CITATION: Flexpark Inc. v. Ercolani, 2025 ONSC 1520
COURT FILE NO.: CV-18-4161
CV-18-4161-A1
DATE: 2025-03-07

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
FLEXPARK INC	)	J. Butson and C. Internicola for the Plaintiff
	)	
Plaintiff/Defendant by Counterclaim	)	
	)	
- and -	)	
	)	
	)	
PATRIZIA ERCOLANI	)	G. Cadogan, for the Defendant
	)	
Defendant/ Plaintiff by Counterclaim	)	
	)	
	)	**HEARD:** May 21, 2024
And-	)	
DIAMOND CAPTIAL INVESTMENTS INC., SABINE PUCCIARELLI and MARIANN KARAGEORGIEVSKI		

SUMMARY JUDGEMENT
REASONS FOR DECISION

L. Shaw J.

<u>Overview</u>

[1] The plaintiff, Flexpark Inc., moves for summary judgment in connection with funds it loaned to the defendant, Ms. Ercolani, in January 2018 in the sum of $375,000. A second mortgage was registered on title to property owned by Ms. Ercolani, municipally known as 278 Leavens Court, Caledon, Ontario (the "Property") to secure the loan. The mortgage matured on August 1, 2018. Ms. Ercolani sought an extension to arrange for financing and the parties entered into an agreement to extend the mortgage for one month. Ms. Ercolani did not pay the mortgage when it came due on September 1, 2018. She has made no payment since August 1, 2018. I shall refer to this transaction as the Flexpark Mortgage.

[2] Flexpark seeks payment of $375,000, plus accrued interest payable at the rate of 15% per annum, plus its costs. When the claim was issued on October 1, 2018, the total amount claimed was $395,727.50. That included $14,062.50 which was for a three month pre-payment penalty. During submissions, counsel indicated the Flexpark was no longer seeking payment of that amount.

[3] Flexpark also seeks possession of the property as a result of Ms. Ercolani's default and her failure to pay out the mortgage.

[4] Flexpark argues that there is no genuine issue that requires a trial as this is a simple mortgage enforcement matter; Ms. Ercolani is in default and the mortgage has matured, without payment.

[5] Ms. Ercolani argues that this summary judgment motion should be dismissed on several grounds. While her statement of defence denied the existence of the Flexpark Mortgage, during submissions, she did not dispute that funds were advanced and a mortgage registered on title.

[6] Ms. Ercolani also argues that she should be discharged from all obligations owing under the Flexpark Mortgage as it is harsh and unconscionable; she relies on s. 2 of the *Unconscionable Transactions Relief Act*, R.S.O. 1990, c. U-2 (the *UTRA*").Ms. Ercolani also argues that the Flexpark Mortgage should be "rescinded" as it was the product of undue influence by Flexpark and its unconscionable conduct. She argues that these issues require at trial.

[7] She also disputes the amount that was advanced to her. Rather than $375,000 as Flexpark claims, Ms. Ercolani says that only $328,125 was advanced to her. She argues that there is a genuine issue about the amounts advanced to her and therefore owing under the Flexpark Mortgage.

[8] Although not pleaded, Ms. Ercolani argues that these proceedings are null and void as the statement of claim was issued prior to the expiry of the time stipulated in the notice and sale and therefore contravened s. 42 of the *Mortgages Act*, R.S.O. 1990, c. M.40.

[9] Lastly, Ms. Ercolani alleges that Flexpark's evidentiary record filed for this motion is insufficient to discharge its onus to prove that there is no genuine issue that requires a trial.

[10] For the reasons that follow, I find that Flexpark has discharged its onus to prove that there is no genuine issue for trial. Ms. Ercolani borrowed money from Flexpark, she agreed to have a mortgage registered on title to secure that loan, and she has not made any payment since August 1, 2018. I also find that the terms of the mortgage are not harsh and unconscionable and that Flexpark did not take advantage of any power imbalance with Ms. Ercolani. I find that Ms. Ercolani was not under duress when she entered into the mortgage agreement.

[11] For the reasons that follow, I therefore grant summary judgement and find that Ms. Ercolani must pay Flexpark $356,250 plus interest at the rate of 15% per annum from August 1, 2018 to the date the motion was argued, plus costs.

Background and Review of the Pleadings

[12] On January 11, 2024, I released reasons striking out several paragraphs and exhibits attached to Ms. Ercolani's affidavit sworn in response to this summary judgment motion. I also dismissed Flexpark's motion that Mr. Cadogan be removed as lawyer of record for Ms. Ercolani: *Flexpark Inc. v. Ercolani*, 2024 ONSC 260.

[13] The paragraphs and exhibits that were struck were with respect to evidence that breached the implied undertaking rule and/or was inadmissible hearsay

evidence that was being relied on for the truth of its contents. I also struck evidence with respect to an alleged fraudulent *Ponzi* scheme that Ms. Ercolani was relying on to allege the mortgage was not enforceable as that was not pleaded in Ms. Ercolani's defence and counterclaim.

[14] Mr. Cadogan, counsel for Ms. Ercolani, was either a party or counsel in other actions that involve claims of an alleged *Ponzi* scheme, involving mortgages arranged through the law firm of Anthony Maniaci, Flexpark's lawyer for the Flexpark mortgage. I declined to remove Mr. Cadogan as lawyer of record for Ms. Ercolani based on the statement of defence and counterclaim filed on behalf of Ms. Ercolani as it does not include an allegation that the mortgage was not enforceable as it was part of a larger *Ponzi* scheme. I therefore found that based on the existing pleading, there was no conflict of interest or risk that Mr. Cadogan would prefer his own interests over those of Ms. Ercolani or that he would soft-peddle his defence of Ms. Ercolani.

[15] At no time has Ms. Ercolani sought to amend her statement of defence and counterclaim to include allegations that the Flexpark mortgage was part of a larger *Ponzi* scheme involving various parties and mortgages and is therefore not enforceable.

[16] As a result of Ms. Ercolani's failure to pay the mortgage when it matured on August 1, 2018 and after a one-month extension was granted to September 1, 2018, Flexpark commenced power of sale proceedings. It issued a notice of sale

dated September 19, 2018. The notice provided that Ms. Ercolani had until October 26, 2018, to pay the outstanding balance owing.

[17] According to the notice of sale, the following amount was owing:

For principal as of August 1, 2018	$375,000.00
September mortgage payment	$ 4,687.50
Pre-payment Penalty (3 months)	$ 14,062.50
Legal costs	$ 1,750.00
HST on legal fees	$ 227.50
TOTAL	$395,727.50

[18] A statement of claim was issued on October 1, 2018, and served on October 3, 2018.

[19] Ms. Ercolani served and filed a statement of defence and counterclaim on January 31, 2019. In that pleading, she summarized the history of various mortgages registered on title to her property and the involvement of other parties in the mortgage financings.

[20] Despite denying the existence of the Flexpark mortgage, her pleading in fact confirms that the mortgage exists. In her defence, Ms. Ercolani does not dispute that Flexpark loaned funds to her and that, as security, a mortgage that was registered on title to her property.

[21] I will review the defence and counterclaim filed by Ms. Ercolani as the pleadings form the backbone of a summary judgment motion.

[22] According to her pleading, on June 18, 2013, Ms. Ercolani and Mr. Cosimo Furlano purchased the property. A first mortgage in favour of Home Trust Company for $367,999 was registered on title that same day.

