CITATION: Khan v. Taji, 2020 ONSC 6704
COURT FILE NO.: CV-20-2369
DATE: 20201102

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Leila Noreen Khan, Plaintiff

AND:

Farzana Begum Taji, Saira Nealum Khan, Naseem Akhtar Raja, Mohammed Sakhi Raja, and Michael Majid also known as Michael Majeed also known as Majid Raja also known as Michael Shawn Majeed, Defendants

BEFORE: The Honourable Mr. Justice R.E. Charney

COUNSEL: Michael Cohen, Counsel for the Plaintiff /Moving Party

Shahzad F. Siddiqui, Counsel for the Defendant, Farzana Begum Taji

Richard Hammond, Counsel for the Defendants, Saira Nealum Khan, Mohammed Sakhi Raja, and Michael Majid also known as Michael Majeed also known as Majid Raja also known as Michael Shawn Majeed

No one appearing for Naseem Akhtar Raja

HEARD: October 28 and 29, 2020

ENDORSEMENT

Introduction

[1] The plaintiff, Leila Noreen Khan, brings this motion for a Certificate of Pending Litigation (CPL) in relation to two properties. The first property is located at 307 Baker Hill Boulevard, Stouffville, Ontario (the Baker Hill property). The second property is located at 52 Norbury Drive, Markham, Ontario (the Norbury property).

[2] The issue on this motion is whether the court should grant leave to the plaintiff to register a CPL against these two properties.

[3] For the following reasons, the plaintiff's motion is dismissed.

Facts

[4] The plaintiff commenced this action against the defendants on September 1, 2020, seeking, among other relief, a declaration recognizing her beneficial interest in the Baker Hill property and the Norbury property. The plaintiff was never registered on title on either of

these properties, but claims a beneficial interest in the property through either an express trust or a purchase money resulting trust.

[5] The parties are all related:

1) The defendant Farzana Begum Taji is the plaintiff's sister (Farzana).

2) The defendant Saira Neelum Khan is the plaintiff's sister (Saira).

3) The defendant Naseem Akhtar Raja is the plaintiff's mother (Naseem).

4) The defendant Mohammed Sakhi Raja is the plaintiff's father (Mohammed).

5) The defendant Michael Majid is the plaintiff's brother (Majid).

[6] The plaintiff alleges that she provided all, or a significant portion of the purchase price of the Norbury property.

[7] The plaintiff also alleges that she provided a significant portion of the purchase price of a property known as 47 Horstman Street, Markham, Ontario (the Horstman property), which was sold, and the monies from the sale of the Horstman property can be traced directly to the Baker Hill property, as will be detailed below.

[8] The plaintiff alleges that the defendants have refused to recognize or acknowledge her interest in the properties, and a CPL is necessary to protect her interests.

The Plaintiff's Marriage

[9] The plaintiff married Mr. Fazale Khan (Mr. Khan) (who is not a party to this proceeding) on September 2, 1994. They separated in December 2010. While he is not a party, the plaintiff's marriage to Mr. Khan is central to the plaintiff's narrative of the events giving rise to this lawsuit.

[10] During the course of her marriage to Mr. Khan, the plaintiff alleges that she purchased two properties: the Horstman property, which was purchased in November 1999, and the Norbury property, which was purchased in January 1997.[1]

[11] Neither of these properties were registered in her name.

[12] The plaintiff alleges that while she was the beneficial owner of each of these properties, they were each registered in the names of various family members "to protect her from

[1] The plaintiff also alleges that she purchased a property at 76 Brookhaven Crescent, Markham Ontario. This property is not at issue in the motion before me.

losing her personal assets as part of any equalization payment or property division in the event of a marital break down".

[13] The plaintiff alleges that it was, at all material times, her intention to maintain her interest in both properties. The plaintiff's affidavit asserts that her intention in registering the properties in the names of her brother and father was to "afford me a means of protecting my assets in case of a marital breakdown between myself and Fazale [Khan] by creating a trust around the title to the properties". A similar assertion is made in her Statement of Claim:

> The Plaintiff was married at the time she purchased the Properties. In order to protect the Properties in the event that her marriage broke down, and keep her family's affairs separate from her marital affairs, the Plaintiff created bare trust relationships with her family members placing the Properties in the names of her relatives.

Horstman and Baker Hill Properties

[14] The plaintiff alleges that she purchased the Horstman property for $210,781 in November 1999. She contributed $62,000 towards the down payment of $76,925. A total of approximately $17,000 was contributed by: her sister, the defendant Farzana ($7,000), her mother, the defendant Naseem ($6,500), and her brother, the defendant Majid ($3,450).

