-->

thestar.com

Bob Aaron *bob@aaron.ca*

December 24, 2005

Seller on hook for damage between deal signing, closing

What happens to a house purchase transaction when the building suffers substantial damage between the time the offer is signed and closing?

A year ago, the parties to a relatively straightforward sale found out the hard way that damage to a house in that interval can cause a legal, as well as practical, headache.

In November 2004, Bibhas Bhattacharya and Tina Dalton sold their property on Bogert Ave. in Toronto for $592,000 with closing scheduled for Jan. 10, 2005. The purchasers, Ming Hou and Kaiyan Fu, paid a deposit of $25,000 to the real estate agents.

A standard clause in the Ontario Real Estate Association offer form used for this deal states that the property remains at the risk of the seller until closing. In the event of substantial damage, the buyer has the option to terminate the agreement and receive a refund of all deposit money paid, or take the insurance proceeds and complete the purchase.

In the first week of December 2004, while the owners were away, a water pipe burst in the main-floor powder room of the house. It flooded a large part of the main floor, including the living room and kitchen, and virtually the entire finished basement.

Within two or three days, the owners' insurance company had retained a contractor to repair the damage at a cost of more than $36,000. On Dec. 9, the purchasers were told of the damage but by the time they were able to visit the house nine days later, repair work was well underway and new drywall had been installed on some of the wall and ceiling areas that had been flooded.

Hou and Fu were concerned about mould, but were unable to see and assess the full extent of the damage.

One week before the scheduled closing date, they were able to inspect the flood-related repairs and found that some of the trim work, carpeting and painting had not been completed.

A week later, an inspection by Carson Dunlop, Consulting Engineers, revealed that there were still 12 outstanding items, with a total estimated value of as much as $12,150, if all 12 items were flood-related.

Some last-minute negotiations took place but the buyers were being forced to make a choice with incomplete information.

Ultimately, they offered to close with a $12,150 abatement, which the sellers rejected.

Bhattacharya, the male seller, said that the new flooring and carpeting, and basement paint job made up for any claimed deficiency. Without an agreement on an abatement, the deal died.

Bhattacharya and Dalton soon resold the house for $622,000, which was $42,150 more than the net price that Hou and Fu were willing to pay after the abatement for unfinished items.

When the sellers refused to return the original $25,000 deposit money, Hou and Fu sued to recover it along with some damages related to the delay.

A 2 1/2-day trial took place before Justice Donald R. Cameron at the end of last month, and his ruling was released on Dec. 2. In coming to his decision, he had to decide if the conduct of the buyers was reasonable in the circumstances, and whether there was a substantial disparity between the value of the deposit that the sellers wanted to keep and the damages caused to the sellers by the breach of contract.

Justice Cameron ruled that the actions of the buyers were reasonable in the circumstances. The sellers suffered no damages as a result of the breach of contract. In fact, they gained $30,000 on the resale.

This the judge compared to the $25,000-plus-costs that the sellers wanted to keep when the purchase died. The court granted the buyers relief from the forfeiture of their deposit, and ordered it returned to them along with a further $2,952 in damages. The sellers' claim to keep the deposit was dismissed.

Last week, I spoke to Sandra Barton, the lawyer who represented the buyers in court.

She told me that no appeal had yet been filed, and the matter of court costs was yet to be decided.

Normally, the legal costs for each party to a court case, when the trial date is expedited as this one was, could be in the range of $10,000 to $20,000 or more. As well, the losing party typically pays some or all of the court costs of the winner.

Barton told me that she had asked the court to order the sellers to pay most of her court costs based on the fact that they had turned down an offer of settlement, which could have avoided the trial and would have produced essentially the same result.

The legal lesson of the case is this: If the house you're buying is damaged before closing, be certain to get legal advice before deciding whether or not to terminate the deal.

And the practical lesson is perhaps even more important: If you're leaving your house for any length of time during cold weather, always shut off the water supply valve, turn the water heater control to the pilot setting, and turn on a water tap on the lowest level of the house to bleed the water pressure out of the system.

That way, if the heat goes off and the pipes freeze, the damage caused will be minimal.

