



- [2] The applicant and the respondent, K.J. & T. Investments Inc. (hereinafter referred to as "KJT") ask that the agreement to sell approximately 56 acres of the said property be enforced, and that the balance of the property be listed for sale in accordance with the September 15, 2016 order.

ISSUES TO BE DETERMINED

- 1) Is there an enforceable agreement between the parties for the sale of 56 acres of vacant land to K.J. & T. Investments Inc.?
- 2) If so, should the balance of the property be relisted for sale?
- 3) If there is no enforceable contract, should the entire property be listed for sale?

FACTS

- [3] For the most part, the facts are not in dispute. The applicant, Mary Trindade (hereinafter referred to as "Mary") is a two-thirds (2/3) tenants in common owner of the property described as Part Lot 3, Concession 5, Division B, Guelph Township, as in RO705022 except Parts 1, 2, 3, 61R8194, Township of Guelph-Eramosa; S/T BS13864 in the County of Wellington and being all of the PIN 71362-0106 (LT) (hereinafter referred to as the "Property")
- [4] The respondent, Zita Fernandes (hereinafter referred to as "Zita") is married to Jose Fernandes. Zita is the tenant in common owner of the remaining one-third (1/3) interest in the Property.
- [5] The respondent K.J. & T. Investments Inc. is an Ontario corporation that is owned and operated by the three children of Mary – Kevin, Jason and Taren. The president of the corporation is Jason.
- [6] KJT owns a two-acre plot of land that borders the Property.
- [7] The Property contains 58 acres of land. There is a large 7,500 square foot residence on the Property composed of three separate units, along with several outbuildings. The balance of the Property is farmland which is currently being rented.
- [8] Zita and Jose reside on the Property in one of the separate units. Mary formerly resided in another unit, but in 2014 moved to Niagara-on-the-Lake.
- [9] As a result of a Partition and Sale Application brought by Mary, Nightingale J. on consent, on September 15, 2016, ordered that the Property be forthwith listed for sale. The matter

could be returned to court on 14 days' notice if the parties were unable to reach an agreement on any issues arising in relation to the sale.

- [10] With the assistance of a jointly retained realtor, Mary and Zita decided to list the entire Property for \$1,950,000.
- [11] They also listed the residence and approximately two acres of adjacent land for sale separately from the balance of the Property.
- [12] KJT had expressed some interest in purchasing the acreage portion of the Property. The parties appeared to have reached an agreement for KJT to purchase the said acreage for \$750,000.
- [13] On March 27, 2017, Zita and Mary accepted an offer to purchase the residence and approximately two acres of adjoining land for a purchase price of \$1,100,000 from Ryan Jantzi (hereinafter referred to as "Jantzi"). This sale was to close on August 29, 2017. The offer was conditional upon a lot line adjustment of the Property being obtained.
- [14] By email on April 20, 2017, Mr. Braganza, on behalf of his client Zita, prepared and forwarded to Mr. Heath an Agreement Regarding Acreage Portion Purchase. The important terms of that agreement included the following:
  - 1) The Owners agree to proceed with a severance for the Property, where the costs of obtaining the Property's severance shall be split according to Property's ownership, whereby Trindade shall be responsible for two thirds (2/3) of the costs of the severance, while Fernandes shall be responsible for one third (1/3) of the costs of the severance.
  - 2) Once the Property has been approved for severance and a severance is actually granted by the relevant municipal authorities, KJT agrees to buy and the Owners agree to sell the Acreage Portion to KJT.
  - 3) The price of the Acreage Portion shall be \$750,000.00 where Trindade's share is \$500,000.00 and where Fernandes's share is \$250,000.00
- [15] The covering email sent with this draft agreement from Mr. Braganza to Mr. Heath stated the following:

Please find attached an Agreement regarding the Acreage Portion for your client and her children's corporation to sign.

If you are in agreement, please return a faxed copy of the agreement signed by both Ms. Trindade and an authorized representative of the corporation. We will then provide you with a signed version from Ms. Fernandes.

