IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: Andrew v. GNF Investments Ltd., 2013 NSSM 48

Claim: SCCH No. 418854
Registry: Halifax

Between:

David Andrew and Pauline Carroll

Claimants

– and –

GNF Investments Limited

Defendant

Adjudicator: Augustus Richardson, QC

Heard: November 12, 2013

Appearances: Stephen Hiscock for the claimants
William Thomson for the defendant

By the Court:

[1] In the spring of 2012 the claimants Pauline Carroll and David A. Andrew were looking for a home at The Waterton at Stoneridge in Halifax, Nova Scotia. What they found instead was financial disaster. They now come to this court to seek redress.

[2] This matter came on before me on November 12th, 2013. I heard the evidence of the claimants Pauline Carroll and David Andrew on their own behalf. On behalf of the defendant GNF Investments Limited I heard the evidence of Michael Quigley, its manager at The Waterton. What follows are my findings of fact based on their testimony, as well as on my reading of the documents entered into evidence by them.

[3] Ms Carroll and Mr Andrew are a couple. In the spring of 2012 Mr Quigley was working as a hospital orderly. He was approaching retirement age. Ms Carroll did not work. She was on disability. She and Mr Andrew had lived in apartments in the past. They saw condominium units for rent at the Waterton advertised on the internet. They drove the neighbourhood and were impressed by what they saw. They made an appointment to look at units in The Waterton.

[4] They met Alissa Allen, the defendant's agent, who showed them unit 1006. They were impressed with its finish. Ms Allen said that she herself owned and lived in a unit at The Waterton, a fact that gave them some comfort. (After moving in Ms Carroll and Mr Andrew learned that Ms Allen did not actually live in the unit she owned at The Waterton. She rented it out.)

[5] The claimants had initially considered renting. However, Ms Allen persuaded them that they could purchase a unit at The Waterton by way of a "lease to purchase" agreement in which a portion of their rent would go towards the purchase price. This was a persuasive suggestion for them because they would end up with an asset. Ms Allen explained that they would start with a $10,000.00 down payment with a closing date set in the future. They would then move in and pay $1,700.00 a month. Half of that payment would count as a credit towards the purchase price (by enlarging the deposit). At the end of a year (which could be extended) the deposit and the credits would be combined with a $10,000.00 credit from the Seller, leaving them with an amount close to $30,000.00 to count as a down payment towards the purchase price on closing.

[6] Based on these representations the claimants decided to proceed as suggested. On or about April 1, 2012 the claimants entered into two agreements with the defendant. The first was an Agreement of Purchase and Sale. The second was a Purchase/Lease to Own Agreement.

The First Agreement of Purchase and Sale

[7] Pursuant to the Agreement of Purchase and Sale (the " First Agreement") GNF agreed to sell the claimants and the claimants agreed to purchase from GNF Suite 1006 "of a proposed 299 unit 2 Phase Residential and multiple Commercial unit Condominium Complex on 60 Walter Havill Drive, Halifax ... to be known as 'The Waterton Condominiums.'"

[8] The Unit subject to the First Agreement was said to be "more particularly shown outlined on the Sketch Plan attached hereto as Schedule 'A'" but no such schedule was in fact attached.

[9] The purchase price was $319,900 (including HST). The price included a deposit (receipt of which was acknowledged) of $10,000.00 "to be paid to the Seller pending completion or other termination of this Agreement, which sum shall be credited on account of the purchase price on closing:" clause 1(a).

[10] Clause 2 of the First Agreement was sub-titled "financing" and provided as follows:

> This Agreement shall be subject to the Buyer being able to obtain approval for a first mortgage in the principal amount of approximately TBD or TBD% of the purchase price. This financing shall be deemed to be arranged unless Seller or Seller's Agent is notified to the contrary, in writing, on or before TBD. If notice to the contrary is received and the reason for not being able to obtain financing is disclosed and which can not be rectified by the seller, either party shall be at liberty to terminate this contract and the deposit to be returned to the Buyer without interest or penalty. Failure to disclose reason for not obtaining financing approval will be cause to forfeit the purchaser's deposit.

[11] Clause 3 dealt with the closing date and provided as follows:

> Subject to the provisions of this Agreement and the extensions arising there from this Agreement shall be completed on or before the 27 day of ~~JULY 2012~~ JUNE 2015 or the closest business day from this date.

[12] I pause here to note that Ms Allen was the one who filled out (or crossed out) those words or letters that are underlined in the two passages quoted above.

