

ANTIGUA AND BARBUDA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

(CIVIL)

CLAIM NO ANUHCV2011/0573

BETWEEN:

LEONA FRANCIS

Claimant

AND

DAVEN JOSEPH

Defendant

Appearances:

Mr George Lake for the Claimant

Ms Kema Benjamin for the Defendant

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2012: September 24

2013: January 30
.....

JUDGMENT

Introductory

- [1] **LANNS, J [Ag]:** The Claimant, Leona Francis (Ms Francis) claims that the Defendant Daven Joseph owes her the sum of \$19,250.00 being a commission arising out of Daven Joseph's sale of his property registered as Registration Section West Central Block 11, 2192 B Parcel 406.
- [2] Ms Francis claims that Daven Joseph breached his oral agreement with her, whereby it was agreed that she would seek a purchaser for Daven Joseph's property, and that if she found a purchaser who eventually purchased the property, she would be entitled to a commission of 5% of the purchase price.
- [3] Ms Francis alleges that pursuant to the oral agreement, she subsequently caused a commissioner's fee agreement to be prepared, but Daven Joseph refused to sign it, and has failed to pay her the commission due to her. Ms Francis alleges that by reason of

Daven Joseph's failure to pay the commission due and owing, she has suffered loss and damage.

- [4] By way of Defence, Daven Joseph denied entering into any agreement with Ms Francis as alleged. However, he admitted that he informed Ms Francis about his intention to sell the property. He also admitted that Ms Francis introduced him to Lerry Joseph, a potential purchaser of the property. Further, he admitted that he had not paid any commission to Ms Francis, because he told her that he would not pay her a commission, and that if she required a commission, it should be paid by the purchaser and/or added to the sale price. He denied that Ms Francis has suffered any loss and or damage and puts her to strict proof thereof.
- [5] Ms Francis replied. She maintained that there was such an agreement as alleged by her. Except where the Defence contains admissions, Ms Francis denied each and every allegation contained in the Defence.

THE EVIDENCE

(a) Ms Francis:

- [6] In summary, Ms Francis, in her Witness Statement states that she is a real estate broker. Around the middle of 2009, Daven Joseph told her that he had a house to sell and if she had any purchasers she should contact him. About one year later, she placed an advertisement in the Observer Newspaper. Some time later Mr Lerry Joseph called her about the advertisement, and expressed interest in purchasing a home. She showed him Daven Joseph's house at Paynters. Lerry Joseph liked the house and expressed an interest in purchasing it. She called Daven Joseph to find out if he was still interested in selling the house. He replied that he was asking for a sale price of \$365,000.00. She informed him that she worked for 5% commission on any house sold. Daven Joseph had no problem with that so they agreed that the house would be sold for \$385,000.00 which would include her commission. Daven Joseph agreed to pay the 5% commission.
- [7] She introduced Lerry Joseph, the then intended purchaser to Daven Joseph. About two weeks later, Daven Joseph's lawyer Ms Marshall drafted the purchase agreement, exhibited as "LF1" While Ms Marshall was preparing the purchase agreement, Ms Francis instructed Mr Adlai Smith to prepare a commission fee agreement to reflect the verbal agreement between her and Daven Joseph.
- [8] After the purchase agreement was prepared, Daven Joseph told her to pick it up from Ms Marshall. She did not go. She sent Lerry Joseph to pick it up instead. Upon receipt of the purchase agreement, Lerry Joseph took it to the bank to assist him in obtaining a loan for the purpose of purchasing the subject property. The bank required a deposit equivalent to ten per cent of the loan. Lerry Joseph did not have the money. He asked Ms Francis to try to get the purchase agreement amended to delete the term of the agreement requiring him to make a deposit of ten per cent.

