
CANADA / JUDGMENT

Mac Mortgage Approval Corp. v. MMB Management Corp.

2013 BCSC 2164

COURT

Supreme Court of British Columbia

DECIDED

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2013 BCSC 2164 Mac Mortgage Approval Corp. v. MMB Management Corp.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Mac Mortgage Approval Corp. v. MMB Management Corp.,

2013 BCSC 2164

Date: 20131128

Docket: S100276

Registry: Vancouver

Between:

Mac Mortgage Approval Corp.

Plaintiff

And

MMB Management Corp.

Defendant

Before: The Honourable Madam Justice Gropper

Reasons for Judgment

Counsel for the Plaintiff:

S. P. Grey

Counsel for the Defendant:

O. Ahmed

Place and Date of Trial/Hearing:

Vancouver, B.C.

July 2 - 5, 2013

Place and Date of Judgment:

Vancouver, B.C.

November 28, 2013

Introduction

- [1] The plaintiff, Mac Mortgage Approval Corp. (Mac), through its principal Leo Paskalidis, claims a commission of \$149,500 for his assistance to the defendant, MMB Management Corp. (MMB) for its work in obtaining a commercial mortgage for MMB for its Ladner property.
- [2] The claim is made under the "exclusive placement agreement" (agreement) which was signed by Mikhail Borovinskiy on behalf of MMB on October 9, 2009. The agreement accompanied a letter of interest issued by Prospera Credit Union (Prospera) on October 8, 2009 in which Prospera advised MMB that it was prepared to consider its request for financing, specifically a \$2,300,000 commercial term mortgage. The letter outlined the terms upon which Prospera would consider issuing the mortgage financing.
- [3] The agreement provides, in relevant part:

In consideration of your accepting this agreement and in consideration of the expense and effort that you have already incurred and intend to incur in arranging a loan on the security as hereinafter appears, we grant to you the exclusive right in accordance with the terms set out below and subject to such conditions and qualifications as the lender deems appropriate, or upon such other terms and conditions as we may approve:

The appointment of the broker exclusively to procure a loan shall be in effect for the period termination on the Friday of February 26, 2010. We agree to pay you a service commission of 6.5% of the loan amount to Mac Mortgage Approval Corp and an addition of 0% if co-brokered of the loan amount upon a letter of interest or commitment letter in the above terms being issued by a lender during the term of this agreement or in respect of which the efforts of you or your agents were an effective cause. We agree to pay a commission in the same amount upon a lender being found during the term of this agreement ready, willing and able to lend on the aforesaid terms irrespective of whether such lender is found by you or your agents or by any other agent or by us. Such service commission shall become due and payable, if the lender actually advances any funds, upon delivery to us of a loan commitment letter containing the above terms or any other terms which are accepted by us.

