

CITATION: RiverRock Mortgage Investment Corporation v. Blazys et al., 2024
ONSC 6357
COURT FILE NO.: CV-24-0103
DATE.: 2024-11-15

SUPERIOR COURT OF JUSTICE – ONTARIO

491 Steeles Avenue East, Milton ON L9T 1Y6

RE: RiverRock Mortgage Investment Corporation v. Blazys et al.

BEFORE: Justice C. Wilkinson

COUNSEL: Christopher, Staples for the Plaintiff
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Kyle, Corbin, for the Defendants
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HEARD: August 14, 2024, by Justice C. Wilkinson, video Conference

RULING ON MOTION

[1] The Plaintiff, RiverRock Mortgage Investment Corporation (“RiverRock”) brings this motion for summary judgment relating to a mortgage registered against 2031 Eckland Court in Mississauga, Ontario (“the Property”) that went into default on October 23, 2023. The Defendant mortgagors, Amadeus Blazys and Luisa Blazys, reside at the property. RiverRock also requests an order for possession and for leave to issue a Writ of Possession.

[2] RiverRock argues that there is no genuine issue for trial as this is a simple mortgage enforcement matter. The Blazys Defendants argue that the action ought

to be dismissed as RiverRock breached the terms of the *Mortgages Act*, R.S.O. 1990, c. M.40, and the *Interest Act*, R.S.C. 1985, c. I-15.

[3] For the reasons that follow, I find that there is no genuine issue requiring a trial of this action. RiverRock is granted judgment against the Defendants in the amount of \$1,529,444.92 as of November 15, 2024, using the mortgage loan interest rate of 9.99% per annum.

Background

[4] The parties entered into a one-year mortgage for \$1,360,000 on September 23, 2021. The mortgage had an interest rate of 6.99% per annum.

[5] The mortgage was renewed on September 23, 2022, for a one-year period at a rate of 8.75% per annum. The mortgage was again renewed on September 23, 2023, for a one-year period, with an interest rate of 9.99% per annum. The agreement states that the interest-only mortgage payments of \$11,322 were owed each month. The Defendants also agreed to pay a renewal fee of \$14,750, which was to be paid in equal monthly payments of \$1,341.

[6] RiverRock provides a copy of “Additional Provisions” included in the mortgage, including the following:

- a) RiverRock has the right to accelerate the repayment of the principal without further notice to the mortgagor upon default;

- b) Upon default RiverRock may enter into and take possession of the Property;
- c) If the principal sum and accrued interest is not repaid on or before the balance due date as set out in the agreement, then the Defendant agrees to pay RiverRock three months' additional interest at the rate of interest chargeable on the principal amount outstanding on the balance due date;
- d) The mortgagor shall pay all property taxes, and a failure to pay property taxes shall be considered a default under the mortgage;
- e) The mortgagor shall pay legal fees to RiverRock on a solicitor and client basis for exercising its rights, remedies and powers under the charge, including taking possession of the Property or other action based on non-payment of the obligations of the mortgagor;
- f) Any legal fees owed by the mortgagor that are not paid shall be added to the amount owed under the mortgage.

[7] The mortgage also provides that RiverRock may charge under the mortgage, and the mortgagor agrees to pay, certain fees stated in the Additional Provisions appended to the mortgage, which total \$9,847.20. This total does not include a reinvestment fee, which was originally claimed by RiverRock but later withdrawn at the hearing of the motion.

[8] RiverRock provides a copy of the Standard Charge Terms attached to the mortgage loan, which states at paragraph 6 that RiverRock is entitled to ongoing interest after the date of maturity, and after the time of default.

[9] RiverRock provides a copy of the demand letter sent to the Defendants on December 12, 2023. It also provides confirmation that as of December 13, 2023, there were tax arrears outstanding against the Property totaling \$7,150.20. RiverRock provides affidavit evidence that it has now paid the realty taxes on behalf of the Defendants.

