

PROVINCIAL COURT OF
BRITISH COLUMBIA

Citation: ☀

MAR 28 2018

NORTH VANCOUVER
SMALL CLAIMS

Date: ☀
File No: C-1323754
Registry: North Vancouver

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

BETWEEN:

MOSA TAGHIPOUR and ZOHREH VALIBEIGI

CLAIMANTS

AND:

**KOUROS PEZESH,
KOROUS PEZESH PERSONAL REAL ESTATE CORPORATION
SUSSEX GROUP - S.R.C. REALTY CORPORATION
C.O.B.A.
PRUDENTIAL SUSSEX REALTY CORPORATION**

DEFENDANTS

**REASONS FOR JUDGMENT
OF THE
HONOURABLE JUDGE D.E. MOSS**

Counsel for the Claimants:

L. Smeets

Counsel for the Defendants:

C. Spratt, Kelly Murray

Place of Hearing:

North Vancouver, B.C.

Dates of Hearing:

June 17, 2016, March 1, 3, 5, 6, 2017, March 6, 2018

Date of Judgment:

March 27, 2018

[1] The claimants sue their real estate agent Kouros Pezesh and his personal real estate corporation as well as Prudential Sussex Group Realtors (Sussex). Their claim is for funds wrongfully withheld and paid toward an assignment fee and listing brokerage commission of \$16,266.50 and for legal fees (estimated total \$12,000.00), but actually \$8,731.50 for a total of \$25,000.00 plus filing fee (Statement of Claim). Mr. Pezesh has been practicing real estate for 15 years.

[2] Their claim against their realtor is for (a) breach of a fiduciary duty of care and (b) negligent misrepresentation. All defendants deny their dealings with the claimants were inappropriate and maintain, at all times, realtor Mr. Pezesh exhibited the appropriate standard of care expected of a reasonably prudent real estate brokerage firm and a reasonably prudent real estate agent.

[3] The primary witness for the claimants was Mrs. Zohreh Valibeigi. She maintained she required an interpreter throughout in the Farsi language. Clearly however she has some facility in the English language. She says she understands calculations. The trial was conducted through a Farsi interpreter Mr. Talerian.

[4] The claimant is 56 years of age a well-educated woman, well-travelled and familiar with real estate purchases. She and her husband Mr. Taghipour came from Iran to Canada between 2008 and 2010 on several occasions finally moving to Canada in 2010, i.e., seven years ago. She is a retired nurse from Iran. Her spouse is a retired neuro-surgeon. They have lived briefly in Australia and the United States where her husband was at an American university. Both of their adult children are fluent in English. Mr. Taghipour has taken an English course, but felt he also required an

interpreter.

[5] The basis of their claim is their Farsi speaking realtor Mr. Kouros Pezesh:

- (a) Did not explain “any” legal documentation to them. This is despite their initials and signatures appearing on all key transactional documents.
- (b) They both claim during their March 2009 search for suitable real estate, they relied completely on him. They “trusted” him. The realtor was initially a stranger but became more or less a social friend as well. They were introduced through a doctor friend in whom they also placed their “complete trust”.
- (c) They claim Mr. Pezesh never asked them if they understood the documentation they were signing, i.e., the assignment documents, the listing documents etc.
- (d) They claim their realtor misled them as to the price of the property. They thought they were getting the property for \$1,097,000.00.

Their realtor strongly disputes each of these allegations.

[6] The property located at 1401 – 1499 West Pender Street was originally purchased in October 2007 by Behzad Razmjouy and Afsan Hadadroshan on a pre-build basis. Their purchase price was \$1,097,000.00 with a \$219,400.00 deposit. (Exhibit 13, Tab 1, Claimants’ Book). The final payment was not due until an occupancy permit was obtained from the developer Reliance Properties Coal Harbour Ltd.

