

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)	
)	
RICHARD SMICIKLAS)	
)	
Plaintiff)	Self-Represented
)	
– and –)	
)	
HOME TRUST COMPANY AND)	
GOWLING WLG)	
)	
Defendants)	Michael R. Kestenberg,
)	Counsel for Gowling WLG
)	
)	
)	
)	
)	HEARD: In writing

MATHAI J.

ENDORSEMENT ON RULE 2.1.01

Overview

[1] On May 9, 2025, counsel for the defendant, Gowling WLG (Canada) LLP, wrote RSJ Edwards requesting that the court institute a r.2.1 review of Mr. Smiciklas’ action. On May 15, 2025, I found that it may be appropriate to make an order under r. 2.1.01(1). Specifically, I found that Mr. Smiciklas’ actions may be an attempt to:

- 1) relitigate issues that were decided by Di Luca J. in a summary judgment decision dated April 22, 2025; and

2025 ONSC 4346 (CanLII)

- 2) seek liability against Gowling for its legal representation of the defendant, Homes Trust Company, on the summary judgement motion.

[2] In a May 15, 2025 endorsement, I ordered the Registrar to give notice to the parties that the action may be stayed or dismissed and ordered the parties to provide submissions in compliance with rr. 2.1.01(8) and (9).

[3] The plaintiff and Gowling provided submissions. Home Trust did not provide submissions. Home Trust filed a Notice of Intent to Defend on April 29, 2025.

[4] For the reasons that follow, I find that Mr. Smiciklas' action against Gowling is frivolous, vexatious and an abuse of process. The action against Gowling is dismissed.

Background – the mortgage action

[5] Gowling represents Home Trust in an action against Mr. Smiciklas and his daughter, Savannah Wells (the "Mortgage Action"). In the Mortgage Action, Home Trust sought \$1,116,534.26 for a breach of a mortgage charge provided by Home Trust to Mr. Smiciklas and his daughter, and possession of the mortgaged property. The mortgaged property was owned by Mr. Smiciklas (1% ownership) and his daughter (99% ownership).

[6] In the Mortgage Action, Home Trust brought a motion for summary judgement which was granted by Di Luca J. on April 22, 2025. In his endorsement on the summary judgment motion, Di Luca J. found the following:

- (a) the statement of claim was never served on Ms. Wells and Home Trust. Further, Home Trust could not seek leave to extend the time to serve the statement of claim on Ms. Wells during the summary judgment motion;
- (b) a trial was not required despite Mr. Smiciklas' argument that Home Trust failed to mitigate damages as it had not sold the mortgaged property despite taking possession of the property in January, 2025; and
- (c) there was no genuine issue with respect to Home Trust's action for judgment and possession of the mortgaged property.

[6] I have reviewed the issued judgment arising from Di Luca J.'s endorsement and an endorsement from Sutherland J. dated July 15, 2025. While these documents were not appended

to Mr. Smiciklas' claim, I believe they are relevant to the action, and I can take judicial notice of the orders and endorsements which are not technically evidence.

[7] Di Luca J.'s issued judgment (dated May 6, 2025) ordered Mr. Smiciklas to pay Home Trust \$1,104,841.41 together with interest at a rate of 6.25% per annum from October 20, 2024. The order also required Mr. Smiciklas to deliver possession of the mortgaged property to Home Trust. The property had already been delivered to Home Trust in January, 2025.

[8] On July 15, 2025, Sutherland J. dismissed Mr. Smiciklas' motion seeking a stay of the execution of Di Luca J.'s judgment. In his endorsement, Sutherland J. found as follows:

The defendant brings a motion seeking a stay of the execution of the Order of Justice DiLuca [sic] on the possession of the property. The Order was not appealed. The property has been listed for sale. The plaintiff indicates that the home was sold today. Thus, the motion is now moot. The defendant indicated that he does not dispute the Order but wished time to attempt to sale [sic] at a better price.

Motion is dismissed.

Mr. Smiciklas' and Gowling's written submissions

[9] In his written submissions, Mr. Smiciklas argues that his action relates to conduct that occurred *after* Home Trust obtained summary judgment. As such, it is not a collateral attack on Di Luca J.'s endorsement or judgment. Mr. Smiciklas points to the following steps taken to execute Di Luca J.'s judgement:

- (a) post-judgment resale and pricing decisions;
- (b) fire-sale reductions that undermine market value and subordinate security interests;
and
- (c) procedural misconduct and material misstatements made in the enforcement process.

