

SUPREME COURT OF NOVA SCOTIA
Citation: *Sibbald v. Lavallee*, 2025 NSSC 49

Date: 20250210

Docket: HFX No. 527192

Registry: Halifax

Between:

Jan Sibbald

Plaintiff

v.

Donna Lavallee and Colin Lavallee

Defendants

Judge: The Honourable Justice Ann E. Smith

Heard: August 27, 2024, in Halifax, Nova Scotia

Counsel: C. Gavin Giles, K.C., for the Plaintiff
Andrew Christofi, for the Defendants

By the Court:

Background

[1] This is a motion for summary judgment on evidence filed in an action by Jan Sibbald against Donna and Colin Lavallee.

[2] Ms. Sibbald filed a notice of action and statement of claim on September 29, 2023. On October 6, 2023, she filed an amended notice of action and statement of claim, and a certificate of *lis pendens*.

[3] In her amended pleadings, Ms. Sibbald alleges that the Lavallees unduly influenced her to purchase a property at 182 Falkenham Road (the “Property”) and to put only their names on title. In return, the Lavallees would pay \$1,000 per month to Ms. Sibbald until the purchase price was repaid in full. Ms. Sibbald describes the evolution of the transaction as follows in her amended statement of claim:

6. Later, in or about 2021, Ms. Lavallee again invited the Plaintiff into a second business venture; this time the purchase of a cottage property then for sale at 182 Falkenham Road, in East Dalhousie, Nova Scotia, also known as PID: 55131098 (“the Property”). Ms. Lavallee’s stated intention was that the Property would be purchased using funding provided solely by the Plaintiff. Thereafter [*sic*] Property was to be managed and operated principally by Ms. Lavallee as an “Air B and B” or as a “VRBO”, with the operating proceeds thereof being used to pay down the Property’s acquisition costs.

7. The agreement between the Plaintiff and Ms. Lavallee was the Property would be owned solely by the Plaintiff until such time as it had been paid for, at which time, title to the Property would be shared amongst the two of them, with operating profits and equity thereafter being shared equally. These agreements were both oral and in writing, but they were primarily oral.

8. At all material times, the Plaintiff was in a weakened emotional state, and open to undue influence and suggestion because of her late husband's then terminal illness, a fact known to the Defendants, especially to Ms. Lavallee.

Property Purchase

9. As time went on, Ms. Lavallee was successful in exercising her undue influence over the Plaintiff such that the Plaintiff agree [*sic*] to include Ms. Lavallee on the Property's title at the same time that it was to be acquired, in May of 2021. No consideration was offered or paid by Ms. Lavallee for her inclusion on the Property's title. All of the financial resources necessary to the Property's acquisition were still intended by Ms. Lavallee to be provided solely by the Plaintiff.

10. As more time went on, the Defendants were both successful in exercising their undue influence over the Plaintiff such that the Plaintiff agreed that only the Defendants would be on the Property's title at the time that is [*sic*] was acquired. No consideration was paid by the Defendants for their placement on the Property's title as sole Grantees. All of the financial resources necessary for the Property's acquisition, effectively for the benefit of the Defendants, were still intended by the Defendants to be provided solely by the Plaintiff.

11. On closing of what had by then become the Defendants [*sic*] acquisition of the Property, the Plaintiff paid to the Defendants' solicitor the sum of \$265,826.38. This was the total adjusted sum due for the Property. The Defendants added nothing by way of financial resources of their own to [*sic*] Property's acquisition.

12. After the closing of the Defendants [*sic*] acquisition of the Property, the Plaintiff continued to fund the Defendants' use of the Property through her acquisition, on behalf of the Defendants, or [*sic*] certain furnishings and appliances at her own expense. Once again, the Defendants added nothing of financial substance to these acquisitions of furnishing [*sic*] and appliances by the Plaintiff.

