CITATION: Rose-Terra Investments Inc. v. Butryn, 2023 ONSC 2332
COURT FILE NO.: CV-19-00622486-0000
DATE: 20230417

ONTARIO SUPERIOR COURT OF JUSTICE

RE: Rose-Terra Investments Inc., Plaintiff

-and-

John Chetti and Anna Marlena Butryn, Defendants

BEFORE: Robert Centa J.

COUNSEL: Colin P. Stevenson and Wei Jiang, for the plaintiff

David Pomer, for the defendant

HEARD: April 4, 2023

ENDORSEMENT

[1] The plaintiff, Rose-Terra Investments Inc., moves for summary judgment against the defendant, Anna Marlena Butryn.[1]

[2] In 2018, Rose-Terra and Ms. Butryn and her husband brought duelling applications regarding a mortgage Rose-Terra held on their home. On January 31, 2019, Rose-Terra and Ms. Butryn entered into minutes of settlement to resolve the proceedings. Ms. Butryn subsequently defaulted on her obligations under the minutes of settlement. Rose-Terra then obtained an order from Chalmers J. confirming that the mortgage could only be discharged upon payment in full of the principal amount of $2.7 million and granting leave to issue a writ of possession for the property.

[3] Rose-Terra sold the property for less than the amount Ms. Butryn owed under the minutes of settlement. It brings this action to recover $638,800.48 in damages, being the shortfall in the sale price, sales commissions, property tax arrears, carrying costs, and costs to repair the home and bring it into a marketable state.

[4] For the reasons that follow, I grant the motion for summary judgment. There are no genuine issues requiring a trial.

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[1] On January 25, 2021, the co-defendant, John Chetti, filed a notice of intention under the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3. A stay of proceedings was issued with respect to Mr. Chetti. On March 12, 2021, Mr. Chetti filed a proposal under the Act. The plaintiff advised that it no longer seeks judgment against Mr. Chetti.

Facts

[5] In June 2015, Mr. Chetti purchased a house from a company related to the plaintiff, Rose-Terra. Title to the property was taken in the name of Mr. Chetti alone. On closing, a mortgage in the amount of $2.7 million was registered in favour of Rose-Terra.

[6] Mr. Chetti defaulted under the mortgage. On October 17, 2018, Rose-Terra served a notice of sale under mortgage.

[7] On December 4, 2018, Mr. Chetti transferred title to the home to Ms. Butryn. That same day, Mr. Chetti and Ms. Butryn swore affidavits for use on an application, which they commenced on December 11, 2018, to set aside the mortgage and the notice of sale. In the notice of application, Mr. Chetti and Ms. Butryn asserted that the home was their matrimonial home. Kevin Sherkin represented both Mr. Chetti and Ms. Butryn in their application.

[8] On December 6, 2018, Mr. Sherkin wrote a letter to Ms. Butryn to confirm his advice to her regarding the risk of transferring title to the home from Mr. Chetti to her since the property "is currently subject to two executions and a mortgage to which you confirm you had no knowledge." The letter confirmed that she accepted those risks.

[9] On December 21, 2018, Rose-Terra commenced an application against Mr. Chetti and Ms. Butryn. Rose-Terra sought a declaration that the mortgage was valid and could only be discharged upon payment in full of the full principal sum of $2.7 million (paragraph 1(a)) and for leave to issue a writ of possession (paragraph 1(b)).

[10] In late January 2019, on the eve of cross-examinations in the two applications, the parties (through their lawyers) began settlement discussions. On January 31, 2019, the parties reached an agreement on terms. Counsel for Rose-Terra drafted minutes of settlement and asked Mr. Sherkin to confirm that "Ms. Butryn has personally signed with full knowledge and consent." [2] The operative terms of the minutes of settlement read as follows:

> 1. Chetti and Butryn shall pay or arrange for payment by certified cheque of the all the inclusive sum of $2,550,000.00 to Rose-Terra on the Closing Date.
>
> 2. The Closing Date shall be April 30, 2019, or such earlier date as the parties may mutually agree.
>
> 3. Chetti and Butryn shall deliver by email today (January 31, 2019) to Rose-Terra's lawyer, Colin Stevenson ("Stevenson"):

[2] The parties to the minutes of settlement were Rose-Terra, Mr. Chetti, Ms. Butryn, and the Mansions of King Inc., Mr. Sherkin asked that Mansions be included in the minutes of settlement because it was a guarantor on the mortgage that was to be assigned if the minutes of settlement was completed and it needed a release. The plaintiff agreed to Mr. Sherkin's request.

