COURT OF APPEAL FOR ONTARIO

CITATION: Ariston Realty Corp. v. Elcarim Inc., 2014 ONCA 737
DATE: 20141027
DOCKET: C57073

Juriansz, LaForme and Lauwers JJ.A.

BETWEEN

Ariston Realty Corp.

Plaintiff (Respondent)

and

Elcarim Inc., Elcarim E Legna Inc., and
Elaine Wai Mascall

Defendants (Appellants)

AND BETWEEN

Elcarim Inc., Elcarim E Legna Inc., and
Elaine Wai Mascall

Plaintiffs by Counterclaim
(Respondents by way of cross-appeal)

and

Ariston Realty Corp. and Anthony Philip Natale

Defendants by Counterclaim
(Appellants by way of cross-appeal)

David A. Taub and Ellad Gersh for the appellants/respondents by way of cross-appeal

Bryan B. Skolnik, for the respondent/appellants by way of cross-appeal

Heard: September 17, 2014

On appeal from the judgment of Justice Darla A. Wilson of the Superior Court of Justice, dated April 11, 2013, with reasons reported at 2013 ONSC 1995.

Juriansz J.A.:

A. INTRODUCTION

[1] This appeal concerns a respondent real estate broker's entitlement to commission on the sale of a property, pursuant to a listing agreement. For the reasons that follow, I would allow the appeal, concluding that the respondent has no contractual entitlement to commission. However, I would also allow, in part, the cross-appeal, concluding that the respondent is entitled to some compensation under the doctrine of restitutionary *quantum meruit*.

B. FACTS

[2] Elcarim Inc. and Elcarim E Legna Inc. ("Elcarim") are real estate investment firms, whose sole officer, director and directing mind is Elaine Mascall. Together, the now amalgamated companies and Mascall are the appellants and the respondents by way of cross-appeal.

[3] Ariston Realty Corp. ("Ariston") is a real estate brokerage firm, at which Anthony Philip Natale is a commercial real estate broker and principal. Ariston and Natale are the respondents and cross-appellants.

[4] On February 10, 1999, Elcarim and Ariston entered into a listing agreement for the sale of a property owned by Elcarim ("the property"). The agreement, which expired on August 30, 1999, contained the following holdover clause:

> I agree to pay you a commission of 5% of the sale price of my property on completion of any sale ... effected during the currency of this agreement from any source whatsoever, or on any sale ... effected within six months after the expiry of this agreement with any party to whom you or your representatives or co-operating brokers have introduced my said property during the term of this agreement, *provided you have notified me in writing prior to the expiry of this agreement of the name of such party you or your representatives or co-operating brokers have introduced to the property*….[Emphasis added.]

[5] During the term of the listing agreement, Ariston introduced Context Development Inc. ("Context"), the eventual purchaser of the property, to Mascall. However, Ariston never provided written notification that it had introduced Context to the property.

[6] On December 16, 2001, some three and one-half months after the expiry of the listing agreement, Context signed an agreement of purchase and sale of the property. After the sale closed on April 30, 2002, Ariston submitted an invoice to Elcarim for commission on the sale. Elcarim did not pay the invoice and Ariston commenced an action for payment.

C. DECISION BELOW

[7] The trial judge found that Natale and Context's broker, Struys, had introduced Context to Mascall for the purpose of discussing the property during the term of the listing agreement. She concluded that this involvement by the cooperating brokers in the initial presentation of the property met the introduction requirement of the listing agreement.

[8] The trial judge held that Ariston's failure to provide written notice of the introduction was of no significance. She reasoned that the purpose of the written notice requirement in the listing agreement was to ensure that the vendor was aware commission would be owed once the sale was completed because the broker had introduced the purchaser to the property during the term of the listing agreement. She found that this purpose had been achieved as Mascall had been aware of Natale's involvement in the introduction from the outset, and of his corresponding expectation of commission.

[9] The trial judge held Elcarim and Mascall personally, liable for the unpaid commission, together with interest.

D. POSITIONS OF THE PARTIES

[10] The appellants submit that the trial judge focused on the wrong question regarding the introduction, and concluded that Natale introduced Context to Mascall rather than "to the property" as required by the holdover clause.

[11] The appellants submit that Ariston did not introduce Context “to the property” within the meaning of the clause. Rather, it was Struys who first took Cohen, the principal of Context, to the property.

[12] They further submit that the trial judge misapprehended the evidence by finding that Struys had been a real estate agent for more than 25 years. According to the appellants, this misapprehension led the trial judge into error when she found Struys was a cooperating broker within the meaning of the holdover clause, despite the fact that he was not licensed as a real estate broker at the time.