Bob Aaron *is a Toronto real estate lawyer. He can be reached by email at bob@aaron.ca, phone 416-364-9366 or fax 416-364-3818. Visit the column archives at http://www.aaron.ca.*

FULL TEXT OF COURT DECISION:

Hou v. Bhattacharya, 2005 CanLII 44816 (ON SC)

Date:	2005-12-02
Docket:	05-CV-285363SR
URL:	http://canlii.ca/t/1m4bd

COURT FILE NO.: 05-CV-285363SR
DATE: 20051202

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
MING HOU AND KAIYAN FU	)	*Sandra L. Barton*, for the Plaintiffs
Plaintiffs	)	
- and -	)	
BIBHAS BHATTACHARYA AND TINA DALTON	)	*Richard Worsfold*, for the Defendants
Defendants	)	
	)	
	)	**HEARD:** November 28, 29 and 30, 2005

CAMERON J.

[1] This is an action for return of a $25,000 deposit and damages and a counterclaim for forfeiture of the deposit.

FACTS

[2] The defendants listed their property at 197 Bogart Ave., Toronto for sale in June, 2004 at $629,000. They sold their property to the plaintiffs pursuant to an Agreement of Purchase and Sale dated November 11, 2004 for a price of $592,000 to close Monday, January 10, 2005. A deposit of $25,000 was paid by the plaintiffs to the agent.

[3] The Agreement of Purchase and Sale contained the following clause:

> All buildings on the property and all other things being purchased shall be and remain until completion at the risk of the Seller. Pending completion, the Seller shall hold all insurance policies, if any, and the proceeds thereof in trust for the parties as their interest may appear and in the event of substantial damage, buyer may either terminate this Agreement and have all monies paid returned without interest or deduction or else take the proceeds of any insurance and complete the purchase.

[4] The purchaser was allowed 3 visits for the purpose of getting quotes and taking measurements.

[5] Ms. Fu was 7 months pregnant. The house was in "move in" condition.

[6] Some time on December 5 or 6, 2004, while the defendant was away, a supply pipe burst in the main floor powder room. It flooded a large part of the main floor, including the living room and kitchen, and virtually all of the finished basement.

[7] On December 8 the insurance company called in Core Insurance Claims Contracting Inc. ("Core"). They gave a quote of $36,031.01 and were hired. They immediately took up the 1st floor and the carpet in the basement and started drying operations. They commenced repairs, consisting primarily of drywall, baseboard, floor covering, and painting on December 15, 2004.

[8] On December 9, 2004 the plaintiffs were advised of "a pipe burst in the main floor powder room which has resulted in some water damage in the basement". They tried but could not gain access until the defendant returned on December 18, 2004. By this time the repairs had commenced. Drywall had covered up some areas of damage to the walls and ceiling. The plaintiffs could not assess the full extent of damage. They were concerned with mould.

[9] Assuming the land was valued at about $250,000, in my opinion the damage was substantial. It represented about 10% of the total value of the building.

[10] On December 10 the plaintiff sought advice re: the progress of repairs. "We will not consider closing prior to the repair work to be completed upon a satisfactory inspection" and "Conduct a professional home inspection by a home inspector appointed by us before closing". On December 20, 2004 the Vendors said that if the purchasers wish to complete an inspection of the repairs, it would be limited to the repairs and area affected.

[11] The Vendors were away from December 23 to December 30.

[12] On Monday, January 3, 2005 the plaintiffs, with a contractor friend, again examined the flood related repairs. Most had been effected but there were outstanding matters such as trim work, carpeting and painting. The plaintiffs sent a list of defects to the agent who passed it on to the defendants. He passed it on to Core. It consisted of many items including powder room tiles, doors, reinstallation of the shower stall, enclosure of circuit box, sliding glass doors, more sanding of joints in drywall boards, etc.

[13] The plaintiffs sought to extend closing.

[14] The plaintiffs were advised that they could inspect the premises following completion of the repairs on Friday, January 7, 2005 and closing could still take place on Monday, January 10, 2005.

[15] The defendant moved his things to Ottawa on Saturday, January 8.

[16] The repairs were substantially complete on January 7. The defendant signed an acceptance of the work on that date, noting some defects. On that date the plaintiffs advised that their inspector would not be available to inspect the premises until Monday, January 10 and asked for an extension of closing to Friday, the 14th. The defence refused.

