

SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: Royal LePage Atlantic v. Ross , 2022 NSSM 14

Date: 20220302

Docket: *Halifax* No. SCCH 21-503704

Registry: Halifax

Between:

Royal LePage Atlantic/Atlantic Real Estate Services Limited and Jessica
Margolian

(Claimants)

v.

Jonathan D. Ross

(Defendant)

Adjudicator: Dale Darling, QC

Heard: May 6th, 2021
February 1st, 2022
February 3rd, 2022
February 8th, 2022, in Halifax, Nova Scotia
(All via MS-Teams virtual platform)

Decision: March 2, 2022

Counsel: Gavin Giles, QC, for the Claimants
Nathan Sutherland, for the Defendant

By the Court:

This decision is further to a hearing held on February 1st, 3rd, and 8th, 2022. An initial hearing was held on May 6th, 2021 pursuant to a preliminary motion made by the Defendant Mr Ross to restrain Mr. Giles from acting for the Claimant in this matter, “in light of his role as Chief Adjudicator of the Small Claims Court of Nova Scotia”. I issued a decision dismissing the motion on May 23, 2021. My decision on that preliminary motion is attached to this decision.

[1] Ms. Margolian is a real estate agent who works for the Claimant Royal LePage.

Mr. Ross is a business person who, in early 2020, was working with Ms.

Margolian with the intention of locating a recreational or cottage property.

[2] The dispute between the parties concerns the enforceability of a Buyer

Designated Brokerage Agreement (the “Ross BDBA”), signed by both Mr.

Ross and Ms. Margolian on October 16, 2020.

[3] The Claimant pleads that the Ross BDBA should be enforceable against the

Defendant Mr. Ross, entitling Ms. Margolian to a commission in relation to the

purchase of a property at 5945 Inglewood Drive, Halifax (the “Inglewood

Property”), in the amount of \$26,000 plus HST for a total of \$29,000, reduced

in order to meet the \$25,000 maximum under the jurisdiction of the Small Claims Court, to \$25,000, plus the allowable costs.

[4] The Defendant argues that the Ross BDBA is not enforceable, because Mr. Ross was unaware of the terms of the BDBA, because he did not know what he had signed (a defence of “non est factum”, or “not my act”). Alternatively, the Defendant argues that Mr. Ross did not purchase the Inglewood Property. The Defendant argues that since his wife, Renee Gersovitz Ross, purchased the Inglewood Property, the Ross BDBA could not apply.

[5] I am dismissing this claim, for the reasons that follow. Mr. Ross was bound by a valid BDBA, but he did not purchase the Inglewood Property.

The Chronology of Events:

[6] I heard evidence in this proceeding from Ms. Jessica Margolian, Mrs. Gersovitz Ross, and Mr. John Ross. An Exhibit Book containing exhibits from both the Claimant and the Defendant was filed with some 300 pages of documents. Pre-hearing briefs and authorities were filed, all of which I reviewed.

[7] Ms. Margolian gave evidence that she has worked as a real estate agent since 2016. While not acquainted with Mr. Ross, she says that their families knew

each other, and that her father introduced her to Mr. Ross and Mrs. Gersovitz Ross in the summer of 2020, with a view to her assisting them with locating properties. Text messages between Mr. Ross and Ms. Margolian confirm that Mr. Ross contacted Ms. Margolian asking her specifically for assistance in locating a cottage property somewhere in HRM. In his evidence, Mr. Ross was clear that he was undertaking this search without his wife's knowledge, as she was not interested in a cottage property. Mrs. Gersovitz Ross confirmed in her evidence that this was the case.

[8] Ms. Margolian testified that she probably spoke to Mrs. Gersovitz Ross by text, email or phone five to six times, and communicated with Mr. Ross much more often. Through these communications, Ms. Margolian testified that she knew that the Rosses were looking for a home in the south end of Halifax with the price range of anywhere between \$500,000 to \$4 million dollars. Mr. Ross had advised her that he was looking for something "off market", not yet listed, in order to save on costs.

[9] Ms. Margolian testified that it was important that she know if Mr. Ross was working with someone else. If so, she would not have proceeded because she would not have wanted to step on any toes, and also that there was no benefit in working with a client who had multiple agents.

