

Ontario
Superior Court of Justice
Toronto Small Claims Court

Between

Horace Dockery

Plaintiff

and

Kathleen Strachan

Defendant

Judgment

The Plaintiff Horace Dockery [Dockery] met the Defendant Kathleen Strachan [Strachan] on or about August 2013. Strachan was in the process of adopting a child and needed a house as part of the adoption process. Evidence was presented and accepted by the Court that neither Strachan or her husband Shane Myers [Myers] would qualify for a mortgage, Strachan because she had made a previous proposal to her creditors and Myers because of a lack of sufficient income. There was contradictory evidence as to whether Dockery or Strachan broached the idea of rent to own and as to who initially contacted Ronald Huang [Huang] about the possibility of financing a property through the rent to own concept. Through Huang, an investor, Emily Taoping He [He] was located and Strachan entered into a rent to own agreement [The Agreement] with He. The property which is the subject matter of the Agreement was 2270 Britannia Rd. W. Unit 4, Mississauga Ontario is hereinafter referred to as the Property. The Agreement is basically a rental agreement with the tenant having a right to purchase the rental

property at a purchase price which escalates proportionately with the date of execution of the option to purchase. The Agreement specified a monthly rental plus an additional monthly payment which would be credited as a deposit against the purchase price of the Property should the option to purchase be exercised.

Two different versions of the Agreement were entered into evidence. One version [Exhibit 8] contained no upfront deposit to be utilized in the event of the exercise of the option to purchase. A second version, [Exhibit 10 and Exhibit 14] contained an upfront nonrefundable deposit of \$13,500 to be credited against the purchase price of the Property should the option to purchase be exercised. Based upon the testimony of Huang and to a lesser extent that of He [who seemed somewhat unaware of the details of the transaction even though she was the purchaser of the Property and the landlord under the Agreement], I am satisfied that the version of the Agreement in exhibits 10 and 14 was the actual agreement entered into by Strachan and He. I am satisfied, based upon the evidence, that Strachan was to pay to He, under the Agreement, first months' rent in the amount of \$2490, last months' rent in the amount of \$2490 and the nonrefundable deposit in the amount of \$13,500 for a total of \$18,480. Although much time was spent at trial providing evidence as to which version of the Agreement was the one entered into by Strachan and He, I find it of little consequence as I am satisfied that the sum of \$18,480 was actually received by He when she entered into the Agreement with Strachan.

A document headed instalment promissory note [the Note] was entered into evidence. The Note was drawn by Strachan and executed by Strachan. Dockery issued a Claim for payment of the face value of the Note being \$25,000 together with certain other amounts owing under the Note, namely unpaid service fees as specified in the Note for a total amount owing of \$26,100. It is the position of Dockery that the amount advanced under the note was \$18,480, that the difference

between that amount and \$25,000 was to be interest payable under the note and that additional monthly service payments in the amount of \$100 we're also due and payable under the Note.

A copy of a bank draft (the Draft) in the amount of \$18,480 payable to Emily Taoping He was entered into evidence. It is Dockery's position that this is the money that was advanced under the Note and that the original of the Draft was given to Strachan in return for her executing the Note. Strachan takes an opposing position as to the advancement of the sum of \$18,480.

Extensive extraneous evidence was provided by both parties during the course of the trial. While this extraneous evidence had some probative value in ascertaining the relative credibility of the witnesses, there is only one central issue to this matter. Was the Note a valid evidence of indebtedness, what amount of money if any was advanced under the Note, and what, if any was the balance due to Dockery under the Note? The first question to be determined is whether the Note is a valid instrument of indebtedness. That the Note was drafted by Strachan and executed by Strachan is not in dispute. In spite of the poor draftsmanship, it is clear to the Court that the Note was intended to and did evidence indebtedness owed by Strachan to Dockery. The next question to be determined is what amount, if any, was advanced under the Note. Dockery and his representative argue that the amount advanced under the Note was \$18,480 as evidenced by the Draft in favour of He for that amount. The evidence of He was that there was an amount owing to her under the Agreement [although she did not seem aware of the exact amount]. The evidence of Huang was that the sum of \$18,480 was owed by Strachan to He under the Agreement. There was further evidence to indicate that the face amount of the Draft being \$18,480 was deposited to He's bank account. Strachan and her representative take the position that Strachan advanced the first and last months rent being \$4980 to Dockery and that said amount was then advanced to He to cover the first and last month's rent due under the Agreement. There is simply no evidence except the testimony of Strachan that this advance to

