CITATION: *Vista Mortgage Capital Corporation v. MacSweeney et al*, 2025 ONSC 2322
COURT FILE NO.: CV-23-289
DATE: 2025-04-28

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
Vista Mortgage Capital Corporation Plaintiff / Moving Party	Michael S. Myers, Counsel, for the Plaintiff
– and –	
Rachelle Adelle MacSweeney and Garrett Patrick MacSweeney Defendants / Responding Parties	M. L. Biggar and Julian Heller, Counsel, for the Defendants
	HEARD: April 15, 2025

WOODLEY, J.

MOTION FOR JUDGMENT FOR POSSESSION OF MORTGAGED PROPERTY

Nature of the Motion

[1] The Plaintiff Vista Mortgage Capital Corporation ("Vista") as Mortgagee moves for partial summary judgment for possession of certain mortgaged property as against the Defendants, Rachelle Adelle MacSweeney ("Rachelle") as Mortgagor and her spouse Garrett Patrick MacSweeney ("Garrett"), and more particularly for the following Order:

i. An order that the Mortgagor deliver to the Mortgagee possession of the property pursuant to the terms of the Mortgage registered against title to the Property.

ii. An order granting the Mortgagee leave to issue a Writ of Possession directed to the Sheriff of the Regional Municipality of York.

iii. Costs.

[2] The Defendant Rachelle submits:

a. This matter is not appropriate for summary judgment.

b. The action fails to name the appropriate parties as Defendants. The Defendant Rachelle holds the property as "bare" trustee for a Trust and not in her personal capacity. There are two further trustees of the Trust who are not named in this proceeding, and the Defendant Garrett is Rachelle's spouse, not a Trustee, and not an appropriate party to the proceeding.

c. The mortgage is invalid.

d. The property subject to the mortgage is a "farm" which entitles the Mortgagor to special consideration under the provisions of the *Farm Debt Mediation Act*, S.C. 1997, c. 21 ("*FDMA*"). The Plaintiff was obligated under the terms of the *FDMA* to comply with certain notice provisions and did not and this failure renders the within action a nullity that cannot be saved by the Court.

Facts

The Trust Agreement and the Mortgage

[3] On November 5, 1999, Sofia Jackowski, as settlor, established the Jackowski Family Trust for the benefit of George Jackowski and his family. The Jackowski Family Trust is a standard form trust agreement that includes thereto schedules that are incorporated by reference and deemed to be part of the Trust Agreement.

[4] Pursuant to Schedule II of the Trust Agreement the Trustee(s) were, *inter alia*, entitled to:

i. encumber any part of the trust on such terms as the trustees consider advisable;

ii. to abandon any property that the trustees deem to be worthless;

iii. to permit any such property to be lost by tax sale or other proceedings;

iv. to renew and keep renewed any mortgage upon any property;

v. to borrow money…from others…upon the security of the Trust … and to secure the repayment of borrowed money, and to extend or modify any such encumbrances.

[5] On December 31, 2020, a transfer deed of land was registered transferring 17725 Keele Street, King City, from George Jackowski to the Defendant, Rachelle. The transfer was signed by Susan Ann Susi Carlyle, lawyer, acting for the transferor and transferee. The property was transferred by "personal representative from estate to beneficiary" for no consideration.

[6] The Defendant Rachelle declared that she was a "transferee named in the above-described conveyance" and not "a trustee named in the above-named conveyance to whom the land is being conveyed".

[7] On November 15, 2021, Rachelle, as Trustee of the Jackowski Family Trust, executed a loan commitment agreement with the Plaintiff, Vista Mortgage Capital Corporation as against the 17725 Keele Street property, and personally.

[8] Pursuant to the terms of the loan commitment, the borrowers were the Jackowski Family Trust, the Lender was the Plaintiff Vista Mortgage Corporation, and the (personal) Guarantors of the mortgage were the Defendant Rachelle and George Jackowski.

[9] The total amount of the loan was $500,000 which was to be registered against title to 17725 Keele Street, King, Ontario. The purpose of the loan was "refinancing". The mortgage loan was to be in the form of a single advance upon completion of the required security documentation. The interest rate on the loan was 13.50% per annum, adjusted from the date of funding. The prepayment provisions were that the mortgage was closed for 6 months, open thereafter with 3-month interest bonus.

