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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L.2001/C036

BETWEEN C. D. ALEXANDER CO. REALTY LTD. PLAINTIFF

A N D PALACE AMUSEMENT CO. (1921) LTD. DEFENDANT

Joseph Jarrett instructed by Joseph Jarrett & Co. for the plaintiff.

John Graham instructed by John Graham & Co. for the defendant.

**Heard: 23rd & 24th January, 2003, 12th March, 2003 and 7th April, 2003**

**M. COLE-SMITH, J. (Ag.)**

This is an action by the plaintiff seeking commission from the sale of the Odeon Complex from the defendant or in the alternative the plaintiff claims damages on a quantum meriut.

The plaintiff C. D. Alexander Company is a licensed Real Estate Dealer which sells, lease, rents, auctions properties, chattels and appraise property.

Georgia Stewart worked as a Sales Associate to the plaintiff Company from May, 1999 to January, 2000. She possessed a licence to conduct sales on behalf of the plaintiff and her function was to solicit listing agreements, find purchasers and she also did rentals and leases.

In May 1999 she obtained a listing agreement from the defendant. The agreement dated May 13th, 1999 Exhibit 1 was signed by Georgia

Stewart as the authorized agent of the company and by Melanie Graham behalf of the defendant company. The agreement was in respect of Od Complex. Attached to the agreement there is a description of the prop and the asking price. The agreement provides for the payment of commission which is 5% of the sale price inclusive of Governm Consumption Tax.

The document Exhibit 1 states:

> "Should you introduce someone ready and willing to buy at the above price or a price acceptable to me or should the property be sold at anytime before the date mentioned above or subsequently to a purchaser introduced by you I hereby irrevocably authorize my/our Attorney(s) at-Law, on completion of the sale to deduct the commission due and payable to you hereunder together with the applicable General Consumption Tax thereon from the proceeds of the sale and to forward same to you in settlement thereof prior to the disbursement of the net proceeds of sale to me/us."

On October 12, 1999 Mrs. Georgia Stewart wrote a letter Exhibit 2 to Transport Licensing Authority, Attention Commander John McFarla introducing the property.

Mrs. Stewart again on the 2nd December, 1999, wrote to the Transport Licensing Authority Exhibit 3, Attention Commander McFarlane. The lett states in part:-

> "Thank you for the interest shown in The Odeon Complex which we introduced to you.
>
> It is understood that Parliament has first to approve any plans to purchase. As such we would appreciate any information you can supply regarding your progress with Parliament."

Arising from the letters Mrs. Stewart met with Major Desmond Brown and the meeting could have been within a month of introduction of the first letter Exhibit 2. At this meeting feasibility studies for the location of the depot and funding were discussed.

On the 8th December, 1999, Mrs. Stewart received a letter Exhibit 4 from Transport Authority signed by Lt. Commander John McFarlane, Managing Director which states in part.

> "Re Odeon Complex
>
> We acknowledge receipt of your letter of 1999, December 2 regarding the above-mentioned. Plëase be advised that all correspondence should be referred to Major Desmon Brown at Metropolitan Management Transport Holdings."

On December 2, 1999, Mrs. Stewart wrote to Palace Amusement Company Limited attention Mrs. M. Graham, Exhibit 5.

The letter states:

> "I have introduced the Odeon Complex to Transport Authority/Metropolitan Management Transport Holdings Limited for the purpose of Bus Depot.

This has generated positive interest and as such I will inform you as there are further developments."

Mrs. Stewart states that between the time she entered into the agreem with the defendant on 13th May, 1999 and her departure from the plaint company in January, 2000 she did not receive any information regarding any prior introduction from the defendant in respect of the building comple She did not receive any instructions from the defendant not to introduce property to the Transport Authority neither did she receive a list from the defendant of persons to whom she should not introduce the property. did introduce the property and C. D. Alexander is entitled to the commis which would be about $8,625000 plus interest and costs.

In cross-examination Mrs. Stewart states that the contract Exhibi was non-exclusive and she agreed that non-exclusive means that Pal Amusement was free to employ as many persons whom they wish to he them with the sale.

Mrs. Stewart said she had a meeting with Mrs. Graham for about f (5) minutes. She did not get enough time as she thought it needed to dis the contract with her. In meeting with Mrs. Graham she did not tell her at other agents were trying to sell the property on her behalf. She conclude

that Mrs. Graham did not have enough time for her and she could have called her to say her appointment was running behind schedule.

Mrs. Stewart agreed that if the property was introduced by some other agent in the past and she showed the property sometime later to that same person the introduction would have been made by the first agent.

In answer to questions posed by the Court Mrs. Stewart stated that the meeting with Major Brown was just about the property, what they had done so far as trying to identify where to put the bus depot. She said he discussed where the funding would come from and the feasibility studies. There was nothing said by Major Brown that he had any discussion with anyone else about the property.

