COURT FILE NO.: 07-CV-339892SR
DATE: 20080508

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Mark Borden v. Joyce Rai and Metro East Realty Ltd.

BEFORE: Master Glustein

COUNSEL: R. Naimark for the plaintiff

R. Baijnath for the defendants

HEARD: May 7, 2008

REASONS FOR DECISION

Nature of the motion

[1] The defendants Joyce Rai ("Rai") and Metro East Realty Ltd. ("Metro East") (collectively, the "Rai Defendants") bring this motion for an order under rule 13.1.02(2)(b) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, to transfer this action to Whitby, Ontario.

[2] The plaintiff, Mark Borden ("Borden"), opposes the transfer of this action from Toronto to Whitby, but submits that the trial should be heard either in Newmarket or Toronto. The parties agree that if the court finds that Newmarket is a more appropriate venue than Whitby, the trial should be heard in Toronto.

Background to the action

[3] This case arises from Borden's purchase of his home at 16 Thornhill Avenue in the City of Thornhill (the "Property"). Borden retained Rai as real estate agent and Metro East as real estate brokerage to purchase a residential property. The parties negotiated and executed a "Buyer Representation Agreement" on or about April 22, 2007 in Thornhill[1]. That agreement provided that the Metro East was entitled to a 2.5% commission of the sale price of a property purchased through the Rai Defendants.

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[1] Borden's evidence is that the "Confirmation of Co-operation and Representation Agreement" was negotiated and executed on or about April 22, 2007 in Thornhill in front of the Property, but that statement is a typographical error in that both parties agree in the pleadings that Borden signed the Confirmation Agreement in Michigan and faxed it to the Rai Defendants in Oshawa (as discussed below). The Rai Defendants did not challenge (i) that the agreement to which Borden intended to refer was the Buyer Representation Agreement or (ii) the veracity of the corrected evidence as stated by Borden's counsel at the hearing.

[4] Borden alleges that he verbally agreed with the Rai Defendants that they would (i) receive a 1.25% commission from the vendor on the sale of the Property to Borden (instead of the 2.5% commission set out in the Buyer Representation Agreement), and (ii) rebate $5,000 to Borden from the 1.25% commission to reduce the price of the Property to be paid by Borden.

[5] Borden relies on a "Confirmation of Co-operation and Representation Agreement" (the "Confirmation Agreement") which he alleges confirms that the Rai Defendants would accept a 1.25% commission. The Confirmation Agreement was signed by Borden in Michigan and faxed to the Rai Defendants' office in Oshawa.

[6] After Borden signed and faxed the Confirmation Agreement, the Rai Defendants amended the terms of that agreement to provide for a 2% commission. The Rai Defendants allege that Borden authorized the change by telephone. Borden denies that allegation.

[7] The Rai Defendants further allege that Borden agreed to pay a 2.5% commission if a target lower price for the Property could be negotiated. The Rai Defendants allege that the target price was reached, and as such, Borden is required to pay a 2.5% commission.

[8] Finally, the Rai Defendants deny any agreement for a 1.25% commission or a $5,000 rebate.

[9] Borden seeks damages for the difference in the commission, and the payment of the $5,000 rebate. Rai and Metro East deny the claim and bring a counterclaim seeking 2.5% for commission on the Property.

Applicable law

[10] The applicable principles for this motion can be summarized as follows:

(i) The onus is on the moving party to satisfy the court that it is desirable in the interests of justice to transfer the proceeding from where it has been commenced (*Nutech Brands Inc. v. Air Canada*, [2007] O.J. No. 5031 (S.C.J.) ("*Nutech*") at para. 22).

(ii) The plaintiff's right to choose the place of the commencement of the action is not to be abrogated lightly (*Joseph v. Lefaivre Investments (Ottawa) Ltd. (c.o.b. Cash Cow)*, [2005] O.J. No. 2324 (S.C.J.) at para. 10; leave to appeal refused, [2005] O.J. No. 2911 (Div. Ct.) at para. 6).

(iii) Motions under rule 13.1.02(2)(b) are fact specific and require weighing and balancing all enumerated factors under the rule. No factors are more important than others (*Nutech*, at para. 21).

(iv) A counterclaim that is intertwined with the main claim is a neutral factor (*Eveready Industrial Services Corp. v. Jacques Daoust Coatings Management Inc.*, [2005] O.J. No. 2285 (S.C.J.) at para. 28).

Analysis

[11] I now review the evidence on this motion in light of the above law and the factors set out in rule 13.1.02(2)(b).

(a) Rule 13.1.02(2)(b)(i): Location of the events or omissions that give rise to the claim

[12] There is no strong connection of the location of the events or omissions that give rise to the claim to either Newmarket, Toronto, or Whitby.

