CITATION: Calicom Solutions Inc. v. Sunil, 2025 ONSC 3616
OSHAWA COURT FILE NO.: CV-24-00000920
DATE: 20250617

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
CALICOM SOLUTIONS INC., LARDAN INVESTMENTS INC., 1407659 ONTARIO INC., 1961362 ONTARIO INC., SOLEST INVESTMENTS LIMITED, SOUDAN MANAGEMENT SERVICE LTD., MARK J. SHINER PROFESSIONAL CORPORATION, MARILYN GOLDSTEIN, STEWART MILLER, PAUL KETTNER, PAUL HERBERT, RORDEN HOLDINGS LIMITED, MILES KETTNER, KEN KEY, THE MCRAE FAMILY TRUST, 2292818 ONTARIO INC., HARTLEY GARSHOWITZ, MALTRIX GROUP INC., FRANCES MEYERS, SHELDON MEYERS, ELLIOTT STEINBERG, HAGOP CELIL, HUGH SCHURE and ROBERT CONWAY	)	Megan Van Kessel, for the Plaintiffs
Plaintiffs	)	
– and –	)	
AMBER SUNIL, SUNIL ZUBAIR, NOOR ZUBAIR, SHAMAIL ZUBAIR and TAHIRA ZUBAIR	)	Mark Klaiman, for the Defendants
Defendants	)	
	)	**HEARD:** June 12, 2025

REASONS FOR DECISION

CHARNEY J.:

Introduction

[1] The Plaintiffs bring this motion for summary judgment to enforce personal guarantees, and to obtain an order for possession and payment under a collateral mortgage.

[2] The Defendants do not dispute the validity of the collateral mortgage or the fact that the mortgage is in default. They argue that there is evidence that the primary property, which was sold by a receiver pursuant to a court order, was significantly undervalued and this resulted in an improvident sale for approximately one half the property's value. This issue, they argue, raises a factual dispute that requires the trial of an issue.

[3] The Defendants also dispute the Plaintiffs' entitlement under the mortgage to charge $300 per hour for internal collection costs to collect the monies owed under the mortgage.

[4] The Plaintiffs have also brought a motion to amend their Statement of Claim to correct incidental errors relating to the municipal description of the property and the interest rate in the mortgage. This motion is not opposed by the Defendants, and shall be granted.

Facts

Summary

[5] The Plaintiffs are the holders of a Collateral Mortgage, which was registered on February 23, 2022 against the following residential properties:

a. 535 Broadgreen Street, Pickering, Ontario,

b. 1573 Avonmore Square, Pickering, Ontario,

c. 1527 Avonmore Square, Pickering, Ontario

[6] The Collateral Mortgage and personal guarantees were provided by the Defendants as additional security for a loan in the principal amount of $5,950,000.00 (the "loan") advanced by the Plaintiffs to 2538983 Ontario Inc. (the "Corporation"). Each of the Defendants was either an officer, director, or shareholder of the 2538983 Ontario Inc., or a family member of an officer, director, or shareholder of 2538983 Ontario Inc.

[7] The Defendants, Shamail Zubair, Sunil Zubair and Amber Sunil, are the registered owners of 535 Broadgreen Street. The Defendant, Tahira Zubair, is the registered owner of 1573 Avonmore Square. The Defendant, Noor Zubair, is the registered owner of 1527 Avonmore Square.

[8] The loan was primarily secured by a first mortgage registered against a commercial property located on Highway 35 in Coboconk, Ontario (the "Coboconk Property"). The Coboconk Property operates as a gas station and restaurant.

[9] The Coboconk Mortgage and the Collateral Mortgage (collectively, the "Mortgages") have been in default since July 1, 2023.

[10] The Coboconk Property was sold for $5,600,000.00 on December 12, 2024 by a court-appointed receiver. The proceeds of sale were insufficient to repay the indebtedness owed to the Plaintiffs under the Mortgages.

[11] The Plaintiffs claim against the Defendants for payment of the outstanding indebtedness owed by the Corporation and possession of the properties secured by the Collateral Mortgage.