[7] Two years later and before occupancy (early 2009) these original owners listed their pre-build for sale with Prudential Sussex Realty and Mr. Pezesh (Exclusive Listing). Their listing price was \$1,200,000.00 with a brokerage commission of \$4,500.00 (Exhibit 13) to be paid by the seller. Mr. Pezesh acted as a limited dual agent. (Exhibit 13, Clause 9, Tabs 9 and 10, Claimants’ Book). Having listened

carefully to the evidence of the parties, it is my conclusion the claimants understood the nature of a dual agency. Their agent Mr. Pezesh testified he explained everything carefully and got the claimants to initial dual agency documents.

[8] The claimants took their interest as assignees from the original purchasers despite an error in the date (January 20, 2009). They knew their realtor was a dual agent for both parties.

[9] Mr. Pezesh testified he also gave his clients advice on whether or not to buy various properties including in the downtown Shangri-La complex. Mrs Valibeigi claims Mr. Pezesh told them he knew someone who was pre-selling a condominium unit for \$50,000.00 under the market price. This claim is disputed by the real estate agent. They were expecting to pay \$50,000.00 under the list value because the vendor wanted to free up some money to buy property in California.

[10] I infer from the claimant's evidence she is an educated person, not unfamiliar with buying and selling real estate. To somewhat of a lesser degree so was her husband. Mrs. Valibeigi had most of the discussion regarding the purchase. In early March 2009 they looked at various properties with their realtor and they made offers on some including: 3701-1111 Alberni, 3408-1111 Alberni, 3703-1111 Alberni and 3404-1111 Alberni (their son's condominium). Mr. Taghipour testified he let his wife do the negotiating. He focussed on the selling price.

[11] Mrs. Valibeigi maintains the realtor never explained to them the requirement of a developer's assignment fee of \$11,518.50 nor the necessity to obtain the developer's consent to assign a pre-build contract. She did know in Toronto, Ontario you needed

the developer's consent to assign a pre-build contract. Mrs. Valibeigi is not, in my view, a naïve purchaser. One of the main points of contention is whether their realtor told them they could get this condo for \$50,000.00 below market. Mrs. Valibeigi said they were never told the original 2007 selling price until they found out on April 15, 2009, the date of the assignment of purchase and sale to them. (Exhibit 6, Tab 5).

[12] Both she and her husband signed the assignment contract and initialled each and every page, yet both maintain they did not know what they were signing. This is often in law referred to as non est factum. They claim realtor Pezesh did not explain any documentation to them, nor would it appear did they inquire. They have adult children fluent in English. They have travelled extensively and lived in the United States and Australia, they have bought and sold properties. They purchased one condominium for their son within days of their assignment purchase on April 15, 2009.

[13] The claimants used a Farsi-speaking realtor presumably to assist them in understanding details of their real estate purchase, their various offers and acceptances including their "Assignment of Contract of Purchase and Sale". According to the claimants, their realtor called between the 13th and 17th of April to advise them the assignor would not sell for \$50,000.00 below his asking price. Mr. Taghipour told his wife that they should buy anyhow.

[14] Mrs. Valibeigi disagrees. She makes all the business decisions. "My husband only signs documents." She maintains she told the realtor "if the assignor is not prepared to offer us a \$50,000.00 discount, I am not prepared to offer one cent more." She also testified she felt they were paying \$1,097,000.00 for the property and ended

up paying \$1,204,000.00, not the expected \$1,097,000.00. They made two payments of \$237,898.00 deposit and \$966,160.00. (Exhibit 23, Tab A, p.31). The total was \$1,204,058.00. They did not use a lawyer when they paid the initial deposit, but used Mr. Parks for the completion documentations.