[13] Rai swears in her affidavit that she prepared the agreement of purchase and sale in Durham and that the agreement of purchase and sale was negotiated by Rai in Durham.

[14] As noted above, the "Buyer Representation Agreement" was negotiated and executed in Thornhill.

[15] Regardless of the above two agreements, it is the alleged verbal agreement and the Confirmation Agreement that are the bases of this action. There is no evidence as to where the alleged verbal agreement took place.

[16] The Rai Defendants' counsel submitted that the court should conclude that the Confirmation Agreement was "negotiated" in Oshawa because Borden signed the agreement in Michigan and faxed the agreement to Oshawa. However, the agreement could have been negotiated in any place and then faxed to Oshawa. There is no evidence that any negotiations took place in Oshawa.

[17] The Rai Defendants' submission leads to the conclusion that negotiations take place in the location to which an agreement is faxed. I reject that conclusion as illogical in fact and law.

[18] Consequently, there is no strong connection between the Confirmation Agreement and any of the locations at issue, and no evidence as to the location of the alleged verbal agreement. I find this factor to be neutral.

[19] Even taking the Rai Defendants' evidence at its highest point, such evidence would establish only a very slight benefit in favour of Oshawa if the issue of the alleged conversations regarding the amendment took place over the telephone between Borden in Michigan and Rai in Oshawa, and if the alleged amendment took place in Oshawa prior to the Confirmation Agreement being faxed to the vendor.

(b) Rule 13.1.02(2)(b)(ii) and (iii): Location where a substantial part of the damages were sustained and location of the property which is the subject-matter of the action

[20] There is no dispute that Borden sustained his damages in Thornhill as the damages relate to the purchase of the Property which is located in Thornhill. This factor favours Thornhill as a venue for the trial, although it is not significant given the contractual nature of the case.

(c) Rule 13.1.02(2)(b)(iv): Local community interest in the subject-matter of the proceeding

[21] There is no evidence on this point and as such this factor is neutral.

(d) Rule 13.1.02(2)(b)(v): Convenience of the parties, the witnesses, and the court

[22] The evidence on this issue can be summarized as follows:

(i) Rai resides in the Town of Clarington, which is 15 kilometres from the Whitby courthouse. While Rai's evidence is that she would be inconvenienced if she had to travel to Toronto in "rush hour bumper to bumper traffic", there is no evidence that she could not attend the trial due to any physical difficulties.

Even if I accept the Rai Defendants' evidence (for which no support was provided) that traffic is more congested into Toronto than out of the city, those problems can be alleviated by taking public transit or by leaving at an earlier time. In any event, any inconvenience is limited by the relatively short distance between Toronto and Whitby.

Further, given that the action and counterclaim are under the simplified rules and should not require an excessive period of time, this factor is not significant.

Consequently, while there is undoubtedly inconvenience to Rai if she is required to attend trial in Toronto (and as such this factor favours the venue in Whitby), this factor is not determinative on the convenience issue.

(ii) Borden resides in Thornhill and works in Oshawa. There is no evidence that Borden would be inconvenienced if he had to travel to Whitby for a trial.

(iii) All of the witnesses except Rai and her spouse live in Thornhill, Toronto, or otherwise in the Greater Toronto Area. This factor strongly favours Newmarket or Toronto as venues for trial.

An important issue in the case is whether the Rai Defendants promised to rebate the $5,000 as alleged by Borden. The Rai Defendants' evidence is that they "will be calling a lengthy number of former clients who will testify that they have never received kickbacks from the defendants", and that these witnesses reside throughout the GTA". This factor does not favour Whitby as a venue. At best, it is neutral in that these individuals will have to travel to Whitby, Thornhill, or Toronto for a trial. It is more likely that the factor favours Toronto as a venue, since Toronto would likely be a central access point for GTA residents.

Borden lists nine witnesses in his Schedule "D" filed in his support of his action under the simplified rules. These witnesses include:

(a) his spouse, who lives in Thornhill and will give evidence on her dealings with the defendants in relation to the subject matter of the law suit;

(b) his father-in-law, who lives in Thornhill who "discovered the events which gave rise to this law suit" and "has relevant evidence in relation to the issues which form the subject matter of this law suit";

(c) the vendors of the Property (one of whom, Mr. Ifono, is a real estate agent), who live in Thornhill;

(d) his law partner and associate, both of whom live in Toronto and work in Oshawa, who will give evidence in relation to a "kick back" they received in relation to the purchase of a property in Oshawa where Borden practices law; and

(e) the spouses of his law partner and associate, both of whom live in Toronto, and who will give similar evidence on the "kick back" issue.

