

CITATION: Lisozzi v. Montana Holdings Ltd, 2024 ONSC 6946
COURT FILE NO.: CV-23-705355
DATE: 20241212

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: GIUSEPPE LISOZZI,

Plaintiff

AND:

MONTANA HOLDINGS LIMITED

Defendant

BEFORE: Justice Pollak

COUNSEL: *Tibor Sarai*, for the Plaintiff

Mitchell Wine, for the Defendant

HEARD: November 13, 2024

ENDORSEMENT

[1] The Moving Party Plaintiff, Giuseppe Lisozzi (“Lisozzi”), asks for an Order that the Defendant, Montana Holdings Limited (“Montana”), provide a full accounting of its Power of Sale transaction. Lisozzi seeks documentary proof for the deductions and expenses Montana claimed in its Statement of Proceeds, dated August 3, 2023, and that it pays out the proper residual funds.

[2] Montana consents to an order for an accounting but brings a cross-motion for security for costs as a term of the order for an accounting.

[3] Montana relies on rule 56.09 which provides for the exercise of this court’s discretion to order security for costs as a term of the requested Order.

[4] Montana submits the Court should exercise its discretion to order security for costs for the following reasons:

- a) “Lisozzi is impecunious.
- b) The case is not likely to be heard for two to three years at which time any excess funds from the power of sale may be dissipated.
- c) Lisozzi’s position in the litigation is frivolous and vexatious.

d) The mortgage terms stipulate that Montana is entitled to substantial indemnity costs arising from the power of sale.”

[5] Lisozzi defaulted on his mortgage to Montana in the amount of \$550,000 (the “Mortgage”). The term of the Mortgage was one year.

[6] Montana commenced power of sale proceedings after the default. The Property was sold under power of sale on June 5, 2023. This action was commenced on August 31, 2023. The Statement of Claim alleges there was an improvident sale of the Property. The Statement of Defence denies all the allegations in the Statement of Claim.

[7] Montana’s assessment is that a trial of the issues involved in the action would take from 5 to 10 days.

[8] Motions for security for costs are usually brought under rule 56.01(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. The Court has discretion to make the Order if a Plaintiff in an action is a corporation or nominal Plaintiff with insufficient assets in Ontario to pay the Defendant’s legal costs, or, if there is good reason to believe the action is frivolous and vexatious and the Plaintiff has insufficient assets in Ontario to pay the Defendant’s legal costs. These motions are brought before an Associate Judge.

[9] However, Montana brings this motion under rule 56.09 which provides:

“Security for Costs as Term of Relief

56.09 Despite rules 56.01 and 56.02, any party to a proceeding may be ordered to give security for costs where, under rule 1.05 or otherwise, the court has a discretion to impose terms as a condition of granting relief and, where such an order is made, rules 56.04 to 56.08 apply with necessary modifications. R.R.O. 1990, Reg. 194, r. 56.09.”

Orders on Terms

1.05 When making an order under these rules the court may impose such terms and give such directions as are just. R.R.O. 1990, Reg. 194, r. 1.05.

[10] Montana submits that this is an appropriate case for the Court to exercise its discretion. It submits that although the surplus of sale proceeds will provide Lisozzi with sufficient funds to finance this litigation, it is reasonable to believe those funds may be dissipated by the time the action comes to trial in two or three years. There is no evidence to support this submission.

[11] Lisozzi denies he is impecunious. This position, however, is alleged to be directly contradicted by his own submissions at the July 10, 2023 case conference, in which his counsel wrote:

“The Plaintiff has lost his home and now lives at the mercy of relatives for his shelter. He has no retirement funds from which to live and needs the money from the sale proceeds which, in effect, constitute his meagre life savings and only real asset.”

[12] Montana submits its Statement of Defence discloses a strong *prima facie* case that it will be successful in this litigation. This, however, does not satisfy the test on regular motions for security for costs.

[13] As well, Montana points out that the mortgage terms stipulate that it is entitled to substantial indemnity costs arising from the power of sale, and it is therefore entitled to claim such costs from Lisozzi.

[14] There is insufficient evidence to support Montana’s submission that the Court can draw an inference from the actions of the parties and their counsel to date. Montana submits that it has tried to meet its legal obligations in a manner that is expeditious and fair to both parties. In return, Lisozzi has failed to engage in a way that similarly increases procedural efficiency; Lisozzi’s conduct has resulted in lengthy delays and unnecessary Court costs.

[15] Montana estimates legal costs for a 5-10 day trial from \$59,990.24 to \$82,307.74 (inclusive of disbursements and HST) on a partial indemnity basis. If awarded on a substantial indemnity basis, the cost estimates rise accordingly. Montana asks for an order that \$50,000 be set aside as security for costs.

[16] Montana refuses to release any of the surplus funds to the Plaintiff from the Power of Sale without mandatory conditions. The Plaintiff has not agreed to such conditions and the funds have thus not been released.

[17] The Plaintiff submits that mortgage enforcement and the determination of Montana’s costs are not critical aspects in the action for improvident sale. I agree.

[18] There has been no accounting for the costs and expenses set out in the Statement of Proceeds.

[19] I agree that the Plaintiff is entitled to be paid a sum in excess of \$250,000.00, subject to the accounting. For this reason, I find that the evidence does not support a finding that he is impecunious.

[20] The order Montana requests is discretionary and would be imposed as a term or condition of the order for relief that the Plaintiff seeks. It must be reasonable to impose this particular term or condition. I do not find that imposing an order for security for costs constitutes a reasonable term or condition of the Plaintiff’s order for an accounting. The Defendant agreement to granting the Plaintiff’s order is contingent upon an order for security for costs. However, I find that the Plaintiff had no improper motive for bringing the request for an order for an accounting. Montana agreed that he is entitled to that order. The accounting request is also not directly related to the Plaintiff’s claim of an improvident sale. Instead, the order for an accounting seeks to determine

the basis for the Defendant's claim to an entitlement to deduct costs. This information would allow the Plaintiff to evaluate whether the Defendant has the right to withhold those amounts from the surplus proceeds of sale. The Plaintiff can then identify and pursue appropriate means of obtaining proper surplus payments.

[21] For these reasons, I therefore grant the attached Order.

[22] The Plaintiff is the successful party on this motion and the costs he submitted during the hearing are appropriate and reasonable. I order that the Defendant pay costs on a partial indemnity basis in the agreed upon amount of \$13,000. However, if the parties are unable to agree on costs that arise as a result of the rules of **Offers to Settle**, the Plaintiff may make submissions of no more than two pages, double spaced, sent to the Defendant, uploaded to CaseLines, and with a copy sent to my assistant Roxanne Johnson at Roxanne.johnson@ontario.ca by December 23, 2024. The Defendant may make submissions of no more than two pages, double spaced, sent to the Plaintiff, uploaded to CaseLines, and with a copy sent to my assistant by January 6, 2025. No reply submissions will be accepted. If no submissions are received by January 6, 2025, costs will be deemed to be settled.

Justice Pollak

Date: December 12, 2024