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497957 Alberta Ltd. v. Sidhu

Between
497957 Alberta Ltd., plaintiff, and
Jagir Sidhu and Kamaldeep Sidhu, defendant

[1996] A.J. No. 1216

Action No. 9603 21195

Alberta Court of Queen's Bench
Judicial District of Edmonton - Edmonton, Alberta

Master Funduk

Judgment: filed November 25, 1996.

(12 pp.)

Counsel:

B. Mohan, for the applicant.
S.M. Mann, for the respondents.

REASONS FOR DECISION

- 1 **MASTER FUNDUK:**-- This is an application by the Applicant for an order for possession of a house.
- 2 The Applicant says that the Respondents are tenants under a verbal tenancy. The Respondents say that they are purchasers under a verbal agreement for sale.
- 3 There is conflicting evidence on this point.
- 4 The Applicant's witness was cross-examined. The examination is 48 pages. Some of the

cross-examination is (a) irrelevant, (b) browbeating the witness, (c) double-barrel led questions and attempts to put words in the witness's mouth and (d) non-intelligent questions.

5 The husband testifies:

3. I entered into an Agreement for Sale (hereinafter "the Agreement") between myself and my wife, Kamaldeep Sidhu and Jagmohan Baidwan, on behalf of 497957 Alberta Ltd. (hereinafter "the Applicant"), for the land legally described as:

Lot 3
Block 13
Plan 9123203

also known municipally as 3911 - 32 Street, Edmonton, Alberta (hereinafter the "Premises").

4. The terms of the Agreement for Sale were the following:
 - (a) agreed sale price of \$126,000.00;
 - (b) a deposit of \$1,000.00;
 - (c) interest on the balance of the purchase price of \$125,000.00 at 8% per annum;
 - (d) monthly payments of \$1,144.00 calculated to include principle, interest and taxes; and
 - (e) possession date of April 15, 1995.
5. The monthly payment of \$1,144.00 per month was calculated by the Applicant, based on the balance of the purchase price of \$125,000.00.
6. The Applicant represented to me that his lawyer would draft the Agreement for Sale and Transfer documents. I paid the deposit of \$1,000.00 on March 28, 1995 by cheque. Attached hereto as Exhibit "A" to this my Affidavit is a copy of the cancelled cheque #483 payable to Jagmohan Baidwan in the amount of \$1,000.00.
7. The Applicant required funds to be payable in his name personally, i.e. Jagmohan Baidwan, notwithstanding that the house was owned by the Applicant.
8. I paid my monthly mortgage payments by both cash and cheque. Attached hereto as Exhibit "B" are copies of some of the cancelled cheques, being cheque

numbers 490, 507, 511, 519, 529, 534, 540 and 571.

9. The payments I have made toward the house total \$30,122.64.

6 I am not a mathematician. However, I do know that even if the Respondents paid a \$1000 deposit and \$1,144 a month from May 1995 to October 1996 that is \$23,880. Why did the Respondents pay \$30,122.64?

7 The husband does not identify the cash payments made, either by dates of payments and specific amounts. There is just the sweeping statement that he has paid \$30,122.64.

8 Why does the husband provide only "some of the cancelled cheques"? Why not all?

9 The cheques he evidences are as follows:

(1)	March 28, 1995	-	\$1,000
(2)	May 5, 1995	-	\$ 600
(3)	June 1, 1995	-	\$ 600
(4)	July 29, 1995	-	\$ 700
(5)	August 30, 1995	-	\$ 700
(6)	Sept. 26, 1995	-	\$ 700
(7)	Oct. 6, 1995	-	\$ 400
(8)	Nov. 18, 1995	-	\$ 500
(9)	March 18, 1996	-	\$ 500

That totals \$5,700.

10 Am I to assume that the Respondents paid \$24,422.64 in cash over a period of time without getting any receipts for the payments?

11 The husband says that:

12. I had recently been through a foreclosure, and would have a problem qualifying for a mortgage with a financial institution. This is why the Applicant offered to finance my purchase through his company's mortgage.

12 The Respondents were not able to service the mortgage on the residence they were foreclosed on but they have the financial ability to pay \$30,122.64 in an 18 month period? If they have that financial ability why did they not just service the mortgage on thee residence?

13 The Applicant's witness testifies that from April 1, 1996 to now the Respondents have paid only \$1,150. The Respondents gave the Applicant five cheques as follows:

(1)	May 3, 1996	-	\$ 500
(2)	May 19, 1996	-	\$ 500

- (3) June 27, 1996 - \$ 300
- (4) June 30, 1996 - \$1,650
- (5) Aug. 9, 1996 - \$ 300

14 None of those cheques were honoured when presented for payment. Ms. Mann says that the cheques were not honoured because the Applicant held them until September 1996 and so there were not sufficient funds to cover all of them.

15 Where is that in the evidence? The witness's evidence is that he periodically checked to see if each cheque would be honoured if presented for payment and was always told no.

16 There is this incredible evidence on the cross-examination, pp. 26-27:

Q So did they provide you with an explanation as to why they stopped payment shortly after April 1st, 1996?

A Well, actually, as a matter of fact, they did pay me 1050 instead this, and they had been writing me the cheques, and they had been saying that because his son got laid off and his wife is sick, he's going through hardship. He has other -- a lot of other bills to pay. He will keep paying me slowly, slowly, and his situation is going to get better in month, two months; then he will clear all these cheques, so he had been writing me cheques but they were not -- been cashed. There was no --

Q Is it not true that they provided -- that you showed up at the residential premises and spoke with the Respondent, Kamaldeep Sidhu, and obtained from her the five cheques listed in your Paragraph 6, and these cheques were provided as security, but you took them with the understanding that you would not be negotiating them at the time that they were delivered to you; is that true; is that what happened?

