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Real estate commissions must be paid

A decision of the Ontario Divisional Court late last year serves as a good reminder that it's not a good idea to try to avoid an obligation to pay real estate commission, and it's an even worse idea to try to get your lawyer to pay the commission for you.

In late 2003, Sohan Gidda listed his property for sale with a real estate agent, and retained a Brampton law firm to represent him in the transaction.

While the property was subject to the listing agreement, Gidda found a purchaser on his own and entered into a private agreement of purchase and sale.

The listing agreement expired Feb. 12, 2004 and the private sale transaction closed at the end of that month. According to Gidda's listing agreement, commission was payable even if the property was sold privately during the listing period.

Gidda's real estate agent heard of the private sale and called the lawyer's office stating that she was the agent acting on the private transaction. She convinced the lawyer's secretary to send her a copy of the private sale agreement.

The real estate agent then sued Gidda in Small Claims Court for $10,000, and was successful in obtaining a judgment against him for that amount. The judgment was filed in the office of the local sheriff and when the house was later sold, Gidda was forced to pay off the agent's claim.

Blaming his $10,000 loss on the mistake of his lawyer's secretary in releasing the document, Gidda then sued his lawyer to recover the damages. The trial took place before the sale of the house and before the judgment was paid.

The deputy small claims court judge ruled that the lawyer was negligent in disclosing the private agreement, but dismissed the case on the basis that Gidda had not suffered or proven any damages. His reasoning was that since Gidda had not yet paid the $10,000 to the agent at the time of the court hearing against his lawyer, he could not recover the money.

Gidda appealed the decision of the small claims court, and the case was heard by Justice John R. Sproat in October, 2006.

Justice Sproat ruled that in his opinion, Sohan Gidda had in fact suffered damages since the court judgment against him was a legal obligation, which eventually had to be paid.

Nevertheless, the judge dismissed the appeal and ruled that although Gidda had suffered damages, he failed to prove that the negligence of the lawyer actually caused the damage.

First, the judge wrote, it was agreed that the agent knew of the private sale prior to calling the law firm.

"I think it unlikely," he ruled, "that a real estate agent who believed she was being cheated out of a $10,000 commission would simply let the matter rest. The fact of the sale would be a matter of public record, the real estate agent would probably have pursued the matter, the plaintiff could have been compelled to testify and would have been obliged to tell the truth."

The judge also ruled that the direct cause of the "damages" was not the mistake of the lawyer's secretary, but rather the fact that Gidda entered into the listing agreement and agreed to pay commission if the property was sold.

Justice Sproat wrote, "I have some difficulty in seeing how the plaintiff is damaged by being obliged to make a payment which he agreed to make under a contract that he entered into. It does not sit well with me that a person in the position of the plaintiff can enter an agreement, set out to deprive the other party of their entitlement under the agreement and then when he is caught, shift the loss to the law firm."

Although the judge did not specifically refer to it, the ruling may well have been based on the doctrine of "clean hands."

This common-law doctrine, going back hundreds of years, says that a person who has acted wrongly, either morally or legally in other words, someone with unclean hands will not be helped by a court when complaining about the actions of another party.

Gidda lost his first case when the agent sued him. He lost the second case when he sued his lawyer, and he lost the appeal of that decision. Justice Sproat awarded the lawyer $1,500 in costs against Sidda. The judge stated that his decision should not reflect adversely on the lawyer's professional competence or reputation.

This case serves as a useful reminder that the standard Ontario Real Estate Association listing agreement obliges the seller to pay a commission for any valid offer to purchase the property obtained from any source during the listing period.

As well, there is usually a holdover period after the listing expires, which obliges the seller to pay commission on a sale to anyone introduced to the seller during the listing period. If you've committed yourself to pay commission to a real estate agent, pay it. The courts don't look too kindly on an attempt to circumvent a binding agreement, or to shift the loss to a third party like your own lawyer.

The Gidda case is also a good lesson about suing a third party when you only have yourself to blame for the loss.

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COURT FILE NO.: DC-05-003045-00

DATE: 20061020

SUPERIOR COURT OF JUSTICE ONTARIO

DIVISIONAL COURT

RE: SOHAN GIDDA Appellant

(Plaintiff)

v.

MALIK LAW OFFICE/NARIN MALIK Respondent

(Defendant)

BEFORE: SPROAT J.

COUNSEL: Peter C. Verbeek, for the Appellant

Yadvinder Singh Toor, for the Respondent

ENDORSEMENT

[1] This is an appeal from the decision of Deputy Judge McCrea dated March 7, 2005 dismissing the plaintiff s claim.

[2] At the outset of the appeal the Deputy Judge suggested to the parties that the case proceed on an agreed statement of facts as follows:

(a) the plaintiff listed his property for sale with a real estate agent;

(b) the plaintiff retained the defendant law firm to act for him in connection with the sale of the property;

(c) the plaintiff sold the property pursuant to a private agreement of purchase and sale;

(d) the real estate agent heard of the private sale, called the defendant's office and misrepresented that she was a real estate agent acting for the plaintiff in relation to the private sale and asked for a copy of the "private offer";

(e) a secretary in the employ of the defendants forwarded a copy of the agreement for the private sale;

(f) the real estate agent made a claim for commission against the plaintiff and was successful in attaining a judgment in the amount of $10,000. (Although the plaintiff had not, at that time, actually paid the judgment.)

