

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)	
)	
SCOTIA MORTGAGE CORPORATION)	Yonatan Kramer, for the Plaintiff
Plaintiff)	
)	
– and –)	
)	
WAYNE CHRISTOPHER SMILE and)	
JENNIFER ANN-MARIE SMILE)	Jennifer Smile and Wayne Smile, Self-
Defendants)	Represented
)	
)	
)	
)	
)	HEARD: August 28, 2024

2024 ONSC 5128 (CanLII)

REASONS FOR DECISION

CHARNEY J.:

[1] The Defendants, Jennifer Smile and Wayne Smile, bring this motion to set aside the Judgment for Possession dated March 21, 2024 and to recover all property seized pursuant to the Judgment.

Facts

[2] The Plaintiff’s action related to a mortgage signed on December 13, 2017, made between the Defendants as mortgagors and the Plaintiff as lender and mortgagee. The mortgage was registered on December 13, 2017 on title to the Defendants’ property in Georgina, Ontario (the “Property”).

[3] Default by the Defendants occurred on October 13, 2023, and a demand for payment was made by the Plaintiff on January 16, 2024. The demand letter stated, in part:

We have been instructed to commence legal proceedings against you to enforce all remedies available to the Lender, including Power or Sale or Foreclosure.... A Notice of Intention to Enforce Security under the

Bankruptcy and Insolvency Act accompanies this demand letter. The total amount outstanding under the mortgage to January 16, 2024 is \$350,259.26 plus accruing interest, costs and applicable taxes to the date of payment. If you wish to discharge this debt within the ten day period, please contact us to obtain particulars of the total amount required as of the proposed date of payment. Despite this demand, and depending on the type of mortgage and maturity date, you may have the right under the Mortgages Act to put the mortgage into good standing by paying only the overdue payments and the Lender's costs.

- [4] Notwithstanding such demand, no payment was received from the Defendants.
- [5] On January 29, 2024, the Plaintiff commenced the action against the Defendants for possession of the Property secured by the mortgage and the sum of \$350,649 to January 15, 2024 together with interest at 5.61 per cent per year. This action was commenced as Court File No. CV-24-242.
- [6] The Defendants did not file a statement of defence and were noted in default, and Default Judgment was issued on March 21, 2024, ordering the Defendants to pay the Plaintiff the sum of \$354,098 and to deliver possession of the Property to the Plaintiff.
- [7] The Judgment was served on the Defendants by registered and ordinary mail on March 22, 2024.
- [8] On June 12, 2024, the Plaintiff sent a discharge statement to the Defendants by way of email. No payment was received from the Defendants and the balance remains outstanding.
- [9] The Plaintiff brought a motion seeking leave to issue a writ of possession on the property. The Writ of Possession was issued on July 15, 2024. The Lender obtained possession of the property pursuant to the Writ of Possession on August 14, 2024.
- [10] On August 21, 2024, the Defendants brought a motion as a "Special Case" under Rule 22 of the Rules of Civil Procedure naming themselves as the Plaintiffs and Scotia Mortgage Corporation as the Defendant, under a new court file number, CV-24-3926. The "Special Case" seeks "Specific Performance that is exclusively in equity, breach of Trust", and seeks to "Discharge and Settle Obligation", "Recovery of Real Property" and "Deed for real property".
- [11] In their motion material, Jennifer Ann-Marie Smile and Wayne Christopher Smile append a document entitled "Non-Negotiable Notice of Acceptance" that they have both signed. It is directed to the Clerk of the Court and the Chief Justice, and states:

Due to the assurance of uniform value, this is an exchange acknowledgement. This presentment is tendered in good faith, peace, and friendship, and authorizes the transfer of credits for the anticipated value received under the Bills of Exchange Act.

