

Ontario Court of Justice - General Division

Toronto, Ontario

Davidson J.

December 12, 1990

Action No. 310331/87

**[1990] O.J. No. 2284**

Between New Commerce Realty Group Inc., Plaintiff, and Sam DiBlasi, Vito Monaco, Giuseppe Calamia and Guy DiBlasi, Defendants

(55 paras.)

**Case Summary**

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**Brokers — Compensation — Right to compensation — Loss of right — Loss of right, failure to satisfy a statute.**

Action for a real estate commission owing under a listing agreement. The defendant sold the property through another real estate broker while the property was listed with the plaintiff.  
HELD: Action dismissed.

The testimony was inconsistent. The plaintiff failed to comply with the Real Estate and Business Brokers Act by not delivering the owner's copy of the listing agreement immediately after its execution to the person who signed it. The listing agreement was thus void.  
M.A. Klaiman, for the Plaintiff. C.C. Mark and Elizabeth Ackman, for the Defendants.

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**DAVIDSON J.**

**1** The plaintiff's claim is against the defendants for real estate commission in the sum of \$60,000 allegedly owing pursuant to a written Listing Agreement dated April 21, 1987 (Exhibit 3).

**2** The subject property was in fact sold by another real estate broker in October 1987 at a price of \$1,000,000. The Listing Agreement with the plaintiff contained the usual clause providing the 6% commission be paid "on any sale ... during the currency of this agreement."

**3** The Listing Agreement recited December 31, 1987 as its date of expiration.

**4** The plaintiff was represented in discussions leading up to the Listing Agreement by Peter Pitino.

**5** The defendants, Vito Monaco, Giuseppe Calamia and Guy DiBlasi. were never personally involved with the plaintiff in regard to negotiations either verbally or in correspondence.

**6** A prior Listing Agreement dated March 13, 1987 had been prepared by Mr. Pitino after discussion with the defendant, Sam DiBlasi, said Listing Agreement showing a purchase price of \$999,500 with an expiry date of October 30, 1987. This came about after Mr. Pitino had done some research as to approximate market value. This was apparently satisfactory to Sam DiBlasi who signed the Listing Agreement. Subsequently either through Sam DiBlasi or Joe Buscema (the son-in-law of the defendant Vito Monaco) information was conveyed to Mr. Pitino that the other defendants co-owners were not satisfied with the purchase price.

**7** Thereafter, Mr. Pitino gave Joe Buscema a new blank Multiple Listing Agreement which Mr. Buscema was to have signed by the defendants Monaco, Calamia and Guy DiBlasi.

**8** Mr. Pitino's evidence is that on April 21, 1987 he met with Sam DiBlasi at Sam DiBlasi's office with no one else present at which point Sam DiBlasi produced the previously blank Listing Agreement which now had written in it the plaintiff's name, the purchase price of \$1,200,000, 6% in the space relating to commission and that it bore the three signatures of Vito Monaco, Giuseppe Calamia and Guy DiBlasi. Mr. Pitino says that the date of the Agreement was not filled in nor was the expiration date.

**9** Mr. Pitino says that Sam DiBlasi signed the document in his presence and that he, Pitino, signed as witness, dated the Agreement April 21, 1987 and filled in the expiration date as December 31, 1987.

**10** It is Mr. Pitino's evidence that prior to this he had discussed with Sam DiBlasi that he intended to take a vacation for an extended period of time in the Summer of 1987 and that as the property was of a commercial nature which would not necessarily sell immediately, Pitino suggested that he be given a listing for an extended period of time and it is his testimony that Sam DiBlasi agreed to this as he did not really care.

**11** Mr. Pitino says that he then detached the owner's copy of the three copy Listing Agreement and left it with Mr. DiBlasi.

**12** Mr. Pitino testifies that after he returned from Italy at the end of August he had a conversation with Mr. Buscema to the effect that they might have a private buyer to which Pitino said "Not to worry about the Listing Agreement, once you get a Purchase Agreement contact me, give me a copy and we could discuss the listing", and that he indicated he could negotiate the fee down. He says he had this conversation more than once and that about the first or second week in October Mr. Buscema and Mr. DiBlasi told him that they had finalized an Agreement for Sale and that their solicitor had asked them to obtain a release from the plaintiff's

Listing Agreement. He says he asked them for a copy of the Agreement and was told that they would get one to him as soon as possible.

