



Bob Aaron bob@aaron.ca

April 19, 2008

Buyer pays price for jilting agent

Earlier this month, the Ontario Superior Court of Justice released a decision which highlights the obligations of parties signing a buyer-agency agreement.

In the fall of 2005, Helen Clubine was looking at properties in the Orangeville area with her real estate agent Zoi Boussoulas.

By early January, 2006, Clubine had inspected a property known as Willow Hall several times, and was finally ready to put in an offer to purchase it.

At the time the offer was being prepared and signed, Boussoulas presented Clubine with a standard form buyer-agency agreement (now known as a buyer representation agreement), which gave the broker exclusive authority to act as the buyer's agent until June 30, 2006.

This form, which is commonly used in the real estate industry, provides that the broker is entitled to be paid commission if the buyer enters into an agreement to purchase any property, during the running of the agreement. If the seller does not pay the commission, or all of it, the buyer is required to pay it.

The form also has a holdover clause which entitles the broker to commission if the buyer, within 180 days after the agency agreement expires, enters into an agreement to buy a property shown or introduced to him or her by the agent while the agreement was in force.

In paragraph 4, Clubine agreed: "if I fail to advise you of any property of interest to me that came to my attention during the currency of this Agreement and I arrange a valid offer to purchase the property during the currency of this agreement or within the holdover period after expiration of this agreement, I agree to pay you the amount of commission set out above."

A later amendment to the agreement set the buyer's agent's commission at 2.5 per cent.

Willow Hall was listed at \$825,000 but needed major renovations. Clubine instructed Boussoulas to prepare and submit an initial offer of \$575,000. It was rejected.

Eventually, Boussoulas submitted a final offer of \$750,000, but the vendors' bottom line was \$765,000. The listing and selling agents offered to kick in \$10,000 of their commission, but by that time the buyer lost interest in it.

Clubine and Boussoulas had an "unpleasant" telephone conversation in the aftermath of the transaction, and their friendship came to an end.

Clubine later purchased another property using a different agent, and that fact came to the attention of Homelife/Vision Realty Inc., the company where Boussoulas worked. Ken Kakoullis, the Homelife broker, wrote to Clubine advising that she had breached the terms of the buyer-agency agreement, and owed his company \$21,774.50.

Clubine denied any responsibility for payment, alleging that Boussoulas had orally agreed to terminate the agreement, and that it was not explained to her that Clubine was responsible for paying commission if she bought another property.

Eventually, Homelife/Vision sued Clubine for its lost commission. The matter came up for trial before Justice Darla Wilson in March of this year, and her decision was released earlier this month. Justice Wilson found no fault with the actions of the real estate agent.

"The evidence establishes that she is an experienced real estate agent who conducted herself in a professional manner throughout," the judge wrote in her decision. "I do not accept the evidence offered by Ms. Clubine that she signed (a buyer-agency) agreement without satisfying herself of her obligations under that contract."

The judge concluded, "Ms. Clubine was angry that she did not get the Willow Hall property for the price that she wanted and she blamed Ms. Boussoulas for the outcome. She chose to enter into an agreement with another agent, which resulted in the purchase of a property during the period of time covered by the agreement with the Plaintiff and consequently, she owes the Plaintiff the 2.5 per cent commission which amounts to \$21,774.50," plus interest and costs.

Buyer representation agreements have an important role in the real estate process. The lesson of this case is that buyers should always be aware of their risks and responsibilities when signing one.

Bob Aaron is a Toronto real estate lawyer. He can be reached by email at bob@aaron.ca, phone 416-364-9366 or fax 416-364-3818. Visit the column archives at www.aaron.ca/columns/toronto-star-index.htm.

Homelife/Vision Realty Inc. v. Clubine, 2008 CanLII 14891 (ON S.C.)

PDF Format

Date: 2008-04-09

Docket: 06-CV-322729-SR

URL: <http://www.canlii.org/en/on/onsc/doc/2008/2008canlii14891/2008canlii14891.html>

[Reflex Record](#) (noteup and cited decisions)

Noteup

[[Search for decisions citing this decision](#)]

COURT FILE NO: 06-CV-322729-SR

DATE: 20080409

RE: HOMELIFE/VISION REALTY INC.