[15] The plaintiff alleges that her contribution to the property came from some Guaranteed Investment Certificates (GIC) that she cashed in.

[16] A mortgage was obtained from the Royal Bank for the balance of $135,000. The mortgage was in Majid's name.

[17] The plaintiff alleges that the Horstman property was registered only in the name of her brother Majid in order to shield it from any equalization claims made by her husband should they separate. In her factum the plaintiff states:

> The plaintiff arranged for Majid to be registered on title to the Horstman Property in order to protect the property from any matrimonial proceeding she may be a party to in the future.

[18] On November 16, 1999, one day prior to the closing, Majid executed an Acknowledgment stating that he held title in trust for the plaintiff. He also executed an Undertaking in which he undertook not to transfer or encumber the Horstman property without the plaintiff's prior written consent.

[19] The plaintiff alleges that Majid breached the terms of the Acknowledgment and Undertaking on February 19, 2008, when he transferred the title in the Horstman property to the defendant Farzana for $108,949 without the plaintiff's consent.

[20] After the Horstman property was transferred to Farzana, Farzana secured a $300,000 mortgage from the Bank of Nova Scotia against the title to the Horstman property.

[21] The plaintiff alleges that between 1999 and 2010 she made payments for expenses relating to the Horstman property including the mortgage payments, insurance and property taxes. These payments were allegedly made from the rental payments made to her by the defendant family members who lived at the property.

[22] Farzana sold the Horstman property for $415,000 on June 28, 2010 and kept the proceeds of sale, depositing $250,000 into personal GICs in her name.

[23] The plaintiff was not repaid for her initial investment in the property.

[24] The plaintiff alleges that the proceeds from the sale of the Horstman property were used by Farzana to purchase a property at 37 James Parrot Avenue, Markham, Ontario (the James Parrot property) on October 13, 2011.

[25] In 2013 the plaintiff required financial assistance with her divorce proceedings, and approached Farzana to ask about obtaining monies from her in satisfaction of the plaintiff's investment in the Horstman property, which the plaintiff claimed carried forward in the James Parrot property.

[26] Eventually, the parties agreed to participate in a mediation process with another relative (their uncle, Javed Agha) acting as the mediator. The parties signed a Settlement Agreement on March 7, 2017 (the Agreement). Pursuant to the terms of that Agreement, Farzana agreed to pay the plaintiff $110,000 to settle the funds owing from the property dispute arising from the Horstman property. Once this amount was paid, the Agreement provided that the plaintiff will have no claim or commence any legal proceedings of any nature against Farzana in relation to the Horstman property or the James Parrot property.

[27] The plaintiff takes the position that this Settlement Agreement has been breached by the defendants and is not enforceable. She also alleges that the agreement is unconscionable and that she was not given an opportunity to obtain independent legal advice.

[28] On July 1, 2020 Farzana entered into an Agreement of Purchase and Sale to sell the James Parrot property for $1,160,000, with a closing on September 17, 2020. Prior to selling the James Parrot property, Farzana had entered into an Agreement of Purchase and Sale to purchase the Baker Hill property. The Baker Hill property was purchased using bridge financing, with the proceeds from the sale of the James Parrot property used to repay the financing.

[29] In an effort to preserve her interest, the plaintiff commenced this action on September 1, 2020, and registered a caution against title to the James Parrot property. Prior to the closing date of September 17, 2020, the plaintiff and Farzana agreed that the plaintiff would delete the caution registered on title to the James Parrot property and instead register a caution on the Baker Hill property. That caution was registered on September 10, 2020, and will expire on November 10, 2020.

[30] In addition, Farzana agreed to hold back $100,000 from the sale of the James Parrot property to be held in her lawyer's trust account until further court order or agreement of the parties. This amount is available to satisfy the terms of the Settlement Agreement or any court order that may be made against Farzana.

The Norbury Property

[31] The plaintiff alleges that she purchased the Norbury property on January 31, 1997 for $348,363. She provided a down payment of $133,363 and secured a mortgage from the Toronto-Dominion Bank for $215,000. The plaintiff alleges that she provided the entire down payment for the Norbury property from monies obtained by cashing in GICs in her name. The plaintiff alleges that the money from the GICs was placed by her into a joint account she held with her father Mohammed, and while the cheque for the down payment appears under both her and her father's name, the money actually came from her.