13. ~~At no time was~~ Since the Property ~~ever used~~ was purchased, by the Defendants have used it as both an "Air B and B", or as a "VRBO", or as ~~any~~ another other form of short-term rental commercial endeavour. ~~Instead, and the Property was used, and continues to be used, solely as the Defendants' own personal cottage.~~

14. In consideration of the Plaintiffs' [*sic*] financial outlay with respect to what became the Defendants' acquisition of the Property, the Defendants, and each of them, pledged that they would pay to the Plaintiff the monthly sum of not less than \$1,000.00 until the Plaintiffs' outlay had been repaid to her in full.

[4] Ms. Sibbald pleads that the Lavalles made 12 sporadic payments between October 2021 and March 2023, for a total of \$12,000, before they ceased making payments to her. Ms. Sibbald further alleges that the Lavalles made defamatory statements about her to her circle of friends and professional acquaintances, as well as to members of the broader community.

[5] In terms of relief, Ms. Sibbald seeks, among other relief:

- (a) Special damages in the sum of \$265,826.38 to compensate the Plaintiff for her purchase of the Property;
- (b) In the alternative, a declaration that the Plaintiff is the beneficiary of an Equitable Mortgage over the Property, with all of the legal and equitable remedies attendant thereon;
- (c) Other special damages, the particularly [*sic*] of which will be provided;

...

[Emphasis added]

[6] On October 11, 2023, Ms. Sibbald, through counsel, recorded the certificate of *lis pendens* on title to the Property.

[7] In their defence, filed on December 14, 2023, the Lavalles plead that Ms. Sibbald decided to gift Donna Lavallee a one-half interest in the Property, with Colin Lavallee taking title to the other half. It was agreed that Mr. Lavallee would pay Ms. Sibbald for his half. The Lavalles describe the arrangement as follows in their defence:

10 The Sibbalds decided they wanted to do something for Ms. Lavallee in consideration of her support, their continued friendship, and her assistance in donating substantial time and resources to Mr. Sibbald's treatment and recovery.

11 Over the years, the Lavallee's had indicated to the Sibbald's their desire and interest in acquiring a cottage/camp to be used as a getaway.

12 As a result, Ms. Sibbald offered to purchase a cottage property, located at 182 Falkenham Road, East Dalhousie, Nova Scotia (PID 55131098) (the "Property"), and devise a one-half interest in the Property to Ms. Lavallee by her last will and testament.

13 At no time did the Lavallee's ever demand or request from the Sibbald's, expressly or impliedly, that the Sibbald's or either of them finance or purchase any portion of the Property for the Lavallee's or either of them.

14 Subsequently, Ms. Sibbald reconsidered, and decided to simply gift Ms. Lavallee a one-half interest in the Property during her lifetime. At this time, Ms. Sibbald and Ms. Lavallee agreed that they would take joint title to the Property.

15 Subsequently, Ms. Sibbald reconsidered, and offered to give Ms. Lavallee one half of the Property, and Mr. Lavallee would take title to the other half of the Property. The Lavallee's proceeded on the understanding that they would finance Mr. Lavallee's purchase of his half of the Property with a mortgage from a third party, and took steps to secure a mortgage against the Property.

16 At no time did the parties agree to, or discuss as an option, that the plaintiff or Mr. Sibbald would be entitled to take any form of security over the Property whatsoever.

17 In fact, the Sibbald's indicated repeatedly to the Lavallee's, including in writing, that they did not want to have, nor would they in fact have, any form of security over the Property, including but not limited to a mortgage.

18 Furthermore, Ms. Sibbald indicated to the Lavallee's that if anything happened to the Sibbald's, the Lavallee's would carry no obligations to the Sibbald's.

19 As a result, the Lavallee's abandoned their mortgage application with a third-party lender.

20 At the beginning of April 2021, the purchase transaction closed, and the Lavallee's acquired sole title to the Property. The Lavallee's never agreed to, or provided, any form of security over the Property to Ms. Sibbald, or to anyone else.

21 On August 16, 2023, the Lavallee's were contacted by the solicitors for Ms. Sibbald demanding payment on an alleged loan, or else an action would be filed. Later that day, Mr. Lavallee replied to the solicitors' assistant, expressing his shock at having received the letter, and requesting documentation to support the allegations of an unpaid loan to Ms. Sibbald.

