SCCH 338659

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Whalen v. Murphy, 2011 NSSM 19

Between:

Tracy Whalen and Roderick Whalen

CLAIMANT

- and –

DEFENDANTS

René Murphy and Wenche Overland

DECISION AND ORDER

Adjudicator: David T.R. Parker

Heard: January 19, 2011

Decision: March 24, 2011

Counsel: Peter Landry represented the Claimant
The defendants were self represented

Parker:-this matter involved a Purchase Sale Agreement and a breach of that Agreement by the Defendants and the claimants are claiming damages ensuing from that breach.

Pleadings:

1. The Claim:

The Claimant stated there was a breach of contract relating to the sale of property and

they claim damages in the amount of $16,557.96 resulting from that breach by the defendants.

2. The Defence:

The defendants state that the breach of contract is not applicable. The offer to purchase the property was conditional on financing. Financing was not in place by the timeline, all parties – realtors and lawyers were informed in good time. [Including mortgage broker.]

3. Facts and Analysis:

The claimants were selling their home through a realtor and the defendants executed a Purchase Sale Agreement on March 26, 2010. The offer was for the purchase of the claimants' property located at 66 Romkey, Halifax Nova Scotia for the purchase price of $227,500.00. A counter offer of even date by the claimants was for a purchase price of $234,500.00 with a closing date to be May 25th 2010 was accepted by the Defendants. All other conditions and terms as in the original offer and as contained in the Orignal Purchase Sale Agreement were to remain the same. This counter offer was accepted by the defendants on March 27, 2010.

The Purchase Sale Agreement contained a typical financing clause which stated:

"This agreement is subject to the buyer being able to obtain approval for financing 95% of the purchase price at an interest rate not to exceed current percentage. This financing shall be deemed to be arranged unless the seller or the seller's agent is notified to the contrary in writing on or before the 8 day of April 2010. If notice to the contrary is received, either party shall be at liberty to terminate this agreement and the deposit shall be returned to the buyer.

The Claimants and their lawyer did not receive any notification in writing or otherwise that financing was not approved.

On May 11, 2010 Peter Landry, solicitor acting for the Claimants contacted via correspondence Andrew Trider, solicitor acting for the Defendants with the standard letter respecting the upcoming closing of this transaction.

On May 18, 2010 Mr. Landry received correspondence from Mr. Trider advising Mr. Landry that the defendants will be unable to complete this transaction due to an issue with financing. In that letter he also stated that his clients were unable to meet Mr. Landry's clients' proposal of increasing the deposit and extending the closing date to May 17, 2010.

On May 20, 2010 Mr. Landry in correspondence to Mr. Trider said:

"The property had been placed back on the market and hopefully, in not too much time, will be sold, at, hopefully the purchase price that was expected to be received from your client.
It would appear that your clients are in breach of the agreement and that they are liable to pay all damages that flow from that breach. We will not be able to calculate our damages until the subject property is sold.
We will write once again when we are in a position to talk with the damages that Mr. and Mrs. Whalen are going to sustain as a result of the subject breach."

The claimants were committed to purchasing another property and did so on may 25th 2010. The claimants listed their property for sale with a realtor and while ultimately it sold on August 4, 2010 it did so by way of a private sale rather than through a real estate company. The purchase price for the subject property was $220,000.00.

On September 21, 2010 Mr. Landry contacted Mr. Trider advising him that his clients, the claimants would be advancing a claim for damages resulting from the breach of contract.

The Claimants' losses were calculated as follows:

Difference in sale price---------- $14,500.00
71 days of property taxes---------- 410.12

Bank interest to carry mortgage and interim financing --------	1,855.34
Home insurance----------	150.00
Nova Scotia power----------	120.00
Water----------	80.00
Hot water heater rental----------	40.00
Legal fees----------	402.50
Less deposits held in trust----------	-1,000.00
Total	**$16,557.96**

There is no doubt that neither the claimants nor their solicitor were advised either orally or in writing that financing was in doubt by the April 8, 2010 deadline. The defendants' solicitor prior to April 8, 2010 advised the defendants by way of e-mail that prior to April 8, 2010 the mortgage financing condition had to be addressed by that date if they wish to escape The Purchase and Sale Agreement.

Interestingly enough when the defendants were preparing for this court hearing they obtained correspondence sent to their realtor, Ryan Saunders from Invis, a mortgage broker indicating that financing for the defendants has been approved as presented. This letter was dated April 1, 2010 but the evidence of the defendants was they never saw this letter until after the court action had started. On April 19, 2010 the representative from Invis e-mailed the defendants asking whether they sold the land in Norway. On April 23 the lender First National Financial provided a mortgage commitment to the applicants which was conditional on *inter alia* a satisfactory gift letter. On April 28, 2010 the defendants e-mailed Invis advising them that the sale of land in Norway was going to be delayed and that they talk to their agent to see about extending the closing date. On May 10, 2010 the defendants wrote Invis again advising there was a problem getting money from Norway and that they asked their realtor to get a one-month extension. It became obvious that there was a problem with financing and according to the defendants this problem was a result of their relatives in Norway not being able to or not wanting to sell certain property in Norway. The sale of property in Norway was to result in funds being gifted or lent to the defendants which would allow mortgage financing to take place in Canada on this particular property involved in this action.