[32] The plaintiff alleges that she was the only family member who contributed to the purchase price of the Norbury property.

[33] The Norbury property was registered in the name of the plaintiff's father, the defendant Mohammed Sakhi Raja. The plaintiff alleges that she informed Mohammed of her intention to register him on title and that he would reside at the Norbury property, but that the plaintiff would still retain ownership of the property, and that Mohammed agreed to this arrangement. There was no written agreement or document signed.

[34] The plaintiff alleges that the Norbury property was registered only in the name of her father Mohammed in order to shield it from any equalization claims made by her husband should they separate. In her factum the plaintiff states:

> The Norbury Property was registered in Mohammed's name in order to protect it from being caught in a potential future matrimonial proceeding between the Plaintiff and Mr. Khan.

[35] The plaintiff alleges that she also rented out rooms at the Norbury property to tenants and used the rental income from the property to contribute to the mortgage, property tax and property insurance payments for that property.

[36] On January 9, 2004, Mohammed transferred a 50% title in the Norbury Property to Majid in exchange for consideration of $49,057. The plaintiff was informed of this transfer after it was completed, but alleges that she was told by Mohammed that the transfer was intended as a temporary measure to protect the Norbury property while Mohammed was on a pilgrimage, and that the transfer would be reversed upon Mohammed's return.

[37] At no time following Mohammed's return was the transfer to Majid reversed.

[38] On February 27, 2008, Mohammed and Majid transferred title in the Norbury property to the plaintiff's sister Saira for $0.00. The plaintiff alleges that she was not informed of this

transfer. Saira has been the sole registered owner of the Norbury property since February 27, 2008.

[39] In December 2014, the plaintiff asked Saira to transfer the Norbury property back to her, but Saira refused.

[40] On August 6, 2020 Saira sold the Norbury property for $1,299,800, with a closing date scheduled for November 6, 2020. The prospective purchasers are not parties to this action.

[41] In order to preserve her interest in the Norbury property, the plaintiff registered a caution against title to that property on August 28, 2020. Since this caution expired on October 28, 2020 (the first day of the hearing of this motion) the parties agreed to a temporary order that there would be no dealing with the Norbury property pending the decision of this Court on this motion.

The Plaintiff's *Family Law Act* Financial Statement

[42] As indicated above, the plaintiff and Mr. Khan separated in March, 2010, after sixteen years of marriage. On December 30, 2010, the plaintiff swore a Form 13.1 Financial Statement setting out her property and assets for the purpose of determining the equalization of net family property pursuant to the *Family Law Act,* R.S.O. 1990, c. F.3.

[43] True to her intentions, the plaintiff's Financial Statement did not refer to any property interest in either the Norbury Property or the Horstman property. Nor is their any suggestion that Farzana owed the plaintiff any money with respect to the sale of the Horstman property, which sold on June 28, 2010. The only property referenced by the plaintiff was the Matrimonial Home at 41 Boxwood Crescent, Markham, Ontario.

The Evidence of the Defendants

[44] The defendants have filed their own affidavits disputing the plaintiff's claim to a purchase money resulting trust in the Norbury property. Mohammed has denied the plaintiff's allegation that she advanced any of her own money towards the purchase of the Norbury property or that there was ever any trust agreement discussed or agreed to in relation to that property. He alleges that he purchased the Norbury property with his own funds and with mortgages that he obtained. He alleges that he made all mortgage and other property related payments and that the plaintiff was never responsible for any of these payments. Saira has also filed an affidavit corroborating Mohammed's evidence with respect to the Norbury property.

Statement of Claim

[45] The plaintiff's Amended Statement of Claim includes claims for a declaration that the plaintiff holds a beneficial interest the Norbury property and the Baker Hill property and an order vesting title of the properties in the name of the plaintiff to the extent of her beneficial interest.

[46] The plaintiff alleges that the February 19, 2008 transfer of the Horstman property from Majid to Farzana, and the February 27, 2008 transfer of the Norbury property from Majid and Mohammed jointly to Saira, were fraudulent conveyances.

[47] The Statement of Claim also alleges breach of fiduciary obligations and unjust enrichment, and the plaintiff has claimed damages against each of the defendants.

Analysis

Test for Granting a CPL

[48] The test for granting and discharging a CPL is set out in s. 103 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43. The applicable principles were recently summarized by Schabas J. in *Marmak Holdings Inc. v. Miletta Maplecrete Holdings Ltd. et al*., 2019 ONSC 4630, at para. 14 (citations omitted):

> The moving party must demonstrate that there is a triable issue with respect to the moving party's claim to an interest in the Property... The Court must consider all relevant factors between the parties, including whether damages would be a satisfactory remedy, and balance the interests of the parties in exercising its discretion equitably.