[8] The Lavalkees further plead that Ms. Sibbald subsequently purchased a cottage at 185 Falkenham Road, directly across the street from the Property. They say Ms. Sibbald originally planned to use the cottage with her husband, but she decided to sell it when his medical condition worsened.

[9] The Lavalkees allege that the cottage required extensive renovations before it could be sold and the parties agreed that the Lavalkees would complete all the renovations in exchange for half of the net profit from the sale of the cottage, less the cost of materials they purchased to do the renovations. The Lavalkees refer to this arrangement as the "Sibbald Property Agreement".

[10] The Lavalkees say they purchased various materials for the renovations and Ms. Sibbald periodically transferred funds to Ms. Lavallee to cover these costs. The Lavalkees allege that Ms. Sibbald sold the cottage to a third party in June 2022 and did not share the proceeds with them, in breach of the Sibbald Property Agreement.

[11] In addition to their defence, the Lavalkees filed a counterclaim for damages flowing from Ms. Sibbald's alleged breach of the Sibbald Property Agreement.

[12] Ms. Sibbald filed a defence to the counterclaim on December 27, 2023. In it, she denies the existence of the purported “Sibbald Property Agreement” and says she paid for all materials used to renovate the cottage.

[13] The Lavalles filed this motion for summary judgment on the evidence to strike Ms. Sibbald’s alternative claim that she has an equitable mortgage over the Property and to vacate the certificate of *lis pendens*.

The Evidence

[14] The evidence before the Court consists of an affidavit of Donna and Colin Lavalles filed on March 28, 2024; an affidavit of Jan Sibbald filed on April 8, 2024; and a reply affidavit of the Lavalles filed on August 27, 2024.

[15] In their original affidavit, the Lavalles state that neither Ms. Sibbald nor her late husband ever communicated to either of them, by any method whatsoever, that they, either together or separately, intended to take any security whatsoever over the Property, by mortgage or otherwise. The Lavalles said that at no time whatsoever, either together or separately, did they ever discuss with the Sibbalds, or either of them, or with anyone else, that the Sibbalds would take any security whatsoever over the Property, by mortgage or otherwise.

[16] The Lavalles further state that on March 22, 2021, Ms. Sibbald texted Donna Lavallee that “there will be no mortgage registered on the property”, along with a screenshot of the Property Online parcel mapping for the Property. The Lavalles attached a copy of the text message as an exhibit to their affidavit. They indicated that at that time, and since that time, they agreed that there was never to be any security whatsoever, including a mortgage, over the Property, in favour of the Sibbalds, or either of them. They added that they never signed any document providing any security over the Property, including a mortgage, in favour of anyone.

[17] Jan Sibbald’s affidavit largely mirrored her pleadings. Nowhere in the affidavit does Ms. Sibbald say that she and the Lavalles, or either of them, ever discussed or intended that Ms. Sibbald or her late husband would take any security over the Property, by mortgage or otherwise. Ms. Sibbald states:

33. On the closing of the property’s purchase, my late husband and I provided the sum of \$265,826.38.

34. This was the total adjusted sum due for the purchase of the property, and no part or portion of this sum was paid for by Ms. Lavallee or by Mr. Lavallee.

35. In consideration of the financial outlay made solely by me and by my late husband to the purchase of the property, Ms. Lavallee and Mr. Lavallee undertook and agreed that they would pay me the monthly sum of not less than \$1,000.00 until all of the financial outlay referred to above had been repaid.

[18] Ms. Sibbald accurately notes at paragraph 46 of her affidavit that the Lavalles, in their affidavit, “do not deny that the only source of the funding required to purchase the property was provided by me and my late husband.”

[19] In their reply affidavit, the Lavalles state that they own the property in Elmsdale where they reside, and that no mortgage encumbers that property. In response to Ms. Sibbald’s affidavit, they deny that they ever exercised any undue influence over Ms. Sibbald at all, at any time, ever.

