IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bayfield Mortgage Professionals Ltd. v. Keith,* 2024 BCSC 2108

Date: 20241030
Docket: H251549
Registry: New Westminster

Between:

Bayfield Mortgage Professionals Ltd., and James Michael Pell

Petitioners

And:

Timothy Murray Keith, Janice Joanne Lowe, Matthew Richard Dewolde, G & R Singh & Son Trucking Ltd., Hans Trucking Ltd., and The Toronto Dominion Bank

Respondents

Before: The Honourable Justice Elwood

Oral Reasons for Judgment

(In Chambers)

Counsel for the Respondents, Timothy Murray Keith and Janice Joanne Lowe:	H.M.E. Sevenoaks
Counsel for the Respondent, The Toronto Dominion Bank:	S. Stephens
No other appearances	
Place and Date of Hearing:	Vancouver, B.C. October 25, 2024
Place and Date of Judgment:	Vancouver, B.C. October 30, 2024

[1] **THE COURT:** These reasons for judgement were delivered orally and then issued to the parties in writing with citations added, but otherwise unchanged.

Introduction

[2] The Toronto Dominion Bank ("TD Bank") applies for an order that it have conduct of sale of a residential property in Langley.

[3] The property is the subject of foreclosure proceedings by Bayfield Mortgage Professionals Ltd. ("Bayfield"). Bayfield holds the first mortgage and two second mortgages on the property. The total amount secured by Bayfield's mortgages is approximately $3.6 million. Bayfield obtained an order *nisi* on May 30, 2024. The redemption period will expire on November 30, 2024.

[4] TD Bank claims an equitable mortgage on the property with a face amount of $400,000. It brings this application relying on what it describes as the standard practice of allowing a subsequent charge holder the ability to step in part way through the redemption period and seek a sale of the property to protect its interest.

[5] The application is opposed by Timothy Murray Keith and Janice Joanne Lowe, who are 95 percent owners of the property. I will refer to them as the Homeowners.

[6] The Homeowners dispute the validity of the equitable mortgage. They say a trial will be required to determine whether TD Bank has any interest in the property. They argue that an order for conduct of sale is inappropriate where there is adequate security for the applicant's interest in the land, and where the interest claimed is disputed and unproven.

Background

[7] Mr. Keith is or was an employee of Klondike Contracting Corporation and/or FBS Fairview Builder Services Incorporated.

[8] Klondike and FBS defaulted on various lending arrangements with TD Bank. The bank issued demands for repayment which went unsatisfied. The bank then

obtained a receivership order appointing a receiver of the assets of Klondike and FBS.

[9] Counsel for the interested parties, including TD Bank and the Homeowners, agreed to hold the unentered receivership order in trust while they attempted to negotiate a forbearance agreement.

[10] TD Bank alleges that the parties agreed on forbearance terms in an exchange of emails between counsel from September 6–11, 2023. It alleges that the forbearance terms, expressly stated to be binding on the parties, included an agreement by the Homeowners and the five percent co-owner of their property to create a mortgage with a principal amount of $400,000. It alleges that the agreement documented in the emails between counsel was subject only to being recorded in a more formal document and supplemented with the bank's usual forbearance terms.

[11] The Homeowners executed a written forbearance agreement and a Form B mortgage. TD Bank alleges that a legal mortgage would have been filed on title but for the fact that the five percent owner Matthew Richard Dewolde refused to execute the documents.

[12] The Homeowners allege that the parties continued to negotiate the terms of a forbearance agreement after they signed the documents. The Homeowners allege that there was no meeting of the minds on the final terms of a forbearance agreement including the requirement for a mortgage against their property.

[13] TD Bank filed the receivership order on October 18, 2023. It commenced an action to enforce the alleged equitable mortgage on October 20, 2023. It caused a certificate of pending litigation ("CPL") to be registered against title to the property on October 23, 2023.

[14] Forty-five additional financial charges were registered on title after TD Bank registered its CPL. These include three builders' liens, another CPL in support of a claim of approximately $600,000, and numerous judgments in favour of the

Township of Langley in the amount of $500 each. The total amount of the charges, before and after TD Bank's CPL, is approximately $4.9 million.

[15] Bayfield commenced these foreclosure proceedings in November 2023. As stated, it obtained the order *nisi* on May 30, 2024, with the usual six-month redemption period.

[16] TD Bank brought an application for a summary trial in the action to enforce its equitable mortgage. It obtained a date for the summary trial on August 28, 2024. It also brought an application for conduct of sale in the foreclosure proceedings. The Homeowners cross-applied in the action for cross-examination on affidavits, and an order that the CPL filed by TD Bank be removed from title.

[17] The Homeowners obtained an appraisal which values the property at $5.2 million. The appraisal notes that there are no recent comparable sales in the area. While there may be some uncertainty, this appears to be the best evidence so far of fair market value for the property.

[18] Mr. Keith prepared an equity analysis based on the $5.2 million appraisal less outstanding property taxes, conveyancing fees and mortgage debt and interest charges including the face value of TD Bank's alleged equitable mortgage. Based on this analysis, the Homeowners say there is approximately $2.2 million equity in the property, although they do not include any charges that were registered after the TD Bank's CPL.

