IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Select Mortgage Corp. v. 0856716 B.C. Ltd.,* 2012 BCSC 620

Date: 20120323
Docket: S106623
Registry: Vancouver

Between:

Select Mortgage Corp.

Plaintiff

And

0856716 B.C. Ltd. and Yogeshchandra Ramanlal Nathawad also known as Yogesh Nathawad

Defendants

Before: The Honourable Mr. Justice Barrow

Oral Reasons for Judgment

Counsel for the Plaintiff:	J.W. Zaitsoff
Appearing on behalf of 0856716 B.C. Ltd. and on his own behalf:	Y.R. Nathanwad
Place and Date of Trial:	Vancouver, B.C. March 20-22, 2012
Place and Date of Judgment:	Vancouver, B.C. March 23, 2012

[1] **THE COURT:** This is an action in debt or, in the alternative, for damages for breach of contract. The plaintiff, Select Mortgage Corporation, is a mortgage broker doing business as Verico Select Mortgage. Dhiraj Raniga is a sub-mortgage broker and a subcontractor of the plaintiff.

[2] The plaintiff's claim is based on the contention that it is owed fees or a commission as a result of having found a mortgage lender prepared to lend money to the defendant, Yogesh Nathawad, and his company, 0856716 B.C. Ltd. The broad underlying facts are not in dispute. The issue turns on whether the terms of the fee arrangement made between Mr. Raniga and Mr. Nathawad were as Mr. Raniga testified or were as Mr. Nathawad said they were.

[3] By way of general background, the defendant company owned two adjacent lots at a civic address on Cartier Place in Vancouver. Initially, there was a duplex on each lot. Mr. Nathawad, through his company, obtained a mortgage from the Bank of Montreal which was registered against title to the properties. In 2010, he wished to redevelop the property. He demolished the duplexes and planned to consolidate the lots, then subdivide the consolidated lots into three. He hoped then to build duplexes on each lot. He needed financing to bring this plan to fruition. He sought that financing from the chartered banks in the spring of 2010, but they were not prepared to lend him the amount he wished to borrow.

[4] In March 2010, Mr. Raniga obtained the email addresses of members of the Gujarati Society and he sent a mass email to those people advising them of his services as a mortgage broker. Mr. Nathawad, who was a member of that society, received the email. Mr. Nathawad had used the services of a mortgage broker in some of his earlier business projects. In fact, he had used Dominion Lending Centres, the company for whom Mr. Raniga was then contracting. As a result of all of this, Mr. Nathawad telephoned Mr. Raniga in April or May 2010 and explained his borrowing needs and asked for Mr. Raniga's assistance. Mr. Raniga agreed to help and he sent Mr. Nathawad a document called "Client Agreement."

[5] On May 30, 2010, Mr. Nathawad signed the client agreement and returned it to Mr. Raniga. All of this was done by fax and/or email. The two men had yet to meet face to face. The client agreement sets out the applicant, Mr. Nathawad's numbered company and a co-applicant, Mr. Nathawad personally, and provides that they agreed with both Mr. Raniga and Dominion Lending to do certain things. The agreement provides that Mr. Raniga and Dominion would seek out financing for Mr. Nathawad and his company and if they were successful in securing the

lender, they "may be entitled to receive financial compensation" for doing so. The agreement does not specify what that compensation would be.

[6] After receiving the client agreement and a statement of Mr. Nathawad's financial circumstances, Mr. Raniga began looking for lenders. He said that the process was more difficult than he initially expected it would be. By late June, however, he had managed to interest the Greater Vancouver Community Credit Union in the transaction. Richard Rochard, a commercial loans officer with that institution, provided Mr. Raniga with a "Letter of Interest" dated June 23, 2010. The letter set out that the credit union was "interested" in exploring the possibility of a loan to Mr. Nathawad's company in the amount of $1,850,000 at an interest rate of prime plus 2.5 percent. Before going further, the credit union required about $1,150 in various fees. With this letter in hand, Mr. Raniga telephoned Mr. Nathawad and the two men agreed to meet at Church's Chicken, a restaurant on 41st Avenue in Vancouver. What transpired at this meeting is at the core of this dispute.

