CITATION: Steed v. 1848756 Ontario Inc., 2024 ONSC 3197
COURT FILE NO.: CV-19-8531
DATE: 2024-06-05

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
Larry Steed	)	Marc A. Huneault,
Plaintiff	)	for the Plaintiff
– and –	)	
1848756 Ontario Inc.	)	Paul A. Johnson / Marshall P. Hope,
	)	for the Defendant
Defendant	)	
	)	**HEARD:** May 24, 2024

DECISION ON MOTION

CORNELL, J.

Introduction

[1] The plaintiff has brought a motion for summary judgment to recover the balance outstanding under a mortgage, to recover possession of the mortgaged property known municipally as 157 Willow Avenue, Sault Ste. Marie, Ontario (the "Property"), together with claims for pre and postjudgment interest and costs. With the exception of determining the amount that is actually outstanding under the mortgage, the motion for summary judgment is dismissed.

Background

[2] The Property is owned by the defendant. At the time in question, the Property was subject to a first mortgage in favour of Community First Credit Union ("CFCU") and a second mortgage in favour of The Real Estate Stop Inc. The defendant was in financial difficulty with the result that the second mortgage went into default. Power of sale proceedings were commenced. At that time, Dacian Vladuleasa ("Daci") and Adam Mike Tsokas ("Tsokas") each owned 50% of the shares in 1848756 Ontario Inc., the defendant corporation.

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[3] The plaintiff discovered that Daci had misappropriated approximately $400,000 that was owed to him. Apparently, these funds were used to acquire the Property.

[4] In an effort to recover this amount, the plaintiff took certain steps. These included taking an assignment of the second mortgage that was in default, the creation of a Loan Agreement that involved a cash advance in the amount of $172,010.35 and a third mortgage in his favour having a registered amount of $300,000.00 as security for the amounts owing under the Loan Agreement.

[5] The Loan Agreement was, among other things, a Direction Re: Funds that required the defendant to pay any and all amounts owing to Daci to the plaintiff in an effort to recover the funds that had been misappropriated.

[6] On October 12, 2017, Daci transferred his 50% interest in the defendant to Tsokas for the sum of $30,000. The defendant did not receive any money nor pay any money in connection with this transaction.

Issues

[7] There are three issues to be considered.

[8] Was the renewal of the CFCU mortgage a "Transaction" as defined under the Loan Agreement making all monies owing under the third mortgage due and payable?

[9] Did the defendant default on the third mortgage because Daci's share transaction triggered an event of default under the Loan Agreement?

[10] What is the proper amount outstanding under the mortgage?

Position of the Parties

Plaintiff

[11] The first mortgage in favour of CFCU was renewed for one year in March of 2018. It was subsequently renewed for a period of five years to mature in 2024.

[12] The third mortgage in favour of the plaintiff provided that all principle and interest would become due and payable upon a "Transaction" defined to be "any sale, refinancing or financing of the property." The plaintiff maintains that the renewals of the mortgage in favour of CFCU constituted a refinancing or financing such that the amount owing under the third mortgage became due and payable.

[13] It is also the position of the plaintiff that the transfer of Daci's shares to Tsokas triggered the default provisions of the Loan Agreement so that the amount outstanding under the third mortgage became due and payable.

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[14] Finally, it is the position of the plaintiff that at the time of the issuance of the notice of sale on July 23, 2019, the sum of $308,678.07 was outstanding for principle and interest at a rate of 5% per annum pursuant to the provisions of the *Interest Act* together with legal costs in an amount of $3,500.

Defendant

[15] It is the position of the defendant that neither the renewal of the first mortgage in favour of CFCU or the transfer of Daci's shares constituted default under either the third mortgage or the Loan Agreement. Accordingly, the issuance of the notice of sale was improper as no default had occurred.

[16] In addition, the defendant takes the position that the notice of sale is void as it claimed the sum of $308,678.07 when, in fact, the amount outstanding at the time the notice of sale of was issued was $148,010.35.

