CANADA / JUDGMENT

Gordon v. Wilson

2018 BCSC 1664

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2018 BCSC 1664 Gordon v. Wilson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Gordon v. Wilson,

2018 BCSC 1664

Date: 20180927

Docket: S163807

Registry: Vancouver

Between:

Gaynel Michelle Gordon

Plaintiff

And:

Deborah Faith Wilson and Faith Wilson Realty Group Inc. doing business as Faith Wilson Group and Stefan Biorn Morissette and Christina Breane McPherson and Elfrieda Penner

Defendants

Before: The Honourable Mr. Justice G.C. Weatherill

Reasons for Judgment

Counsel for the Plaintiff:

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M. Caine, Articled Student

A. Goldin, Articled Student

Counsel for the Defendants, Deborah Faith Wilson, Faith Wilson Realty Group Inc. doing business as Faith Wilson Group and Elfrieda Penner:

S.B. Twining

Counsel for the Defendants, Stefan Biorn Morissette and Christina Breane McPherson

D.K. Plunkett

Place and Date of Hearing:

Vancouver, B.C.

September 12, 2018

Place and Date of Judgment:

Vancouver, B.C.

September 27, 2018

Introduction

[1] Each of the defendants seeks, by way of summary trial, an order dismissing the plaintiff's claim against them.

[2] The claim arises out of the sale of the plaintiff's home at #2 - 127 West 12th Avenue, Vancouver, B.C. (the "Property") in the context of a heated Vancouver real estate market. Approximately four months after the sale completed, the Property was resold by the purchasers for $288,000 more than the plaintiff had received.

[3] The plaintiff seeks a disgorgement of this "profit", raising various causes of action against her realtors and the purchasers in negligence, breach of contract and breach of fiduciary duty.

[4] For the reasons that follow, the plaintiff's claims are dismissed.

Background

[5] The plaintiff is an accountant who retired from her employment position with the Canada Revenue Agency in 2014 due to mental health issues, including depression, post-traumatic stress disorder, and anxiety disorder.

[6] The plaintiff was experienced with real estate transactions, having purchased a condominium in Burnaby in 1992, which she sold in 2004, and having purchased other property in Vancouver in 2003.

[7] The plaintiff originally purchased the Property in 2003. She listed it for sale from February 2011 to August 2011 and again from November 2011 to April 2012 with a listing price of $1,188,000. She did not receive any written offers.

[8] In 2015, the plaintiff once again became interested in selling the Property. A property across the street had sold for $1.3 million. She sensed that the Vancouver real estate market was picking up. She interviewed three different real estate agents including the defendant, Deborah Faith Wilson ("Ms. Wilson").

[9] On June 16, 2015, Ms. Wilson presented to the plaintiff a market evaluation document and they discussed the market value of the Property. Based upon the sale of the property across the street (which the plaintiff considered inferior to hers), the plaintiff was of the view that the market value of the Property was also $1.3 million. Ms. Wilson was of the view that the value of the Property was much less, and recommended a list price of between $1,138,000 and $1,168,000. The plaintiff advised Ms. Wilson that she was willing to wait for the right offer and that her health issues had made it difficult to sell the Property in the past.

[10] The defendant, Elfrieda Penner ("Ms. Penner") was a representative and the managing broker of the defendant, Faith Wilson Realty Group Inc. doing business as Faith Wilson Group ("FWRG").

[11] On June 21, 2015, the plaintiff signed a Multiple Listing Contract with FWRG but deposed that she left the pricing information on the document blank. Ms. Wilson deposed that a list price of $1,138,000 was filled in. The listing was to commence on July 16, 2015 after the plaintiff had taken steps to "spruce up" the Property.

[12] The plaintiff's evidence is that she chose to list the Property with Ms. Wilson because she had been assured that Ms. Wilson had a professional team that would accommodate her mental health issues and provide support throughout the process, which justified what the plaintiff considered to be an unusually high commission requirement as compared to what she had previously encountered.

[13] On the same day, the plaintiff also signed a document titled "Working With a Realtor". The plaintiff maintains that Ms. Wilson told her that she, Ms. Wilson, would be acting as the plaintiff's sole agent throughout the listing and sales process. Ms. Wilson's evidence in her first affidavit dated August 13, 2018 is that:

12. When reviewing the Working with a Realtor brochure, I would have explained the three kinds of relationships that a seller and/or buyer might enter into with a real estate agent and how this could relate to her transaction: namely, designated agency, limited dual agency and customer relationship, the latter being a relationship where a buyer has opted not to have representation in a transaction. I would have also explained that if an offer were presented through another agent at Faith Wilson Group, which happened from time to time, that it was the brokerage policy to have the seller and buyer enter into a limited dual agency agreement.

