

COURT OF KING’S BENCH OF MANITOBA

B E T W E E N:

MARC FRECHETTE AND SHARON FRECHETTE,	)	<u>Deborah A. Yeboah</u>
	)	<u>Samuel Kroft</u>
	)	<u>Articling Student</u>
plaintiffs,	)	for the plaintiffs
)	
- and -	)	<u>Jesse Rock</u>
	)	for the defendant
15019745 CANADA INC.,)	
	)	<u>Kelsey L. Schade</u>
defendant,	)	For third party,
	)	on a watching brief
- and -)	
)	
NICHOLAS FRECHETTE AND KILKENNY REAL)	
ESTATE LTD. OPERATING AS SUTTON GROUP)	
- KILKENNY REAL ESTATE,)	
	)	<u>Judgment Delivered</u>
third parties.	)	May 20, 2026

TOEWS J.

INTRODUCTION

[1] The plaintiffs, Marc and Sharon Frechette (“Marc” and “Sharon” respectively or “the Frechettes” when referred to jointly), have brought a motion for summary judgment

arising out of their action against the defendant 15019745 Canada Inc. ("150") in respect of its alleged failure to purchase land and property in Richot, Manitoba from the plaintiffs.

[2] The plaintiffs state that in breach of its obligations, 150 has failed to allow for the release of a deposit in the sum of \$200,000 to the plaintiffs, has additionally failed to pay an agreed upon additional deposit in the sum of \$225,000 to the plaintiffs and has failed to tender the funds to close the deal on October 19, 2023. In addition to the deposit amounts, the plaintiffs seek damages for the consequential loss occasioned by 150's failure to close.

[3] 150 states that this action is not amenable to a resolution by way of a summary judgment motion as there are substantive factual disputes which require a trial of the issues in dispute. Although 150 initially filed a motion for summary judgment of its counterclaim, 150 states it was unable to obtain affidavit evidence from its real estate agent, Terry Duddridge ("Duddridge") and therefore abandoned its summary judgment motion. It is only the Frechettes' summary judgment motion that remains before the court. The third parties to this action are not parties to this motion.

THE EVIDENCE

[4] The evidence before the court on this motion for summary judgment is by way of affidavit.

[5] It is not disputed that the Frechettes are joint registered owners of the land and property commonly known as 850 Provincial Road 200 in Richot, Manitoba (the "Property"). On or about August 12, 2023, the Frechettes and 150 entered into a written agreement ("the Agreement") respecting the purchase and sale of the Property for the

sum of \$3,500,000 ("the Purchase Price"). The terms of the Agreement included that the date of possession would be no later than September 12, 2023, the Purchase Price would be paid by way of an initial deposit of \$200,000 ("the Deposit") and the remaining \$3,300,000 would be paid on or before the date of possession.

[6] On August 16, 2023, 150 paid the Deposit which is now being held in trust by Kilkenny Real Estate Ltd. operating as the Sutton Group ("the Sutton Group"), the listing broker for the Frechettes. 150 did not tender the closing funds by September 12, 2023, or at all. Following negotiations between the parties, it was agreed that the possession date would be extended to October 19, 2023 ("the Amended Possession Date") in exchange for an additional deposit of \$225,000 ("the Additional Deposit") to be paid by October 5, 2023. 150 failed to pay the Additional Deposit prior to the Amended Possession Date and failed to complete the transaction.

[7] 150 states it did not close the transaction because it could not obtain overland flood insurance for the Property. Otherwise, the Property was insurable.

[8] The third party in this action is Nicholas Frechette ("Nicholas"), the son of the Frechettes. At the material time Nicholas was a licensed real estate agent contracted by the other third party, the Sutton Group. The Sutton Group was the listing broker while Nicholas acted as his parents' agent.

