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Beware sending a real estate deal off the rails

Be reasonable, get solid legal advice to help minimize damages and avoid an ugly court case

An interesting decision from Toronto's small claims court last December provides a useful lesson on the obligations of buyers, sellers and lawyers when a real estate transaction starts to go off the rails.

In his decision, Justice M. Donald Godfrey wrote that the case came to court because the parties and their lawyers were unable to work out a "reasonable compromise" on the closing of a transaction on Mould Ave., in Toronto.

Nuno Barbosa and Paula Boas agreed to buy the house for \$516,000 from Helder and Maria Rodriguez, with a scheduled closing of October 30, 2009. Two days before closing, the buyers discovered that the property taxes were not \$2,300 as indicated on the MLS listing but were in fact almost \$4,600. The increase was the result of a re-assessment of taxes due to an addition to the property which was completed in early 2008.

The buyers requested a \$10,000 price reduction. When the sellers declined the offer, the buyers refused to close even though their lawyer was holding enough trust funds to complete the transaction.

After receiving advice from another lawyer, the buyers changed their minds and told their lawyer that they were willing to close and sue later. But the request was not made until after the 6 p.m. closing deadline.

The sellers did not agree since they did not know what damages they were exposed to as a result of two "chain reaction" closings, which depended on the sale of their Mould Avenue house.

The buyers then sued the sellers for return of their \$10,000 deposit, and the sellers sued the buyers for damages resulting from their refusal to close.

After an unusually long three-day trial, Justice Godfrey ruled that the buyers should have closed the transaction on time since the breach of contract was "not material." However, the judge also decided that the sellers were entitled to refuse to close 15 minutes after the 6 p.m. deadline because the contract stated that time was "of the essence."

The sellers could keep the \$10,000 deposit, but were awarded no additional damages since they did not take reasonable steps to limit their losses. Although their legal position in refusing a price reduction was technically correct, they were exposing all parties to the risk of subsequent litigation.

"The vendors knew or ought to have known," the judge wrote, "that they were obliged to compensate the purchasers for the misrepresentation on the taxes if the purchasers were forced to close." The judge felt that the \$10,000 reduction offer "certainly appears to be a reasonable attempt to estimate (the purchasers') potential loss," and the sellers were "negligent in absolutely refusing the \$10,000 abatement."

They "could and should have at least made a counter offer" to hold back the money and establish the proper damages after closing.

Three days after the scheduled closing, a further attempt to close failed. The sellers offered to close if the buyers agreed not to sue them afterward, and the buyers insisted on retaining their right to sue for damages as a result of misrepresentation of the taxes.

On this point, "the vendors were not acting reasonably," the judge wrote, since "there was no question that the purchasers would be entitled to some compensation for the misrepresentation of the taxes."

In the end, "both sides acted unreasonably" in not enabling the transaction to close.

Even though the purchasers lost their deposit, the sellers were unsuccessful in recovering their almost \$27,000 in losses on their own purchase when they failed to limit their damages. The sellers also had to pay their realtors \$3,750 in costs when the case against them was dismissed.

The lesson to be learned from this sad case is that any real estate transaction carries the risk of going off the rails.

If that happens, it is critical that all parties act reasonably and get solid legal advice on the risks involved, so that damages can be minimized and the possibility of an ugly court case is avoided.

Often, in litigation, nobody wins.

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