

[4] The relevant portions of that Order are paragraphs 3 to 8, which provide:

3. THIS COURT ORDERS that, subject to the terms in paragraph 4 below, El-Riffaey and the Bank of Nova Scotia or other Schedule “1” Canadian Bank or a lending institution satisfactory to the Plaintiffs, acting reasonably (collectively the “Bank”) shall be at liberty to discuss terms and, if mutually agreeable, enter into an agreement for a line of credit or similar loan to be drawn on from time to time and not advanced at once in full, of up to the principal amount of \$380,000 (the “Loan”) to be secured against the property municipally known as 50 West Borough Street, Thornhill, ON, ... (hereinafter referred to as “50 West Borough”).
4. THIS COURT ORDERS that, prior to El-Riffaey and the Bank entering into any agreement for the Loan or registering any security against 50 West Borough in relation to the Loan, El-Riffaey shall provide to the Plaintiffs (via their counsel) the proposed terms of the Loan (including any mortgage or other security) for the Plaintiffs’ review and approval, which approval shall not be unreasonably withheld. No agreement for the Loan may be finalized and closed between El-Riffaey and the Bank, and no security may be registered against 50 West Borough by the Bank, without the Plaintiffs’ prior written approval having been sent to El-Riffaey’s counsel, or further order of this Court sought on 48 hours notice to the Plaintiffs.
5. THIS COURT ORDERS that, other than as set out herein, no funds can be drawn on the Loan (if one is entered into pursuant to paragraphs 3-4 above) without further Order from this Court.
6. THIS COURT ORDERS that, upon written acknowledgement from the Plaintiffs’ counsel to the Defendants’ counsel of compliance with and completion of paragraphs 3 of this Order (or pursuant to a further Order of this Court), the funds from the Loan shall only be disbursed by the Bank as follows:
 - (a) \$90,000 from the Loan will be immediately paid to the Defendants’ counsel, Blaney McMurtry LLP, to be applied by Blaney McMurtry LLP to past and future legal fees of El-Riffaey in this matter;
 - (b) Any amount awarded by the Court in favour of the Plaintiffs in respect of the costs of the Plaintiffs’ Mareva/Norwich motion heard on April 18, 2023 will be immediately paid by El-Riffaey, who shall forthwith direct the Bank to make such payment to the Plaintiffs (via Ross Nasserri LLP in trust) using the Loan;

...

7. THIS COURT ORDERS that if El-Riffaey is not able to reach an agreement with the Bank for the Loan or if the Plaintiffs, acting reasonably, do not approve of the terms of the Loan (or any related security), the Parties shall return before me on a date to be scheduled for directions.
8. THIS COURT ORDERS that in the event hereafter that 50 West Borough is sold by Power of Sale (due to default under the Loan), 50% of the net proceeds of sale shall be paid into a lawyer's trust account (to be agreed on between the parties) or into Court, and not disbursed in any way to El-Riffaey.

- [5] As events unfolded, the Bank would not agree to the loan. The Defendant's counsel found a private lender to provide a short-term loan at a significantly higher interest rate, but the Defendant did not agree to the terms proposed by the private lender.
- [6] Since the Defendant was not able to reach an agreement with a Bank for the loan, the Defendant was not able to pay his lawyers for their legal services, and his lawyers, Blaney McMurtry LLP ("Blaney"), successfully moved to be removed as counsel of record on February 19, 2025.
- [7] Blaney then brought this motion for an order "to give effect to the Fees Order – an order that the amount owing to Blaney pursuant to the Fees Order forms a charge on the land, and that said charge be registered on the Property until the Fees Order is satisfied". Blaney takes the position that the May 30, 2024 Order (which it refers to as the "Fees Order") entitled Blaney to an equitable mortgage or charge in respect of the 50 West Borough Street Property.
- [8] The motion is opposed by the Defendant.
- [9] The Plaintiff takes no position on the motion, other than to assert the position that if Blaney is entitled to an equitable mortgage for \$90,000 as a result of para. 6(a) of the May 30, 2024 Order, then the Plaintiff is entitled to an equitable mortgage for \$60,000 as a result of para. 6(b) of that Order.

Facts

- [10] The essential facts are not in dispute.
- [11] Blaney McMurtry LLP ("Blaney") acted as counsel for the defendants, Ahmed Yasser El-Riffaey ("El-Riffaey") and Trustex Currency Trading Corporation (collectively, the "Defendants"), in fraud litigation commenced by Kiosk Design Inc., Squadrapiu Inc. o/a Poliform Toronto, and Robert Sidi (the "Plaintiffs").