- [9] Meanwhile, Ms Francis called Daven Joseph about the need to execute the commission agreement. But Daven Joseph refused to do so.
- [10] She heard nothing further from Daven Joseph. Nor did she hear anything from Lerry Joseph, until one month after she called Daven Joseph about a potential purchaser for another piece of land he wanted to sell. During the telephone conversation, Daven Joseph confirmed that he "got the house rented." However, she stated that as she drove by in the area of the subject property, she saw Lerry Joseph on the premises, and he (Lerry Joseph) told her that he got the loan and he purchased the house. She enquired of him why he did not inform her and he did not answer. She then called Daven Joseph and asked about her commission. He replied that he did not ask her to sell his house so he is not paying anything. She stated that at no time did she agree with Daven Joseph that Lerry Joseph would pay her commission. The agreement was between Daven Joseph and her.
- [11] Under cross examination, Ms Francis admitted that since her engagement in 2009 and 2010 when she found the purchaser, she placed two advertisements in the newspaper. She also admitted that she only had one viewing of the said property. Nothing, to my mind turns on these admissions.

(b) Daven Joseph

- [12] With a few variations, Daven Joseph's evidence in chief mirrors the contents of his statement of Defence. In his Witness Statement, Daven Joseph states, that some time in October 2010, Ms Francis approached him and enquired as to whether the subject property was for sale. He told her that he would sell the property if the price was right. She then informed him about a prospective buyer and he indicated that he would sell the property for \$385,000.00.
- [13] He stated that at no time did he ever agree to pay Ms Francis a commission. The issue of a commission was raised by Ms Francis and he suggested that the commission should be added to the purchase price or be paid by the purchaser since she was neither his broker nor his agent. He informed her that he would pay all taxes owed and due on the property but he would not be paying a commission.
- [14] He stated that Ms Francis brought Lerry Joseph and his wife to view the property. After introducing Lerry Joseph and his wife to Daven Joseph, Ms Francis left to go to another appointment.
- [15] He told Lerry and his wife that the sale price was \$385,000.00 and he could not negotiate for a reduction of that price. The property was eventually sold to Lerry Joseph and his wife, but the sale took place several months after he met them. They informed that they had approached the bank for a loan, but the bank required a ten percent deposit which they did not have. He offered to lend them \$22,000 to allow them to obtain the necessary financing from the bank. A Promissory Note was executed reflecting the repayment terms. His attorney drafted the sale agreement and this agreement was executed between Lerry Joseph and his wife and Daven Joseph after they obtained the loan.

- [16] Daven Joseph stated that he personally contacted Lerry Joseph requesting that he attend the office of his Attorney at law to execute the sale agreement, which he did. He has not paid Ms Francis a commission, because at the onset, he advised her that he would not be paying her a commission. And he did not hire her to find a purchaser for his property.
- [17] Daven Joseph states further that, without his loan of \$22,000.00, Mr and Mrs Joseph would not have been able to obtain the loan from the bank and the sale of the property would not have occurred.
- [18] Under cross examination, Daven Joseph stated that he knew Ms Francis for over five years. He did not know she was a realtor seeking a commission on the sale of his property. He maintained that he never had any agreement with her. He denied that he told Ms Francis to collect the purchase agreements. He maintained that the sale took place long after Lerry Joseph was introduced to him.

(c) Lerry Joseph

- [19] In his Witness Statement Lerry Joseph stated that he first met Ms Francis through an advertisement for a property for sale in the Daily Observer Newspaper that he saw either in September or October 2010. The advertisement was for the sale of a two bedroom house owned by one, Mr G Browne located at Paynters Estate. He accompanied her at Paynters for viewing. The house was occupied; so Ms Francis notified the occupants of the house that she was coming. On arrival there, Ms Francis left him at the property and went to another appointment. One of the occupants (Keman) showed him around Browne's property
- [20] Keman told him about another property across the street owned by Daven Joseph. Keman accompanied him to Daven Joseph's property and after seeing it, he became interested in it.
- [21] He asked Keman for Mr Joseph's number so he could talk to him about the property.
- [22] He told Ms Francis that he saw Daven Joseph's property and that he was interested in buying it. Ms Francis indicated that Daven Joseph was not serious about selling his property because he tried to sell it several times. She then indicated that Mr Browne was willing to reduce the price of his property to \$275,000. She also pointed him to another property at Lawyers Pasture/Ferris Farm. He stated that Ms Francis tried to discourage him from purchasing Daven Joseph's property and after he insisted that he was only interested in Daven Joseph's property, she contacted Mr Joseph to arrange for viewing. Ms Francis arranged for Lerry Joseph and his wife to meet with Daven Joseph. At that meeting, Ms Francis introduced Lerry Joseph and his wife to Daven Joseph and then left for another appointment. Daven Joseph informed him that the sale price of the property was \$385,000.00. He told him that he would pay all taxes on the property. He also told him that he did not ask Ms Francis to find a buyer for his house and that she was not his broker or agent.

