

CITATION: Dalpha Technologies Inc. v. Farrage 2024 ONSC 4926
COURT FILE NO.: CV-17-00571401-0000
DATE: 20240909

ONTARIO SUPERIOR COURT OF JUSTICE

RE: DALPHA TECHNOLOGIES INC., Applicant

-and-

JUDITH LORRAINE FARRAGE and EDMUND FARRAGE, Respondents

BEFORE: L. Brownstone J.

COUNSEL: *David A. Brooker*, for the Applicant

John Jeyaratnam, for the Respondent

HEARD: August 7, 2024

ENDORSEMENT

Introduction

- [1] On March 31, 2000, the applicant Dalpha Technologies Inc. (“Dalpha”) bought three properties in Kitchener, both residential and commercial, from the respondent Judith Farrage. The agreement of purchase and sale was entered into under a power of attorney “by her Attorney Edmund Farrage as Attorney for Judith Farrage”. Edmund is Judith’s husband.

- [2] The purchase was financed in part by a vendor-take-back mortgage (“VTB”) in the amount of \$442,000. The mortgage went into default. In October 2006 Ms. Farrage issued a Notice of Sale under Mortgage and in December 2006 she started a claim against Dalpha. On January 23, 2007, Ms. Farrage obtained default judgment against Dalpha in the amount of \$453,223.92 and \$1,141.69 in costs. The judgment bore interest at a rate of 7.0 per cent per annum. It was not ordered to be compounded. Ms. Farrage took possession of the properties in about January 2007. She collected rents from the properties, which were managed by her husband.

- [3] When Dalpha started this application in March of 2017, it was still on title. The application sought, among other things, a declaration that Dalpha has been and remains the registered owner of the properties, an order that the defendants provide a full accounting for the period during which they were mortgagees in possession, an order that the defendants provide a discharge statement, and a declaration that the mortgage had been discharged. During the period when Dalpha was making unsuccessful efforts to serve the respondents with the

application, culminating in an order for substituted service, Ms. Farrage sold the properties under a power of sale. The closing date was September 26, 2017. Dalpha now seeks an accounting and payment.

- [4] Given the lack of documentation produced by the Farrages and the incomplete documentation available to Dalpha, Dalpha retained Ms. Jennifer Lynch, a forensic and investigative accounting expert, to prepare an accounting using the available evidence. Dalpha claims the respondents owe it \$1,000,381 as of September 26, 2017 (the date of sale), plus pre-judgment interest. The respondents claim that Mr. Farrage owes Dalpha nothing. Ms. Farrage either owes Dalpha \$318,227 on a simple interest calculation or is owed \$316,317 by Dalpha on a compound interest calculation.

1. Procedural History

- [5] Dalpha had been seeking an accounting from the Farrages for years. Eventually, by a consent order granted by Patillo J. on February 11, 2019, the respondents were ordered to provide a full accounting of all revenues and expenses in respect of the properties from the date upon which they took possession of the properties until the date of sale, in the form of a responding application record.
- [6] Five months after the court order of February 11, 2019, the respondents provided a two-page “Mortgage Statement” with respect to the properties. The statement had no back-up documentation, nor did it provide any details on how the amounts were calculated. Along with the “Mortgage Statement”, the respondents provided to Dalpha a copy of the 2007 default judgment.
- [7] Given the sparseness of the documentation and the discrepancies that Dalpha believed existed between the information provided and the information it did have, Dalpha located and examined three tenants or previous tenants of the properties. Dalpha thereby obtained some evidence of revenues and expenses in respect of the properties. It gathered whatever other information it could.
- [8] In October 2020, Mr. Farrage swore a further affidavit with some accounting. The applicant noted significant deficiencies with these documents – there was no back-up documentation, they were handwritten records, and they were incomplete.
- [9] Ms. Lynch prepared a report dated December 15, 2020 (“the 2020 Lynch report”). The 2020 Lynch report sets out calculations of income statements for each of the three properties from the date of purchase to the date of sale, and a formal mortgage calculation which accounted for all of the principal and interest to date.
- [10] As required by an endorsement of O’Brien J. dated October 22, 2020, and agreed to by the parties, the 2020 Lynch report was provided to the respondents in February 2021. It was served on the respondents in affidavit form on March 4, 2022. Under O’Brien J.’s endorsement, the respondents were required to provide their expert report by April 9, 2021. They did not do so. Nor did they cross-examine Ms. Lynch on her report.

