

CITATION: Toronto-Dominion Bank v. Andrade, 2024 ONSC 4631
COURT FILE NO.: CV-24-00714240-0000
DATE: 20240821

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
TORONTO-DOMINION BANK) James Butson and Cristina Internicola, for
) the Applicant
Applicant)
)
- and -)
)
SANDRA ANDRADE and all other) Jerald J.D. MacKenzie, for the Respondent
Tenants/Occupants of the premises) Sandra Andrade
municipally known as 270 SCARLETT)
ROAD, UNIT 1201, TORONTO,) Rahul Kesarwani and Andres Dovale for
ONTARIO, M6N 4X7) Sesanarine Singh
Respondent)
)
)
)
) **HEARD:** August 14, 2024

2024 ONSC 4631 (CanLII)

PAPAGEORGIU J.

Overview

[1] This application involves two individuals who allege fraud against each other, Ms. Sandra Andrade and Mr. Sasanarine Singh, with respect to a condominium located at 270 Scarlett Road, Unit 1201 (“270 Scarlett”).

[2] Ms. Andrade is the registered owner of 270 Scarlett, but Mr. Singh says he is the beneficial owner and that Ms. Andrade executed a trust agreement whereby she agreed to hold 270 Scarlett in trust for him.

[3] The Toronto Dominion Bank, (“TD”) advanced funds towards the purchase of 270 Scarlett (the “TD Charge”) and is essentially caught in the middle of Ms. Andrade’s and Mr. Singh’s dispute. TD’s position is that it had no knowledge of Mr. Singh’s alleged interest, but this is a disputed fact. There is no dispute that the TD mortgage funds went toward the purchase of 270 Scarlett.

[4] There is also no dispute that Mr. Singh and his mother have been living at 270 Scarlett since 2020 and he says this is his home. He says he has been paying all the bills and that he advanced money to Ms. Andrade to make mortgage payments as well.

[5] TD initially brought these proceedings only as against Ms. Andrade, on the basis of its position that it had no knowledge of Mr. Singh's alleged interest.

[6] After TD commenced enforcement proceedings, Ms. Andrade advised TD that there were individuals living in the property who were "squatters" and that she would assist TD in its enforcement proceedings and removal of these squatters.

[7] TD originally scheduled this matter by attending at Civil Practice Court. At that time, an individual named Sheila Singh attended and indicated that she was Mr. Singh's tenant and that he was the owner of the property. Sheila Singh is Mr. Singh's mother. Mr. Singh also attended and advised that he was in the process of commencing proceedings against Ms. Andrade. He was given time to file materials, but ultimately had not done so by the time of the first scheduled application hearing date. There was a further and final adjournment to August 14, 2024, peremptory to Mr. Singh.

[8] As of the date of this hearing, the proceeding between Mr. Singh and Ms. Andrade has not proceeded very far. I note as well that counsel advised that their dispute is much broader than simply about 270 Scarlett.

[9] TD seeks orders for immediate possession of 270 Scarlett, as well as an order setting aside any tenancy that may exist as against all respondents, who include Ms. Andrade, Mr. Singh, and Ms. Singh.

[10] Mr. Singh takes the position that there are facts in dispute that require a trial of an issue in this matter. Specifically, he argues that TD was aware of his beneficial interest and the trust agreement in his favour before it advanced money to Ms. Andrade. He also argues that the process pursued by TD is deficient. Specifically, he claims that TD should have sued Ms. Andrade and Mr. Singh. As well, he argues that TD should have issued its Notice of Sale to him as well as Ms. Andrade. He argues that this process must now begin anew and that the current application is a nullity.

Decision

[11] I disagree that TD's application is a nullity or that it must begin anew. TD has a right pursuant to the TD Charge to take possession upon default and sell 270 Scarlett, subject to issues of priority as well as the protections that exist in the *Mortgages Act* and at common law for parties who claim an interest. Mr. Singh provided no authority for the proposition that TD must bring a formal action against him and Ms. Andrade, win a monetary judgment against both parties, and only following this litigation, subsequently begin enforcement proceedings.

[12] For the reasons that follow, I am directing that there be a trial of an issue before me in respect of whether or not TD had actual notice of Mr. Singh's claim to a beneficial interest in 270 Scarlett and/or the trust agreement in his favour when it advanced mortgage funds to Ms. Andrade pursuant to the TD Charge.