**13** Mr. Pitino says that it was about the end of October when he went to Sam DiBlasi's office and that while Sam DiBlasi was on the telephone, he saw an Offer to Purchase on the desk, realized that it was the property that he had the listing for and saw that there was a commission payable of 4-1/2%. He says an argument with Sam DiBlasi ensued and he left the office. It is a bit difficult to get the exact chronology because of course the Agreement of Purchase and Sale with the other real estate broker is dated the 1st and 3rd of October, 1987. Further it is Mr. Pitino's evidence that at some point in time Mr. Buscema and Mr. DiBlasi had come to his office and said that they could not find a copy of the Listing Agreement with the plaintiff and that he said he would get a copy from his file and that he did so and gave it to them. He said he made a photocopy, went to DiBlasi's Willowdale office, DiBlasi was not in and he left the copy with the secretary.

**14** Mr. Buscema's evidence is that he brought the March 13, 1987 Listing Agreement back to Mr. Pitino advising that the price had to be changed to \$1,200,000 and that the expiry of the Listing Agreement had to be changed from October 30, 1987 because Guy DiBlasi felt if the land would not sell by July 30th it would not sell at all because it was a boom real estate year.

**15** Mr. Buscema's evidence also is that he got the blank Listing Agreement from Mr. Pitino, he arranged for Mr. Monaco to sign it, left it with Guy DiBlasi for him to get Mr. Calamia to sign it and that he returned to Guy DiBlasi, picked up the Listing Agreement with the three signatures on it and he, Buscema, filled in New Commerce Realty Group Inc., the 6 for the percentage commission and the \$1,200,000 price. Mr. Buscema says he then left it at Sam DiBlasi's office for the latter's signature. He says he returned the completed document with the four signatures on it to Mr. Pitino. He says Pitino was not present when Sam DiBlasi signed it. He seems to indicate that there was no discussion about an expiration date for the Listing Agreement at that time but there had been when the March 13, 1987 Listing Agreement was discussed.

**16** Mr. Buscema denies that he spoke to Mr. Pitino in September 1987 and denies discussing a potential purchaser which the defendants had.

**17** Mr. Sam DiBlasi testifies at trial that he had discussed a date of expiration for the March 13th Listing Agreement and that October 30, 1987 was fixed as the date and he did not seem to feel that it was too important. It was Sam DiBlasi who entered into negotiations with the real estate agent who eventually obtained an offer for the purchase of the property, one Cathy Lee, an agent with Howard S. Lee Real Estate Ltd. He states that after this Offer to Purchase was accepted by the defendants on October 5, 1987, Mr. Pitino came to his office and saw the completed Offer to Purchase and a discussion ensued and Mr. DiBlasi advised Mr. Pitino that he had never given him a copy of the Listing Agreement with the plaintiff. He says Mr. Pitino left and returned later that day while he, Sam DiBlasi, was out and he left with his secretary the owner's copy of the Listing Agreement filed as Exhibit 8. He denies ever receiving a copy of the Listing Agreement prior to that date.

**18** The said Exhibit 8 contains a stamp on it "Received Oct. 05, 1987."

**19** Finella Episcopo testified at trial that she was the receptionist for Willowdale Insurance Brokers which was Mr. Sam DiBlasi's business. She says Mr. Pitino brought a Listing Agreement to the office on October 5, 1987. As to how she could be precise, her evidence is that Sam DiBlasi stamped the date on it in her presence. She identifies Exhibit 8 as that document. She says, as well, Mr Pitino had been in the office earlier that morning and there had been an argument between he and Sam DiBlasi to the effect that Pitino was saying the property had been listed with another agent. She says that when Mr. Pitino returned and left Exhibit 8 with her she put it on Sam DiBlasi's desk and when he returned from lunch he asked her for the date stamp. She said she gave him the date stamp and he stamped the document in her presence. She denies the suggests on that it was a photocopy of a document that was dropped off. She says it was an original and it was the owner's copy.