[10] Repayment was noted to be interest only. Twelve (12) months of interest was retained by the Lender at the time of funding for the interest payments due during the Term. If the Loan is repaid in full prior to end of the Term (which it was not), any difference, less repayment penalties/fees/costs/ will be returned to the Borrower within 30 days.

[11] The following deductions were retained from the $500,000 advance on funding:

a. 12 months of interest payments;

b. Any arrears, outstanding or upcoming property Tax payments for any Taxes due before December 31, 2021;

c. Lender Fee equal to 5% of the Loan Amount;

d. Lender solicitor, third-party and consultants' fees; and

e. Brokerage fees equal to $10,000 and $750.00 discharge fee, and all out of pocket legal costs incurred for the discharge.

[12] The mortgage was a one-year mortgage with a maturity date of December 1, 2022.

[13] Renewal was available on certain terms that were not satisfied in the present case.

[14] The Loan Commitment was signed on behalf of the Jackowski Family Trust by the Defendant Rachelle, as Trustee and guarantor, and by George Jackowski, personally as guarantor, on November 15, 2021.

[15] On November 21, 2021, the trustees of the Jackowski Family Trust passed a "Resolution" which provided as follows:

> The trustees of the Family trust are George Jackowski, Rachelle MacSweeney and Kristin DiMatteo (collectively the Trustees).

Section 5 of the Family Trust requires all actions by the Trustees to be determined by a majority of the Trustees appointed, including at least one trustee who is not George Jackowski.

The Trust provides that the Trustees may borrow funds and mortgage Trust Property.

And whereas the Family Trust has agreed to borrow the sum of $2,700,000 from Ryan Mortgage Income Fund Inc. to be secured against the Property as a first Charge, on the terms and conditions contained in a Charge/Mortgage of Land, as attached hereto ("Ryan Mortgage").

And whereas the Family Trust has further agreed to borrow the sum of $500,000 from Vista Capital also to be secured against the Property as a second Charge on the terms and conditions contained in a mortgage disclosure as attached hereto ("Vista Mortgage").

NOW THEREFORE BE IT RESOLVED THAT:

The Family Trust is hereby authorized to borrow funds secure by Mortgages to complete the Ryan Mortgage and the Vista Mortgage ("the Lenders").

The Trustees confirm Rachelle MacSweeney is authorized to sign such further and other documents on behalf of the Family Trust to confirm such liability of the Family Trust to these Lenders.

The Trust is authorized to provide such further security as required by the Lenders.

Any person, including the solicitors for the Trust, is hereby authorized to do all things necessary or desirable and to sign all documents or instruments required to give effect to the foregoing.

[16] The Resolution was signed as required by the terms of the Trust.

[17] Additional documents were executed on November 21, 2021, as follows:

[18] The Jackowski Family Trust issued a Trustee's Certificate which included the following terms:

Para 4: each of the persons named below has been authorized by the Trustees under the Trust instrument to execute and deliver on behalf of the trust, all loan documents to which the trust is a party and all other agreements, documents, and certificates to be delivered by the Trust pursuant thereto. Opposite each name below is a

specimen of the genuine signature of that person. Name: Rachelle MacSweeney Signature: "Rachelle MacSweeney".

[19] An Acknowledgement and Authorization wherein the Defendant Rachelle signed as "covenantor" and "trustee" and acknowledged "I am a trustee of the Jackowski Family Trust and I have authority to bind the Trust". The Defendant Garrett signed the acknowledgement as the consenting spouse and George Jackowski signed as "covenantor".

[20] The Mortgage at issue was registered on November 26, 2021, against the property located at 17725 Keele Street, King City, as instrument number YR3346956. The Chargor is recorded as the Defendant Rachelle, with the Defendant Garrett noted as being the spouse of Rachelle who "consented to this transaction".

[21] The Mortgage was registered as a second mortgage with standard charge terms 2000033 attached thereto. The registered Vista mortgage noted that it was to "take precedence after a certain Mortgage to Ryan Mortgage Income Fund ("RMIF") dated the 26th day of November 2021, in the principal amount of $2.7 Million."

[22] A legal opinion was provided by the Defendant Mortgagor's lawyers, Carlyle Peterson, which is addressed to the Plaintiff Vista and the Plaintiff's lawyers, Gardiner Roberts.