Loan and Collateral Mortgage

[12] Pursuant to the terms of a letter of commitment dated November 10, 2021 (the "Agreement"), the Plaintiffs agreed to provide the Corporation with the Loan to assist 2538983 Ontario Inc. in financing its purchase of the Coboconk Property.

[13] The Loan was initially for a term of one year and carried interest at a compounding rate of 8.25 per cent per annum, payable monthly, in interest-only payments of $40,906.25.

[14] The Loan was primarily secured by the Coboconk Mortgage, which was granted to the Plaintiffs by 2538983 Ontario Inc. and registered against the Coboconk Property on February 23, 2022.

[15] In accordance with the terms of the Agreement, the Defendants, Sunil Zubair, Noor Zubair, Shamail Zubair and Tahira Zubair, executed a personal guarantee dated February 8, 2022 whereby they jointly, severally and unconditionally guaranteed the indebtedness of 2538983 Ontario Inc. to the Plaintiffs. As security for the Guarantee and as a condition of the Agreement, the Defendants granted the Plaintiffs the Collateral Mortgage, which is a collateral second mortgage registered against each of the Collateral Properties.

[16] Under the terms of the Collateral Mortgage, the Defendants mortgaged the Collateral Properties for an initial term of one year, securing the principal sum of $5,950,500.00 with interest thereon at the rate of 8.25 per cent per annum, calculated monthly.

[17] Pursuant to a renewal letter executed on March 1, 2023 (the "Renewal"), the Agreement, the Coboconk Mortgage, and the Collateral Mortgage were renewed for a further term of one-year, maturing March 1, 2024. The Renewal increased the interest rate at BMO prime rate plus 3.5% subject to a floor rate of 10%. The monthly payments were fixed at $50,575 of interest only, with any shortfalls or overages to be quantified and collected or disbursed on the earlier of maturity or discharge of the loan. The security remained unchanged.

Default and Enforcement

[18] The Mortgages have been in default since July 1, 2023, when the Corporation failed to make the payment then due.

[19] On January 18, 2024, the Plaintiffs made written demand on the Guarantors with respect to the indebtedness owed under the Guarantee.

[20] On March 6, 2024, the Plaintiffs served the Corporation and the Guarantors with a Notice of Sale under Mortgage for the Coboconk Property.

[21] On May 16, 2024, the Plaintiffs served the Defendants with a Notice of Sale under Mortgage for the Collateral Properties.

[22] Despite being given an opportunity to do so, the Corporation and the Guarantors failed to pay the sums due and owing under the Agreement and the Mortgages.

Sale of the Coboconk Property

[23] In May 2024, the Plaintiffs brought an application for the appointment of a receiver and manager of all present and future property of the Corporation, including the Coboconk Property.

[24] On May 31, 2024, Kimmel J. issued an Order appointing Rosen Goldberg Inc. as receiver and manager of 2538983 Ontario Inc.'s real property and assets. Following the Appointment Order, the Receiver took control of the Coboconk Property and marketed it to prospective buyers. The marketing and sale process undertaken by the Receiver was detailed in the First Report off the Receiver dated November 21, 2024. The Report states:

a. On July 16, 2024, the property was listed on the MLS for $6,400,000;

b. The listing agent held in-person meetings with 37 potential buyers;

c. The Receiver received two offers to purchase the Coboconk Property;

d. The Receiver entered into an Agreement of Purchase and Sale for the Coboconk Property dated August 11, 2024 (the "Coboconk APS"); and

e. While the Coboconk APS included a term which allowed the listing process to continue until August 31, 2024, no offers superior to the Coboconk APS were generated through the listing process.

[25] Pursuant to the Coboconk APS, the Receiver agreed to sell the Coboconk Property for the purchase price of $5,600,000.

[26] The sale contemplated in the Coboconk APS was approved by the Approval and Vesting Order (AVO) of Conway J. dated December 6, 2024.

[27] The Defendants appeared in person at the hearing before Conway J., and raised the issue of improvident sale, relying on the same appraisals relied on the Defendants in this summary judgment motion. The Defendants also sought an adjournment to refinance the Coboconk Property.