Mr. David Terrence McNulty, General Manager and Director of C. D. Alexander Co. Realty Ltd. said he is employed to the plaintiff company for ten years.

In or around May, 1999 his company he would think was number one but certainly in the top three. He was familiar with the Odeon Complex property and when the property was listed with his company he actually walked the property.

There was an introduction to the property and he had cause to enter into correspondence with the defendant company. On December 22, 2000,

Mr. McNulty wrote to Palace Amusement Company Limited, Attention Mrs. Melanie Graham. The letter Exhibit 6 states in part:

> Re sale of The Odeon Complex to the Government of Jamaica
>
> "In the Jamaica Observer dated December 12, 2000 we were pleased to read that the Cabinet had approved the purchase of the Odeon Complex for $172,000,000.00.
>
> We would refer you to our previous correspondence and look forward to hearing from you with regard to the commission payable to ourselves.
>
> We urge you to furnish us a reply by December 31, 2000."

Mr. McNulty states that he did not receive a reply hence this action and he is asking the Court for the 5% commission inclusive of Government Consumption Tax and interest and costs.

In cross-examination the following questions were asked by learned Counsel for the defendant and the answers given.

> "Q. Would it be your company's duty when taking non-exclusive listings to ask the potential purchaser whether he had been introduced to the property before?
>
> A. The taking of the listing is between the company and the vendor and there is no potential purchaser at that point.

Q. Having taken a non-exclusive listing is it your company's duty to ask the potential purchaser whether he was introduced to the property before?

A. No.

Q. Would it be your duty to ask the vendor if he had introduced property to anyone before?

A. No."

He said the owner of property could end up owing more than one commission.

In answer to the Court Mr. McNulty states that depending on the circumstances the commission could be the same for each. On occasions it could be proportionate or it could remain the same.

Based on the question asked by the Court learned counsel for the defendant asked the following questions and the following answers were given.

"Q. When the judge asked you yesterday if the 5% would be to each or whether it would be proportionate when you answered it about co-broking you were thinking of the proportionate situation?

A. Not necessarily.

Q. If you have a situation where you have five different dealers how could that 5% commission be proportioned if there is no prior agreement between them?

A. What sometimes happens in those circumstances is that the vendor recognizes the predicament and would speak to the parties concerned and arrive at an agreement. In that situation the landowner would depend on the good graces of the dealer. He cannot impose a situation on them. If the agreement was identical to the non-exclusive he could find himself liable five different times."

In answer to the Court Mr. McNulty said that the vendor is suppose inform the agent that he has listed the property with other dealers.

In re-examination Mr. McNulty was asked the following question:

"Q. At the time of the listing agreement with the defendant if you were told of a prior listing agreement by the vendor what would be your course of action?

A. I would like to know the type of listing arrangement that had been made. If it was exclusive then we would decline the listing. If it was non-exclusive we tell the vendor that we can accept the listing but we are honour bound to inform the other Real Estate Dealer. We would also perhaps ask why it was that he wished to list the property with more than one dealer.

> I would be honour bound because of the Code of Ethics which is gazetted by The Real Estate Board. You can be struck off the list and the licence revoked."

By consent The Jamaica Gazette Supplement Proclamations, Rules and Regulations dated Wednesday, December 23, 1998 was tendered and admitted as Exhibit 8.

The relevant section of the Jamaica Gazette Supplement Proclamations, Rules and Regulations supra is Section 11:

> "A real estate dealer or a real estate salesman shall not
>
> (a) agree to be engaged to act in any real estate transaction in which the client has, to his knowledge, previously engaged another real estate dealer or real estate salesman;
>
> (b) knowingly engage in any practice, or take any action which is damaging to the practice of another real estate dealer or real estate salesman."

Mr. Charles Michael Douglas Graham states that he is the Chairman and Managing Director of Palace Amusement Co. 1921 Ltd.

The Company was the owner of the Odeon Cinema Complex in Half-Way Tree. The Company has since sold the property to the Commissioner

of Lands. The discussions for sale of the property took place with the Ministry of Transport and Works.

He states that the first contact was prior to May, 1998 because when himself and Major Brown spoke they set up a meeting for May 19th, 19[illegible] He said he cancelled the meeting because he had to leave the country urgently.

He states that another meeting was subsequently arranged for July 15th, 1998 but he was unable to attend because of a conflict of meetings but Mr. Lloyd Alberga, the General Manager, attended the meeting with Major Brown on their behalf.

The purpose of the meeting was to discuss their acquisition and the sale of the Odeon Property.

Mr. Alberga reported to himself and the Board what took place at the meeting. The company had Board Meetings monthly. It was the Board Meeting for August that the Report was made by Mr. Alberga.

