

CITATION: 2642322 Ont. Inc. vs. Rexell Dev. Inc., 2023 ONSC 1979

COURT FILE NO.: CV-21-1091

DATE: 20230328

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**APPLICATION UNDER 14.05(3)(d), (e) and (h) of the *Rules of Civil Procedure*,  
R.R.O. 1990, Reg. 194**

<b>BETWEEN:</b>	)	
	)	
	)	
2642322 ONTARIO INC.	)	M. Ross and A. Kapur, for the
Applicant	)	Applicant
	)	
-and-	)	
	)	
REXELL DEVELOPMENTS INC.	)	A. Lefler, for the Respondent
Respondent	)	
	)	
	)	HEARD virtually: January 16, 2023

2023 ONSC 1979 (CanLII)

**REASONS FOR DECISION RE APPLICATION  
TO DETERMINE ACCOUNTS RENDERED ON POWER OF SALE**

**WOODLEY, J.**

**OVERVIEW**

1. The Applicant 264322 ONTARIO INC. (“the Applicant”) was the third mortgagee on a parcel of vacant land in Ajax (“the property”) sold by power of sale.
2. The Respondent REXELL DEVELOPMENT INC. (“Rexell”) was the first mortgagee by vendor take back mortgage and the party that sold the property pursuant to power of sale.

3. The Applicant challenges 20 charges and fees totaling approximately \$200,000.00 paid to the Respondent Rexell on the basis that the fees/charges are illegal, unenforceable, unsubstantiated, and otherwise constitute fines/penalties contrary to s. 8 of the *Interest Act*.

4. The Respondent Rexell submits that all charges are appropriate and properly payable under the mortgage excepting two charges, paid in error, totaling \$59,113.75.

5. There are no other parties to the proceeding. The second mortgagee was paid and it is agreed that fees/charges charged that are disallowed are properly payable to the Applicant as third mortgagee.

## ISSUES

6. There are two related issues which need to be determined:

- a. Are any of the impugned fees or charges illegal, unenforceable, unsubstantiated, or constitute fines/penalties contrary to s. 8 of the *Interest Act* such that they should be disallowed and paid to the Applicant?
- b. Should Rexell's legal accounts paid from the proceeds of sale be assessed as part of the within application, or be referred to assessment on notice to the Respondent's lawyers?

## FACTS

7. On August 8, 2018, Rexell sold a parcel of vacant land in Ajax, Ontario to Harkins Ridge Developments Inc. ("Harkins") and granted a vendor-take-back first mortgage in the amount of \$4,650,000.00, registered on title on closing.

8. On April 1, 2020, Harkins failed to make an interest payment to Rexell on the first

mortgage and the mortgage went into default.

9. On April 9, 2020, the Applicant registered a third mortgage, in the principal amount of \$890,547.00, on title to the property following the unrectified default.
10. On May 15, 2020, Rexell served a Notice of Sale, in accordance with the *Mortgages Act of Ontario* on all parties.
11. On September 11, 2020, Rexell served a Statement of Claim for the funds due under the first mortgage and seeking the sale of the property.
12. On December 16, 2020, Rexell sold the property under power of sale to Ajax Meadows Ltd. for \$6,000,000.00.
13. Prior to closing, Rexell's lawyer, Forgiione Law Firm, produced a mortgage statement claiming that \$4,764,243.60 was due to Rexell under the first mortgage.
14. On December 16, 2020, an updated mortgage statement was produced claiming that \$5,053,088.18.12 was due to Rexell under the first mortgage.
15. On December 23, 2020, Rexell produced a further updated mortgage statement and trust ledger that increased the amount payable to Rexell on account of legal fees incurred since the sale.
16. On April 15, 2021, Rexell produced a "Power of Sale Mortgage Accounting" claiming that \$5,086,337.93 was due to Rexell under the first mortgage.
17. The difference claimed to be due to Rexell between the December 16, 2020 mortgage discharge statement and the April 15, 2021 Accounting is \$322,094.33.
18. The Applicant claims that the sum of \$200,000 has been improperly charged by the Respondent in fees/charges and seeks to have these amounts disallowed and paid to the

Applicant.

19. The Respondent concedes that the Accounting erroneously charged three months interest totaling \$58,125.00 which should be credited to the Applicant. Otherwise, the Respondent states that the Accounting is accurate and the monies properly payable as noted therein.

20. The Accounting as adjusted by Rexell's above noted concession entitles the Applicant to recover \$73,598.73 on account of their registered third mortgage.

