

CITATION.: 2624221 Ontario Inc. v. Matsvayai et al., 2024 ONSC 4167
COURT FILE NO.: CV-20-2084-0000
DATE.: 2024-07-24

SUPERIOR COURT OF JUSTICE – ONTARIO

7755 Hurontario Street, Brampton ON L6W 4T6

RE: 2624221 ONTARIO INC. and Plaintiffs
FLEXPARK INC.

AND:

MATSVAYI, LUCIA Defendants
MADZIMA, BLENDE

AND BETWEEN:

LUCIA MATSVAYI Plaintiff by Counterclaim

AND:

WESTHAVEN INCOME INC., LUIGI LATTO, FLEXPARK INC., PETER GROCCIA, ROSA GROCCIA, SABINE QUATTROCIOCCHI aka BARRAGAN aka SABINE PUCCIARELLI, GABRIEL BRUTTO, BRUTTO LAW PROFESSIONAL CORPORATION, DI MAURO LAW PROFESSIONAL CORPORATION, 2666906 ONTARIO INC ., SANDRA DE BARTOLO, RAMESH SRIVASTAVA aka GARRY SRIVASTAVA and DSMNK INVESTMENT GROUP LTD.

Defendants to the Counterclaim

BEFORE: JUSTICE WILKINSON

COUNSEL: ROGERS, ETHAN for the Defendant/ Plaintiff by Counterclaim, Lucia Matsvayi, and the Defendant, Blenden Madzima
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HEARD: March 25, 2024, in person

RULING ON SUMMARY JUDGMENT MOTION

[1] There are four summary judgment motions before me relating to two mortgage loans that are now in default.

[2] The first mortgage was granted against title to 85 Twin Willow Crescent in Brampton, Ontario (“the Property”) for \$650,000 advanced to the Defendant, Lucia Matsvayi, by the Defendant to the Counterclaim, DSMNK Investment Group Ltd. (now assigned to the Plaintiff/Defendant to the Counterclaim, Flexpark Inc. [“Flexpark”]). The second mortgage was granted against title to the Property for \$330,000, advanced to Ms. Matsvayi by 2624221 Ontario Inc., which has now been renamed Westhaven Income Inc. (“Westhaven”).

[3] The mortgages are registered in the name of Ms. Matsvayi. Her husband, the Defendant Blenden Madzima, signed the charge documents as the consenting spouse.

[4] Flexpark and Westhaven each seek summary judgment against the Defendants.

[5] The Defendants have filed Counterclaims against numerous individuals and corporations, claiming those parties have colluded to defraud them and engaged in misrepresentations to the Defendants regarding the terms of the mortgage loans.

[6] The Defendant to the Counterclaim, Peter Groccia, is the sole director of 2666906 Ontario Inc., which was paid a referral fee of \$40,000 with respect to the first mortgage. He and his wife, Rosa Groccia, are also the only officers of Flexpark. A corporate search from May 22, 2019 also lists Peter Groccia as a director of Westhaven in 2018, and the person authorized to file the tax return for the corporation in 2019. On this motion, Mr. Groccia provides affidavit evidence for both Flexpark and Westhaven.

[7] The Defendant to the Counterclaim, Luigi Lato, is listed as the sole officer and director of Westhaven in a corporate search dated May 22, 2019.

[8] The Defendants to the Counterclaim, Flexpark, Westhaven, Peter Groccia, Rosa Groccia, and Luigi Lato, all move collectively for summary judgment dismissing the Counterclaims against them.

[9] The Defendants to the Counterclaim, Sandra De Bartolo, and Dimauro Law Professional Corporation, were the lawyers acting for the Plaintiffs at the time the mortgage loans were advanced. They also seek summary judgment dismissing the Counterclaims against them.

[10] At the commencement of the motions, I granted leave for the Defendants to amend their pleadings to correct factual errors contained in the original pleadings. This leave was granted on consent. All counsel agreed that the motions shall proceed on the understanding that the pleadings had already been amended as requested by the Defendants.

[11] For the reasons that follow, I make the following Orders:

- 1) The motion brought by Flexpark for summary judgment on the main action is granted, subject to the Counterclaim.
- 2) The motion brought by Westhaven for summary judgment on the main action is granted, subject to the Counterclaim.
- 3) The motion to dismiss the Counterclaims brought by the Defendants, Ms. Matsvayi and Mr. Madzima, as against Flexpark, Westhaven, Luigi Latto, Peter Groccia, and Rosa Groccia, is dismissed.
- 4) The motion to dismiss the Counterclaim brought by the Defendants to the Counterclaim, Sandra De Bartolo, and Dimauro Law Professional Corporation, is granted.

BACKGROUND

[12] The Defendants, Ms. Matsvayi and Mr. Madzima are spouses. They wished to purchase a four bedroom house for their family. Ms. Matsvayi testified at her cross-examination that the Defendant to the Counterclaim, Ramesh Srivastava aka Garry Srivastava (“Mr. Srivastava”), was referred to Mr. Madzima by a family friend, Mr. Boahene, to provide assistance with obtaining a mortgage.

[13] Ms. Matsvayi gave evidence at her cross-examination that in March 2019, Mr. Madzima began viewing homes with Mr. Srivastava, but it was Ms. Matsvayi who found a desirable property for sale at 85 Twin Willow Crescent in Brampton. Ms. Matsvayi also stated that once she had identified the home that she wished to purchase, Mr. Srivastava asked her if she could make a deposit, and indicated that he would begin working with a mortgage broker, the Defendant to the Counterclaim Sabine Quattrociocchi, on their behalf to secure funding for the purchase.

[14] Ms. Matsvayi testified at her cross-examination that the original plan was for the mortgage to be in Mr. Madzima’s name only, to allow Ms. Matsvayi the option to possibly purchase her own investment property at a later date.

[15] It is not in dispute that on March 12, 2019, Mr. Madzima signed an Agreement of Purchase and Sale for the Property for \$849,000, with a closing date of May 23, 2019. Mr. Madzima testified at his cross-examination that prior to signing the Agreement of Purchase and Sale, he had been verbally assured by

Ms. Quattrociocchi that he would be able to secure financing from her for the purchase.

[16] Mr. Madzima states in his affidavit that he and his wife met with Mr. Srivastava and Ms. Quattrociocchi on March 25, 2019. Both Defendants testified at their cross-examinations that during this meeting, they were advised by both of these individuals that they could obtain a mortgage to pay for the Property for \$3,000.00 per month, with an interest rate of 8%. Both Defendants stated they were further advised that the payments for the first year were to be interest-only payments, but that once the year was up, they would be in a good position to seek financing from a bank at a more favourable interest rate.

[17] The Defendants each testified at their cross-examination that prior to the closing of the Property, they were never advised that there was to be a second mortgage on the Property.

[18] The Defendants stated at their cross-examinations that they were advised by Ms. Quattrociocchi that it was acceptable for them to provide a \$30,000 deposit for the purchase of the home, plus they would also have to pay additional closing costs that were anticipated to be in the range of \$10,000 to \$13,000. Both Defendants testified that this arrangement was acceptable to them.

[19] On May 21, 2019, the Defendants met with Mr. Srivastava and Ms. Quattrociocchi to sign the mortgage documents. Mr. Madzima signed commitment

documents in favour of Flexpark for a mortgage loan of \$650,000, with 8% interest, which included interest only payments of \$4,333.33 for twelve months. On the same day, Mr. Madzima signed a second mortgage commitment document with Westhaven for a loan of \$330,000, with interest at 14%, and interest only monthly payments of \$3,850.00 for twelve months. The commitment documents also indicate that the first mortgage registered on the Property was not to exceed \$650,000 with interest at 8%, and that the interest only payments for the second mortgage were to be prepaid with the monies advanced for the second mortgage.

