IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Domain Mortgage Corp. v. Movassaghi,* 2023 BCSC 1973

Date: 20231109
Docket: H230472
Registry: Vancouver

Between:

Domain Mortgage Corp.

Petitioner

And

Ataollah Movassaghi, Zarin-Taj Mir-Hadi, also known as Naisan Mirhadi, Spark Mortgage Ltd., all Tenants or Occupiers of the Subject Land and Premises

Respondents

Before: Master Vos

Reasons for Judgment

(In Chambers)

Counsel for the Petitioner:	J.J.R. Schachter
Counsel for the Respondents, Ataollah Movassaghi and Zarin-Taj Mir-Hadi:	K. Tutt
Counsel for the respondent, Spark Mortgage Ltd.:	H.L. Oreck
Place and Date of Hearing:	Vancouver, B.C. September 14, 2023
Place and Date of Judgment:	Vancouver, B.C. November 9, 2023

Introduction

[1] This a foreclosure proceeding. Three matters were scheduled for hearing today:

1) The petition filed by Domain Mortgage Corp. ("Domain"). It seeks an *order nisi* of foreclosure and associated relief. Domain's Fourth Amended Statement of Accounting and Relief Sought indicates the amount required to redeem the Domain Mortgage as of September 14, 2023 was $7,359,744.89. The *order nisi* sought by Domain would provide a redemption period of three months.

2) A notice of application filed on behalf of the respondents, Ataollah Movassaghi and Zarin-Taj Mir-Hadi, also known as Naisan Mirhadi (the "Borrowers"), seeking an order that would convert Domain's petition into an action and refer the action to the trial list, or, alternatively, transfer the petition to the trial list. They also seek an order that would cancel the Certificate of Pending Litigation Domain registered on title to the Property.

3) A notice of application filed on behalf the respondent, Spark Mortgage Ltd. ("Spark Mortgage"). It seeks an order that would grant Spark Mortgage immediate conduct of sale of the Property.

Background

[2] The petitioner, Domain, is a company that administers privately funded mortgages. To protect their investors, Domain has a team of professionals that monitor borrowers' compliance with their loan covenants.

[3] The respondent, Ataollah Movassaghi, is the registered owner of a sub-penthouse condominium in the Coal Harbour area of Vancouver (the "Property").

[4] On December 6, 2022, Domain entered into a commitment letter with Ataollah Movassaghi as mortgagor (the "Mortgagor") and the respondent, Zarin-Taj Mir-Hadi, also known as Naisan Mirhadi, as covenantor (the "Covenantor") (the Mortgagor and

the Covenantor will be collectively referred to as the "Borrowers"). The commitment letter provided for a loan to the Borrowers in the amount of $7 million, with a 15-month term. The loan was funded in December 2022. The loan was secured by a mortgage against the Property (the "Domain Mortgage").

[5] The Domain Mortgage was registered at the Vancouver Land Title Office. It is the second ranked mortgage registered against the Property. The first mortgage is held by the Bank of Montreal.

[6] The respondent, Spark Mortgage, holds the third mortgage registered against the Property.

[7] The Borrowers are in default under the terms of the Domain Mortgage. They failed to make payments required under the mortgage and specifically failed to make the interest payment due on June 1, 2023.

[8] The terms of the Domain Mortgage provide that upon default the whole of the monies secured by the mortgage and remaining unpaid became due and payable at the option of Domain. Domain exercised that option. In a letter dated June 5, 2023, Domain demanded that the Borrowers make payment of the amounts then owing under the mortgage. On June 21, 2023, Domain filed the petition to commence this foreclosure proceeding.

Analysis

[9] The threshold issue to be resolved is whether this petition proceeding should be transferred to the trial list. The Borrowers seek an order that would convert the petition into an action and transfer it to the trial list. Domain and Spark Mortgage oppose that application.

[10] The Borrowers' application is pursuant to Rule 16-1(18) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 (the "Rules"). It provides:

> (18) Without limiting the court's right under Rule 22-1 (7)(d) to transfer the proceeding referred to in this rule to the trial list, the court may, whether or not on the application of a party, apply any other of these Supreme Court Civil Rules to a proceeding referred to in this rule.