Background

- [4] In September 2009, MMB was in a precarious financial state. There were two mortgages against its commercial property in Ladner, totalling approximately \$1,900,000. There were a number of builder's liens registered against the property and MMB owed a total of approximately \$300,000 to \$350,000 to builders who were renovating the property. MMB was incurring ongoing renovation costs. Some of the units on the property, particularly the largest one on the ground floor, were vacant. They were not generating income.
- [5] Mr. Borovinskiy contacted George Kyriakelis in August or September 2009, to ask him to arrange a commercial mortgage on the property. Mr. Borovinskiy knew Mr. Kyriakelis from the Royal Bank of Canada (RBC) where Mr. Kyriakelis had been a mortgage specialist dealing with residential mortgages. They had known each other for about 10 years. In September 2009, Mr. Kyriakelis left RBC and was establishing himself as a mortgage broker. He was not licensed and says that he did not have much experience in completing commercial transactions at the time.
- [6] Around the same time Mr. Borovinskiy contacted Mr. Kyriakelis, Mr. Paskalidis advised Mr. Kyriakelis that he had a contact at Prospera and asked Mr. Kyriakelis if he had any clients looking for financing.
- [7] Mr. Kyriakelis told Mr. Borovinskiy that Mr. Paskalidis was an experienced commercial broker and that he had a good relationship with someone at Prospera. Mr. Kyriakelis contacted Mr. Paskalidis in mid to late September 2009 and told him that MMB was seeking a commercial mortgage and it needed the money right away as it was in a precarious financial state.
- [8] Mr. Paskalidis admitted that this was the first commercial mortgage that he was involved with as a licenced broker.
- [9] Mr. Kyriakelis and Mr. Borovinskiy spoke Russian; Mr. Paskalidis did not. Mr. Paskalidis and Mr. Borovinskiy never met; all of their communications were through Mr. Kyriakelis. They never spoke or corresponded, except at the end of their relationship.
- [10] Mr. Borovinskiy agreed to retain Mac. He forwarded Mr. Paskalidis relevant financial information through Mr. Kyriakelis.
- [11] With the information and documents provided to him from Mr. Borovinskiy through Mr. Kyriakelis, Mr. Paskalidis approached Lori Hinz, a commercial accounts manager at Prospera, regarding the mortgage financing MMB required. Mr. Paskalidis also prepared the agreement which he provided to Mr. Kyriakelis, along with Prospera's letter of interest dated October 8, 2009, for Mr. Borovinskiy's review and signature.
- [12] In the period between Mr. Kyriakelis advising Mr. Paskalidis that MMB required mortgage financing to the issuance of the letter of interest from Prospera, Mr. Paskalidis says he performed the following work on the mortgage application: making some phone calls with

Mr. Kyriakelis, performing two hours of internet research regarding potential lenders, possibly telephoning other lenders, reviewing documents which Mr. Kyriakelis had forwarded from Mr. Borovinskiy (which took him about one day) and sending the documents to Prospera.

[13] Around October 11, 2009, Mr. Borovinskiy and Mr. Kyriakelis met in a coffee shop in West Vancouver to discuss the agreement and the letter of interest from Prospera. Mr. Borovinskiy asked Mr. Kyriakelis a series of questions. Mr. Kyriakelis says that he told Mr. Borovinskiy:

1. Mr. Paskalidis was an experienced mortgage broker in commercial transactions who had a good relationship with Prospera and that Mr. Paskalidis was confident that the financing could be obtained through Prospera;
2. Mr. Paskalidis was only dealing with Prospera for mortgage financing. If Prospera did not fund the mortgage, he would ask Mr. Paskalidis to waive the agreement (which he believed Mr. Paskalidis would) and then Mr. Borovinskiy could go elsewhere to obtain the financing; and
3. In response to Mr. Borovinskiy's concern that the percentage fee in the agreement was too high and his view that 3% was reasonable in the circumstances, Mr. Kyriakelis said that it was most important to get the approval from Prospera and that following the approval they could go back to Mr. Paskalidis and do something to lower the percentage rate.

[14] Mr. Borovinskiy says that Mr. Kyriakelis assured him that the commercial deal would be done in two weeks. Mr. Kyriakelis denies this and says that a commercial deal cannot be done in two weeks from start to finish and he would not have told Mr. Borovinskiy that it could.

[15] Mr. Borovinskiy says that he did not perceive that agreement as a contract. He understood it prevented him from dealing with Prospera directly. He says that he relied on what Mr. Kyriakelis told him, including that Mr. Paskalidis was an experienced commercial mortgage broker, that if Prospera did not provide financing that Mr. Paskalidis would waive the agreement and he could go elsewhere, and that the commission percentage rate was negotiable.

[16] Mr. Paskalidis says that Mr. Kyriakelis was not his agent and did not have the authority to make the statements that he did to Mr. Borovinskiy. He was not willing to reduce the percentage rate or to waive the agreement at any time.

[17] Mr. Paskalidis says that brokers do not work for free, especially in commercial settings. He expected to be paid and the manner of payment was a commission. Once the letter of interest was issued and the agreement was signed, the commission was due and payable. He continued to make efforts to obtain a letter of commitment from Prospera, but only to ensure that MMB had the funds to pay the commission.

