

CITATION: Newbridge Mortgage Inc. v. Rouge Park Terraces Non-Profit Development Corporation et al., 2023 ONSC 3298
COURT FILE NO.: CV-19-00625530-0000
DATE: 20230501

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: NEWBRIDGE MORTGAGE INC.

Plaintiff/Moving Party

AND:

ROUGE PARK TERRACES NON-PROFIT DEVELOPMENT CORPORATION
and CHARLES SUTHERLAND

Defendants/Responding Parties

BEFORE: Koehnen J.

COUNSEL: *Jeffrey E. Feiner and Ryan W. O. Chan*, for the Plaintiff/Moving Party

M. John Ewart, for the Defendant/Responding Party, Charles Sutherland

HEARD: April 28, 2023

ENDORSEMENT

- [1] The Plaintiff, Newbridge Mortgage Inc. (“Newbridge”) is a mortgage brokerage. It found financing for the corporate defendant in the amount of \$4,000,000 for a development project at 9700 Ninth Line in Markham Ontario. The plaintiff was owed a brokerage fee of \$350,000 for that financing. The financing and the fees associated with that were secured by a mortgage on the property.
- [2] The defendant, Rouge Park Terraces Non-Profit Development Corporation (“Rouge Park”), is a federal not for profit corporation. It was incorporated by the defendant, Charles Sutherland (“Sutherland”), “to develop and construct affordable housing for ownership by households of various income levels, in particular by households of low and moderate income levels.”

- [3] Sutherland served as Rouge Park’s Chief Executive Officer. Sutherland is also the President of 877244 Canada Incorporated, with which Rouge Park entered into a related party transaction for consulting services. Pursuant to this agreement, Sutherland’s numbered corporation was to earn approximately \$770,000 in fees from Rouge Park in relation to the affordable housing development at issue in this action.
- [4] The project could not proceed and had to be sold.
- [5] For the sale to close, the defendants required the plaintiff to discharge its mortgage against the property. Newbridge was not required to do so until all amounts owed, including its fees, were paid in full.
- [6] To facilitate the sale, Sutherland asked Newbridge to consent to discharge its mortgage, waive half of the fees owing to Newbridge, and agree to a deferral of payment until after closing of the sale. Under that proposal, Newbridge would be paid \$175,000 out of the proceeds of the sale of the property for its outstanding fees.
- [7] Newbridge advised Sutherland that it would agree to reduce its fee and defer payment until after closing if the real estate agents acting on the sale also reduced their real estate commission by 50%. This was necessary to ensure that there would be sufficient funds available to pay Newbridge out of the proceeds of the sale.
- [8] On October 29, 2018, Sutherland wrote an email to Lee, in which he claimed:
- “Steven,
- Further to our discussion earlier today, please find attached the proposed disbursements.
- I have been able to reduce the Sales Commission by 50%* **[emphasis added]**, Owner willing not Holdback the \$50k for the Site Plan Fees and I am using \$100k reduction in penalties.
- [9] The “proposed disbursements” that were attached to the listed the proposed disbursements from the proceeds of the sale and included Newbridge’s fees and the real estate commission, each reduced by 50%. Sutherland confirmed this agreement in an in-person meeting with Lee the next day, October 30, 2018.
- [10] At no time did Sutherland ever suggest that Rouge Park did not owe Newbridge its fees. On the contrary, Sutherland asked that Newbridge reduce by one half the fee to which it was entitled and confirmed that entitlement by sending the email and the attachment of October 29, 2018.
-

- [11] Newbridge relied on Sutherland’s representation that the real estate commission had been reduced by 50%, and agreed to waive half its fees on that basis. As noted, the real estate agent’s agreement to this was necessary, failing which there would not be enough money remaining from the sale to pay both the real estate commission and the Newbridge fee.
- [12] Newbridge’s mortgage on the Property was discharged on November 16, 2018, and the sale of the Property closed on the same day.
- [13] Newbridge did not, however, receive anything from the sale. Instead, Sutherland now took the position that although he had asked the real estate agents to reduce their commission, “after sometime they indicated they were unable to do so” and insisted on payment of their full commission. After payment of the real estate commissions, there were no available funds to pay Newbridge.
- [14] Rouge Park no longer appears to be an active corporation and has been noted in default.
- [15] Sutherland denies liability and submits there are genuine issues for trial on three bases:
- i. He never made the misrepresentation that the real estate agents had agreed to reduce their commission by 50%.
 - ii. At all material times he was acting as the CEO of Rouge Park or President of his numbered company when dealing with the Plaintiff.
 - iii. The Co-Defendant, Rouge Park did not owe Newbridge any fees.
- [16] In my view, none of those grounds provide a defence to the summary judgment motion.
- i. Did Sutherland Make the Representation?**
- [17] I find that Sutherland represented to Newbridge that the real estate agents had agreed to reduce their commission by 50%. The email that Sutherland sent on October 29, 2018 says this explicitly. During cross-examination, Sutherland dismissed that email as being attributable to a poor choice of words. While it is always a poor choice of words to say something that is not true, that does not relieve one of liability if the recipient of “the poor choice of words” relies on them to its detriment.
- [18] In his factum and in his affidavit, Sutherland maintains that he told Newbridge on November 16, 2018 that the real estate agents had refused to reduce their commission. Sutherland does not, however, say that he gave that information to Newbridge *before* the closing on November 16.
- [19] During oral argument, counsel for Sutherland submitted that Sutherland had stated during his cross-examination that he had told Newbridge on October 30, 2018 that the real estate
-

agent would not be reducing its commission. I do not accept that submission for three reasons.

