CITATION: Townsgate Homes Inc. v. Owens Wright LLP, 2023 ONSC 3086
COURT FILE NO.: CV-21-00673163-0000
DATE: 20230525

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: TOWNSGATE HOMES INC. and DELPARK HOMES (SUTTON 25) INC., Applicants

– and –

OWENS WRIGHT LLP, 2088556 ONTARIO INC., GREENVILLA (SUTTON) INVESTMENTS LIMITED, and RSM CANADA LIMITED in its capacity as RECEIVER OF 2088556 ONTARIO INC., and GREENVILLA (SUTTON) INVESTMENTS LIMITED, Respondents

BEFORE: Justice E.M. Morgan

COUNSEL: *Jonathan Roth*, for the Applicants

Robert Choi and Paul Jacoby, for the Respondents, Owens Wright LLP, 2088556 Ontario Inc., and Greenvilla (Sutton) Investments Limited

Anisha Samat, for the Respondent, RSM Canada Limited

HEARD: May 23, 2023

APPLICATION TO SET ASIDE JUDGMENTS

I. The Application

[1] The Applicants seek to set aside two consent judgments obtained by the Respondent, Owens Wright LLP ("Owens Wright"), as against its now insolvent clients, the Respondents, 2088556 Ontario Inc. and Greenvilla (Sutton) Investments Ltd. (together, "Greenvilla"). The Respondent, RSM Canada Ltd. ("RSM"), is receiver of Greenvilla, and supports the relief sought by the Applicant.

[2] The challenge to the judgments is explained succinctly by Applicants' counsel in their factum. The Applicants are creditors of Greenvilla and contend that,

a. First, the consent judgments were obtained by the law firm, Owens Wright LLP, through abuse of the Court's process. In Court File No. CV-21-00669866-0000, Owens Wright failed to serve RSM with its Statement of Claim, despite knowledge of RSM's appointment as Receiver of Greenvilla. When RSM discovered the action and delivered a Notice of Intend to Defend on behalf of Greenvilla, Owens Wright ignored that Notice and proceeded to obtain a 'consent' judgment in the defended action.

b. Second, the consents to judgment were null and void and ineffectual to support judgment pursuant to s. 3 of the *Assignments and Preferences Act* (the 'Act'). The consents to judgment were given by insolvent entities with a transparent intention to prefer one creditor – the law firm – over all others. Virtually every conceivable badge or indicia of a preferential intent is present. Under the Act, a consent to judgment made in these circumstances is void and ineffectual to support any judgment or execution.

II. Procedural background

[3] The consent judgments obtained by Owens Wright were registered as executions against Grenvilla. The Applicants are property developers who purchased lands from Grenvilla. Without removing those executions, the Applicants' plan of subdivision could not be registered as each phase of the subdivision development project was reached.

[4] To avoid costly delay at the expense of home buyers who had made pre-registration purchases in the subdivision, the Applicants were compelled to pay off the two judgments; the first one dated August 9, 2021 was in the amount of $265,550 and the second one dated November 17, 2023 was in the amount of $442,989.32. With interest and costs, the judgments cost the Applicants a total of $739,649.70. That amount was paid to Owens Wright, in trust, while the present Application was pending, without prejudice to the Applicants' position herein.

[5] Accordingly, in addition to a Declaration that the consent judgments are null and void and an Order setting them aside, the Applicants seek return of the $739,649.70 that it paid.

[6] Owens Wright has been counsel to Greenvilla since 2019, when Greenvilla retained the law firm for the trial of a claim brought against it by M & M Homes Inc., the developer of a neighbouring parcel to that of the Applicants. In the *M & M* case, it was claimed that Greenvilla had failed to service the lands that it sold to the plaintiff/developer; in the result, specific performance was awarded against Greenvilla, based in part on the perceived inability of Greenvilla to satisfy a damages award: *M & M Homes Inc. v. 2088556 Ontario Inc.*, 2019 ONSC 5403, aff'd 2022 ONCA 364.