[9] On July 30, 2023, 150's representative, Michael Lue ("Lue") and 150's real estate agent, Duddridge met with Nicholas to tour the Property. 150 maintains that there is a factual dispute between Lue and Nicholas regarding statements made during the tour on July 30, 2023, including disputes about Lue advising Nicholas regarding 150's intended

use of the Property, and Nicholas' representations to Lue about his parents' use of the Property. Furthermore, 150 submits that there is a factual dispute between Nicholas and Lue regarding the nature and significance of flood protection works that existed on the Property.

[10] Following the July 30, 2023 tour, 150 entered into an Offer to Purchase agreement ("the OTP") with the Frechettes, conditional upon an inspection. After the inspection took place on August 12, 2023, 150 paid the deposit pursuant to the OTP. However, as a result of 150 being unable to obtain an insurance policy which included protection from overland flooding, 150 was unwilling to proceed and requested the return of the Deposit. The Frechettes refused.

THE LAW GOVERNING SUMMARY JUDGMENT

[11] Motions for summary judgment are governed by the Court of King's Bench Rules, the relevant portions of which provide as follows:

Summary judgment motion

20.01(1) A party may bring a motion, with supporting affidavit material or other evidence, for summary judgment on all or some of the issues raised in the pleadings in the action.

Motion must be heard by pre-trial judge

20.01(2) Subject to subrule 50.04(2), a motion for summary judgment may only be scheduled after a pre-trial conference for the action has been held. The motion is to be heard by the pre-trial judge for the action.

CONDUCT OF SUMMARY JUDGMENT MOTION

Responding evidence

20.02 In response to affidavit material or other evidence supporting a motion for summary judgment, a responding party may not rest on the mere allegations or denials of the party's pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue requiring a trial.

Granting summary judgment

20.03(1) The judge must grant summary judgment if he or she is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence.

Powers of judge

20.03(2) When making a determination under subrule(1), the judge must consider the evidence submitted by the parties and he or she may exercise any of the following powers in order to determine if there is a genuine issue requiring a trial:

- (a) weighing the evidence;
 - (b) evaluating the credibility of a deponent;
 - (c) drawing any reasonable inference from the evidence;
- unless it is in the interests of justice for these powers to be exercised only at trial.

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When summary judgment motion may proceed

50.04(5.2) The pre-trial judge must allow a proposed motion for summary judgment to proceed if he or she is satisfied that the summary judgment motion can achieve a fair and just adjudication of the issues in the action by providing a process that

- (a) allows the judge to make the necessary findings of fact;
- (b) allows the judge to apply the law to the facts; and
- (c) is a proportionate, more expeditious and less expensive means to achieve a just result than going to trial.

[12] The Manitoba Court of Appeal decision in ***Dakota Ojibway Child and Family Services et al. v. MBH***, 2019 MBCA 91 (CanLII), sets out the test applicable to the consideration of summary judgments. The court held at paras 107 - 11:

[107] The test for summary judgment may be briefly summarised as follows.

[108] At the hearing of the motion, the moving party must first satisfy the motion judge that there can be a fair and just determination on the merits (i.e., that the process will permit him or her to find the necessary facts and to apply the relevant legal principles so as to resolve the dispute, and that proceeding to trial would generally not be proportionate, timely or cost-effective). In so doing, the moving party bears the evidential burden of establishing that there is no genuine issue requiring a trial.

[109] If those requirements are met, the responding party must meet its evidential burden of establishing "that the record, the facts, or the law preclude a fair disposition" (*Weir-Jones* at para 32; and *Stankovic v 1536679 Alberta Ltd*, 2019 ABCA 187 at para 22; see also *Stankovic* at para 29) or that there is a genuine issue requiring a trial (e.g., by raising a defence). In other words, the responding

party must establish why a trial is required (see *Hryniak* at para 56). If the responding party fails to do so, summary judgment will be granted.

[110] The analysis contemplated by Karakatsanis J in *Hryniak* is itself a two-step analysis (see para 66). First, the motion judge must determine if there is a genuine issue requiring a trial based only on the evidence, without using any additional fact-finding powers. If there is such an issue, the second step requires the motion judge to determine if the need for a trial can be avoided by weighing the evidence, evaluating credibility, drawing inferences and/or calling oral evidence (see r 20.07(2)).

