Date: 20020308
Docket: S.T. No. 09107

IN THE SUPREME COURT OF NOVA SCOTIA

[Cite as: Wirvin v. DMT Properties Ltd., 2002 NSSC 70]

BETWEEN:

THERESA MARY WIRVIN of Wolfville, in the County of Kings and Province of Nova Scotia

PLAINTIFF

- and -

DMT PROPERTIES LIMITED, a body corporate, with Head Office at Middleton, in the County of Annapolis and Province of Nova Scotia

DEFENDANT

D E C I S I O N

HEARD BEFORE: The Honourable Justice D. Merlin Nunn in the Supreme Court of Nova Scotia, at Truro, Nova Scotia on February 6 & 8, 2002

DECISION: March 8, 2002

COUNSEL: Linda R. Hupman, Solicitor for the Plaintiff
Ronald D. Richter, Solicitor for the Defendant

NUNN, J.:

[1] This is an action for specific performance and/or damages relating to a lease and option agreement entered into by the parties.

[2] The Plaintiff is the lessee though all the negotiations for the lease and the option agreement, as well as the subletting, collecting and paying rentals were carried on, on her behalf, by her husband, Brian Wirvin.

[3] The Defendant company is owned by several Thompson brothers, which fact is only relevant to the history of the property leased and the actions subsequently taken.

[4] The property subject to the lease, is a large two bay garage located in Lower Truro.

[5] The Thompson brothers owned Thompson's Transfer Company Limited, which carried on a large freight transfer and moving business, and as part of its business owned the property in question, which was part of a larger piece of land.

[6] In 1997, Thompson's sold the freight and moving business, including vehicles and buildings to Cabana Kingsway Ltd., and the Defendant was incorporated to manage those properties not sold to Cabana Kingsway.

[7] The Defendant, having some use for the maintenance garage, which Cabana did not, leased back the garage property for its use.

[8] Brian Wirvin was employed by the Defendant from early 1998 as its Comptroller and General Manager. While there are slight differences in the evidence as to the property, there is no dispute that Wirvin raised the matter of buying back the property and that he was interested in acquiring it for himself, though there is evidence that he was not able to arrange financing to do so.

[9] In any event, the Defendant purchased the property indicating to Wirvin that he could purchase it from them and Graham Thompson told him the purchase price would be the price they paid for the property; ie. $50,000, plus $2,000 for expenses they incurred in having the property subdivided and obtaining title.

[10] A down payment of about $9,000 was credited against the price and the balance was to be the outstanding balance on a collateral mortgage on the property held by the bank. While the actual amounts are not clear in the evidence, their only significance is, in a ballpark sense, to illustrate the terms agreed upon so, for that purpose it would appear that the amount owing the bank at the time of the lease was approximately $43,000.

[11] The payment of that balance was to be done by the vehicle of the lease so, as a result, the lease in question here was entered into by the parties. Its term was seven years and five months commencing February, 2000. The rental was to be an amount equal to the principal and interest on the collateral mortgage, plus H.S.T., and the lease was a net lease making the Plaintiff liable for all other costs of the property over the term.

[12] To solidify the intent of the arrangement, which was that the Defendant was willing to convey the property to the Plaintiff for its costs in acquiring it only, the lease provided an option clause as follows:

> "2.03 During the term of this lease or any renewal hereof, the Landlord hereby grants to the Tenant an option to purchase the lands described in Schedule A hereto and premises located thereon on the following terms:
>
> (a) the purchase price shall be an amount equal to the outstanding principal and interest owing on the existing collateral mortgage on the lands described in Schedule A;
>
> (b) the closing shall be within 30 days of the Tenant notifying the Landlord in writing of her desire to exercise the within option;
>
> (c) the transfer of the property shall be by way of warranty deed from the Landlord to the Tenant or her designate."

[13] The lease was executed by the parties and, at the same time, sublet to a company formed by the person who did garage work, a Mr. Morrisey, who was a former employee of Thompson's Transfer and ran that facility.

