

Foo Song Mee v Ho Kiau Seng
[2011] SGHC 4

Case Number : Suit No 597 of 2009
Decision Date : 11 January 2011
Tribunal/Court : High Court
Coram : Lee Seiu Kin J
Counsel Name(s) : Tan Thong Young John (Pereira & Tan LLC) for the plaintiff; Hee Theng Fong and Sim Mei Ling (Khattarwong) for the defendant.
Parties : Foo Song Mee — Ho Kiau Seng

Contract

[LawNet Editorial Note: The appeal to this decision in Civil Appeal No 16 of 2011 was allowed by the Court of Appeal on 06 July 2011. See [\[2011\] SGCA 45.](#)]

11 January 2011

Judgment reserved.

Lee Seiu Kin J:

Introduction

1 The plaintiff's claim against the defendant is for the balance two-thirds of the sum of \$437,870.10 that plaintiff alleges the defendant had agreed to pay in consideration of the plaintiff procuring "a good price" in relation to the defendant's *en bloc* purchase of 11 units of apartments at 3 Buckley Road ("the Development"). The defendant denies that he had entered into any such agreement with the plaintiff. The background to the dispute is as follows.

2 The plaintiff was a real estate agent for REA Realty Network. The defendant gave his occupation as "merchant". It is common ground that the relevant transactions were entered into by the defendant in his personal capacity. The matter came about in the following manner. Sometime in May 2007, the plaintiff was informed by one Ray Lau ("Lau"), then an assistant vice president of United Overseas Bank Limited ("UOB"), of the Development being developed by Gazelle Land Pte Ltd ("Gazelle"). UOB had provided the project financing to Gazelle and Lau was the officer handling the account. He told the plaintiff that Gazelle would soon be appointing Knight Frank Estate Management Pte Ltd as its exclusive agent and that if the plaintiff wanted an opportunity to market the Development she would have to act quickly. The plaintiff's father was an acquaintance of the defendant's brother, Hoo Long Sin ("Hoo") and the former arranged a meeting between the plaintiff and Hoo. At that meeting, Hoo agreed, for a fee, to approach the defendant to purchase units in the Development. Hoo brought the plaintiff to meet the defendant at the latter's office at Jurong sometime in July 2007. In the event, on 24 October 2007, the defendant entered into sale and purchase agreements for the 11 units in the Development and the total sum amounted to \$37,763,000. The defendant made two payments to the plaintiff subsequent to this transaction: \$145,956.70 on 3 December 2007 and \$20,000 on 3 September 2008. The purposes of these payments are disputed by the parties.

Plaintiff's version

3 According to the plaintiff, in her first meeting with the defendant, he had expressed interest in purchasing a few units in the Development and told her to negotiate with Gazelle for a better price. The plaintiff went and asked Lau to negotiate with Gazelle on this, and Lau reverted with an offer to reduce the price from the original \$1,650 per square foot (psf) to between \$1,601 to \$1,636 psf. When the plaintiff informed the defendant of this, he told her to ask for a further reduction as he wanted to purchase all 11 units. Lau was eventually able to procure a price of \$1,550 psf from Gazelle and when the plaintiff informed the defendant of this, the latter agreed to the purchase. The plaintiff told the defendant that he had to pay her a commission for the work she had done and he agreed. The plaintiff gave the defendant a letter on 29 July 2007 which stated as follows:

Thank you for giving me an opportunity[.]

I, Agnes Foo, am proposing to you to be your direct agent for the purchase and sale of this promising development on **No. 3 Buckley Road** .

As your agent, I would help you negotiate a better purchasing price for the whole 11 units of the development, which in the last proposal I showed you was going for \$1601 p.s.f. Upon purchase of this development, I would be your exclusive marketing agent for this project, selling off the units individually at your desired market price.

Fact; the Singapore Properties' prices rising across the board in property market. In addition, given the extremely good locality of this development and the burgeoning property market in Singapore, I foresee no problems in generating a tidy profit for your investment in this development. I will work strongly for this development towards our Goal.

[emphasis in original]

4 There was further negotiation with Gazelle after the defendant realised he had to pay over a million dollars in stamp duty for the transfer. Lau managed to squeeze out a reduction of \$70,000 per unit, amounting to a total of \$770,000 and the defendant finally paid for the options to purchase ("the Options") for the 11 units on 25 September 2007.

5 The plaintiff said that at an early stage of their dealings, the defendant had orally agreed to pay her a commission although the amount was not discussed until after the Options were procured. At a meeting shortly after 25 September 2007 (the day the Options were procured), the plaintiff and defendant computed the amount of savings the former had obtained for him. It amounted to \$1,459,567. The defendant agreed to pay her 30% of the savings, amounting to \$437,870.10. However the defendant put off paying the plaintiff, saying that he would do so after he sold the units. In late November 2007, the plaintiff told the defendant that Lau and Hoo were pressing her for their share of the commission and urged him to pay her one-third of the \$437,870.10, amounting to \$145,956.70. On 3 December 2007, the plaintiff delivered a letter to the defendant's office for him to sign to acknowledge that he had agreed to pay her \$437,870.10. The letter states as follows:

In consideration of the services rendered by you in helping me to secure my purchase of the [Development], I agree to pay to you a sum of \$437,870.10.

