CITATION: Albrecht v. 1300880 Ontario Inc., 2024 ONSC 3328
COURT FILE NO.: CV-23-150
DATE: 2024-06-10

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
Wendy Albrecht	)	C. Boyd, Counsel for the Applicant
	)	
Applicant	)	
	)	
– and –	)	
	)	
1300880 Ontario Inc.	)	R. Scriven, Counsel for the Respondent
	)	
Respondent	)	
	)	
	)	
	)	
	)	**HEARD:** June 3, 2024

REASONS FOR JUDGMENT

M. BORDIN, J.

Nature of the application

[1] On March 7, 2011, the applicant granted a mortgage to the respondent with respect to property in the County of Norfolk. The mortgage was registered on title as a second mortgage. The mortgage secured the principal sum of $43,000, repayable at 14% interest per annum commencing on March 4, 2011, and ending March 4, 2012, at which time the principal sum then owing would become fully due and payable. On the same day, the mortgage was also registered against title to another property in Brantford, Ontario.

[2] The applicant issued this application on June 23, 2023 seeking an order that the enforcement of the mortgage is statute barred and directing the discharge of the mortgage from title to the Norfolk property. The respondent asserts that the parties entered into an

agreement which has the effect of extending the limitation period and relies on promissory estoppel and the doctrine of part performance.

[3] The evidence before the court is comprised of one affidavit of the applicant, one affidavit of Mr. Melick, President and CEO of the respondent, exhibits to both affidavits, and excerpts from the transcripts of cross-examination of the affiants and follow up correspondence.[1]

Undisputed Facts

[4] In exhibits to Mr. Melick's affidavit he describes himself as a mortgage broker with Mortgage Intelligence in Waterloo, Ontario.

[5] Title to the property is held in the applicant's sole name. The applicant is the mortgagor.

[6] The mortgage went into default on or about July 4, 2011. Mr. Melick received an NSF cheque on July 6, 2011. No payments were made after that date. Mr. Melick understood that the mortgage was to have been paid in full by March 4, 2012.

[7] A notice of sale for the Norfolk and Brantford properties dated December 16, 2011, was served on the applicant by registered mail on December 16, 2011.[2] The Brantford property was sold by the respondent under power of sale in early 2012. No further steps were taken by the respondent to enforce the mortgage or sell the Norfolk property until a demand letter was issued by the respondent in May 2023.

[1] The entire transcripts were filed, but in accordance with the provincial practice direction, the parties were advised that the court would not review the entirety of the transcripts, but only those portions which were drawn to the court's attention.

[2] This is according to a letter from the respondent's lawyer to the respondent at the time. Notwithstanding the date of the notice of sale and the date of service indicated in the letter, Mr. Melick deposes in his affidavit that it was issued on or about February 7, 2012. No explanation was provided for the discrepancy.

[8] The applicant made an assignment in bankruptcy on August 16, 2012. The respondent is listed on the applicant's statement of affairs as a secured creditor in the amount of $43,000. Mr. Melick received a copy of the notice of bankruptcy on or about August 16, 2012. He understood that he was a secured creditor and so he was not concerned.

[9] On May 19, 2023,[3] a demand letter dated was sent to the applicant by the respondent's lawyers.[4] The respondent has never commenced legal proceedings to enforce the mortgage against the Norfolk property.

Position of the Parties

[10] The applicant's position is that the ability of the respondent to enforce the mortgage is statute barred by the expiry of the limitation period. Further, that pursuant to section 23 of the *Real Property Limitations Act*, R.S.O. 1990, c. L. 15 ("RPLA"), an extension of the limitation period must be acknowledged in writing and signed by the debtor and that there has been no such written acknowledgement. The applicant submits that the listing of the respondent as a secured creditor in the statement of affairs in the applicant's bankruptcy does not constitute an acknowledgement in writing. Moreover, as a secured creditor, the respondent was entitled to enforce his security notwithstanding the bankruptcy.

[11] The respondent argues that the parties entered into an oral agreement in 2012 by which the applicant was to do certain things and the respondent would hold off on enforcement of the mortgage until the applicant's financial situation improved. The respondent says that as a result, promissory estoppel applies to extend the limitation period. The respondent says the equities bar the applicant from relying on the limitation period. Alternatively, the

[3] The respondent says the letter is incorrectly dated May 19, 2021.
[4] The respondent indicates that a search conducted in May 2023 disclosed that a third mortgage had been put on the property in November 2022 which suggested to the respondent that the applicant had recovered financially and could arrange to pay the debt owed to the respondent.

respondent says that there was part performance of the oral agreement, and that the applicant cannot rely on any requirement that the agreement be in writing.