Applicant

- and -

HELEN CLUBINE

Respondent

BEFORE: The Honourable Madam Justice Darla A. Wilson

COUNSEL: *Robert Watt,*

for the Plaintiff

Gregory W. Banks,

for the Defendant

HEARD: March 3 & 4, 2008

-

WILSON D.A., J.:

ENDORSEMENT

[1] The plaintiff is a licensed real estate brokerage company and it brings this action under the Simplified Rules for damages for breach of contract. On consent, at the outset of trial, the counterclaim was dismissed without costs as was the claim against the other defendants. The Plaintiff seeks payment of a commission of \$21,774.50 pursuant to a Buyer Agency Agreement entered into with the Defendant Helen Clubine, who disputes that any commission is owing. She alleges that the agent employed by the Plaintiff, Zoi Boussoulas, was incompetent or alternatively, that the agent was negligent and her actions breached her fiduciary duty to the defendant.

BACKGROUND

[2] A statement of agreed facts was submitted by counsel. The agent, Boussoulas, and the defendant Clubine became friends in approximately 2003. Ms. Boussoulas had been a real estate agent for approximately twelve years at that time. Ms. Clubine was in the process of a divorce and wished to sell her home in Newmarket and relocate further north. In 2004, Ms. Boussoulas and Ms. Clubine looked at some houses in the Sharon, Ontario area.

[3] In the fall of 2005, Ms. Clubine told Ms. Boussoulas that she was interested in looking at rural properties in the Orangeville/Adjala/Mono area and requested her assistance in this endeavour. She advised her that she had approximately \$750,000 to spend on a house but that she would not be in a position to make an offer until early 2006 as that was when her divorce would be finalized and she would receive her settlement funds.

[4] Commencing in September of 2005, Ms. Boussoulas and Ms. Clubine were exchanging e-mails concerning properties in the desired area and both agreed that they looked at 4-5 properties between October and December of 2005. Ms. Boussoulas also entered the defendant's e-mail address into a computer programme that searched for properties that matched the criteria the defendant was looking for and automatically sent e-mails to Ms. Clubine for her perusal. The defendant would then advise Ms. Boussoulas which properties she was interested in viewing.

THE EVENTS IN 2006

[5] In early January 2006, Ms. Clubine asked Ms. Boussoulas to take her through a property in Adjala/Mono known as Willow Hall. Ms. Boussoulas contacted the vendor's broker, John Dunlap, and Ms. Clubine went through the house accompanied by the defendant's boyfriend, Brent Rogers. Ms. Clubine testified that the property was stunning but the house was a disaster. Consequently, her boyfriend arranged to have an architect, an engineer and a project manager of construction view the house and property so that she could determine how much it would cost to bring the house to an acceptable condition. Ms. Clubine decided to put in an offer to purchase Willow Hall.

[6] Ms. Boussoulas testified that there is a standard Buyer Agency agreement that is used by the Toronto Real Estate Board which gives a broker exclusive authority to act as agent for an individual for a specified period of time. This standard form agreement has blanks that are filled in to identify the property type and the geographic location. Paragraph 2 stipulates that the broker is entitled to be paid commission if, during the currency of the agreement, the buyer enters into an agreement to purchase any property. Furthermore, the agreement provides that a buyer will pay the broker commission if they enter into an agreement within 180 days of the expiration of the agreement (holdover period) for a property shown or introduced to the buyer during the period of the agreement. Paragraph 4 of the agreement requires the buyer to advise the broker of all offers to purchase properties submitted by the buyer during the course of the agreement and states:

if I fail to advise you of any property of interest to me that came to my attention during the currency of this Agreement and I arrange a valid offer to purchase the property during the currency of this agreement or within the Holdover period after expiration of this agreement, I agree to pay you the amount of commission set out above (emphasis added).

[7] Ms. Boussoulas testified that the agent must have the buyer sign the Buyer Agency Agreement prior to an offer to purchase being submitted. In the case at hand, she did not have Ms. Clubine sign the agreement when she first commenced showing her properties because they were friends and she trusted her. She showed her various properties in the fall of 2005 without asking for the agreement to be signed but she was aware the defendant was not in a position to make an offer because her divorce was not finalized.