[10] So, in the summer of 2020, Ms. Margolian started to find off market opportunities for the Rosses, and that is confirmed by some of her communication with them. At the same time, she was looking for cottage properties, specifically for Mr. Ross.

[11] She testified that she knew about the Inglewood Property by the end of summer of the year 2020, and had spoken to the Defendant and Ms. Gersovitz Ross about it. The evidence shows that Ms. Gersovitz Ross was also aware of the property in that time frame, from other sources.

[12] On November 6th, 2020, Mr. Ross texted Ms. Margolian to say that he had bid on the Inglewood Property and “got it”. In that email exchange she asked if the transaction was through the agent Craig Snow, who had been listed as the selling agent, and he agreed.

[13] There is no evidence of further communication between either Mr. Ross or Mrs. Gersovitz Ross. Although the evidence before me is not complete, it appears that the matter was referred to legal counsel and letters began to be exchanged in late 2020 and January of 2021.

[14] There are two important dates in Ms. Margolian’s chronology. On July 25, 2020 she has a twelve minute telephone call with Mr. Ross. Her evidence was

that he told her at that time that he was unhappy with the results of working with another agent, and that she had warned him that she could not work with him if he had another agent. She also says that she told him at that time, that if an offer was made by her on a property, her brokerage would require a BDBA in order to formalize her acting for him exclusively. Her evidence was very clear on that point. She says that he laughed during the call and said that he understood how such matters worked.

[15] The second important date, is October 16, 2020. Ms. Margolian had located for Mr. Ross a potential cottage property in Enfield, and received instructions from him to make an offer of \$450,000. On that date, she sent Mr. Ross four documents by way of an electronic signing program called DocuSign. Those four documents were titled, in bold face type:

1. Working with the Real Estate Industry (two pages total);
2. Buyer Designated Brokerage Agreement (BDBA)(three pages total);
3. Agreement of Purchase and Sale (three pages total);
4. Vacant Land Schedule (One page total);

[16] There is also a Certificate of Completion which indicates that the documents were sent to Ms. Margolian and Mr. Ross at 12:28:14. They were “viewed” by

Ms. Margolian at 12:28:29 and signing completed at 12:28:51. They were “viewed” by Mr. Ross that same day at 2:22:37, and signing completed at 2:27:26.

[17] The BDBA that Mr. Ross signed made Ms. Margolian his Designated Agent from October 16th to December 31, 2020, entitling her for commissions on his purchases in “HRM and surrounding areas, Enfield and surrounding areas”.

[18] Ms. Margolian explained that she had not been present when Mr. Ross signed the documents, and that they were sent via email and signed and initialled by way of electronic signature.

[19] She was asked in her evidence if she had either tricked him into a BDBA brokerage agreement or alternatively was she aware that he had not read the document, to which she said she was not, and had not.

[20] She was also asked whether she had given a time limit for him to sign the documents and indicated that she had not.

[21] She also agreed in cross examination that she didn't tell him specifically that he was obligated to use her exclusively, but again reiterated that she had talked to him about the fact that a BDBA would be required for any offer, and that Royal LePage operated under the BDBA model.

[22] When asked in cross examination if she knew that Mrs. Gersovitz Ross was “spearheading” the search for a family property, she said she did not know that, but denied that her dealings with Mr. Ross dealt only with a cottage property. Certainly, the evidence of listing cuts she was sending to Mr. Ross show several related to the south end property search.

Mrs. Gersovitz Ross

[23] Mrs. Gersovitz Ross testified on behalf of the Defendant. She is currently Vice President of Operations for Rozen Management and Leasing, which she described as a family owned residential property business comprising 400 units of residential rental property. She has worked with the company for 18 years. Her name is on the title of the current family property (Mr. Ross’s evidence being that it was done after purchase for business reasons).

[24] In 2010, Ms. Gersovitz Ross started to search for a new family home in the South end area. She was clear in her evidence that Mr. Ross was not interested in moving at that stage. Her methodology was to drive around looking at properties, and then call the broker involved in order to perhaps look at the property. She testified that she never had an exclusive arrangement with an agent until she signed a BDBA with Mr. Cecil Snow in August of 2020.

[25] Her evidence was that Mr. Ross's role was very limited in looking at for a new family home. She was emphatic that she was not involved in a BDBA with any agent until her BDBA with Mr. Snow, and that she had called Ms. Margolian soon after they were introduced and told her she was not getting into an exclusive relationship with her.