13. When discussing limited dual agency with a client such as Ms. Gordon, I would explain that while I would rarely write an offer for a buyer on one of my listings, it sometimes happened that an offer would come in from one of the other agents working on my team. I would

explain that if such a situation arose, I would want to ensure that the seller was aware of the Faith Wilson Group's dual agency and to assure her that I would not disclose confidential information to the other party to the transaction except with her consent and that the team members involved in the transaction would ensure that there was no unfair advantage gained by one party over the other.

[14] In the middle of July, the plaintiff contacted Ms. Wilson's office to discuss the completion of the listing agreement. She was told that the Property was already being advertised for sale for $1,138,000 in Real Estate Weekly. The plaintiff deposed that she was extremely upset that the Property had been advertised and says she did not receive an adequate explanation as to why it had happened without her knowledge and at a price that she had not agreed to.

[15] On July 16, 2016, the plaintiff met with Ms. Wilson to discuss her concerns. The plaintiff reiterated that she wanted to list the property for $1.3 million. Ms. Wilson explained that the listing price was low to attract buyers. The plaintiff's evidence is that she reluctantly agreed to a list price of $1,149,000 because Ms. Wilson asked her to trust her. She deposed that she felt pressured into adding this list price to the listing contract. The listing agreement provided for a commission to be paid on the sale of the Property of 7% on the first $100,000 and 3% on the balance of the sale price. The agreement also provided that FWRG would offer a portion of the commission to "Cooperating Brokerages" who assisted in obtaining a buyer for the Property.

The Buyers

[16] There were two open houses at the Property on the weekend of July 18 and 19 as well as an agent's open on July 21, 2015. The defendants, Stefan Biorn Morissette ("Morissette") and Christina Breane McPherson ("McPherson") (collectively, the "Buyers") were among dozens of prospective buyers who attended the weekend open houses. Morissette is a commercial realtor. At the time, the Buyers were living in a 2-bedroom apartment and McPherson had just delivered their first child. They had been looking for a larger home for several months before learning of the listing for the Property.

[17] The Buyers decided to make an offer to purchase the Property. They approached Ms. Penner and asked if she would be willing to act as their agent in a joint agency capacity. Ms. Penner agreed, explaining that in her capacity as dual agent, she would not be able to provide the Buyers with advice on price. The Buyers and Ms. Penner signed a one-page document entitled "Limited Dual Agency Agreement".

[18] At the time, it was the practice of FWRG to offer a referral fee to a real estate licensee who was purchasing or selling property. Morissette asked Ms. Penner about what she thought would be a fair referral fee. Ms. Penner subsequently responded that that the referral fee would be 25% of the "buyer side commission".

[19] On July 21, 2015, the Buyers, through Ms. Penner, made an offer to purchase the Property for $1,170,000, which was $21,000 above the listing price.

[20] On the afternoon of July 21, 2015, the plaintiff attended at Ms. Wilson's office for an offer presentation. The plaintiff deposes that, while waiting for the meeting to begin, she was advised by the receptionist that another agent had asked whether the Property would be available for a private showing on July 23, 2015.

[21] The meeting began at approximately 3:30 p.m. on July 21, 2015. Ms. Wilson presented the plaintiff with three offers to purchase the Property, one for $1,180,000, one for $1,158,000, and the Buyers' offer of $1,170,000. The plaintiff was advised that one of the Buyers, Morissette, was a commercial realtor. The plaintiff did not make any enquiries regarding the request for a private showing she had just learned about from the receptionist.

[22] At the meeting, the plaintiff also signed the Limited Dual Agency Agreement that had been signed by the Buyers but claims that no one discussed the document with her and she did not read it. However, Ms. Penner's evidence in her first affidavit dated August 13, 2018 is that:

12. When I presented the Morissette/McPherson offer to Ms. Wilson and Ms. Gordon, I had placed the Limited Dual Agency Agreement (already signed by Mr. Morissette and Ms. McPherson) on top of the offer and I specifically informed Ms. Gordon in the presence of Ms. Wilson that we were acting in a limited dual agency capacity as the brokerage was also writing an offer on behalf of the buyers.

