

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Russell v. Murphy*, 2017 NSSM 38

BETWEEN:

ROBERT JOSEPH RUSSELL

Claimant

- and -

SHIRLEY BUDHIA MURPHY

Defendant

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Halifax, Nova Scotia on June 20 and 22, 2017

Decision rendered on July 6, 2017

APPEARANCES

For the Claimant

self-represented

For the Defendant

Gordon Allen
Counsel

BY THE COURT:

1. This case arises out of a complicated, and (in my experience) highly unusual real estate transaction.
2. The Claimant Robert Joseph Russell (“Russell”) was not initially, in any sense, a party to the transaction. Because of the numbers involved, it is useful to set out some of the cast of characters:
 - a. Odilio Lopez (“**Odilio**”) is a contractor who, along with his son Marco Lopez (“Marco”), operates a home renovation business, Lopez Construction.
 - b. Herman Murphy (“**Herman**”) is also a sometimes contractor. He is the husband of the Defendant Shirley Murphy (“Shirley”), and together they have operated in the business of buying, renovating and selling houses.
 - c. Maurice G. McGillivray (“**McGillivray**”) is an experienced lawyer, practising in Dartmouth in the firm Landry McGillivray, whose practice includes real estate.
 - d. Clyde Paul (“**Paul**”) is a Halifax lawyer whose practice also includes real estate.
 - e. Tony Bower (“**Bower**”) is a realtor and mortgage broker, operating as Bower Mortgage Services (“Bower Mortgage”).
3. The Claimant Russell is a self-described entrepreneur, who owns several local businesses. He is a close personal friend of Odilio.
4. The transaction in question was for a property at 54 Fairbanks Street (“the property”) in Dartmouth, Nova Scotia, which as of early 2015 was owned by Shirley. It was in a poor state of repair. The evidence suggests that Herman and Shirley bought it not long previously with the intent to renovate

and sell it at a profit. For reasons which were not made clear, they opted instead to sell it to someone else who would renovate it.

5. The initial discussions were between Odilio and Herman.
6. The property was subject to a mortgage in the amount of \$225,000.00 in favour of Bower Mortgage.
7. The evidence of Herman and Odilio agree to a point, but disagree on a major point. They both agree that the purchase price of the property would be \$225,000.00 and that there would be a \$15,000.00 deposit. Odilio says that the verbal understanding was that the \$15,000.00 would be immediately applied to reduce the mortgage, such that \$210,000.00 would be needed on closing to retire the mortgage (and pay for the property). Herman says that the \$15,000.00 was simply to be a non-refundable deposit, but that there was no agreement to apply the money to the mortgage. He did admit that if the deal closed, the amount required for closing would be \$210,000.00. He did not explain what would happen on closing where the outstanding mortgage might exceed the balance payable on closing. Logically it would have been up to Shirley to pay off the shortfall out of her own funds, in order to pass clear title to the purchaser.
8. In any event, an Agreement of Purchase and Sale was drawn up on the standard form of the Nova Scotia Association of Realtors. The extent of Bower's involvement in this document is unclear, but I believe he was offering some degree of assistance as he held the mortgage on the property and had a significant interest in what occurred. Bower was not present at the trial.

9. The Agreement dated the 19th of March 2015 contains several key terms:
 - a. The buyer was Marco.
 - b. The seller was Shirley.
 - c. In Schedule A there are terms that provide for a non-refundable deposit of \$15,000.00.
 - d. The buyer was entitled to begin renovations upon paying the deposit.
 - e. The closing date was to be September 18, 2015.

10. I can infer from all of the evidence that the intention was to complete renovations before the actual closing date, allowing the property to be conveyed to a third party buyer without Marco actually taking title. This is the only way to explain why there would be a six-month closing date, with renovations going on all the while. Also, this was never intended to be Marco's home. It was essentially a renovation project for Lopez Construction. Having to close would cost Marco significant closing costs including deed transfer tax, which could be avoided by directing Shirley to close with the eventual buyer.

11. Even if I assume too much, the essential facts remain. The \$15,000.00 was paid to either Shirley or Herman. In fact, neither of them could recall who received it or where it went, though they concede it was paid. It is a fact that it was not used to pay down the mortgage.

12. I note here that neither of Herman or Shirley was a particularly credible witness. They both had very selective memories. However, the case does not really turn on their credibility.