[11] In 2023, Pollak J. ordered this application to be heard on May 14, 2024. A schedule for the exchange of materials was ordered. On April 10, 2024, the respondents appeared in civil practice court seeking an adjournment of the application. Centa J. denied the adjournment and issued the following endorsement:

The respondents seek an adjournment of an application date set for May 14, 2024, that was fixed by Pollack J. in 2023. Counsel for the respondents is in a trial and the respondents' expert report has not been completed. All other evidence has [been] exchanged and cross-examinations have been conducted.

I am not inclined to grant an adjournment of this hearing date. I will, however, see counsel for a case conference on April 17, 2024, at 1:30 to explore whether or not there are terms of an adjournment that would be acceptable to the applicants.

[12] At the April 17, 2024 case conference that followed, Centa J. made the following orders:

Counsel for the respondents indicated today that he did not receive instructions from his clients to propose terms for the adjournment. In the circumstances, I decline to adjourn the application.

I order the applicant to deliver its factum on or before April 29, 2024 and the respondents to deliver their factum on or before May 6, 2024. The applicant shall deliver the confirmation form on or before April 30, 2024.

[13] The respondents did not serve or file their factum by May 6, 2024. They uploaded their factum on May 13, 2024, the evening before the scheduled hearing. They renewed their request for an adjournment before me on May 14, 2024, on the basis that the Farrages were hospitalised in 2021 and 2022 and suffered diminished capacity resulting in a change of counsel. No evidence to this effect was filed. If the matter was not adjourned, the respondents sought to file an expert report of more than 100 pages, dated the day before the hearing and uploaded to CaseLines the evening before the hearing (“the KPMG report”).

[14] Dalpha chose to consent to an adjournment to permit cross-examinations and a responding report. By endorsement dated May 14, 2024, I ordered the matter to return before me on August 7, 2024, and ordered a timetable and costs. Ms. Lynch prepared a responding report to the KPMG report, in which she reduced the amount she opined was payable (“the 2024 Lynch report”).

2. What, if any, sums are owing between the parties?

[15] Dalpha argues that the respondents became mortgagees in possession – they took control of the properties, collected rents, engaged tenants, and managed the properties to the exclusion of the mortgagor: *Melo v. 2297248 Ontario Ltd.*, 2016 ONSC 4877, 2016

CarswellOnt 14123, at paras. 13-16. As such, they must account to Dalpha, and the court should rely on the evidence of Ms. Lynch regarding the accounting and the amount the respondents must pay Dalpha.

- [16] The respondents agree that Ms. Farrage became a mortgagee in possession and concede that Ms. Farrage is required to account to Dalpha. They take issue with the Lynch reports and ask the court to rely on the KPMG report. Further, the respondents deny that Mr. Farrage became a mortgagee in possession and deny he owes any duties or has any liability in this matter.

A) The expert reports

- [17] The underlying evidence on which the expert reports are based is somewhat messy and incomplete. I considered whether to order that the matter proceed to a trial under r. 38.10(1)(b) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, given the state of the evidence. However, I determined that this was not appropriate for several reasons. First, this application was started in 2017. Further delay is to be avoided. Second, the biggest problem with the evidence is its paucity. The mortgagee in possession has been given every opportunity to produce underlying documentation on which proper calculations could be made. Instead, the mortgagor has been put to the expense of finding and examining tenants and retaining a forensic investigative accountant to piece together the evidence. Neither party asked that the matter proceed by way of trial. The further delay and expense a trial would cause is unwarranted and the benefit dubious. The parties will live with the evidentiary record as it stands. Changing the form of the hearing will not add to the amount of evidence available.

- [18] As will be discussed more fully below, the mortgagee in possession has a duty to account. This is not a foreclosure proceeding. The mortgagor remained on title until the properties were sold. The mortgagee in possession is required to reasonably maintain the property, but does not become an owner. It is required to account fully to the mortgagor: *Beckstead v. Ball et al.*, [1961] O.R. 127 (H.C.), at p. 129. A mortgagee in possession assumes the obligation to keep accounts and “have his accounts always ready”: *Long v. Glenn*, 1854 CarswellOnt 45, 5 Gr. 208, at p. 209. The mortgagee in possession’s affidavit should verify all monies received or disbursed, with particulars: *Noyes v. Pollock* (1885), 30 Ch.D. 336 (Eng. C.A.), see William G. Dunn & Wayne Scarisbrick Gray, *Marriott and Dunn: Practice in Mortgage Remedies in Ontario*, 5th ed. (Scarborough: Carswell, 2024), at § 10:35.