[12] The applicant submits that the evidence does not establish the existence of the alleged oral agreement and that even if there were such an agreement, the equities do not favour extending the limitation period or circumventing the requirement that the agreement be in writing.

[13] The parties were content that this matter be determined on a paper record, without *viva voce* evidence, notwithstanding the disputed allegation of an oral agreement with no contemporaneous documentary support and no subsequent confirmation of the agreement in writing.

The Limitation Period

[14] The applicant submits that section 4 of the *Real Property Limitations Act*, R.S.O. 1990, c. L. 15 ("RPLA"), provides for a limitation period applicable to a mortgage of land of ten years from the date that the right to make entry or distress, or to bring action, first accrued. Further, that sections 4, 13, 22 and 23 of the RPLA provide that the limitation period of ten years commences from the date upon which the right to receive the monies accrued, unless a payment of any part of the principal money or interest is made or an acknowledgment in writing is received. Finally, that upon expiry of the ten-year limitation period, the right of any person to make an entry or distress or bring an action is extinguished pursuant to section 15 of the RPLA.

[15] The applicant relies on *McVan General Contracting Ltd. v. Arthur*, 61 O.R. (3d) 240. In *McVan* the court held:

a. At para 19: a mortgagee's right to claim possession of mortgaged land accrues upon the first default in payment of interest and the ten-year limitation period established by s. 4 of the Act runs from that time. … [An] action for possession is statute-

barred by s. 4 of the Act and [a] right to seek possession of the land is extinguished by operation of s. 15 of the Act. [para. 19]

b. [A] power of sale proceeding is an attempt to recover land, which is prohibited under s. 4 of the Act after the expiry of ten years from the time when the right to make such an attempt first accrued. … [In such circumstances, a] power of sale proceeding is barred by operation of ss. 4 and 15 of the Act. [para. 52]

[16] The effect of the RPLA as asserted by the applicant was not disputed by the respondent.

[17] Even if the assignment in bankruptcy were an acknowledgement in writing sufficient to satisfy the RPLA, the latest date which would trigger the commencement of the limitation period is the date of the applicant's bankruptcy, August 16, 2012, when, possibly, the applicant made a written acknowledgment of the debt in the statement of affairs. Earlier dates for the commencement of the limitation period are also possible – July 4, 2011, when the mortgage went into default, or March 7, 2012, when the mortgage was due and payable in full. In any of these circumstances, ten years (as extended by the COVID-19 standstill period) have passed since any of the above dates. No claim for possession or money or power of sale was commenced within the limitation period (ten years as extended by the COVID-19 standstill period).

[18] Subject to a principled basis upon which the limitation period could be said to be extended or the respondent establishing some other means of avoiding the limitation period, the enforcement of the mortgage would now be statute barred.

[19] I will first consider whether the *Statue of Frauds* applies. Then I will consider whether there was an oral agreement between the parties as alleged and whether promissory estoppel or some other principled basis upon which to extend the limitation period has been established. Finally, I consider the application of the doctrine of part performance.

Does the *Statute of Frauds* Apply?

[20] Section 4 of the *Statute of Frauds*, R.S.O 1990, c S.19, provides:

> No action shall be brought to charge any executor or administrator upon any special promise to answer damages out of the executor's or administrator's own estate, or to charge any person upon any special promise to answer for the debt, default or miscarriage of any other person, or to charge any person upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them, unless the agreement upon which the action is brought, or some memorandum or note thereof is in writing and signed by the party to be charged therewith or some person thereunto lawfully authorized by the party.

[21] The parties provided the court with no legal authorities to determine whether section 4 applies to the facts of this case. It its factum, the respondent asserts it applies.

[22] Initially, the applicant took the position that section 4 does not apply because the alleged agreement does not vary a mortgage. Eventually, the applicant conceded for the purposes of the application that section 4 applies.

[23] In *Shook v. Munro et al*., 1948 CanLII 8 (SCC), [1948] S.C.R. 539; [1948] 3 D.L.R. 652, Kellock J. held that:

> Assuming that the parties to the mortgage verbally agreed to extend the time of payment until the mortgagor should be able to pay, that agreement cannot, by reason of the *Statute of Frauds,* be permitted to be proved for the purpose of varying the terms of the mortgage; *Goss v. Nugent*; *Marshall v. Lynn* at 117. [Citations omitted.]