[13] I am also directing that Mr. Singh and Ms. Andrade arrange a case conference before me in respect of their proceeding as against each other. Mr. Singh's position is that he would like to exercise a right of redemption and either bring the TD Charge current or pay it out completely. As such, Mr. Singh would like to obtain a summary adjudication of his claim that Ms. Andrade holds 270 Scarlett in trust for him. At this stage, without seeing any of the pleadings in respect of that matter, it is unclear whether that issue can be determined outside the other issues in their dispute.

Issues

1. Is there a triable issue as to whether Mr. Singh holds the beneficial interest in 270 Scarlett and/or whether Ms. Andrade holds 270 Scarlett in trust for him?
2. Is there a triable issue as to whether TD had prior actual knowledge of Mr. Singh's alleged beneficial interest in 270 Scarlett and/or the trust agreement?

Analysis

[14] Before addressing the issues, I will say a few things about this matter being brought by way of application.

[15] Rule 14.05(3)(d) and (h) of the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 provides that a proceeding may be brought by application where the relief claimed is the determination of rights depending upon the interpretation of a contract, or in respect of any matter where it is unlikely that there will be any material facts in dispute.

[16] As set out in *2516216 Ontario Ltd. o/a NUMBRS v. AbleDocs Inc.*, 2023 ONSC 4713, at paras. 14-18, an order converting an application to an action is typically only made when there are complex and disputed questions of fact or credibility which require oral evidence. This is like the standard applied on a motion for summary judgment. The court also noted that, as with a summary judgment motion, a court may proceed on the basis that the parties have put their best foot forward.

[17] In *Dubblestyne et al v. Town of Oakville*, 2021 ONSC 2678, at para. 8, the court agreed that enhanced fact-finding powers in r. 20 of the *Rules of Civil Procedure*, are applicable to applications.

[18] This approach to hearing and determining applications is consistent with the Supreme Court's direction in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, that fairness and justice do not require "painstaking" procedure and *viva voce* evidence in all cases, even those where there

is some conflict in the evidence: at para. 28. The paramount consideration is whether the process employed can achieve a fair and just outcome.¹

[19] In this case, there are triable issues that cannot be determined by way of this application without viva voce evidence.

Issue 1: Is there a triable issue as to whether Mr. Singh holds the beneficial interest in 270 Scarlett and/or whether Ms. Andrade holds 270 Scarlett in trust for him.

[20] In his factum, Mr. Singh asked for the following determinations as against Ms. Andrade: a declaration that a trust agreement between him and Ms. Andrade is valid; an order that the title to 270 Scarlett be amended to show him as the registered owner; and permission to deal with 270 Scarlett and the TD Charge in due course. In the alternative, Mr. Singh seeks a declaration that Ms. Andrade holds 270 Scarlett in his favour by way of resulting trust. In the further alternative, Mr. Singh seeks a declaration that Ms. Andrade breached a fiduciary duty to him, that she is unjustly enriched, and that a constructive trust be imposed against 270 Scarlett in Mr. Singh's favour.

[21] Mr. Singh did not bring a cross-application against Ms. Andrade and so he is unable to obtain any orders of this nature as against her in this proceeding. As noted above, the parties have explained to me that there is an ongoing and complicated proceeding between Mr. Singh and Ms. Andrade related to their dealings in respect of 270 Scarlett and other properties where each make various significant allegations against each other.

[22] However, whether there is a triable issue as to Mr. Singh's claimed beneficial interest is nevertheless relevant in this proceeding because if there is no triable issue in this regard, then arguably, whether or not TD had actual notice of such alleged interest, is not relevant.

[23] I find that there is a triable issue as to whether Mr. Singh holds the beneficial interest in 270 Scarlett and/or by way of the trust agreement in his favour for the following reasons.

[24] Mr. Singh says that he is in the business of providing loans for home renovations and home improvement.

[25] Mr. Singh has provided affidavits from himself, a lawyer named Mr. Victor Wall, and a previous affidavit purportedly signed by Ms. Andrade, that support his alleged beneficial interest in 270 Scarlett and /or that she holds it in trust for him.

