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February 22, 2014

Failed property sale by email a 'poster child' case, judge says

All document changes should be reviewed and initialled

Scanning and sending an agreement of purchase and sale by email requires close attention if the deal is to close properly

Last month you wrote about a ruling by the late Justice Sydney Robins which paved the way for signing real estate agreements by fax. Does that also apply to signing offers by email?

The short answer is: yes. As I see it, the reasoning in the Court of Appeal decision in the 1989 case of Rolling v. Willann also applies to concluding real estate deals by email. In that case, Justice Robins wrote that technological advances which expedite the transmission of documents "should be encouraged and approved."

The longer answer, however, is more complicated. Using a document scanner to create an electronic version of an agreement requires a considerable amount of care and attention. Doing it wrong can result in disastrous consequences for the parties involved.

A small claims court decision last month illustrates the complexity of using email to conclude real estate contracts.

"This case," wrote Deputy Judge J. Sebastian Winny, "would make a good case study for realtors on how not to conduct a real estate transaction. And it is another poster child for the wonders of miscommunication by email."

In the fall of 2011, Ian and Anita Pilon put in an offer on a Kitchener property owned by Adrian and Florica Rosu. The price on the agreement was $400,000. The Rosus signed it back at $420,000, and initialled all the pages except Page 4, the critical signing page.

The sign back was then scanned and emailed back to the agent for the Pilons missing the signature page. Thinking it was valid, the buyers countered at $410,000 and sent the document back to the sellers, again missing the signature page.

The sellers met with their real estate agent, Ninoslav Orasanin. There was some confusion about whether they intended to accept the $410,000 price, or sign it back at $420,000. In any event, the change in price was never initialled and the document was returned to the buyers — still missing the signature page.

Looking back on the events, the deputy judge later noted, "it did not appear that (Clifford van Dincten, the buyers' agent) examined the document with any significant care — if indeed he opened that email attachment and looked at it at all."

In this comedy of errors, all parties thought an agreement had been reached. The buyers thought they were paying $410,000, and the sellers apparently thought the price was $420,000.

The sellers acknowledged receiving a "final" copy of the agreement of purchase and sale from their realtor, but did not open the email attachment believing they were aware of its content and felt no need to review it.

The buyers had the home inspected, and waived the condition on home inspection. They were ready, willing and able to close on the scheduled closing date, but the sellers could not provide vacant possession since their tenant had not moved out. The deal died because of the confusion over the price.

The buyers sued for damages exceeding $17,000 and return of their deposit.

After analyzing the evidence, the deputy judge decided that a complete contract was never concluded since it was missing Florica Rosu's signature, and communication of the acceptance to the buyers was never completed.

The buyers were denied damages but they were awarded return of their deposit.

Sadly, cases like this are all too frequent. A number of lessons emerge for buyers and sellers:

- Always initial every page of an agreement, and every change to the price and the wording.
- It is imperative to retain a copy of every document version that has been signed. If a copy is not available, take a picture of each page with a cellphone.
- Open, print and review all email attachments.
- Monitor every step taken by the real estate agents to ensure nothing is missed.
- And above all, make sure the real estate agent retained has a minimum level of experience and is focused on properly completing the transaction.

Pilon v Rosu, 2014 CanLII 140 (ON SCSM)

Date:	2014-01-08
Docket:	1682/12
URL:	http://canlii.ca/t/g2jqz
Citation:	Pilon v Rosu, 2014 CanLII 140 (ON SCSM), <http://canlii.ca/t/g2jqz>

ONTARIO
SUPERIOR COURT OF JUSTICE
(SMALL CLAIMS COURT)

BETWEEN:	)	
	)	
IAN TIM PILON and ANITA PILON	)	Mr. Benjamin E. Jefferies
	)	Student-at-Law for the Plaintiffs
Plaintiffs	)	
-and-	)	
	)	
	)	
ADRIAN OCTAVIAN ROSU and	)	Mr. Daniel W. Veinot
FLORICA ROSU	)	Counsel for the Defendants
	)	
Defendants	)	
	)	
	)	Heard: January 3, 2014

REASONS FOR JUDGMENT

1. After hearing the evidence and argument, the plaintiffs' claim was dismissed for reasons to follow which are provided below along with brief reasons for a mid-trial evidentiary ruling.