[111] There is no shifting onus; the standard of proof is proof on a balance of probabilities; and the persuasive burden of proof remains at all times with the moving party to establish that a fair and just adjudication is possible on a summary basis and that there is no genuine issue requiring a trial.

THE POSITION OF THE PLAINTIFFS

[13] The Frechettes state that this matter is suitable for summary judgment in that it is not a complex matter, there are no issues of credibility with respect to the claim and the evidence available on summary judgment is sufficient to apply the facts to the law and adjudicate this action in the most proportionate and cost-effective manner.

[14] The Frechettes state that they did not make any representations to 150 with respect to overland flood insurance and did not make any representations to 150 at all outside of what is contained in the Property Disclosure Statement ("the PDS"). The Frechettes admit that their answer in the PDS to question number 19 does not include an explanation that the Property is not eligible for overland flood insurance but maintains that the answer to this question need not include any such explanation. Accordingly, the Frechettes submit, the issue before the court is whether they had a positive obligation to disclose that the Property was not eligible for overland flood insurance in response to question 19 of the PDS.

[15] The Frechettes argue that the beliefs of 150 regarding overland flood insurance and the diking system that surrounds the Property were not based on representations made by them or by third parties but were based on the lack of representations regarding overland flood insurance. The Frechettes submit that they had no positive obligation to disclose that the Property was not eligible for overland flood protection in the PDS because the information was not directly responsive to question 19 in the PDS nor does it relate to a latent defect or render the Property unfit for habitation. The Frechettes also point out that to their knowledge an insurer has never refused to issue or renew a policy of insurance for the Property.

[16] The Frechettes point out that the evidence of Nicholas is that he informed Duddridge, 150's realtor, that "there is no insurance for flooding out here" (see affidavit of Nicholas Frechette dated July 25, 2025 at para. 6) and that he provided Duddridge with the insurance policy the Frechettes had for the Property at the time.

[17] In respect of 150's allegations of fraudulent or negligent misrepresentation, the Frechettes' maintain that:

- a) No representations were made by them to 150 outside of what is contained in the PDS;
 - b) They made no untrue or misleading misrepresentations;
 - c) 150 did not rely on any representations made by the Frechettes, but entered into the agreement relying on his own impression of the Property to determine whether the Property would qualify for overland flood insurance;
- and

- d) 150 had inspectors access the Property to perform an inspection of the Property and as a consequence negotiated a lower price for the purchase of the Property.

[18] The Frechettes submit that the damages claimed can be substantiated on the basis of the affidavit evidence before the court and proving the damages sustained does not require a trial. They submit that they are entitled to the Deposit and the Additional Deposit regardless of whether they are ultimately able to sell the property at a higher price.

[19] The Frechettes also submit that 150 is liable to them for the loss of profit occasioned by the fact that they have had to subsequently list the Property for \$500,100 less than the agreed upon purchase price.

[20] Furthermore, the plaintiffs submit that the claim for damages based on the cost of professional fees in connection with the breached Agreement, and the cost of maintaining the Property in the form of costs such as mortgage installments, property taxes, maintenance and upkeep of the property can be determined on the basis of affidavit evidence.

[21] It is the position of the Frechettes that a summary judgment motion is a proportionate, more expeditious and less expensive means to achieve a just result than going to trial.

THE POSITION OF THE DEFENDANT

[22] It is the position of 150 that proceeding by way of a summary judgment motion does not allow the court to fully appreciate the evidence and the issues that is required to make dispositive findings.

[23] It is 150's position that the majority of the factual dispute here arises during a critical period of the negotiation of the purchase of the Property, including:

- a) Whether or not Nicholas and Lue discussed the diking system at the Property;
- b) Whether or not Nicholas was informed that 150 did not intend to use the Property as a personal residence;
- c) Whether or not Nicholas had advised that the Property was not the Frechettes' primary residence;
- d) Whether Nicholas made any representations to Lue or to Duddridge about the sufficiency of the diking system; and
- e) Whether Nicholas made any representations to Lue or to Duddridge about the availability of flood protection insurance.