[10] Mr. Smiciklas alleges that the defendants have strategically underpriced the mortgaged property which evidences, "a pattern of unjust enrichment".

[11] Mr. Smiciklas also asserts that Gowling misled Di Luca J. regarding the service of Ms. Wells; submitted a draft judgment that exceeded the scope of relief before the Court and participated in enforcement efforts that compromise fairness and equity.

[12] Gowling argues that Mr. Smiciklas' claim against it is frivolous, vexatious or otherwise an abuse of process of the court because:

- (a) it is a collateral attack on Di Luca J.'s April 22, 2025, endorsement;
- (b) Gowling is immune from liability pursuant to the common law doctrine of absolute privilege;
- (c) Gowling does not owe a duty of care to Mr. Smiciklas; and
- (d) Mr. Smiciklas' claim against Gowling is an abuse of process.

Statement of Claim

[12] In the "Overview" of the statement of claim, Mr. Smiciklas alleges:

This civil claim is brought in direct response to the manner in which the Defendants obtained and sought to enforce judgment in CV-24-00002839-0000, including strategic procedural misconduct, mid-motion revision of relief, concealment of asset liquidation, and disregard for subordinate mortgage rights and service rules.

The Plaintiff was cooperative throughout, surrendering the property in January 2025 and engaging in good faith communications with both Defendants. The Defendants nonetheless proceeded to litigation using misleading affidavits, manipulated jurisdictional assertions, and strategic omissions that deprived the Plaintiff of a fair process.

[13] The claim also pleads the following:

- (a) that the statement of claim in the Mortgage Action falsely identified Ms. Wells as the plaintiff's spouse;
- (b) the defendants filed an affidavit of service purporting to serve Ms. Wells with the statement of claim;
- (c) the defendants ignored Mr. Smiciklas' offer to indemnify Ms. Wells; and
- (d) the defendants did not advise Di Luca J. that the mortgaged property had already been listed for sale.

[14] As a result of the above conduct, Mr. Smiciklas pleads that the defendants are liable to him for the following causes of action: unjust enrichment, procedural abuse, negligent misrepresentation, failure to mitigate, and double recovery.

Analysis and Findings

[15] Pursuant to r. 2.1.01, the court may stay or dismiss a proceeding that appears on its face to be frivolous, vexatious, or otherwise an abuse of the process of the court. The rule serves an important role in screening out frivolous claims that lack merit (see *Kokic v. Johnson*, 2025 ONCA 4 at para 6).

[16] Rule 2.1 should be applied robustly so that motion judges may effectively exercise their gatekeeping function to dismiss litigation that is clearly frivolous, vexatious, or an abuse of process (see *Scaduto v. The Law Society of Upper Canada*, 2015 ONCA 733 at para 8, leave to appeal refused 2016 CanLII 27190 (SCC)). However, r. 2.1 is not applied to close calls and must be limited to the clearest of cases where the abusive nature of the proceeding is clear on the face of the pleading (see *Scaduto* at paras 8-9; *Sumner v. Ottawa (Police Services)*, 2023 ONCA 140 at para 9; *Wu v. Toronto (City)*, 2024 ONCA 810 at para 3). A motion under rule 2.1 focuses on the pleadings and any submissions by the parties under the rule (see *Scaduto* at paras 9 and 11-12).

[17] A frivolous proceeding lacks a legal basis or legal merit, or is brought without reasonable grounds and readily recognizable as devoid of merit with little to no realistic prospect of success (see *Rahman v. Financial Services Regulatory Authority of Ontario*, 2025 ONSC 1210 at para 6; *Buehlmann-Miyake v. Buhlmann*, 2025 ONCA 131 at para 3; *Gill v. MacIver*, 2023 ONCA 776 at para 3; *Lavallee v. Isak*, 2022 ONCA 290 at para 19).

[18] Despite Mr. Smiciklas' submissions to the contrary, his statement of claim clearly seeks liability against Gowling for its representation of Home Trust leading up to and during the summary judgement motion. On a generous reading of the claim, it also seeks liability against the defendants for steps taken to enforce Di Luca J.'s judgment. However framed, the pleading suffers from 4 insurmountable obstacles.

