CITATION: Condoman Developments v. Cannect International Mortgage, 2025 ONSC 3752
COURT FILE NO.: CV-24-00723170-0000
DATE: 20250625

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: CONDOMAN DEVELOPMENTS INC., 1808176 ONTARIO INC. and HOWARD YOUHANAN, Plaintiffs/Defendants by Counterclaim

– and –

CANNECT INTERNATIONAL MORTGAGE CORPORATION, CANNECT MORTGAGE INVESTMENT CORPORATION, LOOKOUT CONDOMAN DEVELOPMENTS INC., THEODOPOLIS DEVELOPMENT CORP., 2638169 ONTARIO INC., 2638170 ONTARIO INC. and MARCUS TZAFERIS, Defendants/Plaintiffs by Counterclaim

BEFORE: Justice E.M. Morgan

COUNSEL: *Wojtek Jaskiewicz*, for the Plaintiffs/Defendants by Counterclaim

Philip Underwood, for the Defendants/Plaintiffs by Counterclaim, Cannect International Mortgage Corporation, Cannect Mortgage Investment Corporation and Marcus Tzaferis

HEARD: June 24, 2025

COSTS ENFORCEMENT

[1] The Defendants, Cannect International Mortgage Corporation, Cannect Mortgage Investment Corporation, and Marcus Tzaferis (collectively "Cannect"), seek an order enforcing a costs order that remains unpaid by the Plaintiffs (collectively "Condoman").

[2] Condoman is a real estate developer. It borrowed some $46,000,000 from Cannect, securing that debt with an umbrella mortgage over a number of Condoman's properties. Having borrowed this substantial sum and having thoroughly documented the loans and mortgage through its lawyers, Condoman then attempted to deny the debt and sought an injunction prohibiting Cannect from exercising its rights under the mortgage when Condoman defaulted.

[3] In December 2024, I issued a timetable leading up to the injunction motion. At the same time, I imposed a standstill order – effectively, an interim injunction, putting a halt to Cannect's mortgage enforcement efforts until the full injunction motion could be heard.

[4] The injunction was argued in full on March 5, 2025. I dismissed Condoman's injunction request, issuing reasons for decision dated March 14, 2023. At paragraph 67 of my reasons, I summarized Condoman's gambit in bringing that motion:

> [67] The loans were made, the money was advanced and accrued, and the mortgages were registered. Youhanan freely consented to it all; there was nothing coercive or oppressive about any of the mortgage loans… And after all of that, Youhanan defaulted on the loans now outstanding. There is simply nothing here that needs to be tried.

[5] Condoman's challenge to the mortgage was, to say the least, overblown and costly. It was also based on little credible evidentiary support. Given the substantial size of the outstanding loan, the transactions at issue were somewhat complicated. But the bottom line was that the mortgage was entered into by sophisticated real estate professionals, thoroughly advised by their respective solicitors, well documented, properly registered, and entirely enforceable. Condoman had put Cannect through a litigation ordeal, involving very significant time and expense, as a tactic. There was no substantive merit to its position.

[6] Condoman's submissions in the injunction motion included an argument that raised the spectre of its insolvency in the event that the injunction was not granted. As stated in the Notice of Motion for the injunction, Condoman "will lose the entirety of his lifelong investments should they be liquidated." As I said in my reasons, asserting that enforcement of a large debt for which you have already received the lender's funds does not become unenforceable because paying the loan back will deplete your resources. Unless and until Condoman is formally bankrupt, with the consequent stay of any proceedings against it, its financial difficulties are not an answer to its non-payment of money that it owes.

[7] Shortly after my ruling in the injunction motion, Condoman apparently sought a review of orders made against it by the Landlord and Tenant Board (the "Board"). In those orders, the Board took account of Condoman's default under its blanket mortgage and directed certain tenants of Condoman's properties to pay their rent to Cannect as mortgagee/trustee of the funds rather than to Condoman as landlord. In seeking review, Condoman advised the Board that my interim injunction was still in place, and that only by Condoman continuing to collect rent could my order be adhered to. Along with this submission, Condoman informed the Board that it would experience "severe financial and legal consequences" if its rents had to be paid to Cannect to be held in trust rather than directly to Condoman.

[8] Condoman subsequently conceded that the information it provided to the Board was incorrect, and he has apologized for the error. Nevertheless, the point to be made is that the spectre of insurmountable financial hardship is a consistent theme for Condoman. He has never advised that he has embarked on actual bankruptcy proceedings, but he has regularly argued that he should be relieved of his financial obligations because he is on the verge of insolvency or impecuniosity.

[9] The terms of the Cannect mortgage require Condoman to pay full indemnity costs for any enforcement proceedings thereunder. On April 16, 2025, I ordered costs in the amount of $268,500

payable by Condoman to Cannect. Despite Condoman's professed financial difficulties and his arguments that the amount sought by Cannect was too high, I found no reason to deny Cannect's full indemnity request. Its entitlement to that level of costs was unambiguously set out in the terms of the mortgage.