[24] 150 states that it attempted to obtain an affidavit from Duddridge detailing his evidence on the circumstances of this transaction, however Duddridge was unable or unwilling to provide an affidavit prior to the deadline agreed to by counsel for the parties. At the pre-trial conference of December 16, 2025, the court determined after a contested motion for an adjournment that the defendant would not be permitted to adduce any further evidence and the record was therefore closed.

[25] 150 argues that this inability to obtain an affidavit from Duddridge is necessary for a fair adjudication of this dispute and therefore it is necessary to have Duddridge provide oral evidence through a subpoena issued for trial pursuant to Rule 53.04 or discovery of a non-party with leave under Rule 31.10.

ANALYSIS AND DECISION

[26] I am satisfied that there is no genuine issue requiring a trial with respect to the matters at issue here. In my opinion, the summary judgment motion can achieve a fair and just adjudication of the issues in the action by providing a process that allows me to make the necessary findings of fact, apply the law to the facts, and that the summary judgment process is a proportionate, more expeditious and less expensive means to achieve a just result than going to trial.

[27] First, in my opinion there is no merit to the defendant's objection to the summary judgment motion on the basis that it was unable to obtain crucial evidence from Duddridge by way of affidavit within the time frame agreed to by the parties.

[28] The responding party to a summary judgment motion has a strict obligation to "put their best foot forward" and present their evidence in opposition to the motion at the time of the motion. This is spelled out in Rule 20.02 which provides:

20.02 In response to affidavit material or other evidence supporting a motion for summary judgment, a responding party may not rest on the mere allegations or denials of the party's pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue requiring a trial.

[29] In my opinion 150 has failed to meet this obligation. 150 has failed to provide any evidence showing that there is a genuine issue requiring trial. 150 cannot simply rely on the position that its own real estate agent failed or refused to provide crucial evidence

demonstrating that there is a genuine issue requiring a trial. Even if 150 was unable to obtain an affidavit from Duddridge, the King's Bench Rules provide that a party responding to a summary judgment motion may rely on affidavit evidence based on information and belief. In this respect Rule 39.01(4) specifically provides:

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39.01(4) An affidavit for use on a motion, **including a motion for summary judgment**, may contain statements of the deponent's information and belief, if the source of the information and the fact of the belief are specified in the affidavit.
[emphasis added]

[30] 150 admits that it failed to meet its obligations under the Agreement and the Amended Agreement to close the transaction, pay the stipulated purchase price and take possession of the Property. However, it has defended its actions on the basis of a counterclaim for fraudulent or negligent misrepresentation against the plaintiffs.

[31] In this case 150 has failed to put forward any evidence of either fraudulent or negligent misrepresentation. The evidence that is relied upon by the Frechettes, including the affidavit of Lue affirmed July 25, 2025 and the examination of Lue on that affidavit on August 12, 2025, establishes that no representations were made by the Frechettes to 150 outside of what is contained in the PDS. In the cross-examination on that affidavit, Lue, on behalf of 150, admits that he does not know the plaintiffs and has never spoken to them. With respect to the interactions with Nicholas, Lue admits that he did not have any conversations with Nicholas about overland flood insurance.

[32] The affidavit of Lue and the transcript of the examination on that affidavit establish that 150 did not rely on any representations made by the Frechettes and that 150 relied on its own impression of the Property to determine whether it would qualify for overland

flood insurance. 150 had inspectors access the Property to perform an inspection on its behalf and relied on that inspection to negotiate a lower purchase price.