[49] See also: *2254069 Ontario Inc. v. Kim*, 2017 ONSC 5003, at paras. 20 -21.

[50] The threshold is whether the plaintiff has demonstrated a triable issue, not whether the plaintiff is likely to succeed: *Perruzza v. Spatone*, 2010 ONSC 841 at para. 20(ii). The triable issue must, however, relate to the plaintiff's interest in land, not simply a right that would lead to an award of damages: *Bobbie Mann v. Marcus Chac-Wai*, 2017 ONSC 3416, at para. 5. In other words, an interest in land must be a possible remedy at trial based on the evidentiary record on the motion.

[51] The cases confirm that granting a CPL is an equitable remedy: "[T[he governing test is that the Judge must exercise his discretion in equity and look at all of the relative matters between the parties…": *Clock Investments Ltd. v. Hardwood Estates Ltd. et al*., 1977 CanLII 1414 (ON SC), 16 O.R. (2d) 671 (Div.Ct.), at para. 10; *Perruzza* at para. 20(v) and cases cited therein; *2235209 Ontario Inc. v. Sedona Lifestyles (Rometown) Inc.*, 2020 ONSC 4008, at para. 70. See also: *Bobbie Mann*, at para. 5:

> Even if the plaintiff has a potential case for a remedy related to an interest in land the court may still refuse the CPL if it would be unjust to order it. The court must consider the equities of granting this form of interim relief. This is not a mechanical application of a test but an exercise of discretion to achieve a just result.

Interest in Land

[52] The Statement of Claim alleges that the plaintiff has a beneficial interest in both the Norbury property and the Baker Hill property through either a simple trust or a purchase money resulting trust, and seeks an order vesting title of the properties in the name of the plaintiff to the extent of her beneficial interest.

[53] The defendants acknowledge that the plaintiff has met the initial threshold of claiming an interest in land.

Triable Issue

[54] The defendants argue, however, that the plaintiff has not met the triable issue threshold.

[55] The defendants have encouraged me to critically examine the plaintiff's supporting affidavit, weigh the conflicting affidavits, and conclude that there is no merit to the plaintiff's claim. While there are certainly weaknesses in some of the plaintiff's evidence, I am of the view that, putting aside the limitation period issue, the plaintiff has met the low threshold of "triable issue" with respect to both properties. Given the written trust agreement with Majid for the Horstman property, the evidence with respect to the Horstman property is certainly stronger than the evidence with respect to the Norbury property, but the evidence for both properties meets the "triable issue" standard. It is not appropriate, at this stage of the proceedings, to resolve any factual disputes or make any credibility findings with respect to the competing affidavits.

Limitation Period

[56] The primary argument advanced by the defendants on the triable issue question relates to the expiry of the 10-year limitation period in s. 4 of the *Real Property Limitations Act,* R.S.O. 1990, c. L-15 ("RPLA"), which, the defendants argue, applies in this case. If the plaintiff has missed the limitation period for the recovery of land, there is no triable issue.

[57] Section 4 of the RPLA provides that a ten year limitation period applies to "an action to recover any land". In *McConnell v. Huxtable,* 2014 ONCA 86, the Court of Appeal provided the following edited version of the "archaic and difficult language" in s. 4 of the RPLA, at para. 15:

> To understand the application of s. 4, it will be helpful to remove those parts that do not directly apply to this case:
>
> > No person shall bring an action to recover any land, but within ten years next after the time at which the right to bring such action first accrued to the person bringing it.

[58] Section 2(1)(a) of the *Limitations Act, 2002,* S.O. 2002, c. 24 provides that that Act does not apply to a proceeding to which the RPLA applies.

[59] In *McConnell* the Court held that "an action to recover any land" under s. 4 of the RPLA covers both a claim for an express trust and an equitable claim for real property based on the remedy of constructive trust.