[20] The mortgage loan agreements specified that the Defendants were to pay \$3,000 per month in twelve post-dated cheques, and the balance of the interest payments owed (\$1,333.33 per month for the first mortgage over and above the \$3000 monthly post-dated cheques, and \$3,850 per month for the second mortgage) were incorporated into the \$330,000 second mortgage, and prepaid through the second mortgage, as per the terms of the two mortgages. The amount of the interest-only payments for the two mortgage loans therefore totaled \$8,183.33 per month, including the \$3,000 monthly payments made with post-dated cheques.

[21] The Defendants both stated at their cross-examinations that they believed they were only paying \$3,000 per month for interest-only payments for a one-year

term, and that they were unaware of any additional interest payments for the first year.

[22] At his cross-examination, Mr. Madzima testified that he believed that Ms. Quattrocciochi had consolidated all the mortgage loans owing to the one payment that he and Ms. Matsvayi had agreed to, of \$3,000 per month for twelve months. Mr. Madzima further stated that he and Ms. Matsvayi were not given an opportunity to review the mortgage commitment documents before he signed them on May 21, 2019.

[23] Both Defendants stated at their cross-examinations that at the time that the mortgage commitment documents were signed, Ms. Matsvayi was not listed as a “guarantor”. They both gave evidence that the guarantor language was added to the loan documents after they had both signed them.

[24] After the mortgage loan agreements were signed, the Defendants stated that Ms. Quattrocciochi referred them to lawyer Gabriel Brutto to close the sale of the Property.

[25] It is not disputed that on May 23, 2019 the Defendants attended the offices of Gabriel Brutto for the purpose of executing documents to purchase the Property. The Defendants stated at their cross-examinations that during that attendance, Mr. Brutto's office advised them that it had been discovered that Mr. Madzima had an outstanding judgment against him from Canada Housing and Mortgage

Corporation (“CMHC”) for \$176,315.80. Ms. Matsvayi testified that she and Mr. Madzima were given the choice of adding the amount owed to CMHC to the total amount they were borrowing to purchase the house, or, alternatively, the mortgage loan would be arranged in Ms. Matsvayi’s name only. The couple chose to have the loan go forward in Ms. Matsvayi’s name alone.

[26] The next day, on May 24, 2019, the Defendants re-attended at Mr. Brutto’s office for Ms. Matsvayi to sign the mortgage paperwork. Ms. Matsvayi indicated at her cross-examination that most of the time at that meeting was spent with Mr. Brutto’s assistant, who explained to them that after payment of their \$30,000 deposit, the remaining mortgage was for \$819,000. Ms. Matsvayi further stated that during this meeting, it was once again confirmed that the mortgage was to have an annual interest rate of 8%, and the monthly payments were to be \$3,000.00. In accordance with this representation, Ms. Matsvayi stated that she signed twelve post-dated cheques each totaling \$3,000.00, which she left at Mr. Brutto’s office.

[27] The mortgage loan documents also disclose that \$55,600 in lender’s fees and additional processing fees were added to the first mortgage, and \$34,600 in lender’s fees and additional processing fees were added to the second mortgage. The agreements also stated that the full amount advanced for both mortgages was to be repaid to the lenders on June 1, 2020.

[28] The Defendants to the Counterclaim, Ms. De Bartolo, and the law firm where she worked, Di Mauro Professional Corporation, acted for the Plaintiffs on the mortgage transactions. Ms. De Bartolo provides affidavit evidence that she prepared the submissions for the two mortgages to be registered on title to the Property. There is no dispute that it was the Defendant to the Counterclaim, Gabriel Brutto, who actually registered the mortgages on title to the Property.

[29] After the various fees had been paid as set out in the directions signed by the Defendants, Di Mauro Law Professional Corporation sent two wire payments to Mr. Brutto on May 24, 2019. The first wire transfer was for \$592,671, and the second wire transfer from was for \$231,568.20. Together, the loans wired to Mr. Brutto for the benefit of the Defendants totaled \$824,239.20.

[30] The Defendants made their monthly \$3,000 payments until the spring of 2020, when Ms. Matsvayi testified that she put a stop payment on the last \$3,000 post-dated cheque. Her evidence was not clear as to the date of the cheque, but the Plaintiffs state in an affidavit sworn by Defendant to the Counterclaim, Peter Groccia, that Ms. Matsvayi breached the terms of the loan on or about April 24, 2020. This date is in error, as the Notices of Sale for the breach of the two mortgage loans were issued on April 22, 2020 and April 23, 2020. However, the error is not material.

[31] Ms. Matsvayi testified that she made the decision to put a stop payment on the last post-dated cheque after becoming suspicious as to the terms of their mortgages, based upon the experiences of her friend Mr. Boahene who had also obtained a mortgage through Mr. Srivastava and Ms. Quattrociocchi, and later had difficulty getting his mortgage renewed.

[32] Ms. Matsvayi testified at her cross-examination that she has made no further payments to the Plaintiffs since the second to last post-dated cheque for \$3,000 was cashed. However, Ms. Matsvayi did not cease making the interest payments under the second mortgage, as the additional interest payments of \$1,333.33 for twelve months totaling \$16,000 for the first mortgage, and the monthly interest payments of \$3,850 for twelve months totaling \$46,200 for the second mortgage, were pre-paid through the second mortgage. As a result, these interest-only payments were prepaid through to the end of June 2020.

[33] Ms. Matsvayi and Mr. Madzima have been living at the Property since May of 2019 when they first moved in. They have not made any mortgage payments for over four years.

[34] Both mortgage agreements include a provision in the Standard Charge Terms which indicates that if the mortgagor is in default for the payments under the charge, the lenders can elect to have the whole of the principal owing, together with accrued interest, become due and payable. The Standard Charge Terms also

include a provision permitting the lenders to enter on and sell or lease the land in the event of a default in payment.

[35] The Standard Charge Terms also provide that in the event of default, additional charges are payable forthwith, and may be added to the debt of the Chargee. These charges include costs and legal expenses on a solicitor and client basis incurred in taking, recovering, and keeping possession of the property, plus interest on these payments. The Terms also state that if the lender is required to issue either a Notice of Sale or Statement of Claim, the lender is entitled to charge the borrower an additional fee equivalent to three months' interest. The Terms also include other penalties such as administrative fees for late payments.

[36] Both lenders each issued a Statement of Claim against the Defendant, Lucia Matsvayi, on June 5, 2020.

[37] On November 3, 2020, the Defendant by Counterclaim, DSMNK Investment Group Ltd., assigned its charge to the Plaintiff/Defendant by Counterclaim, Flexpark. The action by DSMNK against Ms. Matsvayi was later withdrawn, and on March 25, 2022, a new claim was filed by the Plaintiff, Flexpark, against the Defendants, Ms. Matsvayi and Mr. Madzima.

[38] The Defendants filed Statements of Defence in both actions brought by Flexpark and Westhaven, and then filed their own Statement of Claim against a number of Defendants, alleging fraud and collusion as between the Defendants.

The various actions in this litigation have been consolidated pursuant to the November 17, 2022 Order of Doi J., wherein the action brought by the Defendants, Ms. Matsvayi and Mr. Madzima, is now a Counterclaim to the actions brought by Flexpark and Westhaven.