[33] The mere fact that 150 is alleging that there were negligent and fraudulent misrepresentations made by the Frechettes does not prevent this matter from being decided by way of a summary judgment motion. Two cases relied upon by the Frechettes support their position. First, in ***Smith v. Lehmann et al.***, 2022 MBQB 155 (CanLII), decided a matter by way of summary judgment motion, finding that there was no issue of credibility requiring a trial. The court held at paras. 40-41, after setting out the particular facts in that case:

[40] Accordingly, the statutory declaration did not contain a misrepresentation that was untrue, inaccurate, or misleading. In addition, the plaintiff's apparent reliance upon Lehmann's statement, to the exclusion of conducting her own due diligence, was not reasonable in the circumstances. The very purpose of conducting due diligence in a transaction is to learn information that is not in the possession of the other party, or that has not been otherwise disclosed, but there is no evidence that the plaintiff took any steps in that regard.

[41] For all of the foregoing reasons, I am not satisfied that the issue of whether Lehmann is liable in negligent misrepresentation requires a trial.

[34] Second, in ***Gupta v. Gill***, 2024 BCSC 193, the court allowed a matter to proceed by way of summary judgment motion on very similar facts to the case at bar. In ***Gupta***, the plaintiff brought a claim against the defendant for failing to complete a real estate transaction, and the defendant brought a counterclaim against the plaintiff and both realtors for return of the deposit, alleging negligent and fraudulent misrepresentation for a failure to disclose an unregistered right of way. The court held in favour of the plaintiff's claim and dismissed the defendant's counterclaim.

[35] My review of the evidence here leads me to the conclusion that there were no representations made by the Frechettes outside of what is contained in the PDS and that the Frechettes made no untrue or misleading statements in the PDS. I am satisfied that the issue of whether the Frechettes are liable in negligent or fraudulent misrepresentation does not require a trial. In the result, the Frechettes' claim against 150 is successful and 150's counterclaim is dismissed.

DAMAGES

[36] The Frechettes advance their claim for damages under a number of headings. These headings include the full amount of the Deposit and the Additional Deposit, the ongoing carrying and maintenance costs associated with retaining and maintaining the Property, the plaintiffs' loss of income, and \$500,100 in lost profit associated with the future sale of the Property.

[37] In my opinion, the Frechettes' entitlement to both the deposit of \$200,000 being held in trust by the Sutton Group and the Additional Deposit of \$225,000 which 150 failed to pay is clear. The Frechettes are entitled to the Deposit and the Additional Deposit regardless of whether they are able to sell the Property at a higher price or whether an amount on account of the deposit has been paid or not. As stated in *Angus v. Sian*, 1982 CarswellBC 618 (WL Can):

35 The principle involved is not new — it is this. A party to a contract should not be able to take advantage of his default in order to place himself in a better position than he would otherwise have been if he had complied with the terms of the agreement. That concept arose in *Dewar v. Mintoft*, [1912] K.B. 373. Briefly put, that case arose out of a purchaser refusing to carry out his contract. He had agreed to pay a deposit but had left the auction without doing so. He later repudiated the sale. The owner was successful in reselling at a higher price. Nevertheless, the Court held that the defaulting purchaser must pay the full

amount of the deposit agreed to by him, and not merely the amount of actual loss and expenses. To quote Horridge J. at p. 387:

I ruled that the defendant could not put himself in a better position by refusing to pay the deposit than if the deposit had in fact been paid, in which case it could be retained by the seller.

[38] It would also appear that the case law would support the Frechettes' claim to damages for the costs of maintaining the property since October 19, 2023, which includes costs such as property taxes, maintenance and the upkeep of the Property.

[39] On the basis of the affidavit evidence presented by the Frechettes, it is my opinion that the appropriate factual underpinning is in place to support the claim for both deposits, the loss of profit and some of the amounts claimed under the various other heads of damage, with the exception of the loss of income claim. I am not satisfied that the evidence supports the loss of income claim and I would not make an award in that respect.

[40] However, before I set out the amounts that I would award in relation to each head of damages, I wish to state that although the case law generally supports the heads of damages sought by the Frechettes it strikes me that there is an element of "windfall" in awarding an amount for some of these heads of damages. Specifically, it appears to me that the recovery by the Frechettes of both the unpaid and paid deposit amounts, being \$225,000 and \$200,000 respectively, together with the award for loss of profit in the amount of \$500,100, could be viewed as the Frechettes being put into a better position than it would have been had 150 actually gone through with the purchase agreement.

