

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Behan v. Waugh*, 2018 NSSM 34

Claim No: SCCH 468642

BETWEEN:

TREVOR BEHAN

Claimant

-and –

DONALD WAUGH, JUDY WAUGH and
OLYMPIA TRUST COMPANY

Defendants

Trevor Behan – self represented.

Donald Waugh and Judy Waugh – self represented.

Olympia Trust Company – not appearing.

Editorial Note: The electronic version of this judgment has been edited for grammar, punctuation and like errors, and addresses and phone numbers have been removed.

DECISION

Background

- (1) The Claimant, Trevor Behan, was a mortgagor in a private mortgage of funds loaned to him by the Defendants, Donald Waugh and Judy Waugh. The mortgage was held inside the Waughs' Tax Free Savings Account ("TFSA"), which was administered by the Defendant, the Olympia Trust Company.
- (2) The mortgage was dated October 7, 2014. It was for a two year term and a maturity date of November 1, 2016. The sum advanced was \$86,500 at 10% per annum. The mortgagor was required to pay a number of fairly substantial fees not typically found in a conventional mortgage. It also contains a number of items which were penalties

but do not figure in these reasons. Both parties had legal representation at the time of the transaction.

- (3) When the mortgage matured, the parties began the process of negotiating a renewal. The assorted fees were clearly a sticking point for Mr. Behan. In addition, Mr. Behan had stated several times to the Waughs that he found a buyer for the property. That turned out not to be the case prior TO June 2017.
- (4) As the property was not sold and the mortgage not paid out, the Waugh's renewed the mortgage at the same rate rather than proceed to foreclosure. Mr. Behan was advised of this decision by the Waugh's solicitor on November 9, 2016. There was no other communication until June 2017 when Mr. Behan found a buyer for the property.
- (5) When the property sold, Mr. Behan protested several of the fees once the mortgage was paid out. The Waugh's response was that they could renew the mortgage at their option and in any event, by his actions Mr. Behan accepted the new contract.
- (6) Mr. Behan seeks reimbursement for renewal fees, early payout payments and agreed upon "NSF" charges.
- (7) For the reasons set out below, I find the Claimant accepted the offer on the terms proposed in their correspondence. The offer involved only a payment of renewal fees and NSF charges. The payout penalty was waived. I also find there was agreement on the NSF fees. The Claimant is successful but only in part.

Liability of Olympia Trust Company

- (8) The mortgagee is shown as "Olympia Trust Company, Trustee". The trust company was served by way of their registered agent in Nova Scotia, who is a solicitor. Curiously, they did not file a defence. Nobody appeared for the trust company at the hearing, or communicated their intentions with the Court.
- (9) The parties have both testified the mortgages were being held inside the Waughs' TFSAs. The Claimant has not shown how Olympia Trust Company was directly liable for the actions of the Waughs. While there was no trust document placed in evidence, I find the evidence establishes on the balance of probabilities that Olympia's role was as an administrator of the mortgage and its funds. In essence, it was an intermediary. I find Olympia Trust Company was not a party to the mortgage other than in a representative capacity. The Claim against that Defendant is dismissed without costs.

Issue

- Has the Claimant proven the Defendants were overpaid and, therefore, unjustly enriched?

The Evidence

- (10) Trevor Michael Behan testified that he took out a loan with Donald Waugh to finance his property at 1483 St. Margaret's Bay Road. The principal of the loan was \$86,500. He tendered into evidence a statement showing how the mortgage was created and the funds advanced. The term ended on October 31, 2016. As the maturity date neared, Mr. Behan testified that he did not want to pay the renewal fee (2% of the outstanding amount) and the parties began negotiations. There is evidence of several offers and counter offers.
- (11) When it became clear the parties were not going to reach agreement, Mr. Behan received a notice indicating he was in arrears and no new terms had been agreed upon. The Waughs indicated there were several options available. He received a letter from their solicitor, Lloyd Robbins, demanding payment in full or notification that the mortgage would be renewed. When the property sold in June, he protested the fees which were taken, but the mortgage was still paid out so that it could be released to complete the sale.
- (12) Judy Waugh testified that the mortgages were assets held inside Tax Free Savings Accounts with Olympia Trust Company. She testified the payout fees are charged at 2% of the balance. In October 2016, the parties thought the property had sold, however that did not materialize. They opted to renew the mortgage.
- (13) The fees payable under the mortgage can be summarized as follows:
- | | |
|-------------------------|----------------------|
| Renewal | 2% |
| NSF/Stop Payments/Late: | \$100.00 |
| Early payout: | Two months' interest |
- (14) The mortgage contains the following statement regarding renewal of the mortgage:
- “The mortgage shall only be renewed at the sole option of the mortgagee.”
- (15) Further in the mortgage, it states the following:
- “At the mortgagee's option, the mortgage may be renewed by one or more written agreements with the borrower on such terms as our (*sic*) agreed to by both parties.”
- (16) The Waughs interpreted these provisions as authority to allow them to unilaterally impose a renewed mortgage. In my view, that is not correct.
- (17) By late May 2017, the parties became aware of another potential sale. At that time, the principal owed was \$90,865.66. Olympia Trust provided a statement confirming payments received to date and an acknowledgement of an overpayment of NSF fees.