[60] In *Waterstone Properties Corp. v. Caledon (Town)*, 2017 ONCA 623, at para. 32, the Court of Appeal made it clear that the 10-year limitation period in s. 4 applied not only to claims for the possession of land but would encompass claims of ownership of land advanced by way of a resulting trust:

> The words "action to recover any land" in s. 4 of the RPLA are not limited to claims for possession of land or to regain something a plaintiff has lost. Rather, "to recover any land" means simply "to obtain any land by judgment of the Court" and thus these words also encompass claims for a declaration in respect of land and claims to the ownership of land advanced by way of resulting or constructive trust… [citations omitted]

[61] In *Conde v Ripley et al*., 2015 ONSC 3342, at para. 41, Dunphy J. concluded that s. 4 of the RPLA applies to an action to set aside a conveyance under s. 2 of the *Fraudulent Conveyances Act,* R.S.O. 1990, c. F-29: "Where the conveyance attacked is of real property, such an action is thus quite literally an "action to recover land"…". See also: *Anisman v. Drabinsky*, 2020 ONSC 1197, at para. 56.

[62] There can thus be no doubt that the plaintiff's claim to recover property from the defendants in this case is also covered by the 10-year limitation period in the RPLA. The plaintiff does not dispute this. Indeed, the plaintiff benefits from a 10-year limitation period, as opposed to the basic two-year limitation period generally applicable in the *Limitations Act, 2002*.

[63] The defendants argue that the limitation period for the Norbury property began to run either in 1997, when the Norbury property was purchased and the trust was created, or on January 9, 2004 when Mohammed transferred a 50% title in the Norbury Property to Majid in exchange for consideration of $49,057.

[64] In this regard, the defendants rely on this Court's decision in *Sinclair v. Harris*, 2018 ONSC 5718. In that case the deceased had loaned the defendants $137,000 to purchase a property in 2000. The defendants sold the property in 2003 and moved to Hawaii. The loan was never repaid. The deceased died in 2015. The loan was discovered by the estate trustee in 2016, and the estate trustee brought an action to recover the funds, claiming that the funds were held by the defendant on a resulting trust.

[65] Nakatsuru J. held that the claim was an action to recover property, and therefore the 10-year limitation period in s. 4 of the RPLA applied. Even though the plaintiff had the benefit of this longer limitation period, he found that the 10-year period began to run in 2000, on the day that the resulting trust was created, since, that was the date on which "the right to bring such action first accrued" within the meaning of s. 4 of the RPLA. He concluded, at para. 28:

> [T]the plaintiff's right to bring an action accrued on the date that the resulting trust was created. In other words, on the date that Ms. Rock gave the defendants the monies to purchase the Beeton property, she could have brought an action for her interest in the property. The fact that she chose not to exercise it did not mean she did not have the right to bring an action for the return of her interest in the land on the day the resulting trust was created: *McVan General Contracting v. Arthur*, 2002 CanLII 45035 (ON CA), [2002] O.J. No. 3336 (C.A.) at paras. 18 – 19.

[66] In the alternative, Nakatsuru concluded that the right to recover the land accrued at the time that the property was sold in 2003 (at para. 29):

> If I am wrong about this, then the right must have accrued at the time the Beeton property was sold and Ms. Rock's interest was not paid back to her. At this point, she would have been alive to the fact that she would have to bring an action for the return of her monies. At this time, she knew that she had a cause of action… In short, even if the discoverability principle is applied to s. 4, the claim would still be statute barred.

[67] Either way, the plaintiff had missed the limitation period when the estate brought the action in 2016.

[68] As between the two alternate accrual dates considered by Nakatsuru J., I am more persuaded that the 2003 date is the correct one to use for s. 4 of the RPLA. My reasons for this are twofold.

[69] First, in choosing the earlier 2000 date, Nakatsuru J. relied on the Ontario Court of Appeal's decision in *McVan General Contracting* [2].

[70] The Court in *McVan* held that the right to claim possession of mortgaged land accrued on the first default of payment under the mortgage. As the plaintiff failed to commence its action for possession within ten years of that date, as required by s. 4 of the *Limitations Act*, its right to possession of the land was extinguished. The case is not authority for the proposition that the ten year limitation period begins to run on the date that the loan is made.

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[2] The applicable limitation period in *McVan* was the precursor to s. 4 of the RPLA, which, prior to 2002, was found in s. 4 of the pre-2002 *Limitations Act*, R.S.O. 1990, c. L.15, and was worded identically to s. 4 of the RPLA. The relationship between s.4 of the RPLA and s. 4 of the pre-2002 *Limitations Act* was explained by the Court of Appeal in *McConnell*, at para. 14:

> The *Real Property Limitations Act* is, with some modifications, what used to be Part I of the *Limitations Act*, R.S.O.1990, c. L-15. ... When the Legislature decided to overhaul the law of limitations in this province, it decided to leave the law as applied to real property largely untouched; hence the archaic and difficult language in the *Real Property Limitations Act*.

