

CITATION: JiuJias v. Lau, 2024 ONSC 3926
COURT FILE NO.: CV-24-00722428-0000
DATE: 2024-07-10

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: JIUJIAS v. LAU et al

BEFORE: ASSOCIATE JUSTICE R. FRANK

COUNSEL: FRED TAYAR and COLBY LINTHWAITE for the plaintiff / moving party

ENDORSEMENT

A. Background

[1] This is a motion by the plaintiff seeking an order granting leave to issue a certificate of pending litigation (“CPL”) as against the land and premises known municipally known as 194 Torrens Avenue, Toronto, Ontario, M3H 6B9, and legally described as follows:

LAND REGISTRY OFFICE #66 (10407-0197 (LT))

PROPERTY DESCRIPTION:

PCL B-14 SEC M198; PT BLK B N/S TORRENS AV PL M198 EAST YORK COMM AT A POINT IN THE NLY LIMIT OF TORRENS AV, DISTANT 60 FT WLY FROM THE S ELY ANGLE OF THE SAID BLK; THENCE NLY PARALLEL TO THE ELY LIMIT OF THE SAID BLK, 149 FT 9 INCHES MORE OR LESS, TO A POINT DISTANT 150 FT SLY FROM THE NLY LIMIT OF THE SAID BLK; THENCE WLY PARALLEL TO THE NLY LIMIT OF THE SAID BLK, 30 FT; THENCE SLY PARALLEL TO THE ELY LIMIT OF THE SAID BLK, 149 FT 9 INCHES, MORE OR LESS, TO THE NLY LIMIT OF TORRENS AV; THENCE ELY ALONG THE NLY LIMIT OF TORRENS AV, 30 FT TO THE POB; TORONTO; CITY OF TORONTO

(the “Property”).

[2] The motion is brought without notice, in writing, and on an urgent basis.

[3] The plaintiff in the statement of claim is styled as “Theodore JiuJias, on behalf of the creditors of Michael Chun Ho Lau”. Michael Chun Ho Lau (“Lau”) is one of the defendants in this action.

[4] The factual matrix is outlined in the motion record that includes an affidavit of the plaintiff sworn July 4, 2024. The pertinent facts include the following:

1. In September 2020, the plaintiff made a loan to the defendants Lau and Mortgage Impression Corp. (“MIC”). Lau was Chief Executive Officer, President, Director, Secretary, Treasurer and General Manager of MIC. The loan was secured by a charge/mortgage of land made between the plaintiff, as chargee, and Lau and MIC, as chargors, in respect of the properties municipally known as 379 and 381 Rhodes Avenue, Toronto, Ontario (the “Mortgage”).
2. Upon maturity of the Mortgage, Lau and MIC defaulted on payment of the amount then owing under the Mortgage, which exceeded \$1.1 million. As a result, the plaintiff commenced power of sale proceedings. One of the Rhodes Avenue mortgaged properties was sold under power of sale on November 3, 2023.
3. On November 29, 2023, the plaintiff commenced an action bearing Court File No. CV-23-00710507-0000 (the “First Mortgage Action”) against Lau and MIC for, among other relief, judgment for the amount then owing to the plaintiff pursuant to the Mortgage, being in excess of \$1.1 million.
4. The plaintiff’s statement of claim in the First Mortgage Action was personally served on Lau on November 30, 2023.
5. Neither Lau nor MIC filed a statement of defence in the First Mortgage Action.
6. Although, the plaintiff sought default judgment, no judgment was obtained at the time because the Registrar raised certain questions regarding the calculation of the amounts claimed by the plaintiff.
7. The second mortgaged property was ultimately sold on January 8, 2024.
8. After completion of the second sale, there remained a deficiency of \$414,533.43 plus interest (the “Deficiency”) owing to the plaintiff under the Mortgage.
9. The plaintiff asserts that following the commencement of the First Mortgage Action, Lau made a fraudulent conveyance of the Property. More specifically, the plaintiff asserts as follows:
 - a. In 2015, Lau and his spouse, the defendant Aaron Storr (“Storr”) purchased the Property.
 - b. On November 30, 2023, the day Lau was personally served with the statement of claim in the First Mortgage Action, the Property was owned by Lau and Storr, and Lau was indebted, and in default, to the plaintiff in an amount exceeding \$1.1 million, pursuant to the Mortgage.

- c. On March 27, 2024, when Lau was aware that he had defaulted on payment of the Mortgage, that he had not defended the First Mortgage Action, and that, as a result, the plaintiff may have obtained or was seeking judgment against him:
 - i. Lau and Storr conveyed title to the Property to Storr and the defendant ASML Holdings Inc. (“ASML”), a company controlled by Storr (the “Transfer”). The Transfer indicated that it was an “[i]nter-spousal transfer for natural love and affection”. The consideration for the Transfer registered on title to the Property was two dollars; and
 - ii. Storr and ASML, as chargors, granted the Royal Bank of Canada, as chargee, a charge/mortgage of land on title to the Property, which was registered in the Land Registry Office for the Land Titles Division of Toronto as instrument number AT6539812 (the “RBC Mortgage”). The registered amount of the RBC Mortgage was \$2,375,000, an amount which was roughly equivalent to the market value of the Property. The RBC Mortgage replaced an earlier mortgage, also registered by RBC, for an amount approximately \$1 million less than the RBC Mortgage.
 - d. Neither the Transfer nor the RBC Mortgage were on notice to the plaintiff.
 - e. On April 3, 2024, a week after the Transfer and the registration of the RBC Mortgage, Storr and ASML entered into an agreement of purchase and sale respecting the Property (the “Property Sale”). The sale price was \$2,380,000, \$5,000 more than the registered value of the RBC Mortgage.
 - f. The Property Sale is scheduled to close on July 25, 2024.
10. In May 2024, the plaintiff (unaware of the Transfer, the RBC Mortgage, and the Property Sale), discontinued the First Mortgage Action, and commenced a new action against Lau and MIC, bearing Court File No. CV-24-00721308-0000 (the “Second Mortgage Action”) seeking judgment in the amount of the Deficiency, plus interest and costs.
11. Lau was served with the Second Mortgage Action on June 5, 2024. He has not served a Notice of Intent to Defend or a Statement of Defence. The plaintiff has sought, and awaits, default judgment.