[26] In the course of her search, Mrs. Gersovitz Ross had entered into a BDBA with Mr. Snow on August 19, 2020 in relation to an offer for a listed property on Emscote Avenue in Halifax, to be in effect from that date until January 19, 2021 (the "Gersovitz Ross BDBA")

[27] Mrs. Gersovitz Ross testified that she had a previous business relationship with Mr. Snow, based upon his acquisitions of apartment buildings for her in a business context. The August 19, 2020 BDBA was the first time she had entered into an exclusive relationship with an agent in the home search.

[28] In September of 2020, based on knowledge gleaned from the community, she put in a private offer on the Inglewood Property (which she says Mr. Snow agreed he would not seek commission on, given their considerable business dealings). She testified that the extent of Mr. Ross's knowledge was that he knew the price. That offer was refused.

[29] When asked why she did not advise Ms. Margolian of this private offer, she testified that “she did not think she had to”. She was emphatic in her denial of any knowledge of Mr. Ross’s offer on the property of Enfield, or of the circumstances of the Ross BDBA, and it appears that her evidence was she only became aware of the circumstances around those events when Royal Lepage sought payment of a commission on the Inglewood property starting in December of 2020. She says her husband knew that she did not want a cottage property. She was not aware until after these events that Mr. Ross had a BDBA with Ms. Margolian.

[30] In November of 2020, she testified that she knew again from community contacts that the family at the Inglewood Property were cleaning out the house and when the property was listed. She put in an offer of 1.3 million, again only discussing with Mr. Ross the amount of offer, which was accepted. Mr. Snow received a 2.5 % commission on the sale under the terms of the Gersovitz Ross BDBA.

Mr. Ross:

[31] Mr. Ross testified that he works for a family business selling scrap metal called John Ross and Sons. He manages people and acts as Chief Operating

Officer. He was called to the Nova Scotia bar in 1998, and articulated at Goldberg Thompson, practicing for about a year prior to going into the family business.

He agreed in cross examination that he was familiar with contracts.

[32] His evidence was that the purchase of the Inglewood Property was “driven by Renee” (Mrs. Gersovitz Ross), although he agreed on cross examination that he became more involved in the home search in the fall of 2020. He knew that his wife really wanted to move downtown. He was not really interested, although he would drive around to look at properties with her. He described his involvement in the 2020 search for a home as limited to discussions of price with Mrs. Gersovitz Ross.

[33] He was fairly sure that he spoke to Ms. Margolian in July of 2020. His evidence was that he thought it appropriate that “the more the merrier” agents be involved in the property search.

[34] Mr. Ross was asked about his conversation with Ms. Margolian of July 25, 2020. He says that they spoke generally about their families, and the geographic area of the home search. He was asked if the term “designated agency” was used on the call, to which he responded “absolutely not”.

[35] With respect to whether Ms. Margolian would expect to be compensated in the event of an offer, his reply was that she would through a commission from the seller.

[36] Later on July 25, 2020, he contacted Ms. Margolian again, now specifically regarding a cottage property.

[37] By the fall of 2020, Mr. Ross testified that he knew Ms. Gersovitz Ross was working with Mr. Snow, and that she has made an offer on a property on Emscote, although he did not know the details. He also knew about the private offer on the Inglewood Property. He testified that he did not think he had any obligation to tell Ms. Margolian about these offers.

[38] Finally, in October of 2020, he became interested in a cottage lot in Enfield. This is what lead to the execution of the Ross BDBA.

[39] Mr. Ross says that “my take was we were writing up the offer price”. To that end, in text exchanges with Ms. Margolian he stipulated that he wanted a due diligence clause, to have the offer in his name only, and financing included. He says that he recalls receiving “an email with documents I had to sign”. He says that he had never used the “DocuSign” program before, and “when you click things it just jumps to the next – it was a busy Friday afternoon and I’m

just clicking away”, and that he “already knew the terms”. He claims that he was physically unable to view the document through the DocuSign program.

[40] He says that if he had known about the Ross BDBA at the time, he would not have agreed to it.