[23] On May 1, 2014, a mortgage was registered on title to the property in favour of Mainline Capital Corp. for $41,000.

[24] On July 2, 2015, Ms. Ercolani registered another mortgage on title to the property in favour of Mainline Capital Corp. for $15,000.

[25] On December 15, 2015, a Notice of Security Interest was registered on title to the property by Reliance Home Comfort for $14,200.

[26] In early 2017, Ms. Ercolani sought to consolidate the mortgages on title. In her statement of defence, Ms. Ercolani pleads that she was referred to Ms. Sabine Pucciarelli of Diamond Capital Investments Inc., an alleged mortgage broker, who suggested that Ms. Ercolani obtain a second mortgage to pay off the other mortgages registered on title, other than the first mortgage.

[27] According to her statement of defence, on March 13, 2017, Ms. Ercolani and Mr. Furlano agreed to execute a second mortgage in favour of Francesca Greco, Angela Tedesco and Maria Morano for $280,000 (the “Greco Mortgage”). The interest charged on that mortgage was 12% calculated monthly and was for a term of six months.

[28] The Statement of Advance directed that the proceeds from the Greco Mortgage be disbursed as follows:

Received from Mortgage:		$280,000.00
Paid ILR Fee:	$450.00	
Paid IAD:	$2,800.00	
Paid Total Mortgage Fee:	$33,600.00	
Paid Prepayments:	$16,800.00	
Paid to Discharge previous 2nd Mortgage	$41,000.00	
Paid to Discharge Previous 3rd Mortgage:	$15,000.00	
Paid to Discharge Previous 4th Mortgage:	$11,074.00	
Paid Title Insurance:	$376.92	
Paid Legal Fees and Disbursements:	$2,081.13	
Paid to Ms. Ercolani Following Closing:	$156,817.95	

[29] Ms. Ercolani alleges that Ms. Pucciarelli never explained to her if the mortgage fees were paid to Ms. Pucciarelli or anyone else. Ms. Ercolani also alleges that Ms. Pucciarelli failed to explain her role in the Greco mortgage and how she was to be paid. Ms. Ercolani denies having any legal representation for the Greco mortgage.

[30] According to the statement of defence, when the Greco mortgage matured, Ms. Pucciarelli advised Ms. Ercolani to obtain a new second mortgage to pay off the Greco mortgage.

[31] In para. 15 of the statement of defence, Ms. Ercolani acknowledges executing a second mortgage in favour of Flexpark for $375,000 that was registered on title on January 12, 2018 (the “Flexpark Mortgage”). She acknowledges that the interest charged was 15% calculated monthly and that the mortgage was for a term of six months.

[32] In para. 16, Ms. Ercolani acknowledges that a Statement of Advance set out the breakdown of payment of the mortgage funds as follows:

Received from Mortgage:		$375,000.00
Paid to Discharge First Second Mortgage:	$295,104.60	
Paid Prepaid Mortgage for 6 Months:	$28,125.00	
Paid Total Mortgage Fee:	$40,750.00	
Paid Interest Adjustment:	$3,082.00	
Paid to Prisila Pietropaolo Promissory Note:	$2,300.00	
Paid Title Insurance:	$392.62	
Paid Legal Fees and Disbursements:	$1,717.47	
Paid to trust to Ms. Ercolani following closing:	$3,528.11	

[33] Ms. Ercolani alleges that Ms. Pucciarelli never explained to her if the mortgage fee was going to be paid to Ms. Pucciarelli or anyone else. She pleads, again, that Ms. Pucciarelli failed to explain her role in the Flexpark Mortgage and how she was to be compensated. These are the same allegations she made in connection with the Greco mortgage.

[34] In her statement of defence, Ms. Ercolani admits that she was represented by a lawyer, Ms. Mariann Karageorgievski, for the Flexpark Mortgage and that she was referred to Ms. Karageorgievski by Ms. Anthony Maniaci, the lawyer who acted for the mortgagees in both the Greco and Flexpark mortgages. She alleges that Mr. Maniaci represented Flexpark in numerous other mortgage transactions.

[35] Ms. Ercolani alleges that due to excessive and unconscionable fees, she could not meet the payments of both mortgages. When the Flexpark Mortgage came due, she admits to requesting an extension to find other financing. Ms. Ercolani pleads that due to unconscionable fees, she could not secure financing and her request for another extension was rejected by Flexpark.

[36] Ms. Ercolani alleges that Flexpark took unfair advantage of her financial position by immediately demanding payment of an excess bonus, fee and charge that rendered the transaction harsh and unconscionable. She alleges that Flexpark knew she was unsophisticated in these matters and not in a good bargaining position since she needed to pay the Greco mortgage.

[37] Ms. Ercolani seeks to set aside the Flexpark mortgage on the basis that its terms were harsh and unconscionable. She also alleges that Flexpark knew she was unsophisticated in these matters and not in an equal bargaining position.

[38] In the statement of defence, she also makes allegations about the conduct of Ms. Pucciarelli and Ms. Karageorgievski.

[39] In her counterclaim, in addition to seeking an order to set aside the mortgage, Ms. Ercolani also seeks an order that the mortgage be varied to relieve her from paying excessive amounts or that the mortgage be rescinded as it was the product of undue influence, unconscionability, and breach of fiduciary duty.

[40] Flexpark filed a reply and defence to counterclaim in February 2019 and then an amended reply on March 19, 2019, denying the allegations made by Ms. Ercolani.

[41] On March 4, 2019, Ms. Ercolani commenced a third party claim against Ms. Pucciarelli, Diamond Capital Investments Inc. (a company in which she claims Ms. Pucciarelli is an officer and director), and Ms. Karageorgievski. She seeks contribution and indemnity from these third parties for any amounts which she is required to pay to Flexpark. She also seeks payment for unwarranted and unconscionable fees, costs, and interest she paid in relation to the mortgage. She seeks punitive and exemplary damages from Ms. Pucciarelli and Diamond Capital.

[42] In the third party claim, Ms. Ercolani claims that under the direction of Ms. Pucciarelli, she signed both second mortgages which included several significant fees. Ms. Ercolani also alleges that Mr. Maniaci was the lawyer for Flexpark and had finalized numerous other mortgages that were arranged by Ms. Pucciarelli. She alleges that Ms. Karageorgievski failed to explain Ms. Pucciarelli's role and how she was to be compensated. She also alleges that Ms. Karageorgievski failed to inform her that Ms. Pucciarelli was not a licensed mortgage broker.

[43] Ms. Ercolani alleges that Ms. Pucciarelli knowingly, fraudulently, and deceitfully misrepresented to her that she was a licensed mortgage broker possessing the skills, knowledge, and expertise to provide mortgage advice to her. She said this was done so that Ms. Pucciarelli and her company, Diamond Capital, could benefit from unconscionable fees.

[44] She alleges that Ms. Pucciarelli owed her a fiduciary duty and breached that duty by failing to act in Ms. Ercolani's best interest.

[45] In both the defence and third party claim, Ms. Ercolani alleges that the Property was overleveraged and that she was not informed of that.

