CITATION: Di Trapani v. 9706151 Canada Ltd., 2019 ONSC 7311
COURT FILE NO.: CV-19-00069777-0000
DATE: 20191216

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Josephine Di Trapani, Plaintiff

- AND -

9706151 Canada Ltd., Roy Francis D'Mello, 2691333 Ontario Inc. and Anthony Forgione, Defendants

BEFORE: The Honourable Madam Justice L. Sheard

COUNSEL: Joshua D. Hemmings, Counsel for the Plaintiff

Karanpaul Randhawa, Counsel for the Defendants 2691333 Ontario Inc. and Anthony Forgione

No one appearing for the Defendants 9706151 Canada Ltd. and Roy Francis D'Mello, not having been served

HEARD: November 29, 2019

ENDORSEMENT ON MOTION FOR CPL

[1] The plaintiff moves for an order granting her leave to register a certificate of pending litigation ("CPL") against 88 Frances Ave., Hamilton, ON, L8E 5W9 (the "Property"). The Property was transferred by the defendant 9706151 Canada Ltd. ("9706") to the defendant 2691333 Ontario Inc. ("2691"). The principals of those corporations are the defendants, Roy Francis D'Mello ("D'Mello") and Anthony Forgione ("Forgione"), respectively.

[2] Among other relief, in her Statement of Claim, the plaintiff seeks a declaration that the transfer of the Property to 2691 was fraudulent and void as against the plaintiff.

[3] The facts relevant to this motion are briefly summarized, as follows:

a. The plaintiff bought the Property in 1998;

b. As at October 2016, the Property was subject to a first mortgage of $318,750. According to the plaintiff, as of that date, the fair market value of the Property was $425,000;

c. In September 2018, the plaintiff borrowed $30,000 from 9706. This interest-only loan was secured by a second mortgage against the Property (the "Mortgage"). The first of the monthly payments of $375 was due on November 1, 2018;

d. The plaintiff's second post-dated cheque dated December 1, 2018 was returned NSF. This constituted a default under the Mortgage. According to the plaintiff, through inadvertence she had failed to ensure that sufficient funds were in her bank account. Immediately upon realizing her mistake, she asked her mortgage broker, Aidan Pryce ("Pryce"), to contact D'Mello and find out how she could cure her default;

e. Pryce was unable to contact D'Mello, but on January 2, 2019, 9706 deposited the plaintiff's third post-dated cheque;

f. On January 15, 2019, the tenant at the Property advised the plaintiff that the tenant had received a letter containing Notice of Sale under Mortgage, demanding payment of $34,342.20. The Notice of Default contained an incorrect amount owing under the Mortgage and also failed to include the first mortgagee or the tenant on the Notice;

g. In January 2019, the plaintiff contacted solicitor, Frank Calcagni ("Calcagni") who acted for her on the Mortgage, to assist her in remedying the December 1, 2019 default;

h. The plaintiff also attempted to cure the default by hand-delivering payment of $675—representing the December 1, 2018 mortgage payment—together with a $300 NSF fee. Finding no mailbox, the plaintiff instead sent these funds to 9706 via Canada Post Xpresspost;

i. When 9706 failed to deposit the plaintiff's February 1, 2019 post-dated cheque, the plaintiff again used Canada Post Xpresspost to send money orders to 9706 for the February and March payments on the Mortgage;

j. In addition to seeking assistance from Pryce and Calcagni, on four occasions in March 2019, the plaintiff, herself, emailed and/or telephoned D'Mello;

k. The plaintiff finally heard from D'Mello on March 16, 2019. He asserted he had corresponded to the plaintiff in December 2018, and in January, February, and March 2019. The plaintiff denies receiving those letters. For the purposes of this motion, her evidence is not contradicted;

l. By letter dated March 6, 2019 and sent by email on March 16, 2019, D'Mello provided a new statement of arrears and confirmed that if certified funds in the amount of $4247.21 were not received by "Roy D'Mello in trust" by March 18, 2019, he had been "instructed" by 9706 to continue mortgage enforcement proceedings;

m. On March 27, 2019, the tenant at the Property advised the plaintiff that she had received another letter from D'Mello. The following day Calcagni wrote to D'Mello advising that his client (the plaintiff) would "vigorously defend" any further action being taken by 9706 and asking that 9706 cash the plaintiff's April 1, 2019 mortgage payment;

n. On April 4, 2019, the plaintiff delivered a further bank draft to D'Mello in the amount of $375 in satisfaction of her April 2019 mortgage payment. The plaintiff next heard from D'Mello on April 10, 2019 claiming that he had not received the hand-delivered payments and that the plaintiff had until April 12, 2019 to advise if she intended to bring the Mortgage into good standing; failing which, enforcement of the Mortgage would continue;

o. The plaintiff continued to disagree with 9706's calculation of the amount due under the Mortgage, in particular, the late payment fees and interest. On May 6,

