

**IN THE SMALL CLAIMS COURT OF NOVA SCOTIA**

**Citation: *Osborne v. Mydean*, 2022 NSSM 6**

**Date:** 20220124

**Claim: No.** SCT507411

**Registry:** Truro

Between:

Crystal F. Osborne

CLAIMANT

and

Kamal Mydean

RESPONDENT

Adjudicator: Julien S. Matte

Heard: October 18, 2021, January 10 and 19, 2022 (via teleconference)

Appearance: Crystal F. Osborne, self represented, for the Claimant  
Kamal Mydean, self represented, for the Respondent

Matte, Adjudicator,

[1] The parties entered into an agreement for the lease and eventual purchase of a house ("Property") owned by the Defendant. Despite mutual intentions of completing a sale, things did not go as planned. The Claimant says the Defendant ended their Agreement after she completed renovations to the Property by increasing the monthly payments beyond her means. The Claimant asks for \$25,000 in damages.

[2] The Defendant claims the Claimant failed to obtain financing as required by

the terms of the Agreement thereby ending the Agreement. Further, the Defendant says that the Claimant's renovations caused damage to the Property. The Defendant asks that the claim be dismissed and abandoned his counterclaim at the hearing.

[3] The Defendant has been renting out properties since the 1970's and estimated he has rented out over 40 units during that time. The Defendant testified that he purchased the Property in 2009 for approximately \$25,000 with the intention of using it as a rental property. At the time, the Defendant replaced the septic system, converted the heating from oil to electric, did needed electrical work, renovated two bathrooms and refurbished flooring with an estimated total cost of over \$75,000. After completing the work in around 2011, the Defendant rented the Property for \$850 per month until the Claimant moved in.

[4] The Claimant signed the Agreement after seeing an ad on Kijiji which advertised "5 bedroom house lease to own in Londonderry". In late October 2016, the Claimant's spouse replied to the ad by asking " Hello your ad said it for rent to own. How much would u need to do this". The Defendant replied:

"just \$5000 down and 926.00 a month for 15 years. That is only 76.00 more a month and you will own in 15 years."

### **Agreement**

[5] The parties met and the Claimant was given the "Standard Lease-Purchase Agreement" which both parties signed without amendment. The parties entered into an arrangement whereby the Claimant would "lease" the property for a period of three years from January 1, 2017 to January 2020 at the rate of \$929.66 per month with the intention that the Claimant would purchase the property at the agreed upon price of \$115,000.00. A down payment of \$5000 was paid by the

Claimant to the Defendant at or before the signing of the Agreement.

[6] The Claimant testified that the \$929.66 was calculated by the Defendant by using an online mortgage calculator although no schedule of payments was attached to the Agreement. A letter from the Defendant confirms that the amount was arrived at by applying a 6.1% interest rate amortized over 15 years.

[7] The Defendant described the Agreement as a purchase and sale agreement and a mortgage for the Property. The Agreement is three pages long with no schedules with the parties defined as "landlord" and "tenants" and includes the following:

- a. A requirement for the tenant to insure personal property (page 1);
- b. A list of ten "[s]ervices that are the responsibility of the tenants" (page 2) including:
  - i. Garbage disposal
  - ii. Keep building in excellent repair
  - iii. Keep property insurance;
  - iv. Regular maintenance of property;
  - v. Keep eye on basement flooding;
  - vi. Ensure wood stove is put out
  - vii. Procure drinking water from elsewhere
- c. A list of "[a]dditional Agreements and conditions" (page 3) including:
  - i. Property is "as is" with no repairs proposed by seller;
  - ii. the lease is for the Tenants and Landlords;
  - iii. caution above the use of the wood stove;
  - iv. legal liability of landlord during "term of occupancy";
  - v. general clause with respect to the binding nature of the "[l]eases and agreements" on the "seller's" heirs.

[8] However, the Agreement also states:

The purchase price of the property is \$115,000.00 and a sum of \$5,000.00 has been paid as down payment.

The landlords will lease the above premises to the tenants on a lease to own basis for a term of three years.

The lessee has to (sic) option to obtain the balance of purchase price on the 3rd anniversary from a financial institution as they wish to pay off the mortgage.