[46] In her defence to the third party claim, Ms. Pucciarelli acknowledges that she is a director and officer of Diamond Capital. She denies acting as agent for Ms. Ercolani. According to Ms. Pucciarelli's defence, Ms. Ercolani approached her seeking to refinance the Property, and for both the Greco and Flexpark mortgages, she referred Ms. Ercolani to Mr. Maniaci. Ms. Pucciarelli denies having any direct involvement with the Greco or Flexpark mortgages. She denies that she represented herself as a licensed mortgage broker and denies entering any contract with Ms. Ercolani.

Summary Judgement Legal Framework

[47] Before reviewing the evidence, I will review the test for summary judgment as set out in Rule 20.04(2.1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg.

194. Summary judgment is to be granted where the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence. Subrules 20.04(2.1) and (2.2) provide for additional fact-finding powers available to the court. Specifically, Rule 20.04(2.1) permits the court to weigh the evidence, evaluate the credibility of the deponent and draw any reasonable inference from the evidence in order to consider whether there is a genuine issue requiring a trial.

[48] In *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, the Supreme Court of Canada held that on a motion for summary judgment, the court should first determine if there is a genuine issue requiring trial based only on the evidence in the motion record without using any of the enhanced fact-finding powers available under subrules 20.04(2.1) and (2.2). The factual record should be reviewed, and summary judgment granted if there is sufficient evidence to fairly and justly adjudicate the dispute. The court should also consider if summary judgment would be a timely, affordable, and proportionate procedure. The Supreme Court specifically found that summary judgment rules are to be interpreted broadly. The focus must be on providing access to justice in a timely manner.

[49] In *Sweda Farms v. Egg Farmers of Ontario*, 2014 ONSC 1200, aff'd 2014 ONCA 878, Corbett J. reviewed the process by which the court considers whether summary judgment is appropriate. At para. 33, he found that the court should assume that that the parties have placed before it all the evidence that will be available at trial. In essence, a party is expected to put their best foot forward.

Based on that record, the court then decides if it can make the necessary findings of fact, apply the law to the facts, and achieve a fair and just adjudication of the case on the merits.

[50] The onus for proving that there is no genuine issue requiring a trial is on the moving party. Once the moving party discharges their burden, the onus shifts to the responding party to provide evidence that there is a genuine issue that requires a trial. The responding party cannot rely on mere allegations or denials in their statement of defence. An adverse inference can be drawn if the responding party fails to present affidavit material or other evidence to support the allegations or denials in their pleadings: *Pearson v. Poulin*, 2016 ONSC 3707 at para. 40. The responding party must set out in affidavit format, the admissible evidence upon which they rely to argue that there is a genuine issue for trial. I am therefore entitled to presume that the record before me is complete and contains all the evidence that a party intends to rely upon as if this was a trial.

[51] If there is a genuine issue that requires a trial, the judge hearing the motion should then determine if a trial can be avoided by using the enhanced fact-finding powers in Rule 20.04(2.1). The enhanced fact-finding powers includes weighing the evidence, evaluating the credibility of a deponent, and drawing any reasonable inference from the evidence. Pursuant to Rule 20.04(2.2), the court may find that in order to exercise its powers under 20.04(2.1), it can order that oral evidence be presented.

[52] The goal at all times is to determine if the use of the enhanced powers will lead to a fair and more just result keeping in mind the principles of proportionality and affordability and ensuring a timely adjudication on the merits,

[53] Based on the evidentiary record before me, I am satisfied that I can make the necessary findings of fact and apply the legal principles to arrive at a just and fair determination of the issues in dispute. I can determine if there was a valid mortgage that should be enforced, what is owing, and whether there should be any equitable relief granted to the defendant based on claims of unconscionability and duress.

Review of the Evidence

[54] Mr. Peter Groccia, the President of Flexpark, swore an affidavit for this motion. His evidence is that the Flexpark Mortgage, registered on title to the Property, secured the loan of $375,000. It was for a term of 6 months, maturing on August 1, 2018. Interest was calculated at the rate of 15%. The monthly mortgage payments, of interest only, were $4,687.50.

[55] Ms. Ercolani executed an acknowledgement that she received a copy of the standard charge terms and that the terms were incorporated in the mortgage. The standard charge includes a term that upon default of payment for at least 15 days, the chargee may, on at least 35 days notice, enter on and lease or sell the land.

[56] The standard charge terms also includes a term that if the chargor is in default, then at the option of the chargee, the whole of the principal amount owing, together with accrued interest, shall immediately become due and payable.

[57] Ms. Ercolani filed as evidence a document entitled "2nd Mortgage Commitment" dated January 9, 2018. In that document, the name of the lender is not identified. The document was signed by Ms. Ercolani; there is no signature for the lender. According to Ms. Ercolani, she signed the form at the law office of Polsenelli Law, where her lawyer, Ms. Karageorgievski worked. While Ms. Pucciarelli's name is typed as a witness, she did not sign it.

[58] Although not signed, the document was for the Flexpark Mortgage. It states that the monthly interest payments are $4,687.50 and that the total amount of $28,125 for the six months is to be prepaid and deducted form the mortgage advance. There is no reference to any mortgage or lender fees in that document.

[59] The Mortgage Commitment also sets outs several terms and conditions including requiring a real estate comparable showing that the value of the property is not less than $700,000 and that the first mortgage shall not be increased from $330,000.

[60] Ms. Ercolani signed a document entitled "Statement of Advance: Re Direction re Funds" dated January 10, 2018. That direction authorized Mr. Maniaci to disburse the mortgage proceeds as follows:

Received from 2nd mortgagee - Flexpark Inc.		$375,000.00
Paid to discharge previous 2nd mtg - Marrano Maria, Tedesco, Angela & Greco, Francesca	$295,104.60	
Paid prepaid mortgage for 6 months	28,123:00	
Paid total mortgage fee	40,750.00	
Paid Interest Adjustments	3,082.20	
Paid to Prisila Pietropaolo promissory note	2,300.00	
Paid Title Insurance	392.62	
Paid legal fees and disbursements - Anthony Maniaci Barrister and Solicitor	1,717.47	
Paid to Polsinelli Law Professional Corporation, in trust following closing	3,528.11	
	$375,000.00	

[61] In connection with the payout of the Greco Mortgage, according to a mortgage discharge statement dated October 19, 2017, the principal amount to be discharged on November 1, 2017, was $280,000 plus a per diem of $92.05 after that date, plus legal fees of $640.27. A more up-to-date mortgage discharge statement was not filed by either party.

[62] As the Greco Mortgage was paid out on January 12, 2018, based on the per diem of $92.05, the total interest payable for those 72 days was $6,627.60. When the legal fees of $640.27 are added, the total payout should be $287.267.87. That is $7,386.73 less than the amount listed in the direction regarding payment of the mortgage funds advanced, which said the payout was $295,104.60. No evidence

was led about this discrepancy or if there was a more up-to-date statement that verified the payout. If the payout figure was not correct, that is an issue for Ms. Ercolani to address with her lawyer for this transaction, Ms. Karageorgievski as presumably she obtained the payout information from the second mortgagee on behalf of Ms. Ercolani.

