

# Court of Queen's Bench of Alberta

**Citation: Boonstra v. 1220201 Alberta Ltd., 2011 ABQB 695**

**Date:** 20111110  
**Docket:** 0703 14184  
**Registry:** Edmonton

Between:

**Marvin Boonstra**

Plaintiff

- and -

**1220201 Alberta Ltd.**

Defendant

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**Reasons for Judgment  
of the  
Honourable Mr. Justice Brian R. Burrows**

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[1] Marvin Boonstra seeks various remedies as purchaser under a contract for the purchase of 5 adjacent lots from 1220201 Alberta Ltd. The contract was entered on June 21, 2007. It was to close on July 31, 2007 but did not.

[2] In particular Mr. Boonstra seeks rectification of the contract to require 1220201 to provide 5 separate transfers, one for each lot, specific performance of the rectified contract, damages for loss of use of the land from the date the sale was to close, damages in the alternative to specific performance, a declaration that he holds a valid lien against the land for the damages, and foreclosure remedies if the damages are not paid.

[3] The 5 lots in question, Lots 4, 5, 6, 7, and 8, were on two titles. Lots 5, 6, 7, and 8 were on one title. Lot 4 was on a second title with 3 other lots, Lots 1, 2 and 3, which were not

included in the sale. It appears likely that neither party realized that the titles were so configured at the time the contract was entered.

[4] 1220201 Alberta Ltd. takes the position that the parties were operating under a mutual mistake when the contract was entered. They both understood that the conveyance of the 5 lots could occur without a subdivision application. In fact, separation of Lot 4 out of the title which included it and Lots 1, 2 and 3 required a subdivision application. 1220201's position is that upon learning of this mutual mistake it notified Mr. Boonstra that it rescinded the contract. It pleads that by his conduct thereafter, in particular his failure to tender the purchase price on or before the closing date, Mr. Boonstra must be taken to have accepted the rescission.

[5] 1220201 counterclaims for damages resulting from the filing by Mr. Boonstra of a caveat against the lands.

[6] The events relevant to this dispute are:

1. June 5, 2007 - Mr. Boonstra offered to buy Lots 4 to 8 inclusive for \$450,000.
2. June 6, 2007 - 1220201 accepted the offer and a written sale contract was signed. The contract was conditional upon Mr. Boonstra arranging financing by June 21, 2007. The closing date, which the contract referred to as "Completion Day", was July 31, 2007. Mr. Boonstra paid a deposit of \$10,000.
3. June 21, 2007 - Mr. Boonstra obtained mortgage commitment from a lender subject to "appraisal of 5 lots" and "Lawyer". Mr. Boonstra waived the financing condition in the sales contract.
4. June 28, 2007 - 1220201's solicitor submitted an Application for Separation of Title to the Land Titles Office requesting that the title covering Lots 1 to 4 inclusive be separated into two titles, one for Lots 1 to 3 inclusive and one for Lot 4.
5. June 29, 2007 - 1220201's solicitor wrote to Mr. Boonstra's solicitor inquiring as to how Mr. Boonstra wished to be described on the land transfer.
6. July 9, 2007 - The Land Titles Office rejected the Application for Separation of Title and advised that subdivision approval from the municipality would be required.
7. July 12, 2007 - 1220201's solicitor wrote to Mr. Boonstra's solicitor asking for a reply to his June 29 request for advice as to how Mr. Boonstra wished to be described on the transfer and advising:

We determined yesterday in the process of preparing transfers that Lot 4 is part of a title containing three other lots which will require subdivision to separate Lot 4 from the others. We understand from

previous experience that this is a process that will take 6 to 8 weeks. Consequently, we will not be able to deliver title to Lot 4 until the end of August at the earliest. We will proceed immediately with the subdivision.

We propose that we close Lots 5-8 as originally planned for July 31, 2007 based on a price of \$90,000 per lot and close the sale of Lot 4 once the subdivision has been affected.