13. On May 6, 2015, McGillivray (who had not been involved previously in the transaction) sent a letter to Marco (the named purchaser) confirming where, he believed, matters stood. That letter stated the following:

I write to confirm as follows:

1. The purchase price is \$225,000.00, with a non-refundable deposit of \$15,000.00 paid to Mrs. Murphy and the remainder to be paid at closing.
2. You have taken possession of the property and are obliged to maintain it and any improvements being made at your own risk.
3. You are aware the property is presently mortgaged to Bower Mortgage Services for \$225,000.00 and that the shortfall on closing will have to be made up by the vendor or you will not be able to complete the purchase for the \$210,000 remaining to be paid as there would be a shortfall. You have advised you are prepared to rely on the seller to deal with this issue on or before closing.
4. I advised you and you are aware that you are making improvements to the property before it is in your own name. Accordingly, if Mrs. Murphy were to get into financial trouble, you could be at risk of not being able to complete the purchase on the intended terms, even though you will have expended a great deal of time, effort and money on the property. You have confirmed that you are aware of the risk and that the only safe way to proceed is to complete the purchase ASAP, as you could be at risk unless and until you do. In this regard, you have advised you anticipate and plan to take title in about 2 months, as you hope you will be able to obtain new financing by that time.
5. You provided me with 3 post-dated cheques to pay the mortgage in the amount of \$1875.00 each, the first of which was sent to Bower Mortgage Services today, as well as a cheque for \$810.00 to cover 3 months of taxes and insurance. In this regard, we advise we also sent this months' tax and insurance payments to HRM and to Hub Insurance today.
6. You are aware that I also act for Mrs. Murphy, and that you are in agreement with that. You are also aware that I cannot keep confidential from Mr. or Mrs. Murphy any information pertaining to the property or the transaction etc., nor can I keep any info confidential from you. In the event

a dispute were to arise concerning the property , which cannot be resolved, I will not be able to act for either you or Mrs. Murphy.

Please confirm you have received the above message, and please keep me posted with respect to a closing date.

14. Both Marco and Odilio signed back a copy of this letter indicating that they were in agreement with its contents. To the extent that their evidence is in conflict with this letter that they acknowledged, the letter governs as it is the most reliable evidence and Marco and Odilio cannot now be heard to take a different position.
15. Odilio and Marco got to work on the renovations. They also took over paying the mortgage, taxes and insurance, even though they were not the legal owners.
16. It appears that the project took longer and was more expensive than anticipated. As the September closing date approached, Odilio and Marco ran out of money. A deal was arranged whereby a second mortgage was arranged through Bower, in the amount of \$50,000.00, although after a \$5,000.00 fee to Shirley and other expenses, the net amount available to Odilio and March was barely more than \$40,000.00. This \$5,000.00 fee to Shirley was stated to be in consideration of the extension of the closing date, and was not to be accounted for in any other fashion.
17. The fact that the property could be mortgaged to raise funds to be used by the purchaser, who had not yet closed the purchase, highlights the unusual nature of the transaction.

18. On the 17th of September 2015, another somewhat lengthy letter was directed to Marco by McGillivray (and which was also seen by Odilio) confirming the new aspects of the deal:

I write to confirm the background and current status of the above transaction.

An agreement of purchase and sale was signed on March 19th, 2015, which provided for the payment of a non refundable payment of \$15,000.00 to Shirley Murphy, and a further payment of \$210,000.00 to complete the purchase of the property. The agreement called for a closing date of September 18. I was not involved in the preparation of that agreement, nor did I advise you with respect to same. A copy of the agreement is attached for your ready reference.

An arrangement was made between you and Mrs. Murphy so as to allow you to access the property and to commence renovations before the property was to be purchased by you, provided, among other things, that you would make the mortgage payments on the then existing first mortgage of \$225,000.00 and provided as well that you would pay for the taxes and insurance etc., on the property until the closing date.

We (you, your father, Odillio, and I) met in my office on April 22, 2015 at your request. I had not met you before. I expressed my preference that you complete the purchase and put the property in your own name before commencing any renovators (sic). You advised the renovations had already commenced.

I also recommended that you retain your own lawyer for this matter, as I act for Shirley Murphy, however, you advised that you would like me to deal with it.

We reviewed the agreement between you and Mrs. Murphy, and you provided cheques for the initial mortgage payments and taxes and insurance for a total of 3 months, as you anticipated the renovations would be complete and the property sold within that time period.

On the same day we met, I emailed you (Marco) to confirm the understanding, and asked that you acknowledge receipt and agreement.