21. The question remains whether further amounts are due to the Applicant and whether the legal fees paid by Rexell that appear in the Accounting should be fixed as part of this hearing or sent for assessment.

## **THE LAW**

22. Where there are concerns about the amount claimed to discharge a mortgage, Rule 14.05(3)(e) of the *Rules of Civil Procedure* provides that an applicant may seek a judicial determination of *all* disputed items and provide evidence in support of its position. The judge will then determine the amount owing.

23. A mortgage is a contract, and any fee or charge must be rooted in either an actual expense or something provided for in the mortgage. Charges provided for in the mortgage must be genuine pre-estimates of their losses.

## **Assessment of Power of Sale Accounting**

24. With respect to administrative costs, while a mortgagee is generally entitled to be indemnified for costs incurred to respond to default, the costs must be reasonable and properly incurred. There must be some evidentiary basis to determine the costs were incurred at the amounts claimed. Absent proof, costs are subsumed in the ordinary course of the mortgagee's business.

25. In *BMMB Investments Limited v. Naimian*, 2020 ONSC 7999, at para. 36, Myers J. held that there must be evidence supporting all amounts the lender seeks to pass on to its borrower:

Claims for costs reimbursement in mortgage enforcement are susceptible to abuse. Service providers who know that their lender clients will pass on their invoices to their borrowers may be incentivized to charge above-market rates [...] It does no injustice to any plaintiff to require it to adduce evidence to support disbursements for which it claims reimbursement. As no evidence is adduced by the plaintiff to support any of the costs for which it claims reimbursement, none is allowed.

26. In *P.A.R.C.E.L. Inc. v. Acquaviva*, 2015 ONCA 331 at para. 96, Cronk, J.A., found that absence evidence that the charges reflect *real* costs legitimately incurred for the debt recovery, administrative charges merely impose an additional penalty or fine.

### **Three Months Interest Charge**

27. Section 17 of the *Mortgages Act* does not permit the mortgagee to add an additional three-month penalty. This section allows a defaulting mortgagor to repay the entire principal with three months' notice to the lender or pay three months' interest in lieu of notice, despite any term of the mortgage providing otherwise.

28. Section 17 does not allow a mortgagee to levy a penalty on a mortgagor who has defaulted. It is not a basis for a claim by a mortgagee unless first the mortgagor seeks a payout and charging a three-month interest penalty for default on a mortgage is contrary to s. 8 of the *Interest Act*.

### **Assessment of Legal Fees**

29. Section 43(2) of the *Mortgages Act* requires that if there is a dispute as to the "costs payable" *by the person or on whose behalf such payment is either made or tendered*, such costs, *shall be ...assessed* by an assessment officer.

30. Section 43(4) provides that a “mortgagee’s costs of and incidental to the exercise of a power of sale, whether under this Part or otherwise, *may*, without an order, be assessed by an assessment officer *at the instance of any person interested*.”

31. The requirement found in s. 43 (2) of the *Act* that requires that costs be assessed applies only to the party “by or on whose behalf such payment is either made or tendered”. In the present case, the party “by or on whose behalf such payment is either made or tendered” is limited to Rexell.

32. Where there is a dispute regarding the payment of costs involving “*any other interested party*” as per section 43(4), costs *may* be assessed. In the present case, the Applicant as third mortgagee is “*any other interested party*”. Therefore, the Applicant *may* but is not *required* to seek assessment of Rexell’s legal fees.

33. In the present case, the Applicant does *not* seek assessment of the Applicant’s legal fees – instead, they seek a determination of whether the fees/charges included in the s. 27 Accounting are properly charged to the sale proceeds.

34. The Applicant commenced the within application pursuant to Rule 14.03 (e) and is entitled to seek a declaration regarding a charge on land, including the *settling of charges*.

35. Unproven and/or unsubstantiated charges are consistently disallowed by the Court as offending s. 8 of the *Interest Act*. Legal fees are no exception. Absent evidence that the charges reflect *real* costs, any charges, including legal fees, may be reduced, or disallowed on an application under Rule 14.05 (3) (e) for the settling of charges.

36. Considering all the circumstances, I find that legal fees are included in the term “settling of charges” and further that it best serves the interests of justice that the settling of charges shall include all legal fees, which shall be determined as part of the within application.

## **THE ANALYSIS**

37. The analysis below tracks the Objections, Responses, and Determination of Objections, relating to Rexell's notice of sale and mortgage accounting.