[7] Accordingly, there is little doubt that as counsel, Owens Wright was cognizant of its client's financial decline. The trial judge observed in *M & M*, at para 77:

> There was also evidence that the defendant may be unable to satisfy a damage award. I take into account the nominal consideration of the transfer to CRC and the subsequent substantial mortgaging. I also take into account the evidence of the defendant's planner, Michael Smith, who testified that three to four months would pass in which he would not get paid for his planning work on the defendant's development, and that the defendant has now owed him money for several months. It also took this court's intervention for the defendant to pay costs of $5,000 that it had been ordered to pay forthwith on August 14, 2018.

[8] In fact, the Court intimated that Owens Wright was more than aware of its clients' problems. At paras 87-88 of her trial judgment, Justice Healey went so far as to suggest that the law firm was implicated in covering them up:

> [87] Despite calling evidence to attempt to hoodwink this court into entertaining the notion that the defendant has fulfilled its obligations to provide servicing, Mr. Choi wrote, at para. 56:
>
> > In APS, Schedule 'C', s. 17 ('Section 17'), the closing of the transaction is premised upon the delivery of the written confirmation ('Municipality's Confirmation') from the Municipality's Director of the Engineering and Public Works Department that 'adequate servicing is available for the appropriate development of the Property'. *No such written confirmation has been or can be obtained* [emphasis added].
>
> [88] I find this to be a shocking statement, rendering much of this trial to be a waste of time and resources. It is unconscionable that the defendant and its counsel conducted a charade to elicit evidence that the defendant has satisfied its obligations under the APS, when both clearly knew otherwise.

[9] Later in 2019, Owens Wright did the legal work for Greenvilla's transfer to the Applicants of certain mortgages on which Greenvilla had defaulted. As Applicant's counsel puts it, Owens Wright thereby became aware of the Applicants' significant investment in the development project on the lands purchased from Greenvilla. The law firm also came to understand the extent of the Applicants' efforts to salvage that project.

[10] Owens Wright continued to represent Greenvilla through 2021, despite having to successively sue its client for unpaid fees. On January 18, 2021, Owens Wright obtained judgment against Greenvilla on consent. Just before completion by the Applicants of the first phase of their development project, Owens Wright registered an execution against Greenvilla knowing that the Applicants would have to pay the judgment debt in order to have the execution deleted and their first phase registered.

[11] Indeed, the Applicants did pay the judgment amount to Owens Wright, as they needed to do so in order to continue with their subdivision project. The Applicants contend that after that,

Owens Wright must have realized that it could keep wracking up fees for a non-paying client and have the Applicants – who were themselves creditors of Greenvilla, but who needed to have lands transferred from Greenvilla as each phase of their subdivision project became ready to be registered – pay off any execution.

[12] The record in this Application shows that by May 2021, Greenvilla had defaulted on at least three mortgages and, in addition, had defaulted on repayment of amounts advanced by the Applicants on an unsecured basis. Greenvilla's municipal taxes were in arrears, and it had defaulted to a number of contractors and various consultants. In the midst of all of this, and in the wake of the Applicants' payoff of the execution registered against Greenvilla, Owens Wright wrote to the Applicants by email giving them "fair notice" that there were more claims against Greenvilla (and, therefore, more executions) to come. That, however, was the only "notice" that the Applicants received of further actions by Owens Wright.

[13] On May 12, 2021, Owens Wright, who continued to represent Greenvilla in a number of matters, issued a new Statement of Claim against its client. That claim was for $265,550 plus interest and costs. The Statement of Claim was not served on the Applicants, making the "fair notice" that Owens Wright had warned the Applicants about the previous week distinctly less fair.

[14] Judgment on the May 12, 2021 action was taken out by Owens Wright, with the consent of Greenvilla, on Aug. 9, 2021. Having been given no notice, the Applicants had no opportunity to apply to court to intervene or to raise any objection to the "consent" judgment.

[15] On September 23, 2021, the predictable deterioration finally culminated in Greenvilla became formally insolvent. On that date, RSM wrote to Owens Wright advising that it had been appointed as receiver for Greenvilla. That appointment was done by another of Greenvilla's creditors, the Canadian Mortgage Servicing Corporation, under authority of its own security agreement with Greenvilla. Although counsel for Greenvilla vocally complains about this receivership, its validity has not been put in issue.

