

In the Small Claims Court of Nova Scotia

Cite as: Black v. Century 21 A.B.C. Realty Ltd., 2015 NSSM 17

BETWEEN

Terry Black

Claimant

c/o

Mark Charles

Mark Charles Legal Services Inc., c/o Mark Charles Law

75 Alderney Drive

Dartmouth, NS B2Y 2N7

-and-

Century 21 A.B.C. Realty Limited

Defendant

c/o

Jeremy Gay

Livingstone & Company

17 Prince Street, Suite 201

PO Box 664

Dartmouth, NS B2Y 3Y9

Adjudicator: David TR Parker QC

Heard: January 20, 2015 and February 18, 2015

Final Submissions: March 13, 2015

Decision: April 7, 2015

Counsel: Mark J. Charles represented the Claimant

Jeremy Gay represented the Defendant

DECISION

1. This matter came before the Small Claims Court on January 20, 2015 and on February 18, 2015 with final submissions provided on March 13, 2015.
2. Before proceeding with the claim the parties were asked if there were any preliminary matters they wish to bring to the court's attention and, if there were any requests to change pleadings. There being none the matter proceeded accordingly.

The Pleadings:

a. The Claim:

3. The claim is for unpaid realtor commissions in 2012 and 2013 pursuant to the terms of a 2005 Sales Representative Agreement.

b. The Defence and Counterclaim:

4. The Defendant in its pleadings stated commissions have been properly paid to the Defendant in accordance with the Sales Representative Agreement with the exception of the commission referred to in paragraph 8[c] of the Claimant's statement of claim. The amount claimed in paragraph 8[c] is not correct and the correct amount is currently held in trust and will be paid to the Claimant upon the Claimant completing services owed to the Defendant.
5. The Defendant counterclaimed for \$7738.53 representing the return of erroneous overpayment of harmonized sales tax paid by the Defendant to the Claimant plus interest and costs.
6. The Claimant was a realtor that worked with the Defendant as an independent contractor since 2005. The Client herein is referred to as the Sales Representative.
7. As of October 3, 2012 the Claimant was terminated as a licensed realtor with or associated with the Defendant Company.
8. It was not clear from the testimony exactly why the parties agreed to terminate the relationship. There was some suggestion by the Defendant's owner that the

Claimant was asking for too much and was not satisfied with what the Company was prepared to provide.

9. The Claimant's position was, the Defendant ended the relationship. In his testimony he said "to cut to the chase I was let go and I was told. I just believe it was not fair. I am saying I did not terminate the agreement."
10. The Defendant's position was that the Claimant terminated the agreement and it was not the Defendant. To support their claim the Defendant produced a document entitled; Notice of Termination Nova Scotia Real Estate Commission. This document was completed by the Defendant and signed by the Claimant. In the document, clause number 6 stated that the termination [was] initiated at the request of the licensee that is, the Claimant. Clause 7 stated that the reason for termination is changing brokerage.
11. On the second page of the Notice of Termination, the Claimant signature appears under the following statement: I declare that I have given notice of termination of my license to represent century 21 ABC Realty on October 3/12.
12. Under this declaration which the Claimant signed, there is a separate section which stated: "only complete part[b] below if the termination has been initiated by the Brokerage." Part [b] stated "I acknowledge receipt of this Notice of Termination and I DO DO NOT agree with the information contained therein. If "DO NOT" give particulars.
13. Part[b] was not completed or signed by the Claimant.
14. The Defendant takes the position that the Claimant decided to move on and the Claimant takes the position that he was told to leave.
15. The Claimant is claiming commission for properties he originally listed while being associated with the Defendant Company.
16. These properties included: 2 Fury Dr., Dartmouth, Nova Scotia; 72 Hartlen Ave., Halifax, Nova Scotia; 5562 Bloomfield St., Halifax, Nova Scotia; 17 Oaks Rd., Fall River Nova Scotia; 21 Wilcock Ln., Dartmouth, Nova Scotia and 2550 Old Sambro Rd., Halifax, Nova Scotia.

