CITATION: Prudent Excellence Mortgage Investment Corporation v. Triumph Development HK Bradford Twin Regency Inc., 2022 ONSC 7180
COURT FILE NO.: CV-22-00677227-00CL
DATE: 20221208

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

RE: Prudent Excellence Mortgage Investment Corporation, Applicant

AND:

Triumph Development HK Bradford Twin Regency Inc. et al, Respondents

BEFORE: Osborne J.

COUNSEL: *Ziyi Tang*, for the Applicant

Catherine Qin, for the Third Mortgagees, Xiaofeng Fu and Meng Sun,
Dom Michaud and Anisha Samat, for the Receiver
Paul Hancock, for 10853828 Canada Inc. and Delbrook Triumphant Builders Inc.

HEARD: December 8, 2022

ENDORSEMENT

[1] BDO Canada Limited [”BDO”], in its capacity as Court-appointed Receiver, seeks an order:

(a) approving the settlement of a lien claim;

(b) approving a distribution in respect of administration expenses claimed under the mortgage that was the subject of the receivership;

(c) approving the Receiver’s fees and those of its counsel; and

(d) for advice and directions regarding a claim made by the mortgagee for three months’ interest pursuant to either or both of the terms of the mortgage at issue and/or section 17 of the *Mortgages Act*.

[2] The first three heads of relief are unopposed. As to the fourth, the Receiver seeks direction with respect to the claim for interest given its concern that the contractual basis in the mortgage terms relied upon contravene section 8 of the *Interest Act* and its further concern that section 17 of the *Mortgages Act* is not applicable in the circumstances, with the result that it cannot be relied upon as the basis for the payment claimed.

[3] The Property was subject to a construction lien in favour of Gerritts Engineering Limited registered prior to sale. Proceeds of sale have been distributed, subject to a holdback related to the issues that are the subject of this motion.

[4] The Receiver has settled the lien claim. For the reasons set out in the motion materials and the Third Report of the Receiver dated November 28, 2022, and given that the priority of the lien is acknowledged by the other lien claimants, I am satisfied that the settlement as reflected in the settlement agreement among the Receiver, Gerritts [the lien claimant] and the subsequent-ranking lien claimants is appropriate, reasonable and should be approved in the amount of $16,385.15 together with the corresponding distribution to the lien claimant.

[5] The mortgagee claims an expense reimbursement for administrative costs in the amount of 14,150 relating to mortgage enforcement. The Receiver requested and received supporting documentation as backup for these costs claimed and is satisfied that they are appropriate. Section 8 of the Standard Charge Terms in the mortgage provides that all enforcement costs incurred by the mortgagee are recoverable. They are approved.

[6] The fees and disbursements of the Receiver and its counsel are fully set out, as against the activities to which they relate, in the Third Report. They are appropriate and are approved.

[7] The mortgagee claims an additional amount equal to three months interest on the mortgage, to which it submits it is entitled to be paid according to the terms of the mortgage agreed to and, in any event, pursuant to section 17 of the Mortgages Act.

[8] The relevant contractual terms are found in section 7 of the Additional Charge Provisions and Schedule B to the Loan Agreement, both of which are incorporated by reference into the mortgage agreement.

[9] Section 7 reads:

> *7. In the event that the full principal amount is not paid on or before the maturity date hereof, the Chargees shall be entitled to require a payment equal to three (3) months' interest on the principal amount outstanding prior to permitting repayment thereof by the Chargor.*

[10] Schedule B reads:

> *Payment:* *N.S.F. fee: $250 each for any reasons.*
>
> *Holding a payment/delaying payment while permitted: $100 each.*

Default bonus: 3 month interest.

[11] Section 8 of the *Interest Act* provides:

> **No fine, etc., allowed on payments in arrears**
>
> **8 (1)** 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.
>
> **Marginal note: Interest on arrears**
>
> **(2)** Nothing in this section has the effect of prohibiting a contract for the payment of interest on arrears of interest or principal at any rate not greater than the rate payable on principal money not in arrears.

