

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Qiao v. Fu*,
2023 BCSC 2246

Date: 20231221
Docket: S180050
Registry: Vancouver

Between:

Man Qiao

Plaintiff

And

Lawrence Fu and New World Realty Ltd.

Defendants

Before: The Honourable Justice Basran

Reasons for Judgment

Counsel for the Plaintiff:

R. Lo

Counsel for the Defendants:

S.J. Gladders

Place and Dates of Trial:

Vancouver, B.C.
October 3–5, 10–12, 2023

Place and Date of Judgment:

Vancouver, B.C.
December 21, 2023

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Introduction

[1] In September 2016, Man Qiao, the plaintiff, executed contracts of purchase and sale (the “Contracts”) for three pre-sale condominium units, namely, Unit 411, Unit 211, and Unit 408, in a development located at 4468 Dawson Street, Burnaby, BC (the “Properties”).

[2] The closing date of the Contracts was July 24, 2017 (the “Closing Date”).

[3] The vendor of the Properties was Amacon Dawson Development Partnership (the “Vendor”).

[4] Ms. Qiao retained Lawrence Fu as her real estate agent for these transactions. Mr. Fu works for New World Realty Ltd. (“New World”). Mr. Fu and New World are the defendants in this action.

[5] On August 1, 2017, Ms. Qiao completed the purchase of only one of the three units of the Properties, for which she incurred additional expenses for the cost of an expedited mortgage and a contract extension fee.

[6] The Vendor cancelled the Contracts on the two other units of the Properties due to Ms. Qiao’s failure to complete these transactions on the Closing date.

[7] Ms. Qiao alleges that Mr. Fu was negligent in failing to forward the Contracts to Pauline Fong-Leung, a notary public, before the Closing date and in failing to ensure that Ms. Fong-Leung had received all the documents required to facilitate the closings on the Properties.

[8] Alternatively, Ms. Qiao asserts that Mr. Fu breached the fiduciary duty he owed her.

[9] Ms. Qiao, Mr. Fu, and Ms. Fong-Leung testified at trial. A notice of discontinuance and an amended notice of civil claim was filed with the court on September 28, 2023 and October 4, 2023 respectively, such that Ms. Fong-Leung is no longer a defendant to this action.

[10] Ms. Qiao's evidence was internally inconsistent, self-serving, and generally not credible. At several points, it did not harmonize with the circumstances surrounding the subject transactions and the events that took place.

[11] On the other hand, the evidence of Mr. Fu and Ms. Fong-Leung was credible, coherent, logical, and consistent with both the documentary evidence and each other. I prefer their evidence to that of Ms. Qiao.

[12] For the reasons that follow, I have concluded that Mr. Fu was neither negligent nor in breach of the fiduciary duty he owed to Ms. Qiao. Mr. Fu did not breach the standard of care expected of a real estate agent and, in any event, his actions did not cause Ms. Qiao to fail to close on the Properties on the Closing date.

[13] Ms. Qiao's claim is dismissed.

Credibility of the Witnesses

Legal Principles

[14] The parties' credibility is a key issue in this matter. In assessing the truthfulness of the witnesses' testimony, I am guided by the test set out in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 357, 1951 CanLII 252 (B.C.C.A.):

[...] In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. [...]

[15] In assessing credibility, I will apply the factors described by Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296:

Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether

a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); [*Faryna*] v. *Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) [*Faryna*]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna*] at para. 356).

Assessment of the Witnesses' Credibility

Man Qiao

[16] There were several problems with Ms. Qiao's testimony.

[17] Ms. Qiao testified that she is a successful businessperson who earns a living by buying and selling real estate. She asserted that she had completed eight real estate transactions, including four presale transactions, prior to purchasing the Properties. At trial, she demonstrated awareness of the tax implications of selling a principal residence as compared to an investment property.

[18] Ms. Qiao undertook efforts to earn a quick and significant profit by assigning the Contracts for the Properties prior to their closing. However, in respect of the purchase of the Properties, she described herself as unsophisticated and entirely reliant on the advice, assistance, and instructions of the professionals she worked with, such as Mr. Fu and Ms. Fong-Leung. I reject this assertion. Ms. Qiao's evidence reveals that she is both knowledgeable and experienced with the steps involved in residential real estate transactions.