In the final analysis it does not matter whether financing had been approved or not. The claimants were never advised financing had not been arranged and therefore pursuant to clause 2 of the Purchase Sale Agreement it was deemed to be arranged. In other words the condition that the purchase was subject to financing was no longer applicable after April 8, 2010. The law in this area was dealt with extensively in **Barrett v. Reynolds** [1997] NSJ No. 494. The case also deals with the issue of damages. Justice Anderson was the presiding Supreme Court judge in that case and the relevant portions of that case as it relates to the case before this court are as follows:

"Liability for breach of contract

20 The plaintiffs and Reynolds, entered into an Agreement of Purchase and Sale for Lot A. As set out previously, the Reynolds had a 14 day notification period. If no notification was given, the Reynolds were obliged to honour the contract. Not having done this, the plaintiffs are now suing for breach of contract.

21 A somewhat similar situation arose in **McNabb v. Smith** et al (1981), 124 D.L.R. (3d) 547 (B.C.S.C.). In that case, the agreement was subject to the purchaser arranging a first mortgage for a set amount at a particular interest rate by a specific date. The clause stated that the agreement would be binding upon the parties unless the purchaser gave notice by a certain date that financing could not be arranged. The question to be decided in that case was whether the agreement remained alive despite the fact that no notice was given. The court held that unless notice was given by the specified date, the clause would no longer be a means for the purchaser to escape the bargain:

- Thus, it does not really matter whether or not she told the defendants on September 22, 1980, that financing had been arranged. If she did not, she was bound to complete. If she did, it was in law a mere courtesy call. Legally speaking, the only thing that would have been important was notice to the defendants on or before September 22, 1980, telling them financing had not been arranged and she was thus unable to perform her part of the agreement. In that event, both parties would have been released from their commitments. No such notice having been given, the contract remained alive. (Page 551)

22 In **Nichol v. Myers et al.** (1992), 111 N.S.R. (2d) 150 (T.D.), the purchase and sale agreement allowed the purchaser to terminate the agreement by providing notice within 15 days of an inability to secure proper financing. Notice was not given, the purchaser could not complete the sale and the vendor sued for damages. Grant J., at page 155, interpreted the situation as follows:

- [42] In the absence of such notice the agreement went on - that escape clause was foreclosed. The phrase used was the "condition shall be deemed to have been waived".

- [43] I interpret that phrase to mean that, in the absence of any notice within the 15 days, the inability to raise the money was no longer a defence to completion.

23 Similarly, the Reynolds, by failing to give the notice provided in the agreement, lost any means of escaping the binding effects of the contract. When they were unable to complete the transaction on the date of closing, the Reynolds were in breach. They are therefore liable for any damages which reasonably flow from that breach.

- 1.

  Defendant Reynolds

  - (B)

    Proper assessment of damages

24 The general principles of damages in sale of land cases is set out in Perell on Remedies and the Sale of Land (Butterworths: Toronto, 1988) at page 170:

- In contract, the general goal of an award of damages is to use money to put the innocent party in the same position as it would have been if the contract had been performed. This is sometimes described as protecting the expectation interest of the injured party. Refinement of this general goal is accomplished by the general principles that losses must be reasonably foreseeable, they must be unavoidable, and there must be certainty in their proof. The first factor is sometimes referred to as the **principle of remoteness**. [Emphasis added]This principle works on grounds of policy to define the outside limit beyond which losses are not recoverable even though they flow directly from the breach. The second factor is usually referred to as the **duty to mitigate**.[Emphasis added] The injured party must take reasonable steps to avoid loss. To the extent that loss is avoided or ought reasonably to have been avoided, it is not recoverable. In assessing what losses ought to have been avoided, the plaintiff's impecuniosity is no excuse for a failure to mitigate. The third factor is described as the **certainty principle**.[Emphasis added] It places the general burden of proof on the plaintiff who must demonstrate a loss and lead evidence as to its quantification. This evidentiary burden, however, is softened by the generous spirit in which the court applies the principle. If a loss is demonstrated, the difficulty of establishing an exact quantum will not relieve the wrongdoer, and the court will do the best it can on the material available.

25 The heads of damage claimed by the plaintiffs in this case must be examined to determine if they were within the contemplation of the parties at the time the contract was made, were unavoidable and are reasonably certain.

- A.

  Special Damages

  - 9.

    Loss on sale of Lot A, less commission

  - 10.

    Landscaping for Lot A (in mitigation)

  - 6.

