

**CITATION:** Home Trust Company v. Mahmood 2024 ONSC 4276  
**COURT FILE NO.:** CV-24-00002522-0000  
**DATE:** 2024-07-26

**SUPERIOR COURT OF JUSTICE – ONTARIO**

491 Steeles Avenue East, Milton ON L9T 1Y6

**RE:** Home Trust Company, Applicant

**AND:**

Ahmad Mahmood, Shanaz Bigem, Ibrar Ahmad Shah, Uzair Rashid, Aimen Rashid, Rashid Mehmood, Bushra Rashid, Umair Rashid, Nawal Uzair, Salman Ilyas, Neeraj Chopra, Anoop Joshi, Respondents

**BEFORE:** Justice M. Kurz

**COUNSEL:** James Riewald, for the Applicant

Uzair Rashid, Aimen Rashid, Self Represented Respondents

Ahmad Mahmood, Self Represented Respondent

**HEARD:** July 26, 2024, by video conference

**ENDORSEMENT**

***Introduction***

- [1] This is an application by Home Trust Company (“HTC”) to set aside a residential tenancy agreement (the “Lease”) between the Respondents, Ahmad Mahmood and Shanaz Bigem, (collectively the “Landlords”) and Uzair Rashid and Aimen Rashid (collectively the “Tenants”).
- [2] The only party to have filed any materials in this application was HTC. No adjournment was requested although I gave the parties the opportunity to speak to see whether they could resolve any issues before me today. The

Respondents, Neeraj Chopra and Anoop Joshi, who hold a second mortgage on the subject property, consent to the relief sought in this application.

[3] For the reasons that follow, I grant this application on the terms set out below.

***Background***

[4] On August 19, 2021, the Landlords granted a \$1,136,000 mortgage (the “Mortgage”) to Computershare Trust Company of Canada (“CTCC”) over the property municipally described as 963 Fielder Drive, Mississauga (the “Property”). CTCC transferred the Mortgage to HTC on October 18, 2022.

[5] Monthly payments under the Mortgage were \$9,736.11. The Mortgage matured on September 1, 2023.

[6] The Landlords also granted a second mortgage to Neeraj Chopra and Anoop Joshi, which requires monthly payments of \$6,980.

[7] The Landlords first defaulted on the Mortgage on September 1, 2022. The Mortgage has remained in default ever since and as set out above, it has now matured any event.

[8] HTC issued a Notice of Sale under Charge and a statement of claim against the Landlords, claiming damages for arrears of payment of the Mortgage and possession of the property. HTC obtained a default judgment on April 6, 2023. The Landlords owe HTC \$1,318,102.12 plus interest of 9.25% annually, as of March 25, 2024.

[9] At the time of a December 5, 2022 inspection on behalf of HTC, the Property was vacant. By April 3, 2023, there were 11 boarders in the Property. HTC’s counsel objected to the Landlord moving boarders into the Property.

[10] On September 15, 2023, the Landlords rented the Property to the Tenants in accord with the Lease, with a term of one year and rent of \$4,900/mo. That

amount is \$11,816.61 less than the amount required to pay the two mortgages granted by the Landlords on the Property.

- [11] There is no evidence that the Tenants were aware of the legal proceedings taken by HTC against the Landlords when they entered into the Lease.
- [12] On January 15, 2024, HTC served a Notice Demanding Possession on the Landlords and the Tenants as well as any occupants of the Property.
- [13] On January 16, 2024 the Tenants wrote to HTC's counsel by email, acknowledging receipt of the Notice Demanding Possession and stating that they were tenants under a one-year lease. They added that they had been paying rent on time to the Landlords. They stated that they are not in a position to move until the Lease matures. They also stated that they "will seek further guidance from our legal expert to know what motions we will need to proceed when required". They further stated that they wished to know to whom they should pay rent.
- [14] HTC did not accept the Tenants' rent as it did not wish to attorn to the tenancy in light of the facts set out in this proceeding. As a result, the Tenants have paid no rent to anyone since receipt of the Notice Demanding Possession. Ahmad Mahmood, on behalf of the Landlords, complains that the Tenants should have paid rent to him.
- [15] In retrospect, it is unfortunate that the parties did not work out to whom the rent should be paid. That being said, my decision is not guided by the failure to pay rent, which is a matter for another day and perhaps another proceeding.

### ***Authorities***

- [16] HTC brings this application under s. 52 of the *Mortgages Act*, R.S.O. 1990, Ch. M.40, which reads as follows:

### Application to set aside tenancy

52 (1) The Superior Court of Justice may on application by the mortgagee vary or set aside a tenancy agreement, or any of its provisions, entered into by the mortgagor in contemplation of or after default under the mortgage with the object of,

- (a) discouraging the mortgagee from taking possession of the residential complex on default; or
- (b) adversely affecting the value of the mortgagee's interest in the residential complex.

### Idem

(2) In considering the application, the judge shall have regard to the interests of the tenant and the mortgagee.

[17] As Sutherland J. explained in *Compcorp Life Insurance Co. v. Divitcos*, [1997] O.J. No. 186, at para. 46, the purpose of this provision is to prevent a mortgagor in default from entering into a “sweetheart” deal with a tenant to the detriment of a “vulnerable” mortgagee.