[23] In her first affidavit, Ms. Wilson's evidence is that:

35. I asked Ms. Gordon to sign the Limited Dual Agency Agreement that was appended to the Morissette/McPherson offer and explained why it was necessary to enter into the agreement. I explained that this was a case like the one we discussed at the time Ms. Gordon signed the Working With a Realtor brochure and that since Ms. Penner was presenting the offer as a representative of the Faith Wilson Group, we would need Ms. Gordon's permission to represent both agency relationship and then signed the Limited Dual Agency Agreement in my presence.

[24] The Limited Dual Agency Agreement provides, in relevant part:

1. The Buyer/Tenant and the Seller/Landlord acknowledge and agree that they each have an agency relationship with Faith Wilson (the "Designated Agent") and that it is not a breach of duty to either of them for the Designated Agent to act as agent for both the Buyer/Tenant and the Seller/Landlord and they hereby authorize and consent to the Designated Agent acting for both the Buyer/Tenant and the Seller/Landlord as a limited dual agent with respect to the purchase and sale or lease of the Property.

2. Any previous agreements entered into between the Brokerage and either the Buyer/Tenant or the Seller/Landlord and the agency duties assumed by the Designated Agent are hereby modified by this Agreement and shall continue in full force and effect except as modified herein.

3. The Buyer/Tenant and the Seller/Landlord acknowledge and agree that with respect to the purchase and sale or lease of the Property the Designated Agent will be the agent for both the Buyer/Tenant and the Seller/Landlord and will represent both parties as a limited dual agent with the following changes and limitations to its duties as agent:

A. despite Real Estate Services Act Rule 3-3(a) and (b), the Designated Agent will deal with the Buyer/Tenant and Seller/Landlord impartially;

[25] After presentation of the three offers to the plaintiff, Ms. Wilson contacted the agents involved with the offers, informed them of the multiple offer situation and asked them to respond with their best offer. Ms. Penner advised the Buyers that there were two other offers. The Buyers decided to increase their offer to $1.2 million. The other prospective buyers did not. At approximately 5 p.m. on July 21, 2015, the Buyers were told that they offer had been accepted. The plaintiff had accepted the Buyers' offer "with reservations".

[26] The Contract of Purchase and Sale Addendum contains the following provision:

Both the Buyer and the Seller acknowledge that the brokerage providing agency services to the Buyer and the Seller do not provide legal or other expert advice in matters beyond the common standard of care in the real estate industry. The parties have been advised to seek independent legal advice prior to executing this Contract of Purchase and Sale.

[27] The plaintiff denies ever being advised to seek independent legal advice.

[28] Morissette's evidence is that he disclosed to Ms. Penner that he was a commercial realtor and had never been professionally involved in residential real estate. He deposed that he was unaware of the requirement in Rule 5-9 of the Real Estate Council Rules that he complete a document referred to as a "Disclosure of Interest in Trade" which informs either a buyer or seller of property that the other party to the transaction is a licensed real estate agent and recommends that the buyer or seller (as the case may be) obtain independent advice if there is uncertainty as to the fair market value of the property being purchased or sold. Ms. Penner was aware of but, through inadvertence and oversight, did not apprise the Buyers of this requirement.

[29] The purchase of the Property by the Buyers closed on October 9, 2015 and they moved in on October 10, 2015. A referral fee of $4,211.16 was paid to Morissette from the commission received by FWRG.

[30] On October 9, 2015, the plaintiff sent an email to FWRG advising that she had moved from the Property and that:

Mixed feelings, equal parts sad and thrilled at the same time.

It was a pleasure working with you

[31] The plaintiff admitted on her examination for discovery that she did not rely on the Buyers to act on her behalf in respect of the transaction and that she did not have any kind of special relationship with them.

The Re-Sale

[32] After living in the Property for a few months, it became apparent to the Buyers that the Property was not well suited to them. One of the more significant issues was the workweek traffic noise along 12th Avenue which had been absent during the weekend open houses they had attended. The noise disrupted their sleep as well as that of their newborn son. Moreover, approximately one month after they had moved in, a large van hit the lamp post in front of the Property and crashed into their neighbour's house two doors away. The Buyers were concerned about the traffic as a safety concern for their child.