[19] Ms. Qiao testified that she did not have digital versions of the Contracts, and that she was generally unfamiliar with the use of email and did not know how to forward documents by email. However, the documents in evidence show that Mr. Fu sent the Contracts by email to Ms. Qiao in December 2016 and in either May or June 2017. When Ms. Qiao received these documents in December 2016, she forwarded them by email within five minutes to Frank Chen, another real estate agent. Her evidence on this issue was inconsistent internally and with the documentary evidence.

[20] When confronted at trial with the emails showing that Mr. Fu sent the Contracts to her in December 2016, which she then forwarded to Mr. Chen, Ms. Qiao testified that she did not read these documents. She also vaguely and unhelpfully explained that she receives many emails, and she does not open all of them nor does she check her email everyday.

[21] Ms. Qiao testified that she retained Ms. Fong-Leung to prepare the closing documents for the purchase of the Properties. She testified that she called Ms. Fong-Leung's office weekly or bi-weekly commencing in January 2017 to inquire on the status of the work she expected Ms. Fong-Leung to do in preparation for the closing of the Properties. Ms. Qiao, however, said that Ms. Fong-Leung's office staff repeatedly rebuffed her on these calls and told her that the office had no file in respect of the Properties. At no point in the course of making these phone calls did Ms. Qiao insist on speaking with Ms. Fong-Leung to confirm that she would prepare the necessary closing documents. Rather, Ms. Qiao purports to have accepted the "no file" explanation from office staff every week or two from January until June 2017. This explanation is not believable.

[22] Furthermore, Ms. Qiao met with Ms. Fong-Leung in person on three separate occasions in March, June, and July 2017 in respect of other unrelated transactions. She did not, however, use these opportunities to formally retain and instruct Ms. Fong-Leung in respect of the closings of the Properties. Ms. Qiao unconvincingly explained that she did not mention the upcoming closing of the Properties because Ms. Fong-Leung seemed busy and had other clients waiting. Ms. Qiao was evasive and vague during cross examination on this issue.

[23] Ms. Qiao also testified that she clearly recalled retaining Ms. Fong-Leung during a June 30, 2017 meeting. However, Ms. Fong-Leung denies that Ms. Qiao retained her for work relating to the Properties prior to July 24, 2017. This contention is supported by emails sent by Ms. Fong-Leung to the Vendor's lawyer on July 21 and July 25, 2017, confirming that she had not yet opened a file for Ms. Qiao, was

still awaiting instructions from her, and that she was “not sure if [she was] acting on behalf of” Ms. Qiao in respect of the subject transactions.

[24] Ms. Qiao asserts that some of the inconsistencies in her evidence are due to nuances lost in translation or because she misunderstood the questions she was asked. I reject this explanation. Her memory was conveniently sharp and specific on details that assisted her position, yet vague and obtuse when the defence confronted her with inconsistencies in her evidence. For example, during her examination for discovery, Ms. Qiao testified that she was capable of reading and, presumably, understanding the closing documents if she were given adequate time to review them. During her cross-examination at trial, she denied being capable of reading and understanding these documents.

[25] In my view, and based on the reasons above, Ms. Qiao was generally not a credible witness. Her evidence was often internally inconsistent, frequently self-serving, and at odds with some of the documentary evidence. Her account of the events surrounding the subject transactions did not harmonize with the relevant documents or the testimony of Mr. Fu and Ms. Fong-Leung. As discussed in the following sections, I find Mr. Fu and Ms. Fong-Leung’s evidence to be rational, coherent, logical, and therefore credible. As a result, I prefer their evidence where it conflicts with that of Ms. Qiao.

Lawrence Fu

[26] Mr. Fu has worked as a licenced real estate agent in B.C. since 1990. He recalled that Ms. Qiao was interested in the Properties because they were attractive investments. Mr. Fu remembered sending the Contracts to Ms. Qiao electronically in December 2016 because she wanted to earn a quick profit by assigning these Contracts before the Closing date. She told him that she had placed several advertisements to assign the Contracts and that she was working with Mr. Chen, another real estate agent, who was assisting her with this plan.

