CITATION: Labonte et al. v. 539644 Ont. Inc.et al., Browns Clearwater v. Labonte et al., 2024 ONSC 3278
COURT FILE NO.: CV-23-0225-00
DATE: 2024-06-07

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: Caroline Manon Labonte aka Carolle Manon Brown v. 539644 Ontario Inc., Brian Wayne Whalley and Aniela Jane Hannaford

AND:

Browns Clearwater West Lodge Inc. v. Caroline Manon Labonte and the Estate of Barry William Brown

HEARD: June 6, 2024

BEFORE: Fitzpatrick J.

COUNSEL: *J. Kirk*, for moving parties 539644 Ontario Inc., Brian Wayne Whalley, Aniela Jane Hannaford and Browns Clearwater West Lodge Inc,

M. Cupello, for responding parties Caroline Manon Labonte and the Estate of Barry William Brown,

Endorsement on Motion

[1] 539644 Ontario Inc., Brian Wayne Whalley, Aniela Jane Hannaford and Browns Clearwater West Lodge Inc. (collectively the "Browns") move for an injunction order. The Browns seek to enjoin Caroline Manon Labonte and the Estate of Barry William Brown (collectively Labonte) from taking any further steps in respect of a notice of sale under mortgage dated April 25, 2024 (the NOS). The NOS sets out the outstanding mortgage debt inclusive of interest and costs to be $2,670,357.83.

Background

[2] This is a commercial mortgage case. The matter originated with the purchase of an outdoor and adventure lodging business near Atikokan Ontario commonly known as Browns' Clearwater West Lodge (the Lodge). The deal closed in August 2021. The deal was structured as a share purchase. The purchase price was $3.1 million. The purchase price was paid by way of a cash payment of $150,000.00 and the balance, $2,735,471.00 by way of a vendor take back mortgage (the Mortgage). The Mortgage was secured against lands where the Lodge was located. The Mortgage term was five years. The monthly payments on the Mortgage are $12,000, blended principal and interest. The NOS at issue in this motion arose from an alleged breach of the obligation to make the ongoing monthly payments on Mortgage.

[3] The Browns alleged Labonte breached the purchase agreement. The Browns rely on a set off clause in the purchase agreement and began withholding the monthly payments on February 1, 2023. Litigation ensued. Both parties issued claims. A consolidation motion was heard by Fregeau J. in September 2023. The decision of Fregeau J. (*Brown's Clearwater West Lodge Inc. v. Labonte et al,* 2023 ONSC 5337) at paras 2 through 16 clearly and completely sets out the history of the litigation to that point. I rely on the recitation of those facts for the purpose of this endorsement. Fregeau J. decided the two actions should be consolidated. Fregeau J. made a decision about costs of the motion to consolidate. Fregeau J. did not make any determination on the merits of the matters or provide any other procedural directions.

[4] On March 25, 2024, Labonte served a motion for summary judgment seeking an order for sale of the Lodge property, possession of the property, payment of the mortgage debt of $2,659,175.49 plus interest and other relief.

[5] On April 8, 2024, I was appointed case management judge by R.S.J. Newton. On April 26, 2024, the parties held a case conference. Labonte was pressing for an early date for a hearing of the motion for summary judgment. The Court advised that because of the current and foreseeable demand on the judicial complement in the Northwest Region for criminal matters, it was unlikely the matter could be heard until the Fall of 2024. A schedule for the exchange of materials and cross examination was determined. The parties were directed to return to seek a date for hearing of the motion once cross examinations were completed and they were ready to argue the motion. In the meantime, the Browns brought this motion for a stay of the NOS.

The Law

[6] A party may seek an interlocutory injunction pursuant to s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, and Rule 40.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[7] The parties agree resolution of this motion for an injunction is governed by the well-known test set out in *RJR — MacDonald Inc. v. Canada (Attorney General)* [1994] 1 S.C.R. 311. On this motion the Browns as parties seeking injunctive relief are required to demonstrate;

a. the action raises a serious question to be tried, in the sense that the claim is neither frivolous nor vexatious;

b. the moving party would suffer irreparable harm if the court does not grant the injunction until the completion of the trial; and

c. that the balance of convenience favours granting the injunction because Browns would suffer greater harm than Labonte if the injunction is not granted.

[8] In the absence of exceptional circumstances such as fraud or bad faith, in general, a court does not have jurisdiction to restrain a mortgagee from enforcing its rights absent a payment of a mortgage debt in to court (*Arnold v. Bronstein* [1971] O.R. 467 ("*Bronstein*").

Disposition

[9] In their respective materials on this motion, the parties have blended in facts and arguments that would also closely relate to their expected positions on the outstanding motion for summary judgment. It is difficult to separate these allegations and arguments in the context of what is the narrower factual focus on this motion. As I am case managing this matter, it seems to me incumbent to make a decision that serves to assist the parties in expediting either resolution of the matter or having it ultimately adjudicated in a fair and efficient manner.

[10] I will determine the issue using the framework of the *RJR-MacDonald* test.