[23] The legal opinion provided, *inter alia,* the following information:

a. The borrower is a trust duly formed and validly existing and organized under the laws of Ontario.

b. Pursuant to the Trust Agreement, Rachelle was appointed as one of the Trustees of the Trust and a resolution was passed by all Trustees putting title to the property in Rachelle's name with the power and capacity to own the property and assets of the trust and to enter into and perform its obligations under the documents to which it is party.

c. Rachelle is qualified to act as a trustee of the Trust under the laws of the province of Ontario and to enter into and perform the obligations under the Loan Documents to which the Trust is a party.

d. All necessary action was taken by all the Trustees, including in accordance with the Trust Agreement, that permitted Rachelle in her capacity as a trustee of the Trust, to authorize the execution, delivery, and performance by the Trustee of the Loan Documents.

e. Each of the Loan Documents to which the Trust and Rachelle is a party has been executed and delivered in accordance with the provisions of the Trust Agreement in her capacity as a trustee of the Trust.

f. The execution, delivery and performance by Rachelle, in her capacity as a trustee of the Trust, of each of the Loan Documents to which it is a party do not and will

not breach or constitute a default under any law, statute, rule or regulation to which the Borrower is subject.

g. Each Loan Document to which the Trustee is a party constitutes a valid and legally binding obligation of the Trust and Rachelle, in her capacity as a trustee of the Trust, and of the property and assets for the trust, enforceable against them respectively in accordance with its terms.

[24] On or about November 25, 2021, the Plaintiff Vista fully advanced to the Defendant Rachelle the mortgage funds.

[25] Other than the pre-payment of interest made as a hold-back on the original advance of the mortgage funding (as contemplated by the Loan Commitment), no payment had been made whatsoever towards the mortgage. The Vista Mortgage has been in default since December 1, 2022.

Commencement of Legal Proceedings and the *Farm Debt Mediation Act*

[26] Following default, the Plaintiff sought repayment of the sums due under the mortgage but the Defendants refused and/or neglected to remit payment.

[27] On February 10, 2023, the Plaintiff issued the Statement of Claim in this action seeking possession of the property, payment of the sum of $554,509.93, together with interest and costs. While no information was provided with respect to the date the claim was served, the Defendants served a Notice of Intent to Defend on March 1, 2023, and served their Statement of Defence on March 18, 2023.

[28] On March 27, 2023, the Plaintiff caused form AAFC 4805-E to be sent to the Defendant Rachelle under the *FDMA.* The form contained thereon, *inter alia,* the following notice: "A secured creditor must wait 15 business days after this notice has been deemed served before beginning action to realize on their security. You may apply for mediation and a stay of proceedings at any time, before, during, or after the 15 day period, by making an application to the Farm Debt Mediation Service."

[29] On April 28, 2023, the Plaintiff received a letter from Agriculture and Agri-Food Canada Services that notified the Plaintiff that under s. 13(1) of the *FDMA* an extension of the Stay of Proceedings for a further 30 days was granted to The Jackowski Family Trust (George Jackowski and Rachelle MacSweeney, operating as Against the Wind Farms Inc., located at 17725 Keele Street, King, Ontario). The letter noted that the stay would continue in effect until June 11, 2023, at midnight and that the stay was the second of three possible extensions under the *FDMA.* Under a section titled "Rights of the farmer and creditors" it was noted: You are reminded that during the Stay of Proceedings creditors cannot realize on their security, recover their debt or take property out of the possession of the farmer. In turn, the farmer may not dispose of secured property nor use money obtained as a result of such disposal without the approval of the secured creditor.

[30] Counsel for the Plaintiff submitted that following issuance of Form AAFC 4805-E and delivery of the April 28, 2023, letter, that the parties participated fully in the *FDMA* process, that three stay of proceedings were extended, and that the parties participated in mediation, however, no resolution was reached.

Issues

[31] The following are the issues on this motion:

a. Is this an appropriate case for summary judgment?

b. Are all necessary parties present and represented?

c. Is the mortgage valid?

d. Did the Plaintiff comply with the provisions of the *FDMA*, and if not, is the proceeding a nullity?

e. Is the Plaintiff Vista entitled to an order for possession and leave to issue a writ of possession as claimed in its statement of claim?

