

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
Bemco Financial Services Ltd.) Amanda Deveaux, for the Plaintiff
)
Plaintiff)
– and –)
)
12425467 Canada Inc., Sasitharan)
Somasekarampillai, and Laavanya) Granville N. Cadogan, for the Defendants
Sasitharan)
Defendants)
) **HEARD:** March 27, 2025

DECISION ON SUMMARY JUDGMENT MOTION

STOTHART J.

Overview

[1] The plaintiff Bemco Financial Services Ltd. loaned the defendant 12425467 Canada Inc. (“124”) \$1,000,000. This loan was guaranteed by the defendants Sasitharan Somasekarampillai and Laavanya Sasitharan. To secure the loan, a mortgage was taken out on a rental building owned by 124 located at 47 Bloor Street, in Sudbury, Ontario. When the loan matured the defendants did not pay the amount owing. As a result of this the plaintiff sold 147 Bloor under power of sale to recoup the monies owed. When the sale of the property did not result in enough funds to pay off the amount owed, the plaintiff brought this action seeking recovery of the deficiency.

[2] The defendants dispute that the property sold for \$1,100,000, they think it sold for more and that there was a surplus on the power of sale. The defendants also take the position that the plaintiff has claimed improper fees and has not provided a proper accounting for monies received from the sale which should be deducted from any deficiency claimed.

[3] This is a motion for summary judgment brought by the plaintiff to determine whether a trial is required to resolve the issue between the parties. The issues to be determined on this motion are:

1. Is this an appropriate case for summary judgment;
2. Do the defendants raise any genuine issue requiring a trial in this action; and

3. Is the plaintiff entitled to judgment respecting the defendants' covenant on the mortgage in the amount it claims in this motion.

[4] I am satisfied that this is an appropriate case for summary judgment and that the plaintiff has established that there is no genuine issue requiring a trial in this action. I have determined, based on the evidence presented, that the plaintiff is entitled to judgment in the amount of \$58,067.48 plus pre-judgment and post-judgment interest at a rate of 7.99% which is the rate set out in the charge terms.

Background

[5] Most of the facts in this case are not in dispute. The defendant 124 borrowed \$1,000,000 from the plaintiff. This principal amount was secured by way of a mortgage over 47 Bloor Street. The defendants, Sasitharan Somasekarampillai and Laavanya Sasitharan, personally guaranteed the loan. The mortgage matured on October 1, 2022.

[6] On November 11, 2022, the defendants gave notice that they intended to pay out the mortgage at the end of November. Ultimately, the defendants did not pay the amount owing at the end of November.

[7] The plaintiff issued a Notice of Sale on December 22, 2022. The Notice of Sale provided notice of what was owed for principal, interest, statement charges, actual bank charges, and costs. It provided that unless the sums were paid before January 28, 2023, the property would be sold under the provisions in the mortgage. The Notice of Sale was not redeemed, and the property was listed under power of sale on March 10, 2023. The property was eventually sold, with the sale closing on May 15, 2023.

[8] The parties part ways on what occurred next. According to the plaintiff, the property sold for \$1,100,000. As part of the sale, the plaintiff gave the purchaser a Vendor Take-Back Mortgage in the amount of \$825,000.

[9] The plaintiff states that after applying the net proceeds from the sale to the amount owing and costs, charges, and expenses incurred, \$79,057.87 remains to be paid, plus pre-judgment and post-judgment interest at a rate of 7.99%.

Analysis

Is this an appropriate case for summary judgment?

[10] I am satisfied that the only genuine issue between the parties relates to whether the plaintiff suffered a shortfall as a result of the sale of the subject property, and if so, how much that shortfall was.

[11] On a motion for summary judgment, the motion judge is to consider the evidence submitted by the parties, and may exercise the additional powers of weighing the evidence, evaluating credibility, and drawing reasonable inferences as set out in r. 20.04(2.1) of the *Rules of Civil Procedure* to determine whether there is a genuine issue, unless it is in the interest of justice for

such powers to be exercised only at a trial: *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at paras. 49-52.

