

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *Kimm v. Almadina International Limited*, 2021 NSSM 62

SCCH 507615

BETWEEN

JOANNE KIMM AND JOHN KIMM

CLAIMANT

AND

ALMADINA INTERNATIONSL LIMITED

DEFENDANTS

Heard: December 9, 2021

Final Submissions – December 17

For the Parties: Claimant – Alexis Muscat, Articled Clerk

Defendants – Kent Noseworthy, Counsel

Decision – December 22, 2021

DECISION & ORDER

[1] The Claimants seek damages resulting from an alleged breach of contract by the Defendant. For reasons outlined below, I find the Defendant breached its contract with the Claimants by unilaterally terminating the agreement.

[2] Joanne Kimm, Yasser Mohammed, owner of the Defendant and Yasser Khalaf, the Defendant's real estate agent testified. There are few disagreements on the facts as the crucial evidence is in emails among the parties and their representatives. The evidence is outlined below. It is personalized to a single witness if necessary to explain that person's role or perspective.

[3] Joanne Kimm testified that by standard form agreement of purchase and sale dated May 29, 2020, the Claimants agreed to purchase from the Defendant a home under construction at 158 Honeygold Drive, Spryfield for \$324,000 (including HST).

[4] A \$5000 deposit was paid.

[5] The closing was to be on November 17, 2020.

[6] Upgrades and the costs associated with them are listed in Schedule E to the Agreement.

[7] By amendment dated June 12, 2020, the closing date was moved to October 23, 2020, a date coinciding with the Claimant's arranged mortgage financing.

[8] On October 8th, Ms Kimm and her husband drove by the construction site. They were concerned the home may not be finished by October 23. That resulted in calls to their realtor and subsequent discussions with the Defendant's real estate agent. Their lawyers became involved.

[9] The Defendant proposed to amend the closing date to November 17, but that was not immediately possible as the Claimant's financing was for the October closing date. A change would necessitate resubmitting documents to their lender.

[10] Options were discussed and a further amendment to the Agreement was made on October 26, 2020. That agreement contains the clauses that are the subject of this dispute:

3. This agreement is conditional upon the buyer securing financing no later than November 10 2020. Should notice be given to the contrary, the buyers (sic) deposit will be returned without interest or penalty.
4. The closing date to be on or before November 30 2020.
5. seller to provide the buyers \$1500 (One Thousand and Five Hundred) for living accommodation to be paid by October 30, 2020

[11] Ms. Kimm stated because they had to vacate a rental property, they moved to a hotel in Halifax. The Defendant provided the \$1500 on November 2.

[12] The Claimants applied to extend the date for their financing. On November 6, 2020, they received and signed a Mortgage Commitment from their lender relating to their purchase of 159 Honeygold Drive.

[13] Ms. Kimm stated at that stage, though the financing was in place, there were concerns about completion of the upgrades. The Claimant's lawyer, Catherine Walker QC emailed the Defendant's lawyer, Kent Noseworthy on November 10 at 11:09 am:

Hi Kent

Just an update on this one.

Our financing is up today on this one. Our clients' lender is indicating that all looks good but he does not expect to have final approval until Monday so we will need an extension of financing from today until at least Monday and would suggest that perhaps, knowing lenders, Tuesday might be a better day to pick.

Secondly an issue has arisen with respect to the deck. It has been constructed of wood but the Schedule E from the agreement (see below) clearly indicates that it is to be composite and an extra was agreed to for this item.

Can you confirm these two matters with your client please? Once in place the two agents would be only too pleased to execute on that.

Many thanks

Cathy

[14] Mr. Noseworthy replied and addressed both issues. Germane is his comment about the financing. He stated at 1:53 pm:

I understand the realtors are discussing the financing extension and I will leave it to them.

[15] Ms Kimm stated the Claimants were prepared to close, even without an extension to the formal financing terms, because they had their commitment in hand. The issue she wanted addressed related to the Schedule E items.

[16] There were emails between the parties' realtors earlier on November 10 discussing both the deck and the financing.

[17] Late on November 10, 2020, the Claimants' real estate agent presented a formal request for an extension of time to confirm financing. It was not accepted.

[18] Yasser Khalaf, agent for the Defendant received the request for the extension. On November 12 at 8:28 am he emailed the Claimants' agent:

...Mary, I sent you rejected amendment on Tuesday could you please confirm the status of the deal now? As the deadline was til Tuesday

[19] Mary replied at 9:07:

The rejected Amendment was delivered late on Tuesday, yesterday was a no activity day and we'll follow up today once my clients have had a chance to speak with their lawyer/lender – they need advice before proceeding in any direction ... I would suggest, a response of some sort is forthcoming today.

