

- [5] The Defendant requests the following relief:
- a. The setting aside of the default judgment for foreclosure and the noting in default;
 - b. An order that the foreclosure proceeding be converted to an immediate judicial sale pursuant to rule 64.03(22) of the *Rules of Civil Procedure*;
 - c. A reference, if necessary, with respect to the Plaintiff's alleged further expenses with respect to the property; and
 - d. Costs.
- [6] The Plaintiff opposes the motion.
- [7] For the reasons that follow, the motion is dismissed.

Issue

[8] The issue before the court on this motion is whether the Court should exercise its discretionary, equitable jurisdiction to set aside the foreclosure and order that the foreclosure proceedings be converted to an immediate judicial sale.

The Governing Law

[9] The parties agree on the law to be applied. They differ in the outcome that flows from its application.

[10] The law that governs my decision was succinctly stated in *992548 Ontario Inc. v. 8657181 Canada Inc.*, 2018 ONCA 416 at paras. 8-11:

The court has a broad jurisdiction to set aside a default judgment and grant relief against foreclosure “wherever the equities in the mortgagor’s favour outweigh all that are against him or her”. Walter M. Traub, *Falconbridge on Mortgages*, loose-leaf, 5th ed. (Toronto: Thomson Reuters, 2017).

The factors to be considered in the exercise of the court’s discretion include: (i) whether the motion to set aside was made with reasonable promptness; (ii) whether there is a reasonable prospect of payment at once or within a short period of time; (iii) whether the applicant has been active in endeavouring to raise the money necessary; (iv) whether the applicant has a substantial interest in the property or the property has some special intrinsic value to him or her; and (v) where the property has been sold after foreclosure (not the case here), whether the rights of the purchaser will be unduly prejudiced.

In addition, relief such as the appellant requested may be granted where there are “special circumstances” justifying the reopening of the foreclosure or, more generally, whether the

equities in favour of reopening the foreclosure order outweigh the equities against doing so. In *Winters v. Hunking*, 2017 ONCA 909, Blair J.A. added that “a weighing of the equities cannot be done without taking into account the relative prejudice to the respective parties in making or not making the order.”

In these fact-based cases, the ultimate task is “to determine whether the interests of justice favour granting the order”: *Mountain View Farms Ltd. v. McQueen*, 2014 ONCA 194, 317 O.A.C. 255, at paras. 47-51.

Analysis

Was the motion to set aside made with reasonable promptness?

[11] I conclude that the motion to set aside the order of default judgment for foreclosure has not been made with reasonable promptness. A review of the chronology is necessary to understand this conclusion:

- a. On December 16, 2021, the Defendant was advised that the mortgage was in default and would be enforced by power of sale.
- b. On April 29, 2022, the Defendant’s lawyer sent the Defendant an email advising him that the Plaintiff was “no longer prepared to renew the mortgage” and stated that the Plaintiff had retained the services of Martin Black to take enforcement proceedings. The Defendant’s lawyer urged him to immediately put the property on the market for sale and work with the Plaintiff in light of the current real estate market.
- c. On May 12, 2022, the Plaintiff’s lawyer sent the Defendant a letter by registered mail enclosing a *Bankruptcy and Insolvency Act* Notice of Intention to Enforce Security.
- d. On June 10, 2022, the Plaintiff’s lawyer sent the Defendant a notice of sale under mortgage by registered mail.
- e. On August 17, 2022, the Defendant was advised by the Plaintiff’s lawyer that the Plaintiff was proceeding with foreclosure of the property under the mortgage instead of power of sale.
- f. The Defendant was served with the statement of claim in September 2022. The Defendant does not deny receiving it but states that he does not recall being served with the documents.
- g. On October 13, 2022, the Plaintiff filed a requisition to note the Defendant in default with the court.

