SUPREME COURT OF NOVA SCOTIA
Citation: 101252 P.E.I. Inc. v. Brekka, 2013 NSSC 289

Date: 20130919
Docket: Hfx No. 413840
and Hfx No. 413842
Registry: Halifax

Between:

101252 P.E.I. Inc., a body corporate

Plaintiff

v.

Betty Ann Brekka

Defendant

Judge:	The Honourable Justice Michael J. Wood
Heard:	September 11, 2013, in Halifax, Nova Scotia
Written Decision:	September 19, 2013MJW
Counsel:	Ezra B. van Gelder, for the plaintiff Richard A. Bureau and Sean Kaulback (articled clerk), for the defendant

By the Court:

[1] Betty Ann Brekka had a small portfolio of investment properties in Nova Scotia, which she hoped would provide income to see her through retirement. Unfortunately, Ms. Brekka was injured in a motor vehicle accident which had a negative impact on her employment. The result was that by 2013, foreclosure proceedings had been commenced with respect to five of her properties.

[2] On July 12, 2013, a foreclosure sale took place in Halifax and two six unit apartment buildings located at 6 and 8 MacIntosh Street were sold. The plaintiff, 101252 P.E.I. Inc., was the successful bidder for both properties.

[3] Ms. Brekka claims that an oral agreement was reached with the president of 101252 P.E.I. Inc. on the day of the foreclosure sales, which would have entitled her to have additional time to come up with financing to save the properties.

[4] Ms. Brekka has brought this motion pursuant to *Civil Procedure Rule* 10.04 for an order giving effect to the alleged settlement agreement.

[5] The two primary issues raised on the motion are the applicability of the *Statute of Frauds*, R.S.N.S. 1989, c. 442 and whether the parties had reached an agreement which should be enforced.

BACKGROUND

[6] Ms. Brekka mortgaged the MacIntosh Street properties to Capital Direct Atlantic Inc. in May, 2012. Capital Direct was acting as a mortgage broker for 101252 P.E.I. Inc., which was the party that provided the funds. Capital Direct assigned the mortgages to 101252 P.E.I. Inc. in July, 2012.

[7] Ms. Brekka was in default of her payment obligations under the mortgages on the MacIntosh Street properties and foreclosure proceedings were commenced in March, 2013. The proceedings were not defended and foreclosure orders were issued in May, 2013.

[8] Foreclosure sales were originally scheduled for June 13, 2013.

[9] On June 12, 2013, Ms. Brekka's legal counsel, Mr. Colin Bryson, Q.C., negotiated a thirty day postponement of the sale in exchange for a payment of $5,000.00 in order to give her the opportunity to secure new financing. At that time, Mr. Glenn Hodge, counsel for the plaintiff, advised that his client would not agree to any further postponement beyond the new sale date of July 12, 2013.

[10] On July 11, 2013, Mr. Bryson contacted Mr. Hodge's office to request a further postponement in order to allow Ms. Brekka to obtain financing.

[11] Messrs. Bryson and Hodge exchanged a number of e-mails on July 11 and 12, 2013. Four times Mr. Hodge indicated that his client was not prepared to

postpone the sale which was scheduled to take place on July 12th at 12:30 p.m. Mr. Hodge's last e-mail confirming these instructions was sent at 12:03 p.m.

[12] After hearing from Mr. Bryson that he was not successful in obtaining a postponement of the sale, Ms. Brekka tracked down the home phone number of the president of 101252 P.E.I. Inc., Mr. Geoffrey Boyle, of Charlottetown. Ms. Brekka called Mr. Boyle's home and obtained his cell phone number which she used to reach him at 12:19 p.m. Mr. Boyle had not been directly involved in the foreclosure process as he had left that to his mortgage broker, Mr. Trevor Bowie, and his legal counsel, Mr. Glenn Hodge. Mr. Boyle had never spoken with Mr. Hodge or given him direct instructions, that was the responsibility of Mr. Bowie. When Mr. Boyle spoke with Ms. Brekka, he knew the foreclosure sale was taking place on July 12 but he did not know at what time.

[13] Over the next forty-five minutes, there were a number of telephone calls involving Ms. Brekka, Mr. Boyle, Mr. Bryson and Ms. Brekka's mortgage broker, Ms. Gurdeep Brar.