THE ISSUES

[39] The issues on these motions are:

- a) Is there a genuine issue for trial regarding the Plaintiffs' motion for summary judgment to enforce the mortgage loan agreements signed by Ms. Matsvayi?
- b) Is there a genuine issue for trial regarding the motion to dismiss Ms. Matsvayi's Counterclaim against Westhaven, Luigi Lato, Flexpark, Peter Groccia, and Rosa Groccia?
- c) Is there a genuine issue for trial regarding the motion to dismiss the Counterclaim against Ms. De Bartolo and Di Mauro Law Professional Corporation?
- d) Is this an appropriate case for partial summary judgment?

POSITION OF FLEXPARK AND WESTHAVEN

[40] The Plaintiffs take the position that Ms. Matsvayi and Mr. Madzima have been living in a home for the last four years rent free, after having received over \$800,000 in loans to purchase the home. The Plaintiffs have not been reimbursed for the majority of the loans that they forwarded to Ms. Matsvayi, nor have they received the interest, lenders fees, and other financial penalties now owed to them

pursuant to the mortgage loan agreements signed by Ms. Matsvayi. The Plaintiffs submit that there is no genuine issue for trial to be determined regarding the payments owed by Ms. Matsvayi pursuant to the mortgage contracts, and that it is appropriate that their motions to enforce the mortgage loans proceed by way of summary judgment.

[41] The Plaintiffs submit that the Defendants were well aware of the terms of the agreements that were signed by Ms. Matsvayi. They further argue that private mortgages are well known to be more expensive than mortgages financed through a bank, given the higher risk faced by the lenders. The Plaintiffs further argue that they had no personal contact with the Defendants prior to the mortgage agreements being signed, and that their only involvement in this matter is that they provided the funding to the Defendants to allow them to purchase the Property. They submit that, under the terms of the agreements, the Defendants ought to have known that the full amount of the mortgages was due and owing after the one-year term, and that the Defendants must repay the money advanced to them, plus all interest, penalties, and legal fees, as per the loan agreements that were signed.

[42] The Plaintiffs also submit that the Defendants to the Counterclaim, Mr. Srivastava and Ms. Quattrociocchi, did not act as their agents in facilitating financing for Ms. Matsvayi and Mr. Madzima. They further submit that they have

no knowledge of any of the representations made by Mr. Srivastava or Ms. Quattrociochi to Ms. Matsvayi and Mr. Madzima. Similarly, they submit that they had no involvement with the Defendants' lawyer, Mr. Brutto, nor do they have any knowledge of any representations made to the Defendants by Mr. Brutto or his staff.

[43] Flexpark and Westhaven also note that in the Statement of Defence filed by Ms. Matsvayi and Mr. Madzima, the Defendants admit that under the first mortgage they owed interest-only monthly payments of \$4,333.33 per month for one year. In the Statement of Defence the Defendants also admit the Plaintiffs' rights in the Standard Charge Terms upon the Defendants' default in payment.

[44] The Plaintiffs also state that Mr. Madzima created the need for a mortgage when he signed the Agreement of Purchase and Sale on March 12, 2019, before he had funding for the mortgage secured. They note that this event took place before they were ever approached to provide loans to Ms. Matsvayi or Mr. Madzima.

[45] The moving Defendants to the Counterclaim, Flexpark, Westhaven, Luigi Lato, Peter Groccia, and Rosa Groccia, submit that Ms. Matsvayi has advanced no evidence to support her allegation that the mortgages were registered as a consequence of conspiracy or collusion. Mr. Groccia provides affidavit evidence that no collusion or fraud took place with respect to the mortgages.

[46] These parties also object to the inclusion of some of the materials submitted by the Defendants in response to these motions, including affidavits from non-parties, and affidavits from some of the parties in this litigation that were presented as evidence in a different case that is not before me. They argue this evidence is irrelevant to the present litigation, and is inadmissible hearsay. They take the position that by filing these materials, the Defendants are asking me to accept allegations made in another proceeding for their truth. The moving parties submit that I ought not to consider any of the materials provided by the Defendants related to litigation not before me.

[47] The Plaintiffs/Defendants to the Counterclaim also submit that if the Defendants were serious about trying to prove a case of fraud, they would have chosen to cross-examine Peter Groccia. This was not done.

[48] The Plaintiffs seek possession of the Property to allow it to be sold, to reimburse the Plaintiffs pursuant to the terms of the mortgage loan agreements.

[49] Flexpark submits that, pursuant to the first mortgage contract, the following was owed by the Defendants as of March 24, 2022 (the date when the motion materials were first filed), plus interest at 8% per annum on \$773,297.82 and legal fees:

- a) For Principal - \$650,000
- b) For Interest at 8% - 102,597.82

c) For Mortgagee's Late Payment Fees - 7,350

d) For 3 Months Interest Penalty - 13,000

e) For Mortgagee's Administration Fees - 350

TOTAL: \$773,297.82 plus interest at 8% per annum

[50] Westhaven submits that, pursuant to the second mortgage contract, the following was owed by the Defendants as of January 22, 2024:

a) For Principal - \$330,000

b) For Interest at 14% from June 1, 2020 to January 22, 2024 -
\$168,345.20

TOTAL: \$498,345.20 plus interest accruing at the rate of 14% per annum, plus legal fees.

[51] The Plaintiffs submit that granting them summary judgment as against the Defendants, and granting partial summary judgment dismissing the Defendants' Counterclaims against them will in no way prejudice Ms. Matsvayi from pursuing her claims against the remaining Defendants to the Counterclaim, including her lawyer, Mr. Brutto, the mortgage broker, Ms. Quattrociocchi, and her realtor, Mr. Srivastava.

POSITION OF SANDRA DE BARTOLO AND DI MAURO LAW PROFESSIONAL CORPORATION

[52] The Defendants to the Counterclaim, Ms. De Bartolo and Di Mauro Law Professional Corporation, join the Plaintiffs in their arguments that the Defendants have produced no evidence of fraud, misrepresentation, or conspiracy with respect to the Counterclaims against them. They take the position that the Defendants have failed to establish a genuine issue for trial, and that the Counterclaims against them ought to be dismissed. They also join the Plaintiffs in their submission that dismissing the Counterclaims against them will in no way prejudice Ms. Matsvayi from pursuing her claims against the remaining Defendants to the Counterclaim.

[53] As lawyers for the lenders on the mortgage loan transaction, these parties submit that they discharged their responsibilities to the Plaintiffs appropriately when they prepared the submissions for the two mortgages. They further argue that at no time did they act for Ms. Matsvayi, who was represented by her own lawyer, Mr. Brutto. They therefore submit that they have no duty of care to Ms. Matsvayi. They also provide affidavit evidence that they had no direct involvement or contact with Ms. Matsvayi or Mr. Madzima. They argue that if Ms. Matsvayi had any misunderstanding about the nature of the documents that she was signing, that is an issue between her and her lawyer, Mr. Brutto.

[54] These Defendants to the Counterclaim also provide affidavit evidence through Ms. De Bartolo that they were not involved in negotiating the terms of the

mortgage commitments signed by Ms. Matsvayi, and further, that they had no reason to doubt that Mr. Brutto had obtained the necessary identification and signatures from Ms. Matsvayi, or that Ms. Matsvayi understood the nature of the transactions.

