CITATION: Kandlproperties Inc. v. George Street Law, et al., 2023 ONSC 1495
COURT FILE NO.: CV-23-00000104-0000
DATE: 20230303

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: Kandlproperties Inc., Plaintiff

AND

George Street Law Group LLP, Summer Harb, Li Cheng, Robert Wood also known as Bob Wood, 1272 Gramercy Park Holdings Inc. and Big Bang Consulting Inc., Defendants

BEFORE: Justice Spencer Nicholson

COUNSEL: A. Gabriele for the Plaintiff, Moving Party

J.D. Sobel for the Defendants 1272 Gramercy Park Holdings and Li Cheng, Responding Parties

A. Melfi for the Defendants Summer Harb and George Street Law Group LLP, Responding Parties

J. Bennett for the Defendant, Robert Wood, Responding Party

C. Hubley for the Defendant, Big Bang Consulting Inc., Responding Party

HEARD: February 17, 2023

REASONS

NICHOLSON J.:

[1] On April 21, 2022, I granted summary judgment to Kandlproperties Inc. as against Big Bang Consulting Inc., with respect to an aborted real estate transaction arising out of an agreement of purchase and sale (*Kandlproperties v. Big Bang*, 2022 ONSC 2419). I declined to order specific performance, but instead granted judgment in Kandlproperties' favour in the amount of $120,920.00 plus pre- and post-judgment interest. The parties agreed to costs and judgment was taken out in the total amount of $145,461.27 plus ongoing post-judgment interest.

[2] Almost a year later, by happenstance, the within motion appeared on my docket in regular Friday civil motions court.

[3] On the original summary judgment motion, Kandlproperties had asked the court to force Big Bang to sell the property so that Kandlproperties could recover on its judgment. I declined to do so, noting that this was an enforcement issue, and that Big Bang may have other means to satisfy the judgment. However, I did order that the certificate of pending litigation that had been in place should be discharged thirty days following the expiration of the time for appealing my decision. It was my stated intention that Kandlproperties would have the requisite time to "protect its judgment". It was also foreseeable that there could be an appeal, including by Kandlproperties with respect to quantum of damages or my refusal to order specific performance.

[4] The appeal period expired on May 22, 2022, a Sunday. No appeal was taken from my decision by either party.

[5] Kandlproperties caused a writ of seizure and sale to be issued and filed in the County of Middlesex, effective as of June 3, 2022. It was filed by Kandlproperties on June 1, 2022. In its written material and oral argument, Kandlproperties indicates that it could not have a writ issued until the expiration of the period in which an appeal could be taken. It provided no authority for that proposition and the *Rules* nor the *Execution Act*, R.S.O. 1990, c. E. 24 seem to contain that restriction. In fact, Rule 63.03 (3) would suggest that a writ of seizure and sale may be issued even if an appeal is taken, although not acted upon.

[6] On July 26, 2022, the CPL was discharged. Kandlproperties took steps to try to enforce the writ but was advised by the Sheriff's office that no steps could be taken to sell the property within 6 months of the writ's issuance (see Rule 60.07 (18) of the *Rules of Civil Procedure*).

[7] On September 7, 2022, Big Bang transferred the property that had been the subject of the dispute to 1272 Gramercy Park Holdings ("Gramercy") for $1,092,000.00. Despite the writ, no portion of these funds was paid to Kandlproperties. Kandlproperties nor its counsel was advised of the transfer.

[8] Kandlproperties learned of the transfer on January 9, 2023. It also learned that solicitor, Robert Wood, had filed an Application General with the Land Registry Office to have the notice of writ removed from title to the property.

[9] As it turns out, Big Bang and Gramercy had entered into an agreement of purchase and sale ("APS") in respect of the property on May 12, 2022 (the final accepted APS was delivered back to Gramercy on May 19, 2022). The defendant, Li Cheng, entered into the APS to purchase the property in trust for a corporation to be formed later. Gramercy was that corporation. There is evidence that this was an arm's length transaction.

[10] To complete the picture, I identify the other parties to the current litigation. George Street Law Group acted as legal counsel for Gramercy in the transfer of the property. Summer Harb is an associate lawyer with George Street Law Group. Robert Wood is a lawyer and acted as legal counsel for Big Bang in the transfer of the property. They took no position

on the motion. Cheng, an officer and director of Gramercy, is also an associate lawyer practicing with George Street Law Group. Big Bang made no submissions on the motion.

[11] In the within motion, Kandlproperties seeks an interim Order:

(i) precluding Gramercy, or any related parties or representatives, from transferring or encumbering the property;
(ii) declaring that Kandlproperties continues to maintain a valid and binding writ of seizure and sale over the property; and/or
(iii) permitting Kandlproperties to register an Application for Restrictions Based on Court Order on title to the property.

[12] Kandlproperties filed an undertaking with respect to damages on this motion.

[13] Following oral arguments, I reserved my decision. I did place a temporary order in place to preserve the *status quo* pending the release of this decision.

Analysis:

[14] I begin by noting that it is of no importance to me that this judgment emanated from myself, as opposed to any of my colleagues. I am simply required to apply the law as I interpret it.

