

**CITATION.:** 1255717 Ontario LTD. et al. v. Glenrio Financing Limited et al., 2025 ONSC 1630

**COURT FILE NO.:** CV-19-70704

**DATE:** 2025-03-13

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**BETWEEN:** )  
)  
1255717 ONTARIO LTD., 1255705 ) D. Richter, counsel for the Plaintiffs  
ONTARIO LTD., 1290976 ONTARIO LTD. )  
and MARINO RAKOVAC )  
)  
Plaintiffs )  
**- and -** )  
)  
GLENRIO FINANCING LIMITED and ) P. Monaghan, counsel for the Defendants  
ANCASTER CHOICE LIMITED )  
)  
Defendants )  
)  
) **HEARD:** December 20, 2024

**REASONS FOR JUDGMENT**

**THE HONOURABLE MADAM JUSTICE ANTONIANI**

[1] There have been two actions between these litigants in relation to the same subject matter. The action before me (the “Current Action”) and a now concluded mortgage

enforcement action (the “Mortgage Action”), which was brought by the defendants here, as plaintiffs.

- [2] The two defendants in the Current Action were the successful plaintiffs in the Mortgage Action (together, the “Lenders”). Summary judgment was granted in their favour on December 3, 2019.
- [3] The four plaintiffs in the Current Action (the “Borrowers”) were defendants in the Mortgage Action.
- [4] The corporate plaintiffs are all related companies controlled by the personal plaintiff, Marino Rakovac. Mr. Rakovac is an officer and director of the corporate plaintiffs and was a guarantor on two of the five mortgages in issue in the Mortgage Action.
- [5] The two actions were commenced within a week of one another. On September 19, 2019, the Lenders issued the Mortgage Action. On September 25, 2019, the Borrowers issued the statement of claim relating to the Current action, seeking an injunction staying the Mortgage Action, and other claims which are discussed below. Despite the fact that the actions involved the same mortgages, they were not consolidated.

### **History of the Mortgage Action**

- [6] The Mortgage Action was heard by summary judgment. Regional Senior Justice Sweeny (the “motion judge”) granted summary judgment in favour of the Lenders. The motion judge’s reasons were provided on November 24, 2021, and were upheld by the Court of Appeal in *Glenrio Financing Limited v. Rakovac*, 2022 ONCA 677 (the “Court of Appeal decision”).
- [7] The primary issue in the Mortgage Action was whether the parties had entered into an agreement that the Lenders would continue to fund a remediation and rezoning project until it was complete, and that they would not seek payment under the mortgages until the subject properties were “construction ready”. Sweeny R.S.J. found that there was no such agreement and granted possession and enforcement rights.

[8] The Lenders bring this motion to dismiss on the basis that all of the claims in the Current Action were determined in the Mortgage Action and as such are barred by Issue Estoppel, Action Estoppel, and abuse of process.

### **The Issues**

[9] This motion raises the following issues for determination:

- a. Are there claims made by the Borrowers in the Current Action that have not been adjudicated or;
- b. Are any or all of the claims barred by issue estoppel, action estoppel, or as an abuse of process?

### **Decision**

[10] There are no claims in the Current Action which the Plaintiffs are entitled to pursue. The Current Action is dismissed by reason of issue estoppel, action estoppel, and as an abuse of process.

### **Legal Framework**

[11] The re-litigation of matters already decided is barred by the legal principle of *res judicata*.

[12] *Res judicata* may be argued as issue estoppel or as action estoppel. Issue estoppel is a bar to raising an issue that has been decided in a separate cause of action. Action estoppel bars the pursuit of a matter that was the subject of a previous proceeding: *Angle v. M.N.R.*, [1975] 2 S.C.R. 248, at p. 254.

[13] The re-litigating of issues wastes judicial resources if the same result is reached, and it undermines the credibility of the judicial process if a different result is reached: see *The Catalyst Capital Group Inc. v. VimpelCom Ltd.*, 2019 ONCA 354, 145 O.R. (3d) 759, at para. 63. To allow re-litigation would be to invite challenges to the integrity of the previous judgment. Re-litigation would invite excessive use of scarce judicial resources and would prevent parties from having finality in relation to disputes. Further, parties have an obligation to raise every claim and every defence that they wish to have adjudicated in relation to a dispute.