[13] Second, the appellants submit that the trial judge erred in failing to strictly apply the written notice requirement contained in the holdover clause of the listing agreement.

[14] Finally, the appellants submit that the trial judge erred in finding Mascall personally liable for any commission owing to Ariston.

[15] The respondent submits that it is entitled to commission pursuant to the listing agreement. In the alternative, it submits, on cross-appeal, that it is entitled to its full commission on the basis of *quantum meruit* and unjust enrichment.

E. ISSUES

[16] Thus the appeal raises the following issues:

(1) Did Ariston introduce Context to the property, as required to claim commission under the terms of the listing agreement?

(2) If yes, is Ariston's failure to provide Elcarim with written notice of the introduction a bar to its claim for commission under the listing agreement?

(3) If yes, is Ariston instead entitled to compensation from Elcarim on the basis of *quantum meruit*?

(4) Is Mascall personally liable for any compensation owed by Elcarim to Ariston?

F. ANALYSIS

(1) Introduction to the Property

[17] The trial judge did misapprehend the evidence. Struys testified that, at the time of trial, he had been a licensed real estate broker for only two and a half years. At the time of the events he was not licensed, but worked as a consultant for Context, and would look for and conduct due diligence on potential properties for Context to develop. Natale discussed with Struys the possibility that Context might be interested in the property and arranged a meeting between Cohen and Mascall, at which Cohen could see the property.

[18] I need not determine whether Natale's involvement with Struys and Cohen satisfied the introduction requirement of the clause, as I would allow the appeal because of Ariston's failure to provide written notice of the alleged introduction.

(2) Written Notice of Introduction

[19] It is well-established that contracts are to be interpreted in accordance with the intentions of the parties, as evidenced by the words used, and in light of the underlying context of the agreement. This court summarized the basic principles of commercial contract interpretation in *Salah v. Timothy's Coffees of the World Inc.*, 2010 ONCA 673, 74 B.L.R. (4th) 161, at para. 16:

> The basic principles of commercial contractual interpretation may be summarized as follows. When interpreting a contract, the court aims to determine the intentions of the parties in accordance with the language used in the written document and presumes that the parties have intended what they have said. The court construes the contract as a whole, in a manner that gives meaning to all of its terms, and avoids an interpretation that would render one or more of its terms ineffective. In interpreting the contract, the court must have regard to the objective evidence of the "factual matrix" or context underlying the negotiation of the contract, but not the subjective evidence of the intention of the parties. The court should interpret the contract so as to accord with sound commercial principles and good business sense, and avoid commercial absurdity. If the court finds that the contract is ambiguous, it may then resort to extrinsic evidence to clear up the ambiguity.

[20] These principles did not guide the trial judge's interpretation of the contract. The trial judge interpreted the holdover clause to require that Elcarim

was aware Ariston introduced Context to the property, regardless of whether written notice of the introduction was provided. In doing so, she effectively replaced the requirement of written notice with a requirement of actual notice.

[21] In my view, such an interpretation does not accord with sound commercial principles and good business sense. The requirement of written notice, rather than actual notice, is intended to promote commercial certainty and to reduce the potential for litigation, such as that with which we are now dealing.

[22] Justice Howden, who dealt with an identical holdover clause in *C.B. Richard Ellis Ltd. v. Swedcan Lumican Plastics Inc.* (2002), 60 O.R. (3d) 551 (Ont. S.C.), put the matter very well, at paras. 21-22:

> This holdover clause attempts to reverse the normal contractual expectation that expiry terminates the listing contract and the principal will become liable for commission only if the precise commission-earning event stipulated in the clause occurred; hence Foster's conclusion [in *Real Estate Agency Law in Canada*, 2nd ed. (Toronto: Carswell, 1994), at p. 129] that holdover clauses are to be interpreted strictly.
>
> …
>
> In the end, in view of the widespread use of standard form listing agreements, the principle of commercial certainty is most important. Persons using them must have confidence that they mean what they say and that their purpose will be honoured by the court. Such forms are used, no doubt, hundreds of times per week in this country. [Footnotes omitted.]

[23] Justice Howden noted that in the case before him, the lack of certainty in the construction of the holdover clause had led to ludicrous positions as the parties attempted, with considerable difficulty, to reconstruct the events of some four years earlier (para. 23). He concluded that the written notice requirement was more than a mere formality (para. 17) and that strict compliance with this requirement was a condition precedent to entitlement to commission under the holdover clause (para. 20).