[20] The parties were cross-examined on their affidavits at the hearing of the motion.

Positions of the parties

[21] The Lavalles say the authorities on equitable mortgages are clear – the “hallmark” or essential feature of an equitable mortgage is a common intention to make property security for a debt. The Lavalles argue that despite the "best foot forward" obligation on a motion for summary judgment, Ms. Sibbald has offered no evidence that the parties intended that the Property would be security for any debt owing to her. The only evidence on the point came from the Lavalles themselves, who deny ever having or communicating an intention that Ms. Sibbald would have

a charge over the Property until the purchase price was repaid to her in full. They further deny that either of the Sibbalds ever communicated such an intention to them.

[22] The Lavalles submit that Ms. Sibbald's alternative claim for an equitable mortgage – her only claim for an interest in the Property – raises no genuine issue of material fact, nor does it require the determination of a question of law. As a result, the Lavalles say they are entitled to an order granting summary judgment and vacating the certificate of *lis pendens*.

[23] Ms. Sibbald, through counsel, admits that there is nothing in her evidence to show that the parties intended to make the Property security for the Lavalles' debt to her. She argues, however, that an equitable mortgage may be found wherever the principles of justice and equity require it, not just where there is evidence of common intention. Put differently, Ms. Sibbald submits that an equitable mortgage may be found wherever one party gains an unfair advantage over another.

[24] As to the certificate of *lis pendens*, Ms. Sibbald argues that it should not be vacated even if her alternative claim for an equitable mortgage fails. She says the Lavalles have received the full benefit of the Property without paying for it, and the certificate of *lis pendens* is the only thing preventing them from selling the Property and moving the proceeds offshore, if they were so inclined. Ms. Sibbald says it

would be “unthinkable” for the court to order any form of pre-trial relief in the Lavalles’ favour which could lead to any such eventuality.

Issues:

1. Does Ms. Sibbald hold an equitable mortgage over the Property? If not, then summary judgment on this claim must be granted.
2. Should the certificate of *lis pendens* be discharged?

The Law on Equitable Mortgages

What is an Equitable Mortgage?

[25] In Walter M. Traub, *Falconbridge on Mortgages*, 5th ed. (Online: Thomson Reuters Canada, 2024) at 5:1, the author cites *Sunridge Nissan Inc. v. McRuer*, 2023 ABCA 128, application for leave to appeal dismissed, [2023] S.C.C.A. No. 254, for “[a] contemporary definition of an equitable mortgage, and a summary of the relevant legal principles”:

What is an Equitable Mortgage?

[19] Unlike a legal mortgage that transfers the legal title in the property to the mortgagee, an equitable mortgage is a contract that creates in equity a charge upon the property, one that is enforceable under the equitable jurisdiction of the court. As neatly summarized in *Elias Markets Ltd., Re*, 2006 CanLII 31904 (Ont CA) at para 65:

In essence, the concept of an equitable mortgage seeks to enforce the common intention of the mortgagor and mortgagee to secure property for either a past debt or future advances, where that common intention is unenforceable under the strict demands of the common law.

[20] Equitable mortgages have arisen in a variety of circumstances: where a legal mortgage is defective in form; a written agreement to execute a legal mortgage in the future; inadvertent omissions, misdescriptions or refusal of the mortgagor to provide a mortgage; by deposit of title deeds; or by agreement to mortgage an equitable interest: Walter M. Traub, *Falconbridge on Mortgages*, loose-leaf, 5th ed (Toronto: Thomson Reuters, 2018) at 5-2 to 5-4; Anne Warner La Forest, ed, *Anger & Honsberger Law of Real Property*, loose-leaf, 3rd ed (Toronto: Thomson Reuters, 2018) at §33:20.40; Joseph E. Roach, *The Canadian Law of Mortgages*, 3rd ed (Toronto: LexisNexis, 2018) [Roach] at 360-361. The intention of the parties is key: an equitable mortgage will only arise where there is a common intention between the parties that the property be made security for a debt due or a future advance: *Shute v Premier Trust Co.* (1993), 50 RFL (3d) 441 (Ont CJ) at paras 42-43.

