SUPREME COURT OF NOVA SCOTIA
Citation: *Tench v. Cowan*, 2017 NSSC 179

Date: 20170704
Docket: Hfx No. 460093
Registry: Halifax

Between:

Dana Tench

Applicant

v.

Mariana Cowan and Supercity Realty (1998) Limited, C.O.B.A., Coldwell Banker Supercity Realty

Respondents

DECISION

Judge: The Honourable Justice Denise Boudreau

Heard: May 18, 2017, in Halifax, Nova Scotia

Counsel: Dana Tench, Applicant, for himself
Kevin A. MacDonald, for the Respondents

By the Court:

[1] The applicant seeks damages from the respondents, for losses he claims to have incurred in relation to three properties: 32 Hartlen Drive, 34 Hartlen Drive, and 276 Crown Drive, all in HRM.

Applicant's Evidence

[2] The applicant testified that he purchased 32 and 34 Hartlen Avenue in 2000. The applicant lived in 34 Hartlen with his family and, at times, rented 32 Hartlen. He later purchased the property at 276 Crown Drive (he is unsure of the date of purchase).

[3] The applicant further states that in 2008 he had appraisals done of these properties. He provided me with documentation showing that 34 Hartlen was then appraised at $172,00, and 32 Hartlen was then appraised at $150,000. The applicant stated that he later had renovations done to the properties, but I have no further appraisals (I note that the applicant provided me with listing "cuts" for properties, showing the advertised price of the properties at various times; those are, obviously, not appraisals, and may not reflect the true value of a property).

[4] In 2011, the applicant decided to list the properties for sale. His financial situation was poor and he could no longer carry all his debts. He wished to sell the properties in order to obtain some money (he believed all properties had equity). There was some confusion on the part of the applicant as to whether he was actually in arrears on his mortgages at the time the homes were listed. The applicant did agree, however, that he was no longer able to maintain the mortgages on all of these properties.

[5] The applicant first listed the properties with Exit Realty. However, in May 2011 the applicant became aware that the respondents were advertising a program, where they would "guarantee to buy your property in four months if they didn't sell". For this reason, the applicant decided to take his properties from Exit Realty, and list them with the respondents.

[6] The applicant first met with realtor Ian Smith at Coldwell Banker, at which time there was agreement to list the properties. The applicant's evidence is unclear, to say the least, about what he understood about the "120 day guarantee" at that first meeting. He first stated that he was told the guarantee could apply to all 3 properties. Later, he acknowledged in cross-examination that a number of restrictions and conditions had been discussed. He later agreed that he knew 276 Crown would not have qualified, as it was a rental property.

[7] The applicant notes in his affidavit:

> As I went through all the stages of my financial situation with Mariana Cowan herself and her team in the same room she promised she will get them sold. This was repeated many times even after her personal review of each property. She said her appraised value is what she will list each property at, because of her years of experience in what it will sell for. She gave her value for #32 Hartlen at $179,900 and #34 at 189, 900. #276 Crown she valued at $239,900 and listed the properties at those prices.
>
> Even though it was less than the existing appraisals the Bank had recently done I did not complain as I needed to sell the properties. She was clear in saying to me that even though #32 Hartlen had been used as a rental as well as 276 Crown at times, she would qualify them. #34 already met all conditions of her contract. Full details attached here.

[8] The applicant does not explain when any of these events happened. His comments about 276 Crown appear to contradict his evidence on the stand. It was clear from other evidence, including from the applicant, that the respondent Cowan was not present for this first meeting between the applicant and Mr. Smith.

[9] The applicant states that the listings on the properties were renewed through to 2012. He says he was repeatedly reassured by Ms. Cowan that she would sell the properties. In the meantime, foreclosure of the properties was looming ever closer. The applicant requested extensions from the TD Bank and their lawyers on numerous occasions.

[10] The applicant further acknowledged that the respondents had requested that, as part of the deal, he needed to buy a property from them. He described meeting with agent Richard Mawad who took him to see a property at 13 Hanover Court in

Halifax. The applicant claims that he was prepared to buy this property, if his properties sold, even though the Hanover Court property was missing some essential features. He provided me with an agreement of purchase and sale (unsigned) for this property, and indicated that he had provided a $1000 cheque as a deposit. He asserted that he was, at that time, fully able to cover that amount.