- [12] On April 22, 2024, the Plaintiffs obtained a Mareva injunction (the “Mareva Order”) against the Defendants, resulting in the freezing of all of El-Riffaey’s assets, including his principal residence at 50 West Borough Street, Thornhill, Ontario (the “Property”).
- [13] El-Riffaey has limited assets, with the Property being his largest asset. Both he and his wife, who jointly own the Property, rely on pension income and had no access to funds for living or legal expenses due to the Mareva Order (except to the extent that the Mareva Order was varied on consent to provide for living expenses).
- [14] To fund his defense and living expenses, El-Riffaey and Blaney sought court authorization to obtain a line of credit secured against the Property. In an affidavit in support of his motion to vary the Mareva Order dated May 4, 2024 (the “El-Riffaey Affidavit”), El-Riffaey affirmed his intention to use the proceeds to pay himself, the then-outstanding legal fees to Blaney, and a retainer to Blaney for go-forward work. At the time, El-Riffaey stated that, net of all retainers, he owed “in excess of \$75,000 for outstanding accounts and unbilled time” to Blaney. Mr. El-Riffaey’s affidavit states:
- With these funds I intend to immediately pay outstanding legal expenses as further set out below and legal expenses as they fall due hereafter.
- [15] On May 30, 2024 I issued the subject Order quoted above at para. 4.
- [16] Despite his efforts to secure financing—including applications to Scotiabank and Home Equity Bank (“HEB”)— El-Riffaey was not approved for any bank loan. On December 5, 2024, HEB advised Blaney that it would not proceed with the loan (a reverse mortgage at 6.9% fixed interest per year) due to the registration of the Mareva Order on title. Blaney tried to negotiate a subordination or temporary removal of the Mareva Order, but HEB took the position that it could not proceed unless the Mareva Order was removed completely.
- [17] When the efforts to obtain a bank loan failed, Blaney searched for a private lender that might offer a loan in these circumstances. One private lender – a client and relative of a Blaney partner – suggested that it might be able to offer a short term loan – one year – interest only payments at 9% with a Lender’s fee of 3%. Mr. El-Riffaey was of the view that the interest rate was too high, and did not want to proceed with this mortgage.
- [18] As at the date of this motion, El-Riffaey owes Blaney over \$170,000 in legal fees.
- [19] On May 14, 2025, El-Riffaey served Blaney with a Fee Assessment Notice pursuant to s. 3(b) of the *Solicitor’s Act*, R.S.O. 1990, c. S.15.
- [20] The preliminary fee assessment appointment took place June 10, 2025. Two preliminary issues were raised: (i) the jurisdiction of an Assessment Officer to conduct an assessment of the bills as the Order may have been obtained after one month of the date delivery of the final bill, and (ii) whether the \$90,000 payment for legal fees to the date of my May 30, 2024 Order is exempt from an assessment of fees.

[21] The assessment was adjourned *sine die* pending, *inter alia*, the outcome of this motion. In adjourning the assessment, the Assessment Officer gave the following direction:

- 1) This assessment is adjourned *sine die*.
- 2) This assessment is adjourned pending determination of the motion to be heard June 24th, 2025, addressing the scope of the court Order for \$90,000.00 in fees, and a motion addressing the potential s. 3(b) limitations period issue.
- 3) Either party may bring a motion before a Justice of the Superior Court with respect to the potential *Solicitors Act* s. 3(b) limitations period issue in terms of the date of the delivery of the accounts for assessment

[22] As of the date of this hearing, neither party had brought a motion to the Superior Court with respect to the s. 3(b) limitation period issue.

Analysis

Declaration

[23] The first issue raised by Blaney is whether it is entitled to a declaration that the Defendants owe Blaney \$90,000 for legal fees.

[24] Blaney seeks a declaration that once any loan or proceeds from the sale of the Property are received, it will be paid in accordance with the terms of the May 30, 2024 Order (in priority to any new counsel and *pari passu* (on equal footing) with the costs of the Plaintiffs, also ordered in the Fees Order) and that it is Blaney's legal right to be paid its fees in the sum of \$90,000 and the Defendants' obligation to pay those fees.

[25] Blaney also takes the position that any attempt to assess Blaney's fees at less than \$90,000 amounts to an impermissible collateral attack on the Fees Order as it constitutes an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the Fees Order: *Clatney v. Quinn Thiele Mineault Grodzki LLP*, 2016 ONCA 377, at para. 51.

[26] This issue can be dealt with summarily. The consent Order of May 30, 2024 remains in force until it is varied or set aside: *Clatney*, at para. 51. The Defendants have not brought a motion to vary or set aside the consent Order, and so they remain bound by its terms.

