
CANADA / JUDGMENT

Gagne v. McCarthy

2011 BCSC 493

COURT

Supreme Court of British Columbia

DECIDED

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2011 BCSC 493 Gagne v. McCarthy

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Gagne v. McCarthy,

2011 BCSC 493

Date: 20110418

Docket: 82480

Registry: Kelowna

Between:

Joanne Gagne

Plaintiff

And

Cecilia Rae McCarthy, Walter Hintz and Lorraine Hintz

Defendants

Before: The Honourable Mr. Justice Barrow

Reasons for Judgment

Counsel for the Plaintiff:

S. Moring

Appearing on their own behalf:

C.R. McCarthy

W. Hintz

L. Hintz

Place and Date of Trial/Hearing:

Kelowna, B.C.

February 4, 2011

Place and Date of Judgment:

Kelowna, B.C.

April 18, 2011

- [1] The plaintiff, Joanne Gagne, is suing for damages for breach of the contract. She agreed to sell her house to the defendants. They did not complete. Although liability is not admitted, there is no legal defence advanced by the defendants, nor is one apparent on the undisputed facts. The significant issue is the assessment of damages.

Factual Background

- [2] The property at the center of this dispute is located at 1188 Queens Street in Penticton. It was the plaintiff's home. Sometime prior to September 2008, she listed it with the RE/MAX agency in Penticton. The defendant, Cecelia McCarthy, was shown the home by her real estate agent. On September 21, 2008, she offered to purchase it for \$386,000. The next day the plaintiff accepted. Mr. McCarthy paid a \$5,000 deposit which has been held by the realtor ever since. The contract (the "first contract") was subject to a number of conditions which were to be removed by September 30, 2008. One of the conditions was that the purchaser had to obtain suitable financing. On September 30th, all of the conditions except the financing condition were formally removed. The financing condition was extended to October 2, 2008. On October 2, 2008, that condition was also formally removed. By an addendum signed that day, Ms. McCarthy agreed that the deal was "firm and binding". The sale was to complete on October 30, 2008.
- [3] Once the conditions precedent to the transaction were removed, the plaintiff began looking for a new house. On October 6, 2008, she offered to purchase a home for \$497,000. Her offer was accepted. Although the contract was subject to a number of conditions, it was not conditional upon the sale of her house. The completion date for the plaintiff's new home was October 24, 2008.
- [4] On October 30, 2008, Ms. McCarthy did not complete the purchase of the Queen Street property. On November 4, 2008, she and Ms. Gagne agreed to an extension of the first contract. They did so in writing agreeing that, subject to several exceptions, the terms and conditions of the first contract would govern the extension. The first exception related to the completion, possession and adjustment date. They agreed that it would be November 20,

2008 (although the buyer agreed to close the transaction "as soon as possible"). Second, Ms. McCarthy agreed to pay to Ms. Gagnon \$36.04 per day "starting October 30, 2008 and ending on the day the sale completes". This was to reimburse Ms. Gagne for the mortgage interest and bridge financing costs she was incurring as a result of Ms. McCarthy's failure to complete. Third, Ms. McCarthy agreed to pay "any additional legal fees due to the delay in closing". The parties agreed that these adjustments would be accounted for when the sale completed.