[10] I would point out that where impecuniosity is raised in defense to a motion or court order, it is incumbent on the party making that argument to be transparent about their finances. On one hand, Condoman's counsel is correct in submitting that a lack of ability to pay can be factored into an analysis of whether an order should be enforced: *Tarion Warranty Corporation v. 1486448 Ontario Inc*., 2012 ONCA 288, at para. 6. But on the other hand, it is not sufficient for Condoman to simply assert that it is impecunious; it must produce supporting evidence to that effect: *Allen v. Kumar*, 2022 ONSC 4223, at para 12.

[11] Condoman now concedes that, with the passing of more than 60 days since my costs order, the $260,500 in costs has become due and payable and is now late. Cannect seeks a remedy for Condoman's failure to pay those costs; and, of course, it does so in the context of already having security over Condoman's assets such that obtaining further security over Condoman's properties for the costs amount would be a rather hollow form of remedy.

[12] Instead, Cannect seeks to have Condoman's claim and defense to counterclaim dismissed pursuant to Rules 57.03(2) and 60.12. Its counsel submits, as a matter of general principle, that, "The court must ensure compliance with the orders that are made in the course of litigation because failure to do so is ultimately corrosive of the entire justice system": *Rana v. Unifund Assurance Co*., 2016 ONSC 2502, at para. 2.

[13] In *Falcon Lumber Limited v. 24803375 Ontario Limited*, 2019 ONSC 4280, aff'd 2020 ONCA 310 and *Citi v. Klein*, 2024 ONSC 6937, aff'd 2024 ONCA 529, the Court of Appeal has confirmed that striking of a claim or defense is an available remedy for breach of an interlocutory costs order. And while the Court made clear that there is a requirement of proportionality in invoking such a remedy, the striking of a claim or defense need not be a remedy of last resort. Rather, in *Falconer*, at para. 57, the Court set out a number of "common sense" factors that should be brought to bear on the analysis. These include:

> • The remedy is not restricted to "last resort" situations, in the sense that it must be preceded by a party breaching a series of earlier orders that compelled better disclosure or production. However, courts usually want to ensure that a party has a reasonable opportunity to cure its non-compliance before striking out its pleading;
>
> • A court should consider a number of common sense factors including: (i) whether the party's failure is deliberate or inadvertent; (ii) whether the failure is clear and unequivocal; (iii) whether the defaulting party can provide a reasonable explanation for its default, coupled with a credible commitment to cure the default quickly; (iv) whether the substance of the default is material or minimal; (v) the extent to which the party remains in default at the time of the request to strike out

its pleading; and (vi) the impact of the default on the ability of the court to do justice in the particular case;

- The merits of a party's claim or defence may play only a limited role where breaches of disclosure and production obligations are alleged as one would reasonably expect a party with a strong claim or defence to comply promptly with its disclosure and production obligations;

- In considering whether an order to strike out a pleading would constitute a proportional remedy in the circumstances, a court should consider:

    - the extent to which the defaulting party's conduct has increased the non-defaulting party's costs of litigating the action, including the proportionality of those increased costs to the amount actually in dispute in the proceeding; and

    - to what extent the defaulting party's failure to comply with its obligation to make automatic disclosure and production of documents has delayed the final adjudication of the case on its merits, taking into account the simplicity (or complexity) of the claim and the amount of money in dispute.

[14] In addition, counsel for Cannect submits that, "Where there has been non-compliance with an order of the court, the court should be alive to the possibility that its process is being abused; failing to act may deprive the moving party of justice according to law and risks rendering the court a paper tiger": *Rana*, at para. 50(a). It is Cannect's view that this factor is important given that the entire approach by Condoman can be characterized as a ploy to avoid payment.

[15] For its part, Condoman is seeking leave to appeal to Divisional Court my decision dismissing the injunction. He asks that enforcement of the costs order not proceed until after the Divisional Court has ruled on that appeal, or, at least, on the application for leave.

[16] Condoman asserts that it is impecunious and would be unable at this time to pay the Costs Order. According to counsel, Condoman's financial distress "has been exacerbated by the steps taken by the Defendants in this action such that a $268,000 costs award is impossible to pay at this time." I hasten to add that the "steps taken" by Cannect are nothing other than defending an injunction motion that lacked merit and otherwise exercising their rights under the mortgage to try to recover at least some of the massive amount of money that Condoman borrowed.

[17] Condoman must, at some level, have envisioned its lender responding to the injunction motion and seeking to exercising its rights under a $46 million mortgage now in default. Those steps within Cannect's rights as lender cannot be taken as an unforeseen exacerbation of Condoman's situation. Otherwise, one would wonder what Condoman had in mind when it provided an undertaking as to damages in moving to enjoin enforcement of a mortgage whose very terms make costs of enforcement part of the mortgage debt: *Condoman v. Cannect*, 2025 ONSC 2318, at para. 5.

