

**Claim No. SCCH 272176
SH 239386
SCCH 268036**

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Carriage Motor Holdings Ltd. v. Hardie, 2007 NSSM 38

BETWEEN:

CARRIAGE MOTOR HOLDINGS LIMITED

Claimant

- and -

STEWART HARDIE

Defendant

- AND -

STEWART HARDIE

Claimant

- and -

ELI ABRAHAM

Defendant

REALTY CONNECT LIMITED

Defendant

DECISION

Revised Decision: The text of the original decision has been revised to remove addresses and phone numbers of the parties on August 21, 2007. This decision replaces the previously distributed decision.

Adjudicator: David T.R. Parker

Decision: August 13, 2007

Cases considered:

Sydney Medical Arts Building Ltd. v. Armor Realty Ltd. 10 A.C.W.S. (2d) 460
Deber Investments Limited v. Roblea Estates Limited, 21 N.S.R. (2d) 158
O'Leary and Kiley v. G.M. Gaudet Enterprises Ltd., 2 N.S.R. (2d) 95

Counsel:

David R. Melvin represented Carriage Motor Holdings Limited
Kevin P. Downie represented Stewart Hardie
Ross Haynes, Q.C., represented Eli Abraham and Realty Connect Limited

Parker:-

History of Claim

Carriage Motor Holdings Limited commenced in action by way of an

Originating Notice and Statement of Claim in the Supreme Court of Nova Scotia which was subsequently amended on March 9, 2006 and being claim S.H. No. 239386. A defence and counterclaim to the original action was filed by the Defendant Stewart Hardie and was issued on March 4, 2005. The defence to the counterclaim was filed by Carriage Motor Holdings Limited on March 9, 2006. On June 27, 2006 the Claimant, Carriage Motor Holdings Limited elected to have the proceedings transferred to the Small Claims Court of Nova Scotia and being claim number SCCH 208036. A further action was commenced on February 7, 2007 by Stewart Hardie as Claimant in the Small Claims Court of Nova Scotia against the Defendants Eli Abraham and Realty Connect Limited and being claim number SCCH 272176. A defence to the said action was filed on March 20, 2007.

Both claims were heard at the same time as provided by Section 25 of the Small Claims Court Act which states as follows:

"Joinder of hearing of claims

25 Where an adjudicator is satisfied that there are two or more claims before the adjudicator which would be best dealt with together, the adjudicator may in his discretion hear the claims at the same time. R.S., c. 430, s. 25."

1. Pleadings: In Small Claims Court Action transferred from the Supreme Court of Nova Scotia and now being number SCCH 208036

a.] The Plaintiff Carriage Motor Holdings Limited

In summary the pleadings of the Plaintiff Carriage Motor Holdings Limited stated that on January 12, 2004 the Defendant Stewart Hardie offer to purchase unit 409 at 50 Nelson's Landing Blvd. for **\$229,900.00** with the closing date set for October 30, 2005. According to the Plaintiff, the Defendant was to rent the property from May 1, 2004 to October 30, 2005 with rent payable at the rate of \$1278.95 per month with the principal portion of the rent being applied to the purchase price. The Plaintiff also stated it was agreed that the Defendant would pay a \$10,000.00 deposit to the listing broker, Realty Connect Limited. Five thousand dollars [\$5,000.00] was to be paid immediately and the balance was to be paid on or before the occupancy date of April 20, 2004. The initial \$5,000.00 payment was paid by the Defendant who then failed and/or refused to pay the \$5,000.00 balance on the deposit. The \$10,000.00 deposit is claimed in damages.

The pleadings go on to state the Defendant gave notice to the Plaintiff on March 24, 2004 of his intention not to complete the Agreement of Purchase and Sale and he subsequently refused and/or failed to complete the transaction.

On March 24, 2004 in an effort to mitigate its losses the Plaintiff place the property back on the market for sale and the property sold on October 1, 2004 for **\$229,000.00**. The Plaintiff stated that due to the agreement between the Defendant and the Plaintiff reached on January 12, 2004 the property was off the market during the four-month period of January to April 2004. The Plaintiff claims it incurred resulting mortgage interest cost, property taxes and condominium fees in

the amount of \$5,929.25 and claims this amount in damages.

In addition the Plaintiff claims it suffered damages as a result of having to sell the property at a reduced price from that which was originally agreed to by the Defendant on January 12, 2004 and claims a difference of \$900.00 in damages.