[13] Schedule 'C' to the First Agreement dealt with use and occupancy of the Unit. Clause 2 provided that if the Unit forming part of the condominium development "is complete before the Closing Date" (which it clearly was at this point) then the Buyer "at the request of the Seller shall take occupancy of the Unit ...." On occupation the Buyer was required to pay the Seller a "use and occupancy charge in the amount of .75% of the net purchase price prorated for the first month of the occupancy and thereafter payable to the Seller ... every month ... until the actual closing." Clause 2(c) provided that the Buyer acknowledged that "the use and occupancy fee is equivalent to rent and is not credited to the purchase price on closing."

[14] Schedule 'D' of the First Agreement contained "General Conditions." Clause 15 of Schedule 'D', titled "Seller's Remedies for breach," provided that "[i]n addition to any other remedies available to the Seller in law, the deposit paid under this Agreement shall be forfeited to the Seller if the Buyer should default hereunder or fail to complete this transaction set out in this Agreement."

The Purchase/Lease to Own Agreement

[15] As noted above, the claimants entered into a "Purchase/Lease to Own Agreement" ("PLOA") with the defendant at the same time as the First Agreement.

[16] The material terms of the PLOA are as follows:

> (1) The Purchaser will provide a deposit to total $10,000.00 to be cashed upon acceptance of this agreement by both the buyer and seller. **Deposit is non-refundable for any reason**.
>
> (2) the Purchaser agrees to pay $1700 per month occupancy fee up to the closing date of July 27, 2013. The monthly occupancy fee will be prorated and the difference credited back to the purchaser depending upon the date at which closing is obtained during the month.
>
> (3) If the purchaser is unable to obtain financing within 12 months of occupancy this contract then defaults to the terms below.

[17] The "terms below" mentioned in clause 3 of the PLOA were numbered 4-13 under the heading "Additional Terms." Clauses 4, 5, 6, 8 and 9 are relevant, and provided as follows (all emphasis in original):

> (4) The guaranteed lease to own purchase price of the property will be $319,900. **Note:** If the purchaser buys **Unit 1006**, 60 Walter Havill Drive ... within **36 months** of the contract date for a closing date to be ~~July~~ June 27, 2015 then the purchaser will receive **$20,000 down payment assistance which is reflected as a credit toward the purchase price. 50% of occupancy fees credited back to a maximum of $20,000.**
>
> (5) **Second and third year lease to own terms:**

(a) Should the purchaser/lessee not be able to complete the purchase transaction of the subject property within the first 12 months of their 36 month lease to own contract then they will be responsible for the common area fees. The Purchaser agrees to pay **$361** in condo fees if **Unit 1006** is not purchased within the first 12 months of occupancy beginning on the 1st day of the 13th month which is ~~July~~ June 27, 2014.

(b) The Purchaser agrees to pay monthly prorated property taxes in addition to monthly condo fees if **Unit 1006** is not purchased within the first 24 months of occupancy beginning on the 1st day of the 25th month which is ~~July~~ June **2015**.

(6) The Purchaser will pay rent fees in the amount of $1700 per month the 1st year which will begin on (estimated move in date) ~~July~~ June 27, **2012** on a year to year basis and to end on the date of closing which is ~~May~~ June 27, **2013**.

(8) Failure to close the sales transaction on or before ~~July~~ June 27, 2015 will result in the down payment assistance of $10,000 to become forfeited.

(9) Termination of the agreement on or before ~~July~~ June 27, **2015** will result in the purchaser's deposit becoming forfeit. After ~~July~~ June 27, **2015** if the purchaser purchases **Unit 1006** the vendor will provide the purchaser/lessee's lease to own **$10,000** deposit upon closing only.

[18] Ms Carroll and Mr Andrew paid the defendant the $10,000.00 deposit called for under the First Agreement (and referenced in the PLOA). They then moved into Unit 1006 in or about June 2012. When they were provided with the key by Ms Allen she also asked for a damage deposit of $850.00. Ms Carroll was surprised by this request, since they had already provided a deposit of $10,000.00. She testified that Ms Allen told them that they were considered tenants until they actually purchased the property–hence the need for a damage deposit. She told them that they would get the damage deposit back if they left the Unit, but that the purchase deposit would be forfeit if the purchase was not completed.

[19] The claimants were essentially happy with the Unit itself. They did, however, have some problems with the storage space that was associated with the Unit, finding it covered with black mould. They also became concerned about two things.

[20] First, with Mr Andrew's pending retirement at the end of 2012 they became concerned that their finances might not be able to support the mortgage payments that would be required to complete the purchase. Second, Ms Carroll was fearful of heights and found living on the 10th floor too anxiety-provoking for her.