The Factual Contest

[7] Mr. Raniga testified that he deliberately did not tell Mr. Nathawad of the Greater Vancouver Community Credit Union at the outset of their meeting because he wanted to first settle the question of his fees. To that end, he prepared an invoice in the form of a letter dated June 23, 2010. It referenced the Cartier Place property and, at least initially, was addressed only to Mr. Nathawad. It read:

> Please accept this letter as our invoice for brokerage fees for arranging a mortgage on the above-noted property. The fee for the service performed will be 2.65 percent of the total borrowed amount. Please pay and make your payment to: Dhiraj Raniga. The amount will be due when the mortgage is approved and you have signed all the legal documents.

[8] Mr. Raniga said he presented this document to Mr. Nathawad and they began a negotiation about the precise amount of the fee. He said that he eventually agreed to reduce his fee to two percent. Once they had reached that agreement, he, that is, Mr. Raniga, crossed out the reference to "2.65" percent in the letter and wrote in by hand "two %" and initialled the change. He said that Mr. Nathawad then signed the letter indicating his agreement to its terms. Then and only then did Mr. Raniga produce the letter of interest from the Greater Vancouver Community Credit Union. He said that he and Mr. Nathawad then met with Mr. Rochard and the loan was eventually processed. Ultimately, Mr. Nathawad received $1.6 million from the credit union on August 6, 2010.

[9] Between the June 23, 2010, meeting and early August when the loan was advanced, Mr. Raniga made a number of changes to the letter that Mr. Nathawad had signed. The changes dealt with the identity of the brokerage firm to which the brokerage fees were to be paid and with who was responsible for paying them. As to the latter matter, Mr. Raniga testified that when he prepared the letter, he omitted any reference to Mr. Nathawad's numbered company. He said that he added the company name under Mr. Nathawad's name after the June 23, 2010, meeting.

[10] Next, he said that he changed employers the day after the June 23, 2010, letter was signed. He had been working for Dominion on June 23, but on June 24, he became associated with the plaintiff, Verico Select. Therefore, on or after June 24, he added the words "Verico Select Mortgage" after the phrase in the letter that read "Please make your payment to." He said that he telephoned Mr. Nathawad and explained that he was making these changes and asked him whether he wished to initial the changes. He said that Mr. Nathawad replied that he did not care who the brokerage fees were payable to or who Mr. Raniga was now associated with. Rather, all he was concerned about was the amount of the fee. Given this, he said, according to Mr. Raniga, to simply make the changes and leave it at that. Mr. Raniga did that, but when he did, he forgot to add the address of the plaintiff. When he realized that omission, he made yet another change to the document inserting the address under the last line of the letter. He also deleted from the heading of the letter a reference to his former email address at Dominion and to his website address. He said that he advised Mr. Nathawad of these changes, as well, and asked again if Mr. Nathawad wanted to initial them. Again, Mr. Nathawad replied that he did not need to, that all he was concerned about was the amount of the fee.

[11] Mr. Nathawad has a diametrically different recollection of these events. He testified that he met Mr. Raniga at the chicken restaurant on June 23, 2010, and that Mr. Raniga produced the letter that he had prepared. He said that when he saw the proposed fee of 2.65 percent, he objected. He told Mr. Raniga he was only prepared to pay one percent or maybe a little bit more if Mr. Raniga was able to secure a loan for the full amount that Mr. Nathawad wanted, namely, $1,850,000, and if there were no conditions attached to the granting of such a loan. He further testified that he did not sign the letter and that he did not know how his signature came to be on it. He did, however, agree that Mr. Raniga changed the commission set out in the letter from 2.65 percent to two percent and that Mr. Raniga, initialled that change in Mr. Nathawad's presence. He said, however, that when he told Mr. Raniga his position as to the amount of commission he was prepared to pay, Mr. Raniga agreed.

[12] Thus, from Mr. Nathawad's point of view, Mr. Raniga agreed to accept a one-percent commission with the possibility that Mr. Nathawad would pay more if the loan was made on favourable terms and in the full amount he wanted. Mr. Nathawad said that he kept a copy of the letter which he eventually produced in evidence. The copy he produced is not signed by him.