**20** The evidence of Sam DiBlasi is that Exhibit 8 came to the office on October 5, 1987 and that he affixed the stamp on the document in front of his secretary and Mr. Buscema. On his cross-examination he said that "either one of us had stamped it". He says that when he found it he brought it to his secretary and asked her to get the date stamp and "one of us date stamped it". On his examination for discovery as to how he knew that this occurred on October 5, 1987, he replied because his secretary had it on her desk and she stamped the date that it was received and left it for my attention. When confronted with this at trial, he seemed to take the position that the truth was that his secretary had stamped it in front of he and Mr. Buscema.

**21** Mr. Buscema's evidence is that the owner's copy, Exhibit 8, was received by the secretary the week of October 3, 1987 when it was left at her desk. He says it was when he and Sam DiBlasi returned from lunch the same day that Mr. Pitino had been in the office and had viewed the Agreement of Purchase and Sale, arranged by Howard S. Lee Real Estate Ltd. He says that the secretary had put the document on Mr. Sam DiBlasi's desk and that was the first time the owners had been given the owner's copy of the Listing Agreement.

**22** On all of the evidence I have recited, there is no doubt, and I find as a fact, that a copy of the Listing Agreement was in fact delivered by Mr. Pitino to Mr. DiBlasi's office and left with the secretary. The question is whether or not it was the owner's copy as testified to by the secretary, Mr. DiBlasi and Mr. Buscema or a photostatic copy of the Listing Broker's copy as testified to by Mr. Pitino.

**23** Counsel for the plaintiff concedes that on the basis of the decision in *Bowes & Cocks Ltd. v. Corbeil* (1978), 20 O.R. (2d) 152, C.A., that in order for the plaintiff to succeed in the action he must establish that he as broker, immediately after execution of the Listing Agreement delivered a true copy to the person who signed the Agreement. This is the requirement of Section 35(1) of the Real Estate and Business Brokers Act. *Bowes and Cocks* decided that if a true copy of the Listing Agreement was not provided to the person signing it immediately after its execution, then the action must fail.

**24** The determination of this issue has given me some difficulty.

**25** With some exceptions I felt that the evidence of Mr. Pitino, Mr. Buscema and Mr. Sam DiBlasi was frequently less than candid. I thought each of them on occasions were evasive, were not responding to the questions but seeking to give their answers in a way best supportive of their case. Their evidence was, in many ways, confusing. On occasions the evidence was inconsistent with prior testimony and with other witnesses whose evidence impressed me.

**26** The issue is further complicated by a comparison of Exhibit 3, the Listing Brokers copy and Exhibit 8, the owners copy said to have been left at Mr. DiBlasi's office on October 3rd.

**27** Under two of the boxes on the Listing Broker's copy headed "Dist." and "Munic." appears respectively the notation "X42" and "York". The comparable boxes in the owner's copy, Exhibit 8, are blank. The evidence also indicates that the middle copy, the Toronto Real Estate Board copy, was processed by the Toronto Real Estate Board on or about April 28, 1987, according to the evidence of its representative, Marcia Briggs. Although their copy was not produced, there was produced a Co-op Listing, Exhibit 4, which does contain the words "X42" and the letter "Y".

**28** As the three copies of the Listing Agreement have the top copy in the original writing, and the middle and third copies are carbon, it is apparent that the boxes on the Listing Broker's copy containing "X42" and "Y" did not carry through to the owner's copy but probably did to the Toronto Real Estate Board's copy. If Mr. Pitino had filled out the Listing Broker's copy before he handed the owner's copy to Mr. DiBlasi, those words would presumably have been on it. Alternatively, if he had not filled those boxes out until some time after he had given Mr. DiBlasi the owner's copy, this could be the explanation. In the further alternative, if he had detached and kept the owner's copy and then filled in the boxes on the Listing Broker's copy and it went through to the Toronto Real Estate Board copy, it would support the finding that it was the owner's copy which was left with Mr. DiBlasi's secretary on October 3rd.

**29** In dealing with the testimony of Mr. Pitino which, as I have said, has given me some difficulty, I note that on his examination for discovery, he indicated that he had first spoken to Mr. DiBlasi about the sale of the property around the beginning of April. In fact, at trial, he acknowledged that prior to that there had been a Listing Agreement prepared with a date, March 13, 1987. He says that there was confusion in his mind on this but that when he was shown the second document, it cleared up that confusion.

