CITATION: Ashton Realty v. Moyes, 2015 ONSC 8046
COURT FILE NO.: DC-3-15
DATE: 2015-12-23

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
Ashton Realty Inc.	)	
	)	
Plaintiff (Respondent in Appeal)	)	No one appeared
	)	
– and –	)	
	)	
	)	
	)	
Patricia Anne Moyes	)	Katherine Metcalf - Counsel for the Appellant
	)	
Defendant (Appellant in Appeal)	)	
	)	
	)	
	)	**HEARD:** December 21, 2015

THE HONOURABLE JUSTICE JAMES W. SLOAN

[1] This is an appeal to the Divisional Court from a Small Claims Court Judgment.

[2] The defendant Moyes, signed a Buyer Representation Agreement ending on October 28, 2013 at 11:59 pm.

[3] The Buyer Representation Agreement contains the following clauses among others:

> 2 "…If, during the currency of this agreement, the buyer enters into an agreement to purchase or lease a real property of the general description indicated above, the buyer agrees that the brokerage is entitled to receive and retain any commission offered by a listing brokerage or by the seller …"
>
> "The Buyer agrees to pay the Brokerage such commission if the Buyer enters into an agreement within _____ days after the expiration of this Agreement

> **(Holdover Period)** to purchase or lease any real property shown or introduced to the Buyer from any source whatsoever during the term of this Agreement, provided, however, that if the Buyer enters into a new buyer representation agreement with another registered real estate brokerage after the expiration of this agreement, the buyer's liability to pay commission to the brokerage shall be reduced by the amount paid to the other brokerage under the new agreement."

[4] The number of days in the above-mentioned paragraph defined as the holdover period was left blank.

[5] Moyes initially signed an Agreement of Purchase and Sale using another realtor to buy a property, on October 26, 2013.

[6] This offer contained two conditions, one of which was she wanted written permission from the Condominium Corp. to have two pets (dogs) rather than the allowed number of one.

[7] On October 28, 2013, Moyes resigned the Agreement of Purchase and Sale increasing the purchase price but leaving the pet condition in the agreement.

[8] On October 31, 2013, the board of the Condominium Corp. granted her request to exceed the limit on the number of pets allowed.

[9] On October 31, 2013, Moyes signed a Notice of Fulfilment of Condition making the Agreement of Purchase and Sale a firm and binding contract.

[10] Moyes' position is that the October 28, 2013 offer was not a valid contract until the pet condition was satisfied, and the pet condition was not satisfied until October 31, 2013, after the expiration of the Buyer Representation Agreement.

[11] In the Trial Judge's reasons he stated at paragraph 29:

> "There was no ultimate waiting period and the conditions could have been complied with and waived at any point including the day that the agreement was presented. As such, it is not a condition subsequent and was a valid contract as of October 26, 2013" (I believe the word subsequent is a typo and should read precedent)

[12] At paragraph 30 he stated:

> "The buyer's agreement and other documents as well as the actions of the parties suggest to me that there was in fact an agreement and understanding that the defendant had in fact retained the plaintiff to find her a new home."

[13] It is obvious that Moyes entered into a conditional agreement to purchase real property before 11:59 PM on October 28, 2013.

[14] Is a conditional "agreement to purchase" an "agreement to purchase" within the Buyer Representation Agreement?

[15] Moyes argues that the conditional agreement to purchase was not a valid contract until the pet condition was satisfied and the pet condition was not satisfied until October 31, after the expiration of the Buyer Representation Agreement.

[16] Moyes relies in part on the case of *Naccarato v. Boudry*, 1980 CarswellOnt 2172, where the agreement of purchase and sale included a condition to secure financing from a third party.

[17] The court states at paragraph 40 "... In addition, the conditional clause is, in effect a condition precedent to a binding agreement and until that condition has been fulfilled there is no binding contract of sale."

[18] Following *Zhilka v. Turney*, [1959] S.C.R. 578, and as explained more recently in *Hilchie v. Wateron Condominiums Inc.*, 2012 NSCA 126, 2012 CarswellNS 952, a true condition precedent has three elements:

1) the term is a future uncertain event beyond the parties' control (i.e. the happening of the event is within a third party's control),

2) no party reserves the right to waive the condition, and

3) there can be no breach of contract should the event not occur.

[19] I find that the first element is satisfied. The decision to allow Moyes to keep two dogs in the condominium unit is an uncertain event. Further, it is a decision the Condominium Corporation controls, so the happening of the future event is beyond the parties' control.

[20] The third element also appears to be satisfied.

[21] With respect to the second element, the condition we are dealing with in Schedule A to the Agreement of Purchase and Sale reads as follows:

> "This offer is conditional upon the Buyer receiving express permission, from the Condominium Corporation, to have two dogs. If the buyer cannot get this permission by November 7, 2013, then this offer shall be null and void and the buyers deposit shall be returned in full without production."

[22] Nothing in the agreement states that this condition was inserted for the benefit of the purchaser (Moyes) and could be waived by her at any time.

[23] The trial judge found the "condition could have been ... waived" but nowhere in his reasons does he state how he arrived at this conclusion.

[24] From a practical point of view, it is highly likely that if Moyes wanted to waive the condition, the seller would have consented.

[25] However the term at issue here does not expressly allow either party to waive the condition. In addition, Moyes did not waive the condition.

[26] Therefore, I find that the second element has also been satisfied and find that there was no contract until the "pet condition" was fulfilled on October 31, 2013.

[27] I therefore set aside the judgment of Deputy Judge Lannan dated January 12, 2015 and dismiss the Plaintiffs claim with costs.

[28] I also dismiss the cross-appeal of the Respondent without costs.

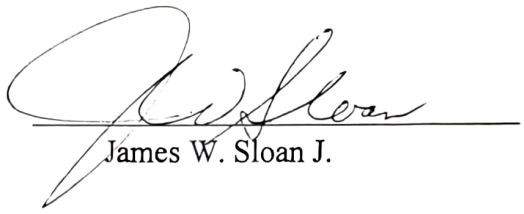
Costs

[29] The Appellant has submitted a bill of costs for this Appeal on a partial indemnity basis, for fees in the amount of, $5,393.80 plus HST and $1,445.58 in disbursements, inclusive of HST for a total of $7,540.58.

[30] The initial judgment in this matter was for $7,006.

[31] The request for costs in this matter certainly offends against the rule of proportionality.

[32] The appellant shall have her costs as follows, legal fees are fixed in the amount of $3,390 and disbursements in the amount of $1,445.58, inclusive of HST, for a total of $4,835.58.



James W. Sloan J.

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– and –

Patricia Anne Moyes

Defendant (Appellant in Appeal)

REASONS FOR JUDGMENT

J.W. Sloan J.

Released: December 23, 2015