8. July 19, 2007 - 1220201's solicitor wrote to Mr. Boonstra's solicitor requesting a reply to his letter of July 12.
9. July 31, 2007 - This was Completion Day. It passed without 1220201 tendering any transfer of land and without Mr. Boonstra tendering any purchase money.
10. August 3, 2007 - Mr. Boonstra's solicitor wrote to 1220201's solicitor enclosing \$149,912.47 on the trust condition that the funds not be released to 1220201 until 5 registerable transfers of land, one for each of Lots 4 to 8, was provided to Mr. Boonstra's solicitor.
11. August 7, 2007 - Mr. Boonstra's solicitor wrote to 1220201's solicitor requesting that the funds forwarded on August 3 be returned. The letter explained:

My client has returned from holidays and has instructed me not to pay any amount on this transaction until all five individual titles can be transferred to him. . . .

I believe that the parties need to have a new agreement in writing confirming that your client will proceed with subdivision of the titles and also confirming exactly what use of the land Mr. Boonstra may be entitled to and exactly what his obligations are between now and when the five individual titles can be provided.
12. August 13, 2007 - Mr. Boonstra's solicitor again requested that 1220201's solicitor return the funds which had been paid on August 3, 2007.
13. August 13, 2007 - Mr. Boonstra registered a caveat against the titles to Lots 1 to 4 and a second caveat against the title to Lots 5 to 8.
14. August 14, 2007 - 1220201's solicitor returned the funds, as requested, with interest.
15. August 21, 2007 - Mr. Boonstra's solicitor forwarded a proposed Addendum to the Real Estate Purchase Contract to the real estate agent and requested confirmation that 1220201's solicitor had reviewed and approved it. The proposed Addendum, among

other things, provided that 1220201 would subdivide the land into 5 separate titles and that Mr. Boonstra would be permitted immediate use of the lands and extended the closing date.

16. September 11, 2007 - Mr. Boonstra's solicitor sent the Addendum signed by Mr. Boonstra to 1220201's solicitor and requested that it be signed and returned. It was never signed by 1220201.
17. September 12, 2007 - The real estate agent forwarded a different Addendum to the contract. It also was never signed by 1220201.
18. September 12, 2007 - 1220201 gave notice to Mr. Boonstra to take proceedings on his caveats.
19. September 20, 2007 - 1220201's solicitor wrote to Mr. Boonstra's solicitor and advised that 1220201 did not accept the Addendum to the contract which Mr. Boonstra had proposed. He also advised that 1220201 considered the contract to be at an end.

[7] The contract was entirely silent as to how many titles were involved in the transaction. There is no foundation in the contract or the evidence for Mr. Boonstra's submission that the true contract between the parties was that 1220201 would convey 5 separate titles to him.

[8] Section 7.1 of the contract provided that all time periods, deadlines and dates in the contract "shall be strictly followed and enforced".

[9] 1220201's obligation was to provide whatever documentation was required "within a reasonable time to confirm registration prior to the Completion Day" (s. 8.3(3) of the contract). Mr. Boonstra's obligation was to pay all money due and owing to the Seller "on or before the Completion Day" (s. 8.6 of the contract). The contract did not make performance by one party contingent upon prior performance by the other. Neither party performed its respective obligation. Neither party excused the other party's failure to perform.

[10] In these circumstances the contract was discharged by non-performance. Mr. Boonstra had no right to insist on performance by 1220201 given that he did not perform the obligation imposed on him by the contract by the deadline imposed by the contract. 1220201 had no right to insist on performance by Mr. Boonstra given that it did not perform the obligation imposed on it by the deadline imposed by the contract.

[11] Mr. Boonstra is therefore not entitled to the remedies he claims in this action except one. The last remedy listed in the prayer for relief in the Statement of Claim is, "Such further and other relief as this Honourable Court may allow." Mr. Boonstra is entitled to the return of the \$10,000 deposit he paid. I grant him judgment in that amount. In all other respects the claim is dismissed.

[12] 1220201 offered no evidence to prove the damages it claimed in the Counterclaim. The relief claimed in the Counterclaim included, "Such further and other relief as the circumstances require and the Court may permit." 1220201 is entitled to have the caveats registered by Mr. Boonstra discharged. I order them discharged. In all other respects the Counterclaim is dismissed.

[13] There shall be no costs awarded to either party.

Heard on the 27<sup>th</sup> day of September 2011.

**Dated** at the City of Edmonton, Alberta this 10<sup>th</sup> day of November 2011.

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**Brian R. Burrows**  
**J.C.Q.B.A.**

**Appearances:**

Jason Van Doesburg  
for the Plaintiff

John Hope, Q.C. and Bryan Kwan  
for the Defendant

