COURT OF APPEAL FOR ONTARIO

CITATION: Rose-Terra Investments Inc. v. Chetti, 2024 ONCA 427
DATE: 20240527
DOCKET: COA-23-CV-0537

Roberts, Trotter and George JJ.A.

BETWEEN

Rose-Terra Investments Inc.

Plaintiff (Respondent)

and

John Chetti and Anna Marlena Butryn*

Defendants (Appellant*)

Earl A. Cherniak, K.C., Jacob R.W. Damstra and David Pomer, for the appellant

Maureen L. Whelton, Ed Hiutin and Wei Jiang, for the respondent

Heard: May 2, 2024

On appeal from the order of Justice Robert Centa of the Superior Court of Justice, dated April 17, 2023, with reasons reported at 2023 ONSC 2332.

Roberts J.A.:

[1] This appeal arises out of mortgage enforcement proceedings. At issue is the enforceability of the minutes of settlement signed by the parties to resolve their mortgage dispute. The appellant alleged that she signed the minutes of settlement under undue influence and duress exercised by her husband, John Chetti, and that

she did not have independent legal advice. She submits that the motion judge erred in concluding that those issues did not require a trial.

[2] These reasons explain why I would dismiss the appeal.

A. FACTUAL BACKGROUND

[3] The appellant is the registered owner of a property over which the respondent holds a mortgage. The agreement of purchase and sale signed on June 3, 2015 and the Direction Re Title dated July 16, 2015 state that the property was purchased by the appellant's husband, John Chetti, "in trust". When the purchase transaction closed, on or about July 16, 2015, the respondent's mortgage was registered as a charge on the title to the property (the "Charge"). In the Charge, Mr. Chetti represented that: "The property is not ordinarily occupied by me and my spouse, who is not separated from me, as our family residence." The mortgage went into default when it came due in September 2018, and the respondent served a notice of sale under its mortgage on October 17, 2018. On December 4, 2018, Mr. Chetti transferred title to the property to the appellant.

[4] Also on December 4, 2018, the appellant and Mr. Chetti, represented by the same litigation counsel, swore affidavits in support of an application commenced on December 11, 2018 to set aside the mortgage and the notice of sale. They submitted, contrary to Mr. Chetti's representation in the Charge, that the property

was the matrimonial home. They further alleged that the appellant's consent to the mortgage had not been obtained. In their affidavits, the appellant and Mr. Chetti deposed that he had purchased the property in trust for the appellant. No allegations of undue influence or duress were pleaded in their application.

[5] On December 21, 2018, the respondent commenced a competing application seeking a declaration that the mortgage was valid, and that it could only be discharged upon payment of the full principal sum, and requested leave to issue a writ of possession.

[6] On January 31, 2019, represented by counsel, the parties reached a settlement agreement and entered into minutes of settlement. The minutes of settlement provided, among other things, that the appellant and Mr. Chetti would have an extended time to pay a discounted amount of $2.55 million in satisfaction of the $2.7 million mortgage debt. The appellant and Mr. Chetti failed to pay this amount as required under the minutes of settlement.

[7] On June 4, 2019, the respondent was granted an order from Salmers J., declaring that the mortgage was valid and that it could only be discharged upon payment of the full principal amount. The respondent obtained a writ of possession. The appellant and Mr. Chetti refused to leave the property until the Sheriff enforced the writ of possession on July 10, 2019. The property was subsequently sold for less than the amount under the minutes of settlement.

[8] The respondent commenced an action against the appellant and Mr. Chetti, who subsequently declared bankruptcy, to recover as damages the shortfall of $638,800.48. In her amended amended statement of defence, contrary to the position taken in her application that the property was purchased by her husband in trust for her as the matrimonial home and her acknowledgement that the property was subsequently transferred into her name, the appellant pleaded that she was not the beneficial owner of the property, she never advanced any consideration for its acquisition, the property was transferred into her name without her knowledge and consent, and she was a bare trustee for her husband and never a transferee of the equity of redemption of the property. Further, she alleged that she never received proper legal advice and signed the minutes of settlement under duress and/or undue influence exerted by her husband.