[20] First, Sutherland does not make that suggestion in his affidavit. Had he in fact told Newbridge on October 30 that the real estate agents had changed their minds and that his email of October 29, 2018 was no longer accurate, I would have expected that to be front and centre in his affidavit. I would also have expected a follow-up email from Sutherland that made clear that the October 29 email could no longer be relied upon.

[21] Second, the statement that Sutherland relies on from his cross-examination is anything but clear. During his cross-examination, Sutherland was asked what was discussed at the meeting of October 30. He responded as follows:

What I indicated to him, that I didn't...I didn't have any written confirmation ...well, I did. By that time I did have written confirmation that the real estate company was not going to reduce their fee.

[22] What Sutherland actually says in this answer is that he told Newbridge that he did not have written confirmation but that in fact he did have written confirmation that the real estate agent would not reduce its fee. He does not say that he told Newbridge that the real estate agent would not reduce its fee.

[23] This is particularly relevant in light of email correspondence between the parties after closing. After Newbridge raised the issue of the fees after closing, Sutherland sent an email to Newbridge on November 19, 2018. In which he states:

This is to confirm that I made a verbal request to the Real Estate Broker's to reduce their Commission Fees. After some time they indicated that they were unable to do so and sent their Invoice directly to our Solicitors for payment out of the closing proceeds.

Further, there are no excess Funds in our Solicitor's Trust Account out of the Sale

[24] If Sutherland had in fact told Newbridge on October 30, 2018 that the real estate agents would not reduce their commission, I would have expected that to be front and centre in Sutherland's the email of November 19. It is nowhere to be found in that email. Moreover, the email says that it was only after some time that the real estate agents indicated they were unable to reduce their commission, not the day after Sutherland sent his email of October 29, 2018.

[25] Sutherland does not explain any of those discrepancies.

- [26] Newbridge has also filed an affidavit from Lili Bai, the real estate agent in question. She says that, although Sutherland asked her real estate agency to reduce its commission by half, neither she nor anyone else at her agency ever agreed to reduce their commission. Moreover, on October 29, 2018 her brokerage delivered a statement of commission to Rouge the Park's lawyer showing the full commission as being owing. Ms. Bai emailed that statement to Sutherland on October 29, 2018. Sutherland responded to that email on October 29, 2018 at 12:44 PM stating that if the real estate agent would not reduce its commission, the transaction would not close because the proceeds from sale would not satisfy both the commission and the mortgage brokerage fees. Sutherland also advised in the same email that Newbridge had agreed to reduce its commission by 50% if the real estate commission is also reduced by 50%.
- [27] At 6:39 PM on October 29 Sutherland sent the email to Newbridge confirming that the real estate agents had agreed to reduce their commission. This was clearly false. Sutherland knew six hours earlier when he wrote the email to the real estate agent that the agent had not reduced its commission. There is no evidence before me of any further communications between Sutherland and the real estate agent during those six hours.
- [28] After the sale closed, there were further email exchanges about the real estate commission. Sutherland confirmed with Newbridge on November 19, 2018 that the real estate agent would not reduce its commission. Newbridge responded with an email on November 21. That email repeated the text of the October 29 email, indicated that Newbridge had been told the real estate agent would reduce its commission by half and asked Sutherland to confirm this. Sutherland responded the same day making some minor and immaterial corrections to the email of October 29 and then stated that it was otherwise accurate. In other words, this amounts to a confirmation on November 21, 2019 that Sutherland did tell Newbridge that the real estate agent had agreed to reduce its commission by half.
- [29] It is well established law that on a motion for summary judgment each side must put their "best foot forward" with respect to the existence or non-existence of material issues to be tried. The Court is entitled to assume that the record contains all of evidence that would be available at trial.¹
- [30] Had Sutherland wanted to contest the obvious conclusions deriving from these exchanges of emails, it was up to him to put forward hard evidence on the motion to demonstrate that there was an issue that required a trial to resolve. He has not done so.
- [31] In these circumstances, there is no issue about the meeting of October 30 that requires a trial to resolve. I accept Newbridge's evidence that Sutherland confirmed on October 30 that the real estate agent had agreed to reduce its commission.

¹ *Hino Motors Canada Ltd. v. Kell*, 2010 ONSC 1329 at para 9.

ii. Is Sutherland Personally Liable?