**Notice of Sale: Objections 1 – 9**

**Objection 1: \$19,400 for 2 ½ months Default**

38. On May 15, 2020, which is the date of the notice of sale, the mortgage had been in default for 1 ½ months and charged for 2 ½ months, which the Applicant submits results in an overcharge of \$19,400.

39. The Respondent submits that the mortgage was paid monthly, not in advance. The interest payment due April 1, 2020 was the accrued interest for the month of March 2020 which went unpaid. The mortgage went into default on April 1, 2020 when the interest went unpaid. Interest continued to be unpaid until May 15, 2020, the date of the Notice of Sale. The Respondent submits that while the mortgage had been in default for 1 ½ months, as at May 15, 2020 there was 2 ½ months interest owing at this date.

40. I accept the Respondent's explanation for this charge. **Objection Dismissed.**

**Objection 2: \$350 for Tax Information Request**

41. In response to the Applicant's request for evidence that Rexell requested tax information, Rexell provided an email from their lawyer, Forgione Law Firm (whose legal fees are separately charged under the mortgage), relating to a request made prior to default. The mortgagee seeks payment of \$350 under "Other Default Charges" in the "Additional Provisions" section of the mortgage. There is no provision for this charge "Other Default Charges" and no evidence that any costs were incurred by Rexell. **Objection Upheld (-\$350).**

**Objection 3: \$350 for Statement Administration Fee**

42. This objection is conceded by the Respondent. The mortgage does not contain a provision for a \$350 “Statement Admin Fee”. **Objection Upheld (-\$350).**

**Objection 4: \$2,250 for 4 Default Letters**

43. The Respondent produced four letters – two of which were repeats – from their lawyer Forgione Law Firm relating to the default. The Respondent claims that the letters “are in fact legal fees billed by Forgione Law... of \$450.00 plus HST for a letter. The Respondent claims that these are Rexell’s “legal costs incidental to the power of sale proceedings”. The Respondent claims that the Applicant is required to seek an assessment pursuant to s. 43(3) of the *Mortgages Act* to obtain an assessment of the legal fees.

44. As set out above, I disagree that an assessment is required. A letter of default does not equate to a legal fee of \$450 plus HST per letter. As no invoice or legal account was produced to support the charge and as legal charges incidental to the power of sale proceedings are fixed elsewhere, this charge is disallowed. **Objection Upheld (-\$2,250).**

**Objection 5: \$58,125 for 3 Months Interest s. 17 *Mortgages Act***

45. The law applicable to this objection is set out above. The amount was conceded to be owed by Rexell at the hearing. **Objection upheld (-\$58,125).**

**Objection 6: \$650 for admin/legal fee to obtain property tax certificate**

46. Rexell’s lawyer requested the tax certificate (not Rexell) and the charge is objected to being paid as forming part of the legal services provided by Forgione Law Firm separately charged in the Accounting. This submission is accepted, and as legal charges incidental to the power of sale proceedings are fixed elsewhere, this charge is disallowed. **Objection upheld (-\$650).**



**Objection 7: \$2,475 for legal fees for preparation and delivery of Notice Under Sale**

47. Rexell confirmed that the \$2,475 claimed for legal fees for preparation and delivery of the Notice of Sale was not paid prior to May 15, 2020, and instead was added to the principal owing on the mortgage. No separate legal account was rendered evidencing this charge. The Notice of Sale is a two-page standard document that would have taken a short time to prepare, serve and file. Considering the length and complexity of the document, the appropriate legal fees for preparation of the Notice of Sale are fixed at \$1000.00 plus HST.

**Objection Partially Upheld (-\$1,475).**

**Objection 8: \$697.80 for Paid Disbursements**

48. When asked for particulars of the disbursements and costs charged together with evidence of payment, Rexell provided the *same* invoice as was presented for Objection 6 which invoice does not include *disbursements* charged of \$697.80. Instead, the invoice charged \$148.50 for “couriers, deliveries, registered mail, and travel”. This disbursement was disallowed for Objection 6 but is allowed as per the stated invoice for charges totaling \$148.40. **Objection Partially Upheld (\$697.80 - \$148.50 = -\$549.30).**

**Objection 9: \$880.49 for HST Paid on Disbursements**

38. The Respondent advises that this fee is HST on those amounts claimed on Objection 2, 3, 4, 6, 7, and 8. The total amount approved as being properly paid for these objections is \$1,148.40 with corresponding HST due of \$149.29. **Objection Partially Upheld (-\$731.20).**