Analysis

Mortgage Renewal

[17] The mortgage in favour of CFCU matured on February 2, 2018. It was renewed for a period of one year. It was renewed for a second time. On the occasion of the second renewal, CFCU provided the defendant with a Mortgage Renewal Agreement dated February 1, 2019. It was accepted by the defendant on February 13, 2019. The Renewal Agreement increased the interest rate from 5.09% to 5.25%. It increased the payments from $10,336.97 to $10,475.47. The new maturity date was set for March 1, 2024.

[18] The plaintiff met with an agent of CFCU at the time that his financial assistance was being contemplated. The plaintiff acknowledged during the course of his cross-examination that he knew that the CFCU mortgage was up for renewal on February 2, 2018.

[19] No notice of sale was issued when the CFCU mortgage was renewed the first time. It was the occasion of the second renewal on March 1, 2019 that caused the plaintiff to issue a notice of sale. Did the renewal of the CFCU mortgage constitute a financing or refinancing? According to *Black's Law Dictionary*, 11th ed., *s.v.* "financing", is defined as "[t]he act or process of raising or providing funds". As no funds were raised, this is of no assistance to the plaintiff.

[20] According to *Black's Law Dictionary*, a refinancing constitutes "[a]n exchange of an old debt for a new debt, as by negotiating a different interest rate or term or by repaying the existing loan with money acquired from a new loan." Did the Renewal Agreement constitute the exchange of an old debt for a new debt because a different interest rate and term were provided for? I find that when all of the circumstances are considered, the renewal of the first mortgage in favour of CFCU did not constitute a refinancing.

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[21] The Renewal Agreement contained the following provision:

ACCEPTANCE

> I/We accept the offer to extend the times of payment of the balance of the mortgage upon the terms and conditions set out in the renewal option selected by me/us and upon the terms and conditions set out in paragraph 2 hereof.
>
> The terms and conditions of the said mortgage shall remain in full force and effect in all other respects and nothing herein shall be construed to impair your security or lien and nothing herein shall affect or impair any rights or powers which you have or may have against us or any other person for the recovery on the date of this Agreement. I/We hereby covenant and agree to observe and be liable under all the covenants, agreements, stipulations and conditions on the part of the mortgagor in the said mortgage as herein modified and to pay the principal and interest thereon at the time herein before specified. This agreement is not intended to be in substitution of or replacement to the said mortgage. Nothing herein contained shall in any way affect the present state of our mortgage account.

[22] The first paragraph offers to “extend the times of payment”.

[23] The second paragraph states that the original terms of the mortgage shall continue except as modified. There is nothing in the language of the Mortgage Renewal Agreement that indicates a new mortgage is being created. To the contrary, the Agreement goes on to say that it is “not intended to be in substitution of or replacement to the said mortgage.” This is not the language of a new mortgage.

[24] Paragraph 19 of the Standard Charge Terms for the CFCU mortgage provides:

> … and the Charge may be *renewed* by an agreement in writing at maturity for any term with or without an increased rate of interest notwithstanding that there may be subsequent encumbrances. It shall not be necessary to deliver for registration any such agreement in order to retain priority for the Charge as altered over any instrument delivered for registration subsequent to the Charge. [Emphasis added.]

[25] Although it remains necessary to consider the substance of the transaction, the fact remains that the extension of the first mortgage in favour of CFCU is documented as a renewal and not as a new mortgage or a refinancing.

[26] The issue as to whether a renewal agreement constituted a new mortgage was considered in *Manulife Bank of Canada v. Conlin*, [1996] 3 S.C.R. 415. In that case, a guarantor was released of such guarantee as the interest rate on the mortgage was increased and the consent of the guarantor was not obtained. The court observed that the section dealing with renewals only authorized a renewal that the mortgagee hoped would be enforceable against third parties. It did not stipulate that the guarantor need not be a party to the renewal. It is pointed out in the majority decision that the renewal form prepared by the bank anticipated the signature of the guarantor.