[41] However, despite my concern in this respect, the case law in Manitoba would appear to support not only the awarding of the Deposit and the Additional Deposit

amounts, but also the anticipated loss of profit as a result of the listing of the Property being reduced from the \$3,500,000 to the current listing of just under \$3,000,000. Indeed, I awarded similar heads of damages in *Jordan et al. v. Bains et al.*, 2023 MBKB 43 (CanLII), for the amount of the deposit and the loss of profit in respect of a residential property where the purchaser failed to carry out a binding agreement.

[42] In the result in that case, I awarded the plaintiff damages for many of the same headings being advanced in the case at bar. Accordingly, despite my concern that the award here for both the Deposit and the Additional Deposit as well as the loss of profit may result in a windfall for the Frechettes, it appears that based on the case law, these heads of damages along with most of the other consequential heads of damages are recoverable by the Frechettes by way of summary judgment.

[43] In my opinion, the affidavit evidence here supports the Frechettes' position that most of the damages claimed may be properly recovered without the requirement of the issue of damages going to trial.

[44] Specifically, the Deposit and the Additional Deposit, in the amount of \$200,000 currently being held in trust by the Sutton Group and the Additional Deposit in the amount of \$225,000.00 are recoverable by the Frechettes. In respect of the loss of profit, the affidavit evidence of Marc Frechette states that the Property has been and continues to be listed with RE/MAX Executive Realty, in an effort to sell the Property to a third party. The Property is listed at \$2,990,000, \$500,100 less than the purchase price agreement with 150. To date the Frechettes have been unable to secure a buyer. The amount of \$500,100 in respect of lost profits is recoverable by the Frechettes.

[45] In addition, the Frechettes are claiming the costs for maintaining the Property since October 19, 2023, which includes costs such as property taxes, maintenance and upkeep of the Property. The affidavit evidence states that since that date the Frechettes have paid \$40,860.45 in property taxes. The Frechettes also claim storage fees in the amount of \$4,456.92 in connection with the failed sale of the Property and maintenance costs in the amount of approximately \$3,500 on an ongoing monthly basis and totalling approximately \$75,000 since October 19, 2023.

[46] While I am satisfied on the evidence that the amount claimed in respect of property taxes is recoverable, I am not satisfied on the evidence that the claim for storage fees and the full claim for the ongoing \$3,500 monthly fee in respect of maintenance should be granted. I will order the payment of maintenance costs, but I will fix this amount and grant judgment for this head of damages (the storage fees and the maintenance fees) in the total amount of \$40,000 from October 19, 2023 on the basis of the evidence before me. I am not prepared to grant judgment in respect of the lost income claimed by Marc on the basis of the evidence before me.

CONCLUSION

[47] In the result and on the basis of the foregoing reasons, I grant judgment in favour of the plaintiffs by way of summary judgment in respect of or for the following amounts:

- a) The Deposit held in trust by the Sutton Group in the amount of \$200,000 plus any accrued interest is to be released to the Frechettes;
- b) 150 is ordered to pay to the Frechettes the Additional Deposit in the amount of \$225,000;

- c) 150 is ordered to pay the Frechettes the amount of \$500,100 on account of lost profits;
- d) 150 is ordered to pay the Frechettes the total amount of \$40,000 on account of storage fees and maintenance fees, but I am not prepared to order any amount in respect of any ongoing costs in this respect; and
- e) 150 is ordered to pay the Frechettes the total amount of \$40,860.45 on account of property taxes, an amount that is fixed and not ongoing.

[48] The claim by Marc in respect of lost income is dismissed.

[49] As discussed during the course of the hearing with counsel, including counsel for the third parties who attended the hearing on a watching brief, this summary judgment does not prevent 150 from continuing its claim against the third parties as a separate action.

[50] The Frechettes are entitled to their costs on the basis of the appropriate tariff.

_____ J.