[15] It is crucial to note that Kandlproperties was very careful not to allege that a fraudulent conveyance had taken place, including upon direct questioning by me. There was a hint by plaintiff's counsel that perhaps the defendants had backdated the APS, but in the evidence there is an email bearing the May 19, 2022 date and ostensibly enclosing the signed APS. I also have affidavit evidence from Cheng that this was an arm's length transaction. Thus, I approach this motion on the basis that Gramercy is a good faith purchaser of the property who acquired its interest upon good consideration.

[16] I also note that Gramercy did have notice of Kandlproperties' claim. It admits to being aware of the CPL (which was clearly there to be seen), at the time Cheng entered into the APS. However, I accept, for the purpose of this motion, that Cheng had been advised by Big Bang that the CPL would be lifted in July 2022 in accordance with my judgment and was thus, not a barrier to the sale ultimately closing.

[17] During argument, extensive reference was made to the case of *Dhatt v. Beer*. In *Dhatt v. Beer*, the plaintiff successfully sued the defendant for specific performance with respect to the aborted sale of a residential home. An appeal from that decision was ultimately dismissed.

[18] I note that there are several reported decisions dealing with that case, but for the purpose of this motion, *Dhatt v. Beer*, 2021 ONSC 770 (CanLII), authored by F.L. Myers J., is the decision relied upon. In that case, the former lawyers for the defendants, who had been removed as counsel prior to trial, had successfully sued the defendants for unpaid legal fees

and then registered seven writs of seizure and sale against title to the subject house. The lawyers sought to have the sheriff enforce their writ by selling the property during the trial. The trial judge (C. Brown J.) stayed the sheriff's sale pending the release of her trial decision. Before Myers J., the lawyers moved for an order setting aside the decree of specific performance. The plaintiffs moved for an order declaring that all writs of execution filed after the date of their APS did not bind the land.

[19] In granting the plaintiffs' cross-motion, Myers J. analyzed the law in this area in considerable detail. He referred to several decisions of the Ontario Court of Appeal, including *Robinson v. Moffatt*, 1916 CanLII 576 (ON CA), [1916] O.J. No. 107 (Ont. C.A.), *J.A.R. Leaseholds Ltd. v. Tormet Ltd. and Kaye*, 1964 CanLII 219 (ON CA), *Kiminiak v. Anderson*, 1929 CanLII 367 (ON CA) and *Mercado Capital Corporation v. Qureshi*, 2018 ONCA 711 (CanLII). It was Myers J.'s conclusion that those cases collectively stood for the proposition that once there is a valid contract for sale, the vendor becomes in equity a trustee for the purchaser of the property and the beneficial ownership passes to the purchaser, so long as the transaction subsequently closes or a decree of specific performance is later made by the court. Any writ of seizure and sale issued subsequent to the execution of the contract does not bind the purchaser's equitable interest in the land. This is true whether or not the purchaser has paid the full amount of the purchase price at the time of the formation of the contract or at closing (see: *Mercado, supra*, at para. 31).

[20] Myers J. stated as follows, at para. 80:

> [80] …on the signing of an agreement of purchase and sale, the vendor conveys equitable title and makes herself amenable to the rules of equity and a decree of specific performance. The vendor no longer has the right to bind the land in a way to interfere with the purchaser's entitlement to specific performance if later found appropriate by the court. Hence, subsequent writs of execution that bind the vendor's interest, cannot attach to the purchaser's equitable title or right to specific performance once the agreement of purchase and sale is signed.

[21] The analysis conducted by Myers J. in *Dhatt v. Beer* with respect to this issue appears consistent with the appellate authorities that he cited. In the within case, Kandlproperties, as execution creditor, could only claim an interest which Big Bang had in the land. I reject the argument that Kandlproperties had any interest in the land until the appeal period expired. My judgment was effective as of the date of its release and provided only that Kandlproperties was entitled to damages and therefore, they did not have an equitable interest in the property. An appeal would have simply stayed my judgment. As the APS had been entered into prior to the issuance of the writ of seizure and sale, Big Bang had divested itself of the equitable interest in the land. As the sale of the property did subsequently close, Gramercy became the equitable owner as of the date that the APS was entered into. The writ of seizure and sale cannot attach to Gramercy's equitable interest in the land in the circumstances.

[22] I note that Myers J.'s decision in *Dhatt v. Beer* does not appear to have been judicially considered in any reported cases.

[23] However, as part of its responding materials, Gramercy attached a paper authored by Jeffrey Lem, Director of Titles for the Province of Ontario, dated April 19, 2021, wherein he addresses the decision of Myers J. in *Dhatt v. Beer*. Mr. Lem is statutorily responsible for administering the *Land Titles Act*, R.S.O. 1990, c. L. 5. I must be careful in the weight that this document is given. Mr. Lem has obvious expertise. Yet, it is the non-delegable duty of the court to interpret and apply the law. Indeed, Mr. Lem expressed in his letter to counsel for Kandlproperties that he ought not to substitute his thoughts on the matter for those of the court.