[27] On May 9, 2017, Mr. Fu sent an email to Ms. Qiao in which he provided her with a list of three notary publics. He testified that he did this to encourage Ms. Qiao to choose one of them and notify the Vendor accordingly.

[28] On May 24, 2017, a representative of the Vendor sent an email to Mr. Fu and Ms. Qiao asking them to provide the contact information for the lawyer or notary who would be assisting Ms. Qiao with closing on the Properties.

[29] Mr. Fu testified that, in May 2017, Ms. Qiao told him that she intended to retain Ms. Fong-Leung as the notary public for the subject transactions in the event that she closed on them. However, Ms. Qiao verbally instructed Mr. Fu not to forward the Contracts to Ms. Fong-Leung because she was confident that she would be able to assign the Contracts prior to the Closing date and, therefore, did not want to incur any unnecessary expenses related to closing.

[30] Mr. Fu described Ms. Qiao as absent-minded. He recalled providing her with electronic and hard copies of the Contracts for the Properties on several occasions, including before December 2016.

[31] Mr. Fu testified that he sent the Contracts to Ms. Qiao by email on at least three occasions:

- a) on December 11, 2016, in furtherance of her efforts to assign the Contracts;
- b) in May or June 2017, because a mortgage broker required them; and
- c) on July 24, 2017, when he sent the Contracts to both Ms. Fong-Leung and Ms. Qiao.

[32] Mr. Fu recalled that, after he had sent the Contracts to Ms. Fong-Leung on July 24, 2017, Ms. Qiao told him that she only had sufficient funds to close on one of the three Properties. He had recommended that Ms. Qiao close on Unit 411 because this unit had two large balconies and, therefore, had the highest potential for profit.

[33] Mr. Fu recalled suggesting that Ms. Qiao meet with Ms. Fong-Leung soon after she signed the Contracts because he expected that they would be closing relatively soon. He reiterated that he did not send the Contracts to Ms. Fong-Leung because Ms. Qiao instructed him not to do so and Ms. Qiao did not confirm that she had retained Ms. Fong-Leung to do the conveyancing of the Properties. He recalled that Ms. Qiao repeatedly told him that she was “99 percent sure” that she would be assigning the Contracts prior to the Closing date so there was no need to send the Contracts to Ms. Fong-Leung.

[34] Mr. Fu does not recall a telephone call with Ms. Fong-Leung in September 2018 during which they discussed Ms. Qiao’s failure to complete the purchase of the Properties. Ms. Fong-Leung made detailed notes of this discussion and recalled it clearly. In my view, Mr. Fu’s inability to recall this particular telephone call is an isolated and minor problem with the reliability of his memory, not an indication that his evidence is generally not credible. Aside from not recalling this particular telephone call, the contents of Ms. Fong-Leung’s notes generally accord with the substance of Mr. Fu’s testimony. In particular, the notes reflect that Mr. Fu’s reason for not sending the Contracts to Ms. Fong-Leung was because Ms. Qiao had informed him of her desire to assign the Contracts before the Closing Date.

[35] Mr. Fu’s version of the events involving the Properties accords with Ms. Fong-Leung’s evidence and the documentary evidence, such as the emails in which he forwarded the Contracts to Ms. Qiao. Mr. Fu testified thoughtfully and carefully. His description of the relevant events is reasonable, logical, consistent, and harmonizes with the evidence of Ms. Fong-Leung. I find Mr. Fu to be a credible witness and to the extent that his evidence differs from that of Ms. Qiao, I prefer his evidence.

Pauline Fong-Leung

[36] Ms. Fong-Leung has been a practising notary public since 1995.

[37] Ms. Fong-Leung testified on October 11, 2023. She was removed as a defendant to this action by an amended notice of civil claim filed October 4, 2023.

