

2000 ABQB 31
Alberta Court of Queen's Bench

Parwinn Developments Ltd. v. 375069 Alberta Ltd.

2000 CarswellAlta 50, 2000 ABQB 31, [2000] A.W.L.D. 153, [2000]
A.J. No. 68, 259 A.R. 137, 30 R.P.R. (3d) 74, 94 A.C.W.S. (3d) 415

**Parwinn Developments Ltd. and Perry Nygren,
Plaintiffs and 375069 Alberta Ltd., Defendant**

375069 Alberta Ltd., Plaintiff by Counterclaim (Defendant) and Parwinn
Developments Ltd. and Perry Nygren, Defendants by Counterclaim (Plaintiffs)

Lewis J.

Heard: October 5, 1999

Judgment: January 26, 2000

Docket: Edmonton 9903-02337

Counsel: *W. Murray Smith*, for Plaintiffs/Defendants by Counterclaim.

Barry D. Young, Q.C., for Defendant/Plaintiff by Counterclaim.

Subject: Contracts; Torts; Property

Headnote

Agency --- Real estate agents — Creation of agency

Plaintiff real estate agents brought action against defendant vendor for unpaid commission — Contract in evidence was between defendant and agent other than plaintiffs — Plaintiffs not entitled to commission as plaintiffs had no contract with defendant — Plaintiffs claimed that agent who was signatory to contract was plaintiffs subagent — Plaintiffs brought action against defendant for unpaid real estate commission — Action dismissed — Plaintiff provided no evidence of relationship between themselves and other agent.

Contracts --- Parties to contract — Privity — General

Plaintiff real estate agents brought action against defendant vendor for unpaid commission — Contract in evidence was between defendant and agent other than plaintiffs — Plaintiffs not entitled to commission as plaintiffs had no contract with defendant — Plaintiffs claimed that they were entitled to exception to rule of privity of contract — Plaintiffs brought action against defendant for unpaid real estate commission — Action dismissed — Plaintiffs were not third party beneficiaries as contemplated by exception to rule of privity — Exceptions to rule only to be used as shield rather than as sword, as plaintiffs wanted to use it.

Agency --- Real estate agents — Rights of agent — General

Plaintiff real estate agents brought action against defendant vendor for unpaid commission — Contract in evidence was between defendant and agent other than plaintiffs — Plaintiffs not entitled to commission as plaintiffs had no contract with defendant — Plaintiffs claimed that they were ambushed at trial by defendant's allegations of fraud and deceit — Plaintiffs brought action against defendant for unpaid real estate commission — Action dismissed — Defendant did not plead fraud, nor did he rely on deceit or illegality — Action dismissed.

Table of Authorities

Cases considered by *Lewis J.*:

Alex Duff Realty Ltd. v. Eaglecrest Holdings Ltd., [1983] 5 W.W.R. 61, 26 Alta. L.R. (2d) 133, 30 R.P.R. 207, 146 D.L.R. (3d) 731, 44 A.R. 67 (Alta. C.A.) — referred to

Caskey v. Guardian Insurance Co. of Canada (1994), 148 A.R. 251 (Alta. Master) — referred to

Edmonton Savings & Credit Union Ltd. v. 124968 Construction Co. (1985), 40 R.P.R. 126, 61 A.R. 296 (Alta. Master) — referred to

Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd., [1999] 9 W.W.R. 380, 11 C.C.L.I. (3d) 1, 176 D.L.R. (4th) 257, 245 N.R. 88, [1999] I.L.R. I-3717, 67 B.C.L.R. (3d) 213, 47 C.C.L.T. (2d) 1, 127 B.C.A.C. 287, 207 W.A.C. 287 (S.C.C.) — distinguished

McMurray Homes Ltd. v. Fort McMurray (Town), [1976] 5 W.W.R. 442 (Alta. C.A.) — referred to

Northwestern Securities v. White (1962), 35 D.L.R. (2d) 666 (B.C. C.A.) — considered

375069 Alberta Ltd. v. 400411 Alberta Ltd., 2000 ABQB 29 (Alta. Q.B.) — referred to

Statutes considered:

Judgment Interest Act, S.A. 1984, c. J-0.5

Generally — pursuant to

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68

R. 104 — considered

R. 109 — considered

ACTION for unpaid real estate commission.