The Law and Analysis

a. <u>Is this an appropriate case for summary judgment?</u>

[32] Rule 20 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, outlines when a court may grant summary judgment. In *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, the Supreme Court of Canada stated that r. 20 was amended to improve access to justice. The reforms changed the test for summary judgment from whether a case presents "a genuine issue for trial" to whether there is a "genuine issue requiring a trial" (at para. 43).

[33] The new powers in r. 20 allow motion judges to weigh evidence, evaluate credibility, draw reasonable inferences, and call oral evidence. These new powers expand the number of cases in which there will be no genuine issue requiring a trial, thereby establishing that a trial is not the default procedure and eliminating the presumption of substantial indemnity costs against a party that brings an unsuccessful motion for summary judgment.

[34] Karakatsanis J., writing for the court, laid out the test to apply when determining whether a summary judgment motion may be granted, at para. 66:

> On a motion for summary judgment under Rule 20.04, the judge should first determine if there is a genuine issue requiring trial based only on the evidence before her, without using the new fact-finding powers. There will be no genuine issue requiring a trial if the summary judgment process provides her with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure, under Rule 20.04(2)(a). If there appears to be a genuine issue requiring a trial, she should then determine if the need for a

trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2). She may, at her discretion, use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if they will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

[35] In determining whether there is a genuine issue requiring a trial, the Ontario Court of Appeal suggested, as cited in *Hryniak*, that "summary judgment would most often be appropriate when cases were document driven, with few witnesses and limited contentious factual issues, or when the record could be supplemented by oral evidence on discrete points" (at para. 48).

[36] The Supreme Court of Canada affirmed that the Court of Appeal's suggestions are helpful observations but should not be taken as delineating firm categories of cases where summary judgment should and should not apply; summary judgment may be appropriate in a complex case, with a voluminous record if there is no genuine issue requiring a trial. The Court further explained at para. 49, that a case where there is no genuine issue requiring a trial will be a case "when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result."

[37] When summary judgment allows the judge to find the necessary facts and resolve the dispute, proceeding to trial is generally not proportionate, timely, or cost effective. Alternatively, a process that does not give a judge confidence in her conclusions can never be the proportionate way to resolve a dispute.

[38] The focus is not what kind of evidence could be adduced at trial, but rather whether a trial is required. The evidence simply must be such that I am confident that I can fairly resolve the dispute fairly and justly.

[39] In the present case I am confident that I can fairly and justly resolve the dispute.

[40] The onus is on the moving party to establish a *prima facie* case that there is no genuine issue requiring a trial. The onus then shifts to the responding party to show that there is a genuine issue requiring a trial. The responding party must put their best foot forward and cannot simply advise that further or better evidence may be available at trial.

[41] In the circumstances of this case, I find that the evidence submitted is sufficient to allow me to make the necessary findings of fact and apply the law to the facts. Based on the facts before me, I find that summary judgment is a proportionate, more expeditious, and less expensive means to achieve a just result.

b. <u>Are all parties present and represented?</u>

[42] The Trust documents, including the original Trust Agreement, the Schedules, and most particularly the Trustee's Certificate and Resolution of Trustees both dated November 21, 2021, identify that it is the Defendant Rachelle who is the sole party empowered to act on

behalf of the Trust, and the sole party authorized to sign documents on behalf of the Trust and to confirm the liability of the Trust to Vista Mortgage.

[43] Rule 5 of the *Rules of Civil Procedure* provides that a defendant may be sued in different capacities in the same proceeding.

[44] Rule 11 of the *Rules of Civil Procedure* provides that a proceeding may be brought against a trustee as representing the trust and its beneficiaries without joining the beneficiaries as parties.

[45] It is my view that the evidentiary record filed on the motion overwhelmingly establishes that the action, as it relates to Rachelle and the Trust, was commenced against the appropriate party. This argument is without merit.

c. <u>Is the mortgage valid?</u>

[46] The evidentiary record filed on the motion (again) overwhelmingly establishes that the mortgage was valid, and that Rachelle received detailed and highly specialized independent legal advice with respect to all rights and responsibilities that attach the Vista mortgage. Of special note is the opinion prepared by the lawyers for Rachelle, Carlyle Peterson, that confirmed the validity of the mortgage, which letter Rachelle is entitled to rely upon for all purposes pursuant to paragraph 7.5 of the Trust Agreement.