In addition to the Plaintiff claims it suffered damages in the form of loss rental income for the five-month period, between May 1, 2004 at October 1, 2004, totalling \$6,394.75.

The Plaintiff also claims it had to pay increased real estate commission in the second sale and suffered a loss of \$1,870.00. The total loss the Plaintiff claimed was \$25,094.00 which it ultimately agreed to reduced to \$25,000.00 to fit within the monetary jurisdiction the Small Claims Court.

The Defence of Stewart Hardie to Claim and Counterclaim

b] The Defence

The Defendant gives a general denial of the claim denying a contract existed. Further the Defendant stated that if there was any contract which was denied, then he was induced to enter into any such contract by reasons of material misrepresentations of fact made by the Plaintiff to the Defendant the particulars of which are as follows:

a. The Plaintiff through its agent represented to the Defendant that

the existing building bylaws would permit the Defendant to place a small satellite dish on his balcony when in fact the condominium bylaws appear to prohibit this.

b. The Plaintiff through its agent advised the Defendant that he did not require a financing or insurance clause in the aforesaid contract and when the Defendant was unable to obtain sufficient financing, the Plaintiff through its agent assured the Defendant that it would arrange to have the contract terminated without penalty.

c. The Plaintiff's agent misrepresented that at all material times he was representing and protecting the interests of the Defendant.

And in the further alternative the Defendant stated that the Defendant did not repudiate the contract as and when alleged by the Plaintiff.

In the further alternative the Defendant stated that the Plaintiff at no time was ready, willing or able, as alleged, to carry out any part of the said alleged contract to be performed by it and that he, the Defendant, at all material times was ready willing and able to carry out all parts the said alleged contract to be performed by him.

In the further alternative the Defendant stated that the Plaintiff has not mitigated its losses if any and has in fact inflated the alleged damages.

The Defendant also stated that the realty commission payable by the Plaintiff is a matter between the Plaintiff and its agent and is not properly claimed against the Defendant.

c.] The Counterclaim by Stewart Hardie against Carriage Motor Holdings Limited

In the counterclaim the Defendant and Plaintiff by way of counterclaim claims the \$5,000.00 deposit paid by the Defendant to the Plaintiff.

d.] The Defence of Carriage Motor Holdings Limited to the Counterclaim of Stewart Hardie

In addition to a general denial of Stewart Hardie's counterclaim, Carriage Motor Holdings Limited stated that the deposit is to be forfeited pursuant to the Agreement of Purchase and Sale signed by the party on January 12, 2004.

2. Pleadings: In Small Claims Court Action SCCH 272176

a.] The Claim of Stewart Hardie:

Stewart Hardie in his pleadings claimed the amount as set out in his defence and counterclaim in the Small Claims Court proceedings No. SCCH 208036 as well as any amounts owing to Carriage Motor Holdings Limited in the same Small Claims Court action, specifically SCCH 208036.

The Claimant Stewart Hardie alleges misrepresentation by the Defendant Eli Abraham in his capacity as a real estate agent with Realty Connect Limited related to the Agreement of Purchase and

Sale for the condominium property known as unit 409 Nelson's Landing in Halifax Nova Scotia. The particulars of the misrepresentation being alleged by the Claimant Stewart Hardie are the same as those particularized in the said Defence and Counterclaim of Stewart Hardie in the Small Claims Court preceding No. SCCH 208036.

b.] The Defence all of Eli Abraham and Realty Connect Limited

The Defendant Eli Abraham states that on June 12, 2003 the Claimant Stewart Hardie signed a lease for unit 403 located at the said 50 Nelson's Landing for two years, commencing on July 1, 2003 at a monthly rental of \$1,300.00. At that time the Claimant received all information about the restrictions in the condominium including the bylaws of the condominium.

The Defendant Eli Abraham stated the Claimant attempted to purchase unit 403 with the assistance of Eli Abraham however the unit was not for sale. Eli Abraham then stated that the Claimant Stewart Hardie advised Eli Abraham that he was interested in purchasing unit 409 at 50 Nelson's Landing. The Defendant Eli Abraham stated that the owners of unit 403 occupied by the Claimant gave him permission to sublease the said unit and therefore Mr. Abraham showed the Claimant unit 409 and the Claimant advised he wished to purchase the unit. The Defendant Abraham stated he met with the Claimant on January 9, 2004 and prepared the Purchase and Sale Agreement. The offer contained in the purchase sale agreement

was rejected by the owners of unit 409 because of a "Vendor Take Back Mortgage" clause contained in the said agreement. The Purchase and Sale Agreement was then revised with a request to leased unit 409 for two years and at the end of that the Claimant was to purchase the property for \$229,900.00. Mr. Abraham presented the revised Purchase Sale Agreement to the owner of unit 409 containing the offer which offer was accepted on January 12, 2004.