[10] RiverRock also provides affidavit evidence that it received a notice of cancelation of property insurance for the Property from Wawanesa Insurance dated January 16, 2024, and that this failure to insure the Property constitutes a further default under the mortgage.

[11] RiverRock issued a Statement of Claim against the Defendants on January 8, 2024. A Notice of Sale was issued on January 16, 2024.

[12] The Defendants filed a Statement of Defence on February 16, 2024.

[13] The motion materials were served on the Defendants in March 2024.

[14] The Defendants have not made any mortgage payments since the mortgage went into default on October 23, 2023. The Defendants do not dispute that the mortgage is in default, or that that they failed to pay the property taxes.

Issues

1. Is this an appropriate case for summary judgment?
2. Should the Statement of Claim be dismissed because it was issued prior to the Notice of Sale being served?
3. Do the renewal terms offend s. 8 of the *Interest Act*?
4. What additional amounts do the Defendants owe to RiverRock considering s. 8 of the *Interest Act*?
5. What is the impact of the Property being listed on the MLS on this motion?

Position of RiverRock

[15] RiverRock takes the position that the Statement of Defence of the Defendants discloses no genuine issue for trial, and that it should be granted summary judgment against the Defendants for the amount owed to it under the mortgage. It states that in addition to their failure to make the mortgage payments due and owing, the Defendants have also breached the terms of the mortgage by failing to pay the property taxes owed, and by failing to pay the property insurance for the Property. RiverRock submits that these breaches of the mortgage are very serious, and that none of the breaches have been contested by the Defendants.

[16] RiverRock takes the position that, in addition to a judgment for damages, it should be granted an order for possession and leave to issue a Writ of Possession directed to the Sheriff.

[17] As the mortgage is now in arrears, RiverRock asks for the entirety of the mortgage funds loaned to the Defendants be paid, along with all applicable fees and costs as per the mortgage contract. RiverRock states that as of August 14, 2024, the Defendants owed \$1,541,732.87, with an interest rate of 9.99% per annum, which was agreed to by the Defendants when they signed the mortgage renewal.

[18] RiverRock acknowledges that the Statement of Claim against the Defendants was issued in advance of the Notice of Sale being served on the Defendants, but argues that the combined effect of s. 31 and s.42 of the *Mortgages Act* does not prohibit this action. RiverRock does not dispute that the purpose of the Notice of Sale is to provide the Defendants with an opportunity to redeem the mortgage before a Statement of Claim is issued. However, it argues that these sections only prevent it from obtaining a judgment against the Defendants prior to the expiry of the notice period under s. 42 of the *Mortgages Act*. RiverRock further argues that the Defendants have demonstrated no prejudice that would cause the Statement of Claim to be dismissed.

[19] RiverRock also takes the position that any deficiencies in the Notice of Sale do not invalidate the Statement of Claim, as this action is based on the amounts owed under the mortgage contract, and the evidence presented on this motion, rather than the accuracy of the amounts listed in the Notice of Sale. It argues that the fact that the amount claimed in the Notice of Sale is some \$3,000 less than the amount claimed in the Statement of Claim is not material to the issues in dispute.

[20] RiverRock disputes that the \$14,750 renewal fee contained in the mortgage contract offends s. 8 of the *Interest Act*, as it is a term of the mortgage that was agreed to by the Defendants, and not a fine or a penalty. RiverRock further argues that the Defendants could have gone elsewhere to renew their mortgage, but instead chose to accept the terms offered by RiverRock. Further, they argue that the renewal fee is reasonable, as it is just over 1% of the total mortgage of \$1,360,000.

[21] Similarly, RiverRock takes the position that the provision under the mortgage that allows it to charge three months' interest totaling \$33,144.58 in the event of default is a contractual agreement made by the Defendants with RiverRock, which is legally binding on the Defendants.

