

COURT OF APPEAL FOR ONTARIO

CITATION: 1803275 Ontario Limited v. Deerbourne Estates Corporation,
2025 ONCA 390
DATE: 20250523
DOCKET: COA-25-OM-0120

Lauwers J.A. (Motions Judge)

BETWEEN

1803275 Ontario Limited and Ardler Farms Inc.

Plaintiffs
(Respondents/Responding Parties)

and

Deerbourne Estates Corporation* and South Dundas Waterfront
Development Corporation

Defendants
(Appellant/Moving Party*)

Patricia Thériault, for the appellant/moving party, Deerbourne Estates
Corporation

K. Daniel Reason, for the respondents/responding parties, 1803275 Ontario
Limited and Ardler Farms Inc.

Heard: in writing

ENDORSEMENT

[1] The moving party, Deerbourne Estates Corporation, and its co-defendant in
the motion below, South Dundas Waterfront Development Corporation, were

mortgage borrowers.¹ The moving party borrower seeks an order extending the time to file its motion for leave to appeal from the costs award made by John M. Johnston J. and released February 25, 2025, in a mortgage action.

[2] The motion judge awarded the full costs claimed by 1803275 Ontario Limited and Ardler Farms Inc., the mortgage lenders, and fixed in the amount of \$78,855.83. The moving party borrower argues that there was an earlier decision by “Adams J.” that fixed costs at \$20,000 to be paid by the losing parties, which, it asserts, were the lenders.² The amount at issue would then vary between the amount awarded to the lenders of \$78,855.83, and \$20,000 to either the lenders or the borrowers depending on the parties construed to be the losing parties. The motion judge took the clear position that the borrowers were the losing parties.

[3] The *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, provide clear timelines for filing documents with the court. Rule 61.03.1(3) requires that a notice of motion for leave to appeal be served within 15 days of the order to be appealed from and filed within 5 days of that service. Rule 61.03.1(6) requires the moving party to file a motion record, a factum, and transcripts, if any, within 30 days after the filing of the notice of motion for leave to appeal.

¹ For clarity, I refer to both co-defendants collectively as the “borrowers” and to the responding parties on this motion as the “lenders”.

² The responding parties submit that this was a misspelling of Abrams J.

[4] In this case, the moving party borrower submitted the notice of motion for an extension of time and supporting material to this court on April 9, 2025, almost a month and a half after the motion judge's order.

[5] In terms of the governing principles, the test for an extension of time to file a notice of appeal was succinctly stated by Gillese J.A. in *Enbridge Gas Distribution Inc. v. Froese*, 2013 ONCA 131, at para. 15:

The overarching principle is whether the “justice of the case” requires that an extension be given. Each case depends on its own circumstances, but the court is to take into account all relevant considerations, including

- (a) whether the moving party formed a bona fide intention to appeal within the relevant time period;
- (b) the length of, and explanation for, the delay in filing;
- (c) any prejudice to the responding parties caused, perpetuated or exacerbated by the delay; and
- (d) the merits of the proposed appeal.”

[6] The merit of a proposed appeal is the most important factor and can be determinative: *Liu v. Chan*, 2024 ONCA 699, at para. 29; *Robson v. Law Society of Ontario*, 2023 ONCA 709, at para. 5.

[7] I do not doubt that the moving party borrower intended to appeal within the relevant time period, but it provides no explanation for the delay. There is no real prejudice to the lenders. However, as I will explain, I dismiss the motion for leave because the appeal lacks merit.

[8] The moving party borrower seeks leave to appeal the motion judge's costs award, which was the only issue before him. A party requires leave from this court where the appeal is only as to costs: Section 133(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. The test for leave to appeal a costs award was set by *Hobbs v. Hobbs*, 2008 ONCA 598, 240 O.A.C. 202, at para. 32, and requires a moving party to establish that there are strong grounds upon which the appellate court could find that the judge erred in exercising discretion in awarding the costs.

[9] The proceeding started as a contested foreclosure action that was eventually converted into an action for sale. The sale closed and the lenders received \$2,002,424.48 in proceeds. The action was reported to the court as settled with costs reserved.

[10] The motion judge noted:

[30] Costs are payable by the [borrowers] to the [lenders]. The parties by way of the standard Mortgage Charge terms agreed costs in this circumstance were payable at the higher rate, namely, solicitor client.

[31] Courts have consistently held that where a Mortgage provides that a Mortgagee is entitled to costs on a solicitor client basis in proceedings to realize on the security, the costs are to be awarded on that scale.

[11] The motion judge recorded the positions of the parties on the issue of costs, as follows.

[15] The [lenders] argue they were successful in the Claim. Their objective after the [borrowers] defaulted was

to be paid what it was owed under the Mortgage. They say it was irrelevant whether the property was sold and they were paid, or a foreclosure order was made. The [borrowers] were in default.

[16] The [lenders] further argue[] the steps taken were both reasonable and necessary. The Standard Charge Terms of the Mortgage provided for costs on a solicitor and client basis. The [lenders] took steps to enforce the Mortgage after the default and in the end the [borrowers] paid the mortgage. The [lenders] argue: “clearly the litigation was effective in advancing the contractual position of the [lenders].”

[17] The [lenders] seek costs awarded to them in the sum of \$78,855.83. At closing of the resale of the property by the [borrowers], the amount of \$61,250 was retained by the lawyer acting on the real estate transaction. The Plaintiff seeks an[] Order for release of the funds to it, in addition a further \$17,605.83 be ordered payable by the [borrowers].

[12] Before the motion judge, the borrowers argued that the lenders were unreasonable in advancing a claim for foreclosure, because that would have produced a windfall for the lenders, on the basis that the borrowers had “obtained an appraisal of the property in the amount of \$5.2 million” and a proposed “future valuation of the property would be in excess of \$14 million; if it spent \$3.6 million on further development.”

[13] The motion judge took the view that the borrowers had “an inflated view of the property value.” He noted that they “first listed the property for sale on MLS for \$9,950,000 on June 1, 2022”, but then reduced the price to \$4,995,000 on February 17, 2023, and then sold it on March 15, 2023, at \$3,200,000. He found

that the steps taken by the lenders “were reasonable and necessary” and awarded the full costs claimed fixed in the amount of \$78,855.83, with \$61,250 to be paid to the lenders out of the trust proceeds held, and with the balance owing payable within 30 days.

[14] I deny the moving party borrower’s motion for an extension for three reasons.

[15] First, as noted, leave to appeal a costs award is rarely granted. The moving party borrower has not shown that the motion judge erred in exercising his discretion. He considered the positions of the parties on the issue of costs and made his determination based on past precedent and the evidence before him. He fully addressed the arguments made by the moving party.

[16] Second, as noted, the moving party borrower argues that there was an earlier decision that fixed costs at \$20,000 to be paid by the losing party. The lenders deny that such an order was made. The order is not in the record. Nor was this argument made to the motion judge; it does not appear in the borrowers’ written submissions to him. This court will rarely consider an argument on appeal that was not made by the proposed appellant in the proceeding below: *R. v. Salifu*, 2023 ONCA 590, 429 C.C.C. (3d) 492, at para. 14, citing *R. v. Reid*, 2016 ONCA 524, 132 O.R. (3d) 26, at para. 40.

[17] Third, an award of costs is highly discretionary, and this court usually defers to the decision of the first instance judge, absent an error in principle or unless the costs award is plainly wrong: *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303, at para. 27. The moving party borrower has not demonstrated any error or that the award is plainly wrong.

[18] The motion to extend the time to file the moving party borrower's motion for leave to appeal is dismissed.

“P. Lauwers J.A.”