Claim No: 353530

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: MacInnis v. Arab, 2011 NSSM 64

BETWEEN:

DONALD MacINNIS

Claimant

- and -

JOSEPH ARAB

Defendant

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on September 20, 2011

Decision rendered on October 5, 2011

APPEARANCES

For the Claimant self represented

For the Defendant self represented

BY THE COURT:

[1] The Claimant purchased a home from the Defendant and took possession thereof on December 30, 2010.

[2] A condition of the purchase was that the Defendant undertook to construct a new fence and extend a deck, prior to June 1, 2011. To secure that obligation, the sum of $10,000.00 was held back and placed in the trust account of the Defendant's lawyer.

[3] The main issue in this claim is whether the Defendant's failure to perform his obligations gives the Claimant the right to declare the condition unfulfilled and obtain the return of the $10,000.00.

[4] There is also a relatively minor issue concerning the alleged failure of the Defendant to leave a full tank of fuel oil, as well as a claim by the Claimant to recover certain legal expenses. I will deal with these issues later.

The condition in the agreement

[5] The precise language of the condition in the Agreement of Purchase and Sale reads as follows:

> 2) The Vendor shall before June 1, 2011 make modifications to the deck on the property as follows: the deck at the side of the house shall be cut back so that it becomes flush with the stairs on the driveway side of the property and he shall extend the back portion of the deck to run the entire width of the house. He shall also install a stairway from the back deck to grade level. All work to be performed in a good and workmanlike manner.

> 3) The Vendor shall construct a wood panel fence to enclose the back yard area in its entirety. Said fence shall be six feet and six inches (66") in height and shall have a swinging gate located at the end of the driveway. This work shall be completed in a good and workmanlike fashion on or before June 1, 2011.

[6] A separate amendment to the agreement established the $10,000.00 holdback.

[7] A condition of this nature is a bit unusual, in my experience. For most vendors and purchasers of real property, the date of closing marks the effective end of their legal obligations to each other, subject to warranties (most often observed in the case of new home construction) and, even more rarely, claims arising from a Property Condition Disclosure Statement.

[8] This was not a new home, and the Defendant is not a builder or contractor, although he professes to have experience in purchasing and renovating houses. So what the Claimant was in effect doing was hiring the Defendant to make improvements to a property he no longer owned, having no special connection with it (other than past ownership) and no particular skill (as far as I am aware) to do this type of work. In fact, on the evidence, the Defendant had planned to use a contractor to perform the work, albeit someone he used on a regular basis.

[9] Neither the Claimant nor the Defendant could explain how the $10,000.00 holdback figure was arrived at, other than to say that the real estate agents or lawyers came up with it. The Claimant testified that he agreed to the arrangement because his real estate agent convinced him that the Defendant could probably get it done cheaper than he could. Other than that, there is no

evidence that the amount is (or is not) an accurate estimate of the cost of doing the work, either on a wholesale or retail basis.

[10] Both parties acknowledge that the Agreement is silent as to the consequences of the work not being completed (let alone started) before the June 1, 2011 date.

[11] The Claimant explained that there were reasons why he specified June 1. First of all, he appreciated that the work could not be done until the spring because there would have to be concrete poured both for fence posts and supports for the deck. He also wanted the work done before the summer, when he spends much of his time at his cottage. This was important because he wanted to be around to check in on the progress of the work; i.e. he did not want to come back from being away and find that the job had been done incorrectly or otherwise not to his satisfaction. There was no evidence that these reasons were specifically made known to the Defendant, but neither is there any reason for him to believe that the June 1 date was just arbitrary.

[12] The Claimant testified that he had no communication whatsoever from the Defendant until the last weekend in May, namely Saturday, May 28 when the Defendant came over to discuss what needed to be done. It was agreed to meet again on Monday the 30th at 11:00 a.m. with the Defendant's contractor present. According to the Claimant, the contractor showed up first and appeared to be confused as to who was hiring him: the Claimant or the Defendant. According to the Claimant, the contractor thought he was there to provide an estimate. The Defendant doubted that the contractor could have been confused, but he was not yet there when that exchange is said to have occurred. He did eventually arrive and it was agreed that the work would start the following day, May 31.

