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Get it all in writing if building a home

When a contract to build a custom-built home says that it can only be amended in writing and not verbally, will the courts enforce a handshake deal for thousands of dollars worth of extras?

That was the question in a case, which came before the Ontario Divisional Court last fall.

The decision of Justice Fletcher Dawson was handed down in October, and published last month in the Real Property Reports, a weekly series of court cases for the legal community.

In March 2000, Asan and Barbara Dzourelov contracted with T.B. Bryk Management and Development Ltd. for the construction of a custom-built home. The agreement said that about 1,000 square feet of the basement would be finished with a layout to be confirmed by the purchasers. It also provided that "extras" (with some examples being given) were to be "priced separately."

At closing in August 2000, the builder asked for an extra $13,636.73 for finishing an additional 570 square feet in the basement.

The purchasers objected, saying they never agreed to have the additional space finished. Before closing, the parties negotiated a reduction to $9,544.30.

The buyers paid the money and closed under protest. They then successfully sued in Small Claims Court to recover the amount they claimed they overpaid.

At the trial, the evidence was that the Dzourelovs were aware that the extra space in the basement was being finished, since they witnessed the ongoing construction on a regular basis.

Despite the fact that the trial judge apparently believed that the purchasers requested the additional space be finished, he ruled that they did not have to pay for that part of the job because of the "entire agreement" clause in the contract between the builder and the buyers.

This type of clause is typical in virtually all Ontario agreements of purchase and sale, for new and resale homes and condos.

Basically, it says: "This is the entire agreement. There's nothing else." It also says that the agreement may not be amended unless the change is in writing.

The Small Claims court judge concluded that this exclusivity clause prevented the builder from recovering payment for a subsequent verbal agreement to finish the additional basement space. Since there was no written amendment, and the main contract contained the "entire agreement" between the parties, the builder could not get paid for the extra 570 square feet.

Not happy with the result in Small Claims court, the builder appealed to the Divisional Court.

There, Justice Dawson reversed the decision of the lower court, and ruled that the builder was entitled to receive the entire $9544.30. His decision was based on a 2003 Ontario Court of Appeal ruling dealing with "entire agreement" clauses. In the case of *Shelanu v. Print Three*, the appeal court said that if the conduct of the parties makes clear that the written agreement no longer reflects their full intentions, the entire agreement clause can be ignored. It can also be ignored if it would result in "substantial unfairness."

In the Dzourelov case, it appeared at trial that there was a subsequent verbal agreement about the extra basement space. The original written purchase agreement required that 1000 square feet of basement be finished. It was silent about the extra 570 square feet.

The Divisional Court ruled that since the later agreement about the 570 square feet was not in any way inconsistent with the original agreement, it became a separate agreement and not an amendment to the original agreement.

So it seems that the law in Ontario is that if a written agreement prohibits a verbal change, it can't be changed verbally to amend what's already there. But if a verbal agreement is made over a matter, which is not dealt with in the original agreement but in effect creates a new deal, the courts will enforce it.

I'm very uncomfortable with the court's reasoning in this case since it can lead to a certain amount of commercial uncertainty.

People buying new homes are not always going to put every light switch and doorknob on a written change order.

The court in Dzourelov did discuss two legal principles, which might have been better suited to settle the dispute, but unfortunately these arguments were not pursued in court.

Justice Dawson noted in his decision that "it would seem" that the related doctrines of unjust enrichment and quantum meruit applied in this case. (*Quantum meruit* is a Latin principle, which courts invoke when there is a contract but no price was set in it for the work to be done. The courts then award quantum meruit the amount merited, or a reasonable remuneration for the work performed.)

In this case, the buyers benefited by the extra work done and did nothing to stop it while it was in progress.

This basis might have been a more easily understandable rationale for awarding damages to the builder.

Based on this case, I have developed Aaron's three rules of contract extras in the construction of a custom-built house. These three rules also apply to all new home contracts, custom-built or not. No other rules are necessary.

Here they are:

Get it in writing.

Get it in writing.

Get it in writing.

They are worth remembering.

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