[13] As earlier noted, Mr. Nathawad agreed that his company was properly named in the letter. It was both parties' expectation from the outset that the arrangement that Mr. Raniga was negotiating in terms of fees was one that was being negotiated with both Mr. Nathawad personally and with his numbered company.

Analysis

[14] The plaintiff argues that Mr. Nathawad's account of the events of June 23 is not credible for several reasons. First, the plaintiff says it does not accord with common sense or with what one might expect of cautious business people in similar circumstances. Second, the plaintiff argues that the undisputed aspects of the meeting and the documents associated with it do not support Mr. Nathawad's position. Third, the plaintiff points to the fact that the only documents that have been produced in relation to this transaction support his position and, while the defendant said that there were emails referencing a one-percent commission, he has not produced them. Next, the plaintiff argues that Mr. Nathawad has a conviction for two serious offences involving dishonesty and that that should be weighed in the balance. Finally, the plaintiff argues that Mr. Raniga gave his evidence in a clear and straightforward manner and, while there may have been some inconsistencies in his evidence, when they were pointed out, he readily acknowledged them and they were of the kind that one would expect given the passage of time.

[15] Mr. Nathawad argues that Mr. Raniga's evidence changed in material aspects over the course of his testimony. Those changes and inconsistencies are important and significant. He says, further, that he would not have signed the June 23rd, 2010, letter no matter what it said about commission because it was otherwise unclear and it was not a contract, at least not as he understands that term. Further, he argued that Mr. Raniga was in breach of a number of aspects of the *Mortgage Brokers Act* and that is telling against Mr. Raniga's credibility.

[16] Finally Mr. Nathawad argues that whatever the rate of commission that is found to be payable, it is only payable on the actual amount of the loan he received, namely $1.6 million, and not on the amount claimed by the plaintiff, namely, $1,830,000. More generally, Mr. Nathawad

argues that Mr. Raniga made changes to the letter of June 23, 2010, which were not agreed to by him and, thus, even if the arrangement was as Mr. Raniga says it was, the contract is not enforceable.

[17] The threshold issue is whether the plaintiff has established on a balance of probabilities that there was an agreement between Mr. Nathawad and his company on the one hand and Verico Select and/or Mr. Raniga on the other that commission would be paid at the rate of two percent and, if it was payable, on what amount it is payable. Resolving this question involves more than an assessment of the manner in which each of the witnesses presented on the witness stand. The oft-cited remarks of O'Halloran J.A. in *Faryna v. Chorny* (1952), 2 D.L.R. 354, are apposite. He wrote at page 356 of that decision:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.
>
> The trial Judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion. The law does not clothe the trial Judge with a divine insight into the hearts and minds of the witnesses. And a Court of Appeal must be satisfied that the trial Judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can be tested in the particular case.

[18] While in *Faryna* the court was as much concerned with the quality of the reasons for judgment given by a trial judge as it was with the assessment of credibility, the observations are a useful instruction on how trial judges ought to approach the resolution of conflicting evidence. The instructions are particularly apt in this case for reasons I will come to in a moment. It is first appropriate to observe that the question in this case is not whether the parties made an agreement. Both say that they did. The question is the terms of that agreement. Further, the case does not turn on whether the June 23, 2010, letter constitutes an enforceable agreement in and of itself, but rather whether the parties reached an agreement.

[19] I am satisfied on a balance of probabilities Mr. Nathawad agreed to pay a commission of two percent to Mr. Raniga for the latter's efforts in arranging a lender. I reach that conclusion for several reasons. First and most significantly, it is the conclusion that is harmonious "with the preponderance of probabilities which a practical and informed person would readily recognize as

reasonable" in the circumstances of these parties at that time. To state the matter negatively, the conclusion that Mr. Nathawad would have the court reach is inconsistent with that which one would expect reasonable people in the circumstances to have reached.

