

**CITATION:** Patel v. 2811230 Ontario Ltd., 2024 ONSC 6731  
**COURT FILE NO.:** CV-24-00062347  
**DATE:** 20241203

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

Jay Patel	)	
	)	Glenn E. Cohen, for the Plaintiff
Plaintiff	)	
	)	
– and –	)	
	)	
2811230 Ontario Ltd., Alisha Chaly, The	)	2811230 Ontario Ltd. and Alisha Chaly,
Corporation of the City of Niagara Falls,	)	Self-represented Defendants
1000247710 Ontario Inc. and AMB X	)	
Energy Inc.	)	
	)	
Defendants	)	
	)	
	)	<b>HEARD:</b> November 29, 2024

**THE HONOURABLE JUSTICE R. B. REID**

**DECISION ON SUMMARY JUDGMENT MOTION**

**Introduction**

- [1] The plaintiff holds a first mortgage in the principal sum of \$392,000 registered against the mortgaged property, 5759 Robinson Street, Niagara Falls, (“the property”) which is a residential property owned by the defendant 2811230 Ontario Ltd. (“281”). The mortgage is guaranteed by the defendant Alisa Chaly (“Ms. Chaly”).
- [2] Payments were made as required during the one-year term of the mortgage which matured and came due on February 2, 2023.
- [3] No payments have been made since February 2, 2023, and the mortgage remains unpaid, with interest accruing and compounding monthly since maturity.
- [4] The Corporation of the City of Niagara Falls (“the City”) is a named defendant because it is a subsequent encumbrancer, having registered two work orders against the property. The

plaintiff advised that the City did not oppose the relief sought nor did it appear in court on the motion.

- [5] AMB X Energy Inc. and 1000247710 Ontario Inc. are holders of an unenforceable notice of security interest and of an expired lien claim which were registered on title. They have been noted in default.

### **Preliminary Issue**

- [6] Ms. Chaly requested permission to represent 281 as well as herself personally on this motion. She indicated that she is the company's sole officer and director and that the company did not have sufficient funds to retain a lawyer. In addition, she advised that she is a licensed private investigator and an experienced investor in property. She has intimate knowledge of the matter and experience litigating in the courts and tribunals of Ontario.
- [7] On the basis of her representations, Ms. Chaly was permitted to represent 281 pursuant to the court's discretion under rule 15.01(2) of the *Rules of Civil Procedure*<sup>1</sup> ("the Rules").

### **Relief Requested and Conclusion**

- [8] The plaintiff, as chargee, moves for summary judgment for the relief claimed in the statement of claim, namely foreclosure of the property that is the security for the mortgage, payment of the debt by the chargor 281 and by the guarantor Ms. Chaly, and for possession and leave to issue a writ of possession. The plaintiff also requests a dismissal of the counterclaim.
- [9] The plaintiff claims principal and interest to November 29, 2024 of \$451,699.67 plus a mortgage administration fee of \$2,500 (as per the charge terms) and per diem interest of \$88.91 after November 29.
- [10] The defendants seek a dismissal of the motion.
- [11] For the reasons set out below, the plaintiff's motion is granted.

### **Background Facts**

- [12] The mortgage loan was brokered for 281 by a brokerage representing the borrower. The defendant's lawyer received funds in trust on February 1, 2022, paid the broker and lender fees, and applied the balance of the funds toward the purchase of the property.
- [13] The abstract of title for the property shows that it was acquired by 281 on February 2, 2022 and that the charge was registered immediately thereafter. Standard charge terms 20033 apply.