[14] At this point in time, everything is well between the parties, the agreement was very favourable to the Plaintiff and the Defendant was doing a favour to the Plaintiff at no real cost to itself.

[15] By late spring and early summer 2000, the Defendant's business was winding down and there was not enough to warrant Brian Wirvin's continued employment and he ceased that employment on September 4. There were discussions about monies owed from one to the other, resulting in a substantial dispute. I need not report the details other than to say that Mr. Wirvin and the two Thompson brothers who testified all used the same description of their relationship at the time as "acrimonious". It was further aggravated by Mr. Wirvin's return of a rental car which resulted in the Defendant losing $2,000.

[16] In all these circumstances, the lease continued with the monthly rentals being paid, though there was a dispute over the October rent which is not relevant here.

[17] Finally, in January, the Plaintiff decided to exercise the option in the lease and set about arranging financing which, it appears, they were able to do, though that is not an issue here in view of several agreements of fact by counsel for the Defendant which I will refer to later.

[18] Because of the unusual nature of the events relating to the option, it is necessary to set forth the correspondence between counsel for the parties.

January 4, 2001
Curling, Gillis, Parker & Richter
74 Commercial Street
Middleton, Nova Scotia
B0S 1P0

<u>Attention: Ronald D. Richter</u>

Re: DMT - Wirvin

<u>3705 Highway 236 Lower Truro</u>

I represent the buyer in the noted transaction.

I enclose a deed for completion by your client, if satisfactory. Please forward the signed deed to me in escrow. On receipt of the deed, I will instruct the buyer to pay out the existing Royal Bank collateral mortgage and confirm payout to you at which time the deed will be recorded. I will obtain and record a release of the Royal Bank mortgage.

There are no adjustments as the buyer is responsible for all costs associated with the property in accordance with the existing lease agreement between the parties.

I trust these arrangements are satisfactory.

BURCHELL MACDOUGALL
Signed by
James W. Stonehouse
JWS/mgb
Enc:

January 12, 2001

Mr. James W. Stonehouse
Burchell MacDougall
P.O. Box 1128
710 Prince Street
Truro, NS
B2N 5H1

Dear Mr. Stonehouse:

Re: DMT - Wirvin - 3705 Highway 236 Lower Truro

I am writing to advise as follows:

1. We do not consider your offer to purchase pursuant to the option granted in the Lease dated January 25, 2000 to be validly made in accordance with clause 2.03 of the Lease. In your letter of January 4, 2001 you propose that DMT deliver a deed and you will instruct your client to payout the existing mortgage on the property. The option requires a closing date within 30 days of the Tenant notifying the Landlord of her desire to exercise the option. In addition, the option requires the tender of the purchase price to the Landlord in an amount equal to the outstanding principal and interest on the existing Collateral Mortgage. Therefore, we do not consider your letter of January 4, 2001 as a valid exercise of the Tenant's option.

2. The Tenant, Theresa Wirvin is in breach of the terms of the January 25, 2000 Lease. Among other breaches, she is in default of payment of the October 2000 rent. Therefore on today's date we have delivered written notice to the Tenant that the Landlord has terminated the Lease and re-entered the property.

3. I will be writing you within the next several days to advise what amounts we consider due and owing by Mrs. Wirvin under the terms of the Lease up to the date of termination.

Yours very truly,
DURLAND, GILLIS, PARKER & RICHTER
Signed by
RONALD D. RICHTER
RDR/smr
c.c. client

January 12, 2001

Durling, Gillis, Parker & Richter
74 Commercial Street
Middleton, Nova Scotia
B0S 1P0

Attention: Ronald D. Richter

Re: DMT - Wirvin

3705 Highway 236 Lower Truro

I acknowledge receipt of your letter by fax today, subsequent to our brief telephone conversation.

Our position with respect to the points noted in your letter is as follows:

1) My letter of January 4, 2001, is clearly and implicitly an exercise of the option. Your client's position to the contrary is patently unreasonable.