2019, she delivered a further bank draft in the amount of $375 to D'Mello representing her May 1, 2019 payment under the Mortgage;

p. On May 31, 2019, the tenant at the Property reported to the plaintiff that a representative of APEX Property Management ("APEX") had attended at the Property and was attempting to evict the tenant and change the locks;

q. The following day, Forgione attended at the Property and demanded the tenant pay rent to 2691. A letter of even date from lawyer K.P. Randhawa was delivered to the tenant advising that the Property had been transferred to 2691 as of May 14, 2019;

r. Following receipt of this letter, and after conducting a title search of the Property, the plaintiff learned that the Property had been transferred by 9706 on May 14, 2019 via Power of Sale for $400,000. On that date, the first mortgage and the Mortgage had been discharged and replaced by a new mortgage of $400,000 in favour of GTA Mortgage Investment Corporation ("GTA").

[4] The evidence on this motion, including transcripts of the cross-examinations of the plaintiff and Forgione, give rise to real questions of the bona fides of the transfer between 9706 and 2691. Without exhaustively listing all of the evidence on which the plaintiff relies, I note the following:

a. Aside from the correspondence referenced above, the Property appears otherwise to have been sold in secret. The plaintiff did not have actual notice that the Property was being marketed for sale as there was no public signage, listing or advertisement;

b. D'Mello's partner, a real estate agent, was apparently authorized to sell the Property. Instead of listing the Property on the open market, D'Mello directed that it be marketed exclusively to Forgione, someone with whom D'Mello and his partner had had prior real estate and business dealings. Forgione's evidence on cross-examination conflicted with documents obtained by the plaintiff after

that cross-examination, giving rise to a serious question of Forgione's credibility;

c. Despite assertions in his Affidavit that the Property was to be his home, Forgione incorporated 2691 just prior to the completion of the transfer so that the Property could be transferred to 2691. That fact, combined with the facts set out below, all support the plaintiff's contention that Forgione and 2691 knew that the Property was being sold at well under market value and that the intention was to resell it at a profit:

    i. Forgione did not see the inside of the Property before he purchased it;

    ii. Forgione did not obtain any independent or proper appraisal of the Property;

    iii. Forgione obtained a three-month mortgage;

d. Forgione is a principal of APEX, which previously marketed and sold a property via power of sale to 9706. On a different transaction, involving another property, D'Mello had acted for the chargee and the chargor, APEX; thereby supporting the plaintiff's assertion that, prior to the transfer of the Property and contrary to Forgione's assertions, D'Mello and Forgione had a prior business relationship;

e. The evidence that the Property was transferred at well below market value, which was known to Forgione/2691 and D'Mello/9706, includes that:

    i. the Property was transferred for $400,000, lower than the $425,000 value ascribed to the Property in October 2016 when the plaintiff obtained a new first mortgage;

    ii. in the term sheet and solicitor instructions, signed by Forgione on behalf of 2691 in support of its mortgage application to GTA, it was a condition of the mortgage loan to 2691 that a satisfactory appraisal

be obtained, showing a current market value of the Property of not less than $502,000; and

iii. Forgione did not obtain any appraisal of the Property nor, prior to purchase, did Forgione or anyone else on behalf of 2691, even enter the Property. Forgione suggests that this term of the GTA mortgage was varied based on a "handshake deal" with GTA.

[5] The plaintiff submits that the above-mentioned constitute "badges of fraud".

[6] The plaintiff submits that a further badge of fraud is the unusual haste taken in making the transfer. To support that submission, the plaintiff notes that on April 15, 2019, five days after D'Mello's letter dated April 10, 2019 - in which he acknowledges receipt of Calcagni's March 28, 2019 email - Forgione incorporated 2691, which entered into an Agreement of Purchase and Sale with 9706 on April 16, 2019. This transfer by D'Mello was made in the face of the email of March 28, 2019, in which Calcagni had indicated that the plaintiff would vigorously oppose any steps to enforce the Mortgage.

