

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Freda M. Steel
Mr. Justice William J. Burnett
Madam Justice Janice L. leMaistre

Docket: AI19-30-09273)

BETWEEN:)

VENNI SARTOR and ROSA SARTOR)

(Plaintiffs) Respondents)

- and -)

RICHARD BOON, 5026113 MANITOBA LTD., 4724438 MANITOBA LTD. and DAYLIGHT CAPITAL CORPORATION)

(Defendants) Appellants)

- and -)

Docket: AI19-30-09274)
BETWEEN:)

4638817 MANITOBA LTD.)

(Plaintiff) Appellant)

- and -)

VENNI SARTOR and ROSA SARTOR)

(Defendants) Respondents)

G. M. Wood
for the Appellants

J. R. Beddome and
S. R. C. Hunter
for the Respondents

Appeals heard and
Decision pronounced:
March 9, 2020

On appeal from 2018 MBQB 174

STEEL JA (for the Court):

[1] These appeals concern a series of transactions between the respondents Venni and Rosa Sartor (the Sartors) and the appellants 4638817 Manitoba Ltd. (463), 5026113 Manitoba Ltd. (502) and Richard Boon (Boon) relating to the Sartors' home. Boon beneficially owns 463 and 502. Boon appeals summary judgment orders granted in respect of two actions that were joined.

Facts

[2] In the first action, brought by the Sartors, summary judgment was granted in their favour vacating the transfer of land and mortgage in favour of 502 and 463 and awarding punitive damages of \$30,000. In the second action, brought by 463, judgment was granted against the Sartors for the amount of \$27,830.07 plus simple interest at the rate of 9.25 per cent as the amount owing under the mortgage.

[3] The Sartors were in financial difficulties when their mortgage came due and they were approached by Boon. Various documents were signed which included the transfer of the mortgage on the property to 463, a purchase/sale agreement and transfer of land to 502, a residential lease between the Sartors and 502 and an option to purchase the property from 502. The transfer of the mortgage to 463 was filed in the Winnipeg Land Titles Office and the Sartors began making payments to 502.

[4] Boon attempted to register the transfer of land, but the district registrar refused to process it and filed a caveat, stating that the transfer of land appeared to be for substantially less than the market value of the house.

Boon did not pay the property taxes because the Sartors missed some payments and the property went into tax sale. The Sartors were able to redeem the property, but then retained a lawyer and, upon his advice, stopped making any further payments.

[5] The Sartors then filed an action seeking a declaration that the transfer of land to 502 was an unconscionable transaction as defined in *The Unconscionable Transactions Relief Act*, CCSM c U20, and that it was therefore void. 463 commenced an action seeking payment of the outstanding balance under the mortgage.

Motion Judge

[6] While the actions came before the motion judge by way of summary judgment on affidavit evidence, she determined that some *viva voce* evidence should also be heard. The Sartors and Boon testified and were cross-examined.

[7] The motion judge considered the transactions to be a financing arrangement which added to Boon's security and circumvented the safeguards in *The Mortgage Act*, CCSM c M200. She made a number of findings of fact, including that the Sartors believed that Boon was simply taking over the mortgage and that he knew or was wilfully blind to the fact that the arrangement would deprive the Sartors of the equity in their home and rights under the mortgage. She concluded that the transaction was unconscionable under the *Unconscionable Transactions Relief Act* and violated *The Mortgage Act*, and that the sale agreement and transfer to 502 was therefore void. She removed 463's mortgage from the title but gave judgment in its favour for the amount of \$27,830.07 plus interest. Given Boon's wrongful actions, she made

no award of compound interest and credited the Sartors for 502's breach of contract in failing to pay property taxes. She awarded the Sartors \$30,000 in punitive damages.

[8] Boon raises several grounds of appeal. Fundamentally, he asserts that the motion judge erred in considering the transaction to be a loan arrangement rather than a sale and bona fide agreement between willing parties to save the Sartors' property. In Court, he argued that the nature of the transaction was different because there was an assumption of an existing mortgage.