> (a) a duly executed consent to an order dismissing the Chetti/Butryn Application without costs;
>
> (b) a duly executed consent to an order granting the relief sought in paragraphs 1(a) and (b) of the Rose-Terra Application.
>
> 4. Rose-Terra will direct Stevenson to hold these consents in escrow until the earlier of the Closing Date or any default by Chetti or Butryn under this agreement.
>
> 5. In the event the $2,550,000.00 payment described above is made on or before the Closing Date:
>
> (a) both applications shall be dismissed without costs;
>
> (b) the Collateral Mortgage (described in the Chetti/Butryn Application) will be assigned as directed by Chetti and Butryn; and
>
> (c) the parties will exchange mutual releases in form and content satisfactory to the lawyers for the parties acting reasonably.
>
> 6. In the event of any default under this agreement by Chetti or Butryn, including the failure to pay the $2,550,000.00 in full on or before April 30, 2019, the terms of escrow shall be lifted and Rose-Terra may obtain and act on the order granting the relief sought in paragraphs 1(a) and (b) of the Rose-Terra Application.
>
> 7. Anna Marlena Butryn acknowledges that she has signed this agreement voluntarily and of her own free will after obtaining legal advice.

[11] Ms. Butryn signed the agreement and sent it to Mr. Sherkin from her private email account. Mr. Sherkin added the following confirmation to the minutes of settlement:

> I, Kevin Sherkin, lawyer for Anna Marlena Butryn, confirm that I have advised her with respect to these minutes of settlement independently of her husband, John Chetti, and to the best of my knowledge she understands this agreement and she has signed above of her own free will and without any duress or undue influence.

[12] The parties agreed to extend the closing date until May 31, 2019. However, Mr. Chetti and Ms. Butryn did not pay the $2.55 million as required by paragraph 1 of the minutes of settlement.

[13] Rose-Terra then acted on the signed consents to judgment and, on June 4, 2019, obtained an order from Salmers J. declaring that the mortgage was valid and could only be discharged upon payment in full of the principal amount of $2.7 million and an order granting leave to issue a writ of possession in favour of Rose-Terra.

[14] Mr. Chetti and Ms. Butryn refused to leave the property until the Sheriff enforced the writ of possession on July 10, 2019.

[15] On July 22, 2022, Rose-Terra sold the property for $2.25 million, which was $300,000 less than the amount Ms. Butryn and Mr. Chetti owed under the minutes of settlement.

[16] Rose-Terra brought this motion for summary judgment submitting that there was no genuine issue for trial.

Motion to amend the statement of defence

[17] At the beginning of the motion for summary judgment, Ms. Butryn brought a motion to amend her statement of defence for a third time. She first shared this proposed pleading with counsel for the plaintiff on February 13, 2023. This was almost four years after she delivered her initial statement of defence, and one year after she delivered her first amended statement of defence. In substance, the proposed amendments added four new paragraphs to the statement of defence.

[18] Counsel for Ms. Butryn confirmed that if I granted leave to amend the statement of defence, an adjournment would not be necessary to tender any additional evidence and that he was prepared to argue the motion for summary judgment.

[19] Counsel for Rose-Terra confirmed that, while he opposed the request to amend further the statement of defence, he was prepared to proceed with the motion for summary judgment on the basis of the amended pleading. He confirmed that he did not need to file any additional evidence.

[20] In the circumstances, and given the mandatory language of rule 26.01 of *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, I grant leave to amend the statement of defence in the form attached as Exhibit A to the affidavit of David Sorbara, sworn March 14, 2023.

Test on a motion for summary judgment

[21] Summary judgment is an important tool for enhancing access to justice where it provides a fair process that results in a just adjudication of disputes.[3] Used properly, it can achieve proportionate, timely, and cost-effective adjudication.