[19] On August 23, 2024, Associate Judge Robertson adjourned the summary trial application by TD Bank. After reviewing the appraisal evidence, the Court found that there was at least a $200,000 "buffer" over and above the creditors' recoveries, with a "burn rate" of approximately $30,000 per month. The Court also found that one day was insufficient for all of the applications and cross-applications. In the circumstances, Associate Judge Robertson found that it was in the interests of justice to adjourn the summary trial generally.

[20] The parties reset the application by the Homeowners to remove the CPL, and the application by TD Bank for conduct of sale.

[21] On September 25, 2024, I dismissed the Homeowners' application to remove the CPL. I found that the notice of civil claim in the action alleges facts which, if true, are capable of giving rise to an equitable mortgage and therefore claims an interest in land as required for a CPL by s. 215(2) of the *Land Title Act*, R.S.B.C. 1996, c. 250.

Analysis

[22] The issue on this application is not whether TD Bank may apply for conduct of sale in the Bayfield foreclosure proceeding. Rather, the issue is whether TD Bank, as the holder of a CPL in respect of an unproven equitable mortgage, ought to be granted conduct of sale at this time.

[23] This Court's foreclosure practice allows any respondent with an interest in the property to apply for conduct of sale, regardless of whether their claims have been proven: *InstaFund Mortgage Management Corp. v. Li,* 2024 BCSC 1512, at para. 11.

[24] Where there are competing applications for conduct of sale, a creditor with a defined interest such as a mortgage will have preference over the holder of a CPL. However, there is no rule that a CPL holder must wait for the mortgagee who obtained the order *nisi* to apply for conduct of sale. *Jin-Ocean Mortgage Investment Corporation v. 1011066 BC Ltd.,* 2024 BCSC 847, at para. 81.

[25] The established rule of thumb is that where there is adequate security for all encumbrances, the court will not grant any order for conduct of sale until part way through the redemption period, normally three months into a six-month redemption period. This rule of thumb is set out in a frequently-cited article, (1983) 41 Advocate 583 ("On Foreclosure Practice") by former Chief Justice McEachern:

> If there is adequate security for all encumbrances, there should not be an order for conduct of sale until part way through the redemption period so that the mortgagor may have a chance to sell his property or redeem it. If he does not do so, when should the second or subsequent encumbrancers have an

> opportunity to protect themselves from being foreclosed by the first mortgagee? Halfway through the redemption period is a useful rule of thumb in this connection.

[26] The Homeowners argue that, when a junior or subordinate charge holder brings the application, it must prove that its security is in jeopardy.

[27] In support of this proposition, the Homeowners cite a passage from *British Columbia Creditors' Remedies - An Annotated Guide* (Vancouver, The Continuing Legal Education Society, 2017).

[28] The Homeowners also cite the initial decision in *InstaFund Mortgage Management Corp. v. Li,* 2024 BCSC 1144 [*InstaFund*], where, after referring to the passage I have quoted from the Advocate article by the Chief Justice, Associate Judge Muir said at para. 29:

> [29] It is obvious from that quote that the question of adequate security for all encumbrances is a very serious factor to be considered when looking at such applications.

[29] In *InstaFund,* Associate Judge Muir made an order granting a CPL holder conduct of sale effective at the three-month mark of the redemption period. The order was upheld on appeal. The Homeowners argue that *InstaFund* is distinguishable because:

a) the applicant's claim to an interest in the property by way of a resulting trust was found to have a "strong probability of success";

b) there was evidence that there was going to be a shortfall for the CPL holder should they obtain judgement and seek to recover on their security; and

c) there was no evidence that the property owners intended to redeem, had any plans to redeem or had the ability to do so.

[30] The Homeowners also rely on *Statesman Capital Corporation v. Yeap,* 2013 BCSC 1817. In that case, a judgement holder applied for conduct of sale during the redemption period of a foreclosure proceeding. The judgement debtor

argued that the applicant had not shown sufficient prejudice to justify the order for conduct of sale. In making the order over his objections, Justice Fisher then a judge of this Court said at para. 14:

> [14] Mr. Yeap raised the issue of an order for sale being made before the expiry of the redemption period. However, he has adduced no evidence of any intention to redeem the property and CEIR has demonstrated that its interest in the equity of these properties will be in jeopardy if it is not granted conduct of the sale.…

[31] While I appreciate the efforts of counsel for the Homeowners to provide a principled basis for her clients' opposition to this application, I don't think any of the judicial authorities cited in support stand for the proposition that a subordinate charge holder must prove that its security is in jeopardy before it will be granted conduct of sale.

[32] The Advocate article by the Chief Justice McEachern does not support this proposition. In fact, it stands for the opposite. Where there is adequate security for all encumbrances, the mortgagor should be given a fair opportunity—usually three months to redeem or sell the property, after which the charge holders may apply for conduct of sale. This well-recognized practice cannot be turned on its head to require proof after three months that there is inadequate security.