- h. On January 11, 2023, the Defendant requested a mortgage discharge statement from the Plaintiff's lawyer. This statement was provided to the Defendant, but there was no follow-up by the Defendant with the Plaintiff or his lawyer.
- i. On March 30, 2023, the Defendant again requested a mortgage discharge statement from the Plaintiff's lawyer. This statement was provided to the Defendant, but there was no follow-up by the Defendant with the Plaintiff or his lawyer.
- j. On May 31, 2023, the Plaintiff filed a requisition for default judgment with the Court.
- k. On June 7, 2023, the court issued a default judgment for foreclosure, which was registered on title.
- l. On August 23, 2023, the Defendant telephoned the Plaintiff's lawyer's office. The Defendant was advised that the property was transferred into the Plaintiff's name by the foreclosure proceedings.
- m. On August 25, 2023, the Defendant emailed the Plaintiff, the Plaintiff's lawyer and the Defendant's lawyer, Mr. Wong, requesting a mortgage payout statement.
- n. On September 6, 2023, the Plaintiff's lawyer emailed the Defendant. In the email, the lawyer stated, "As you were advised by my assistant on August 23rd, my client foreclosed on the Renfrew property on June 23rd, 2023, in accordance with the Mortgages Act of Ontario and the Rules of Civil Procedure. My client accepted title to the property under this process, in lieu of payment under the mortgage. You were duly served with the appropriate pleadings, and chose not to participate. This was after you had previously requested payout statements on 2 or 3 occasions but failed to make any payment." The Defendant did not reply to the email.
- o. On October 11, 2023, the Defendant retained a new lawyer.
- p. On December 7, 2023, the Defendant's new lawyer contacted the Plaintiff's lawyer for the first time, enclosing a draft notice of motion, no hearing date and no supporting affidavit. The Plaintiff's lawyer communicated that, given the history of the matter, they would await the full motion record, including affidavits, before responding.
- q. On May 6, 2024, the Defendant's new lawyer responded by email, stating, "Due to my client's financial difficulties, we could not progress with this matter earlier. However, my client is now in a position to continue, and we intend to proceed with a motion. My law clerk will be contacting the courthouse for available motion dates. Thereafter, we will contact your office regarding a proposed timeline."

- r. On May 29, 2024, the lawyer for the Plaintiff and the Defendant exchanged emails confirming a timetable with an October 10, 2024, hearing date. The Defendant was late in meeting various deadlines and successfully sought an adjournment of the hearing to December 4, 2024.
- s. On December 4, 2024, the motion was argued before me.

[12] The evidence of the Defendant is that he experienced financial difficulties due to a slowdown in his business and in light of financially assisting his ill elderly mother. Additionally, he stated that he could not find a second tenant for the building.

[13] The Defendant asserts that while he understood that the property might be potentially sold under the power of sale process, he did not understand that he could lose ownership of the property through foreclosure.

[14] The Defendant states that he was advised by one of his tenants that the tenant had received a “notice of attornment” from the Plaintiff’s lawyer and that the tenant would now be paying rent directly to the Plaintiff. The Defendant states that he understood that this meant he would not be responsible for making payments on the mortgage.

[15] The position of the Defendant is that he only discovered the default judgment of foreclosure in October 2023 and promptly retained a lawyer on October 11, 2023.

[16] I do not accept the Defendant’s characterization of the facts concerning his understanding of the risk of foreclosure proceedings or when he discovered that judgment of foreclosure had been obtained in relation to the property.

[17] First, the Defendant was employed as a mortgage agent. As such, he would be aware, at least in a general sense, of the possibility of foreclosure as a remedy for non-payment of his debt under the mortgage. The Defendant understood that he could lose ownership of the property through foreclosure.

[18] Second, I do not accept the evidence of the Defendant that he believed that since the rents of the building tenants had been attorned, he would not be responsible for making the payments. The assertion of this belief is contradicted by his repeated requests for mortgage discharge statements. The Defendant would have clearly understood that his indebtedness was not declining. I do not accept his evidence that he would not have appreciated that foreclosure was a possibility.

[19] Third, the Defendant was properly served. The Defendant’s position that he does not deny that he was served with the statement of claim for foreclosure but does not recall it is untenable. It is belied by his repeated requests for mortgage discharge statements. These statements would let him know his indebtedness and consider his options for dealing with it.