A I don't understand the question, actually.

Q You showed up at the house. Mrs. Sidhu gave you the cheques. Mr. Sidhu said, we will give you the cheques but there is no money there right now. You can hold them as security but do not cash them. Is that what you were told?

A Well, actually, he did tell me that, like, one cheque will go through at a time, and he will call me when it will go through. He did call me, and then I went to the bank to cash it. It didn't cash. Then I called him. He will say, well, he used this money for this thing; then next week he is going to get another cheque; it will be cashed.

Q What date did you try to negotiate each and every of the five cheques that you have listed in Paragraph 6 of your Affidavit?

A Well, I have been in regular contact with them.

Q What date did you try to negotiate each cheque? Did you try them all at once, or did you try them one at a time?

A One at a time.

Q And what dates?

A Well, I would go at least twice a week.

17 Post-dated cheques cannot be negotiated before their dates so the line of questioning is illogical.

18 In any event, the cheques were not honoured when presented for payment. An attempt to blame the Applicant for that is spurious.

19 There is this non-intelligent question about the five 1996 cheques, p. 35:

Q MS. MANN: Looking at Paragraph 6 of your Affidavit, you are listing five cheques. You indicated earlier, and correct me if I'm wrong, that you attended -- and you are going to provide the dates but attended roughly twice a week at the bank of the Sidhu's to find out if there's enough money that you can negotiate one or each of these cheques; would that be fair to say?

A Yes.

Q And then you put the cheques through, and they all came back non sufficient funds; is that correct?

A Yes.

Q Did you ever get an indication from the bank that there were sufficient funds?

A No.

Q Why would you try to cash them? Is it an attempt to put together a basis for vacating them from the premises?

(emphasis mine)

20 Why would anyone try to cash a cheque given to him? The question asked of the witness should not be dignified by a response.

One

21 Mr. Mohan says that there is no written agreement for sale so s. 4 Statute of Frauds applies. But that section says that no action shall be brought upon a contract of sale of land unless the agreement upon which the action is brought is evidenced by a memorandum in writing signed by the person to be charged.

22 This is not a lawsuit by the Respondents so s. 4 does not apply. The statute does not prevent a defence that there is an oral agreement: *Barber v. Glen*, (1988), 59 Sask. R. 49 (C.A.).

23 If part-performance is relevant to proving an oral agreement see *Colberg v. Braunberger's Estate*, (1978), 12 A.R. 183 (C.A.). The court says this, p. 192:

The second test proposed by Lord Reid is that you must look at the alleged acts of part performance and see if they provide that there must have been a contract. You must not look at the oral contract and then find alleged acts of part performance. The acts must in themselves indicate that there must have been a contract or the purchaser would never act as he did in creating the equities that now favour him. The choice is whether the court should undo what has been done or to complete what the parties have left undone. Where the court cannot in fairness and justice undo what is done, then the equitable doctrine of part performance comes into play.

24 The possession of the house by the Respondents and the monthly payments by them is equally consistent with a landlord-tenant relationship as it is with a vendor-purchaser relationship. The cheques are not for \$1,142 each so if anything they bear out a definite leaning to a landlord tenant

relationship.

Two

25 However, it is not necessary to deal with the issue whether the contract is a landlord-tenant contract or a vendor-purchaser contract because of the husband's evidence. He goes on to say this:

11. Before the Applicant and I entered into the Agreement, I indicated to him that I had a house lined up to rent in Millwoods for \$600.00 per month. In convincing me to enter into the Agreement, the Applicant commented to me that the money for rent would go "down the drain" and that the monthly payments that I would make would go towards the purchase of Premises.
12. I had recently been through a foreclosure, and would have a problem qualifying for a mortgage with a financial institution. This is why the Applicant offered to finance my purchase through his company's mortgage.
13. After the Applicant and I entered into the Agreement, the Applicant advised me that I should put a Caveat against the Title of the Premises. As I trusted the Applicant, I did not do this.
14. Two months after possession, the Applicant represented to me that it would cost a lot in Goods and Services Tax if the house was transferred to me at that time and that the Applicant would like to wait until April of 1996. I agreed to wait until April of 1996 to process the documents.
15. On or about August, 1996, I requested receipts for the cash that I had paid the Applicant towards the monthly mortgage payments, demanded the transfer documents immediately, and advised that in default, I would only pay \$600.00 for rent from here on. I further indicated that the excess amount of \$544.00 that I had made on previous mortgage payments should be put towards rent for future months.

(emphasis mine)

26 There is an oral contract between the parties. The issue is whether the Respondents are lessees or purchasers.

27 If the Respondents are purchasers the Applicant's position is tantamount to dictating different terms (changing the nature of the contract). Refusal to complete the contract and dictating different terms is a repudiation of the contract: *Wile v. Cook*, [1986] 2 S.C.R. 137. In that case the Respondents have a choice to make: (1) refuse to accept the repudiation and sue for specific performance or (2) accept the repudiation, in which case the contract is at an end and sue for damages.

28 My interpretation of paragraph 15 of the husband's evidence is that the Respondents have chosen to accept the repudiation of the alleged contract for the purchase of the house. They cannot

then stay in the house for "\$600 a month rent". That position is not logical. That is blowing hot and cold.

Decision

29 There will be an order for possession to be delivered up no later than 10 days from the date of this decision, with a writ of possession to follow, if necessary.

30 As to the Applicant's claim for rent, that depends on what the contract between the parties is. In the face of the conflicting evidence I cannot decide that. I direct a trial of an issue on that. Hopefully common sense will prevail.

31 As the Applicant has gotten an order for possession it will have costs on column 2.

MASTER FUNDUK

qp/s/bbd/mjb