[9] He also submits that the motion judge erred in concluding that the transaction was unconscionable and in violation of *The Mortgage Act*. He argues that the motion judge erred by placing no weight on the document where the Sartors acknowledge that the property had been sold for less than its value and that they had been offered legal advice, which they declined. He submits that the Sartors were aware of what they were doing, that they were contributorily negligent in their actions and that there was no requirement for them to receive independent legal advice in this situation.

[10] As well, he argues that the motion judge erred in her finding of *non est factum* and fraudulent inducement and, finally, he contends that there was no basis for the motion judge to find him in breach of contract, cancel the mortgage terms as to compound interest, or award punitive damages.

Decision

[11] We dismiss the appeals based on the reasons of the motion judge in relation to her finding of unconscionability.

[12] While Boon objected to the procedure adopted by the motion judge in his factum, he withdrew that ground of appeal at the hearing. That was an appropriate concession. The decision to determine the matter summarily is entitled to deference unless there is a material error. In any event, there were two days of *viva voce* evidence and one day of final argument in this case, as well as affidavit evidence, case briefs, a case management conference and an agreed book of documents. The Sartors and Boon all testified and the motion judge was well able to determine matters of credibility. Following the Supreme Court of Canada's decision in *Hryniak v Mauldin*, 2014 SCC 7, the process adopted by the motion judge provided a proportionate, expeditious and less-expensive means to adjudicate the issues in this particular case.

[13] Next, if we agree with the decision of the motion judge with respect to her finding that this was an unconscionable transaction, as we do, it is unnecessary for us to deal with the issues of *non est factum* and fraudulent inducement.

[14] In order to be unconscionable, the debtor must demonstrate both the inequality of the parties and the improvidence of the bargain. The onus then shifts to the creditor to show that the contract was freely entered into by the parties and was fair, just and reasonable in the circumstances (see *Quick Auto Lease Inc v Nordin*, 2014 MBCA 32 at para 14). The issue in an unconscionable transaction is unfair advantage gained through power.

[15] The finding that the transaction as a whole was unconscionable was clearly open to the motion judge on the evidence before her. The fact that the transfer was for substantially less than the market value of the house is contained in the letter which stated that the property was being transferred to

502 for substantially less than market value, as well as in the fact that the district registrar refused to register the title to the land because of the value. The motion judge's findings of fact as to the inequality of the parties was well grounded in the evidence. She held that "[t]he arrangement was unfair and took advantage of the Sartors' precarious situation. It was not commercially reasonable." Based on the evidence, she also held that Boon failed to satisfy the onus that fell on him to demonstrate that the arrangement was freely entered into and that it was fair, just and reasonable.

[16] She made no error in characterising the transaction, when considered as a whole, as a loan and finding it to be unconscionable. Having so determined, the motion judge had broad remedial powers with respect to the enforcement of the agreements, which included the ability to order a modification of the interest rate. A modification of the interest rate was also upheld in *Brown et al v Boon et al*, 2018 MBCA 14, where this Court upheld a decision finding an interest rate of 2.5 per cent rather than the interest rate in those documents.

[17] The award of damages, punitive or otherwise, is discretionary. The motion judge held that Boon's conduct went beyond an unconscientious use of power. She also took into account that this was not a one-time situation. This was the manner in which he conducted business. He testified to this, the caveat filed by the district registrar suggests this, and it is borne out by other decisions from this jurisdiction where the same arrangements have been found to be unconscionable transactions involving parties who did not understand the effect of the agreements they entered into. He has made a practice of seeking out the financially vulnerable (see *Brown et al v Boon et al*; and *Aguiar v 5026113 et al*, 2019 MBCA 47). We see no error warranting

appellate intervention in the motion judge's decision in this regard or in her decision that the award of punitive damages should be assessed against all of the appellants.

[18] This case was decided on its facts. The motion judge has not made any palpable and overriding error with respect to the facts nor has she erred in law or in principle. The appeals are dismissed with costs in favour of the respondents.

Steel JA

Burnett JA

leMaistre JA