Nature of the Dispute

2. This case would make a good case study for realtors on how not to conduct a real estate transaction. And it is another poster-child for the wonders of miscommunication by email.

3. The plaintiffs thought they had a contract for the purchase of their intended new home from the defendants. The defendants, who also believed there was a deal albeit at a different price, failed to close the transaction on December 16, 2011, apparently because a tenant did not vacate within the timeframe they had expected. Their request for an extension of the closing date was turned down by the plaintiffs, who made other arrangements and brought this action for damages.

4. My conclusion was that there was no valid contract formed between the parties and the plaintiffs' claim was dismissed accordingly. My reasons for that conclusion follow.

Review of Evidence and Findings of Fact

5. In the summer and fall of 2011, the plaintiffs were looking for a new home for their family which included three children and another on the way. They put in an offer on 208 Paige Place, Kitchener, which was owned by the defendants.

6. I find there was a mutual mistake on the municipal address of the subject property as stated on the offer (Exhibit 1, Tab 1). It was described as 208 Paige Street instead of 208 Paige Place. In the absence of evidence to the contrary I find that the legal description of the property was correct. I reject the defence suggestion that the difference between "ST" and "PL" in the corresponding municipal address as stated on that document has any legal significance in the circumstances of this matter.

7. The plaintiffs' realtor was Mr. Clifton van Dincten. The defendants' realtor was Mr. Ninoslav Orasanin. All communications between the parties were through their realtors and there was no direct communication between any of the parties at any time. Both realtors were called by the plaintiffs to testify at trial.

8. None of the parties or their realtors has copies of the several versions of the several offers and counter-offers, each of which was transmitted as an attachment to an email. The court is left only with the "final" version of the document entitled "Agreement of Purchase and Sale" and the court must re-construct its content on each transmittal based on the "final" version (Exhibit 1, Tab 1) combined with the other evidence.

9. The plaintiffs made an offer on September 22, 2011, to purchase the property for $400,000 with a closing date of November 16, 2011.

10. The defendants had previously made known to their realtor that there was a tenant on the property and his rent was paid in advance "through December" which I find - consistent with Mr. Rosu's evidence on this point - meant through to the end of that month. For some reason their position in light of that was that a closing "in mid-December/January" would address the concern over the tenancy (Exhibit 1, first page, email dated July 19, 2011).

11. The defendants met with their realtor Mr. Orasanin on September 23 to review the plaintiffs' offer. It is common ground and I find that they did not accept it.

12. The result of that meeting was the transmittal by Mr. Orasanin to the plaintiffs' realtor Mr. van Dincten of a counter-offer at $420,000 with a closing date of December 16, 2011. However the precise description of what was in fact transmitted is less than straightforward.

13. It is clear and I find as a fact that the price of $400,000 was amended to $420,000 and both defendants initialled that change, both to the number

and the words, and they initialled the change to the closing date. They also initialled the lower right-hand corner of pages 1, 2, 3, 5 & 6 of the document.

14. It is the signature page (being page 4 of 6) which produces the greatest uncertainty concerning what happened. On the page 4 of 6 as produced later and in the "final" version, Mrs. Rosu signed and her signature was witnessed by Mr. Orasanin and dated September 23, 2011. But Mr. Rosu's signature appears below hers and is neither witnessed nor dated.

15. There is an email from Mr. van Dincten to Mr. Orasanin dated September 24 (Exhibit 4), in which he states that he did not get a copy of the signature page the previous night. I find as a fact that the defendants' counter-offer at $420,000 was transmitted to the plaintiffs as a PDF attachment to an email and the PDF scan was missing page 4 of 6 which was the signature page.

16. The plaintiffs did not accept what they believed was the defendants' counter-offer at $420,000. On September 25 they signed it back at $410,000, but left the December 16 closing date unchanged. That further counter-offer was open and irrevocable only until 6 p.m. on that same date - September 25, 2011 - at which point it would expire.