[12] The Supreme Court of Canada has clearly stated that the purpose of this statutory provision is to prohibit increases in the applicable rate of interest tied to an event of default: *Krayzel Corp. v. Equitable Trust Co.*, 2016 SCC 18, [2016] 1 S.C.R. 273 at para. 24:

> "An interest rate increase triggered by default infringes s. 8 of the *Interest Act*, R.S.C. 1985, c. I-15, regardless of whether it is cast as imposing a penalty on the mortgagor for default or a bonus or compensation to the mortgagee because of the default. If the effect of the interest rate, regardless of how it is framed – e.g., as a bonus, a penalty or other – is to impose "a higher charge on arrears than that imposed on principal money not in arrears", it infringes s. 8."

[13] The mortgagee submits that *Krayzel* does not apply in the present circumstances. I cannot agree with the submission. In *Krayze*l, the Supreme Court was asked to decide whether s. 8 of the *Interest Act* is offended by terms of a mortgage agreement imposing an interest rate that takes effect only where the mortgagor falls into default. Brown J., for the majority, found that "a rate increase triggered by default does infringe s. 8, irrespective of whether the impugned term is cast as imposing a higher rate penalizing default, or as allowing a lower rate by way of a reward for the absence of default": *Krayzel*, at para. 3.

[14] The purpose of s. 8, according to Brown J., is "to protect landowners from charges "that would make it impossible for [them] to redeem, or to protect their equity": at para. 21 (brackets in original), citing *Reliant Capital Ltd. v. Silverdale Development Corp.*, 2006 BCCA 226, 52 BCLR (4th) 13, at para. 53.

[15] Brown J. goes on state that this purpose does not support drawing a distinction between a higher interest rate as penalty for default and a discounted interest rate for punctual payment because "the effect" of doing so imposes a higher charge on arrears than that imposed on principal money not in arrears": *Krayzel*, at para. 24 (emphasis in original), citing s. 8(1) of the *Interest Act*.

[16] Accordingly, and applying those principles to this case, in my view so long as the three-month "bonus interest" has the effect of imposing a higher rate of interest on arrears than that rate applicable to principal amount outstanding, it violates s. 8.

[17] This is further confirmed by Brown J., at para. 25:

> "by directing the inquiry to the effect of the impugned mortgage term, Parliament clearly intended that mortgage terms guised as a "bonus", "discount" or "benefit" would not as such comply with s. 8. Substance, not form, is to prevail. What counts is how the impugned term operates, and the consequences it produces, irrespective of the label used. If its effect is to impose a higher rate on arrears than on money not in arrears, then s. 8 is offended." [Emphasis added.]

[18] Finally, this approach is consistent with that taken by this Court in *Benson Custodian Corporation v. Situ*, (2019) ONSC 3077, where a mortgage term providing that the mortgagee was entitled to three months' interest on the principal amount owing following an event of default was held to be unenforceable. The Court concluded that once a lender initiates enforcement of its rights under the terms of the mortgage, it can collect only the actual interest owing and not the additional three months of interest which the borrower could pay to cure the default. Enforcing such a provision would amount to punishing or penalizing the borrower with the practical effect of increasing the applicable rate of interest contrary to section 8 of the *Interest Act*.

[19] The relevant provisions of the mortgage here are to the same effect. Section 7 provides that the additional three months interest is payable in the event that the full principal amount "is not paid on or before the maturity date" [i.e., payable upon default]. Schedule B expressly states that a "Default Bonus" is 3 months' interest.

[20] The mortgagee has already received a distribution from the Receiver in an amount equal to the total amount owing to the date of default, including interest.

[21] For all of these reasons, I find that the mortgagee is not entitled to recover the additional three months interest pursuant to the terms of the mortgage since they violate section 8 of the *Interest Act*.

[22] I further conclude that section 17 of the *Mortgages Act* is not applicable here so as to provide an alternative basis for the payment of the three months interest to the mortgagee.

