

RECO Discipline: Unpaid Deposits

By Brian Madigan



This is a rather interesting case. The vendor of a property negotiates the sale of his property through an agent. But, the deposit is not paid. Being somewhat disgruntled he selects another agent thereafter. The new agent says that the old offer is null and void and there are no legal repercussions by accepting the second offer. In fact, she consults with her broker. If the deposit is not paid, the deal is dead. So, the vendor accepts the second offer.

Only one little problem, the first purchaser shows up with the deposit. So, now we have a real mess. Have a look at this case, and RECO's decision.

AGREED STATEMENT OF FACTS

1. Martha Thorne is a member of RECO. She had only been registered as of June 18, 2003.
2. Brokerage ABC Realty also a member of RECO and a brokerage registered under the REBBA. William Hurlburt was the principal broker/broker of record of Brokerage ABC Realty. Thorne was an employee of Brokerage ABC Realty.
3. Maurice Paul is a member of RECO and a salesperson registered under the REBBA and was an employee of Brokerage XYZ.
4. Richard Kenworth is a member of RECO and a salesperson registered under the REBBA and was an employee of Brokerage C.
5. John Smith was selling a property known as 1-AB Street in City A, Ontario.
6. By an MLS Listing Agreement dated January 26, 2004 (the "January 26, 2004 MLS Listing"), the Smith listed his property for sale with Brokerage XYZ. The January 26, 2004 MLS Listing was to run from January 26, 2004 to March 27, 2004.
7. By the January 26, 2004 MLS Agreement, the property was listed at \$279,900.00.
8. By an Agreement of Purchase and Sale dated March 27, 2004, Kenworth on behalf of his clients, made an offer to purchase the property (the "**first offer**"). The parties to the first offer were Frank Taylor, and the John Smith. The offered

price was \$255,000.00 with a **deposit of \$8,000.00 payable upon acceptance.**

9. The first offer was conditional on, among others,
a. Taylor arranging financing within 5 banking days from acceptance of the offer;
b. Taylor obtaining, at his own expense, and inspection of the property by a qualified home inspector within 5 banking days from acceptance of the offer;
c. Smith agreeing to provide, at his own expense, upon acceptance, an existing survey of the property.

10. On March 30, 2004 Kenworth called Paul and advised him as follows:

a. Taylor had difficulty registering his children for the special education program with the school and he may not firm up the offer;
b. Smith could start looking for another buyer just in case.

11. By the time of the phone call of March 30, the **deposit** cheque of \$8,000.00 had **not yet been delivered** to Brokerage XYZ.

12. In the course of the discussion with Smith on March 30, 2004, Smith states that when Paul called him and advised him of the information contained in paragraph 10 above, he expressly advised Paul that he considered that there was no contract anymore.

Smith further advised Paul that he would be looking for another buyer himself, but that if Paul found another buyer he would look at the offer. Paul did not have a Mutual Release signed to protect Smith.

13. On March 31, 2004, the Smith contacted Martha Thorne and asked her to list the property. By an exclusive listing agreement dated March 31, 2004, Thorne on behalf of Brokerage ABC Realty listed the property effective March 31, 2004 to April 5, 2004. The property was listed at \$264,800.00.

14. On March 31, 2004, Thorne presented another offer for the property.

This 2nd offer was dated March 31, 2004 and it was between Raymond Glover and Smith. The price offered in the 2nd offer was \$257,000.00 with a \$5,000.00 deposit to be paid upon acceptance. The second offer was accepted with the confirmation of execution signed at 12:00 p.m. on the 31st March 2004.

Brokerage ABC Realty acted as a dual agent.

15. On March 31, 2004, Kenworth delivered the deposit of \$8,000.00 to Paul. On the same date the Smith called Paul and advised him that there had been another offer which he had accepted. Paul then requested that Smith's second offer be faxed to him. Upon review of the second offer, Paul discovered that the Smith had

entered into another valid Agreement of Purchase and Sale, while the first offer was still alive.

16. When asked as to why the Smith entered into another Agreement of Purchase and Sale when the first offer was valid, Smith indicated the following:

a. **Thorne advised Smith** that the first **offer was not valid** as he had not received the deposit even after 5 days; and

b. Smith could go ahead and sign the second offer as there would be **no legal repercussions** as the first offer was not valid.

17. Thorne contacted Hurlburt about the previous offer and deposit issue and asked his advice. Hurlburt advised Thorne to proceed with the second offer without any conditions and without asking Thorne for any further clarification.

18. Although Smith requested Thorne to call Paul before they negotiated the second offer, Thorne declined to do so because of her interpretation and the advice from Hurlburt that the first offer was not valid and therefore there was no need to contact Paul.