[21] Whether a particular transaction gives rise to an equitable mortgage depends on the intention of the parties, ascertained by what the parties have done in the then existing circumstances. The intent of the parties can be inferred from the circumstances: *North West Trust Company v Raymond West* 1989 ABCA 252 at para 36, leave to appeal to SCC refused, 21728 (15 March 1990); *Bank of Montreal v Georgakopoulos* 2021 ONCA 60 at para 14.

[Emphasis added]

[26] To similar effect, Anne Warner La Forest, *Anger & Honsberger Law of Real Property*, 3d ed (Online: Thomson Reuters Canada, 2024), states at 33.5:

An equitable mortgage is one that does not transfer the legal estate in the property to the mortgagee, but creates in equity a charge upon the property. It may be created by mortgaging the equity of redemption (i.e., a second or subsequent mortgage) or a future interest, or by a deposit of title deeds, or by an agreement to give a mortgage or to charge property for a debt. It may also be created when the mortgage is insufficient to transfer the legal estate because of improper execution or because of an incorrect description. The term “equitable mortgage” means, generally, a mortgage that does not involve a transfer of legal title.

An essential feature of an equitable mortgage is a common intention that the property be made security for a debt due or for future advances. If that intention is lacking, no equitable mortgage can be created. For example, it has been held that where there is a letter of undertaking to deliver a mortgage on demand, this constitutes an “executory contract”, not an equitable mortgage. In such instances, an equitable mortgage is created only when the demand is made.

[Emphasis added]

[27] The requirement for a common intention is reiterated in C.W. MacIntosh, *Nova Scotia Real Property Practice Manual* (Online: LexisNexis Canada Inc., 2024) at [12.2A.7]:

Not all mortgage transactions are documented by means of a normal mortgage format. This may not be fatal to the character of the transaction if the court finds, on equitable grounds, that the contract should be treated as one of conveyance subject to a proviso for redemption of the property concerned. The courts may decide that such a situation exists in circumstances where there has been no conveyance of the legal estate but instead the creation of an equitable charge on the property. Very convincing evidence is required before they will arrive at this conclusion. It has been held that the “hallmark of an equitable mortgage is a common intention to make property security for a debt”. This may occur when there has been a deposit of title deeds only without execution of a proper mortgage instrument, or where the mortgage itself is defective in failing to convey the property in question. The deposit of a title deed may create an equitable mortgage, despite the *Statute of Frauds*.

[Emphasis added]

[28] An equitable mortgage was found to have been created in *Gibson Estate (Re)*, 2017 NSSC 68, cited by the Lavalles. In that case, Mr. Gibson loaned money to Ms. Shand. Ms. Shand then entered into an agreement with a third party to purchase a one-acre lot; however, the warranty deed to the lot was taken in Mr. Gibson’s name. Ms. Shand testified that the understanding between herself and Mr. Gibson, who had since died, was that she would repay him the amount loaned to her over time. Then, once it was paid in full, the land would be conveyed to her. The evidence included a partially completed draft agreement of purchase and sale between Mr. Gibson and Ms. Shand for the same lot which was attached to a lawyer’s letter to

both parties. The letter also referred to forfeiture of the land if the purchaser fell into arrears on repayment. Correspondence between Mr. Gibson and his financial advisor also “clearly indicate[d] that Mr. Gibson would be taking title to the property in his name as security for the monies he would be lending to Ms. Shand” (at para. 151).

The court concluded:

[154] In my view, in the circumstances which existed, even though the property was never put in the name of Ms. Shand prior to being put in the name of Mr. Gibson, an equitable mortgage was created. The clear intention for putting the property in Mr. Gibson's name was to provide security for repayment of the loan.

[155] I am of this view despite no written Agreement having been signed.