Serious Issue to be Tried

[11] In their defence and counterclaim, the Browns do not challenge the validity of the mortgage. It appears they want the mortgage to remain in place for the three years remaining in the term. They simply don't want to make the monthly payments until they have crystalized their alleged damages against Labonte. However, on this motion there is no evidence from which I could ascertain the quantum of any potential best-case scenario for the Browns' claim to a set off against the ongoing mortgage payments. The arrears of the monthly mortgage payments are substantial at this point.

[12] Labonte takes an initial position that the motion be dismissed. Alternatively, she proposes to stay enforcement of the NOS if the mortgage arrears are brought in to good standing.

[13] There is no evidence in the material before me alleging fraud on the part of Labonte. There is an allegation of bad faith in the post closing actions of Labonte which the Browns say has caused them damages and has given rise to their claim for set off. Labonte denies these claims in full. Labonte submits there is no claim for set off in any event as a careful reading of clause 6.9, the right of set off arises only in respect of debts owed by Labonte to Browns.

[14] In his decision noted above, Fregeau J. comments at paragraph 48 that Browns entitlement to set off against the mortgage debt remains to be determined. That issue was not squarely before him on that motion, but it is an observation of note.

[15] In my view, the operation of set off clause, 6.9, referred to by both parties, is subject to alternative interpretations. One possible interpretation upon a plain reading would have a circumstance where if the Browns owes Labonte money it can be set off only against amounts payable by Labonte to the Browns. This would appear to be a fairly limited right aimed at easing accounting exercises between the parties. The Browns claim a much broader right of set off against the ongoing mortgage payments. Complicating things, without the benefit of further evidence, is the fact that the right of set off accrues to two parties defined in the Agreement but appears to benefit only one. The first, "Purchaser" is 280840 Ontario Inc. The second, "Corporation" is 539644 Ontario Inc. However, the right of set off is only "against or otherwise credited against amounts payable by the Vendors (defined as Labonte) to the Purchaser". Arguably it does not apply to amounts payable by Labonte to 539644. I appreciate 539644 Ontario Inc. and 280840

Ontario have amalgamated into Browns' Clearwater West Lodge Inc. It seems to me there is a serious issue to be tried.

[16] In the case of *Venpax Corp v. Paniw* 2002 CarswellOnt 342 (SCJ) relied upon by the Browns, at paragraph 13, Molloy J. found that matter involved a *prima facie* allegation of fraud in the context of a motion to enjoin ongoing mortgage enforcement. That is not the case here. The allegations of bad faith are not sufficiently particularized in the affidavit material before me to raise this claim to one I would say is "exceptional" in accordance with the test set forth in *Bronstein*.

[17] In answer to the first branch of the *RJR* test, the interpretation of the set off clause 6.9 may be a serious issue to be tried but it is one that does not strongly militate in favour of granting an injunction against enforcement of a mortgage debt.

Irreparable Harm

[18] In *Venpax* supra, despite the property at issue being an income-producing apartment building, Molloy J. found that a sale would eradicate the mortgagor's business and therefore found that the harm of not granting the injunction could not be compensated for in damages. This is the kind of irreparable harm alleged by the Browns if the NOS was not somehow stopped at this point before the litigation can proceed further.

[19] In this case, I appreciate and am persuaded that a sale of the property would have significant consequences on the Browns that could not adequately be compensated in damages. I don't agree that Labonte would suffer irreparable harm if the injunction was granted. The validity of her

mortgage is not challenged. The Browns do not seek recission of the mortgage. Ultimately, Labonte has recourse to the equity of redemption of the Lodge property.

[20] In answer to the second question, the Browns would suffer irreparable harm if the NOS had a serious chance of leading to the possibility of a sale before the issue of the set off could be determined. There are many practical difficulties to this possibility coming to fruition. Foremost of which would be the lack of access Labonte has to the property without an order for possession.

Balance of Convenience

[21] I appreciate the candour of counsel for the moving party in acknowledging that both parties are suffering as the result of the circumstances of this case. However, I find the material put forward by Labonte to be more persuasive of the fact that the balance of convenience does not favour granting an injunction on the material filed and at this time, except on some terms. The Browns have not put forward any evidence quantifying what they expect to achieve in pursuing their claim for set off. The vendor take-back mortgage represented far and away the majority of the consideration moving between the parties in this sale. The Browns put up only a very small portion of the purchase price. They have now not paid the mortgage for seventeen months. Without interest the arrears are in the order of $204,000.00.

[22] I am persuaded that Labonte is suffering a significant economic consequence as the result of the Browns ceasing to make the monthly mortgage payments.

[23] At this point, it is unclear when the motion for summary judgment will be heard. In the meantime, the Browns are not paying the mortgage and have not particularized even in broad terms how much they expect they can set off against the mortgage arrears or the ongoing payments going forward. The Browns want to continue with the benefit of the mortgage deal they made without paying what they agreed to do on a monthly basis. Considered in isolation, it seems to me the balance of convenience would not be in favour of preventing Labonte from taking whatever steps are necessary to try and enforce the mortgage. That said, I am not convinced that pursing remedies arising strictly from the NOS at the same time that a contested summary judgment motion is before the Court which seeks to obtain all the necessary elements to effectively realize on the mortgage, will lead to a just and fair result, at least in the short term.