[14] In *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, the Supreme Court described the elements necessary to establish issue estoppel, at para 23:

- i. The issue must be the same as the one decided in the prior decision;
- ii. The prior judicial decision must have been final; and
- iii. The parties to both proceedings must be the same, or their privies.

[15] The Supreme Court explained policy grounds that support issue estoppel, namely, “to preserve the courts’ and the litigants’ resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice”: see *Toronto (City)*, at para. 38. [Emphasis added.]

[16] In referring to *Catalyst Capital Group*, the Court of Appeal in *Dosen v. Meloche Monnex Financial Services Inc. (Security National Insurance Company)*, 2021 ONCA 141, 457 D.L.R. (4th) 530, at para. 13, articulated a similar test for cause of action estoppel:

- a. There is a final decision of a court of competent jurisdiction in a prior action.
- b. The parties to the subsequent litigation were parties to, or in privy with the parties to the prior action;
- c. The cause of action in the prior action is not separate and distinct; and
- d. The basis of the cause of the action and the subsequent action was argued or could have been argued in the prior action if the parties had exercised reasonable diligence. [Emphasis added.]

### **Abuse of Process**

[17] The *Rules of Civil Procedure*, R.R.O 1990, Reg. 194, specifically rr. 21.01(3)(d) and 25.11, grant the court the authority to address issues of estoppel, where it is found to be an abuse of process. Rule 21.01(3)(d) provides that:

- (3) A defendant may move before a judge to have an action

stayed or dismissed on the ground that,

d) the action is frivolous or vexatious or is otherwise an abuse of the process of the court, and the judge may make an order or grant judgment accordingly.

[18] Rule 25.11 (c) provides that:

The court may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,

c) is an abuse of the process of the court.

[19] In *Toronto (City)*, the Supreme Court also considered abuse of process in the context of issue estoppel; at para. 37, the court quoted *Canam Enterprises Inc. v. Coles*, 51 O.R. (3d) 481 (C.A), and stated the following:

The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.)

One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined. [Emphasis in original.]

## Analysis

[20] The Mortgage Action alleged a default by the Borrowers, in relation to 5 mortgages, upon which the Lenders were granted possession of the properties and judgment for the amounts owing under the mortgages.

[21] The statement of claim in the Current Action is comprised of 21 paragraphs. Of those, paras. 4-20 are either verbatim duplicates of the statement of defence in the Mortgage Action, or near duplicates. Only the introductory paragraph claiming relief, and the conclusory paragraphs differ.

- [22] The Borrowers conceded at the hearing of the motion before me that all of the claims made in the Current Action were raised as defences in the Mortgage Action. Their position is that the fact that the pleadings are the same is not relevant to the issue of whether there was an adjudication of the claims.
- [23] The Borrowers argue that five of the claims were not adjudicated by the motions judge and were not addressed in his decision. They argue that they are entitled to have those claims addressed in the Current Action, as a matter cannot be *res judicata* unless it has been ruled upon by a court.
- [24] The Lenders argue that the Current Action is about a duty of care of a mortgagor, not about mortgage enforcement. As the statement of claim in the Mortgage Action only addressed enforcement claims, not all of the defences were relevant to the court's consideration.
- [25] The following is a review of the five claims that the Borrowers argue remain outstanding.

Claim 1: the Defendants breached their obligations and representations to the Plaintiffs

- [26] Counsel for the Borrowers argued that the main claim left unadjudicated is that the Lenders had, and breached, a general and overarching duty of care, or a duty of good faith, in all of their interactions with the Borrowers. The Borrowers argue that promises were made, and a duty was owed, outside the four corners of a Lending Agreement, dated January 13, 2014 (the "Agreement"), to which it has previously been determined that the borrowers were not parties.
- [27] Despite earlier findings that the Borrowers were not parties to that agreement, and that there was no breach of a duty of care owed to them, Counsel reiterated that the Borrowers were lied to, as they would not have embarked on the project without a promise of continued funding and forbearance. They now argue that the Agreement was irrelevant in any event, since the lenders always owed them a duty to act in good faith.
- [28] In his submissions, counsel for the Borrowers argued that the motion judge, in the ruling on the motion for summary judgement, only addressed whether there was a duty of care

and good faith embedded in the Agreement and did not adjudicate the misrepresentations that the Borrowers argue lay outside the four corners of the Agreement.

