In the Court of Appeal of Alberta

Citation: Mosca v Landmark West Capital Management Inc, 2026 ABCA 136

Date: 20260427
Docket: 2501-0261AC
Registry: Calgary

Between:

Giovanni Mosca, Pasquale Mosca and the Estate of Marlene June Mosca by its personal representatives, Frank Mosca and Linda Mosca

Appellants/Cross-Respondents

- and -

Landmark West Capital Management Inc

Respondent/Cross-Appellant

The Court:

The Honourable Justice Jolaine Antonio
The Honourable Justice Jane Fagnan
The Honourable Justice Joshua B. Hawkes

Memorandum of Judgment

Appeal from the Order by
The Honourable Justice O. Malik
Dated the 26th day of August, 2025
Filed the 23rd day of December, 2025
(Docket: 2401-01090)

Memorandum of Judgment

The Court:

[1] On January 24, 2024, Giovanni Mosca, Pasquale Mosca and the Estate of Marlene June Mosca filed a statement of claim against the respondent Landmark West Capital Management Inc, alleging Landmark breached an agreement to purchase land from the Moscas. By way of remedy, the Moscas sought both an "order for specific performance" of the agreement for purchase and sale and damages for breach of contract.

[2] On April 5, 2024, Landmark filed a statement of defence, alleging it repudiated the agreement for purchase and sale because the Moscas failed to disclose material information about land use restrictions. Landmark filed a counterclaim, claiming return of deposits paid under the agreement and damages for costs incurred in anticipation of closing.

[3] In July 2024, the Moscas entered into a purchase and sale agreement with a new buyer.

[4] On January 28, 2025, Landmark registered a certificate of *lis pendens* (CLP) on title to the land, certifying proceedings had "been taken in Court to enforce a claim of interest in land by [Landmark] against the" land. According to Landmark, it was concerned about what a sale to a third party would mean for its legal rights and obligations in the underlying litigation.

[5] On February 10, 2025, the Moscas applied for an order directing that the CLP be discharged. On February 27, Applications Judge Farrington granted that application on the basis that Landmark's counterclaim "claims a return of a deposit… pre-trial interest… some expenses, but it does not claim... any interest in the land".

[6] Landmark appealed the discharge of its CLP to the Court of King's Bench. It also applied for an order under Rule 5.11 of the *Alberta Rules of Court*, Alta Reg 124/2010 [*Rules*] directing the Moscas to produce the sale agreement with the new buyer and "any other records" regarding that sale.

[7] On August 26, 2025, Justice Malik granted Landmark's appeal. He found that because the Moscas' statement of claim sought specific performance of the purchase and sale agreement as a remedy, Landmark had a sufficient interest in the land to sustain a CLP under section 148 of the *Land Titles Act*, RSA 2000, c L-4. However, if the statement of claim was amended to abandon the claim for specific performance, he reasoned, then Landmark would not have an interest in the land and the CLP should be withdrawn. Justice Malik allowed the appeal but also ordered, "Upon the [Moscas] amending their Statement of Claim to remove the claim for specific performance, [Landmark] shall forthwith withdraw the CLP".

[8] Justice Malik denied Landmark's application for production, holding that records pertaining to the sale to the new buyer were records of "ongoing negotiations or... pending agreements that have not yet been finalized" and, as such, were not yet relevant and material to the underlying litigation.

[9] The Moscas appealed the "portion of the decision which allowed [Landmark's] appeal". Landmark cross-appealed the decision refusing production. Landmark did not cross-appeal the direction that it "forthwith withdraw the CLP" in the event the statement of claim was amended to remove the claim for specific performance.

[10] After factums were filed but before the appeal hearing in this Court, the Moscas applied in the Court of King's Bench for permission to amend their statement of claim to remove the claim for specific performance. Landmark contested the amendment, arguing it was not being sought in good faith, because the Moscas were attempting to remove the CLP in reliance on Justice Malik's order while they were, at the same time, appealing that order to this Court. Justice Feasby granted the application, and the statement of claim was amended to remove the claim for specific performance.

[11] With that amendment, Landmark became subject to a binding court order requiring it to "forthwith withdraw the CLP". As of the date of the hearing before us, Landmark had not complied with that direction.

[12] As Landmark did not appeal that portion of Justice Malik's order, the question becomes whether the Moscas' appeal is moot. The Moscas say, practically speaking, there is still a live dispute between the parties because Landmark has refused to comply with Justice Malik's order. Landmark submits the Moscas' appeal is moot, yet asks us to consider other arguments it says were before Justice Malik to support its position that the CLP can exist independently of the Moscas' claim for specific performance. It submits Justice Malik never considered those arguments.