[63] Both parties rely on another document entitled “Form 9D Investment Authority” dated January 11, 2018. That document was addressed to Mr. Maniaci and signed by Mr. Groccia on behalf of Flexpark. It set out the details of the investment including the name of the borrower. The form states that the principal amount of the mortgage was $375,000 and the amount of the loan being advanced was $328,125. The form states that Flexpark is satisfied that the approximate value of the property was $720,000 based on real estate comparables satisfactory to the lender. The details of the disbursements to be made from the mortgage were as follows:

Lender fee	$ 18,750 deducted from the advance
Prepaid Mtg	$ 28,125 deducted from the advance
2605336 Ontario Inc	$ 22,000
IAD	$ 3,082
Discharge of 2nd mtg Greco	$ 295,104.60
Debt paid prom note	$ 2,300 prisila p (sic)
Legal fees of AOM	$ 2,220.09
Balance to Polsinelli	$ 3,528 as per undertaking

[64] According to Ms. Ercolani, 2605336 Ontario Inc. (“260”), to whom $22,000 was paid, was a company that was solely under the control and direction of Ms. Pucciarelli. She did not, however, file a corporate profile for 260 to verify that Ms. Pucciarelli was a shareholder for that company nor did she identify the source of her information about Ms. Pucciarelli’s connection to 260 so I place little if any weight on that evidence.

[65] On January 9, 2018, Ms. Ercolani signed a form entitled “Irrevocable Direction re: Fees” that authorized Mr. Maniaci to deduct $43,750 from the mortgage advance representing the total mortgage fee. I note that the total of the lender fee of $18,750 and the amount paid to 260 of $22,000 totals $40,750 and not $43,750 as noted in the direction signed by Ms. Ercolani.

[66] There were no documents filed regarding the agreement to pay 260 a mortgage fee or to pay Flexpark a lender fee. The only evidence of such payments was from the Directions signed by Ms. Ercolani. There was no mention of these fees in the Mortgage Commitment document.

[67] The form 9D signed by Mr. Groccia that was directed to his lawyer noted that the lender fee of $18,750 and prepaid interest of $28,125 for a total of $46,875 was to be deducted from the mortgage advance. When this amount is deducted from the principal of $375,000, the amount of funds advanced was $328,125 which was the amount noted in the form.

Analysis

a) Is this an Appropriate Case for Summary Judgment?

[68] There is no dispute that money was loaned to Ms. Ercolani that was secured by way of a mortgage registered on title to the Property and that part of those funds were used to pay an existing second mortgage that had matured. There is no dispute that the Flexpark Mortgage matured on September 1, 2018 and that Ms. Ercolani has not paid anything owing since August 1, 2018. Flexpark has therefore discharged its onus to prove there is no genuine issue for a trial regarding the enforcement of the Flexpark Mortgage.

[69] The onus shifts to Ms. Ercolani to demonstrate that there is a genuine issue for a trial. At the core of her challenge to the mortgage is that its terms are harsh and unconscionable. She also argues that Flexpark took advantage of her lack of sophistication and she was under duress.

[70] As discussed below, I find that Ms. Ercolani has failed to discharge her onus to demonstrate that there is a genuine issue requiring a trial regarding the issues she has raised. Based on the evidence, or lack of evidence filed, the issues she has raised can be fairly, expeditiously, and justly determined on the evidentiary record before me for this motion.

[71] I will address several issues raised by Ms. Ercolani before addressing the issues of unconscionability and duress.

b) What was the Amount Advanced to Ms. Ercolani?

[72] If I find that summary judgment should be granted, Ms. Ercolani argues that I should find that $306,125 was advanced to her and not $375,000. She argues that the prepayment of the six months of interest payment of $28,125, and the amount paid for the mortgage fees of $40,750, should not be included in the principal owing to Flexpark.

[73] All documents, including the mortgage commitment and the various directions signed by Ms. Ercolani, clearly state that the 6 months of interest-only mortgage payments were to be prepaid from the mortgage advance. Rather than requiring Ms. Ercolani to pay the interest-only mortgage payments each month from her own funds, the 6 months of payments totaling $28,125 were paid in advance from the mortgage proceeds. That amount is owed by Ms. Ercolani.

[74] According to the form 9D signed by Mr. Groccia, $328,125 was advanced to Ms. Ercolani. As note above, that amount is arrived at by deducting the prepaid interest payments of $28,125 and the lender fee of $18,750 from the principal of $375,000 to arrive at $328,125. If only the prepaid interest is deducted, the amount of the advance is $356,250.

[75] In the Form 9D from Flexpark to Mr. Maniaci, there is reference to a lender fee of $18,750 and a payment to 260 for $22,000 for a total of $40,750. The form

says that the lender fee of $18,750 was to be deducted from the advance. The amount owing to 260 in the sum of $22,000 was not deducted from the advance.

[76] In two directions signed by Ms. Ercolani, the Irrevocable Direction re. Fees dated January 9, 2018, and the Direction re. Funds dated January 10, 2018, there is a reference to mortgage fees. In the Irrevocable Direction re. Fees, Ms. Ercolani directed Mr. Maniaci to deduct $43,750 from the mortgage advance representing the total mortgage fee. In the Direction re. Funds, Mr. Maniaci was directed to pay $40,750 for total mortgage fees. The total of the lender fee of $18,750 and the amount paid to 260 of $22,000 totals $40,750. There is no evidence about why there is a $3,000 difference in the two directions. The statement of advance uses the correct figure of $40,750 so I presume the figure used in the Irrevocable Direction re Fees was an error.

[77] Despite these signed directions regarding mortgage fees, there is no reference to mortgage or lender fees in the mortgage commitment signed by Ms. Ercolani.

[78] The issue of lender fees was addressed in *Acquaviva v. Holmes*, 2023 ONSC 1696. Emery J. relied on *Stoney Creek v. 2459437 Ontario Inc*., 2019 ONSC 2450, aff'd 2020 ONCA 119, where the court upheld the validity of a lender's fee where the parties agreed to those fees as part of the deal: *Acquaviva*, at para. 31. In *Stoney Creek*, Leiper J. found that the parties entered into an agreement for the borrower to pay a lender's fee as a term of the mortgage financing

agreement. The lender's fee was to be deducted from the amount advanced. Based on this agreement, Leiper J. found that lender's fee was valid: paras. 21 and 35.

[79] Leiper J. relied on the rule from *Edmonds v. Hamilton Provident & Loan Society* (1891), 18 O.A.R. 347 (Ont. C.A.), that if a mortgagee advances less than the face value of the mortgage, it can only recover the amount advanced unless there is an agreement that provides otherwise. The Court of Appeal upheld the decision in *Stoney Creek* and at para. 17 found that the law recognizes that a person may give a mortgage for a larger sum in consideration of the loan of a smaller sum where there is an agreement to that effect.

[80] In *Acquaviva*, the mortgage commitment did not include an agreement to pay a lender fee. The mortgagor relied on a direction the mortgagee signed which included the payment of a lender's fee. Relying on *Stoney Creek*, Emery J found at para. 35 that an agreement for the payment or withholding of funds for the purpose of paying a lender fee for a private mortgage is necessary to enforce that fee. As there was no such agreement, Emery J. found that the mortgagee was not entitled to charge a lender's fee on top of the amount actually advanced for the mortgage.

[81] I was not directed to any agreement between Flexpark and Ms. Ercolani for the payment of a lender fee of $18,750 to be deducted from the funds advanced for the mortgage. Accordingly, I find that Flexpark was not entitled to charge a

lender's fees on top of the amount actually advanced for the mortgage. Accordingly, I find that the amount secured by the mortgage was $356,250 ($375,000 - $18,750).

c) Can Flexpark's Claim include the $22,000 paid to 260?