[29] I reject this argument. Paragraph 17 of the Borrower’s defence in the Mortgage Action states:

“The Defendants maintain that the mortgage documents do not stand on their own. Glenrio and Ancaster cannot rely solely on their mortgages, charge terms and their rights thereunder. The mortgages and charge terms are subject to and form part of a larger agreement, the Glenrio Agreement dated Jan. 13, 2014, defining additional obligations on the parties, which include acting in good faith to see the project to conclusion, with the implied and accepted understanding that Glenrio and Ancaster would continue to fund to completion.”

[30] Other communications between the parties were also before and considered by the motion judge.

[31] This claim regarding these alleged obligations and representations was clearly and conclusively addressed by Sweeny R.S.J. at paras. 26, 51 and 54 of the *Endorsement on Motion For Summary Judgement*, Sweeny, J. (Ont. S.C.), November 24, 2021, Sweeny R.S.J. stated:

[26] The evidence in support of this position is the bald statement of Mr. Rakovac that this was his understanding as the basis upon which the plaintiffs agreed to become involved in the project. Aside from his bald assertions, he points to an agreement dated January 13, 2014, made between Anthony and Joan Powell and Glenrio.

[51] The other available evidence does not support Rakovac’s contention that the mortgagors agreed to continue to fund and not to seek payment of the mortgages until the property was construction ready. [Emphasis added.]

[54] I find that there is no fiduciary duty owed by the plaintiffs/mortgagors to the defendants/mortgagees in this case.

This is not a case where the mortgagors acted in bad faith or in breach of **any** duty of good faith. The allegation of the breach of the duty of good faith is, in my view, subsumed in the argument with respect to the alleged obligation under the January 13, 2014 agreement. I have found no such obligation exists. [Emphasis added.]

[32] Paragraphs 37- 51 of the decision on summary judgment review in great detail all of the other evidence which was available to determine whether these claims could be made out.

[33] In affirming the motion judge’s decision, the Court of Appeal in *Glenrio Financing Limited* stated, at para. 4:

As the motion judge correctly found, the parties’ **conduct**, as well as their **written documentation**, was inconsistent with the appellants’ assertions of an agreement to forebear or to provide further funds. Nothing prevented the mortgagees from taking any proceedings that they deemed necessary on the mortgagor’s default. [Emphasis added.]

[34] The decisions of the motion judge and of the Court of Appeal clearly and fully address whether there was a breach of a duty of care or bad faith and were not limited to an adjudication of the January 13, 2014 Agreement.

[35] In any event, had there been any lack of clarity as to these findings, the final element of the test in *Dosen* makes clear that the time for the Borrowers to have addressed these concerns would have been on the appeal.

[36] Additionally, I find that this claim in the Current Action is a re-litigation of a claim that has already been adjudicated and as such, this claim is an abuse of the court’s process.

Claims 2 and 3: Whether the Lenders failed to require the Borrowers to get a certificate of independent legal advice and a determination that the Lenders colluded with the Borrower’s lawyer, Mr. Powell

[37] The claim that the Borrowers should have been required to obtain a certificate of independent legal advice relates to the claim that counsel who was acting for the

Borrowers, Anthony Powell, had a conflict of interest, and that he colluded with the Lenders.

- [38] Mr. Powell was alleged to have been both a lender in the transactions, and counsel for the Borrowers. He was not a party to the Mortgage Action and is not a party to the Current Action (there is a separate action which includes him as a defendant). The Borrower's statement of defence in the Mortgage Action, at para. 21, details the very same allegations, verbatim, as in the Current Action, at para. 6, claiming that Mr. Powell was both lawyer and a lender, and as such he had a conflict of interest.
- [39] At the hearing of the motion in the Mortgage Action, Marino Rakovac, who was self-represented, attempted to tender evidence relevant to the alleged conflict of interest, by way of affidavit prepared after cross examinations had been conducted. The motion judge found that the evidence was available prior to cross examinations and refused to admit it.
- [40] All three corporate Plaintiffs here (1255717 Ontario Ltd., 1255705 Ontario Ltd., and 1290976 Ontario Ltd.) were represented by counsel Daniel Richter, who advised the motion judge that his clients did not intend to rely on the affidavit evidence. As such, the corporate defendants expressly indicated that they did not rely on the allegation of conflict of interest, or, implicitly, the issue regarding a certificate of independent legal advice.
- [41] Sweeny R.S.J. found that the Lenders did not have and did not breach any duty of care to the Borrowers and that they did not act in bad faith. This determination necessarily implies a finding that there was no collusion with Anthony Powell, and no conflict of interest, in relation to the Lenders.
- [42] The motions judge found that the Lenders were represented by counsel. The possible conflict of interest of a lawyer who was not a party to the proceeding is not relevant to the parties in the Current Action.
- [43] Counsel Daniel Richter represented all appellants, including Marino Rakovac, at the Court of Appeal. The claim that former counsel Anthony Powell had a conflict of interest is not addressed in the decision of the Court of Appeal.