[71] Second, the Court of Appeal concluded in *McConnell* that in a family law case in which the claimant pleads facts to establish a constructive trust and asks the court to award an ownership interest in land, the "right to bring such action first accrued" on the date of separation, not the date on which the funds were advanced or other contribution made.

[72] The defendants argue that the discoverability principle in s. 5 of the *Limitations Act, 2002*, has no application to s. 4 of the RPLA. They argue that the discoverability principle is a statutory construct, and does not apply unless expressly stated in the statute. In the absence of an express statement, the right to bring an action for the recovery of land first accrues the moment the trust is established, not on the date that a breach of trust is discovered.

[73] There is no question that the application of the discoverability rule is a question of statutory interpretation, but the analysis is not as simple as that proposed by the defendants. In *Pexeiro v. Haberman*, 1997 CanLII 325 (SCC), [1997] 3 S.C.R. 549 (S.C.C.), the Supreme Court of Canada dealt with the question of whether the discoverability rule applied to all limitation provisions or whether its application depended upon the actual wording of the statutory limitation. Major J. adopted the following statement from the Manitoba Court of Appeal in *Fehr v. Jacob* , at para. 37:

> [T]he judge-made discoverability rule is nothing more than a rule of construction. Whenever a statute requires an action to be commenced within a specified time from the happening of a specific event, the statutory language must be construed. When time runs from "the accrual of the cause of action" or from some other event which can be construed as occurring only when the injured party has knowledge of the injury sustained, the judge-made discoverability rule applies. But, when time runs from an event which clearly occurs without regard to the injured party's knowledge, the judge-made discoverability rule may not extend the period the legislature has prescribed. (Emphasis added)

[74] In *McCracken v. Kossar*, 2007 CanLII 4875 (ON SC), Shaw J. concluded that the language of s. 4(1) of the RPLA did nor preclude the application of the discoverability rule, at para. 54:

> Ms. Kossar submits that the discoverability principle does not apply to s. 4(1) of the *Real Property Limitations Act*. She quotes in support of her submission the words in s. 4(1), "… when the right to bring such action first accrued." However, *Fehr v. Jacob*, cited with approval by Major J. in *Pexeiro*, refers to very similar language as leading to the possible application of the discoverability rule.

[75] In any event, I note that s. 28 of the RPLA does expressly provide for a discoverability rule in cases of concealed fraud. Section 28 provides:

> 28. In every case of a concealed fraud, the right of a person to bring an action for the recovery of any land or rent of which the person or any

> person through whom that person claims may have been deprived by the fraud shall be deemed to have first accrued at and not before the time at which the fraud was or with reasonable diligence might have been first known or discovered.

[76] In the present case, the plaintiff has pleaded fraud with respect to the transfers of both properties.

[77] In conclusion, the plaintiff's right to bring an action for the recovery of land "first accrued" in this case when one of the defendants violated a term of the alleged trust, or, in the case of concealed fraud "the time at which the fraud was or with reasonable diligence might have been first known or discovered".

[78] In the case of the Norbury property, the plaintiff's right to bring an action for the recovery of land first accrued on January 9, 2004, when Mohammed transferred a 50% title in the Norbury Property to Majid in exchange for consideration of $49,057. This transfer was contrary to the terms of the oral trust agreement alleged by the plaintiff. The plaintiff has acknowledged that she was informed of this transfer soon after it occurred.

[79] The Statement of Claim was not issued until September 1, 2020, well outside the ten year limitation period in s. 4 of the RPLA.

[80] The plaintiff argues that the defendants cannot rely on the limitation period since they have not yet filed a Statement of Defence. As a general proposition, defendants must expressly plead a limitation period defence in order to rely on it in any proceeding. As the Court of Appeal stated in *Metropolitan Toronto Condominium Corporation No. 1352 v. Newport Beach Development Inc.*, 2012 ONCA 850, at para. 116:

> The rules call for a limitation defence to be pleaded in the statement of defence. A plaintiff is entitled to reply to a statement of defence and put before the court further facts, for example, on the question of the discoverability of the claim. Only in the rarest of cases – and this is not one of them – should this court entertain a defendant's motion to strike a claim based on the limitation defence where the defendant has yet to deliver a statement of defence.

[81] See also: *McHale v. Lewis*, 2018 ONCA 1048, at paras. 24 – 25.