Mr. Abraham stated that after a week waiting for any concerns from the Claimant he contacted the Claimant Stewart Hardie and Mr. Abraham was advised by Mr. Hardie that he had not contacted a lawyer because he was satisfied with everything and he wanted to firm up the deal. In another few days Mr. Abraham called the Claimant and asked him if he was 100% sure about the purchase of the said unit so he could remove it from the market. Mr. Abraham alleges that the Claimant confirmed that he was one hundred percent sure and to tell Mr. Abraham's client it was a done deal.

Mr. Abraham stated that on March 23, 2004 the Claimant contacted Mr. Abraham and requested an amendment the purchase sale agreement, asking the deposit be reduced to \$5,000 and permission to install hardwood flooring in the unit and to have the right to assign the Purchase Sale Agreement to another party. Mr. Abraham stated that his clients the vendors agreed to the amendment with some further provisions to those requested by the Claimant.

On March 24, 2004 the Claimant asked for the termination of the agreement with respect to buying unit 409 saying and that this was due to financial complications arising from his divorce. The Claimant then asked Mr. Abraham's client to return the deposit which Mr. Abraham's client refused to do and the unit was back on the market for \$234,900.00. The unit was sold on July 20, 2004 by another agent and not Mr. Abraham for \$229,000.00.

In paragraphs 13, 14 and 15 Eli Abraham denies the allegations contained in paragraph 3 of the defence and counterclaim of Stewart Hardie in the

Small Claims Court action heard along with this action in the following manner:

" 13. Mr. Abraham specifically denies the allegations contained in paragraph 3[a] of the defence and counterclaim attached to the notice of claim as scheduled 'A' [claim number 272176] and says that the claimant met with Mr. Abraham on January 9, 2004, at his house, he noticed the claimant had installed a satellite dish on his balcony. Mr. Abraham asked him how he received permission from the Condo Corporation to install the satellite dish. The claimant told him that no one had mentioned that it was a problem. Mr. Abraham told the claimant that it is against the building bylaws. The bylaw book was given to the claimant by Mr. Abraham in 2003. The claimant then told Mr. Abraham that he would remove it if he were asked to do so. Mr. Abraham learned that, according to a letter addressed to the claimant dated February 11, 2004 the building superintendent asked the claimant to remove the dish on January 14, 2004. Mr. Abraham says the claimant signed the purchase sale agreement on January 12, 2004, and so if the claimant was unhappy with the bylaw he had five days to have the contract reviewed by himself and a lawyer.

14. Further, Mr. Abraham specifically denies the allegations contained in paragraph 3[b] of the defence and counterclaim attached to the notice of claim as scheduled 'A' and says that the claimant waive the financing clause because he realized that to obtain financing for a bank, he would have to pay a higher interest rate due to his financial ratings as evidence in

the letter from the Royal Bank dated January 8, 2004. Mr. Abraham says that the claimant pleaded with him to convince his clients to finance him themselves at current interest rate and since his client agreed to the financing that is why the claimant waive the financing clause. Mr. Abraham says that. With regards to the insurance clause of the claimant was aware that the condo fees cover the building insurance and he was only required to obtain a tenant insurance policy to cover the contents. The tenant's insurance is the same as the claimant was acquired to already have in the leased unit #403. It is for this reason that he waived the insurance clause.

15. Further, Mr Abraham specifically denies the allegations contained in paragraph 3[c] of the defence and counterclaim attached to the notice of claim as scheduled 'A' and denies the allegations of misrepresentation and says that he was representing and protecting the interests of his own client/vendor. The claimant fully understood

that Mr. Abraham was only representing the vendor at all times and the claimant confirmed this in an e-mail to Mr. Abraham dated May 4, 2004. Mr. Abraham read and explained to him the brochure entitled 'Working with a Real Estate Agent' and the claimant signed an acknowledgment of reading the brochure. Mr. Abraham reiterated to the claimant that there could be a conflict of interest if he were to represent him and the vendor and advised him that he would extend to him five business days in order to retain a lawyer to complete the transaction. Mr. Abraham had further

advised him that if he was still unable to find a lawyer, he then would request extension of time until he obtains proper representation. It is for that reason that the number of days in the second line of clause [1] on the schedule [A] was left blank.