- [19] Nonetheless, the 2020 Lynch report was prepared on the basis of information Dalpha gathered, because it could not get the evidence from the party that was obligated to produce it, the mortgagee in possession. This included one lease that Dalpha had in its possession as well as evidence Dalpha took directly from tenants under oath. Dalpha also relied on information that was provided by Mr. Farrage to the real estate agent at the time the properties were listed for sale. Ms. Lynch then applied published vacancy rates, permitted rental increase rates, and the terms of the mortgage in preparing her calculations.

[20] The respondents, in their factum, argue that the Lynch reports should not be admitted. These arguments were not raised in oral argument and no objection to the admission of the Lynch reports was made. There were arguments made about the methodology used and the conclusions reached, which I will consider when I address the contents of the reports.

[21] The KPMG report, prepared by Mr. Rohan Sethi, described its mandate as being to “review the Lynch Report and to provide our observations and comments as it pertains to Lynch’s calculation of the Net Proceeds, and if applicable, to adjust Lynch’s calculation of the net proceeds... based on our independent review of accounting and other financial documents that were available to us.”

[22] The KPMG report sets out the following limitations:

Our findings and conclusions are qualified herein, as we requested but were not provided with complete accounting records. In particular, we have not been provided with the following:

- Lease agreements for the Residential Properties for the years 2007 to 2017, unless otherwise noted herein;
- Rent receipts or proof of payments for the Residential Properties and for the Commercial Property (except for those months provided by Ms. Turtle to Dalpha);
- Access to the books and records related to the Properties or the working paper files of the Respondents' accountant that may have been used to prepare the various tax returns for Mrs. Farrage,
- Supporting documentation for the \$75,000 in renovations that were purportedly incurred in 2007 by the Farrage; and
- Certain invoices for utilities, maintenance, insurance and taxes during the Adjusted Rental Period.

[23] The primary areas of disagreement between the parties are with respect to the liability of Mr. Farrage, rental income from the properties, payment of property taxes, and calculation of the amounts owing under the VTB, which is an issue of interest calculation.

B) Mr. Farrage

[24] Dalpha argues that Mr. Farrage held himself out as the landlord of the properties, both to the tenants and to the Landlord and Tenant Board. He is the only party affiant for the respondents. Given his knowledge and management position, he is akin to a mortgagee in possession and should be treated as such. Dalpha concedes Mr. Farrage is not a mortgagee

in possession. Dalpha provided no law in support of its position that Mr. Farrage shares joint liability with the mortgagee in possession.

- [25] Mr. Farrage argues that he was assisting his wife, the mortgagee in possession, and has no legal obligations in respect of the mortgage.
- [26] I agree with Mr. Farrage that Dalpha has not established a basis upon which liability attaches to Mr. Farrage.

C) Rental income from the properties

- [27] As noted above, the 2020 Lynch report relied on limited available leases, information from tenants, limited financial information, and information provided by Mr. Farrage to the real estate agents at the time of sale to determine rental income. The information Mr. Farrage provided to the real estate agent in 2016 stated that the properties had effective gross income of \$75,000, less expenses of \$18,100, with net operating income of \$56,900. The sale price was based on these figures and a cap rate of 6 per cent. Dalpha created a summary based on all of this information and provided it to Ms. Lynch. Ms. Lynch then used tenancy vacancy rates published by the Canada Mortgage and Housing Corporation (“CMHC”) as well as published guidelines for rental increase allowances to prepare her reports. This is the best she could do in the circumstances, when Dalpha had repeatedly asked for underlying documentation and an accounting from the mortgagee in possession, to no avail.
- [28] Ms. Lynch notes that some tenants paid some rent in cash and were not provided with rental receipts. This was confirmed by Ms. Turtle, who operated a tattoo parlor as the commercial tenant until the summer of 2016. Ms. Lynch extrapolated from the amount Ms. Turtle paid to estimate the rent paid by the new tenant, a dispensary, starting in 2017. Ms. Lynch points out that her calculation of net income aligns with the cap rate targeted by the real estate agents when the properties were sold in 2017.
- [29] KPMG states that the Lynch report does not reflect actual amounts received in rental income. It states that there were vacancies in the properties at times, but back-up information is not provided. Ms. Farrage argues that Ms. Lynch “failed to consider the actual revenues collected”.
- [30] The KPMG report reviewed some cheques received from Ms. Turtle. The amounts on the cheques were lower than the amount on the tattoo parlor’s lease. As noted, Ms. Turtle provided testimony that some payments were made in cash. KPMG takes the position that the Lynch report overstated the tattoo parlor’s rent by several thousand dollars.
- [31] Ms. Lynch points out that the only way to determine with certainty the amounts actually paid by Ms. Turtle would be to obtain Ms. Farrage’s bank statements as well as source documents such as emails, messages, or ledger records for cash payments. Ms. Farrage produced none of this information despite repeated requests. Ms. Lynch notes that the cheques reviewed by KPMG were not reconciled with any bank statements.