17. Before I go any further I shall refer to clauses in the SALES REPRESENTATIVE AGREEMENT which are relevant to this decision:

4. REAL ESTATE LISTINGS

The Sales Representative agrees that all listings obtained by the Sales Representative shall be taken in the name of the Company and immediately turned over to the Company. The Sales Representative further agrees that all real estate transactions in which he or she has interest, directly or indirectly, will be reported to and processed through the Company on a timely basis. Further, the Sales Representative agrees to make written disclosure of such interests to the other parties to the transaction as and when required by the Act.

5. COMMISSIONS

The commission payable in respect to each listing secured by the Sales Representative shall be fixed by the Sales Representative guided by office policies pertaining to conditions of said listing, in addition to the Compensation Rates for Substitute Agents as set out in Schedule "A" hereto. When any property listed with the Company is sold or leased as a result of the Sales Representative's negotiations, subject to the Sales Representative's obligations under this Agreement and policies and procedures issued by the Company from time to time with respect to commission splits between listing and selling sales representative or otherwise; the Sales Representative will be entitled to 100% of the real estate commission paid to and received by the Company in respect of such sale or lease. The Sales Representative acknowledges that the Company has the right obligation to divide such commission between listing and selling sales representatives or otherwise in accordance with the custom of the trade at the applicable time. The Company acknowledges that the portion of the commission from time to time payable to the Sales Representative will be received and held in trust for the Sales Representative pending distribution to the Sales Representative.

8. TERMINATION

This agreement may be terminated by the Company, at any time, for any reason, upon one months notice in writing to the other party.

The Sales Representative may terminate this Agreement at any time by personally delivering to the Company written notice of his or her intention to do so whereupon this Agreement shall terminate at the end of the second complete calendar month following the date of delivery of such notice ("the Notice Period"). (By way of illustration, if notice of termination were delivered on May 15th the Notice Period would be May 15 - July 31 and this Agreement would terminate on July 31st).
- However, all expenses payable by the Sales Representative Section 6 hereof, when property listed with the Company is sold or leased during or after the Notice Period as a result of the Sales Representative's negotiations, subject to the Sales Representative's obligations under this Agreement and policy and procedures issued by the Company from time to time with respect to commission splits between listings and selling sales representatives or otherwise, the Sales Representative will be entitled to 50% of the real estate commission paid to and received by the Company in respect to such sale or lease.

18. The agreement speaks to the commission a sale Representative is entitled to if the Sale Representative terminates the agreement. However, it does not address the entitlement of commission when the Company terminates the agreement. It could well be that the sales Representative receives his commission as outlined in article 5 of the agreement up to one month after the Company notifies the sales Representative in writing that the agreement is being terminated.
19. I do not have to decide this issue as the notice of termination specifically stated that the Claimant terminated the relationship at his request. While the Defendant Company checked off and filled in the provisions which indicate clearly the Claimant terminated the agreement there is no ambiguity in the wording of the termination agreement. Further the Claimant is a seasoned realtor, use to reading and understanding contracts and to now say "I thought the most prudent thing was to sign it." The Claimant in referring to part[b] of the declaration said "I must have missed that". This is not very strong evidence to conclude that the Company terminated the agreement.
20. The Sales Representative Agreement speaks to what happens when the realtor in this case the Claimant terminates the agreement.
21. The Sales Representative Agreement under article 8 entitled "TERMINATION", stated the agreement shall terminate at the end of the second complete calendar month following the date of delivery of notice to terminate by the Sales Representative. In this case as the termination notice signed by the Claimant is dated October 3, 2012, the agreement would terminate at the end of December 31, 2012. This is referred to as the "Notice Period."
22. Article 8 of the Sales Representative Agreement continues to say "when property listed with the Company is sold... during or after the Notice Period **as a result of the sales Representatives negotiations**[my highlighting], subject to the sales Representatives obligations under this agreement and policy and procedures issued by the Company from time to time with respect to commission splits between listing and selling sales Representatives or otherwise, the sales Representative will be entitled to 50% of the real estate commission paid to and received by the Company in respect to such sale or lease.