[24] In fashioning a remedy for this particular matter, I consider how long it may take to get this motion for summary judgment heard and resolved. Civil matters are now being scheduled much further off in future than has been enjoyed by the civil litigation bar in the Northwest in the past. As an aside, these new Northwest time-lines would likely appear very reasonable to litigators in other areas of the Province who have been experiencing long delays of greater lengths for many years. In any event, this new reality in the Northwest Region is not one about which anyone is happy. The Court sympathizes with the frustration expressed by civil litigants in getting timely court dates because of the Court's other commitments. In my view, this calls for solutions that are focused on the practical.

[25] On the third branch of the test, I find the Browns as the moving party have not satisfied me that the balance of convenience favours granting an injunction as requested in the notice of motion.

The Result

[26] Despite the fact that the moving party does not satisfy all the branches of the *RJR* test, I see it as in the interest of justice to adjourn this motion and put in place an interim prohibition on taking any immediate steps with respect to the enforcement of the NOS on terms, pending return of the motion. I find that the moving party has not demonstrated the exceptional circumstances required by *Brownstein* to prevent a mortgagee from enforcing an acknowledged mortgage debt. That said, it seems a more commercially reasonable interim solution for this problem is to require the Browns to make substantial payments against the mortgage arrears over a reasonable period of time and for the litigation to continue. Or resolve. If the Browns are not able to comply with any of the terms set out below, Labonte will be at liberty to return this matter before Fitzpatrick J. and seek an order that the motion for the injunction be dismissed. In that case, the expensive and awkward litigation would continue with a notice of sale being issued where a party does not have a right to access the property. The practical aspect of that result makes little sense. However, the court hopes over the next few months that a date can be found to hear the motion for summary judgment.

[27] I note that Ms. Labonte's first name is spelled differently in the style of cause and her affidavits in this matter when compared to how it is spelled in the NOS. I use the spelling in the NOS for this interim adjournment order as it is directed at that process initiated by that document.

[28] Therefore, it is ordered that this motion be adjourned on the following terms;

> 1. Until further court order, Carolle Manon Labonte is hereby prohibited from enforcing a Notice of Sale dated April 25, 2024 against lands set out therein in respect of the chargor 539644 Ontario Inc. Carolle Manon Labonte or any person acting on her behalf is also prohibited from issuing any further process in respect of the mortgage debt at issue in this consolidated action;

2. It is hereby ordered that Brown's Clearwater West Lodge Inc., 539644 Ontario Inc., Brian Walley and Aniela Jane Hannaford or any of them shall pay to Caroline Manon Labonte the following funds on the following schedule;

a. $25,000.00 on or before June 28, 2024;

b. an additional $25,000.00 on or before July 31, 2024;

c. an additional $50,000.00 on or before August 30, 2024;

d. an additional $100,000 on or before September 30, 2024;

3. The funds ordered paid in paragraph 2 of this order shall be in respect of principal and interest on arrears of the mortgage from February 1, 2023 to June 1, 2024. In the event any of Brown's Clearwater West Lodge Inc., 539644 Ontario Inc., Brian Walley and Aniela Jane Hannaford makes additional payments above the amounts ordered, they shall be applied to the ongoing mortgage payments commencing July 1, 2024.

4. The funds ordered paid are without prejudice to any position the parties may take in future in this litigation with respect to any claim for set off.

5. Unless approached earlier by the trial coordinator at Thunder Bay, counsel shall arrange a case conference with Fitzpatrick J. some time after September 30, 2024. This case conference will discuss further steps in the litigation and what, if any, further payments are to be made in respect of a mortgage that may still be in arrears as of October 1, 2024;

6. In default of any of the payments required by this order, Caroline Manon Labonte is at liberty to return the motion before Fitzpatrick J. on at least 14 days notice to seek an order dismissing the motion for ongoing injunctive relief. A brief affidavit particularizing the default in compliance with the order will be required if the matter is returned on that basis;

7. Caroline Manon Labonte shall have costs of the attendance of June 6, 2024 fixed in the amount of $3,000.00 inclusive of HST in any event of the cause against Brown's Clearwater West Lodge Inc.. This cost award may be set off against any amounts quantified or agreed to be owing following the costs award of Fregeau J. in paragraph 48 of *Brown's Clearwater West Lodge Inc. v. Labonte et al*, 2023 ONSC 5337.

"originally signed by"

The Hon. Mr. Justice F.B. Fitzpatrick

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COUNSEL: *J. Kirk,* for moving parties 539644 Ontario Inc., Brian Wayne Whalley, Aniela Jane Hannaford and Browns Clearwater West Lodge Inc, for the Applicant

M. Cupello, for responding parties Caroline Manon Labonte and the Estate of Barry William Brown, for the Respondent

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ENDORSEMENT ON MOTION

Fitzpatrick J.

DATE: June 7, 2024