[28] Conway J. reviewed the Receiver's First Report and Supplementary Report. She was not prepared to adjourn the motion. She stated:

> The Receiver entered into the Transaction following a sales process that reasonably exposed the Property to the market. It met with 37 potential buyers and generated two offers. It negotiated the Transaction and received a deposit of $200,000 from the Purchaser. The Receiver recommends the Transaction as the highest and best offer in the circumstances.
>
> I am satisfied that the *Soundair* factors have been met and that the Transactions should be approved. Although the Principals have provided the court with the Draft Appraisal, I note that the Receiver had a current appraisal when it initiated the sales process and, mor importantly, the market has spoken, through the 37 potential buyers and two offers generated in the process…

[29] Conway J. approved the transaction, but noted, in a paragraph relied on by the Defendants on this motion, that the:

> Principals can continue to assert whatever defences are available to them in the guarantee action brought by the Applicant and nothing in this endorsement or the AVO is intended to restrict them in so doing.

[30] The "*Soundair* factors" referred to by Conway J. refer to the factors set out in the Court of Appeal decision in *Royal Bank of Canada v. Soundair Corp.*, 1991 CanLII 2727 (ON CA), which held that the reasonableness and adequacy of any sales process proposed by a court-appointed receiver must be assessed in light of the following factors:

1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.

2. It should consider the interests of all parties.

3. It should consider the efficacy and integrity of the process by which offers are obtained.

4. It should consider whether there has been unfairness in the working out of the process.

[31] The sale closed on December 12, 2024. The total amount that the Plaintiffs received from the Receiver following the sale was $574,285.76.

[32] As of January 28, 2025, $1,515,009.10 was due and owed by the Corporation to the Plaintiffs and secured by the Collateral Mortgage and the Guarantee.

Position of the Defendants

[33] 2588983 Ontario Inc. acquired the Coboconk Property on February 23, 2022. The purchase price was $7,450,000.

[34] Before acquiring the Coboconk Property, 2588983 Ontario Inc. obtained an appraisal from Ridley & Associates Appraisal Services Ltd. The appraised value as at October 27, 2021 was $7,500,000.

[35] In March 2023, in an effort to obtain financing, the Defendants obtained an appraisal from Colliers International. The appraised value as at March 2023 was $10,310,000.

[36] During the years 2022 and 2023, 2588983 Ontario Inc. was profitable having earned $495,025.00 in 2022 and $501,861.00 in 2023.

[37] The Defendants argue that, given the two appraisal reports, the sale of the Coboconk Property for $5,600,000 on December 12, 2024, was an improvident sale, and that this factual dispute raises a triable issue.

[38] While Conway J. found "that the *Soundair* factors have been met and that the Transactions should be approved", she did leave open "whatever defences are available to [the Defendants] in the guarantee action brought by the Applicant and nothing in this endorsement or the AVO is intended to restrict them in so doing."

[39] The Defendants also argue that the terms of the Agreement signed by the parties does not permit the Plaintiffs to charge e $300.00 for their time to collect monies (the "internal collection costs") due under the Mortgage. This is a question of contract interpretation.

[40] In the alternative, the Defendants argue that the Plaintiffs failed to prove that they spent 216.75 hours because the Plaintiffs did not produce their dockets or any other documents to support that claim in the time prescribed by the Court.

Analysis

Motions for Summary Judgment

[41] Rule 20.04(2)(a) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194 provides: "The court shall grant summary judgment if the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence."

[42] Rule 20.04(2.1) sets out the court's powers on a motion for summary judgment:

> In determining under clause (2)(a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:
>
> 1. Weighing the evidence.
>
> 2. Evaluating the credibility of a deponent.
>
> 3. Drawing any reasonable inference from the evidence.

[43] These powers were extensively reviewed by the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7, where it laid out a two-part roadmap for summary judgment motions, 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.

[44] Even with these extended powers, a motion for summary judgment is appropriate only if the material provided on the motion "gives the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute" (*Hryniak*, at para. 50).

[45] In *Hryniak*, the Supreme Court held (at para. 49) that there will be no genuine issue for trial when the summary judgment 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."