I suggest a reasonable procedure for closing. There is no closing procedure prescribed in the lease. Our proposal was to make the closing process as simple and convenient as possible for your client. Therefore, the deed was prepared and forwarded. A proposal for paying out the mortgage (purchase price) was made which would have involved your client only minimally (to receive verification of the payout). As my letter indicates “I trust these arrangements are satisfactory”' if the arrangements were not satisfactory, I would have expected a proposal from you with respect to other arrangements for transfer of funds and title documents.

Contrary to your letter, the option does not specifically require tender of the purchase price. I note your comment with respect to a closing date within 30 days of notification, as contained in the lease, but I fail to understand the relevance of that provision regarding your position that the option has not been validly exercised.

We suggest the option has been exercised, and to suggest otherwise is untenable. Suggested closing procedures are apparently not agreeable; however, that is no justification for declaring that the option has not been validly exercised.

2) It is acknowledged that the October rent was not paid. The rental for November was invoiced and paid, as was the December rental invoice which was recently received and paid, I believe, today. The non-payment of the October rent was the subject of discussion and agreement between Brian Wirvin and Graham Thompson. There was no previous demand for payment of the October rental and subsequent rentals have been invoiced and paid. It is not only unfair (given the financial investment of the tenant in the property to date) but unreasonable in the circumstances to purport to terminate the lease and advise the sub-tenants (thereby impairing their business relationship with the tenant) all resulting in aggravation, expense and economic interference to my client.

It is our position that your client’s conduct in termination of the lease, in the circumstances is unwarranted, unreasonable and actionable. Proceedings will be commenced unless your client is prepared to immediately retract its position.

Please advise.

BURCHELL MACDOUGALL
Signed by
James W. Stonehouse
JWS/mgb".

[19] Following this last letter of Mr. Stonehouse, there is nothing further regarding the option or purchase until April 4, 2001, when the Originating Notice in this action was begun with the exception that the Defendant, on January 12, 2001, served a Notice of Termination of the lease as of that date.

[20] At the commencement of trial, counsel for the Defendant made two admissions of fact:

[21] 1. That on January 4, 2001 there was an existing lease between the Plaintiff and the Defendant and the option was available to be exercised that day; and

[22] 2. That the Wirvins were ready, willing and able to complete the purchase with regard to having the purchase price.

[23] The first admission removed all matters relating to whether the lease had been broken earlier and the second removed all matters relating to the Wirvins' ability to raise the money needed.

[24] As a result, the only real issue, according to the Defendant, is whether the Plaintiff did all that was required to complete the purchase so as to warrant the remedy of specific performance. The Plaintiff's position is that the Defendant made completion impossible so as to relieve her of any further action while still entitling her to specific performance.

[25] It is difficult to conceive how this matter has reached the outcome it did, taking into consideration the agreement between Graham Thompson and Brian Wirvin clearly indicated that the purchase by the Defendant of the property and the lease to the Plaintiff was purely an accommodation. The Defendant would not gain a profit or suffer a loss under the arrangement. Further, since it was winding down its business, one would think it to be advisable to be rid of the property as quickly as possible rather than to possibly continue for another six and a half years.

[26] In any event, within a few days of Mr. Richter's receipt of Mr. Stonehouse's letter of January 4, both Thompson brothers attended at Mr. Richter's office and the matter was discussed. In Graham Thompson's testimony, he said that his concerns with Mr. Stonehouse's suggested procedure were that there was no closing date set, no tender of the purchase price and no arrangements for delivery of the purchase price, all of which are contained in Mr. Richter's

letter of response. These reasons are quite legalistic and will be referred to shortly. However, on the whole of the evidence adduced, including the termination of the lease on January 12, I have no doubt the real reason was the Thompsons' acrimonious feelings towards Brian Wirvin. In his testimony, Graham Thompson said he never advised Brian Wirvin that he was not prepared to sell and that is true but, clearly, there was no willingness to accommodate the sale.

[27] Turning to the letters, Mr. Richter, on behalf of the Defendant, at trial, indicated that there was no issue as to validity of the January 4th letter of Mr. Stonehouse, as notice under the lease nor as to service of the landlord. I cannot help but say that this letter is most inadequately worded, for what is intended to be a notice of exercise of an option under a lease, which requires notice in writing, and where the lease sets out the Landlord's address for service of a notice.

