CITATION: First National Financial GP Corporation v. Wallace et al., 2025 ONSC 5397
COURT FILE NO.: CV-25-00000280-0000
DATE: September 23, 2025

SUPERIOR COURT OF JUSTICE

BETWEEN:	
FIRST NATIONAL FINANCIAL GP CORPORATION	James M. Butson, counsel for the Applicant
Applicant	
– and –	
RODERICK OMAR WALLACE, CORY HIGGONS, BRIANA MARSHALL, and all other Tenants/Occupants of the premises municipally known as 736 ANNLAND STREET, PICKERING, ONTARIO, LIW 1B6	Roderick Wallace, Self-represented Samuel Mason, counsel for the Respondents, Brianna Marshall and Cory Higgons
Respondents	

HEARD**:** August 7, 2025

JUDGEMENT ON APPLICATION

THE HONOURABLE JUSTICE SUNIL S. MATHAI

Introduction

[1] The Applicant seeks an order setting aside tenancy agreements made by the Respondent, Roderick Wallace, with the Respondents, Briana Marshall, Cory Higgons and the unnamed Respondents that reside in the basement apartment at 736 Annland Street, Pickering, Ontario (the

"Property"). The Applicant also seeks leave to issue a writ of possession in favour of the Applicant as against all the Respondents.

[2] On the consent of the relevant parties, I dismiss the application as against Briana Marshall and Cory Higgons. The evidence before me clearly establishes that these Respondents rented the upstairs apartment at the property well before Mr. Wallace became their landlord and well before Mr. Wallace breached the terms of his charge with the Applicant.

[3] For the reasons that follow, I cannot grant the application to set aside the tenancy agreement with respect to the basement tenants. The evidence before me establishes that there are unnamed individuals renting the basement apartment; however, the Applicant has not led sufficient evidence to satisfy the three-part test for setting aside a tenancy agreement pursuant to s. 52 of the *Mortgages Act*, R.S.O. 1990, c. M.40 (the "*Act*"). As a result, I am unable to issue a writ of possession for the basement apartment. Section 48 of the *Act* prohibits a person exercising rights under a mortgage from obtaining possession of a rental unit from the mortgagor's tenants, except in accordance with the *Residential Tenancies Act, 2006*, S.O. 2006, c.17 ("*RTA*").

[4] Despite the above conclusions, I am not dismissing the application as against Mr. Wallace or the unnamed basement tenants. Instead, I am ordering Mr. Wallace and the basement tenants to provide further information to the Applicant about the nature of the tenancy agreement. If Mr. Wallace and the basement tenants comply with these orders, then the Applicant can determine whether it is appropriate to move forward with the application.

(a) Background

[5] The application arises out of a Charge/Mortgage of Land (the "Charge") made between Computershare Trust Company of Canada, as Mortgagee, and Mr. Wallace, as Mortgagor. The Charge was registered on the Property's title on April 14, 2022. The principal of the mortgage was $1,008,000. The Charge was assigned by Computershare to the Applicant.

[6] The Charge required Mr. Wallace to pay the sum of $4,787.53 on the 13th day of each month commencing on May 13, 2022 until April 13, 2023. The standard charge terms permitted the Applicant to take the following steps upon Mr. Wallace's default: (a) lease or sell the land without entering into possession of the premise; and (b) require the immediate payment of the principal amount owing under the charge with interest. The terms of the Charge were renewed on February 13, 2024 with a maturity date of April 13, 2025. At the time of renewal, the monthly payment ballooned to $7,182.17 per month as the interest rate had increased.

[7] Mr. Wallace defaulted on the Charge on April 13, 2024. Since that time, Mr. Wallace has not remedied the breach. On August 14, 2024, the Applicant commenced a statement of claim against Mr. Wallace. Mr. Wallace did not defend the action, and the Applicant obtained default judgment against Mr Wallace on September 23, 2024. The judgment required Mr. Wallace to pay the Applicant $1,054,365.96 plus costs. Additionally, Mr. Wallace was required to deliver possession of the Property to the Applicant.

[8] The Applicant's property manager conducted an occupancy inspection at the Property on September 26, 2024. At that time, the inspectors posted a notice on the side door of the Property

because they were unable to speak with anyone residing at the Property. After posting the notice, the inspectors received a call from the Respondent, Ms. Marshall. Ms. Marshall advised that she resided in the upstairs apartment with her husband, Mr. Higgons, and their young child. Ms. Marshall also advised that there were four tenants who resided in the basement apartment who did not speak English.