[55] Ms. De Bartolo also provides affidavit evidence that when she prepared the mortgages to be registered on title, she explicitly relied on the transaction documents including the acknowledgements and directions executed by Ms. Matsvayi that were provided to her by Mr. Brutto and his law firm. Similarly, she relied on the same documentation when she advanced the mortgage funds to Brutto Law Professional Corporation, and paid broker and referral fees with respect to the mortgages.

[56] Although she argues that she owed no duty of care to the Defendants, Ms. De Bartolo states in her affidavit that based on her experience, there was nothing out of the ordinary with respect to the amount, or timing, of the mortgages. She deposes that on private mortgage transactions where the purchaser makes a downpayment of less than 5%, as was the case for the Defendants, it is common for the amount registered on the property to exceed the purchase price for the property, especially where there are lender's fees, broker's fees, and pre-payments of interest, as there were in this case. Ms. De Bartolo was not cross-examined with respect to this evidence.

[57] These Defendants to the Counterclaim acknowledge that some of the mortgage documents were missing a signature from the lender, and also acknowledge that many of the documents reflect the closing date of May 23, 2019 instead of May 24, 2019. However, they argue that these errors in the documentation do not alter the reality that \$824,239.20 was advanced by the Plaintiffs to the Defendants to close this deal. They submit that there is no dispute that the mortgages were validly registered, or that the funds were advanced. They argue that if anything, these errors could result in a claim made by the Plaintiffs against Ms. De Bartolo, but do not give rise to any liability claims by the Defendants, since there is no question that they have received the benefit of the funds that were advanced.

[58] These Defendants to the Counterclaim also join the Plaintiffs in arguing that the affidavits submitted by the Defendants in response these summary judgment motions contain hearsay and irrelevant evidence relating to third parties not involved in this litigation, that ought not to be considered by me when determining these motions.

[59] They further submit that there is nothing inappropriate about a lawyer using his or her own address to register a mortgage for a client, or to effect service for a client, and that such action is not indicative of fraud.

[60] Ms. De Bartolo also points to the Acknowledgements signed by Ms. Matsvayi and Mr. Madzima on May 24, 2019 for both mortgages, which confirm that Riccardo Di Mauro of Di Mauro Law Professional Corporation was acting “solely on behalf of the Mortgagee”. She therefore argues that by signing the acknowledgement forms, the Defendants have confirmed that they were aware that the lawyers at Di Mauro law were not representing them or their interests with respect to the registration of the mortgage loans. Further, she points out that she did not actually register the mortgages; that task was completed by Mr. Brutto.

[61] These Defendants to the Counterclaim also submit that the Defendants have not put forward any expert evidence to establish that they breached a duty of care, and therefore their motion to dismiss the Counterclaim ought to be granted.

POSITION OF THE DEFENDANTS

[62] The Defendants submit that the summary judgment motions ought to be dismissed, as there are three questions to be determined in this case that are genuine issues requiring a trial:

- a) Were the mortgage documents executed based upon fraudulent misrepresentations made by Mr. Srivastava, Ms. Quattrociocchi, and Mr. Brutto?
- b) Were all the Defendants to the Counterclaim engaged in a conspiratorial scheme to defraud the Defendants?
- c) Did Ms. De Bartolo and Di Mauro Law Professional Corporation intentionally aid the conspiracy by assisting with

registering both mortgages in circumstances that ought to have raised various red flags?

[63] The Defendants acknowledge that the mortgage loan documents indicate that there were to be two mortgages on the property, but gave evidence that they were not aware of this fact at the time the mortgage agreements were signed. Mr. Madzima admitted at his cross-examination that he did not actually read the documents before signing them. Ms. Matsvayi did not specifically state that she did not read the mortgage commitment documents before she signed them, however, both Defendants gave evidence that they relied upon the verbal communications by Ms. Quattrociocchi and Mr. Srivastava, and simply signed the paperwork where they were told to sign.

[64] The Defendants do not dispute that the mortgage documents indicate that they owe the payments now being claimed by the Plaintiffs. However, they argue that these amounts are significantly higher than the amounts that they believed they were borrowing based upon the information communicated to them verbally at the time that they signed the mortgage documents.

[65] The Defendants are also both adamant in their evidence that they were not aware that a second mortgage for \$330,000 had been arranged to be placed on the property, or that they were borrowing these additional funds.

[66] Ms. Matsvayi consistently stated in her cross-examination that she agreed to pay \$3,000 per month interest-only, and then intended to renegotiate the principal mortgage when the one-year period was over, as per the advice of Mr. Srivastava and Ms. Quattrociocchi. She was emphatic in her evidence that she was not aware of any additional financial commitments pertaining to these mortgage loans.

[67] Ms. Matsvayi stated at her cross-examination that she understood the principal amount owed for the Property after one year was in the range of \$837,000, based upon the trust ledger statement given to her by Mr. Brutto dated May 24, 2019. This statement does not mention lenders' fees or other additional expenses that appear in the mortgage loan documents.

[68] Ms. Matsvayi also indicates in her affidavit that she was never aware of the various fees that were to be added to the mortgage, as she claims that this aspect of the mortgage loans was never pointed out or explained to her.

[69] Ms. Matsvayi gave both oral and affidavit evidence that she never would have agreed to mortgage payments totaling over \$8,000 per month, as her financial limit for a mortgage contribution was \$3,000 per month, and that this fact was well known by Ms. Quattrociocchi and Mr. Srivastava.

[70] Ms. Matsvayi provides affidavit evidence that she never signed or initialed any documents in which she agreed to be a guarantor for her husband when he

signed the original mortgage documents. She submits that any initials being attributed to her on those documents are forgeries.

[71] The Defendants point to the Disclosure to Borrower document regarding the first mortgage, which includes the following statement: “The Brokerage is representing the Borrower & the Lender, not to the preference of either in this transaction”, which suggests that Ms. Quattrociocchi was therefore in a conflict of interest with respect to the Plaintiffs and the Defendants when she arranged the mortgages.

[72] The Defendants point out numerous connections between the Defendants to the Counterclaim and allege that these interconnections support their allegation that the parties colluded together to defraud them. Some examples of these interconnections are listed below:

- a) A corporate search of Flexpark Inc. conducted on February 7, 2022 indicates that Peter Groccia was the sole director of Flexpark Inc., and that he and Rosa Groccia were the only officers of Flexpark Inc., which was located at 100 Floral Parkway, Toronto;
- b) A corporate search of 2622441 Ontario Inc. (now renamed as Westhaven) indicates that Matteo Damasco was the sole director as of May 17, 2019, and the address for Westhaven was the same as Flexpark. The corporate search lists Mr. Damasco’s address for service as 3200 Dufferin Street, Suite 504, Toronto, which is the same address as Di Mauro Law Professional Corporation. A corporate search conducted three days later, on May 22, 2019, lists Matteo Damasco as

the sole director, with an address for service of 100 Floral Parkway.