[20] I was not particularly impressed with either Mr. Raniga or Mr. Nathawad as witnesses in this matter. What I do accept from Mr. Raniga's evidence is that he was concerned that he be paid for his services. He said that he was not prepared to tell Mr. Nathawad who the lender was that he had arranged until he had an agreement on his fees. That is a reasonable approach for a person in Mr. Raniga's position to take. He knew that once he disclosed the name of the lender, he would have no further bargaining power. It would be open to Mr. Nathawad at that point to deal directly with the lender and pay nothing to Mr. Raniga. Mr. Raniga wanted to avoid that possibility. It was to that end that he prepared the June 23, 2010, letter.

[21] On Mr. Nathawad's version of events, Mr. Raniga agreed to receive a one-percent commission together with a gratuitous promise by Mr. Nathawad to consider paying more if certain unspecified events occurred. While such an arrangement might be plausible between businesspeople with a history of satisfactory dealings with one another, it is not one that accords with the preponderance of probabilities in this situation. These men had never done business together before. In fact, the first time they ever laid eyes on each other was on June 23, 2010. The difference between a one-percent and a two-percent commission was, to the knowledge of both men, at least $18,000. That is a significant amount by any standard. Mr. Raniga knew by June 23, 2010, that Mr. Nathawad had been unable to obtain financing from conventional lenders. All of these things make it unlikely that someone in Mr. Raniga's position would accept a mere promise from a relative stranger to consider a gratuitous additional payment in the order of $18,000 in the event of certain unspecified future events coming to pass. Mr. Raniga may be many things, but naively credulous is not one of them.

[22] For these reasons, I am satisfied that it is more likely than not that Mr. Raniga wanted and obtained Mr. Nathawad's signature on a document setting out the commission that was to be paid. It is beyond dispute that there were two copies of the June 23, 2010, letter brought to the meeting in question. It stands to reason that each party was going to keep one copy. It is also beyond dispute that Mr. Raniga initially sought a commission of 2.65 percent and that he changed that to two percent on both copies of the letter and that he initialled that change on both copies of the letter in Mr. Nathawad's presence.

[23] Mr. Nathawad agreed that Mr. Raniga did all of these things. There would be no reason for Mr. Raniga to change the commission to two percent if, at the end of the meeting, he knew that Mr. Nathawad had not agreed to pay that amount. Further, there would be no point in leaving a copy of the letter with that change with Mr. Nathawad if that was not what the men had agreed to. Finally, there would be no point in Mr. Raniga making an extra copy and making a change to it without obtaining some written acknowledgement from Mr. Nathawad confirming the terms of the commission. Mr. Nathawad himself testified that Mr. Raniga said as much during the meeting. According to Mr. Nathawad, however, Mr. Raniga simply abandoned that notion when Mr. Nathawad steadfastly refused to agree. As I say, that proposition does not accord with the preponderance of probabilities, in my view.

[24] While the foregoing is sufficient to dispose of the threshold question, I will deal briefly with some of the other arguments advanced by the parties. Each pointed to other reasons for accepting their account of what happened and rejecting the account put forward by the other. Mr. Raniga argued that Mr. Nathawad's conviction for two offences on March 6, 2000, is a basis for approaching his evidence with caution. The offences were tax evasion and making false or deceptive statements in relation to Goods and Services Taxes. He was fined in excess of $100,000 for those convictions.

[25] Mr. Nathawad pointed out that the offences related to events that occurred in 1995 or earlier and, given their age and the fact that there was only one set of convictions, they ought not to feature significantly or at all in the assessment of credibility. While these convictions are a matter that is relevant to the threshold issue in this case, that is the assessment of Mr. Nathawad's credibility, I would have reached the conclusions that I have even in the absence of this evidence.

[26] Next, Mr. Nathawad points to the fact that Mr. Raniga changed aspects of the June 23, 2010, letter on several occasions after the meeting. He argues with some justification that Mr. Raniga's evidence as to when and how many times he changed the document varied during the course of his evidence. I note, also, that the explanation that Mr. Raniga himself gave as to how he made the changes was odd. The document was produced on a computer. The changes involved inserting typed words or phrases into the document. According to Mr. Raniga, he made these changes on a computer as opposed to a typewriter. While I find it odd and indeed somewhat difficult to envision how he actually did that, it is not particularly troubling in the context of this case with one exception. The changes did not have any effect on Mr. Nathawad's financial obligation.