- [23] Lerry Joseph testified that he and his wife went to the bank to secure a loan but the bank required 5 % of the asking price which they did not have, and gave them time to source the money. He spoke to Daven Joseph and he offered to lend the money to assist in getting the bank loan. He signed a promissory note. He got the bank loan after he got the loan from Daven Joseph.
- [24] He opined that without Daven Joseph's assistance, he would not have been able to get the bank loan and the purchase and the sale of the property would not have taken place.
- [25] After Lerry Joseph and his wife got the loan from the Bank, Daven Joseph's lawyer drafted a Sale Agreement. When Ms Francis found out the sale of the property was going ahead, she told them to encourage Daven Joseph to use her Attorney to complete the transaction. Daven Joseph declined saying he had a lawyer
- [26] Learned counsel for Ms Francis cross examination Lerry Joseph vigorously to show that he did in fact collect the draft purchase agreement and took it to the bank, and that he did in fact had a conversation with Ms Francis about the deposit of 5%. He maintained that he never collected any draft Purchase Agreement from Ms Marshall, and gave it to Ms Francis. He never saw the draft purchase agreement. He said that it was after he got the loan that Daven Joseph's lawyer drafted the Sale Agreement. Yet under cross examination, he admitted that he took purchase agreements to the bank but he does not recall the order in which he took them. He knew Ms Francis for about three years. He knew that she was a realtor; so he assumed that she was acting as Daven Joseph's agent. He stated that the first time he knew that Ms Francis was not acting as agent for Daven Joseph was after the sale had been completed. He said that he became interested in Daven Josephs property when Keman showed it to them. Yet under cross examination, he said that Ms Francis arranged viewing of the property.

ISSUES

- [27] The main issues which seem to arise for determination are:
- (i) Whether or not the parties entered into any agreement?
 - (ii) If so, did Mr Joseph breach that agreement?
 - (iii) If so has Ms Francis suffered any loss?
 - (iv) If so, what is the measure of that loss?

Was there an agreement between the parties for the sale of the Defendant's property?

- [28] The first requirement for the formation of a contract is that the parties must have reached agreement.¹ A valid contract requires an agreement; an intention to create legal relations,

¹ Chitty on Contracts, Volume 1 30th Edition at paragraph 2 - 001

and consideration.² The onus of proof is on Ms Francis to prove that an agreement existed for finding someone interested in purchasing Daven Joseph's property, and eventually purchasing it and for the payment of a commission. Ms Francis says there was an agreement for providing a purchaser for the property and for the payment of a 5 % commission. Daven Joseph says there was no such agreement. The court is called upon to decide on a balance of probabilities if there was an agreement between the parties to pay a 5% commission for providing a purchaser for the said property.