The Law

[7] I adopt the following statements of law, as set out in the factum of the defendants, Forgione and 2691:

a. Rule 42 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 and section 103 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, allow a plaintiff who has commenced a proceeding in which an interest in land is claimed to seek a CPL;

b. A CPL is available where a plaintiff claims an interest in land and there is a triable issue as to such interest. The principle issue is whether there is a triable issue;

c. The onus is on the party opposing the CPL to demonstrate that there is no triable issue with respect to whether the party seeking the CPL has a reasonable claim to an interest in the land;

d. The test for the registration of a CPL is well-established. In *Perruzza v. Spatone,* 2010 ONSC 841, Master Glustein helpfully set out the following principles at para. 20:

    i. The test on a motion for leave to issue a CPL made on notice to the defendants is the same as the test on a motion to discharge a CPL;

    ii. The threshold in respect of the "interest in land" issue in a motion respecting a CPL is whether there is a triable issue as to such interest, not whether the plaintiff will likely succeed;

    iii. The onus is on the party opposing the CPL to demonstrate that there is no triable issue in respect to whether the party seeking the CPL has "a reasonable claim to the interest in the land claimed";

    iv. Factors the court can consider on a motion to discharge a CPL include (i) whether the plaintiff is a shell corporation, (ii) whether the land is unique, (iii) the intent of the parties in acquiring the land, (iv) whether there is an alternative claim for damages, (v) the ease or difficulty in calculating damages, (vi) whether damages would be a satisfactory remedy, (vii) the presence or absence of a willing purchaser, and (viii) the harm to each party if the CPL is or is not removed with or without security; and

    v. The governing test is that the court must exercise its discretion in equity and look at all relevant matters between the parties in determining whether a CPL should be granted or vacated [citations omitted].

[8] I also accept and rely upon the statement of legal principles set out in the plaintiff's factum, as follows:

a. The courts of this province have long held that an action to set aside a fraudulent conveyance is an action in which an interest in land is brought into question: see

United States Securities & Exchange Commission v. Boock, 2010 ONSC 2340 at para. 9 (citing *Bank of Montreal v. Ewing* (1982), 35 O.R. (2d) 225 (Ont. Div. Ct.);

b. In deciding whether there is a reasonable claim to the interest in the land, and that a CPL is therefore appropriate, the court must engage in a fact-specific exercise generally considering the following three factors[1]:

    i. the nature of the property involved;

    ii. the related question of the inadequacy of damages as a remedy; and

    iii. the behaviour of the parties, having regard to the equitable nature of the remedy.

Analysis

[9] Forgione and 2691 assert that there is no triable issue, because 2691 is a bona fide purchaser for value without notice. Based on the evidence before me on this motion, I cannot accept that submission. I find that the evidence put forth by the plaintiff puts into question whether Forgione and 2691 were acting in good faith in their dealings respecting the Property. I also find that the plaintiff's claim to an interest in the Property—the transfer of which by and to the defendants, the plaintiff asks this court to set aside as fraudulent—gives rise to a triable issue.

[10] I now consider the *Perruzza* factors. Based on the evidence on this motion, I infer that both defendant numbered companies are shell corporations. I also infer that the land has special value to the plaintiff, who had owned it since 1998 and used it as her home until somewhat recently. There is also a valid concern that damages may not be recoverable from the defendant numbered companies and recovery against D'Mello or Forgione is unknown. Determining damages may not be easy in a changing real estate market; based on the plaintiff's 2016 appraisal and the GTA minimum value requirement, I infer that the Property has increased in value over a

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[1] See *Matthew Brady Self Storage Corp. v. lnStorage Limited Partnership*, 2014 ONCA 858, at para. 32 (citing *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415) ("*Matthew Brady Self Storage*")

relatively short time and, short of selling the Property - something the plaintiff does not wish to do - it may be difficult to calculate the plaintiff's damages. Given the plaintiff's agreement to allow Forgione and/or 2691 to refinance, and the availability of rental income to carry the mortgage, there is relatively minimal harm to those defendants if a CPL is granted.

[11] Most important to my decision is the behaviour of the defendants referenced earlier in this decision and, in particular, the lack of credibility on the part of Forgione: see *Matthew Brady Self Storage*.

Disposition on CPL

[12] At the conclusion of the hearing, I indicated to the parties that I would reserve my decision. I was then advised that Forgione and 2691 had agreed to not transfer or further encumber the Property pending the release of my decision on this motion. Absent such agreement, I would have made that order immediately.