[82] The payment of $22,000 to 260 was paid from the mortgage proceeds; it was not prepaid or withheld. Ms. Ercolani argues that an action cannot be commenced to enforce payment of that amount as Ms. Pucciarelli was not a licensed mortgage broker. She relies on s. 12 of the *Mortgage Brokerages, Lenders and Administrators Act, 2006*, S.O. 2006, c. 29 in support of that position.

[83] Other than that bald assertion, there is no evidence about whether Ms. Pucciarelli owned or controlled 260 to whom $22,000 was paid or that she was not a license broker. The onus is on Ms. Ercolani on this summary judgment motion to put her best foot forward. I expect that she should have presented whatever evidence she had about Ms. Pucciarelli's connection to 260, such as a corporate search. She has failed to do so. Accordingly, I find that Flexpark has met its burden and there is no genuine issue that requires a trial regarding that payment.

[84] Ms. Ercolani can pursue her claim against Ms. Pucciarelli in the third party action and seek to recover whatever may have been paid to her as a fee if she can prove that Ms. Pucciarelli was not a licensed mortgage broker and is therefore not entitled to be paid a fee in that regard. Again, that claim against Ms. Pucciarelli

has no bearing on whether summary judgment should be granted, and Ms. Ercolani ordered to pay what is owing to Flexpark.

d) Can Summary Judgment be Granted as Flexpark has not filed as Evidence a Copy of the Cheque for the Funds it Advanced?

[85] Ms. Ercolani argues that Flexpark has failed to produce copies of the cheques for the funds it said it advanced and on that basis, this motion should be dismissed.

[86] In her affidavit, she alleges that the mortgage funds for the Flexpark Mortgage may not have been advanced by Flexpark but were taken from other sources by Ms. Pucciarelli to pay Mr. Groccia for his financial assistance in dealing with mortgages that were part of a Ponzi scheme.

[87] This is not pleaded in her statement of defence nor has Ms. Ercolani led any evidence in support of this bald allegation.

[88] The failure to provide a cheque as evidence of funds advanced is not fatal to this motion for summary judgment, as in her pleading, Ms. Ercolani does not dispute that funds were advanced to her and that a mortgage is registered on title to the Property confirming Flexpark as mortgagee to whom funds are owed.

e) Inconsistencies in what was paid to discharge the Greco Mortgage

[89] As identified in paras. 62-63 above, there appears to be an unexplained discrepancy of $7,836.73 between the mortgage discharge statement for the Greco Mortgage dated October 19, 2017 and the amount listed to discharge the

Greco Mortgage in the Statement of Advance re Funds dated January 10, 2018. There is no evidence about why there is a difference.

[90] In my view, that alleged discrepancy has no bearing on whether summary judgement should be granted. If the wrong amount was paid to discharge the Greco Mortgage, that is an issue that Ms. Ercolani can pursue in the third party claim against Ms. Karageorgievski, her lawyer, who ought to have ensured that the appropriate amount was paid to discharge the Greco Mortgage. Furthermore, Ms. Ercolani signed these documents in front of her lawyer.

[91] In the absence of an updated discharge statement for the Greco mortgage, I cannot determine if in fact there is any discrepancy or if the wrong amount was paid to discharge the Greco mortgage. That is evidence that Ms. Ercolani should have filed as this was an argument she advanced.

[92] The discrepancy has no bearing on what amount was borrowed from Flexpark by Ms. Ercolani and the fact that there has been no payment made by her for 6.5 years.

f) Is the Notice of Sale Materially Inaccurate?

[93] According to the notice of sale, $375,000 was owing for principal on August 1, 2018. Based on my reasons set out herein, I have found that the principal owing is $356,250. The notice of sale also demanded payment of $14,062.50 that Flexpark is no longer seeking. The notice of sale is therefore not correct.

[94] There is no evidence that Flexpark prepared a notice of sale that it knew was wrong or misleading at the time it was issued. Rather, it is my findings, several years later, that render the notice of sale incorrect and not Flexpark's conduct at the time.

[95] I also do not agree that the notice of sale was issued in breach of s. 32 of the *Mortgages Act* which states that a notice of sale cannot be given until there has been at least 15 days of continuous default. In her factum, Ms. Ercolani argues that the mortgage was extended a second time to October 31, 2028, she did not state that in her affidavit or file any evidence about this extension. She did file an Acknowledgement she signed on August 9, 2018 acknowledging that the maturity date was extended from August 1, 2018 to September 1, 2018. Had there been a second extension, there likely would have been a similar document signed. There is none. I put no weight on this argument as there is no evidence to support it.

g) What is the Impact, if any, of the Property being Overleveraged

[96] Ms. Ercolani argues that the property was overleveraged, meaning that the mortgages registered on title, including the first mortgage and the Flexpark Mortgage, exceeded the value of the property. Ms. Ercolani relies on two appraisals of the property. One appraisal, done at the request of Flexpark, dated November 29, 2018, says the property has a value of $605,000. A second appraisal, done at Ms. Ercolani's request, dated October 2018 says the property has a value of $564,000. I note that these appraisals were done after the mortgage

funds were advanced to Ms. Ercolani in January 2018. There is therefore no evidence to support Ms. Ercolani's argument that the property was overleveraged at the time the mortgage was registered on title.

[97] In the Form 9D signed by Mr. Groccia, he stated that Flexpark was satisfied that the Property had a value of $720,000. Ms. Ercolani argues that Flexpark should have filed as evidence whatever real estate comparables it relied on to satisfy itself of the value.

[98] If the property was overleveraged in January 2018, meaning that the balances owing on the mortgages registered on title exceed the value of the property, that does not render the Flexpark Mortgage unenforceable.

[99] I agree with Flexpark that it had to obligation to provide any advice to Ms. Ercolani regarding loan to value ratios. The mortgagee certainly has an interest to ensure that the property is not overleverage as this could affect its ability to collect should the mortgagor default as there could be insufficient funds to discharge the mortgage should the property be sold by power of sale. Furthermore, the higher the property is leveraged, the riskier the loan which could affect the interest charged by the mortgagee. A riskier loan would attract a higher interest rate.

[100] I reject Ms. Ercolani that the property was overleveraged at the time she entered into the mortgage agreement. She has not filed evidence to support that assertion. Even if it was, Ms. Ercolani has not filed any jurisprudence to support

her argument that the mortgage is not enforceable as the property was overleveraged.

h) Were Ms. Pucciarelli and/or Ms. Karageorgievski Agents for Flexpark?

[101] Ms. Ercolani argues that Ms. Pucciarelli and/or Ms. Karageorgievski were agents for Flexpark.

[102] To support that bald assertion, she relies on the mortgage commitment form on which Ms. Pucciarelli's name was typed, but not signed and that the Form 9D that indicated that $22,000 was to be paid to 260, a company that Ms. Ercolani alleges was controlled by Ms. Pucciarelli.

[103] I reject that argument. First, Ms. Ercolani's own pleading is that she was referred to Ms. Pucciarelli who assisted with the Greco Mortgage and that it was Ms. Pucciarelli who recommended that she get another mortgage when the Greco Mortgage matured.