[22] RiverRock submits that the additional fees triggered with the default of the mortgage do not offend s. 8 of the *Interest Act*. It provides affidavit evidence that for the balance of the charges claimed against the Defendants, the amount claimed

represents an accurate estimate of the value of the time and effort spent by RiverRock staff to address the issues identified as set out below:

- a) Tax default fee (\$350.00) to review the tax status of the Property;
- b) Tax payment and administration fee (\$750.00) to pay the taxes owed on the Property;
- c) NSF fees (\$1,000) for two NSF payments at \$500 each to review the circumstances of the non-payment and contact the customer;
- d) Manual payment processing fees (\$250) resulting from the two NSF payments to review the circumstances of the payment, discuss same with the customer and make arrangements to process payment;
- e) Default proceedings fee (\$3,750) to address the administration of default proceedings by RiverRock, including email exchanges with the mortgagors regarding referral to legal counsel; preparing the file for legal action; referring the file for enforcement; instructing the law firm, requesting and reviewing regular reports on the status of proceedings, and the review and swearing of affidavits;
- f) Mortgage statement fees (\$650) to prepare two mortgage statements: one at the request of the Defendants and the other for the purposes of enforcement;
- g) Discharge administration fee (\$500) to discharge the mortgage when the balance is paid, or when the Property is sold under power of sale; and

- h) Property management charges (\$497.20) which are actual costs incurred by RiverRock as paid to its property manager to conduct two occupancy checks of the Property, and to ensure the physical security of the Property. As well, the property taxes were in arrears and had to be paid.

Position of the Defendants, Amadeus and Luisa Blazys

[23] The Defendants did not file a factum despite the requirement to do so under Rule 20.03(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. They filed an affidavit and a Book of Authorities in support of their position. They submit that there is a genuine issue in dispute between the parties that requires a trial.

[24] The Defendants take the position that RiverRock's Statement of Claim should be dismissed as a result of RiverRock having violated several sections of the *Mortgages Act*, as follows:

- a) Section 31(1) was violated as the Notice of Sale was issued after the Statement of Claim had already been issued;
- b) Section 33(1) was violated as the Notice of Sale was not served on them personally or by registered mail as required by the Act; and
- c) Section 42(1) was violated as the Plaintiff did not wait until the required time had expired after the Notice of Sale was served to commence its action against them.

[25] The Defendants argue that s. 31(1) of the *Mortgages Act* cannot be ignored by lenders, as the purpose of that section is to provide the defaulting mortgagor with an opportunity to redeem the mortgage. They argue that statutory provisions are to be followed and not minimized, and rely upon *McKenna Estate v. Marshall* (2005), 30 R.P.R. (4th) 222 (Ont. S.C.), in which Justice Sproat found at para. 11 that the purpose of s. 42 of the *Mortgages Act* is to provide the "mortgagor in default with breathing space and an opportunity to correct the default without having the additional concern or requirement to retain counsel and prepare a Statement of Defence."

[26] The Defendants also submit that that Statement of Claim is void because the amount claimed in the Statement of Claim is some \$3,000 more than the amount listed in the Notice of Sale. They argue that this difference is material, because if the Defendants had paid the amount claimed, RiverRock would have been unjustly enriched.

[27] The Defendants also take the position that the amount of interest claimed by RiverRock is illegal and unenforceable, as it is greater than the stated interest charges in the mortgage, and therefore violates s. 8(1) of the *Interest Act*. They also claim that that RiverRock's claim for payment of three months' interest violates s. 17 of the *Mortgages Act*, as this provision for payment of three months' interest

in the Act is intended to benefit the mortgagor as a grace period in the event of default.

[28] The Defendants also submit that the other claims being advanced by RiverRock are not legitimate because it has failed to provide proof or evidence that the fees and/or charges are either a genuine pre-estimate of damages suffered by it, or the fees and/or charges in question reflect real costs legitimately incurred by RiverRock for the recovery of the debt in the form of actual administrative costs or otherwise, contrary to s. 8 of the *Interest Act*. In oral submissions, counsel for the Defendants specifically identified that the difference between the tax default fee of \$350 and the tax payment administration fee of \$750 has not adequately been explained by RiverRock, and that there is a duplication of the tax fee being charged to the Defendants.