[46] To defeat a motion for summary judgment, the responding party must put forward some evidence to show that there is a genuine issue requiring a trial. A responding party may not rest on mere allegations or denials of the party's pleadings, but must set out—in affidavit material or other evidence—specific facts establishing a genuine issue requiring a trial. The parties may not rely on the prospect that additional evidence may be tendered at trial: *Sweda Farms Ltd. v. Egg Farmers of Ontario*, 2014 ONSC 1200 (Ont. S.C.J.), at para. 26, aff'd 2014 ONCA 878 (Ont. C.A.), leave to appeal to SCC refused, [2015] S.C.C.A. No. 97 (S.C.C.)

[47] It is well settled that "both parties on a summary judgment motion have an obligation to put their best foot forward" (see *Mazza v. Ornge Corporate Services Inc.*, 2016 ONCA 753, at para. 9). Given the onus placed on the moving party to provide supporting affidavit or other evidence under Rule 20.01, "it is not just the responding party who has an obligation to 'lead trump or risk losing'" (see *Ipex Inc. v. Lubrizol Advanced Materials Canada*, 2015 ONSC 6580, at para. 28).

[48] A plaintiff or defendant bringing a motion for summary judgment has the initial onus of proving that there is no genuine issue for trial and must file some affidavit evidence to support that position. See for example, *Sanzone v. Schechter*, 2016 ONCA 566, at paras.

30-32, confirming the initial evidentiary obligation borne by the moving party (in that case the defendant) on a summary judgment motion.

[49] If the moving party meets the evidentiary burden of producing evidence on which the court could conclude that there is no genuine issue of material fact requiring a trial, the responding party must either refute or counter the moving party's evidence or risk a summary judgment.

[50] As held by Perell J. in *Levac v. James*, 2016 ONSC 7727, at para. 132:

> *Hryniak v. Mauldin* does not alter the principle that the court will assume that the parties have placed before it, in some form, all of the evidence that will be available for trial. The court is entitled to assume that the parties have advanced their best case and that the record contains all the evidence that the parties will present at trial…

[51] While Rule 20.04 provides the court hearing a summary judgment motion with "enhanced forensic tools" to deal with conflicting evidence on factual matters, the court should employ these tools and decide a motion for summary judgment only where it leads to "a fair process and just adjudication": *Mason v. Perras Mongenais*, 2018 ONCA 978, at para. 44; *Eastwood Square Kitchener Inc. v. Value Village Stores, Inc*., 2017 ONSC 832, at paras. 3-6 (and cases cited therein).

[52] Having reviewed the material filed by each party, I am satisfied that this is an appropriate case in which to proceed by way of motion for summary judgment. Very few relevant facts are in dispute. Where there is a factual dispute, I am satisfied that I can make the necessary factual findings based on the affidavit evidence filed by the parties.

Improvident Sale

[53] The test developed by the Court of Appeal for Ontario for determining whether there has been an improvident sale is whether the party making the sale "has taken reasonable precautions to obtain the true market value of the property as of the date of the sale": *Centurion Farms Ltd. v. Citifinancial Canada Inc.*, 2013 ONCA 79, at para. 4.

[54] In *Bank of Montreal v. Zaffino*, 2013 ONSC 3090 (Sup. Ct.), at para. 39, this Court confirmed that the defendant has the burden of demonstrating that there is a triable issue on a motion for summary judgment where a defence of improvident sale is raised:

> A defendant who relies on a defence of improvident sale must place evidence before the court demonstrating that a triable issue as to whether the sale was improvident. It is not sufficient to criticize the receiver's marketing efforts (see *Royal Bank of Canada v. 2021847 Ontario Limited, supra*), or to simply advance a theory (see *Arts v. Samu*, [2004] O.J. No. 4331, 2004 CanLII 34584 (C.A.)).

[55] In *HSCBC Bank Canada v. Kupritz*, 2011 BCSC 788 (Sup. Ct.), at para. 36, the British Columbia Supreme Court emphasized that the evidence of an expert in valuation is generally required to demonstrate that a sale has been improvident:

> In practical terms, this onus of proof requires the debtor to establish both that the secured party departed from industry norms, and that a higher price would have been obtained if the secured party had done what is considered to be reasonable in that particular sector or industry. Generally, meeting that burden will require the debtor to provide expert evidence on the industry standard against which the debtor's allegation of substandard conduct can be measured. However, it will not always be the case that expert evidence is required; in some cases the conduct of a secured party may so obviously depart from commercial common sense that evidence of what was done alone will suffice.