[38] In her testimony, Ms. Fong-Leung explained that she typically receives information regarding an upcoming transaction directly from her clients, not from their real estate agents. Although the contract of purchase and sale may come directly from a real estate agent, before Ms. Fong-Leung opens a file or takes any further steps on the matter, the client must formally retain her and provide her with instructions.

[39] Ms. Fong-Leung clearly recalled working with Ms. Qiao on three separate transactions, unrelated to the Properties, in the three months prior to July 2017.

[40] Ms. Fong-Leung testified that Ms. Qiao did not advise her that she had bought the Properties until July 13, 2017. Further, Ms. Fong-Leung testified that as of July 21, 2017, Ms. Qiao had still not formally retained her in respect of the anticipated Closing Date of the Properties. Ms. Fong-Leung recalled receiving the notices of completion for the Properties and that she tried contacting Ms. Qiao regarding a retainer and instructions for the Properties, however, Ms. Qiao failed to respond to these inquiries.

[41] As of July 25, 2017, the day after the anticipated Closing Date of the Properties, Ms. Qiao still had not retained Ms. Fong-Leung.

[42] On July 26, 2017, Ms. Fong-Leung provided the Contract extension letters in respect of each of the three units of the Properties to Ms. Qiao by hand. She also instructed her office to send these documents to Ms. Qiao electronically on July 27, 2017. Ms. Fong-Leung characterized Ms. Qiao's conduct during this period as "chaotic". Ms. Qiao was angry that the Closing Date, i.e., July 24, 2017, could not be delayed in light of alleged deficiencies in the units, and Ms. Qiao was upset that she was required to pay a closing extension fee of \$3,000 for Unit 411. Ms. Fong-Leung recalled that Ms. Qiao signed the Contract extension letter for Unit 411 on July 27, 2017.

[43] In a manner similar to Mr. Fu, Ms. Fong-Leung testified clearly, thoughtfully and forthrightly. Where their evidence conflicts, I prefer the evidence of Ms. Fong-

Leung to that of Ms. Qiao. Ms. Fong-Leung's evidence accords with both the documentary evidence and Mr. Fu's testimony. The evidence of both of these witnesses is reasonable and credible.

Analysis

Did Mr. Fu Breach the Standard of Care Expected of a Real Estate Agent by not Sending the Contracts to Ms. Fong-Leung?

Standard of Care

[44] Tom Garvey, an experienced real estate broker, provided expert evidence on the standard of care expected of real estate agents. I accept Mr. Garvey's opinion that the standard of care expected of a real estate agent in 2017 was to provide contracts of purchase and sale in a timely fashion to a conveyancer retained by the purchaser so that the transaction could be completed on time.

Positions of the Parties

[45] Ms. Qiao asserts that despite having extensive experience with real estate purchases, including pre-sale condominiums, she has always relied on professionals, such as real estate agents and notaries public, to ensure that transactions close successfully. She specifically denies having provided Mr. Fu with verbal instructions not to send the Contracts to Ms. Fong-Leung. Accordingly, she maintains that Mr. Fu's failure to forward the Contracts to Ms. Fong-Leung fell short of the standard of care expected of real estate agents.

[46] The defendants submit that Ms. Qiao instructed Mr. Fu not to send the Contracts to Ms. Fong-Leung and, accordingly, Ms. Qiao has not established that Mr. Fu breached the applicable standard of care. They also assert that Ms. Qiao did not retain Ms. Fong-Leung until after July 24, 2017, the anticipated Closing Date. Given that Ms. Fong-Leung was not formally retained prior to this date, the defendants allege that Mr. Fu did not breach the applicable standard of care by not forwarding the Contracts to Ms. Fong-Leung.

Findings of Facts

[47] As of September 2016, Ms. Qiao was an experienced real estate investor who had completed eight real estate transactions, including four presale condominium development purchases.

[48] Following the execution of the Contracts, Ms. Qiao understood that completion of the subject Contracts would occur sometime in 2017 and that the Vendor would notify her and her notary of the completion date.

[49] From her own experience, Ms. Qiao understood that completion would happen shortly after the walk-through inspection of the units, which were held in May and June 2017.

[50] At all material times prior to July 24, 2017, Ms. Qiao expected to assign the Contracts for a profit.