17. It appears therefore and I find as a fact that Mr. Orasanin received from Mr. van Dincten a further counter-offer from the plaintiffs on September 25 at a price of $410,000 and that document was missing page 4 of 6 being the signature page.

18. Mr. Orasanin testified that he then met with both his clients, discussed the new proposed price of $410,000, and they accepted that price. But then he said he could not remember if Mrs. Rosu was in fact present for that meeting. He said that if she was indeed present, he would have had her sign the confirmation of acceptance section on page 4 of 6 along with Mr. Rosu, whose signature appears alone there, dated September 25 at 2:15 (which I infer to be p.m. although that distinction is not completed on the form).

19. It is common ground that Mrs. Rosu did not sign the confirmation of acceptance. Only Mr. Rosu signed there. Moreover his signature appears immediately beneath the single signature line, which is consistent with him leaving space for her to sign above his signature just as hers appears above his in the acceptance of offer section on the same page.

20. Mr. Orasanin testified that his clients intended to accept the plaintiffs' further counter-offer at $410,000, that they both signed the document, and he then had it sent back to the listing agent Mr. van Dincten, again as an attachment to an email on that same date September 25 - which I take it must have occurred before 6 p.m. However he said and I accept that the transmitted version was missing page 4 of 6 being the signature page. In addition - and this is common ground - neither one of the Rosus had signed or initialled the change of the price on page 1 of 6 from $420,000 to $410,000, whether in the numerical or word form.

21. It does not appear that Mr. van Dincten examined the document with any significant care - if indeed he opened that email attachment and looked at it at all.

22. Mr. Orasanin testified and I accept that the omission of page 4 of 6 was only corrected on October 11, 2011, when he said that a complete version of what he had intended to transmit on September 25 was forwarded to Mr. van Dincten. As noted above, the plaintiffs' further counter-offer, which the defendants intended to accept according to their realtor, expired on September 25 at 6 p.m.

23. To further confuse the matter, after September 25 a dispute arose between the Rosus and Mr. Orasanin over the putative sale price. The Rosus both testified that at the time, they believed their counter-offer at $420,000 had been accepted by the plaintiffs and they say that belief was based on Mr. Orasanin having told them so. He denies making any such statement.

24. Both of the defendants testified that they had never agreed to sell the property for $410,000. Mr. Rosu says there was never any meeting with Mr. Orasanin at which that price was discussed. Mrs. Rosu's evidence was the same in that regard. Both say they did not know of the plaintiffs' position that they had purchased the property not for $420,000 but for $410,000, until after the litigation started.

25. On this issue, Mr. Orasanin testified that his clients' dispute with him was based on them believing, in error, that the price was agreed at $419,000 and not $420,000, but that they later conceded (to him) their mistake in that regard. As I understand their evidence, both of the Rosus maintain at trial that their intention was to sell the property at $420,000 and they always believed the plaintiffs to have accepted that price and that a sale was contracted for on that basis. Both say they received copies of the "final" version of the Agreement of Purchase and Sale as an attachment to an email from their realtor, but that they did not open the attachment because they believed they were aware of its content and felt no need to review it.

26. During the course of his evidence, Mr. Orasanin allowed that there had been many oversights with respect to the execution of this Agreement of Purchase and Sale. I agree. For his part Mr. van Dincten conceded that he had apparently overlooked the fact that the version of the Agreement of Purchase and Sale he received back from Mr. Orasanin on September 25 had no initials from the vendors indicating their acceptance of the price at $410,000. In other words, he had heard verbally from Mr. Orasanin that the vendors were going to accept that offer, but he failed to review the document to see if it constituted such an acceptance.

27. A few additional facts are useful even if they make no difference to the outcome.

28. On September 22, he plaintiffs paid a deposit of $2,500 to the listing brokerage in trust to show their desire to purchase the property (Exhibit 1, Tab 2). Those funds remain in that account to date.

29. The putative agreement was conditional on inspection and that condition was waived by the plaintiffs on September 29 (Exhibit 1, Tab 3). A condition for sale of the plaintiff's current home was waived on October 9 (Exhibit 1, Tab 4).

