

CITATION: First Canadian Mortgage Corporation v. Djukic, 2024 ONSC 1314
COURT FILE NO.: CV-22-958
DATE: 2024/03/13

SUPERIOR COURT OF JUSTICE-ONTARIO

RE: FIRST CANADIAN MORTGAGE CORPORATION, Plaintiff

-and-

MARKO DJUKIC and DUKE LAW FIRM PROFESSIONAL CORPORATION,
Defendants

-and-

MARY WYNIA and PAUL CHIARELLI, Third Parties

BEFORE: Gibson J.

COUNSEL: Steven D. Gadbois, Counsel for the Plaintiff and the Third Party, Mary Wynia

Marko Djukic, Counsel for the Defendants

HEARD: February 29, 2024

ENDORSEMENT

Overview

[1] This action arises out of a dispute concerning the purchase of a property located at 147 1st Concession Road South, Cayuga, Ontario (“the Property”).

[2] The Third Party, Paul Chiarelli (“Chiarelli”), the purchaser, entered into an Agreement of Purchase and Sale on October 8, 2021, for the amount of \$1,325,000. The transaction originally had a closing date of January 15, 2022, but was postponed repeatedly as Chiarelli was unable to secure mortgage financing. The final closing date arranged for the transaction was August 19, 2022. Chiarelli had already provided a deposit of \$100,000 to the vendor, and secured a vendor take back mortgage of \$325,000. He was thus required to provide a further \$900,000 to the vendor, subject to adjustments, and pay for closing costs, to complete the transaction.

[3] The Plaintiff, First Canadian Mortgage Corporation (“First Canadian”), a mortgage broker, arranged a loan of \$750,000 from the Third Party Mary Wynia (“Wynia”) to Chiarelli, to be secured with a first mortgage against the Property, which was registered on the closing date.

[4] The borrower/mortgagor Chiarelli signed a mortgage commitment wherein he agreed to pay a broker fee of \$37,500 to the Plaintiff for arranging the loan.

[5] Chiarelli retained the Defendants Marko Djukic and the Duke Law Firm PC (“the Defendants”) to act on his behalf with respect to completing the purchase transaction and the mortgage loan transaction, on December 20, 2021. Mr. Djukic is a sole practitioner and Duke Law Firm PC is his firm. Wynia retained Timothy J. Fedy (“Fedy”), a Waterloo lawyer, to act on her behalf with respect to completing the mortgage loan transaction.

[6] As will be detailed further below, the Defendants received mortgage monies which they held in trust pending closing. Fedy mistakenly advanced all the mortgage monies, including the broker fees, in trust, to the Defendants. The Plaintiff says that the trust was subsequently revised, with the \$37,500 being removed from the monies to be advanced to the Defendants’ client. The Defendants resist this characterization of the import of the email communication between the two lawyers. The Plaintiff asserts that without communicating with the Plaintiff, the Defendants breached the trust and advanced all the monies to their client.

[7] The Plaintiffs now seek an Order:

- a. That the Statement of Defence of the Defendants be struck;
- b. That the Third Party action against Mary Wynia be struck;
- c. That Summary Judgment be granted to the Plaintiff regardless of whether the Statement of Defence of the Defendants or the Third Party action against Mary Wynia is struck;
- d. That the Defendants pay to the Plaintiff the sum of \$37,500;
- e. Prejudgment interest at the rate of 9.5% per annum payable pursuant to the mortgage from September 9, 2022 to the present;

f. Costs of the action and the motion; and

g. Post-judgment interest calculated at the rate of 9.5% per annum from the date of judgment to the date of payment.

[8] The Defendants resist the motion and ask that it be dismissed in its entirety.

Facts

[9] The Plaintiff is a mortgage broker who was contractually entitled to payment of broker fees from the principal monies of the mortgage amount, as per the mortgage commitment.

[10] As of August 4, 2022, the Defendants requested a copy of the mortgage commitment from Fedy, the lawyer for the lender. Fedy provided it as of August 4, 2022. Both communications were by email.