**Mortgage Accounting re Power of Sale**

**Objection 10: \$734.50 Admin Fee for 1<sup>st</sup> Appraisal + \$734.50 Admin Fee for 2<sup>nd</sup> Appraisal**

49. Rexell was asked to provide full particulars of the work claimed for admin fees and to produce all communications with each of the two appraisal companies. The first charge was supported by a four one-line email exchange between the law firm's articling student and the appraiser and communications with appraisers also appear in the law firm dockets. Rexell claims these charges are permitted pursuant to the "Default Administration Fee" "Additional Provisions" of the mortgage which do not specifically name a "Chargee Admin Fee". Rexell claims that despite the email from Forgione Law firm and the corresponding dockets, that Rexell via Rocco Forgione, spoke with "both appraisers to discuss the scope of work, cost and current status of the development project on the Property" and produced email correspondence to prove that Rocco Forgione (Rexall) corresponded to provide instructions, management, and facilitate payment. The Applicant claims that these fees are captured under the "legal fees payable" and Rexell is not entitled to charge twice. I find that the evidence submitted is sufficient to support the fee charged for both appraisals. **Objection Dismissed.**

**Objection 11: \$46,500 Default Administration Fee as per Charge (August 14, 2020)**

50. In response to queries as to the particulars of this fee, Rexell claimed the fee was partly for directing appraisers (multiple maybe ½ dozen) but provided no evidence of communication with appraisers except as summarized above re Objection 10.

51. As the land sold was vacant – it follows that there were no rents to collect or ongoing maintenance at the property to justify the fee. It is likely, however, that there was some administration involved relating to the default not caught by the legal fees separately billed, including meeting with and instructing the lawyers on the power of sale. Given that the land was vacant and did not need daily management or administration but would require enquiries and payment into taxes, insurance, and other issues, and ongoing consultation with lawyers, a fee of \$6,500.00 is appropriate. **Objection Partially Upheld (- \$40,000).**

**Objection 12: \$6,045.00 HST on Default Administration Fee**

52. This charge is properly reduced to match the fee allowed to \$845 (HST on \$6,500).  
**Objection Partially Upheld (- \$5,200).**

**Objection 13: \$734 (\$650 + HST) Administration Fee re Property Taxes**

53. Rexell advised that this charge was for making the property tax payments. This fee has already been credited to Rexell as part of payment noted at Objection 11. **Objection Upheld (-\$734).**

**Objection 14: \$19,775 (\$17,500 + HST) Private Receiver Compensation**

54. Rocco Forgione, of Rexell, claimed he appointed himself as “receiver” but was not able to identify work done as receiver following the date of his alleged appointment and the only evidence of his appointment is an email from Rexell’s lawyer, Aldo Forgione to Rocco Forgione, stating that he “should appoint” himself as receiver. This fee is *not* justified and represents a penalty. **Objection Upheld (-\$19,775).**

**Objection 15: \$508.50 (\$450 + HST) Mortgage Information Statement Fee: Sept. 5, 2020**

55. The Mortgage Information Statement was requested by the Second Mortgagee on August 23, 2020, and the email requesting the statement while not proof that the statement was produced, is sufficient in the circumstances to support the charge. **Objection Dismissed.**

**Objection 16: \$4,977.10 Legal Account re Statement of Claim: Sept. 11, 2020**

56. Rexell confirmed that there are no invoices for the claimed disbursement – in that an account was *not* delivered although the amount was paid out of the funds on closing.

57. The docket provided list 8.5 hours for drafting and .6 hours for discussing service of the standard claim. The Applicant proposes that \$500 is a reasonable fee for drafting the claim. Rexall proposes that the amount paid is the appropriate fee for drafting the claim. In the complete absence of a *rendered* account, I am of the view that \$1,500.00 plus HST and disbursements (\$439.51) for a total of \$2,134.51 is an appropriate fee for drafting the claim.

**Objection Partially Upheld (-\$2,842.59).**

**Objection 17: \$15,182.57 Mortgage Enforcement and Receivership**

58. As previously noted, apart from one email suggesting that Rocco Forgione *would* be appointed as a receiver, no other evidence was produced that any further steps were taken to appoint him as the receiver.

59. No documents were produced to support the charge except the email between the Forgione brothers and an email from an articling student dated November 2, 2020.

60. Evidence that the charges were properly incurred and properly charged to the power of sale proceeds received is required. Absent proof, the charges are disallowed. **Objection Upheld (-\$15,182.57).**

**Objection 18: \$8,660.32 Legal Account re Sale and Mortgage Transaction: Dec. 17, 2020**

61. No legal account was produced to support the charge. The Applicant suggests that the account must be for the period following November 30, 2020, and notes there are no dockets to support the fee.