[8] After several viewings of the Willow Hall property, Ms. Clubine decided that she wished to make an offer to purchase. Therefore, on February 1, 2006 Ms. Boussoulas met with Ms. Clubine and presented the Buyer Agency agreement for signature as well as the Working With a Realtor document. Ms. Boussoulas testified that she went over the agreement with Ms. Clubine and explained that the agreement was an exclusive one and she would be entitled to a commission even if Ms. Clubine bought a house through another agent or during the holdover period. Ms. Boussoulas testified that she had no doubt that Ms. Clubine was aware of the contents of the agreement she was signing.

[9] Ms. Clubine denies Ms. Boussoulas's version of events. She testified that Ms. Boussoulas presented the Buyer Agency agreement to her along with the Working With a Realtor form and did not explain either to her but simply asked her to sign them. Ms. Clubine acknowledged that she is an experienced businesswoman and her job is to sell and lease

very expensive cars. Indeed, her employment involves the negotiation of contracts with sophisticated individuals who are high income earners. Nonetheless, she testified that she did not read the agreement and signed it because Ms. Boussoulas told her to and she trusted her. She acknowledged that she was aware that Ms. Boussoulas would receive a commission of 2.5% from any purchase made but thought that she was not responsible for paying it, even though the agreement is clear on this point.

[10] I find as a fact that Ms. Boussoulas reviewed the agreement with the defendant and explained its exclusive nature and the obligation to pay commission if any property was purchased during the period of the agreement or during the holdover period. In preferring Ms. Boussoulas's evidence on this point to that of Ms. Clubine, I am influenced by the following factors:

[11] Ms. Boussoulas struck me as a reliable witness. She appeared to be an honest historian with a good recall of the salient facts.

[12] Having observed Ms. Clubine's demeanor during the trial, I conclude that she is forceful and aggressive and I do not find as a fact that she would sign a legally binding document dealing with the purchase of a property worth in excess of \$750,000 without first reading it.

[13] Ms. Clubine and her boyfriend who gave evidence, Brent Rogers, testified that Ms. Boussoulas often appeared inebriated at showings of houses, slurring her words and acting in an unprofessional manner. However, the evidence John Dunlap, a broker who was involved in negotiations with Ms. Boussoulas on one of the properties on behalf of the defendant and who has no reason to mislead to court on behalf of the Plaintiff testified that at all times, Ms. Boussoulas conducted herself in an entirely appropriate manner and he never saw any evidence of intoxication.

[14] Further the broker of the Plaintiff, Ken Kakoullis, testified that Ms. Boussoulas worked for him for more than 13 years and in that period of time, he has never had a complaint about the quality of her work, nor did he ever observe that she had a problem with alcohol. I do not find the evidence of Ms. Clubine on this issue to be reliable and I view it as an attempt to discredit Ms. Boussoulas.

THE WILLOW HALL PROPERTY

[15] The Willow Hall property was listed for \$825,000 and both Ms. Boussoulas and Ms. Clubine agreed that the price was high. Consequently, Ms. Boussoulas secured details of other properties in the area and exchanged them with the listing broker John Dunlap in an effort to determine what an appropriate selling price might be. After being advised by the architect who viewed the property that it would cost at least \$250,000 to bring the house up to an acceptable condition, Ms. Clubine, with input from her boyfriend Mr. Rogers, decided to submit an offer of \$575,000. It was clear that the price contained in the first offer to purchase for Willow Hall was decided by the defendant and her boyfriend with little input from Ms. Boussoulas. Ms. Clubine instructed Ms. Boussoulas to draft an offer.

[16] Ms. Boussoulas met with her broker, Ken Kakoullis, and obtained his input as he had been in the real estate business for more than 30 years. Ms. Clubine testified that Ms. Boussoulas provided no assistance in drafting the offer of February 1, 2006 and that she relied on her boyfriend, Brent Rogers, to advise her on what terms ought to be included in the offer. I do not accept this evidence as being accurate. Ms. Boussoulas had been in the real estate business in excess of 15 years at that point and would have been capable of drafting an offer to purchase a residential property. I accept her evidence that she discussed the contents of the offer with her broker, Mr. Kakoullis, as it was a rural property and he had more experience in that area than she did.