[41] Mr. Ross’s offer was not accepted and a counter was made. Mr. Ross did not pursue the property further, as Ms. Gersovitz Ross had become aware that he was looking at this property, and had information that the property was unsuitable.

[42] With respect to the eventual purchase of the Inglewood property, Mr. Ross says that he knew it had been listed, and that he and Ms. Gersovitz Ross discussed how much to offer on it.

[43] After October 16, 2020, Ms. Margolian continued to contact Mr. Ross regarding south end properties.

[44] On November 6, 2020, Ms. Margolian texted Mr. Ross to say that the Inglewood property had been listed, to which Mr. Ross responded “That is the one I knew was coming”. Another real estate agent they had worked with before sent the listing to both the Rosses on that same day.

[45] On November 17, 2002, after Ms. Gerzovitz Ross's offer on the Inglewood Property was accepted, Mr. Ross sent a text to Ms. Margolian saying: "Jessica: I just bid the lot across the street. And got it. 1.3. I knew the owners. Please keep that to yourself. Not public". She responded "Through Craig Snow"?, to which he responded "Yes".

[46] When questioned about this email, Mr. Ross described it as a "loose text to say stand down", but that Ms. Gersovitz Ross had purchased the property.

[47] After this point, Ms. Margolian stopped communicating with Mr. Ross, and after that point it appears that their communication was conducted through legal counsel.

Decision:

[48] Mr. Giles on behalf of the Claimants argues that Mr. Ross is bound by the terms of the BDBA that he signed with Ms. Margolian to pay the stipulated commission pursuant to the purchase of the Inglewood Property, amounting to 2% of the price, as reduced pursuant to the Small Claims Court limits on recovery.

[49] The Claimant says that Mr. Ross cannot rely upon the argument that the signing of the BDBA is voided by virtue of what is called “non est factum (not my act), because he did not know what he was signing.

[50] The Claimant further says that the fact that the offer on the Inglewood Property was made by Ms. Gersovitz Ross also does not shield him from the effect of the Ross BDBA. He is a beneficiary of the purchase of the home, and therefore should be bound by the terms of the BDBA.

[51] The Defendant says that non est factum is a complete defence for Mr. Ross, and that he is entitled to rely as well upon the acknowledged fact that Ms. Margolian never explained to him the documents she expected him to sign.

[52] The Defendant argues the Ross BDBA falls into the same category as the contracts in the “ ticket cases”. I was referred to a number of these in argument, beginning with *Tilden Rent-a-Car v. Glendenning* [1978] O.J. No. 3260. These cases stand for the proposition that “standard form commercial contracts”, or “contracts of adhesion”, characterized by their boilerplate or “take it or leave it nature”, may give rise to special responsibilities on the part of the vendor to bring certain clauses to the attention of the contracting party.

[53] These contracts are scrutinized by the Courts based on the circumstances of their creation- in the cases provided to me the individual tends to be standing at a counter, at a car rental, a ski lodge rental, or a horseback riding stable. There is a extremely narrow temporal window in which the contract must be signed, generally, a matter of minutes, due to the logistics of the transaction, and the consumers desire to commence the activity bargained for as soon as possible, as well as the vendors desire to accommodate as many clients as possible.

[54] Such circumstances can create a positive obligation on the part of the vendor to bring the consumers attention to terms such as exclusions of liability, and other onerous terms.

[55] However, while they can carve out exceptions in those circumstances, “ticket cases” continue to support the general (and central) requirement of contract, that a party who signs a legal document, which they know affects their legal rights, is bound by its terms whether they read it closely, or indeed, as all.

[56] Applying the principles of contract to the facts of this case, I find that the signing of the Ross BDBA cannot be characterized as analogous to the restrictions created by standard form contracts in the ticket cases.

[57] The essence of those cases is an extremely time limited window in which to review the contract, creating the obligation of greater diligence on the part of the vendor to point out onerous clauses.

[58] Mr. Ross in his evidence certainly suggested that he felt urgency, due to what he described as the volatile real estate market. However, the evidence does not reflect that urgency. The documents were electronically signed or initialled by Ms. Margolian in one place, and in an 20 second window after being received at 12:28:14. They were received by Mr. Ross at the same time, 12:28:14. He viewed them at 2:22:37, and made 9 signatures or initials, completing the signing at 2:27:26.

