



Civil Resolution Tribunal

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File: SC-2020-000177

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Kiani v. Alexander*, 2020 BCCRT 568

B E T W E E N :

BEHDAD KIANI and SAIDEH HABIBI

APPLICANTS

A N D :

MICHAEL ALEXANDER, SHANNON HILLMAN, DAYMON ENG, and
PACIFICA MORTGAGE INVESTMENT CORPORATION

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:

Chad McCarthy

INTRODUCTION

1. This dispute is about a deposit for a residential home mortgage. The applicants, Behdad Kiani and Saideh Habibi, had a binding contract to purchase a home from its developer. The respondent, Michael Alexander, was the applicants' mortgage

broker who assisted them in obtaining a first mortgage from the respondent, Pacifica Mortgage Investment Corporation (Pacifica). The respondents, Shannon Hillman and Daymon Eng, are directors of Pacifica.

2. The applicants say Michael Alexander failed to obtain a necessary second mortgage for them, and Pacifica reduced the funds available under its mortgage after the applicants paid a deposit, so they sought financing elsewhere. The applicants claim \$2,400 for the portion of the deposit that was not refunded, plus \$600 in travel and other expenses to deal with the refund.
3. Pacifica says it paid legal fees to prepare mortgage documents, which it deducted from the deposit funds as permitted under the mortgage contract, and returned the excess to the applicants, so it owes nothing. Mr. Alexander says he advised the applicants about the non-refundable aspects of the deposit before they signed the mortgage contract with Pacifica, and it was their choice to abandon that mortgage, so he owes nothing. Shannon Hillman and Daymon Eng say they are Pacifica's directors and are not personally liable under Pacifica's mortgage contract.
4. The applicants are both represented by Behdad Kiani. Shannon Hillman represents herself and Pacifica. Daymon Eng and Michael Alexander are each self-represented. Pacifica, Shannon Hillman, and Daymon Eng all rely on the same evidence and arguments.

JURISDICTION AND PROCEDURE

5. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over small claims brought under section 118 of the *Civil Resolution Tribunal Act* (CRTA). The tribunal's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the tribunal must apply principles of law and fairness, and recognize any relationships between parties to a dispute that will likely continue after the dispute resolution process has ended.

6. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. I decided to hear this dispute through written submissions only, as there are no significant issues of credibility or other reasons that might require an oral hearing.
7. The tribunal may accept as evidence information that it considers relevant, necessary, and appropriate, whether or not the information would be admissible in a court of law. The tribunal may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.
8. Where permitted by section 118 of the CRTA, in resolving this dispute the tribunal may order a party to do or stop doing something, pay money or make an order that includes any terms or conditions the tribunal considers appropriate.

ISSUES

9. Are the applicants responsible for mortgage-related legal fees and expenses, and if not, how much must the respondents reimburse them?
10. Are the respondents liable for the applicants' travel and other expenses, and if so, how much do they owe?

EVIDENCE AND ANALYSIS

11. In a civil proceeding like this one, the applicants must prove their claims on a balance of probabilities. I have read all the submitted evidence, but I refer only to the evidence I find relevant to provide context for my decision.

Are the applicants responsible for mortgage-related legal fees and expenses, and if not, how much must the respondents reimburse them?

12. The undisputed evidence is that the applicants hired Mr. Alexander to obtain a first and second mortgage for the home they were purchasing. Mr. Alexander obtained a first mortgage from Pacifica. The applicants signed a February 1, 2019 mortgage

agreement with Pacifica, titled Residential Commitment Letter (first agreement). The first agreement was also signed by Ms. Hillman as Pacifica's director. The loan amount was less than the home's price.