- [16] The agreement forwarded to Mr. Heath was not signed by Zita.
- [17] On April 21, 2017, Mr. Heath returned to Zita's lawyer a signed copy of the said agreement. The agreement was only executed by Mary. The letter Mr. Heath emailed to Mr. Braganza contained the following statements: "Attached is your agreement signed by my client. It may be appropriate that we agree that the transfer will be subject to the usual adjustments."
- [18] Mr. Heath did not send a copy of the said agreement signed by KJT. KJT and/or its representative did not provide a signed copy of the agreement to Zita at this time.
- [19] After receipt of the agreement signed by Mary, Zita instructed her lawyer to prepare an Addendum to Agreement Regarding Acreage Portion Purchase. The terms of that Addendum included two terms.
- [20] The first, incorporated the additional request made by Mr. Heath. The second, made the sale to KJT conditional on completion of the offer to purchase from Jantzi.
- [21] Zita signed both the original agreement and the Addendum. Both were sent to Mr. Heath on April 25, 2017.
- [22] The covering email stated the following:

Please find attached our client's signed version of the (1) Agreement regarding Acreage Portion Purchase and (2) the Addendum to Agreement regarding the Acreage Portion Purchase.

Please have your client sign the Addendum, and please arrange for an authorized representative from KJT to sign both documents and return a faxed or emailed copy to us.
- [23] Mr. Heath forwarded this email and the agreements to his client, Mary, on April 25, 2017.
- [24] Thereafter, there was no response from Mr. Heath or KJT for several months.
- [25] It was not until December 2017 that Mr. Heath and Zita received a copy of the agreement executed by Jason Trindade on behalf of KJT. Mr. Trindade's signature is undated. Mr. Trindade's evidence is that this agreement was executed by him on April 21, 2017.

- [26] The agreement signed by Mr. Trindade has a signature of Zita on the document. The agreement with Zita's signature was first sent to Mr. Heath on April 25, 2017.
- [27] In December 2017, Zita brought this Motion for Directions. KJT sought to be added as a party, and at that time produced the signed agreement for the first time.
- [28] Between April 2017 and December 2017, Zita did not receive any confirmation from KJT that the agreement was executed or that it intended to purchase the Property. Hence, the Motion for Sale pursuant to Justice Nightingale's order and for directions from the court.
- [29] Despite not receiving the signed contract from KJT, or the Addendum signed by Mary or KJT, Mary and Zita used the services of Rod Finnie to obtain a lot line adjustment of the Property. Mr. Finnie had already advised Mary, Zita and Jason that it would not be possible to get a severance because the land was designated as prime agricultural lands. He advised them that the only way to sever the house portion from the farm portion was to transfer the farm property to an abutting owner. The application to the municipality was therefore not a severance but a lot line adjustment.
- [30] In August 2017, Mary entered into an Occupancy Agreement with Jantzi, permitting him to move on to the Property with his family. Zita is not a party to this agreement. Mary receives all rents paid by Jantzi.
- [31] The request for a lot line adjustment was approved by the Municipality on July 20, 2017 conditional upon the Property being rezoned.
- [32] The rezoning was obtained on November 6, 2017.
- [33] By this time, the closing date on the Jantzi purchase had been extended and expired. Jantzi refused to extend any further, and the agreement to purchase the residence fell through.
- [34] In January 2018, Jantzi made a new offer to purchase the entire Property for \$1,950,000. Zita wishes to accept, and proceed with this offer. Mary refuses, believing there is a binding agreement in place for KJT to purchase the acreage.

#### POSITION OF THE PARTIES

- [35] Zita alleges there is no binding contract between the parties to sell the acreage to KJT. The original offer was revoked by Zita's Addendum to Agreement dated April 25th.
- [36] By that date, KJT had not communicated its acceptance of the contract. It was not until sometime in December 2017 that Zita saw for the first time a copy of the agreement with KJT's signature.

- [37] Both Mary and KJT argue that there is a binding agreement for Mary and Zita to sell the acreage to KJT for \$750,000. Mary and Jason Trindade executed the agreement on April 21, 2017, four days before Zita sent out her Addendum.
- [38] Further, Zita acquiesced to the terms of the contract. After April 21st, she and Mary retained Mr. Finnie, applied for a lot line adjustment, and obtained rezoning of the subject Property. This is inconsistent with Zita's position that there is no binding contract.
- [39] KJT asks that the court order specific performance under the terms of that agreement.