[18] For the period from October 8, 2009 to November 28, 2009, Mr. Paskalidis forwarded documents and the information provided to him by Mr. Kyriakelis from Mr. Borovinskiy to Ms. Hinz. Mr. Paskalidis did not prepare or create any documents. Ms. Hinz asked for certain documents and he would pass that on to Mr. Kyriakelis, who would pass that along to Mr. Borovinskiy. Mr. Paskalidis did not determine what documents were necessary to support the mortgage financing. The documents were all provided to him by Mr. Kyriakelis from Mr. Borovinskiy. They included a personal net worth statement prepared by Mr. Borovinskiy, leases, surveys, liquor licenses, and most particularly, an appraisal from Grover, Elliott, dated September 9, 2009, that MMB had commissioned directly.

[19] The Grover, Elliott appraisal stated:

Letter dated Sept 11 2009

Re: 4841 Delta Street

Delta, British Columbia

Pursuant to your request, we have appraised the fee simple interest of the above mentioned real property. Our estimate of market value, assuming stabilized occupancy, as at September 9, 2009

THREE MILLION EIGHT HUNDRED AND EIGHT THOUSAND DOLLARS

\$3,880,000

[20] MMB was required to pay a deposit of \$8,600 to Prospera. Mr. Borovinskiy provided a cheque to Mr. Kyriakelis who sent it to Mr. Paskalidis.

[21] Shortly after Prospera issued the letter of interest, Ms. Hinz emailed Mr. Paskalidis to advise that a further appraisal had to be performed by an appraiser approved by Prospera. MMB was responsible for the appraiser's fee. Mr. Borovinskiy met with the approved appraiser, Dean Doolan of JRC Real Estate Evaluators, in the middle of October 2009 and provided him with the Grover, Elliott appraisal. After that, Mr. Borovinskiy communicated directly with Mr. Doolan and provided the documents that were requested. Mr. Borovinskiy contacted or attempted to contact the appraiser repeatedly as he was aware that Prospera was awaiting the report. He says that he became frustrated with the appraiser who did not, in Mr. Borovinskiy's view, understand or address the urgency of preparing the appraisal that Prospera required before it was prepared to fund the mortgage.

[22] In respect of the appraisal, Mr. Paskalidis phoned Ms. Hinz twice to ask her about the status of the appraisal. He did not contact the appraiser directly.

[23] Because a letter of commitment had not been issued by November 19, 2009, Mr. Borovinskiy approached Vancity Credit Union about mortgage financing. Vancity issued a discussion paper on November 24, 2009 and issued a commitment letter on November 30, 2009. Vancity did not receive the appraisal commissioned by Prospera before it issued its commitment letter.

[24] Mr. Doolan provided his appraisal report to Prospera in a transmittal letter of November 24, 2009. He stated: "Based on my inspection and analysis of the available data, it is my conclusion that the market value of the leased fee interest in the completed subject property under the conditions described at October 19, 2009 was \$3,925,000."

[25] On November 28, 2009, Mr. Borovinskiy faxed Mac directly. In his letter he stated:

Hereby I would like to express my total disappointment with services I received from your company.

On October 09, 2009 you forced me to sign letter of interes[t] for loan from Prospera credit union. Your company was promising to refinance the property on 4841 Delta Street in Ladner BC in two weeks. I paid my commitment fees and since then 7 weeks passed and refinancing did not happen and I did not receive a commitment letter from you so far.

Relying on loan your company promised, I put my business on the edge of bankruptcy. Amount of property liens increased dramatically, which will correspondingly escalate my expenses, while you were promising me absolutely opposite.

This is totally unacceptable. I would like to terminate the service due to these circumstances before I receive any money from you and I require you to return my money which I paid as commitment fee immediately.

