

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Canadian Western Bank v. 1164429 BC Ltd.*,
2023 BCSC 1952

Date: 20231006
Docket: S226656
Registry: Vancouver

Between:

Canadian Western Bank and 1415643 BC Ltd.

Petitioners

And:

1164429 BC Ltd., 1152299 BC Ltd., 1168556 BC Ltd., Topley Investment Limited, Angela Yan Hong Guo aka Yanhong Guo and Aaron Wenbao Zhang aka Wenbao Zhang

Respondents

Before: Master Robertson

Oral Reasons for Judgment

In Chambers

Counsel for 1415643 BC Ltd.:

A.P. Hochhauser

Counsel for A. Zhang and 1168556 BC Ltd.:

C. Martin

No other appearances

Place and Date of Hearing:

Vancouver, BC
October 5, 2023

Place and Date of Judgment:

Vancouver, BC
October 6, 2023

[1] **THE COURT:** When I issued these oral reasons for judgment, I reserved the right to edit them as to grammar, background and citations should a transcript be ordered. I have made such edits, without affecting the substance or final disposition.

[2] The application before the Court today is for an order absolute in these foreclosure proceedings.

Litigation Status

[3] By way of the background in terms of the foreclosure proceedings itself, they are relatively brief.

[4] In particular, the petition was filed August 18, 2022. Order Nisi was pronounced in favour of Canadian Western Bank, the first named petitioner who held the first mortgage with respect to this matter, on October 27, 2022 with a six-month redemption period which expired on April 27, 2022.

[5] There was no redemption and as such, on May 9, 2023, Canadian Western Bank was granted an order for conduct of sale.

[6] Thereafter on May 23, 2023, 1415643 BC Ltd. (“141”), the second named petitioner and applicant seeking an order absolute today, took an assignment of Canadian Western Bank’s mortgage and, pursuant to an assignment agreement, was substituted by order pronounced June 29, 2023 as petitioner for the purposes of the *in rem* remedies under the mortgage. It is on that basis that 141 is seeking order absolute today.

Background

[7] In terms of the background to the dealings under the mortgage itself, as a result of the order nisi, there is no remaining defence to the validity of the mortgage, or amount secured thereunder. However, some background is necessary and relevant to this application.

[8] The issues most relevant to this application relates to a shareholder dispute between Ms. Guo and her related companies (collectively, the “Guo Parties”), and

Mr. Zhang and his related companies and investors that he solicited for the purpose of investing in this real estate project (collectively, the “Zhang Parties”).

[9] In 2018, the respondent 1168556 BC Ltd. (the “Owner Co.”) obtained title to the subject property, with the Zhang Parties and Guo Parties each being shareholders, however with 1168556 BC Ltd., a company owned by Mr. Zhang, and 1152299 BC Ltd. a company owned Ms. Guo, having voting shares, with each having 50%.

[10] The evidence of Mr. Zhang is that the purchase was undertaken after Ms. Guo approached him with respect to the opportunity to acquire development property in the Vancouver area. At that time, he was a licensed realtor, and the property was identified as a potential development opportunity. The property was purchased for \$21.5 million.

[11] Mr. Zhang deposes that the Owner Co. was incorporated for the purpose of the purchase and pursuant to the discussions between Ms. Guo and himself, in terms of what the individuals' contributions to the property would be, it was well understood. Specifically, Mr. Zhang deposes, that after the acquisition costs he would have no further ability to contribute financially. While it was expected that he would be able to assist with, for example, obtaining the investors, which he did, and possibly dealing with rezoning issues with respect to the development potential, he would not be able to pay any of the holding costs for the property, including the mortgages and/or the development costs, and as such, it is his evidence that it was the express agreement between the parties that those would be paid by Ms. Guo herself, or the Guo Parties.

[12] The purchase price for the property, and some initial development costs, were paid by way of personal investment of approximately \$12.1 million, and just over \$11 million through the mortgage obtained from Canadian Western Bank.

[13] Conflicts arose quickly after closing. In particular, as the parties began to pursue the development options, including obtaining advice that an application

needed to be made with respect to rezoning with the City of Vancouver, the application fee for which was approximately \$57,000. Ms. Guo started to look to Mr. Zhang for some of the financial contributions with respect to these costs, and Mr. Zhang relied on what he alleges was that original agreement. He says he could not afford or was not willing to, it is not entirely clear, put in any further financial investment and he relied upon that agreement accordingly.