[9] On October 22 and 26, 2024, the property manager re-attended at the property to obtain the occupancy particulars of the basement tenants. Again, notices were posted. Again, no responses were received. There is no evidence of subsequent attendances at the Property after October 26, 2024.

[10] The Applicant's special accounts manager, Danny Sougaris, swore an affidavit in support of the application. In that affidavit, Mr. Sougaris states the following:

> I am advised by the [property manager] and verily believe that [Mr. Wallace], who is also a local realtor, keeps advising the "tenants" that he has spoken with the Applicant and that all issues have been resolved. [Mr. Wallace] has instructed the "tenants" not to speak with the PM going forward; alleged that the PM inspector was a scam artist; and, that the notices posted by the PM were illegitimate documents. As a result, it appears that [Mr. Wallace] has installed the "tenants" with the specific intention to prevent the Applicant from realizing upon its security.

[11] The Applicant's application record and factum were served on Mr. Wallace, Ms. Marshall and Mr. Higgons on February 26, 2025. The basement tenants were served with the application record and factum by mail on February 26, 2025. The basement tenants did not attend the hearing of this application, nor did they file any materials in response to the application. Mr. Wallace attended the hearing but did not provide evidence with respect to the basement tenants.

[12] Ms. Marshall and Mr. Higgons filed a responding application record. Ms. Marshall's affidavit makes it clear that she and Mr. Higgons began leasing the upstairs apartment in August 2020 and that Mr. Wallace became their landlord in April 2022, nearly two years before he defaulted on the Charge. For a period of time, Ms. Marshall and Mr. Higgons paid rent to Mr. Wallace until the Canada Revenue Agency required them to pay their rent directly to the CRA as a result of Mr. Wallace owing tax.

(b) Governing Principles

[13] Pursuant to s. 52(1) of the *Act*, the Applicant seeks to set aside the tenancy agreement between the Respondents and Mr. Wallace. Section 52(1) and (2) reads as follows:

> **52** (1) The Superior Court of Justice may on application by the mortgagee vary or set aside a tenancy agreement, or any of its provisions, entered into by the mortgagor in contemplation of or after default under the mortgage with the object of,
>
> > (a) discouraging the mortgagee from taking possession of the residential complex on default; or

> (b) adversely affecting the value of the mortgagee's interest in the residential complex
>
> (2) In considering the application, the judge shall have regard to the interests of the tenant and the mortgagee.

[14] The test to set aside a tenancy agreement was outlined by Brown J. in *Melo v. 2297248 Ontario Ltd*., 2016 ONSC 4877, at para. 7. For a tenancy agreement to be set aside, an applicant must establish each of the following:

> (1) there must be a tenancy agreement entered into by the mortgagor;
>
> (2) the tenancy agreement must be entered into in contemplation of or after default; and
>
> (3) the tenancy agreement must have the object of either discouraging the mortgagee from taking possession or adversely affecting the value of the mortgagee's interest in the property.

[15] To set aside a tenancy agreement, an applicant must do more than establish that the tenancy constitutes a "bad deal" for the mortgagee (see: *Bank of Montreal v. Smith* (2008), 71 R.P.R. (4th) 52 (Ont. S.C.J), at para. 26; *Mortgage Company of Canada Inc. v. Singh*, 2019 ONSC 6200, 8 R.P.R. (6th) 254, at para 29). The applicant must establish that the tenancy agreement was entered into with the object of discouraging the mortgagee from taking possession or with the object of affecting the value of the mortgagee's interest in the property (see *Smith*, at para. 26; *Singh*, at para. 29).

[16] It would be rare for a mortgagor to admit that they entered into a lease to frustrate the mortgagee's ability to take possession of the subject property. As a result, the court will often rely on inferences that may be drawn from the surrounding circumstances. Such circumstances include:

> (a) the amount of the rental payments as compared to the mortgage payments and other expenses;
>
> (b) the relationship of the tenant to the mortgagor; and
>
> (c) the timing of the lease in relation to the date of default.
>
> (see *Singh*, at para. 30; *Duca Financial Service Credit Union Ltd. v. Osundina*, 2019 ONSC 3358, at para. 28).

[17] Pursuant to s. 50(1) of the *Act*, a mortgagee may at any time after the default under a mortgage make inquiries of the mortgagor regarding the existence of any tenancy agreement and require the mortgagor to provide a list of tenants, if any. Section 50(2) permits the mortgagee to demand production from the mortgagor or the mortgagor's tenant of a copy of the tenancy agreement if it is written; and demand from the mortgagor or the mortgagor's tenant any particulars of the tenancy agreement. Both the mortgagor and the mortgagor's tenants are obligated to provide the mortgagee with the information related to a tenancy agreement (s. 52(5)). If a mortgagor or

mortgagor's tenant does not satisfy their obligations, then the mortgagee may apply to the Superior Court of Justice for an order requiring compliance (s. 50(6)).