[11] The leading case on the application of Rule 16-1(18) is *Cepuran v. Carleton*, 2022 BCCA 76 (“Cepuran”). Prior to *Cepuran*, the prevailing test was as set out in *British Columbia (Milk Marketing Board) v. Saputo Products Canada G.P. / Saputo Produits Laitiers Canada S.E.N.C.*, 2017 BCCA 247 [*Saputo*], where the court considered itself bound by previous decisions that held that a petition must be referred to trial where there is a *bona fide* triable issue (*Cepuran*, para. 143). In *Cepuran* a five justice panel of the court of appeal concluded that the test identified in Saputo no longer applies (para. 168). The court indicated that if a petition proceeding raises triable issues, a judge has discretion to refer the matter to trial or allow it to continue as a petition proceeding, with hybrid procedures. The court provided the following comments on the approach to be adopted:

> [159] The modern approach to civil procedure, as encouraged in *Hryniak*, is to allow parties and the trial courts to tailor the pre-trial and trial procedures to a given case, in the interests of proportionality and access to justice, while preserving the court’s ability to fairly determine a case on the merits. In my view, R. 16-1(18) and R. 22-1(4) work to reflect this modern approach within a petition proceeding.
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> [160] To summarize, I am of the view that a judge hearing a petition proceeding that raises triable issues is not required to refer the matter to trial. The judge has discretion to do so or to use hybrid procedures within the petition proceeding itself to assist in determining the issues, pursuant to R. 16-1(18) and R. 22-1(4). For example, the judge may decide that some limited discovery of documents or cross-examination on affidavits will provide an opportunity to investigate or challenge the triable issue sufficiently to allow it to be fairly determined by the court within the petition proceeding, without the need to convert the proceeding to an action and refer it to trial.

[12] The Borrowers rely on *HGE Administrative Services Ltd. v. Perrick*, 2011 BCCA 308 at paras. 18-19 and other case authorities that predate *Cepuran*. Those cases applied the test in *Saputo*, which no longer applies.

[13] The Borrowers dispute the amount owing under the Domain Mortgage. The mortgage includes a term the Borrowers say is unusual for a mortgage. The term provides that the Borrowers are liable to pay Domain an administration fee charged at $500 per hour or any portion thereof for each occasion Domain performed work in connection with the loan security that would be outside the normal course of administration of the loan (term 18 in the schedule to the mortgage). Domain

charged fees to the Borrowers pursuant to this clause; for example, when it made inquiries with respect to whether the Borrowers paid their strata fees on time. The Borrowers also question the interest calculations Domain provided with respect to the amount owing on the mortgage.

[14] The Borrowers submit that disputes about legal fees, administration fees and penalties charged by Domain raise triable issues that should be referred to trial. They have also indicated that they want the proceeding to be referred to the trial list so they can advance claims of negligent misrepresentation, intentional infliction of mental distress, and claims for harassment and damage to reputation.

[15] Domain submits that the claims based on allegations of negligent misrepresentation, intentional infliction of mental distress, and the tort claims for harassment and damage to reputation are independent causes of action, rather than defences to the enforceability of the Domain Mortgage, and therefore are not a basis on which to convert the foreclosure proceeding to an action (Domain's application response filed September 5, 2023, para. 32). Domain relies on *Royal Bank of Canada v. Rizkalla*, 1984 CanLII 396 [*Rizkalla*] at paras. 8-12. In that case, the petitioner/bank applied for an *order nisi* of foreclosure and related orders. The mortgagors alleged that the bank had acted in an improvident manner. The court had to determine if the matter should be referred to the trial list, because of the issues the mortgagors wished to pursue against the bank (para. 1). The bank argued that the mortgagors' complaints did not provide a defence to the claim on the mortgage and were in the nature of a counterclaim, rather than a true defence (para. 5). The court distinguished between a defence and a counterclaim, stating:

> [9] A defence is a contention that the plaintiff's claim is not established. It adopts one or more of the following positions:
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> (i) an objection on grounds of jurisdiction;
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> (ii) a denial of the plaintiff's allegations (traverse);
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> (iii) a submission that if the plaintiff's allegations are true they disclose no cause of action (demurrer); and
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> (iv) a submission that if the plaintiff's allegations are true there are facts which provide a legal justification for the defendant's conduct (confession and avoidance).

> A counterclaim, on the other hand, is an independent action raised by a defendant, which, because of the identity of the parties, can conveniently be tried with the plaintiff's claim. While a counterclaim frequently (although not necessarily) arises from the same events as the plaintiff's claim, and while it may result in reduction of the plaintiff's claim, it is in principle an independent action.

[16] The court observed that the "defences" raised by the mortgagors reduced, in essence, to a contention that the amount they owed would have been less if the bank had not taken steps of which they complained. This allegation was found to be an independent claim for damages, rather than a defence (para. 11). The court concluded that the issues raised by the mortgagors did not disclose a defence to the petitioner's claim and were not sufficient grounds to grant an order that would refer the action to the trial list (para. 12).