[29] The Defendants also argue that the \$14,750 renewal fee is unlawful as it is not clearly outlined in the mortgage contract. They claim in their Statement of Defence that they did not agree to this renewal fee, and that it is unenforceable due to s. 8 of the *Interest Act*, as they claim RiverRock has not established that it legitimately incurred these costs in recovering its debt.

[30] The Defendants also dispute the prejudgment and post-judgment interest rate of 9.99% per annum being claimed by RiverRock, as Mr. Blazys states in his

affidavit that he and his wife did not agree to this interest rate, and that it offends s. 8 of the *Interest Act*.

[31] In addition, Mr. Blazys provides affidavit evidence that he and his wife have hired a real estate agent, along with a copy of the MLS listing for the Property. The Defendants submit RiverRock is not entitled to summary judgment, and/or an order for possession of the Property, and/or an order granting leave to issue a Writ of Possession for the Property, as such an order would interfere with their contract with the real estate agent and the sale of the Property to a good faith purchaser.

The Law and Analysis

Summary Judgment

[32] Rule 20.04(2)(a) of the *Rules of Civil Procedure* provides that:

The court shall grant summary judgment if,

- a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence.

[33] Rule 20.04(2.1) sets out the powers of the judge hearing the summary judgment motion:

Powers

(2.1) In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any

of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:

1. Weighing the evidence.
2. Evaluating the credibility of a deponent.
3. Drawing any reasonable inference from the evidence.

[34] Summary judgment is available to the parties when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result: *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 50.

[35] The moving party seeking summary judgment has the burden of proof to establish that there is no genuine issue for trial. However, “[a] responding party may not rest on mere allegations or denials of the party’s pleadings, but must set out, in affidavit material or other evidence, specific facts showing there is a genuine issue requiring a trial”: *Sweda Farms Ltd. v. L.H. Gray & Son Limited et al.*, 2013 ONSC 4195, at para. 27.

[36] Each party to a motion for summary judgment has an obligation to "... 'put its best foot forward' with respect to the existence or non-existence of material issues to be tried": *Ramdial v. Davis* (Litigation guardian of), 2015 ONCA 726, 341

O.A.C. 78, at para. 27, citing *Papaschase Indian Band No. 136 v. Canada (A.G.)*, 2008 SCC 14, [2008] 1 S.C.R. 372, at para. 11.

Analysis

Is this an appropriate case for summary judgment?

[37] There is no dispute that the Defendants defaulted on the mortgage after it was renewed, and that no mortgage payments have been made since the default occurred in October 2023.

[38] The onus therefore shifts to the Defendants to establish a genuine issue for trial relating to validity of the Statement of Claim, and the amounts claimed pursuant to the Statement of Claim.

[39] There are no credibility issues that must be determined to decide if the actions of RiverRock have violated the *Mortgages Act* or the *Interest Act*. I am satisfied that based on the record before me, I am able to find the necessary facts and apply the relevant legal principles to resolve the issues raised in the Statement of Claim. I need not resort to the enhanced fact-finding powers granted pursuant to Rule 20.04(2.1) to fairly and justly resolve the dispute.

[40] As set out below, I find that the Defendants have failed to provide sufficient evidence to establish that there is a genuine issue requiring a trial to determine the

validity of the mortgage, or the amounts owed by the Defendants to RiverRock under the mortgage.

Should the Statement of Claim be dismissed because it was issued prior to the Notice of Sale being served?

[41] There is no dispute that RiverRock issued a Statement of Claim against the Defendants on January 8, 2024, and that the Notice of Sale was issued eight days later on January 16, 2024, contrary to the requirements under the *Mortgages Act*.