[33] On December 25, 2015, the Buyers received a substantial and unexpected financial windfall from McPherson's mother. They decided to test the market to see if they would be able to afford a more suitable home.

[34] On February 26, 2016, the Buyers listed the Property for sale and, on March 6, 2016, were presented with three offers, the highest of which was $1,550,000. They accepted that offer.

[35] The Buyers found a new home located at [address redacted] Walden Street, Vancouver which is on a quiet street and, they deposed, is better suited to their needs as a growing family. The purchase price was $2,050,000.

Expert Evidence

[36] The plaintiff did not proffer any expert evidence in support of her case.

[37] The following opinions were obtained by the defendants.

William Binnie

[38] Mr. Binnie is the managing broker of Royal LePage Sussex West Vancouver and Royal LePage Sussex Sunshine Coast. At page 2 of his July 26, 2018 opinion letter prepared for counsel for Ms. Wilson, Mr. Binnie stated:

In 2015 it was not a standard practice for a real estate licensee representing our brokerage to disclose a referral fee paid to a purchaser out of the gross real estate commission in circumstances such as the present case, where the licensee was representing both the purchaser and the vendor in the capacity of limited dual agent.

Sandra L.M. Cawley P. App

[39] Ms. Cawley is an expert real estate appraiser. She conducted a detailed assessment of the valuation of the Property as at July 21, 2015 and prepared a Short Form Appraisal Report dated January 26, 2018. In her report, Ms. Cawley opined that the Property's fair market value at the time was between $1,070,000 and $1,120,000 and that the price paid by the Buyers, $1.2 million reflected its fair market value. At page 19 of her report, Ms. Cawley wrote:

Overall, the comparables indicate a value for the subject to be significantly below $1,350,000, below $1,333,000, slightly below $1,176,000 and more significantly above $1,060,000 suggesting a value range between $1,125,000 and $1,175,000; if a further 5% adjustment downward to reflect the suggested further discount for the West 12th Avenue major traffic corridor, the range could be $1,070,000 to $1,120,000. The contract price of $1,200,000 is slightly above the concluded value range suggesting the accepted purchase price (which was above the list price) is a very fair value and is fully supported by market evidence. It is challenging in a very active market with very strong demand and limited supply to fully quantify the market activity. As such, we have adopted the contract price in our final value calculation.

[40] Ms. Cawley also opined that the price obtained by the Buyers when they sold the Property in March 2016, $1.55 million, was a reflection of the increase in market since July 21, 2015.

Discussion

Suitability of Determination by Summary Trial

[41] Rule 9-7 of the Supreme Court Civil Rules provides that the court may grant summary relief on an issue or generally unless the court is unable to find the facts necessary to decide the issues of fact or law, or it would be unjust to do so.

[42] The facts of the case are not complex and the legal issues are well established. Most of the material facts are not controversial and there are no significant credibility issues. Where issues have arisen, they can be resolved judicially based upon the evidence before the court.

[43] This action is not currently set for a conventional trial. If successful in her claim, the plaintiff's damages will likely be the difference between the purchase price she received and the fair market value of the Property at the time of the transaction, thus, making the cost of a full conventional trial disproportionate to the value of the claim.

[44] All of the parties are in agreement that disposition by way of summary trial is appropriate. Counsel for the plaintiff made no submissions to the contrary.

[45] I agree with their assessment and find that this action is suitable for determination by summary trial.

The Claims

[46] The plaintiff's claims against the defendants are founded in negligence, breach of contract, and breach of fiduciary duty. They are based upon the following allegations:

a) the fair market value of the Property was not properly assessed and the Property was not properly exposed to the market;

b) Ms. Wilson, Ms. Penner and FWRG (collectively the "Realtor Defendants") failed to properly advise the plaintiff regarding the Limited Dual Agency Agreement and were thereby in a conflict of interest;

c) Morissette failed to provide the plaintiff with a Disclosure of Interest in Trade form;

d) the Realtor Defendants failed to advise the plaintiff to obtain independent legal advice;

e) a failure on the part of Ms. Penner and FWRG to monitor and supervise the activities of Ms. Wilson to ensure that she complied with the Multiple Listing Contract;

f) failing to disclose that, by virtue of the Limited Dual Agency Agreement, FWRG would earn a greater commission.

[47] The plaintiff seeks damages in lieu of rescission and restitution for breach of fiduciary duty including disgorgement of commissions and/or profits.