By consent a copy of the Minutes for The Palace Amusement Company (1921) Limited Board Meeting held at 1A South Camp Road Kingston on August 12, 1998 at 2;00 p.m. was tendered and admitted as Exhibit 7.

Page 2 supra the last item states:

"Odeon (Half-Way-Tree).

Mr. Alberga attended a meeting with Major Brown who told him of their proposal to build a bus terminus with a cinema over the bus terminus. The Managing Director subsequently spoke to Major Brown and informed him that the asking price was $300M. The Managing Director has not heard from him since."

In cross-examination Mr. Graham states that after the Board Meeting he never heard from Major Brown again. He said a valuation of the property was done by Mr. DeLisser a valuator. He valued it for $231.8M. He said the sale price was agreed at $172.5M and he arrived at the price without seeing the Government's valuation.

He states that he cannot recall when the first listing agreement was entered into and that information would be recorded in contracts at the office of the company. He said they had other non-exclusive agreements with seven (7) others.

In answer to the Court Mr. Graham said he paid commission to Ravers Limited and it was 3%.

Mr. Jarrett in his written submissions for the plaintiff points out the answer to question five in the Answer to Interrogatories sworn to by Mr. Graham on the 17/10/01.

"Question 5.

> "If commission was payable for the alleged introduction has this commission been paid and the date of payment?"
>
> Answer
> "No commission was payable and none has been paid to anyone as a result of the 1998 introduction."

Mr. John Graham in his written submissions for the defendant point out that no question was asked as to whether the payment was made in respect of an introduction and no such evidence was given.

In cross-examination Mr. Graham states that when he entered into agreement with the plaintiff company he did not inform them that there was a prior introduction because it was over the previous two years the property was introduced by us and other Real Estate Dealers to a number of prospective buyers.

The issue to be decided is whether based on the non-exclusive agreement and the circumstances that have emerged the plaintiff is entitled to the 5% commission of the sale price inclusive of Government Consumption Tax.

Mr. Graham in his written submissions refers to The Law of Estate Agency and Auctions Third Edition by John Murdick LLB. AC1A&B. Senior Lecturer in Law Reading University.

3 Effective Cause.

> "In order for an agent to claim commission it is necessary to show not only that a specified event has occurred, but also that the agent has caused it to occur. This like all questions of causation, is a matter of fact which is to be determined upon the evidence available. Moreover, it is a question of common sense whether what the agent has done is sufficiently closely connected with the subsequent transaction for it to be said effectively to have caused the transaction wholly or in part.
>
> In this connection it should be noted that it is not enough for the agent's activities to be a causa sine qua non, that is to say, that the event would not have taken place without the agent's intervention (for example because the parties would never have met). It must further be established that the agent is an "effective" or "efficient" cause or, to put it another way, that the result has been achieved through, the instrumentality of the agent."

It is quite evident from Exhibit 7 that there was a discussion between Mr. Alberga and Major Brown as regards to the sale of the property and there was no response up to August 12th, 1998.

The contract between the plaintiff and the defendant was signed on the 13th May, 1999 Exhibit 1.

Mr. Jarrett for the plaintiff in his written submissions cited the case of James T. Burchell v. Gowrie and Blockhouse Collieries Limited 1910 AC 614 Privy Council Appeal from the Supreme Court of Canada.

> "In an action by the appellant to recover an agreed commission on the proceeds of sale of mining property by the respondent company the latter contended that he was not the efficient cause of the particular sale effected:-
>
> Held, that as the appellant had brought the company into relation with the actual purchaser he was entitled to recover although the company had sold behind his back on terms which, he had advised them not to accept."

Mr. Graham for the defendant in his written submissions referred to the case of John D. Wood & Co. vs. Dantana (1985) 2 E.G.L.R. 44, (1987) 2 E.G.L.R. 23 affirmed by C.A. Forbes, J said.

> "I do not consider that an agent who effects a second introduction to the property (if that is not a contradiction in terms) can succeed in demonstrating that such an introduction was the effective cause of the sale, unless he can show that the interest by the first introduction has evaporated by the time of the second."

From the minutes Exhibit 7 and the date of the contract Exhibit 1 it is quite evident that the first introduction had evaporated and the meeting that Georgia Stewart had with Major Brown was the 'effective' or 'efficient' cause of the sale.

I reject the evidence of Mr. Graham that he paid Ravers Limited 3% commission and I find that his answer to the Court contradicts his answer to

question five in the Interrogatories. There is no documentary evidence to show that 3% was paid to Ravers Limited and I find it strange.

I find on a balance of probabilities that the plaintiff is entitled to 5% of the sale price inclusive of Government Consumption Tax which is $8,625,000.00 in respect of the sale of the Odeon Complex to the Government of Jamaica with interest at 12% per annum from the 8th February, 2001 to 7th April, 2003.

Costs to the plaintiff to be agreed or taxed.