[14] Matters became more fraught as the holding costs for the Canadian Western Bank mortgage continued to be incurred, with Ms. Guo deposing that she was paying approximately \$25,000 per month on the mortgage, for interest only. Although, there was residential tenancy agreements with respect to the dwellings that were on the property at the time that continued to be rented out during this predevelopment period.

[15] Eventually, Canadian Western Bank became concerned with the servicing of or risk to its mortgage and, in January 2020 it demanded that either the loan's principal be reduced, or that there be a posting of a significant interest reserve account.

[16] Mr. Zhang deposes that, at that time, he told Ms. Guo that given that he was not willing to put in further money, and that it might be appropriate to sell the property. However, Ms. Guo was resistant to that idea. As such, her solution was that she would fund a \$4 million mortgage to the Owner Co. in order to provide the requested interest reserve to Canadian Western Bank. That was done and another company of hers, Topley Investments Limited ("Topley"), has funded that amount, thus bringing down the Canadian Western Bank balance, but constituting a second mortgage on title in the amount of \$4 million. At the time, Mr. Zhang deposes that he made it clear that the property should be sold. He deposes that Ms. Guo refused to sell.

[17] Thereafter in 2021 issues again arose with respect to Canadian Western Bank, with the mortgage coming up for renewal. Given the financial issues that had been plaguing the parties in terms of who was contributing what, a deadlock arose

again with Mr. Zhang again indicating that he would like to see the property marketed and sold as he would not be contributing anything further financially.

[18] A mortgage renewal was entered into on July 21, 2021, with a lower principal amount being due, \$7.5 million based on a paydown of some \$4 million which was made through an advance of Ms. Guo's company, Topley who was granted a second mortgage by the Owner Co. in that principal amount.

[19] As part of that renewal process, a drive-by appraisal was obtained by Canadian Western Bank, which appraised the property at \$10.535 million.

[20] In addition, as a result of the deadlock between the parties, Ms. Guo filed a petition for relief, which counsel described as being a means to resolve the deadlock whereby either party would buy out the other party's shares of the company so that they could deal with the company as they saw fit. The specific relief sought by Ms. Guo was to have Mr. Zhang removed as a director, however, in her affidavit filed in support of that petition Ms. Guo did say that she would be open to a purchase of her shares by Mr. Zhang if he could do it.

[21] Thereafter, various discussions occurred between the parties with respect to how the company ought to be operated given the obvious deadlock in that Mr. Zhang wanted the property sold to a third party, and Ms. Guo wanted to retain it, either with the financial assistance of Mr. Zhang or on the basis that he no longer be part of the company if he was not going to provide that financial assistance.

[22] I am advised that there were without prejudice communications occurring during that time, which are not before the Court today given their nature.

[23] This petition was then filed on August 18, 2022 and, as noted, order nisi pronounced on October 27, 2022, with the substitution of 141 as petitioner in respect of the *in rem* rights under the mortgage being by order pronounced June 29, 2023.

[24] The Zhang Parties here say that throughout this period of time when the foreclosure proceeding was being pursued, and throughout the pre-foreclosure

period, Ms. Guo represented to them that she would take responsibility for the financial matters and was not willing to consider a sale to a third party. Once the Canadian Western Bank foreclosure proceedings were commenced, she then represented that she would participate in a sales process.

[25] In particular, on October 24, 2022, Ms. Guo advised the Zhang Parties that she would be filing an application for conduct of sale herself. An order was then pronounced on March 9, 2023 granting Ms. Guo and Topley exclusive conduct of sale. However, the evidence is that she took no steps to market the property under that order. In addition, Mr. Zhang deposes that she simply failed to update the Zhang Parties of any steps she was taking, or not taking, such as by advising that she was not going to market the property notwithstanding the conduct of sale order in her favour.

[26] Instead, they point out, sometime in May 2023, Ms. Guo made the decision to pay out Canadian Western Bank in exchange for the assignment of the mortgage rights. Although the amount paid by her for the assignment is not necessarily relevant, the evidence before the Court today is that Ms. Guo paid out the full balance that was owing, as well as some transactional fees with respect to that mortgage and assignment, that being over \$8 million. Ms. Guo deposes, as things currently stand that she, or companies to which she is the principal, has invested into the property the mortgage amounts of over \$12 million in addition to the amounts personally invested by her, which I believe was about \$5.7 million, meaning that she is invested in this property in an amount close to \$18 million.