[48] The plaintiff also alleges that the transaction was unconscionable and that she should be awarded punitive or exemplary damages.

Negligence

As Against the Buyers

[49] Liability in negligence on the part of the Buyers requires the plaintiff to establish that the Buyers owed a duty of care to her. No argument was or could have been made that the Buyers, as purchasers, owed a duty of care to the plaintiff, much less that any such duty was breached. During his submissions, counsel for the plaintiff wisely decided not to pursue this claim.

[50] The plaintiff's claim in negligence against the Buyers is dismissed.

As Against the Realtor Defendants

[51] There is no evidence of the applicable standard of care, other than the opinion evidence of Mr. Binnie to the effect that it was not the practice to disclose a referral fee paid to a purchaser in the context of a limited dual agency.

[52] There is no evidence that the manner in which the Property was advertised and exposed to the market did not meet the standard of the industry. Indeed, there is no evidence that any of the Realtor Defendants failed to meet the applicable standard in any way. Rather, the plaintiff's claim is seemingly founded on nothing more than remorse in selling too soon in a rising real estate market. Again, counsel for the plaintiff wisely did not pursue this claim during his submissions.

[53] The plaintiff's claim in negligence against the Realtor Defendants is dismissed.

Fraudulent/Negligent Non-Disclosure

[54] The plaintiff claims that the Buyers fraudulently or negligently failed to disclose that Morissette was a realtor. However, the plaintiff has admitted being advised before she accepted the Buyers' offer that Morissette was a commercial realtor.

[55] The plaintiff also claims that Morissette's failure to provide the Disclosure of Interest in Trade form required by the Real Estate Council Rules is actionable because, had it been provided to her, she would have sought legal advice. However, she has not provided any evidence regarding whether that legal advice would have changed anything or resulted in her not accepting the Buyers' offer.

[56] The Real Estate Council Rules are a creature of statute, in particular s. 89.2 of the Real Estate Services Act, S.B.C. 2004, c. 42, which empowers the superintendent to "make rules that the superintendent considers necessary or advisable (a) respecting licensing, or (b) regulating licensees in relation to the provision of real estate services."

[57] Morissette's failure to provide the requisite form of disclosure required by Rule 5-9 of the Real Estate Counsel Rules, whether or not he was aware of the requirement, does not establish a cause of action in favour of the plaintiff. There is no nominate tort of breach of statutory duty: Canada v. Saskatchewan Wheat Pool, [1983] 1 S.C.R. 205. Any civil liability arising as a result of a breach of statute should be considered under the law of negligence: Ari v. Insurance Corporation of British Columbia, 2015 BCCA 468 at para. 38.

[58] An argument similar to the plaintiff's was made in Galambos v. Perez, 2009 SCC 48. In Galambos, the plaintiff, an employee and sometimes client of a lawyer, lent the lawyer money. The lawyer subsequently went bankrupt and the plaintiff claimed a cause of action based upon the lawyer having been in breach of the Law Society's Code of Professional Conduct, which forbade a lawyer from accepting loans from a client. The plaintiff needed to establish that the lawyer owed her a duty of care in order to avail herself of the layer's insurance policy. The Supreme Court of Canada stated:

[29] there is an important distinction between the rules of professional conduct and the law of negligence. Breach of one does not necessarily involve breach of the other. Conduct may be negligent but not breach rules of professional conduct, and breaching the rules of professional conduct is not necessarily negligence.

[59] The Court held that no duty of care existed in connection with the loans despite the lawyer having a professional obligation not to accept them: para. 33.

[60] The mere professional obligation that Morissette owed to the Real Estate Council to complete a Notice of Interest in Trade form does not de facto establish that he owed a duty of care to the plaintiff. Rather, it is up to the plaintiff to demonstrate that a duty of care exists on the basis of some compelling causal connection between Morissette and her. She has not done so.

[61] I find that the failure on the part of Morissette to provide the required Disclosure of Interest in Trade form was the result of oversight and inadvertence, and was not an attempt on his part to fraudulently deprive the plaintiff of her ability to obtain advice on the fair market value of the Property, as is alleged. Moreover, I find that the plaintiff has failed to demonstrate that she was owed a duty of care by Morissette to provide the form to her.

Breach of Contract

[62] There is no evidence that any of the defendants breached a term of a contract with the plaintiff. Moreover, no breach was argued by her counsel.