[22] On a motion for summary judgment I am to:

a. determine if there is a genuine issue requiring a trial based only on the evidence before me, without using the enhanced fact-finding powers under rule 20.04(2.1);

[3] *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at paras. 4-7.

b. if there appears to be a genuine issue requiring a trial, determine if the need for a trial could be avoided by using the enhanced powers under

   i. rule 20.04(2.1), which allow me to weigh evidence, evaluate the credibility of a deponent, and draw any reasonable inference from the evidence; and

   ii. under rule 20.04(2.2), which allows me to order that oral evidence be presented by one or more parties.[4]

[23] In para. 66 of *Hryniak*, the Supreme Court of Canada emphasized that I must focus on whether the evidence before me permits a fair and just adjudication of the dispute and cautioned that judges should not use the enhanced powers where their use would be against the interests of justice:

> On a motion for summary judgment under rule 20.04, the judge should first determine if there is a genuine issue requiring trial based only on the evidence before her, without using the new fact-finding powers. There will be no genuine issue requiring a trial if the summary judgment process provides her with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure, under rule 20.04(2)(a). If there appears to be a genuine issue requiring a trial, she should then determine if the need for a trial can be avoided by using the new powers under rules 20.04(2.1) and (2.2). She may, at her discretion, use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if they will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

[24] On a motion for summary judgment, the court assumes that the parties have each advanced their best case and that the record contains all the evidence that would be led at trial. Each party is obliged to put their best foot forward. They are not permitted to sit back and suggest that they would call additional evidence at trial.[5]

No genuine issue for trial

[25] In my view, based on the evidence before me on this motion for summary judgment, there is no genuine issue for trial. I am able to reach this conclusion without relying on any of my enhanced powers under rules 20.04(2.1).

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[4] *Royal Bank of Canada v. 1643937 Ontario Inc*., 2021 ONCA 98, 154 O.R. (3d) 561, at para. 24.
[5] *Prism Resources Inc. v. Detour Gold Corporation*, 2022 ONCA 326, 162 O.R. (3d) 200, at para. 4; *Ntakos Estate v. Ntakos*, 2022 ONCA 301, 75 E.T.R. (4th) 167, at para. 38; *Salvatore v. Tommasini*, 2021 ONCA 691 at para. 17; *Miaskowski (Litigation guardian of) v. Persaud*, 2015 ONSC 1654, 51 R.P.R. (5th) 234, at para. 62, rev'd on other grounds, 2015 ONCA 758, 342 O.A.C. 167.

[26] I will address each of the defences raised by Ms. Butryn. None of them raise a genuine issue requiring a trial.

Ms. Butryn's defences of duress and undue influence do not require a trial

[27] Ms. Butryn submits that there is a genuine issue for trial regarding whether or not she signed the minutes of settlement under duress or the undue influence of her husband.

[28] In her affidavit, Ms. Butryn asserts that Mr. Chetti was a gambler who incurred significant debts, financially abused her, and would yell and bang things in front of the children. Ms. Butryn stated that she feared associates of her husband. For example, she asserted that one night in June 2018, a man rang the doorbell 30 times, which scared her and prompted her to call the police. Ms. Butryn states that she went to see a counsellor and therapist and attended meetings of an association for people living with gamblers and gambling addictions. Ms. Butryn asserted that she was threatened by her husband when she signed the minutes of settlement.

[29] For the purposes of this motion, I will accept Ms. Butryn's evidence as being true. That evidence does not raise a genuine issue for trial because, even if true, it would not affect Rose-Terra's ability to enforce the minutes of settlement against her.

[30] The common law has always recognized a defence of duress, but its scope is narrowly defined.[6] The common law would grant relief to parties who signed contracts in response to physical threats. A contract is rendered voidable by reason of duress in cases where the duress has been applied by one party to the contract to another party to the contract.[7] In such a case where person A is subject to duress by person B, the contract between A and B is rendered voidable by A. In this paradigm, if Mr. Chetti threatened Ms. Butryn to enter into a contract with him, the contract is voidable at the election of Ms. Butryn. That is not the situation in this case. Here, Ms. Butryn seeks to set aside her contract with a third party, Rose-Terra, because of the actions of Mr. Chetti.