[27] The Zhang Parties are of the view that Ms. Guo is in breach of her duties to the Owner Co. in her dealings, including with respect to the assignment.

[28] On September 15, 2023, after receipt of this application for an order absolute, the Zhang Parties filed an oppression remedy action by petition. In that action, they are seeking the usual oppressive remedies, including with respect to the property, an order that the lands be transferred back to the Owner Co., to them, Ms. Guo or

any company to which she is affiliated, if the lands are ultimately transferred to any other entity, which would include 141.

[29] 141's position is that:

- a) 141 stands in the shoes of Canadian Western Bank by virtue of the assignment of the *in rem* rights, including those under the order nisi;
- b) The redemption period has expired, with no redemption occurring; and
- c) Under the terms of the order nisi, as assigned, 141 is entitled to an order absolute given that there has been no redemption, with no reasonable prospect of 141 being able to redeem, even if the redemption period was extended.

[30] The position of the Zhang Parties is that Ms. Guo should not be able to obtain title of this property through the foreclosure process without having first marketed the property for sale. In essence, they are saying that the potential for abuse to allow a participant in a shareholders dispute to essentially do an end run around those disputes by using the foreclosure process is significant and should be considered by this Court as a reason to deny an order absolute. In addition, they argue that any application for an order absolute should be deferred pending the outcome of the shareholder oppression action that has just been filed.

Legal Framework

[31] The entitlement to an order absolute is one that is a fundamental principles of foreclosure proceedings. In short, if the order nisi grants a period of time for a redemption to occur, and if none of the respondents redeem in that period, the petitioner is entitled to seek an order absolute. That is specifically set out in the order nisi itself, in this case at para. 16:

16. If the Lands and Property not be redeemed, the petitioner shall be at liberty to apply for an order absolute of foreclosure and upon pronouncement of the order absolute of foreclosure the respondents and all persons claiming by, through or under them shall henceforth stand absolutely debarred and foreclosed of and from all right, title, interest and

equity of redemption in and to the Lands and Property and all monies paid under the Security shall become the property of the petitioner free from any right of the respondents and that thereupon the petitioner shall recover vacant possession of the Lands and Property.

[32] Because of that general principle that allows for the order absolute to be obtained upon the expiry of the redemption period, the general test when opposing an order absolute is the same test as is for the extension of a redemption period, that being as set out in *Nord Real Estate Developments Ltd. v. Suncoast Projects (2004) Ltd.*, 2008 BCSC 879:

[3] The necessary and sufficient condition for an order extending a redemption period, was confirmed in *Regional Trust Company v. Palmer et al* (1984), 1984 CanLII 291 (BC CA), 57 B.C.L.R. 143 (B.C.C.A.), at page 144, namely:

... there must be a reasonable prospect of payment, and that the property must have sufficient value by way of security for the amount outstanding.

...

[27] The tests in *Regional Trust Company*, referred to above, are mandatory. There "must" be a reasonable prospect of payment, and, the property "must" have sufficient value by way of security for the amount outstanding.

[28] The onus is on the applicant to satisfy those tests.

[29] In the circumstances of this case, a "reasonable prospect of payment" connotes, on a continuum, a "probable" prospect of payment, not a "possible" prospect of payment.

[33] In short, there must not only be sufficient security such that the mortgage is not at risk, but there must be a reasonable, that meaning probable, prospect of repayment. The onus is on the applicant to satisfy both elements of those tests.

[34] That the onus to establish sufficient security and a reasonable, or probable, prospect or redemption, and that both of those tests are mandatory, was confirmed in *Imor Capital Corp. v. Bullet Enterprises Ltd.*, 2014 BCSC 2540: At para. 14 the court noted that while there was a possibility to obtain financing, that did not satisfy the burden that rested before the party, noting that there was no evidence of either a pending sale or a potential refinancing on which evidence of a sufficient probability of redemption could be established.

[35] Here there does not appear to be any evidence before the court to meet either of the tests.