[17] The reasoning in *Rizkalla* is applicable here. The claims the Borrowers want to advance are based on negligent misrepresentation, intentional infliction of mental distress, and tort claims for harassment and damage to reputation. Those claims are not a defence to the foreclosure, but rather are independent claims for damages. They cannot be the basis for an order that would refer this proceeding to the trial list.

[18] It is common ground that Domain and the Borrowers are parties to the Domain Mortgage and that the mortgage is properly registered against the title to the Property. The Borrowers' response to petition does not raise triable issues with respect to the foundational issue of there being a valid mortgage or the fact that the mortgage is in default. The Borrowers' complaint is the calculation of the amount owing under the Domain Mortgage.

[19] Applying the approach set out in *Cepuran*, it is apparent that this case is well-suited for the use of hybrid procedures within a petition proceeding. The basis for the proceeding is not in issue: there is a mortgage that is in default. The matter in dispute is the amount owing on the mortgage. The interests of proportionality and access to justice favour continuing the litigation as a petition proceeding, with the ability to integrate pre-hearing procedures, rather than push the case to a full trial. Pre-hearing procedures can be adopted to assist in resolving the issues raised by

the Borrowers. Given the matters in issue, the court's ability to fairly determine the disputed issues on their merits should be achieved through hybrid procedures.

[20] The matter to be determined in order for this foreclosure proceeding to progress is the amount the Borrowers would have to pay to redeem the Domain Mortgage. The parties are encouraged to try to resolve that issue. However, if the parties cannot agree on the amount the Borrowers would need to pay to redeem the mortgage, the parties are directed to attend for an accounting before a registrar, pursuant to Rule 18-1(1), to determine that amount.

[21] Foreclosure practice in British Columbia has been guided by Chief Justice McEachern's article, "On Foreclosure Practice", (1983), 41 The Advocate 583. Proceeding to a hearing before a registrar to determine the amount required to redeem the mortgage would be consistent with the procedure suggested at pages 586-7 of that article:

> In the absence of such material, or if any question arises with respect to any part of the interest calculation, then there must usually be an accounting by the District Registrar. Notice of the date of the accounting should, in most cases, be given to the respondents although personal service is not required, particularly if there has been no appearance.
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> On the application for the Order Nisi, or on the accounting, it is necessary to determine the amount required to redeem. The preferred practice is to declare the amount owing at the date of the hearing (or the accounting), together with interest to the date of payment at the rate set forth in the mortgage (which must be described in the order) plus such costs as may be directed with liberty to any party to apply for a further accounting.
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> Any order directing an accounting by the District Registrar should include a direction that the amount owing at the date of the accounting be determined and certified, that the amount required to redeem is this amount plus interest to the date of payment at the rate set out, plus costs as ordered, and with the same provision for liberty to apply for a further accounting.
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> ...

And at p. 592:

> The Registrar should be directed to determine the amount owing at the date of the accounting and the amount (or amounts, as above) required to redeem. The Order should, where judgment is sought, direct that there be judgment for the first amount determined by the Registrar, when this amount is certified by him, against specified parties who are liable.

[22] The registrar would be directed to determine the amount required to redeem the Domain Mortgage, including the principal remaining, accrued interest, administration fees and any other charges owing under the terms of the Domain Mortgage, and the rate of interest to be applied up to the date of payment.

[23] If the parties require additional information with respect to the determination of the amount owing, including matters relating to whether the administration fees charged were authorized under the Domain Mortgage, both may conduct examinations for discovery of the opposite party and avail themselves of document discovery relevant to the accounting issues.

[24] The applications at Part 1, paras. 2 and 3 of the Borrowers August 28, 2023, notice of application, seeking alternative orders that would result in this proceeding being referred to the trial list, are dismissed. This matter will continue as a petition proceeding.

[25] The Borrowers' notice of application also seeks an order that would cancel the Certificate of Pending Litigation ("CPL") Domain registered on title to the Property. The Borrowers allege they are experiencing hardship and inconvenience as a result of the registration of the CPL. During the hearing, counsel for the Borrowers argued that the Borrowers believe that the registration of the CPL has negatively impacted on their ability to sell the Property. However, they have not provided convincing evidence that this is the case. No other basis for hardship was been established on behalf of the Borrowers.