- [32] The KPMG report states: “The Lynch Report uses the Tattoo Lease Agreement to estimate the 2017 rental revenue amounts. It is unknown to us as to why Ms. Lynch did not have the new lease agreement, and therefore Ms. Lynch’s calculations are incorrect accordingly.”
- [33] Ms. Lynch did not have the 2017 lease agreement because Ms. Farrage did not produce it, despite her obligation to do so. The same was true with respect to the Sue Marshall Lease Agreement.
- [34] The KPMG report relied on the figures from Ms. Farrage’s T776 Statement of Real Estate Rentals from prepared for tax purposes as conclusive evidence of the rent she received. Ms. Farrage argues that Dalpha is required to rely on those forms as complete and trustworthy evidence of all the rent received by Ms. Farrage. She argues that the T776 information is unbiased, as it was not prepared for litigation. Ms. Farrage also criticises the 2020 Lynch report for assuming the properties were not vacant and that rents were collected in full.
- [35] However, Ms. Farrage did not produce any bank accounts, rent cheques, leases, or notices of assessment from the CRA. KPMG noted that it was provided only with the T776 document, not with the complete income tax return. Notably, the KPMG Report states:
- We have assumed that these T776 statements were submitted to the CRA as part of Mrs. Farrage’s personal income tax returns. As discussed in Section 4 - Scope Limitation of our Report, we do not have the underlying accounting details to verify the information reported on these tax documents. We requested additional financial and accounting information from the Farrage’s former accountant Flabbi and Associates LLP, however we have not been provided with any information from them at this time.
- [36] KPMG was asked to produce to Dalpha the accountant’s response to KPMG’s request for information. That question was refused by Ms. Farrage’s counsel.
- [37] The responsibility for the 2020 Lynch report being constructed the way it was lies solely with the mortgagee in possession, who both failed and refused to provide information to the mortgagor regarding rents collected, expenses paid, property taxes paid, and HST remitted. It does not lie in the mortgagee in possession’s mouth to criticise the 2020 Lynch report for failing to be based on documents that it alone had the ability to provide, was required to provide, and failed to provide.
- [38] In these circumstances, Ms. Lynch and Dalpha were not required to accept the T776 documents at face value without the provision of underlying evidence. Some rental payments were made to Ms. Farrage in cash. Ms. Farrage herself created the challenging situation in which Ms. Lynch found herself, that is, being compelled to construct her report based on scanty information. If Ms. Farrage wishes to play this game of cat and mouse, she cannot complain about the consequences that flow.