[56] In the present case, the Court has already determined that the sale of the Coboconk Property met the *Soundair* factors, which satisfies the Plaintiffs' obligation under Rule 20.01. The onus shifts to the Defendants to prove a triable issue with respect to their argument that there has been an improvident sale.

[57] Although the Defendants have provided the Court with appraisals from 2021 and 2023, these appraisals are appended to the affidavit of the Defendant Sunil Zubair - there is no expert affidavit that opines that the Receiver could have obtained the appraised price when the Coboconk Property was sold in December 2024. An expert affidavit to support the appraisals is necessary in these circumstances, since the appraisals cannot be admitted for the truth of their contents unless appended to an expert affidavit: *The Bank of Nova Scotia v. Scholaert*, 2017 ONSC 5960, at paras. 29 and 30(a).

[58] As stated in *Markowa v. Adamson Cosmetic Facial Surgery Inc*., 2012 ONSC 1012, at paras. 79-80 [footnotes omitted]:

> Furthermore, it is well-established that, on a motion for summary judgment, expert reports or opinion evidence (including opinions found in medical literature) must be tendered through direct evidence and in a manner that permits cross-examination of the expert. The expert must either place the substance of his or her opinion in an affidavit or swear an affidavit to which the report is annexed and in which the truth of the report is attested to.
>
> As Strathy J. noted in *Suwary v. Women's College Hospital*:
>
> > The reason for this rule is obvious: a party relying on expert evidence in a motion for summary judgment does not 'play trump' by shielding its expert from cross-examination through the use of an 'information and belief' affidavit of someone completely unqualified to testify on the issue.

[59] See also: *Drummond v. Cadillac Fairview Corporation Limited*, 2019 ONCA 447, at paras. 21 and 24.

[60] The Plaintiffs also argue that the Receiver sold the Coboconk Property as a duly appointed officer of the court, pursuant to its authority under Kimmel J.'s Appointment Order and Conway J.'s AVO. The Plaintiffs are not responsible for the Receiver's conduct in marketing and selling the Coboconk Property, if there is a shortfall, the Defendants must seek leave to proceed against the Receiver: *Farm Credit Canada v. Beira Limited Tomato*, 2014 ONSC 5592, at paras. 64-65:

> I find that FCC did not sell the Properties; rather, the Receiver, a duly appointed officer of the court, sold the Properties. Accordingly, FCC cannot be held responsible for the Receiver's conduct.
>
> I find that the court appointed Receiver sold the Properties pursuant its authority under the Appointment Order and the Approval and Vesting Order. The Receiver is not a party to this action. As required by the terms of the Appointment Order, Pratas must obtain leave of the court before suing Deloitte, as court-appointed Receiver of Beira Limited for improvident sale of the Properties. No leave has been granted.

[61] For this reason as well, there is no genuine issue requiring a trial with regard to this aspect of the Plaintiffs' case.

Internal Collection Costs

[62] The Plaintiffs claim that they are entitled to charge $300.00 for their time to collect monies due under the Mortgage. This claim is based on the Agreement and the Collateral Mortgage, which include the following term:

> DISHONOURED CHEQUES/LATE OR NON PAYMENT: In the event that any payment is returned to the Lender(s) / Investor(s) for any reason whatsoever, including there being insufficient funds in the Borrower's bank account to cover said payment, then the Borrower will be responsible for all related bank charges of the Lender(s) / Investor(s) including their internal collection costs, to be billed at a rate of $300.00 per hour. All time related to collection will be docketed. All payments must be received no later than 1:00 P.M. on the due date or they shall be deemed received on the following business day and subject to additional interest on a per diem basis. [Emphasis added.]

[63] The Plaintiffs allege that they docketed 240.45 hours for enforcement proceedings, for a total claim of $72,135 at $300 per hour.