On May 6, 2015, I emailed you again asking for confirmation. Later that day I received an a message from you confirming the email was received. Copies of the email are attached.

Yesterday your father came to see me re the status of the renovations and other matters.

He advised that you had arranged with Shirley Murphy to increase the agreed sale price of the property from \$225,000.00 (less the \$15,000 already paid to and received by Shirley Murphy), to \$275,000.00 (less the \$15,000.00 already paid to and received by Shirley Murphy), if Shirley would arrange and place a second mortgage on the property for \$50,000.00 (see copy attached) and advance to you the proceeds of the mortgage less \$5,000.00 to be deducted and given to Shirley as consideration for entering into the revised agreement and extending the closing date to January 8, 2016, and less the costs of arranging and placing the mortgage. The costs of arranging and placing the mortgage in accordance with the requirements of the lender are approximately \$3,000.00 (\$2,000.00 to Private Mortgages Inc. (Tony Bower) and approximately \$1,000.00 in legal fees and disbursements. As property taxes and insurance are your responsibility until you complete the purchase, they will have to be taken from the proceeds as well, so in the end, you would receive approximately \$40,239.25, as per the attached Statement of Adjustments.

Additionally, you will have to keep the existing first mortgage payments in the amount of \$1875.00 per month up to date, as well as pay the payments on the additional \$50,000.00 as described above. The additional payments (to be paid to Bower Mortgage services) are in the amount of \$416.67 per month.

The basic bottom line is that you agree to increase the purchase price for the property to \$275,000.00 (less the deposit already paid to and received by Shirley Murphy), and to extend the closing date to on or before January 8th, 2016, in exchange for \$5,000.00 of the additional mortgage amount being paid to Shirley Murphy, which \$5,000.00 is NOT a deposit and which will NOT be credited against the purchase price, and the rest to you as per the attached Statement of Adjustments, so that what you will receive is approximately \$40,239.25, being \$50,000.00 less the \$5,000.00 to Shirley Murphy, and the costs of the mortgage and the taxes and insurance to the end of December, 2015. You also agree to make the required mortgage payments of \$1,875.00 per month and \$416.67 per month to Bower Mortgage Services until the mortgages are paid out.

We ask that you review this letter and confirm your understanding and agreement by signing.

We will ask Mrs. Murphy to sign and confirm her agreement regarding the revised agreement and the terms pertaining to continued obligations on your part as well.

19. As had been done some months earlier, all of the parties (Marco, Odilio and Shirley) signed a copy of this letter indicating their agreement.
20. Having signed the two letters, Marco and Odilio would have a difficult time, legally speaking, in contending that the transaction was other than that contained in the two letters, as far as they go. In particular, Odilio's contention that the \$15,000.00 deposit was to be used to pay down the mortgage is not supported by the documentation. Odilio and Marco ought to have spoken up in a timely way, if they disagreed with how McGillivray characterized the transaction.
21. It is unclear from the evidence why the transaction did not close in January 2016. In fact, it appears that the closing date came and went without much fanfare. It appears that for some period of time the renovations were not complete, and the property was not in a fit state to realize its value on the open market. But there was also a time, post-renovation, when the property was listed for sale but did not sell.
22. Legally speaking, with the agreed-upon closing having passed and neither side pressing for a new closing date, the transaction remained alive, with time having ceased to be of the essence. Either party was in a position to set a reasonable closing date and force the issue, but neither one did so.
23. By late 2016, Russell became aware of the project and how Odilio seemed to be struggling with aspects of it. It appears that Russell was

helping Odilio financially. Finally, the idea came about that Russell would buy the property.

24. Around this time, Herman (who did not previously know Russell) began approaching Russell for money. One amount, \$970.00 advanced on December 20, 2016, was supposedly for arrears of insurance on the property. This is entirely dubious as the evidence suggests that the insurance had been paid out of the second mortgage proceeds. This sum forms part of Russell's claim, the other part being the same \$15,000.00 that formed the initial deposit.
25. The difficulty with the claim for \$970.00 is that it is brought against Shirley, and there is not a shred of evidence that the money ever went to Shirley, or even that she had any knowledge of it. While I might be prepared to find that Herman was an agent of Shirley for some purposes, this is not one of them.
26. On that day, December 20, 2016, Russell prepared two documents which he asked Herman to sign. One was a receipt for the \$970.00. The other document read:

I, Herman Murphy acknowledge I have borrowed \$15,000 Canadian dollars from Odilio Lopez in 2015. I agree to pay Odilio Lopez this amount by January 31, 2017 plus simple interest in the amount of 10% per year (\$125 per month) for the time the loan has been outstanding.
27. This fact of this document reveals several things:

- a. Odilio had become concerned about the original \$15,000.00 deposit that he had given to Herman, and was afraid that it would not be accounted for in the sale.
 - b. Russell was somewhat confused about the nature of that payment, which was never previously characterized as a loan, let alone one bearing a particular rate of interest.
 - c. Herman, who offered no plausible explanation for why he would have signed this document, appeared to be willing to sign anything in the interest of acquiring money from Russell. It is not disputed that in the weeks that followed Russell loaned additional moneys to Herman, which are the subject of a separate claim.
28. In the meantime, Russell began to explore conventional mortgage financing to take over the property. By April 2017 a concept had been developed whereby the bank would advance approximately 65% of the value of the home, which was pegged at \$389,000.00, with an invoice in the amount of \$93,215 to be rendered by Lopez Construction to be credited against the purchase. The statement of adjustments prepared by Clyde Paul just before the closing best illustrates the accounting:

Purchase price	\$389,000.00
Deposit	\$0.00
Property tax adjustment	(\$465.62)
Property tax arrears	(\$6,653.10)
Invoice to be paid to Lopez Construction (including amount for Bower 2 nd Mortgage)	(\$145,630.30)
Balance to complete	\$236,250.98

29. An Agreement of Purchase and Sale dated the 15th of April 2017 had been signed by Shirley and a company, 3301919 Nova Scotia Limited ("3301919"), which was Russell's company.
30. The closing date was set for May 5, 2017.
31. What is clear from all of this evidence is that the \$15,000.00 "non-refundable deposit" was lost in the shuffle, so to speak. It was not mentioned in the agreement between 3301919 and Shirley, and plays no obvious part in the adjustments, although there is no explanation for how the purchase price of \$389,000.00 was arrived at.
32. Several things happened on the day before the closing date, the order of which is significant for the Claimant's theory of the case.
33. In preparation for closing, McGillivray prepared several documents, including a document that, while not titled as such, was effectively a release, asking Marco and Odilio to release any interest they had in the original Agreement:

TO WHOM IT MAY CONCERN:

Re: Termination of Agreement of Purchase and Sale 54 Fairbanks St., Dartmouth, NS, Murphy to Lopez

In consideration of Shirley Murphy agreeing to sell 54 Fairbanks Street to 3301919 Nova Scotia Limited for \$389,000 (the purchase price) on terms to be agreed between Shirley Murphy and 3301919 Nova Scotia Limited, we Odilio Lopez and Marco Lopez, hereby release any entitlement we may have with respect to the above referenced Agreement made on or about March 19, 2015 amended on September 16, 2015, which was to be completed on or before January 8, 2016.

We further confirm and authorize payment to, 3301919 Nova Scotia Limited by way of a credit in the amount of \$145,630.30 against the purchase price, of which \$93,215 is to be paid by or on behalf of the Purchaser, 3301919 Nova Scotia Limited, to Lopez Construction and the balance to be used to pay the 2nd mortgage on 54 Fairbanks Street all as per the attached schedule.

Signed at Dartmouth, Nova Scotia, this 4th day of May, 2017.

Odilio Lopez
Marco Lopez

34. McGillivray also sent an email to Marco, which included:

I have discussed this with your father, Mr. Russell's company (the buyer) is to receive a credit for \$145,630.30 against the agreed sale price of \$389,000.00. Mr. Russell's lawyer is to pay Lopez Construction the amount of \$93,215.00 as per the invoice on Page two of the attachment. The balance of \$52,415.30 will be used to pay off and release the 2nd mortgage on the property as per the info provided.

I will be paying the 1st mortgage and filing the release of the 1st mortgage. Mrs. Murphy will receive no proceeds of the sale.

I will be asking your father to come in to sign, to confirm, but I ask that you confirm you are in agreement by return email, as the closing is to take place tomorrow.

I look forward to hearing from you ASAP so that I may arrange for your father to come in as well. So... please confirm you are in agreement ASAP.

35. It is clear from these documents that McGillivray's understanding of the transaction did not allow for any explicit credit toward the \$15,000.00 deposit paid toward the original purchase. By now Russell was advising Odilio and believed that once Odilio (or Marco) released any interest in the original transaction, the \$15,000.00 was essentially forfeited. As such, he hatched a plan for Marco and Odilio to sign a document before they attended to sign the release. That document read:

Thursday, May 4, 2017

We hereby sell our interest in debts owed by Shirley Murphy, 3692 Albert Street, Halifax Nova Scotia to us to Robert J. Russell.