[24] I proceed on the basis that any agreement to vary the mortgage would therefore have to be in writing to be enforceable, subject to promissory estoppel, some other equitable principle, or partial performance.

Was There an Agreement Between the Parties?

[25] Notwithstanding that Mr. Melick is a mortgage broker, the alleged agreement was not in writing. Neither party sent an email or anything in writing evidencing the agreement.

[26] In her affidavit, the applicant deposes that she has never been contacted by anyone on behalf of the respondent since the mortgage came due on March 4, 2012. She denies the existence of any agreement.

[27] In his affidavit, Mr. Melick deposes that:

a. Between March 4, 2012, and March 4, 2022, he contacted the Applicant on numerous occasions regarding the Mortgage.

b. He spoke to the applicant's spouse about the mortgage on numerous occasions and the applicant's spouse consistently acknowledged the mortgage and the monies owing to the respondent and that he left regular messages on the applicant's voicemail regarding the mortgage having become due and payable and the possibility of power of sale proceedings regarding the Norfolk property.

c. Before he would speak to the applicant and/or her spouse, he would generate PurView Property Reports on the property to view the ownership information and estimated value of the property. He produced reports for February 2, 2016, November 22, 2016, November 14, 2017, August 30, 2018, March 1, 2019, and July 16, 2022.

d. He kept a record of the phone numbers he used to reach the applicant and/or her spouse, as well as the dates of the calls. These notes are written on a single page of

lined paper and are undated. Nine dates are listed on consecutive lines beginning with 02-02-2016 and ending on 07-16-2022, a period of over 6 years.

[28] However, contrary to his affidavit evidence, in cross-examination Mr. Melick testified that he has not spoken to the applicant or her spouse since 2012. In cross-examination, he agreed that he had two conversations about the agreement in 2012. He testified that he had never spoken with the applicant – he always spoke with her spouse.

[29] With respect to the alleged phone calls after 2012, some of the dates of alleged calls correspond to the dates of the PurView report, but some do not. If made contemporaneously, the notes of alleged calls had to be made on the same piece of paper which was then kept so that dates could be added roughly once or twice a year. No evidence that the dates were entered contemporaneously and no explanation in the evidence for how this occurred was drawn to the court's attention. Mr. Melick's cross-examination evidence is that none of the alleged phone calls referenced in his notes were returned.

[30] Mr. Melick deposed that "every year on the anniversary date of the mortgage" he would search the property and leave a message or discuss the mortgage with the applicant or her spouse and always requested an update regarding repayment of the mortgage. However, with a few exceptions, the PurView Property Reports and alleged dates of the phone calls do not correlate to the anniversary date of the mortgage. Further, the evidence that Mr. Melick spoke with the applicant or her spouse at the time of the anniversary date of the mortgage is contradicted by his evidence on cross-examination already referred to. Moreover, in cross-examination, Mr. Melick testified, "I don't even know if the phone numbers I have for [the applicant] were correct."

[31] In paragraph 12 of his affidavit, Mr. Melick deposes that when talking with the applicant that he and the applicant agreed that "if the Applicant would keep the Mortgage up to date and in good standing, [he] would be willing to wait until they were financially able to pay the Mortgage, interest and legal costs and would not exercise the power of sale on the

Norfolk Property." At his cross-examination he corrected this to say that he spoke with the applicant's spouse, not the applicant.

[32] In short, Mr. Melick's evidence that he had ongoing discussions with the applicant or her spouse after 2012 contains several contradictions and I do not accept the evidence. I find that any discussions that took place, occurred between Mr. Melick and the applicant's spouse in 2012. There were no discussions at all between Mr. Melick and the applicant. Neither the applicant nor her spouse spoke to Mr. Melick after 2012.

[33] Mr. Melick's evidence is that he agreed not to enforce the mortgage in part because there was insufficient equity in the property. The fact that there was insufficient equity is not disputed by the applicant.