[36] As to the first part of the test, there is approximately just over \$12 million that is owed on the mortgages. The exact numbers were not put before the court. However, the appraisal evidence before the court is that the value of the lands is somewhere between \$10.3 million (using the Canadian Western Bank appraisal on renewal), or \$13 million on a direct comparison approach, although with the final opinion in the appraisal dated April 24, 2023 being that it is \$12.1 million. With holding costs during a marketing process, and realtor fees, it seems likely that there is a shortfall to the mortgagees. Although, I do note that only the mortgage balance of the applicant is relevant in terms of the security risk, and that mortgage balance is approximately \$8 million.

[37] In any event, the Zhang Parties are not here today providing any other evidence as to value. In order to establish any reasonable prospect of redemption, they would need to establish a value that would enable all mortgage security to be paid out, that being over \$12 million.

[38] The Zhang Parties argue that the court should not determine the issue as to value based on appraisals. Rather, they argue that the ability to show value should be determined based on an exposure to the market.

[39] While I agree that the best indicator of value is what a ready and willing buyer will pay for it, there is no such rule that the court cannot rely on the opinions of appraisers for applications such as this. I also note that in advancing this argument, notably the Zhang Parties did not present any contrary evidence, such as a realtor's opinion as to a marketing strategy and possible market interest.

[40] Regardless, there is no rule that a property be marketed for sale in order for a party to successfully obtain an order absolute.

[41] As I noted, the order absolute is a remedy that arises as a result of a failure to be able to redeem, not a failure in being able to sell at a price that will payout the mortgages.

[42] The Zhang Parties also argue that the application should be deferred until the shareholder litigation is resolved. The question, then, is whether or not the ongoing shareholder litigation somehow changes the second part of the test, namely the obligation to establish that there is a “probable” prospect of redemption.

[43] In short, is there a probability that, as a result of the shareholder litigation that is ongoing, the Zhang Parties will be able to somehow redeem the mortgage.

[44] In this respect, it is hard to conceive of a scenario where the almost certainly uncertain outcome of litigation would establish a probable prospect of redemption as required under the second part of the test.

[45] In this respect, I commented in a *Royal Bank of Canada v. Kirkpatrick*, 2022 BCSC 811, at para. 14 as to litigation being perhaps one of the most more uncertain elements of anything that is put before a court as to a probability of outcome. I noted:

Litigation may or may not resolve itself soon or within two years given that the notice of civil claim has just been filed and no trial date set yet. There is no way to judge at this point the likely outcome.

[46] The same can be said of the outcome of the oppression action that has just now been filed by the Zhang Parties. It is not clear on the record before the court, nor would the court be a position to say, what the chances of success on the shareholder litigation will be.

[47] However, I note that this is a court of equity, with foreclosure principles relying on such equitable principles. As such, notwithstanding the two-part test to extend a redemption period, it may also be appropriate to ask whether or not there is an equitable reason why 141 ought not be entitled to an order absolute at this time

given the history of the parties, their dealings with the property and the mortgage, and the ongoing shareholder litigation.

[48] Given that the two-part test in this context is well settled, if that test cannot be met a mortgagor would need evidence of exceptional equitable factors for the court to consider a deferral of an order absolute on such a basis given that a mortgagee is, as noted, entitled to take title to the property once a redemption period expires. That is the nature of the bargain made by a mortgagor when it grants the mortgage.

[49] In *Toronto-Dominion Bank v. Gao*, 2018 BCCA 268, one of the respondents there was seeking an ownership interest in the property, based upon an allegation that they had a beneficial interest and that the owners held the property in trust for her. As such, she sought a redetermination period longer than the standard six-month period on the basis that she wished the litigation in which her trust claim was being advanced to be determined, with a 15-day trial having been scheduled to commence nine months after the order nisi was heard. When the typical six-month redemption period was granted, she appealed that decision.

[50] At para. 25, the court referred to the various cases where litigation has been considered as a reason to grant an extension of a redemption period. While the court noted that those cases were distinguishable, it acknowledged that such an extension may be appropriate where there is a cross claim against the mortgagee “which could invalidate security or reduce the amounts payable.” Here, as noted, there is no dispute as to the obligations under the mortgages, i.e. the debts to 141 and Topley. To the extent there are remaining issues in dispute, they are not a defence to the mortgage claims. The extent to which those claims may give rise to set-off was not fully argued, although I do note that the parties involved in the shareholder/corporate litigation were not all parties to the original mortgage.

