

CITATION: *Bhuiyan v. Gonzales et al.*, 2025 ONSC 683
COURT FILE NO.: CV-25-00734801
DATE: 20250130

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: MOHAMMED MAZBAH UDDIN BHUIYAN, Applicant

AND:

MARISSA GONZALES, MCC MORTGAGE HOLDINGS INC., SAMANTHA DAVENPORT, SEAN ROLAND and CENTURY 21 PERCY FULTON LTD. BROKERAGE, Respondents

BEFORE: Schabas J.

COUNSEL: *Obaidul Hoque*, for the Applicant

Amanda McInnis, for the Respondent MCC Mortgage Holdings Inc.

Marissa Gonzales, in person

HEARD: January 27, 2025

ENDORSEMENT

- [1] The Applicant, Mohammed Mazbah Uddin Bhuiyan (“Bhuiyan”), entered into an Agreement of Purchase and Sale on November 13, 2024 (the “APS”) to buy a house from the Respondent Marissa Gonzales (“Gonzales”) located at 33 Budworth Drive South, Toronto (the “Property”).
- [2] The transaction was to close on December 16, 2024. However, Gonzales refused to close as the purchase price was insufficient to discharge the mortgages on the property. Bhuiyan did not accept the repudiation of the APS. Bhuiyan subsequently learned that Gonzales had relisted the property, causing him to commence this application on January 14, 2025 seeking specific performance, and to bring this urgent motion for leave to issue a Certificate of Pending Litigation (“CPL”) respecting the Property.
- [3] The motion is opposed by Gonzales and the second mortgagee, MCC Mortgage Holdings Inc. (“MCC”). Gonzales has now withdrawn the listing. She opposes the CPL on the ground that she does not want further complications.
- [4] MCC’s mortgage, however, is in default. On June 25, 2024 MCC obtained default judgment against Gonzales and an order that Gonzales deliver possession of the Property to MCC. A writ of possession was issued to MCC on November 1, 2024. Neither the judgment nor the writ of possession were registered on title prior to the closing date of the

APS. I am advised, however, that MCC is moving forward with its writ of possession and will be seeking to evict Gonzales as early as January 31, 2025.

[5] For the reasons that follow, the motion is dismissed.

The test for a CPL

[6] The test to be met for the Court to issue a CPL is well-established and not in dispute. The moving party must demonstrate that there is a triable issue with respect to the moving party's claim to an interest in land: *Pacione v Pacione*, 2019 ONSC 813 at para. 20. A "triable issue" is a relatively low test – it does not require the moving party to show that it will likely succeed, but simply that the party has "a reasonable claim to the interest in the land claimed": *G.P.I. Greenfield Pioneer Inc. v. Moore*, 2002 CanLII 6832 (ON CA), 2002 CarswellOnt 219 (C.A.) at para. 20.

[7] The Court must also consider all relevant factors between the parties, including whether damages would be a satisfactory remedy and the intent of the parties in acquiring the land or interest. The Court must balance the interests of the parties in exercising its discretion equitably: *Perruzza v. Spatone*, 2010 ONSC 841 at para. 20; *Natale v. Testa*, 2018 ONSC 2823 at paras. 49 and 50.

Application to the facts

[8] The Applicant argues that this case raises a conflict between two contractual rights - the rights of a mortgagee and the rights of a buyer pursuant to an Agreement of Purchase and Sale. As the test for a CPL is a low one, the Applicant submits it is satisfied here and that the equities favour a CPL.

[9] In support of his claim for specific performance, the Applicant asserts "unique" features of the Property – that it is on the same street as close friends, near another friend and a five-minute walk to the family's preferred place of worship. The Applicant has taken temporary living accommodation in the hope to resolve this matter and obtain ownership of the Property.

[10] There is no suggestion that the purchase price of \$1.245M does not reflect market value. Bhuiyan has not sought return of his deposit of \$75,000. The shortfall to discharge the mortgages, after all other expenses are paid, is about \$90,000.

[11] The test for a CPL is a low one, but in my view it has not been met in the circumstances of this case. The "unique" features asserted by the Applicant relate more to the location of the Property than the specific features of the home. I am not satisfied that there is a triable issue for specific performance.

[12] In any event, even if there was a reasonable claim for specific performance raising a potential interest in land, the rights of a mortgagee are stronger and favour dismissing the CPL application.

- [13] As Lacourciere J., as he then was, stated in *Arnold v. Bronstein et al.* [1971] 1 O.R. 467, 1970 CanLII 245 (ON SC), “Courts have refused to interfere with the proper exercise of a power of sale in all but the most extreme and exceptional cases.” Lacourciere J. quoted from Kerr on Injunctions, 5th ed., p. 532, that absent fraud and “provided he keep within the terms of the power of sale” that “the Court has no jurisdiction to restrain a mortgagee from selling under power of sale” if the mortgagee is acting in good faith and the mortgagor has not tendered all amounts owing.
- [14] This is still the law today. As stated in Sharpe, *Injunctions and Specific Performance*, at s. 4.11:
- Injunctions are often sought by mortgagors to forestall enforcement proceedings. In *Arnold v. Bronstein* it was held that as a general rule “a mortgagee, acting in good faith and without fraud, will not be restrained from a proper exercise of his power of sale, except upon tender by the mortgagor of the principal monies due, interest and costs”. On the other hand, interlocutory injunctions may granted to restrain irregular enforcement proceedings, to enforce agreements to postpone the mortgagee's rights, in cases of fraud, or in other unusual situations where a delay is necessary to protect the interests of the mortgagor and the interests of the mortgagee would not be unduly impaired.
- [15] In short, barring “extreme or exceptional circumstances”, a mortgagee should not be prevented from exercising its power of sale rights. The mortgagee’s rights take on added force in this case where it has already obtained judgment.
- [16] In my view, there are no “extreme or exceptional circumstances” in this case that would override the rights of the mortgagee to enforce the mortgage and dispose of the property through power of sale and, accordingly, the motion is dismissed.
- [17] I appreciate that this may deny the Applicant the ability to purchase the house, and that he has been put to considerable inconvenience and expense. The Applicant is not at fault for this; Gonzales is the cause, having sold the house for an amount that made it impossible for her to discharge the encumbrances on the Property. But MCC is also not at fault. It obtained a default judgment and was pursuing its remedies in the usual course leading to a power of sale – which are strong rights with which courts will rarely interfere.
- [18] Should the parties be unable to agree on costs they may provide me with written submissions, no longer than two pages, double-spaced, not including attachments, within 14 days of the release of this Endorsement.

Paul B. Schabas J

Date: January 30, 2025