[31] The law is clear that if innocent third party C is not aware of the threats, C can enforce its contract with A, even if A signs that contract because of B's physical threats toward A.[8]

[32] In her affidavit, Ms. Butryn does not suggest that Rose-Terra knew anything about the duress she describes. Rose-Terra confirmed that it did not have any business dealings with Ms. Butryn other than in relation to the applications. Counsel for Rose-Terra confirmed via undertaking that he did not have any direct communications with Ms. Butryn. There is no evidence that Rose-Terra knew anything about the situation described by Ms. Butryn.

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[6] Stephen Waddams, *The Law of Contracts*, 8th ed. (Toronto: Thomson Reuters Canada, 2022), at §515.
[7] *Wilgross Investments Ltd. v. Goldshlager*, (1974), 5 O.R. (2d) 687 (Sup. Ct.), citing 8 Hals. (3d) 85, para. 146.
[8] *Wilgross*, at para. 10; *Toronto Dominion Bank v. Nahmiache*, (1991), 5 B.L.R. (2d) 113 (Ont. Gen. Div.); *Bentley v. Hooton*, 2019 ABQB 822, at para. 47; *Bank of Credit & Commerce Canada v. Iwanski*, [1991] O.J. No. 1149 (Gen. Div.), at para. 25; *Santos v. Santos*, 1979 CarswellOnt 2867, at para. 18.

[33] Mr. Sherkin testified that he saw no indication of duress or undue influence by Mr. Chetti toward Ms. Butryn. Mr. Sherkin testified that when Ms. Butryn spoke to him directly about the minutes of settlement, she did not express any concern to him, directly or indirectly, about Mr. Chetti's influence over her and he had no concerns of his own. The importance of this evidence is that if Mr. Sherkin did not see any red flags, he could not have communicated any such concerns to counsel for Rose-Terra.

[34] Because there is no evidence suggesting that Rose-Terra knew that Ms. Butryn was under duress, Ms. Butryn's evidence does not raise an issue requiring a trial. Even if her evidence is true, she is not able to set aside a contract made with Rose-Terra because of the actions of Mr. Chetti.

[35] Rose-Terra's lack of knowledge of the situation described by Ms. Butryn is equally fatal to her undue influence defence. As a general proposition where B induces A to enter into a transaction by means of undue influence, A is entitled to set aside the transaction as against B.[9]

[36] Again, that is not the situation in this case, where Ms. Butryn seeks to set aside her contract with Rose-Terra. In order for a contract for value to be voidable as against a third party, there must be notice to the third party or the person exerting the undue influence must be regarded as the agent of the third party.[10] This defence does not raise an issue requiring a trial.

[37] First, the minutes of settlement were a contract of value to Ms. Butryn, who held title to the property in question at the time the minutes were signed:

a. The amount owing under the mortgage was reduced from $2.7 million to $2.55 million;

b. She was given until the end of April (and an additional extension) to pay the amount owing under the minutes of settlement;

c. She would not have to pay an of Rose-Terra's legal costs of the two applications; and

d. Rose-Terra would not dispute that she properly held title to the property.

[38] Second, there is no evidence that Rose-Terra knew that Mr. Chetti was exerting undue influence over Ms. Butryn. There can be no suggestion that Mr. Chetti, the co-defendant and debtor, was acting as Rose-Terra's agent.

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[9] *Bank of Montreal v. Duguid* (2000), 47 O.R. (3d) 737 (C.A.), at para. 4.
[10] *Santos* at para. 19.

[39] For these reasons, Ms. Butryn's defences of duress and undue influence do not raise genuine issues requiring a trial.

Ms. Butryn's defence that she did not have independent legal advice does not require a trial

[40] Ms. Butryn submits that whether or not she required or received "independent" legal advice raises a genuine issue for trial. Because Mr. Sherkin also represented Mr. Chetti, she argues, his legal advice was not independent and was, therefore, legally ineffectual. I disagree.

[41] It is important to consider Ms. Butryn's submission in the context of this case. Ms. Butryn held title to the property. She was the applicant in one proceeding and the respondent in another proceeding both of which concerned the property she owned. Mr. Chetti was a co-applicant and co-respondent in each case. Mr. Sherkin represented Ms. Butryn (and Mr. Chetti) in each proceeding. There is nothing unusual about parties aligned in interest sharing the same litigation counsel. Ms. Butryn (and Mr. Chetti) with the advice of her litigation counsel, settled the proceedings.