Lewis J.:

1 The plaintiffs seek judgment against the defendant for an unpaid real estate commission of \$127,800.00, plus interest under the *Judgment Interest Act*, S.A. 1984, c. J-0.5, as well as any applicable goods and services tax and costs on a solicitor and his own client basis. The defendant denies the claim and counterclaims for a declaration that if a real estate commission is payable, the payment of the real estate commission would constitute a forfeiture and the plaintiff by counterclaim is entitled to relief against such a forfeiture.

Issues

2 Plaintiffs' counsel's position is that the issues before the court are:

(1) What weight should be given to the evidence of John Ryan?

(2) Is there privity of contract between the plaintiff real estate agent and the defendant vendor such as to sustain an action for commission and, if not, alternatively, can this matter be brought within a principled exception to the doctrine of privity of contract? and

(3) Should the removal of the conditions precedent be enforced as the triggering event for the payment of the commission as provided for in paragraph 16 of the offer to purchase and agreement for sale ("the agreement")?

3 Counsel for the defendant defines its position on the issues before the court as follows:

(1) The plaintiffs are under a misunderstanding that the case turns on deceit or fraud;

(2) Can the plaintiffs sue successfully for recovery of a commission on the basis of the agreement to which neither of the plaintiffs is a party;

(3) If the Court finds for some reason that there is privity between the plaintiff Nygren and the defendant, then the defendant asks the court to allow an amendment to the statement of defence and counterclaim to plead unilateral mistake and allow the remedy of rectification to be applied to the facts so that clause 16 of the agreement conforms to what Mr. Ryan understood it to be;

(4) If the Court finds that there is privity of contract between the plaintiffs and the defendant and that the plaintiffs cannot sue successfully on the agreement, then is there some other agreement that exists between the plaintiffs and the defendant? (Such agreement has not been pled by the plaintiffs. At the opening of trial, counsel for the defendant asked what agreement was being sued on by the plaintiffs. Plaintiffs' counsel stated that it was only the agreement); and

(5) What effect does this Honourable Court's decision in the first trial (*375069 Alberta Ltd. v. 400411 Alberta Ltd.* [2000 ABQB 29 (Alta. Q.B.)]) have on the instant case?

Facts

4 The plaintiff, Mr. Nygren ("Nygren"), has been a licensed real estate broker in Calgary since the summer of 1986. In early 1989, after being associated with two real estate firms, he incorporated his own real estate company, the plaintiff, Parwinn Developments Ltd. ("Parwinn"). According to the plaintiffs, Nygren is the sole shareholder of Parwinn.

5 In early 1989, Nygren contacted Mr. Ryan ("Ryan") of Coopers & Lybrand, chartered accountants, in Edmonton regarding a condominium property in Calgary, known as the Forest Lawn property. The Forest Lawn property was owned by Ryan's company, 386361 Alberta Ltd. ("386361"). Nygren's purpose in contacting Ryan was to determine if he was interested in selling the property, which Mr. Ryan was.

6 Ryan has had many years of experience as a chartered accountant, trustee in bankruptcy and receiver manager with Coopers & Lybrand. He has had a vast experience in selling and marketing hundreds of properties throughout Canada and has dealt with realtors for upwards of 20 years.

7 Nygren testified that he was working in conjunction with Mr. Pat Vuong ("Vuong") of Remax Real Estate North of Calgary. Vuong indicated to Nygren that he might have a buyer for the Forest Lawn property and, according to Nygren, he and Vuong made an agreement to split the commission on any sale.

8 Vuong obtained an offer for the purchase of the Forest Lawn property. Nygren and Vuong brought the offer, dated May 1, 1989, to Ryan in Edmonton. On May 3, 1989, Ryan accepted the offer on behalf of the owner and vendor of the property, 386361.