[51] A case that is more factually on point is *High Wave Management Ltd. v. Englishman River Falls RV Park Ltd.*, 2017 BCSC 353, where the court considered specifically whether or not shareholder litigation ought to be a basis on which a redemption period should be extended, having regard to the test, as I have set out.

[52] The Zhang Parties seeks to distinguish this case given that many of the self-help remedies that could have been taken by the aggrieved party in that case were either frustrated by his own actions, or he resiled from them in a way that made him the author of his own misfortune. In other words, he did not come to the court with clean hands when he was seeking equity to intervene to allow him to have a further time for redemption given the ongoing shareholder dispute, given his inability to meet the test for such an extension.

[53] The court described the issue as follows:

[57] Simply put, he believes the joint venture agreement should prevent High Wave from enforcing its security by way of order absolute because he was owed duties by Ms. Wenngatz in her capacity as a director of Englishman River and as a joint venturer in that business, and that his share of the equity in the business will be lost if order absolute is granted.

[58] In order to be entitled to any significant equity in the Lands, it seems to me he will need to defend the second mortgage which he complains was not fully advanced. That issue is not properly before me on this application, and I only mention it because the existence of the second mortgage is a significant threat to the availability of equity in the property.

[59] In my view, Mr. Wanstall has failed to meet the burden to establish that there is a reasonable likelihood of payment of the mortgage, now or within a reasonable time, notwithstanding that there is significant equity to pay the first mortgage. No authority was cited to me to suggest that a dispute between shareholders or directors of corporations in the circumstances of this case can be relied on to obtain an extension of the redemption period.

[54] The same principles apply here. What is noteworthy in this respect is that the Zhang Parties did not do anything here to assert their own rights with respect to the mortgage remedies, which they could have done. They are respondents. They could have redeemed the Canadian Western Bank, and obtained their own assignment, in which case they could be here seeking an order absolute. They did not.

[55] Rather than seek conduct of sale themselves, they allowed Topley and Ms. Guo to obtain exclusive conduct, and thereafter made no inquiries as to the status, nor did they then seek conduct themselves on the basis that Ms. Guo was not marketing the property herself. If they had been active in the proceedings one would expect that they would be asking themselves about the status of the marketing during this time period, or perhaps monitoring the listing themselves by,

among other things, conducting their own search on the regularly used real estate listing services to confirm that it has been listed.

[56] Since the proceeding was commenced, they appear to have been content to sit back and let the process resolve at the control of the mortgagee as they were content to have the property sold, although they say that was, in some part, due to being led down a garden path of sorts by Ms. Guo with respect to her stated intention to sell the property.

[57] Nonetheless, they did nothing to preserve or protect the property, such that, if the assignment had not taken place the property would be at risk of Canadian Western Bank, or frankly any party who stepped into their shoes, seeking an order absolute, or there being a sale to a third party.

[58] The evidence before the court today is that the value of this property and the value of the mortgages secured by it is roughly the same. There is no evidence of equity to be preserved. To the extent the Zhang Parties have a claim with respect to their shareholder remedies as being pursued in the petition, those can be continued to be pursued, notwithstanding a transfer of the ownership of the property as a result of an order absolute.

[59] There is nothing inequitable with Ms. Guo seeking to preserve her mortgage investment as well as her own personal investment by taking the steps that she has and seeking an order absolute so that she can be put into that position.

[60] In considering the equities in this respect, as noted above, in the oppression remedy petition the Zhang Parties seek relief akin to a tracing remedy into the property such that even if there is a transfer of ownership, such as what will occur through an order absolute, they may be able to pursue their remedies against the land at the end of the day. I make no findings in this respect, but those claims may entitle them to register a certificate of pending litigation against the property, either as the pleadings currently stand or possibly after an amendment to reflect any such change in ownership.

[61] Regardless, what is evident is that the Zhang Parties have been clear that they have no personal interest in this property, other than as may be necessary to recover damages from the Guo Parties. They were content to see it sold. Their dealings are consistent with a position that damages are an appropriate remedy if they are successful in their oppression remedy action.

Conclusion and Order

[62] As such, and to summarize, I find that the Zhang Parties have failed to meet the onus upon them to establish both that there is sufficient equity in the property and a reasonable prospect of redemption. I find no other equitable basis on which the redemption period should be extended.

[63] As such, I grant the order as sought. Order absolute is granted in favour of the petitioner 141.

“Master Robertson”