The price of the purchase is \$1. Any money collected will be applied to monies owed by us to Robert J. Russell or his designees.

These include \$15,000 owed from the purchase of a property at 54 Fairbanks Street, Dartmouth NS on March 19, 2015. Shirley Murphy failed to give a cheque of \$15,000 as required as a part of the closing. This amount is still outstanding.

This \$15,000 represents the net difference between the purchase price of \$225,000 less a \$15,000 deposit paid giving a net payment of \$210,000. The agreement had us taking over paying interest on an existing mortgage of \$225,000 and being refunded \$15,000. This payment was never received.

We made interest payments for over 2 years at 10% per annum on the amount defaulted on by Shirley Murphy. We paid interest on \$225,000 where we by our agreement should only have paid interest on \$210,000. This interest amount to March 18, 2017 equals \$3,000 and is accumulating at \$4.11 per day.

There were two transactions involving 54 Fairbanks Street. On the initial agreement on March 19, 2015 to pay the interest on the mortgage of \$225,000 held by Bower Mortgage Services of \$225,000, a cheque of \$810 was given by us to cover future payments on municipal taxes and insurance. A further transaction occurred on September 17, 2015 where we requested additional funds of \$50,000 from Bower Mortgage Services. \$1,620 was deducted from the proceeds to cover municipal taxes and insurance. On December 20, 2016, Shirley Murphy's husband Herman Murphy requested \$970 additional for insurance. The tax records only recorded an \$800 payment in October 2015. We have requested and have not received a reconciliation of \$3,400 paid out and the remittances by Shirley Murphy.

36. This document was signed by Russell, Marco and Odilio. The Claimant's theory of the case is that the \$15,000.00 "debt" was assigned by Marco and Odilio to Russell before they released any claims arising from the

original transaction - even though the purported assignment was not known to McGillivray or his clients.

37. I have a lot of difficulty with this theory.
38. The first point is that this presumes that there was a stand-alone \$15,000.00 debt owed by Shirley to either or both of Marco and Odilio. Debts, as a type of *chose in action*, are assignable, with notice to the affected party: s.43(5) *Judicature Act*:
- 43 (5) Any absolute assignment by writing under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be deemed to have been effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee if this subsection had not been enacted, to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.
39. In my opinion, what Marco and Odilio had was an arguable right to insist that the original transaction be closed, and that the \$15,000.00 deposit be properly credited and not forfeited. Perhaps they could have assigned the original Agreement of Purchase and Sale to Russell. As I have indicated, the original deal was probably technically alive as neither party had insisted on a closing date, and tendered payment (or a deed) on that date, to put the other party in breach of contract. Instead, what they did was to ignore the original deal, in a sense, and make a completely new

agreement. Under that scenario, there was a good argument to be made that the \$15,000.00 deposit was forfeited.

40. Marco and Odilio also had a right to argue, before the closing, that the \$15,000.00 deposit ought to have been factored into the adjustments on the sale to Russell's company. This argument could have been advanced by Paul, acting on behalf of Russell, or directly to McGillivray. It might or might not have been successful. Certainly, there is no guarantee that McGillivray or his clients would have seen it the same way.
41. Even if one treats the \$15,000.00 as a "debt," which I do not accept, I would have difficulty with the tactic of Odilio "assigning" this debt, without notice to Shirley, just hours before signing a release that McGillivray and his clients took at face value as relieving Shirley of any liability arising out of the original transaction. This was not an act of fair dealing. While Russell might have thought he was being clever in devising this scheme, I see it as devious.
42. It is ironic that Russell relied on the proposition that parties have an obligation to carry out their contractual obligations in good faith. His own actions were not done in good faith.
43. The bottom line, however, is that I do not believe that there was a "debt" or other *chose in action* between Shirley and Odilio or Marco, that was capable of being assigned. Russell's choice of language in the documents he drafted suggests that he believed there was some type of lender/borrower relationship between Odilio/Marco and Shirley. This is a wrong characterization.

44. A little timely legal advice might have made a difference, in the sense that the status of the \$15,000.00 might have been treated differently had it been brought up in a timely way. By now, it is too late for that issue to be raised and anything of the \$15,000.00 salvaged.

45. For all of the foregoing reasons, this claim must be dismissed.

Eric K. Slone, Adjudicator