23. Article 8 makes it clear when the Sales Representative is entitled to commission and the amount of the commission to be paid the Sales Representative. The Article also speaks to what is required of the Sales Representative.
24. Both parties address the issue of what the term "sold" meant in the Sales Representative Agreement and in this case in relation to Article 8. The Claimant's solicitor argued that there are several different stages to a real estate transaction. There is a listing date that is when the property is listed for sale on the market. There is the sold date which is often before the date in which the property is closed. Counsel Charles explained that the common practice in Nova Scotia is to place a sold sign on a property once it has been sold which remains on the property until it is closed.
25. The reason this distinction is being put forward is because article 8 references that when the property listed with the Company is sold the sales Representative will be entitled to commission.
26. With respect to this fine point I disagree. The property that is listed is sold when all the conditions in the Purchase Sale Agreement have been met. While commission statements from the realtors are generated prior to the closing date of the property, commissions can change and do not occur until documents and money has been tendered and the property transaction is then closed.
27. Notwithstanding this, if a property is listed with the Company and it is sold as a result of the Sales Representative's negotiations then upon closing the Representative will receive 50% of the real estate commission received by the Real Estate Company This is according to Article 8 of the Sales Representative Agreement.
28. This is less than the commissions which the Sales Representative would normally receive as an independent agent prior to the Notice Period as outlined in article 5, under the topic entitled "COMMISSIONS."
29. Any commissions received by the Defendant Company would also attract Harmonized Sales Tax ["HST"]
30. I mentioned the HST at this stage as there is a counterclaim by the Defendant with respect to overpayment of HST.

31. Keeping that in mind, I shall turn to the property listings for which the Claimant is making his claim.

2 Fury Drive

32. With respect to the property at 2 Fury Drive, this was listed by the Claimant and the property closed on October 23, 2012. The amount of commission paid to the Company was \$7650.00. This does not include the HST component of the commission. There were 2 listing agents which were paid commission. The Claimant who was allotted \$6900.00 and \$750.00 for René McCulloch thereby comprising the total commission of \$7650.00 Deducted from the Claimant's commission was \$10.00, \$110.40 related to expenses and \$3763.17 related to the Defendant's share of the commission pursuant to the contract. The final payment to the Claimant was \$3016.43.[reference to Defendant's exhibit D-14] there was \$538.29 attributed to office expenses leaving the Claimant with a payment of \$2478.14 for which he received a cheque on November 1, 2012.

33. The Claimant was also paid \$1018.44 HST by the Defendant and it should have been 15% of \$3016.43 or \$452.46 a difference of \$565.98 which the Defendant is claiming as part of its overpayment.

34. The Claimant is saying the commission payable on the transaction involving 2 Fury Dr. was 2.5% of the purchase price which purchase price was \$306,000.00 and therefore he should have received \$7650.00 plus HST. The Claimant claims he only received half of his commission and he is owed the other half which would be \$3825.00 plus HST.

35. Exhibit C – 5 and exhibit D – 16 correctly shows that the Claimant was paid his commission less expenses as provided under the Sales Representative Agreement on the sale of 2 Fury Drive.

72 Hartlen Ave.

36. The same analysis would apply to the property at 72 Hartlen Ave. where the listing was done by the Claimant in the first instance and the closing took place on October 31, 2012. The amount of commission received by the Company was \$3760.00 of which the Claimant was paid 50% of same less expenses of \$70.16. Total amount payable to the Claimant in that case was \$1839.92 as evidenced

by the cheque in exhibit D–16 and representing 50% of the net commission due the Claimant.

37. The Claimant was paid \$554.98 HST on this commission whereas HST should have been 15% of \$1839.92 or \$275.99 a difference of \$278.99 which the Defendant is claiming as part of its overpayment

5562 Bloomfield Street

38. The same analysis applies to the 5562 Bloomfield St., Halifax, Nova Scotia. The listing was done by the Claimant and the closing took place on November 15, 2012. The amount of the commission received by the Company was \$10,400.00. The amount of commission due the Claimant based on 50% less expenses of \$176.40 would be \$5106.80 Exhibit D – 18] HST payable on this commission would be \$766.02.

39. To date the Claimant has been paid no commission or HST with respect to this property. The Defendant takes the position that the file is not complete and until it is complete they have no obligation to pay that commission. The reason the Defendant says the file is not complete is due to a apparent promise by the Claimant for extra air miles to the client involved in this property. There was a claim that the client was expecting 924,000 air miles or \$31,416.00. Based on the testimony of the Defendant this claim was never processed to date.