- c) A second corporate search of Westhaven conducted in February 2022 lists Luigi Lato as the sole director of Westhaven, with an address for service of 100 Floral Parkway in Toronto, which is the same address as Flexpark. In addition, the registered business address for Westhaven is listed as 81 Zenway Blvd, Unit 21, Woodbridge, Ontario, which is the same address where 2688285 Ontario Inc. is located, which has Peter Groccia listed as the sole officer and director.
- d) Sabine Quattrociocchi is currently operating through Adamas Financial Corporation, which shares the address of 81 Zenway Blvd., Unit 21, with 2688285 Ontario Inc., for which Peter Groccia was listed as the sole officer and director as of April 24, 2022;
- e) A corporate search dated April 3, 2019, lists the address for 2688285 Ontario Inc. as 3200 Dufferin Street, Suite 504, which is the same address as Di Mauro Law Professional Corporation, and lists one director, Matteo Damasco, with the same address at 3200 Dufferin Street. As of April 24, 2022, a corporate search revealed that the address for service for this corporation remained at 3200 Dufferin Street, but the only director listed for the corporation was Peter Groccia, with an address for service at 100 Floral Parkway;
- f) In 2019, 2666906 Ontario Inc. had a registered head office of 100 Floral Parkway, Toronto, and its only officers were Peter Groccia and Rosa Groccia, and its only director was Peter Groccia. This corporation received a \$40,000 lender's fee paid out of the proceeds of the first mortgage placed on the subject property.

[73] The Defendants also provide affidavit evidence regarding the negative experiences of their friend, Mr. Boahene, who originally put them in contact with Mr. Srivastava. They submit that their experiences involve many of the same parties involved in Mr. Boahene's situation, and that this evidence demonstrates a pattern of fraudulent behaviour by a number of the Defendants to the Counterclaim.

[74] The Defendants also point to another case involving the Defendant to the Counterclaim, Mr. Groccia, who provided funds to borrowers who became victims in a fraudulent real estate scheme conducted by the law clerk of the lawyer who was handling the real estate transfers. The Defendants rely upon affidavits filed in a series of separate court actions involving Mr. Groccia and Ms. Quattrociocchi to allege that Mr. Groccia was colluding with Ms. Quattrociocchi in their case, and that he was in a romantic relationship with Ms. Quattrociocchi. They suggest that this circumstance is evidence of Mr. Groccia's involvement in a fraudulent scheme involving their mortgage loans, as they claim, amongst other allegations, that he knew that the properties were overleveraged, and that Ms. Quattrociocchi was falsifying documents.

[75] Ms. Matsvayi also states in her affidavit that she believes the Defendants to the Counterclaim, Ms. De Bartolo and DiMauro Law Professional Corporation,

were working in concert with Mr. Groccia and his corporations to prepare and register her mortgages which she describes as fraudulent.

[76] Ms. Matsvayi also submits that there is no evidence contradicting her evidence that Ms. Quattrociocchi and Mr. Srivastava misrepresented the terms of the mortgages to her and Mr. Madzima, and accordingly, the mortgage contracts should be rescinded.

[77] Ms. Matsvayi also argues that even though the Defendants to the Counterclaim Ms. De Bartolo and Di Mauro Law were not acting for her, they should have been alive to the presence of a potential fraud and/or conspiracy, and should not have prepared the paperwork for the mortgages to be registered. Ms. Matsvayi argues that mortgages had the hallmarks of fraud and predatory lending, including the following:

- a) The mortgages were large relative to the value of the property;
- b) There were significant lender and brokerage fees;
- c) The mortgage term was one year with prepaid interest;
- d) The interest, when fees and costs were considered, was very high;
- e) The loans were provided without regard to the borrower's ability to repay; and
- f) The loan documents were missing signatures in some places, the date on the mortgage loan documents was not correct (by one day), fire insurance was not arranged as required, and

other mortgage forms had not been completed to alert the first mortgagee, DSMNK Investment Group, that a second mortgage had been placed on the property.

[78] The Defendants point to the case of *Law Society of Ontario v. Harrison*, 2023 ONLSTH 80, to argue that Ms. De Bartolo had an obligation to alert Mr. Brutto as to any red flags for potential fraud that she observed with respect to the transaction. The decision contains the following comments at para. 51:

Real estate lawyers have a particular obligation to protect against fraud and ensure each transaction is *bona fide* regardless of which party they act for in the transaction:

...

Faced with red flags of fraud or other facts that may be material to the lender, the lender's lawyer must make appropriate inquiries and draw them to the attention of the lender.

[79] Ms. Matsvayi and Mr. Madzima also argue that the two mortgages should be considered as a single transaction for the purposes of the *Unconscionable Transactions Relief Act*, R.S.O. 1990, c. U.2. They argue that the costs of the loans are excessive, and that the loan transactions are harsh and unconscionable. They therefore argue that the mortgages should be set aside either wholly or in part.

[80] The Defendants argue that there are genuine issues for trial involving credibility issues concerning their claim that the Defendants by Counterclaim colluded to misrepresent the terms of the mortgages to the Defendants. They

therefore argue it is in the interest of justice that the issues related to credibility and the alleged conspiracy be determined at trial on a full record.

[81] The Defendants also submit that issuing summary judgment or partial summary judgment in favour of any of the moving parties will not avoid a trial, and may lead to inconsistent findings of fact, and a denial of a just outcome when the matter proceeds to trial on a full record.

THE LAW

[82] Rule 20.04 (2)(a) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, provides that, “The court shall grant summary judgment if the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence”.

[83] Rule 20.04 (2.1) sets out the powers of the judge hearing the summary judgment motion:

Powers

(2.1) In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:

1. Weighing the evidence.
2. Evaluating the credibility of a deponent.
3. Drawing any reasonable inference from the evidence.

[84] Summary judgment is available to the parties when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result (*Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 50).

[85] The moving party seeking summary judgment has the burden of proof to establish that there is no genuine issue for trial (*Botnick et al. v. The Samuel and Bessie Orfus Family Foundation et al.*, 2011 ONSC 3043, 71 E.T.R. (3d) 210, at para.10).

[86] On a motion for summary judgment, "a responding party may not rest on mere allegations or denials of the party's pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue requiring a trial" (*Sweda Farms Ltd. v. L.H. Gray & Son Limited et al.*, 2013 ONSC 4195, at para. 27).

[87] The responding party on a motion for summary judgment must "lead trump or risk losing." A party opposing a motion for summary judgment must show a "real chance of success" against the party seeking summary judgment. A party must put their best foot forward when resisting an Order for summary judgment (*Virco v. Blair*, 2012 ONSC 7104, para. 15).

[88] Partial summary judgment is appropriate where issues “may be readily bifurcated from those in the main action and that may be dealt with expeditiously and in a cost-effective manner” (*Butera v. Chown, Cairns LLP*, 2017 ONCA 783, 137 O.R. (3d) 561, at para. 34).

[89] In *Malik v. Attia*, 2020 ONCA 787, at para. 62, the Ontario Court of Appeal discussed the criteria that must be addressed by the moving party in a partial summary judgment motion. The parties must:

- a) Demonstrate that dividing the determination of the case into several parts will prove cheaper for the parties;
- b) Show how partial summary judgment will get the parties’ case in and out of the court system more quickly;
- c) Establish how partial summary judgment will not result in inconsistent findings by the multiple judges who will touch the divided case.

[90] A lawyer owes no duty of care to the opposite party. Otherwise, lawyers would be in “untenable conflict between their duty to their client and the need to protect themselves against their client’s adversary” (*Furney v. Staples*, 2022 ONSC 6951, at para.18).

[91] The circumstances in which a lawyer will be found to owe a duty of care to a third party are very narrow. A lawyer “cannot be expected to protect the economic interests of a non-client unless, in all of the circumstances, the non-client

reasonably relied upon him to do so and the solicitor knew or should have known of this reliance” (*Chand Morningside Plaza et al. v. Badhwar et al.*, 2015 ONSC 293, at para. 26).