Position of the Parties

Position of the Plaintiff

[26] Mr. Paskalidis says that the agreement is clear on its face. His counsel argues that Mac was entitled to the fee upon the issuance of a commitment letter from any financial institution. Thus, he argues, the fee was payable when Vancity issued its commitment letter at the end of November 2009. Mr. Paskalidis says that the agreement is like a real estate listing: if a deal was made during its term the fee was payable to Mr. Paskalidis.

[27] Mr. Paskalidis asserts that Mr. Kyriakelis was not his agent and he had no authority to say what he said to Mr. Borovinskiy. Mr. Paskalidis did not intend to waive the agreement, reduce the percentage of the commission or limit the agreement only to circumstances where Prospera provided the financing.

- [28] Alternatively, Mr. Paskalidis argues that if the agreement does not support his position, he has a claim in quantum meruit. As he notes, brokers do not work for free. He refers to Mr. Borovinskiy suggesting that 3% would have been a reasonable fee and suggests that that is the basis for his quantum meruit claim.

Position of the Defendant

- [29] MMB asserts that Mac made misrepresentations that were relied upon and induced MMB into entering the agreement between the parties. These misrepresentations were made by Mr. Kyriakelis, who was Mac's agent. Further, MMB argues that the agreement does not represent the full agreement between the parties: it was intended only to address a commitment by Prospera and no other financial institution.

Analysis

- [30] This dispute requires an exercise of the principles of contractual interpretation. These principles were summarized in *Athwal v. Black Top Cabs Ltd.*, 2012 BCCA 107 at paras. 42-48:
- (i) The principles of contractual interpretation
- [42] The contractual intent of parties to a written contract is objectively determined by construing the plain and ordinary meaning of the words of the contract in the context of the contract as a whole and the surrounding circumstances (or factual matrix) that existed at the time the contract was made, unless to do so would result in an absurdity. Where the language of a contract is not ambiguous (that is, when viewed objectively it raises only one reasonable interpretation), the words of the written contract are presumed to reflect the parties' intention. An interpretation that renders one or more of the contract's provisions ineffective will be rejected.
- [43] Extrinsic evidence to explain the meaning of an unambiguous contractual provision is not admissible. Evidence of a party's subjective intention in executing the contract, or of their understanding of the meaning of the words used in the contract, is not admissible to vary, modify, add to or contradict the express words of the written contract. This is particularly so where a contract contains an "entire agreement" clause. As was noted by the authors of *Cheshire, Fifoot and Furmston's Law of Contract*, 13th ed. (London, UK: Butterworths, 1996) at p. 127, "the court is usually concerned not with the parties' actual intentions but with their manifested intention."
- [44] A helpful analysis of this legal principle was provided by Mr. Justice Lowry in *Water Street Pictures Ltd. v. Forefront Releasing Inc.*, 2006 BCCA 459:
- [23] Recourse to extrinsic evidence to aid in the interpretation of an agreement is the court's last resort. It is only when the intentions of the parties cannot be objectively determined from the words they have chosen to employ, such that there is ambiguity, that the law permits consideration to be given to evidence of their conduct in making their agreement and in

fulfilling their obligations. If it were otherwise, the certainty that is essential to documenting commercial transactions would be seriously undermined. The two-step approach to be taken has been succinctly stated by the Manitoba Court of Appeal in *Geoffrey L. Moore Realty Inc. v. Manitoba Motor League*, [2003] 9 W.W.R. 385, 2003 MBCA 71 at para. 26:

- [26] In brief summary then, to determine the intentions of the parties expressed in a written contract, one looks to the text of the contract as a whole. In doing so, meaning is given to all of the words in the text, if possible, and the absence of words may also be considered. If necessary, the text is considered in light of the surrounding circumstances as at the time of execution of the contract. The goal is to determine the objective intentions of the parties in the sense of a reasonable person in the context of those surrounding circumstances and not the subjective intentions of the parties. If, after that analysis, the text in question is ambiguous, extrinsic evidence may be considered.
- [24] Thus, the court looks first to the words of the agreement, read as a whole, aided, if necessary, by evidence of the circumstances or what is referred to as the factual matrix existing when the agreement was made. Such evidence is generally restricted to circumstances known to both parties that illuminate the meaning a reasonable person would give to the words employed: *Glaswegian Enterprises Inc. v. BC Tel Mobility Cellular Inc.* (1997), 49 B.C.L.R. (3d) 317 (C.A.) at paras. 18 to 20. See also Lord Hoffman's discussion of the principles of interpretation in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society* (1997), [1998] 1 W.L.R. 896 (H.L.). The wording of the agreement must not, however, be overwhelmed by a contextual analysis: *Black Swan Gold Mines Ltd. v. Goldbelt Resources Ltd.* (1996), 25 B.C.L.R. (3d) 285 (C.A.) at para. 19.
- [45] The limited scope of the inquiry into the factual matrix or surrounding circumstances in which an agreement was reached was also canvassed by Mr. Justice Donald, writing for the Court in *Black Swan Gold Mines Ltd. v. Goldbelt Resources Ltd.* (1996), 25 B.C.L.R. (3d) 285 at para. 17, where he quoted with approval from the decision of Lord Wilberforce in *Prenn v. Simmonds*, [1971] 3 All E.R. 237 at 240-41:

There were prolonged negotiations between solicitors, with exchanges of draft clauses, ultimately emerging in cl. 2 of the agreement. The reason for not admitting evidence of these exchanges is not a technical one or even mainly one of convenience (although the attempt to admit it did greatly prolong the case and add to its expense). It is simply that such evidence is unhelpful. By the nature of things, where negotiations are difficult, the parties' positions, with each passing letter, are changing and until the final agreement, although converging, still divergent. It is only the final document which records a consensus. ... It may be said that previous documents may be looked at to explain the aims of the parties. In a limited sense this is true; the commercial, or business object, of the transaction, objectively ascertained, may be a surrounding fact. Cardozo J. thought so in the *Utica Bank* case [(1918), 118 NE 607]. And if it can be shown that one interpretation completely frustrates that object, to the extent of rendering the contract futile, that may be a strong argument for an alternative interpretation, if that can reasonably be found. But beyond that it may be difficult to go; it may be a matter of degree, or of

judgment, how far one interpretation, or another, gives effect to a common intention; the parties, indeed, may be pursuing that intention with differing emphasis, and hoping to achieve it to an extent which may differ, and in different ways. The words used may, and often do, represent a formula which means different things to each side, yet may be accepted because that is the only way to get 'agreement' and in the hope that disputes will not arise. The only course then can be to try to ascertain the 'natural' meaning.

[Emphasis added.]

- [46] Thus, evidence of the factual matrix or surrounding circumstances in which a contract is reached is admissible for the purpose of determining the meaning of the words of the contract as they would be understood by an "objective reasonable bystander" in the circumstances of the parties. See G.H.L. Fridman, *The Law of Contract in Canada*, 5th ed. (Toronto: Thomson Canada Limited, 2006) at 15. Ambiguity is not a pre-condition to the admissibility of such evidence. However, the scope of the contextual evidence must not overwhelm the inquiry into the parties' objective contractual intention or no certainty would be achieved by reducing an agreement to writing.
- [47] If after the contextual inquiry into the circumstances in which the agreement was reached, the language of the contract remains ambiguous (that is the meaning of the words is vague, inconsistent or in conflict with other provisions of the contract, redundant, or overly general), extrinsic evidence of what was said, done or known by the parties when the contract was made, is admissible for the purpose of determining the parties' common intention.
- [48] There is a presumption against adding an unexpressed term to a contract by implication unless: (i) it is necessary to do so in order to give the contract business efficacy (this does not include a test of reasonableness for the contract); (ii) to correct an obvious oversight for which there is "no dispute" that the parties intended to include such a term in the contract (i.e. the implied term "goes without saying"); (iii) the term can be clearly and precisely formulated; and (iv) the term will not conflict or be inconsistent with an express term of the contract. However, a term of a contract may only be implied where it is necessary to give legal effect to the parties' presumed intention, as expressed in the contract, and to give business efficacy to the contract. The onus is on the party seeking to establish an implied term of a contract. See *Perin v. Shortreed Joint Venture Ltd.*, 2009 BCCA 478 at para. 27.
- [31] Applying those principles, I find that the agreement is ambiguous. This is amply demonstrated by the fact that Mr. Paskalidis testified that he was entitled to the commission upon the issuance of a letter of interest, yet in argument his counsel asserted that the commission was payable upon the issuance of a commitment letter. The agreement refers to the payment of a commission "upon a letter of interest or commitment letter in the above terms being issued by a lender". Taken literally, the mortgage broker could choose whether the commission is payable on the issuance of a letter of interest or a commitment letter, or presumably, on the issuance of each. Because of the ambiguity of the most significant term