[20] Fourth, even if I were to accept that the Defendant has no recollection of being served with a statement of claim, the Defendant had ample warning of the foreclosure proceedings yet took no

action to address the situation until October 2023. I do not accept that the Defendant failed to comprehend the significance of the information conveyed to him. I have considered that:

- a. The Defendant was verbally advised on August 17, 2022, by the Defendant's lawyer that the Plaintiff was proceeding with foreclosure of the property.
- b. He was advised on August 23, 2023, by the Plaintiff's lawyer's assistant in a telephone call that the property had been transferred into the Plaintiff's name by virtue of the foreclosure proceedings. The significance of this information coming to the Defendant's attention is confirmed by the Defendant requesting a mortgage payout statement two days later.
- c. The content of the August 23, 2023 telephone call was confirmed in an email from the Plaintiff's lawyer to the Defendant on September 6, 2023.

[21] Fifth, I do not accept that the Defendant learned of the foreclosure in October 2023 due to having contacted the electricity company and being told that the property was no longer in his name. Even on the most generous interpretation of the facts, the Defendant would have known that foreclosure proceedings were contemplated in August 2022 and that judgment of foreclosure had been issued by August 2023.

[22] On the record before me, I find that the Defendant knew of the foreclosure proceedings on September 16, 2022.

[23] This motion to set aside was not made with reasonable promptness. The mortgage matured on March 1, 2022—over 34 months ago. The Statement of Claim for Foreclosure was served on the Defendant on September 16, 2022—almost 27 months ago. The Judgment was signed and registered on the property title on June 7, 2023—over 18 months ago.

[24] The Defendant did not act with reasonable promptness even as of August 2023. He only retained counsel in October 2023; no meaningful steps to move the matter forward occurred until May 2024. While a timetable was set, it was not respected, and the October 2024 hearing date had to be adjourned to December 2024.

[25] I conclude that the Defendant was financially unable to make the mortgage payments and made a conscious decision not to defend the foreclosure proceedings. I reject the explanations of the Defendant that he did not know that the foreclosure proceedings were underway or that he did not appreciate that foreclosure was a possibility.

Is there a reasonable prospect of payment at once or within a short period?

[26] I conclude there is no reasonable prospect of payment immediately or within a short period.

[27] The evidence before me discloses that the Defendant has been having financial difficulties for several years and that these problems continue. The Defendant's residence is listed for sale to

pay off three mortgages against it. The Defendant seeks to sell the residence for \$1,600,000. Although there have been no offers to date, if the property is sold at that price, there will be no equity from the sale owed to the Defendant.

[28] There is no evidence of refinancing available to him. There is no evidence of a pending or early sale of the property should the court grant an order setting aside the foreclosure.

[29] The Defendant points to offers for the sale of the property that exceed the mortgage owed and to appraisals of the property, and that if the property is ordered to be sold, the Plaintiff would be made whole. In particular, the Defendant points to an offer to purchase the property in January 2023 for \$390,000. The Defendant did not accept the offer as he felt it was too low. If the Defendant had accepted the offer, his financial difficulties concerning that property would have been solved, and he would have arguably been left with some equity from the sale. The rejection of this asserted offer to purchase following the mortgage's maturity date and service of a notice of foreclosure upon the Defendant is difficult to understand.

[30] The offer to purchase cited above included the observation that the building required repairs in the range of \$50,000 to \$70,000 to be saleable. The Defendant did not invest in the repairs.

[31] The Defendant cites an appraisal obtained by the Plaintiff that valued the property in October 2023 at \$445,000. The appraisal considered the contemplated, now completed, repairs to the property by the Plaintiff. Based on this appraisal, I find that the Defendant would have little, if any, equity in the property after the mortgage loan balance, interest, related expenditures, commissions and closing costs are considered. I do not accept the submission made by the Defendant that I should discount the expenditures made by the Plaintiff into the property.

[32] The Defendant also relies upon an appraisal of the property at \$755,000, but there is no evidence of any offers approaching that amount. Considering the offers cited by the Defendant of \$425,000 and \$470,000, I do not accept that the appraisal at \$755,000 is accurate or reliable.

Has the Defendant been active in endeavouring to raise the money necessary?

[33] The circumstances of the January 2023 offer to purchase that was rejected by the Defendant have been discussed above. I will not repeat that discussion here. The January 2023 offer is the sole concrete evidence of an offer made regarding the property to the Defendant. It was rejected by the Defendant.