30. It is clear and I find as a fact that the plaintiffs were ready, willing and able to close as scheduled on December 16, 2011.

31. The defendants failed to close on December 16. Their lawyer advised the plaintiffs' lawyer that their tenant remained in possession and so they

could not give vacant possession on that date. They requested an extension to December 19, but consent was refused (see Exhibit 1, Tab 10, letter dated December 16, 2011). Then they requested another extension and that was also denied. There was some attempt to settle and some discussion of payment of the plaintiffs' accommodation and other expenses after December 16 if closing the following week could be agreed, but closing did not occur.

32. The plaintiffs, with their children and faced with the loss of a roof over their heads just days before Christmas, moved into a basement apartment on a temporary basis.

33. On December 20 the defendants communicated to the plaintiffs' lawyer the fact that they then had vacant possession (Exhibit 1, Tab 12). But the deal was dead.

34. The plaintiffs claim damages consisting of various wasted expenses including moving and storage costs, legal fees, rental of the basement apartment, the wasted inspection cost, replacement of Christmas gifts which ended up in storage due to these events, and replacement of clothes and toiletries including diapers on an emergency basis. They also claim general damages of $10,000. The total damages claim as pleaded is $17,082.80. Finally, they ask that their deposit of $2,500 be returned.

Issue 1: Was a Valid and Enforceable Contract Formed?

35. To succeed in their claim for breach of contract, the plaintiffs must establish that a valid and enforceable contract existed for the defendants to have breached by their failure to close on December 16, 2011.[1] For the following reasons I find for the defendants on this issue and conclude that no such contract was formed.

36. For a legally-binding contract to be formed, an offer must be accepted. But also, the acceptance must be communicated to the offeror. If a party executes an agreement which simply then remains in the possession of that party's agent and is not transmitted to the offeror, there has been no communication of acceptance and contract formation has not occurred: see Stephen M. Waddams, The Law of Contracts, 3rd ed. (Toronto: Canada Law Book, 1993), at para. 88; John D. McCamus, The Law of Contracts (Toronto: Irwin Law, 2005), at p. 67, citing *Larkin v. Gardiner* (1895), 27 O.R. 125 (Div. Ct.).

37. In this case, the plaintiffs' realtor had received verbal notification from the defendants' realtor that they intended to accept the offer at $410,000. But an intention to accept is not an acceptance. I find that Mr. van Dincten never received an acceptance in this case.

38. What the plaintiffs' realtor received on September 25 was a document consisting of 5 pages which where identical to 5 of the 6 pages comprising the plaintiffs' counter-offer. It was missing page 4 of 6 being the signature page and there were no initials on page 1 of 6 to indicate acceptance of the revised price at $410,000. It contained, in fact, nothing to indicate acceptance of their counter-offer. Those 5 pages sent back to Mr. van Dincten were the same as they appeared when he had sent them to Mr. Orasanin earlier the same day.

39. In my view the fact that Mr. van Dincten expected to receive an acceptance - because that was what he was led to expect by Mr. Orasanin - cannot convert the document he in fact received into something materially different in fact and in law than it actually was.

40. I find that if the defendants did indeed accept that counter-offer, their acceptance was never communicated to the plaintiffs prior to its expiry. The later transmittal by Mr. Orasanin's office of a complete version of the "final" document was ineffective because it occurred on October 11, after the counter-offer had expired.

41. But that being said, the question remains as to whether the defendants in fact accepted that counter-offer. Both of them testified that they had no intention of selling at $410,000 and believed their prior counter-offer at $420,000 had been accepted by the plaintiffs. Both of them said they had no knowledge of an alleged sale price at $410,000 until after the litigation commenced. As dubious as that story might seem at first impression, there is more.

42. Mr. Rosu signed the confirmation of acceptance but Mrs. Rosu did not. I hasten to observe that confirmation of acceptance is just that and is not the same thing as acceptance. For a valid contract to be formed what is needed is acceptance and communication of acceptance. Confirmation of acceptance is not an essential element of a contract but is simply an instrument used in real estate practice to avoid potential disagreements over whether agreement has been reached. It is a "belt and suspenders" measure - which was nevertheless ineffective in this instance.