[34] A notice of sale was served after the mortgage went into default. The Brantford property was sold. The respondent was always able to enforce the sale of the Norfolk property. The applicant made an assignment in bankruptcy in August 2012. However, this did not affect the respondent's security or the mortgage. Obviously the property was not sold by secured creditors or the trustee as it remained in the applicant's name. Mr. Melick did not act on his power of sale or enforce the mortgage. The only evidence I have indicates that there was insufficient equity in the property at the time for the respondent to be paid on the mortgage. I have no reason not to accept this evidence. Mr. Melick continued to make enquiries to ensure that he was still secured. The reports he obtained provided a proposed value for the property.

[35] Paragraph 12 of Mr. Melick's affidavit clearly references maintaining the mortgage to the respondent in good standing. No date is given for this alleged conversation with the applicant. The mortgage went into default on July 4, 2011, and no payments were made after July 2011, so it is difficult to understand how the applicant was supposed to or in fact kept the mortgage in good standing.

[36] At his cross-examination Mr. Melick changed his evidence and the terms of the alleged agreement. He testified that keeping the mortgage in good standing meant making all the payments on the first mortgage (rather than the respondent's mortgage), and if and when they renewed they were to notify him of the renewals. He then added that the taxes were to be kept in good standing as well. Mr. Melick never received proof that the first mortgage or taxes were in good standing. However, there is no evidence that the first mortgage or taxes were not in good standing.

[37] Although the terms of the first mortgage were not in evidence, given that well over 10 years had passed after 2012, it seems likely that the first mortgage was renewed. There is no evidence that Mr. Melick was advised of any renewals.

[38] In submissions, Mr. Melick put a different spin on the meaning of "good standing" and suggested that it meant that so long as the mortgage in his favour was registered it was in good standing.

[39] The demand letter dated May 19, 2023 is the first indication in writing that the respondent may have decided not to pursue enforcement of the mortgage. However, the letter does not refer to an agreement between the parties. It simply states that the respondent has been very patient while the applicant recovered financially.

[40] Mr. Melick asserts that the applicant's spouse could and did bind the applicant to the alleged agreement. No one provided evidence from the applicant's spouse or sought to examine him under rule 39.03 of *The Rules of Civil Procedure,* RRO 1990, Reg 194. In cross-examination, Mr. Melick testified that he did not think that the applicant had provided him with an authorization to enter into agreements with her spouse.

[41] Mr. Melick relies on evidence that the applicant's spouse signed title documents for the applicant in 2023. In my view, these documents signed 11 years after the date of the alleged agreement do not assist the respondent; they are simply too long after the fact. It cannot be taken to reflect a state of affairs 11 years earlier.

[42] The applicant's evidence in cross-examination was that she sometimes assisted her husband in his business of buying and renovating properties. She denied that they were partners. However, the applicant did acknowledge that her husband was the primary contact with the respondent. The applicant could have provided evidence from her husband but did not do so. On the basis of her acknowledgement that her spouse was the main contact with the respondent, I find that the applicant agreed that her husband could act as her agent with the respondent. As her agent, he could bind her to an agreement.

[43] As proof that there was an agreement between the parties, Mr. Melick references the applicant's evidence of her intentions as expressed in her cross-examination. The applicant testified that when they entered into the mortgage, they intended to repay it. She agreed that she wants to honour her obligations. She testified that she had not decided one way or another whether she would not repay the respondent. Finally, she testified that when she is financially set, she would like to honour her agreement.

[44] The terms of the agreement as alleged by Mr. Melick, do not provide for an end date. The only triggering event appears to be that the mortgage is to be repaid when the applicant was financially able to pay the mortgage, interest and legal costs. This corresponds to the applicant's evidence. However, there is no evidence as to how it would be determined when the applicant was financially able to repay the mortgage.

[45] The respondent does not assert, and there is no evidence that the mortgage was renewed from year to year. Rather, the mortgage was in default after July 4, 2011.

[46] Precisely what the applicant was to do until she could repay the mortgage is not at all clear. Perhaps it was to keep the first mortgage in good standing. It could not have been to keep the respondent's mortgage in good standing as that mortgage was already in default at the time. Perhaps it included ensuring that the taxes did not go into default. Perhaps it included notifying the respondent of renewals.

[47] The applicant concedes that when she is financially set, she would like to honour her agreement. She did not communicate this to the respondent. I accept that there were conversations between the applicant's spouse and Mr. Melick in 2012. However, I cannot conclude on the balance of probabilities what the applicant's spouse agreed to if anything. There are too many inconsistencies in Mr. Melick's evidence as to the terms of the agreement and the alleged ongoing calls to, and discussions with, the applicant and her spouse to accept his evidence. I do not find it reliable. There are important terms missing from the alleged agreement.