9 The form of offer used in the Forest Law property sale was obtained from Ryan's lawyer, Mr. Romanko of Bryan & Company. This form of offer was used in the Forest Lawn property sale by filling in the blanks, with respect to the sale price, the deposit, when the balance of the purchase price was payable, the date the conditions precedent had to be concluded and the closing date of the sale. The commission clause in the form of offer provides:

16. Commission

The parties acknowledge that a real estate commission of Three (3%) percent of the gross sale price of the subject Property is payable to the Agent and, such shall be the responsibility of and shall be fully paid by the Vendor.

10 In the form of offer for the Forest Lawn property, Remax Real Estate North is shown as the agent for the vendor, 386361. There was no listing agreement signed by Ryan, on behalf of 386361, with either of the plaintiffs, nor with Vuong or Remax Real Estate North. The Forest Lawn property sale closed, but I have no evidence as to whether a real estate commission was paid and if so to whom and the amount. However, I assume a commission was paid in view of the further attempted sale arranged by Nygren and Vuong with another of Ryan's companies.

11 In any event, Nygren determined from Ryan that he had other properties held by other numbered companies that he would be interested in selling. A package of information on the other properties was obtained by Nygren from Ryan.

12 Ryan indicated he would be prepared to entertain offers on two properties in Edmonton consisting of 208 townhouse units in total and referred to as the Townhouse and Wellington projects. These two townhouse properties are legally described as Lots 1, 2, 3, 4, 5 and 7 in Block 75, Plan 1837KS. Both properties were limited dividend projects, being controlled by C.M.H.C. through an agreement attached to its first mortgage on each of the properties. The purpose of the limited dividend projects is to provide low-cost housing for low income families.

13 Vuong found a purchaser for the Townhouse and Wellington properties. This offer was set out in a form of offer to purchase and agreement of sale (the "purchase contract") prepared by Nygren. Nygren prepared this purchase contract using the form of purchase contract he had received from Romanko for the Forest Lawn property sale.

14 The first draft of this purchase contract was directed to Remax Real Estate North, as agent for the vendor 386361. 386361 was the owner of the Forest Lawn property, but not the owner of the Townhouse or Wellington properties. Another numbered company of Ryan's, 375069 Alberta Ltd. ("375069"), was the owner of the latter properties. Therefore, another purchase contract was prepared and addressed to Remax Real Estate North, as agent for 375069, the vendor and owner. The purchase price remained the same in this revised purchase contract, but the deposit was increased as Ryan had requested, that is, the deposit payable on the removal of the conditions set forth in the purchase contract was increased from a total of \$75,000.00 to a total of \$200,000.00 (This deposit amount includes both the initial deposit and the subsequent deposit). This purchase contract was accepted by Ryan on behalf 375069 after it was faxed to him and the original couriered to him.

15 Besides changing the sale price, deposit, closing date for the conditions precedent to be removed, and the date of closing of the sale, from the form of purchase contract used in the Forest Lawn property sale, Nygren also changed the commission clause in paragraph 16 to read as follows:

16. Commission

The parties acknowledge that a real estate commission of Three (3%) percent of the gross sale price of the subject Property is payable to the Agent and, such shall be the responsibility of and shall be fully paid by the Vendor. The real estate commission shall be deemed to have been earned upon removal of the Conditions Precedent and the Deposit monies shall apply firstly to the to [sic] pay the real estate commission and the parties authorize the Agent to deduct from the Deposit the real estate commission payable. The Vendor hereby irrevocably assigns out of the proceeds of the sale any unpaid balance of the real estate commission and the Vendor directs its solicitors to pay

the same to the Agent upon completion of the sale. The Vendor hereby notifies both the Purchaser and its solicitor of this assignment.

16 Nygren did not tell Ryan of this change to the commission clause in the purchase contract. According to Ryan, he asked Nygren if there were any changes in the purchase contract outside of the price, conditions, deposit and closing date and Nygren said there were no other changes. As with the Forest Lawn property sale, Ryan did not, on behalf of the owner, enter into a listing agreement with any real estate agent with respect to the Townhouse and Wellington properties. Ryan testified, and I accept his evidence, his general practice in 99 percent of the cases when he is selling property, is to never give a listing and to pay commission only upon completion. He testified that his unwavering practice is that no commission is paid until the deal is satisfactorily completed.