- [39] Had Ms. Farrage provided the underlying documentation, perhaps KPMG's calculations would have been seen to be correct. However, given Ms. Farrage's refusal to provide the information, it does not now lie in her mouth to criticise the methodology used by Ms. Lynch or to suggest that Ms. Farrage's unsubstantiated CRA documents, which have not even been confirmed to have been filed, much less assessed, must be accepted at face value. I do not find that the T776 documents on their own are sufficient or reliable evidence on which to base a finding of rental income.
- [40] I accept the evidence provided to Ms. Lynch as the proper basis for the revenue calculations in respect of the properties. That evidence, collected and collaged by Dalpha, included a signed lease from the tattoo parlour, initial confirmed rent payments, a list of tenants as far as could be determined by Dalpha, some handwritten receipts apparently for cash received, cheque stubs, the evidence of three tenants taken under oath at examinations, financial information in the possession of Dalpha for the period prior to the mortgagee taking possession, and the information Mr. Farrage provided to the real estate agent at the time the properties were listed for sale. I find that this is the best evidence available of the rent revenues. I find that Ms. Lynch properly relied on this evidence gathered by Dalpha. This finding is assisted by the adverse inference I draw against Ms. Farrage. Based on Ms. Farrage's failure to produce leases, bank statements, ledgers, receipts, information to and from the CRA, and communications to and from her accountant, I draw an inference that this documentation would not have supported her position that Dalpha and Ms. Lynch's calculations overstate the revenue she received.
- [41] The figures used by Ms. Lynch were based in large part on a tenant summary prepared by Dalpha. Dalpha, through its investigations, determined that the commercial property at 650 King Street East was leased to Dalpha in 2001 and 2002, and then to Way Cool Tattoos until 2016. Ms. Lynch had available to her two leases and the evidence of Ms. Turtle that some of the tattoo parlor's rent was paid in cash. Ms. Lynch based her calculations for the revenue of 650 King Street East until 2017 on this evidence. In 2017, 650 King Street East was occupied by a dispensary. Because Ms. Farrage did not provide the lease with respect to the dispensary, or any documentation from which the rent could be calculated, Ms. Lynch calculated the amount based on the Way Cool Tattoo Lease. It has been clearly demonstrated that documents provided by Ms. Farrage are unreliable on their own. I accept Ms. Lynch's figure for the 2017 commercial rent as correct. I find that the revenue for 650 King Street East is as set out in Ms. Lynch's table reproduced below.
- [42] The two residential units at 656 King Street East were leased to an unknown tenant, other than in 2016 and 2017 when the smaller of the units was leased to a known tenant for \$950 per month including utilities. The tenants who were examined confirmed that 656 King Street East was rented throughout the period in question. The rent for the larger unit at 656 King Street East was estimated by Dalpha to be \$650 per month per bedroom, which is less than the rent per bedroom for the other units for which information was available. I find this to be a reasonable figure based on the rental income of the other units. I therefore find the revenue for 656 King Street East is as set out in Ms. Lynch's table reproduced below.

[43] The residential unit at 664 King Street East was rented for \$950 per month at times, but as of 2016 a new tenant for that unit was paying \$1450 per month plus hydro and utilities. This information was collated by Dalpha based on the sources set out above and I find it, too, is the most reliable evidence available as to the rents that were paid. I find the revenue for 664 King Street East is as set out in Ms. Lynch's table reproduced below.

[44] On the basis of this evidence, Ms. Lynch prepared the following schedule of revenue:

	Income Statement																	Total	
	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016		2017
Rental Revenue (1)																			
650 King St. (2)	0	0	0	11000	26400	26400	26400	32411	32104	32104	33328	34551	34551	34551	34551	34551	20155	25913	\$438,969
664 King St.	7200	7409	7698	7921	11400	11571	11814	12121	12291	12512	12775	12864	13263	13595	13703	13923	14201	17400	\$213,661
656 King St.	23400	26085	27102	27888	28697	29128	29739	30266	30689	31242	31898	32121	33117	33945	34216	34764	35459	35991	\$555,746
Total Revenue	30600	33494	34800	46809	66497	67099	67953	74797	75084	75858	78000	79536	80931	82090	82470	83237	69815	79304	\$769,407
Expenses (3)																			
Insurance	-1909	-2291	-2673	-3054	-3436	-3818	-4200	-4582	-4964	-5345	-5727	-6109	-6491	-6873	-7254	-7636	-8018	-8400	-5514,197
Utilities	-1656	-1964	-2291	-2618	-2945	-3273	-3600	-3927	-4255	-4582	-4909	-5236	-5564	-5891	-6218	-6545	-6873	-7200	
Maintenance	-545	-655	-764	-873	-982	-1091	-1200	-1309	-1418	-1527	-1636	-1745	-1855	-1964	-2073	-2182	-2291	-2400	
Property Tax	-4151	-4361	-4582	-4813	-5057	-5312	-5581	-5863	-6159	-6471	-6798	-7141	-7502	-7881	-8280	-8698	-9138	-9600	
Interest on Mortgage	-21193	-23990	-25300	-23997	-21920	-19494	-17310	-14756	-12020	-9090	-5950	-2587	-184	0	0	0	0	0	-5197,992
Total Expenses	-29435	-33261	-35609	-35356	-34340	-33188	-31891	-30437	-28816	-27015	-25020	-22819	-21595	-22609	-23825	-25062	-26320	-27600	\$262,178
Net Pre-Tax Rental Income	1165	233	-809	11453	32157	33910	36063	44360	46268	48843	52980	56717	59336	59482	58645	58175	43495	51704	\$694,178
Rental Vacancy (4)	-214.2	-301.446	-800.405	-1145.9	-1403.4	-1343.06	-1371.26	-1144.44	-773.641	-1443.87	-1161.49	-764.749	-1205.87	-1378.64	-1102.15	-1168.47	-1092.52	-1014.43	-\$18,830
Mortgage Principal Payments	-6447	-29177	-27868	-29170	-31248	-33473	-35857	-38411	-41147	-44078	-47217	-50581	-17325	0	0	0	0	0	-\$432,000
Net Surplus Payable	-\$5,496	-\$29,245	-\$29,477	-\$18,863	-\$494	-\$906	-\$1,166	\$4,804	\$4,347	\$3,321	\$4,601	\$5,372	\$40,805	\$58,103	\$57,543	\$57,007	\$42,402	\$50,690	\$243,348