[42] In submitting that Rose-Terra cannot enforce the minutes of settlement because she did not receive "independent" legal advice, Ms. Butryn seeks to expand radically the principle drawn from guarantee cases that, in certain circumstances, a third party will owe a duty to inquire whether or not a guarantor had received independent legal advice.[11] In my view, those cases have no application here.

[43] First, the duty to inquire arises in cases where the transaction is clearly detrimental to the person offering security. As noted above, the minutes of settlement provided significant and material benefits to Ms. Butryn.

[44] Second, Ms. Butryn was not a stranger to the transaction at issue. She held to title to the property in dispute. She was a named applicant in one proceeding and a named respondent in the either. She was represented by experienced litigation counsel in both proceedings.

[45] Courts have been reluctant to extend the requirement to obtain independent legal advice beyond guarantee cases. For example, in *Wilgross Investments* the court distinguished a case where a spouse gave a guarantee for the benefit of her husband with a case where the spouse received the benefits of the bargain, and no independent legal advice was required:

> The other defence raised by the defendant was lack of independent legal advice in respect of the mortgages of 26th October 1973 and 5th April 1974. When the two mortgages were given to the plaintiff, the defendant was the sole owner of the property and she borrowed the money from the plaintiff; there is no evidence before us that the plaintiff knew the money was being borrowed for the use of the defendant's husband. In these circumstances, I can see no necessity

[11] *Gold v. Rosenberg*, [1997] 3 S.C.R. 767; *Bank of Montreal v. Duguid*, at para. 12.

> for the defendant to receive independent legal advice in order that the plaintiff receive valid security. This is not the case of a wife furnishing security for the benefit of her husband where the courts have in certain cases required independent legal advice; rather, this is a situation where the wife has mortgaged her own separate property and turned over the proceeds to her husband.[12]

[46] In my view, there is no obligation on Rose-Terra to insist that Ms. Butryn receive independent legal advice in respect of minutes of settlement that settle litigation where she was a party and where she is represented by counsel. Nothing about the facts of this case suggest that Rose-Terra was under an obligation to look behind the joint retainer of Mr. Sherkin by Ms. Butryn and Mr. Chetti. It would create great instability if one party to litigation could not settle with jointly-represented adversaries without insisting that each of the adversaries received "independent" legal advice. I would not recognize such an obligation in the circumstances of this case.

[47] Ms. Butryn also submits that Rose-Terra insisted that she receive independent legal advice and then did not ensure that she received it. This submission does not raise a genuine issue for trial because there is no evidence to support it.

[48] Counsel for Rose-Terra did not ask, much less insist, that Ms. Butryn receive independent legal advice. The email from counsel for Rose-Terra asked Mr. Sherkin to provide his "personal confirmation that Ms. [Butryn] has personally signed with full knowledge and consent." Nothing about this request suggests that Rose-Terra was insisting that Ms. Butryn receive advice from an independent lawyer or a lawyer other than Mr. Sherkin.

[49] In response to this request, Mr. Sherkin sent an email confirming that he had confirmed with Ms. Butryn. He also provided the declaration that read:

> I, Kevin Sherkin, lawyer for Anna Marlena Butryn, confirm that I have advised her with respect to these minutes of settlement independently of her husband, John Chetti, and to the best of my knowledge she understands this agreement and she has signed above of her own free will and without any duress or undue influence.

[50] Mr. Sherkin testified on cross-examination that when he said he advised Ms. Butryn "independently of her husband," he meant on a separate telephone call with her alone. This makes sense. Nothing about the context of the communications between counsel, Mr. Sherkin's certificate, or his evidence suggests that anyone contemplated that Ms. Butryn needed advice from anyone other than her own lawyer, Mr. Sherkin.

[51] Finally, Ms. Butryn attempted to suggest that she did not receive good advice from Mr. Sherkin. That is an issue between Ms. Butryn and Mr. Sherkin and one that is irrelevant to the matters at issue on this motion for summary judgment.

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[12] *Wilgross Investments*, at para. 13.

[52] For these reasons, I find that the issue of whether or not Ms. Butryn required or received independent legal advice does not raise a genuine issue for trial.