17 The purchase contract on the Wellington and Townhouse projects is dated August 9, 1989. This purchase contract was accepted on August 15, 1989. The closing date was September 20, 1989, with the conditions precedent having to be waived by the purchasers by 12 o'clock noon on September 10, 1989. The date by which the conditions precedent had to be waived, as well as the closing date, were extended a number of times. Finally, on December 29, 1989, the conditions precedent were waived or removed by the purchaser and a closing date was agreed on of February 1, 1990. This closing date was subsequently extended to April 1, 1990. The sale never closed.

18 Neither of the plaintiffs nor Remax Real Estate North nor Vuong are signatories to this purchase contract. 400411 Alberta Ltd. is the purchaser in this purchase contract.

19 On January 22, 1990, Nygren on behalf of Nygren Real Estate Agencies, wrote a letter to Coopers & Lybrand, to the attention of Ryan, which Ryan acknowledged and approved on behalf of 375069. The letter states:

Re: Sale of Townhouse Development Ltd.

13135 - 131 Street, Edmonton, Alberta

This letter will re-affirm that upon closing of the sale of the above mentioned property to 400411 Alberta Ltd., the Vendor will pay a real estate commission of 3% of the gross sale price in accordance with paragraph 16 of the Offer to Purchase and Agreement of Sale.

The Commission shall be payable to NYGREN REAL ESTATE AGENCIES and Nygren Real Estate Agencies shall be responsible to pay its sub-agent, REMAX REAL ESTATE NORTH, the selling portion of the commissions payable.

Thankyou [sic] for your continued support and it is always a pleasure to do business with you.

Yours truly,

NYGREN REAL ESTATE AGENCIES

Perry F. Nygren

Real Estate Agent

Land Agent

100, 209 19 STREET N.W.

CALGARY, ALBERTA T2N 2H9

Ph: 403-560-1607

ACKNOWLEDGED AND APPROVED 375069 ALBERTA LTD.

PER: _____

John M. Ryan

20 According to Ryan, the reason for this letter is that when he found out that Nygren had changed clause 16 of the purchase contract to read that the commission was payable on the conditions being waived, he was livid with Nygren and phoned him and demanded a change in the purchase contract to reflect that the commission was payable on the closing of the sale and not on the conditions precedent being removed or waived. Nygren could not recall exactly what the circumstances were that gave rise to his writing the above letter, or that Ryan was upset with him. I accept Ryan's evidence on this issue.

21 Nygren acknowledged that in most real estate transactions, he gets paid his real estate commission after the sale is concluded and the monies have been paid. He also testified that he sometimes gets paid his real estate commission after the conditions are removed, but this is totally dependent on the agreement made for the payment of commission.

22 The first demand Nygren made on Ryan for payment of his commission was in a letter dated November 30, 1990. This was followed by a further letter from Nygren to Ryan on December 3, 1990 seeking payment of his real estate commission.

23 The real estate commission has not been paid and thus the reason for this action, which was commenced with the issuance of a statement of claim on August 4, 1993 in the Judicial District of Calgary. This action was transferred to the Judicial District of Edmonton for trial, which followed immediately after the trial of the action commenced by the vendors against the purchasers, in which the purchasers seek, amongst other remedies, specific performance of the purchase contract or the return of their deposit monies of some \$200,000.00. The vendor seeks amongst other remedies, an order of forfeiture of the deposit monies.

Issues or Questions to be Decided

1. Is there a contract between the plaintiffs and the defendant to pay a real estate commission?

24 Clearly in the purchase contract signed by the vendor, Remax Real Estate North is the agent for the vendor and the company to whom the real estate commission is payable under clause 16. A number of the cases counsel provided to me refer to this type of an agreement as a commission agreement, as opposed to a listing agreement. There was no listing agreement entered into in this case by the defendant vendor with anyone. The commission agreement in the purchase contract was made by the defendant vendor with Remax Real Estate North, not with the plaintiffs. Therefore, if clause 16, the commission agreement, could be enforced it could only be done by Remax Real Estate North.