- (18) Ms. Waugh submitted there were no arguments from Mr. Behan. He did not protest any of the fees until after the mortgage was paid out.
- (19) She believed her options were to foreclose or renew at the mortgagees' option. They renewed the mortgage and capitalized the renewal fee.
- (20) For his part, Mr. Behan submits that the Waughs made no efforts to demand after December. They took no steps toward foreclosure. He did not renew it. The document was not entered into with his consent. He submits that he paid under protest.
- (21) Ms. Waugh indicated that they renewed the mortgage on good faith. Mr. Behan did not protest whatsoever when the mortgage was paid.
- (22) Neither position is fully sustainable.

The Law

- (23) There are numerous cases governing the interpretation of contracts. In essence, they are principle that parties who enter into a contract intend to say what they mean. Thus, any terms contained in a contract are to be given their ordinary meaning.
- (24) The second issue is to determine what conduct can be construed as acceptance of contractual terms.
- (25) The onus is on the Claimant to prove his claim on the balance of probabilities.

Findings

The Renewal Clause

- (26) As noted above, the mortgage contained two renewal clauses, one providing the mortgage can be renewed at the sole option of the mortgagee while the other required a written agreement with the borrower.
- (27) A renewal clause provides a number of useful purposes. The most significant, as noted by the Supreme Court of Canada in *Manulife Bank of Canada v. Conlin*, [1996] 3 S.C.R. 415, is to put subsequent encumbrancers on notice that the mortgage may be renewed at the mortgagee's option. In addition, since a renewal is in essence a new agreement, it confirms the mortgagee is not bound if it does not wish to be party to the mortgage any longer.
- (28) I find the second clause is a more specific version of the former. Perhaps one of the clauses was intended to be deleted. In any event, it does not authorize the unilateral imposition or renewal of a mortgage at any point. Further, any extension must be in writing.

Acceptance

- (29) In order to find a valid contract, there must be offer and acceptance.
- (30) G.H.L. Fridman in *The Law of Contract in Canada*, 6th ed. (Toronto: Carswell, 2011) at 25 stated as follows:
- “...the common law requires a clear manifestation of agreement. The mechanism of that agreement is contained in the notions of offer and acceptance. Without an offer and its acceptance, there is no contract. If either or both is missing, there is no proof that the parties were ever *ad idem*, that is, had reached a stage in their negotiations in respect of which it could be said that they had shown not only an intent to be bound together, but the nature, extent, and manner of their being bound so as to give rise to a legally recognizable and enforceable contract. The parties will not be bound *unless* they intend to be bound, nor will they be bound *until* they intend to be bound. Their intentions in these respects are indicated by the features of offer and acceptance.”
- (31) The cases have also found that a contract may be deemed to have been accepted in cases where silence has caused the other party to take action (or in this case, inaction) as a result. I find there was acceptance to the renewal based on the correspondence between the parties and as noted below, the silence on the fees and continued payment of the mortgages.
- (32) As noted above, the parties began negotiating the renewal of the mortgage including liability for certain fees. There were arrears for September’s payments and other factors for consideration. Several e-mails were exchanged:
- October 31, 2016 (10:53 am): The Waughs offer a renewal, forego the early payout penalty and applicable renewal fee.
- October 31, 2016 ((1:33 pm); Mr. Behan suggests he will reply “in a few days”, and proposes a 7% interest rate.
- October 31, 2016 (4:26 pm): In effect, the Waughs reply they have not changed their previous offer.
- November 21, 2016: The Waughs look for a reply.
- December 9, 2016: The Waughs’ solicitor advises the December mortgage payment was taken and the terms renewed.
- (33) There is no evidence of a further response from Mr. Behan until June 2017. The documentation in evidence shows he did not sign the extension documents sent by Olympia. These documents show that the mortgage payments continued on schedule until it was paid out.

(34) In my opinion, this constitutes acceptance of the offer. The mortgage was renewed on the same terms except:

- The renewal fee of \$1730.00 would be applied and capitalized.
- The early payout fee (later shown as \$1441.66) would be waived.

(35) Further documentation with the trust company shows a \$273.84 overpayment on NSF fees.

(36) I find the Defendants took and retained the early payout fee and overpayment contrary to the terms of the contract and, therefore, they are in breach. I am not satisfied the payout of the mortgage at closing was sufficient to show a waiver of liability on his part. The tacit acceptance of the offer allowed the Defendants to collect on the mortgage without the time and expense of foreclosure. They derived a benefit and must be bound by the contract.

(37) I find the Claimant has proven entitlement to the following:

Early Payout fee:	\$1441.66
NSF fees	\$ 273.64
Prejudgement Interest	\$ 30.30
(4% from June 30 to date of the hearing)	
Costs	<u>\$ 99.70</u>
Total Judgment	\$1845.30

Summary

(38) For the foregoing reasons, I find the Defendants, Donald Waugh and Judy Waugh liable to the Claimant, Trevor Behan for \$1845.30. The claim against Olympia Trust Company is dismissed without costs.

(39) An order shall be issued accordingly.

Dated at Halifax, NS,
on February 23, 2018;

Gregg W. Knudsen, Adjudicator

Original:	Court File
Copy:	Claimant(s)
Copy:	Defendant(s)