[11] Fedy mistakenly advanced all the mortgage monies, including the broker fees, in trust, to the Duke law firm on August 16, 2022, at 1:36 p.m. Fedy advanced the sum of \$748,305, representing the mortgage loan less Fedy's legal fee, noting that "funds are to be held in escrow" pending the satisfaction of all the funding conditions. The mortgage was scheduled to close August 17, 2022.

[12] Fedy realized his error and advised the Duke law firm later the same day, August 16, 2022, by email at 9:18 p.m. The email stated:

"I also forgot to deduct the broker fee of \$37,500. Please confirm you can send it back to me tomorrow before closing. Sorry about that."

[13] Fedy says that in using this language, he amended the trust by instructing the Defendants to return the broker's fee before closing.

[14] Chiarelli disputed the amount of the broker fee, claiming that he had already paid some funds to the mortgage broker. Chiarelli told Djukic that he would make arrangements directly with the Plaintiff to settle any broker fee owing after closing, as he did not have \$37,500 at that time. He instructed the Defendants to close the transaction immediately. Djukic forwarded the void cheque

which had been sent by Fedy to Chiarelli. Djukic advised Fedy that Chiarelli did not deliver \$37,500 to the Defendants to cover the broker fee, and that Chiarelli had indicated that he would make payment of the broker fee directly to the Plaintiff. The Defendants proceeded to complete the transaction as instructed by Chiarelli.

[15] Djukic insists that up to and including the closing date, there was no communication, contract terms or letters of direction exchanged, whether directly or indirectly, between the Plaintiff and the Defendants. The mortgage commitment states that lender fees, including the broker fee, shall be, unless paid in advance, deducted from the mortgage loan advance. The mortgage commitment does not direct a solicitor to pay the broker fee, and notes that “in the event that the transaction is not completed for any reason that is not the fault of the lender...then all lender fees and fees incurred by the lender shall become immediately due and payable by the borrower to the lender.”

[16] On August 18, 2022, the closing was extended to August 19, 2022, and at 8:04 a.m. on August 19, 2022, Fedy sent a void cheque of the Plaintiff and asked the Duke law firm to deposit the monies directly into the Plaintiff’s account. Both the extension and subsequent communication was done via email.

[17] Djukic discussed Fedy’s August 19 8:04 a.m. email with Chiarelli prior to 3:08 p.m. on August 19, when the email was forwarded. Djukic communicated with Fedy via email at 3:22 p.m. on August 19, advising that he was sending the funds to the vendor’s lawyer now. Djukic never addressed the broker fees or the various emails with Fedy. Having received no response from Djukic, at 3:25 p.m. on August 19, 2022, Fedy reminded Djukic to deposit the broker’s fee into the Plaintiff’s account.

[18] Without communicating with either Fedy or the Plaintiff on the issue, Djukic advanced all the mortgage monies, including the broker’s fees, to Chiarelli.

[19] Chiarelli has not paid the broker’s fee. The mortgage fell into default, causing a Power of Sale action. On December 8, 2022, Wynia served Chiarelli with a Notice of Sale under Mortgage, seeking the total amount of \$820,769.69, which included the principal amount of \$750,000 and the broker fee of \$37,500.

[20] On August 22, 2022, and for several days thereafter, the Plaintiff contacted the Defendants for the first time by email, seeking “support” in getting Chiarelli to pay the broker fee to the Plaintiff.

Issues

[21] The issues on this motion are:

1. Was there a trust agreement between the Plaintiff and the Defendants and, if so, did the Defendants breach the trust?
2. If so, should the Defendants pay the monies involved in the breach to the Plaintiff? and,
3. Is summary judgment appropriate in this case?

Positions of the Parties

Position of the moving party Plaintiff

[22] First Canadian submits that all communications in this matter were by email, and that there are no factual issues in dispute. It submits that the matter is therefore suitable for determination by way of Summary Judgment.

[23] It submits that the mortgage monies were advanced to the Defendants in trust pending closing. It submits that the Defendants were advised of Fedy’s error in a timely manner, and that they either negligently or purposefully took advantage of the error to benefit their client and potentially themselves. Such actions were, the Plaintiff contends, in breach of the Defendant’s duty to act honourably and professionally.