[9] The respondent brought a motion for summary judgment. In her responding affidavit, sworn March 10, 2022, the appellant deposed that she was forced to sign the minutes of settlement and did not sign them of her own free will, that she did not receive any legal advice, independent or otherwise, and requested that the matter proceed to trial. The respondent successfully obtained judgment on its motion for summary judgment in the amount of $610,416.16.

[10] The motion judge assumed for the purpose of the summary judgment motion that the appellant did sign the minutes of settlement under undue influence and

duress. However, he determined that there was no evidence that the respondent had knowledge of these circumstances and that it had obtained the assurance of the appellant's litigation counsel that he had independently confirmed with the appellant that she understood and signed the minutes of settlement "of her own free will and without any duress or undue influence".

[11] The motion judge found that the minutes of settlement provided significant and material benefits to the appellant, including the discounted mortgage amount, additional time to pay, no liability for the respondent's legal costs of the applications, and no challenge to her title to the property. Moreover, he determined that the issue of whether or not the appellant was required to receive or had received independent legal advice was not a genuine issue requiring a trial because the appellant was not a stranger to the transaction: she held title to the property; she was a named applicant in one proceeding concerning the property; she was a named respondent in the respondent's application; and she was represented by experienced litigation counsel in both proceedings.

[12] As a result, the motion judge concluded that there were no genuine issues requiring a trial and granted summary judgment in favour of the respondent against the appellant.

B. ISSUES AND ANALYSIS

[13] The appellant acknowledges the high degree of deference owed to a summary judgment motion judge's decision: see *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at paras. 81-84. However, she submits that the motion judge made extricable legal errors and palpable and overriding errors in his analysis. Specifically, the appellant submits that the motion judge erred by applying the wrong legal test in considering the allegations of undue influence and duress, which in turn led him to incorrectly consider the sufficiency of the legal advice provided to the appellant by her own counsel. As a result, the appellant submits, the motion judge erred in concluding that there were no genuine issues requiring a trial.

[14] I am not persuaded that the motion judge made any reversible errors.

[15] The motion judge applied the appropriate governing principles. He found that the minutes of settlement benefitted the appellant. He also found that she was represented by experienced counsel who represented to respondent's counsel that the appellant had received legal advice independently from her husband and that she had entered into the minutes of settlement of her own free will and without undue influence or duress. Those findings were open to him on the record.

[16] There is no categorical presumption that a spousal relationship gives rise to an actual or constructive presumption of undue influence or to a concomitant duty on the part of an innocent third party to ensure that the spouse's agreement to the transaction has been properly obtained: *Bank of Montreal v. Duguid* (2000), 47 O.R. (3d) 737 (C.A.), at paras. 14-16. Rather, it is an evidentiary presumption that arises depending on the nature of the relationship and the transaction in issue: *JGB Collateral v. Rochon*, 2020 ONCA 464, 151 O.R. (3d) 601, at paras. 8-9. Specifically, as this court instructed in *Duguid*, at para. 16, constructive notice of undue influence "may be established by a close relationship between the parties … coupled with a manifestly disadvantageous transaction" (emphasis added). It is an analytical error for the court to consider only the spousal relationship without also taking into account the nature of the impugned transaction: *JGB Collateral*, at para. 21.

