

CITATION: Fisher v. Nagamuthu, 2024 ONSC 4675
COURT FILE NO.: CV-23-696424
DATE: 2024-08-22

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: FILIPP FISHER and ELIZABETH KRON, Plaintiffs

AND:

THAYALAN NAGAMUTHU and THAYAPARI THAYALAN, Defendants

BEFORE: Parghi J.

COUNSEL: Amanda Deveaux, for the Plaintiffs
Defendants, Self-represented

HEARD: August 19, 2024

ENDORSEMENT

- [1] The Plaintiffs move for summary judgment further to a mortgage default. The mortgage is registered on the property municipally described as 6 Whistling Hills Drive, Scarborough (the “Property”). The Plaintiffs seek to enforce the mortgage debt against the Defendants and obtain an order for possession of the Property, with leave to issue a writ of possession in respect of the Property.
- [2] This motion was scheduled in May 2023 and first came before me on July 8, 2024. On that date, it was adjourned on consent on terms. Pursuant to those terms, the Defendants were to take certain steps in relation to a purported refinancing of the Property, in accordance with an agreed-upon timetable. The Defendants consented to a judgment against them, which was to be held in escrow. The Plaintiffs would be able to bring a motion for summary judgment in writing, on the basis of the consent judgment, if and only if the Defendants defaulted on any of the agreed-to terms.
- [3] The Plaintiffs have advised, and provided evidence to demonstrate, that the Defendants did not comply with the terms. I am accordingly hearing the motion in writing.
- [4] For the reasons discussed below, I find that there are no genuine issues requiring a trial and therefore grant summary judgment.

The Test for Summary Judgment

- [5] The Supreme Court of Canada has confirmed, in *Hryniak v. Mauldin*, 2014 SCC 7, that the ultimate question in a motion for summary judgment is whether there is a genuine issue

requiring a trial. The court held that a genuine issue requiring trial does not exist if the motion allows a judge to make the necessary findings of fact; allows the judge to apply the law to the facts; and is a proportionate, more expeditious and less expensive means to achieve a just result than going to trial.

- [6] Once the plaintiff demonstrates that there is no genuine issue requiring a trial, the burden shifts to the defendant to prove that the defence put forward has a real chance of success at trial (*Kamalanathan v. CAMH*, 2019 ONSC 56). The court is entitled to presume that the defendant has put forth its best evidence on the motion and that if the case were to proceed to trial, no additional evidence would be presented (*TD Waterhouse Canada Inc. v. Little*, 2009 CanLII 43663).

Application of the Test for Summary Judgment

Ability to Make Necessary Factual Findings

- [7] On the evidentiary record and undisputed evidence before me, I am able to make the necessary findings of fact.
- [8] On February 28, 2022, the Defendants, as mortgagors, entered into a mortgage with the Plaintiffs, as mortgagees. The mortgage was registered on the Property as instrument No. AT6000353 (the “Mortgage”). It secured the principal sum of \$960,000 for a period of one year, with interest at a rate of 6.99%, calculated monthly, not in advance.
- [9] The Mortgage matured on February 22, 2023. The Defendants did not pay the Mortgage out in full as required at maturity. They did not ever pay out the Mortgage. The Mortgage remains matured and unpaid.
- [10] On March 27, 2023, the Defendants were served with a Notice of Sale in respect of the Mortgage. The Notice of Sale matured on May 1, 2023. The Defendants did not redeem the Mortgage. The right to redeem is now expired.
- [11] The Defendants did not ever refinance the Mortgage, although unsuccessful efforts to refinance it were made, most recently in and around July 2024.
- [12] The Defendants have not listed the Property for sale.
- [13] The Defendants continue to live on the Property.
- [14] The fees charged by the Plaintiffs in respect of the Mortgage and sought to be recovered are as follows:
- a. the principal of the Mortgage in the amount of \$960,000.00;
 - b. interest on the Mortgage in the amount of \$92,476.55 (calculated at \$183.85 in interest per day for 503 days, *i.e.* from the date on which the Mortgage matured, February 22, 2023, to the scheduled hearing date of this motion, July 8, 2024);

- c. NSF Fees of \$500, in respect of the two payments missed in January;
- d. a Statement Fee of \$350, reflecting the cost of preparing the statement for the previous discharge request and the statement prepared for this motion;
- e. the Discharge Fee of \$350; and
- f. the legal fees owing to a lawyer for the prior discharge request, which the Plaintiff paid to its solicitors when the Defendants did not go through with the discharge in February 2023, of \$1,155.50.

- [15] In the consent judgment entered into by the parties, the Defendants agreed to pay these amounts. These payment obligations are all set forth in the Mortgage agreement and are not in dispute.
- [16] Additionally, Schedule “A” to the Mortgage agreement establishes a fee chargeable as liquidated damages for commencing this legal action. It provides that in the event of default, if the lender commences legal action to recover the debt, it is entitled to charge a fee equal to three-months of interest, or \$16,776.00. The Plaintiffs seek to recover this amount as they have had to commence this proceeding to recover the Mortgage debt due to the Defendants’ default.
- [17] The facts outlined above are the facts I require in order to be able to determine the motion. As I am able to make the factual findings necessary to determine the motion, this aspect of the “no genuine issue requiring trial” test for summary judgment is met.