[13] We conclude the Moscas' appeal is moot. Justice Malik's order settles the practical question. It is not the role of the Court of Appeal to enforce that order. Substantively, all that remains is a "hypothetical or abstract question" about the requirements for registering a CLP that "will not have the effect of resolving some controversy which affects or may affect the rights of the parties": *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 at 353, 57 DLR (4th) 231.

[14] The Moscas have asked us to address Landmark's argument regarding the requirements of section 148 of the *Land Titles Act*, which provides that a CLP can be registered by a "person claiming an interest in any land" or a "person who has proceeded by way of action to call into question some title or interest in any land": *Fenoglio v Thompson*, 2025 ABCA 212 at para 27. Landmark submits that the requirements of section 148 can be met by a defendant who *opposes* a claim for specific performance and eschews any interest in land. It cites no authority for this

counterintuitive proposition. Given our conclusion that the appeal is moot, we do not feel it is necessary or appropriate to address this argument.

[15] As the Moscas' appeal is moot, and Landmark did not cross-appeal the part of the order requiring it to "forthwith withdraw the CLP" upon amendment, we need not consider Landmark's arguments for why the CLP should be sustained.

[16] In any event, it is evident to us that Justice Malik did consider all of Landmark's arguments and concluded the only basis on which the CLP could be upheld was the then-extant claim for specific performance. Contrary to Landmark's submissions, there was nothing improper about the Moscas proceeding on two fronts to have the CLP discharged – in this Court, by appealing Justice Malik's decision to sustain the CLP, and in the Court of King's Bench, by satisfying Justice Malik's prerequisite for removal of the CLP. Landmark's other arguments in support of maintaining the CLP boil down to an assertion that the mere existence of a contractual dispute involving land is sufficient to constitute an "interest in land" and ground a CLP. We are concerned that, to make this argument properly, Landmark may well have needed to apply to reconsider this Court's judgment in *Morrison v Moe-Villa Investments Ltd*, 2022 ABCA 159 at para 26; *Rules*, Rule 14.72. It did no do so.

[17] The Moscas' appeal is dismissed for mootness. The portions of Justice Malik's order regarding the CLP remain in effect. According to that order, Landmark must withdraw its CLP forthwith. Landmark's counsel assured us that, if this Court declined to consider its independent grounds, as we now have, Landmark will recognize the validity of Justice Malik's order and withdraw the CLP.

[18] With respect to Landmark's cross-appeal, the production of records is a discretionary decision that is afforded deference on appeal: *Kennedy v Swientach*, 2022 ABCA 161 at para 12; *Geophysical Service Incorporated v Husky Oil Limited*, 2013 ABCA 99 at para 17.

[19] The court may order a record produced if it is satisfied "a relevant and material record under the control of a party has been omitted from an affidavit of records": *Rules*, Rule 5.11(1)(a). A record is "relevant and material" where it "could reasonably be expected (a) to significantly help determine one or more of the issues raised in the pleadings, or (b) to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings": *Rules*, Rule 5.2(1).

[20] We agree with Justice Malik that the agreement with the new buyer is relevant to damages and mitigation: *Southcott Estates Inc v Toronto Catholic District School Board*, 2012 SCC 51 at paras 23-25. It is not clear to us how, at the time the matter was before him, Justice Malik could have characterized the July 2024 purchase and sale agreement as "pending", notwithstanding that the Moscas' affiant described it as "definitive".

[21] However, the broader request for "[a]ny other records which were created or are in the possession of the Plaintiffs regarding the sale" lacked particularity. The evidentiary basis for this request is not apparent on the record before us. Given the fact that Justice Malik granted Landmark leave to bring its application again "should circumstances warrant", we decline at this time to address producibility of the July 2024 agreement. If Landmark wishes to pursue production of these records, it should bring a properly particularized request. All related records may then be considered together. Of course, any records produced will be subject to the implied undertaking that "information acquired through the discovery process shall not be used for any purpose which is ulterior or collateral to the lawsuit", as codified in Rule 5.33: *Simpson v Pawlowski*, 2024 ABCA 254 at para 10.

[22] Thus, Landmark's cross-appeal is dismissed.

[23] In the unique circumstances of this case, costs of both appeals are awarded to the Moscas according to the Schedule C tariff. The hearing of the Moscas' appeal likely would not have been necessary if Landmark had complied with its obligation to discharge the CLP "forthwith" after the Moscas obtained permission to amend their statement of claim.

Appeal heard on April 8, 2026

Memorandum filed at Calgary, Alberta
this 27th day of April, 2026

Antonio J.A.

Fagnan J.A.

Hawkes J.A.

Appearances:

P. Osadetz
for the Appellants/Cross-Respondents

T. Runyowa
for the Respondent/Cross-Appellant