[19] First, Mr. Smiciklas' claim against Gowling is a collateral attack on Di Luca J.'s decision, which was never appealed. The statement of claim effectively challenges Di Luca J.'s finding and alleges that the order was only obtained as a result of Gowling's false representations to the Court. This is a collateral attack on Di Luca J.'s findings (see *Bluteau v Griffiths*, 2023 ONSC 1004 (CanLII), at paras 21, 26, 28). If Mr. Smiciklas believed that the order was obtained improperly, he should have appealed. I note that it is not clear to me how the issued judgment, dated May 6, 2025, exceeds the scope of relief before Di Luca J. as argued by Mr. Smiciklas in his written submissions.

[20] Second, it is clear that Gowling’s conduct during the mortgage action, including steps taken to enforce the judgment, are immune from liability on the basis of absolute privilege (see *Amato v. Welsh*, 2013 ONCA 258 at para. 34). The common law doctrine of absolute privilege protects counsel from any action for words spoken in the ordinary course of any proceedings before any court so long as the words sought to be cloaked with the privilege were uttered for the purposes of judicial proceedings by someone who has a duty to make statements in the course of the proceedings. The doctrine also applies to affidavits prepared in furtherance of judicial proceedings (see *Donovan v. Waterloo Regional Police Services Board*, 2019 ONSC 1212 at para. 34).

[21] Third, the law is clear that Gowling does not owe a duty of care to Mr. Smiciklas in the circumstances of this case (see *MacDonald v MCAP Service Corp.* 2013 ONSC 4473 at paras. 15-16; *Davidoff v. Paderewski*, 2020 ONSC 1162 at para.22; *Powell v. Shirley*, 2016 ONSC 3577 at para. 23). In the absence of a duty of care, Mr. Smiciklas’ claim in negligent misrepresentation cannot succeed. This applies to Gowling’s conduct leading up to and during the summary judgment motion and steps taken to enforce the summary judgment motion.

[22] Finally, commencing an action against an opposing party’s counsel is an abuse of process (see *Mikhail v Hickman*, 2016 ONSC 6747 (CanLII) at para 23, *Mukwa v Farm Credit Canada*, 2021 ONSC 1632 (CanLII) at para 52; *Royal Bank of Canada v. Tehrani*, [2009] O.J. No. 3153, 2009 CarswellOnt 5134 (S.C.J.), at para. 19).

[23] Actions commenced against opposing counsel have routinely been found to be an abuse of process for two reasons: (1) allowing such actions puts the law firm and the firm’s client in an untenable position of having to waive solicitor-client privilege in order to defend against the claims; and (2) allowing such actions to proceed would lead to the “endless relitigation of disputes” as each action would spawn new actions against opposing counsel (see *Hedary Hamilton PC v. Dil Muhammad, et al.*, 2013 ONSC 4938 (CanLII) at paras. 20-23) These concerns apply with equal vigor to Mr. Smiciklas’ claim against Gowling.

[24] Based on the above, I find that Mr. Smiciklas’ claim against Gowling is frivolous, vexatious and an abuse of process. As such, the action against Gowling is dismissed.

[25] Some of the issues identified above may apply to the claim against Home Trust (e.g. collateral attack). Additionally, it is not clear how Home Trust could be liable to Mr. Smiciklas for the above noted causes of action (to the extent that they exist at law) for any conduct leading up to or during the summary judgment motion or any steps taken to enforce Di Luca J.’s judgment.

[26] That said, I have not considered whether the claim against Home Trust is frivolous, vexatious or otherwise an abuse of process because: (a) Home Trust filed a Notice of Intent to

Defend the action prior to Gowling's May 9, 2025 request to the court; (b) Home Trust did not request a r. 2.1 review either before or after receiving Gowling's request on May 9, 2025; (c) despite receiving notice of my intention to review Mr. Smiciklas' claim under r. 2.1, Home Trust did not provide submissions; and (d) it is unclear whether Mr. Smiciklas understood that the review requested by Gowling could lead to the dismissal of his claim against Home Trust.

[27] In light of the above, the claim against Gowling is dismissed and the order staying the action is lifted.

The Honourable Justice S. Mathai

Released: July 31 2025