[11] Unfortunately, the applicant does not have in his possession the actual contract that was signed between himself and the respondents, relating to the listing of his properties. His affidavit states (schedule D):

> One document that I no longer have in my possession, is the portion of the contract that Respondent and I (Applicant) signed. The rest of the contract along with documents (submitted in Schedule A) pertaining to the contract, such as next few steps of action only required to be performed as terms of the actual contract.
>
> Reason being is that Sheriff came right away with extremely violent eviction action and with very limited time provided I grabbed the essentials and did not notice that page was missing from the over 80 pages of documents given to me in the 2 booklets of contract information from the Respondent.

[12] As a result, the only documents put before this Court in relation to the applicant's agreement with the respondents were the various listing sheets for the properties, wherein the properties were advertised to the public.

[13] The applicant further provided to this Court, email correspondence between he and bank lawyers, wherein he had sought extensions for the payment of his outstanding mortgage. On January 9, 2012, the email reads (in part):

> Please note that the properties are up for sale (documents attached) and in addition to above proposals, the Marianne Cowan Group at Caldwell banker will buy the property at Hartlen Ave (also attached).

[14] The applicant appears to have attached only the agreement relating to 32 Hartlen Avenue.

[15] The applicant further provided a document outlining the respondent's guarantee. It reads as follows:

> 120-DAY GUARANTEE
>
> The 120-Day Guarantee program was designed to help clients who want to buy one of my listings, but they have a home to sell first. As a result, my clients would lose the home they wanted since someone else would purchase it unconditionally. For this reason, and to better serve my clients, I started the 120-Day Program.
>
> The conditions/restrictions, as far as the home guarantee goes, are as follows:
>
> > The seller has to move up to one of my listings
> >
> > The home must be in the Halifax Metro area (I don't guarantee properties that are on well and septic)
> >
> > The home must be $300,000
> >
> > The home must be owner occupied (no rental properties)
> >
> > Mobile/mini homes are not eligible for the guarantee
> >
> > The Guaranteed Sale Price is calculated up to 95% of market value less 6% commission
> >
> > All properties for which a Guarantee is requested are subject to an appraisal that is cost-shared by the owner and myself to determine the market value.
> >
> > The Guaranteed Sale Price is confidential and must not be discussed with anyone.
>
> You can benefit indirectly. Chances are whomever buys your home may also have a home to sell, which I may be able to place a guarantee on. This would enable the purchaser to offer unconditionally on your home. In turn, you would then know your house is sold.
>
> I have helped a number of clients in this situation; hopefully there is something I can do to help you.

[16] By 2012, none of the properties had sold. The applicant then decided to move 276 Crown Avenue back to Exit Realty. He notes that property was then quickly sold, in under two weeks. The applicant did not advise me as to the listing price, nor the sale price, for that property; although the applicant acknowledges that after the bank was paid, he was left with no equity. Both #32 and 34 Hartlen were eventually foreclosed by the bank.

[17] The Applicant's first Notice of Application dated February 3, 2017 indicated the claim was "for breach of contract". The applicant filed an amended Notice dated March 22, 2017; there is no longer mention of breach of contract, but rather indicating "the applicant claims against the respondent noting negligence, as after extensive evaluations of his situation, failed in several areas." The Applicant's Brief filed May 11, 2017 mentions contract, negligence, and negligent misrepresentation.

[18] In other words, the tort being advanced by the applicant is a moving target. In his brief, the applicant outlined his monetary claims in detail:

> **Order sought**
>
> General damages sought are the property values as set by Cowan & Caldwell Banker:
>
> Property #1, 34 Hartlen Avenue - $189,900, less 6% commission and 5% agreed payout

Property #2, 32 Hartlen Avenue - $179,900, less 6% commission and 5% agreed payout

*Property #3, 276 Crown Drive - $239,000 - seeking equity value here as property sold by Exit Realty for $189,000, seeking sought value at $50,000, less 6% commission and 5% agreed payout

Final calculated values after minus 6% commission and 5% agreed payout:

Property #1, 34 Hartlen Avenue = $169,580.70 (lost to Sheriff's sale)

Property #2, 32 Hartlen Avenue = $160,650.70 (lost to Sheriff's sale)

Total of listed properties = $330,231.40

Full amount owing to TD Bank = $161, 008.64

Remaining amount sought = $169,222.76

*Property #3, 276 Crown Drive = $50,000 lost equity—($189,900 sold for cost by Exit Realty)

Total general damages sought = $219, 222.76

Punitive damage for pain and suffering at $75,000.