[28] Essentially, the letter is a suggested manner of completing a purchase though it makes no reference to a completion date, which is a fundamental part of the option.

[29] Since validity for notice and service are not in issue, a willing vendor could merely reply indicating dissatisfaction with the proposed arrangements and suggest an alternative approach.

[30] Instead, in this action, came Mr. Richter's letter of January 12, a troublesome letter, because it takes a very different position than that at trial. Essentially, it indicates that the January 4th letter is not a valid exercise of the option and sets out reasons; one of which, ie. "the option requires tender of the purchase price" is clearly wrong as there is no reference to tender in the option, and the Plaintiff's had 30 days from the date of the notice to complete the purchase. Then the letter indicates the lease is being terminated. This letter is unresponsive to any request for setting up a closing of the purchase.

[31] Then comes Mr. Stonehouse's letter of reply. It defends the valid exercise of the option, the procedure he had suggested for completing the transaction, challenges the issues expressed by Mr. Richter, but completely fails to set forth any procedure which would facilitate the completion of the sale in accordance with the option. A mere suggestion of arranging a closing date within the option, requesting a deed to be prepared and requesting a

mortgage payout figure would have put the issues between the parties at rest and forced the Defendant to either complete the sale or clearly refuse.

[32] A refusal then would require the Plaintiff to do what would be required to entitle her to the remedy of specific performance.

[33] Unfortunately, the January 12th Stonehouse letter does nothing to force the completion of the sale and nothing further is done until this action is started on April 4.

[34] The remedy of specific performance is available to enforce the transfer of real property, but there are certain requirements. First, the property in question must be unique. Here I am satisfied that the leased premises here is, indeed, unique. Basically, it is a one of a kind property in this area, especially unique to the Plaintiff because of the special agreement, the lease and the option. It certainly meets any test as to whether another suitable substitute is readily available. I need not deal with this further, as it was not a real issue between the parties and there was no evidence that damages would be an adequate remedy.

[35] Secondly, the remedy requires strict compliance with the terms of any agreement relating to the land. Here is where the Plaintiff has significant problems. There is no doubt, and I so find, that there was a valid notice

given to the Defendant that the option was being exercised. As well, the Plaintiff had access to sufficient funds to complete the purchase.

[36] The next requirement of this remedy requires a time for completion of the sale, and evidence that the Plaintiff was ready, willing and able to complete. Here the Plaintiff fails, as no time for closing was ever set by the respective counsel and there is no evidence that, absent any date set by counsel, the Plaintiff made any effort to tender the purchase price within the time set in the option. Tender would be required, in any event, but here that requirement of tender is referred to in the letter of January 12th and, even if tender was not necessary with the notice, the letter did indicate that tender was required. Failure to tender is fatal to obtaining the remedy of specific performance, unless it can be shown that the conduct of the vendor was such to render any tender an obviously useless exercise.

[37] In this case, there can be no doubt that there was an apparent unwillingness to cooperate in the completion of the sale on the part of the Defendant, but there is not sufficient evidence to conclude there was a refusal to sell. The Plaintiff did nothing to establish that fact. The evidence is, nothing was done after January 12th and there still was 21 days left under the option. The burden was on the Plaintiff to perform all that would be required to complete

the purchase and, at least, to tender the money, at least, within the 30 day period. This was not done.

[38] As a result, this action by the Plaintiff for specific performance must be dismissed. No evidence was introduced regarding any damages, so none are considered.

[39] With regard to costs which were requested by the Defendant in the event the Plaintiff was not successful, it is my view that in the particular circumstances of this case, it would be most unjust to award costs to the Defendant. This transaction should have taken place and, it appears, the acrimony against the Plaintiff's husband overcame any reasonable approach to honour the agreement earlier reached and contained in the lease. Had the Plaintiff made any effort to close within the time, I would have decided differently. As a result, the Plaintiff's action is dismissed without costs being awarded to the Defendant.

J.