[18] As Cannect's counsel point out, Condoman has not sought, and neither this Court nor Divisional Court have issued, a stay pending appeal. The Court of Appeal has made it very clear that the filing of an appeal does not, on its own, stay a costs order: *Conti v. Duca*, 2025 ONCA 356, at para 22. Counsel for Cannect submits that if Condoman wanted a stay pending appeal, the proper procedure is to bring a motion either to the court in which the appeal will be heard – i.e. Divisional Court – or the court that issued the judgment being appealed – i.e. this Court.

[19] Counsel for Condoman responds that this is an inappropriate stage of the proceedings for the costs order to be enforced. As an example, he points out that in *Adams v Adams*, 2019 ONSC 1431, Associate Justice Brott reasoned that a costs order ought not be enforced when there was a mediation session scheduled for the near future, as the mediation might resolve all issues between the parties, including costs.

[20] Counsel for Cannect submits in response that while the timing of any enforcement is a factor to be considered, adherence to the *Rules of Civil Procedure* is also an important factor. He describes what Condoman is seeking as, in effect, a stay pending appeal without following the Rules for a stay. Unlike in *Adams*, where there is no particular Rule governing a stay pending mediation, here Rule 63.02 provides a specific procedure and a test to be applied for a stay pending appeal.

[21] In other words, the position Condoman is taking – not moving for a stay but simply refusing to pay and resisting any further remedy – is both an end run around the stay criteria and a paradigm case of "rendering the court a paper tiger": *Rana*, *supra*. This approach has broad implications for the civil justice system, since cost orders are the system's primary tool for preventing parties from using the court system to manipulate or delay fulfillment of their obligations.

[22] As his penultimate argument, counsel for Condoman submits that striking out the claim or the defense to counterclaim is an extreme remedy that the courts have warned should be "exercised sparingly": *James Bay Resources Limited v. Mak Mera Nigeria Limited*, 2022 ONSC 5711, at para. 17. Generally speaking, this discretionary remedy is to be invoked "only where there is a combination of a very serious, if not complete, failure by the defaulting party to meet his pre-trial responsibilities and resulting significant actual or potential prejudice to the opposite party": *Kawasaki Kisen Kaisha Ltd. v. Chiu*, 2004 CanLII 5761, at para. 19.

[23] While I agree with that policy, the point is not to dispense entirely with the most serious remedy. Striking a pleading is certainly "within the discretion of the Court, to be determined in the context of that particular case": *Falcon Lumber*, at para. 49. Rather, the point is that such a severe step ought to be taken only where less invasive steps have failed. As the Court of Appeal has put it, "The defaulting party should, at least, be provided with an opportunity to cure the default": *Koohestani v. Mahmood*, 2015 ONCA 56, at para. 54.

[24] Under the circumstances, Condoman has had ample opportunity to "cure the default" by paying the costs – or even a part or installment thereof – but has failed to do so. And, as indicated above, the more typical remedy – registration of the judgment debt to secure it against Condoman's

properties – is pointless in the face of Condoman's ongoing default under Cannect's massive mortgage across all of its properties.

[25] Finally, Condoman's counsel states that it is one thing to strike the Statement of Claim where costs for a step in the action pursued by Condoman as plaintiff remain unpaid. It is quite another thing, he says, to strike the Statement of Defense to Counterclaim and to thereby deprive Condoman of the ability to defend itself from a lawsuit that has been launched against it.

[26] While that argument has some superficial appeal, a deeper examination reveals it to be based on a false analogy. Condoman's counsel likens it to a motion for security for costs, where Rule 56.01(1) makes the motion available to plaintiffs but not to defendants. It is Condoman's view that this establishes the idea that a defense is in a different category than a claim and that, much as a claim should not be lightly struck, striking a defense should give the court even greater pause.

[27] With respect, that is not the message I would take from Rule 56. Rather, I would simply conclude that the security for costs motion is of a different kind than a costs enforcement motion. Unlike Rule 56.01(1), Rule 60.12 does permit a defense to be the subject of an order just like a claim is. This is particularly the case here, where Condoman's defense to the counterclaim essentially just repeats and adopts all of the allegations and arguments contained in its Statement of Claim. Under the circumstances, striking the claim without striking the defense to counterclaim would provide no remedy for Cannect; the entire dispute would still have to be litigated in full.

Disposition

[28] Condoman's action is dismissed and its defense to Cannect's counterclaim is struck out.

[29] Cannect is permitted to proceed with its counterclaim notwithstanding the dismissal of Condoman's action.

Costs

[30] Cannect and Condoman have submitted costs outlines that are very similar to each other. The Defendants seek all-inclusive costs in the amount of $13,108, while Condoman would seek costs of $13,039.07 on an all-inclusive basis.

[31] Using round numbers for convenience, Condoman shall pay Cannect costs of this motion in the amount of $13,000, inclusive of all fees, disbursements, and HST.

Date: June 25, 2025 **Morgan J.**