IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: *Livingston v. Apogee Properties Inc.,* 2016 NSSM 43

Claim: SCCH 441347
Registry: Halifax

Between:

James D. Livingston and Sharon A. Livingston

Claimants

v.

Apogee Properties Inc. and Rick Findlay

Defendants

Adjudicator: Augustus Richardson, QC

Heard: July 21 and September 27, 2016 (claimants' evidence only)

Appearances: Alex Embree for the claimants
Matt Conrad for the defendant Apogee Properties Inc.
No one appearing for defendant Rick Findlay (claim against him having been settled)

By the Court:

[1] This is an interim ruling with respect to the claimants' (the "Livingstons") motion to re-open their case after they had closed it. The defendant Apogee Properties Inc ("Apogee") opposes the motion.

[2] The claim in this matter arises out of the purchase by the Livingstons of a house in Halifax in 2013. Apogee was the vendor. It had purchased the house and conducted extensive renovations on it, apparently with the intent of then re-selling it. The Livingstons allege that Apogee represented or warranted the house to be fully renovated "like new," and that that representation was an important factor in their decision to buy the house. Following the closing of the transaction they discovered what they allege were various water leakage issues in the

basement of the house. They say that the leakage issues required–or will require–extensive and expensive repairs. They claim $25,000.

[3] I heard the testimony of Zak Miller (floor repairer), Kyle Godsoe (basement water proofing technician), Rick Findlay (real estate agent and former defendant in these proceedings), and of the claimants Sharon and James Livingston over the course of two sittings (one during the evening of July 21st, and one during the day of September 27th). The evidence (much of it first hand) went to the events leading up to the purchase of the house; the subsequent discovery of apparent water leakage under the basement floor covering; and what steps were taken (and why) to rectify the various problems that were said to have been discovered once the floor covering was taken up.

[4] One of the items of loss discussed in the testimony related to a bent water supply pipe. The bent pipe was discovered after the floor covering was taken up. The bend was in the main water supply pipe at its entry point into the house. The claimants decided to replace that part of the pipe (in order to remove the bend), which in turn required digging up the line leading from the house to the city's main water line (resulting in further expense).

[5] The claimants closed their case late in the day on September 27th. There was not enough time at that point to commence with the defendant Apogee's evidence, and it was agreed that the matter would be adjourned to a later date to be set.

[6] At that point counsel for Apogee stated that he ***might*** make a motion for non suit; and that in any event he might elect not to call any evidence. Counsel for the claimants responded by asking for time to consider this development and, if so advised, to make a motion to re-open their case. It was decided that any such motions would be made in writing.

[7] Counsel for the claimants subsequently advised that he did wish to re-open the claimants' case. He filed his submissions on October 21, 2016. Counsel for Apogee filed his on October 28th. Both were very helpful.

[8] The claimants seek to re-open their case in order to call one of two potential witnesses. Both of the proposed witnesses are employees of the Halifax Water Commission. The witness would be expected to provide evidence as to the consequence of having a bent water supply pipe.

Counsel for the claimants argues that without such evidence his clients will be at a disadvantage in responding to any motion for non-suit that the defendant may make.

[9] Counsel for Apogee resists the motion. He argues that his client would be prejudiced because the proposed evidence may be used to defeat his motion for non suit (if he makes it). He also argues that the claimants could have introduced the evidence but did not, and that in any event the proposed evidence is unnecessary, since there already has been testimony as to the bent water pipe and what was done (and why) to rectify it.

[10] I am satisfied that an Adjudicator has the power in a proper case to permit a party to call new evidence after it has closed its case. I have reviewed the following decisions relied upon by both counsel: *Dhawan v. College of Physicians and Surgeons (Nova Scotia)* 1998 NSCA 83; *Griffin v. Corcoran* 2001 NSCA 73; *AB v. CD* 2014 BCSC 1676. That review suggests that the following points ought to be considered:

a. Was the evidence in question reasonably available to the party prior to the close of his or her case, or is it new evidence that could not reasonably have been discovered prior to that time;

b. Where in the proceedings is the application made—at the end of the party's case, or after all of the evidence of all parties is in, or after the decision of the court is taken under reserve;

c. What prejudice, if any, would the opposing party experience by reason of the re-opening;

d. The importance of maintaining the principle of finality—that is, the requirement that parties bring forward their whole case at one time rather than piecemeal; and

e. Whether it is in the interests of justice that the case be re-opened—that is, whether a miscarriage of justice would occur if the proposed evidence was not received.

[11] Added to that is the concern, expressed by s.2 of the *Small Claims Court Act*, that claims "are adjudicated informally and inexpensively but in accordance with established principles of law and natural justice."

[12] Having considered these principles I was not persuaded that the claimants' motion should be granted. The evidence in question was available prior to the commencement of their case. It is not new evidence. Both claimants spoke to the issue of the bent pipe, which they had seen themselves. The proposed testimony is not of a witness who actually saw the bent pipe, or who made decisions or recommendations based on any such direct observation. Nor do I see the proposed evidence as being crucial to fending off any motion for non suit that the defendant might bring. As I have noted, there already is evidence of the pipe and what the claimants did about it (and why). The proposed evidence may add to such evidence—but it does not fill a hole that is otherwise empty. Finally, the principle of finality (as well as s.2 of the Act) highlights the importance of requiring parties in Small Claims Court proceedings to put their best foot forward when they come to court. Making motions to re-open too easy to obtain would work against that requirement, leading perhaps to laxity in the presentation of a case as well as further delay.

[13] For all of these reasons the claimants' motion to re-open their case is dismissed. The matter now proceeds with the defendant's case.

DATED at Halifax, Nova Scotia
this 1st day of November, 2016

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Augustus Richardson, QC
Adjudicator