13. Mr. Kiani signed a payment form on February 1, 2019, agreeing for Pacifica to charge his credit card a \$3,000 mortgage deposit, plus a 2% fee. Both the first agreement and payment form said the 2% fee was only added when a credit card was used to pay the deposit, so I find the 2% fee was a credit card usage fee. Both the first agreement and the payment form clearly stated the 2% fee was non-refundable even if the loan did not proceed. So, I find the applicants are not entitled to a refund of the 2% fee.
14. One of the first agreement's conditions for providing the loan funds was that Pacifica receive an appraisal showing a home value of at least \$1,695,645, and confirmation from the appraiser that it had viewed all the home's rooms. A February 6, 2019 appraisal report for the home gave a value of \$1,600,000. Further, the report said the appraisers were not provided with access to the home because it was under construction, so the appraisal was based on assumed information. The home had also been appraised on June 28, 2018 at \$1,700,000, but the appraisers were not given access to the home at that time either. Pacifica says the appraisals were not satisfactory, and so it did not advance any funds to the applicants under the first agreement.
15. The applicants signed a revised mortgage agreement with Pacifica (new agreement) dated February 7, 2019, for a reduced loan amount. The other terms of the new agreement were mostly the same as the first agreement. Ms. Hillman and another Pacifica director signed the new agreement as directors of Pacifica. It is undisputed that Pacifica accepted that the appraisal conditions of the new agreement were met, and that the parties used the \$3,000 deposit on the first agreement as the deposit for the new agreement.
16. The new agreement authorized Pacifica to instruct the applicants' lawyers. The applicants say they did not think Pacifica would send mortgage documents to the

lawyers before the applicants obtained additional financing. However, I find there is no supporting evidence to conclude the applicants told Pacifica or Mr. Alexander to wait for further financing before instructing the lawyers to prepare the mortgage documents.

17. Based on emails in evidence, I find that after the applicants signed the new agreement, they chose to seek other financing options with a different mortgage broker, and did not immediately inform Mr. Alexander or Pacifica. I find Pacifica discovered on February 22, 2019 that the applicants were considering a second mortgage through a different broker. I find the applicants informed Mr. Alexander on February 26, 2019, who informed Pacifica the same day, that they would be financing the home purchase through the other broker and a different lender, instead of Pacifica. Pacifica confirmed by email that it had already sent mortgage documents to the lawyers by February 26, 2019. On February 28, 2019, the applicants instructed Mr. Alexander not to submit any Pacifica mortgage documents to the lawyer. This was also the date of the lawyer's invoice to Pacifica for mortgage-related legal services and expenses.
18. The lawyer's invoice charged \$2,362.76 for tasks relating to the Pacifica mortgage. The applicants do not deny that in an April 4, 2019 letter, Pacifica deducted this amount from the \$3,000 deposit and refunded them the remaining \$637.24 balance. It is not clear why the applicants claim a \$2400 deposit refund, but I infer that they may have rounded up the \$2,362.76 deduction. In any event, on the evidence before me, I find the lawyers had already completed their mortgage-related services by the time the applicants informed Mr. Alexander and Pacifica that they were using other financing on February 26, 2019.
19. The new agreement said that whether or not any amount was actually loaned under the agreement, the applicants would pay all of Pacifica's loan-related legal costs, plus registration fees and out-of-pocket expenses Pacifica usually incurred in preparing for and completing the mortgage transaction. The new agreement also said if the mortgage did not proceed, the deposit would be returned after deducting

Pacifica's out-of-pocket expenses and costs associated with issuing the agreement and making the loan funds available. I find that under the new agreement, the applicants were liable for the legal fees and expenses invoiced by the lawyers.

20. The applicants argue that the full deposit should be refunded because Pacifica's mortgage was not enough to finance the home purchase, and Mr. Alexander did not obtain a required second mortgage. I find the new agreement does not say that legal fees and expenses could only be deducted if further financing was obtained.
21. Having reviewed the evidence, I find that Pacifica properly deducted legal fees and expenses from the applicants' deposit under the new agreement, and I find it does not owe any more of the deposit to the applicants. I also find that Ms. Hillman and Mr. Eng do not owe any portion of the deposit to the applicants. Further, I find Ms. Hillman and Mr. Eng were acting as representatives of Pacifica for the mortgage and not as individuals, so I dismiss the applicants' claims against Ms. Hillman and Mr. Eng.
22. Turning to Mr. Alexander, the applicants say their purchase could not complete on the Pacifica mortgage alone, which they abandoned because Mr. Alexander failed to arrange a second mortgage quickly enough. The applicants say this means the whole deposit should be returned.
23. I note the home's seller extended the deadline for completion multiple times, including to February 28, 2019 and then March 7, 2019, both of which were after the applicants abandoned the Pacifica mortgage arranged by Mr. Alexander. On the evidence before me, I find the applicants abandoned the Pacifica mortgage by choice, not because Mr. Alexander failed to arrange additional financing in time.
24. Further, the applicants do not refute that Mr. Alexander told them that if they obtained a second mortgage elsewhere, they could use it to top up the Pacifica mortgage funds, which would have meant the legal fees and expenses paid by Pacifica would not have been wasted.

