Claim No. SCCH 302559

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: Bryant Realty Atlantice v. Lawless, 2009 NSSM 20

BETWEEN:

BRYANT REALTY ATLANTICE

Claimant

- and -

MICHAEL LAWLESS

Defendant

ORDER

Adjudicator: David T.R. Parker

Heard: March 24th and 30th, 2009

Decision: May 12, 2009

Counsel:

Peter Rumscheidt represented the Claimant

The Defendant was self-represented

General Overview

This was a claim for real estate commission due the Claimant on the sale of the Defendant's home. The claim is based on contract and the defence is based on breach of contract.

Pleadings

Claim:

The claim is for $13,715.37 for unpaid real estate commission.

Defence:

The Defendant stated the Claimant “failed to fulfill her duties and obligations as outlined in section 4.A. of the Seller Broker Agreement signed between the parties on or around March 31, 2008, and further to that agreement, according to section II(vi), the agreement was terminated on her failure to fulfill those obligations…since remuneration flows from her fulfillment of those duties and responsibilities, the remuneration and irrevocable direction to pay detailed in section 6 of the Agreement is void and of no further force and effect on the parties.”

The Defendant then goes on to request the court “to review and interrupt the facts of this matter to see if the Claimant failed to meet, in whole or in part, her contractual, professional and ethical duties and obligations from which remuneration would have been earned.”

Facts

The Defendant decided to sell his home and interviewed real estate agents to see which one they would enter into a listing agreement. Ultimately the Defendant and his spouse decided to list with the Claimant and entered into a Seller Brokerage Agreement on March 31, 2008. The listing price was $499,900.00. The broker’s remuneration was 5 percent of the purchase price.

In May 2008 a Purchase and Sale Agreement (“PSA”) was entered into between the Defendant and the purchaser of the home. The final purchase price was $485,500.00.

The PSA contained an inspection clause allowing the property to be inspected by the buyer’s inspector. The buyer had until June 9, 2008, to be satisfied with the inspection.

As a result of a water inspection report the buyer’s agent raised a concern with the

Claimant, the Defendant's agent, about a water problem. This occurred on Friday, June 6, 2008.

The Claimant notified the Defendant and they met with the Defendant's neighbour on June 8, 2008, to review the situation.

The Defendant completed his own report [memo] concerning the buyer's water report and sent the report to the Claimant and the buyer's agent. Thereafter the Defendant primarily dealt with the buyer and the buyer's agent directly without the assistance or involvement of the Claimant.

After the house sold the Defendant instructed his solicitor to not pay the Claimant for the reasons articulated in his defence.

Analysis

The Claimant in her testimony went through the entire process of dealing with the Defendant's home. Her office was set up so that the Claimant's assistant often responded to any questions made by the Defendant or the buyer's agent with respect to the home. The Defendant felt that the Claimant did not know the home well enough to be able to sell the home, or should have known answers to questions raised by the buyer's agent. When the water/septic issue was raised on June 6, 2008, the Defendant felt the Claimant did not take the problem with the report seriously enough and it was through his efforts he was able to overcome the problem. With this I disagree. The Claimant obtained a buyer, the Claimant or her office stayed on top of the situation during the course of the sale in terms of communication with the Defendant. It may be that the Defendant's memo on the septic problem assisted the buyer in alleviating his concerns however the evidence of the Claimant was that this was in reality a non-issue and certainly was so after the investigation on June 8, 2008.

The Claimant's Counsel argued that in order for a termination of the brokerage

agreement there has to be a material breach of the agreement which must be put in writing by the non-defaulting party. Counsel suggests that there was nothing put in writing nor was their any material breach which Counsel characterized as a fundamental breach.

Chief Justice MacKeigan, in **Canso Chemicals Ltd. v. Canadian Westinghouse Co.**

Ltd. (1974), 10 N.S.R. (2d) 306, provides, of a number of definitions or descriptions that have been attached to the phrase "fundamental breach"

"The phrase or concept has been defined or described as follows:

- "whether in consequence of [the breach] the performance of the contract becomes something totally different from that which the contract contemplates." - Lord Dilhorne in Suisse Atlantique, supra, at p. 393.