[14] Ms. Brekka alleges that there was an oral agreement with Mr. Boyle to postpone the foreclosure sale for two weeks on the following terms:

1) She would pay $10,000.00 as compensation for the postponement.

2) 101252 P.E.I. Inc. would "hold the deeds" to the MacIntosh Street properties to be returned to her if she paid the total amount of the

> outstanding mortgage balance, including interest, as well as the plaintiff's court costs.

[15] While these telephone calls were occurring, the foreclosure sale took place and 101252 P.E.I. Inc. was the successful bidder on both properties. The Sheriff executed the deeds conveying the property to the company on July 12, 2013.

[16] On July 15, 2013, 101252 P.E.I. Inc. entered into an agreement of purchase and sale, to sell the MacIntosh Street properties to a third party. I am advised by counsel that that transaction is scheduled to close on October 9, 2013.

THE *STATUTE OF FRAUDS*

[17] In their initial briefs, both parties suggest that s. 7(d) of the *Statute of Frauds*, R.S.N.S. c. 442, is applicable to the alleged settlement agreement. That provision reads as follows:

> **7** No action shall be brought
>
> . . .
>
> (d) upon any contract or sale of land or any interest therein; or
>
> . . .
>
> unless the promise, agreement or contract upon which the action is brought, or some memorandum or note thereof, is in writing, signed by the person sought to

> be charged therewith or by some other person thereunto by him lawfully authorized.

[18] The relief sought by Ms. Brekka on this motion includes an order that 101252 P.E.I. Inc. convey the properties to her in exchange for a payment of $10,000.00, the principal and interest owing under the mortgages, and the plaintiff's costs. It is clear to me that this is a request to enforce an agreement for the sale of land or an interest therein and, therefore, s. 7(d) applies.

[19] In her rebuttal memorandum, Ms. Brekka included an argument that the statute might not apply since the alleged agreement was, in fact, a security agreement and would not be encompassed by the *Statute of Frauds*. No authority was provided for that proposition, and I do not accept it. There is no doubt that the alleged arrangement reached between the parties is the type of transaction intended to be caught by that legislation.

[20] The primary position of Ms. Brekka is that there have been sufficient acts of part performance to take the agreement outside of the *Statute of Frauds*. The doctrine of part performance is described in McCamus' *The Law of Contracts* (2d), Irwin Law, 2012 at p. 177-178:

> Within a few years of the enactment of the statute, courts of equity began to develop a doctrine that would essentially waive compliance with the statute in circumstances where it would be unjust to refuse enforcement of the agreement. The principal doctrine of this kind is the doctrine of part performance. This doctrine holds that where one party to an oral agreement partially performs his or her undertaking, the oral agreement may be enforced in order to avoid injustice to the party conferring value. The doctrine is typically applied in the context of oral transactions concerning the transfer of land in return for the provision of services.

> Having provided that services in question, the service provider seeks the equitable remedy of specific performance of the agreement to transfer the land. If the doctrine is applicable, the oral agreement becomes enforceable. Articulation of the test for application of the doctrine rests on a determination of the nature of the part performance that must be demonstrated and its relationship to the unenforceable oral agreement.

[21] Traditionally courts held that in order to amount to part performance, the conduct in question had to unequivocally refer to the particular agreement alleged. In England, the standard has been relaxed somewhat since the decision of the House of Lords in *Steadman v. Steadman*, [1976] A.C. 536. In that case, the Court said that it was sufficient part performance if the acts relied upon were done in reliance on a contract relating to the land. It was not necessary that it be unequivocally referable to the specific agreement alleged.

[22] In Canada, the courts have not universally adopted the more relaxed approach. To date, the Supreme Court of Canada has not specifically accepted the *Steadman* test.

[23] The issue of the applicable standard for part performance was considered by the Honourable Justice Coady of this Court in *Self v. Brignoli Estate*, 2012 NSSC 81. After reviewing the English and Canadian cases, Justice Coady concluded as follows:

> [19] I submit that the law in Nova Scotia follows the more traditional test set out in *Deglman* and applied by Hallett, J. in *Carvery*. In order to avoid the *Statute of Frauds* a plaintiff must show acts of part performance that are unequivocally referable to the contract for land asserted by the plaintiff.