[42] Section 42(1) of the *Mortgages Act* states that a mortgagor may not take further action or proceed to enforce a mortgage until after the expiry of the time period during which payment must be made pursuant to the Notice of Sale, unless an order permitting the same has been obtained from a judge of the Superior Court.

[43] The purpose of s. 42 of the *Mortgages Act* is to provide the mortgagor in default with an opportunity to correct the default without the additional concern or requirement of having to retain counsel. However, the combined effect of s. 31 and s. 42 of the *Mortgages Act* is not that a Statement of Claim cannot be issued before the notice period has expired, but rather, it prohibits the enforcement of a judgment for possession of a property until after the "breathing space" required by s. 42 of the *Mortgages Act* has expired: *Resco Mortgage Investment Corp v. Kaur*, 2024 ONSC 3615, 61 R.P.R. (6th) 310, at para. 106.

[44] Clearly, the practice of issuing a Statement of Claim prior to serving a Notice of Sale is contrary to the *Mortgages Act* and should not be encouraged. In *Resco*, Justice Kurz found that a party's failure to follow the statutory requirements may be reflected in the costs awarded. He states at para. 111 in reference to Justice Sproat's decision in *McKenna Estate*:

I am informed that the process of serving a statement of claim before a notice of sale is an unexceptional one. This practice was referred to as "common" at para. 32 of *Sadana*. It appears to be a case of "better to ask for forgiveness than permission". That should not be standard procedure in mortgage enforcement. As Sproat J, stated, there is a very good reason for the breathing space that the statute affords the mortgagor. It should not be common practice to grant forgiveness when the statute is not followed.

[45] The impact of the Statement of Claim being issued before the notice of Power of Sale was served was also considered by Justice Reid in *New Haven Mortgage Corp. v. Codina*, 2022 ONSC 7036, 51 R.P.R. (6th) 47, in which he described this type of situation as a "technical" problem and found that there was no evidence of prejudice to the Defendants. He stated at para. 37:

...At most, the issuing of the statement of claim prior to the expiry of the notice period under the notice of sale was a technical problem, which the Act allows to be addressed in s. 42 by a court order. I am prepared under these circumstances to make an order *nunc pro tunc* permitting the statement of claim to be issued in advance of expiry of the notice period under the notice of sale.

[46] There is no evidence before me of any prejudice suffered by the Defendants as a result of RiverRock issuing a Statement of Claim against them prior to providing them with the Notice of Sale. A demand letter was sent by RiverRock to

the Defendants in December 2023. There is no evidence before me as to what efforts the Defendants made to redeem the mortgage once they were served with the Statement of Claim and received the Notice of Sale.

[47] Similarly, the Defendants provide no evidence of prejudice that they have suffered as a result of the amount claimed in the Notice of Sale being some \$3,000 less than the amount claimed in the Statement of Claim.

[48] The Defendants have failed to demonstrate prejudice or damages suffered by them as a result of the failure of RiverRock to properly follow the statutory regime in the *Mortgages Act*. RiverRock shall be granted leave *Nunc pro Tunc* permitting the Statement of Claim to be issued in advance of expiry of the notice period under the Notice of Sale. The failure of RiverRock to properly follow the statute will be considered when costs for this motion are assessed.

Do the renewal terms offend s. 8 of the Interest Act?

[49] Section 8 of the *Interest Act* is legislation that protects mortgagees from abusive lending practices. It states:

8(1) No fine, penalty or rate of interest shall be stipulated for, taken, reserved or exacted on any arrears of principal or interest secured by mortgage on real property or hypothec on immovables that has the effect of increasing the charge on the arrears beyond the rate of interest payable on principal money not in arrears.

(2) Nothing in this section has the effect of prohibiting a contract for the payment of interest on arrears of interest or principal at any rate not greater than the rate payable on principal money not in arrears.