- [5] Ms. Gagne provided an executed Form A transfer to Ms. McCarthy's lawyer prior to the completion date. When Ms. McCarthy failed to complete on November 20, 2008, Ms. Gagne instructed her lawyer to write to Ms. McCarthy's solicitor explaining that Ms. Gagne was "ready, able and willing to complete the sale" and that legal action would be taken "unless some new contractual agreement" was reached with Ms. McCarthy.
- [6] Ms. McCarthy agreed to new contractual arrangements on November 29, 2008 (the "second contract"). The offer which gave rise to the new contract was prepared by Ms. McCarthy's real estate agent. By it Ms. McCarthy and her grandparents, the defendants Walter and Lorraine Hintz, offered to purchase the Queen Street property for \$386,000. The completion date was to be December 4, 2008. The offer was signed by each of the defendants and accepted by the plaintiff later that day. An addendum to the contract was also signed by all of the parties on November 29, 2008. In it Ms. McCarthy and her grandparents acknowledged that the "subject conditions" which were part of the first contract had been satisfied in full. In addition, the defendants agreed to "credit the seller for the additional costs incurred (due to the delay in completion) for interest on the seller's mortgage and bridge financing". The costs were to run from October 30, 2008, until completion. Unlike the extended first contract, the second contract did not specify the amount of the interest on the bridge financing. Finally, the defendants agreed to pay the utilities on the Queen Street property from October 30, 2008 until completion.
- [7] On December 2, 2008, Ms. Gagne's notary wrote to the defendants' lawyer detailing the costs that Ms. Gagne had incurred as a result of the delayed completion of the transaction. Those costs totalled \$1,930 and consisted of legal and notary fees of \$548, bridge financing costs of \$504, and mortgage interest of \$878. Prior to the scheduled completion, Ms. Gagne had her notary provide another executed Form A transfer to the purchasers' solicitor. The purchasers did not complete as scheduled on December 4, 2008.
- [8] Between December 5, 2008 and mid-March 2009, either Mr. Hintz or Mrs. Hintz repeatedly assured Ms. Gagne that they would be completing the transaction. On December 5, 2008, Mr. Hintz told Ms. Gagne that he expected to have the funds to complete the sale by December 8th. On December 12th, Shelley Hintz, the Hintzs' daughter-in-law, told Ms. Gagne that the Hintzs had met with their lawyer and remained committed to the purchase. On December 16th, Mr. Hintz confirmed as much in a conversation with Ms. Gagne. He told her that they would be finalizing the purchase before Christmas. On December 29th, Mrs. Hintz left a message on Ms. Gagne's answering machine advising that they were still committed to the

purchase and were expecting funds shortly. On January 6, 2009, Mrs. Hintz told Ms. Gagne that she was now able to complete and wanted to know the precise amount she was required to pay. Ms. Gagne had her notary public calculate that amount and informed the Hintzs' solicitor. The amount was \$392,000. On January 7th, no money was forthcoming, but on January 8th, Mrs. Hintz assured Ms. Gagne that funds would be arriving soon. Mrs. Hintz told Ms. Gagne on January 14, 2009, that the money would be there by 10 o'clock the next morning "at the latest". The funds were not available at 10 o'clock the next morning, but Mrs. Hintz assured Ms. Gagne that the money would be there later in the week. That also proved not to be the case. On January 20th, Ms. Gagne retained a lawyer to pursue legal action. After receiving a demand letter, Mrs. Hintz told Ms. Gagne that things were "moving forward" and that their solicitor would be in receipt of \$392,000 by February 17, 2009. That did not happen. Several more weeks passed and on March 9, 2009, Mrs. Hintz informed Ms. Gagne's lawyer that the earliest she would have the funds was March 11th. That too proved not to be the case. This action was commenced on March 16, 2009.

- [9] After being served with the writ and statement of claim, Mr. Hintz wrote to Ms. Gagne's lawyer in late March. In that letter, he said that he had promised his granddaughter that he would buy a house for her. He said that he did not receive money that he thought he was going to receive. He said that he had not seen the Queen Street house, and although he had been told he could see it, no one had given him keys. He said that he was 81 years old and had been told never to pay for anything "if there is bills or anything unpaid against the title". He expressed doubt as to whether the title to the home was free and clear. He said that he had funds in place to complete the sale and had since February 1, 2009. He said that he would have "gladly" given the money to Ms. Gagne if he received "a statement of proof", but because he had not received such a document, he did not think he should have to pay anything extra for the months of February and March. Ms. Gagne has deposed that Mr. Hintz never asked to see the Queen Street property and never asked her for "statement paid in full title", nor had he told her that he would forward funds when "everything is 100%". The first she learned of any of these concerns was when she received Mr. Hintz's letter.
- [10] On April 14, 2009, the defendants filed their statement of defence. In it they denied the facts pleaded by the plaintiff. Although the statement of defence is filed on behalf of all three defendants, it is written from the perspective of Ms. McCarthy. In it she wrote, "I was misinformed that the financing was available therefore the subject [to] financing should never have been removed." She also wrote that "this was suppose[ed] to be a gift from my grandparents who were suppose[ed] to receive money, for whatever reason their funds were unable to be released".
- [11] On July 7, 2009, Ms. Gagne sold the Queens Street house. The sale completed on August 15th for the price of \$339,000.
- [12] This matter was first set down for summary trial in December 2010. Although the Mr. and Mrs. Hintz were properly notified of the hearing, they did not appreciate that they needed to attend. The matter was therefore adjourned. On January 13, 2011, Mr. Hintz swore an