[63] Rather, throughout his submissions, plaintiff's counsel stressed the plaintiff's mental health condition and her lack of understanding of the meaning and consequences of the documents she signed. However, there is no plea or evidence from the plaintiff that she lacked such understanding or that she was induced to enter into the agreements by a misrepresentation or that the agreements she signed did not reflect her true intent.

[64] No basis has been made out for the plaintiff's claim in breach of contract. It is dismissed.

Breach of Fiduciary Duty

[65] The crux of the plaintiff's claim is breach of fiduciary duty.

[66] In Galambos, the Supreme Court of Canada reviewed the circumstances that could lead to a fiduciary relationship. Quoting from Hodgkinson v. Simms, [1994] 3 S.C.R. 377 at 406, Justice Cromwell described the fiduciary principle as one which "monitors the abuse of loyalty reposed". He went on to explain that the critical aspect of a fiduciary relationship is an undertaking of loyalty, where the fiduciary undertakes to act in the beneficiary's best interest (Galambos, paras. 69-70, 76):

[69] The second is that a critical aspect of a fiduciary relationship is an undertaking of loyalty: the fiduciary undertakes to act in the interests of the other party. This was put succinctly by McLachlin J. (as she then was) in Norberg [v. Wynrib, [1992] 2 S.C.R. 226], at p. 273, when she said that "fiduciary relationships ... are always dependent on the fiduciary's undertaking to act in the beneficiary's interests". See also Hodgkinson, per La Forest J., at pp. 404-7.

[70] The particular relationships on which fiduciary law focuses are those in which one party is given a discretionary power to affect the legal or vital practical interests of the other

...

[76] Thus, what is required in all cases of ad hoc fiduciary obligations is that there be an undertaking on the part of the fiduciary to exercise a discretionary power in the interests of that other party.

The Realtor Defendants

[67] It is undisputed that there was a fiduciary relationship between the plaintiff and the Realtor Defendants: Mulligan v. Stephenson, 2016 BCSC 1941 at paras. 108-14.

[68] The plaintiff says that the fiduciary duty owed to her was breached by the Realtor Defendants because:

a) they failed to disclose, or fully disclose, their conflict of interest and the relevant information pertaining to the conflict of interest, specifically, double-ending of commission by Ms. Wilson and the receipt of a portion of the commission by Morissette, thereby, breaching their duty to act in the best interest of the plaintiff, their duty of loyalty, and transparency;

b) they agreed to act for the Buyers in a dual agency without the plaintiff's prior consent, thereby favouring their own interests and the interests of the Buyers over those of the plaintiff. They pressured the plaintiff to accept the Buyers' offer over all others, including those yet to be received, depriving the plaintiff of the opportunity to make an informed decision or allow her to wait for a higher offer in the future;

c) the Disclosure of Interest in Trade form was not provided to her. Had it been, the plaintiff would have had an opportunity to review the transaction details as she sought independent legal advice. Additionally, the plaintiff would have been aware that Morissette would receive a referral fee if his offer was accepted.

[69] The plaintiff says further that the scope and the standard of care with respect to the fiduciary duty owed to her was heightened by virtue of Ms. Wilson's knowledge of her mental health issues.

[70] The plaintiff argues that the conduct of Ms. Wilson surrounding the foregoing breaches placed her in a conflict of interest and influenced the plaintiff's decision with respect to the sale of the property: S. Maclise Enterprises Inc. v. Grover, 2014 ABQB 591 at paras. 93, 139, 143; Ocean City Realty Ltd. v. A & M Holdings Ltd. (1987), 36 D.L.R. (4th) 94 (B.C.C.A.) at para. 23.

[71] The difficulty with the plaintiff's submissions in this regard is that the evidence does not support any of them. There is no evidence that the receipt by the Realtor Defendants of all of the commission the plaintiff had agreed to pay, as opposed to the commission being split

with another brokerage firm, was of any concern to the plaintiff or would have caused her to reconsider her decision to accept the Buyers' offer. There is no evidence that the Realtor Defendants did not act in the plaintiff's best interests. There is no evidence that the Realtor Defendants failed to act impartially between the plaintiff and the Buyers. There is no evidence that the plaintiff was "pressured" into accepting the Buyers' offer over others. The plaintiff knew about a requested private showing two days hence yet chose to accept the fair market value offer she had rather than risk losing it. There is no evidence that the plaintiff lost any opportunity to "make an informed decision". Finally, there is no evidence that the receipt by the plaintiff of independent legal advice would have changed anything.