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[27] The decision in *Conlin* is largely based upon the fact that the guarantor was not a party to the renewal agreement and that the renewal agreement was a material change to the original mortgage debt not contemplated by the language of the mortgage or guarantee. The court in *Conlin* went on to say that in some cases, a renewal agreement can create a new mortgage and found in that case that it did so.

[28] The concerns raised in *Conlin* are not present in this case. The plaintiff was well aware of the existence of the first mortgage and its maturity date. It would have been a simple matter to provide that the balance outstanding under the third mortgage would become due and payable upon the sale, financing, refinancing *or upon the maturity or renewal of the first mortgage in favour of CFCU*. In this respect, "it is not the function of the court to rewrite a contract for the parties. Nor is it their role to relieve one of the parties against the consequences of an improvident contract": *Jedfro Investments (U.S.A.) Ltd. v. Jacyk*, 2007 SCC 55, [2007] 3 S.C.R. 679, at para. 34, quoting *Pacific National Investments Ltd. v. Victoria (City)*, 2004 Scc 75, [2004] 3 S.C.R. 575, at para. 31.

[29] The plaintiff asserts that the words finance or refinance are sufficiently broad to include mortgage renewals or extensions. The defendant responds by submitting that such a position is "clearly inconsistent with the commercial interests of the parties" and does not "make business sense of its terms". See *First Elgin Mills Developments v. Romandale Farms*, 2013 ONSC 1919, at para. 23.

[30] The plaintiff knew that the defendant was in serious financial difficulty. He became an angel investor in an effort to recover the money that had been misappropriated by Daci. The use of the words "sale, financing, or refinancing" connote additional funds being available to the defendant, something that did not occur as a result of the renewal of the first mortgage.

[31] I find that the commercial interest of the plaintiff was clearly to recover some or all of the money that had been misappropriated by Daci and that such funds would originate from the sale or refinancing of the Property that would give rise to proceeds that would be available to apply to the debt. If the commercial interest of the plaintiff was such that the balance owing under the third mortgage was to be due and payable upon the original maturity date of the first mortgage, or pursuant to a renewal agreement, then it would have been a simple matter for the Loan Agreement to include this provision. As previously pointed out, it is not the function of the court to rewrite the contract to obtain the relief the plaintiff now seeks.

[32] I find the renewal of the CFCU mortgage did not create a new mortgage within the meaning of *Conlin* nor did it constitute the exchange of an old debt for a new debt so as to constitute a "refinancing" within the meaning of the Loan Agreement.

Daci Share Sale

[33] It is the position of the plaintiff that the transfer of Daci's share to Tsokas constituted default under the Loan Agreement with the result that the plaintiff was entitled to remedy such default by bringing power of sale proceedings. I find that the share transfer did not create any default.

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[34] The Loan Agreement dated December 30, 2015 is quite detailed and runs to seven pages. It is not a standard form agreement, rather it is an agreement that was custom made. It provided that as security for the funds advanced by the plaintiff, he would receive an assignment of the second mortgage as well as a third mortgage in a registered amount of $300,000. Nowhere in the Loan Agreement is there any reference to Daci's share ownership in the defendant corporation. If shares are to form part of a security arrangement, it is typically done with the use of a share pledge agreement. There was no such agreement in this case.

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[35] The Loan Agreement provides that the defendant shall pay any monies owing to Daci to the plaintiff until such time as Daci's indebtedness to the plaintiff has been satisfied. The corporation did not redeem the shares. The corporation did not receive any proceeds as a result of Daci's share sale. There is nothing in the Loan Agreement that required the corporation to notify the plaintiff of a share sale. There is nothing in the Loan Agreement that speaks to share ownership whatsoever.

[36] To accede to the position of the plaintiff, a significant rewrite of the Loan Agreement would be required. As previously pointed out, it is not the function of the court to do so.