[17] Where constructive notice of a presumption of undue influence is established, a duty to inquire may arise as to whether agreement to the transaction was properly obtained: *Gold v. Rosenberg*, [1997] 3 S.C.R. 767, at para. 78. While legal advice may go a long way to rebutting the presumption of undue influence, independent legal advice is not, however, a rigid requirement to rebut the presumption of undue influence: *Duguid*, at paras. 25-27, citing with approval, *Laird v. Mulholland*, [1998] O.J. No. 855 (Gen. Div.), at para. 37, *per* Lax J. The

presumption of undue influence can be rebutted in the absence of independent legal advice: *JGB Collateral*, at para. 33. As Iacobucci J. (dissenting, but not on this point) framed the issue in *Gold*, at para. 65: “The question … is whether the [third party] made sufficient inquiry or, alternatively, whether it received assurances which would have satisfied a reasonable person.” Each case turns on its own facts and the court must examine the evidence it has to decide if the presumption of undue influence has been rebutted. For example, as this court noted with approval in *Duguid*, at para. 25, quoting M.P. Furmston *et al.*, *Cheshire, Fifoot & Furmston’s Law of Contracts*, 13th ed. (London: Butterworths, 1996), at p. 329: “[I]f evidence is given of circumstances sufficient to show that the contract was the act of a free and independent mind, the transaction will be valid even though no external advice was given.”

[18] The motion judge’s decision correctly follows those governing principles. I reject the appellant’s suggestion that the motion judge’s approach was too narrow and that he should have considered the propriety of the underlying mortgage transaction during his assessment of whether the settlement was a manifestly disadvantageous transaction.

[19] The validity of the mortgage transaction was not before the motion judge. While she impugns the minutes of settlement as having been signed under duress, the appellant did not plead in her amended amended statement of defence that

the mortgage was the product of undue influence or duress. Nor was there any other basis to challenge the validity of the mortgage transaction, given the motion judge's finding that she was advised by her litigation counsel on December 4, 2018, of the risks arising from the transfer of title to the property from her husband to her, namely, that the property was "subject to two executions and a mortgage to which [she] confirm[s] she had no knowledge", and that "[t]he letter [from litigation counsel] confirmed that she accepted those risks". As a result, the only transaction in issue before the motion judge was the minutes of settlement, and he properly limited his analysis to whether the minutes of settlement represented a manifestly disadvantageous transaction.

[20] The motion judge concluded that the respondent was a third party without knowledge of the appellant's allegations of undue influence and duress at the time the parties entered into the minutes of settlement. Importantly, he found that the settlement was of significant and material benefit to the appellant and that she was not a stranger to this transaction, but a litigation participant represented by experienced counsel. As a result, there was no need for the respondent to look behind the assurances that her litigation counsel had made about her understanding and signing of the minutes of settlement of her own free will and without any duress or undue influence. Those factual findings were open to the motion judge on the record and contain no error.

[21] I am also not persuaded that the motion judge erred in finding that there was no genuine issue for trial regarding the appellant's allegation that the legal advice received from her own litigation counsel was insufficient and that the respondent was required to insist that she receive independent legal advice from another lawyer. The motion judge's determination of this issue was based on his factual findings that the appellant was not a stranger to the transaction and was represented by counsel, that the settlement provided her with material benefits, and that the respondent had no knowledge of any allegation of undue influence or duress.

[22] The appellant was a participating, named litigant in both applications that culminated in the settlement reached by the parties. The appellant's and her husband's interests were aligned in their application and in their response to the respondent's application, so there was no need for separate counsel to advise her on the settlement.

[23] As a result, there was no need for any inquiry by the respondent as to whether the appellant had received independent legal advice. The respondent was entitled to rely on the assurance given by the appellant's counsel that he had discussed the settlement of the litigation with the appellant, independently of her husband, and that she had entered into the minutes of settlement of her own free will and without undue influence or duress.

C. DISPOSITION

[24] I see no basis to intervene. I would dismiss the appeal.

[25] In accordance with the parties' agreement, I would grant the respondent payment from the appellant of its costs of the appeal in the amount of $20,000 plus HST.

Released: May 27, 2024 "L.B.R."

"L.B. Roberts J.A."
"I agree. Gary Trotter J.A."
"I agree. J. George J.A."