affidavit in response to Ms. Gagne's claim. That is the only affidavit filed by the defendants in this case. In it Mr. Hintz deposed that, as he had written in the letter referred to above, he had not seen the Queen Street house and that therefore he "would not pay the money". He also said that at some unspecified time, likely in the fall of 2008, he met with the plaintiff and others at the RE/MAX real estate office. During that meeting, and perhaps on other occasions, Conrad Burke, "did all the talking" (Mr. Burke was and may still be Ms. Gagne's friend or spouse). Mr. Hintz deposed that because Mr. Burke did the talking, he assumed that Mr. Burke was a part owner of the property. Other than expressing surprise that Mr. Burke is not a plaintiff in this action, Mr. Hintz does not appear to attach any significance to this aspect of the matter.

Analysis

- [13] As noted above, there is no legal defence advanced by the defendants in this case, nor is one apparent on the proven facts. Both the first and second contracts were reached between competent adults. The terms are clear and certain, and the obligations are supported by consideration. The defendants failed to perform that which they agreed to perform, and absent some legal excuse, they are liable for the consequences of their failure.
- [14] There are no legally significant excuses advanced by the defendants. Mr. Hintz appears to advance two explanations for not completing the contract. The first is that he has always been of the view that he should not purchase something if there may be unpaid bills associated with the thing to be purchased. That is no doubt a sound credo, but in this case, there is no evidence to suggest that title to the property would be other than clear on completion. Second, he argues that because he did not physically see the property, he ought not to be obliged to complete the purchase. There are three difficulties with this assertion. First, the contract does not contain such a term. To the contrary, it contains an entire contract clause (para. 18) and a clause that obligated the vendor to maintain the property in substantially the same condition that it was in on September 20, 2008, when it was inspected by the buyer. There is no evidence that it was in anything other than the same condition as it had been when inspected. Second, Mr. Hintz could have arranged to view the property at any time. There is no evidence that he asked to. Third, his claim that this was his reason for not completing the transaction is at odds with his letter of March 2009. In that correspondence, he made no reference to any desire to inspect the property; rather, he wrote that he was willing to complete and would do so as soon as he was satisfied that there were no unexpected charges on title.
- [15] It follows that the defendants are in breach of their obligations under the second contract.
- [16] The next issue is the amount of damages to which the plaintiff is entitled. She claims damages that fall into five categories: the loss in value of the property, costs associated with its maintenance, legal fees, financing and interest charges, and the cost of medication necessitated by the significant stress that the failure of this transaction caused her. In total, the plaintiff claims \$83,273.81. Before dealing with each of these individual claims, some

comment on the general rules governing the measure of damages in contracts involving the purchase and sale of land are in order.

