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Review survey before signing any agreement

Is a real estate agent responsible for accurately advertising the lot size? What happens if he or she gets it wrong?

Those were the questions facing clients of mine recently. Last August, Regina and Leon signed an agreement to buy a house in Vaughan for \$730,000.

Located between Bathurst and Dufferin Sts. north of Major Mackenzie Dr., the luxury five-bedroom house is 4,200 square feet in size.

It was listed in July 2008 by an agent with a large brokerage in Woodbridge at an asking price of \$759,900. The house was purchased from the builder two months earlier for \$726,977 plus GST, so even if it had sold for its full asking price, the seller would have lost money.

Unfortunately, the listing agent advertised the lot size as 55 by 110 feet, and those measurements were included in the agreement of purchase and sale. In fact, the frontage as shown on the subdivision plan is only 13.72 metres, or 45 feet. The discrepancy exceeds 18 per cent.

During the period that the offer was conditional on inspection, Regina and Leon were handed what they were told was a survey of the property. In fact, it was a pre-construction siting and grading plan, which shows the lot and proposed location for the house. It contains dozens of measurements of the lot elevations above sea level. Obscured in the small print was an indication of the correct lot frontage.

When the lot size problem was discovered by my clients' real estate lawyer, he referred Regina and Leon to me to see if I could help resolve the problem.

I met with the clients and provided them with a detailed explanation of the law on breach of contract, agent negligence and misrepresentation, as well as the costs and risks of litigation if they didn't close and decided to sue for return of their \$20,000 deposit.

Despite my assurances that the law was on their side, Regina and Leon decided to terminate the transaction when we could not negotiate a price reduction to reflect the smaller lot size.

The seller and his lawyer were adamant that my clients were in default, and that the seller was not, because the grading plan had been given to them while the offer was conditional.

My clients reluctantly agreed to forfeit their deposit and sign a release with the seller. This process took several weeks because the seller's lawyer and agent would not agree to a release unless the selling agent and brokerage were also released from liability.

Eventually, the parties agreed directly with each other and against the adamant advice of the seller's lawyer to release each other but not the agent.

The house, which could have been sold to my clients in October, is still on the market. It has now been relisted with another agent and another brokerage at \$729,900 \$30,000 less than last summer's asking price. Meantime, the owner is carrying the costs of taxes, utilities and a mortgage of \$616,000.

The real estate commission on the original transaction was about 5 per cent, or \$36,500, half of which would have gone to the listing agent and brokerage. During the negotiations over the lot size, the seller refused to lower the price and the agent refused to budge on the issue of whether he would contribute part of his commission to compensate for the mistake in the listing.

As a result, the agent lost the commission, the client and the listing. Although the seller received my client's \$20,000 deposit, the market for luxury homes in Vaughan is softer now and when the house sells, he will clear less money than if he had lowered the price to my clients.

The listing agent now faces litigation for my client's losses, as well as a complaint to the Real Estate Council of Ontario, the licensing body for Ontario real estate agents.

Regina and Leon's story is a classic example of why purchasers should review a survey before signing an agreement to buy a house.

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