[15] Regarding the Assignment of Purchase and Sale, Mr. and Mrs. Valibeigi both maintain throughout (Exhibit 6) their evidence:

- (a) That they did not read the document.
- (b) Her signature and initials were on documents. "He told us where to sign and initial." She even questioned whether or not one document contained her initials.
- (c) No one reviewed any documents with them.
- (d) Their realtor Mr. Pezesh simply said "sign this document. It is "OK!"
- (e) The realtor never discussed any assignment fee with them. "I don't even know what it is". I find this improbable.
- (f) She says she asked their realtor if the \$237,896.00 amount was correct or too much and Mr. Pezesh told her "don't worry, we will get you a credit". He disputes this claim.
- (g) Despite asking Mr. Pezesh for copies of contract documents, he did not provide any. Mr. Pezesh says he did.
- (h) They signed the Assignment document, but never read it and it was not explained to them. Ms. Valibeigi maintains although they signed the assignment document, they did not understand it. (Exhibit 8).
- (j) The May 20, 2011 buyer's Statement of Adjustment prepared by their lawyer Mr. Parks (Exhibit 9, p.36), incorrectly described the responsibility to pay an "Assignment Fee" of \$13,000.00 to the assignors fell to the claimants. (Exhibit 9, p.3). This also called for an additional \$260.00 for property purchase tax. This increased their total overall closing payment to \$966,160.26. Mrs. Valibeigi testified she did not agree to this figure but felt "trapped" therefore paid the amount of \$966,160.26 to complete the

transaction. Her lawyer Mr. Parks had originally described the purchased price as being \$1,097,000.00. This was corrected to \$1,110,000.00 in Mr. Parks revised Statement of Adjustment. (Exhibits 9, 10, 11). She feels they paid \$18,000.00 more than she expected. On the evidence the claimants did not pay a developer's assignment fee, but rather an assignment amount of \$13,000.00 was paid by them to the assignors as consideration for the assignment. (Exhibit 7).

- (k) In answer to her counsel's question, Mrs. Valibeigi felt she paid \$13,000.00 more for the property than the original purchaser, i.e., who paid \$1,097,000.00. Mrs. Valibeigi maintains if they have known they would not have bought the condominium. She says her realtor did not respond to her questions after they received their Statement of Adjustments. Their realtor made a realtor's fee of \$4,500.00. (Exhibit 12).

[16] The evidence from Mrs. Valibeigi as to whether she signed the Limited Dual Agency Agreement is somewhat in conflict. I am satisfied both she and her spouse did sign the document (Exhibit 21) incorrectly dated the 20th of January 2009. At one point, she admitted signing the document but was not sure she was even in the country on January 20, 2009. She said she could not recall signing the Limited Dual Agency document. I find her evidence in this regard less than compelling.

[17] On cross-examination, Mrs. Valibeigi continued to use the interpreter more or less throughout but occasionally answered in English. She confirmed they had travelled extensively throughout the world and that her children speak English. They have owned property in Canada before in Toronto as well as in Iran. They have lived in the United States. They purchased a pre-sale contract in Toronto in 2008. They used a realtor in Toronto.

[18] Mrs. Valibeigi agrees in early March 2009 they were shown various properties by their agent before they offered on 1401-1499 West Pender Street. She tended to

minimize their realtor's attempts at assisting them finding suitable properties. They had been introduced to their realtor by a trusted doctor friend. She maintains her realtor never discussed with them the pricing of Vancouver Downtown real estate or what was involved in strata ownership, or assignment of pre build properties. Mr. Pezesh testified to the contrary.

[19] She agreed they made other offers that were not accepted in the downtown area and were assisted in that regard by defendant Pezesh. Their offer to purchase 3404-1111 Alberni (son's condominium) was accepted and completed on April 9, 2009, a brief six days before their own purchase on April 15, 2009.

[20] Mrs. Vallibeigi initially testified they would not have bought their property if the selling price had been \$1,110,000.00. In cross examination she conceded "if he had told me from the beginning that was the price I might have bought it." (Transcript, March 3, 2017, p.5, lines 1-8)

[21] Mrs. Vallibeigi confirmed on cross examination Mr. Pezesh told her he was the listing agent for the assignor of 1401-1499 W. Pender. (Transcript, March 1, p.42, lines 18-21):

Q: He told you he was the listing agent for the assignor?