[82] In the present case, however, the facts concerning the January 9, 2004 transfer of the Norbury property, and the plaintiff's knowledge of this transfer, have been put in the Statement of Claim itself. The Statement of Claim states that "the plaintiff was informed of the transfer by Mohammed and Majid after it had taken place, but was told that the transfer was not permanent and would be reversed following Mohammed's return from a religious pilgrimage". It is also clear from the plaintiff's affidavit filed in support of this motion that she knew of this transfer soon after it happened.

[83] This is not a case in which there is a factual dispute regarding the plaintiff's knowledge or discovery of the January 9, 2004 transfer. The information relied upon by the defendants is found exclusively in the plaintiff's pleading and affidavit. In these circumstances, the defendants may rely on the limitation period in this motion even though they have not filed a Statement of Defence: *Torgerson et al. v. Nijem*, 2019 ONSC 3320, at para. 10; *Khursheed v. Venedig Capital SAS*, 2019 ONSC 5190, at para. 19.

[84] Accordingly, I conclude that there is not a triable issue with respect to the plaintiff's claim to an interest in the Norbury property due to the expiry of the ten year limitation period in s. 4 of the RPLA.

[85] The defendants also argue that the plaintiff has missed the limitation period with respect to the transfer of the Horstman property from Majid to Farzana on February 19, 2008. In the alternative, the defendants argue that the ten year limitation period began to run when Farzana sold the Horstman property on June 28, 2010. If they are correct, both of these dates pre-date the Statement of Claim by more than ten years.

[86] I am not able to give affect to this argument, however, because there is no evidence or pleading as to when the plaintiff discovered either of these two events. The Statement of Claim alleges that the transfer from Majid to Farzana was done without the plaintiff's knowledge. While it is possible that the plaintiff was aware of Farzana's sale of the Horstman property on June 28, 2010, the Statement of Claim is silent on this question and the limitation defence has not been pled by the defendants.

[87] Accordingly, I conclude that there is a triable issue with respect to the to the plaintiff's claim to an interest in the Horstman/Baker Hill property.

Equitable Considerations

[88] The next issue is whether the court, after considering the equities of the case, should exercise its discretion to grant the CPL.

[89] My analysis of this issue applies to the Baker Hill property, but would also apply to the Norbury property if the applicable limitation period had not expired.

[90] Because a CPL is a discretionary remedy, the court may also consider the "clean hands" doctrine: *Morguard Residential v. Mandel*, 2017 ONCA 177, at paras. 18 and 28. The clean hands doctrine of equity can be reduced to "he who comes into equity must come with clean hands" (*Elford v Elford* (1922), 1922 CanLII 53 (SCC), 64 SCR 125. It is a long-standing doctrine that a party seeking an equitable remedy such as a CPL must come to the court with clean hands: *Asibayan v. Aghdasi*, 2020 ONSC 1027, at para. 15.

[91] The clean hands doctrine requires that the misconduct considered relates directly to the conduct in the transaction before the court: *2324702 Ontario v. 1305 Dundas*, 2019 ONSC 1885, at paras. 17 – 22, aff'd on appeal: *2324702 Ontario Inc. v. 1305 Dundas W Inc*., 2020 ONCA 353.

[92] In the present case, the plaintiff has taken the position that both the Norbury and Horstman properties were registered in the respective names of her father and brother to shield the properties from any equalization claims made by her husband should they separate. This was a fraudulent intention.

[93] As indicated above, the plaintiff carried out this fraudulent intent when she swore her Form 13.1 Financial Statement in her family law proceeding without including her interest in either of these properties.

[94] Assuming the truth of the plaintiff's allegations, her admitted fraudulent intention defeats her right to claim a CPL against her co-conspirators. Courts have consistently taken a hostile view of parties who attempt to enlist the court in support of their fraudulent schemes, based on the "principle that the court will not assist a suiter to obtain relief from the consequence of his own unlawful act": *Krys v. Krys*, 1928 CanLII 48 (SCC), [1929] SCR 153, at p. 164.

[95] While this principle has a long history in common law, the seminal case in Canada appears to be the Supreme Court of Canada's decision in *Scheuerman v. Scheuerman*, 1916 CanLII 42 (SCC), (1916), 52 S.C.R. 625. In *Scheuerman* the plaintiff had agreed to purchase certain lands and, with the intention of protecting them from action by a judgment creditor, had caused them to be conveyed to his wife on an oral agreement with her that the title should remain in her name until the judgment debt had been satisfied. That debt was subsequently paid by the plaintiff and upon discovering that his wife had sold the lands he brought suit claiming the unpaid balance was his as she held the lands in trust for him.

