COURT FILE NO.: 36/07
DATE: 20071203

SUPERIOR COURT OF JUSTICE - ONTARIO
DIVISIONAL COURT

RE: JOHN AND RANMALIE BROOKER

Appellants

- and -

INDEPENDENCE WAY INC.

Respondent

BEFORE: Mr. Justice Carnwath

COUNSEL: John Brooker, for the Appellants

Mr. F. Feldman, for the Respondent

HEARD: **November 16, 2007**

E N D O R S E M E N T

CARNWATH J.:

[1] The Brookers appeal from the judgment of Deputy Judge Poot, Small Claims Court, in which he dismissed their action against Independence Way Inc. for return of a deposit. The Brookers had also sued for disgorgement of profits on the re-sale of the unit they had agreed to buy. By order, both actions were tried together.

[2] The Brookers had purchased a condominium unit from plans and the location of the furnace was changed.

[3] There are three issues to be decided:

a) Did the Deputy Judge misapprehend the evidence?

b) Should the matter be sent back for a new trial?

c) Did the change in the location of the furnace constitute a fundamental change to the Agreement of Purchase and Sale?

[4] The unit to be purchased is shown at Tab 6 of the Appeal Book in schematic form. Mr. Brooker testified this document was shown to him at the time he signed the Agreement of Purchase and Sale. The plan shows a sliding door separating the powder room from a room marked W/D and F.H.W. Mr. Brooker testified this room was to contain a stacked washer and dryer (W/D) and a hot water heater with the unit's furnace stacked on top (F.H.W.).

[5] The Agreement of Purchase and Sale was signed December 7, 2003.

[6] Mr. Silver, President of Independence Way Inc., testified that in the summer of 2004, a decision was taken to move the furnace into the area marked "COATS" on Tab 6, otherwise described in the evidence as the front hall closet.

[7] Mr. Silver confirmed that the Brookers were not told of this change. On November 17, 2005, approximately a year later, the Brookers were summoned to a pre-delivery inspection. They learned for the first time that the furnace had been moved. On inspection, they learned that the furnace took up one-half of the closet marked "COATS" and the back wall of the remaining space was six inches from the doors. They protested vehemently, but to no avail.

[8] The Brookers spent the next seven weeks attempting to persuade the vendor something had to be done about the closet, but the vendor put them off and, basically, refused to discuss the matter.

[9] On January 4, 2006, the Brookers purported to rescind the Agreement of Purchase and Sale. They issued their Statement of Claim in Small Claims Court on January 26, 2006.

(a) The Misapprehension of the Evidence

[10] The trial judge based his decision on the wrong closet. At p. 3 of his reasons, he found:

> Sometime prior to the proposed date for the delivery of possession of the Unit to the Brookers at a pre-delivery inspection ("PDI") they learned that Independence Way had decided to relocate the furnace to the Walk in closet located between the 4 piece ensuite and Master suite and that for that purpose the walk in closet was apportioned into 2 sections, one containing the heater (nearest the demising wall) and the other the closet.

[11] A glance at Tab 6 shows the trial judge had found the furnace was in the walk-in closet in the master bedroom, rather than the closet marked "COATS", otherwise referred to in the evidence as the front hall closet. His findings of fact as regards the closet must be overturned since he fixed on the wrong closet.

(b) Should the Matter Go Back for a New Trial?

[12] Pursuant to s. 134(1) of the *Courts of Justice Act*, I may make any order or decision that ought to or could have been made by the court appealed from or order a new trial. I conclude it would add unnecessarily to the expenses of this litigation to order a new trial. Pursuant to s. 134(4) of the *Courts of Justice Act*, I may, in a proper case, draw inferences of fact from the evidence and that is what I propose to do.

(c) Did the Change in the Location of the Furnace Constitute a Fundamental Change to the Agreement of Purchase and Sale?

[13] Mr. Brooker testified that the front hall closet was rendered useless by the placement of the furnace in one-half of the closet and by bringing forward the rear wall of the closet to within six inches of the closet doors. I find this represents a change to the original plans viewed by Mr. Brooker. The question is whether the change is a fundamental change as discussed in two Ontario Court of Appeal cases, *Danko v. 792207 Ontario Ltd. (c.o.b. Marbrook Homes*), [2004] O.J. No. 1542 (C.A.); and *Kingsgate Homes Ltd. v. Goliszek*, [2001] O.J. No. 1258 (C.A.).

[14] In *Danko,* above, the purchasers were to receive a cathedral ceiling over the family room. The Court held there was evidence which subjectively and objectively supported a finding that the cathedral ceiling was a crucial feature of the home. The Court agreed with the trial judge that the provision allowing unilateral changes by the vendor was not unlimited and did not apply to fundamental changes. A six-week delay in rescinding the contract after learning the ceiling was being eliminated was not unreasonable and did not give affirmation of the vendor's actions. The purchasers were entitled to the return of their deposit.

[15] In *Kingsgate,* above, the purchasers expected a house with a detached garage at the side instead of the front. The trial judge found this to be a fundamental change and the Court of Appeal concluded it was open to the trial judge to so find and would not disturb his finding.

[16] The subjective evidence of Mr. Brooker given at trial was that the front hall closet was totally useless and, if he had known of the change of the location of the furnace, he would not have entered into the Agreement of Purchase and Sale. This evidence goes to the question of whether the change was a fundamental change.

[17] In the course of attempting to solve his problems, Mr. Brooker obtained the permission of Independence Way to try and sell the unit after he learned of the change in location of the furnace. He testified that two prospective purchasers immediately lost interest in purchasing the unit when they inspected the front hall closet and noted its configuration. This objective evidence goes to the question of the nature of the change.

[18] When I consider the subjective and objective evidence given at trial, I am persuaded that the changed furnace location constitutes a fundamental change within the meaning of *Danko* and *Kingsgate*, above. Schedule "B" to the Agreement of Purchase and Sale, which contains an acknowledgement by the Brookers that the location of the furnace is to be determined by the architect, may not be located as shown on the brochure and they shall be deemed to accept any such change, can not be construed as unlimited and does not apply to fundamental changes. As

in *Danko*, above, a six or seven-week delay in rescinding the contract after learning of the furnace change, is not unreasonable and does not constitute affirmation of the vendor's actions.

[19] The appeal is granted. Independence Way Inc. is ordered to return the deposit in the sum of $10,000, recognizing the limit of the Small Claims Court jurisdiction. The Brookers shall have their disbursements, to include the court costs for the appeal and the cost of ordering the transcript.

CARNWATH J.

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