### THE LAW

- [40] The controlling principles of law applicable in this case are as follows:


- 1) Acceptance of an offer must be communicated to the other parties to the contract in order to have a binding contract, unless the contract specifies otherwise. *Schiller v. Fisher*, [1981] 1 S.C.R. 593 at p. 5.
- 2) If three or more parties intend to form a contract, and any of these parties fails to enter into the agreement, there is no contract. *Hewgill v. Orr*, [1930] O.J. No. 384.
- 3) Proposed amendments to an agreement that is signed back is a counteroffer. *Haley v. Richards*, [1989] A. J. No. 1006; *Pyne v. Footman*, [2008] O.J. No. 2256.
- 4) Agreements for the purchase of land must be in writing to be enforceable. *Statute of Frauds*, R.S.O. 1990, c. S.19.

### ANALYSIS

- [41] It is clear that the original Acreage Agreement was signed by Mary on April 21st. It is also clear that that agreement along with an Addendum to the agreement was signed by Zita on April 21<sup>st</sup>.
- [42] What is not clear is the date the original agreement was executed by Jason on behalf of KJT. The Addendum was never signed by either Mary or KJT.
- [43] The date beside Jason's signature is blank on the document. Mary says she gave her son the document on April 21st, that he signed it and returned it to her. His evidence is that he signed it on the 21st.

- [44] What is of concern to the court is that the document Mr. Trindade says he executed, and which has been produced, already has Zita's signature on it. The uncontradicted evidence before the court is that the document with Zita's signature was not forwarded to Mr. Heath until April 25, 2017.
- [45] Further, this document signed by Jason was not produced to anyone until December 2017 in response to Zita's Application before the court. Mary's evidence is not clear, and certainly she is unable to say that she saw Jason sign the document on the 21st.
- [46] On balance, I am not satisfied that Jason signed this document on April 21st. The earliest he could have signed the document was when it was received on April 25th. By that time, Zita had already sent her letter of April 25th which included an *Addendum*. This *Addendum* revoked the previous offer, and this *Addendum* constitutes a counteroffer that has never been agreed to, or executed by either Mary or KJT.
- [47] Mary and KJT argue that the parties had an agreement to sell the acreage to KJT for \$750,000 and had agreed how the moneys were to be divided. There was no offer and acceptance. There was just the agreement between the parties.
- [48] That may very well be, however, to be enforceable this agreement must be in writing. The agreement that was prepared to reflect the deal between the sisters was never signed by all three parties before the original offer was revoked.
- [49] It is true that Mary and Zita did proceed with obtaining the lot line adjustment. The only way to sever the home from the acreage was to sell the acreage to an adjoining land owner. It may very well be that both parties were in effect acquiescing to their understanding of the terms of the contract. Unfortunately, what we do not know is what contract. Did Zita believe it was the *Addendum*, not yet signed, which required the lot adjustment, but was conditional on the Jantzi purchase? Did Mary rely on the original contract, denying that she ever got the *Addendum*? In my view, this is not the type of acquiescence that would vitiate the need to have a contract signed by all the parties to the agreement.
- [50] At the end of the day I find that there is no binding contract. Accordingly, I do not need to deal with KJT's Motion for Specific Performance.
- [51] In accordance with the order of Justice Nightingale, the entire Property is immediately to be listed for sale at a price to be agreed upon between Mary and Zita within 15 days of today's date. Mary at her expense shall be responsible for ensuring that the vendors are able to provide vacant possession to any prospective purchaser.

- [52] If there are any disputes with respect to the price or the terms of sale, either party may move for further directions from the court.



Walters J.

**Released:** October 26, 2018



**CITATION:** Trindade v. Fernandes et al, 2018 ONSC 6410

**COURT FILE NO.:** 56119/15

**DATE:** 2018/10/26

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

Mary Trindade

Applicant/Responding Party

**- and -**

Zita Fernandes and Jose Fernandes

Respondent/Moving Party

**- and -**

K.J. & T. Investments Inc.

Respondent/Responding Party

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**REASONS FOR JUDGMENT**

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Walters J.

**Released:** October 26, 2018