Finding

- [29] Ms Francis is in the business of selling houses for commission. Daven Joseph knew that. He knew Ms Francis for over five years. They had discussions pertaining to real estate matters before. She said that she had a discussion with Daven Joseph about the sale of his property at Paynters. Her case is that there was an oral agreement as to the payment of a commission once she found a purchaser who eventually purchased the property. Daven Joseph does not deny he had a conversation with Ms Francis about his willingness to sell the property and payment of a commission. This is evident in paragraph 3 of his Defence where he avers "... The Defendant told the Claimant that if she required a commission, the said commission should be paid by the purchaser and/or added to the sale price.
- [30] Daven Joseph repeats that averment at paragraph 3 of his Witness Statement. This bit of evidence suggests to me that Daven Joseph had no issue with Ms Francis receiving a commission so long as it was included in the sale price. Once the property was eventually sold to a prospective buyer who eventually bought the property for the asking price plus the 5%, Daven Joseph would have been obliged to pay over to Ms Francis, the sum of money representing the 5% commission, assuming that it was not retained by Ms Francis.
- [31] I do not accept Daven Joseph's evidence that at all times Ms Francis was aware that he would not be paying her a commission. I find that at all times he knew she was a realtor seeking a purchaser for his property on a commission basis. Nor do I accept his oral testimony that he never gave Ms Francis any authority to sell the property. I do not believe Daven Joseph when he said that he told Ms Francis from the onset that he would not be paying her a commission because she was neither his broker nor his agent. Lerry Joseph in a telling remark said "I was not aware from the onset that Ms Francis was not acting for Daven Joseph. Only when the deal closed, I realized there were some discrepancies as to what transpired between them."
- [32] In the circumstances, I have no hesitation in finding that there was an oral agreement between Ms Francis and Daven Joseph for finding a purchaser for Daven Joseph's property. I also find, based on the evidence, that there was an oral agreement for the payment of a 5% commission once the prospective purchaser identified by Ms Francis eventually bought the property.

² Halsbury's, supra, paragraph 629

- [33] It is noteworthy, and there is no dispute that Daven Joseph refused to execute the formal written agreement reflecting the terms of the commission. But this, to my mind, is not fatal because, as is stated in **Halsbury's Laws of England Volume 9 (1) Fourth Edition, Reissue** at paragraph 620 :

"In the ordinary case, the law does not require a contract to be made in any particular form, nor according to any particular formalities; it is sufficient that there be a simple contract. Such a contract may be validly made either orally or in writing, or partially orally and partly in writing. The term 'orally' should be taken to include all communications made other than in writing, ie by word of mouth or by conduct or both."

Did Ms Francis find a purchaser who eventually bought Daven Joseph's property?

- [34] There is no dispute as to whether purchasers were found in the persons of Mr and Mrs Lerry Joseph. They were the prospective and eventual purchasers of Daven Joseph's property situate at Paynters. That being said, there are other issues that have been raised for the court's consideration, for example, when did the sale take place? Was Ms Francis continually involved in the sale of the property? These, to my mind are relevant considerations, which the court will now address.

Other issues

- [35] Daven Joseph seems to be suggesting that Ms Francis was not continually involved in the sale of the property, and had nothing to do with the eventual sale of the property.
- [36] Indeed, Lerry Joseph testified that Ms Francis had lost interest, and had stopped calling him after he did not have the money to pay the five per cent deposit. It must be remembered that Lerry Joseph had said that the bank gave him time to accumulate the 5%.
- [37] In his Witness Statement, Daven Joseph stated that Ms Francis, brought Mr and Mrs Joseph to view the property, and after introducing them to him, she left. Both Daven Joseph and Lerry Joseph referred to the sale price of \$385,000.00. Both referred to the bank's request for 5 percent of the sale price which Mr and Mrs Joseph did not have. Both referred to the loan of \$22,000.00 granted to Mr and Mrs Joseph by Daven Joseph to meet the bank's request and ultimately to facilitate the funding of the purchase price for the subject property.
- [38] As can be seen from their Witness Statements, both Daven Joseph and Lerry Joseph take the view that if Daven Joseph did not make the loan available to Lerry Joseph, Lerry Joseph would not have been able to obtain the loan from the bank and the sale of the property would not have taken place.

[39] As far as Daven Joseph was concerned, Ms Francis had nothing to do with the Purchase and Sale Agreement as she was not a party thereto. He denied ever calling her to collect any Agreement from Marshall's offices.