[33] The reasons why a subordinate charge holder may be granted conduct of sale before the expiry of the redemption are not limited to whether there is sufficient equity in the property to secure its claim.

[34] First, under the usual terms of an order *nisi*, the first mortgagee will have the right when the redemption period expires to apply for an order absolute. The legal effect of an order absolute is to vest all subordinate charges off of title. While an order absolute may not be a common remedy in foreclosure proceedings, it is nonetheless a risk to parties in the position of TD Bank.

[35] Second, one of the purposes of allowing subordinate charge holders to apply for conduct of sale is to give each interested party a fair opportunity to sell the property, generally in reverse order of their priority, on the terms and at a price that

protects their interests before the first mortgagee, which will not have the same incentive to maximize return to other charge holders, takes control of the process. This purpose is closely related to the underlying rationale of a redemption period which requires the first mortgagee to wait a full six months before assuming conduct of sale: each interested party beginning with the mortgagor themselves should have a fair opportunity to sell the property.

[36] With all due respect to the author of the CLE publication cited above, I do not agree that a subordinate charge holder who applies to protect its interest must prove that its security is in jeopardy before it will be granted conduct of sale. Nor do I agree with the Homeowners that there is a threshold test on the merits before a CPL holder will be granted conduct of sale.

[37] Instead, the degree of risk and the strength of the applicant's claim are two relevant factors in the court's exercise of discretion whether and when to grant conduct of sale to a particular charge holder in the circumstances of the case. Other relevant factors include:

a) The timing of the application within the redemption period;

b) Any steps taken by the mortgagor to date during the redemption period to redeem the property;

c) The likelihood the mortgagor will be able to pay off the encumbrances before the expiry of the redemption period;

d) The experience and ability of the applicant to professionally market the property and obtain a provident sale; and

e) The position of the first mortgagee if known.

[38] In this case, there appears to be sufficient equity in the property to secure TD Bank's claim after the property taxes, superior creditors, relator commissions and conveyancing costs are paid out.

[39] The claim by TD Bank to an equitable mortgage of $400,000 is vigorously disputed by the Homeowners. However, I cannot agree with the Homeowners that it is a weak claim.

[40] I have been shown the emails in which counsel agreed on the terms of a forbearance agreement, including an email in which counsel for the Homeowners at the time confirmed that they agreed to be bound. I have also been shown the forbearance agreement and the Form B mortgage that the Homeowners signed.

[41] The only evidence before me that puts the validity of the equitable mortgage in issue is affidavit evidence by Mr. Keith in which he deposes that it was unclear to him on what terms the parties were going to proceed with a forbearance agreement. Mr. Keith deposes that he understood the TD Bank was still renegotiating the terms of a payment from another party in the negotiations. He deposes that the negotiations continued until the TD Bank filed the receivership order on October 18, 2023, and that, from his perspective, many uncertain terms were never settled.

[42] A contract arises from the outward manifestation of the parties' intentions—from their words and their actions, and not from their subjective beliefs or perspectives. The test is not what the parties subjectively intended but whether they indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of their contract: *Berthin v. Berthin*, 2016 BCCA 104, at para. 46.

[43] In my view, there is a good chance the trial judge in this case will find that an objective reasonable bystander would conclude that the parties agreed to create a mortgage on the property. While there are triable issues, TD Bank has a good prospect of proving an equitable mortgage.

[44] I accept that the Homeowners would like to redeem the property. This is their home. It is a unique and special property to them. However, there is very little evidence of their efforts to redeem the property. The only sworn evidence before me is that the Homeowners listed the property for sale at about the mid-point of the

redemption period for an asking price of $6,999,000, which is well over the appraised value.

[45] I accept the statement of their counsel that the Homeowners are also in discussions to refinance their debts, and that they intend to address all of the charges on title. However, it is now five months into the six-month redemption period and there is no evidence of any refinancing plan or proposal or any objective evidence of the prospects of a refinancing before or even after the redemption period expires.

[46] TD Bank has significant experience marketing properties pursuant to court orders. While the Homeowners say they do not trust the bank, the Court has confidence TD Bank will market the property in a professional and commercially reasonable manner.

[47] I accept the statement of counsel for TD Bank that Bayfield does not oppose his client taking conduct of sale and does not intend to apply for an order absolute so long as someone other than the Homeowners is attempting to sell the property.

Conclusion

[48] In my view, the appropriate and just order in this case is to grant TD Bank conduct of sale but provide that the order will not be effective until November 29, 2024, which is one day before Bayfield will be entitled to apply for an order absolute or conduct of sale.

[49] This will give the Homeowners one more month to sell or redeem the property before TD Bank assumes conduct of sale.

[50] I would order that TD Bank have its costs of this application in the cause of the action to enforce the equitable mortgage. I would also order that the scale or basis of the costs be determined by agreement or further court order in the action. If the court finds that TD Bank is entitled to an equitable mortgage, it may also find that the bank is entitled to contractual costs on an indemnity basis.

[51] I am grateful to counsel for their helpful submissions on this application.

"Elwood J."