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IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: Aucoin v Pinnacle Condominium Construction Ltd., 2007 NSSM 3

Date: 20070110
Claim: SCCH 273785
Registry: Halifax

Between:

M. Georgina Aucoin

Claimant

v.

Pinnacle Condominium Construction Ltd

Defendant

Adjudicator: W. Augustus Richardson, QC

Heard: January 9, 2007 in Halifax, Nova Scotia.

Appearances: Bernadine Macaulay, for the Claimant
Philip Whitehead, for the Defendant

By the Court:

[1] This claim involves the interpretation of the term "extended balcony" in an amendment to an Agreement of Purchase and Sale (the "Agreement") for a condominium unit. The defendant (the condominium developer), who sold the unit in issue to the claimant, maintains that it has fulfilled its obligations under the amendment. The claimant says that it has not.

[2] The claimant entered into an agreement of purchase and sale with the defendant on January 10th, 2004. Pursuant to that agreement the claimant agreed to purchase unit 110 of what was at that time the proposed Halifax County Condominium Corporation No. 267. She agreed to pay $234,900.00 for the unit. The closing date was set for June 30th, 2005: Art.7, though she could be required to take occupancy of the unit before that date: Art.8.

[3] Schedule "B" formed "part of this Agreement:" Art.29. Schedule "B" dealt with "Interior Specifications." Under the subheading "Sunrooms/Conservatories/Balconies" it provided "[g]enerous concrete balconies equipped with outdoor outlets." Photographs entered at the hearing show demonstrate that the unit came with a typical balcony, with a concrete floor and a concrete- and glass-panel protective railing: see Tab 3 of Exhibit C1.

[4] To understand what then happened it is necessary to present a "picture" of the building. The building in question is rectangular. It is divided along its longer dimension by a corridor. The units on level 1 (the claimant's level) occupy the front and back sides of the building. I was not given compass points in evidence, and for the purposes of this decision only I am going to say that the claimant's unit occupied the south-east corner of the building. Her unit shared a wall with Unit 111, which was at the south-west corner.

[5] Units 110 and 111, as they existed at the time of the Agreement, each had a small corner balcony at the south-east and south-west corners respectively of the building. The balconies did not meet along the south edge of the building.

[6] When facing the building from the south there was a garage entrance door. The door occupied the space between and below the level of the balconies for Units 110 and 111. The developer was of the view that this arrangement did not make for a very aesthetic presentation. Pinnacle decided to extend and roof the garage entrance way, so as to integrate its roof with the south-east and south-west balconies, and thereby create a more aesthetic (and presumably more marketable) building. It would also have the effect of extending the corner balconies of Units 110 and 111 right along the south face of the building, meeting in the middle. (It may be helpful to note that the building itself had not been custom-built as a condominium. It had started out as an existing apartment building which was upgraded and converted by the defendant.)

[7] On October 13, 2005 Ms Aucoin received a phone call from Dominika Campbell, a legal assistant working in the office of the Defendant's solicitors. Ms Campbell indicated that the developer (that is, the defendant) wanted to extend the deck of her balcony over the top of the garage. She told Ms Aucoin that the owner of Unit 111 thought "it's a great idea," and that the extra charge to Ms Aucoin would be $15,000.00. Ms Aucoin replied that she was not interested. She was already paying $235,000.00 and didn't see the need to pay that much more. Ms Campbell asked her whether she would pay anything for what was being proposed, and she said "maybe $5,000."

[8] Ms Campbell then called back a half hour later and said that the developer would only charge $8,500.00 for what was being proposed. Ms Aucoin said that she'd think about it. She then called Ms Campbell back and asked for more details. She wanted to know whether there would be concrete or glass walls on the extension; and what would happen to her view if she did not agree to what the developer was proposing. Later that day Ms Campbell called again. She said that the developer had said that it would put in an enlarged balcony with glass walls which would not obstruct the view. However, she could not show Ms Aucoin what it would look like, since there were no visuals available. Ms Aucoin said that she'd think about it.

[9] Ms Campbell called on October 19th. At that point Ms Aucoin said that she was not interested in the developer's proposal. She said that she didn't need a bigger balcony, and didn't want to spend the extra money that was being proposed. Ms Campbell said that the result (that is, the lack of an extended balcony) would "not look very good," but Ms Aucoin said that there was nothing she could do about that.

[10] Notwithstanding Ms Aucoin's reponse (or perhaps because of it) the developer continued to negotiate with her. By November 8th they had arrived at a price of $4,000 for what was now being called "the construction of an extended balcony:" see Tab 1, Exhibit D6. There was also a proposed term to the effect that if Ms Aucoin told the owner of Unit 111 (who had agreed to pay $15,000 for her part of the extended balcony) what she was paying she would be required to pay $11,000 more. There were some other proposed terms to which Ms Aucoin took exception.