Facts

1. Eli Abraham is a real estate agent working with Realty Connect Limited.
2. Stewart Hardie was renting Unit 403 at 50 Nelson's Landing.
3. Stewart Hardie executed a Purchase and Sale Agreement on January 12, 2004, to purchase unit 409. This offer was accepted on even date by Carriage Motor Holdings Limited at a purchase price of \$229,900.00.
4. The purchase and sale agreement required a deposit of \$10,000.00 of which \$5,000.00 was to be paid upon acceptance of the offer and a further \$5,000.00 on or before the occupancy date.
5. The purchase and sale agreement had a closing date of October 30, 2005, with the purchaser, Stewart Hardie leasing the said unit at \$1,278.95 per month with occupancy to commence on April 28, 2004.
6. The purchaser Stewart Hardie was to submit post-dated cheques and agreed that "if for any reason the buyer fails to

honour these payments at their specified dates then this agreement becomes null and void, and the buyer understands that he has no right to recuperate any of the down payment or lease payments that have been paid by him."

7. The purchase and sale agreement stated at paragraph 16, "It is understood and agreed that if the Buyer does not complete this Agreement in accordance with the terms thereof he will forfeit the above deposit in addition to any other claim which the seller may have against the buyer for his failure to so complete."
8. An amendment to the purchase and sale agreement was entered into between Carriage Motor Holdings Limited and Stewart Hardie on March 23, 2004. The amendment stated, "The Buyer/s and Seller/s herein agree to the following amendments of the aforementioned agreement:
 1. Total deposit to read \$5,000.00 (Canadian Dollars Five Thousand Dollars).
 2. Buyer to install hardwood flooring in the living, dining, hallway and the 2 bedrooms at his own expenses before Apr 28th 2004 subject to inspection and approval by seller. If Buyers fails to do said work, then he agrees to pay the seller \$5,000.00 within 24 hours.
 3. Occupancy to read March 25, 2004. Buyer not to pay occupancy fee for March & Apr 2004. All parties are aware that occupancy is for the sole purpose of installing the hardwood flooring and does not give the right to move

any furniture into unit before Apr 28th 2004.

4. Seller, hereby, gives permission to Buyer to assign the agreement of purchase & sale subject to the Seller's approval.
5. Buyer, hereby, agrees that he will not install or allow to be installed a satellite dish on the balcony or adjacent to Unit #409.
9. On March 24, 2004, the purchaser Stewart Hardie completed a termination agreement saying that he could not complete the agreement with the vendor due to "unexpected divorce proceedings." Stewart Hardie requested the return of his \$5,000.00 deposit.

Analysis

Counsel for Stewart Hardie raised several issues for this Court to consider: entitlement of his client to terminate the agreement, the issue of tendering of documents, and misrepresentation by the real estate agent.

The purchaser Stewart Hardie in the purchase and sale agreement struck out the clause that it was subject to financing and provided the vendor, Carriage Motor Holdings Limited, with post dated cheques to rent the premises prior to purchasing Unit #409. Mr. Robert McNeil provided testimony on behalf of Carriage Motor Holdings Limited that the company believed that Stewart Hardie did not have any financial problems with respect to the deal. Mr. McNeil said his company agreed to allow the

hardwood floor to be put in because his company was still going to receive the same purchase price and he understood it was Mr. Hardie's intention to "flip it" or sell it and that was fine with them. The amended purchase and sale agreement said in part if Stewart Hardie failed to complete the hardwood flooring by April 28, 2004, he would pay the seller the remaining \$5,000.00 deposit. Stewart Hardie never did complete the flooring.

The agreement clearly stated that if Stewart Hardie did not complete the agreement he would forfeit deposit and the amended agreement clearly stated that he would pay the \$5,000.00 being the final half of the deposit if he did not complete the hardwood floor prior to a specified date.

Eli Abraham's testimony was consistent with the documentation and with other witnesses except for Stewart Hardie. I found Mr. Abraham's testimony credible and I accept it over Stewart Hardie where there were inconsistencies. Stewart Hardie's pleadings are at times inconsistent with his testimony and with discovery evidence during the Supreme Court Action, again reflecting on his credibility. I find no evidence of misrepresentation by Mr. Abraham.