[5] In this action, the plaintiff is seeking, among other relief, a declaration that the Transfer is void as against the plaintiff pursuant to sections 1, 2, and 4, of the *Fraudulent Conveyances Act*, R.S.O. 1990 c. F.9, (the “FCA”) and sections 4 and 12 of the *Assignments and Preferences Act*, R.S.O. 1990, c. A 33, (the “APA”). The statement of claim in this action was issued on June 19, 2024.

B. Law

[6] In order to obtain a CPL, the moving party must demonstrate that an interest in land is in question in the proceeding. An action to set aside a fraudulent conveyance is a proceeding in which an interest in land is brought into question.¹

[7] A plaintiff may obtain a CPL even if the plaintiff has not yet obtained judgment. In the circumstances, the applicable test is summarized as follows:

26 ...in order to obtain a CPL in an action claiming to set aside an alleged fraudulent transfer pursuant to the *Fraudulent Conveyances Act*, (i) before obtaining judgment in the main action, and (ii) where the claim in the main action does not concern an interest in the land allegedly fraudulently transferred, the following legal tests should be met:

(i) The claimant must satisfy the court that there is high probability that they would successfully recover judgment in the main action; and

(ii) The claimant must introduce evidence demonstrating that the transfer was made with the intent to defeat or delay creditors; evidence that the transfer was for less than fair market value lightens the burden; and

(iii) The claimant must demonstrate that the balance of convenience favours issuing a CPL in the circumstances of the particular case.²

C. Analysis

[8] On the record before me, the plaintiff satisfies the three-part *Grefford* test.

High probability of success in the underlying action

[9] Lau has not defended the Second Mortgage Action (and had not defended the First Mortgage Action). I am satisfied that there is a high probability that the plaintiff will obtain judgment on the outstanding debt against the defendants in the Second Mortgage Action.

¹ *Fernandes v Khalid*, 2021 ONSC 190 (SCJ) at para 33 citing, among other cases, *Bank of Montreal v. Ewing* (1982), 35 O.R. (2d) 225 (Ont. Div. Ct.)

² *Grefford v Fielding*, [2004] O.J. No. 1210 (SCJ), 70 OR (3d) 371 (“*Grefford*”) at para 26

Intent to defeat or delay creditors

[10] The plaintiff has introduced sufficient evidence demonstrating that the Transfer of the Property was made with the intent to defeat or delay creditors. The evidence that the Transfer was for less than fair market value lightens the burden.³ Here, there are numerous badges of fraud, including:

1. The parties to the Transfer are closely related, as Lau and Storr are spouses of one another, and ASML is a company controlled by Storr;
2. the consideration for which the Property was conveyed by Lau and Storr to Storr and ASML was far less than fair market value, being “natural love and affection” and two dollars;
3. Lau had significant potential liabilities to the plaintiff on the date of the Transfer;
4. on the date of the Transfer, Lau knew that the plaintiff had commenced legal proceedings against him in respect of Lau’s debt with respect to the Mortgage, and may in fact have recovered or was seeking judgment for an amount exceeding \$1.1 million;
5. the Transfer was done without notice to the plaintiff;
6. Lau continues to be in possession of the Property following the Transfer, and continues to use the Property as his own, with the result that the Transfer has been of no consequence to him; and
7. Further, one week after the Transfer and the registration of the RBC Mortgage, Storr and ASML entered into an agreement of purchase and sale of the Property.

[11] In view of the above indicia of fraud, I accept the plaintiff’s submission that the imminent completion of the Property Sale will liquidate any equity in the Property. This will allow Lau and Storr to dissipate any funds from the sale easily, which would defeat the plaintiff and any other creditors Lau may have.

Balance of convenience

[12] The plaintiff acknowledges that the defendants Storr and ASML may be prejudiced by the granting of a CPL, as it may impede the scheduled closing of the sale of the Property. I also note that this may have an impact on the intended purchaser(s) of the Property who have yet to be identified. Nevertheless, I accept the plaintiff’s submission that if the CPL is not granted, and the sale of the Property closes as currently scheduled, the plaintiff’s interest in the Property will have

³ *Grefford* at para 26

been dissipated. This will result in a real risk of dissipation of the defendants' equity in the Property which, as already noted, will defeat the plaintiff's claim against Lau.

[13] In these circumstances, I find that the balance of convenience favours the granting of a CPL.

Conclusion

[14] I am satisfied on the record that leave should be granted to issue a certificate of pending litigation with respect to the Property. I have signed the draft order filed, as amended electronically.

[15] The plaintiff shall serve the defendants with the motion record, this endorsement and the order signed today. The plaintiff shall also serve those materials on any party registered on title to the Property who may be affected by the certificate of pending litigation. The plaintiff shall also make best efforts to determine the intended purchaser(s) of the Property under the agreement of purchase and sale scheduled to close on July 25, 2024 and serve them with the same materials as are served on the defendants and other parties registered on title to the Property.

R. Frank Associate J.

DATE: July 10, 2024