¹ See also *Middleton v. Direct Broadcast Satellite Communications Corp*, 2024 ONSC 3442, at para. 91.

[26] Mr. Singh says that he first loaned Ms. Andrade funds in respect of 3903 Bloor Street. They entered into a private loan agreement and decided that her residence at 3140 Fifth Line would be used as collateral. However, Mr. Singh agreed that he would not register a security interest against this property.

[27] On the due date for repayment of this loaned amount, Mr. Singh says that Ms. Andrade advised him that she could not repay the balance. Because the arrears exceeded the value of the property at 3140 Fifth Line, Ms. Andrade agreed to transfer 3140 Fifth Line to Mr. Singh. The parties attended before a lawyer, Mr. Wall, where they executed two declarations of trust, one with respect to 3140 Fifth Line and one with respect to 270 Scarlett, which she was in the process of buying.

[28] These affidavits also set out significant allegations of deceit and fraud as against Ms. Andrade, none of which have been disputed by Ms. Andrade by way of affidavit in this application. However, when Ms. Andrade was examined as a witness, she gave evidence that she had no knowledge of any trust agreement and alleges that she never received a copy.

[29] In all the circumstances, I am satisfied that there is a triable issue as to whether or not Mr. Singh is the beneficial owner of 270 Scarlett.

Issue 2: Is there a triable issue as to whether TD had prior knowledge of Mr. Singh's alleged beneficial interest in 270 Scarlett and/or the trust agreement?

[30] The relevant provisions of the *Land Titles Act*, R.S.O., 1990, c. L. 56 provide as follows:

Trusts not to be entered

62 (1) A notice of an express, implied or constructive trust shall not be entered on the register or received for registration.

Description of owner as a trustee

(2) Describing the owner of freehold or leasehold land or of a charge as a trustee, whether the beneficiary or object of the trust is or is not mentioned, shall be deemed not to be a notice of a trust within the meaning of this section, nor shall such description impose upon any person dealing with the owner the duty of making any inquiry as to the power of the owner in respect of the land or charge or the money secured by the charge, or otherwise, but, subject to the registration of any caution or inhibition, the owner may deal with the land or charge as if such description had not been inserted.

[31] Based upon the above, the trust agreement could not be registered on title, and indeed, it was not registered. As a result, in accordance with s. 93(3) of the *Land Titles Act*, the effect of the charge when registered is as follows:

(3) The charge, when registered, confers upon the chargee a charge upon the interest of the chargor as appearing in the register subject to the encumbrances and qualifications to which the chargor's interest is subject, but free from any unregistered interest in the land.

[32] In *Di Michele v. Di Michele*, 2014 ONCA 261, 319 O.A.C. 72, the Ontario Court of Appeal addressed the interrelationship between ss. 62(1), (2) and 93(3) as follows:

[107] Under Ontario's land titles system, the rights of a *bona fide* purchaser (which includes a mortgagee) for value who has registered its interest in the property trump any prior unregistered interests in the property: *719083 Ontario Limited v. 2174112 Ontario Inc.*, 2013 ONCA 11, 28 R.P.R. (5th) 1, at para. 12; *MacIsaac v. Salo*, 2013 ONCA 98, 114 O.R. (3d) 226, at para. 39.

[108] In the present case, as I have already explained, the respondents were *bona fide* purchasers for value without notice. They registered their interest (the Mortgage) in the Property. Their interest would trump those with a prior unregistered interest in it. Therefore, even if the beneficiaries had an interest in the Property that pre-existed the granting of the Mortgage, that interest was unregistered and therefore was trumped by the registered Mortgage.

[33] TD argues that for it to be precluded from relying on ss. 62(2) and 93(3), Mr. Singh must prove that TD had actual notice of the trust agreement, assessed against the credibility of Mr. Singh's evidence: *Cuthbert v. TD Canada Trust*, 2010 ONSC 830, [2010] O.J. No. 630 at para. 42.

[34] In my view, there is a triable issue as to whether or not TD had actual knowledge of the trust agreement or Mr. Singh's alleged beneficial interest.

[35] To understand why, it is important to consider the chronology of alleged events after the trust agreement was allegedly signed.

