

CITATION: Matta v. Altmore Mortgage Investment Corporation, 2022 ONSC 5322
COURT FILE NO.: CV-21-00662471-00CL
DATE: 20220920

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: MONICA MATTA and MARK AMELLO, Applicants

AND:

ALTMORE MORTGAGE INVESTMENT CORPORATION, Respondent

BEFORE: Justice Cavanagh

COUNSEL: *Gregory Azeff and Monica Faheim*, for the Receiver, BDO Canada Limited
Jonathan H. Marler, for Ian Ross McSevney

HEARD: July 19, 2022; additional written submissions filed on July 29, 2022

ENDORSEMENT

Procedural Background

- [1] Pursuant to the Order of Justice Conway dated November 8, 2021 (the “Receivership Order”), BDO Canada Limited (the “Receiver”) was appointed as receiver over Altmore Mortgage Investment Corporation, Altmore Capital Inc., Independent Mortgage Advisors Inc. and Ian Ross McSevney pursuant to s. 248 (1) of the *Business Corporations Act*, R.S.O. 1990, c. B.16, as amended and s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended.
- [2] The Receiver brought a motion for a contempt order against Mr. McSevney that I heard on April 11, 2022. Mr. McSevney did not attend at the virtual hearing. The Receiver sought a finding of contempt against Mr. McSevney on the ground that he had clearly and intentionally failed to comply with the Receivership Order.
- [3] On that day, I released an endorsement finding Mr. McSevney in contempt of Court for specified failures to comply with the Receivership Order. I made an Order declaring Mr. McSevney to be in breach of the Receivership Order and in contempt of this Court. I directed that the hearing as to the applicable penalty be scheduled for May 3, 2022.
- [4] On May 3, 2022, Mr. McSevney appeared at the virtual hearing. He explained that he had understood that the liability phase of the contempt hearing that was to be held on April 11, 2022 was cancelled because he received an email stating this to be so. Mr. McSevney explained that he tried to join the hearing using the separate

Zoom link sent to the parties by the Court Office and when he tried to do so, he was directed to another page showing a different hearing date. Mr. McSevney explained that, for this reason, he did not attend the contempt hearing on April 11, 2022. I adjourned the sentencing hearing to June 7, 2022.

- [5] On June 7, 2022, Mr. McSevney appeared with counsel. Mr. McSevney's counsel assured me that Mr. McSevney intends to fully comply with the Receivership Order, and he requested an adjournment to allow him to assist Mr. McSevney to do so. I granted the requested adjournment to July 19, 2022.
- [6] The Receiver prepared a Third Supplementary Report dated July 17, 2022 to aid the court in sentencing Mr. McSevney at the July 19, 2022 hearing. In this Report, the Receiver reports that since the June 7, 2022 attendance, Mr. McSevney has made efforts to comply with the Receivership Order by providing his written response to the Receivership Order, providing copies of requested documents, and attending examinations on June 16, 2022 and June 21, 2022.
- [7] Mr. McSevney provided affidavit evidence for use at the July 19, 2022 hearing. In his affidavit, he states that since the involvement of his legal counsel in the file, he has worked diligently with counsel to fulfill the requirements of the Receivership Order. Mr. McSevney attended examinations by the Official Receiver and by the Receiver. Mr. McSevney's evidence is that he has complied with requests made of him by both the Official Receiver and the Receiver and that he remains ready, willing, and able to comply with further requests made of him.
- [8] Mr. McSevney, in his affidavit, apologizes to the to the applicants, their counsel, the Receiver Court and to the Court for the difficulties he has caused to everyone involved in this case.
- [9] At the hearing on July 19, 2022, I requested written submissions from the parties with respect to their positions on penalty. The hearing was adjourned to September 20, 2022 for me to give my decision on penalty.

Analysis

- [10] Rule 60.11 of the *Rules of Civil Procedure* provides that in disposing of a motion for a contempt order, the judge may make such order as is just, and where finding of contempt is made, the judge may order that the person in contempt,
- a. be imprisoned for such period and on such terms as are just;
 - b. be imprisoned if the person fails to comply with the term of the order;
 - c. pay a fine;
 - d. do or refrain from doing an act;

- e. pay such costs as are just; and
- f. comply with any other order that the judge considers necessary.

[11] In *Business Development Bank of Canada v. Cavalon*, 2017 ONCA 663, the Court of Appeal for Ontario identified the following factors as relevant to a determination of an appropriate sentence for civil contempt:

- a. Proportionality of the sentence to the wrongdoing;
- b. Presence of aggravating and mitigating factors;
- c. Deterrence and denunciation;
- d. Similarity of sentence in like circumstances; and
- e. Reasonableness of a fine or incarceration.

[12] In *Cavalon*, at paras. 77-81, the Court of Appeal held that the primary aim of sentencing in civil contempt proceedings is gaining compliance with the court's orders, noting, in addition, that courts have also recognized that acts of civil contempt undermine the authority of the courts and diminish respect for the law. For this reason, punishment has been recognized as a secondary purpose for sentencing in civil cases.

[13] The Receiver initially sought a custodial sentence of sixty days when this motion was first brought. The Receiver submits that, giving due credit to the cooperation Mr. McSevney has shown since the involvement of his legal counsel, a custodial sentence of fourteen days should be imposed.