[45] Ms. Lynch calculated the expenses based largely on the information provided by Mr. Farrage to the real estate agent in 2016. These monthly figures totaled \$18,100. Ms. Lynch then discounted these figures linearly. She also had available to her the official tax certificate from the City of Kitchener from the year 2000. I find the expenses are as set out in Ms. Lynch's table above.

[46] KPMG asserts that Ms. Lynch erred in not deducting GST/HST from the rental amounts. KPMG assumed that GST/HST had been remitted to the CRA. Ms. Lynch points out that the HST taxes remitted to the CRA would be net, after Ms. Farrage deducts the HST she paid on her expenses. Again, there is a complete absence of records to determine what that number would be. Given the complete absence of evidence regarding HST remittance, I agree with Ms. Lynch that no deduction for HST should be made.

[47] I therefore accept Ms. Lynch's calculations set out in the income statement reproduced above.

D) Property taxes

[48] The KPMG report criticises the 2020 Lynch report for failing to take into account property taxes that were paid by Ms. Farrage that had accrued prior to Ms. Farrage becoming the mortgagee in possession. These taxes, interest, and penalties were in the amount of \$95,728 and were paid by Ms. Farrage in November 2008.

[49] Ms. Lynch had not been advised at the time of her report that there was an outstanding property tax balance paid by Ms. Farrage.

[50] I accept that this amount should be included in Ms. Lynch's calculations and added to the mortgage principal. That payment should be factored into Ms. Lynch's amortisation calculations starting at the time Ms. Farrage paid it in November 2008.

E) Calculation of amounts owing under the VTB/interest calculation

[51] The difference between the parties on this issue is that the KPMG report accrues interest on the VTB through the entire period of possession without applying any net rental revenues received by the respondents during the period of possession against principal or interest. It only applies rental revenues to the mortgage debt on the date of sale of the properties.

[52] The Lynch reports, on the other hand, apply net rental revenues toward the mortgage as they were received by Ms. Farrage, paying down the mortgage based on the amortisation schedule.

[53] In Walter Traub, *Falconbridge on Mortgages*, 5th ed. (Aurora: Thomson Reuters, 2024), at § 31:3, the manner of accounting in this situation is summarised as follows:

The accounting, between the mortgagor and the mortgagee, must take account of all of the payments made on the mortgage, whether made directly by the mortgagor, or by the mortgagee receiving the revenue and rents from the mortgaged real property. Payments received by the mortgagee are required to be applied against the amount of the mortgage debt even if the payment is made after the commencement of the mortgage action.

(...)

If simple interest is payable, payments are applied first to interest and then to principal at the time of each payment. At the next payment, interest is calculated on the reduced amount of the principal after application of the prior payment.

[54] Further, *Falconbridge on Mortgages* at § 32:9 confirms that the usual practice in Ontario is to take accounts in mortgage actions with rests at intervals similar to those provided for by the mortgage for compounding interest.

[55] Here, the mortgage provided that payments were to be blended monthly installments of principal and interest calculated upon a 25-year amortisation period. Each payment was to be calculated based on the principal balance secured on the first day following each anniversary date and was to remain unchanged during the following year. Further, principal of \$20,000 was to be paid on each anniversary date. Interest was compounded semi-annually.