[12] The document continues:

I do not intend to argue this cause therefore, I hereby make the following demands:

1. Close this account per Court File No. CV-24-242.
2. Issue the Order of the Court immediately.
3. Complete discharge.
4. Adjust and set-off all public charges with the exemptions conforming with the Law applicable in Canada.
5. Exchange the dismissal order for the claim drawn on the estate(s).
6. Complete a full accounting and issue credits by way of a cheque to the party(s) entitled.

[13] The same document under the title “Certificate of Dishonour” was also included in their motion record.

[14] On August 30, 2024, Jennifer Ann-Marie Smile and Wayne Christopher Smile filed the same material as part of motion in Court File No. CV-24-242, with the correct style of cause, and seeking to set aside the March 21, 2024 Judgment.

[15] Ignoring the procedural irregularities, it appears that Jennifer Ann-Marie Smile and Wayne Christopher Smile seek to set aside the Default Judgment on the basis that they have signed these documents entitled “Non-Negotiable Notice of Acceptance” and “Certificate of Dishonour”.

[16] Rule 19.08 of the Rules of Civil Procedure provides:

Setting Aside Default Judgment

19.08 (1) A judgment against a defendant who has been noted in default that is signed by the registrar or granted by the court on motion under rule 19.04 may be set aside or varied by the court on such terms as are just.

(2) A judgment against a defendant who has been noted in default that is obtained on a motion for judgment on the statement of claim under rule 19.05 or that is obtained after trial may be set aside or varied by a judge on such terms as are just.

(3) On setting aside a judgment under subrule (1) or (2) the court or judge may also set aside the noting of default under rule 19.03.

- [17] In *Mountain View Farms Ltd. v. McQueen*, 2014 ONCA 194, the Ontario Court of Appeal considered the principles that must be applied to the application of the court's discretion to set aside default judgment under Rule 19.08. The Court stated, at paras. 47 – 50:

The court's ultimate task on a motion to set aside a default judgment is to determine whether the interests of justice favour granting the order. The approach to be taken to this determination has been considered numerous times by this court. The following draws heavily on the summary of the principles in those cases by Perell J. in *Watkins v. Sosnowski*, 2012 ONSC 3836, at paras. 19-20 and 23-24.

The court must consider the following three factors:

- (a) whether the motion was brought promptly after the defendant learned of the default judgment;
- (b) whether there is a plausible excuse or explanation for the defendant's default in complying with the Rules; and
- (c) whether the facts establish that the defendant has an arguable defence on the merits.

To this list, I would add the following two factors the court should have regard to, as set out in *Peterbilt of Ontario Inc. v. 1565627 Ontario Ltd.*, 2007 ONCA 333, 87 O.R. (3d) 479 (C.A.), at para. 2:

- (d) the potential prejudice to the moving party should the motion be dismissed, and the potential prejudice to the respondent should the motion be allowed; and
- (e) the effect of any order the court might make on the overall integrity of the administration of justice.

These factors are not to be treated as rigid rules; the court must consider the particular circumstances of each case to decide whether it is just to relieve the defendant from the consequences of his or her default.

- [18] It is clear that the Defendants have failed to meet any of these tests. There is no explanation why they did not file a Statement of Defence, or why they did nothing to set aside the Default Judgment after first learning about it in March 2024, or why they waited until August 2024 to bring this motion.
- [19] Nor is there any arguable defence on the merits. The execution by the Defendants of the documents entitled Non-Negotiable Notice of Acceptance and Certificate of Dishonour are not legal documents and afford no defence to the mortgage claim advanced by the Plaintiff.

[20] For the foregoing reasons, the Defendants' motion to set aside the March 21, 2024 Judgment is dismissed.

Justice R.E. Charney

Released: September 16, 2024

CITATION: Scotia Mortgage Corporation v. Smile, 2024 ONSC 5128

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

SCOTIA MORTGAGE CORPORATION

Plaintiff

– and –

WAYNE CHRISTOPHER SMILE and JENNIFER
ANN-MARIE SMILE

Defendants

REASONS FOR DECISION

Justice R.E. Charney

Released: September 16, 2024