    Municipal Taxes for Lot A after closing date

26 Many claims of the plaintiffs can be dealt with summarily here. Generally, in a failed sale of land transaction, the vendor is entitled to recover the benefit of the bargain. The normal measure of damages is the difference between the contract price and the market price (see Laird v. Pin (1841), 171 E.R. 852 and **Gaspari v. Creighton Holdings Ltd.** (1984), 13 D.L.R. (4th) 570 (B.C.S.C.)). The loss on the sale of Lot A was obviously within the contemplation of the parties at the time the contract was made, as were other consequential damages such as the landscaping costs done in an effort to mitigate and the municipal taxes on Lot A after the closing date. The Reynolds had to know that if the proper notice was not given under the agreement, the Barretts would assume that the transaction would be completed. The Reynolds would then be responsible for the selling price agreed on by the parties**.** They were bound to purchase the property for that price. If they did not, they would also know, or should have known, that the Barretts would have to find another purchaser, may incur costs in so doing and would have the added expense of maintaining the property. Further, the Reynolds should have anticipated that the eventual selling price of the property might be lower than the amount they had agreed to pay for it. Before they breached the contract, the Reynolds must be taken to have known that the possibility existed that they might have to make up the difference.

- A.

  Special Damages

  - 11.

    Packing and unpacking due to failure of sale

27 The plaintiffs have also claimed an amount for packing and unpacking of their household items due to the failure of the sale of Lot A. This is a legitimate claim as the Barretts would obviously have to unpack all their personal belongings after the transaction with the Reynolds fell through, in order to live comfortably, while Lot A was again put up for sale. When the property was eventually sold, they would have to repack all the items a second time. Thus, they had to go through the expense and ordeal once, due to the breach of contract by the Reynolds. The Barretts are therefore entitled to compensation under this head of damage. However, sufficient evidence has not been led to establish an exact quantum of damage, but this will not relieve the Reynolds from liability. The amount claimed would not be unreasonable had the plaintiffs hired someone to come in and pack their belongings. However, according to the testimony of Mr. Barrett, he and his wife did the packing and unpacking themselves. The amount claimed then must relate to the cost of the time and materials used. In this case $1,000.00 is far too high. A more reasonable amount is $500.00.

- A.

  Special Damages

  - 1.

    Lost deposit on sale of Lot A

    28 Normally, in cases where a deposit has been paid, that is forfeited on the breach of the agreement. However, where the vendors' losses exceed the amount of the deposit, the deposit is considered a credit toward the damage award (see **Local Holdings Ltd. v. Brassos Devs. Ltd**. (1980), 111 D.L.R. (3d) 598 (Alta. C.A.)). Here, the plaintiffs have claimed the amount of the deposit as well as the loss on the sale of Lot A. They cannot claim both. Either the deposit acts as a cap on the amount of damages that can be claimed or it is credited toward the damage award. There is nothing to suggest that the deposit was intended to act as an amount of liquidated damages in this case, setting an upper limit on the award. The defendants Reynolds wrote two cheques for $2,500.00 each to cover the $5,000.00 deposit. One was cashed and the proceeds placed in trust with HomeLife. The other was returned "NSF". The $2,500.00 held in trust with HomeLife is therefore the property of the plaintiffs and properly credited toward the damage award.”

In this case there was a breach of contract by the defendants and they are responsible for those reasonably foreseeable losses that the claimants would incur as a result of that breach.

The home was to sell for $234,500.00 and ultimately did sell for $220,000.00. The difference between those amounts is $14,500.00. This is the amount the claimants are seeking in this claim, that is the difference in the sale price. While the Supreme Court of Nova Scotia did not deal with this issue beyond the discussion of a difference in the price I believe it is necessary to consider two other factors. The first factor being; did the claimant did a reasonable price first property? There is nothing to suggest they did not. They had it listed again with the realtor and were not successful and then finally they sold it by way of a private sale. The difference between the original sale price to the defendants and the ultimate sale price to the claimants is negligible when one considers there is no Real Estate Commission due on the second sale. This leads to the conclusion that the $220,000.00 sale price was reasonable. The second factor is the court must consider the net loss that the claimants incurred. If the sale had gone through with the defendants the commission on that sale was 4.5% or $10,552.50 plus HST of $1371.93 for total amount of $11,924.33. Therefore the net amount the claimants would have received on their sale of their home to the defendants would have been $222,575.67. Taking that amount and subtracting it from the final proceeds in the sale of their home to another buyer, that is $220,000.00 would leave a net loss of $2575.67. The other foreseeable consequential losses would be property taxes, interest on mortgage and interim financing, home insurance, Nova Scotia power, water, hot water heater rental. I would also include here reasonable legal fees. Normally most of these consequential losses would not have been incurred however in this case the claimants had purchased another house on the same date that their home was to be sold to the defendants.

Therefore the defendants are responsible for the following damages:

Net difference in sale price---------- $2575.67
71 days of property taxes---------- 410.12

Bank interest to carry mortgage and interim financing --------	1,855.34
Home insurance----------	150.00
Nova Scotia power----------	120.00
Water----------	80.00
Hot water heater rental----------	40.00
Legal fees----------	402.50
Less deposits held in trust----------	-1,000.00
	$4633.63

It Is Therefore Ordered that the defendants pay the claimants the following sums:

$4633.63
$ 179.36 court costs
$ 100.05 service costs
$4913.04 total