[48] Keeping the first mortgage and paying taxes would have been a requirement of the first mortgage. It does not constitute consideration for an agreement to delay enforcement or extend the limitation period. There was no revised date of repayment, revisions to the terms of the mortgage, or defined triggers for the obligation to repay.

[49] In *Shook v. Munro et al*., 1948 CanLII 8 (SCC), [1948] S.C.R. 539; [1948] 3 D.L.R. 652, no payments of principal or interest were made on a mortgage for over 15 years. It was found that there had been some understanding between the parties that the mortgagor would not be pressed for the money during her lifetime or would be left until she was able to pay it without embarrassment; but when the agreement arose or what precisely were its terms was not known.

[50] The Supreme Court held that the restraint of the mortgagee was voluntary and unilateral. Rand J. wrote that "the forbearance was at most a voluntary abstention from exercising rights by the mortgagees which of itself could not affect the running of the statute [of limitations]".

[51] The Court of Appeal for Ontario in *Hamilton (City) v. Metcalfe & Mansfield Capital Corporation*, 2012 ONCA 156 (CanLII) considered *Shook* and addressed whether an agreement to forbear enforcement of a debt can suspend the limitation period:

[73] At common law, a creditor and debtor can agree to forbear enforcement of a debt, and such an agreement would suspend the limitation period for the period of forbearance. In order to achieve this result, the creditor must promise not to enforce the debt, and the debtor must provide some consideration in exchange for this promise. In other words, a creditor's promise to forbear will not suspend the limitation period unless the debtor provides consideration for that promise: *Shook v. Munro et al*, 1948 CanLII 8 (SCC), [1948] S.C.R. 539.

[74] Each of the cases the City relies on dealt with a debtor-creditor scenario in which the creditor promised not to sue on the debt and the court had to determine whether the creditor provided consideration in return for that promise. In cases where there was no corresponding promise, the limitation period for the action to enforce the debt was not suspended: see *Shook Estate; Arrow-Kemp Heating and Air Conditioning Ltd. v. Oddi*, 2009 CanLII 23865 (ON SC). In a case where the creditor did provide a corresponding promise, the limitation period for the action to enforce the debt did not commence until after the period of forbearance: see *Mortgage Insurance Co. of Canada v. Grant*, 2009 ONCA 655, 99 O.R. (3d) 535, at para. 30.

[75] The cases relied on provide a means by which parties can agree to suspend the limitation period for an action to enforce payment on the debt. This makes sense because, if a creditor and debtor agree to change the repayment terms of the debt obligation, they have essentially renegotiated their debt agreement. So the limitation period for the creditor's action to collect on the debt would not run because – due to the agreement to change the repayment terms – the debtor is not effectively in default.

[52] Other than the ability to keep the property until they could pay the mortgage, there is no evidence of what consideration, if any, the applicant provided for the respondent's agreement to delay enforcement of the mortgage. I have been referred to no evidence of a corresponding promise from the applicant beyond doing what they were obligated to do – pay the mortgage and the first mortgage and taxes. There was no consideration from the applicant in exchange for the respondent not enforcing the mortgage. There is no evidence that the applicant agreed to pay by a certain date. There were no changes to the terms of the mortgage.

[53] There could not have been an acknowledgement of debt or intent to pay the mortgage and honour commitments by the applicant because she never spoke to the respondent or corresponded with him. There could not have been an acknowledgement of debt or intent to pay the mortgage and honour commitments by the applicant's spouse after 2012 because there was no communication between him and the respondent after 2012. There was no agreement to suspend or extend the limitation period.

[54] As a result, I find that there was no oral agreement between the parties. Rather, the respondent voluntarily agreed to delay enforcement of the mortgage in the hope that it would later be able to collect on the mortgage.

Does Promissory Estoppel extend the Limitation Period?

[55] The respondent submits that although the alleged agreement was not reduced to writing, the limitation period has been extended because of promissory estoppel.

[56] In *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 SCR 50, the Supreme Court considered the circumstances in which an admission of liability made to a prospective plaintiff by a prospective defendant amounts to promissory estoppel precluding reliance on a limitation period. In that case, the insurer had made an admission of liability in an affidavit. The limitation period expired before the plaintiff issued its claim against the insurer. At para. 13, the Supreme Court held:

> The principles of promissory estoppel are well settled. The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, in reliance on the representation, he acted on it or in some way changed his position.