In this particular case the purchaser Stewart Hardie made it very clear he was not going to complete the deal. There certainly was enough information before the vendors to anticipate a breach of contract. The

prudent course of action was to re-list the property to mitigate loss and not to tender documents to Stewart Hardie's lawyer.

a. The Deposit

The initial purchase and sale agreement called for the Defendant Stewart Hardie to submit \$5,000.00 upon the signing of the agreement and the balance of the \$10,000.00 deposit to be submitted on or before the occupancy date, which was to occur on April 28, 2004.

The purchase and sale agreement stated the deposit was to be held in trust by the listing broker pending completion or other termination of the agreement and to be credited towards the purchase price.

The purchase and sale agreement was executed on January 12, 2004.

The closing date in the agreement was to be October 30, 2005.

Clause 16 of the purchase and sale agreement stated: **"It is understood and agreed that if the buyer does not complete this agreement in accordance with the terms thereof, he will forfeit the above deposit in addition to any other claim which the seller may have against the**

buyer for his failure to so complete."

Clause 5 of the purchase and sale agreement states that the agreement is subject to the conditions outlined in the attached schedules A and B.

Schedule B is entitled "Occupancy Agreement" and clause 6 stated the following:

"prior to the extended closing date, the seller shall have the sole option to agree on a further extensions, provided however, if no additional extensions are agreed to then the buyer shall give up possession of the property and leave it in an acceptable condition [usual wear and tear excepted] in which under the agreement, the occupancy agreement shall entitle the seller to terminate the agreement and occupancy agreement and retain all deposits as liquidated damages. Deposit held in trust to be released to seller on occupancy date."

It is clear that the deposit is to be regarded as liquidated damages and not

as a penalty.

The subsequent amendment to the purchase and sale agreement and dated March 23, 2004, stated that the total deposit to read \$5,000.00. It also went on to state the buyer to install hardwood flooring the in the living room, hallway and the two bedrooms at his own expense before April 30, 2004. If the buyer fails to install the hardwood flooring as agreed, then the buyer agrees to pay \$5,000.00 within 24 hours to the seller.

The deposit has now changed to \$5,000.00. The additional \$5,000.00 payable relates to the installing hardwood floor. This second of \$5,000.00 is not a deposit. [See *Sydney Medical Arts*

Building Ltd., v. Armor Realty Ltd., 10 A.C.W.S. (2d) 460]

In my view it is a penalty which would be assessed against the Defendant Stewart Hardie if he went into the premises and did not provide hardwood floor. To allow this to be forfeited is unconscionable, as there is no loss to the Claimant as the condominium remained the same. I draw this distinction here in the same way a deposit versus a penalty distinction is arrived by some of our courts.

b. Mortgage interest, property taxes and condo fees - \$5,929.25

This amount is intended to represent the Claimant's loss while the

home was off the market from January 12, 2004, to April, 2004.

The reasons for not allowing this part of the claim are as follows:

1. The documents provided to the court are simply statements regarding mortgage payments, taxes and condominium fees and nothing beyond a simple statement.
2. If the claimant was concerned about these costs being incurred during the period he was waiting for the Defendant to occupy and start paying rent it would have made allowance for same in the purchase and sale agreement.
3. Thirdly, these are part of the liquidated damages. The

Claimant could have considered this when it determined the amount for the same would be \$5,000.00.

c. Deficiency Amount - \$900.00

The Claimant ultimately sold a condominium for \$900.00 less than what he sold it for to the Defendant Stewart Hardie. This is a valid claim.

d. Loss of Rental Income between May 1, 2004, and October, 2004 - \$6,394.75

I shall not allow this part of the claim for two reasons:

1. The Small Claims Court has no primary jurisdiction with respect to

residential tenancies. It only has appellant jurisdiction.

2. The principal amount was to be credited towards the purchase price and as the deal was never concluded, and no amounts were paid, the claim should be denied.

e. Increased Commission on Second Sale of Condominium Unit

The Plaintiff negotiated the deal with the broker, and this should have nothing to do with the Defendant who was not part of that process.

CONCLUSION

The Defendant Stewart Hardie should forfeit the \$5,000.00 deposit to the Claimant Carriage Motor Holdings Limited, and also be responsible for the \$900.00 loss attributed to the final sale of the condominium unit. The claim by Stewart Hardie against Eli Abraham should be dismissed, and any counterclaim will be dismissed and will be reflected in an order of this Court.

Dated at Halifax, this 13th day of August, 2007.

David T.R. Parker