[104] The fact that Ms. Pucciarelli's name was included in the mortgage commitment does not mean that she was agent for Flexpark. Flexpark may have known that she was involved in the transaction but that does not mean she was Flexpark's agent. As I previously found, there is also no evidence that Ms. Pucciarelli is connected to 260. Even if she were, the fact that the Form 9D, signed by Mr. Groccia. included instructions to pay that company $22,000 is again not evidence that Ms. Pucciarelli was agent for Flexpark.

[105] Ms. Ercolani also relies on messages she exchanged with Mr. Pucciarelli regarding the extension of the Flexpark Mortgage to September 1, 2018 and that Ms. Pucciarelli sent her the acknowledgment to sign for the extension. There is no evidence that Ms. Ercolani had any direct contact with Flexpark at any time. It makes sense, therefore, that when she sought an extension, Ms. Ercolani would have reached out to Ms. Pucciarelli to address the issue with Flexpark as she was the person Ms. Ercolani deal with for both the Flexpark and Greco mortgage. This is not evidence that Ms. Pucciarelli was acting as an agent for Flexpark.

[106] Ms. Ercolani's evidence is that Ms. Pucciarelli told her, via communications with her, that she was agent for Flexpark. She did not, however, attach any of these alleged communications. As she filed messages she exchanged with Ms. Pucciarelli in connection with the request to extend the mortgage, I presume that if such communications existed, Ms. Ercolani would have attached them to her affidavit. In the absence of those communications, I place no weight on her evidence of what Ms. Pucciarelli communicated to her.

[107] With respect to Ms. Karageorgievski, in December 2021 Flexpark commenced an action against her and the law firm in connection with this mortgage and several other mortgage transactions. The claim seeks damages for negligence in connection with an alleged Ponzi scheme operated out of Mr. Maniaci's law firm in connection with these mortgages.

[108] First, the pleading itself is not evidence. Second, the fact that Flexpark commenced a claim against Ms. Karageorgievski for alleged negligent conduct does not mean that she was an agent for Flexpark. A lawyer may be sued for damages based on negligent conduct and be found to owe a duty of care to a party, other than their client. That is not evidence, however, that the lawyer was an agent for the party who commenced the claim seeking damages.

[109] Ms. Ercolani has led no evidence of any contact between Flexpark and Ms. Pucciarelli and Ms. Karageorgievski. In my view, the evidentiary record falls far short of establishing an agency relationship between Flexpark and Ms. Pucciarelli and/or Ms. Karageorgievski.

i) Is the Action Void for not having complied with the *Mortgages Act*?

[110] I will address the argument that this action is null and void as the statement of claim was issued prior to the expiry of the time period stipulated in its notice of sale under mortgage, in contravention of s. 42 of the *Mortgages Act,* even though this was not pleaded in her statement of defence and counterclaim.

[111] Pursuant to s. 31 of the *Mortgages Act*, to exercise a power of sale, a notice must be served. According to s. 32, that notice shall not be given until default has continued for at least 15 days and the sale shall not be made for at least 35 days after notice has been given.

[112] The mortgage was extended to September 1, 2018. No payment was made. The notice of sale was issued on September 19, 2023, which complied with s. 32 of the *Mortgages Act*.

[113] Pursuant to s. 42 of the *Mortgages Act*, after a notice of sale is given, and until expiry of the stipulated time period for payment, no action to enforce the mortgage shall "be commenced or taken until an order permitting the same has been obtained from a judge of the Superior Court of Justice."

[114] During the time period stipulated in the notice of sale, a mortgagor shall not be subject to an action as during those 35 days, the mortgagor has time to correct the default.

[115] According to the notice of sale dated September 19, 2018, Ms. Ercolani had until October 26, 2018, to pay the amount owing. The statement of claim was issued and served on October 3, 2018, within the 35-day period noted in the notice of sale. Although the action was commenced, no steps were taken to note Ms. Ercolani in default during that time. In fact, she did not file her defence for several months — until January 2019.

[116] In this case, the action was commenced without leave of the court at that time. The issue is whether I can make the order now, permitting the statement of claim to be issued within the time period stipulated in the notice of sale.

[117] *Nunc pro tunc* orders means an order with retroactive effect. The courts have recognized that *nunc pro tunc* orders can be made where there is a statutory requirement for leave before an action can be commenced: *Silver v. Imax Corp*, 2012 ONSC 4881 at para. 45.

[118] In *McKenna Estate v. Marshall*, 2005 CanLII 37001 (Ont. S.C.), Sproat J. discussed the court's authority to make orders *nunc pro tun*c. In that case, the action was commenced prior to the expiry of the time period stipulated in the notice of sale.

[119] At paras. 23 and 24, Sproat J. explained how the ability to grant such orders enables the court to do justice between the parties. He also found, following a review of the jurisprudence, that the *Mortgages Act* does not preclude a *nunc pro tunc* order being made and that s. 42 should therefore be interpreted to allow such an order: at paras. 13-33.

[120] In this case, while the statement of claim was issued and served within the 35 days in the notice of sale, no further steps were taken by Flexpark. Had it been trying to exert undue influence by issuing the claim during that period, Flexpark would not have waited until January 2019 for Ms. Ercolani to file her defence. Flexpark took no steps during the 35 days other than issue and serve the claim.

[121] There is no prejudice to Ms. Ercolani in making the order *nunc pro tunc* to permit the statement of claim to be issued during the notice period, other than the

ability to argue that leave was not obtained. Ms. Ercolani had the ability during those 35 days to cure the default by paying the amount secured by way of the mortgage. She has made no payments since the mortgage matured — almost 6.5 years ago. In my view, the proceeding was therefore an irregularity and not a nullity and the *nunc pro tunc* order should be made permitting the claim to be issued within the notice period in the notice of sale. This permits the summary judgment to be heard on its merits.

j) Is the Mortgage Unconscionable and did Flexpark take advantage of Ms. Ercolani?

[122] This is the crux of Ms. Ercolani's argument.

[123] Ms. Ercolani argues that the mortgage should be set aside on the basis of unconscionability and relies on the *UTRA*. She also argues that she was under duress and in an unequal bargaining position that was taken advantage of by Flexpark.

[124] The doctrine of unconscionability in contract law was addressed by the Supreme Court of Canada in *Uber Technologies v. Heller*, 2020 SCC 16, [2020] 2 S.C.R. 118. At para 54, the majority stated that it is "an equitable doctrine that is used to set aside 'unfair agreements [that] resulted from an inequality of bargaining power.'" At para. 60 the court noted that the doctrine of unconscionability is "meant to protect those who are vulnerable in the contracting process from loss or improvidence to that party in the bargain that was made."

[125] At para. 64, the Supreme Court of Canada in *Uber* set out the two core elements of unconscionability as follows: 1) proof of inequality in the positions of the parties, and 2) proof of an improvident bargain: *Uber* at para. 64. The court also found at para. 65 that an inequality of bargaining power exists when one party cannot adequately protect their interests in the contracting process.

[126] The Supreme Court gave some examples of the types of situations where the doctrine would apply. For example, an elderly person with cognitive impairment who sells their assets for a fraction of their value and a vulnerable couple who sign an improvident mortgage with no understanding of its terms or financial implications.

[127] I will first address Ms. Ercolani's argument that Flexpark took advantage of her due to their unequal bargaining position and that it used undue influence and caused her duress. Factors to consider in determining if there is inequality of bargaining position include lack of independent legal advice, lack of business experience, limited education, distress or need, and ignorance of the true effect of the transaction: *Royal Bank of Canada v. Biddell*, 2015 ONSC 6535.