[64] The Defendants argue that the plain wording of the provision of the Agreement relied upon does not include administrative charges for all non-payments, but only for late-payment or non-payment resulting from a payment that "is returned for any reason". The Agreement

speaks to any payment being returned; in which case the borrower will be responsible for any internal collection costs. It does not specifically provide that the borrower is responsible for internal collection costs in the event that the payments are never made.

[65] Administrative fees will not be allowed unless they are specifically referenced in the terms of the mortgage or the standard charge terms, and reflect real costs incurred in the administration of the Mortgage: *Carben Projects Inc. v. Liu*, 2023 ONSC 5006, at para. 6.

[66] The Plaintiffs argue that the heading of the impugned provision specifically refers to "DISHONOURED CHEQUES/LATE OR NON PAYMENT" and that, reading the contract as a whole, non-payment was clearly intended to be included along with late payment for repayment of time related to collection.

[67] When interpreting any contract, the "overriding concern is to determine the intent of the parties and the scope of their understanding" by reading "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.": S*attva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53, at para. 47. The primary object of contract interpretation is to give effect to the intention of the parties at the time of contract formation: *Bhasin v. Hrynew*, 2014 SCC 71, at para. 45.

[68] In *Plan Group v. Bell Canada*, 2009 ONCA 548, 96 O.R. (3d) 81, at para. 37, the Court of Appeal for Ontario held that a commercial contract should be interpreted: (i) as a whole, by giving meaning to all the terms of a contract to avoid an interpretation that would render any term ineffective; (ii) by determining the intention of the parties with reference to the words used in the contract; (iii) with regard to objective evidence of the factual matrix underlying the negotiation of the contract, but without reference to subjective intention; and (iv) to the extent that there is any ambiguity in the contract, in a fashion that accords with sound commercial principles and good business sense and that avoids a commercial absurdity.

[69] Putting aside the heading "DISHONOURED CHEQUES/LATE OR NON PAYMENT", the Defendants' proposed interpretation is, in my view, clearly correct. The impugned clause refers only to "the event that any payment is returned to the Lender(s) / Investor(s) for any reason whatsoever, including there being insufficient funds in the Borrower's bank account to cover said payment,". In this case, there was no dishonoured or returned cheque. The clause does not refer to "non-payment". Non-payment is not "a payment returned to the Lender for any reason", because no payment was made.

[70] The question is whether the heading "DISHONOURED CHEQUES/LATE OR NON PAYMENT" changes this conclusion. In my view it does not. I would interpret the heading as referencing the specific infractions that are set out in the clause itself: payment that is returned to the Lender for any reason whatsoever. A payment returned to the Lender (usually a dishonoured cheque) may result in a late payment or non-payment.

[71] In the present case, no payment was returned to the Lender because no payment was ever made. This simply does not fall within the ambit of the clause relied on by the Plaintiffs. It

would be a simple matter to redraft the clause to read: "In the event of non-payment, or in the event that any payment is returned to the Lender(s) / Investor(s) for any reason whatsoever…", and this would clearly cover the present situation. As drafted, it does not.

[72] In the alternative, I also accept the Defendants' argument that the Plaintiffs have failed to prove the number of hours docketed in support of their claim.

[73] The Plaintiffs rely on the affidavit of Stan Borenstein, an agent of Rescom Capital, the Mortgage Administrator for the Plaintiffs, sworn on January 28, 2025. In his affidavit, Mr. Borenstein states that Rescom Capital has spent 216.75 hours on matters related to the collection of the unpaid amounts owed by the Corporation. He does not suggest that any of these amounts were the result of "any payment returned to the Lender" as required by the Agreement.

[74] Mr. Borenstein further states that, "[a]s time related to collection has been docketed but continues to accrue, the Mortgagees will provide an up-to-date copy of their dockets in advance of the hearing of the motion." The provision of dockets is important, because the Agreement specifically provides that: "All time related to collection will be docketed".

[75] On March 25, 2025, the parties appeared in Civil Triage Court, and Sutherland J. set the following timetable for the exchange of material for the summary judgment motion: Reply material by May 5, 2025, Moving Party's factum by May 12, 2025 and Responding Party's factum by May 26, 2025.

[76] Mr. Borenstein did not provide the dockets until he filed a Supplementary Affidavit on May 30, 2025 – well outside the timelines set by the Court, and after the Defendants had already filed their factum.