[18] The Applicant's request for leave to issue a writ of possession is governed by r. 60.10 of the *Rules of Civil Procedure*, which reads as follows:

> (1) A writ of possession (Form 60C) may be issued only with leave of the court, obtained on motion without notice or at the time an order entitling a party to possession is made.
>
> (2) The court may grant leave to issue a writ of possession only where it is satisfied that all persons in actual possession of any part of the land have received sufficient notice of the proceeding in which the order was obtained to have enabled them to apply to the court for relief.

[19] Importantly, pursuant to s. 48(1) of the *Act*, no person exercising rights under a mortgage may obtain possession of a rental unit from the mortgagor's tenant except in accordance with the *RTA*. Additionally, a person exercising rights under a mortgage who gives notice of termination of a tenancy shall be deemed to be a landlord (ss. 48(2) and 47(1) of the *Act*).

[20] As a result of the above, if there are tenants residing at the Property, then the Applicant can only take possession of the property in accordance with the *RTA*. If, however, the Applicant can successfully set aside the tenants' lease, then s. 48 does not apply.

(c) Application of Governing Principles

[21] As noted above, Ms. Marshall's affidavit clearly establishes that she and her husband entered into a tenancy agreement with respect to the upstairs apartment in August 2020 and that the tenancy agreement was continued with Mr. Wallace in April 2022. The tenancy between these Respondents and Mr. Wallace is clearly not a "sham". The Applicant agrees and no longer seeks relief as against Ms. Marshall and Mr. Higgons. As a result, the application is dismissed against these Respondents.

[22] With respect to the remaining Respondents, there is evidence that there are tenants residing in the basement apartment of the Property. The Applicant's property manager prepared occupancy reports that confirm that tenants reside in the basement apartment. One of the occupancy reports described the inspector's telephone call with Ms. Marshall confirming that a family of four resides in the basement apartment. The Applicant accepts that tenants reside in the basement apartment and, as a result, seek to set aside their lease.

[23] While the parties accept there are tenants residing in the basement apartment, there is a complete absence of evidence that establishes that the basement tenants were "installed" to frustrate the Applicant's ability to take possession of the Property. Instead, the Applicant argues that I can infer that the tenancy agreement with the basement tenants is a "sweetheart deal" because Mr. Wallace has been advising the tenants not to speak to the Applicant's property manager and because the basement tenants have not provided the Applicant nor this Court with a written tenancy

agreement or any particulars of a tenancy agreement. Respectfully, I reject this argument for the following reasons:

> (a) Mr. Sougaris's affidavit includes double hearsay. Hearsay is not permitted in affidavits filed in support of an application, unless it is on uncontentious issues (see r. 39.01(5)). Mr. Sougaris's affidavit does not identify who told the project manager that Mr. Wallace had been misleading the tenants. I cannot assume that it was Ms. Marshall or Mr. Higgons because Ms. Marshall's affidavit does address this issue;
>
> (b) Even if I accepted that Mr. Wallace had engaged in this inappropriate conduct, that does not necessarily mean, even in conjunction with the failure of the basement tenants to respond to this application, that the tenancy agreement was reached in contemplation of or after default and with the intention of discouraging the mortgagee from taking possession.
>
> (c) The evidence clearly establishes that there is one unit at the Property that was rented well before Mr. Wallace's defaulted on the Charge (i.e., the upstairs unit). This is some evidence that Mr. Wallace was not "installing" tenants with the specific intention to prevent the Applicant from realizing upon its security.

[24] To be clear, I do not fault the Applicant for not presenting compelling evidence in support of the relief sought. The absence of this evidence is due, in large part, to Mr. Wallace's decision not to file any responding materials and the basement tenants' decision not to furnish the Applicant with any particulars on the tenancy agreement. However, the Applicant has the burden of establishing that the tenancy agreement should be set aside (*Melo*, at para. 7). Based on the record before me, the Applicant has not met the test for setting aside the basement tenants' tenancy agreement.

[25] In the alternative, the Applicant argues that if I find that it has not met the test under s. 52 of the *Act*, that I should grant it leave to issue a writ of possession because there is no evidence of a tenancy agreement as defined under s. 2 of the *RTA*. The difficultly with this submission is that it ignores what everybody accepts: there are tenants residing in the basement apartment. The reality is that these tenants must have a written, oral or implied agreement to occupy the basement apartment.

