

COURT OF APPEAL FOR ONTARIO

CITATION: 2137073 Ontario Inc. v. Furney, 2024 ONCA 428

DATE: 20240523

DOCKET: M55125 (COA-24-CV-0496)

Lauwers J.A. (Motions Judge)

BETWEEN

2137073 Ontario Inc., Arye Lankar, Lina Balian, Shawn Gabriel,
Elena Keimakh, and 2380376 Ontario Ltd.

Plaintiffs
(Respondents/Responding Parties)

and

Alex Furney and Maryam Furney
also known as Miriam Furney

Defendants
(Appellants/Moving Parties)

Alex Furney and Maryam Furney, acting in person

Daniel Campoli, for the respondent/responding party 2137073 Ontario Inc.

Sanjin (Sonny) Kovacevic, for the respondents/responding parties Arye Lankar,
Lina Balian, Shawn Gabriel and Elena Keimakh

Jordan D. Sobel, for the respondent/responding party 2380376 Ontario Ltd.

Heard: May 23, 2024

ENDORSEMENT

[1] This case involves a mortgage agreement between private lenders (the plaintiffs and responding parties on this motion) and their mortgagors (the defendants and moving parties). On February 9, 2023, Dineen J. granted judgment

in favour of the responding parties on the second mortgage and struck the moving parties' statement of defence and counterclaim, but did not grant a writ of possession. This court dismissed the appeal on January 16, 2024.

[2] The moving parties' next foray was their motion on May 14, 2024 to set aside or vary the order of Dineen J. under r. 59.06 of the *Rules of Civil Procedure*, R.S.O. 1990, c. C.43: 2024 ONCA 392. At para. 4, the panel stated:

Essentially, the moving parties were trying on their appeal to relitigate the summary motion judge's findings that were open to him on the record. They are effectively seeking to do the same thing on this motion.

The panel dismissed the moving parties' motion as an abuse of process.

[3] This morning the panel released an endorsement, 2024 ONCA 421, that prohibited the Furneys from filing any further materials, stating:

We have not received any costs submissions from the Furneys although, in an uninvited May 14th email to the court office, the Furneys indicated that they opposed the May 14th endorsement and would file a further motion. The Furneys' May 14th email and their proposed motion are an abuse of process. They refuse to accept that this matter has been finally decided in the respondents' favour. As a result, we order that the Furneys are prohibited from filing any further materials with this court with respect to this matter without first satisfying all costs awards made against them in favour of the respondents and without first obtaining leave of this court by written motion.

This endorsement did not cover the motion before me.

[4] The judgment under appeal that the Furneys seek to have stayed is Dineen J.'s subsequent decision of April 25, 2024, in which he refused an adjournment of the responding parties' motion for a writ of possession and granted the writ of possession. Given his first judgment of February 9, 2023, in which he granted judgment on the second mortgage and struck the statement of defence and counterclaim, and this court's dismissal of the moving parties' appeal, there was no basis on which he could reasonably refuse the relief sought by the responding parties.

[5] In their notice of appeal, the moving parties seek an order to set aside the judgment of Dineen J. and to rescind the writ of possession. They seek the same relief by motion, but a motion judge has no jurisdiction to grant the relief they seek. The moving parties alternatively seek an order staying the enforcement of the writ of possession pending the appeal. In argument, Ms. Furney asked for a stay until June 14, 2024 so that the various lawyers involved in the refinancing and discharge might co-ordinate in completing the transactions. This is not the first time that refinancing has been promised and the responding parties are skeptical in the absence of hard evidence.

[6] Rule 63.01 does not provide for an automatic stay of enforcement of the judgment upon appeal for a writ of possession, but a motion judge has authority to stay under r. 63.02(b). The test for granting a stay is set out in *Toronto (City) v Ontario (Attorney General)*, 142 O.R. (3d) 481, 2018 ONCA 761, at paras. 9-10:

The three-part legal test for when an appellate court should grant a stay of a lower court decision pending an appeal is set out in the Supreme Court of Canada's decision in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, [1994] S.C.J. No. 17. Ordinarily, the applicant must demonstrate that there is a serious issue to be tried; that it will suffer irreparable harm if the stay is not granted; and that the balance of convenience favours a stay pending the disposition of the appeal.

The minimal "serious issue to be tried" component of that test assumes that the stay will operate as a temporary measure and that the rights of the parties will be finally resolved when the appeal proper is heard. However, *RJR-MacDonald* recognizes that in cases where, as a practical matter, the rights of the parties will be determined by the outcome of the stay motion, the court may give significantly more weight to the strength of the appeal: p. 338 S.C.R.

[7] The appeal of the judgment for the writ of possession is meritless, the merits having been decided earlier. The Sheriff's attendance has been scheduled and any stay would add delay in a situation in which the payment of the mortgage is still uncertain. The moving parties have had plenty of time to refinance. Despite their sad circumstances, there is no serious issue to be tried and the balance of convenience now clearly favours the responding parties.

[8] The motion for a stay is dismissed with costs. The judgment may be enforced.

[9] In the endorsement issued earlier today, the panel fixed costs as follows:

We determine that in the circumstances of this case, the following all-inclusive awards of costs are fair,

proportionate and reasonable, and should have been within the Furneys' reasonable contemplation if their motion were unsuccessful:

- i. 2137073 Ontario Inc.: \$6,725.50;
- ii. Arye Lankar, Lina Balian, Shawn Gabriel, Elena Keimakh: \$14,701.30;
- iii. 2380376 Ontario Ltd.: \$5,304.45.

[10] Before me, the responding parties seek full indemnity costs:

- i. 2137073 Ontario Inc.: \$4,294.00;
- ii. Arye Lankar, Lina Balian, Shawn Gabriel, Elena Keimakh: \$8,766.54;
- iii. 2380376 Ontario Ltd.: \$4221.91.

[11] When I noted surprise that Mr. Kovacevic's bill was so much higher, Mr. Sobel candidly stated that it was because the common factum had been drafted by Mr. Kovacevic. I am at a loss as to why this matter was triple-teamed by counsel. While I acknowledge the legal right of the parties to be separately represented, the court does expect some reasonable forbearance where interests are identical, and the factual and legal issues are not complex. In the exercise of my discretion, I fix costs at \$9,000 all-inclusive, and leave it to counsel to sort out their respective entitlements.

"P. Lauwers J.A."