- [17] As a general rule, damages for breach of contract are intended to put the party not in breach in the same position he or she would have been in had the contract been performed. Doing so is intended to meet or fulfill the parties' expectations upon entering into the contract (see generally *Johnson v. Agnew*, [1979] 1 All E.R. 883 at p. 896; and *Mavretic v. Bowman* (1993), 76 B.C.L.R. (2d) 61 (C.A.) at para. 6-9). This general rule is subject to the duty imposed on those seeking to recover damages to mitigate their losses. The law also permits recovery for consequential losses, such as interest or other carrying costs flowing from the breach and for the reasonable costs of efforts to mitigate. The extent to which these consequential damages may be recoverable is limited two principles: causation and remoteness. The test for determining whether a particular claim is too remote in the context of damages for breach of contract is whether the losses claimed were "reasonably contemplated by the parties as liable to result from the breach" (per Estey J. writing for the court in *Baud Corporation, N.V. v. Brook*, [1979] 1 S.C.R. 633 at p. 647).
- [18] There are several possible times at which damages might be assessed: the date of the breach, the date of trial, or the date the loss crystallized. While the date of the breach is often the appropriate date, there is no absolute rule requiring such an approach. If the circumstances are such that to assess damages at the date of the breach would give rise to an injustice, or would otherwise be inappropriate, the court may select another date (*Johnson v. Agnew* at p. 896 and *Ansdell v. Crowther* (1984), 55 B.C.L.R. 216 (C.A.)).
- [19] With these principles in mind, I turn to the facts of this case.
- [20] It is the plaintiff's contention that to the extent her claim rests on the value of the property, the property should be valued as of the date she was able to sell it to a third party. I am satisfied that it would be unjust and therefore inappropriate to value this aspect of the plaintiff's claim as of the date of the breach. First, the defendants gave the plaintiff repeated assurances over the course of four months following the contract completion date that they intended to complete the transaction imminently. Second, it is apparent that the real estate market was declining over the course of those four months. Third, the plaintiff acted reasonably in reselling the property after it became apparent that the defendants would not be completing the transaction. The property was sold within four months of the defendants' last assurance that they would be completing. It was sold for \$339,000. The contract of purchase and sale was entered into on July 7, 2009. It is apparent from the face of that contract that the sale price was the subject of significant negotiation. The buyer's initial offer was \$330,000. It appears that the plaintiff countered that offer at \$344,000 and negotiations continued until the parties agreed on the eventual sale price. There is no evidence to suggest that this price was not the fair market value at the time the property was sold. There is no evidence to suggest that the plaintiff was either dilatory or precipitous in the manner in which she pursued the sale of this property. I am satisfied that it is appropriate to value this aspect of the plaintiff's claim as of the day that the property was sold. I am further satisfied

that the plaintiff is entitled to the difference between the price at which the defendants agreed to purchase the property (\$386,000) and the eventual sale price (\$339,000), or \$47,000.

- [21] As noted above, the plaintiff is also claiming consequential damages in the form of interest and carrying charges; legal fees; utilities, taxes and insurance costs; medication expense; and payment for the time and effort the plaintiff put in to maintaining the property pending its eventual sale. I will deal with each of these separately.
- [22] Interest costs may be recoverable as a matter of general principle for the reasons expressed by Esson J. (as he then was) in *E & B Mortgages Ltd. v. Skrivanos* (1980), 118 D.L.R. (3d) 139 (S.C.) at p. 143. He there wrote:

No precedent was cited for allowing the interest cost arising out of the six-week delay in completion but, on principle, it seems to be a proper claim. If some such allowance is not made, the plaintiff will not have been put in the same position as if the defendant had performed...

- [23] In the matter at hand, some of the interest costs claimed by the plaintiff were specifically contemplated by the parties. In an addendum to the second contract signed by all of the parties on the same as the main contract, the following clause appears:

Buyer covenants and agrees to credit the Seller for the additional costs incurred [due to the delay in completion] for interest on the Seller's mortgage and bridge financing, together with any additional legal fees assessed. Such costs shall be calculated from October 30th, 2008 until completion date and shall be adjusted & tabulated by the conveyance lawyers on the statements of adjustments.

- [24] The second contract makes a number of references to the first or September 21, 2008 contract. When that contract did not complete as scheduled, the parties agreed to an extension, in the extension dated November 4, 2004, Ms. Gagne and Ms. McCarthy agreed that the latter would:

...credit the Seller for mortgage interest and bridge financing in the amount of \$36.04 per diem. Such amount shall be calculated starting October 30, 2008 and ending on the day the sale completes.

- [25] Although the per diem amount set out in the addendum to the first contract is not incorporated into the addendum to the second contract, I am satisfied that is the amount that was reasonably contemplated by the parties in the way of interest and financing expenses both prior to completion and in the event the sale did not complete. I digress to note that Ms. Gagne required bridge financing between October 24, 2008, when she took possession of her new home, and October 30, 2008, when the first contract in relation to the sale of 1188 Queen Street was to complete. That bridge financing was in the amount of \$50,000 and, I infer, represented the difference between the mortgage financing Ms. Gagne obtained and the purchase price.