[27] Subject to the one month limitation period in s. 3(b) of the *Solicitor's Act*, an issue that is not before me, the Defendants are free to assess Blaney's fees, but cannot seek to assess them at less than \$90,000. I am not sure whether that limitation makes any practical difference in this case; Blaney's unpaid legal fees to date are over \$170,000.

[28] I also note that para. 6(a) of the May 30, 2024 Order provides that "\$90,000 from the Loan will be immediately paid to the Defendants' counsel, Blaney McMurtry LLP, to be applied

by Blaney McMurtry LLP to past and future legal fees” (emphasis added). Accordingly, the \$90,000 figure was not intended to cover Blaney’s legal fees only to the date of the Order.

- [29] Paras. 6 (a) and (b) of the May 30, 2024 Order remain in effect. If the Defendants are able to obtain a line of credit or similar loan secured against the 50 West Borough Street Property, “the funds from the Loan shall only be disbursed” by the lender in accordance with paras. 6(a) and (b) of the May 30, 2024 Order. Accordingly, “\$90,000 from the Loan will be immediately paid” to Blaney and \$60,000 will go to the Plaintiff.
- [30] The fact that Blaney has been removed as lawyers of record does not change the fact that Blaney is the law firm entitled to the payment set out in para. 6(a) of the Order.
- [31] Pursuant to para. 5 of the Order, no funds can be drawn on the Loan without further Order from this Court. If the Defendants’ new lawyer wants to receive a disbursement from any loan, it will have to bring a motion – on notice to all effected, including Blaney – to vary the May 30, 2024 consent Order.
- [32] Para. 8 of the May 30, 2024 Order also remains in effect: “in the event that 50 West Borough is sold by Power of Sale (due to default under the Loan), 50% of the net proceeds of sale shall be paid into a lawyer’s trust account (to be agreed on between the parties) or into Court, and not disbursed in any way to El-Riffaey”.
- [33] Blaney is not entitled to a declaration. The parties and counsel are already bound by a Court Order, and there is no purpose to issuing a declaration confirming an extant Court Order.

Equitable Mortgage

- [34] Blaney submits that the effect of the May 30, 2024 Order is to place a charge on the Property for the payment of Blaney’s legal fees in the amount of \$90,000. Blaney takes the position that it meets the test for an equitable mortgage.
- [35] The general legal principles that apply to equitable mortgages were summarized by the Court of Appeal in *Greenspan v. Van Clieaf*, 2023 ONCA 681, at paras. 44 – 47:

In *Elias Markets Ltd., Re*, (2006) 2006 CanLII 31904 (ON CA), 274 D.L.R. (4th) 166 (Ont. C.A.), at para. 63, this court stated that an equitable mortgage is distinct from a legal mortgage. The court further stated, at para. 65, that an equitable mortgage is meant to enforce “a common intention of the mortgagor and mortgagee to secure property for either a past debt or future advances, where that common intention is unenforceable under the strict demands of the common law”.

In *Emmott v. Edmonds*, 2010 ONSC 4185, at para. 64, Brown J., as he then was, summarized the principles that apply to an equitable mortgage as follows, citing *Elias Market Ltd.*, at paras. 65-66:

- (i) An equitable mortgage is a contract which creates in equity a charge on the property, but does not pass the legal estate to the mortgagee;
- (ii) The concept of an equitable mortgage seeks to enforce a common intention of the mortgagor and mortgagee to secure property for either a past debt or future advances, where that common intention is unenforceable under the strict demands of the law;
- (iii) An equitable mortgage can be created in several ways, including by the fact that the mortgagor has not executed an instrument sufficient to transfer the legal estate. For example, the mortgagor may have signed a document in the form of a legal mortgage, but for some reason of want of formality the document is not sufficient to transfer the legal estate. Or, an equitable mortgage may result from an agreement in writing duly signed to execute a legal mortgage.

Once the court is satisfied that a party has established the existence of an equitable mortgage, the equitable mortgage creates a charge in equity on the property which is enforceable as if it was a conventional mortgage under the equitable jurisdiction of the court: *Elias Markets Ltd.*, at para. 66; Walter M. Traub, *Falconbridge on Mortgages*, 5th Ed. (Thomson Reuters Canada Ltd.) at ss. 5:1. By contrast, a writ of execution, such as the writ of seizure and sale in this case, is not a charge and it would not take precedence over an equitable mortgage. Rather, an execution creditor is subject to the same charges, liens and equities as to which the land was subject in the hands of the debtor [citations omitted].