[44] This claim was subsumed in the reasons of Sweeny R.S.J. and confirmed by the Court of Appeal and thus, is subject to issue estoppel.

Claim 4: A determination that the Lenders obstructed, delayed and made it impossible for the plaintiffs to move forward with the development and refinancing of the property

[45] At para. 53 of the decision on summary judgment, Sweeny R.S.J. stated: "...that there was no evidence adduced to demonstrate the [Lenders] obstructed financing efforts and, in any event, no financing commitment was produced."

[46] This issue is not addressed in the Court of Appeal decision.

[47] This claim is subject to issue estoppel.

Claim 5: An order that the properties be sold and appraised as approved projects not as raw land

[48] The motion judge ordered that the Lenders are entitled to judgment on the debt and made an order for possession of the property.

[49] Paragraph 41 of the Borrower's statement of defence in the Mortgage Action begins as follows: "The [Borrowers] have valid and specific concerns as to the proper sale and marketing of the property by the [Lenders and] the risk of an improvident sale on raw land value vs. a fully completed [Ontario Municipal Board] and City approved project ..."

[50] The motion judge noted that there were a number of defences raised in the pleadings that were not argued on the motion. The Borrowers appealed the summary judgment. It was the Borrower's duty to raise any and all issues which properly arose from the summary judgment decision in their appeal.

[51] In stating the final element of the test for action estoppel, *Dosen* makes clear that the time for the Borrowers to have addressed these concerns would have been on the appeal, rather than by re-litigating the claim in this Current Action.

**Conclusion:**

- [52] An argument that claims were not *sufficiently* addressed in the motion judge's reasons, may be an issue for appeal, but it cannot give rise to another claim for the same relief on the same issues.
- [53] All claims raised in the Current Action, which are alleged not to have been dealt with on summary judgement in the Mortgage Action decision, existed at the time of the hearing of the appeal. If the Respondents did not raise them, they are barred from raising them now. If they did raise them, then the resolution of the claims were subsumed in the Court of Appeal's affirmation of Sweeny R.S.J.'s decision on the motion for summary judgment.

**Order**

- [54] All claims raised in the Current Action are dismissed on the basis of issue estoppel and the Current Action is estopped in its entirety, on the basis of action estoppel and res judicata, because it is a repetition of the prior litigation. The action is also dismissed as an abuse of process. It is a misuse of court procedure, a re-litigation which would waste judicial resources if the same result were reached and would undermine the credibility of the judicial process if a different result were reached.

**Costs:**

- [55] I would urge the parties to agree on costs. If the parties are unable to agree, then costs submissions may be made as follows:
- a. Within 15 calendar days of the distribution of these reasons to counsel, the Defendants shall serve and file their written costs submissions, not to exceed three pages, double-spaced in 12pt font, together with a draft bill of costs and copies of any pertinent offers;
  - b. The Plaintiffs, shall serve and file its responding costs submissions of no more than three pages, double-spaced in 12pt font, together with a draft bill of costs and copies of any pertinent offers, within 25 calendar days of the distribution of these reasons;

- c. The Defendants' reply submissions, if any, are to be served and filed within 30 calendar days of the distribution of these reasons, and are not to exceed two pages;
- d. If no submissions are received within the times allocated by either party, said party shall be deemed to have no submissions; and
- e. If no submissions are received by either party, the parties will be deemed to have resolved the issue of the costs, and costs will not be determined by me.

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S. Antoniani J.

**Released:** March 13, 2025

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**B E T W E E N:**

1255717 ONTARIO LTD., 1255705 ONTARIO  
LTD., 1290976 ONTARIO LTD. and MARINO  
RAKOVAC

Plaintiffs

- and -

GLENRIO FINANCING LIMITED and  
ANCASTER CHOICE LIMITED

Defendants

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**REASONS FOR JUDGMENT**

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S. Antoniani, J.

**Released:** March 13, 2025