[13] That day and several following days passed, with no communication and no work done. This prompted the Claimant to visit his lawyer, Derek Vallis, who on June 7, 2011 wrote to the lawyer for the Defendant, George Clarke, noting that the work had no even been started and demanding that the $10,000.00 holdback be released to the Claimant.

[14] The Defendant's lawyer wrote back on June 8, 2011 and explained that the work had not been started because of inclement weather, and indicated that the work would begin on June 13. He also indicated that the Claimant was supposed to have provided certain information about the location of the fence in relation to the boundary line.

[15] It appears that the Claimant was prepared to go along with this new date. However, on June 13, Mr. Clarke wrote to Mr. Vallis and stated that the work would not be started until June 20 because of forecasted rainy weather for the rest of the week.

[16] This was the last straw for the Claimant who then took the position, through his lawyer, that he was no longer prepared to have the Defendant do the work because of the inordinate delay. He renewed his demand for the release of the $10,000.00.

[17] The Defendant's version of these events varies only slightly. First of all, he doubted that it was not until May 28 that he first communicated with the Claimant; he thought it was "more like the middle of the month." On this point, I prefer the evidence of the Claimant who had a very clear and precise memory of these dates.

[18] The Defendant admitted that he was late in fulfilling his obligation, but mostly blamed the weather. It is a fact that the Halifax area experienced a very wet spring in 2011, but there was no evidence that conditions were so unsuitable throughout the months of (at least) April and May that the work could not have been done.

[19] Indeed, the Claimant, who is himself a contractor of some kind, testified that he was working on various construction projects throughout the wet weather. As he put it, “a little rain doesn’t bother us.”

[20] The Defendant partly justified the delay on the fact that he did not know precisely where to situate the fence. I accept that it is true that there was a question to be answered. Had the work been ready to start, the Claimant would have had to give some direction on precisely where to situate the fence in order to avoid any possibility of encroaching on the neighbour’s land. It is my finding that this issue did not cause any delay whatsoever, and that the Defendant fastened upon it purely as a possible excuse for his failure to act.

[21] The Defendant also attempted to justify his delay by stating that he was reluctant to allow the work to be done when the ground was so wet, because of the damage that it might do to the back lawn. He conceded, however, that he never asked the Claimant whether he was concerned about damage to the lawn. The Claimant appeared to accept that with a fence and a deck to be built, there was bound to be damage to his lawn and this was not a real concern to him.

[22] In the end, the Defendant says that he is still willing to do the work, but obviously he cannot do it without the consent of the Claimant who has taken the

position that he is entitled to the $10,000.00 and no longer has any legal obligation to allow the Defendant to work on his property.

Issues

[23] Some of the questions that arise are:

a. Was time “of the essence” in the Agreement, expressly or impliedly?

b. Even if time was of the essence, did the Claimant waive performance by June 1, such that the Defendant had a further reasonable time to perform?

c. Even if time was of the essence, and the Defendant was in breach for non-performance, is the Claimant automatically entitled to the $10,000.00, or is there some other measure such as the cost of having the same work done by another contractor?

Was time "of the essence" in the Agreement?

[24] The mere insertion of a date in a contract does not automatically import a meaning that time is of the essence. As stated by the House of Lords in *United Scientific Holdings Ltd. v. Burnley Borough Council; Cheapside Land Development Co. Ltd. v. Messels Service Co.,* [1978] A.C. 904, [1977] 2 All E.R. 62 (H.L.), per Lord Simon, at p. 83:

> In my view the modern law in the case of contracts of all types is correctly summarised in Halsbury's *Laws of England* (9 Halsbury's Laws (4th) para. 481):
>
> > Time will not be considered to be of the essence unless: (1) the parties expressly stipulate that conditions as to time must be strictly complied with; or (2) the nature of the subject matter of the contract

> or the surrounding circumstances show that time should be considered to be of the essence.