[21] The claimants wrote to the defendant on November 30th, 2012. They explained that Mr Andrew was retiring as of that date and that as a result they could "no longer afford to live here at the Waterton. We no longer qualify for a mortgage of this magnitude:" Exhibit D5. Ms Carroll met with Mr Quigley to discuss their situation. She asked that they be released from the PLOA both for medical reasons on her part (she was on long-term disability for mental health reasons) and financial issues due to Mr Andrew's retirement: see letter dated December 5, 2012, Exhibit D5.

[22] Mr Quigley met with Ms Carroll and Mr Andrews on separate occasions. He said to them that they were good tenants that he did not want to lose. He suggested transferring the lease to own agreement from Unit 1006 to Unit 309, with suitable adjustments to the purchase price, at a lesser rent of $1,295.00 per month. The purchase price suggested at the time by Mr Quigley was $279,900.00. The claimants agreed to downsize to Unit 309 and to a transfer of the lease to own arrangement, subject to coming to an agreement on the price. In the interim they signed a standard form residential lease for Unit 309 on December 20, 2012, and moved into the unit on January 1, 2013: see Exhibit D6. Negotiations over the purchase price continued.

[23] On March 26, 2013 Mr Andrew wrote to Mr Quigley. He suggested that a "realistic price" for Unit 309 was $249,900.00. He also made a number of other suggestions and requests for changes. He concluded with the comment that if Mr Quigley was "agreeable to all o[ur points and they are completed by the end of May, then we would ask you to make up a new contract to present to the bank:" see Exhibit D5. Mr Quigley accepted some of the changes, but did not agree to the suggested purchase price. In the end they agreed to a purchase price of $279,900.00. The claimants and the defendant signed a new Agreement of Purchase and Sale on May 23, 2013 ("Second Agreement"): see Exhibit C2 (the complete copy is attached to the Notice of Claim). The $10,000.00 deposit that had been paid the year before would be counted as a credit towards that purchase price, even though Mr Quigley's position was that it had already been forfeited by the claimants when they failed to complete the purchase of Unit 1006. On closing they would also receive another credit of $10,000.00.

[24] Clause 1(a) of the Second Agreement referred to the $10,000.00 deposit as follows:

> (1) Subject to paragraph (2) below, the purchase price shall be $279,900 and shall be payable as follows:
>
> (a) The sum of $10,000.00 (paid) as a deposit upon the execution of this Agreement (the receipt of which is hereby acknowledged) to be paid to the Seller pending completion or other termination of this Agreement, which sum shall be credited on account of the purchase prince on closing; **All deposits are Non-refundable for any reason whatsoever**.

[25] The additional seller's credit to the purchaser of $10,000.00 on closing is referenced in clause 1 of Schedule "G" (Additional Conditions) attached to the Second Agreement as follows:

> 1. Purchasers Deposit will be increased by $10,000 for a total deposit of $20,000 **All deposits are non-refundable for any reason whatsoever**.

[26] The Second Agreement, like the First Agreement, also contained a financing clause. This time the underlined portions were filled in by Mr Quigley. Clause 2, the financing clause, provided as follows:

> (2) This Agreement shall be subject to the Buyer being able to obtain approval for a first mortgage in the principal amount of approximately ____ or 95% of the purchase price. This financing shall be deemed to be arranged unless Seller or Seller's Agent is notified to the contrary, in writing, on or before May 24, 2013. If notice to the contrary is received and the reason for not being able to obtain financing is disclosed and which can not be rectified by the seller, either party shall be at liberty to terminate this contract and the deposit to be returned to the Buyer without interest or penalty. Failure to disclose reason for not obtaining financing approval will be cause to forfeit the purchaser's deposit.

[27] With this Second Agreement in hand Ms Carroll then immediately went to her bank to secure mortgage financing. On May 23, 2013 she was told that they did not qualify for mortgage

financing for the purchase of Unit 309. In a letter faxed by the bank to Mr Quigley on that day the bank gave the reason for its refusal to extend financing as follows: “low credit score and inability to service therefore unable to obtain default insurance:” Exhibit C3.

[28] The claimants then asked Mr Quigley to return their $10,000.00 deposit, pointing to the financing clause. Mr Quigley refused to return the money, on the grounds that the deposit had already been forfeit when they failed to close on the First Agreement for Unit 1009.