[20] At 11:34 Mr. Khalaf indicate 'You have until 12:00 noon today to give us an answer as requested by the builder.'

[21] At 12:23, the Claimants' realtor emailed Mr. Khalaf with copies to Mr. Noseworthy and Ms Walker:

I'm pleased to report that we are in a position to firm up the transaction, closing on or before 30 November 2020.

We look forward to seeing you at pre-close

[22] At 2:57 that afternoon, Mr. Noseworthy emailed Ms. Walker:

I have spoken with the seller and their realtor, Yasser Khalaf.

This is my understanding of the transaction. The Amendments of October 26, 2020 made the Agreement conditional on the purchasers securing financing by November 10th, 2020 and should notice to the contrary be received the deposit was to be returned and the transaction terminated. You sent me an email on November 10th advising that the Purchaser did not yet have financing and asking for an extension which was further contained in an Amendment from Mary Clark K, the realtor. This request was rejected by the seller.

Therefore the transaction is terminated and our client will be instructing the realtor to return the deposit to the purchasers.

....

[23] At 11:24 the next morning, November 13, Ms Walker emailed Mr. Noseworthy:

...

My clients view is that no notice was provided as per the October 26th amendment.

My clients consider the deal firm and binding and the closing will proceed as scheduled.

[24] Mr. Noseworthy's reply came at 2:57 pm. He reiterated that 'based on the email of November 10th, 2020, that said financing had not yet been confirmed and the buyers were requesting an extension' that 'Almadina hasn't changed (sic) that the Agreement of Purchase and Sale is terminated.'

[25] Ms. Kimm was shocked by the receipt of this message. It had been their intention to close the purchase transaction. Their lawyer reiterated this position to the Defendant's lawyer, but the Defendant maintained its position the contract was at an end.

[26] Then on the advice of their realtor the Claimants provided a standard form Termination Agreement to the Seller's realtor, which they believed was necessary to obtain the return of their deposit.

[27] With the aborted sale the Claimants stayed in a hotel suite for over two months and incurred various expenses totalling \$9038.83. They returned to the same building in Bedford they had vacated in anticipation of their house purchase. The Defendant did not challenge these expenses or suggest the Claimants had not properly mitigated their damages, which related to the failure of the purchase to close.

[28] The Defendant eventually returned the property at 158 Honeygold Drive to the market after using it as a model home in the subdivision where it was located. It sold for \$456,000. The Claimants seek to recover as damages the increase in value of the home above what they were to pay for it.

Analysis

[29] In analysing contracts, one looks to the words used in the contract to determine the respective obligations of the parties. Here, the provision needing to be assessed is the one dealing with the requirements relating to financing in the amended agreement of October 23, 2020.

[30] In particular, the Court must interpret, this clause:

This agreement is conditional upon the buyer securing financing no later than November 10 2020. **Should notice be given to the contrary**, the buyers (sic) deposit will be returned without interest or penalty (Emphasis added)

[31] In considering this amendment the context in which it was made is relevant. The original purchase was to close on October 23, but because the house was not

ready an extension needed to be obtained. That was a disadvantage to the Claimants because they already financing in place for the original date, yet rather than pursuing a remedy under the original agreement, they consented to amend the closing date, reapply for financing and receive a living allowance from the Defendant.

[32] After the amendment the Claimants applied for and received confirmation of financing via a Mortgage Commitment. They were also concerned about the Schedule E upgrades they were paying for.

[33] Thus, they instructed their lawyer to raise both financing timing and the upgrades with the Defendant. Ms. Walker did this on November 10. I read that email in the context of Ms. Kimm's evidence about the circumstances and the exchanges that had taken place earlier in the day between the real estate agents. However, I must interpret it based on the words used.

[34] Ms. Walker states:

Our financing is up today on this one. Our clients' lender is indicating that all looks good but he does not expect to have final approval until Monday so we will need an extension of financing from today until at least Monday and would suggest that perhaps, knowing lenders, Tuesday might be a better day to pick. Secondly an issue has arisen with respect to the deck. It has been constructed of wood but the Schedule E from the agreement (see below) clearly indicates that it as to be composite and an extra was agreed to for this item. Can you confirm these two matters with your client please? Once in place the two agents would be only too pleased to execute on that.

[35] Counsel for the Defendant, the recipient of the email, would have me find that this email constituted 'notice to the contrary' as was required by the October 23 amendment.

[36] However, that was not his immediate reply, as he responded to Ms Walker with his belief that discussions were ongoing between the agents. He said nothing about her earlier message constituting a notice to terminate the contract or advice that financing was not in place. I can find no words in this message that says there is no financing. Rather, I read it as a request for additional time to finalize both details of the financing and the Schedule E items.