[3] Counsel at trial indicated they were prepared to proceed on the basis of this agreed statement of facts. Counsel also referred to what appeared to be a number of non-contentious facts during argument and both sides appeared to accept that this was proper.

[4] On this appeal counsel for the respondent sought to refer to a transcript of the trial in which the real estate agent obtained judgment against the plaintiff. While it appears that this transcript had been filed in the Court below it was not referred to as part of the agreed statement of facts. While there is an ambiguous reference to it during argument I am not satisfied that this was part of the agreed facts. I am also not satisfied that would be proper to admit this as fresh evidence on this appeal given that it was clearly available at trial and was not made part of the agreed statement of facts at that time.

[5] From the plaintiff s submissions at page 6 of the transcript it appears that the listing agreement expired February 12; that the transaction closed February 28; and it seems implicit that the agreement was dated during the currency of the listing agreement so that liability was plain once the agreement was disclosed.

[6] On these facts Deputy Judge McCrea found that the law firm had been negligent in disclosing the private agreement for the sale of the property but dismissed the action on the basis that the plaintiff had not proven any damages because, while the real estate agent had obtained a judgment, the agent had not taken steps to enforce the judgment.

[7] In fairness to Mr. Malik, who was present in Court, I note that the negligence alleged was that of his secretary and this finding should not be taken to reflect on his professional competence or reputation. The plaintiffs had argued that the negligence of the secretary included that she should have been alerted to the fact something was wrong because there would be no real estate agent on a private sale and there was no attempt to obtain instructions from the client or require a written request from the real estate agent.

[8] In my opinion the agreed facts support the conclusion of negligence. While I am not prepared to disturb the finding of negligence made by the Deputy Judge, I note that the law firm was placed in a difficult position because, according to the agreed statement of facts, the real estate agent misled the secretary in order to obtain the documents.

[9] In dismissing the action, however, Justice McCrea stated:

The defendant has not paid any part of the judgment obtained against him by the agent, nor apparently has the agent taken any steps to enforce the judgment. There has to be more than the potential for a financial loss area. Now, counsel for the plaintiff argues that the mere filing of the writ of seizure and sale constitutes liability. It is liability, but it has not been enforced. If anything it is a contingent liability. It's at the behest of the judgment creditor to take steps to enforce the writ of seizure and sale which was issued, I believe, in October of 2004 and still has about another 3 1/2 years life left in it, and could be subject to renewal indefinitely.

However, the plaintiff did not pay any part or the full amount of the judgment and so the plaintiff has not suffered any actual financial loss. In the absence of any actual financial loss, I have no alternative but I have to dismiss the action.

[10] On appeal the appellant sought to introduce fresh evidence consisting of the fact that subsequent to trial he sold his property and so had to pay the outstanding judgment to lift the writ of execution. The admission of this evidence is academic given my opinion, discussed below, that the plaintiff had suffered damage prior to actual payment. If I am wrong in that I would admit the fresh evidence as the payment of the judgment occurred after the trial.

[11] While no authorities were cited to me, in my opinion the plaintiff at trial had suffered damage. While not part of the facts agreed to at the outset, the Deputy Judge did refer to the fact that there had been a writ of execution. It also appears to have been accepted by both parties that the plaintiff owned property. In that case, any calculation of the plaintiff's net worth would have been $10,000 less the day after the writ of execution was filed.

[12] I would, however, dismiss the appeal. The trial judge found negligence and then proceeded to find that the action should be dismissed as no damage was proven. As such, he did not address causation. In my opinion, on the agreed facts, the plaintiff has not established that the negligence of the law firm caused his damage.

[13] First, it was agreed that the agent knew of the private sale prior to calling the law firm. I think it unlikely that a real estate agent who believed she was being cheated out of a $10,000 commission would simply let the matter rest. The fact of the sale would be a matter of public record, the real estate agent would probably have pursued the matter, the plaintiff could have been compelled to testify and would have been obliged to tell the truth.

[14] Secondly, in my opinion the direct and proximate cause of the "damages", is the fact that the plaintiff entered into the listing agreement and agreed to make the payment. I have some difficulty in seeing how the plaintiff is damaged by being obliged to make a payment which he agreed to make under a contract that he entered into. It does not sit well with me that a person in the position of the plaintiff can enter an agreement, set out to deprive the other party of their entitlement under the agreement and then when he is caught shift the loss to the law firm.

[15] Further, in this regard in Waddams, *The Law of Damages* the author at paragraph 14.740 discusses *Weld-Blundell* v. *Stephens*, [1920] A.C. 956 (H.L.) in which the

defendant wrongfully disclosed a confidential letter containing a libel on a third party. As a result the plaintiff was successfully sued for defamation. The House of Lords found the defendant was not liable. The author states:

The gist of the decision is that the defendant s revelation of the letter had simply enabled the third parties to vindicate their legal right. Lord Sumner said it was as though the plaintiffs had been in unlawful possession of another s property and the defendant had betrayed to the owner the secret of its whereabouts. Lord Wrenbury went so far as to say that the plaintiff had suffered no damage at all, for a man is not damnified by being compelled to satisfy his legal obligation .

[16] The appeal book does not reflect the disposition of costs at trial. As to the appeal, I award costs of $1500 payable by the appellant to the respondent law firm within 30 days. This is somewhat less than I might ordinarily have awarded, however, the law firm bears some responsibility for the events giving rise to the litigation.

Sproat J.

DATE: October 20, 2006

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