[16] Applicants' counsel points out that Greenvilla itself has not been cooperative with RSM as receiver. The Notice of Receivership dated October 4, 2021, indicates that notwithstanding having received the September 23, 2021 letter advising of RSM's appointment, the debtor, Greenvilla, has not responded or provide its books and records to RSM. Applicants' counsel submits that this non-cooperation is a breach of Greenvilla's obligations under section 245(3) of the *Bankruptcy and Insolvency Act*.

[17] Applicants' counsel goes on to submit that this kind of non-cooperation with a receiver acting on behalf of creditors can be considered a badge of fraud on the creditors; and, indeed, that it often is emblematic of a debtor improperly preferring one creditor over the others. Interestingly, given this observation, on September 24, 2021, one day after appointment of RSM as receiver, Owens Wright registered with the sheriff's office its next execution – i.e. the first of the executions in issue in this Application.

[18] On October 6, 2021, after having full notice of the receivership and RSM's appointment, Owens Wright issued a further Statement of Claim against Greenvilla claiming $442,989.32 in fees and disbursements. Owens Wright did not serve RSM with the Statement of Claim, and Greenvilla did not forward the claim to RSM. Instead, Owens Wright moved immediately and without notice for judgment on the claim, with the consent of the defendant and debtor, Greenvilla.

[19] On November 10, 2021, RSM finally learned of the October 6, 2021 Statement of Claim and, as receiver for Greenvilla, sent a Notice of Intent to Defend to Owens Wright. With that Notice was a letter from RSM stating that since the action was to be defended, the motion for judgment, which had already been filed with the court but which had not yet been decided, should be withdrawn.

[20] Owens Wright takes the position that, on a close reading of the Notice of Receivership, RSM might not have had authority to defend the claim on behalf of Greenville. Applicants' reading of the scope of RSM's authority is, of course, different than that, and frankly so is mine. But that debate, even if entirely legitimate, is really beside the point. In fact, as raised by Owens Wright's counsel, it is really a deflection of the point. It does not explain why, and it attempts to draw attention away, from the fact that Owens Wright never responded to RSM and never advised the court that it had been served with a Notice of Intent to Defend.

[21] Instead of withdrawing the motion for judgment, Owens Wright proceeded to take out a consent judgment against Greenvilla, dated November 17, 2021. The court was obviously led to believe that the action was entirely undefended. As it had done previously, the law firm then registered this judgment as an execution against Greenvilla. Predictably, the Applicants were again forced to pay it, along with the August 9, 2021 execution, in order to register the next phase of their subdivision project.

III. Abuse of process

[22] It is the Applicants' view that both consent judgments at issue here – those dated August 9, 2021 and November 17, 2021 – were obtained as an abuse of process. The earlier of the two was pursuant to a claim filed only days after Owens Wright acknowledged to the Applicants that they deserved "fair notice" of further claims against Greenvilla, while the later of the two was taken out purportedly on consent of Greenvilla but in the face of a Notice of Intend to Defend by Greenvilla's receiver who stood in its shoes.

[23] I agree that both of these aggressive maneuvers were abusive of the court's process. The doctrine of abuse of process is a flexible one that covers any number of *sui generis* situations, the common thread being that the circumstances undermine the interests of justice: *Toronto (City) v. C.U.P.E.*, Local 79, [2003] 3 SCR 77, at para 51. As Goudge JA (dissenting) stated in *Canam Enterprises Inc. v. Coles* (2000), 51 OR (3d) 481, at para 55 (CA), rev'd [2002] 3 SCR 30, abuse of process "engages the inherent power of the court to prevent the misuse of its procedure,

in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute."

[24] The Supreme Court of Canada has opined that a consent judgment "is not a judicial determination on the merits of a case but only an agreement elevated to an order on consent": *Rick v. Brandsema*, [2009] 1 SCR 295, at para. 64. It can be more readily varied or set aside than a final judgment on the merits of a case. And while it is true that, as counsel for Owens Wright submits, that the principle of finality points toward deference to consent orders, a court has inherent authority to intervene where necessary in the interests of justice: *Cookish v. Paul Lee Associates Professional Corporation*, 2013 ONCA 278, at para. 56.

