

CITATION: PKF Hotel Realty Inc. v. 3414574 Canada Inc., 2011 ONCA 77
DATE: 20110128
DOCKET: C52448

COURT OF APPEAL FOR ONTARIO

Laskin, Lang and LaForme JJ.A.

BETWEEN

PKF Hotel Realty Inc.

Applicant (Appellant)

and

3414574 Canada Inc. and Jack Lee

Respondents (Respondents)

Glenn R. Solomon, for the appellant

Wendy J. Earle, for the respondents

Heard: January 17, 2011

On appeal from the order of Justice Beth A. Allen of the Superior Court of Justice, dated June 28, 2010.

ENDORSEMENT

[1] The appellant, a real estate brokerage firm, claimed a commission from the respondents arising out of the respondents' lease and sale of a hotel property to a third party. The success of the appellant's claim turned on the interpretation of the exclusive

listing agreement. The application judge rejected the appellant's interpretation and dismissed the application. For the reasons that follow, the appeal is dismissed.

[2] Section 11 of the listing agreement, entitled SALES COMMISSION, provided that the respondents (the corporate owner of the property and its directing mind) would pay the appellant commission "if a transaction is completed" during the 180-day extended period following the termination of the listing agreement's Term. The listing agreement defined neither "transaction" nor "completed".

[3] The appellant argued that the transaction entered into by the respondents during the extended Term amounted to the respondents' sale of the property as a result of which commission became payable.

[4] The actual transaction between the respondents and the third parties consisted of two related documents: a lease agreement and an agreement of purchase and sale. The lease agreement provided for the proposed purchaser to occupy the premises immediately and to pay rent pending closing of the purchase transaction. The agreement of purchase and sale provided for immediate payment by the third party of a \$3 million deposit, a \$1 million payment six months later, and the balance of \$9 million payable on closing of the purchase one year later.

[5] The appellant argues that the combined terms of the two agreements, including terms such as the one calling for requisitions on title by the date of occupancy, evidenced

a transaction that amounted to a virtual sale of the property, with the lease merely serving as a financing arrangement akin to a vendor take-back mortgage.

[6] We do not agree. On their plain terms, the agreements provided for the lease of the lands until the proposed purchaser was obliged to buy the property a year later. Indeed, the appellant agrees that the structure of the transaction appeared to relate to the inability of the proposed purchaser to obtain financing at the time, and concedes there was no evidence that the owner structured the transaction in a particular way to change the substance of the transaction to avoid payment of any commission.

[7] The respondents argue that nothing short of the closing of a sale fits within the listing agreement's "transaction" to be "completed" in the extended period, so as to attract an obligation to pay sales commission. There is some support for the respondents' position from other terms of the agreement. For example, s. 11(b) provided commission would be paid "at the closing of the transaction or on the day set for closing where the sale is not consummated by reason of the failure of Owner to close...". This language could suggest that the "transaction" targeted is a sale of the property and the relevant time is the date set for the closing or "completion" of the sale.

[8] In any event, in the context of the listing agreement as a whole, the meaning of "transaction is completed" is ambiguous at most. Since the wording of the listing agreement was imposed by the real estate broker, such an ambiguity must be resolved in favour of the respondents.

[9] The appellant raises a secondary ground of appeal.

[10] Under the terms of the listing agreement, “sale” was defined to include both an exchange of the property as well as an option to purchase the property. The appellant argues that the two agreements were tantamount to an option completed within the extended Term and amounted to a transaction that attracted commission. In our view, the agreement of purchase and sale and agreement to lease, both of which we have described above, are quite different in nature and character from the option to purchase contemplated by the listing agreement. We also would not accept this ground of appeal.

[11] Accordingly, the appeal must be dismissed. Costs are awarded to the successful respondent in the agreed-upon amount of \$10,000, inclusive of disbursements and all applicable taxes.

“John Laskin J.A.”

“S.E. Lang J.A.”

“H.S. LaForme J.A.”