[92] In *Cement LaFarge v. B.C. Lightweight Aggregate*, [1983] 1 S.C.R. 452, at p.471, the Supreme Court of Canada provides the criteria for the tort of conspiracy:

a) whether the means used by the defendants are lawful or unlawful, the predominant purpose of the defendant's conduct is to cause injury to the plaintiff; or,

b) where the conduct of the defendants' is unlawful, the conduct is directed towards the plaintiff (alone or with others), and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result.

[93] The Supreme Court also stated that with respect to part (b) above, at p.472:

[I]t is not necessary that the pre-dominant purpose of the defendants' conduct be to cause injury to the plaintiff but, in the prevailing circumstances, it must be a constructive intent derived from the fact that the defendants should have known that injury to the plaintiff would ensue. In both situations, however, there must be actual damage suffered by the plaintiff.

[94] More recently, in *Lilleyman v. Bumble Bee Foods LLC*, 2023 ONSC 4408, Perell J. sets out at paragraph 95 the elements of a claim of civil conspiracy as follows:

- 1) two or more defendants make an agreement to injure the plaintiff;
- 2) the defendants: (a) use some means (lawful or unlawful) for the predominant purpose of injuring the plaintiff, or (b) use unlawful means with knowledge that their acts were aimed at the plaintiff and knowing or constructively knowing that their acts would result in injury to the plaintiff;
- 3) the defendants act in furtherance of their agreement to injure; and,
- 4) the plaintiff suffers damages as a result of the defendants' conduct.

[95] The fact that a contract caused economic loss to a party does not establish conspiracy to injure on its own. The plaintiff must show that the predominant purpose of the lawful conduct was to harm the plaintiff. Where the defendants are predominantly motivated by their own self-interests, they are not liable even if the plaintiff is harmed by their conduct (*Lilleyman*, at paras. 99-100).

[96] The purpose of the *Unconscionable Transactions Relief Act* is to relieve a party from the obligations of a contract when the contract is made without informed consent or where there is unequal bargaining power (*Grand Ridge Estates Limited v. Breadner Holdings Inc.*, 2018 ONSC 655, at para. 88).

[97] The defence of unconscionability requires proof of only two elements, namely an inequality of bargaining power and a resulting improvident bargain (*Uber Technologies Inc. v. Heller*, 2020 SCC 16, [2020] 2 S.C.R. 118, at para. 65).

[98] An inequality of bargaining power exists when one party cannot adequately protect their interests in the contracting process (*Uber Technologies*, at para. 66).

[99] The Supreme Court also described inequality of bargaining power as the inability of one of the parties to understand and appreciate the full import of the contractual terms (*Uber Technologies*, at para. 71).

[100] The Supreme Court states “[a] bargain is improvident if it unduly advantages the stronger party or unduly disadvantages the more vulnerable” (*Uber Technologies*, at para. 74), and that improvidence must be assessed contextually as “[a]n undue advantage may only be evident when the terms are read in light of the surrounding circumstances at the time of contract formation, such as market price, the commercial setting or the positions of the parties” (at para. 75).

[101] The Supreme Court also states that if a person is in desperate circumstances in which almost any agreement will be an improvement over the status quo, the emphasis should be on whether the stronger party has been unduly enriched. An example of unjust enrichment is if the price of goods or services departs significantly from the usual market price (*Uber Technologies*, at para. 76).

[102] A high interest rate is not necessarily excessive. In *Aditcorp Holdings Inc. v. 2535679 Ontario Inc.*, 2022 ONSC 854, at para. 51, the Court acknowledged that the interest rate was high, but found that both parties had knowledge of this rate, and the rate did not rise to the level of excessive.

[103] The onus of proof that an interest rate is excessive is on the party claiming unconscionability (*Richmond v. James*, 2008 CanLII 73705 (Ont. S.C.)).

ANALYSIS

a) Is there a genuine issue for trial regarding the Plaintiffs' claim for summary judgment?

[104] The Plaintiffs' case is straight forward. The two Plaintiffs, Flexpark and Westhaven, advanced mortgage loans totaling \$980,000 to Ms. Matsvayi. These loans became due on June 1, 2020, and have not yet been repaid.

[105] The Defendants do not dispute that they borrowed funds from the Plaintiffs, and that these funds have not been repaid. They also do not contest that the loan documents signed by them say what they say, or that the mortgage documents were validly registered. The main objection of the Defendants is that they claim they were not aware of all the terms of the loans due to fraudulent behavior on the part of the Defendants to the Counterclaim.

[106] The Defendants provide affidavit evidence referring to a friend, Mr. Boahene, who was allegedly caught in a similar situation of agreeing to mortgage

loans which he ultimately had no ability to repay, which resulted in the loss of his house. However, the Defendants do not present any affidavit evidence from this individual. The comments that Ms. Matsvayi attributes to this individual in her affidavit are inadmissible hearsay, and cannot be considered by me on this motion.

[107] The Defendants also provide an affidavit from Mr. Groccia and one other individual from an unrelated lawsuit involving mortgage loans provided by Mr. Groccia, and a transcript of a phone call between him and another individual who is not involved in the present case before me. The Defendants suggest that this affidavit evidence demonstrates that Mr. Groccia has been involved in other fraudulent real estate deals. This evidence provided by the Defendants is not relevant to the issues before me. Mr. Groccia's involvement in other litigation does not change the fact that his company Westhaven, and the Plaintiff Flexpark, have provided over \$800,000 in funding to the Defendants that has never been repaid. I must make my decision considering the evidence before me involving the litigants in this action.

[108] The Defendants allege (and Mr. Groccia denies) that Mr. Groccia was in a romantic relationship with Mr. Quattrociocchi at the time the mortgage loans were arranged by Ms. Quattrociocchi. I do not have any evidence before me to make that finding. However, even if that circumstance were true, it does not change the

fact that Mr. Groccia's company has advanced money to Ms. Matsvayi, and she has not repaid the loans pursuant to the terms of the mortgage.

[109] The Defendants suggest that the interconnectedness between the Defendants to the Counterclaim is evidence that supports their theory that the Defendants conspired to defraud them. I cannot make that finding on the evidence before me. It may be that Mr. Groccia had had pre-existing relationships with Ms. Quattrociochi or others that are named as Defendants in the Counterclaim, prior to loaning funds to the Defendants. However, these relationships if they existed, cannot be presumed to be proof of fraud.

[110] The Defendants have not put forward proof of the alleged fraudulent activity before me, nor did they cross-examine any of the Defendants to the Counterclaim prior to arguing this motion.

[111] The urgency to obtain financing for the Defendants was created when Mr. Madzima signed the Agreement of Purchase and Sale on March 12, 2019, before the financing to make the purchase was secured. Whether or not Mr. Srivastava and Ms. Quattrociochi have any legal liability for the fact that the original Agreement was signed is not before me. However, the existence of the signed Agreement resulted in the need for Mr. Madzima and Ms. Matsvayi to obtain financing to permit them to close on the house purchase. The Defendants did not

present any evidence to show that financing was available to them from anyone other than Flexpark and Westhaven.

[112] I also note that Mr. Madzima was aware, or ought to have been aware, that CMHC had an outstanding judgment against him for \$176,315.80. Although this factor may have been the reason the Defendants sought loans from private lenders, neither Defendant provides direct evidence as to why they did not attempt to secure funding for their mortgage from a bank.

[113] While the fees charged by the lenders are high, the Defendants provide no expert evidence that the interest rate and lenders fees contained in the mortgage agreements are unreasonably high. I therefore have no evidence before me that there is anything inherently fraudulent about this lending arrangement. I do, however, have affidavit evidence from Ms. De Bartolo that private mortgage rates are generally more expensive than the interest rates obtained through a bank, and that the interest rates applied to the mortgages in question were not extraordinarily high.

