

Agent's claim to commission owing under BRA dismissed due to non est factum

Buyer's Representation Agreement | Commercial Real Estate | GTA Real Estate | Litigation | Litigation & Dispute Resolution | Real Estate

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Agents often require buyer clients to enter into a Buyer's Representation Agreement (BRA) which sets out the buyer's agreement to pay the agent a commission on certain terms. The BRA is intended to provide an agent with some protection for working for a buyer to look for a home to buy, without any guarantee that a deal will ever result. Often a BRA will have a term that requires a buyer to pay a commission if they find another property using the services of another agent during a specified period of time.

Agents must ensure that their clients understand and agree to the terms of the BRA or it may not be enforceable.

In *Sutton Group-Admiral Realty Inc. v. Taborovska*, 2021 ONSC 2837 (CanLII), the applicant agent worked with two clients for more than a year trying to find a home in the Greater Toronto Area for their daughter, Ganna. In November 2018 the parents decided to make an offer on a property in Mississauga for \$2.1 million. As they lived in Kiev, the offer was made in Ganna's name to avoid the Non-Resident Speculation Tax.

The agent spoke several times by telephone with Ganna's father before the offer was signed. However, he never showed Ganna the Mississauga property or spoke to her about it before he prepared the offer documents for her to sign.

At 6:12 p.m. on 12 November 2018, the agent sent a 19-page document to Ganna's father by email, containing the draft Agreement of Purchase and Sale (APS), the BRA, a Confirmation of Co-operation and Representation form, a REALTOR Customer Relationship acknowledgment form, an Individual Identification Information Record and an Offer Summary.

At 10:21 p.m. on 12 November 2018, Ganna returned the executed documents, including the APS and the BRA, to the agent by email. No changes or amendments had been made to the documents. The BRA entitled the agent to a 2.5 percent commission on the Mississauga property or any other single-family home Ganna bought in the Greater Toronto Area commencing 12 November 2018, and ending four months thereafter on 11 March 2019.

The offer on the Mississauga property was rejected. On 22 November 2018, just ten days after signing the BRA, Ganna made an offer on another home in Toronto through a different real estate agent for \$3 million. That offer was accepted and the deal closed on 4 January 2019.

The agent subsequently brought an application for an order requiring Ganna to pay him a 2.5 percent commission on the Toronto property. In response, Ganna sought a declaration from the court that the BRA was void and unenforceable.

A trial of the issues was heard by the Honourable Madam Justice Breese Davies in late 2020. At trial, Ganna did not dispute signing the BRA or that she bought a property in Toronto ten days later with another agent. As a matter of contract, the agent was therefore entitled to a 2.5 percent commission on the Toronto property unless the BRA was determined to be unenforceable.

In that regard, Ganna raised the defence of "non est factum" which essentially means that a party signing a contract did not understand what they were agreeing to. This position is obviously prone to abuse by parties seeking to avoid contractual obligations, and requires convincing proof that (i) they were mistaken about the nature of the contract; (ii) the mistake as to the nature of the contract was the result of a misrepresentation by the other party; and (iii) they were not simply

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careless in signing the contract without reading it: *Marvco Colour Research Ltd. v. Harris*, 1982 CanLII 63 (SCC), [1982] 2 S.C.R. 774; *Bulut v. Carter*, 2014 ONCA 424 (CanLII) at para. 18; *Spiridakis v. Li*, 2020 ONSC 2173 (CanLII).

Justice Davies ruled in favour of Ganna on all three parts of the test.

Firstly, Justice Davies found that most of the communications regarding the BRA were between the agent and Ganna's father, rather than Ganna. Ganna had a very limited role in the prospective house purchase and was not actively involved in the telephone conversations between the agent and her father. Justice Davies found that the agent did not explain the BRA to Ganna directly and that any information she received about the BRA came from her father.

Secondly, Justice Davies determined that the agent had misrepresented the fundamental nature of the BRA to Ganna's father by telling him that it related to the prospective Mississauga property only, and without expressly confirming that the commission would be payable for other properties if the transaction did not proceed. Ganna's father relayed this incorrect information to her before she signed the BRA. In Justice Davies's view, Ganna therefore misunderstood the fundamental nature of the BRA and her misunderstanding was the result of the agent's misrepresentation to her father.

The final issue was whether Ganna was careless by signing the documents based on her father's description of the documents. Understandably, the agent argued that by signing and returning the documents to him without any changes or inquiries, Ganna was at least careless in the manner that she signed the BRA.

As a general rule in Ontario law, a person who executes a document without taking the time to read it cannot later argue that she was mistaken as to its contents: *Isaacs v. Royal Bank of Canada*, 2010 ONSC 3527 (CanLII) at para. 37, aff'd 2011 ONCA 88 (CanLII). The rationale for this rule is that a party should not be able to rely on their own carelessness to avoid liability to an innocent party to the contract who acted in good faith.

Once again, the agent's main failing was that he never spoke directly to Ganna about the BRA to explain the document to her. At the least, the agent had an obligation to ensure that Ganna understood the documents he was asking her to sign rather than relying on her father to act as the conduit of (incorrect) information. As between the agent and Ganna, Justice Davies found that it was reasonable for Ganna to rely on the information she received from her father and she was not careless in doing so. Having failed to communicate directly with Ganna about the terms of the legal agreement she was entering into, the agent was not permitted to enforce the terms of the BRA against her.

In the result, the agent's application was dismissed and the court determined that the BRA was unenforceable.

One has sympathy for the agent, who will receive no compensation after spending a year trying to find a home for Ganna's parents in the GTA. To avoid similar results, agents who wish to rely on a BRA should take steps to ensure that the party who is signing it has the opportunity to review it, to ask any questions, and positively confirms that they understand under what circumstances the commission is payable, and for what period of time. Often a BRA is presented to a client at the same time as the Agreement of Purchase and Sale and several other documents, and there is little time to review the terms of the BRA in any detail. Agents may wish to consider taking the time to review the terms of a BRA with a client well before a potential deal is finalized so that the client cannot complain thereafter that its terms came as a complete surprise. A PDF version is available to download [here](#).

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