[72] The plaintiff had an obligation to demonstrate a substantial likelihood that disclosure to her of the Disclosure of Interest in Trade form or the referral fee would have significantly altered the "total mix" of the information the plaintiff had available to her: Sharbern Holding Inc. v. Vancouver Airport Centre Ltd., 2011 SCC 23 at para. 45. She has failed to do so.

[73] Indeed, the plaintiff's evidence on her examination for discovery was that she was not in the position of having to sell the Property and was only going to sell if the market conditions were "ideal" and she got a price she was happy with. The plaintiff's email to FWRG of October 9, 2015, the day of the closing, is telling. She was plainly happy with the price she obtained and she only became unhappy when she learned that the Buyer's were able to obtain a higher price in March 2016.

[74] The plaintiff has failed to demonstrate that the Realtor Defendants, or any of them, is guilty of breach of fiduciary duty.

The Buyers

[75] The plaintiff argues that Morissette owed her a fiduciary duty because he was a licenced realtor and was required to disclose that fact to her. The full answer to this submission is that, before she accepted the Buyers' offer, the plaintiff was told by Ms. Penner that Mr. Morissette was a licenced realtor.

[76] The plaintiff next argues that Morissette owed her a fiduciary duty because she was a vulnerable party, that he had discretionary power to affect her interests unilaterally, and that there was an implied undertaking on his part that he would exercise his discretionary power in her best interests. As I understand the plaintiff's argument, Morissette's discretionary power arose because he was a licenced realtor and, by asking Ms. Penner if FWRG would proceed with the transaction under a Dual Agency Agreement, he had the power to affect the plaintiff's interests by effectively depriving her of "fair representation". The plaintiff argues that, in the circumstances, it was entirely inappropriate for Morissette to request a dual agency agreement because he knew or should have known that:

a) the plaintiff would be vulnerable without an exclusive agency;

b) the dual agency agreement would take away that exclusive agency; and

c) the dual agency agreement would provide a monetary incentive for FWRG to persuade the plaintiff to accept the Buyers' offer over others so as to retain the full commission for themselves.

[77] There is no evidence that the plaintiff was left in a vulnerable position because the Buyers' requested a dual agency agreement. There is no evidence that the plaintiff was affected in any way by the change from an exclusive to a dual agency. Finally, there is no evidence that any of the Realtor Defendants encouraged the plaintiff to accept the Buyers' offer instead of another competitive offer. There were no other competitive offers. The Buyers' offer was the best offer received.

[78] The plaintiff argues, in the alternative, that equity will respond to strangers to a fiduciary relationship who knowingly participate in a breach of fiduciary duty through the doctrine of accessory liability. The knowledge requirement can be met through recklessness and wilful blindness: Mulligan at paras. 115-16.

[79] The plaintiff says that Morissette's accessory liability is established by virtue of the following:

a) because he was a licenced realtor, he knew or was reckless or wilfully blind to Ms. Wilson's obligations to the plaintiff, his own obligations to the plaintiff regarding disclosure and the fact that by entering into a dual agency with FWRG he was diminishing the plaintiff's interests of designated agency;

b) he did not provide the plaintiff with a Disclosure of Interest In Trade form;

c) he failed to inform the plaintiff to obtain independent legal advice; and

d) he failed to inform the plaintiff about the referral fee he was to receive.

[80] The full answer to this argument is that I have found that the Realtor Defendants were not guilty of any breach of fiduciary duty. Morissette cannot have been an accessory to a breach that did not occur.

Did the Plaintiff Suffer a Loss?

[81] Regardless, the evidence demonstrates that the Property was exposed to the market and the plaintiff received three offers to purchase it. The offer she accepted was the highest of the three.

[82] There is no evidence that a higher offer would likely have been obtained had the Property been marketed any differently than it was.

[83] The only expert evidence of fair market value that is before me is that of Ms. Cawley. In her opinion, the price accepted by the plaintiff was fair market value. There is no reliable evidence to the contrary.

[84] Accordingly, I find that the plaintiff did not suffer a loss.

Conclusion

[85] The plaintiff's claim is dismissed in its entirety, with costs at Scale B.

"G.C. Weatherill J."

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