[37] The Claimants' agent formalized that request when she presented an amendment to the Defendant's agent, which the Defendant rejected. Yet discussions continued and on November 12, Mr. Khalaf, the agent, discussed confirming that arrangements were in place with the Defendant's agent and said they had until noon to advise of their position.

[38] This conduct of the Defendant's agent does not reflect that the Defendant considered the agreement terminated two days earlier. The language used by Mr. Khalaf, on behalf of the buyer, apparently with his instructions, was designed to keep the deal alive.

[39] Though a few minutes later than the noon deadline, the Claimant's agent advised the purchasers could 'firm up the deal'.

[40] After receipt of the email from the Kimm's agent Mr. Noseworthy advised Ms Walker his clients claimed the deal had been terminated by her email message on the 10th of November.

[41] The Defendant claims Ms. Walker's email constituted 'notice to the contrary', as was required under the October 23rd amendment. I respectfully disagree.

[42] Because the words used do not say there is no financing but are more akin to negotiating an extension; because the Claimant buyers made a formal request for an extension without stating financing was not in place; because two days later the realtors, after the rejection of the proposed extension, were engaged in discussions to keep the deal alive, I find the Claimants' lawyer's email did not advise the Defendants there was no financing.

[43] The email from Ms. Walker did not terminate the agreement.

[44] The conduct of both parties constituted a waiver of the deadline in the October 23rd amendment, with both sides appearing to want the same thing - a closing.

[45] The notice given by Mr. Noseworthy on the Defendant's behalf indicating the Defendant considered Ms. Walker's November 10th email as a notice regarding no financing constituted a termination by the Defendant and a breach of contract.

[46] The Defendant submits the formal standard form termination agreement signed by the Claimants constitutes termination by them. Because the Defendant had already done so unilaterally, I accept the evidence of Ms Kimm that she believed signing the notice to be something they had to do to obtain the return of their deposit. The Defendant had already terminated the agreement; the Claimant's were simply seeking what they were immediately entitled to

Damages

[47] The purpose of damages for breach of contract is to put the innocent party in as good a position as he would have been in had the contract been performed. Here there are two elements to be considered – the living expenses resulting from the Defendant’s breach and the increase in value or the equity the Claimants would have realized had the closing occurred.

[48] The Claimant’s had to spend money to live after the Defendant breached the contract. They had vacated their apartment. They returned to the same property in a couple of months and thus they have appropriately mitigated their damages. They are entitled to receive \$9038.83 for the expenses they incurred and would not have spent but for the Defendant’s breach of contract.

[49] In its brief the Claimants helpfully provide support for their proposition that increased value in property can support a claim for damages. Ms. Muscat states:

Damages for breach of contract must be foreseeable. It is well-established that the lost value of a property is a reasonably foreseeable damage for a breach pertaining to real estate transactions:

As a general proposition, the damages to which a purchaser is entitled in a case outside the *Bain v Fothergill* rule are basically measured by the difference between the contract price and the market price of the land at the date of the breach, normally the date fixed for completion, or having regard to the facts of the particular case, by reference to a period subsequent to the date of breach. In fact, in certain cases, damages have been calculated using the value of the land as of the date of trial as a reference point.

The rule requiring damages to be ascertained as at the time of the breach does not seem to be inflexible. However, the facts of the particular case may require the application of the common law principle that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed.

Victor Di Castri, *Law of Vendor and Purchaser*, 3rd Edition “Remedies of Purchaser: Recovery of Damages by Purchaser” 18.V at §18:18

[50] It is well known, and I can take judicial notice of the fact, that in 2020 and 2021 housing prices in Halifax have escalated significantly. The Defendant took advantage of that rising housing market to sell 158 Honeygold at a price higher than the Claimants would have paid. Under the principles noted above for the calculation of damages, the increase in value would have accrued to the Claimants’ equity. Though the jurisdiction of this court limits the compensation that can be based in that increased value, nevertheless the Claimants are entitled to the full amount this Court can grant.

[51] The Claimants are entitled to an order for damages for breach of contract by the Defendant in the amount of:

- a. Out of pocket expenses - \$9038.83
 - b. Loss of increase value in the property at 158 Honeygold Drive of \$15961.17.
- for a total of \$25000.

[52] Costs are limited to the filing fee for this claim which is \$199.35.

[53] If an order is required counsel for the Claimant should prepare it and I will sign it.

Dated at Halifax, Nova Scotia, December 22, 2021.

Darrel Pink
Small Claims Court Adjudicator