The tenants will pay the sum of \$929.66 per month on the 1st each month for the term starting the Jan 1st 2017 to continue to Jan 1st to Jan 2020.

[9] The Agreement further stipulates at the top of page two that:

The seller agree to sell the property to the tenants, should the tenant make a substantial deposit within 3 years of tenancy and the landlord will consider holding a first mortgage at a specified rate of interest for a fixed term of five years.

[10] Title for the Property never transferred to the Claimant.

[11] Taking into account the four terms above and the parties stated intentions, the Court finds that the Agreement is a Lease with an option to purchase the Property at the end of the lease term. Unfortunately in the absence of clear terms, the Agreement leaves much to be desired.

### **End of Lease Term**

[12] The parties' recollection differs on what occurred at lease end in December 2019. The Claimant testified that the date came and went and she continued to make the payments under the initial lease without addressing it with the Defendant. She further testified that given the continued lease, she assumed that she believed that she now "owned" the property and proceeded with the renovations on that basis. The Agreement does not address circumstances where the option to purchase is not exercised at lease end.

[13] The Defendant testified that he contacted the Claimant by phone at the end of 2019 and when the Claimant indicated she could not get financing, he offered to continue the lease for more one year to the end of 2020.

[14] Between January 2020 and December 2020, the parties continued their arm's length relationship with neither party engaging with the other while payments continued to be made. The Claimant continued under the impression that the terms of the Lease would continue until the Property was paid off in twelve years and the Defendant testified his understanding was that the lease arrangement would continue until 2021 and then the option to buy could be exercised by the Claimant at that time.

[15] The Court finds that by their conduct, the parties agreed to continue of the Lease beyond December 2019. The agreement continued until the Defendant contacted the Claimant in January 2021. The Agreement is not a purchase and sale agreement but rather a Lease with an option to purchase at a specified price. In order for the Claimant to purchase the Property, additional agreements would have to be signed, a deed and a mortgage prepared.

[16] Although the Claimant testified that she was worried about the end of the three year term, and even if the Court accepts that the Claimant's testimony that there was no discussion about the renewal of the lease in and around December 2019 and taking into account acceptance of the continued lease payments, the Claimant chose not to pick up the phone to clear up the state of the lease with the Defendant and clear up her the ownership of the Property.

[17] Instead, the Claimant started renovations.

## **Pre-Agreement Representation**

*"Just \$5000 down and \$926.00 a month for 15 years. That is only \$76.00 more a month and you will own in 15 years. "*

[18] The Claimant testified that she relied on the above representation, which was submitted in a series of texts, and was the reason she assumed that the Agreement was converted to a purchase and sale agreement when the lease term expired at the end of 2019. The Claimant also testified that she was initially told by the Defendant that she had nothing to worry about with respect to the financing, as long she continued the payments, the house would be hers.

[19] Representations made outside a written agreement cannot be incorporated into a written agreement where the representation "would add to, subtract from, vary, or contradict a contract that has been wholly reduced to writing" (See discussion on parol evidence rule in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at 59). However, the admission of surrounding circumstances does not offend the *parol evidence rule* and can be considered in the interpretation of a contract (*Sattva* at 60-1).

[20] The representation that the Property would be the Claimant's after 15 years if the Claimant followed the terms noted was made in response to a direct inquiry as to what it would take in order for the Claimant to "rent to own" was a direct circumstance that led to the signing of the contract. The representation by the Defendant, made in the context of a three years lease with a purchase option, appears negligent at best. Negligent misrepresentation is where someone provides misleading information that induces another to enter into a contract making him liable in damages.

(See *Hedley Byrne* as quoted by the Court of Appeal in *Woolridge* and adopted in *CJBC v. Dorey* 1991 CanLII 4253 (NSSC)). The representation is a direct inducement to the Claimant, by suggesting that for a small additional monthly payment of \$76, the Claimant could own the Property.

[21] The Agreement, on the other hand, prescribes a lease term of three years and stipulates that at the end of the lease term, the Claimant has the option to obtain third party financing to pay off the balance of the purchase price or:

The seller agree to sell the property to the tenants, should the tenant make a substantial deposit within 3 years of tenancy and the landlord will consider holding a first mortgage at a specified rate of interest for a fixed term of five years.