[128] Based on the evidentiary record before me, I reject Ms. Ercolani's argument for several reasons.

[129] First, Ms. Ercolani, on whom rests the burden to prove that the issues of undue influence, duress and unconscionability require a trial, has filed no evidence

regarding the circumstances of the negotiations leading to this mortgage agreement. There is no evidence that she had any contact with Flexpark. She argues that Flexpark's conduct caused her duress but has led no evidence of what Flexpark did to cause such duress. She has led no evidence of what conducted constituted undue influence over her by Flexpark.

[130] Duress means coercion of a person's will. Duress vitiates consent and an agreement obtained through duress is voidable by the person subjected to duress. In essence, duress means that a person has entered a contract against their will: *A. (S.) v. A. (A.)* 2017 ONCA 243 at paras. 27-28.

[131] Ms. Ercolani has led no evidence of Flexpark's conduct that she says caused her duress and resulted in her entering the mortgager agreement against her will. She has led no evidence of what conduct constituted undue influence, what conduct caused her to feel duress, or what actions of Flexpark caused her to feel duress. I find there is no evidence to support these bald assertions.

[132] I accept that Ms. Ercolani was in financial need when she entered into the Flexpark Mortgage, as she needed funds to pay the Greco Mortgage. In almost any mortgage transaction, the mortgagee is going to be wealthier than the mortgagor and likely more sophisticated. The issue is whether Flexpark took advantage of that inequality.

[133] I do not find that was an inequality of bargaining power of which Flexpark took advantage. First, Ms. Ercolani was not unsophisticated as she alleges. Prior to the Flexpark mortgage, Ms. Ercolani had experience with registering several mortgages on title to her property. She also had experience in dealing with private mortgages that involved higher interest rates and fees due to the inherently riskier nature of these mortgages. The terms of the Greco Mortgage were similar to the Flexpark Mortgage: both were from private lenders, were of a short term, had higher interest rates, had large mortgage fees, and the interest payments were prepaid from the mortgage proceeds advanced by the mortgagee.

[134] Ms. Ercolani was also experienced with requesting extensions when a mortgage matured. In connection with the Greco Mortgage, on October 30, 2017, Mr. Cadogan, on behalf of Ms. Ercolani, wrote to Mr. Maniaci and requested an extension to December 16, 2017 to “retire” the mortgage.

[135] Another reason why I reject Ms. Ercolani’s argument that she was taken advantage of by Flexpark is that she was represented by her own lawyer. If she has issues or concerns with the terms of the mortgage or that her interests were not adequately protected, she has recourse against Ms. Karageorgievski in the third party claim she has commenced.

[136] Ms. Ercolani has not led any evidence to support her bald assertion that Flexpark took advantage of their unequal bargaining position. There is no evidence that Ms. Ercolani was pressured by Flexpark to enter the Flexpark Mortgage. In

fact, there is no evidence of any contact between Flexpark and Ms. Ercolani. Rather, based on Ms. Ercolani's evidence, she relied on Ms. Pucciarelli and had a lawyer to represent her interests.

[137] There is absence of evidence to support Ms. Ercolani's assertion that she was an inexperienced or vulnerable homeowner who was taken advantage of by a predatory lender. While she was in financial need, that need, on its own, does not support a claim that her financial vulnerability was taken advantage of by Flexpark. She was skilled in the borrowing of money – as evidenced by the number of mortgages registered on title. There is no evidence that this agreement was not entered into voluntarily by the parties. There is no evidence of duress. There is no evidence that Flexpark was pressuring Ms. Ercolani. She led no evidence about what if any other efforts she made to secure financing from other sources or why she had to rely on private lenders, who typically charge higher rates of interest and other fees that reflect the riskier nature of second mortgages.

[138] There is no evidence of any distress, recklessness, ignorance or that Ms. Ercolani lacked any skill in borrowing money. There is no evidence that her ability to bargain was impaired to the extent that she was "not a free agent and is not equal to protect himself": *Mundinger v. Mundinger* (1968), [1969] a O.R. 606 (Ont. C.A.) at p. 609.

[139] Ms. Ercolani has failed to discharge her onus to prove that there is a genuine issue for trial that the unequal bargaining position between herself and Flexpark was taken advantage of by Flexpark.

[140] The next issue is whether the terms of the mortgage are harsh and unconscionable and if any relief is available to Ms. Ercolani pursuant to the *UTRA*.

[141] In Ontario, relief from unconscionable transactions is found in the *UTRA*. Ms. Ercolani relies on the legislation in support of her position that the cost of the loan was excessive, harsh, and unconscionable.

[142] The relevant sections of the act are as follows:

> 2. Where, in respect of money lent, the court finds that, having regard to the risk and to all the circumstances, the cost of the loan is excessive and that the transaction is harsh and unconscionable, the court may,
>
> > (a) reopen the transaction and take an account between the creditor and the debtor; ...
> >
> > (d) set aside either wholly or in part or revise or alter any security given or agreement made in respect of the money lent, and, if the creditor has parted with the security, order the creditor to indemnify the debtor.
>
> 3. The powers conferred by section 2 may be exercised,
>
> > (a) in an action or proceeding by a creditor for the recovery of money lent;
> >
> > (b) in an action or proceeding by the debtor despite any provision or agreement to the contrary, and despite the fact that the time for repayment of the loan or any installment thereof has not arrived;
> >
> > (c) in an action or proceeding in which the amount due or to become due in respect of money lent is in question.

[143] In *Smit v Pluim*, 2015 ONSC 7945, Woollcombe J. discussed the *UTRA* in a summary judgment where the plaintiff sought to enforce the terms of a mortgage. The defendant acknowledged the debt but argued, relying on the *UTRA*, that their debt owing should be reduced.

[144] At para. 16, Woollcombe J noted that the *UTRA* gives the court fairly broad powers relating to the annulment or reformation of a contract in circumstances where the court finds that having regard to the risk in all of the circumstances, the cost of the loan is excessive and the transaction is hard and excessive. At para. 17, she noted that the purpose of the *UTRA* is to relieve a party to a contract from their obligation where the contract was made without their informed consent or in in circumstances of unequal bargaining power. At para. 17 she found that:

> The legislation exists to protect those in need of money, but not skilled in borrowing it and who are thereby in the hands of lenders who seek to take advantage of them. The legislation affords an ability to give relief where it is "obvious that an unfair advantage has been taken of the borrower (Milani v. Banks (1997), 145 D.L.R. (4th) 55 at pp. 61-62; (1997), 32 O.R (3d) 557 (C.A.).

[145] In *Ekstein v. Jones*, [2005] CarswellOnt 3775, Ferguson J. found that there are two ways to show that the cost of the loan is excessive under the *UTRA*. The first is by showing that the cost constitutes a criminal rate of interest and the second is by showing that the cost of the loan is excessive having regard to the risk and all of the circumstances: paras 48-52

[146] Ms. Ercolani has not argued that there are any penalties etc. that result an effective rate of interest that is above the criminal rate so I will not address that issue.

[147] In addressing whether the cost of the loan is excessive having regard to the risk and all of the circumstances, Ferguson J., in *Ekstein*, relied on several factors identified by the Court of Appeal in *Milani v Banks* (1997), 32, O.R. (3d) 557 (Ont. C.A.). The factors are as follows:

(a) The borrower was unknown to the lender.
(b) The borrow solicited the loan.
(c) The loan was for a short period only.
(d) There was urgency on the part of the borrower to obtain the funds.
(e) The lender had to borrow to finance the loan.
(f) Whether the loan could have been obtained for a lesser rate.