[11] The parties eventually agreed to an Amendment to the Agreement of Purchase and Sale. The Amendment was dated November 10th, 2005 and provided as follows:

> "1. On closing, the Buyer [Ms Aucoin] shall pay the amount of $4,000.00 for the construction of an extended balcony that the Buyer will have exclusive use to.
>
> 2. No party shall divulge the terms of this Agreement to any person, corporation or governmental agency unless required by law to do so."

[12] Ms Aucoin took possession of Unit 110 around November 15th, 2005. At that point in time what was referred to as the "extended deck" was roughly three-quarters completed. There was no railing around the extended portion over the garage. That part of the extension that "belonged" to the owner of Unit 111 was divided from that which "belonged" to Unit 110 by only a plywood partition. It was later replaced with a more substantial, and more aesthetic, brick wall. (I put "belonged" in quotation marks because the extended balcony was actually part of the common elements of the condominium, reserved to the exclusive use of the owners of the two units.)

[13] The floor of the extended balcony was at the same time the concrete roof of the garage below. The garage roof (which formed the floor of the extended balcony) was covered with asphalt shingles. This was done because the roof's concrete was more porous than the type of concrete used in the existing balconies, and because it was over an interior space,. The shingles were sealed at their edges with a black, tar-like substance. Evidence given at the hearing by both the claimant and the defendant's assistant project manager established that abrasion to these shingles (that could be caused by walking on them) would degrade their surface and lead to leaks.

[14] I am satisfied on the evidence that the claimant indicated to the developer early on that she was not satisfied with the state of the extended balcony. In March 2006 (before closing) she highlighted various points that she believed needed to be addressed, including the fact that "the deck floor needs to be covered with turf (rather than roofing material)."

[15] Ms Aucoin initially resisted closing at least in part because of her concerns about the extended balcony. However, since the developer continued to charge her occupancy fees she decided to proceed with the closing.

[16] By the spring or early summer of 2006 Ms Aucoin was pointing to another problem with the shingles on the extended balcony: in the summer heat they became hot and sticky, making it

difficult if not impossible to walk upon. Her neighbour (the owner of Unit 111) had tiled the floor of her portion of the extended balcony. Ms Aucoin obtained quotes for similar work, and learned that it would cost $4,180.38 to install tiles; and an additional $500.00 to remove and dispose of the roofing material.

[17] However, notwithstanding ongoing complaints on her part, the developer refused to do anything about the surface of the extended balcony. Its position (the one it adopted at the hearing) was that it had delivered all that it was required to deliver under the terms of the Amendment; and that Ms Aucoin's demand for a better surface was simply a demand for an "extra" that she was attempting to get for no additional charge.

[18] Against this backdrop I am required to construe the Amendment, and in particular the defendant developer's agreement to construct "an extended balcony" for $4,000.00. In my opinion the words "extended balcony" have to be construed in light of:

1. the fact that this was an agreement of purchase and sale of a residential condominium unit;

2. the use of the words "concrete balcony" in Schedule "B" of the Agreement (which the Amendment formed part of);

3. the construction of the existing balconies (which are the ones referred to in Schedule "B"); and

4. the common, everyday meaning of the word "balcony" in the context of a residential unit.

[19] In this light I cannot agree that what the developer provided was a "balcony." A balcony is something that can be used *as such*. It is something that can be walked upon without suffering damage. It is something that can withstand the use of tables and chairs from which people can enjoy the view. A "balcony" which is surfaced with roofing material that made its use as a "floor" unsuitable (because it was too hot, or too sticky or would lead to leaks) is not in my opinion a "balcony" within the meaning of an agreement for the purchase and sale of a condominium unit.

[20] I am accordingly satisfied that the defendant failed to deliver what it had agreed to deliver under the terms of the Amendment. What it delivered was not an "extended *balcony*."

[21] I now turn to the question of damages.

[22] The defendant's position, as noted above, was that the tiling that was being sought by the claimant was an "extra" or an "improvement" for which she would normally have paid extra, at least, for example, if she had decided to tile the existing balconies. That is true. However, the existing balconies did not have to be protected against leaking because they were not constructed over an interior space. The extended balcony, on the other hand, is over an interior space and so

requires some form of waterproof surface. As I understood the developer's evidence, a bare concrete surface would not suffice to protect the garage against leaks.

[23] Accordingly, the use of tiles (which would provide the necessary waterproofing), or some other form of durable surface upon which people could walk, was mandated by what the developer had agreed to provide. The defendant refused to provide such a surface. Nor did it call any evidence as to an alternative, and cheaper, material that would provide a waterproof surface and at the same time permit the "extended balcony" to be used as a balcony. In these circumstances what I am left with is the evidence that the only way to remedy the defendant's breach is in the manner proposed by the claimant.

[24] I will accordingly order the defendant to pay for (a) the cost of removing the existing roofing shingles; (b) the cost of tiling the extended balcony, pursuant to her estimate; and (c) her costs.

Dated at Halifax, this 10th day of January, 2007

Original: Court File)
Copy: Claimant)
Copy: Defendants)

W. Augustus Richardson, QC
ADJUDICATOR

sp.