[114] Ms. Matsvayi states that she did not understand the trust ledger statement, or any of the other mortgage documents signed by her. However, the lender Plaintiffs were not involved in the discussions between these parties regarding the mortgage documentation. Similarly, the Plaintiffs were not present during any of the exchanges between Ms. Matsvayi and her lawyer.

[115] Mr. Groccia was also clear in his affidavit evidence that he did not have any communication or contact with the Defendants prior to advancing the mortgage loan to them through Westhaven.

[116] The facts before me are similar to those considered by Emery J. in *Acquaviva v. Holmes*, 2022 ONSC 1295. In that case, the Defendant claimed that she unwittingly signed two mortgages for her home that were in excess of her ability to repay. The mortgages went into default, and eventually the lenders sued the Defendant to recover the monies loaned to them. At para. 41 of his decision, Emery J. states:

The amounts owed by Ms. Holmes to the Acquavivas are liquidated damages for money borrowed. They are separate and distinct from any claims that Ms. Holmes may have against any mortgage broker, lawyer, or other parties with whom she has had dealings prior to the Acquavivas.

[117] Emery J. also states at para. 42 of his decision:

An allegation that a borrower entered into a loan agreement or granted a charge because of the misfeasance of third parties does not mean that the borrower is not liable to repay the borrowed funds. At most, it provides a basis for a claim that a borrower may have against another for the funds borrowed from the lender. See *2165330 Ontario Inc. v. Finch*, 2015 ONSC 5789 (Div. Ct.).

[118] The Defendants do not provide actual evidence of fraud or conspiracy on the part of any of the moving Defendants to the Counterclaim.

[119] The Plaintiffs have successfully demonstrated that there is no genuine issue for trial with respect to their claims against the Defendants. The Plaintiffs are entitled to judgment for the amounts owed to them by the Defendants pursuant to the terms of the mortgages, subject to the Counterclaim.

Does the Unconscionable Transactions Relief Act apply?

[120] There is not sufficient information before me to relieve the Defendants from their mortgage obligations to Flexpark and Westhaven under the *Unconscionable Transactions Relief Act*.

[121] The Defendants argue that the two mortgage agreements should be considered as one transaction and discharged pursuant to the *Unconscionable Transactions Relief Act*. The fact that some of the interest payments from the first mortgage were incorporated into the second mortgage lends support to the Defendants' argument that the two mortgages should be considered as a single transaction, for the purpose of considering the application of the *Unconscionable Transactions Relief Act*. I will therefore treat both mortgages as a single transaction for the purposes of determining if the transaction rises to the level of unconscionability.

[122] A transaction must involve inequality of bargaining power which results in an improvident bargain to be deemed unconscionable (*Uber Technologies*, at paras. 66-70).

[123] There is no question that the interest rates charged to the Defendants on these mortgage loans were high. There is also no question that lenders' fees charged on these loans were also high. However, the Defendants do not provide any evidence to suggest that the interest rates and lender fees charged on these loans are extraordinary in the realm of private mortgages. Conversely, Ms. De Bartolo provides evidence that the interest rates charged were not unreasonable for private loans.

[124] The Defendants knew that the first year of payments were interest-only payments, and that the principal would be due and owing after the first year. They provide no evidence as to what steps they took to secure additional financing for their mortgages prior to the expiration of the one-year period.

[125] The Defendants do not provide sufficient evidence at this motion to demonstrate that the terms of the contract were very unfair, that the consideration was grossly inadequate, or that there was an inequality of bargaining power between the parties, particularly since Ms. Matsvayi had her own lawyer to review the mortgage documents. I therefore find on the evidence before me that the Defendants are unable to utilize the *Unconscionable Transactions Relief Act* to set

aside their mortgage obligations to the Plaintiffs. Flexpark and Westhaven shall accordingly have summary judgment as against the Defendants as set out in paragraph 119 of this decision.

b) Have the moving Defendants to the Counterclaim, Flexpark, Westhaven, Luigi Latto, Peter Groccia, and Rosa Groccia established that there is no genuine issue for trial?

[126] The Defendants to the Counterclaim, Flexpark, Westhaven, Luigi Latto, Peter Groccia, and Rosa Groccia, have not established that there is no genuine issue for trial regarding the claims made against them in the Counterclaim. On the record before me, I am unable to make the necessary credibility findings to determine if the Counterclaim should be dismissed.

[127] The Defendant to the Counterclaim, Peter Groccia, provides several affidavits on behalf of the Plaintiffs, Flexpark and Westhaven, in which he denies any involvement in a conspiracy, misrepresentation, or fraud with respect to these mortgages. The Defendants did not choose to cross-examine Mr. Groccia with respect to his affidavit evidence. Consequently, the evidence from Mr. Groccia denying any involvement in a conspiracy, misrepresentation or fraud remains unchallenged. I was not provided with affidavits from Rosa Groccia or Luigi Latto.

[128] It should be noted, however, that the Defendants were both very clear in their evidence that the mortgage agreements that they signed contained different terms than the mortgage terms that they were told by Ms. Quattrociocchi and Mr.

Srivastava. Ms. Matsvayi also gave evidence at her cross-examination that when she viewed the trust ledger statement dated May 24, 2019 from her lawyer, Gabriel Brutto, she concluded that the total amount outstanding on the mortgage loans was \$837,627.05. This trust ledger statement does not reflect the lender referral fees and prepaid interest for the second mortgage that are set out in the mortgage loan documents. I was not provided with evidence regarding the reason why the trust ledger statement provided to the Defendants was missing this information.

[129] Notwithstanding the failure of the Defendants to demonstrate evidence of fraud on the part of Flexpark, Westhaven, Luigi Latto, Peter Groccia, and Rosa Groccia on the record before me, it remains unknown at this point if there will be evidence in the ongoing litigation involving these Defendants to the Counterclaim that may affect the Defendants' claim for relief from their mortgage loan obligations to these parties.

[130] I therefore do not have sufficient information or evidence to make the findings of fact required to allow me to conclude that there is no genuine issue for trial regarding the Defendants' Counterclaim against these parties.

[131] A motions judge may stay the enforcement of a summary judgment order pending the determination of a Counterclaim (*Iraco Ltd. et al. v. Staiman Steel Ltd.* (1987), 62 O.R. (2d) 129, (C.A.)). As the Counterclaim against Flexpark and Westhaven will be proceeding to trial, and arises from the same set of transactions

as the main action, I find that it is in the interests of justice that I stay the enforcement of the judgment in favour of the Plaintiffs pending the determination of the Counterclaim.

c) Have the moving Defendants to the Counterclaim, Sandra De Bartolo and Di Mauro Law Professional Corporation, established that there is no genuine issue for trial?

[132] The Defendants to the Counterclaim, Ms. De Bartolo and Di Mauro Law Professional Corporation, have successfully established that there is no genuine issue for trial in the Counterclaim filed against them.

[133] I acknowledge the Law Society of Ontario's tribunal decision *Law Society of Ontario v. Harrison* found that real estate lawyers acting for lenders have some responsibility towards the borrowers. However, the mandate of the Law Society is the protection of the public, which involves a different analysis than a consideration of whether Ms. De Bartolo owed a duty of care to the Defendants. There is no evidence before me that the Defendants relied upon the Defendants to the Counterclaim, Ms. De Bartolo and Di Mauro Law, to perform any services for them as is required to make a finding of liability pursuant to this Court's decision in *Chand Morningside Plaza*. I therefore find that these Defendants to the Counterclaim did not owe a duty of care to Ms. Matsvayi.