25 The plaintiffs argue that if they were not a party to the commission clause, Remax was its sub-agent and that the plaintiffs can benefit from the clause based on this agency relationship. I have no evidence whatsoever before me as to what, if any, arrangement was in place between Vuong or Remax and Nygren or his company. As a result, the defendant's argument is that Nygren was not consistent in his characterization of his relationship with Remax and is of no significance.

26 Nygren stated at trial that he had an agreement with Vuong or Remax to share the commission. If this is the case, and I have no evidence before me to find that it is, Nygren's cause of action is against Remax not the defendants. The plaintiffs cannot use an alleged commission agreement between themselves and Remax as the basis for a claim against the defendants.

27 If there had been an agreement between Nygren or Parwinn and the defendant vendor to pay a commission on the conditions precedent being waived or removed, I agree with counsel for the defendant vendor that the plaintiffs who

drafted the contract, in particular clause 16, should have this clause construed *contra preferentum*, that is, against them: *Alex Duff Realty Ltd. v. Eaglecrest Holdings Ltd.*, [1983] 5 W.W.R. 61 (Alta. C.A.). Clause 16 is ambiguous, because it says that the commission is deemed to be earned on the conditions precedent being removed, but it does not say when the commission would be payable. Therefore, even if the plaintiffs could rely on the clause, I find that it would not assist their claim.

28 Second, if there had been an agreement between Nygren or Parwinn and the defendant vendor to pay commission, this Agreement was varied by virtue of the letter of January 22, 1990 from Nygren to the vendor, making the commission payable on the closing of the sale. Consequently, the agent was not entitled to a commission unless and until the sale was completed.

29 How can the plaintiffs amend an agreement that they are not a party to? The case does not have to be decided on this point, as it is my finding that the plaintiffs have no cause of action, not being parties to the purchase contract.

2. Does an exception to the doctrine of privity of contract apply?

30 Counsel for the plaintiffs argued at some length, particularly in his written brief, that the concept of privity of contract is evolving to the point where, he argues, his clients should have the benefit of the commission agreement in clause 16 of the purchase contract.

31 The most recent case in which the doctrine of privity of contract was "extended" is a decision of the Supreme Court of Canada in *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, [1999] 9 W.W.R. 380 (S.C.C.). The decision of the Supreme Court of Canada is summed up in the headnote to the case as follows:

As a general rule the doctrine of privity provides that a contract can neither confer rights nor impose obligations on third parties. Consequently, a third-party beneficiary would normally be precluded from relying on the terms of the insurance policy between the barge owner and its insurers. Given the circumstances of this appeal, however, a principled exception to the privity doctrine applies. A new exception is dependent upon the intention of the contracting parties. This intention is determined on the basis of two critical and cumulative factors:

(a) The parties to the contract must intend to extend the benefit to the third party seeking to rely on the contractual provision; and

(b) The activities performed by the third party seeking to rely on the contractual provision must be the very activities contemplated as coming within the scope of the contract in general, or the provision in particular, as determined by reference to the intentions of the parties.

32 Clearly in this case, the plaintiffs are not the type of third-party beneficiaries contemplated by this Supreme Court of Canada decision, nor can it be said that the activities contemplated come within the scope of the contract in general as determined by reference to the intention of the parties. The defendant vendor intended to pay a commission if the sale was concluded. That commission would be payable to Remax under the terms of the purchase contract. Whatever arrangement Remax had with the plaintiffs would dictate what the plaintiffs receive, but I have no evidence, as I said, of this arrangement. I have no evidence that the parties to the purchase contract intended to extend the benefit of clause 16 to the plaintiffs.