[18] The test to set aside such an agreement was set out by Brown J. in *Melo v. 2297248 Ontario Ltd.*, 2016 ONSC 4877, at para .7, as follows:

**7** Pursuant to the jurisprudence, in order to have a tenancy agreement set aside, the applicant must satisfy a three-pronged test, as follows: (1) there must be a tenancy agreement entered into by the mortgagor; (2) the tenancy agreement must be entered into in contemplation of or after default; and (3) the tenancy agreement must have the object of either discouraging the mortgagee from taking possession or adversely affecting the value of the mortgagee's interest in the property.

[19] In *Mortgage Company of Canada Inc. v. Singh*, 2019 ONSC 6200, Gray J. noted, citing *Bank of Montreal v. Smith* (2008), 71 R.P.R. (4th) 52 (Ont. S.C.J), at para. 26, that more must be shown than “that the lease constitutes a bad deal for the mortgagee”. Rather, “[i]t must be shown that the lease was entered into with the object of discouraging the mortgagee from taking possession or with the object of affecting the value of the mortgagee's interest in the property.

[20] Citing *Duca Financial Service Credit Union Ltd. v. Osundina*, 2019 ONSC 3358, at para. 21 Gray J. conceded that “ it would be a rare mortgagor who would candidly admit that his or her object in entering into the lease was to cause difficulty for the mortgagee.” Rather, it is possible for the court to draw inferences from the circumstances surrounding the tenancy. He stated such circumstances could include:

- (a) the amount of the rental payments as compared to the mortgage payments and other expenses;
- (b) the relationship of the tenant to the mortgagor;
- (c) the timing of the lease in relation to the date of default.

### ***Analysis***

[21] Here I find that the test of s. 52 of the *Mortgages Act* is met because:

- a. The Lease was entered into at a time that the Landlords were in default of the Mortgage.
- b. In fact, the Mortgage had matured at the time of the signing of the Lease.
- c. At the time of the signing of the Lease, HTC had already :
  - i. issued a Notice of Sale under Charge, and
  - ii. obtained a default judgment
- d. The Landlords were aware of those facts.
- e. They were also aware that HTC had objected to them placing boarders into the Property.
- f. The rent charged under the Lease was only a fraction of the amount required to pay the Mortgage, let alone the second mortgage on the Property.

- g. On the date that the Lease was signed, the lawyer for the Landlords wrote to HTC to state that the Property was being listed for sale and that they expect it to be sold “in short order”. It was actually listed for sale on November 11, 2023. It never sold. No evidence has been presented as to whether the listing made reference to the Tenants. But it is unlikely that any purchaser would wish to purchase the Property when tenanted at the rental rate the Tenants were paying.
- [22] From the facts set out above, including the rental amount, the timing of the Lease, and the almost contemporaneous listing of the Property for sale, I am able to draw the inference that the Landlords rented the Property to the Tenants with the intention of making the power of sale proceedings more difficult for HTC.
- [23] In saying this, I have no evidence before me to find that the Tenants were in any way responsible for that state of affairs. They say that they were not informed of the circumstances between the Landlords and HTC and I have no reason to doubt that claim.
- [24] Nonetheless, this is an appropriate case to terminate the Lease. The test under s. 2 deals with the conduct of the mortgagor not necessarily the tenant. That being said, under s. 52 of the *Mortgages Act*, my decision must have regard to the interests of the tenants as well as HTC. In that regard, during the course of argument, Mr. Riewald undertook not to evict the tenants before the expiry of the lease, on September 15, 2024. While that is appreciated, it would be difficult for any prospective tenant to find new accommodations in the middle of a month.
- [25] While I retired to write this endorsement, I told the parties that I would grant the relief sought in the application on terms. I asked the parties to speak, to determine whether they could agree on those terms.
- [26] Upon discussions with the parties, I order as follows
1. The Residential Tenancy Agreement between Uzair Rashid and Aimen Rashid as tenants and Ahmad Mahmood and Shanaz Bigem as landlords

dated September 13, 2023 with respect to the property municipally known as 963 Fielder Drive, Mississauga, ON L5V 2S2 is hereby and the same is set aside.

2. The Respondents shall deliver to the Applicant, possession of the following lands and premises:

LOT 172, PLAN 43M1397, S/T RIGHT IN FAVOUR OF BRITANIA MAVIS INVESTMENTS LIMITED UNTIL THE COMPLETE ASSUMPTION OF THE SUBDIVISION WORKS AND SERVICES BY THE CORPORATION OF THE CITY OF MISSISSAUGA AND THE REGIONAL MUNICIPALITY OF PEEL AS SET OUT IN PR60316; CITY OF MISSISSAUGA. Property Identification Number: 13213-2351 (LT)

The Property is municipally known as 963 Fielder Drive, Mississauga, ON L5V 2S2 (the "Property").

3. The Applicant shall be at liberty to issue a Writ of Possession for the Property.
4. The Respondents, Uzair Rashid and Aimen Rashid, shall not be evicted from the Property on or before November 1, 2024.
5. The Respondents, Uzair Rashid and Aimen Rashid, shall pay to Home Trust Company the sum of \$14,700.00 on or before August 10, 2024.
6. The Respondents, Ahmad Mahmood and Shanaz Bigem, pay to Home Trust Company its costs of this Application fixed in the amount of \$4,500.00 inclusive of HST and disbursements.

[27] Those terms are contained in a draft order, which I have signed.

  
Justice Marvin Kurz

Released: July 26, 2024