[29] As Mr Quigley explained it, the $10,000.00 was paid under the PLOA and was non-refundable in the event the purchase did not close because “the customer [who moves in under a PLOA] ties up the unit for a whole year.” When asked about the apparent conflict between the financing clause of the First and Second Agreements, which appeared to make the deposit refundable in the event financing could not be arranged, and forfeiture under the PLOA, Mr Quigley testified that the PLOA was the governing document. He added that it was standard practice to have potential purchasers sign both a purchase agreement (like the First or Second Agreement) and a PLOA; that the deposit was always forfeit even the sale failed to close, even if it was because financing could not be arranged; and that there had been several occasions in the past when that had happened.

Submissions of the Parties

[30] Counsel for the claimants submitted that this was a simple matter. The claimants had signed the First Agreement, but the unit was not suitable. They signed the Second Agreement, which contained a financing clause that was clear on its face. The claimants attempted to get financing, found they could not and notified the defendant within the time stipulated in the financing agreement. They were entitled to a refund of their deposit.

[31] The clauses in the PLOA and the Second Agreement that suggested the deposit was non-refundable were at odds with the financing clause in the First and Second Agreements. An ambiguity existed which had to be interpreted against the defendant as the drafter of the documents.

[32] He accordingly submitted that the claimants should receive the return of their $10,000.00 deposit.

[33] Counsel for the defendant submitted that the First Agreement had not been completed and that accordingly the deposit was forfeit. The fact that the defendant agreed in the Second Agreement to credit the claimants with $10,000.00 towards the purchase price for Unit 309 did not make it a refundable deposit. It was simply a paper credit. Moreover, the $10,000.00 that was originally paid under the First Agreement and the PLOA was not really a deposit. Rather, it was a payment made in recognition of the fact that the claimants would be living in the unit for at least a year. The unit was now a "used" property, and the $10,000.00 reflected the wear and tear associated with that "use."

[34] Counsel also suggested that there was something suspicious about the claimants' conduct. If they had not been able to arrange financing for Unit 1006 how could they reasonable expect to arrange it for Unit 309. Moreover, the speed with which they moved on May 23, 2013, obtaining a denial from their bank on the same day they signed the Second Agreement, suggested that there was something false about their position.

[35] Finally, counsel submitted that the $10,000.00 referenced in the Second Agreement was simply a credit. It was not an actual deposit. The original deposit had been paid under the First Agreement, but had been forfeited when they failed to purchase Unit 1006. There was nothing left to refund.

Analysis and Decision

[36] A review of the provisions of the First Agreement and the PLOA, signed at the same time in respect of the same unit, reveal a confusing mish-mash of clauses and conditions that work at cross-purposes to each other, if not indeed to contradict each other.

[37] For example, the First Agreement contains a financing clause that clearly states that in event the buyers could not obtain financing by a specified date, and gave notice to that effect, then their deposit would be returned to them. Such clauses are extremely common in agreements for the purchase and sale of residential property. Buyers generally need the approval of their financial institution for the proposed transaction, and they often cannot get that approval until the institution has a chance to review the purchase and sale agreement. Financing clauses give buyers permit a buyer to walk from an agreement (and obtain a return of their deposit) if they cannot in good faith obtain that approval.

[38] It is not surprising then that the First Agreement would have such a clause. And the clause contemplates a date by which notice is to be given. However, in this case the defendant's agent failed to specify an exact date. There is no doubt in my mind, however, that the agent contemplated that there would be a date. I come to this conclusion for two reasons.

[39] First, the First Agreement was signed in the context of the PLOA that she had persuaded the claimants to enter into, and that agreement clearly contemplated a period of time prior to closing (or completed purchase) during which the claimants would be occupying the unit as "tenants" in order to build up a larger deposit than the initial $10,000.00 they had put down. But that in turn contemplates the possibility that the buyers might not be able to come up with the financing necessary to complete the purchase of the unit–which is the entire purpose of a financing clause.

[40] Second, had she understood and intended that there would be no date she would have either crossed out the financing clause in its entirety or would have used the letters "NA," which are commonly recognized to mean "not applicable." She did neither. Rather, she used the letters "TBD," which in the context of the two agreements I interpret to mean "to be determined."

[41] All of this means that in my opinion the parties to the First Agreement understood and agreed that the agreement–and hence the right to the return of the deposit–was subject to financing. If the buyers were not able to arrange financing by a date "TBD" then they could terminate the agreement and recover their deposit.

[42] And yet the PLOA, signed at the same time as the First Agreement and in respect of the same unit, purports to state categorically that "all" deposits are non-refundable "for any reason whatsoever." The two provisions contradict each other flatly.