[25] Consistent with this view, there is Canadian authority to the effect that, even where there is no express stipulation that time is of the essence, courts can imply such a term if all of the surrounding circumstances point in that direction: see eg. *Greenside Properties Inc. v. 8458429 Holdings Ltd.* 1996 CarswellBC 515, [1996] B.C.W.L.D. 1050, [1996] B.C.J. No. 531, 1 R.P.R. (3d) 64, at para 52:

> 52 It has been held that courts of equity will not imply that time is of the essence unless:
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> > ... the express words of the contract, the nature of its subject matter or the surrounding circumstances made it inequitable not to treat the failure to comply exactly with the stipulation as relieving the other party from the duty to perform his obligations under the contract. [Citing *United Scientific Holdings Ltd.* (above)]

[26] Dealing first with the question as to whether or not time is explicitly made of the essence, I believe the answer must be no. It is quite common for contracts to make clear their intention by stating explicitly “time shall be of the essence.” Standard real estate agreements make this clear in terms of the closing dates, and many a transaction has been nullified by one party or the other’s failure to tender on closing.

[27] As to whether or not time is implicitly of the essence, this is a much more difficult question. To put it in the terms set out by the House of Lords and accepted in other cases: does the nature of its subject matter or the surrounding circumstances make it inequitable not to treat the failure to comply exactly with

the stipulation as relieving the other party from the duty to perform his obligations?

[28] In my respectful view, the answer is yes. I believe that the provision in the contract was so unusual, in that it prolonged by five months a relationship that would normally have ended on closing, that it should have alerted the Defendant to take it seriously. It also gave him a very generous amount of time to do a job (or arrange to have it done) that would probably only take a few days. This amount of time should have been adequate to account for unforeseen events such as extreme weather events, illness or anything else that might have delayed performance.

[29] Although the Defendant may not have been aware of all of the Claimant's reasons for selecting June 1, it should have been obvious (at least) that the Claimant wanted to be able to use and enjoy his new deck once the better part of the spring season arrived.

[30] It would be relevant to the question of whether it is equitable or not to hold the Defendant to a strict time line, to know whether $10,000.00 is a reasonable approximation of the value of the work. For example, if the cost of doing the work was only $2,000.00, it might be inequitable to see the Defendant forfeiting $10,000.00.

[31] There was no direct evidence on this point. However, on the face of it, the sum of $10,000.00 does not seem out of line with the scope of the project. I take some comfort from the fact that lawyers and real estate agents had input into this number, and they must be taken to have negotiated something that was

proportional to what remained to be done in order for the balance of the money to be paid.

Did the Defendant fail to perform? Did the Claimant waive performance by June 1, such that the Defendant had a further reasonable time to perform?

[32] The Defendant clearly did not perform his obligation under the strict terms of the contract. He also displayed an inexplicable indifference to his obligation. I accept the evidence of the Claimant that he did not even communicate until three days before the June 1 date. To the extent that he loses out, he is clearly the cause of his own misfortune.

[33] The evidence suggests that the Claimant was prepared to be flexible, to a point. He initially expected the work to be started by June 1, though it likely would have taken a few more days to complete. When that did not happen, he retreated to his legal position as stated in his lawyer's letter of June 7. In the face of the letter of June 8 advising him that work would be started on June 13, the Claimant did nothing. He neither accepted nor rejected this proposition. However, when that date came and went and a further date of June 20 was projected, he forcefully rejected that date.

[34] Had the Defendant actually started the work on May 31, or June 13, as promised on successive occasions, different considerations might apply. It would hardly be equitable for the Claimant to stop the work midstream and demand the $10,000.00. However, this is academic as nothing happened. There is no evidence that the Defendant purchased any supplies or incurred any labour cost.