[14] The Receiver submits that notwithstanding his delivery of documents and attendance at examinations, Mr. McSevney has not fully purged his contempt because he misappropriated rental income from a property at Unit 17-81 Valridge Drive, Ancaster, Ontario (the "Unit 17 Property") which was registered in the names of Mr. McSevney and his spouse, and has been the sole significant asset under administration. The Receiver notes that Mr. McSevney's interest in the Unit 17 Property had vested in the Trustee upon his bankruptcy and, moreover, the Receiver had a registered charge against the Unit 17 Property pursuant to the Receivership Order.

[15] In my Endorsement dated April 11, 2022, I made findings that Mr. McSevney has failed to comply with the Receivership Order in specified respects. These findings included that Mr. McSevney has not advised the Receiver of the existence of any Property (defined in the Receivership Order) and that he failed to disclose receipt of rental payments in respect of the Unit 17 Property. I did not find Mr. McSevney in contempt for failing to return rents received from the Unit 17 Property.

- [16] The Receiver submits that Mr. McSevney's contempt has severely frustrated the Receiver from fulfilling its mandate and that the Receiver has incurred substantial additional expense in its effort to identify and secure assets and, ultimately, determine what happened to the substantial amount of money that Altmore received from investors. The Receiver submits that, given Mr. McSevney's financial circumstances, a fine would have little effect because there is no realistic prospect that Mr. McSevney could pay a fine.
- [17] Mr. McSevney's counsel, Mr. Marler, made submissions on his behalf. Mr. Marler submits that Mr. McSevney, after he obtained legal counsel (after his former legal counsel, against whom a contempt order was also initially sought, withdrew in late January 2022), acted diligently to purge his contempt. He submits that Mr. McSevney has given an unequivocal apology for his conduct. Mr. Marler submits, citing *Carey v. Laiken*, [2015] 2 S.C.J. 79, at paras. 65-66, that the contempt order should be set aside.
- [18] The Receiver cites *Sussex Group Ltd. v. 3933938 Canada Inc.*, 2003 CanLII 49334 as an analogous case. In *Sussex Group*, Cumming J., at para. 4, observed that it is extraordinary to order the incarceration of a participant in a civil proceeding because of their contempt. In that case, although the person found in contempt had partially purged his contempt, Cumming J. found that he showed no remorse for his deliberate and wilful contempt and that he continued in his contempt. A custodial sentence of two months was imposed.
- [19] I do not agree that Mr. McSevney's actions taken after he retained Mr. Marler as counsel amount to only partial purging of his contempt. In my endorsement dated April 11, 2022, I made specific findings of the ways that Mr. McSevney had intentionally acted or failed to act to comply with the Receivership Order. The contempt order dated April 11, 2022 was made on this basis. Mr. McSevney appears to have taken actions within his power to comply with the Receivership Order after he retained counsel. The fact that, as a bankrupt, Mr. McSevney did not reimburse the Receiver for his receipt, before the contempt order was made, of rentals from the Unit 17 Property is not a failure to take action to remedy a failure to comply with the Receivership Order that was specified as a basis for the finding of contempt.
- [20] I do not treat the failure to return such rent receipts as a failure by Mr. McSevney to purge his contempt.
- [21] Mr. McSevney has apologized for the difficulties he caused. This is a mitigating factor. In addition, I regard the steps taken by Mr. McSevney to purge his contempt after retaining Mr. Marler as counsel to be a significant mitigating factor. In these significant respects, the facts on this motion are unlike those in *Sussex Group*.
- [22] In my view, having regard to the factors identified in *Cavalon*, this is not a case where it is appropriate to imprison Mr. McSevney for his contempt.

[23] The Receiver, in the alternative, seeks an order directing Mr. McSevney to pay to the Receiver the amount of \$20,000 as a fine for his contempt, and a declaration that the fine shall be deemed a “penalty” within the meaning of s. 178 of the *Bankruptcy and Insolvency Act* (“BIA”).

[24] In *Boily v. Carleton Condominium Corp.* 145, 2104 ONCA 574, Epstein J.A., at para. 79, held:

The purpose of a penalty for civil contempt is to enforce compliance with a court order and to ensure societal respect for the courts. [citation omitted] The remedy for civil contempt is designed not only to enforce the rights of a private party ... but also to enforce the efficacy of the process of the court itself.

[25] Mr. McSevney’s non-compliance with the Receivership Order undoubtedly resulted in the Receiver incurring additional expense and impaired the Receiver’s ability to fulfill its mandate. Mr. McSevney’s failure to comply with the Receivership Order for a significant period of time, until after a finding of contempt had been made, justifies a penalty that shows the Court’s condemnation of his conduct.

[26] In my view, a significant fine is a proper penalty to impose on Mr. McSevney for his contempt. Unless a significant consequence follows from such a refusal to comply with an order of this court, a message will be sent to the public that a refusal to do so will be tolerated. I impose a fine in the amount of \$15,000 to be paid by Mr. McSevney to the Receiver. I am satisfied that the fine qualifies as a “penalty” under s. 178(1)(a) of the *BIA* and, as such, survives an order discharging Mr. McSevney from bankruptcy.

Disposition

[27] For these reasons:

- a. I order and direct that Mr. McSevney pay to the Receiver the amount of \$15,000 as a penalty in respect of the Order dated April 11, 2022 declaring him to be in contempt of this Court.
- b. I order and declare that the penalty prescribed shall be deemed a “penalty” within the meaning of s. 178 of the *Bankruptcy and Insolvency Act*.

[28] The Receiver seeks an order for payment of costs in the amount of \$5,000. I fix costs of the contempt motion in the amount of \$5,000 to be paid by Mr. McSevney to the Receiver.

[29] I ask counsel for the Receiver to provide me with an approved form of Order to be issued.

Date: September 20, 2022