[17] The vendors of Willow Hall did not sign back the offer of \$575,000, which is not surprising given that the listing price was \$825,000. Ms. Boussoulas continued to show Ms. Clubine other properties in the area and Ms. Clubine received the computer generated prospect matches for review. Ms. Boussoulas continued to be in contact with the vendor's broker, Mr. Dunlap concerning the Willow Hall property. Ms. Clubine testified that after having viewed a number of properties, she decided she wished to put in another offer on the Willow Hall property and she contacted Ms. Boussoulas.

[18] At this point, Ms. Boussoulas realized that the initial Buyer Agency agreement that had been signed February 1, 2006 contained an error because it stipulated the amount of the commission was 0%. This was a typographical error that had been made by the secretary who typed the document. Therefore, Ms. Boussoulas gave evidence that she showed the mistake to Ms. Clubine and requested that she sign a corrected version of the agreement which was identical in every other respect but had the correct commission of 2.5% inserted. Ms. Boussoulas testified that she explained the error to Ms. Clubine who signed the corrected agreement. Ms. Clubine did not dispute this, but stated that she did not realize that she was responsible for payment of the commission. I do not accept that Ms. Clubine signed the second Buyer Agency agreement without reviewing it. In addition to her experience in the business world, on her own evidence, by that point she had lost confidence in the abilities of Ms. Boussoulas so it is unlikely she was relying on the representations she made with respect to the agreement.

[19] Further offers were exchanged between Ms. Clubine and the vendors over several days. Eventually, Ms. Clubine made an offer of \$750,000 and Mr. Dunlap advised Ms. Boussoulas that his clients needed 48 hours to consider the offer as one of the vendors, the mother, resided in Australia and wished to review the offer. Mr. Dunlap advised Ms. Boussoulas that perhaps an agreement could be reached between the parties for a price of \$760,000. Ms. Boussoulas imparted this information to Ms. Clubine.

[20] However, after the mother reviewed the offer, she decided that her bottom line was \$765,000 and this was the final offer back by the vendors. This event appears to have enraged Ms. Clubine, who blamed Ms. Boussoulas for not securing a power of attorney from the mother. It is clear that the power of attorney was not responsible for the transaction falling apart. I found Mr. Dunlap to be a credible witness who has a great deal of experience in the purchase and sale of properties in the area of Mono/Adjala. He has no reason to favour either party in this lawsuit. Mr. Dunlap testified that the power of attorney could have been secured but the reason the deal fell apart was because the parties could not reach a consensus on a sale price: Ms. Clubine was not prepared to offer \$765,000 and that was the vendor's bottom line.

[21] Ms. Clubine was infuriated that she did not get the Willow Hall property for the price she wanted. She acknowledged that both the vendor's broker and Ms. Boussoulas offered to decrease their commission so that she would, in effect, get the house for the price that she wanted and the deal would not be lost over \$5,000. However, Ms. Clubine was not prepared to do this and in her words, the house was poison to her at that point.

THE AFTERMATH

[22] She called Ms. Boussoulas and there was an unpleasant exchange on the phone which marked the end of their friendship. Ms. Boussoulas recalled that Ms. Clubine was abusive to her during this conversation and swore at her. She told her that she was not interested in making another offer on the Willow Hall property. Ms. Boussoulas believed that Ms. Clubine was upset about not being successful in her bid on the property so she decided to give her some time to cool off. She denied that Ms. Clubine told her that she no longer wanted her to act as her agent nor did she ask to terminate the Buyer Agency agreement. Ms. Boussoulas was aware that she did not have the authority to terminate an agreement, only her broker, Mr. Kakoullis, could do so. A few days later she left a message for the defendant, which was not returned.

[23] Some weeks later the defendant's boyfriend, Brent Rogers, called Ms. Boussoulas and advised that he was signing with another agent. She advised him that he was free to do so but that Helen Clubine was her client and was bound by the agreement that she had signed. After this conversation, Ms. Boussoulas did not think that Ms. Clubine was going to sign an agreement with another real estate agent. She believed that Mr. Rogers would likely enter sign an agreement with another agent and purchase a property for both of them.

[24] As a result of her discussion with Mr. Rogers, Ms. Boussoulas decided not to contact Ms. Clubine again. She told her broker Mr. Kakoullis what had transpired. While it would have been preferable for Ms. Boussoulas to have sent Ms. Clubine a letter confirming her obligations pursuant to the contract after the breakdown of their relationship, I accept her evidence that Ms. Clubine was aware of her responsibility to pay a commission to the Plaintiff if she purchased a property but that she would likely avoid doing so by having her boyfriend buy the house.