A (Mrs. Vallibeigi): Yes, they hired him to do that.

Mrs. Vallibeigi obviously realized he would be paid for his services. She also confirmed their realtor provided a document "Your Relationship with a Realtor" bearing both her and her husband's signatures. Their answer to that fact is nothing was explained to them. They were simply asked to sign.

[22] Mrs. Vallibeigi seems to say they signed legal documentation throughout, without knowing what they were signing.

[23] In response to questions at p.43, lines1-46:

Q: If he (Pezesh) did not review the document you/and/or your husband could have asked him to translate the document for you ----

A: ...well, that was the mistake, you know throughout this whole process of buying until now, this is the mistake I made”.

[24] Mrs Vallibeigi’s evidence is that their realtor put documents in front of them and said “well initial, sign”. He never reviewed them nor did they ask for clarification. I find this improbable.

The Assignment of Contract of Purchase and Sale (Exhibit 7, April 15, 2009)

[25] Again Mrs. Vallibeigi agrees they signed but did not read the document.

[26] Clearly the Document at Paragraph 5 under the heading Assignment Amount called for:

- 5 (a) a total purchase price of \$1,110,000 (Assignment Price)
- (b) Balance of assignment amount \$13,000.00 (paid to assignors)

*a Developer’s Assignment Fee of \$11,518.50 (+) GST to be paid by the assingors (Exhibit 22) not by the claimants.

[27] According to Mr. Pezesh the claimants were provided a photo copy of the bank draft indicating the assignors paid the developer’s assignment fee. (Exhibit 23, Tab 8, pp.31-32).

[28] Mrs. Valibeigi and her husband in paragraph 5.2 of the Assignment agreed to

pay a deposit of \$237,898.09. (Exhibit 6, Tab 5 and Exhibit 7, Claimants' Book).

[29] The amount of deposit(s) to date under the contract the assignor had put down was \$219,400.00 exclusive of interest. The document also showed in addition to the deposit reimbursement an additional "Assignment Amount" of \$13,000.00 for a total purchase price of \$1,110,000.00. The assignment amount of \$13,000.00 was payable by the claimants to the assignors. This brought the total price to \$1,110,000.00. Mr. Pezesh maintained in his evidence he explained the amount owing the assignees to the claimants. Mr. Taghipour testified he did little of the talking, but did pay attention to price!

[30] Mr. Pezesh maintained he reviewed all documents with his clients and in particular the Assignment Contract as it clearly is somewhat more complex.

[31] Once he had determined the total of the original deposit plus accrued interest the amount credited to the assignors was \$224,898.00. Mrs. Valibeigi testified she knew this amount after she signed the document.

[32] Mr. Pezesh testified after finding out the total of \$224,898.00 to be credited to the assignors he redid the first (2) pages of the assignment and reviewed these changes with the claimants and had them initial the pages. Mrs. Valibeigi agreed she knew they had to repay the assignor's initial deposit (\$219,400.00) plus accrued interest on the original deposit. (Transcript, March 3, 2017, p.26, lines 18-32)

[33] On April 20, 2009 Sussex Realty received the claimants' deposit (\$224,898.00). By this time the assignors had paid the separate Developer's Assignment Fee,

\$11,518.50. (Exhibit 12, Tab 18, p.49). The only funds deducted from the claimants' deposit was the commission to Pezesh of \$4,750.00.

The Law

[34] I have carefully reviewed the Law submitted, my notes of the evidence and submissions by counsel. There is a fiduciary relationship between a real estate agent and a client. A problem in this case is credibility. If the claimants are to be believed their realtor Pezesh 1) failed absolutely to explain anything to them about the Assignment of Purchase and Sale and 2) misled them on the purchase price \$1,110,000.00 vs \$1,097,000.00. The claimants maintain their purchase price was supposed to have been \$1,097,000.00 which is the same amount the original purchasers paid in 2007. According to Mr. Pezesh they are wrong. The sale price was \$1,110,000.00. 3) They assert their realtor failed to explain his dual agency relationship with the assignors/sellers of the property (negligent misrepresentation). 4) Their realtor breached his fiduciary duty by wrongfully requiring them to pay an "Assignment Fee" to the developer from the deposit paid by the claimants to the defendants – per the Notice of Claim. the claimants seem to have confused the \$13,000.00 assignment amount payable by them as consideration to the assignors; with the developer's assignment fee of \$11,515.50 paid by the assignors to the developers.