[50] Renewal fees under a mortgage are not a fine or penalty. It is therefore not necessary under s. 8(1) to prove that the renewal fee represented an actual cost which the lender incurred in renewing the mortgage. The renewal fee is a contractual term negotiated between the parties: *Resco*, at para. 90.

[51] In *Resco*, Justice Kurz found that a renewal fee of 4.5% of the total mortgage was not improvident. He states at para. 90 of that decision:

The Renewal Fee was not a fine, penalty or rate of interest and it was not applied in default of the Mortgage. That being the case, it is not necessary under s. 8(1) to prove that the Renewal Fee represented an actual cost which Resco incurred in renewing the Original Mortgage. High as it was, the renewal fee was a contractual term negotiated between the parties.

[52] Although Mr. Blazys provides affidavit evidence that he and his wife were unaware of the renewal fee, RiverRock provides a copy of a renewal fee statement dated August 8, 2023, signed by both Mr. and Ms. Blazys, which clearly sets out a renewal fee of \$14,750.

[53] As in *Resco*, the renewal fee in the present case was negotiated between the parties, as opposed to a fine or penalty. The renewal fee is a contractual term reached between the parties separate from any additional fees triggered by a default on the mortgage. It is not necessary for RiverRock to prove that the renewal fee is an actual cost which it incurred to renew the original mortgage.

[54] I also note that in the present case the renewal fee of \$14,750 on a mortgage of \$1,360,000 is just over 1%, which is significantly less than the fee in *Resco*. I do not find the renewal fee to be unreasonable.

What additional amounts do the Defendants owe to RiverRock considering s. 8 of the Interest Act?

Three-month interest penalty upon default

[55] The mortgage agreement sets out the following provision at page 6 of the “Additional Provisions” portion of the mortgage document:

If the principal sum, accrued interest thereon and any of the sums which may be due hereunder is not repaid on or before the Balance Due Date (as set out in the Charge), then the Chargor agrees to pay to the Chargee in addition to the amounts required to obtain a discharge, three [3] months’ interest at the rate of interest chargeable hereunder on the principal amount outstanding on the Balance Due Date.

[56] RiverRock relies upon the Court of Appeal decision in: *Devi Financial Inc. v. Everwood Place Ltd.*, 2022 ONCA 104, at paras. 17-19, to support its position that the three-month interest provision upon default in the mortgage loan is enforceable. However, the *Devi* decision did not address s. 8 of the *Interest Act*, as it dealt with the extension of a mortgage.

[57] The Supreme Court of Canada is clear that if a term in a mortgage agreement increases the interest rate on arrears after a default, it contravenes s. 8 of the *Interest Act*, as was discussed in *Krayzel Corp. v. Equitable Trust Co.*, 2016 SCC 18, [2016] 1 S.C.R. 273, at para. 25:

What counts is how the impugned term operates, and the consequences it produces, irrespective of the label used. If its effect is to impose a higher rate on arrears than on money not in arrears, then s. 8 is offended.

[58] The Court of Appeal addressed the situation where default occurs prior to the maturity of a mortgage, and the mortgagee attempts to collect three months' interest in addition to the interest otherwise payable under the loan in *Mastercraft Properties Ltd. v. EL EF Investments Inc.* (1993), 14 O.R. (3d) 519 (C.A.). In finding that this situation would offend s. 8, Justice McKinlay stated at para. 13:

... the amount claimed would clearly constitute a penalty for default, *and* would result in increasing the interest on the arrears beyond the mortgage rate, thus contravening the provisions of s. 8.

[59] The leading Ontario case on the application of s. 8(1) is *P.A.R.C.E.L. Inc. v. Acquaviva*, 2015 ONCA 331, 126 O.R. (3d) 108. In that case, Justice Cronk writing for the Court of Appeal states at para. 51:

Thus, s. 8(1) creates an exception to the general rule that lenders and borrowers are free to negotiate and agree on any rate of interest on a loan. Section 8 prohibits lenders from levying "fine[s], penalt[ies] or rate[s] of interest" on "any arrears of principal or interest" that are "secured by mortgage on real property".