[23] That statutory provision is primarily designed to offer protection to mortgagors by giving them the right, when in default, to repay the mortgage on giving three months' notice to the mortgagee of their intent to pay arrears [including interest, up to the date of payment] without penalty. However, the option is that of the mortgagor. Section 17 does not provide a right of the mortgagee to demand an additional three months' interest beyond the principal, interest and costs due under the mortgage upon default. (See: *Mastercraft Properties Ltd. v. El Ef Investments Inc.*, 1993 CanLII 8545 (ON CA)).

[24] The Court of Appeal has also refused to enforce a claim by a mortgagor for an additional payment of three months' interest where the property at issue was sold by a receiver and not the mortgagor. The Court rejected as a mischaracterization of the role of a receiver, the argument that the receiver was acting as agent of the mortgagor. (See *58 Cardill Inc. v. Rathcliffe Holdings Limited*, 2018 ONCA 672).

[25] Finally, in *Comfort Capital Inc. v. Yeretsian*, 2018 ONSC 5040, this Court held that a distribution of proceeds by a receiver to entitled parties arising from a court-ordered sale of land does not involve any party seeking relief from anything and falls outside the range of circumstances contemplated by section 17 of the *Mortgages Act*.

[26] The Court noted that by its terms, section 17 applies only to "persons entitled to make payment" in respect of a mortgage default and that a receiver [whether creditor appointed or court-appointed] is not such a person. A receiver is not "entitled" to pay a sum of money, has no beneficial interest in the money nor in the property being sold. As the Court noted: "in directing the receiver to pay over proceeds of sale, the court is making a determination of the secured creditor's entitlement to receive the funds, not a determination of the receiver's entitlement to pay." (See paras. 18-22).

[27] In that case, Dunphy, J. observed, and I agree, that it would be regrettable if courts were dissuaded from allowing receivership applications for fear that an undue benefit might be thereby conferred on a single class of creditor to the detriment of others as no such advantage exists or was intended under section 17 of the *Mortgages Act*. (para. 24).

[28] The mortgagee here submits that it would be inequitable to deny its claim for the payment since it was the creditor who had requested the appointment of the receiver in the first place. I disagree for the reasons expressed in the *Comfort Capital* case, where I note that the appointment of the receiver was sought by the very creditor making the additional interest claim.

[29] The mortgagee also submits that the decision of the Divisional Court in *O'Shanter Development Company Ltd. v. Gentra Canada Investments Inc*, 1995 CanLII 10674 (ON SC) is authority for the proposition that it is entitled to the additional three months' interest.

[30] I disagree. The mortgagee in *O'Shanter* was acting pursuant to power of sale proceedings. The Divisional Court held that section 17 is a reduction of the equitable rule requiring a mortgagor to pay six months' interest to claim a right to relief from forfeiture. As was the case in *Comfort Capital*, however, this is a receivership. The Receiver here was appointed by Court order dated March 1, 2022, over a residential condominium development that has now been sold, also pursuant to Court order [the Approval and Vesting Order dated September 14, 2022].

[31] The principles set out by Dunphy, J. in *Comfort Capital* and summarized above are applicable to the present case.

[32] I observe that none of the three cases on which the mortgagee relies here as having followed *O'Shanter* involved court-appointed receivers or other court-appointed officers (see: *Irwin Mintz*,

in Trust v. Mademont Yonge Inc., 2010 ONSC 116; *2088300 Ontario Limited v. 2184592 Ontario Limited*, 2011 ONSC 2986; and *1746534 Ontario Inc. v Phillips*, 2015 ONSC 2232).

[33] For of the above reasons, I find that section 17 of the *Mortgages Act* is not applicable in the circumstances as a basis for the additional three months' interest claimed by the mortgagor. The Receiver is directed to reject that claim.

[34] No costs are requested by any party, and none are ordered.

[35] Order to go in the form signed by me today, which is effective immediately and without the necessity of issuing and entering.

Osborne J.

Date: December 8, 2022