[59] This is not a “ticket case”. The parties in those cases do not have two hours to review a contract, and arguably, Mr. Ross in this case had no time limit that would prohibit him from reviewing a 13 page document.

[60] I add that Mr Ross suggested in his evidence that the DocuSign program was locked such that he could not scroll through and read the document. On a question from me, Ms. Margolian confirmed that the program allowed the document to be viewed, scrolled and printed. It is not credible that a program

could survive as a business tool, that prevented the reader from reading the document.

[61] I find that Mr. Ross could have, and should have, read the documents that Ms. Margolian sent to him. They related to what would have been a binding offer of \$450,000 for the purchase of land, regarding which he had specifically stipulated terms relating to due diligence and financing, and which by his evidence he did not check to ensure were properly drafted. It is not reasonable to require Ms. Margolian to have concluded that Mr. Ross would enter into a \$450,000 transaction without reading the documents legally binding upon him. This is not a case of non est factum. Mr. Ross had to have known, or should have known, that the documents he signed affected his rights, and they were binding upon him accordingly under the normal rules of contract.

[62] Mr. Ross is not, I find, a unsophisticated consumer. By his own evidence, he is legally trained and a very experienced business person, well aware of the requirements of contracting.

[63] I accept Ms. Margolian's evidence that in their conversation on July 25th, 2020, she advised Mr. Ross that should an offer be made, an exclusive relationship would be required. It is not credible that when the offer was made

in October 16th, 2020, Mr Ross believed that Ms. Margolian was working for nothing. On that date, she sent him four documents, the first of which title was a three page document explaining the nature of the responsibilities of both parties in conducting a real estate transaction. The merest glance at page 4 entitled “Buyer Designated Brokerage Agreement” in bold face, would have told him all he needed to know. There is no evidence before me supporting the notion of fraudulent misrepresentation on Ms. Margolian’s part.

[64] I do however think that the evidence may well support the conclusion that Mr. Ross really did not read the documents, and had no idea that the BDBA he had entered into was binding upon him until after the Inglewood Property was purchased.

[65] This takes us to the second issue. If Mr. Ross had a binding BDBA with Ms. Margolian, is the Claimant entitled to compensation for her commission on the Inglewood Property? The answer is, she is not, because Mr. Ross did not purchase the Inglewood property, Mrs. Gersovitz Ross did.

[66] While the Claimant agrees that Mrs. Gersovitz Ross made the offer on the Inglewood property, they argue that Mr. Ross used his knowledge received from Ms. Margolian to effect the purchase, or simply by virtue of the existence

of the Ross BDBA owed the Commission. They also argue that since Mr. Ross as an eventual beneficiary of the transaction (because the family home which is being built will eventually be his home as well as his wife's), the Rosses were bound by the BDBA he signed.

[67] The evidence before me is clear that Mrs. Gersovitz Ross initiated the property search for a new family home, and was the person at the forefront of the property search throughout. I find that Mr. Ross's role was to receive basic information from Mrs. Gersovitz Ross on the search, and the evidence was clear that any decision on properties to pursue and offered upon was hers, not his.

[68] Married women have had the right to contract for and acquire real property in Nova Scotia since 1899. Mrs. Gersovitz Ross's marital status does not in any way affect her entitlement to contract independently of her partner Mr. Ross.

[69] There is absolutely no evidence before me of an intention to defraud Ms. Margolian of her commission, either by Mr. Ross or Mrs. Gersovitz Ross. I find the evidence supports that Mrs. Gersovitz Ross did not know of the existence of the Ross BDBA until after the Inglewood Property was purchased, and it is entirely likely that Mr. Ross did not know of its existence until that

time either. You cannot collude to avoid a legal responsibility you are unaware of.

[70] Equally importantly, Ms. Gersovitz Ross had made a private offer on the property in September of 2020, prior to the Ross BDBA being signed, demonstrating her independent knowledge. There is therefore no evidence that the search for the property, the eventual offer, or any other part of the transaction was actuated by either Mr. Ross, in his business relationship with Ms. Margolian, or any desire or intention on the part of the Rosses to defraud her of her commission.

[71] I thank both counsel for their thorough canvassing of the issues before me. For all of these reasons, I dismiss the claimant's claim in its entirety, and an order will issue accordingly, without costs.

Dale Darling. QC

Adjudicator