- [26] The interest and financing charges Ms. Gagne claims in this action total \$26,572.33. Of that sum, \$10,415.56 is the per diem interest on both her bridge financing and mortgage financing calculated at \$36.04 per day from October 30, 2008 until August 15, 2009, when the property ultimately sold. I am satisfied that this amount is properly recoverable. There are four other components to Ms. Gagne's claim. She is claiming \$125 as the fee charged by her bank when it insisted that the bridge financing be converted to a mortgage, the penalty she paid when she had to liquidate an investment property she owned and had to pay out the mortgage early (\$8,931.77); \$5,850 being interest she paid on a cash advance of \$30,000, which she took on her Visa card; and \$1,250 being interest paid on a \$20,000 line of credit, which she took out in order to pay the monthly mortgage payments on the Queen Street property between the date it should have sold and the date it ultimately did sell. I am not satisfied that Ms. Gagne is entitled to recover any of these amounts. I do not doubt that they were incurred, clearly they were, rather I am not persuaded that they were within the reasonable contemplation of the parties at the time they entered into second contract. What they contemplated was that Ms. Gagne would be paying \$36.04 per day for the money the purchasers were going to pay her. That, it seems to me, is the measure of her damages for interest and carrying costs.
- [27] In addition, the plaintiff is claiming for the cost of her efforts in maintaining the property, that is, shovelling snow, clearing the walkways, mowing the lawn, and tending to the garden. She estimates that she spent five hours per week during the 41 weeks between the date the property should have sold and the date it eventually did sell. In her opinion, her efforts are worth \$26 per hour, and she claims \$5,330 as a result. I think that some amount for maintaining the property pending sale is reasonable. Had, for example, the plaintiff simply abandoned the property and its eventual sale was either delayed or the price reduced, there is no doubt that the defendants would be entitled to argue a failure to mitigate. In this sense, these costs are reasonable costs of mitigation. I am not persuaded, however, that they should be remunerated to the degree claimed or at the rate claimed. I am satisfied that such services are properly valued in these circumstances at \$15 per hour and two hours per week is reasonable. The claim is allowed in the amount of \$1,230.
- [28] The next head of damages is the prorated cost of insurance (\$633.42), utilities (gas to heat the home) in the amount of \$621.33, prorated property taxes of \$1,785.81, and repairs to irrigation (\$52.50), a hot tub and a washing machine (\$139.87). I am satisfied that the insurance, property taxes and utilities are properly recoverable. Spencer J. allowed recovery of similar costs in *Elliott v. Simms* (1982), 34 B.C.L.R. 152 (S.C.) at p. 157. Further, to deny recovery for these amounts would not honour the general principle upon which contractual damages are awarded. This case is distinguishable from the circumstances in *Krangle v. Gustavson* (11 July 1994), Vancouver C933023 (B.C.S.C.). In that case, Errico J. declined to award the interest expense the plaintiff incurred as a result of a failed transaction. There the plaintiff remained in occupation of the house. Ms. Gagne moved into her new home and was obliged to maintain both residences. The defendants knew that Ms. Gagne had purchased another residence at the time they entered into this contract. The costs were, therefore,

clearly within the reasonable contemplation of the parties. I am not allowing the claim for the repairs to the property's irrigation, the washing machine, or the hot tub chemicals. It is not clear on the evidence how these costs were caused by the defendants' breach, nor is it clear that they were within the reasonable contemplation of the parties.

- [29] The claim for anxiety medication is similarly disallowed. It cannot be said to be within the reasonable contemplation of the parties.
- [30] As to legal expenses, three accounts are claimed. Two of them, an account rendered by Gilchrist & Company for \$462 and an account rendered by a notary public Christine Duncan of \$991, relate to costs incurred in an attempt to complete the transaction. A third account rendered by Rush Ihas Hardwick LLP in the sum of \$2,367.50 was incurred in the prosecution of this action. I am satisfied that Ms. Duncan's fee is properly recoverable but limited to the sum of \$300. That is the amount Ms. Duncan attributed to the "delay with sale". The disbursements all appear to be costs that would have been incurred whether the sale completed as scheduled or not. The account of Gilchrist & Company is properly recoverable in its entirety. The account of Rush Ihas Hardwick LLP is not recoverable. That is a matter that falls to be addressed in costs.

Conclusion and Costs

- [31] It follows from the foregoing that the plaintiff is entitled to judgment in the amount of \$71,826.79. She is entitled to prejudgment interest from August 15, 2009, on \$47,000 and from the date the expenses were incurred in relation to the other components of the award.
- [32] Unless there is something touching on the question of costs about which I am unaware, the plaintiff is entitled to her costs at Scale B.

"G.M. Barrow, J."

The Honourable Mr. Justice Barrow

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