25. The applicants argue that Ms. Hillman told them Mr. Alexander's application to Pacifica indicated that the applicants already had the remaining balance for their home purchase, beyond the Pacifica mortgage amount, in their account, which they did not. Ms. Hillman does not confirm or deny saying this. The applicants allege this is "financial fraud" by Mr. Alexander.
26. The applicants do not describe how they were harmed by Mr. Alexander's alleged misrepresentation to Pacifica. I find that Pacifica continued to honour the new agreement after learning of the applicants' attempts to obtain a second mortgage. On balance, I also find the applicants have not proven Mr. Alexander would not have obtained the required second mortgage before the extended March 7, 2019 closing date, and that the applicants could not have completed the sale using the Pacifica mortgage and other financing. So, I find I do not need to address whether Mr. Alexander told Pacifica the remaining home purchase funds were already available, and whether that caused Pacifica to prepare mortgage documents through the lawyers. Even if Mr. Alexander initially told Pacifica the remaining funds were already available, Pacifica did not cancel the mortgage offer and the home purchase likely would have completed, so there was no effect on the financing.
27. In their submissions, the applicants asked that Ms. Hill be "subpoenaed" as a witness, and that Pacifica provide the mortgage application it received from Mr. Alexander. While the tribunal may summons a person to provide evidence under tribunal rule 8.2, the evidence does not show the applicants followed the required procedure for requesting such evidence, which includes requesting it in writing from the person before completing a Summons Form in consultation with a case manager and following the required directions. Keeping in mind the tribunal's goals of speed, economy, proportionality, and fairness, I find the applicants are not now entitled to seek further evidence from the respondents at this late stage. Further, as discussed above, even if the applicants' allegations of misrepresentation were accurate, I found it made no difference to the applicants' financing.

28. On balance, I find Mr. Alexander's actions or inaction did not compel the applicants to abandon the Pacifica mortgage or to seek financing elsewhere. So, I find he is not liable for the legal fees and expenses Pacifica charged to the applicants. I dismiss the applicants' claim for a refund of legal fees and expenses against each of the respondents.

Are the respondents liable for the applicants' travel and other expenses, and if so, how much do they owe?

29. The applicants say they needed to travel to BC to claim the balance of their deposit, and that the respondents should reimburse them for their travel and other costs. The applicants did not say why they needed to discuss the deposit amounts in person. Pacifica says that the parties were able to address this through telephone conversations. Further, I found above that the applicants have no right to any additional deposit refund, so for that reason alone I find they are not entitled to additional expenses to claim it.

30. In addition, I find there is no evidence showing the applicants' claimed international travel and expenses were for the purpose of seeking a deposit refund, and not a different purpose. I also note the evidence does not show the purchase of any travel to BC or other expenses, except airline tickets to Vancouver in late 2019 with no return flight. Having considered the evidence, I find none of the respondents are liable for the applicants' claimed travel and other expenses.

31. As a result, I dismiss all the applicants' claims against each of the respondents.

TRIBUNAL FEES AND EXPENSES

32. Under section 49 of the CRTA and tribunal rules, the tribunal will generally order an unsuccessful party to reimburse a successful party for tribunal fees and reasonable dispute-related expenses. The applicants were unsuccessful, so I order no reimbursement for their tribunal fees. No other tribunal fees were paid, and no dispute-related expenses were claimed.

ORDER

33. I dismiss the applicants' claims, and this dispute.

Chad McCarthy, Tribunal Member