[36] Mr. Singh's affidavit sets out that after the trust agreement was signed, he and Ms. Andrade agreed that Mr. Singh would provide her with \$148,000 to finance the closing of 270 Scarlett. Further, Mr. Singh provided her with \$303,000 for her to deposit in her bank account to show lenders that she had sufficient capital to afford mortgage payments and secure refinancing for both 3140 Fifth Line and 270 Scarlett as required. Thus, he advanced a total of \$451,000 pursuant to the trust.

[37] Community Trust Company provided the first mortgage on 270 Scarlett. Mr. Singh acknowledges that he was aware of this mortgage, and that Mr. Wall, the lawyer who had acted for both Ms. Andrade and Mr. Singh, was the attorney in respect of the Community Trust Mortgage; indeed, Mr. Wall registered it.

[38] Mr. Singh says that subsequently, he paid the monthly mortgage in the amount of \$3,200 by providing Ms. Andrade with this amount. He then began making the monthly mortgage payments.

[39] However, Ms. Andrade failed to keep the Community Trust Mortgage current.

[40] Mr. Singh then obtained powers of attorney from Ms. Andrade in respect of both properties, as well as an affidavit from Ms. Andrade confirming her breaches of fiduciary duty to him. In Ms. Andrade's affidavit sworn June 25, 2021, filed herein, she admits to defrauding him of mortgage payments.

[41] After the Community Trust Mortgage was brought into good standing, it became apparent that the interest rate was too high. Mr. Singh says that he coordinated with someone named Tina Sayed to seek refinancing of the Community Trust Mortgage. Tina Sayed is the mortgage broker with Mortgage Alliance that assisted Ms. Andrade.

[42] Mr. Singh says that after many months, they were able to negotiate a mortgage from TD. He says that he met with a branch manager and signing officer of TD sometime in June 2021 where the TD Charge was approved.

[43] He says that a TD representative acknowledged that even though the funds for the mortgage payments were being made by Mr. Singh, they had to come out of Ms. Andrade's bank account because she was on title. Further, while TD was aware of his beneficial ownership, the mortgage could not be assigned to him until the mortgage was 8-12 months old due to their internal controls. Further, the \$303,000 in Ms. Andrade's bank account had to remain there as proof that she could carry the loan.

[44] TD argues that Mr. Singh has failed to provide any corroborating evidence of this meeting and that his affidavit is bald.

[45] As well, he only provided the name of the individual, who he alleges he met with, Fay Amade, when he was cross-examined. TD alleges that this made it difficult to respond. However, r. 39.02(2) of the Ontario *Rules of Civil Procedure* provides that a court may grant leave to a party to file a further affidavit after cross-examination where it is satisfied that the person ought to be permitted to respond to any matter raised on cross-examination. TD could have sought to respond by obtaining Ms. Amade's evidence as well as leave to admit it after cross examination.

[46] As well, although TD says it has no knowledge of the alleged beneficial interest or trust agreement, TD has not produced evidence that it made inquiries from the TD branch in question seeking information on whether Mr. Singh ever attended and spoke to a TD representative. TD has not indicated that it reviewed the branch file to seek information as to whether this occurred. The evidence that TD has proffered is from its mortgage enforcement personnel with carriage of the enforcement, not any individuals involved in negotiation of the mortgage. As well, TD refused production of the mortgage file on the basis that Mr. Singh was not the mortgagor and had no entitlement to see it.

[47] TD also argues that Mr. Singh's evidence conflicts with the evidence of Ms. Andrade and Mr. Wall, who advise that they never told TD about Mr. Singh's beneficial interest or the trust agreement.

[48] The fact that Mr. Wall and Ms. Andrade say they never advised TD of the trust agreement, or the beneficial interest does not mean that Mr. Singh never had the meetings with TD that he alleges. The fact that there may be some conflicting evidence also does not mean that Mr. Singh never had this meeting.

[49] Both parties have failed to put their best foot forward, Mr. Singh by failing to provide the name of the individual he allegedly spoke with before cross examination, and TD by failing to try to respond once it knew the name by seeking leave to admit a further affidavit from this individual once it knew the person's name.

[50] In all the circumstances, I find that there is a triable issue as to whether or not TD had actual notice of Mr. Singh's alleged beneficial interest or the trust agreement before it advanced the mortgage funds.