[43] Mr Quigley in his testimony airily waived away the apparent contradiction by saying that "it was a mistake," and by arguing that the PLOA was the governing document. I do not accept this argument. It is clear that the transaction contemplated a purchase of the unit. Such a purchase could only be accomplished by way of the First Agreement, not by the PLOA. Moreover, the First Agreement expressly contemplated a period prior to the closing date when the buyers would occupy the unit to be purchased under a form of rental agreement. The PLOA, which refers at various places to a closing date, was clearly the "rental" agreement contemplated by the First Agreement. The PLOA was thus a subsidiary, secondary document that drew upon, and must be interpreted within the context of, the First Agreement.

[44] Another example of the confusing interface between the two agreements is found in the fact that they refer to different closing or purchase dates. The First Agreement provides for a closing date of June 27, 2015, but the PLOA speaks variously of purchase dates within 12 months (June 2014) or 24 months (June 2015). Each date has different consequences attached to it.

[45] I am satisfied then that the claimants moved into Unit 1006 under an agreement that contained a financing clause that permitted them to terminate the agreement and recover their deposit if they could not arrange financing by a date "to be determined." But what was that date?

[46] In my opinion the date contemplated by the parties must have been within 12 months of their occupancy of Unit 1006. I come to this conclusion for several reasons.

[47] First, financing clauses generally have trigger dates that are before the closing date contemplated by the parties. Here the closed date specified in the First Agreement was June 27, 2015.

[48] Second, clause 3 of the PLOA expressly refers to a situation in which the purchaser "is unable to obtain financing within 12 months of occupancy," and goes on to provide that in that event a number of other contractual provisions are triggered.

[49] Third, the purpose of occupancy under the PLOA, as explained by the defendant's agent and as stated in the PLOA, was to create an additional amount of deposit that could be credited to the purchase price by enlarging the purchaser's overall deposit. Financial institutions often look to their borrowers to provide significant down payments before they will consider lending them the balance of a purchase price. But even with such a down payment a financial institution might refuse to lend the necessary funds. The fact that clause 3 of the PLOA expressly references the issue of financing at the 12 month period suggests to me that the parties contemplated the purchaser being in a position at that point to go to his or her financial institution to request funds. This conclusion is supported by the fact that clause 3 then goes on to discuss what happens if financing is not arranged by that point.

[50] In short, the parties here were subject to a financing clause with a date that was 12 months after the claimants took occupancy of Unit 1006.

[51] But the claimants did not occupy Unit 1006 for 12 months. As set out above, it had become clear to them by November 2012 that they could not afford to live in the unit–which, in my opinion, *a fortiori* means that they could not afford or obtain financing. But instead of accepting such notice Mr Quigley persuaded the claimants to enter into a new arrangement, one that was nevertheless subject to an agreement of purchase and sale–the Second Agreement. This agreement also contained a financing clause that provided the claimants with an escape clause if they could not obtain financing. And Mr Quigley filled in the date of May 24, 2013. He did not cross out the clause. He did not use the letters "NA." He inserted a specific date, one chosen by him, not by the claimants.

[52] In my opinion the defendant cannot complain if the claimants, once they learned on May 23rd that they could not obtain financing, chose to exercise the rights given them under an agreement drafted by the defendant.

[53] The defendant sought to avoid this conclusion by arguing that the $10,000.00 deposit originally paid under the First Agreement had already been forfeited when the claimants moved out of Unit 1006; and that the $10,000.00 referred to in the Second Agreement merely a credit offered to them more or less out of the goodness of the defendant's heart. I was not persuaded by this argument.

[54] First, as I have already found, under the First Agreement the claimants moved out of Unit 1006 prior to the 12 month mark that I have found to have been the agreed upon financing date. Hence at the time the claimants entered into the Second Agreement they had and continued to have a right to the return of their deposit in the event they could not obtain financing. That right fed the Second Agreement.

[55] Second, and in any event, Mr Quigley was the one who filled out the Second Agreement, and he used the words "of $10,000.00 (paid) ***as a deposit***." He did not use the words "as a credit." He testified that his use of the words "as a deposit" was a mistake on his part, but in my opinion and in the context of the evidence it was a telling mistake. It evidenced his own understanding at the time that what was passing under the Second Agreement was the $10,000.00 cash deposit that had been paid under the First Agreement.

[56] For all these reasons then I am satisfied that the claimants had a clear right under the financing clause in the Second Agreement to the return of their deposit of $10,000.00 in the

event they were not able to obtain financing by May 24, 2013. They were not able to do so. They gave notice of that fact pursuant to the clause. They were entitled to recover the deposit.

[57] I accordingly order the defendant to pay to the claimants $10,000.00 plus costs, and I will make an order to that effect.

DATED at Halifax, Nova Scotia
this 3rd day of December, 2013

_____
Augustus Richardson, QC
Adjudicator