[57] Further, citing *Engineered Homes Ltd. v. Mason et al.*,, 1983 CanLII 142 (SCC), [1983] 1 S.C.R. 641, at p. 647, the court noted that the promise must be unambiguous but could be inferred from circumstances. The court went on to hold that an admission of liability is clearly one of the factors from which a court may infer as a finding of fact that a promise was made not to rely on the limitation period, but it is not an alternate basis of promissory estoppel.

[58] At paragraph 17 of *Maracle* the court stated:

> There must be something more for an admission of liability to extend to a limitation period. The principles of promissory estoppel require that the promissor, by words or conduct, intend to affect legal relations. Accordingly, an admission of liability which is to be taken as a promise not to rely on the limitation period must be such that the trier of fact can infer from it that it was so intended. There must be words or conduct from which it can be inferred that the admission was to apply whether the case was settled or not, and that the only issue between the parties, should litigation ensue, is the issue of quantum.

[59] Both parties referenced *Stetler v Stetler*, 2015 ONSC 3014. The case was decided on other grounds. The court found that promissory estoppel was not applicable. The facts in *Stetler* were somewhat different.

[60] There was no admission of liability by the applicant or her spouse on her behalf. In 2012, there was a valid mortgage. If they acknowledged that there was a valid mortgage, it was, in the circumstances of a validly existing mortgage, not an admission of liability. There was no acknowledgement after 2012 of the amounts owing on the mortgage, including interest and legal costs. There was no promise not to rely on the limitation period. I cannot infer from the facts that there was such a promise.

[61] The conduct of the applicant was ambiguous. The applicant was in default on the second mortgage. The applicant remained in default. The status quo remained in place. There was no promise or assurance made by the applicant intending to affect the legal relationship with the respondent. One cannot be inferred on these facts.

[62] I am not satisfied that the statutorily required inclusion of the respondent in the applicant's statement of affairs in August 2012 was the kind of admission of liability contemplated by promissory estoppel. It was simply a statement of the obvious – it set out the amount of the mortgage and that the respondent was a secured creditor. The applicant was required to include this in her statement of affairs. It was not a promise or assurance intending to affect the legal relationship with the respondent or not to rely on the limitation period. I am not satisfied that the respondent acted on the statement of affairs or in some way changed his position. The respondent was entitled to enforce the mortgage but chose not to because there was insufficient equity in the property.

[63] I find that promissory estoppel does not apply to extend the limitation period.

[64] The respondent also relies on *Re Craddock et al. and Harstone* (1981), 32 O.R. (2d) 339; aff'd (1981), 33 O.R. (2d) 870 (O.C.A). The court in *Craddock* did not expressly consider promissory estoppel. In *Craddock*, the mortgage given by Craddock was statute barred. Craddock applied for a declaration that the mortgage was no longer an encumbrance against the land. No payments were ever made on the mortgage, but the parties orally agreed to renew the mortgage from year to year with interest to accrue and compound until Craddock had the funds to discharge it. Craddock also made periodic statements to the respondent

that the mortgage was fully secured by the property and that he lacked money to discharge it. Craddock also made representations that the matter would be settled in the near future. The court held that, the relief being sought being equitable and discretionary, it should be denied.

[65] *Craddock* is distinguishable because of the representations made by Craddock and the oral agreement reached between the parties, which do not exist on the facts before me. *Craddock* does not assist the respondent.

Has There Been Part Performance of the Agreement?

[66] Although the respondent did not press part performance in oral argument, it raised the doctrine in its factum. Therefore, for the sake of completeness, I will address the arguments advanced in the factum.

[67] The respondent asserts that in part performance of the agreement the applicant kept the mortgage up to date and in good standing and that the respondent did not exercise the power of sale until the applicant was financially able to pay.

[68] In *Sheard et al. v. Peacock*, 2012 ONSC 4237, Ellies J. at para 25, stated that to exclude the operation of the *Statute of Frauds*, the acts of part performance must:

> 1. Be unequivocally and in their own nature referable to the contract asserted, which must be one that, if properly evidenced by a writing, would be specifically enforceable;
>
> 2. Demonstrably, unmistakenly and exclusively point to this contract as affecting the ownership or the tenure of the land in question; and
>
> 3. Be such that to deny its recognition would be to permit the statue to be made an instrument of fraud by permitting the defendant to escape from the equities with which the acts of part performance have charged him.