[29] In arguing that an equitable mortgage can be created without a common intention to make property security for a debt, Ms. Sibbald relies on *Elias Markets Ltd., Re*, 2006 CanLII 31904 (Ont. C.A.), at paragraphs 63 and 64:

63 An equitable mortgage is distinct from a legal mortgage. "An equitable mortgage is one that does not transfer the legal estate in the property to the mortgagee, but creates in equity a charge upon the property": A.H. Oosterhoff & W.B. Rayner, *Anger and Honsberger: Law of Real Property*, 2d ed. (Aurora, Ont.: Canada Law Book) at 1643.

64 The concept of an equitable mortgage would seem to find its foundation in the equitable maxim that "equity looks on that as done which ought to be done". Historically, the courts of equity mitigated the rigour of the common law, tempering its rules to the needs of particular cases on principles of justice and equity. The common law courts were primarily concerned with enforcing the strict legal rights of the parties, whereas equity was a court of conscience; it would step in to prevent an injustice that would otherwise arise from the strict application of the law.

[Emphasis added]

[30] Counsel for Ms. Sibbald placed great emphasis on the reference to the maxim “equity looks on that as done which ought to be done”, suggesting that it meant that an equitable mortgage is “whatever we want it to be”, is “dependent on the circumstances”, and is available wherever one person has gained an unfair advantage over someone else. However, the court in *Elias Markets Ltd.*, went on to state at paragraph 65:

[65] In essence, the concept of an equitable mortgage seeks to enforce a common intention of the mortgagor and mortgagee to secure property for either a past debt or future advances, where that common intention is unenforceable under the strict demands of the common law.

[Emphasis added]

[31] Ms. Sibbald’s proposed interpretation of *Elias Markets Ltd.* cannot succeed. She has not identified, nor has the Court located, a single authority where *Elias Markets Ltd.* has been taken to mean that an equitable mortgage can be created without proof of a common intention to secure property for a debt.

[32] Moreover, the law already provides a mechanism to protect the interests of a party who purchases a property but does not take legal title – the “purchase money resulting trust.” Where the person advancing the funds is unrelated to the person taking title, the law presumes that the parties intended for the person who advanced the funds to hold a beneficial interest in the property in proportion to that person’s contribution. This is because in such circumstances equity presumes bargains rather

than gifts. The presumption of resulting trust can be rebutted by evidence that at the time of the contribution, the person making the contribution intended to make a gift to the person taking title (*Nishi v. Rascal Trucking Ltd.*, 2013 SCC 13, at paras. 1 and 29). Ms. Sibbald has not pleaded that she has a resulting trust, or indeed any form of trust, over the Property.

[33] By Ms. Sibbald's own admission, she has offered no evidence to support a common intention to make the Property security for a debt owing to her by the Lavallee's. The Lavallee's have given evidence that they never had any such intention.

[34] It follows that Ms. Sibbald's alternative claim for an equitable mortgage raises no genuine issue of material fact, nor does it require the determination of a question of law, and the court must grant summary judgment.

The Certificate of *Lis Pendens*

[35] A certificate of *lis pendens* will be discharged unless the action calls into question the title to, or an interest in, land (*Saulnier's Estate v. Keating*, [1988] N.S.J. No. 602 (S.C. (T.D.)), at paras. 3-4; *Dempsey v. Dempsey*, 2008 NSSC 137, at paras. 14-16; *Little Island Fisheries Ltd. v. Royal Harbour Seafoods Inc.*, 2009 NSSC 300, at paras. 17-19; *Iform Inc. v. Rossignol*, 2010 NSSC 478, at paras. 34-35; *Wang v.*

Lambie, 2022 NSSC 51, at para. 34; *Anger & Honsberger Law of Real Property*, 3d ed., at 34:25).

[36] Without the alternative claim for an equitable mortgage, it is clear that Ms. Sibbald's claim gives no right to lands. The certificate of *lis pendens* must be vacated.

Conclusion

[37] The motion for summary judgment to strike Ms. Sibbald's claim that she has an equitable mortgage over the property is granted and the certificate of *lis pendens* is vacated.

[38] The Lavalles are entitled to their costs on the motion. If the parties can not agree on costs, the Court will receive written submissions within thirty (30) calendar days of this decision.

Smith, J.