[24] I agree with Justice Coady that this reflects the current law in Nova Scotia. It is against this standard that I will assess the alleged acts of part performance put forward by Ms. Brekka.

[25] There are two events relied upon by Ms. Brekka as part performance. The first is the conveyance of the property to 101252 P.E.I. Inc. by the Sheriff on July 12, 2013. The second is the effort which she made to secure financing in order to pay the amounts which she said were promised to Mr. Boyle.

[26] In my view, the transfer of the property by the Sheriff cannot amount to part performance. The essence of the doctrine is that the party seeking to enforce the agreement has taken steps to fulfill their obligations. In this case, Ms. Brekka says that she had agreed to "give the deeds" to 101252 P.E.I. Inc. to be held for two weeks and returned to her if she paid the amount agreed. The purpose of the agreement was to avoid the foreclosure sale occurring. I cannot see how the completion of the sale by the Sheriff amounts to any act on the part of Ms. Brekka, let alone a step in completion of the postponement agreement.

[27] The position most strongly advanced by counsel for Ms. Brekka was that the obtaining of financing amounted to part performance. In order to assess the strength of this argument, it is first necessary to understand the evolution of Ms. Brekka's financing problems.

[28] Earlier in 2013, five of Ms. Brekka's investment properties were in foreclosure. She was seeking financing to pay out the mortgages and stop all of

these foreclosures. As of July 12, 2013, she had not been successful. At 12:00 noon on that date, she was meeting with CIBC and was told that her request for financing had been turned down. The CIBC mortgage representative offered to refer Ms. Brekka to an independent mortgage broker who had successfully assisted other clients who had been refused financing by CIBC. That person was Ms. Gurdeep Brar, who was located in Yarmouth. Ms. Brekka called her from the CIBC office around noon, which was approximately thirty minutes before the scheduled start of the foreclosure sale. That was the first time she had ever spoken with Ms. Brar.

[29] Ms. Brekka's request to Ms. Brar was to obtain financing for all five of the investment properties which were in foreclosure. The blanket financing total which was requested was 1.3 million dollars. The foreclosure orders fixed the mortgage debt for the two MacIntosh Street properties at approximately $155,000.00 as of May, 2013.

[30] On July 19, 2013, Ms. Brar successfully obtained approval for the 1.3 million dollar financing from a private lender. According to Ms. Brar, the structure of the loan was that Ms. Brekka could draw down specific amounts for each of the five properties, and she has now done so with respect to three of them. According to both Ms. Brekka and Ms. Brar, there is a balance which remains available that is sufficient for Ms. Brekka to pay the principal and interest owing to 101252 P.E.I. Inc., as well as the $10,000.00 bonus and other legal expenses.

[31] The financing secured by Ms. Brar was no different than what Ms. Brekka had been looking for all along - an amount sufficient to stop all of the foreclosures. It was set up in a way that Ms. Brekka could access money for each property individually as needed. It is difficult to see how this could be categorized as unequivocally referable to the alleged agreement. It is equally consistent with the proposition that Ms. Brekka was trying to obtain sufficient money to stop the foreclosures in the event that she was successful in reaching an agreement with any of the lenders.

[32] The fact that it was a blanket financing package, rather than a specific loan for the MacIntosh Street properties, also undermines the argument that it represents part performance of the alleged agreement.

[33] I conclude that Ms. Brekka has not met the burden on her to show conduct which is unequivocally referable to the alleged postponement agreement, and so has not proven part performance. As a result, the provisions of s. 7(d) of the *Statute of Frauds* apply and she is not entitled to enforce the alleged agreement.

THE SETTLEMENT AGREEMENT

[34] In the event that I am wrong in my conclusion that Ms. Brekka has not established part performance, I will consider the evidence with respect to the alleged settlement agreement.

[35] I think it is important to keep in mind the context in which the various phone calls were taking place. Ms. Brekka initiated her contact with Mr. Boyle once she and Mr. Bryson had completely exhausted all attempts to negotiate a further postponement. She was desperate to avoid the foreclosure sale and did not want to lose the properties. Mr. Boyle indicated that she was "distraught" over the impending auctions and I believe that is likely an accurate description. She had also just been turned down by CIBC and was contacting a new mortgage broker for the first time. In the circumstances, it is easy to understand how Ms. Brekka would have grasped at any comment which hinted at the possibility of a postponement.