[12] I am satisfied that the evidence submitted by the parties in this case permits me to weigh the evidence, evaluate credibility, and draw reasonable inferences with respect to whether there was a shortfall, and if so, what it was. I am satisfied on the evidence provided, that I can make the necessary findings of fact, apply the law to the facts, and that this is a proportionate, more expeditious, and less expensive means to achieve a just result in this case. Therefore, I am satisfied that this is an appropriate case for summary judgment.

Is there a genuine issue that requires a trial?

[13] I am satisfied that there is no genuine issue that requires a trial in this case.

[14] The defendants have raised the following issues in this motion which they say require a trial:

1. They dispute the sale price of the property;
2. They submit that even if the property sold for the amount claimed by the plaintiff, there are the following deficiencies:
 - i. they are entitled to an accounting for the interest received by the plaintiff as part of the VTB Mortgage;
 - ii. the plaintiff is not entitled to a three-month interest penalty given that the mortgage matured; and
 - iii. the plaintiff has not provided a proper accounting for rents received by the plaintiff, property taxes paid, and the fees paid to the realtor.

[15] Parties are required to put their best foot forward on a summary judgment motion. The court is entitled to assume that the record on a motion for summary judgment contains all the evidence the parties would present at trial: *Sweda Farms v. Egg Farmers of Ontario*, 2014 ONSC 1200, at paras. 26-27, aff'd 2014 ONCA 878, leave to appeal refused, [2015] S.C.C.A. No. 97; *TD Waterhouse Canada Inc. v. Little* (2009), 76 C.C.E.L. (3d) 243 (Ont. S.C.), at para. 15, aff'd 2010 ONCA 145, 79 C.C.E.L. (3d) 216.

[16] Once the evidence presented by the moving party *prima facie* establishes that there is no genuine issue for trial, and the moving party is entitled to summary judgment as a matter of law, the responding party assumes the evidentiary burden of presenting evidence which is capable of supporting the position advanced by the responding party in its pleadings: *TD Waterhouse Canada Inc.*, at para. 15.

[17] Failure of the responding party to tender evidence does not automatically result in summary judgment. While the responding party may not rest its defence on mere allegations or denials in the pleadings, the responding party may nonetheless urge that the moving party's claim as supported by affidavit, is so obviously deficient that it raises a triable issue about the moving party's right to succeed: *Esses v. Bank of Montreal*, 2008 ONCA 646, 241 O.A.C. 134, at para. 45, leave to appeal refused, [2008] S.C.C.A. No. 471.

[18] A self-serving affidavit is not sufficient to create triable issues in the absence of detailed facts and supporting evidence: *Jhaver v. Singh*, 2016 ONSC 2735, at para. 37.

[19] A party is not entitled to "sit back" and rely on the possibility that more favorable facts may develop at trial: *Transamerica Life Insurance Co. of Canada v. Canada Life Insurance Co.* (1996), 28 O.R. (3d) 423 (Gen. Div.), at p. 434, aff'd 1997 CarswellOnt 3496 (Ont. C.A.).

[20] I will address the issues raised by the defendants in this motion in light of these general principles.

Is there a triable issue with respect to the sale price of the subject property?

[21] I am satisfied that credible and reliable evidence establishes that the property sold for \$1,100,000 and that there is no genuine issue that requires a trial with respect to the sale price of the subject property.

[22] The plaintiff has provided two affidavits from Jeffrey Turtel, who is the director of the plaintiff. He states that the subject property sold under power of sale for \$1,100,000 and in the process of the sale, the plaintiff provided a VTB Mortgage to the purchaser. Attached to Turtel's affidavits are a copy of the executed Agreement of Purchase and Sale, a copy of the statement of adjustments, and numerous emails where discussions took place between counsel for the plaintiff and counsel for the purchaser about the sale and the VTB Mortgage. These documents support Turtel's assertion that the property sold for \$1,100,000. Turtel also attached a copy of an appraisal arranged for by the plaintiff, which indicates an appraised value for the property of \$1,000,000 as of February 6, 2023. I have also received the reporting letter from the realtor (Sutton) with respect to the sale of 47 Bloor Street, which shows a sale price of \$1,100,000 and a real estate commission rate of 5%.

[23] The defendants submit that there is evidence that suggests the property sold for more than that claimed by the plaintiff. Given this other evidence, they say that a trial should be held to determine the purchase price of the property.