Ms. Butryn's defence that she held the property as a bare trustee and on resulting trust for Mr. Chetti does not require a trial

[53] Ms. Butryn makes the following submission:

> 105. The *Mortgages Act*, R.S.O. 1990, c M.40, s. 20(2) carefully restricts itself to the situation of a "transferee of the equity of redemption" and not a transferee of "title" in directing what person may become liable as a mortgagor of the transferred equity.
>
> 106. A bare trustee has no equity in the trust property and must carry out the instructions of his principal, who is the person beneficially entitled to the asset. The general rule for gratuitous transfers is that presumption of resulting trust in favour of the transferor applies; the onus is on transferee to demonstrate that gift was intended.

[54] In my view, whatever the merit of this submission, it is irrelevant to the matters at issue on this motion for summary judgment and cannot raise a genuine issue for trial.

[55] Recall that on June 4, 2019, Salmers J. declared the mortgage valid and granted leave to issue a writ of possession. That order is final and cannot be challenged in this proceeding. The property has now been sold. In this proceeding, Rose-Terra is suing Ms. Butryn in contract and on the minutes of settlement, not on the mortgage.

[56] This defence does not raise a genuine issue for trial.

Ms. Butryn's defence that the minutes of settlement are void for want of consideration does not raise a genuine issue for trial

[57] Ms. Butryn submits that there is a genuine issue for trial concerning whether or not she received consideration for the minutes of settlement. I disagree.

[58] As described in paragraph [37] above, the minutes of settlement provided significant value to Ms. Butryn, who was a party to the two applications and held title to the property in question at the time the minutes were signed:

a. The amount owing under the mortgage was reduced from $2.7 million to $2.55 million;

b. She was given until the end of April (and an additional extension) to pay the amount owing under the minutes of settlement instead of facing the potential of a court order granting Rose-Terra leave to issue a writ of possession;

c. She would not have to pay any of Rose-Terra's legal costs of the two applications; and

d. Rose-Terra would not dispute that she properly held title to the property.

[59] The minutes of settlement provided significant, real, and meaningful benefits to Ms. Butryn. The consideration flowing to her is obvious and does not raise a genuine issue for trial.

Conclusion

[60] None of Ms. Butryn's defences raise a genuine issue for trial. I grant summary judgment to Rose-Terra on its claim. I find that Ms. Butryn breached the minutes of settlement, which are enforceable against her. I will now turn to the question of damages.

Damages

[61] Rose-Terra seeks $636,800.48 in damages, broken down as follows:

Item	Amount
Shortfall on the debt after sale of property	$300,000.00
Commissions for sale of property	$101,700.00
Legal fees for sale of property	$7,749.49
Unpaid property taxes	$111,525.77
Premium light fixtures improperly removed	$20,384.32
Expenses to put property into a marketable state	$54,449.68
Carrying costs	$40,991.22
Total	$636,800.48

[62] Ms. Butryn challenged a number of the heads of damages claimed by the plaintiff, so I will address them one at a time.

Shortfall after sale of property

[63] Ms. Butryn agreed to pay $2.55 million under the minutes of settlement. She failed to do so. Justice Salmers then issued his consent order confirming the validity of the $2.7 million mortgage and granted leave to issue a writ of possession. Rose-Terra eventually sold the property for $2.25 million, which was $300,000 less than the amount Ms. Butryn owed under the minutes of settlement.

[64] Rose-Tera, through its real estate broker Marco Alberga at Spectrum Realty Services, based on a comparable market analysis, listed the property for sale on MLS on September 25, 2019, for $2.75 million. Spectrum had sold the homes in this development, so it was very familiar with the market for these homes. Mr. Alberga testified that he thought the listing price was too high for the market.

[65] Rose-Terra reduced its asking price to $2.699 million on September 25, 2019. The property only drew six showings until, on November 14, 2019, the listing was terminated.

[66] Rose-Terra then retained Lyne Cortese at Century 21. The property was listed for sale at $2.499 million. It sat on the market for a further 112 days, but did not sell.