[60] *P.A.R.C.E.L.* sets out four prerequisites for the court's application of s. 8(1) to stop a mortgagee from charging certain fees or other amounts to a mortgagor, at paras. 52-56:

1. The covenant in question must impose a "fine", "penalty" or "rate of interest". If it does not, then s. 8(1) is not engaged.
2. The "fine", "penalty" or "rate of interest" must relate to "any *arrears* of principal or interest secured by mortgage on real property", whether before or after maturity of the relevant debt instrument.
3. "[T]he covenant must also have the prohibited effect of 'increasing the charge on the arrears beyond the rate of interest payable on principal money not in arrears'."
4. "[T]he arrears of principal or interest must be 'secured by mortgage on real property'." [Citations omitted].

[61] Section 8 is offended if an agreement provides for the payment of interest on all amounts owed under the mortgage loan in the event of default, in addition to a three-month interest payment. Justice Cronk confirms at para. 48 of *P.A.R.C.E.L.* that in this scenario, the three-month interest penalty generates a higher interest payment than what is specified under the mortgage loan:

It follows that, because the Interest Escalation Provision applies to arrears that are secured by a mortgage within the meaning of s. 8, and because it has the effect of increasing the rate of interest charged on the arrears beyond the pre-default interest rate payable on the principal amount of the Note, the Interest Escalation Provision violates the statutory prohibition in s. 8 of the *Interest Act* and is ineffective.

[62] In considering the test set out in *P.A.R.C.E.L.*, I find that the three-month interest provision in the mortgage contract offends s. 8 of the *Interest Act*, and is unenforceable for the following reasons:

- 1) The requirement for the mortgagor to pay three-months' interest upon default is an additional monetary penalty or fine triggered by the default;
- 2) The three-month interest penalty relates to arrears of principal secured by a mortgage on real property after the maturity of the mortgage;
- 3) The three-month provision has the prohibited effect of increasing the charge on the arrears beyond the rate of interest payable on the principal money not in arrears, as it is being charged in addition to the 9.99% rate of interest being charged on all outstanding payments under the mortgage; and
- 4) The arrears of principal are secured by a mortgage on real property.

[63] It should also be noted that s. 17 of the *Mortgages Act* does not apply here. Section 17 exists as a protection and benefit to mortgagors, in that it "operates as a shield to the mortgagor to allow for payment of arrears without imposition of three months' interest when three months' notice is provided": *58 Cardill Inc. v. Rathcliffe Holdings Limited*, 2017 ONSC 6828, 84 R.P.R. (5th) 44, at para. 20, aff'd 2018 ONCA 672, 93 R.P.R. (5th) 1, at para. 6. The Defendants do not seek to rely on s. 17, as they have not paid any of the arrears, nor have they given notice that they

intend to pay the arrears. RiverRock does not seek to rely upon this section to attempt to justify the legitimacy of the three-month interest clause in the mortgage agreement.

Other Fees Due Under the Mortgage

[64] RiverRock has the onus to establish that the fees that it is charging in addition to the principal owed on the mortgage are legitimate expenses incurred by it in addressing the default by the Defendants.

[65] The right of mortgagees to provide an advance estimate of their enforcement costs of a defaulted mortgage is set out in *BMMB Investments Ltd. v. Naimian*, 2020 ONSC 7999, 30 R.P.R. (6th) 324, at para. 36:

Case law has consistently held that lenders may lawfully recoup from mortgagors who are in default of their payment obligations the administrative costs incurred by the lenders caused by the defaults. The common law recognizes that for good business reasons such costs can be estimated in advance and fixed in a contract. But fees and charges levied on a mortgage default that are not genuine pre-estimates of costs actually incurred by a lender are penalties that can be void at common law and may violate the statute.

