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Look before you waive a contract condition

And if something goes wrong, try to settle out of court

Almost every agreement of purchase and sale these days - whether for a new or resale home or condominium - has a condition of some kind in it.

When the time comes to waive a condition and make the transaction firm and binding, it's always a good idea to exercise a great deal of caution. If a condition is waived prematurely, the results can be disastrous to all parties.

A good example of this is found in a case heard in Windsor earlier this year. The decision in Nykor vs. Cil was released in July and serves as an important lesson for homebuyers and their real estate agents.

On July 5, 1996, Havva Cil signed an offer to purchase a single-family home at 240 Cabana Rd. W., in Windsor, from the owner, Beverly Anne Nykor.

The contract price was $172,000. Buckingham Realty (Windsor) Ltd., and its agent Jeannette Tourond handled the listing and sale of the property.

The offer was made subject to two specific conditions.

Condition A was that the buyer would be able to arrange a $50,000 first mortgage against her existing home on Montrose Ave. in Windsor. The mortgage in this condition was to be for a one-year period with interest at not more than 7.25 per cent.

This money was to be used as the down payment on the Cabana Rd. property so that Cil would not have to pay a high-ratio CMHC mortgage insurance premium on the financing.

Condition AA made the purchase subject to arranging a new five-year first mortgage of not more than $122,000, with interest at a maximum of 7.95 per cent.

The purchasers required two separate mortgages so that when they sold their house on Montrose, they could pay off the $50,000 mortgage on it without penalty.

After the conditional agreement on the Cabana property was signed, Touround recommended that Cil consult Jordan Services, a mortgage broker, to arrange the necessary first mortgages of $50,000 and $122,000.

Ten days later, the broker called the purchaser and the realtor to advise that the required financing of $172,000 had been arranged. Based on what she heard from the mortgage broker by telephone, Tourond believed the financing matched the specific requirements of the agreement of purchase and sale. She visited Cil the same evening to tell her she had the mortgage, and to get her to sign a waiver of both financing conditions. At this point, neither Cil nor Tourond had actually seen a commitment for the mortgages.

In fact, it was not until Cil and her husband went to see their lawyer to sign the closing documents that they discovered the broker had arranged only one mortgage in the amount of $172,000, which was to be registered against both the Montrose property and the Cabana Rd. house.

When the purchaser discovered she was not getting a $50,000 mortgage on one property and $122,000 on the other, she refused to close the transaction.

Several weeks later, Nykor put the Cabana house back on the market. Because she was in default on her mortgage, she accepted a "fire sale" price of $140,000 - $32,000 less than Cil had been willing to pay.

Eventually, Nykor sued Cil to recover her losses after Cil aborted her purchase, and Cil in turn sued her realtor, Tourond and Buckingham Realty, for negligence and misrepresentation as to the existence of a mortgage commitment.

Cil's claim against the agent and broker is known as a third-party action, and it is tried at the same time as the main action.

Justice Anthony Cusinato decided that when Tourond told the purchaser she had the mortgage, she led the purchaser to believe the financing matched the requirements of the offer.

This, said the judge, was not the case. It would have been better for the agent to have said nothing, or to have visited the purchaser after she had signed the mortgage commitment.

The judge called Touround's assurance to Cil that she had the financing an "innocent but negligent misrepresentation."

It was this assurance that directly led to Cil signing the waiver, and the conditional agreement becoming firm and binding.

According to the judge, the agent "imposed upon herself an obligation, which was not to make a representation even though innocent, but which was untrue."

Resolving disputes in a courtroom is a luxury few of us can afford

In reaching his decision, the judge concluded it was Touround's ultimate actions that made the agreement binding, and the purchaser's refusal to close that created the breach of contract.

As a result, the purchaser, Cil, was found liable in damages to Nykor, the vendor, and Cil in turn was entitled to recover those damages from her agent and broker. As a result, the purchaser who actually breached the contract did not have to pay anything to the vendor.

The total losses of the vendor were calculated at almost $29,000 but were reduced by $9,600 to reflect the fact that the Cabana property was sold for far less than its market value.

Five years to the day after the original transaction was signed, Cusinato set the final calculation of damages at slightly more than $24,000, including five years of pre-judgment interest.

The defendant had to pay her own costs of the six-day trial, and the plaintiff's costs against the realtor were reduced because she was only partly successful.

Like many court cases, nobody in this action was a clear winner.

The plaintiff only got part of her losses and part of her lawyer's costs. The defendant had to pay all of her own lawyer's costs for six days in court and extensive preparation.

The third party agent and broker (or their insurers) had to pay damages to the plaintiff, plus all of their own lawyer's fees, and some of the plaintiff's costs. Everybody spent six days in court and more time in pre-trial examinations.

The lessons for other homebuyers and sellers from Nykor vs. Cil are twofold:

First, never waive a condition until you have all the relevant facts in hand and in writing.

Second, always consider alternatives such as mediation or arbitration or even doing nothing, before heading off to court. Resolving disputes in a courtroom is a luxury few of us can afford.

CORRECTION: Typographical gremlins visited this column on Aug. 18. The number of residential units in the Metropole condominium complex was misstated. The correct number is 314.

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