6 On 5 December 2007, the plaintiff received a call from Hoo to go to the defendant's office to pick up a cheque. The plaintiff went there and collected a cheque for the sum of \$145,956.70 from the defendant's secretary, Ng Poh Keng ("Ng"). The plaintiff had brought along another copy of the letter of 3 December 2007 and she handed it to Ng who typed on it an acknowledgment in the following manner:

I, Ms Foo Song Mee received a cheque ... amounting to \$145,956.70 dated 3 Dec 07 from Ho Kiau Seng.

The plaintiff observed that the first portion of the letter that she had prepared, which was for the defendant to sign, was signed by Ng on his behalf.

7 The plaintiff subsequently made many requests for the balance two-thirds of the commission due to her but did not succeed. After almost a year, in September 2008, the defendant gave her a further \$20,000 payment.

Defendant's version

8 The defendant's evidence departs from that of the plaintiff only in one key respect: that of alleged promise of the commission of 30% of the price reduction procured by the plaintiff. The defendant claimed that there was no such promise, pointing to the absurdity of such a proposition as he was under the impression that the plaintiff would have received a commission from the vendor. The defendant's position is that the plaintiff had represented to him at the outset that she would have no difficulty in reselling the properties at a profit and he had been persuaded by her on this. For this reason, he had agreed to pay the plaintiff the 30% commission based on the price reduction, but only if she successfully re-sold the properties for him. The defendant pointed out that the properties had not been re-sold and therefore the plaintiff was not entitled to the commission.

9 As for the part payment of \$145,956.70, the defendant said that the plaintiff went to his office a few days prior to 3 December 2007 and requested for an advance of one-third of the commission. The plaintiff had explained that she required the money to pay commission to the person who had "introduced the Properties to her". She assured the defendant that she had found a buyer and a sale was imminent. Based on this assurance, the defendant agreed to advance that sum, on the expectation that it would be returned if the resale did not materialise. The defendant prepared the cheque and handed it to his secretary, Ng, with instructions to pass it to the plaintiff. As for the events of 5 December 2007, the defendant had no knowledge of manner in which the plaintiff had collected the cheque. The defendant's evidence was corroborated by Ng, who said that the defendant had given him a cheque to pass to the plaintiff without any other instruction. The plaintiff came to the office on 5 December 2007 and handed the letter dated 3 December 2007 to Ng. Ng then typed an acknowledgement at the bottom for the plaintiff to sign, and Ng signed above the defendant's name on the basis that it was merely a formality. Ng said that she did not inform the defendant about the letter and had simply filed it away.

10 With regard to the subsequent sum of \$20,000 handed to the plaintiff on 3 September 2008, the defendant explained that the plaintiff telephoned him to request for a further advance of \$40,000 as she needed it to pay expenses. Once again she assured the defendant that she had found a buyer. Believing that the sale would be done, the defendant gave her a further \$20,000, again believing that this would be refunded to him if the resale did not materialise.

My findings

11 The crux of the dispute is whether the agreement between the plaintiff and defendant was that the plaintiff would be paid the commission upon the purchase of the properties by the defendant as the plaintiff contends, or whether it would be payable only upon successful resale as the defendant contends. The first point to note, however, is that even on the plaintiff's own case, there was no agreement on the amount of commission (including an agreed formula on computation of the commission) by the time the Options were obtained on 25 September 2007. In her affidavit evidence-

in-chief ("AEIC") at para 19, she said that:

[a]lthough the Defendant had orally agreed to pay to me a commission at the early stage of our dealings, the amount he would pay me was not discussed until after the developer issued the said options to purchase to him.

Indeed it is the plaintiff's own evidence at para 20 of her AEIC that the formula of one-third of the price reduction was arrived upon "after his purchase of the said units was confirmed". This was further affirmed by the plaintiff on cross-examination.

12 Therefore on the plaintiff's case, even though the defendant had agreed to pay her a commission before the Options were obtained, the quantum was not agreed upon until after the Options were granted. Neither was any formula for the quantum agreed upon. It was only a promise to pay an unascertained sum. Although the purchase was not completed upon procuring the Options, the defendant had at that point secured the right to purchase the properties at the agreed price. There was therefore no contract formed at the time the consideration flowed from the plaintiff to the defendant. The agreement on the quantum of the commission (or method of computation) was made only after the consideration had passed from the plaintiff to the defendant. The contract was therefore made without consideration.

13 The foregoing alone is sufficient to determine the action in favour of the defendant. However, in any event, my findings of fact are also in favour of the defendant. First of all, I found the plaintiff to be an evasive witness with a tendency to change her evidence as the cross-examination became awkward for her. Secondly, the plaintiff's version is a rather unusual one. It is unusual for a housing agent to collect commission from the purchaser. Therefore the defendant's evidence that he was under the impression that she would get a commission from the vendor is more believable. Further, the commission amounts to 1.14% of the total sale price of \$38.5m, a rather high amount for what is still an unrealised profit. Seen in this context, the defendant's version that the plaintiff had assured him that she had ready buyers and he agreed to pay that commission only after a successful resale accords more with commercial reality. Indeed, this version is consistent with the plaintiff's letter of 29 July 2007 at [3] above, which stated that she would be his "exclusive marketing agent" for the sale of the Development.

Orders

14 The plaintiff's claim is therefore dismissed. In relation to the counterclaim, the defendant's case is that the payments of \$145,956.70 and \$20,000 were loans made to the plaintiff in anticipation of successful completion of the resale. I find for the defendant in this regard. There will therefore be an order for the plaintiff to pay the defendant the sum of \$165,956.70.

15 As for costs, unless there is any reason to order differently (for which there is liberty to apply), I order the plaintiff to pay the defendant costs of the claim and counterclaim on the standard basis.

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