[22] There are no other clauses in the Agreement that deal with financing of the purchase option. The above clause, on its own, is very vague giving the Defendant the discretion to offer any terms he desired at the end of lease. All the Agreement gave the Claimant, for the additional \$79.66 per month plus a \$5000 down payment, was an option to purchase at the specified price at the end of the lease term not a guarantee of financing by the Defendant.

[23] Although the financing term above is vague, the existence of a three year term was not. The evidence shows that both the parties knew that at the end of three years, the parties were to do something, namely the Claimant was to obtain financing to purchase the property. There is some indication from the parties that the Claimant's lease payment made during the term would be applied to the purchase price but no method was discussed or agreed to. All that was agreed to was the three year lease with an option to purchase.

[24] The Claimant testified that she was nervous when the end of the term came. Her circumstances had changed as she was separated from her spouse and of

limited means, raising four children. The Defendant was aware of her circumstances as the Claimant's spouse had briefly rented another property from the Defendant and at the Claimant's request, the Defendant had signed forms relating to government benefits. However, no evidence was led to suggest that the Claimant was unable to meet her lease payments.

[25] Evidence was also given by the Defendant that he believed that he could sell the Property for \$150,000 if it had been in a marketable state. Estimates and testimony from witnesses were tendered claiming approximately \$20,000 in needed repairs. The Defendant testified that he spent \$40,000 before renting it again after the Claimant left.

[26] Given the Court's finding that the Agreement is a Lease with an option to purchase rather than a purchase and sale agreement or a mortgage as the Defendant contends, there could be no sale until the option was exercised. Had the option been exercised, the parties may have negotiated or agreed to a lower purchase price to reflect the initial lease payments. However, since the option was not exercised, no equity could accrue.

[27] By January 2021, parties addressed the purchase option with the Claimant seeking financing through a third party financial institution but she could not get approved. As a result the Defendant offered the Claimant a further term, initially requiring a second deposit plus the monthly rate but eventually settling on a monthly amount payable of \$178 without the need for a further deposit. Given, her financial situation, the Claimant could not afford the increased amount. As a result, the Defendant granted the Claimant a short term rental period until the end of June 2021 at the rental rate of \$850 monthly.



[28] The Court finds that the Defendant was negligent in making the pre-contract representation. This negligent misrepresentation induced the Claimant into signing the Agreement which caused her damages.

## **Damages**

### *Down Payment*

[29] The parties agree that the Claimant paid a \$5000 down payment towards the purchase of the Property. The Defendant testified that the amount paid was a down payment and not a security deposit. Generally a down payment serves as security during a pre buying period while conditions such as inspection and financing are fulfilled to allow a sale to close.

[30] Given that the only term of the Agreement that needed to be fulfilled by the Claimant in order to exercise the option to purchase, to obtain financing, was not fulfilled, the Court finds that the Claimant is entitled to the return of the \$5000 down payment.

### *Equity*

[31] Both parties spoke in terms of the Claimant gaining equity in the Property with the Defendant testifying that the balance of the "mortgage" sat at approximately \$95,000 giving the Claimant approximately \$20,000 in equity in the Property.

[32] Equity generally refers to the estimated residual value of a property once all liabilities against the property are taken into account. For example, if a homeowner appraises her property for \$100,000 and at the time of the same a bank holds a mortgage against the property for \$30,000, the homeowner is said to have \$70,000 in equity. If that same homeowner elects to rent out the property, the renter has no

right to title and no equity.

[33] Given the Agreement, the Claimant was closer to a renter than a homeowner. At all times, the Claimant had no title to the Property but only a right to occupy it for the specified term. The parties' reference to equity in the context of this term is a reference to the application of the option to purchase at the end of the term as extended to the end 2020. Based on the evidence, the Claimant's "equity" stood at between \$15,000 and \$20,000 based on the portion of the lease payments that might be used to reduce the purchase price having regards to the interest rate applied. However, the "equity" could only crystallize if the option to purchase was exercised. Without the exercise of the option there was only the promise of equity.