[24] In support of their position, the defendants refer to the Instruments registered on title when the property was sold under the power of sale. One of those Instruments, Registered Instrument SD475685, includes a Land Transfer Tax statement that was completed by the purchaser. The LTT statement states that the total consideration for the sale of the property was \$1,925,000.

[25] The defendants submit that this Registered Instrument is presumed accurate by virtue of s. 78(4) of the *Land Titles Act*, R.S.O. 1990, c. L.5 which presumes the accuracy and truth of information recorded in transfer instruments registered on the property.

[26] Section 78(4) of the *Land Titles Act* provides that when registered, an instrument shall be deemed to be embodied in the register and to be effective according to its nature and intent, and to create, transfer, charge, or discharge, as the case requires, the land or estate or interest therein mentioned in the register.

[27] The defendants rely on *Peedham v. 1000516033 Ontario Ltd*, 2025 ONCA 109, 67 R.P.R. (6th) 1, at para. 40, where the Ontario Court of Appeal held that absent fraud, s. 78(4) of the *Land Titles Act* “guarantees the effectiveness of registered instruments in the land titles system by protecting subsequent purchasers who are *bona fide* purchasers for value”.

[28] On May 16, 2023, the day after closing, two Instruments were registered with respect to the property: (a) Registered Instrument SD475685 which transferred the property to 47 Bloor St. Holding Ltd. under Power of Sale; and (b) Registered Instrument SD475686 which registered the charge/mortgage in the amount of \$825,000, which was the VTB Mortgage provided by the plaintiff to the purchaser.

[29] Registered Instrument SD475685 contains conflicting information about the consideration received upon the sale of the property. On the first page it shows the total consideration for the sale as being \$1,100,000. On page three, which is the LTT statement, it indicates \$1,100,000 as “monies paid or to be paid in cash” and then indicates \$825,000 as a mortgage “given back to vendor”. It then adds the two and lists \$1,925,000 as “total consideration”.

[30] There is clearly a discrepancy in the Registered Instrument with respect to the consideration received upon the sale of the property. One part of the Instrument indicates \$1,100,000 and another part indicates \$1,925,000. Given the two conflicting amounts in the same Instrument, I find that the presumption of accuracy cannot apply in the circumstances of this case.

[31] This requires the court to look at other evidence to see whether there is anything that would suggest that the property sold for \$1,925,000 as opposed to the \$1,100,000 set out in Turtel’s affidavit and supporting documents.

[32] The defendants rely on the affidavit of the defendant Sasitharan Somasekarampillai (the “Somasekarampillai affidavit”), sworn December 8, 2023. In the Somasekarampillai affidavit, concerns are raised about the authenticity of the APS produced by the plaintiff because the purchaser listed in the APS is Whitehall Realty Opportunities Corp. and the ultimate purchaser who took title to the property was 47 Bloor St. Holding Corp.

[33] I do not find that this raises a genuine concern about the authenticity of the APS produced by the plaintiff or the actual sale price of the property. The plaintiff has not directly addressed the change in purchaser between the APS and the final sale in its materials. However, when I consider that the Directors of Whitehall are the same as 47 Bloor St. Holding; the fact that 47 Bloor St. Holding was incorporated just prior to it taking title; and that the name of the new company is the same as the address of the subject property; I find it is reasonable to conclude that 47 Bloor St. Holding was simply incorporated by the same Directors to take title of the subject property.

[34] The Somasekarampillai affidavit states that there are two MLS listings related to the property and attaches copies of both as exhibits. The affidavit does not indicate the source of these two MLS listings. One MLS listing shows Sutton Realty as the listing brokerage. It states that the property was listed for \$1,199,000 and sold for 1,100,000 on April 12, 2023. It states that the property was being sold under a “Power of Sale”. All of this is consistent with the plaintiff’s position. The second MLS listing lists RE/MAX Rouge River Realty Ltd. as the listing brokerage and states that the property was listed for \$1,950,000 and was sold for \$1,700,000 on March 27, 2023. It shows a closing date of May 24, 2023. This second MLS listing lists the defendant, 124, as the seller.