[148] When I apply these factors, I conclude that these factors show a higher level of risk associated with this loan, justifying a higher rate of interest. Ms. Ercolani was unknown to Flexpark. Flexpark did not pursue her to enter this agreement. The loan was only for 6 months and it was being used to discharge a second mortgage that was also only for a 6 month term. There was an urgency as Ms. Ercolani needed the funds to pay out the Greco Mortgage.

[149] Ms. Ercolani has led no evidence of whether she looked for other sources to pay the Greco mortgage and whether she could have secured a loan for a higher rate.

[150] The second question to consider under s. 2 of the *UTRA* is whether the transaction is harsh and unconscionable having regard to the risk and all the circumstances. The terms “harsh” and “unconscionable” are not defined in the *UTRA*.

[151] In *Erskine*, Ferguson J noted that two things are required to establish unconscionability:

> (a) That the terms are very unfair or that the consideration is grossly inadequate.
>
> (b) That there was an inequality of bargaining power between the parties and that one of the parties has taken undue advantage of this.

[152] For the reasons set out above, I have already found that Flexpark did not take advantage of any inequality of bargaining position over Ms. Ercolani. Accordingly, a finding of unconscionability cannot be made.

[153] Ms. Ercolani had experience dealing with mortgages that charged a higher rate of interest, were for a short term, charged lender/mortgage fees, and had interest and fees deducted from the advance. The interest rate on the Greco Mortgage was 12% and the term of the mortgage was for 6 months. It had

mortgage fees of $33,600. The interest payments that totaled $16,800 for the term of the mortgage were prepaid from the mortgage funds advanced.

[154] For the Flexpark Mortgage, Ms. Ercolani signed an acknowledgement as part of the mortgage transaction in which she acknowledged that the interest rate being charged of 15%, together with the various fees deducted from the advance, “is not excessive, harsh or unconscionable and is fair, equitable and reasonable having regard to all of the circumstances of and risks associated with the Transaction…” When she signed this acknowledgment, she had the benefit of her own lawyer to provide her with advice.

[155] Ms. Ercolani also signed a separate document acknowledging that the interest rate being charged was 15%, and again, that it was fair and equitable having regard to the risk in the circumstances.

[156] Ms. Ercolani signed several documents that indicate that she was aware of how the Flexpark Mortgage funds would be disbursed and what interest rate was charged. She signed more than one direction about the mortgage fees to be paid. While the interest rate charged was high, as were the mortgage fees, given the risk associated with the Flexpark Mortgage, I do not consider the terms to be harsh or unconscionable, particularly as there is no evidence that Flexpark took advantage of any inequality of bargaining power between it and Ms. Ercolani.

[157] The focus of Ms. Ercolani's argument that the mortgage was unconscionable relates to the fees paid to Ms. Pucciarelli. In connection with the Flexpark Mortgage, $18,500 was pre-paid for a lender fees and $22,000 to 260, who Ms. Ercolani says was controlled by Ms. Pucciarelli. She also claims that Ms. Pucciarelli did not explain to her what she was paid, and what her role was in the mortgage.

[158] Ms. Ercolani's claims about the conduct of Ms. Pucciarelli and Ms. Karageorgievski in connection with the Flexpark mortgage have no bearing on whether the mortgage was harsh and unconscionable. She can pursue her third party claim against both the parties if she is of the view that her interests were not properly protect by Ms. Karageorgievski or if she overpaid Ms. Pucciarelli for any fees paid to her.

[159] I am satisfied that Ms. Ercolani knew how the mortgage funds were going to be disbursed, including payment of mortgage fees, despite an email she sent to Ms. Pucciarelli asking about the $22,000 fee when she was seeking an extension of the mortgage. The fees, which total $40,750 were high but given my finding that there is no evidence that Ms. Ercolani was not under duress, that Flexpark did not take advantage of any inequality in bargaining power, as she was an experienced mortgagor who was represented by counsel and signed several documents directing how funds were to be disbursed, I find that the *UTRA* does not apply.

[160] When I consider the terms of the mortgage as a whole, I do not find that it was harsh and unconscionable as Ms. Ercolani claims.

[161] If Ms. Ercolani's position is that she entered into the Flexpark Mortgage due to the misfeasance of others, including Ms. Pucciarelli and/or Ms. Karageorgievski, that does not mean that she is not liable to pay the funds she borrowed from Flexpark: *2165330 Ontario Inc. v. Finch,* 2015 ONSC 5789 (Div. Ct.), at para. 7. She may have a claim against Ms. Pucciarelli and/or Ms. Karageorgievski for the money she borrowed; that is what she is seeking in the third party claim.

k) Is there a Risk of Inconsistent Findings?

[162] Ms. Ercolani argues that there could be a risk of inconsistent findings should I grant summary judgments in this action, as there are other actions involving this and other mortgages. In particular, she points to the action commenced by Flexpark against Ms. Karageorgievski.

[163] A risk of inconsistent findings relates to decisions being made in the same action – not a risk of inconsistent findings as between entirely separate actions.

[164] I reject this argument as a basis to not grant summary judgment.

Conclusion

[165] The summary judgment motion is granted. Ms. Ercolani shall pay to Flexpark $356,250 plus interest at the rate of 15% from August 1, 2018 to date, plus costs

[166] Flexpark is entitled to possession of the property. Leave may be granted to make an order for a writ of possession at the time an order is made that the plaintiff is entitled to possession. To do so, however, the court must be satisfied that all persons in actual possession of the Property have received sufficient notice of the proceeding to enable them to apply to the court for relief: *Marinic Estate v. Garner*, 2019 ONSC 5771 at para. 50.

[167] Given the time that has lapsed in this matter, I am not certain who is living in the Property. I therefore require evidence of an occupancy check and that those in possession were served with a notice demanding possession. Once that is completed, counsel may return the matter to me, for a 9 am attendance on zoom, to determine if I can grant the writ of possession.

Costs

[168] Flexpark was successful and is presumptively entitled to its costs. If the parties cannot reach an agreement on costs, Flexpark is to serve, file and upload to Case Centre its bill of costs and written submissions, which must be no more than two pages, double spaced, 12 pt. font, together with any written offers to settle by March 27, 2015. Ms. Ercolani is to serve, file and upload to Case Center her

bill of costs and written submission of no more than two pages, double spaced, 12 pt. font, together with any written offers to settle, by April 10, 2025. There shall be no reply.

L. Shaw J.

Released: March 7, 2025

CITATION: Flexpark Inc. v. Ercolani, 2025 ONSC 1520
COURT FILE NO.: CV-18-4161
CV-18-4161-A1
DATE: 2025-03-07

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

FLEXPARK INC

Plaintiff/Defendant by Counterclaim

- and -

PATRIZIA ERCOLANI

Defendant/ Plaintiff by Counterclaim

And-

DIAMOND CAPTIAL INVESTMENTS INC., SABINE PUCCIARELLI and MARIANN KARAGEORGIEVSKI

SUMMARY JUDGEMENT
REASONS FOR DECISION

L. Shaw J.

Released: March 7, 2025