

SWIMMING WITH SHARKS

Accomplice to mortgage application fraud can sue broker

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BACKGROUND

Mortgage brokers who commit mortgage application fraud risk regulatory action and criminal prosecution. As the Alberta Court of Queen's Bench in *Scotia Mortgage Corporation v Pang*, 2019 ABQB 312 illustrates, they also risk having to pay significant civil damages.

ISSUE

A "straw purchaser" knowingly participated in mortgage application fraud and was successfully sued by the lender. Does his involvement in the fraud prevent him from recovering damages from others, including from the mortgage broker?

WHAT HAPPENED?

A co-worker introduced the nominal purchaser, a Mr. Pang, to a mortgage fraud scheme. Pang's understanding was that he would be helping buyers who did not have the required credit rating to obtain a mortgage, be helping his co-worker who was financially stressed and make some money for himself. He understood:

- he would take title to a property and be the borrower, but that he would be taken off title three months after the purchase;
- he would be repaid the three months of mortgage payments that he would have to make, and receive an additional \$3,000; and

■ his co-worker would receive \$2,000 for the referral.

Agreeing to participate, Pang was contacted by the mortgage broker by telephone. She advised she would run a credit check to see if he qualified for a mortgage. He provided her with his social insurance number and, through his co-worker, T4 slips. The broker then arranged a mortgage and gave Pang details of the purchase and the mortgage. The seller was the broker's mother.

The broker told Pang to meet with her husband's brother, who took him into an office with a bank employee and told him to sign some documents.

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Pang understood mortgage payments would be deducted from his account and the seller would reimburse him on a monthly basis. Pang received the reimbursements for 10 months, the additional \$3,000 and \$50 for the delay in removing his name from title. The amount of the monthly mortgage payment being withdrawn from his account then increased; he was told that this was because the mortgage had been renewed. Regardless, the monthly reimbursements ceased being made.

Pang had not paid much attention to the details of the transaction, as he thought he was just a placeholder for three months. He did not even see the property or meet the broker

in person until after the purchase/mortgage completed and things went off the rails.

Pang attended at the property for the first time and discovered the broker's husband had rented it to a family for low rent in return for some painting services. After he advised the tenants of his concerns, they disappeared. He contacted the Real Estate Council, the Law Society, Calgary Police Service and the police fraud unit.

Pang discovered someone had taken out insurance on the home in his name.

Pang had not signed the purchase agreement nor made the required \$5,000 deposit; someone else had done it in his name. His first name was misspelled

throughout the contract. However, he had signed the mortgage.

Until the court proceedings, Pang had not seen:

- the transfer of land document;
- the bill of sale for a vehicle from which he purportedly received \$5,000 to be used toward the down payment (In fact, he had not owned the vehicle and the signature was that of the broker's brother.); or
- the employment letters and pay stubs that had been provided to the lender. He had not worked for the indicated employers.

A mortgage commitment letter had been produced in the litigation. The signature on it was not Pang's.

The sale of the property left a \$200,000 deficiency owing. Pang settled with the lender by agreeing to pay \$100,000. He wanted to recover this amount from others involved in the fraud. Having discontinued the case against or settled with the broker's husband and the lawyer, he continued the case against the broker and her mother.

DECISION

Were the broker and her mother part of the fraud on the lender?

The broker and her mother were part of the fraud inflicted on the lender. False

Did the broker and her mother commit fraud against Pang?

The broker and her mother defrauded Pang. The broker misrepresented the scheme to Pang, in that he was advised he qualified for a mortgage and was not advised of the fraudulent employment and income information being provided to the lender. The mother was involved in misrepresenting the nature of the scheme to Pang, both by becoming Pang's main contact while the relevant documents were executed and by providing cheques to him after the fraud was perpetrated.

something suspicious going on but did not inquire because he did not want to know the likely answer. Legally this is the equivalent of fraud.

- He was negligent, in that the circumstance should have raised concern, and he did not respond to the circumstances as would a reasonable person.
- He was completely innocent and was a mere victim or dupe.