[35] I find that the second MLS listing attached to the Somasekarampillai affidavit is not credible or reliable. During submissions, I raised concerns about the authenticity of the second MLS listing with counsel for the defendants, who was not able to assist me on this issue. The second MLS listing makes no sense. It indicates that 124 sold the property for \$1,700,000. If that were the case, the defendants would have direct knowledge of the sale because they were the seller. They would be able to produce documents such as an APS, closing summaries and trust ledgers. They would have been able to produce an abstract showing who took title to the property. The second MLS listing is contrary to the Registered Instruments registered on title, which indicate that ownership of the property was transferred from the plaintiff to 47 Bloor St. Holding Corp. on May 16, 2023.

[36] On the evidence presented in this motion, I find that there is no genuine issue for trial with respect to the sale price of the subject property. The plaintiff has provided credible and reliable evidence that it sold for \$1,100,000. I am satisfied that the LTT statement was likely filled out by the purchaser incorrectly by adding the purchase price to the VTB Mortgage. I am satisfied that a trial is not required on this issue.

[37] The defendants have not produced any credible or reliable evidence that would suggest that the sale price was anything other than \$1,100,000. The defendants are required to put their best foot forward, including providing detailed facts and supporting evidence. I find that none of the evidence produced in this motion raises any legitimate concern about the sale price of the property.

Should the interest received by the plaintiff on the VTB Mortgage be credited to the defendants?

[38] I am satisfied that that the plaintiff is not required to account to the defendants for any interest received from the VTB Mortgage.

[39] The defendants submit that because the sale of the property was on credit and the terms of the charge provided that the plaintiff would “only be accountable for monies actually received in cash as and when so received”, the plaintiff must account to them for any interest received on the VTB Mortgage when it is received by them. The defendants submit that because the VTB Mortgage bears interest at 12%, and the interest rate that applied to their Mortgage was 7.99%, they are entitled to the 4.1% difference between the two interest rates. The defendants have calculated the 4.1% in interest received by the plaintiff to be \$55,123.66, which they say should be credited towards any amount owed by them.

[40] Where a mortgagee sells a property under power of sale, it may do so and provide credit to the purchaser by way of a VTB Mortgage. While a credit sale may be made, the mortgagee must account to the mortgagor for the whole price as if it were cash. This recognizes that it is advantageous for all parties to allow a mortgagee to sell the property for the best price it can obtain, and that sometimes this involves advancing credit to the purchaser: *Beatty v. O'Connor* (1884), 5 O.R. 731 (H.C.), at p. 735.

[41] Pursuant to the charge terms in this case, upon default, the mortgagee could sell the property “on such terms as to credit and otherwise as may appear to it most advantageous, and for such price as can be reasonably obtained therefor[e]”. With respect to a sale on credit, the charge terms provided “the Chargee shall only be accountable for monies actually received in cash as and when so received”.

[42] The defendants rely on *665456 Ontario Ltd. v. Barelan Management Inc.* (1990), 72 O.R. (2d) 705 (C.A.), 1990 CarswellOnt 522, which they say stands for the proposition that a power of sale is not complete when the sale is on credit. The defendants rely on the following passage found at para. 14:

The whole purpose of a power of sale in a mortgage is “to get rid of the mortgagor’s equity of redemption and realize the mortgage debt. ... The mortgage cannot therefore survive the exercise of such a power for what is authorized to be sold is the mortgaged land itself, the security for the debt”... ***Under this agreement***, the mortgage is to remain in effect and survive the sale. The mortgagor’s equity of redemption is therefore not extinguished, nor is its right to redeem. The mortgagee has, to all intents and purposes, simply postponed payment of the mortgage. [citations omitted] [emphasis added].

[43] This decision does not support the defendants’ position. The Court of Appeal held that a power of sale gets rid of the mortgagor’s equity of redemption. The court’s reference to “under this agreement” does not refer to powers of sale on credit generally, it relates to the specific agreement in that case between Barelan and the purchaser which explicitly provided that the mortgage survived the sale. The court found that, given the specific language used in that agreement, the mortgagor’s equity of redemption was not extinguished upon the sale of the property. This decision does not stand for the proposition that a mortgagor’s equity of redemption survives a power of sale if it is on credit. In fact, it holds that unless explicitly provided for in the contract, it does not.