17 Oaks Rd., Fall River, 21 Wilcot Lane, Dartmouth Nova Scotia and 2550 Old Sambro Road, Halifax

40. With respect to properties, 17 Oaks Rd., Fall River, 21 Wilcot Lane, Dartmouth Nova Scotia and 2550 Old Sambro Road, Halifax Nova Scotia these are properties where closings happen beyond the Notice Period. In the pleadings the Claimant is requesting the full commission paid to the Company, plus HST.

41. The evidence however was that while these properties were originally listed by the Claimant they were relisted and or the Claimant did not complete or was involved in the sale of these properties. The Claimant said on cross examination that he did not secure the sale agreements on these 3 properties. The Claimant said that he “appeal[s] to the court on the basis of fairness for the last 3 properties. I did work and I should be given a referral.”

42. The Claimant in his testimony said that he would expect the Defendant to release the listings or at least give him a referral, \$500 or a case of beer. Later in the Claimant's testimony when referring to the above-noted 3 properties that he originally did work on and obtained the listings for the Company the Claimant said he would expect to be paid 50% of the commission.
43. Article 4 of the Sales Representative Agreement stated that all listings obtained by the Sales Representatives shall be taken in the name of the Company and immediately turned over to the Company. While the listing is "turned over to the Company" the Sales Representatives will be paid a commission which is paid to the Company. In other words the Company is receiving the commission and it and then turns around and pays the Sales Representative from that commission an amount that is determined under the Sales Representative Agreement.
44. The amount due the Sales Representatives under the Agreement would be 100% of the commission that is paid to the company less 20% as contained in Schedule "C" of the Agreement and less expenses as noted in Article 6 of the Sales Representative Agreement. This percentage however changes when there is a termination of the Sales Representatives Agreement as noted in Article 8 of the said Agreement.
45. While the wording in Article 8 is awkward, however in context with the entire agreement the Sales Representative will receive 50% of those Company listings that the Sales Representative obtains for the company less expenses "as a result of the Sales Representative's negotiations.
46. The Claimant admits he was not involved with and secured the sales of the 3 properties. However the evidence also indicates that when others are involved in the sale of our property it is convention that a referral is taken into consideration, as was the case in the sale of property located at 2 Fury Drive.
47. Considering therefore 2 Fury Dr. as an example of the percentage of the listing and deductibles in that case as it relates to referral involvement and related that to the properties 17 Oaks Rd., Fall River, 21 Wilcot Lane, Dartmouth Nova Scotia and 2550 Old Sambro Road, Halifax the Claimant might expect referral amount totaling \$856.00 plus HST of \$129.90 with respect to the 3 properties.

48. There are 2 issues before the court: commission and HST due the Claimant and HST overpayment as claimed by the Defendant and which the Defendant claims is to be paid back.
49. To summarize the first issue: the Claimant has been paid his commission on 2 Fury Dr. and 72 Hartman Ave. however there has been an overpayment of HST to the Claimant by the Defendant in the amount of \$565.98 and \$278.99 which should be paid back to the Defendant.
50. With respect to 5552 Bloomfield St. there is no reason why that commission is not due the Claimant pursuant to Article 8 of the Sales Representative Agreement. That amount would be \$5106.80 plus HST of \$766.02
51. I would also allow the referral amount of \$856.00 plus HST of \$129.90 for 17 Oaks Rd., Fall River, 21 Wilcot Lane, Dartmouth Nova Scotia and 2550 Old Sambro Road, Halifax.
52. I did consider the case **Aim Realty Ltd. v. Beaverbrook Holdings Ltd.** [1985] A.J. No. 147 from the Alberta Court of Appeal. That case involves whether commission is due pursuant to a listing agreement and that in itself is distinguishable from the case at hand. However the case does focus on commissions being due pursuant to contract. While the matter before this court is not on the listing agreement with the owner of the property, the same principles of contract apply with the Sales Representative Agreement as to when and what commissions are due and that is what I explored in the preceding paragraphs.
53. The next issue is the overpayment of HST by the Defendant on the commissions earned and due the Claimant.
54. The agreement the parties had with each other was that HST on the commissions the Claimant was paid by the Company would be kept by the Defendant Company and paid by the Defendant on a quarterly basis.
55. The Company has shown that on a number of properties where commissions were paid to the Claimant as per the Sales Representative Agreement commissions were paid to the Claimant based on 100% of the total commissions paid to the Company but not based on the commissions actually paid and received by the Claimant which was 80%.