Ability to Apply Law to Facts

- [18] I am able to apply the law to the facts.
- [19] On the issue of repayment of the Mortgage principal, interest, and other fees, I find that all of these amounts sought by the Plaintiff are recoverable. They are all set forth in the Mortgage agreement entered into by the parties. The Defendants have accordingly agreed to pay them and are bound by the terms of the agreement to pay them.
- [20] I have considered whether the liquidated damages sought are recoverable, or whether they constitute an improper “fine, penalty or rate of interest” for the purposes of s. 8(1) of the *Interest Act*, RSC 1985, c I-15. Section 8(1) provides:
- 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
- [21] The four-part test for identifying an impermissible covenant for the purposes of s. 8 is set forth in *P.A.R.C.E.L. Inc. v. Acquaviva*, 2015 ONCA 331:

- a. The covenant in question must impose a “fine, penalty or rate of interest”;
- b. The “fine, penalty or rate of interest” must relate to “any arrears of principal or interest secured by mortgage on real property”;
- c. The covenant must also have the prohibited effect of increasing the charge on the arrears beyond the rate of interest payable on principle money not in arrears; and
- d. The arrears of principal or interest must be secured by mortgage on real property.

[22] Here, the liquidated damages obligation is a covenant to pay a fee if the commencement of legal action proves necessary to enforce the Mortgage. It is an independent fee that arises if the Defendants’ default requires the Plaintiffs to begin enforcement proceedings. It is not a “fine, penalty, or rate of interest”. In *Attalla v. Moody*, 2017 ONSC 1971 (CanLII), the court found this same kind of fee to be permitted under s. 8 of the *Interest Act*, for the same reasons.

[23] I accordingly conclude that the liquidated damages sought by the Plaintiffs do not offend s. 8. They are properly payable by the Defendants.

[24] On the issue of the order for possession of the Property, I note that, under the *Mortgages Act*, RSO 1990, c. M.40, upon default of a mortgage, the mortgagee “shall have quiet possession of the land, free from all encumbrances”. The Defendants have defaulted, and the Plaintiffs are accordingly *prima facie* entitled to an order for possession of the Property.

[25] Turning to the issue of the order for leave to issue a writ of possession, Rule 60.10 of the *Rules of Civil Procedure* states:

60.10(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.

60.10(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 enable them to apply to the court for relief.

[26] Applying this test here, I observe that the Property is occupied only by the Defendants and their children. The Defendants have had notice of this motion. They are parties to the motion and have taken part in the motion, including by filing materials and appearing before me on the July 8, 2024 motion date. They have accordingly had sufficient notice of the motion, as required by the *Rules*.

[27] Accordingly, I am able to apply the applicable law on all of the germane issues: payment of the Mortgage debt and associated fees, including the liquidated damages; granting of the order for possession of the Property; and granting of leave to issue a writ of possession. This branch of the “no genuine issue requiring trial” test is thereby satisfied.

Granting Summary Judgment is Proportionate, Expeditious, Less Expensive

- [28] The third branch of the “no genuine issue requiring trial” inquiry asks whether granting summary judgment would be a proportionate, more expeditious and less expensive means to achieve a just result than going to trial.
- [29] I answer this question in the affirmative. All of the relevant documentation is before me. Any affidavit evidence that the parties deemed relevant is before me. The parties have had the opportunity to submit motion materials to me. Requiring a trial would be of no benefit: it would not enable additional evidence to be tendered or additional arguments to be made and would serve no purpose other than to create delay and additional costs. It would involve consideration of all of the same evidence and argument and would lead to the same outcome as this motion.

Chance of Success of Defence at Trial

- [30] Having determined that there is no genuine issue requiring trial, I must now ask whether the defence put forward has a real chance of success at trial. I determine that it does not. The Defendants have offered no evidence that would tend to suggest that there is a triable issue and that they would have a chance of success at trial. They have suggested that the Plaintiff’s actions made it impossible for them to refinance the Property, but the evidence does not bear out this claim. I accordingly find that there is no defence put forward that has a real chance of success.
- [31] As such, and in light of my conclusion that there is no genuine issue requiring trial, it is appropriate to grant summary judgment.

Costs

- [32] The Plaintiffs seek their costs on this motion a full indemnity basis.
- [33] In exercising my discretion to fix costs under section 131 of the *Courts of Justice Act*, R.S.O. 1990, c C.43, I may consider the factors enumerated in Rule 57.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg 194. Those factors include the result achieved, the amounts claimed and recovered, the complexity and importance of the issues in the proceeding, the principle of indemnity, the reasonable expectations of the unsuccessful party, and any other matter relevant to costs.
- [34] In *Apotex Inc. v. Eli Lilly Canada Inc.*, 2022 ONCA 587, the Ontario Court of Appeal restated the general principles to be applied when courts exercise their discretion to award costs. The Court held that, when assessing costs, a court is to undertake a critical examination of the relevant factors, as applied to the costs claimed, and then “step back and consider the result produced and question whether, in all the circumstances, the result is fair and reasonable”.

[35] Applying these considerations here, I decline to award costs. It would not be reasonable, fair, or proportionate to do so, given that the Plaintiffs are already being compensated for the costs associated with bringing this motion by virtue of the liquidated damages covenant being enforced against the Defendants.

Order Granted

[36] I accordingly determine that there are no genuine issues requiring a trial and I grant summary judgment. I order as follows:

- a. The Defendants shall pay to the Plaintiffs the fees outlined in paragraph 14, liquidated damages in the amount of \$16,776.00, pre-judgment interest in accordance with the terms of the Mortgage agreement from July 8, 2024 to the date of this decision, and post-judgment interest in accordance with the terms of the Mortgage agreement from the date of this decision onward;
- b. The Defendants shall deliver possession of the Property to the Plaintiffs; and
- c. Leave is granted to issue a writ of possession with respect to the Property.

Date: August 22, 2024

Parghi J.