of the agreement, that is, the event that triggers the commission being payable, I must: 1) try to interpret using the words in the contract; 2) look to the surrounding circumstances / factual matrix; only if it is still ambiguous, 3) look to extrinsic evidence.

[32] In this context, I must consider Mr. Kyriakelis' role, particularly in that Mr. Paskalidis never met, spoke to or communicated with Mr. Borovinskiy directly. While Mr. Paskalidis asserts that Mr. Kyriakelis was not his agent, I find that position unsustainable.

[33] In G.H.L. Fridman, *Canadian Agency Law*, 2d ed (Markham, Ontario: LexisNexis Canada Inc., 2012) at 150 Mr. Fridman states:

[E]ven though the agent was not expressly authorized to make a certain misrepresentation (whether fraudulent or innocent) or to refrain from disclosing certain information, nevertheless, if an agent did so and appeared to the third party to have the authority to do so, the principal will be bound by what his agent has done, even though the agent was not acting for the benefit of the principal.

[34] Mr. Kyriakelis appeared to Mr. Borovinskiy as though he had the authority to act on behalf of Mr. Paskalidis and Mac. Mr. Paskalidis took no steps to ensure that the information that Mr. Kyriakelis was providing to Mr. Borovinskiy was correct or that he agreed with it. I find that Mr. Kyriakelis, even if he was not strictly Mr. Paskalidis' agent, had the ostensible authority to say what he said. He made representations to Mr. Borovinskiy concerning the agreement, including that Mr. Paskalidis was an experienced mortgage broker in commercial transactions; that Mr. Paskalidis was only dealing with Prospera for the mortgage financing and if Prospera did not fund the mortgage he believed Mr. Paskalidis would waive the agreement and then Mr. Borovinskiy could go elsewhere; and that the commission percentage fee in the agreement was negotiable. Mr. Borovinskiy accepted those representations.

[35] I admit the extrinsic evidence and find that the common intention was that the agreement was intended to refer to mortgage financing being provided by Prospera in accordance with the letter of interest. I find that the commission was intended to be payable upon delivery of a loan commitment letter, not a letter of interest. Furthermore, while the agreement refers to commitment letters issued by other lenders, the understanding of the parties was that it would be with Mac and Mr. Paskalidis' efforts as an effective cause. There is no evidence to support an assertion by Mac that Mr. Paskalidis had any role to play except with regard to Prospera.

[36] I find that Mac is not entitled to a fee under the terms of the agreement.

[37] In the event that I find that Mac is not entitled to a fee under the agreement, Mac claims a fee on the basis of quantum meruit. He argues that 3% would be a reasonable fee as that was the amount that Mr. Borovinskiy told Mr. Kyriakelis would be a reasonable fee. That amount may have been appropriate if Mac had actually succeeded in causing Prospera to fund the mortgage. It did not; Prospera issued a letter of interest.

[38] Nevertheless, I accept that brokers do not work for free and that some payment to Mr. Paskalidis is appropriate. Based on the work which he performed, which did not require any creativity, critical thought, negotiation or skill, I find that 0.5% of the mortgage amount funded by Vancity is an appropriate commission.

[39] The parties may address costs if necessary.

"Gropper J."

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