33 In *Fraser River Pile, supra*, the Supreme Court of Canada indicated that they were making a principled and incremental exception to the doctrine of privity in the particular circumstances of that case. The Court stated that the exception reflected commercial reality and did not introduce significant change to the law. The circumstances of the instant case are distinct from those in *Fraser River Pile, supra*, and to accept the plaintiffs' submission would introduce significant change to the basic tenets of contract law. Moreover, as defendant's counsel points out, the exception to the privity of contract concept in *Fraser River Pile, supra*, provides that the exception can be used as a shield, even though

the party may not be privy to the contract. But, it cannot be used as a sword as the plaintiffs are attempting to argue in this case. I agree.

34 Therefore, I am satisfied that there is no privity of contract between the defendant vendor and the plaintiffs and the exception in *Fraser River Pile, supra*, does not apply. Thus, the plaintiffs' claim fails on this basis.

3. Is there fraud, deceit or mistake?

35 Plaintiffs' counsel argues that his clients have been ambushed by the defendant in its allegation of fraud or illegality committed by Nygren. This position has been denied by defendant's counsel. In any event, if such defence of fraud or illegality was raised by the defendant, it was not pleaded. Thus, the defendant has not complied with Rule 104 of the Alberta *Rules of Court* (the "*Rules*") requiring the defendant to plead the material facts on which he relies for his defence. As well, Rule 109 of the *Rules* expressly mandates against ambush defences. See our Appeal Court's decision in *McMurray Homes Ltd. v. Fort McMurray (Town)*, [1976] 5 W.W.R. 442 (Alta. C.A.) and Master Funduk's decisions in *Caskey v. Guardian Insurance Co. of Canada* (1994), 148 A.R. 251 (Alta. Master) and *Edmonton Savings & Credit Union Ltd. v. 124968 Construction Co.* (1985), 61 A.R. 296 (Alta. Master). In this case, as defendant's counsel points out, the defendant is not relying on deceit or illegality, nor has it been plead.

36 Defendant's counsel argues that if there is a valid contract found between the plaintiffs and the defendant to pay a real estate commission, that the defendant made a mistake in signing the purchase contract providing for the commission to be payable on the conditions precedent being removed, rather than on the conclusion of the sale. Again, this is not plead by the defendant, but counsel has requested that if a valid contract is found between the parties to pay a real estate commission that he be granted leave to amend his statement of defence to plead mistake. In view of my findings and decision, such application is not necessary.

37 Moreover, in view of my findings, the decision in the first trial (*375069 Alberta Ltd. v. 400411 Alberta Ltd.*) has no impact on the instant case.

38 Plaintiffs' counsel has provided me with a number of other cases than those which I have mentioned in this judgment, but pretty well all of these involve the interpretation of a specific agreement, whether it be a listing agreement or some other type of agreement made between the real estate salesman and the vendor. One exception is the case of *Northwestern Securities v. White* (1962), 35 D.L.R. (2d) 666 (B.C. C.A.), in which the British Columbia Court of Appeal found that a real estate agent could not sue on an agreement when it was not made with him. There was a commission clause in the agreement for purchase and sale between the purchaser and vendor which the real estate agent sued on. In *Northwestern Securities, supra*, as in our case, the real estate agent never signed the agreement for purchase and sale. Therefore, the real estate agent was not a party to the purchase and sale agreement and had no cause of action arising from it. The headnote to this case sums it up as follows:

Lack of privity as a defence to an action on a contract is a question of law that need not be pleaded.

Thus, where a real estate agent sued for commission as payable under a written contract (rather than for remuneration for services in effecting a sale of the vendor's property) and the contract relied on was an agreement of purchase and sale between the purchaser and vendor, and the undertaking to pay commission was part of the acceptance but there was no agreement with the real estate agent who was mentioned only as agent of the vendor and who signed only in respect of an acknowledgement of money paid to him on behalf of the vendor, *held*, on appeal, the real estate agent could not sue on the agreement when it was not made with him.

39 Therefore, I find that the plaintiffs' action against the defendant fails for the reasons I have enumerated, and is dismissed, with costs to the defendant on double the appropriate column relative to the claim, no limiting rule to apply. I find there are no exceptional or contractual bases on which to award solicitor and client, or solicitor and his client costs.

Action dismissed.

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