[51] Following the execution of the Contracts, Ms. Qiao verbally instructed Mr. Fu not to send copies of the Contracts to Ms. Fong-Leung.

[52] Ms. Qiao knew from experience that a notary would require a copy of the contract of purchase and sale in order to prepare the closing documents for a transaction.

[53] Ms. Qiao was provided with copies of the Contracts following execution and received additional copies of the Contracts from Mr. Fu in December 2016 and May or June 2017.

[54] Ms. Qiao did not formally retain Ms. Fong-Leung to act as her notary for the purchase of the Properties until after the Closing Date.

[55] Ms. Fong-Leung could not have acted for Ms. Qiao in the conveyance of the Properties until Ms. Qiao formally retained her.

Discussion

[56] I accept Mr. Fu's evidence that Ms. Qiao specifically instructed him not to provide Ms. Fong-Leung with a copy of the Contracts because she intended to assign these Contracts. As expected, he followed the instructions of his client.

[57] I do not accept Ms. Qiao's evidence that she actively sought to assign these Contracts in 2016 but only passively undertook this effort in 2017. By advertising these Contracts for assignment, working with Mr. Chen, another real estate agent who assisted her with this objective, and repeatedly telling Mr. Fu that she was "99 percent sure" that she would assign these Contracts, Ms. Qiao's actions are consistent with an expectation that she would succeed in assigning these Contracts prior to closing.

[58] Ms. Qiao met with Ms. Fong-Leung on several occasions to conduct other business but did not mention the purchase of the Properties, let alone retain her to undertake this work. This is also consistent with Ms. Qiao's expectation and belief that she would be able to assign these Contracts prior to the completion.

[59] Mr. Fu knew that Ms. Qiao had completed numerous real estate transactions previously. He also knew that Ms. Qiao was aware of the need to involve a lawyer or notary to assist with completion and that she knew that a notary would require copies of the Contracts in order to prepare the closing documents.

[60] Ms. Qiao understood that completion would happen shortly after the final inspections on June 7, 2017.

[61] Mr. Fu knew that Ms. Qiao received the correspondence from the Vendor on May 8, 2017, which indicated that completion would be occurring soon and that she ought to choose a legal representative and provide that representative with copies of the Contracts. Mr. Fu was aware that Ms. Qiao possessed copies of the Contracts following the meetings with the Vendor, given Mr. Fu's evidence that he had emailed her copies of the Contracts in December 2016 and May or June 2017.

[62] Mr. Fu did not breach the standard of care expected of a real estate agent in 2017 by failing to forward the Contracts to Ms. Fong-Leung because he reasonably, and understandably, acted on Ms. Qiao's instructions not to do so. Additionally, the applicable standard of care requires a real estate agent to provide contracts of purchase and sale to a conveyancer retained by the purchaser in a timely fashion. Mr. Fu did not breach this standard of care because Ms. Qiao had not retained Ms. Fong-Leung prior to the Closing Date.

In the Event that Mr. Fu Did Breach the Standard of Care Expected of a Real Estate Agent, Did His Actions Cause Ms. Qiao's Loss?

Legal Principles

[63] The test for determining causation in negligence cases is the "but for" test, which requires that a plaintiff prove on a balance of probabilities that their loss would not have occurred but for the negligence of the defendant. In *Clements v. Clements*, 2012 SCC 32, Chief Justice McLachlin wrote:

[8] The test for showing causation is the "but for" test. The plaintiff must show on a balance of probabilities that "but for" the defendant's negligent act, the injury would not have occurred. Inherent in the phrase "but for" is the requirement that the defendant's negligence was necessary to bring about the injury — in other words that the injury would not have occurred without the defendant's negligence. This is a factual inquiry. If the plaintiff does not establish this on a balance of probabilities, having regard to all the evidence, her action against the defendant fails.