[77] The Defendants argue that the dockets are not proper reply evidence, since they do not reply to anything in the Defendants' motion record. Moreover, whether it is reply evidence or not, it was filed outside the deadline set by the Court for the Plaintiffs to file reply material. The Plaintiffs did not bring a motion to amend the timetable set by the Court. The Plaintiffs knew that they had to provide the dockets: Mr. Borenstein's affidavit expressly states that they would be provided.

[78] As indicated above, "both parties on a summary judgment motion have an obligation to put their best foot forward". What is sauce for the goose, is sauce for the gander. For a motion for summary judgment to operate fairly, the defendant must know all the evidence it has to meet before it files its factum.

[79] The Plaintiffs cannot claim 240 hours of time spent without some evidence to support that claim. The bald statement in Mr. Borenstein's January 28, 2025 affidavit, unsupported by dockets – particularly when dockets are expressly required by the Agreement relied on by the Plaintiffs - is not sufficient evidence to claim $72,135 on a summary judgment motion.

[80] Where the Court sets a timetable for the exchange of affidavit material before a summary judgment motion, the parties must follow it, subject to amendment in accordance with Rule

3.04(1). In the present case, the Plaintiffs were fully aware that dockets were required to support their claim for internal collection costs and promised to provide the dockets before the hearing. Once the Court established a timetable for the delivery of the parties' materials, the Plaintiffs were bound to comply with that timetable. It was particularly unfair to file this supplementary affidavit after the Defendants had delivered their factum. Nor did the Plaintiffs bring a motion seeking an indulgence to file the late supplementary affidavit: *Johnson v. North American Palladium Ltd.,* 2018 ONSC 4496, at paras. 11-15.

[81] In these circumstances, I would not admit the improper reply and late evidence set out in para. 3 and Exhibit "C" (the dockets) of Mr. Borenstein's Supplementary Affidavit dated May 30, 2025.

[82] Without these dockets, the Plaintiffs' claim for internal collection costs is dismissed.

Conclusion

[83] This Court Orders:

a. The Plaintiffs' motion to amend the Statement of Claim is granted.

b. The Plaintiffs' motion for summary judgment is granted in all respects, except for the Plaintiffs' claim for $72,135 for internal collections charges, which is dismissed.

[84] Pursuant to the terms of the mortgage, the Plaintiffs are entitled to costs on a full indemnity basis: *Everest Finance Corporation v. Jonker,* 2023 ONCA 146, at para. 8. These costs should be reduced by the time spent with respect to the claim for internal collection charges, since that part of the claim was dismissed.

[85] The parties are encouraged to agree on costs based on the result in this decision. If the parties are not able to agree, the Plaintiffs shall serve and file costs submissions not to exceed 3 pages, within 20 days of the release of this decision, and the Defendants shall serve and file costs submissions on the same terms within a further 15 days.

Justice R.E. Charney

Released: June 17, 2025

CITATION: Calicom Solutions Inc. v. Sunil, 2025 ONSC 3616

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

CALICOM SOLUTIONS INC., LARDAN INVESTMENTS INC., 1407659 ONTARIO INC., 1961362 ONTARIO INC., SOLEST INVESTMENTS LIMITED, SOUDAN MANAGEMENT SERVICE LTD., MARK J. SHINER PROFESSIONAL CORPORATION, MARILYN GOLDSTEIN, STEWART MILLER, PAUL KETTNER, PAUL HERBERT, RORDEN HOLDINGS LIMITED, MILES KETTNER, KEN KEY, THE MCRAE FAMILY TRUST, 2292818 ONTARIO INC., HARTLEY GARSHOWITZ, MALTRIX GROUP INC., FRANCES MEYERS, SHELDON MEYERS, ELLIOTT STEINBERG, HAGOP CELIL, HUGH SCHURE and ROBERT CONWAY

Plaintiffs

– and –

AMBER SUNIL, SUNIL ZUBAIR, NOOR ZUBAIR, SHAMAIL ZUBAIR and TAHIRA ZUBAIR

Defendants

REASONS FOR DECISION

Justice R.E. Charney

Released: June 17, 2025