

Commission not owing to agent under conditional agreement of purchase and sale

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Often, an agreement to purchase real estate will have a conditional period to allow for various steps to be completed by either the buyer or seller. An appeal decision in the Divisional Court affirmed that a party cannot generally sue for compensation under an agreement until it is firm and binding. This principle applies to real estate agents seeking to recover a commission as well as the parties to the conditional agreement, as demonstrated by *Covenoho v. HomeLife Response Realty Inc.*, 2022 ONSC 5877 (CanLII).

The decision arose from a dispute between a real estate agent and two brokerages. In January 2019, the agent executed an Independent Salesperson's Agreement with a brokerage, Right at Home, and was provided with a salesperson's manual.

In June 2020, a property in Mississauga, Ontario was listed for sale on the Multiple Listing Service for \$799,800.00. The agreement to list the property was signed by the listing brokerage, Homelife, and the owners of the property.

The agent presented a conditional offer on behalf of some prospective buyers to purchase the property for \$805,000. The offer contained conditions for the buyers to arrange financing, conduct a home inspection, and satisfy themselves that they could obtain insurance.

If the property had been sold to the agent's clients, she would have been entitled to a portion of the sales commission because she would have been the cooperating broker.

Unfortunately for the agent, the sellers did not accept the conditional offer. Notwithstanding this development, the agent made a demand to Homelife to pay her the cooperating brokers' portion of the real estate fees. Homelife understandably took the position that it was not required to pay the agent any commissions since there was no sale.

In response to a threat by the agent to commence a lawsuit against Homelife for the commissions, the Vice President of Legal for Right at Home advised that she did not have the standing to bring the lawsuit and that she was required to withdraw it. Further, the agent was advised that Right at Home took the view that they did not have any claim against Homelife for any unpaid commissions either.

Undeterred by these developments, the agent commenced a lawsuit for the commissions. Shortly thereafter, her Independent Salesperson's Agreement was terminated by Right at Home.

In December 2021, a Deputy Judge of the Ontario Small Claims Court dismissed the agent's claims against both brokerages. The agent then appealed to the Divisional Court.

On appeal, while the agent raised numerous issues about the real estate brokerage industry generally, the court focused on what actually took place between the parties from a legal standpoint.

To start with, the appellate court found that there was never a binding agreement of purchase and sale formed between the buyers and the sellers. For parties to be in agreement (*ad idem*) on the terms of the contract they must have reached the same understanding as to the essential terms of the agreement. In this case,

the sellers had listed their property for sale, which was, at most, an expression of interest in selling the property and a solicitation of offers.

The agent argued that her clients' conditional offer to purchase the property was an "interim acceptance" of the seller's offer to sell. However, this position was contrary to the well-understood principles of contract law in Canada. In the appellate court's words, "a conditional offer is not a valid offer." An offer that is conditional on certain events or conditions coming to pass may never be completed if those things don't happen. Here, the buyers may not have been able to obtain financing or insurance, in which case they would not have been required to complete the purchase.

The agent further argued that Right at Home was negligent in not suing Homelife to obtain her commission. The court rejected that argument since, under the listing agreement, even if the sellers had an obligation to accept an offer such as the one tendered by the agent's clients, the only party that could enforce that obligation was Homelife. The listing agreement was a contract between Homelife and the sellers. The agent and Right at Home had no rights under the listing agreement. Nothing in any of the applicable rules, regulations or policies imposed a legal obligation on the sellers to accept the offer.

The agent asserted that she was being "denied access to justice" because her claim against Homelife was not pursued by Right at Home. However, a person who does not have a valid claim is not being denied access to justice simply because a third party refuses to advance that claim on their behalf. The court noted that Right at Home was within its rights not to advance the agent's claim and to terminate her position under the Independent Salesperson's Agreement. The agent was not denied access to justice since her claim was adjudicated at both the trial and the appellate level. As a result, the appeal was dismissed by the Divisional Court.

The decision shows that an agent is not generally entitled to recover a commission that would have been payable had a conditional offer become firm and binding. This result may be unfortunate to an agent who puts a substantial amount of time and effort into assisting clients with putting forth a conditional offer but reflects well-established principles of contract law. Absent a binding contract, formed by the fulfilment of all outstanding conditions, there are likely no valid grounds for enforcing a commission payment and one should not have any reasonable expectations of compensation until an offer becomes firm. A PDF version is available to download [here](#).

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