The second and third possibilities are relevant in this case.

Pang had not made misrepresentations in a mortgage application to the bank. Someone else submitted a mortgage application under his name containing false information about his employment and salary. He had not signed the application nor the residential real estate purchase contract. He provided the broker with his correct financial information and had no part in what was eventually provided to the lender.

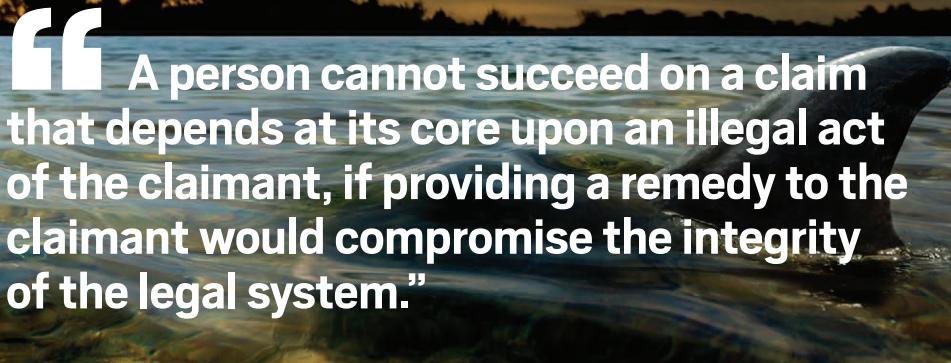
Pang signed only unidentified documents in the lawyer's office (presumably the transfer documents) and the mortgage at the bank, after the mortgage had been approved on fraudulent information.

Pang knew the mortgage proceeds would benefit someone who did not qualify for a mortgage. That should have raised his concerns, but the fact that he did not respond appropriately to that concern does not make his negligent conduct fraudulent. He did not know that the mortgage application would contain fraudulent information about his financial circumstances and had no reason to suspect that that would be the case, given his interaction with the broker and her mother.

Accordingly, Pang was negligent, rather than fraudulent. Being negligent does not bar him from recovering damages from the broker and her mother. Had Pang been informed of the full state of affairs by the broker and the mother, he would not have agreed to participate in the scheme. The broker and her mother were ordered to indemnify Pang for \$100,000.

TAKEAWAY

The takeaway is straightforward – do not commit fraud. If you do, you risk regulatory, criminal and significant civil consequences. Remember that today's accomplice in fraud can be tomorrow's claimant in court. ■



representations were made to the lender about Pang's financial situation, causing it to grant the mortgage and resulting in a loss to the lender.

The broker obtained financial information from Pang and, in furtherance of the scheme, falsely advised him that he qualified for a mortgage. She arranged his attendance at the lawyer's office and at the bank. Pang had no dealings with the bank until he was escorted there to sign the mortgage. The broker was complicit in the fraud perpetrated on the bank.

The broker's mother was involved in the execution of the residential real estate purchase contract, and the transfer of the property to Pang. She was also clearly part of the scheme, as evidenced by her providing reimbursements to Pang to cover the mortgage payments.

If the broker's husband was the mastermind of the scheme, as claimed by the broker and her mother, the broker and her mother knew what they were doing involving Pang and aiding in the fraud. They were complicit in the fraud.

Because:

- the broker and her mother made false representations to Pang;
- the false representations were made either knowingly, or recklessly, careless whether they were the truth;
- the false representations induced Pang to act; and
- Pang suffered a loss from his actions, the broker and her mother committed civil fraud against Pang.

Does Pang's conduct bar his claim?

A person cannot succeed on a claim that depends at its core on an illegal act of the claimant, if providing a remedy to the claimant would compromise the integrity of the legal system. The state of mind and moral culpability of the claimant is the central issue, and four possibilities exist in the typical mortgage fraud case:

- The claimant was intentionally fraudulent, in that he intended to deceive the bank.
- While not intentionally fraudulent, he was wilfully blind, in that he knew there was