62. Rexell submits that the charge is “Rexell’s legal costs incidental to the power of sale” and the appropriate manner to determine legal costs incidental to the power of sale is to conduct an assessment pursuant to s. 43(3) of the *Mortgages Act*.

63. As noted earlier, I disagree that the Applicant is required to proceed to an assessment to determine Rexell's legal accounts between Rexell and their law firm, Forgione Law Firm.

64. The appropriate manner to determine fees charged on a power of sale by an accounting between stakeholders is by application to the Court pursuant to Rule 14.05(3)(e) of the *Rules of Civil Procedure*.

65. The question before me is not whether the legal fees are justified via the lawyer and their client – the question is whether the charges have been proven incidental to the power of sale as between Rexell and the Applicant (the first and third mortgage holders).

66. Rexell did not produce a legal account associated with the charge and stated the fee is reasonable and within the “fee schedule” provided by the Working Group on Lawyers and Real Estate which suggested a fee of \$10,626.00 on a \$6,000,000 sale.

67. As some legal fees were already charged and approved as adjusted and noted above, I find that the fees sought *minus* the fees already approved and credited is a reasonable fee.

68. The fees sought are \$8,660.32. The legal fees already approved as charged to the notice of sale proceedings set out above are \$2,500.00 plus HST totaling \$2,825.00. Therefore the balance of legal fees due as claimed and adjusted by the fees already charged is \$5,835.32 ( $\$8,660.32 - \$2,825.00 = \$5,835.32$ ). **Objection Partially Upheld (-\$2,825.00).**

#### **Objection 19: \$3,955.00 Appointment of Receiver and Authorizations**

69. The legal account was attached to the Respondent's Factum and not otherwise provided to the Applicant. The Respondent claims that the account is for “post closing matters including the s. 27 accounting”.

70. Section 27 of the *Mortgages Act* provides that the money arising from the sale shall be applied (1) for all expenses incidental to the sale; (2) in discharge of all interest and costs due in respect of the mortgage under which the sale was made; (3) in discharge of all the principal

money then due in respect of the mortgage; (4) in payment of the amounts due to the subsequent encumbrancers according to their priorities; and (5) not applicable.

71. Having reviewed the dockets provided for the work, I find that the “post closing matters” charged and docketed are *not* incident to the sale but incident to the dispute regarding charges between the first and third mortgagees.

72. It is my view that matters docketed relating to the preparation of the s. 27 accounts and following, are part of this application and not fees incident to the sale. For this reason, the charge cannot stand. **Objection Upheld (-\$3,955.).**

**Objection 20: \$988.75 Legal Account Dec. 18/20 – Jan. 11/21**


73. The Respondents confirmed that no legal account was issued for this amount. The fees charged are reflected in the dockets as related to the within application. These charges are not payable under the mortgage in accordance with s. 27 but are determinable as part of this application. **Objection Upheld (-\$988.75.).**

**DISPOSITION OF APPLICATION**

74. For the foregoing reasons, the application is determined as follows:

- a. The Respondent Rexell shall pay the sum of \$155,983.41 to the Applicants as amounts improperly charged under the Power of Sale and Mortgage Accounting; and
- b. Subject to any offers to settle exchanged between the parties, the Applicants are the successful parties and shall be entitled to their costs of the application.

75. The parties are encouraged to settle the issue of costs. However, if costs are not agreed upon, the Applicants shall file costs submissions with a Bill of Costs and any Offers exchanged attached, no longer than 3 pages (plus attachments) and shall serve and file the submissions with my judicial assistant directed to my attention within 30 days. The Respondent shall file his response with a Bill of Costs attached, no longer than 3 pages (plus attachments) and shall serve and file the submissions with my judicial assistant directed to my attention within 40 days. Any reply by the applicants is limited to 1 page to be served and filed with my judicial assistant directed to my attention within 45 days.



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Justice S. J. Woodley

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**BETWEEN:**

2642322 ONTARIO INC

*Applicant*

**AND:**

REXELL DEVELOPMENTS INC.

***Respondent***

**BEFORE:** *Justice Susan J. Woodley*

**COUNSEL:**

M. Ross and A. Kapur,, *For the Applicant*

A. Lefler, *For the Respondent*

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**REASONS FOR DECISION**

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*The Honourable S.J. Woodley*

**DATE RELEASED: March 28, 2023**