**30** Mr. Pitino was confused as to when he ascertained that Mr. DiBlasi had a number of partners, indicating at trial that it was when the March 13th Listing Agreement came back to him, while on discovery indicating that Sam DiBlasi had told him about it prior to the listing that he and his partners were thinking of selling. It appears that his position is as stated at trial.

**31** He is confused as to how long after the March 13th Agreement had been signed was it that Mr. Buscema had come back with the document. At trial he indicated that it was two to three

weeks after March 13th and on discovery he indicated a week later. Here his explanation is that he was not aware of the circumstances at the time of discovery and he was seeking to clarify it within his framework of trying to reconstruct what had happened.

**32** At trial Mr. Pitino testified that he had filled in the bottom half of the Listing Agreement, it being his handwriting, before Sam DiBlasi signed in his presence. On examination for discovery, his evidence was that he filled this in after the Agreement was signed and when asked "How much after" had responded "A day or two" and went on to indicate on discovery that it must have been no more than a day because the Multiple Listing Agreement must be submitted to the Real Estate Board within 48 hours and since it was submitted to the Real Estate Board within the specified time he felt that he must have filled it in within that time. Again, it is his evidence at trial that after examining the documents and reconstructing the events, his answer at trial is correct. Plaintiff's counsel did read in a portion of the discovery after the previous noted discovery, reference to the effect that the plaintiff indicated that he could not remember but possibly had filled it in and then gave a copy to Sam DiBlasi. In any event there was never any correcting letter sent by his counsel to defendants' counsel. In this regard there is the further conflict when one considers the evidence of Marcia Briggs of the Toronto Real Estate Board who testified that the listing was not received by the Board until April 28th, the day it was processed and well outside the requirement of 48 hours.

**33** Additionally, Mr. Pitino states at trial that he sent the Listing Agreement to the Board on the same day it was signed, April 21st which is, of course, contrary to his evidence on discovery and once again he indicates at trial that a review of the proceedings and paying accurate attention makes his recollection more clear.

**34** At trial Mr. Pitino indicated that Mr. Sam DiBlasi had come to him in February of 1988 while they were on a court appearance in Newmarket and had grabbed his tie and threatened him saying that he wanted a release from the Listing Agreement. On cross-examination he acknowledged that the court attendance was actually in March of 1987 which, of course, was before any confrontation with Sam DiBlasi about difficulties arising in regard to the Listing Agreement. Again Mr. Pitino indicates at trial that it is now becoming more clear to him but still he says that he was threatened by Mr. DiBlasi in the Newmarket court.

**35** While testifying at trial that he had spoken to Mr. Buscema in mid-September in regard to the property (he having returned from Italy on August 29th), this is denied by Mr. Buscema and Mr. Pitino on discovery in this regard indicated he had approached "them" (Sam DiBlasi and Buscema) about a month after. Mr. Pitino is continually testifying that his conversation with Mr. DiBlasi and Mr. Buscema related to their having a possibility of an independent purchaser to which he was constantly telling them "When you have an agreement in writing come and see me and we will discuss my Listing Agreement". Finally he indicates that what he really meant was, once they got an offer to purchase they should come to see him. This is denied by both Mr. Buscema and Sam DiBlasi.

**36** In regard to the evidence of Sam DiBlasi, it too was confused and, in some instances, in conflict with his examination for discovery. His evidence at trial was that on the first discussion

with Mr. Pitino in his office with Mr. Buscema present, the price was discussed in the sum of \$995,000 as well as the names of the owners. On his examination for discovery, he said the price discussed was \$1.2 million. At trial he indicates that he was confused about this even though he had reviewed the transcript.

**37** At trial he indicates that the March 13th Listing Agreement contained the price of \$999,500 and October 30, 1987 as an expiry date and that he then signed it. On his discovery he indicates that it was a complete blank when he signed it including nothing as to an expiry date. He then says at trial that he signed it in blank and that Mr. Pitino put the list price and expiry date in thereafter. He then says at trial that when he signed it it was not in the presence of anyone and after he signed it he gave it back to Mr. Buscema.

**38** As to how that \$999,500 price was arrived at, he indicated at trial that it was arrived at in discussions with Mr. Pitino and Mr. Buscema. In his discovery in an action brought by Howard S. Lee Real Estate, his answer was "I do not remember how the figure was arrived at". Again at trial it was his evidence that there were many questions and that counsel were trying to confuse him and to mislead him.