[35] The document on its face discloses an agency relationship between the claimants and Mr. Pezesh. However I accept Mr. Pezesh's evidence he explained the dual agency situation to the claimants. He had them initial both the Working with a Realtor document and the Limited Dual Agency Agreement. (Exhibits 20 and 21, Tab 19, Defendants' Books). I do not find the claimant's evidence compelling when they say

“we just signed and relied 100% on our realtor”. As experienced, highly educated people they either knew or ought to have known not to sign legal documents if they did not know what they are signing. Their failure to make any enquiry of their realtor does not enhance their credibility.

[36] I am unable to conclude on the civil standard of proof (i.e. on a balance or probabilities) the claimants' evidence is to be believed over that of their realtor. Mr. Pezesh's evidence has documentary support signed and or initialled by the claimants. That tends to corroborate Mr. Pezesh's evidence.

[37] Presumably the claimants went to Mr. Pezesh because he could explain the various legal documents they were being asked to sign. They were spending well in excess of a million dollars. A modicum of due diligence on their part could reasonably have been expected, not the bare assertion we relied 100% on our realtor.

[38] The legal principal of *Caveat Emptor* still has some application in real estate transactions – i.e. let the buyers beware.

[39] In conclusion I find there was no negligent breach of a duty of care owed by Mr. Pezesh to the claimants. There was on the accepted evidence of Mr. Pezesh taken together with the signed Assignment documents by the claimants, no negligent misrepresentation established. The fact is I infer Mr. Pezesh made full disclosure to his clients prior to their executing documents. He reviewed all documents and had his clients sign or initial where appropriate. He acted in a manner expected of a competent real estate agent and to industry standard. Even if negligent misrepresentation could be said to have been proven the measure of damages would have been the difference

between the purchase price paid by the claimants for the property and its fair market value at the time of the assignment.

[40] There is no evidence to suggest the claimants paid more than fair market value when considering their evidence that if they had of known \$1,110,000.00 was the price – they still have bought the property. (Transcript, March 3, 2017, pp.4-5, Mrs. Valibeigi).

[41] In view of my decision on the negligence claim, I do not need to rule on the claim for legal fees \$8,731.00 in the Notice of Claim reduced at trial to \$6,300.00 for legal work expended up to the filing of the Notice of Claim.

[42] However, apart from very limited exceptions, subsection 19(4) of the *Small Claims Act*, RSBC 1996 C430 is a bar to recovery of legal costs. It reads

“The provincial court must not order that one party in a proceeding under this *Act* or *Rules* pay counsel or solicitors fees to another party in the proceedings.

[43] The reasoning is obvious having regard to section 2(1) of the *Act* which provides the purpose of the *Act* is to provide a just, speedy and inexpensive resolution to civil disputes.

[44] In Brownne & Searle 2014 BCSC 659 the Court (BCSC) an appeal of a small claims court judgment did allow limited legal fees, despite the lack of a contractual obligation between the parties.

The court allowed legal fees of \$736.19 for writing letter(s) trying to reach a settlement long before the appellant started litigation.

[45] I do not find Brownne & Searle applicable on a claim like this for some \$6,300.00

legal fees in order for the lawyer “understand the situation and decide whether or not to bring a claim”.

[46] The action is dismissed as against both defendants. The parties can bear their own costs.

A handwritten signature in black ink, consisting of a large, stylized 'D' followed by a 'Z' and a wavy line.

The Honourable Judge D. E. Moss
Provincial Court of British Columbia