Position of the responding party Defendants

[24] The Defendants state that the Plaintiff has not delivered an Affidavit of Documents in the action, and aside from the mortgage commitment, no evidence has been provided as to the services provided by the Plaintiff, funds exchanged, funds directed to be exchanged, or contract terms, between the Plaintiff and the Third Parties. It asserts that the Plaintiff was obliged to do so.

[25] The Defendants insist that, at all material times, there was no solicitor-client relationship between the Plaintiff and the Defendants, and there was no irrevocable letter of direction executed by Chiarelli directing the Defendants, or Fedy, to pay the broker fee from the mortgage loan proceeds.

[26] The Defendants submit that, in the present case, there is not clear language of an intention to create a trust agreement with the Defendants. Rather, Chiarelli was responsible for paying the broker fee to the Plaintiff. The Defendants did not have additional funds in trust to honour any equitable assignment because Chiarelli disputed and refused to deliver the broker fee. The Defendants insist that Fedy did not demand that the mortgage loan proceeds be returned to his trust account. The Defendants were instructed by both Chiarelli and Fedy to complete the transaction, and that the broker fee would be settled after the closing date.

[27] The Defendants also note that Wynia commenced a claim against Chiarelli seeking, among other relief, the broker fee of \$37,000 due to the Plaintiff. The Plaintiff did not include Chiarelli as a co-defendant in the present action. This, they contend, results in a multiplicity of legal proceedings, which creates a risk of a double recovery if summary judgment is granted to the Plaintiff.

Law and Analysis

The test on a motion for summary judgment

[28] The test on a motion for summary judgment is well-established: Rule 20.04(2) states that the court shall grant summary judgment if it “is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence.” There is no genuine issue requiring a trial if the evidence before the court allows the judge to make the necessary findings of fact, allows the judge to apply the law to the facts and is a proportionate, more expeditious and less expensive means to achieve a just result: *Calloway REIT (Westgate) Inc. v. Elita’s Perfect Touch Hair Studio*, 2019 ONSC 5755, at para. 41; *Hryniak v. Mauldin*, 2014 SCC 7, at para. 49.

[29] The parties on the motion are expected to put their best foot forward when presenting their evidence. The court is entitled to presume all evidence that would be available at trial is in front of the court on the motion so that it is assured of a sufficient evidentiary record on which to make necessary findings of fact, and to apply the law.

[30] Further guidance on the application of these principles has recently been given by Brown J.A. for the Court in *Moffitt v. TD Canada Trust*, 2023 ONCA 349.

[31] Responding parties on a motion for summary judgment may not rest solely on the allegations or denials in their Statement of Defence. Rule 20.02 requires responding parties to set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue requiring a trial.

Analysis

[32] In order for a trust to exist, three elements must be present: (1) certainty of intent; (2) certainty of subject matter; and (3) certainty of object: *Air Canada v. M&L Travel Ltd.*, [1993] 3 SCR 787 at para. 23. In order to find certainty of intention, there must be an imperative obligation to hold property on trust for the benefit of another: *BA Energy Inc., Re*, 2009 ABQB 647 at para. 14; *Accel Canada Holdings Limited (Re)*, 2020 ABQB 204, at para. 41.

[33] For the reasons described below, I decline to find that a trust exists in these circumstances because there was no certainty of intention to create a trust.

[34] First, there was no certainty of intention to create a trust in the language of the commitment letter, or the various emails exchanged between counsel, with regard to the broker fees.

[35] Second, I find that the circumstances that surrounded the transaction do not indicate an intention to create a trust.

[36] Finally, in addition to the lack of clear language or evidence in the circumstances of an intention to create a trust arrangement, there was no indication that the Defendants were acting, or intended to act, in the role of a trustee with regard to the payment of the broker fee by Chiarelli to the Plaintiff.

[37] As articulated in Rule 2.1-1 of the *Rules of Professional Conduct*, a lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity. The Plaintiff submits that Djukic's conduct violated this rule.

