

Claim No: SCBW 461643

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

**Cite as: Kellogg v. Osler, 2017 NSSM 49**

BETWEEN:

PAUL KELLOGG

Claimant

- and -

KATHERINE JANE OSLER

Defendant

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**REASONS FOR DECISION**

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**BEFORE**

Eric K. Slone, Adjudicator

Hearing held at Bridgewater, Nova Scotia on September 5, 2017

Decision rendered on September 6, 2017

**APPEARANCES**

For the Claimant                      self-represented

For the Defendant                      Rubin Dexter  
Counsel



**BY THE COURT:**

[1] This claim arises out of a marital separation. While there are broader issues about to be dealt with in another court in another province, this matter is within the jurisdiction of the Nova Scotia Small Claims Court as it arises out of a discrete contractual arrangement made in Nova Scotia.

[2] The parties jointly owned a home in Mahone Bay, which needed to be sold in the immediate aftermath of their separation in 2015. The Defendant wife was planning to relocate to Ontario and was willing to sell at a lower price for the sake of expediency. The Claimant husband wanted to hold out for a higher price. Specifically, the Claimant considered \$725,000.00 as his bottom line price for the property.

[3] An offer was on the table for \$700,000.00. The Defendant wanted to accept it. The Claimant wanted to hold out. This led to the Defendant making a proposal to the Claimant via email on August 11, 2015 that if they sold for \$700,000.00, they could unequally share the notional shortfall of \$25,000.00 (from his bottom line price). She was willing to absorb \$18,750.00 if he would absorb \$6,250.00 of that shortfall. The email gave other alternatives to this unequal split, which are no longer pertinent.

[4] The evidence is unclear as to whether or not the Claimant formally communicated his acceptance of this proposal, but I believe an acceptance can be inferred from all of the evidence. The most potent piece of evidence is that they went ahead with the sale at a price that the Claimant made quite clear was not what he had wanted. The Defendant also acknowledged in later emails that she was indebted to him, in some amount. She candidly testified that she knew

she owed him money, but hoped that he would not insist upon it, or that it could be rolled into their matrimonial property proceeding.

[5] Upon the closing of the house no one communicated to the lawyers handling the transaction that there should be an asymmetry in the distribution of funds. They were simply distributed 50-50. The Claimant says that he expected the Defendant to send him the money back then, and since she did not, he is now looking to have the difference made up to him.

[6] The reason that it has taken this long to come to a head is partly because the Defendant has travelled extensively out of the country and the Claimant did not press the issue while she was away.

[7] The Claimant was also under the impression that he and the Defendant were going to split the difference on a one-third/two thirds basis. That was not her proposal, and in fact if it were to be done that way, the Claimant would receive less than the Defendant offered him back in 2015.

[8] This is what a one-third/two thirds shortfall share would look like. Assuming a sale price at \$725,000, each party would receive one-half, or \$362,500. But the net to each of them was only going to be \$350,000.00. If the Defendant gave the Claimant \$4,167.00 out of her share of the proceeds - which is less than she was offering - he would have received \$354,167.00 and she would have received \$345,833.00. The notional shortfall would have been borne 2/3 by the Defendant and 1/3 by the Claimant:

Claimant receives	\$354,166.00
Defendant receives	\$345,833.00
Shortfall absorbed - Claimant	\$362,500.00 - \$354,167.00 = <b>\$8,333.00</b>
Shortfall absorbed - Defendant	\$362,500.00 - \$345,833.00 = <b>\$16,667.00</b>

[9] The Defendant actually offered a payment of \$6,250.00, which translates into the shortfall being absorbed 1/4 by the Claimant and 3/4 by the Defendant:

Claimant receives	\$356,250.00
Defendant receives	\$343,750.00
Shortfall absorbed - Claimant	\$362,500.00 - \$356,250.00 = <b>\$6,250.00</b>
Shortfall absorbed - Defendant	\$362,500.00 - \$343,750.00 = <b>\$18,750.00</b>

[10] The Claimant somehow got it into his mind that the adjusting payment by the Defendant ought to have been \$8,333.00. This is a result of faulty math. Were she to make such a payment, it would result in the shortfall being absorbed in the proportion of 1/6 (to him) to 5/6 (to her):

Claimant receives	\$358,333.00
Defendant receives	\$341,667.00
Shortfall absorbed - Claimant	\$362,500.00 - \$358,333.00 = <b>\$4,167.00</b>
Shortfall absorbed - Defendant	\$362,500.00 - \$341,667.00 = <b>\$20,833.00</b>

[11] In any event, I find that the agreement was that the Defendant would pay the Claimant \$6,250.00. Percentages were never agreed upon, although the Claimant appears to have thought in those terms, and fell victim to faulty assumptions.

[12] As this amount has never been paid, the Defendant ought to pay the Claimant \$6,250.00, plus interest calculated in accordance with s.16 of the *Small Claims Court Forms and Procedures Regulations*, at 4% simple interest per annum.

[13] The Claimant managed to complicate things by drawing money from a joint line of credit in April 2017, in the amount of \$11,676.82, which he believed was the amount owing to him (\$8,333.00) plus interest at 2% compounded per month. As already stated, he was never owed \$8,333.00. And moreover, there was no agreement respecting interest that would have entitled him to charge 2% per month, or any other amount excepting statutory prejudgment interest as I intend to allow.

[14] This unauthorized withdrawal is something that the parties will have to deal with in their larger reconciliation in their divorce proceedings. The Claimant has undertaken to restore the money to the line of credit. I hope that he does, but it would not serve anyone's interest for me to attempt to deal with that withdrawal, or factor it into my order, as it is clearly not within my jurisdiction. I cannot say that the Claimant has been "paid" or indeed "overpaid" because he essentially borrowed the money from himself and the Defendant.

[15] The Claimant shall be entitled to judgment of \$6,250.00 plus interest from the date that the house proceeds were distributed, and the additional amount ought to have been paid to him. The closing date appears to have been October 15, 2015. As such, I allow prejudgment interest for 691 days, which totals \$473.29 for a total judgment of \$6,723.29. I will also allow the Claimant his costs of \$199.35 for commencing the claim.

**Eric K. Slone, Adjudicator**