- [32] Sutherland submits that he was not making any statements he made in his personal capacity, as a result of which he cannot be held personally liable.
- [33] It is well-established that officers, directors and employees of corporations are responsible for their tortious conduct even where that conduct was carried out for the corporation and that personal liability for tortious acts cannot be avoided simply because a defendant may have been acting in the pursuit of the interests of the corporation.²
- [34] Sutherland's conduct amounts to fraudulent misrepresentation. Fraudulent misrepresentation exists where the defendant has made a false representation of fact to the plaintiff; the defendant knew the representation was false, had no belief in the truth of the representation or was reckless as to the truth of the representation; the defendant intended that the plaintiff act in reliance on the representation; the plaintiff acted on the representation; and the plaintiff suffered a loss in doing so,³ which includes a loss of ability to negotiate an alternative arrangement.⁴
- [35] The circumstances here meet each of those conditions.

iii. Did Rouge Park Owe Newbridge any Fees?

- [36] On this motion, Sutherland takes the position that Newbridge was not owed any additional fees because the original financing commitment had been for \$6,000,000. Newbridge advanced \$4,000,000 and received a partial fee on the \$4,000,000. Sutherland says Newbridge then agreed to defer the remaining fee until the further \$2,000,000 was delivered. It is important to note that the fee Newbridge claims in this action is on account of the \$4,000,000 advance that was actually made and on account of advisory services that were actually delivered.
- [37] The first time the defendants contested Newbridge's entitlement to a fee of \$350,000 on the closing of the sale of the property was in the statement of defence. Neither defendant has taken me to any argument or material that would suggest that Newbridge had lost entitlement to the balance of the fee owing for the \$4,000,000 advance simply because the property was sold before the remaining \$2,000,000 was advanced. Moreover, the defendants' email of October 29 acknowledges that one half of the fee owing to Newbridge comes to \$175,000. There was no issue at that point about the fee being owing or not.

² *Meridian Credit Union Limited v. Baig*, 2016 ONCA 150 (CanLII), at para 39; *ADGA Systems International Ltd. v. Valcom Ltd.*, 1999 CanLII 1527 (ON CA); *NBD Bank, Canada v. Dofasco Inc., et al.*, 1999 CanLII 3826 (ON CA), at paras 42, 44.

³ *Midland Resources Holding Limited v. Shtauf*, 2017 ONCA 320 (CanLII), at para 162.

⁴ *Meridian Credit Union Limited v. Baig*, 2016 ONCA 150 (CanLII), at para 34.

Sutherland admitted on discovery that he never told Newbridge that the fees were not owing. In those circumstances I am satisfied that Newbridge was owed a further fee of \$350,000 on account of the monies that had actually been advanced.

- [38] This then takes me to the question of whether liability should be for \$175,000 or the full fee of \$350,000. In my view, liability should be for the full \$350,000 fee. Newbridge had always said that it would only reduce its fee if the real estate agent also reduced its commission. That did not happen. As a result, Newbridge is entitled to enforce its contractual rights. While Sutherland did not argue the point that \$350,000 would not have been available to Newbridge on the sale of the property given the prior encumbrances on the land, I do not believe Sutherland would be entitled to make that argument. Had the fraudulent misrepresentation not been made, Newbridge would have been able to step into Rouge Park's shoes and control the sale of the property. It was denied that opportunity. Moreover, had the sale proceeded, all prior encumbrances would have been paid off first, including the Newbridge fees.

Conclusion and Costs

- [39] In the foregoing circumstances I find that both Sutherland and Rouge Park are liable to Newbridge for the sum of \$350,000 plus prejudgment interest on the grounds of civil fraud.
- [40] Newbridge seeks costs on a substantial indemnity basis of \$71,000 and on a partial indemnity basis of \$53,712.
- [41] Sutherland submits that if costs were awarded they should be awarded on a partial indemnity scale. Sutherland notes that the goal of cost awards is not to calculate hours but to assess a sum that is fair and reasonable rather than the exact measure of actual costs to the successful litigant.⁵
- [42] I am satisfied that, on the facts of this case, substantial indemnity costs of \$71,616.12 are appropriate. Sutherland has been found personally liable for civil fraud.
- [43] This action should never have been necessary. After the sale closed, Sutherland compounded the damage suffered by Newbridge by denying what he had previously agreed to and creating a legal and factual narrative that was demonstrably unsupportable. The legal narrative was that he was acting in a corporate capacity and was therefore not liable. That is an unsupportable theory on long and well-established case law. The factual theory was that he had never communicated to Newbridge that the real estate agent would reduce its commission or alternatively, had reversed that information on October 30. There is simply no factual basis for that assertion. In those circumstances, the entire action was unnecessary and simply furthered to delay Newbridge's ability to recover and forced

⁵ *Zesta Engineering Ltd. v. Cloutier* 2002 CanLII 25577 (ON CA) at para. 4.

Newbridge to incur additional costs. This was not a case of a legitimate disagreement on facts or law. This was a case of civil fraud. The theory behind partial indemnity costs is that parties should not be this incentivized from raising valid legal issues. That theory does not apply when there are no valid issues to be raised.

Koehnen J.

Released: May 1, 2023