property, while monies given to the defendant at the outset $60,000 ought to have been earmarked for these costs. Instead in breach of his trust obligation the defendant applied this deposit to his general debts. This contravenes s. 44B (1) of the *Builders' Lien Act.* See also *Shield Sprinkler and Fire System Ltd. v. Fahuki Construction Inc.* (1996), 13 O.T.C. 74 (GD).

[41] The defendant has argued mutual mistake, relying on *Eastern Canadian Coal Gas Venture Ltd. v. Cape Breton Development Corp.* (2001), 200 N.S.R. (2d) 201 (SC) and also said that the termination of the contract was without justification. *Data General (Canada) Inc. v. Polem*, 1998 NSCA 207. With respect, this flies in the face of the mountain of evidence before me supporting the plaintiff's termination of the contract.

[42] The only remaining issue is that of damages.

[43] The "measure of damages" owed when the contractor has failed to complete the work was discussed in Immanuel Goldsmith's, *Canadian Building Contracts*, (4th Ed.) (Toronto: Carswell) 1999, at page 6-10, where the author suggested that the cost of completing the work, over and above the contract price, is the appropriate way to measure damages. More specifically there is a direct reference that applies to the facts in the present case at pp. 6-10 to 6-11:

> It is usually more costly to call in another contractor in the course of the work to complete it and such additional costs must be borne by the defaulting contractor if it is reasonable for the owner to incur such costs and he has done so or it likely he will do so. Any moneys unearned by the defaulting contractor under the original contract must be credited towards completion, since this money would in any event have been payable by the owner; but any excess over this amount represents the loss suffered by the owner as the result of the default.
>
> If more contract money than was actually earned by the contractor prior to the default has been paid to him, he is liable to return the excess towards the cost of completion. . . .

[44] I will first address the failure to complete the agreement of purchase and sale of the Porter's Lake property. The property eventually sold in April 30, 2008 for $165,000 at a loss of $3,000. The plaintiff was required to pay a commission on the final sale of the property in the amount of $8,250 plus $1,072.50 (HST) for a total of $9,322.50. The damages accruing therefore total $12,322.50 with respect to the defendant's failure to complete this contract. I am also satisfied that the reduction in purchase price was occasional solely by the necessity to drop the price to find a buyer.

[45] With respect to the breach of the building contract on 95 Braemar Drive, the calculation of damages involves an analysis of the original contract with Cheevers and the subsequent contract with Melendy.

[46] She contracted with Cheevers to build a house for $300,000. The measure of damages is the cost beyond $300,000 to the plaintiff.

[47] Her contract with Melendy was for $294,018.53 (Exhibit 1, Volume I, Tabs 57, 58 and 59). This is a difference of $5,981.47, a credit to Mr. Cheevers.

[48] When the contract amounts are further compared (Cheevers Exhibit 1, Volume I, Tab 3 and Melendy Exhibit 1 Volume I, Tabs 57, 58 and 59) it is apparent that the defendant will also receive certain further credits. These credits are summarized as follows:

Difference in contract price:	$ 5,981.47
Floor Allowance difference	$10,591.00
Plumbing Allowance difference ($4000 + $2490.26)	$ 6,490.26
Fireplace	$ 15.47
Light fixtures	$ 90.93
Bar Cabinetry	$ 2,000.00
Total	$25.169.13

[49] A deduction from this credit amount however is the sum of $8,200, an amount paid personally by the plaintiff for counter tops on top of the Melendy purchase price, where the cabinet allowance was reduced by this amount.

[50] The credit to the defendant on the difference in the two contracts is therefore $16,969.13.

[51] This amount shall be deducted from the total claim for damages.

[52] The plaintiff is therefore entitled to the following damages:

1. The return of her $60,000 deposit, which was never earmarked for or paid to the contractors whom the defendants engaged for site and foundation work and did not pay.

2. The plaintiff is also entitled to the sum of $6,928.63 paid into court to release the two lien claims filed against her property.

3. She is further entitled to recover the value of the repairs for damages done to her neighbour James Williams' driveway, as it was undermined during the defendants' early excavation work on the lands. That sum is $ 2508 (Exhibit 1, Volume II, Tab 75). The fact that the plaintiff swapped a piece of land in lieu of payment of the repair costs does not diminish her right to claim the value of this loss, occasioned by the defendants.

4. The plaintiff is entitled to an accommodation allowance, as provided for in the amended building contract with the defendant, of $1,000 per month for a total of $7,000 to March 2008, when she was able to occupy her new home.

5. The plaintiff is entitled to her storage charges occasioned after October 15, 2007 to March 2008, in the amount of $1,480.

6. Less the credit to the defendant on the adjustments made between the two building contracts ($16,969.13).

[53] Total special damages to which the plaintiff is entitled to recover against the defendant is therefore $73,720.

[54] I have considered the plaintiff's additional claim of $20,000 in general damages for her travails, during the course of this experience. It is true that the plaintiff suffered some serious stress and inconveniences and a serious delay in moving into to her new home, due to the failure of the defendant living up to the agreement. I assess general damages of $5,000 for this suffering and inconvenience.

[55] The plaintiff shall therefore have judgment against the defendant in the amount of $78,720 with pre judgment interest of 2.5% from October 15, 2007.

Justice M. Heather Robertson