[47] The Defendants' position that the mortgage is not valid as it was signed by a bare trustee is unsubstantiated in law. The decision that the Defendants rely upon (*Upper Mapleview Inc. v. Stolp Homes (Veterans Drive) Inc.* (1997), 36 B.L.R. (2d) 31 (Ont. S.C.)) is not applicable to the present situation.

[48] The legal documents that govern the exercise of the Trustee's power in the present case are contained within the terms of the Jackowski Family Trust (which incorporates therein the Schedules). The terms of the Trust clearly authorized Rachelle as Trustee to enter into the mortgage. More specifically, the Trust provides as follows:

a. Pursuant to the Trust, at paragraph 7.11, the Trustees are provided with "an absolute and uncontrolled discretion or power".

b. Paragraph 8 of the Trust empowers Trustees to divide the duties of their offices between them as they may from time to time deem advisable.

c. Paragraph 8.1.3 provides that the Trustees may, in writing, provide that only one Trustee may exercise any Powers, duties and discretion vested in them jointly. This delegation of power applies to duties and discretions relating to the management and administration and operation of the Trust or any property in which the Trust is interested but not to the power to advance or distribute income or capital to or amongst any of the Beneficiaries.

d. Paragraph 8.2.1 provides that no documents required to be signed, made on behalf of the Trust and purporting to bind the Trust, shall be binding upon the Trust unless it is executed in the manner and by the person(s) designated from time to time by the Trustees. Only those documents executed as required shall be valid and binding upon the Trust without further authorization or formality.

e. Paragraph 8.2.1. provides that the Trustees acting unanimously shall be entitled to vary, alter, or amend Paragraph 8.2.1.

[49] In the present case, the Trustees were authorized to delegate sole authority to Rachelle regarding the Vista mortgage and the Trustees complied with the terms of the Trust when ALL Trustees executed the Resolution that designated Rachelle as the sole Trustee authorized, empowered, and obligated to deal with the Vista mortgage.

[50] The Resolution which was executed by ALL Trustees of the Trust provided:

C. The Trust provides that the Trustees may borrow funds and mortgage Trust Property.

E. AND WHEREAS the Family Trust has further agreed to borrow the sum of $500,000.00 from Vista Capital also to be secured against the Property as a second Charge, on the terms and conditions contained in a Mortgage Disclosure, as attached hereto (Vista Mortgage).

1. The Family Trust is hereby authorized to borrow funds secured by Mortgages to complete the Ryan Mortgage and the Vista Mortgage ("the Lenders").
2. The Trustees confirm Rachelle MacSweeney is authorized to sign such further and other documents on behalf of the Family Trust to confirm such liability of the Family Trust to these Lenders.
3. The Trust is authorized to provide such further security as required by the Lenders.
4. Any person, including the solicitors for the Trust, is hereby authorized to do all things necessary or desirable and to sign all documents or instruments required to give effect to the foregoing.

[51] The terms of the Trust also provided the following authority:

a. Paragraph 12 of the Trust provides the Trustees with the "widest possible latitude and discretion. In carrying out their rights and duties, the Trustees shall have all the Powers and capacities that a natural person would have in the investment, management, supervision, and administration of the person's own properties" except as limited by the Trust.

b. Paragraph 12.2 expands the trustees ability to exercise their "powers and authority in their sole and absolute discretion, as they shall deem advisable… without approval by any court… or official, for any province or state or country". Further, the Trust provides that the Trustees' judgment shall be final and binding "upon all parties interested or potentially interested in this Trust".

c. Paragraph 12.2 of the Trust further provides that "no person having any dealing with the Trustees shall be charged with any duty to enquire into the Trustees' authority".

[52] The Defendants did not provide nor am I aware of any authority that would suggest that the terms of the Jackowski Family Trust, or the Schedules or Resolution made thereunder, are contrary to any provision of the *Trustee Act*, R.S.O. 1990, c. T.23, and/or are invalid.

[53] Similar to the findings of the Court in *Jimenez v. Montemurro*, [1996] O.J. No. 1792 (Ont. Gen. Div.), I find that the Trustees of the Trust were entitled to designate and appoint the Defendant Rachelle to enter into the mortgage loan agreement with Vista, and that Rachelle was authorized to enter into the mortgage with Vista, that the Trust and the Trust property are bound by the mortgage agreement, and that the proper parties to the lawsuit are the Plaintiff and the Defendant Rachelle, as the duly designated Trustee. Rachelle holds title to the trust property, was the sole trustee empowered to enter into the mortgage loan, and was the sole trustee authorized to execute the mortgage documents, as Trustee.

