

Realtor's full and final release extended to cover brokerage

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Litigation claims or the threat thereof are often settled by way of payment by one party to the other in exchange for a full and final release. A full and final release is a contract. The scope and extent of the terms in the release are subject to the general principles of contractual interpretation. As with any contract, a party seeking to avoid the enforcement of any terms therein faces a steep hurdle to show that they should not be bound by any terms they have agreed to.

In *Sharif v. Shaikh et al.*, **2021 ONSC 6834 (CanLII)**, the Ontario Superior Court of Justice addressed whether a full and final release was enforceable against parties who claimed that they did not understand what they had signed. In addition, the court addressed whether the release covered a corporation that had not signed it.

The case involved a real estate agent who had assisted a pair of clients in connection with two real estate purchase transactions.

The buyers refused to complete the first purchase transaction due to the discovery that the property had a history as a grow-op. The buyers had paid a \$20,000 deposit for the property. The seller refused to return the deposit and sued the buyers for damages of \$900,000, on the basis that they had no legal right to refuse to close.

The buyers sought contribution and indemnity against the agent and his brokerage, arguing that they had failed to check previous listings for the property to determine if it had been used as a grow-op, and had failed to ask other realtors about the history of the property.

Before that litigation had been resolved, the buyers purchased another property in October 2017 with the assistance of the same real estate agent, who personally paid the \$10,000 deposit since his clients had not recovered the deposit from the first aborted transaction.

On 29 November 2017, the buyers received a further \$10,000 payment from the real estate agent and they signed a full and final release in which they agreed to release him as well as his "officers, directors, employees, servants, agents, representatives, successors, insurers, heirs and assigns," from all claims which were raised or could have been raised with respect to the aborted purchase transaction.

When the buyers subsequently refused to dismiss the crossclaim, the agent and the brokerage brought a motion for summary judgment to have it dismissed.

In response to the motion, the buyers claimed that they never would have agreed to sign the full and final release had they understood its terms.

The buyers did not allege duress, unconscionability, or any other defence to avoid the full and final release. They relied solely on the defence of *non est factum*, which is available to "someone who, as a result of misrepresentation, has signed a document mistaken as to its nature and character and who has not been careless in doing so": *Bulut v. Carter*, **2014 ONCA 424**, at para. 18, citing *Marvco Color Research Ltd. v Harris*, **1982 CanLII 63 (SCC)**, [1982] 2 S.C.R. 774.

The need for certainty and security in commerce generally means that a person cannot carelessly choose not to read an agreement and subsequently rely on *non est factum*: *Alphera Financial Services Canada (BMW Canada Inc.) v. Ambihapalan*, **2021 ONSC 3530**, at para. 33.

In the case at hand, the motion judge found that the defence of *non est factum* was not available to the buyers. Even on their own evidence, they were careless in signing the release. Neither of the buyers read the release. There was no evidence that the agent had misrepresented its contents or had changed any material terms without notice.

The buyers blamed the agent for not explaining to them in Gujarati, a language all three speak, what they were signing. They claimed that their English language skills were poor. However, they offered no evidence that they asked what the document was, asked for time to take it to their Gujarati-speaking lawyer who they had been dealing with, or asked for time to have someone else translate it for them. They simply agreed to sign wherever the agent told them to do so. That behaviour was careless.

Further, while at times there were several documents that had to be signed in connection with the transactions, the second purchase closed in October 2017 and they were not asked to sign the full and final release until the end of November 2017– at least a month later. At that time, they only had to sign a single document, and in exchange, they received \$10,000.

In the motion judge's view, it defied common sense to think that the buyers signed a single document a month after their house closing and at the same time received a \$10,000 cheque without considering the purpose of the document they were signing. If they did not understand the document and did not ask what it was, they were careless in not doing so.

Without a misrepresentation, and in the face of their carelessness, the defence of *non est factum* was not available.

A second issue addressed by the motion judge was whether the full and final release covered the real estate agent's brokerage, which had not signed it.

The Supreme Court of Canada recently affirmed that there are no special interpretive principles that apply to full and final releases: *Corner Brook (City) v. Bailey*, **2021 SCC 29 (CanLII)**. Rather, a full and final release is to be interpreted in accordance with the principles of contractual interpretation outlined in *Sattva Capital Corp v. Creston Moly Corp.*, **2015 SCC 53**, at para. 47. This generally requires a "practical, common-sense approach" to reading the terms of the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract.

In the motion judge's view, a practical, common sense approach to understanding the parties' intention, reading the release as a whole, and in the context of the surrounding circumstances, led to the conclusion that the release conferred protection on the brokerage, as an entity contemplated by the release.

In the crossclaim, there was no "free-standing" claim against the brokerage since all of the allegations made against the brokerage were made against the agent. The allegations turned on the agent's actions and conduct. The claims against the brokerage were entirely derived from its responsibility for the agent's actions.

Further, the release identified the scope of claims released to include counterclaims, crossclaims and claims over that could be made by the brokerage against the agent, and the release referred to directors, officers and corporations, which suggested that the brokerage – the only corporation involved in the dealings between the agent and the buyers–was contemplated to be covered by the release.

Lastly, the release provided protection for "insurers," and in this case, the agent and the brokerage had the same insurer. There would be no point to releasing the insurer for the agent if it remained responsible for the agent's conduct through the alleged liability of the brokerage.

As a result, the court determined that the full and final release was of full force and effect, and the crossclaim commenced by the buyers against the real estate agent and his brokerage were barred by the release and must be dismissed. A PDF version is available to download [here](#).

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