[34] Had the Claimant rented rather than entered into the Agreement, she would have paid \$850 per month from January 2017 through to March 2021 for a total of 51 months. From April to June 2021 the Claimant paid the rental rate. The difference between the lease rate and the rental rate is therefore \$4,062.66.

[35] The Court finds that while no equity accrued, the Claimant is entitled to damages for the Defendant's negligent misrepresentation and awards the sum of \$4,062.66. This puts the Claimant back to where she would have been had she chosen to rent the property instead of enter into the Agreement as induced by the Defendant's negligent misrepresentation.

### *Renovations*

[36] The bulk of the claimed damages by the Claimant is for renovation costs incurred in 2020. In the summer 2020, the Claimant decided to take on numerous renovations to the house. The renovations included the kitchen, the floors,

removing lath and plaster walls, installing insulation, drywalling, a new deck, a wood stove hearth, shelving among others.

[37] At the time of the renovations, the Claimant knew or ought to have known that the three year lease term had expired. Even if the Claimant believed, based on the pre-agreement representation, that the Defendant was going to finance the purchase on the same terms, she did not know what the status was and testified she was worried about the end of the term. The Court finds that the Claimant was willfully blind as to the legal status of the Agreement but elected to undertake renovations without first clarifying the state of affairs with the Defendant. Had she done so she would have discovered that she did not "own" the Property and realized she needed to obtain financing to exercise the option.

[38] The Court finds that a reasonable person would have contacted the Defendant before spending any money on the Property. As a result the Court finds that any time and money put into the property was done at the Claimant's own risk.

[39] The claim for renovation costs is denied.

#### *Damage to the Property*

[40] Conversely the Defendant's claims for damages as a result of the Claimant's renovations are also dismissed. The Agreement, drafted by the Defendant, contemplates that the property is provided "as is" and proposes "no repairs to the property by the seller" but with the Claimant expected to undertake all maintenance costs such as roof repairs and replacing the pressure pump which would generally be undertaken by the landlord rather the tenant. The Defendant also gave the Claimant consent to do as she wished as was confirmed when renovations were brought to his attention.

[41] However, after viewing the property first hand, the Defendant claims that the Claimant caused damages to the property including damages arising from the renovations, which were of a "do it yourself" quality with many projects left undone or done improperly. The Court finds that the Defendant is not in a position to complain about the quality of the renovations done given that the Agreement was drafted by him and required the Claimant to undertake all maintenance. It was up to the Defendant to stipulate any restrictions in the Agreement with respect to work done on the property, something that was not done .

[42] Although the Court recognizes that there appear to be damages to the Property without reasonable explanation such as the disconnected plumbing and electrical for the septic, given the increased market value of the Property, the Defendant's abandonment of his counterclaim, the overall circumstances of the Agreement and conflicting evidence as to the timing of those damages, the Court exercises its discretion and declines to find that the Defendant suffered any loss for the apparent breach in the Claimant's obligation under the Agreement to maintain the Property.

### **Summary**

[43] Based on the above the Claimant is entitled to the return of the down payment of \$5,000 and \$4,026.66 representing damages for the Defendant's negligent misrepresentation for a total of \$9,026.66. The Court also allows pre-judgment interest for a period of four years in accordance with s.16 of the *Regulations* and the *Civil Procedure Rules*.

### **Order**

[44] The Claim is allowed in part.

[45] The Court orders the Defendant to pay the Claimant the sum of \$9,026.66 plus interest and costs.

Julien S. Matte, Adjudicator

**Form 7(c) -- Order**

**In the Small Claims Court of Nova Scotia**

Claim No: SCT-507411

**BETWEEN:**

Name Crystal Osborne  
[personal information removed]

Claimant

Name Kamal Mydean  
[personal information removed]

Defendant

On October 18, 2021 and January 10 and 19, 2022 the parties attended hearings and based on the evidence, the following Order is made:

**I ORDER** that the Defendant pay to the Claimant the sums as follows:

**Damages: \$9,026.66**

**Interest: \$1,444.27**

**Costs: \$199.35**

**Total: \$10,670.28**

DATED at Halifax Regional Municipality  
on January 24, 2022

Julien S. Matte, Adjudicator

Original: Court File  
Copy: Claimant  
Copy: Defendant