Given that an equitable mortgage derives from an agreement, see: *Elias Markets Ltd.*, at para. 66, determining whether there is an equitable mortgage is a matter of contractual interpretation. The normal principles of contractual interpretation therefore apply. The court is to determine the intent of the parties, based on the words in the contract used in their ordinary and grammatical meaning, consistent with the surrounding circumstances reasonably known to the parties at the time the contract was formed: see *Creston Moly Corp. v. Sattva Capital Corp.*, at para. 47. While the surrounding circumstances are relevant to interpreting the terms of a contract, they cannot be used to overwhelm the meaning of the words in the contract or to create what amounts to a new agreement: see *Sattva*, at para. 57.

[36] Blaney relies on the May 30, 2024 consent Order as the agreement that establishes an equitable mortgage. Blaney argues that the Order identifies the precise PIN and municipal address of the Property, the secured amount (\$90,000), and the beneficiary (Blaney). It also entitles Blaney to “immediate” payment of \$90,000 upon the advance of loan proceeds

against the Property. Blaney argues that the May 30, 2024 consent Order gave it an interest in the Property.

- [37] Blaney also relies on the affidavit sworn by El-Riffaey on May 4, 2024, where El-Riffaey affirmed his intention to use the proceeds of the loan to pay his outstanding and future legal fees to Blaney.
- [38] In my view, the May 30, 2024 consent Order did not create an equitable mortgage in favour of Blaney for two reasons.
- [39] Firstly, El-Riffaey’s intention to obtain a loan from a bank secured against the Property to pay for Blaney’s fees does not equate to an intention to grant Blaney a security interest against the Property.
- [40] The intention of the parties to the consent Order was that a bank would lend funds to the Defendant, and those funds would be secured by the Property. The bank was to be the secured creditor and mortgage holder, not Blaney. The Defendant’s debt to Blaney was to be paid from the borrowed funds, but the bank, not Blaney, was the intended mortgagee.
- [41] Second, the May 30, 2024 consent Order was a conditional order. It authorized the Defendant to apply for a loan and directs certain disbursements to Blaney and others if the loan is advanced. If the loan is granted, para. 6(a) of the Order authorizes a disbursement from the loan to Blaney, but does not create a charge on the Property itself in favour of Blaney. The conditional nature of the Order is also clear from para. 5 of the Order, which provides that “no funds can be drawn on the Loan (if one is entered into pursuant to paragraphs 3-4 above) without further Order from this Court” [emphasis added].
- [42] The Defendant was not able to obtain the loan proposed in para. 3 of the Order, and so no security interest was created. El-Riffaey was not obligated by the Order to consent to the short term, high interest loan contemplated (but never officially offered) by Blaney’s private lender client. This is also clear from para. 3 of the Order, which provides that El-Riffaey “shall be at liberty to discuss terms” of a loan or line of credit with a bank or other lending institution and, “if mutually agreeable, enter into an agreement”. El-Riffaey was not approved for the bank loan, and the terms proposed by the private lender were not “mutually agreeable”.
- [43] Blaney argues that El-Riffaey acted unreasonably in refusing to consider the potential offer from the private lender. I do not agree. What was proposed was a short term loan – one year – interest only payments at 9% with a Lender’s fee of 3%. Once El-Riffaey paid the \$150,000 required by paras. 6(a) and (b) of the May 30, 2024 Order, he would have to somehow repay the entire principal at the end of the one year term or be in default. There is no suggestion that he would have been able to repay the loan in one year.

Conclusion

- [44] For the foregoing reasons, Blaney’s motion is dismissed.

[45] That said, I will continue para. 1 of my interim order dated June 24, 2025 as follows:

Any party seeking to vary or discharge the Mareva Injunction Order of April 22, 2024 or to vary or discharge the variation Order dated May 30, 2024 must do so on Notice to Blaney McMurtry LLP, to the attention of Amelia Phillips Robbins.

[46] If the parties are not able to agree on costs, the Defendant may deliver costs submissions of no more than 3 pages plus costs outline and any offers to settle within 20 days of the release of this decision, and Blaney may deliver responding costs submissions on the same terms within a further 15 days.

Justice R.E. Charney

Released: July 3, 2025

CITATION: Kiosk Design Inc. v. El-Riffaey, 2025 ONSC 3970

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

KIOSK DESIGN INC., SQUADRAPIU INC. O/A
POLIFORM TORONTO, and ROBERT SIDI

Plaintiffs

– and –

AHMED YASSER EL-RIFFAEY and TRUSTEX
CURRENCY TRADING CORPORATION

Defendants

REASONS FOR DECISION

Justice R.E. Charney

Released: July 3, 2025