**39** His evidence at trial is that in discussions with Mr. Pitino they fixed October 30, 1987 as the length of time of the first agreement. On discovery his evidence was that it was not discussed as to the specific date but they discussed no longer than six months.

**40** As to the April 21st Listing Agreement, it is Mr. Sam DiBlasi's evidence that the three signatures of his partners were on it when it came to him. On his examination for discovery in the Howard S. Lee action, his evidence is that he could not recall when he signed it and he could not remember if the three other owners signatures were on the document.

**41** At trial his evidence is that he signed this second Agreement of the April 21, 1987 two or three or four days after he had signed the March 13th Agreement. On his examination for discovery he says he would have signed it around the 20th of March and his explanation is that it could be anywhere from the 15th to the 20th. When it was suggested to him that he just does not recall when he signed it, his testimony was that he did remember and that if he did not remember he would not have said around March 20th. He is then referred to his discovery in the Howard S. Lee action as to whether - did he recall if he signed the Agreement in about the month of April and his answer was "I can't honestly say, no because I don't recall."

**42** At trial Mr. DiBlasi identified the signatures of the three co-defendants as appearing on the Listing Agreement. At the examination for discovery in the Howard S. Lee action, his evidence was that he did not recognize any of the signatures. For instance he said he had never seen Monaco's signature. At trial he explains by saying that when he meant was that he never saw them sign it.

**43** At trial, he testifies as to the real estate market between March and into the Summer of 1987 as "getting pretty good" and that he did not speak to Mr. Pitino on occasions other than about March 13th when the first Agreement was signed and just before Pitino went off to Italy in late

June. Again, at his examination for discovery in the Howard S. Lee action, he says he had seen Mr. Pitino once or twice a week but that they did not discuss the listing, only rarely, because market conditions were dormant.

**44** While testifying at trial that he had contacted Cathi Lee of the Howard S. Lee Real Estate Ltd. in regard to a possible sale of the defendants' lands about the end of August or beginning of September, he acknowledges his examination for discovery, his evidence was that it was around the middle of September.

**45** He testifies at trial that he had told Cathi Lee on two occasions when she brought in Offers to Purchase that the owners were only interested in \$1.2 million because that was the amount that they had listed it for with another agent back in March. On his examination for discovery there are a series of questions ending with whether or not he had ever told Cathi Lee that he had listed the property with another real estate agent before he signed the Agreement of Purchase and Sale and his answer had been that he could not remember. I permitted defence counsel to read in questions 367 and 370 on that discovery to the effect that prior to signing the Offer to Purchase he had mentioned to Cathi Lee that there was one point way back in March when some sort of a listing worked out and when asked if he had a copy of it by Ms. Lee he indicated that he did not have a copy.

**46** The evidence of Ms. Cathi Lee is that during discussions she had with Mr. Sam DiBlasi (and some of these discussions were in the presence of Mr. Buscema) at the end of August and early September of 1987 it was not indicated to her that the owners had entered into a prior Multiple Listing Agreement. She says that the offer which she had procured was not acceptable to the owners but they later got in touch with her as to whether that purchaser was still interested. She says that it was agreed that Mr. DiBlasi and his partners would make a vendor's offer and that on October 3rd she picked up the signed offer, returned to her purchaser, changed the price from \$1.1 million to \$1 million, altered the amount of the deposit and changed it over to a purchaser's offer irrevocable until midnight October 3rd. She says at that time she had no information as to any other Listing Agreement. She says the owners agreed to the changes that were made but that Mr. Buscema had called back saying they wished to have the commission reduced from 5% to 4%. Ms. Lee says that they agreed on a compromise of 4-1/2%, that she went to Mr. Buscema's house in Markham, changed the commission and she gave Mr. Buscema two copies for Mr. DiBlasi and his partner, Mr. Monaco. She says that Mr. Buscema stated that the parties felt relieved because there was animosity between the owners and they would have to go out and get a release from a previous listing. Her evidence is that this is the first time she had been told about any previous listing and when she asked about it Mr. Buscema said that there would be no problem, it was an old listing with an old friend.