[17] The plaintiffs also sought a 1½-year guarantee which they subsequently reduced to a guarantee from the contractor. However the contractor would guarantee his workmanship only to the defendant. The defendant was prepared to assign the guarantee to the plaintiffs.

[18] There were still minor deficiencies being repaired for 5 hours on Monday the 10th during the inspection by Carson Dunlop, Consulting Engineers. They included paint touch up, caulking, mirror, towel bar and toilet paper roll, some ¼ round, a light cover and a grill for a heat vent. On the 10th the closing was extended to the 12th so that the inspection report could be prepared. In view of the short time available, a draft report was given to the plaintiffs late on January 12, 2005. At the same time closing was extended to the 14th.

[19] The final report was received on the 13th with the following changes:

(a) Many are not suspected to be resulting from the water leak event or attendant repairs

was changed to:

> Many are related to the water leak event or related repairs.

(b) There is a significant crack in the granite counter radiating from the kitchen sink. The crack does not appear to have recently occurred.

was changed to:

> There is a significant crack in the granite counter radiating from the kitchen sink. The sealant is no longer flexible. This suggests that the crack has not newly formed, but may have recently recracked.

and in the conclusion:

(c) The improperly supported granite foyer tiles are likely resulting from an installation defect. For the most part the repairs undertaken were professional, although there were some repairs that were incomplete or substandard quality.

was changed to:

> The flex of the granite foyer tiles is likely resulting from an installation issue with the plywood sub-floor, but impact from the leak event cannot be ruled out entirely. The plasterwork and carpeting repair work is considered to be of medium to sub-standard quality. The trim and hardwood installations are apparently of professional quality.

[20] The plaintiff denied any influence in affecting the report. She did not notice the changes. Whether she did or did not, they had no material effect.

[21] The final report listed 12 items relating to the flood:

- grout and caulk baseboards in the powder room and foyer. This was apparently done on the 10th.
- repair the cabinet floors and peeling edges, the buckled metal trim and finish the kick plate quarter round ($500-$1,000). This was apparently done, at least in part, on the 10th.
- improve the finish at bottom of dining room doorjamb ($200). Paint touch up was done on the 10th.
- complete installation of carpeting under stairs etc. ($300-$500).
- repair flooring in kitchen and basement washroom ($800-$1,300).
- repair the rough plaster and paint at various locations in the basement ($800-$1,200). This was done on the 10th.
- repair the basement doors ($250-$1,000).
- have plumber check kitchen sink and related piping, including dishwasher, for leakage ($200 up).
- caulk the basement shower stall and doors; monitor and eventually replace shower stall. The shower was caulked on the 10th.
- have an inspection by a qualified mould specialist ($500 + up).

[22] The granite counter, estimated at $3,000 to replace, was cracked prior to the flood, notwithstanding the "clear" report prior to going firm on the purchase in November, 2004.

[23] The deficiencies related to the construction, design or efficiency of the property.

[24] The report was forwarded to the Vendors with the comment that it caused the plaintiffs "great concern".

[25] The plaintiffs did not know what problems had been cleared up on January 10. The defendants had said that Core would be out by Friday, January 7, 2005. They were not and so did not know the latest developments after Carson Dunlop left.

[26] The purchasers offered on January 13, 2005 to close provided there was an abatement in price of $12,150. They agreed to accept an assignment of warranty. The insurance company would give no guarantee.

[27] Even excluding the counter top, there were still some $5,000 in the report which appeared to be unremedied.

[28] The Vendor refused the abatement. He said the new hardwood flooring and new carpeting and paint job in the basement make up for the alleged deficiency.

[29] The defendant refused to accept a lesser price so the agreement was terminated.

[30] The defendants relisted at the same asking price of $629,000 and sold shortly thereafter for $622,000, closing February 15, 2005. The plaintiffs had offered $579,850 which was not accepted.

CLAIM AND COUNTERCLAIM

[31] The plaintiffs sue for recovery of the $25,000 deposit and $3,450 in damages re: 2 inspection reports for $803, $1,600 penalty to the current landlord and $690.40 for ½ month's rent, and legal fees of $763.66.

[32] The defendant counterclaims for an order forfeiting the $25,000 deposit.