[54] To suggest that the mortgage is not valid in the circumstances of this case ignores the overwhelming evidence to the contrary. This argument is also without merit.

d. <u>Did the Plaintiff comply with the provisions of the *Farm Debt Mediation Act*, and if not, is the proceeding a nullity?</u>

[55] The Plaintiff submitted to the court that it fully complied with the provisions of the *FDMA*. However, during argument counsel candidly acknowledged that usually if a proceeding were commenced prior to the discovery that the Defendant/Mortgagor was a farmer, the proceeding would be dismissed, the provisions of the *FDMA* complied with, following which if no resolution was reached, the proceeding would be re-issued.

[56] That did not happen in the present case.

[57] The question that arises is whether the Plaintiff's action is rendered a nullity as the action was issued *prior* to Notice being provided under the provisions of the *FDMA*.

[58] The *FDMA* provides, at sections 21 and 22:

Notice by Secured Creditors

21(1) Every secured creditor who intends to

(a) Enforce any remedy against the property of a farmer, or

(b) Commence any proceedings or any action, execution or other proceedings, judicial or extra-judicial, for the recovery of a debt, the realization of any security or the taking of any property of a farmer

Shall give the farmer written notice of the creditor's intention to do so, and in the notice shall advise the farmer of the right to make an application under section 5.

Time of Notice

21(2) The notice must be given to the farmer and to an administrator, in the form established by the Minister and in accordance with the regulations, at least 15 business days before the doing of any act described in paragraph 1(a) or (b).

General

Contravention by creditor

22(1) Subject to subsection (2), any act done by a creditor in contravention of section 12 or 21 is null and void, and a farmer affected by such an act may seek appropriate remedies against the creditor in a court of competent jurisdiction.

[59] In the present case, notice was not properly given within the timeframe provided by section 21 of the *FDMA.* The *Act* provides that notice must be given and the 15 business-day-time period must elapse, before proceedings can be commenced.

[60] There are numerous decisions across our country that have considered the application of sections 21 and 22, and the law with respect to this issue is settled - where a secured creditor fails to provide notice as required by the *FDMA,* the underlying proceeding is a nullity and is *void ab initio*.

[61] Beginning in Saskatchewan, the Court in *HCI Ventures Ltd. v. S.O.L Acres,* 2020 SKCA 24, 100 B.L.R. (5th) 165, noted that the *FDMA* is remedial in nature whose object is to provide for mediation between farmers and their creditors. The *FDMA* is designed as a tool for farmers to work with creditors in order to keep the farming operation afloat during difficult financial times. Section 21 of the *FDMA* is an extremely broad provision and on a plain reading casts a wide net over the actions of a secured creditor that warrant notice being given to the farmer of their rights under the *FDMA.* The Saskatchewan Court of Appeal at paras. 42-43, held:

> …a broad interpretation best accords with the objects of the *FDMA,* which are meant to afford farmers facing financial difficulties an opportunity to mediate with their creditors. It also accords with the overall legislative scheme, which gives only farmers the power to apply for a stay of proceedings and/or financial review and mediation (s. 5). Secure creditors are of particular concern to farmer facing financial difficulties because such creditors often hold as security key elements of their farming operations such as land, equipment, cattle or inventory. Without those assets a farmer would struggle to remain viable. It is not thus surprising that s. 21 refers to secured creditors as opposed to all creditors.
>
> 43 Requiring a secured creditor to provide notice of its intention in accordance with s. 21 is not cumbersome, nor does it unduly prejudice such creditors. The

notice period is short — 15 days — and the secured creditor has the ability to control when it provides such notice.

[62] In *HCI Ventures,* following review of the nature and intent of the *FDMA,* the Court upheld the decision of two lower court judgments, consistent with a plain reading of the *FDMA.* The first decision, upheld on appeal, related to the dismissal of a summary judgment motion due to the mortgagee's failure to provide proper notice in accordance with the *FDMA.* In that case, the motion was dismissed and the claim was struck as a nullity. The second decision, upheld on appeal, concerned a decision that allowed a secured creditor whose claim had been struck as constituting a nullity for failure to comply with the provisions of the *FDMA,* to re-issue their claim following dismissal despite being outside the two-year limitation period.

