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Gretzky: he sues, he misses

Great One lost bid for \$1.86 million Muskoka cottage

I often tell my clients what I call Aaron's First Law of Real Estate: If it's not in writing, it doesn't count.

This is always accompanied by Aaron's Second Law of Real Estate: If it's not signed or initialled, it doesn't count either.

These rules are based on the Ontario Statute of Frauds, which copies an old English law dating back to the time of Charles II in 1677. The law says any agreement to sell land must be in writing and signed by the parties or their authorized agents.

This means that if even the smallest essential detail has not been agreed to in writing and properly signed or initialled, the whole agreement will fail.

The vendors and purchasers of a luxury cottage property in Muskoka learned these lessons the hard way when their bitter dispute wound up in court in late 1998.

In the fall of 1997, Gerdina Baluke and her spouse Max Neiman decided to sell their cottage on Lake Joseph. They signed a listing agreement with Ross Wilson of Prudential Sadie Moranis Realty.

The cottage consisted of a main house, a guest cabin and a two-level boathouse. Its upper level was a fully furnished residence, while the lower level housed two boats and various supplies.

Hockey legend Wayne Gretzky and his wife Janet were introduced to the property by Richard Scully, a local agent with ReMax Plus Muskoka Realty. They saw the cottage several times in December 1997 and January 1998, and eventually submitted two offers to purchase.

The Gretzkys' second offer, on Jan. 11, was for \$1.86 million with a quick closing date at the end of that month. An inspection condition allowed the purchasers to back out of the transaction if they were not satisfied with a home inspection of the buildings within three days.

During the negotiations, a problem arose over the contents of the boathouse. The Gretzkys wanted to do some renovations and insisted that the buildings, including the boathouse, be vacant for the January closing.

Since Lake Joseph was partially frozen, it would have been difficult to move the boats, and the vendors wanted the right to leave the boats, supplies and furniture in place until May.

The vendors accepted the offer three days after receiving it, but changed the terms so they could leave the boats, supplies and furniture in the boathouse until May. This was unacceptable to the Gretzkys and further discussions took place between the agents.

Acting on instructions from the Gretzkys, Scully phoned Wilson, the vendors' agent, to say they could leave the boats but not the furniture in the boathouse until May 7. On Jan. 12, Wilson prepared a third offer with those terms, and sent it to the vendors with a letter congratulating them on getting their price.

When the vendors accepted this third offer, they added the words "supplies and furniture" after the word boats. This meant that the boats, supplies and furniture would be allowed to stay in the building following closing.

Scully learned that the offer had been changed and knew the changes were not acceptable to the Gretzkys. He spoke to Wilson, and later testified that Wilson told him it was acceptable to the owners that the signed offer be amended to reflect the changes the Gretzkys wanted - namely, that the furniture and supplies be removed on closing.

Based on the verbal assurance that the vendors agreed to the changes, the purchasers amended the offer to delete the words relating to furniture and supplies, initialled the changes, and faxed the offer back. These final changes were never initialled by the vendors.

Gretzky's \$100,000 deposit was paid, and the home inspection completed. A few days later, Neiman suddenly announced the deal was dead because he and his wife had never initialled the deletion of the three little words, "supplies and furniture."

With their representative Laurie K. Hunter as nominal plaintiff, the Gretzkys sued Baluke and Neiman demanding the right to close the purchase. In November 1998, the vendors applied to court to toss out the Gretzky case without having to go to trial. They argued that since there was no definitive agreement in writing fully signed and initialled by both sides, there was no basis for the lawsuit.

The Gretzkys in turn argued the alterations to the last offer were made by the authority of the vendors and with their approval.

They also argued the changes, which in law became a counter-offer, were accepted by the subsequent conduct of the owners. In law, this is known as part performance. The vendors had accepted the deposit, allowed a detailed home inspection, and accepted the waiver of the conditions by the Gretzkys.

Justice Harvey Spiegel tossed out the Gretzkys' claim, ruling there was, in fact, no binding agreement of purchase and sale and no case to go to trial. The judge said the purchasers had not been appointed by the vendors as their agents to initial the changes.

Acceptance of the purchasers' counter-offer to delete the words "furniture and supplies" had to be in writing and not merely by conduct. Completing the inspection, waiving of the inspection condition and payment of the deposit could not constitute part performance, so as to require the vendors to complete the rest of the deal.

The Gretzkys got their deposit back, but lost the court case and the cottage. They also had to pay costs to the vendors.

The lesson to be learned here is always initial every change to an offer. If this isn't done, one party may well wind up very disappointed.



TIM KOORS/AP PHOTO

NO SCORE: Gretzky's offer to buy Lake Joseph cottage was ruled invalid in court.

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