[25] This is particularly the case here, where at issue is a failure to give notice of the August 9, 2021 judgment to the one interested party that Owens Wright acknowledged deserved "fair notice", and a failure to heed the Notice of Intent to Defend served by Greenvilla's validly appointed receiver for the November 17, 2021 judgment. These failures effectively undermined any chance for a proper adjudication of those two actions to take place.

[26] Where there exist, as here, grounds to doubt the validity of a consent judgment, it can and should be set aside on that basis alone: *Stoughton Trailers Canada Corp. v. James Expedite Transport Inc*., 2008 ONCA 817, at para 1. In proceeding the way it did, Owens Wright effectively converted what would have been contentious matters into a process that appeared consensual, thereby undermining the court's ability to determine a fair and just result.

[27] . As Applicants' counsel argue, the lack of notice in obtaining the August 9, 2021 judgment and the failure to adhere to the *Rules of Civil Procedure* in obtaining the November 17, 2021 judgment, were not merely technical defects. These maneuvers created circumstances in which to "set aside court orders…[as] it is necessary in the interests of justice to do so": *Clatney v. Quinn Thiele Mineault Grodzki LLP*, 2016 ONCA 377, at para 60.

IV. Fraudulent preference

[28] In addition to the abuse of process argument, Applicants' counsel also submit that the consent judgments in issue here amount to a fraudulent preference. Section 3 of the *Assignments and Preferences Act*, RSO 1990, c. A.33 provides:

> Every confession of judgment, *cognovit actionem* or warrant of attorney to confess judgment given by a person, being at the time in insolvent circumstances or unable to pay his, her or its debts in full or knowing himself, herself or itself to be on the eve of insolvency, voluntarily or by collusion with a creditor with intent thereby to defeat, hinder, delay or prejudice creditors wholly or in part, or to give one or more creditors a preference over other creditors or over any one or more of them, is void as against the creditors of the person giving the same and is ineffectual to support any judgment or execution.

[29] Under this provision, a party's consent to judgment is void and cannot give rise to a judgment or execution if given by a person who is insolvent – i.e. unable to pay its debts in full – or on the eve of insolvency and who has an intent to defeat or prejudice creditors. The statutory section makes it clear that it does not matter whether the consent to judgment is given voluntarily or is entered into in collusion with a creditor. The intent to prefer a creditor is sufficient to render the transaction void, as the overriding purpose of the statute is to protect creditors where a debtor is in or approaching insolvent circumstances: *Stevens v. Hutchens*, 2022 ONCA 771, at para. 18.

[30] In discerning whether there was the requisite intent, a court will look to inferences of preferential or fraudulent intent from the factual circumstances: *Robinson v. Countrywide Factors Ltd*., [1978] 1 SCR 753, at 800. The *indicia* of fraud may include the relationship and history of the parties to the challenged transactions, the timing or structure of the transactions, the transparency and notice given of the transactions, and the existence of any other unusual or self-serving aspects of the transaction: *Montor Business Corporation v. Goldfinger*, 2016 ONCA 406, at para 82. Once an applicant raises one of the badges or *indicia* of fraud, the evidentiary burden shifts to the respondent to disprove that inference: *Percaru v Seliverstova*, 2016 ONCA 610, at para 5.

[31] Courts have found that the effect of the transaction in issue can be evidence of the intent of the parties engineering the transaction: *Bank of Montreal v. Bibi*, 2020 ONSC 2948, at para 24. In the present circumstance, the natural consequence of the two consents to judgment was that there would be a preference shown toward Greenvilla, since the Applicants were in a position that ensured that they had to pay the judgments in full.

[32] Likewise, the relationship between the parties to the impugned transaction can give rise to an inference of an improper preference, as where a transfer or consent judgment is entered into between close family or friends: *Devry Smith Frank LLP v. Chopra*, 2018 ONSC 1303, at para 46, aff'd 2019 ONCA 78. In the present circumstance, the solicitor-client relationship between Owens Wright and Greenvilla makes them non-arm's length transactors: *Mutual Trust Co. v. Stornelli*, 1996 CanLII 8122, at para 57 (SCJ). This, in turn, puts an onus on Owens Wright and Geenvilla to establish that the consent judgment was non-collusive.