[44] The defendants also rely on *Smith v. Duca Financial Services Credit Union Ltd.*, 2017 ONSC 825. They submit that Master D. E. Short raised the possibility of renewal and perpetual renewal of a VTB Mortgage where there is a sale on credit.

[45] In *Smith*, Master D. E. Short set aside an administrative dismissal of an action finding that there was a genuine issue for trial with respect to the value of property at the date of sale under a power of sale. In that case, the defendant, Duca, sold property under a power of sale and appeared to have received a purchase price that was more than the amount owed to it under its first charge. This triggered an obligation to provide any surplus funds received to the subsequent

encumbrancers. The subsequent encumbrancers were the plaintiffs. The portions of the decision quoted by the defendants are the portions where Master Short is describing a defence pled by the defendant, Duca, which was that it did not have to provide the surplus to the plaintiffs until it received full payment of a VTB Mortgage. At no point does Master Short endorse this defence in his decision. His comments about perpetual renewal are simply his recognition of the practical problems with this type of defence.

[46] The plaintiff submits that the charge term related to the duty to account for monies received in cash when and so received, applies where property is sold on credit at a price that results in a surplus. Only in those circumstances would the mortgagee be required to account for the surplus when it is actually received in cash: *Smith & Shurtleff Inc. v. Parks* (1982), 26 R.P.R. 78 (Ont. C.A.); *Beatty v. O'Connor*, at p. 735.

[47] The defendants have not provided any authority that would support their position that a mortgagee must not only account to a mortgagor for the *purchase price* received under a power of sale on credit but must also account for any *interest* they receive on a VTB Mortgage as well.

[48] In this case, the plaintiff has credited the defendant with the entire purchase price as if it was received as cash. The plaintiff has chosen to provide a VTB Mortgage to the purchaser and in doing so assumes the risk of this investment. The defendants do not assume this risk. The plaintiff is not required to account to the defendants for either a profit or loss as a result of the plaintiff's investment.

[49] I find that the terms of the mortgage in this case did not provide that the plaintiff would have to account to the defendants for any interest earned on a sale on credit. Rather, it provided that the plaintiff would have to account for the entire purchase price received on the sale on credit.

Is the plaintiff entitled to a three-month interest penalty?

[50] I am satisfied that a trial is not required on this legal issue. I find that in the circumstances of this case, where the mortgagee has brought enforcement measures to recover amounts owing on a mortgage that has matured, the addition of a three-month interest penalty amounts to a penalty under the *Interest Act*, R.S.C. 1985, c.1-15. As such, the plaintiff is not entitled to the \$20,990.39 claimed in these proceedings.

[51] The plaintiff submits that it is contractually entitled to the three-month interest penalty by virtue of the terms of the mortgage and by virtue of s. 17 of the *Mortgages Act*, R.S.O. 1990, c. M.40. The plaintiff submits that when the defendants gave notice that they intended to redeem the mortgage on November 11, 2022, this triggered the 3-month interest charge term and s. 17 of the *Mortgages Act*. The plaintiff submits that it would be inequitable to not permit the fee in circumstances where the defendant gave notice of intent to redeem the mortgage but did not end up paying the amount owed when they said they would. The plaintiff relies on *Piesok v. Johnson*, 2010 ONSC 1284, 92 R.P.R. (4th) 283; *O'Shanter Development Co v. Gentra Canada Investments Inc.*, 25 O.R. (3d) 188 (Gen. Div., Div. Ct.), 1995 CarswellOnt 399, leave to appeal granted, 1995 CarswellOnt 4055 (Ont. C.A.); and *Mastercraft Properties Ltd. v. EL EF Investments Inc.*, 14 O.R. (3d) 519 (C.A.), 1993 CarswellOnt 614, leave to appeal refused, [1993] S.C.C.A. No. 463.

[52] The defendants submit that because the mortgage matured and the plaintiff chose to take action to recover the monies in default, the plaintiff is not entitled to payment of three-months interest. The defendants submit that where a mortgage goes into default after maturity, and is not redeemed, a three-month interest payment amounts to a penalty, which is prohibited by the *Interest Act*. The defendants rely on *Lee v. He*, 2018 ONSC 5932, 2 R.P.R. (6th) 154; *Elle Mortgage Corporation v. Sihota*, 2021 ONSC 1593, 27 R.P.R. (6th) 101; *2757043 Ontario Inc. v. Sansone*, 2024 ONSC 2393; *Benson Custodian Corporation v. Situ*, 2019 ONSC 3077, 146 O.R. (3d) 261; and *Ialongo v. Serm Investments Ltd.* (2007), 54 R.P.R. (4th) 310 (Ont. S.C.)

