Case a reminder to get it in writing

Real estate broker out $100K commission and $150K in costs

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For Law Times

A recent Ontario Court of Appeal decision serves as a stern reminder for those working with any kind of contract to get it in writing. If not, thousands of dollars can be on the line. For one real estate broker, the failure resulted in the loss of $100,000 in commission along with a costs award of $150,000.

"There's probably hundreds of these signed every day across Ontario and people need to know what they're getting into," says Matt Maurer, a litigator with Minden Gross LLP. "It sends a clear message. . . . If your contract requires written notice, you've got to give written notice or you're not going to get paid. I think in this case the Court of Appeal wanted to emphasize the principle of commercial certainty and strict adherence to the terms of written agreements, especially so since Superior Court judges will be obligated to follow suit."

At the core of *Ariston Realty Corp. v. Elcarim Inc.* is the relationship between Elcarim Inc., a real estate investing company owned by Elaine Mascall, and real estate brokerage Ariston Realty, whose principal is commercial real estate broker Anthony Philip Natale.

The two entered into a six-month listing agreement that contained a holdover clause stipulating that any introductions made in writing and resulting in a sale within six months of the expiration of the listing would result in a commission for Ariston.

Natale introduced Context Development Inc. to the listed property. Just over three months after the listing agreement period expired, Context Development purchased the property. But there was no paper trail for the introduction. And when Ariston submitted an invoice to Elcarim for commission on the sale, the company refused to pay.

The trial judge found the lack of written notice not to be of issue and ordered Mascall's Elcarim to pay the $120,000 commission. Mascall begged to differ and won on appeal. While Justice Russell Juriansz of the Ontario Court of Appeal decided the lack of written notice was indeed a significant issue, he did throw the real estate broker a bone.

"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."

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So while the court denied Natale the $120,000 commission, Juriansz did find the value of his services following the six-month listing period to be worth $20,000. Juriansz determined the trial judge based the finding on actual rather than written notice. And that, he declared, goes against the principles of commercial contract. "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," wrote Juriansz.

In the followup decision involving costs, Elcarim received $20,000 for the costs of the appeal and $130,000 for the trial.

While the judgment, which leaves the broker $100,000 short, combined with the costs award might seem harsh, the appellate court did follow the letter of the contract, says Maurer. The clause did refer to making the introduction in writing, something the broker had failed to do.

Lawyer Bryan Skolnik says that while that's indeed the way the clause reads, that wasn't the intent.

"The notice-of clause was intended to protect the vendor of property and ensure they wouldn't be liable for a commission that they weren't aware of after the fact," says Skolnik, who acted for Ariston.

And the reference to making introductions in writing is no longer in the standard boilerplate used by agents across Toronto. In Ariston's case, the broker's name also appeared in the agreement, according to Skolnik. As a result, a written introduction seemed superfluous.

"While there was not strict compliance with the terms of the agreement, everyone knew what was happening," he says.

The Court of Appeal determination, however, does serve as a lesson to the real estate industry, Skolnik adds.

"You have to strictly comply with every single term and if you don't, you're not going to be getting your commission."

That lesson applies to scenarios that use clauses, such as leases, says David Taub, who represented Elcarim. This case paid particular attention to the need for a written document even if it seemed superfluous.

"If there's an argument that it was oral, this decision will guide courts that if a written notice is a prerequisite . . . then a written notice is required," says Taub, a partner at Robins Appleby LLP.

He expects the decision will also reduce the number of lawsuits.

"It reinforces what should have been settled law and should have been in this case." LT