[66] With respect to the fees set out in paragraph 22 of this decision, I accept the affidavit evidence of RiverRock as to the estimated costs it will incur in addressing the Defendants' default on the mortgage, with respect to the tax default fee of \$350, the tax payment fee of \$750, the mortgage statement fee of \$650, and the discharge administration fee of \$500. I also accept RiverRock's evidence that it

was required to pay a property manager \$497.20 to conduct two occupancy and security checks at the property. These additional fees total \$2,747.20.

[67] RiverRock does not attach copies of the insufficient cheques allegedly written. They therefore have not proven entitlement to the two NSF fees, or to the \$250 in NSF processing fees.

[68] According to its affidavit, the default proceedings fee of \$3,750 being claimed by RiverRock predominantly involves legal work that was required to bring the claim forward, including email exchanges with the mortgagors regarding referral to legal counsel; preparing the file for legal action; referring the file for enforcement; instructing the law firm, requesting and reviewing regular reports on the status of proceedings, and the review and swearing of affidavits. It is more appropriate that these expenses be addressed when determining the costs for this motion and the action.

[69] RiverRock is therefore entitled to claim \$2,747.20 in additional fees it incurred or reasonably estimates that it will incur in addressing the Defendants' default on the mortgage. I find that payment of these fees does not offend s. 8 of the *Interest Act* as they are not penalties or fines.

What is the impact of the Property being listed on the MLS on this motion?

[70] In his affidavit, Mr. Blazys submits that RiverRock is not entitled to summary judgment or possession of the Property as such an order would interfere with their contract with the real estate agent and the sale of the Property to a good faith purchaser. However, counsel for Mr. Blazys did not address this issue in his oral argument, nor did he provide a factum providing me with authority for such a position.

[71] As I have been provided with no legal authority to make this finding requested by the Defendants, I make no such finding.

Conclusion

[72] RiverRock has successfully established that there is no issue in dispute that requires a trial. RiverRock is therefore granted summary judgment in the amount of \$1,529,444.92. I make the following orders:

- 1) RiverRock is granted leave *Nunc pro Tunc* permitting it to issue the Statement of Claim in advance of the expiry of the notice period under the Notice of Sale;
- 2) RiverRock is granted an order for possession of the Property; and
- 3) The Defendants will pay to RiverRock:
 - a) Principle mortgage payment of \$1,360,000;
 - b) Prejudgment interest at 9.99% per annum from October 23, 2023 to November 15, 2024, totaling \$144,797.52;

- c) Renewal fee of \$14,750;
- d) Reimbursement for property taxes paid totaling \$7,150.20; and
- e) Additional fees as per paragraph 65 totaling \$2,747.20.

[73] As per the mortgage contract, this judgment carries a post-judgment interest rate of 9.99% per annum.

Costs

[74] In the event that the parties are unable to agree upon costs, RiverRock may make cost submissions recognizing that costs awarded will be reduced due to its failure to follow the *Mortgages Act* requirements. RiverRock is to serve and file its cost submission by November 28, 2024. The Blazys Defendants shall serve and file a responding cost submission by December 12, 2024. Cost submissions are to be no longer than three pages double spaced, not including any Bills of Costs or Offers to Settle. No reply submission is to be prepared unless requested by me. If I do not receive submissions by these deadlines I make no order as to costs. All cost submissions must be emailed to my judicial assistant at Bihara.wijewardena@ontario.ca.

Wilkinson J.

Released: November 15, 2024

CITATION: RiverRock Mortgage Investment Corporation v. Blazys et al., 2024
ONSC 6357
COURT FILE NO.: CV-24-0103
DATE.: 2024-11-15

**SUPERIOR COURT OF JUSTICE -
ONTARIO**

RE: RiverRock Mortgage Investment
Corporation v. Blazys et al.

BEFORE: Justice Wilkinson

COUNSEL: Christopher, Staples

for the Plaintiff

Kyle, Corbin,

for the Defendants

RULING ON MOTION

Wilkinson J.

Released: November 15, 2024