19. Thorne did not include a condition in the second offer making the second offer conditional on either the first offer failing or there being a Mutual Release signed between Smith and Taylor.

20. On February 14, 2005 RECO received a complaint from Andy Stone (the "Second Complainant"). Stone raised the following issues:

a. That he had entered into a valid Agreement of Purchase and Sale for the purchase of the property;

b. That he had provided a cheque of \$5,000.00 to Thorne as a deposit; and

c. At no time when she was making this offer did Thorne advise him that there was another offer for the property.

21. Stone states that as a result of this agreement he had obtained counsel, he had prepared financing and had incurred a lot of other costs in relation to the second offer.

22. Stone further states that he had wanted his deposit returned, but the broker in this case is not returning it until a Mutual Release is signed. Stone has refused to sign a Mutual Release as he intends to pursue legal action against the Smith and Thorne and Brokerage ABC Realty.

23. Since the complaints being filed, Thorne voluntarily paid \$1,500.00 to Stone for costs and his deposit has been returned.

i. Accordingly, **Thorne acted unprofessionally** when she:

a. Failed to insert a condition in the second offer stating that the offer was conditional on the first offer either failing or there being a Mutual Release signed as between the parties of the first offer.

b. Failed to verify the pertinent facts in relation to the first offer before having the seller enter into the second offer.

Thereby breaching the following Rules of the RECO Code of Ethics:

Rule 2 – Primary Duty to Client – A member shall endeavour to protect and promote the best interests of the Member’s Client. This primary obligation does not relieve the Member of the responsibility of dealing fairly, honestly and with integrity with others involved in each transaction.

Rule 11 – Discovery of Facts – A member shall discover and verify the pertinent facts relating to the Property and Transaction relevant to the Member’s Client that a reasonably prudent Member would discover in order to fulfill the obligation to avoid error,

ii. Accordingly, **Hurlburt** as the Principal Broker/Broker of Record and operating mind of Brokerage ABC Realty, and the supervisor of Thorne, **acted unprofessionally** when he,

a. Failed to instruct Thorne to insert a condition in the second offer stating that the offer was conditional on the first offer either failing or there being a Mutual Release signed between the parties to the first offer;

Thereby breaching the following Rules of the RECO Code of Ethics:

Rule 2 – Primary Duty to Client – A member shall endeavour to protect and promote the best interests of the Member’s Client. This primary obligation does not relieve the Member of the responsibility of dealing fairly, honestly and with integrity with others involved in each transaction.

Rule 43 – Broker Responsibility – A Broker shall be responsible for the professional conduct and professional actions of those Members registered with that broker.

Decision of the Panel

Thorne: Administrative Penalty of \$1,000.00 payable to RECO within 60 days and also one (1) year probation.

Hurlburt: Administrative Penalty of \$3,000.00 payable to RECO within 60 days.

COMMENT

This case is only difficult because so many sophisticated individuals within the real estate industry operate under the impression that “no deposit, means no deal”.

The only problem with that, is that such a claim is groundless. It is not supported by the case law. The failure to provide a deposit as agreed is a simple breach of contract in most cases. There is an exception, and that is where the payment of the deposit has been made a condition and there are specific provisions in the agreement to remedy such failure.

Earlier, I had written about this issue under the title “Unpaid Deposits”. A sample clause that would protect the vendor was set out in that article.

Here, the issue appears to be simple: Thorne and Hurlburt did not know the law, and even though many of their colleagues do not know the law, they should have made inquiry. And, why be so cavalier about providing advice about an agreement that they knew nothing about? Why take the listing? Why interfere with another’s listing and agreement?

In my view, they got off quite lightly by RECO. There were other sections of the Code of Ethics that might have applied and made this case a more serious one.

Recommendations

- Obtain full information about the prior listing
- Get a copy of any prior Offer (particularly accepted offer)
- Get a copy of a mutual release
- If there is no release, ask why
- Get legal advice
- Recommend that the vendor obtain legal advice
- Don’t interfere with a contract, either the listing contract or the agreement of purchase and sale
- Accept the client’s request to contact the former agent
- Be cautious about acting for both sides and the inherent conflict of interest
- Co-operate with your buyer, if he asks for his deposit back but refuses to sign a mutual release

As a rule, I use fictitious names. The actual case is published on RECO’s website and is available to the public. For educational purposes, the names of the parties really don’t have any bearing. If you need to quote the case, you will have to obtain the proper legal citation.

*Brian Madigan LL.B., Realtor is an author and commentator on real estate matters, Coldwell Banker Innovators Realty
905-796-8888
www.OntarioRealEstateSource.com*