[23] Consequently, the majority of Borden's witnesses live in Thornhill or Toronto. Even if I accept that the location of the defendants' GTA witnesses is neutral, the consideration of convenience of witnesses strongly favours Toronto or Newmarket.

[24] Given the strong factor of convenience of witnesses favouring Toronto or Newmarket, and at best a minimal factor of convenience of parties favouring Whitby, on balance the factor of convenience of the parties and witnesses strongly favours Toronto or Newmarket.

(e) Rule 13.1.02(2)(b)(vi): Existence of counterclaims, crossclaims, or third or subsequent party claims

[25] The counterclaim in this case is intertwined with the claim and as such is at best a neutral factor.

[26] If anything, this factor favours Newmarket as a venue because the Rai Defendants allege that there was a specific discussion in front of the Property (in Thornhill) on April 19, 2007 in which "Rai advised the plaintiff that neither she or Metro East would agree to [a reduced commission] and that Metro East would have to be paid the 2.5% commission advertised by the listing broker in the MLS listing" (see paragraph 5 of the Statement of Defence and Counterclaim).

[27] The Rai Defendants further rely on the Buyer Representation Agreement to claim the 2.5% commission, an agreement which was negotiated and executed in Thornhill.

[28] Consequently, this factor is neutral at best, and likely favours Newmarket as a venue.

(f) Rule 13.1.02(2)(b)(vii): Advantages or disadvantages of a particular place with respect to securing the just, most expeditious, and least expensive determination of the proceeding on its merits

[29] Borden's counsel practices in Toronto and would suffer inconvenience if required to travel to Whitby for the trial. Conversely, the Rai Defendants' counsel resides and practices in Durham and will be inconvenienced if he has to travel to Toronto. However, neither party gave evidence that their counsel would not act for them in the litigation if required to travel.

[30] In fact, the Rai Defendants' evidence was to the contrary. They had earlier been unable to retain counsel since the file required travel to Toronto, but the Rai Defendants' current trial counsel can attend at a Toronto trial, even though he would be "inconvenienced". This is evidenced by a comparison between Rai's initial affidavit, in which she swore that none of her "potential counsels in mind ...are willing to travel to Toronto", to her subsequent affidavit, in which she swore that Mr. Neal would be trial counsel for the Rai Defendants and would "be inconvenienced if he has to travel to Toronto for the trial of this matter".

[31] Consequently, the convenience of counsel's location is a neutral factor.

[32] There are no other factors which the parties claim to be relevant to this consideration, so it is neutral.

(g) Rule 13.1.02(2)(b)(viii): Whether judges and court facilities are available at the other county

[33] There is no evidence on this point and as such this factor is neutral.

(h) Rule 13.1.02(2)(b)(ix): Any other relevant matter

[34] The Rai Defendants state that some members of the legal community are aware of the litigation, and as such, the action is part of a "rumour mill". The Rai Defendants' counsel submits that this evidence supports a venue in Whitby so that people in Durham could read the pleadings and dispel any rumours. However, litigation is a public process, and I do not find it is a valid factor for an action to be in a venue simply so that pleadings could be read in that venue. Being part of a "rumour mill" does not constitute local community interest in the subject-matter of the proceeding, and the Rai Defendants' counsel acknowledged that there was no evidence of local community interest.

[35] Borden swears that "I wish to keep my personal affairs removed from the region in which I practice [law]". However, given my above comments that litigation is a public process, I do not find this factor to be relevant.

(i) Conclusion

[36] The Rai Defendants have not displaced the onus upon them to establish that it is desirable in the interests of justice to transfer the proceeding to Whitby. To the contrary, the balance of the factors discussed above favour Toronto or Newmarket as the venue for the trial. Given that

both parties prefer Toronto over Newmarket, I do not need to find which of those two locations has a stronger connection to the action. I reach this conclusion even if I take the Rai Defendants' case at its highest point on all of the issues discussed above.

Order and costs

[37] Consequently, I dismiss the motion to transfer the action to Whitby.

[38] Both parties made submissions on costs. The principal difference between the costs sought was the hourly rates charged by counsel. However, the actual rate charged by Borden's counsel was reasonable for his year of call, although I would reduce the partial indemnity rate to reflect a more appropriate reduction from the actual rate. Taking into account the considerable affidavit material prepared, the importance of the motion, and the costs an unsuccessful party would reasonably expect to pay, I fix costs at $5,000, inclusive of GST and disbursements, payable by the Rai Defendants to Borden within 30 days of this order.

Master Benjamin Glustein

DATE: May 8, 2008