[64] Our Court of Appeal recently affirmed the following key legal principles applicable to causation, in the case of *Engman v. Canfield*, 2023 BCCA 56:

- a) A defendant is not liable in negligence unless their breach caused the plaintiff's loss: *Engman* at para. 93.
- b) The causation analysis involves two distinct inquiries: (1) the plaintiff must establish factual causation by proving that the harm would not have occurred but for the defendant's negligent act; and (2) the plaintiff must also establish legal causation, namely that the actual injury must have been a reasonably foreseeable result of the negligent conduct: *Engman* at para. 93.
- c) While a plaintiff is not required to adduce "scientific proof" of causation and a causal link between the negligent conduct and a claimed loss can be

inferred, any such inferences must be based on proven facts and cannot be simply guesswork or conjecture: *Engman* at para. 87 and 94.

Positions of the Parties

[65] Ms. Qiao asserts that Mr. Fu's failure to forward the Contracts to Ms. Fong-Leung is the reason Ms. Fong-Leung did not open a file in respect of the Closing Date for the Properties, which in turn caused Ms. Qiao's loss by her not being able to close in time. Alternatively, Ms. Qiao asserts that Mr. Fu materially contributed to the alleged loss sustained by her.

[66] Mr. Fu denies that he caused Ms. Qiao's alleged loss because he acted on her instructions by not forwarding the Contracts to Ms. Fong-Leung. He also asserts that, in any event, Ms. Qiao did not have the financing to complete the transactions on the Closing Date and she did not retain Ms. Fong-Leung to close these transactions until the Closing Date or later.

Findings of Fact

[67] The purchase price of each of the three units that comprise the Properties was as follows:

- a) Unit 411: \$587,900;
- b) Unit 211: \$595,900; and
- c) Unit 408: \$374,900.

[68] On May 8, 2017, the Vendor sent Ms. Qiao a notice of the home orientation for the units.

[69] On June 7, 2017, the Vendor sent Ms. Qiao a notice of the final home orientation for the units.

[70] On July 24, 2017, sometime before noon, the Vendor notified Ms. Qiao by telephone of the completion date.

[71] Ms. Qiao did not know the completion date until July 24, 2017.

[72] None of the units completed on July 24, 2017.

[73] Ms. Qiao signed a Contract extension letter in respect of Unit 411 but did not sign such letters for Units 211 and 408.

[74] On July 28, 2017, the Vendor terminated the Contracts for Unit 211 and Unit 408.

[75] Ms. Qiao closed on Unit 411 on August 1, 2017.

[76] Ms. Qiao sold Unit 411 for \$865,000 in November 2017.

[77] Ms. Fong-Leung received the notices of completion for the Properties on July 13, 2017. Despite her efforts to contact Ms. Qiao, Ms. Fong-Leung did not speak with her about the Closing Date until July 24, 2017 or later because Ms. Qiao did not return her telephone calls.

[78] Ms. Fong-Leung was not formally retained and had not received instructions from Ms. Qiao to act for her on the completions of the Properties until on or after the Closing Date, July 24, 2017.

[79] Ms. Qiao did not inform her mortgage company of the Closing Date until July 24, 2017 or later. Accordingly, as of July 24, 2017, Ms. Qiao did not have financing in place to close on the Properties.

[80] On June 28, 2017, Ms. Qiao took out a mortgage of \$1,290,000 secured by a property she owned in Maple Ridge, BC. The interest rate on this mortgage was 20 percent per annum.

[81] Ms. Qiao received extension letters in respect of each of the three units that comprised the Properties, but she did not sign these letters for Units 211 and 408. She only signed an extension letter in respect of Unit 411.

Discussion

[82] I find that Mr. Fu did not cause Ms. Qiao's failure to close on the Properties. Rather, Ms. Qiao's failure to close on the Properties resulted from her inability to arrange financing for all three units of the Properties and the fact that she had not retained a notary public to prepare for closing.

[83] Ms. Qiao asserted that she was unaware of the Closing Date until July 24, 2017 although she inspected the Properties in May and June 2017. I find that, despite Ms. Qiao's claim that she did not know the exact completion date, she knew, based on her past real estate experience, that the timing of the final inspections indicated that the closing was imminent. Nevertheless, as of July 24, 2017, she had not arranged financing to ensure that she could close on the Properties.