[69] The doctrine of part performance does not apply only to the *Statute of Frauds*. The Supreme Court of Canada addressed the doctrine in *Hill v. Nova Scotia (Attorney General)*, 1997 CanLII 401 (SCC), [1997] 1 SCR 69. The Court held that the doctrine of part performance operated to prevent the Crown from relying on the writing requirement in s. 21(1)(a) of the *Public Highways Act* which required a written permit from the Minister to use a controlled access highway or gate or access onto the highway.

[70] In *Hill*, the Province of Nova Scotia wanted to build a controlled access highway. To achieve this, it expropriated land which bisected a farm belonging to Hill. The issue for the courts was whether, at the time of expropriation, the province granted Mr. Hill an equitable interest in the expropriated land which permitted him to move people, cattle and equipment back and forth across the highway. The province had built and maintained ramps giving access to the highway from Mr. Hill's land for 27 years.

[71] Concluding that the doctrine of part performance operated to prevent the province from relying on the writing requirement, the court stated at paragraph 16:

> As the decision of the House of Lords in *Steadman*, *supra*, makes clear, the very purpose of the doctrine of part performance is to avoid the inequitable operation of the *Statute of Frauds*. … The writing requirement is specifically required to give way in the face of part performance or estoppel by conduct, because the part performance or conduct fulfils the very purpose of a written document.

[72] The court noted that "Where the terms of an agreement have already been carried out, the danger of fraud is averted or at least greatly reduced." The Supreme Court held that strict adherence to the literal terms of the writing requirement would not serve the purpose for which it was devised. Fraud would not be prevented; rather, the appellants [the Hill family] would be defrauded.

[73] The Court of Appeal for Ontario in *Erie Sand and Gravel Limited v. Tri-B Acres Inc*, 2009 ONCA 709 (CanLII), considered the doctrine of part performance and the evidence to be considered to determine if sufficient acts of part performance take an alleged agreement outside the operation of the *Statute of Frauds* such that the party alleging the agreement is permitted to adduce evidence of the oral agreement [citations and notes omitted]:

> [49] The purpose of s. 4 of the Statute of Frauds is to prevent fraudulent dealings in land based on perjured evidence. However, Equity will not allow the Statute of Frauds to be used as an "engine of fraud". It created the doctrine of part performance to prevent the Statute of Frauds from being used as a variant of the unconscionable dealing which it was designed to remedy: see *Hill v. Nova Scotia (Attorney General)*, at para. 10. The requirements in s. 4 of the Statute of Frauds must give way in the face of part performance because the acts of part performance fulfill the very purpose of the written document -- that is, they diminish the opportunity for fraudulent dealings with land based on perjured evidence.
>
> …
>
> [64] Hill stands for this principle: if one party to an otherwise unenforceable agreement stands by while the other party acts to its detriment by performance of its contractual obligations, the first party will be precluded from relying on the requirements in the Statute of Frauds to excuse its own performance.
>
> …
>
> [70] In conclusion, Equity will intervene because it would be unconscionable for the Statute of Frauds to be used when Erie acted to its detriment by irremediably carrying out its obligations under the otherwise unenforceable contract. Equity devised the doctrine of part performance to remedy precisely

this kind of situation -- it will not stand by and allow the Statute of Frauds to be used as "an engine of fraud".

…

[75] In sum, it appears to me that given the decision of the Supreme Court in Hill, it is now settled law in Canada that the acts of both parties to an alleged oral agreement may be considered when a court is called on to determine if sufficient acts of part performance take an alleged agreement outside the operation of the Statute of Frauds.

…

[79] Furthermore, in my view, the Proposition flows from the conflation of two distinct, albeit related, aspects of the doctrine of part performance. The first aspect is detrimental reliance which, as has been noted, requires a party to prove its acts of performance. Without detrimental reliance there can be no inequity in relying on the Statute of Frauds, thus, it is the first hurdle to be met. The second aspect of the doctrine, however, relates to Equity's requirement that the acts of part performance sufficiently indicate the existence of the alleged contract such that the party alleging the agreement is permitted to adduce evidence of the oral agreement. This latter requirement is discussed in the following section. For the purpose of this discussion, it is significant to note that these two aspects of the doctrine are not synonymous. The former is a matter of substantive law based on the rationale for the doctrine of part performance, whereas the latter is primarily evidentiary in nature.