**47** The evidence of Mr. Buscema is that the first offer presented by Cathi Lee was given to Sam DiBlasi who kept it overnight and signed it back the next day at \$1.2 million and Buscema's evidence is that he told Cathi Lee at that time that they had it listed at \$1.2 million and they wanted to get that money. That offer is Exhibit C, bears the date September 14, 1987 and a signed back date of September 25, 1987, eleven days later. Mr. Buscema acknowledges he probably was incorrect saying it was signed back the next day. Mr. Buscema says that when a

second Offer of Purchase and Sale dated October 1, 1987 was submitted, that it too was signed back at \$1.2 million and Buscema again says Cathi Lee was told that the owners had listed the property for \$1.2 million some time ago and that the value of the land had gone up so why should they accept less.

**48** Mr. Buscema says that Cathi Lee did come to his home on the evening of October 3rd and that the offer of Purchase and Sale was signed and that he and DiBlasi and Monaco changed the commission from 6% to 5%. When he looks at the document he realizes and agrees that it was changed from 5% to 4-1/2%. He then looks at the Agreement of Purchase and Sale and his evidence was that the changes were made by he and Mr. DiBlasi putting the price at \$1 million rather than \$1,100,000 and reducing the deposit from \$110,00 to \$35,000. Obviously he is in error on this as the vendors would not be reducing the price and reducing the amount of the deposit. It is another indication in my view of witnesses who are very careless in giving their testimony and substantially diluting the reliance that can be placed on it. Mr. Buscema denies telling Cathi Lee that the parties were happy that the matter was over because of the animosity between the parties and he denies indicating that they were getting or had gotten a release from another Listing Agreement.

**49** In respect to all of the evidence that I have recited, it is apparent to me that the evidence of the parties to this litigation is fraught with inconsistency and conflict. The evidence of Mr. Buscema to some degree I felt was slanted to favour the defence position. The evidence of Cathi Lee although it might be said to have been given with a view to her involvement in the action brought by her principal, Howard S. Lee Real Estate, for commission appeared to me generally to have been forthright and reasonably credible.

**50** The evidence of Ms. Marcia Briggs which was entirely independent and founded upon records in her possession was supportive of a finding that the Listing Agreement copy for the Toronto Real Estate Board was only received on April 28, 1987 and this is contrary to the evidence of Mr. Pitino on behalf of the plaintiff. I find Ms. Briggs' evidence to be accurate on this point and I accept her evidence. To a large degree it seems to me that this is demonstrative of the shortcoming in the evidence of Mr. Pitino who, on the one hand professes to abide by the requirements of being a real estate broker to comply with the Real Estate Board regulations for forwarding of copies of Listing Agreements and has not done so, and his knowledge of the requirements of the Real Estate and Business Brokers Act which prescribes a delivery of a copy of the Listing Agreement immediately after its signing to the person who signed it.

**51** In this latter regard Ms. Episcopo, although involved in the defendants' position in an employment relationship, I felt was giving her evidence to the best of her ability and recall and the application of the "Received Oct. 05, 1987" date stamp on the owner's copy of the Listing Agreement in her presence, struck me as being reasonably reliable evidence. To find otherwise would require me to find that she and Mr. Sam DiBlasi and Mr. Buscema were not only deliberately fabricating a story that a different document was delivered by Mr. Pitino than he testified to but that further they had agreed between them to select the date on which Mr. Pitino, by his own admission, had attended to deliver a copy of the Listing Agreement and then re-adjust a date stamp and affix it to the owners' copy in question.

**52** In my assessment of Ms. Episcopo's demeanour in the witness box and her response to questions, I do not feel that this is a reasonable nor just assessment of her evidence. Rather I think it reasonable that indeed the document, Exhibit 8, the owner's copy of the Listing Agreement was the one received by Ms. Episcopo on October 5, 1987 as per the date stamp, and I so find.

**53** On all of the evidence and bearing in mind particularly the evidence of Marcia Briggs and Ms. Episcopo, the plaintiff has not satisfied me on a balance of probabilities on credible evidence that the owner's copy of the Listing Agreement was delivered to the person who signed it immediately after its execution.

**54** Accordingly, on the authority previously recited, the plaintiff's action is dismissed.

**55** Costs may be spoken to at a date convenient to counsel to be arranged through my secretary.

DAVIDSON J.