[53] The “Prepayment Provisions” of the charge in this case stated:

If the Indebtedness and any of the other sums which may be due hereunder or under the Security Documents are not repaid on or before the Balance Due Date, then the Chargor agrees to pay to the Chargee in addition to the amounts required to obtain a discharge, three-months interest at the rate of interest chargeable hereunder on the principal amount outstanding on the Balance Due Date.

[54] Subsection 17(1) of the *Mortgages Act* provides:

Despite any agreement to the contrary, where default has been made in the payment of any principal money secured by a mortgage of freehold or leasehold property, the mortgagor or person entitled to make such payment may at any time, upon payment of three months interest on the principal money so in arrear, pay the same, or the mortgagor or person entitled to make such payment may give the mortgagee at least three months notice, in writing, of the intention to make such payment at a time named in the notice, and in the event of making such payment on the day so named is entitled to make the same without any further payment of interest except to the date of payment.

[55] Subsection 8(1) of the *Interest Act* provides:

No fine, penalty or rate of interest shall be stipulated for, taken, reserved or exacted on any arrears of principal or interest secured by mortgage on real property or hypothec on immovables that has the effect of increasing the charge on the arrears beyond the rate of interest payable on principal money not in arrears.

[56] In *Mastercraft Properties Ltd.*, the Court of Appeal for Ontario found that a term in a mortgage that provided that the mortgagee was not required to accept payment after default, unless the mortgagor gave three months’ notice of their intention, or paid three months of interest as a bonus, did not offend the *Interest Act*. In its decision, the Court of Appeal specifically chose not to address whether s. 17 (then s. 16) of the *Mortgages Act* applied to situations where the mortgagee was taking action to recover monies owing: *Mastercraft Properties Ltd.*, at para. 25.

[57] In *Mastercraft Properties Ltd.*, the Court of Appeal found that terms that purported “to extract a bonus in addition to any other moneys payable under the mortgage” would be a clear contravention of the *Interest Act*: at para. 9. They also found that where a mortgagee claimed or sought to enforce a covenant to pay three months-notice in addition to the payment of interest in full up to the time of repayment on principal, this would constitute a penalty for default because it would result in an increase in the interest on the arrears beyond the mortgage rate, in contravention of *Interest Act: Mastercraft Properties Ltd.*, at paras. 9 and 12.

[58] In *O’Shanter Development Co.*, at paras. 12 and 13, Saunders J. found that while equity has historically provided a defaulting mortgagor with an opportunity to redeem his property, and that this rule has been codified in s. 17 of the *Mortgages Act*, if a mortgagee seeks to realize on their security, the equitable right of the mortgagor to redeem is triggered, and they are not required to give notice or pay the additional interest.

[59] In *Ialongo*, Brown J. found at para. 30 that the reasoning in *O’Shanter Development Co.* and *Mastercraft Properties Ltd.* were consistent with the view that s. 17 provides options to a mortgagor on default: it can give notice or pay the bonus prior to the expiry of the notice period. However, once a mortgagee takes steps to realize on its security, such as by issuing a notice of sale, it cannot convert the rights of the mortgagor under s. 17 into obligations of the mortgagor upon the realization of the security. Rather, the amounts a mortgagee may demand from a mortgagor upon realization are those spelled out in the mortgage contract, not s.17 of the *Mortgages Act: Ialongo v. Serm Investments Ltd.*, at para. 30.

[60] In *Lee*, Boswell J. found that the purpose of s. 17 of the *Mortgages Act* was to permit mortgagors to pay arrears without penalty, or by permitting early redemption at a price. Boswell J. found that the rationale behind s.17 ceases to make sense when a mortgage goes into default after maturity because in those circumstances the lender has already received, or is entitled to receive, the whole of the income stream contracted for. In those circumstances, tacking on an additional 3 months-interest would be nothing more than a penalty: *Lee v. He*, at para. 24-27.