[67] In July 2020, Rose-Terra retained Mark Salerno of Salerno Realty Inc. to list the property for sale. The proposed listing price was $2.388 million, which Mr. Salerno felt was too high. The property was marketed on social media, and a "for sale" sign was placed in front of the house on July 16, 2020. The property was listed on MLS. The ultimate purchaser of the house made an offer of $2.13 million on July 22, 2020, which was increased through negotiations to the final purchase price of $2.25 million. The ultimate sale price confirmed Mr. Salerno's opinion that the $2.388 million listing price was higher than what the market would pay in July 2020.

[68] Although Rose-Terra did not obtain an appraisal of the property, the reasonableness of the sale price is confirmed by the contemporaneous sale price obtained for a much more desirable neighbouring property at 140 Annsleywood Court. That property had been exposed to the market for almost one year. It was originally listed for over $3 million and the asking price was reduced over time to just under $2.6 million. It finally sold for $2.425 million. Mr. Salerno described that property as follows:

> Finally, the Property faced direct competition because 140 Annsleywood Court, which was diagonally across the street from the Property, was also being sold in July, 2020. 140 Annsleywood Court was around the same price range as the Property, but was overall a better property because it backed onto a ravine (premium lot) and had a significantly larger lot (43% larger; 11,728 square feet for 140 Annsleywood Court compared to 8,197 square feet for the Property). In comparison, the Property backed onto both a highway and a heritage house, both of which are less desirable features. In the other areas, such as the quality of the upgrades, the Property and 140 Annsleywood Court were similar. 140 Annsleywood Court was listed for $2,590,000.00 and sold at $2,425,000.00.

[69] Mr. Salerno acknowledged that the COVID-19 pandemic affected sale prices, particularly in March to May of 2020. He was of the view that $2.25 million was a "great offer" for this house and did not accept that an earlier valuation of over $3 million was at all realistic.

[70] Rose-Terra is presumptively entitled to damages equal to the difference between the amount to be paid under the minutes of settlement and the sale price.[13] There is no obligation on the seller to provide an expert appraisal of value where the property is sold on the market because an arm's length sale to a third party is *prima facie* evidence of the market vale of that property on the date of the resale.[14]

[71] Ms. Butryn has not provided any expert evidence to suggest that the actual value of the property exceeded its sale price. She was required to put her best foot forward on this motion for summary judgment.

[72] Indeed, there is no evidence that the house was actually worth more than its market price. The house was listed twice at a higher price for many months and did not sell. A neighbouring house on a larger and more desirable lot, sold for $200,000 more than the property at issue. There is no evidence of collusion among the brokers or between Rose-Terra and the purchaser. There is no expert evidence to suggest that Rose-Terra sold the property improvidently. All the evidence supports my conclusion that the sale price was reasonable.

[73] There is no genuine issue requiring a trial on this issue. Rose-Terra is entitled to damages on the sale of the property of $300,000.

Commission fees, legal fees, unpaid property taxes

[74] Ms. Butryn did not seriously challenge Rose-Terra's entitlement to damages for the sales commissions, legal fees, and unpaid property taxes, all of which were supported by invoices. I see no reason not to award those amounts.

[75] Rose Terra is entitled to damages of $220,975.26 comprising:

Commissions for sale of property	$101,700.00
Legal fees for sale of property	$7,749.49
Unpaid property taxes	$111,525.77

[13] *100 Main Street Ltd. v. W.B. Sullivan Construction Ltd*., (1978), 20 O.R. (2d) 401 (C.A.), at para. 81; *Marshall v. Meirik*, 2021 ONSC 1687, at paras. 28 to 30.
[14] *Bang v. Sebastian*, 2018 ONSC 6226, at para. 46; *Zou v. Sanyal*, 2019 ONSC 738, at paras. 45 and 51-56; *Elliott v. Montemarano*, 2020 ONSC 6852 at para. 80 citing *Cuervo-Lorens v. Carpenter*, 2016 ONSC 4661 at para. 6, aff'd at 2017 ONCA 109.

Premium light fixtures improperly removed

[76] Rose-Terra claims $20,384.32 in damages for Ms. Butryn removing premium light fixtures when the Sherriff obtained vacant possession of the property. Rose-Terra also claims approximately $3,520 in costs for replacing the light fixtures.

[77] I am not satisfied on a balance of probabilities that Ms. Butryn was not allowed to remove the premium light fixtures, and I disallow that claim.