[35] Just as there must be clear evidence of an intention to treat time of the essence (as I find there is here) so must there be clear evidence before a court will find that strict performance has been waived. I find that the Claimant did not waive strict performance. At most, he allowed a short extension when he agreed that work could start on May 31. And it is also arguable that he may have done so on a second occasion after receiving the letter of June 8, promising that work would start on June 13. However, even if those were legally enforceable extensions, I find that there was no legal duty on the Claimant to continue to grant extensions when the Defendant (for whatever reason) could not deliver what he promised.

[36] The Defendant's position renders the time stipulation virtually meaningless, which I do not believe was ever the intention.

[37] In conclusion, I find that the Defendant's actions amounted to a repudiation and there was no longer any duty on the part of the Claimant to allow the Defendant to perform the work.

Does this necessarily result in the $10,000.00 reverting to the Claimant?

[38] Having already found that the $10,000.00 is not disproportional to the amount involved, I believe the answer is that the full amount reverts to the Claimant. The alternatives are rather complicated and more likely to lead to conflict, and I do not believe that was their intention.

[39] The matter can be tested by asking the question: what if the Defendant simply refused to perform, or became incapable of performing? Would it then fall to the Claimant to have the work done by someone else, and either refund the

balance or claim the deficiency (depending on whether the cost was less or more than $10,000.00?) Would he need to obtain multiple estimates, and in effect mitigate his loss to the satisfaction of the Defendant? My reading of the clause, in the circumstances of the relationship as a whole, is that this was intended to be a much cleaner break than that.

[40] As such, I find that the Claimant is entitled to have the $10,000.00 returned to him.

The oil tank issue

[41] The Claimant contends that Defendant failed to leave a full tank of oil, as it was his obligation to do. It is typical in real estate transactions for the seller to obtain a credit on the Statement of Adjustments for the cost of a full tank of oil. Here that is shown as $803.17.

[42] I take notice of the fact that it is the practice in real estate practice to have the tank “topped off” as close to the date of closing as is feasible.

[43] The evidence that emerged before me demonstrates that the Defendant’s oil supplier attended to fill the tank on December 17, 2010, which was thirteen days before closing. No explanation was given for why there was no top off closer to the actual closing date. I appreciate that this is the holiday season, but oil companies deliver throughout the winter, if necessary.

[44] The Claimant testified that when he went to read the gauge after taking possession, the tank showed only 3/4 full. He protested this fact through his

lawyer, and was supplied with the slip showing that the delivery had taken place on the 17th.

[45] The Defendant's position was that he had turned off the oil heat, as no one was living there in December, leaving only the supplementary electric heat on. He says that someone else turned the heat on, and suggests that it may have been the Claimant or someone associated with him such as his real estate agent who was there for showings. The Claimant denied touching the heat settings himself.

[46] The Defendant also suggests that the gauge might be inaccurate, although there was no evidence to this effect.

[47] The possibility that one quarter of a tank of oil could be consumed in a two-week period in December is hardly far-fetched. There is no evidence that would hold the Claimant responsible for turning on the heat inappropriately. In my view, the Claimant's evidence overall is more compelling and the sum of $200.00 is allowed as a rounded off approximation of the amount of oil that would have been necessary to top off the tank.

[48] In my view, it is necessary to restore this amount to the Claimant in order to avoid an unjust enrichment of the Defendant.

Lawyer's costs

[49] The Claimant also seeks $402.50 which is the amount that he paid to his lawyer in connection with his involvement in the correspondence with the Defendant's lawyer in June 2011.

[50] There is nothing unreasonable about the claim *per se*, but the regulations under the *Small Claims Court Act* (the *Small Claims Court Forms and Procedures Regulations*) in s.15(2) expressly forbid adjudicators to award any form of “agent or barrister fees.” This provision has consistently been interpreted to preclude claims like this, where a lawyer is involved in the very dispute that ends up before the court, even though the lawyer did not act in the drafting of the claim or represent the party before the court.

[51] As such, this part of the claim is not allowed.

Conclusion

[52] The Claimant is entitled to a judgment for $10,200.00 plus his costs of commencing this claim, in the amount of $182.94.

Eric K. Slone, Adjudicator