[56] The Lynch reports applied the rental revenue to the mortgage debt in accordance with the mortgage terms.

- [57] Ms. Farrage relies on *Capsule Investments Ltd. v. Heck (H.C.J.)* (1990), 72 O.R. (2d) 481 (S.C.), at pp. 510-511, aff'd 12 O.R. (3d) 225 (C.A.) in which the court stated as follows:

Having reviewed such judicial pronouncements as counsel have canvassed I conclude that the proper rule to be applied by this court is as proposed by Mr. Schindler as follows:

A mortgagee in possession is bound to apply rent revenue first to current outgoings including repairs, insurance premiums and interest on prior encumbrances. The balance is to be applied first to the payment of interest on the mortgage debt and to the expenses of improvements which the mortgagee is entitled to make; and secondly, to the reduction of principal or proper capital additions.

The reason for this order of priority is simply a matter of equity. The mortgagee is bound to lend his best efforts to preserve the property as a prudent owner would, as much to protect the interest of the mortgagor as his own. So long as the mortgagor has the right of redemption the mortgagee ought not either to increase the value of the property so as to preclude or impair the mortgagor's ability to redeem; or to allow the property to fall into disrepair so as to whittle away the value of his equity of redemption or that of other encumbrancers.

- [58] However, Ms. Farrage provided no receipts or underlying information regarding expenses incurred for repairs or improvements. There is therefore no basis on which to calculate any repair or improvement payments.
- [59] Similarly, the KPMG report includes deductions for management fees without any explanation of what they are, to whom they were paid, and for what services. It includes expenses for professional services but provides no explanation of how those sums were derived. Utility charges are calculated with no evidence of utility bills provided. Indeed, there is evidence that some tenants paid the utility bills themselves. Claims are made for maintenance and repairs without any discernible substantiating evidence. There is simply no proper basis in the evidence before me for these deductions.
- [60] Ms. Farrage relies on *Versatile Mortgage Corp. v. Hemmingson*, 2010 BCSC 1361, 11 B.C.L.R. (5th) 388 ("*Versatile*"). That case was a foreclosure action that considered whether the interest accruing on the amount due and owing under the mortgage was subject to interest in accordance with the *Court Order Interest Act*, R.S.B.C. 1996, c. 79 or the mortgage interest rate. I do not read *Versatile* as affecting in any way the statements in *Falconbridge on Mortgages* that the income received by the mortgagee in possession are to be applied against the amount of mortgage debt. I do not view this method of accounting as a collateral attack on the default judgment. Ms. Lynch's 2024 report clearly takes account of the default judgment and the interest required to be paid thereon. Her

calculations are carried out in accordance with the method outlined in *Falconbridge on Mortgages*.

- [61] Ms. Lynch notes in her 2024 report that she has calculated the interest ordered payable on the default judgment with reference to the amortisation calculations until the mortgage would have been paid off. That interest calculation (\$45,968) will be affected by the addition of the property tax arrears to the mortgage debt that I have required, as set out above.
- [62] There is no dispute about the proceeds of sale and expenses related to the sale, and I find that those sums are properly set out in Ms. Lynch's 2024 report: \$960,000 from the proceeds of sale, \$25,000 commission fees paid, and \$3182 in legal costs incurred.

3. Disposition

- [63] The application against Mr. Farrage is dismissed. Ms. Farrage shall pay to Dalpha a sum re-calculated by Ms. Lynch to take account of the \$95,728 of property tax arrears, interest, and penalties relating to the time during which Dalpha was in control of the properties, paid by Ms. Farrage in November 2008, and any effect this has on the accrued interest calculation from the default judgment. In all other respects, Ms. Lynch's calculations stand.
- [64] Dalpha is entitled to pre-and post-judgment interest.
- [65] The parties may submit an order to me with Ms. Lynch's revised calculation and the pre-judgment interest calculation.
- [66] The parties are strongly encouraged to agree on costs. If they are unable to do so, the applicant may provide costs submissions of no more than three double-spaced pages, plus any offers to settle, within seven days. The respondent may provide responding submissions with the same page limits within seven days thereafter. There will be no reply submissions.
- [67] The above may be sent to my judicial assistant at linda.bunoza@ontario.ca.

L. Brownstone J.

Date: September 9, 2024