[61] I do not find that *Piesok v. Johnson* assists with the plaintiff’s submission in this case. In *Piesok*, the mortgage fell into default before it matured. The mortgagee exercised a power of sale, sold the property, and then sued on the covenant for recovery of a deficiency. Lauwers J., as he then was, found that the mortgagee was entitled to three months of interest because it represented the payment the mortgagor was required to make for the privilege of retiring the mortgage early without providing three months’ notice. He found that to hold otherwise would allow a mortgagor to avoid the three-month penalty by simply retiring the mortgage early by purposefully going into default: *Piesok*, at paras. 27-30.

[62] The facts in *Piesok* are different than those in this case. This is not a case where the defendants defaulted on the mortgage prior to maturity and then sought to avoid the three-month interest penalty. In this case, the mortgage matured, and the plaintiff seeks payment of the full amount owing.

[63] The plaintiff submits in the alternative that it is entitled to three months of additional interest because the defendants “triggered” the Pre-payment Charge provision by advising on November 11, 2022 that they intended to pay the mortgage by the end of November. The plaintiff submits that this was less than three months’ notice and as such, the plaintiff is entitled to the three-month interest penalty.

[64] I agree that had the defendants paid the mortgage at the end of November, they would have had to pay the three-month interest penalty due to the short notice. The three-month interest penalty is payable for the privilege of paying the arrears on short notice. However, the defendants did not pay the arrears at the end of November and the plaintiff moved forward with enforcing its security by issuing a Notice of Sale. In my view, at that point, the plaintiff became entitled to what was provided for in the mortgage contract.

Has the plaintiff provided a proper accounting for rents received and management fees paid?

[65] I am satisfied that the plaintiff has provided a proper accounting for rents received and that the management fees claimed by the plaintiff are in accordance with the charge terms.

[66] The defendants submit that the plaintiff has failed to account for amounts claimed with respect to rent and what those monies were used for. They submit that the plaintiff should have filed an affidavit from the property management company that set out the amounts collected and what the money was used for.

[67] The plaintiff has provided as Exhibit “N” to the Turtel affidavit, sworn September 11, 2023, the rental owner statements prepared by Transparent Property Management Corp. for the period of December 19, 2022, to May 10, 2023, which set out the amounts of rent received and what amounts were paid and for what purpose. I am satisfied that the statements prepared by Transparent Property Management provide a detailed accounting of the rents received and what they were used for. A trial is not required with respect to this.

[68] The defendants submit that the \$1,978.75 in rent that was credited to the purchaser on closing should be credited to them.

[69] The sale of the property closed mid-month. The statement of adjustments on closing sets out that the rents collected for that month were divided between the plaintiff, who received 14 days of rent, and the purchaser, who received the remaining amount which was \$1,978.75. The purchaser became the owner of the property mid-month and was entitled to receive the rents collected for the last half of the month.

[70] The defendants submit that the plaintiff overcharged for management fees. According to the charge terms, the mortgagee was entitled to claim 10% of the gross rents as management fees. The defendants state that the gross rent collected during the time the mortgagee was in possession was \$22,717.20, and the amount charged for management fees was \$3,250. Under the terms of the charge the plaintiff was only entitled to \$2,271.72 (10%). This is a difference of \$978.28 which they say should be credited to them.

[71] According to the Closing Funds Summary, the plaintiff charged \$3,250 for legal fees regarding property management and enforcement proceedings, not management fees.

[72] The records from Transparent Property Management show that they charged \$1,520.71 in management fees for the period of December 19, 2022, to May 10, 2023. This is less than 10% of the rents collected.

Has the plaintiff properly accounted for the payment of property taxes?

[73] I am satisfied that there is no triable issue with respect to whether the plaintiff paid the property taxes owing on the property.

[74] The defendants submit that the plaintiff has only provided a copy of a cheque payable to the City of Sudbury for taxes owing in the amount of \$25,676.07, dated May 18, 2023. They submit that this is not sufficient evidence that the property taxes were actually paid.

[75] Exhibit “F” to the affidavit of Turtel, sworn December 18, 2023, is of a copy of a cheque payable to the City of Greater Sudbury Tax Department in the amount of \$25,676.07 and a copy of a TD deposit receipt, dated May 18, 2023, for the bill payment. In addition, the closing funds summary indicates that the property taxes were paid as part of the sale of the property. I find that this is *prima facie* proof that the taxes were paid.