[26] Domain's September 5, 2023 application response provides the following submissions with respect to the Borrowers' application to cancel the CPL:

> 36. The Borrowers conflate the considerations to be weighed when discharging a certificate of pending litigation in ordinary civil proceedings with those applicable in the context of a foreclosure. In a foreclosure proceeding, the certificate of pending litigation ensures that other creditors or persons with interest in the subject lands have notice that the subject property is in foreclosure. For that reason, Rule 21-7(4) of the *Supreme Court Civil Rules* provides as follows:
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> *Person filing interest after certificate of pending litigation*

> (4) If a petitioner under this rule registers a certificate of pending litigation in respect of the proceeding against the mortgaged property, a person who subsequently registers or files in a land title office an interest, right or claim in or to the mortgaged property
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> (a) need not be served with the petition,
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> (b) is bound by an order made in the proceeding, and
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> (c) may file a response to petition in the proceeding.

[27] Domain's application response then refers to *First National Financial GP Corp. v. Sirotka*, 2011 BCSC 340, para. 11, where the court commented that the filing of a CPL in a foreclosure proceeding is "the line in the sand". Any person claiming an interest in the land or a registered charge obtained before the line is drawn will be added as a party and given notice of the proceeding, whereas any interest created after the line is drawn would take subject to the rights found to reside in the petitioner in consequence of a judgment in the proceeding.

[28] The CPL registered by Domain serves a legitimate purpose. The Borrowers bear the onus to establish that the hardship or inconvenience they allege as a result of the registration of the CPL justifies it being cancelled. They have failed to provide evidence that meets that onus. The application at Part 1, para. 1 of the Borrowers' August 28, 2023 notice of application is dismissed.

[29] The notice of application filed by Spark Mortgage seeks an order that it have immediate exclusive conduct of sale of the Property. However, Spark Mortgage does not have an application before the court seeking its own *order nisi*. As Domain's application for *order nisi* is being adjourned, Spark Mortgage's application for conduct of sale of the Property should also be adjourned. As McEachern C.J.'s article points out (at p. 589), granting an order for conduct of sale without an *order nisi* is equivalent to an *order nisi* without a redemption period. That would not be appropriate in the circumstances of this case. The Borrowers' lawyer has indicated that the Property is currently listed for sale and the Borrowers want an opportunity to redeem the Domain Mortgage. Spark Mortgage's application for conduct of sale of the Property is adjourned generally, with a direction that it is not to be heard until an application for *order nisi* of foreclosure proceeds.

Result

[30] The notice of application filed on behalf of the Borrowers on August 28, 2023 will result in the following orders. The application at Part 1, para 1 seeks an order that would cancel the CPL Domain registered against the property. That application is dismissed. The applications at Part 1, paras 2 and 3 seek orders that would convert Domain's June 21, 2023 petition into an action and refer the action to the trial list, or, alternatively, refer the petition to the trial list. Those applications are dismissed. During the hearing, counsel for the Borrowers advised that the application at Part 1, para. 4 was adjourned generally.

[31] The hearing of Domain's petition filed on June 21, 2023 is adjourned generally, with a direction that it not proceed until the amount required to redeem the Domain Mortgage is agreed on by the parties or is determined at an accounting before the registrar. Hybrid procedures are available to the parties in advance of the accounting, including examinations for discovery and discovery of documents relevant to accounting issues.

[32] The notice of application filed on behalf the respondent, Spark Mortgage, on September 8, 2023, seeking an order for immediate exclusive conduct of sale of the Property is adjourned generally, with a direction that it is not to be heard until an application for *order nisi* proceeds.

[33] The Borrowers and Domain have each claimed special costs with respect to the Borrowers application for an order that would refer this action to the trial list. The Borrowers argue that Domain's conduct has been reprehensible and has caused additional legal expense to be incurred by the Borrowers. However, there is no convincing evidence to support the allegation of reprehensible conduct. Domain seeks special costs because the Borrowers have alleged misconduct by Domain. Domain says those allegations are unfounded and suggests they were designed to delay these proceedings (Domain's application response, paras. 42, 43). Although this complaint could not be assessed on this application, it must be noted that during the hearing counsel for the Borrowers did allege theories about Domain's motives that were speculative and unsupported by evidence. The Borrowers are reminded

that submissions made with respect to an application are to be based on proper evidence and should not include speculative theories.

[34] Domain successfully opposed applications the Borrowers proceeded on. They are awarded costs of that application in any event of the cause as against the Borrowers. Those costs are summarily assessed at $985.60 (assessed at scale B under Appendix B of the Rules; 3 units under Item 21 plus 5 units under Item 22 plus applicable taxes). Spark Mortgage will bear its own costs with respect to that application.

[35] The costs with respect to the petition and Spark Mortgage's application are to be determined when those matters are heard on their merits.

"Master Vos"