[40] However, whereas, Daven Joseph referred to one agreement, both Ms Francis and Lerry Joseph referred to two Agreements being a draft Purchase and Sale Agreement which obviously was taken in the first place to the bank by Lerry Joseph, and the final Purchase and Sale Agreement which was amended to reflect the change in the deposit pursuant to the conversation Lerry Joseph allegedly had with Ms Francis after his first appointment with the bank.

[41] As to when the sale took place, Daven Joseph stated that although the property was eventually sold, the sale took place months after he met Mr and Mrs Lerry Joseph. How should the term 'months after' be interpreted? This calls for speculation which the court will not do.

Finding in relation to other Issues

[42] The evidence on these issues is conflicting. As to the issue of time when the sale was effected, the court is not at all persuaded by the evidence proffered. Furthermore, no evidence was led before me that time was of the essence, or as to when time expired for the sale of the property.

[43] Lord Russel of Killoween, in the case **Luxor (Eastbourne v Cooper)**³ one of the leading cases on commission contracts remarked:-

Commission contracts are subject to no peculiar rules or principles of their own. ... In each case the rights of the agent or the liability of the principal must depend on the exact terms of the contract in question.

[44] Guided by the case of **Luxor**, I therefore find that no weight should be attached to time when the sale was effected because the contract did not stipulate a time limit for the sale of the property. In my view, the condition precedent to the commission was the introduction of Lerry Joseph to Daven Joseph. When Lerry Joseph bought the property it triggered the commission.

[45] The court accepts the evidence of Ms Francis that Daven Joseph told her that he was asking \$365,000.00 for the property, and that she told him about the commission and that he said it was OK with him. I believe her when she said that they agreed that the property would be sold for \$385,000. This included her 5 % commission. I believe her when she said that Daven Joseph and Lerry Joseph surreptitiously kept her out of the negotiations after Daven decided to lend Lerry the deposit funds. I believe her when she said that the

³ [1981] AC 108 (HL)

second agreement came about when she communicated with Daven Joseph's attorney requesting the deletion of the deposit from the original agreement, so as to facilitate the bank's request.

- [46] I find Ms Francis to be a witness of truth. She was not shaken by cross examination. On the other hand, I find Daven Joseph was not an impressive witness. He seemed to be operating on the belief that because he gave the loan, and because the sale took place "months after" that these facts in and of themselves voided the Commission agreement between him and Ms Francis.
- [47] As for Lerry Joseph, his demeanor left much to be desired. I find his recollection on certain issues was conveniently foggy. He could not recall certain things. He was evasive. He kept asking counsel to repeat the question.
- [48] Wherever the evidence of Daven Joseph and Lerry Joseph conflicts with that of Ms Francis, the court prefers and accepts that of Ms Francis
- [49] On the totality of the evidence, I find that Ms Francis is entitled to her 5% commission on the sale price.
- [50] Learned Counsel for Daven Joseph pointed out that there was a discrepancy in the Claimant's calculation of the figure for her commission. I do not agree. The evidence before the court is that the property was sold for \$385,000.00.⁴ Five percent of \$385,000.00 amounts to \$19,250.00. That is exactly what Ms Francis is claiming.

CONCLUSION

- [51] Judgment will enter in favour of the Claimant, Leona Francis against the Defendant Daven Joseph in the sum of \$19,250.00 being the commission of five percent of the sale price of \$385,000.00.
- [52] Subject to any agreement on costs, the Claimant shall have her costs as prescribed.
- [53] This judgment attracts statutory interest at the rate of five per cent per annum from the date of its delivery to the date of payment.

⁴ See the Purchase Agreement dated 15th October 2010, executed by Daven Joseph, Lerry Joseph and Julian Davis Joseph in the presence of Denise Marshall, Solicitor.

[54] Neither counsel provided the court with any authority on commission claims. Nevertheless, I thank them for their helpful submissions.


Pearlita E Lanns
Judge [Ag]