…

> [88] Thus, the question becomes: are the acts of part performance as found by the trial judge "unequivocally referable in their own nature to some dealing with the [south side property]"?
>
> [89] In answering this question, the first step is to determine whether the acts of part performance are connected to the land. In this regard, the conduct in the present case stands in marked contrast to that in Deglman. In Deglman, it will be recalled, the acts of performance consisted of Mr. Constantineau doing chores on two properties, driving his aunt about and doing her personal errands – those acts are not referable to any particular piece of property. In this case, however, each act of part performance relates directly to the south side property.
>
> [90] However, it is not sufficient that the conduct is unequivocally referable to the property in question; the conduct must also, in and of itself, indicate that there had been "some dealing with the land".
>
> …
>
> [94] [I]n my view, the proper approach to making such a determination is this. Begin by determining the context (or the "relevant circumstances" to use Haskett terminology). Then consider the acts of part performance having regard to the way in which reasonable people carry on their affairs.

[74] Applying the analysis in *Erie Sand*, the acts of part performance alleged by the respondent are the applicant maintaining the mortgage in good standing and the respondent refraining from enforcing the power of sale and the mortgage. The respondent argues it relied on the alleged agreement to its detriment because the applicant is now relying on the limitation period. I am doubtful that a mortgagee continuing to pay the first mortgage and taxes amounts to part performance indicative of an oral agreement with respect to a second mortgage, but I will assume without deciding that equity's requirement that the acts of part

performance sufficiently indicate the existence of the alleged contract such that the respondent is permitted to adduce evidence of the oral agreement.

[75] In *Erie Sand*, the trial judge considered the significant evidence of an oral agreement and concluded that an oral agreement had been reached. The decision was upheld by the Court of Appeal. Above, I considered the evidence as to the existence of an oral agreement between the parties as alleged by the respondent and concluded that no such agreement was made.

Disposition

[76] I find there was no oral agreement between the parties, promissory estoppel does not apply to extend the limitation period, and the doctrine of part performance does not assist the mortgagor.

[77] I find that enforcement of the respondent's covenant to pay and the mortgage registered as Instrument No. NK41323 on the property known municipally as 355 Angling Road, Townsend, Ontario described more particularly as PT LT CON 4 TOWNSEND BEING PART 1 ON 37R9285; NORFOLK COUNTY and bearing the Parcel Register 50275-0145 (LT) (the "Mortgage") is statute barred by the *Real Property Limitations Act*, R.S.O. 1990, c. L.15 and so declare. The respondent is barred from making an entry or distress or bringing an action to recover out of any land or rent any sum of money secured by the Mortgage.

[78] Where, by operation of the RPLA the entitlement under the charge to enter upon the land, to bring action for the recovery of the land, or to sue on the covenant, has been extinguished due to the expiry of applicable limitation periods, in order to do justice between the parties a motions judge has jurisdiction under the wide authority of the Superior Court of Justice confirmed by s. 11 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 to discharge the charge and to direct its deletion from title: *McVan*, at paras. 55 and 56.

[79] I order that the Mortgage be deleted from title and that the Norfolk Land Registry Office No. 37 be directed to discharge Instrument No. NK41323 from Parcel Register 50275-0145 (LT).

Costs

[80] The parties are encouraged to resolve costs between them. If they are unable to do so, they may submit a bill of costs and make written submissions consisting of not more than two double-spaced pages in length, together with any relevant offers to settle and excerpts of any legal authorities referenced, according to the following timetable:

a. The applicant shall serve its costs submissions, if any, by no later than June 20, 2024.

b. The respondent shall serve its costs submissions, if any, by no later than July 11, 2024.

[81] All submissions are to be filed with the court, with a copy to the trial coordinator by end of day July 11, 2024.

[82] If no submissions or written consent to a reasonable extension are received by July 11, 2024, the matter of costs will be deemed to have been settled.

M. Bordin, J.

Released: June 10, 2024

CITATION: Albrecht v. 1300880 Ontario Inc., 2024 ONSC 3328
COURT FILE NO.: CV-23-150
DATE: 2024-06-10

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Wendy Albrecht

Applicant

– and –

1300880 Ontario Inc.

Respondent

REASONS FOR JUDGMENT

M. Bordin, J.

Released: June 10, 2024