Respondent's evidence

[19] The respondents provided the court with affidavits from respondent Mariana Cowan, Ian Smith, and Suzanne Laframboise. Ms. Cowan and Mr. Smith were cross-examined.

[20] The respondent Cowan, in her affidavit, explained the 120 Day guarantee:

> 14. During my early years as a Real Estate Agent, I perceived that there were sometimes problems with “domino” or “cascading” real estate transactions (were closing upon properties conditional upon or “tied” to the sale of another).
>
> 15. To assist my Clients and help market my business, I created a Programme designed to remove the uncertainty of a “tied” closing (where the purchase of one property can only take place after the sale of another). My experience was that such conditional purchase can be problematic and a disincentive for a willing seller.
>
> 16. To overcome this, in conjunction with our Bank (RBC), I develop a Programme that would remove the uncertainty of conditional or tied sale by providing a guarantee; if, in certain circumstances, the purchaser bought another of our listings.
>
> 17. In that case, if the home they are trying to sell could not sell within the 120 days, then our guarantee Agreement provides that our firm will buy the home that was listed for sale on specific terms and conditions.

[21] The respondent Cowan confirmed that, according to her records, the applicant first met with broker/realtor Ian Smith in March 2011.

[22] Mr. Smith testified that he is familiar with the 120 Day guarantee program, and confirmed its terms as described by the respondent Cowan. He confirms that he was the duty realtor working in mid-March 2011 when he took a call from the applicant, who was interested in listing his properties with them.

[23] Mr. Smith states that he and the applicant met in or about the third week of March. The applicant was interested in listing three properties; he was also interested in the 120 day guarantee. Mr. Smith states that he reviewed the applicant’s circumstances and advised the applicant that he did not qualify for the program at that time. He noted to the applicant that since he was not buying a

Coldwell Banker property, he did not meet one of the essential terms of the program. However, Mr. Smith says that he noted to the applicant that the guarantee might assist him in another way: e.g. if someone wished to buy one of his properties conditional upon the sale of their home, perhaps the respondents could guarantee that property. Mr. Smith states that the applicant seem to understand, and he stated that he would start looking at Coldwell Banker listings online.

[24] The respondent Cowan noted that, according to their records, the Hartlen Street properties were shown 22 times without any offers being made; all properties were shown 55 times. She further noted that potential buyers were expressing concerns relating to the state of the properties, and that those deficiencies were discussed with the applicant, in relation to the price being advertised. The respondent Cowan noted that she and her firm tried very hard to sell the applicant's properties, without success.

[25] The respondent Cowan further noted that her company lost money in trying to sell the applicant's properties. In addition to all of the showings and advertisements, the respondent Cowan asserted that when the Crown Drive property was finally sold by Exit Realty, the purchaser was a client of hers, who purchased as a result of an introduction she had made. The respondent Cowan noted that she was never paid her commission for that sale.

[26] The respondent Cowan stated that she met with the applicant on April 9, 2012, to discuss possible strategies to better expose the properties to the market. At that meeting the applicant explained to her his financial situation, in that he was in default in respect of his three mortgages, and foreclosure was imminent. The respondent Cowan understood that to mean that it was highly unlikely that the applicant would be able to purchase one of her listings.

[27] During that meeting, the applicant asked the respondent Cowan to provide a letter explaining the 120 day guarantee program, "so he could show that to his Bank in hopes they would delay foreclosure efforts, so he could sell some or all of his properties in the meantime." Although the respondent Cowan agreed to provide this letter, she testified that it was merely to outline the requirements of the program; in no way was it meant, she says, to suggest to the bank that she would be buying the applicant's properties if they did not sell. The letter provided:

> April 11, 2012
>
> To Whom It May Concern:
>
> Dana:
>
> As per our conversation, the following steps will need to be addressed for further action:
>
> You will need to enter into a Purchase and Sale Agreement on one of our listings that is greater than the Hartlen Avenue Property value, with the condition of our 120 day Guarantee program implemented and placed on the Hartlen Avenue property.