[26] As noted above, no person exercising rights under a mortgage may obtain possession of a rental unit from the mortgagor's tenant except in accordance with the *RTA*. The Applicant accepts, based on their own evidence and its primary submission on this application, that there are tenants in the basement apartment. In these circumstances, I cannot grant the Applicant leave to issue a writ of possession in a manner that is inconsistent with s. 48(1) of the *Act*.

[27] The conclusions I have reached do not compel me to dismiss the application as against Mr. Wallace or the basement tenants. As noted above, the approach taken by the basement tenants and Mr. Wallace have frustrated the processes contemplated under the *Act* and have left the Applicant and this Court with insufficient evidence to properly rule on the application. This cannot be tolerated. Instead of dismissing the application against Mr. Wallace and the basement tenants, I make an order pursuant to s. 50(6) of the *Act*, requiring Mr. Wallace and the basement tenants to:

(a) produce any written tenancy agreement, if it exists, to the Applicant on or before October 31, 2025; and

(b) provide the Applicant with full particulars of the tenancy agreement including documents establishing: (i) when the basement tenants began renting the basement apartment; (ii) the amount of the rent paid per month; and (iii) who the rent has been paid to in the past and present. This information must be provided to the Applicant on before October 31, 2025.

[28] The Applicant will serve this judgment and order on the basement tenants by regular mail and registered mail. If Mr. Wallace and the basement tenants do not comply with this order, then the Applicant has numerous mechanisms to enforce the order. In addition, the Applicant can renew its request to set aside the tenancy agreement. If the above order is complied with, the Applicant can review the materials produced and determine whether it is appropriate to seek to set aside the tenancy agreement.

[29] Finally, I use this judgment to speak directly to the individuals residing in the basement apartment at 736 Annland Street, Pickering, Ontario.

[30] You will receive a copy of this endorsement and an order requiring you to provide the information detailed in paragraph 28 above. **Do not ignore this judgment or its reasons.** If you are told that you do not have to comply with my order or that the issues have been fully resolved, then you are being misled. If necessary, seek out legal assistance. If you cannot afford legal assistance, please contact Pro Bono Ontario at 1-855-255-7256. You can also contact the Law Society Referral Service which provides a 30-minute free legal consultation (1-855-947-5255 or 416-947-5255 (within the GTA)).

C. Costs

[31] Ms. Marshall and Mr. Higgons seek costs in responding to the application. The Applicant takes the position that no costs should be ordered because Ms. Marshall and Mr. Higgons did not provide its property manager with information about their tenancy agreement. Alternatively, the Applicant argues that Mr. Wallace should be liable for the costs because he advised the tenants not to cooperate with the Applicant.

[32] Ms. Marshall and Mr. Higgons were successful in resisting the application and are entitled to costs against the Applicant for the following reasons:

(a) Ms. Marshall's affidavit does not corroborate the double hearsay information contained in the Applicant's affidavit that Mr. Wallace told the tenants not to co-operate with the Applicant. I have no admissible evidence that establishes that Mr. Wallace told Ms. Marshall and Mr. Higgons not to speak to the property manager;

(b) Ms. Marshall and Mr. Higgons did reach out to the property manager in September 2024. At the time of commencing this application (February 2025), the Applicant had no evidence that supported setting aside their tenancy agreement. In fact, the Applicant knew

that Ms. Marshall and Mr. Higgons were residing in the upstairs apartment and, as noted in the occupancy report, these Respondents had, "[n]o relationship to [Mr. Wallace]"; and

(c) The responding application record was served on April 17, 2025. This was a week before the first appearance on this application (i.e. April 24, 2025). At that time, the Applicant should have discontinued the application against Ms. Marshall and Mr. Higgons.

[33] While Ms. Marshall and Mr. Higgons are entitled to costs, I am reducing their costs to reflect the fact that they did not furnish the Applicant with information about their tenancy agreement until 7 months after they were originally contacted by the Applicant's property manager. As such, I order the Applicant to pay costs to Ms. Marshall and Mr. Higgons in the amount of $2,500.00 (inclusive of H.S.T. and disbursements) within 30 days from the release of this ruling.

[34] To facilitate the issuing and entering of the order, the Applicant may email a draft order consistent with this judgment to my judicial assistant, Manuella Pascoe, at manuella.pascoe@ontario.ca.

The Honourable Justice Sunil S. Mathai

Released: September 23, 2025