Amount of the Mortgage

[37] The third mortgage in favour of the plaintiff has a face amount of $300,000. The Loan Agreement provides that the amount that was actually advanced under that mortgage comprised the sum of $128,010.35 for taxes paid, the sum of $20,000 for legal fees previously paid together with $24,000 in additional working capital that was provided to the defendant. This means that the sum of $172,010.35 was actually advanced by the plaintiff.

[38] The Loan Agreement goes on to provide that the plaintiff was to receive the sum of $1,000 per month as "the fees the Lender would otherwise be entitled to as the Property Manager." In other words, because the defendant had financial problems, the Loan Agreement contemplated that although the plaintiff would provide property management services, the remuneration for such services would simply accumulate under the third mortgage and would not be paid as it was earned.

[39] Lest there be any doubt about this, the plaintiff acknowledged during the course of his cross-examination that during the time that he was acting as Property Manager, he would receive a notional amount of $1,000 per month that would just be added to the mortgage principle.

[40] Despite the fact that only $172,010.35 was advanced under the mortgage, the plaintiff maintains that he is entitled to the face amount of the mortgage in an amount of $300,000 as the Loan Agreement states that the third mortgage would be "discharged upon repayment of the $300,000 registered amount." This conflicts with the second paragraph 2 (there are two paragraph "2s") that provides that the "registered amount of $300,000 (is) to secure the $130,000 in taxes paid, the $20,000 in legal fees previously paid, the $24,000 in additional working capital to the owner" together with the fees that were to be earned for services provided by the plaintiff in his capacity as Property Manager.

[41] In November of 2017, a mortgage discharge statement was requested from the plaintiff. The discharge statement in connection with the third mortgage shows a balance owing of

$277,000.00. This statement reflects the fact that the defendant had paid to the plaintiff the sum of $23,000 to that point in time. The plaintiff acknowledges that a further sum of $1,000 was paid and acknowledges receiving a total of $24,000. At the time that the plaintiff issued its notice of sale under the third mortgage, he failed to take into account the payments totalling $24,000 that had been made by the defendant. This is enough in and of itself to render the notice of sale null and void.

[42] The problems with the amount claimed in the notice of sale do not end there. The discharge statement that was provided by the plaintiff's lawyer indicates that the balance outstanding under the third mortgage includes an "Upfront Lender's Fee in an amount of $127,989.65." There is no mention whatsoever of an Upfront Lender's Fee in the Loan Agreement. This is the third example of where the plaintiff is asking the court to rewrite the terms of the Loan Agreement. As previously stated, it is not for the court to do so.

[43] I find that at the time of the issuance of the notice of sale under the third mortgage and currently, the balance outstanding under the Loan Agreement and the third mortgage is $148,010.35.

Conclusion

[44] I find that neither the first or second renewal of the CFCU mortgage constituted a sale, financing or a refinancing of the Property.

[45] I find that the sale of Daci's share to Tsokas did not trigger a default under with the Loan Agreement or the third mortgage in favour of the plaintiff.

[46] I find that the amount outstanding currently and at the time that the notice of sale under the third mortgage was issued to be $148,010.35.

[47] For these reasons the plaintiff's motion for summary judgment is dismissed.

[48] The notice of sale under the third mortgage in favour of the plaintiff is declared to be void.

Costs

[49] If the parties are unable to agree upon costs, the defendant shall provide cost submissions within 14 days limited to 2 pages together with supporting documentation. The plaintiff shall have 14 days to respond, such response to be limited to 2 pages together with supporting documentation. The defendant shall have 7 days to deliver a one-page reply if so advised. In the absence of cost submissions, it shall be conclusively determined that the parties have resolved the issue of costs.

The Honourable Mr. Justice R. Dan Cornell

Released: June 5, 2024

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Larry Steed

Plaintiff

– and –

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DECISION ON MOTION

Cornell, J.

Released: June 5, 2024

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