[33] Given the circumstances – a law firm continuing to do a high volume of work for a client that it knows cannot pay, and a history of judicial findings about Owens Wright and Greenvilla attempting to "hoodwink the court" and conducting a "charade" – the relationship between the parties here gives rise to a suspicion of collusion. That suspicion has not been rebutted or even addressed by Owens Wright. And to the extent that it is addressed by Greenvilla's affiant, what he says is that Owens Wright "provided valuable legal services, and the Greenvilla Group was the beneficiary of same. There is nothing untoward about the Greenvilla Group recognizing the law firm's entitlement to be paid."

[34] Without meaning to sound jaded, I have no doubt that Greenvilla got what it paid for from Ownes Wright – in fact, it got even more. After all, Owens Wright's accounts were engineered so that it was the Applicants who paid the bill. The Greenvilla affiant's claim of satisfaction with the firm's services does nothing to counter the sense of collusion between a law firm continuing to serve its non-paying commercial client, and then the two of them entering successive consent judgments.

[35] Citing *Peterborough (City) v. Kawartha Native Housing Society Incorporated*, 2010 ONCA 705, counsel for Owens Wright submits that Greenvilla's predominant intent in consenting to judgment was to prevent bankruptcy by keeping its lawyers working. He argues that the intent was not to prefer one creditor over another.

[36] With respect, this argument, coming from the very law firm that is the preferred creditor, is rather self-serving. Owens Wright certainly was preferred over all other creditors in that its bills were paid in full while other creditors went unpaid.

[37] But beside that, one of the consent judgments in question was obtained on the eve of Greenvilla going into receivership, and the other was paid after the receivership was already in place. The judgments had nothing to do with staving off Greenvilla's slide into insolvency; rather, they seem to have been designed to give Greenvilla a place to park its remaining money.

[38] I say this in light of the fact that, as Applicants' counsel has advised, the Applicants were directed by Owens Wright to pay off the two executions by forwarding their funds to Owens Wright "in trust". Much was made of this in the submissions at the hearing before me, with Applicants' counsel asking rhetorically who the funds were being held in trust for. The question is a logical one, since the executions being paid off were for Owens Wright's own invoices, and not for any client.

[39] I cannot guess at the answer to Applicants' counsel's well-founded question. I can only note here that this question went unanswered by counsel for (and from) Owens Wright.

[40] This silence in response to the "in trust" question leaves me perplexed. On one hand, there is the lingering suggestion by the Applicants that Owens Wright has colluded with its client to save the client's money for what might be called a post-rainy day. I make no finding in this regard, but I do observe that the way in which the claims were issued and then hastily converted into consent judgments does indicate that Owens Wright did not want to wait in the queue of creditors in the usual way.

[41] The circumstances of the two consent judgments challenged by the Applicants are replete with the badges of a fraudulent preference. These *indicia* of fraud have not been overcome or countered by Owens Wright.

[42] I conclude, therefore, that the agreements leading to the two consent judgments in issue were therefore entered into contrary to section 3 of the *Assignments and Preferences Act*. As a consequence, the consent judgments of August 9, 2021 and November 17, 2021 are null and void.

V. Disposition

[43] The Applicants shall have a Declaration that the consents to judgment given by Greenvilla in Court File Nos. CV-21-00662196-0000 and CV-21-00669866-0000 are null and void, along with a Declaration that the consent judgments of August 9, 2021 and November 17, 2021 are null and void as an abuse of process and as violating section 3 of the *Assignment and Preferences Act*. There shall also be an Order setting aside the two judgments.

[44] In addition, there shall be an Order that Owens Wright forthwith pay the Applicants the sum of $739,649.70, plus interest to date of payment.

[45] The parties may make written submissions on costs. I would ask Applicants' counsel to email my assistant with short submissions within two weeks of today, and for Owens Wright's counsel to email my assistant with equally short submissions within two weeks thereafter.

Date: May 25, 2023

Morgan J.