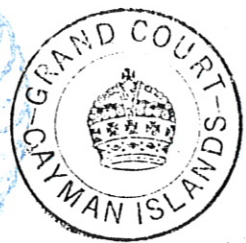


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**IN THE GRAND COURT OF THE CAYMAN ISLANDS  
HOLDEN AT GEORGE TOWN, GRAND CAYMAN**

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CAUSE NO. GC585 of 2001

BETWEEN:

- (1) SHARLEEN DUVAL
- (2) STEPHEN DUVAL



Plaintiffs

- and -

- (1) RUDOLPH EVANS
- (2) ROSEDEAN EVANS

Defendants

Appearances:

Mr. James Chapman for the Plaintiffs

Mr. Clyde Allen for the Defendants

Hearing Dates: January 16th, 17th, 22nd, February 28th, March 3rd, April 9 and 15th

**JUDGMENT**

1. On March 7th, 2001 the plaintiffs and the first defendant entered into an oral agreement to purchase a newly constructed home for the price of C.I. \$299,000.00 dollars. The plaintiffs paid \$15,000 to the defendant Rudolf Evans, before completion. They also purchased appliances and fixtures at a cost of \$6,716.40, which they installed in the

house. In addition, the plaintiffs also spent approximately 4,170.00 in painting and landscaping the property. The purchase and sale of the house ultimately, did not complete.

2. The defendants subsequently sold the property to another purchaser for \$300,000.00. The plaintiffs' claim:

- (a) Rescission of the contract and return of the \$15,000.00 paid, plus \$6,716.40 for the appliances and fixtures, plus interest;
- (b) Alternatively damages in the amount of \$15,000.00, \$6,716.40 and \$4,710.00, plus interest.

3. It is not entirely clear from the pleadings but I think the damages claim is founded alternatively, in breach of contract, money had and received and conversion.

4. The issues in this case are:

- (a) Did the parties agree that the contract be rescinded and the first defendant repay the \$15,000.00 and \$6,716.40 to the plaintiffs?
- (b) Alternatively, are the plaintiffs entitled to rescind the contract as a result of either misrepresentation or fundamental breach?
- (c) In the further alternative are the plaintiffs entitled to damages for breach of contract, conversion or the return of monies had and received?

## FACTS

5. The key findings of fact turn on the credibility of the parties. I found the plaintiffs to be generally creditable and honest. While they were both naive in the dealings, their testimony was candid. I observed them closely in the witness box and conclude that they were both attempting to tell the truth and were not inclined to guess at events if they could not recall them. Mr. Evans, however, was less impressive as a witness. He would often guess at what happened or tell the Court what might have happened or what he wished had happened. There were several examples of when he gave conflicting evidence during the trial.
6. Where the evidence of Mr. Evans conflicts with the plaintiffs I prefer the evidence of the plaintiffs unless otherwise stated.

## FINDINGS

7. On March 7th, 2001 the plaintiffs looked at the property. Mr. Evans told them that the house was 3,500 square feet, was appraised at \$500,000.00 and needed minor work to complete. Mr. Evans had advertised the property in the Cayman Compass in similar terms.
8. The plaintiffs were not shown a copy of any appraisal. I accept the plaintiffs' evidence and reject the defendants' evidence on this point.

9. The appraisal that Mr. Evans had obtained, indicating a value of \$500,000.00 was prepared before the house was completed and was based on specifications that were not actually contained in the completed house. Further the appraisal was almost 9 months old. Mr. Evans acknowledged that there had been a severe slump in the real estate market in the fall of 2000. Mr. Evans agreed that the house was not worth \$500,000.00 in March 2001, but he said that he explained the differences in the specifications and showed the plaintiffs the appraisal. As stated, I do not accept that evidence.
  
10. On March 7th, Mr. Evans told the plaintiffs he would require \$5,000.00 to complete the finishing touches. The plaintiffs and Mr. Evans agreed to the sale and purchase of the property for \$299,000.00. The completion was to be April 15th. The plaintiffs gave Mr. Evans a cheque dated March 7th, 2001 in the amount of \$5,000.00. After that cheque cleared the bank Mrs. Duval wrote on the cheque "deposit on property Crew Road". She said this was a mistake. That the cheque really was to complete the work. I accept her evidence.
  
11. On March 8th, Mr. Evans called Mrs. Duval and told her he would require an additional \$7,000.00 to complete the house. Mr. Evans testified that his builder had advised him that it would cost \$15,000.00 to complete the house. Mr. Evans testimony was that he told the plaintiffs he wanted a \$12,000.00 deposit and that it would cost an additional \$15,000.00 to complete the house, which they would have to pay. I reject this evidence. I find that Mr. Evans requested \$5,000.00 on March 7th and a further \$7,000.00 on March 8th for the purpose of completing the house. It was not agreed that this \$12,000.00 would be a deposit, either refundable or non-refundable. I find that Mr.