[24] I agree with Justice Howden's analysis. The provision of written notice was a condition precedent to Ariston's entitlement to commission on a sale executed after the expiry of the listing agreement. Having failed to fulfill this condition precedent, Ariston has no contractual entitlement to commission.

(3) Compensation under *Quantum Meruit*

[25] Ariston claims it is entitled to compensation – equal to the amount of commission it would have received pursuant to the listing agreement – under the doctrines of *quantum meruit* and unjust enrichment. While I do not completely accept this argument, I do find that Ariston is entitled to some measure of compensation on the basis of *quantum meruit*.

[26] In my view, Ariston cannot claim its commission on the basis of *quantum meruit* for services provided pursuant to the listing agreement during the term of the agreement. Such services are governed by the agreement. The introduction

of Context to the property was a service provided pursuant to and during the term of the agreement.

[27] The existence of the agreement is a juristic reason for refusing Ariston's claim for its commission on the basis of *quantum meruit*: *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269, at para. 41. Equity cannot imply and substitute another contract with conflicting terms in place of the listing agreement.

[28] However, the services Ariston provided to Elcarim after the expiry of the listing agreement are a different matter. Ariston can claim reasonable compensation for these services on the basis of *quantum meruit.* Justice Cronk articulated the nature of such restitutionary relief in *Consulate Ventures Inc. v. Amico Contracting & Engineering (1992) Inc.*, 2007 ONCA 324, 282 D.L.R. (4th) 697, at paras 95, 99:

> Such a claim is not dependant on the existence of a valid contract. Rather, it is a discrete cause of action, separate and apart from claims grounded in contract or tort, which contemplates a remedy for unjust enrichment or unjust benefit.
>
> …
>
> Thus, where the claim for restitutionary relief is based on *quantum meruit*, as in this case, an explicit mutual agreement to compensate for services rendered is not a prerequisite to recovery. It suffices if the services in question were furnished at the request, or with the encouragement or acquiescence, of the opposing party in circumstances that render it unjust for the opposing party to retain the benefit conferred by the provision of the services.

[29] The trial judge made clear findings that Natale continued to assist Elcarim after the expiry of the listing agreement. For instance, Natale attended meetings with Mascall and Context and assisted Elcarim in responding to an action for specific performance brought by Context, which was eventually settled.

[30] Elcarim accepted the provision of these services with full knowledge that the listing agreement had expired and that Natale expected to be paid for its efforts to close the deal with Context. Accordingly, Ariston is entitled to some compensation in *quantum meruit* on the basis of an implied contract that followed the expiry of the listing agreement.

[31] I emphasize that under the implied contract, Ariston may claim payment only for the services Natale provided after the listing agreement expired. These services did not include introducing Context to the property, which had been done before the listing agreement expired.

[32] Recognizing that the services Natale provided after the expiry of the listing agreement are not easily valued, I would allow the cross-appeal and award Ariston $20,000 on the basis of *quantum meruit*. In my view, this lesser amount, as compared with the full commission granted by the trial judge, is just, equitable and reasonable in the circumstances: see G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed. (Toronto: Carswell, 2011), at p. 670.

(4) Personal Liability

[33] I conclude that the trial judge erred in ruling, in her supplementary reasons, that her judgment ordering payment of the commission applied to all the defendants, including Mascall personally. There was no basis for holding Mascall personally liable. While Mascall was no doubt the directing mind of Elcarim, the evidence fell far short of establishing that she had acted in pursuit of some interest separate from that of the corporations, as required for her to be found personally liable: *Truckers Garage Inc. v. Krell* (1993), 3 C.C.E.L. (2d) 157, at para. 40.

[34] The corporate appellants alone are liable for the compensation owed to Ariston.

G. DISPOSITION

[35] For the reasons above, I would allow the appeal, set aside the judgment of the trial judge, and replace it with a judgment dismissing Ariston's claim.

[36] I would also allow, in part, the cross-appeal, finding Elcarim liable to Ariston in the lesser amount of $20,000, on the basis of *quantum meruit,* for services provided after the expiry of the listing agreement.

[37] At the close of the appeal hearing, counsel indicated to the court their agreement on the costs to be awarded in the event one or the other were successful. In view of the divided success, that agreement does not apply. If the

parties are unable to reach agreement on costs, they may file written submissions, of no more than five pages, with the court.

Released: OCT 27, 2014
(RGJ)

"R.G. Juriansz J.A."
"I agree H.S. LaForme J.A."
"I agree P. Lauwers J.A."