The exception was the insertion of Mr. Nathawad's numbered company into the letter as a contracting party, but Mr. Nathawad himself agreed that that change was proper. His company name ought to have been on the document. Thus, none of the other changes would have been of any particular concern to someone in the Mr. Nathawad's position. They all related to Mr. Raniga's employment or contractual relationship with the brokerage firm he was assuming an association with. Indeed, I accept it is more likely than not that Mr. Raniga told Mr. Nathawad about at least some of these changes and that Mr. Nathawad said he did not care about them as long as they did not affect his financial exposure.

[27] As noted above, counsel for the plaintiff points to the fact that there are no documents which make reference to a one-percent commission. The only references in any of the documents are to a commission of two percent or 2.65 percent. This is odd given that Mr. Nathawad testified that he exchanged emails with Mr. Raniga at or near the time of the June 2010 meeting in which he made specific reference to a one-percent commission. He testified that he had a problem with his email account and lost all of the emails he sent at or around that time. I find this odd for two reasons. First, while Mr. Nathawad acted on his own at the trial, he was represented by counsel in this action when it started and at least until December 2010 when negotiations were underway to remove the certificate of pending litigation the plaintiff had caused to be filed against Mr. Nathawad's property. The emails were not listed on any list of documents nor are they referenced in any other correspondence that is in evidence. Second, it would have been apparent to Mr. Nathawad that these emails were of some importance as soon as this dispute arose. That is, by the late summer of 2010 at the latest. It is odd that he would not have sent them to his lawyer or printed them out or taken any other steps to preserve them at or near that time. It may be that that was not possible because it may be that the email difficulties precisely coincided with the advent of this dispute. To the extent that is so, it renders the entire explanation all the more odd. This is a matter of some significance in the overall assessment of the issue, but again, I would have reached the conclusions I have without this consideration.

[28] Finally, Mr. Nathawad argues that Mr. Raniga was in breach of various aspects of the *Mortgage Brokers Act* and the Regulations passed pursuant to it. He does not argue that these breaches provide a basis for avoiding any contract that may have been formed, but that they should, rather, ground a concern as to Mr. Raniga's credibility. I am not satisfied that there were any proven breaches of the Act or Regulations. I note that none were pleaded, although given the purpose for which they were advanced, that may not be necessary. Moreover, even if Mr. Raniga

was in breach of some of the provisions of the Act or the Regulations, that would not affect my conclusion on the threshold issue.

[29] The next issue is the amount on which the two percent commission ought to be calculated. Mr. Rochard testified that the Greater Vancouver Credit Union advanced $1.6 million to Mr. Nathawad and his company. This money, or most of it, was used to pay out the mortgages that were on title. No further money was advanced, at least in part because Mr. Nathawad could not obtain the necessary approvals to permit a consolidation and subdivision of the lots.

[30] The resolution of this issue turns on the language of the contract. In the June 23, 2010, letter the commission is said to be payable on "the total amount borrowed." The total amount borrowed by Mr. Nathawad and his company was $1.6 million. To the extent the phrase admits of ambiguity, and I am not persuaded that it does, some light is shed on its meaning, at least the meaning that Mr. Raniga considered it to have, from his communication written at the time. He wrote several letters to Mr. Nathawad's solicitor in August 2010 seeking payment of his commission from the loan proceeds. On August 3, 2010, he wrote:

> The brokerage fee is two percent of the total loan that is advanced.

On August 10, he wrote:

> The brokerage fee is on the total amount that is loaned.

As if to underline the point, he added that the fee was to be paid from the proceeds as those proceeds were advanced.

[31] I am satisfied that the contract required the defendants to pay a two-percent brokerage fee on the amount actually advanced as opposed to the amount approved for future advances. The amount actually advanced was $1.6 million. The fees therefore are $32,000. The plaintiff filed a certificate of pending litigation against the property when they began this action. The certificate was cancelled when the defendants paid $36,600 into the plaintiff's solicitor's trust account. The arrangement was that the plaintiff was entitled to receive $18,300 from that amount once the CPL was discharged. The CPL was in due course discharged and the plaintiff took payment of that sum. The other half of the amount remains in trust pending the outcome of this trial.