[36] On the other hand, Mr. Boyle was not directly involved in the foreclosure process. He receives a telephone call out of the blue on his cell phone from Ms. Brekka desperate to negotiate a postponement. Mr. Boyle knew that Ms. Brekka was seriously in arrears with respect to her mortgage payments and had already requested one postponement for financing purposes which had not been fruitful. He was anxious to get his investment back without a loss. He was not interested in any further postponement unless he had a high degree of confidence that he would be paid out. He said that he never would have agreed to any arrangement which would postpone the sale without it being in writing, and I accept that this was his intention. In these circumstances, he would have been careful never to say to Ms. Brekka that he had agreed to postpone the sale.

[37] I believe that both Ms. Brekka and Mr. Boyle are genuine in what they believe was discussed during the phone calls. In my view, that belief is coloured

by their perspective, Ms. Brekka was looking for a deal and Mr. Boyle did not want to give one. It is with these considerations in mind that I must assess the evidence presented at the hearing.

[38] In her affidavit signed on July 22, 2013, Ms. Brekka described her discussions with Mr. Boyle as follows:

> 6) On the morning of July 12, 2013, prior to the scheduled sale, I called and spoke to Geoff Boyle, the President of the Plaintiff. In this conversation, Mr. Boyle offered that if I conveyed the property (and 8 MacIntosh Street) to the Defendant, it would reconvey the two properties to me if, by July 26, 2013, I paid to the Defendant the outstanding mortgage balance and Court costs for each property, plus $10,000.00. I accepted this offer in our conversation.

[39] This suggests that there was a single conversation with Mr. Boyle during which the agreement was reached. In her cross-examination at the hearing, she described multiple calls with Mr. Boyle. In the first one, Mr. Boyle refused her request for an adjournment despite her telling him that she was 99% certain that financing could be arranged.

[40] Ms. Brekka says that she then spoke with Ms. Brar and asked her to call Mr. Boyle to confirm that she was working on financing. Ms. Brekka then said that Mr. Boyle called her back and made a proposal that he would not proceed with the sale provided she gave him the deeds to the property which he would hold for two weeks. He said that she would have to pay the principal and interest, plus legal expenses relating to the mortgage, as well as $10,000.00 by the end of the month.

Ms. Brekka says that she accepted the proposal in that call and asked Mr. Boyle to call Mr. Bryson so he would confirm that she was in agreement with the terms.

[41] Ms. Brekka testified that Mr. Boyle did not indicate when he needed the deeds and did not say that he wanted anything in writing. Although she agreed to pay court costs, she does not know what was included in this and thinks it might have been simply the expenses of postponing the sale. She definitely would not agree to pay the actual legal expenses incurred by Mr. Hodge.

[42] In Ms. Brar's affidavit of July 23, 2013, she describes her discussion with Mr. Boyle as follows:

> 5) On the morning of July 12, 2013, I spoke to Geoff Boyle by phone. Mr. Boyle confirmed to me that he had reached an agreement with Ms. Brekka that if she conveyed 6 and 8 MacIntosh Street to the Defendant, it would reconvey the two properties to Ms. Brekka if, by July 26, 2013, she paid to the Defendant the outstanding mortgage balance and Court costs for each property, plus $10,000.00.

[43] This clearly indicates that when she spoke with Mr. Boyle, he confirmed that the deal with Ms. Brekka was already done. She confirmed this in her cross-examination.

[44] In his affidavit of July 25, 2013, Mr. Bryson says that he was advised by Ms. Brekka that she had reached an agreement with Mr. Boyle to the effect that the sale would be postponed if she conveyed the property to the plaintiff, with a reconveyance to her if by July 26, 2013 she paid the outstanding mortgage balance, court costs and $10,000.00. He says that Mr. Boyle subsequently called

him to say that an agreement was reached on these terms, but that he was not sure if it was legally possible. Mr. Bryson says that he assured him that it was possible to carry out the transaction.