[38] I do not find, in the circumstances of this case, that this Rule was violated. If Djukic had affirmatively promised or otherwise indicated to Fedy that he would deduct the contested broker fee and return it, and subsequently failed to do so, then I would agree that he had acted dishonourably within the meaning of Rule 2.1-1. But, on the evidence advanced before me on this hearing, that is not what happened. Djukic did not so promise. In the circumstances of this case, the Defendants owed a duty to their client, Chiarelli. Fedy had made a mistake. But his mistake did not create a duty upon Djukic to remedy Fedy's mistake by disadvantaging or ignoring the instructions of his client.

[39] The Plaintiff should look to Chiarelli for recovery of the disputed broker fee, not to the Defendants.

Lawyer Acting as Both Witness and Counsel

[40] There is one further aspect of this matter upon which I feel obliged to comment.

[41] The Defendant, Marko Djukic, who is a lawyer member of the Law Society of Ontario, tendered his own Affidavit dated February 24, 2023 as evidence on the hearing of the motion, and also acted as counsel.

[42] The *Rules of Professional Conduct* of the Law Society of Ontario provide the following at s.5.2:

SECTION 5.2 THE LAWYER AS WITNESS

Submission of Evidence

5.2-1 A lawyer who appears as advocate shall not testify or submit their own affidavit evidence before the tribunal unless

- (a) permitted to do so by law, the tribunal, the rules of court or the rules of procedure of the tribunal, or
- (b) the matter is purely formal or uncontroverted.

[Amended - October 2014]

Commentary

[1] A lawyer should not express personal opinions or beliefs or assert as a fact anything that is properly subject to legal proof, cross-examination, or challenge. The lawyer should not in effect appear as an unsworn witness or put the lawyer's own credibility in issue. The lawyer who is a necessary witness should testify and entrust the conduct of the case to another lawyer. There are no restrictions on the advocate's right to cross-examine another lawyer, however, and the lawyer who does appear as a witness should not expect to receive special treatment because of professional status.

[43] At the start of the hearing I drew Mr. Djukic's attention to my concern that he was acting both as affiant and counsel, and this is usually quite imprudent, if not improper, and inconsistent with the Rule. He insisted that, as he was a sole practitioner, necessity required him to act as both.

[44] I do not agree with this assertion. It is a false economy. Consistent with the Commentary to the Rule, the lawyer who is a necessary witness should testify and entrust the conduct of the case to another lawyer. It was necessary in the circumstances of this case that Mr. Djukic be the affiant. But, as his own actions and conduct were at issue in the motion, it would have been far preferable, more consistent with Rule 5.2 and its Commentary, and better for him in particular, if he had retained other counsel to argue the motion.

Conclusion

[45] The Plaintiff has failed to establish that there was a trust agreement between the Plaintiff and the Defendants, and that the Defendants breached the trust, or that Djukic acted dishonourably, or that the Defendants should be liable to pay the disputed broker fees, or that summary judgment is appropriate in this case.

[46] The Plaintiff has not demonstrated any grounds for the Statement of Defence to be struck, or that the Third Party action against Wynia be struck.

Order

[47] The Court Orders that:

1. The Plaintiff's motion is dismissed.

Costs

[48] The parties are encouraged to agree upon appropriate costs. If the parties are not able to agree on costs, they may make brief written submissions to me (maximum three pages double-spaced, plus a bill of costs) by email to my judicial assistant at mona.goodwin@ontario.ca and to Kitchener.SCJJA@ontario.ca. The Defendants may have 14 days from the release of this decision to provide their submissions, with a copy to the Plaintiff; the Plaintiff a further 14 days to respond; and the Defendants a further 7 days for a reply, if any. If no submissions are received within this timeframe, the parties will be deemed to have settled the issue of costs as between themselves. If I have not received any response or reply submissions within the specified timeframes after the Defendants' initial submissions, I will consider that the parties do not wish to make any further submissions, and will decide on the basis of the material that I have received.

M. Gibson, J.

Date: March 13, 2024