[84] Ms. Qiao did not argue that the funds received from the mortgage of her Maple Ridge property were intended to be used to close on the Properties. In any event, these funds were not sufficient to close on all three units of the Properties. If there had been sufficient funds available, Ms. Qiao would have been able to close on at least two of the three units. However, she was only able to close on Unit 411 upon arranging financing after the Closing Date. This supports the contention that her Maple Ridge property mortgage funds were not intended to be used to close on the Properties.

[85] Furthermore, despite knowing that closing was imminent after completing the May and June 2017 inspections, Ms. Qiao had not retained Ms. Fong-Leung, or any other notary or lawyer, to prepare the closing documents for the Properties until on or after the Closing Date. I accept Ms. Fong-Leung's evidence that after she received the completion notices, she tried to contact Ms. Qiao prior to the Closing Date but Ms. Qiao did not return these calls.

[86] I find that, in the event that Ms. Qiao suffered a loss, and I am not satisfied that she did, there is no nexus between it and any actions or inactions by Mr. Fu. Even if I were to accept that Mr. Fu had a duty to forward the Contracts to Ms. Fong-Leung, a proposition that I have rejected on the facts of this case, Mr. Fu's actions

still would not have caused Ms. Qiao's theoretical loss because she did not have the funds available to complete the transactions on the Closing Date and she had not retained and instructed Ms. Fung-Leung prior to this date.

[87] Ms. Qiao is responsible for any loss that she may have suffered by failing to close on the Properties on July 24, 2017.

Did Mr. Fu Breach his Fiduciary Duty to Ms. Qiao?

[88] An allegation of breach of fiduciary duty implies dishonesty, deceit, or constructive fraud: *Girardet v. Crease & Co.* (1987), 11 B.C.L.R. (2d) 361 at 362, 1987 CanLII 160 (S.C.). In *Girardet*, Madame Justice Southin wrote that the court must be careful to distinguish ordinary negligence from a breach of fiduciary duty, the latter of which "carries with it the stench of dishonesty". As she stated, "to say that simple carelessness in giving advice is [a fiduciary] breach is a perversion of words": *Girardet* at 362.

[89] There is a presumption in law that real estate agents owe a fiduciary duty to their clients. The defendant may rebut that presumption by proving that the relationship was not one of reliance, trust, and confidence: *DeJesus v. Sharif*, 2010 BCCA 121 at para. 54.

[90] I accept that Mr. Fu owed a fiduciary duty to Ms. Qiao. Although Ms. Qiao had experience with real estate transactions, Mr. Fu has not met the burden of proving that, as her real estate agent, he did not have a relationship of reliance, trust, and confidence with Ms. Qiao. The evidence demonstrates that Mr. Fu, at several points, advised Ms. Qiao with respect to the Properties and that Ms. Qiao shared with Mr. Fu her plans for assigning the Contracts.

[91] However, in my view, Mr. Fu did not breach this fiduciary duty. This is because Ms. Qiao does not assert any form of wrongdoing tantamount to a breach of fiduciary duty. Ms. Qiao does not characterize Mr. Fu as acting dishonestly or in a fraudulent manner. Rather, her argument against Mr. Fu is completely rooted in his alleged failure to meet the standard of care he owed Ms. Qiao. Ms. Qiao relies on

the same allegations asserted in the negligence claim in respect of the alleged breach of fiduciary duty.

[92] The allegation that Mr. Fu breached his fiduciary duty to Ms. Qiao is misplaced because Ms. Qiao has not established any dishonesty, deceit, or wrongdoing by Mr. Fu. As discussed above, Mr. Fu also did not breach the standard of care expected of a real estate agent in the circumstances because he properly acted on the instructions provided by Ms. Qiao.

Conclusion

[93] Ms. Qiao's claims against Mr. Fu and New World Realty are dismissed.

Costs

[94] If the parties wish to make submissions on costs, they may be filed within 30 days of the date of this judgment. If the parties wish to make oral submissions on costs, they may make the necessary arrangements with Supreme Court Scheduling within this timeframe.

[95] If no submissions are received, the defendants will have their costs at Scale B.

“Basran J.”