[78] Rose-Terra is entitled to claim the cost of replacing the removed fixtures, as discussed below.

Expenses to put the property into a marketable state

[79] Rose-Terra claims damages of $54,449.68 to put the property into a marketable state:

Item	**Amount**
Security guard and locksmith	$1,256.00
Replacement of light fixtures	$3,520.00
Repairs to home control system	$8,379.00
Repairs to home and cleaning	$24,487.60
Staging home, furniture rental, email marketing	$16,807.08
Total	$54,449.68

[80] Rose-Terra led evidence that, when it obtained possession of the house, it was in a state of disrepair and could not be sold. For example, the home control system was broken, Ms. Butryn had installed a garage side door in violation of the building code, and the sprinkler system was broken.

[81] Ms. Butryn submits that there either needs to be a trial with respect to this claim for damages or that I should disallow the claims. I disagree.

[82] First, Ms. Butryn submits that Rose-Terra has not proved that these expenses were incurred. I disagree. Rose-Terra has provided invoices for all of these expenses and counsel did not direct me to any invoices that related to a different property. In addition, Rose-Terra has provided account statements showing images of the cheques used to pay these invoices. The cheques all show a processing date. Counsel for Ms. Butryn did not show me a single invoice for which there was not a matching cheque.

[83] Ms. Butryn submits that I should not accept this evidence because Rose-Terra gave an undertaking to provide front and back views of the cheques and it only provided the front of the cheque. Counsel for Rose-Terra confirmed that, at this time, CIBC could only

provide an image of the front of the cheque. That is a sufficient explanation to discharge the undertaking. In my view, the account statements are sufficient proof of payment, and I am satisfied on a balance of probabilities that the expenses were incurred and that invoices were paid.

[84] Second, Ms. Butryn submits that there is no proof that Rose-Terra incurred these expenses. She notes that some of the invoices are made out to companies other than Rose-Terra and that there is no evidence that Rose-Terra incurred these expenses. I disagree.

[85] Ronald Taylor is the controller of Rose-Terra. In his affidavit, he affirmed that "The various expenses identified above were invoiced to Rose-Terra or its affiliated companies Rosehaven and Klein-Rose Homes Limited, but were all ultimately paid for by Rose-Terra."

[86] Ms. Butryn submits that I should not accept this evidence because Mr. Taylor did not produce a ledger showing the intercompany transfers and chargebacks as proof. I disagree. There is no evidence to challenge Mr. Taylor's sworn evidence and I accept it. I am satisfied on a balance of probabilities that Rose-Terra ultimately paid for all of these expenses.

[87] Third, Ms. Butryn submits that some of the invoices are unreasonably large. She did not, however, lead any evidence to demonstrate that the expenses were above market rates or otherwise unreasonable. On this motion for summary judgment, she was required to put her best foot forward. Absent such evidence, I do not conclude that any of the expenses are obviously unreasonable.

[88] I am satisfied on a balance of probabilities that Rose-Terra is entitled to recover $54,449.68 of expenses to put the property into a marketable state.

Carrying costs

[89] Rose-Terra claims $40,991.22 in carrying costs comprising the following items:

Item	**Amount**
Utilities	$6,610.06
House insurance	$4,646.16
Lawn maintenance and snow removal	$29,735.00
Total	$40,991.22

[90] Ms. Butryn raises the same objections to these expenses as she raised with respect to the expenses incurred in putting the property in a marketable state. I do not accept these submissions for the same reasons set out above.

Conclusion and costs

[91] Rose-Terra claimed damages of $630,800.48. There is no genuine issue requiring a trial in respect of the damages claim. I am satisfied on a balance of probabilities that Rose-Terra is entitled to a damages award for all of the claimed expenses, except for the value of the removed light fixtures, which initially cost $20,384.32.

[92] I grant summary judgment in favour of Rose-Terra against Ms. Butryn and award Rose-Terra damages of $610,416.16.

[93] If the parties are not able to resolve costs of this action, Rose-Terra may email its costs submission of no more than three double-spaced pages to my judicial assistant on or before April 24, 2023. Ms. Butryn may deliver her responding submission of no more than three double-spaced pages on or before May 1, 2032. No reply submissions are to be delivered without leave.

Robert Centa J.

Date: April 17, 2023