[63] Moving on to Alberta, the Court in *Intec Holdings Ltd. v. Grisnich,* 2003 ABQB 993, 350 A.R. 264, considered the nature and effect of s. 22 of the *FDMA* and concluded that the addition of a specific and express penalty made the advance notice mandatory. As such, the provision in s. 22 that declared any proceeding that breached the notice period to be a nullity did not permit the court to intervene, even where there was evidence that the farmer was "well aware" of the contents of the notice.

[64] In Manitoba, the Court in *Hill Estate v. Chevron Standard Ltd.* (1992), 85 Man. R. (2d) 67 (MB CA), held that a statement of claim issued during the stay of proceeding under the *FDMA* is a nullity and as a result all relief that flows from issuance of the claim, including any judgment or writ of execution, are also nullity, having been done contrary to the stay of proceedings. The Court further held that estoppel cannot arise in these circumstances.

[65] Finally, the Court in Quebec, in *Financement Agricole Canada c. Messier,* 2008 QCCS 3355, held that notice must be given under the *FDMA* prior to the action being commenced, and not otherwise. Failure to comply with the notice provisions of the *FDMA* renders the proceeding *void ab initio* and a nullity.

[66] In the present case, the statement of claim was issued and served prior to notice being provided under the terms of the *FDMA.* It matters not that the claim was held in abeyance pending completion of the notice and mediation provisions contained within the *FDMA.* The penalty contained within the *FDMA* is mandatory. Neither r. 2 of the *Rules of Civil Procedure*, nor any other equitable remedy can oust the mandatory penalty provision contained within the *FDMA.* As the claim was commenced in contravention of the notice provisions of the *FDMA,* the claim is a nullity and is *void ab initio.*

Determination of Motion and Costs

[67] For the foregoing reasons, the Plaintiff's motion for summary judgment is dismissed and the underlying claim is hereby struck as being a nullity.

[68] With respect to the issue of costs, although the plaintiff's motion was dismissed and the underlying action struck, the result was based on a technical interpretation of legislation and in my view is not reflective of the underlying equities.

[69] The Plaintiff was successful with respect to three of the four issues raised by the Defendants: it was recognized that summary judgment was appropriate; the Defendant Rachelle was recognized to be the proper party to represent the Trust; and the mortgage was held to be valid. Unfortunately for the Plaintiff, however, the final issue relating to the notice provisions under the *FDMA* proved to be fatal to their motion and underlying action.

[70] Notwithstanding, the following facts remain to be true: the mortgage has been in default since December 1, 2022; and Rachelle has refused and/or neglected to make any payments on account of the mortgage.

[71] Rule 57 of the *Rules of Civil Procedure* codifies and broadens the discretion of a judge to award costs under section 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

[72] In exercising such discretion the court may consider, *inter alia*, the result in the proceeding, the conduct of any party that tended to lengthen unnecessarily the duration of the proceeding, and a party's denial of or refusal to admit anything that should have been admitted.

[73] In the present case, there was overwhelming evidence that the Defendant Rachelle was the sole trustee of the trust empowered to enter into the mortgage and that the mortgage was valid.

[74] Had the issues been confined to the dispute concerning the effect of s. 22 of the *FDMA* on the proceeding, this matter could have proceeded as a short motion which would have allowed the matter to proceed more expeditiously and would not have wasted valuable court time.

[75] Correspondingly, had the Plaintiff recognized their error and simply re-issued the claim as was the stated practice in mortgage enforcement proceedings, there would have been no necessity for the motion to be heard at all.

[76] The net result is that the results were mixed, and neither party is entitled to any costs for the proceeding and/or the motion.

[77] Accordingly, although the Plaintiff's motion is dismissed, and the underlying proceeding struck, there shall be no costs awarded with respect to this motion or the underlying action.

Justice Susan J. Woodley

Released: April 28th, 2025

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Vista Mortgage Capital Corporation
v.
MacSweeney et al

REASONS FOR DECISION REGARDING MOTION FOR SUMMARY JUDGMENT FOR POSSESSION OF MORTGAGED PROPERTY

The Honourable Justice Susan J. Woodley

Released: April 28, 2025