[13] For the reasons set out above, I grant the relief sought by the plaintiff at paragraph (a) of her Notice of Motion and order that a CPL may issue and be registered against title to the Property.

[14] Also, as agreed by the plaintiff and the defendants Forgione and 2691, I order that the plaintiff shall lift the CPL to allow the defendants Forgione and/or 2691 to extend, refinance or replace the existing $400,000 mortgage on the Property with a mortgage in the same amount or in such other amount or terms as the plaintiff and those defendant parties may, in writing, agree.

Costs

[15] At the conclusion of the hearing, the parties were asked to hand up their Costs Outlines, to be kept in a sealed envelope and not opened until my decision was made. After the hearing, counsel for the plaintiff submitted an Offer to Settle, which had not been included with the materials filed in court. I did not look at any of the costs documentation until after I completed my decision on the merits.

[16] As the successful party on the motion, the plaintiff is presumptively entitled to costs.

Costs Principles

[17] The general principles applicable to party and party costs are well-settled. Costs are discretionary. Rule 57.01 of the *Rules of Civil Procedure* sets out factors I may consider in exercising my discretion, in addition to the result of the proceeding and any written offers to settle. Overall, the objective is to fix an amount that is fair and reasonable, having regard for, among other things, the expectations of the parties concerning the quantum of costs: *Boucher v. Public Accountants Council for the Province of Ontario,* 71 O.R. (3d) 291 (C.A.) at paras. 26, 38.

[18] Certain general principles have now been expressly articulated in subparagraphs (0.a) to (i) of r. 57.01. Those include success, the amount claimed and recovered, the complexity and importance of the matter, unreasonable conduct of any party which unduly lengthened the proceeding, scale of costs, any offers to settle, the hourly rate claimed, and the time spent.

[19] I have now reviewed the Costs Outlines of the parties to this motion. That information is helpful to the application of the principle of indemnity and the affirmative obligation to consider the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed.

[20] The plaintiff's partial indemnity fees, with HST, total $19,951.85 compared to the defendants' fees and HST of $11,224.29. The hourly rates of the parties' counsel are similar and in keeping with the timekeeper's year of call to the Bar. The difference between the time spent by the plaintiff's counsel may be explained, in part, by the fact that the plaintiff bore the onus on the motion. Also, the plaintiff's counsel included travel time for attending cross-examinations and court. The difference between the two sets of fees may also be explained by the fact that plaintiff had two lawyers and a student working on the matter, whereas there was only one timekeeper recorded in the defendants' Costs Outline. While it is often appropriate and a benefit

to the client to have legal work performed by a more junior lawyer under the supervision of a more senior lawyer, it inevitably leads to some overlap.

[21] Having considered the r. 57 factors and the principles set out in *Boucher*, I conclude that fair and reasonable fees for the plaintiff, fixed on a partial indemnity scale would be $13,350 plus HST of $1,735.50 for a total of $15,085.50. I have considered the disbursements incurred by both parties and conclude that the disbursements of $2,857.69 (inclusive of HST) claimed by the plaintiff are both reasonable and within the reasonable expectations of the defendants on the motion. When added together, the plaintiff's fees and disbursements that I accept total $17,943.19.

[22] I must now consider the impact, if any, of the plaintiff's Offer to Settle this motion. On October 23, 2019, the plaintiff offered to settle this motion on the basis that the CPL would be registered against title to the Property and the defendant, 2691, would pay costs to the plaintiff of $15,000. As set out above, I have determined the plaintiff's reasonable partial indemnity costs to be $17,943.19. Therefore, the provisions of r. 49.10 apply.

[23] The plaintiff's Costs Outline does not permit me to easily identify the time spent after October 23, 2019. While most of the plaintiff's motion materials pre-date October 23, 2019, the plaintiff's Factum is dated November 1, 2019. Of course, the hearing also took place after October 23, 2019.

[24] Notwithstanding the provisions of r. 49.10, the court continues to retain the discretion to fix costs. Therefore, in accordance with my discretion, and in consideration of the plaintiff's Offer to Settle, I increase the amount of costs to be awarded to the plaintiff by $1,000.

Disposition on Costs

[25] As explained above, I fix the plaintiff's costs on this motion in the total amount of $18,943.19, inclusive of disbursements and HST, payable by the defendants on this motion, 2691 and Forgione.

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Justice L. Sheard

Date: December 16, 2019