[32] There will, therefore, be an order that from those funds, the plaintiff is entitled to a further $13,700 representing the difference between that which the plaintiff has received and that which

the plaintiff is entitled to. In addition, the plaintiff is entitled to pre-judgment interest on that amount from August 6, 2010. The plaintiff is also entitled to pre-judgment interest on $13,700 calculated from August 6, 2010 to the date the money was released upon cancellation of the CPL.

[33] The final issue relates to costs. The plaintiff is seeking special costs. The primary basis for that claim is that Mr. Nathawad relied on a fraudulently altered document to support his position. That document is the copy of the June 23, 2010, letter which Mr. Nathawad exhibited to an affidavit he swore in this case in connection with a summary trial application and which he relied on in his evidence at trial. The version of the June 23, 2010 letter he produced is the same as the ones that Mr. Raniga produced, except it does not have Mr. Nathawad's signature on it. The removal of the signature is said to be fraudulent and is the basis for the plaintiff's claim for special costs.

[34] I am satisfied that Mr. Nathawad signed a copy of the June 23, 2010, letter that Mr. Raniga kept. It may be that he signed the one that he kept, but that does not necessarily follow. What Mr. Raniga wanted was to be sure that he had a signed copy. It would have mattered less to him whether Mr. Nathawad signed his own copy. Thus, the conclusion that the copy that Mr. Nathawad produced was altered depends on Mr. Raniga's oral evidence and is not central to the conclusion that I have otherwise expressed. Mr. Raniga's evidence is not of a sufficient quality to support that serious finding. I am not satisfied to the degree necessary that the document was, in fact, altered by Mr. Nathawad, nor am I satisfied that there should be an order for special costs for any other reason.

[35] In the result, the plaintiff is entitled to its costs at Scale B. The funds that remain in trust, that is to say, the difference between the amount that is ordered paid out in accordance with the foregoing calculations and any amount that may remain is to be held in trust and applied to any eventual award of costs.

[36] Mr. Zaitsoff, from your perspective, are there any questions?

[37] MR. ZAITSOFF: My Lord, just to confirm, the amount payable as pre-judgment interest is payable from the trusts funds, as well, is that correct?

[38] THE COURT: Yes, it is, and I probably was awkward in that. So the calculation is that from August 6, 2010, until whatever date some money was paid out in December 2010, pre-judgment interest is on the $32,000. It then is calculated on the reduced balance from the date that your client took his payment from the trust funds.

[39] MR. ZAITSOFF: Yes, My Lord, of $13,700?

[40] THE COURT: Right, and do I have the amounts right in terms of the -- it was $36,600 that was paid in?

[41] MR. ZAITSOFF: Yes, I believe that is correct.

[42] THE COURT: Okay, okay, thank you.

[SUBMISSIONS RE COSTS]

[43] THE COURT: Well, I will tell you what -- I want to deal with this as efficiently as possible, but I want it to be fair. What Mr. Zaitsoff is saying is that there is a provision in the Rule that allows for the fixing of a lump-sum amount of costs and, if that provision applies here, those costs are $11,000 plus disbursements. The other route is to simply order costs at Scale B and that means that unless there is an agreed to amount, the plaintiff will take out an appointment before the registrar and tax its costs. All of that adds more money both to the amount of the costs and to the plaintiff's legal expenses. I do not want to add any more trouble to this than is necessary.
Mr. Nathawad, you want to talk to your lawyer about this and I am going to allow you to do that. What I will do is I will decide the question of costs next week at nine o'clock one morning. Nobody has to appear. We will do this over the telephone and, if you have some submissions to make I will hear from you then and, if there is any reply submissions, I am not expecting any, Mr. Zaitsoff, but I will hear from you then, I will make the order as to costs I am going to say nine o'clock next Friday which is March 30th.

Barrow J.