> Next we hire an independent appraiser that is cost shared by both of us.
> …

[28] In relation to the visit to 13 Hanover Court, the respondent Cowan had no knowledge that this visit took place, although she was aware that the applicant had asked to see some properties (none listed with her company).

[29] The respondent Cowan notes that the Hanover Court property was not a Coldwell Banker listing, and therefore, would not have qualified the applicant for the program. In any event, the applicant did not purchase this (or any) property, which was a pre-condition to the program.

Findings

[30] I found the applicant's evidence to be somewhat unclear. He was, at times, self-contradictory. Some parts of his evidence were simply not credible; for example, how could he be facing the imminent foreclosure of his family's home, but still have money on the bank to provide down payments on other properties?

[31] I find that the applicant's three properties were listed for sale with the respondents, under the usual terms for such a transaction, from 2011-2012. The respondents made every effort to sell these three properties, but unfortunately they did not sell.

[32] The applicant was interested in the respondents' 120 day guarantee program, at the time he approached the respondents to list. While it was certainly discussed by the parties, I accept the evidence of Mr. Smith and the respondent Cowan that the applicant was not told that he qualified for this program.

[33] The program is clear, and I find the applicant understood, that rental properties were not qualified. The properties at 32 Hartlen and 276 Crown had been used as rental properties.

[34] In any event, the applicant's properties did not qualify because he did not purchase a Coldwell Banker listing, which was a clear requirement. I find that this requirement was made clear to the applicant from the beginning. The applicant did not fulfill this condition, and did not qualify.

[35] In his claim for breach of contract, the applicant submits that the respondent Cowan and the respondent company "promised" to buy his three properties if they did not sell. I accept the evidence of the respondent Cowan and Ian Smith that they never promised anything. The respondents only agreed to make best efforts to sell the applicant's properties. As far as I can tell, they did so.

[36] Furthermore, the *Statute of Frauds R.S.N.S. c. 444*, makes clear that contracts for the purchase and sale of land must be reduced to writing:

> 7 No action shall be brought
>
> …
>
> (d) upon any contract or sale of land or any interest therein… unless the promise, agreement or contract upon which the action is brought, or some memorandum or note thereof, is in writing, signed by the person sought to be charged therewith or by some other person thereunto by him lawfully authorized.

[37] The applicant has nothing in writing that shows that the respondents agreed to purchase his properties.

Negligence

[38] I see nothing in the evidence before me that points to negligence on the part of the respondents.

Negligent misrepresentation

[39] I find that the applicant was not misled in his dealings with the respondents. The evidence shows that they explained the program to him in detail; it seems that he did, at the very least, understand some of the requirements. This is why, as he says, he went to see the property at Hanover Court. He understood that a property had to be purchased.

[40] Unfortunately, the Hanover Court property was not eligible in any event. That may point to the conclusion that the applicant misunderstood the guarantee. However, this was not as a result of anything the respondents did/did not do.

[41] Furthermore, the fact that the respondents were aware of the applicant's financial difficulties, does not make them responsible for those difficulties. In fact, those difficulties only gave them further concern that the applicant would likely not be able to purchase one of their listings.

[42] The applicant's properties were marketed by the respondents for approximately one year. If the homes had sold during the time they were listed with the respondents, perhaps the applicant would have avoided foreclosure. Obviously that would have been a benefit to the applicant and to, one supposes, his credit rating.

[43] However, the homes did not sell during their listing with the respondents; nor did the respondents agree to buy them. In the end, the foreclosures of 32 and 34 Hartlen happened because the applicant failed to pay his mortgages, and not because of any actions of the respondents. I find that the applicant was not misled.

[44] I wish to make further comment as to the losses claimed by the applicant. Many of them (relating to the equity in the properties) are speculative. I have no updated appraisals on these properties to determine their actual value during any of the relevant times. The values placed on the listing cuts before me, may or may not be fair values. If these properties had actually sold while the respondents had them

listed, who can say whether there would have been equity? The Crown Drive property did eventually sell, and it did not leave equity.

[45] Furthermore, even if the respondents had agreed to buy any of these properties, who is to say what the purchase amount would have been (since, as per the guarantee document, an appraisal is required)? Who can say whether any equity would have resulted there?

[46] The application is dismissed. I award costs to the respondents in the amount of $2000, in accordance with Tariff C (one day court hearing).

Boudreau, J.