DISCUSSION

[33] Section 14 gave the right to the plaintiff, if there was substantial damage, to "either terminate the Agreement and have all monies paid returned without interest or deduction or else take the proceeds and complete the purchase".

[34] However repairs were well under way before the plaintiffs were given an opportunity to assess:

(a) the damage;

(b) the insurance available; and

(c) decide on its options.

[35] The defendant had proceeded without first having had the opportunity to inspect and a reasonable time to consider the matter.

[36] On December 20 the defendant accepted a new arrangement. The plaintiff could postpone the election until there was an inspection. Following completion of the repairs and an inspection the plaintiff could elect to terminate or go through with the deal.

[37] There was nothing in the agreement which precluded reliance on the inspection report to base a judgment to purchase or decline: *Marshall* v.*Bernard Place Corp.*, [2002] O.J. No. 463 (C.A.). It was a natural consequence of the agreement.

[38] There was clearly an obligation on both the plaintiff and defendant to act reasonably and with good faith.

[39] In this case the plaintiff was being pressed to close with no extensions granted until January 10th to allow for inspection, and again only on January 12 to the 14th to allow for preparation of the report.

[40] In addition, the repairs were still being made when the inspection was done on January 10. There was, unfortunately, no update on the repairs either sought by the plaintiffs nor offered by the defendants after those repairs were finished. Accordingly, the plaintiffs were forced to make their choice with incomplete information.

[41] The report revealed objective facts on which the purchasers based the exercise of their discretion under the inspection condition. They chose to close with an abatement of $12,150 to cover the costs of the apparent shortfall. The defendant refused the abatement.

[42] They did have an assignment of the guarantee and were prepared to offer to co-operate in enforcing the guarantee.

[43] Had the plaintiffs known the true state of affairs they might have acted differently. Had the defendants been aware of their lack of knowledge he might have acted differently.

[44] In addition, the cracked counter was not noted in the November inspection obtained by the plaintiff. It was only noted on the January 10 inspection and then only as a possibly flood related event. It was also noted in pictures taken December 13, 2004. The plaintiff had to rely on the earlier inspection in determining its existence. I find it occurred between November 15, 2004 and December 13, 2004.

[45] I find that having inspected the repairs the plaintiff chose to complete, but with an abatement of slightly less than the cost of repairs. On refusal of the abatement, the defendant was obliged to return the deposit as there was outstanding work.

[46] In addition s. 98 of the *Courts of Justice Act* gives broad jurisdiction to grant relief from forfeiture. That relief is not restricted to preclude relief from forfeiture of a deposit. In order to grant relief 3 questions must be answered:

1. Was the plaintiff's conduct reasonable in the circumstances?

2. Was the object of the right of forfeiture essentially to secure payment of money?

3. Was there a substantial disparity between the value of the property forfeited and the damage caused the vendor by the breach?

See *Liscumb* v. *Provezano* reflex, (1985), 51 O.R. (2d) 129 (C.A.) at pp. 7-8 citing *Shiloh Spinners Ltd.* v. *Harding*, [1973] A.C. 691 at pp. 722-4.

[47] I consider the plaintiffs' actions reasonable in the circumstances. The object of the right of forfeiture was to secure the payment of the deposit. The damage caused to the vendor was nothing; in fact he gained $30,000 on the resale. This can be compared to $25,000 plus costs otherwise to be forfeited by the plaintiffs on the failure of the transaction.

DECISION

[48] In the circumstances I grant relief from forfeiture of the deposit and order it returned to the purchaser.

[49] I further grant the plaintiffs damages of $2,952.16. I disallow ½ of the Carson Dunlop report as responsibility for it had not been resolved and the one half months rent which was payable in any event.

[50] I dismiss the defendants' claim for forfeiture of $25,000.

COSTS

[51] If the parties cannot agree on costs they may speak to me. The plaintiffs' representations shall be made within 15 days of release of these reasons. The defendants shall respond within 15 days thereafter.

_____
CAMERON J.

Released: December 2, 2005

COURT FILE NO.: 05-CV-285363SR
DATE: 20051202

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

MING HOU AND KAIYAN FU

Plaintiffs

- and -

BIBHAS BHATTACHARYA AND TINA DALTON

Defendants

REASONS FOR JUDGMENT

CAMERON J.

Released: December 2, 2005