[96] The majority of the court held that the plaintiff's fraudulent intention was enough to defeat his claim, even though his creditors had been paid. Sir Charles Fitzpatrick C.J.C. said at pp. 626-7:

> But if it were necessary to hold that there was a resulting trust, in favour of the respondent, I do not think he is in a position to ask the court to enforce it. He can only make out his case by alleging his own unlawful intentions in making the conveyance to his wife.
>
> * * *
>
> I am prepared to hold that a plaintiff is not entitled to come into court and ask to be relieved of the consequences of his actions done with intent to violate the law, and that though they did not and even could not succeed in such purpose.

[97] Anglin J. dissented, holding that fraudulent intent without a fraudulent act was not sufficient. He stated at p. 638:

> The law condemns and penalizes the fraudulent act, not the fraudulent intent. The act must be one which at least may be injurious to persons

> whom the law protects against it… The plaintiff's intent was fraudulent; his act was not…

[98] The question of whether the law condemns fraudulent intent when it is not brought to fruition by fraudulent acts has been debated for the past century: see *Goodfriend v. Goodfriend*, 1971 CanLII 28 (SCC), [1972] SCR 640, at pp.643, 647 – 648; *Nagel's Debt Review Inc. v Mosiuk*, 2019 SKCA 16, at paras. 66 – 76. The question does not arise in the present case because the plaintiff's intention to defraud her husband upon separation was carried out.

[99] In *Elford v. Elford* (1922), 1922 CanLII 53 (SCC), 64 S.C.R. 125 a husband had put land into his wife's name, with her knowledge, for the purpose of defeating his creditors. He held a general power of attorney from her. A quarrel occurred between them, and the husband used the power of attorney to transfer the title to the land back into his own name. The wife sued to have the title re-transferred into her name.

[100] The Supreme Court of Canada held that the wife was entitled to have the transfer set aside because the authority conferred by the power of attorney did not embrace the power to execute a conveyance in favour of the agent himself. *Prima facie*, the wife was entitled to have the husband declared a trustee for her. The majority held that the husband could not displace that right by alleging that her title was acquired in pursuance of his unlawful design to defeat his creditors. The dissent would have permitted the husband to retain the properties, since the wife was also party to the fraud. By leaving the property with the husband, the dissent reasoned, the property would be available to satisfy his creditors.

[101] In his concurring opinion, Duff J. stated at pp. 128-130:

> The question therefore arises whether the husband can displace this prima facie right of the wife's by alleging that she held her title to the property for his benefit, but for the purpose of protecting it from his creditors. In other words, whether her title was acquired in pursuance of an unlawful design and plan to defeat the creditors of the husband.
>
> It is quite clear, I think, that such a defence is not competent to the husband. As Lord Hardwick said in *Cottington v. Fletcher*, as long ago as 1740 such "fraudulent conveyances" are "absolute against the grantor." It is quite clear that the husband would not be heard in an action to impeach the wife's title brought by himself to set up a claim based upon an arrangement of the character he now seeks to rely upon.

[102] In his dissenting opinion, Brodeur J. stated, at p. 132:

> [A] man who is obliged to set up his own fraud as the basis for the granting of an equitable relief should not succeed… The husband, in such a case, could not be relieved from the consequence of his actions done with intent to violate the law. In other words, the courts are always refusing to assist

> in any way, shape or form those who violate the law or who act fraudulently.

[103] I wish to emphasize that in reviewing these cases I am expressing no opinion on whether the plaintiff should ultimately succeed in her claim to recover land or damages from the defendants. It may be that the equities with respect to the final decision are weighed differently than at this interlocutory stage. The purpose of the "clean hands" analysis is only to decide whether the plaintiff should be granted leave to register a CPL. Given the plaintiff's admission that both the Norbury and Horstman properties were registered in the respective names of her father and brother for the sole purpose of defrauding her then husband from his equalized share of the net family property, and given the evidence that she carried that intention into effect when they separated, I conclude that the court should not assist the plaintiff with an equitable remedy at this stage of the proceedings.

Conclusion

[104] For the foregoing reasons the plaintiff's motion is dismissed.

[105] If the parties cannot agree on costs the defendants may serve and file costs submissions of no more than 3 pages, plus costs outline and any offers to settle, within 20 days of the release of this decision. The plaintiff may serve and file reply submissions on the same terms within a further 15 days.

Justice R.E. Charney

Date: November 2, 2020