[51] I am directing as follows to ensure that these matters are adjudicated in a just and efficient manner:

- The trial of an issue shall take place before me on December 17, 2024, for a full day in person. It shall solely involve the issue of whether or not TD had actual notice of Mr. Singh's claim that he has the beneficial ownership, as well as whether TD had actual notice of the trust agreement.
- The parties shall exchange affidavits of documents, which shall solely relate to this issue, on or before September 16, 2024. If there are issues related to production of any materials such as the TD mortgage file, the parties may arrange a case conference before me to address it.
- The parties shall be at liberty to conduct further examinations out of court prior to the trial of an issue, specifically with respect to the issue of whether or not TD had actual notice of Mr. Singh's claim. These shall be completed by November 18, 2024.
- The parties shall be at liberty to call evidence at the trial of an issue that goes outside the parameters of what is in the current materials on this issue.
- The parties may choose to use affidavit evidence for the in-chief portion of the trial of an issue and only conduct in court cross-examinations.
- At the trial of an issue, in the event that I find that TD did have actual notice of the claimed beneficial interest, and/or trust agreement, I am directing the parties to consider and make submissions on the legal issue of whether this disentitles TD to take possession and sell the

property, given the unique situation before me where Mr. Singh admits that he knew about the TD Charge, participated in negotiating it, and that the monies went into the property. As noted, Mr. Singh's position is not that the TD Charge is invalid; rather, he claims that he cannot deal with it because he is not the registered owner.

- Mr. Singh shall provide his factum by December 2, 2024, and TD shall provide its factum by December 9, 2024.

[52] As noted, Mr. Singh has raised issues as to defects in TD's proceeding. Specifically, he claims that the Notice of Sale ought to have been served on him by virtue of s. 31(1)(4) of the *Mortgages Act* that provides as follows:

Notice of power of sale

31(1) A mortgagee shall not exercise a power of sale unless a notice of exercising the power of sale in the form prescribed by the regulations made under this Act has been given by the mortgagee to the following persons, other than the persons having an interest in the mortgaged property prior to that of the mortgagee and any other persons subject to whose rights the mortgagee proposes to sell the mortgaged property:

...

4. Where the mortgagee has actual notice in writing of any other interest in the mortgaged property and where such notice has been received prior to the giving of notice exercising the power of sale, to the person having such interest.

[53] He says that if he is successful in proving that TD had actual notice of his claim, then TD ought to have served him with a Notice of Sale. I make no findings on this even though TD has provided significant evidence of its attempt to give notice to whoever the occupants were, and it is clear that Mr. Singh has received the Notice of Sale since he has appeared and is responding to it. Nevertheless, to avoid yet a further adjournment, I am directing that TD serve Mr. Singh with a Notice of Sale without prejudice to TD's right and ability to take steps within this proceeding relating to the trial of an issue and without prejudice to its position that the first Notice of Sale was validly served.

[54] I also order on consent, beginning October 1, 2024, that Mr. Singh make ongoing mortgage payments to TD, that TD is authorized to advise Mr. Singh what the monthly payment required is, and that TD may accept that payment. If Mr. Singh misses a payment, then the parties may arrange an urgent hearing before me.

[55] I order that any payment does not nullify the Notice of Sale.

[56] I also order that Mr. Singh bring the condo fees current and that he pays such fees on an ongoing basis as well as taxes.

[57] I am also directing that Ms. Andrade and Mr. Singh arrange a case conference with me in respect of the proceeding between them to consider Mr. Singh's request that a summary procedure be established to determine the issue of his beneficial claim to 270 Scarlett, as well as the validity of the written trust agreement filed before me. They shall arrange this case conference to occur before September 15, 2024.

[58] I am also directing that TD and Mr. Singh arrange a case conference before me sometime in mid-October to address any issues that may have arisen, to ensure that the parties are ready for the December 17 hearing. They should communicate directly with my assistant in this regard.

Papageorgiou J.

Released: August 21, 2024

CITATION: Toronto-Dominion Bank v. Andrade, 2024 ONSC 4631

**ONTARIO
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TORONTO-DOMINION BANK

Applicant

– and –

SANDRA ANDRADE and all other Tenants/Occupants
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ROAD, UNIT 1201, TORONTO, ONTARIO, M6N 4X7
Respondent

REASONS FOR JUDGMENT

Papageorgiou J.

Released: August 21, 2024