[34] There is no evidence that the Defendant successfully refinanced the indebtedness to the Plaintiff before or after the foreclosure. Additionally, there is no evidence that the Defendant is capable of refinancing the property.

[35] In terms of efforts to refinance, the evidence is sparse. The text message communications between the Defendant and Mr. Eddy El Khouri from June 2023 are tendered as evidence of the efforts to refinance the property. These text messages do not reveal any firm financing being

achieved, and no documentation beyond these text messages is in evidence before me. These messages were provided pursuant to an undertaking to provide evidence of the cash or an unconditional approved mortgage commitment as of August 25, 2023, capable of refinancing the mortgage on the property.

[36] I do not accept the assertion by the Defendant that he did not believe there was any urgency to refinance. The communications between the Plaintiff and the Defendant contradict it, as do communications between the lawyers, Mr. Black and Mr. Wong, with the Defendant.

Does the property have some special intrinsic value to the Defendant?

[37] The parties agree that the property has no special or intrinsic value to the Defendant.

Are there “special circumstances” that apply in this case?

[38] I do not find that any special circumstances apply in this case. Upon examination of the case, seeking to do justice to the parties, I do not find that the equities of the circumstances militate in favour of setting aside the order of judgment for foreclosure.

[39] In coming to this conclusion, I accept the proposition argued by the Defendant that the mortgagor does not need to be in an extreme state of vulnerability or hardship described in *Winters v. Hunking*. Nor does he need to come to the court with clean hands or perfect conduct.

[40] In concluding that the equities do not favour setting aside the foreclosure judgment, I have considered the following:

- a. The Defendant's background, including his education level, family background and obligations, and employment as a mortgage agent. As a mortgage agent, the Defendant would have some understanding of mortgages and how they are enforced.
- b. The shift in enforcement mechanisms by the Plaintiff that progressed from attornment of rent to a possible power of sale and, ultimately, foreclosure proceedings. I do not find that this evolution misled or unfairly prejudiced the Defendant.
- c. Clear notice was provided to the Defendant regarding the foreclosure proceedings.
- d. The delay in bringing a motion to set aside the judgment of foreclosure.
- e. The nature of the property—here, the property was an investment property as opposed to a personal residence.
- f. The long period over which the Defendant did not make the mortgage payments. The mortgage has long ago matured.

- g. The fact and timing of the Defendant consulting with a lawyer, Mr. Wong, who advised him to retain counsel. The Defendant does not appear to have acted upon this advice.
- h. The significant period that the foreclosure proceedings took allowed the Defendant time to take steps to redeem the mortgage.
- i. The minimal amount of equity the Defendant had in the property.
- j. The repeated communications between the Defendant and the Plaintiff's lawyer included providing discharge statements and notice that the judgment of foreclosure had been obtained.
- k. The absence of any evidence that the Defendant succeeded in obtaining refinancing for the property. No commitment letter or other documentation from a financial institution is available to the court.
- l. The expenditures by the Plaintiff to make necessary repairs and improvements to the property increased the rental value of the property and the rental income of the property. The Plaintiff would suffer significant prejudice if the judgment for foreclosure were to be set aside considering the passage of time and the money he invested in the property.

Disposition

[41] The motion to set aside the default judgment for foreclosure and the noting in default is dismissed.

Costs

[42] The parties are encouraged to agree upon appropriate costs. If the parties cannot agree on costs, they may make brief written submissions. The submissions shall be a maximum length of three double-spaced pages plus a bill of costs. The Plaintiff may have 14 days from the release of this decision to provide his submissions. The Defendant shall have a further 14 days to respond. The Plaintiff, if necessary, may have a further 7 days for a brief reply. If I have not received any response or reply submissions within the specified timeframes after the Plaintiff's initial submissions, I will consider that the parties do not wish to make any further submissions and will decide based on the material that I have received.

Mr. Justice B. C. J. Holowka

CITATION: Gupta v. Manirambona, 2025 ONSC 0068
COURT FILE NO.: CV-22-00000086
DATE: 20250103

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Pawan Gupta

Plaintiff

-and-

Eric Manirambona and Ural Link Ltd.

Defendants

REASONS FOR DECISION

Mr. Justice B. C. J. Holowka

Released: January 3, 2025