56. As a result of a Revenue Canada HST audit the Defendant was able to establish that there was an overpayment of HST to the Claimant on a number of properties in which the Claimant received commission.
57. The overpayment to the Claimant on these properties from 2011 through to 2012 was the amount of \$7510.16.
58. Counsel for the Claimant with respect to the HST issue, argues that nonunionized and unionized work force cannot have wages or benefits withheld by employers in order for the employers to recover their own errors and recoup their own losses. At least without an expressed clause in an employment contract or the employees' permission.
59. Counsel for the Claimant referred to the following cases: **International Association of Fire Fighters, Local 2779 and Cape Breton Municipality**, 201 CanLII 97661 (NS LA) ("IAFF") where the employer paid vacation benefits and overtime hours to their unionized Fire Fighters in error. Upon discovering their error they attempted to withhold further payments to make up for the error. They were prohibited from doing so.
60. Also the case of **Brown Bear Daycare v. Monika Hollander**, 2856-09-ES 2010, CanLII 35656 (ON LRB) ("Brown Bear"). The Arbitrator ruled that an overpayment of vacation hours to an employee was recoverable as an employment term and only because that Brown Bear Daycare made express intention to do so throughout the employee and the employment contract itself.
61. Counsel for the Defendant in relation to the overpayment of HST and whether or not it should be paid back to the Defendant by the Claimant provided the following cases and arguments: **David E. Funston Merchandising Ltd. v. J.E. Gidney Enterprises Limited** 1997 Carswell Man. 423, wherein it stated at para 47 "It is trite to say that money mistakenly paid under a mistake of fact can be recovered even though the person paying it did not avail himself of the means of knowledge which he possessed.
62. And in **Royal Bank v. R.**, [1931] 1 W.W.R. 709 (Man. K.B.), Dysart, J. at pp. 712 and 713, set out four conditions required to be met by a party before money could be recovered because of a mistake of fact. These conditions were stated as follows: First, that the mistake is honest. There must be on the part of the person paying the money the genuine bona fide belief that certain facts exist which really do not exist. It is not what he ought to believe or what he ought to

have learned. His laches or negligence will not of themselves affect his belief. Knowledge will not be imputed to him; however ample may be the means of knowledge which he has on hand, or however readily accessible those means may be, they do not constitute knowledge; and knowledge will not be imputed to him or inferred against him, unless he willfully abstains from enquiry...The second condition is that the mistake must be as between the person paying and the person receiving the money. In other words, the receiver must in some way be a Party to the mistake, either as inducing it, or as responsible for it, or connected with it ...The third condition is that the facts, as they are believed to be impose an obligation to make the payment ...The fourth condition to recovery is that the receiver of the money has no legal or equitable or moral right to retain the money as against the payer.

63. In **O'Grady v. Toronto** (1916), 37 O.L.R. 139 (Ont. H.C.), it was held that money ought not to be retained if it cannot be retained honestly and conscionably.

64. In the case before this court the Defendant had a software program and it imputed the wrong or incorrect percentages in calculating on the amount that would attract HST and be payable to the Claimant. This was an honest mistake. From the Claimant perspective if he paid too much HST to the Receiver General which is not owed the Receiver General there would simply be an overpayment of taxes which could be adjusted.

In summary the following accounting would be applicable:

\$7,510.16 overpayment of HST claimed by the Defendant
Less \$5,106.80 commission due the Claimant on 5562 Bloomfield St.
Less \$ 766.02 HST do the Claimant on 5562 Bloomfield St.
Less \$ 856.00 referral portion due the Claimant
Less \$ 129.90 HST on referral portion due the Claimant
Less \$ 193.60 Court Costs award to the Claimant

\$457.84 total due the Defendant

There is no award for service costs or counterclaim costs as none were provided. If a formal order is required I would be pleased to receive one from the Defendant.

Dated at Halifax this 7th day of April 2015

David T.R. Parker QC
Adjudicator

Original	Court File
Copy	Claimant
Copy	Defendant