[76] It would have been open to the defendants to provide some evidence that the taxes were not paid. This evidence would have been relatively easy to obtain from the City of Greater Sudbury. On a summary judgment motion, the defendants cannot sit back in the face of the materials provided by the plaintiff and claim that there is a triable issue on whether the taxes were paid without providing some evidence that would support this.

Has the plaintiff accounted for the real estate commission paid for the sale of the property?

[77] I am satisfied that there is no triable issue with respect to the real estate fees and the amount charged by the realtor to sell the property.

[78] The defendants submit that the plaintiff has provided inadequate disclosure with respect to the 5% real estate fee charged by Sutton. They submit that the plaintiff should have provided the contract it had with Sutton setting out that they had agreed to the 5%. In support of this submission, the defendants rely on the second MLS listing, which indicates a 2.25 % realty fee with the Empire Realty Point, Brokerage.

[79] The plaintiff has provided the real estate commission statement from Sutton which shows a commission rate of 5% and the sale price of \$1,100,000. The plaintiff was entitled, as per the terms of the Mortgage, to sell the property on such terms as they deemed fit. In this case, they agreed to pay 5% commission, which is not outside the normal commission charged to sell a commercial property.

[80] I have already found that the second MLS listing which indicates the Empire Realty Point, Brokerage as the listing agent, is an unreliable document. I do not find this to be a credible basis to doubt the accuracy of the Sutton real estate commission document or to find that the commission paid in this case was unreasonable.

Did the plaintiff charge the defendants for fees associated with the VTB Mortgage

[81] I am satisfied that the plaintiff did not charge the defendants for the fees associated with the VTB Mortgage and that a trial is not required on this issue.

[82] According to the statement of adjustments, the cost related to the registration of the VTB were paid by the purchasers. The “other charges” totaling \$5,958.05 are accounted for in the property management statement and the receipts for the payment of utilities for the subject property.

Other fees challenged by the defendants

[83] I am satisfied that the other fees and amounts challenged by the defendants are properly accounted for in the materials provided on this motion.

[84] A mortgagee is generally entitled to be indemnified for the costs that are incurred to respond to a default by a mortgagor. Costs claimed must be reasonable and properly incurred. There must be some basis in the evidence to determine that the costs were incurred for the amounts claimed. Absent proof of specific costs being incurred, the costs are subsumed in the ordinary course of the mortgagee’s business: *Lee*, at para. 43; *P.A.R.C.E.L. v. Acquaviva*, 2015 ONCA 331, 126 O.R. (3d) 108, at para. 96.

[85] Having reviewed the other costs, as explained in the Turtel affidavit, I am satisfied that the other costs claimed are reasonable and properly incurred. I am also satisfied that there is no triable issue with respect to these other costs.

Conclusion

[86] I am satisfied that there are no genuine issues in this case that require a trial. As such, I am satisfied that the plaintiff is entitled to summary judgment in the amount of \$58,067.48 plus pre-judgement and post-judgement interest at a rate of 7.99% which is the rate set out in the mortgage and so order. I have calculated this amount as follows: \$79,057.87 (which was the amount claimed in this motion) less \$20,990.39 (which was the three-month interest penalty I have determined is not appropriate).

Costs

[87] If the parties are unable to agree on the issue of costs, the plaintiff may provide written submissions on the issue of costs within 30 days of the release of this decision. These written submissions shall be no longer than 2 pages. The defendants shall provide their written responding submissions, of no more than 2 pages, 15 days after receipt of the plaintiff’s submissions.

The Honourable Madam Justice S.K. Stothart

CITATION: Bemco Financial Services Ltd. v.12425467 Canada Inc., 2025 ONSC 3987
COURT FILE NO.: CV-23-11263
DATE: 2025-07-04

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

Bemco Financial Services Ltd.

Plaintiffs

-and-

12425467 Canada Inc., Sasitharan Somasekarampillai,
and Laavanya Sasitharan

Defendants

**DECISION ON SUMMARY JUDGMENT
MOTION**

Stothart J.

Released: July 4, 2025