Evans agreed to complete the house with the money and that the completion date was April 15th.

12. On March 8th Mrs. Duval met with her mother who advised her to advance an additional \$10,000.00, rather than the \$7,000.00 requested by Mr. Evans. Mrs Duval agreed with her mother and so the plaintiffs paid an additional \$10,000.00 to Mr. Evans to provide him with sufficient funds to complete house. They paid \$15,000.00 to Mr. Evans to complete the house, which was \$3,000.00 more than he had asked for.
13. After May 8<sup>th</sup>, the plaintiffs were given the keys to the house. They commenced purchasing chattels and fixtures, which were also installed in the house. They also did painting and landscaping work.
14. On April 15th the sale did not complete. No documentation had been prepared. Neither party was in a position to complete. The house was not complete and no certificate of occupancy had been issued. The plaintiffs had not obtained the necessary funds to complete. It was agreed that the completion date would be expended to April 30th, 2001.
15. On April 18th Mr. Evans presented a written contract to the plaintiffs for signature. He told them it was intended to reflect the terms of the oral agreement. The plaintiffs did not read it closely but skimmed it. Mrs. Duval asked what it meant when it referred to the \$15,000.00 as being a non-refundable deposit. Mr. Evans told them both that the \$15,000.00 was the money being used to complete the house and they were not to worry about it because he would pay back the money if anything went wrong. The contract also described the property as lot 118 when it was actually lot 115. Also, the agreement was

- not signed by Mrs. Evans who was one of the owners of the property or Mr. Duval who was one of the intended purchasers.
16. On April 30th the sale again did not complete for the reasons previously indicated. The plaintiffs say that around this time they were becoming increasingly frustrated with the lack of progress being made by Mr. Evans towards completion. They retained their own appraiser who advised them that the house was 3,100 square feet (including garage and the front porch) and was valued at \$325,000.00. The plaintiffs complained to Mr. Evans that he had misled them. In early May they learned that the occupancy certificate had not been issue.
  17. After April 30th past, no further completion date was agreed to. During the period from March 8th to mid May Mr. Evans estimates that he spent approximately \$4,000 to \$5,000.00 on work to complete the house.
  18. The plaintiffs also learned that the septic tank had to be moved and that it would move more into the backyard then its previously location.
  19. As a result of the slow progress being made by Mr. Evans towards completion, the moving of the septic tank into the backyard, the lack of a permanent occupancy certificate, the value of the house being appraised at \$325,000.00 and the square footage being 3,100 instead of 3,500 square feet, the plaintiffs decided that they did not want to go ahead with the purchase of the property.
  20. On May 16th, 2001 Mr. Duval telephoned Mr. Evans. Mr. Duval said that they had been misled by Mr. Evans and they were unhappy with the state of affairs because;

- (a) the value was \$175,000.00 less than advertised;
  - (b) the house was 3,100 square feet and not 3,500 square feet as they had been told;
  - (c) the work that Mr. Evans had to do, was not complete.
  - (d) there was no certificate of occupancy;
  - (e) the septic tank had to be moved more into the backyard.
21. Mr. Duval told Mr. Evans that he was cancelling the contract. He also told Mr. Evans that the sale that the plaintiffs were waiting for, to provide for the purchase had collapsed and so the plaintiffs were not in a position to proceed even if they wanted to. Mr. Duval said in his evidence in chief that Mr. Evans said he would give the money back, once the house was sold. He also testified that there was no discussion directed solely at the return of the deposit if the house sold for \$299,000.00 or more. In his witness statement he said that Mr. Evans asked him if he could keep the appliances in the house to assist in the sale and that Mr. Evans "would pay us back for the appliances and return the money".
22. I find that both Mr. Evans and Mr. Duval were vague in their discussions about the return of the \$15,000.00. I conclude it was not clearly agreed to by Mr. Evans nor did Mr. Duval insist it upon. There was no agreement at this meeting that Mr. Evans had agreed to the rescission of the agreement and a refund of all money. I am satisfied, however, that Mr. Evans agreed that if he could keep the appliances and fixtures he would repay the plaintiffs for them when he sold the property. This agreement was subsequently confirmed by Mr. Evans orally and in writing by his lawyer.