Dockery took place. It is beyond the comprehension of the Court that a lawyer of Strachan's education and experience would have made such an advance [presumably in cash since otherwise Strachan would have provided a cancelled check or a copy of a draft for this amount] without obtaining a receipt to prove the advance. I find that the amount of \$4980 was advanced under the Note. Strachan and her representative also advanced the position that the remaining \$13,500 was alternatively not advanced under the Note or belonged to Dockery's sister or some other person and therefore is not properly owing to Dockery under the Note. I am satisfied from the evidence that Dockery advanced the sum of \$18,480 under the Draft and that amount was advanced to He in satisfaction of Strachan's obligation to He under the Agreement. It matters not whether Dockery borrowed the money from his sister or dug money out of a hole in his backyard. I am satisfied that the funds as set out in the Draft constituted an advance under the Note and are properly owing to Dockery by Strachan.

Strachan has taken the position that a reading of the Note would indicate that the principal amount advanced under the Note [having been established by the Court as \$18,480] would not be due and owing unless Strachan purchased the Property by September 1, 2014. This position conflicts with the opening paragraph of the Note which reads "for value received, the undersigned promises to pay to the order of Horace Dockery ["the Payee"] the sum of \$25,000 CND". Strachan would have the Court believe that the payment of \$25,000 under the Note was conditional upon Strachan purchasing the Property by September 1, 2014. It is inconceivable that Dockery would advance funds under the Note with the belief that if Strachan delayed the purchase of the Property by even one day after September 1, 2014, he would not receive back any of the monies advanced under the Note. The Note also indicates that "in the event the undersigned fails to purchase the home, the undersigned agrees to pay to the payee the total amount outstanding plus all reasonable legal fees and costs of collection to the extent permitted by law ". No evidence was provided by Strachan that would be consistent with her position that

the Note was to be interpreted as requiring repayment if the Property was purchased by September 1, 2014, or repayment if the Property was not purchased but not repayable if purchased after that date. I find Strachan's position in this regard to be completely untenable.

Dockery's position is that the difference between the \$25,000 face value of the Note and the sum of \$18,480 advanced under the Note or \$6420 was interest under the Note. No rate of interest is stipulated in the Note. In accordance with the Interest Act "Whenever any interest is payable by the agreement of the parties or by law and no rate is fixed by the agreement or by law, the rate of interest shall be 5% per annum". The Note clearly falls within the purview of this section.

Based upon the above, there will be judgment for Dockery as against Strachan in the amount of \$18,480 plus prejudgment interest at the rate of 5% per annum from August 8, 2013 to the date of this Judgment and post judgment interest at the same rate from the date immediately following the date of this Judgment.

I also find that Dockery is entitled to costs as against Strachan in the amount of \$2000 plus disbursements in the amount of \$335. This amount for disbursements includes \$100 for photocopies. In making this determination as to costs, I have taken into consideration that, in my opinion, the trial was unnecessarily extended in duration by the actions of both counsel, particularly with regard to extensive examination and cross-examination of witnesses pertaining to issues which were not germane to the dispute at hand. I would further indicate that the inclusion of an addendum of 605 pages in the Plaintiff's submissions when the Court specifically limited submissions to 10 pages directly conflicts with the instructions of the Court.

If either party disagrees with the award for costs in this matter, they may make written submissions to the Court in this regard within 10 days of the date of this Judgment.

Dated at Toronto this 6th day of February, 2017


Robert Caplan DJ