[25] In her evidence, Ms. Clubine acknowledged that she never told Ms. Boussoulas that she wished to terminate the Buyer Agency agreement that she had signed. Nonetheless, she continued to review properties on MLS and continued to receive the prospect matches from Ms. Boussoulas. She testified that because she did not want to speak with Ms. Boussoulas, she asked her boyfriend Mr. Rogers to contact her to advise that their agreement was terminated. She stated that he did so and told Ms. Clubine that Ms. Boussoulas was fine with it. I reject the evidence of Ms. Clubine and Mr. Rogers on this point. Ms. Clubine clearly knew that she was obligated to deal with Ms. Boussoulas exclusively until June 30, 2006 pursuant to the agreement and that she would be owed a commission from any purchase of a property during that period and that is why she asked her boyfriend to contact Ms. Boussoulas. Given Ms. Boussoulas's evidence (which was confirmed by Mr. Kakoullis), that she did not have the authority to terminate a buyer agency agreement, I do not accept that she would have simply agreed with the request of Brent Rogers. Rather, I accept the evidence of Ms. Boussoulas on this point, that she confirmed that Ms. Clubine was bound by the agreement she had signed, although that did not prevent Mr. Rogers from purchasing a property from another agent. It is not disputed that Ms. Clubine failed to advise Ms. Boussoulas of the fact that she had purchased a property during the term of their agreement.

[26] The fact that the defendant had purchased a property came to the attention of the Plaintiff and on October 20, 2006 Mr. Kakoullis wrote to Ms. Clubine to advise that she had breached the terms of the Buyer Agency agreement and that she owed the Plaintiff the sum of \$21,774.50 in commission. In response, Ms. Clubine telephoned him and requested a copy of the agreement, which was faxed to her on October 20, 2006. Subsequently, on October 27, Mr. Kakoullis had a discussion with Ms. Clubine and he made notes during the conversation. Ms. Clubine was critical of Ms. Boussoulas, alleging she had a drinking problem and did not negotiate the deal appropriately. She informed Mr. Kakoullis that she

dealt with contracts on a daily basis and was comfortable with them. She did not suggest that the Buyer Agency agreement of February 1, 2006 had been terminated.

[27] It is conceded that the commission has not been paid by the defendant. The explanation offered by the defendant is that Ms. Boussoulas was incompetent and that she misrepresented who was responsible for payment of the commission and because of this breach of her fiduciary duty to the defendant, she disentitled herself to a commission or alternatively, that Ms. Boussoulas agreed with the termination of the Buyer Agency agreement.

[28] I do not find that Ms. Boussoulas was incompetent in the services that she provided to the defendant. To the contrary, the evidence establishes that she is an experienced real estate agent who conducted herself in a professional manner throughout. She showed the defendant a number of properties, negotiated with John Dunlap for the purchase of Willow Hall and appears to have worked diligently on behalf of Ms. Clubine. The reason the deal was not concluded was because Ms. Clubine decided she did not want to make a further offer on the property. That was her prerogative, but she cannot blame Ms. Boussoulas for the fact that she was unsuccessful.

[29] There is no reliable evidence that Ms. Boussoulas breached the fiduciary relationship so as to disentitle her to a commission. As I have indicated, I find that the defendant is a sophisticated businesswoman and I do not accept the evidence offered by Ms. Clubine that she signed an agreement without satisfying herself of her obligations under that contract.

[30] Ms. Clubine was angry that she did not get the Willow Hall property for the price that she wanted and she blamed Ms. Boussoulas for the outcome. She chose to enter into an agreement with another agent which resulted in the purchase of a property during the period of time covered by the agreement with the Plaintiff and consequently, she owes the Plaintiff the 2.5% commission which amounts to \$21,774.50. The Plaintiff is entitled to prejudgment interest pursuant to the Courts of Justice Act from June 28, 2006. The defendant shall pay to the Plaintiff its costs. If the parties cannot agree on costs, written submissions shall be made within 30 days of the release of these Reasons.

Wilson D.A., J.

Released: April 9, 2008

Bob Aaron is a Toronto real estate lawyer. www.aaron.ca ©Aaron & Aaron. All Rights Reserved.