[134] The Defendants have failed to establish a genuine issue for trial with respect to the Counterclaim brought against Ms. De Bartolo and Di Mauro Law

Professional Corporation. The Defendants had no dealings or communication with these parties. Their role was simply to prepare the paperwork to arrange mortgages for their lender clients.

d) Is this an appropriate case for partial summary judgment?

[135] This is an appropriate case for partial summary judgment with respect to the Counterclaim against Ms. De Bartolo and Di Mauro Law Professional Corporation.

[136] I will address the three-part test for partial summary judgment motions as set out in *Malik*.

i) Will dividing the determination of the case into several parts prove cheaper for the parties?

[137] There are presently two Plaintiffs in this action, two Defendants, and twelve Defendants to the Counterclaim (two of whom are the two Plaintiffs). Removing two Defendants from the Counterclaim will streamline the action. With each party that is removed from the litigation, there is one less case to put forward, and one less party to cross-examine each witness. Removing these two Defendants to the Counterclaim will unquestionably shorten the trial and thereby save legal costs for the parties.

ii) Will a partial judgment get the case in and out of the court system more quickly?

[138] A shorter trial will likely result in an earlier trial date. In addition, the quantum of damages for the Counterclaim that will carry on will be clear and quantified, which will shorten the length of the trial.

iii) Will a partial summary judgment result in inconsistent findings by the multiple judges who will touch the divided case?

[139] The claims made by the Defendants as against Ms. De Bartolo and Di Mauro Law Professional Corporation can be considered separately from the claims made by the Defendants against the other Defendants to the Counterclaim for the following reasons:

- a) These Defendants to the Counterclaim did not represent Ms. Matsvayi, and therefore did not owe her a duty of care (*World Financial Solutions Inc. v. 2573138 Ontario Ltd.*, 2024 ONSC 1748, at para. 48, citing *Diamond Contracting Ltd. v. MacDearmid* (2006), 214 O.A.C. 92 (C.A.)). Ms. Matsvayi had her own independent counsel representing her with respect to the mortgage transactions.
- b) The evidence from Ms. De Bartolo is that she submitted the mortgages but did not register them. Ms. Matsvayi's own lawyer, Mr. Brutto, registered the mortgages on title. Both Ms. De Bartolo and Ms. Matsvayi agree that they had no contact or discussions prior to the mortgages being placed on title to the property.
- c) Ms. De Bartolo indicated in her affidavit that she relied upon the documents prepared by the Brutto Defendants to the Counterclaim which were signed by Ms. Matsvayi, including summaries setting out the fees that were being paid using the mortgage funds, directions how to pay out the mortgage funds, and acknowledgments that Di Mauro Law was acting only on behalf of DSMNK and 2624221 Ontario Inc. (now Westhaven).

- d) Ms. Matsvayi provides no evidence to suggest that Ms. De Bartolo had any reason to doubt that Ms. Matsvayi fully understood the content of the documents that she had signed, or that the Brutto Defendants to the Counterclaim obtained proper instructions from Ms. Matsvayi.
- e) Ms. De Bartolo provides evidence that it is not uncommon for her clients to use her business address as their address to register a mortgage, or to use her firm's address for service.
- f) Ms. Matsvayi provides no evidence that Ms. De Bartolo or Di Mauro Law Professional Corporation was involved in a conspiracy to commit fraud against her.
- g) Ms. De Bartolo provides affidavit evidence that she was not involved in a conspiracy scheme, and the Defendants chose not to cross-examine her.
- h) Ms. De Bartolo and Di Mauro Law did not provide any funds or mortgage loans to the Defendants.
- i) Ms. Matsvayi does not provide an expert report to identify the reasons and evidence supporting her allegation that Ms. De Bartolo owed her a duty of care and breached that duty of care (*Flood v. Boutette*, 2021 ONCA 515, at para. 72).

[140] These Defendants were simply acting for their clients, the lenders. There is no risk that the remaining action will produce a verdict that is inconsistent with a dismissal of the Counterclaims against these Defendants.

CONCLUSION

[141] The Plaintiff, Flexpark, shall have judgment against the Defendants for \$773,297.82 plus interest at 8% per annum retroactive to March 24, 2022. The

Plaintiff, Westhaven, shall have judgment against the Defendants for \$498,345.20 plus interest at 14% per annum retroactive to January 22, 2024. Enforcement of both judgments shall be stayed pending the disposition of the Counterclaim at trial.

[142] The motion brought by Flexpark, Westhaven, Luigi Latto, Peter Groccia, and Rosa Groccia to dismiss the Counterclaim against them is dismissed. It is in the interests of justice that a trial on these issues proceed rather than to use my enhanced fact-finding powers provided under Rule 20.04 (2.1), as there is a genuine issue requiring a trial regarding the allegations of fraud and collusion made by the Defendants.

[143] The motion brought by Ms. De Bartolo and Di Mauro Law Professional Corporation to dismiss the Counterclaim against them is granted. There is no risk of inconsistent findings of fact regarding these parties in the ongoing litigation. By removing these Defendants to the Counterclaim from the litigation, the trial will be shortened, and the costs of the litigation will therefore be reduced for the remaining parties.

COSTS

[144] If the parties are unable to agree upon costs, Ms. De Bartolo and Di Mauro Law Professional Corporation are to serve and file submissions no longer than two pages, double spaced, by August 2, 2024, not including any Bills of Costs or Offers to Settle.

[145] Since the success of the balance of the motion was divided, it is my inclination not to award costs to either the Plaintiffs or the Defendants. If there is an offer to settle that any of these parties wishes to submit for my review that is relevant to the issue of costs, then they may make a submission no longer than two pages, double spaced, by August 2, 2024.

[146] All responding cost submissions must be served on the opposing parties by August 15, 2024.

[147] All cost submissions must also be sent to my judicial assistant at Bihara.wijewardena@ontario.ca and uploaded to Case Center. If I have not received cost submissions within the time frames set out above, I make no order as to costs.

Wilkinson J.

Released: July 24, 2024

CITATION.: 2624221 Ontario Inc. v. Matsvayai et al., 2024 ONSC 4167
COURT FILE NO.: CV-20-2084-0000
DATE.: 2024-07-24

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

2624221 ONTARIO INC. and
FLEXPARK INC.

Plaintiff

- and -

MATSVAYI, LUCIA
MADZIMA, BLENDE

Defendant

AND BETWEEN:

LUCIA MATSVAYI

Plaintiff by Counterclaim

- and -

WESTHAVEN INCOME INC., LUIGI LATTO, FLEXPARK INC.,
PETER GROCCIA, ROSA GROCCIA, SABINE QUATTROCIOCCHI
aka BARRAGAN aka SABINE PUCCIARELLI, GABRIEL BRUTTO,
BRUTTO LAW PROFESSIONAL CORPORATION, DI MAURO LAW
PROFESSIONAL CORPORATION, 2666906 ONTARIO INC .,
SANDRA DE BARTOLO, RAMESH SRIVASTAVA aka GARRY
SRIVASTAVA and DSMNK INVESTMENT GROUP LTD.

Defendants to the Counterclaim

RULING ON SUMMARY JUDGMENT MOTION

Wilkinson J.

Released: July 24, 2024