- "a situation fundamentally different from anything which the parties could as reasonable men have contemplated ..." - Lord Reid in Suisse Atlantique, at p. 397.

- "a breach which goes to the root of the contract" - Idem, p. 399.

- "when there is such a congeries of defects as to destroy the workable character of the machine" - Pollock & Co. v. Macrae, [1922] S.C. (H.L.) 192 at p. 200 (quoted by Lord Hodson in Suisse Atlantique at p. 413).

- "destroying the whole contractual substratum" - [*page345] Lord Wilberforce in Suisse Atlantique at p. 433.

- "totally different performance of the contract from that intended by the parties" and which will "undermine the whole contract" - Sellers, L.J., in Hong Kong Fir Shipping Co. Limited v. Kawasaki Kisen Kaisha Ltd., [1962] 1 All E.R. 474 (C.A.) at p. 479.

- "an 'event' ... which has deprived the plaintiffs of substantially the whole benefit which they were to obtain under the contract." - Widgery, L.J., in Harbutt's Plasticine Ltd. v. Wayne Tank and Pump Co. Ltd., [1970] 1 All E.R. 225 at p. 239.

- "so defective as to be quite incapable of performing the function which both parties contemplated it should perform ... resulting in performance totally different from what the parties had in contemplation." - Arnup, J.A., in McLean, supra, in [1971] 1 O.R. at p. 212.

- "an accumulation of defects which ... taken en masse, constitute such a ... breach going to the root of the contract, as disentitles a party to take refuge behind an exception clause intended to give protection only in regard to those breaches which are not inconsistent with and not destructive of the whole essence of the contract." - Pearce, L.J., in Yeoman Credit Ltd. v. Apps, [1961] 2 All E.R. 281 at p. 289.

113 The kind of test involved is illustrated by Lord Wilberforce in Suisse Atlantique at p. 432:

‘In application to more radical breaches of contract, the courts have sometimes stated the principle as being that a 'total breach of the contract' disentitles a party to rely on exception clauses. This formulation has its use so long as one understands it to mean that the clause cannot be taken to refer to such a breach but it is not a universal solvent: for it leaves to be decided what is meant by a 'total' breach for this purpose--a departure from the contract? but how great a departure?; a delivery of something or a performance different from that promised? but how different? No formula will solve this type of question and one must look individually at the nature of the contract, the character of the breach and its effect upon future performance and expectation [*page346] and make a judicial estimation of the final result.’"

In order to have a fundamental breach the breach must go to the very root of the contract. It must be a breach that results in something wholly different from what the contract contemplates. There is nothing here to support a fundamental breach having occurred.

The Defendant stated that he made an offer to settle this matter by having a reduction in the amount of commission being claimed. While not a factor in my decision making if there was a material breach that resulted in a provable loss then the full amount of that loss would be recoverable.

The defense in this case was framed in terms of the breach of contract, which I have already dealt with and rejected that defense. The testimony of the defendant at least a considerable amount of the testimony revolved around the concept of negligence and the pleadings in part raise this issue. If I had to deal with that directly I would say that the evidence does not disclose the existence of all the elements necessary for a party to prove negligence. I do not believe there has been a breach of the standard of care should be exercised by a real estate agent. More importantly there has been no damage and damages shown to exist. Therefore the defendant's allegation of negligence would not hold up in law.

Claim for Bryant Realty is for $13,715.37 however the exhibit entered indicates the amount of $8,715.37. If the amount of the real estate commission due is actually the

amount of the claim pleaded, Counsel should make an application to this court to have the order amended and such an application should be inter partes.

IT IS THEREFORE ORDERED that the Defendant pay the Claimant the following sums:

$8,715.37
$ 174.13 court costs
$8,889.50 total

Dated at Halifax, this 12 day of May, 2009.

David T.R. Parker
Small Claims Court Adjudicator