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Have your lawyer review purchase agreement before you sign anything

A decision of a three-judge panel of the Ontario Divisional Court earlier this year highlights the risk of waiving conditions in a multiple-offer scenario.

In December 2001, Saeid Sharifara and his wife were refugees from Iran who had started their own business in Canada and accumulated enough capital for a down payment on a house.

Sharifara submitted an offer to buy a house through a real estate agent. Among other things, the offer was conditional on arranging financing within seven business days. One day later, Sharifara learned there were other potential buyers bidding for the property. He then submitted a second written offer to purchase the house at a higher price and with a larger deposit.

He says that at the time he signed the second offer, he believed that only the price and the amount of the deposit had been increased and that the new offer was conditional in the same way as the first had been. It wasn't, and when the second offer was accepted by the seller, an unconditional agreement of purchase and sale was made.

Sharifara testified that the agent, without his consent, did not include the financing and other conditions in the second offer. The agent disputes this and testified that Sharifara was aware the second offer was unconditional.

Four days after submitting the second offer, the buyer was approved for financing by the Bank of Montreal. He began preparations to move into the house on Jan. 10, 2002, the scheduled closing date.

Two days before closing, however, the bank withdrew its approval for financing because of discrepancies in the mortgage application. All of the dealings Sharifara had with the bank were handled by a mortgage broker without any direct participation or involvement by the applicant.

Sharifara then consulted a lawyer to review the agreement of purchase and sale and says that only then did he learn the agreement was unconditional. Despite this, he decided not to proceed with the transaction. Using the services of another lawyer, he negotiated a return of one-half of his deposit and successfully sued his real estate agent and broker for damages including the forfeited half of the deposit.

The agent and broker then appealed the judgment against them to the Divisional Court. In a decision released in March of this year, the trial judgment was reversed and the buyer's action against the agent and broker was dismissed.

Writing for the three-judge panel, Justice Theodore Matlow notes that the real cause of Sharifara's problem was not the unconditional offer prepared by the agent, but rather "the decision of the bank to withdraw the financing that it had earlier offered to provide to him."

Even if the second offer had been made conditional, as Sharifara says he expected, the financing condition would have expired before the bank withdrew its offer of financing, and the buyer "would have been left in exactly the same position he would have been in had the offer been conditional, namely, without the desired financing from the bank."

In dismissing the action, the court concluded that Sharifara suffered no damage as a result of any act or omission of his agent or broker, since they had no responsibility for the actions of the bank.

Three important lessons to be learned from the case are:

Always have an agreement of purchase and sale reviewed by a real estate lawyer before signing it or make it conditional on subsequent approval of the terms by a lawyer.

Remember that a financing commitment is almost always conditional until closing. A prudent buyer will have a Plan B in case the bank changes its mind at the last minute.

Blaming the real estate agent for something that's not his or her fault is not a wise idea.

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Sharifara v. Akhbari, 2007 CanLII 9619 (ON S.C.D.C.)

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Toronto

SUPERIOR COURT OF JUSTICE - ONTARIO

DIVISIONAL COURT

RE: SAEID SHARIFARA Plaintiff (Respondent)

A N D:

NADER AKHBARI and

RE/MAX REALTRON REALTY INC. Defendants (Appellants)

BEFORE: JUSTICES CARNWATH, MATLOW and JENNINGS

COUNSEL: H. J. Ash, for the Plaintiff (Respondent)

Aaron Postelnik, for the Defendants (Appellants)

HEARD: March 7, 2007.

E N D O R S E M E N T

MATLOW, J.;

[1] This appeal is allowed, the judgment in appeal is set aside and this action is dismissed. As well, the cross-appeal of the respondent is dismissed. Despite this result which is favourable to the appellants, I decline to make any award of costs either with respect to this appeal or the trial below, having regard to the fact that it was the appellants conduct which contributed to the commencement of these proceedings,

[2] The appellants, Akhbari and Re/Max, the defendants in the action, submit that the respondent, Sharifara, the plaintiff, had failed at trial to prove that he had suffered damage by reason of the negligence of the appellants and that the trial judge erred in awarding any damages to him. For the purposes of this appeal, the appellants counsel does not challenge any of the findings of fact made by the trial judge. The facts essential to the determination of this appeal are summarized below.

[3] This appeal arises from a failed real estate transaction in which the respondent, through the appellants who were real estate agents or brokers, submitted a written offer to purchase a certain residential property. The respondent and his wife were then refugees from Iran who had started their own business and had accumulated sufficient savings for a deposit on a home. The respondent was an interior decorator, trained in Iran, and had rudimentary oral English and some difficulties with written English. The offer, which was prepared by the appellants, was submitted on December 15, 2001, was made conditional on certain events including the arranging of financing within seven business days. The date for completion of the resulting transaction was January 12, 2002.

[4] On the following day, December 16, 2001, after he learned that there were other potential buyers bidding for the property, the respondent submitted a second written offer to purchase, which was also prepared by the appellants, in which the price and the amount of the deposit were increased. When he signed the second offer, the respondent believed that only the price and the amount of the deposit had been increased and that the new offer was conditional in the same way as the first, However, unknown to the respondent and without his consent, the provisions which had been inserted by the appellants in the first offer to make it conditional, including the provision relating to financing, were not inserted by them in the second offer. As a result, when the second offer was accepted by the vendor, an unconditional agreement of purchase and sale was made..

[5] On December 20, 2001, within the seven business days conditional period stipulated in the respondent s first offer, the respondent was approved for financing by the Bank of Montreal. As a result, he began his preparations to move.

[6] On January 10, 2002, the Bank of Montreal withdrew its approval for financing because of certain discrepancies which the bank claimed to have discovered in the respondent s application and supporting documentation. All of the dealings which the respondent had with the bank were carried out by a mortgage broker on behalf of the respondent and without any involvement or participation of the appellants.

[7] The appellants, in an effort to salvage the transaction, proceeded to obtain another source of financing for the respondent. However, the respondent refused to accept it.

[8] Instead, he consulted a lawyer to whom he showed the relevant documentation in his possession and sought the lawyer s advice. It was only then that the respondent learned that the provisions that he had believed made his second offer to purchase conditional had not been inserted in it by the appellants.

[9] Following that consultation, the respondent decided not to proceed further with the transaction. He then retained another lawyer who negotiated the return of one-half of the deposit paid. Several months later, the respondent purchased another home.

[10] As these facts reveal, the appellants failure to make the respondent s second offer conditional did not, as it turned out, change the respondent s position to his detriment. The real cause of his ultimate problem was the decision of the bank to withdraw the financing that it had earlier offered to provide to him. Even if the second offer had been made conditional as the respondent expected, the period during which the resulting agreement would have remained conditional would have expired by January 10, 2002, and the respondent would have been left in exactly the same position he would have been it had the offer been conditional, namely, without the desired financing from the bank. Even if the offer had been made conditional at the time it was presented to the vendor for acceptance, the resulting transaction would, in any event, have become firm before the bank withdrew its approval, It follows, therefore, that the respondent suffered no damage as a result of any act or omission of the appellants. The only cause of the respondent s damage was the withdrawal by the bank of its prior approval of the respondent s financing, an event for which the appellants had no responsibility.

[11] Accordingly, I respectfully conclude that the trial judge s judgment awarding damages to the respondent reflects a palpable and overriding error in her analysis of the evidence which now requires this Court to intervene.

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Matlow, J.

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Carnwath, J.

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Jennings, J.

Released: March 28, 2007