[45] Mr. Boyle attaches a copy of his cell phone records to his affidavit. This shows the time of all incoming calls, as well as the time and number for all long distance calls. Based upon this, he is able to confirm when various discussions occurred. He says that the initial call from Ms. Brekka was at 12:19 and he said that he advised her that he was not prepared to postpone the foreclosure sales. He says that the next call was from Ms. Brar at 12:31. This call lasted twelve minutes and, in his cross-examination, Mr. Boyle acknowledged that Ms. Brar was very persistent and persuasive. They discussed a possible arrangement whereby Ms. Brekka would convey the properties to the plaintiff on the understanding that they would be reconveyed if, by July 26, 2013, she paid the outstanding mortgage balance, legal costs and an additional $10,000.00 payment. He said that these items were the starting point of any agreement, but that there were other details required, including a written document. He said that he would not agree to postpone the sale until these were in place.

[46] Mr. Boyle says that his next call was at 12:44 from Ms. Brekka, who asked him if he would agree to the terms that had been discussed with Ms. Brar. He testified that he was concerned about the terms of the agreement being completed before the auctions, and also whether the agreement was even legally possible. He says that he reiterated the requirement for a written agreement. Ms. Brekka said

that she would speak with her lawyer and call him back, which she did at 12:54 p.m. at which time she asked him to speak with Mr. Bryson.

[47] At 12:56 p.m., Mr. Boyle called Mr. Bryson and told him that he and Ms. Brekka had discussed a possible agreement but he was concerned about whether it could be implemented. Mr. Boyle testified that he explained his frustration with Ms. Brekka and his desire to have a written agreement in place and the deeds executed prior to any postponement of the auctions. He was not aware of the time of the sales and nobody he spoke to told him that they were scheduled for 12:30.

[48] Mr. Boyle says that at 1:03 p.m. he spoke with Mr. Hodge who told him that the foreclosure sales had taken place and that the plaintiff had been the successful bidder. At 1:06 p.m., he called Ms. Brekka and told her that because the sales had occurred he was no longer interested in the terms which had been discussed.

[49] Ms. Brekka's evidence is somewhat inconsistent in a number of respects, including the number and timing of phone calls which took place that day. She was also unclear with respect to what was encompassed in the term "legal costs" as there had been no discussion on these particulars. Her recollection of the sequence of calls is not supported by the objective information in Mr. Boyle's cell phone records. According to her, Mr. Boyle called her to make the proposal which she then accepted. According to the cell phone records, the first call from Mr. Boyle to her was at 1:00 p.m., which is after the calls between Mr. Boyle and Mr. Bryson and Ms. Brar in which the agreement was allegedly confirmed.

[50] Ms. Brar says that when she spoke with Mr. Boyle, he confirmed the agreement and yet Ms. Brekka says that in the initial phone call (which was the only one that occurred prior to Ms. Brar calling Mr. Boyle) no terms were discussed and no agreement was reached.

[51] If Ms. Brekka's version of events is correct, Mr. Boyle would have agreed to the postponement of the sale based only upon a phone call with her in which she made future promises of payment. He may have also received assurances from Ms. Brar that she could obtain financing, even though she had just been retained. I accept as credible his evidence that he never would have agreed to an adjournment without a high degree of comfort that he would ultimately be paid. He was dealing with a borrower who was seriously in default and had already received one thirty day extension to no avail.

[52] In my view, the evidence indicates that there was an active negotiation taking place between Mr. Boyle, Ms. Brekka and her representatives, and that Mr. Boyle was prepared to consider a proposal in accordance with the terms discussed but wanted greater certainty.

[53] I am not satisfied that Ms. Brekka has proven that she and Mr. Boyle reached an agreement in their phone call on July 12, 2013. At most, there was a discussion about the framework of an arrangement that might be acceptable, but I believe that there were a number of details to be resolved before Mr. Boyle was prepared to commit to the arrangement. In addition to a written agreement and conveyance of the property, details such as what was included in the costs to be

paid had simply not been discussed. On July 12, 2013, Ms. Brekka and Mr. Boyle had different ideas about what would be included in that category.

CONCLUSION

[54] In order to succeed on her motion to enforce a settlement agreement, Ms. Brekka must establish part performance in order to avoid the application of s. 7(d) of the *Statute of Frauds*. She has not done so. Aside from that issue, the evidence does not establish that a binding agreement was entered into between Ms. Brekka and Mr. Boyle on July 12, 2013. As a result, I will dismiss Ms. Brekka's motion.

[55] If the parties cannot agree on the issue of costs, I will receive written submissions from them within twenty days of the date of this decision.

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Wood, J.