[24] In essence, Mr. Lem, in response to *Dhatt v. Beer*, points out that the Teraview electronic conveyancing system in effect for Ontario cannot identify when an APS has been entered into and thus, the system cannot determine whether a writ of execution was filed prior to or after an APS was finalized. Thus, the Land Registry Office currently accepts transfers subject to writs of execution followed by an Application General filed to amend the registry under the *Land Titles Act*, that requests the deletion of the post-contract writ. This would only occur if the transaction "closed" and thus, the purchaser's equitable interest in fact crystalized and is not subject to the writ.

[25] I am accordingly cautioned by the responding parties not to up-end the Land Titles system in Ontario. Clearly, Myer J.'s analysis in *Dhatt v. Beer* has been accepted as the current state of the law by the Land Registry Office.

[26] Kandlproperties relies upon the comments of Lauwers J. (as he then was) in *Lograsso v. Kuchar*, [2009] O.J. No. 713 (ONSC), at paras. 12-13, wherein he described the importance of writs of execution in ensuring that successful litigants recover on their hard-earned judgments. The importance of writs of execution in securing payment for successful lawsuits is not questioned. Here, however, Kandlproperties did not avail itself of this manner of securing its judgment in time. Part of the lengthy quote relied upon by Kandlproperties referenced by Lauwers J. states as follows:

> …
> Executions must be searched *prior* to acquiring an interest in land to ensure that title is clear of executions. … (emphasis added)

[27] A search at the time that this APS was agreed upon would not have turned up the writ of seizure and sale. It had not yet been filed. At that time, Gramercy acquired an interest in the subject property. *Lograsso* does not assist the moving party. S.136 (2) of the *Land Titles Act* makes clear that "[n]o registered land is bound by any writ of execution, renewal or certificate of lien mentioned in subsection (1) until the sheriff has complied with that subsection".

[28] In my Reasons for judgment, I declined to grant specific performance. I also declined to force the sale of the subject property so that Kandlproperties could be assured of receiving its judgment. I note that Kandlproperties could have appealed my decision and did not. Kandlproperties now, in effect, is asking this court to effectively do both of those things. I agree with the submissions of Gramercy that Kandlproperties has the ability to pursue other steps to enforce its judgment which are available under Rule 60 and ought not to be able to bind Gramercy, which *appears* to be an innocent third-party purchaser.

[29] The test for an injunction is set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.). Three criteria must be met by the moving party, as follows:

(a) From a preliminary assessment of the merits of the case, there is a serious question to be tried;
(b) Irreparable harm will result if the relief is not granted; and
(c) Which of the parties would suffer greater harm from the granting or refusing of the injunction pending a decision on the merits.

[30] In *R. v. Canadian Broadcasting Corp*., [2018] 1 S.C.R. 196 (S.C.C.), the tests were slightly modified, as follows:

(a) The applicant must demonstrate a strong *prima facie* case that it will succeed at trial. This entails a strong likelihood on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice;
(b) The party seeking the injunction would, unless the injunction is granted, suffer irreparable harm that is not susceptible or would be difficult to be compensated in damages; and
(c) The party seeking the injunction "must show that the balance of convenience favours granting the injunction".

[31] In my view, the moving party cannot meet either (a) or (c) of this test. As I described above, the writ of seizure and sale was not placed on the subject property until after it had been sold pursuant to the APS between Big Bang and Gramercy and thus, I cannot conclude that Kandlproperties has a strong *prima facie* case given the decision by Myers J. in *Dhatt v. Beer*, which I choose to follow. Alternatively, I cannot conclude that there is a serious issue to be tried regarding priority in the circumstances of this case.

[32] In any event, I have no evidence that Kandlproperties has even attempted other methods of collecting its judgment debt as against Big Bang. Gramercy, as a third-party purchaser in good faith and for good consideration, ought not to have its newly acquired property encumbered by a judgment creditor with whom it has no relationship and to whom it owes no money. The balance of convenience favours Gramercy.

[33] None of this is to say that Kandlproperties cannot enforce its judgment against Big Bang through any of the means available to it under Rule 60. Indeed, the sale of the property

generated over a $1 million. It may be that certain respondents', or even non-parties', actions in respect of those proceeds are actionable, although I expressly do not make any findings in that regard. As the judge who awarded judgment, it was my intention that Kandlproperties recover what I determined it was entitled to. However, it is my view that Gramercy, as a seemingly innocent purchaser for value, ought not to be dragged into the fray by having its property tied up by a writ that was not in place at the time it purchased the property.

[34] Kandlproperties' motion is dismissed and the temporary order that I issued on February 17, 2023 is hereby lifted.

[35] None of my comments should be taken as approval or disapproval for the actions of any of the parties. Any alleged impropriety is expressly for another day.

[36] If the parties cannot agree on costs of this motion, any responding party seeking costs may deliver written submission not to exceed three pages in length, double-spaced, to my attention through the trial coordinator by March 31, 2023. The moving party may deliver responding costs submissions within the same parameters by April 11, 2023.

[37] For guidance in perhaps resolving the issue of costs, without pre-determining who may recover costs, or the quantum of those costs, I simply point out that only Gramercy filed responding material.

"Justice S. Nicholson"
Justice Spencer Nicholson

Date: March 3, 2023