23. After Mr. Duval met with Mr. Evans on May 16th he discussed the matter with Mrs. Duval. They decided to write to Mr. Evans to confirm that the deal was off. Mrs. Duval wrote a letter dated May 6th which said that the plaintiffs could not obtain financing because the deal they were counting on to obtain funds was forfeited. That was not true. Mrs. Duval said that the plaintiffs said this, to make it very clear to Mr. Evans that they would not be going ahead.
24. Although this letter was troubling because it did not mention any of the real reasons why the Duvals were not going ahead, ultimately I accept the Duvals' explanation. I understand why they would want Mr. Evans to think there was no possibility that they could go ahead. They wanted this matter finalized and thought this letter would achieve that. Both Mr. and Mrs. Duval admitted in evidence that the letter was untrue.

**ISSUE 1 – WAS THERE AN AGREEMENT TO TERMINATE OR RESCIND.**

25. I conclude that was no mutual agreement to terminate the contract and refund the \$15,000.00 and the \$6,716.40 on May 16th, 2001. There was an acceptance by Mr. Evans that the sale would not be proceeding and he did agree that he would refund the \$6,716.40 upon the sale of the property.

**ISSUE 2 – WAS THERE AN ENTITLEMENT TO TERMINATE OR RESCIND.**

26. The second issue for determination is whether the plaintiffs were legally entitled to terminate or rescind the contract on the basis of material misrepresentation or fundamental breach.
27. The claim in misrepresentation is based on the advice by Mr. Evans that the house had a value of \$500,000.00 and was 3,500 square feet. Both of these representations were material, were relied upon by the plaintiffs and were incorrect. I am persuaded that the plaintiffs were entitled to rescind the agreement on May 16th, 2001.
28. With respect to the claim for fundamental breach I am not persuaded that the failure to complete the work sooner, the moving of the septic tank and the failure to obtain the occupancy certificate are sufficient to constitute a fundamental breach. The completion of the work and the certificate of occupancy were matters relating to timing of the work only. The certificate of occupancy was ultimately obtained and the work was ultimately completed. Time was not of the essence.
29. Although it is not necessary it may be advisable to say what the courts determination would have been if the plaintiffs were not entitled to rescission of the contract and the defendant was entitled to damages. The defendant agreed to sell to the plaintiffs for \$299,000.00. Since it was never agreed that the \$15,000.00 was a non-refundable deposit, nor was it in fact a deposit, it could not be retained by Mr. Evans. The defendant would only be entitled to the actual damages suffered. He sold the house to other purchasers for \$300,000.00 including the chattels. He has, therefore, not suffered any damages and in fact is a \$1,000.00 better off. If, however, he was ordered to repay the

deposit of \$15,000.00 plus \$6,716.40 for the fixtures and chattels, he would have suffered a net loss of \$5,716.40. That amount, would be his maximum in damages. I was not, however, satisfied that Mr. Evans took reasonable steps to mitigate his damages. He waited several months to re-list the property for sale and when he did, he sold it almost immediately. His efforts to recover the additional \$6,716.40 for the chattels was half hearted at best.

30. Finally, my decision has proceeded on the assumption that there was a valid contract in place. In view of the conclusion I have reached it was not necessary for me to make that final determination. I do, however, again observe that the written agreement was not signed by either Mrs. Evans or Mr. Duvall and that it did not accurately describe the property in question. Mr. Allen sought to amend his pleadings to plead rectification, after all of the evidence was heard but that application was dismissed was for the oral reasons given at that time.

## CONCLUSIONS

31. The plaintiffs are entitled to rescission of the contract based on the misrepresentation of the defendant Rudolf Evans. They are entitled to the return of the \$15,000.00. The plaintiffs are further entitled to payment of \$6,716.40 being the amount they spent on fixtures and chattels, on the basis that Mr. Evans agreed that he would repay them this amount. The plaintiffs are not entitled to return of the amount of \$4,710.00 for painting and gardening. That work was done for their benefit and there is no evidence that it was requested by Mr. Evans or increased the value of the property. Mr. Evans did not receive the money. There is no legal basis for claiming that amount from him.

32. The plaintiffs are also entitled to interest on the amounts awarded.

~~19.~~<sup>33.</sup> Finally the plaintiffs are entitled to costs of these proceedings. I do not recall Mr. Allen making any submissions on costs at the trial although he was entitled to do so. Generally submissions on costs should be made at the close of the trial and not after judgment is rendered. If, however, either counsel wish to make any submission on costs they may do so in writing within 7 days from the release of these reasons.

Sanderson J  
Judge of the Grand Court

Dated this 19<sup>th</sup> day of May 2003



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*DG Sanderson J.*  
Sanderson J  
Judge of the Grand Court

Dated this 19<sup>th</sup> day of May 2003