43. I note in passing that Mr. van Dincten's stated belief that only the last party accepting an offer needs to sign the confirmation of acceptance, even if two parties are accepting that offer jointly, is plainly erroneous. If the confirmation has any significance it needs to be signed by both of two parties jointly accepting an offer - as Mr. Orasanin appeared to agree.

44. But Mr. Rosu's signature on the confirmation of acceptance appears in a way that suggests he left room for his wife's signature. At the same time, his signature below hers in the acceptance section of the same page, unlike hers, is neither witnessed by their realtor nor dated by him. That could be consistent with Mr. Rosu having signed both sections at the same time on September 25 - which would mean he did not sign the defendants' putative counter-offer on September 23.

45. On any analysis of the evidence, I find as a fact that Mrs. Rosu never signed or initialled any part of the document on September 25. I conclude that she did not accept the plaintiffs' counter-offer of that date. I accept that Mr. Rosu signed both the acceptance section and the confirmation of acceptance section on September 25 but that signature was not transmitted to the plaintiffs' realtor before expiry of the offer that was open only until 6 p.m. that day. In any event, acceptance by both of the joint owners, and timely communication of such acceptance, would have been necessary to form a legally-valid contract.

46. The question as between the defendants and their realtor over whether they ever agreed to sell at $410,000 need not be resolved by this court. What matters for present purposes, in view of agency law principles, is the communications which took place between Mr. Orasanin and Mr. van Dincten on behalf of their respective clients.

47. I concluded as a matter of fact that the defendants never accepted the plaintiffs' counter-offer on September 25, 2011, at a price of $410,000, and that in any event no such acceptance was communicated to the plaintiffs before their counter-offer expired at 6 p.m. that same day.

48. There being no contract between the parties as alleged, the defendants could not be liable for breach of it by failing to close on December 16 and the plaintiffs' claim was dismissed.

49. I find it unnecessary to address the several other substantive defences.

Issue 2: Damages

50. For completeness I will assess the damages, as is generally required of a trial judge even though the claim will be dismissed.

51. I would have allowed the following expenses as claimed: storage at $282.50 for 3 months which is $847.50, $1,724.15 for movers on December 17, rent and board at $600 for 3 months which is $1,800, $2,095 for legal services, $265.55 for the inspection, $120 for childrens' clothes and $150 for Ms. Pilon, $200 for diapers and toiletries, $800 for replacement Christmas presents. The total of those damages is $8,002.20.

52. In addition I would have made an award for general damages or aggravated damages based on my finding that the scope and extent of mental distress which would have been within the contemplation of the parties at the time of contract formation (had that occurred) supported such an award in the unusual circumstances of this case. I would have awarded $5,000.

53. The total damages award would have been $13,002.20. I would not have given effect to the defence of failure to mitigate.

Reasons on Mid-Trial Evidentiary Ruling

54. The defence objected during the examination-in-chief of Ms Pilon to certain evidence that counsel anticipated would be led concerning attempts between the parties to settle the matter on and after December 16 through to the following week, after the defendants had announced their inability to close as scheduled. I overruled that objection with reasons to follow.

55. In my view the objection was premature because no specific question had yet been asked which would warrant the concern raised by the defence.

56. But in any event I did not view the potential evidence as settlement privileged as alleged. It was simply part of the narrative, as was the fact that the defendants failed to close and that the reason for that failure was the tenant who was paid up to the end of December. In my view it would be unfair for the defendants to be permitted to seek to justify their failure to close by explaining the reason for it and then refuse to permit the plaintiffs to respond to that position by seeking to explain their response to the defendants' failure to close. In my view it was a situation where fairness mandated a finding of implied waiver of any privilege which might arguably apply to such evidence.

Conclusion

57. The plaintiffs' claim was dismissed, but in the circumstances, without costs. I directed the listing brokerage to refund the plaintiffs' deposit.

January 8, 2014 Deputy Judge J. Sebastian Winny

[1] The Agreement of Purchase and Sale contained the usual time is of the essence clause.

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