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<sup>1</sup> R.R.O 1990, Reg. 194

- [14] The charge was for principal of \$392,000, payable interest only at the rate of \$2,450 per month, not in advance, with a maturity date of February 2, 2023. Monthly interest was payable at 7.5 percent.
- [15] Interest was paid as required initially with eight postdated monthly cheques and then with a lump sum.
- [16] The mortgage matured and was not renewed.
- [17] The property was purchased by 261 as an investment for resale. Ms. Chaly and 261 made improvements to it and listed it for sale.
- [18] After the maturity of the mortgage, no immediate action was taken by the plaintiff despite the lack of any further payments. The plaintiff knew that the property was listed for sale. A purported sale of the property fell through in early July 2023, apparently due to the uncertainty created by the work orders registered on title.
- [19] A lawsuit was commenced by the plaintiff on July 27, 2023 for payment and possession. A default judgment was obtained and subsequently set aside by the defendants for failure by the plaintiff to have properly served the statement of claim. Costs were awarded to the defendants against the plaintiff which have been paid.
- [20] During the initial lawsuit, a process server was directed to attempt to take possession of the property on behalf of the plaintiff by changing the entrance door locks. On finding that the property was apparently unoccupied, he did so. The defendants were able to have the locks re-changed and retook possession.
- [21] Ms. Chaly deposed that she moved into the property as her residence in the first week of June 2024. She also deposed that as of about the same time, her “tenant/roommate” Alex Shishman moved in, occupying the second bedroom. She filed a lease form in his name dated September 27, 2024.
- [22] The foregoing background facts are undisputed.

### **Is This a Proper Case for Summary Judgment?**

- [23] The principles to be applied in a summary judgment motion were established by the Supreme Court of Canada in *Hryniak v. Mauldin*, [2014] 1 SCR 87. They were summarized by this court in *Mayers v. Khan*, 2017, ONSC 200 at para. 18:
- i) Summary judgment must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims. It is no longer merely a means to weed out unmeritorious claims but rather a "legitimate alternative means for adjudicating and resolving legal disputes" (*Hryniak*, at paras. 5 and 36);

ii) An issue should be resolved on a motion for summary judgment if the motion affords a process that allows the judge to make the necessary findings of fact, apply the law to those facts, and is a proportionate, more expeditious and less expensive process to achieve a just result than going to trial (*Hryniak*, at paras. 4 and 49);

iii) On a motion for summary judgment, the judge must first determine if there is a genuine issue requiring a trial based only on the evidence before the judge and without using the judge's fact-finding powers. If there appears to be a genuine issue requiring a trial, the judge should then determine if the need for a trial can be avoided by using the powers under Rules 20.04(2.1) and (2.2) (*Hryniak*, at para. 66); and

iv) The standard for determining whether summary judgment will provide a fair and just adjudication is not whether the procedure is as exhaustive as a trial, but rather "whether it gives the judge confidence that [the judge] can find the necessary facts and apply the relevant legal principles so as to resolve the dispute" (*Hryniak*, at para. 50). A judge must be confident that he or she can fairly resolve the dispute (*Hryniak*, at para. 57).

[24] The plaintiff relied on *Yamada v. Joseph-Walker*, 2023 ONSC 1725, which was a case in which the plaintiff sued for a breach of an agreement of purchase and sale, as an example of the type of case somewhat similar to this mortgage contract, which was found amendable to a summary judgment motion.

### **Triable Issues Advanced by the Defendants**

[25] The defendants rely on several propositions to support their request that the summary judgment motion should be dismissed, and that there are genuine issues requiring a trial.

#### ***Did the unsigned mortgage commitment negate the debt obligation?***

[26] By letter dated January 26, 2022, the plaintiff committed to lend \$392,000 secured by a charge. The terms are not disputed. The funds were advanced, and the charge was registered. The defendants were represented by independent legal counsel. The commitment contained in the letter was accepted as shown by the signature of Ms. Chaly who initialled each page. However, it was not signed by the plaintiff. The space over his printed name is blank.

[27] The defendants assert that the commitment, and by extension the debt obligation and the charge was not legally binding.

[28] I reject that assertion. The commitment was fully executed as evidenced by payment of money and the charge. The lack of signature on the commitment letter is irrelevant.

***Was the lack of signature on the commitment letter an indication of civil fraud or conspiracy?***

- [29] The defendants submit that the lack of signature on the commitment letter may have been intentional, as part of a civil fraud or conspiracy.
- [30] The defendants combine the lack of signature with a suspicion that the collection efforts by the plaintiff, including the taking of possession of the property, could have been fraudulent. An affidavit filed by the plaintiff attached a copy of his driver's licence as an exhibit, which was distorted. The defendants saw that as an alteration or forgery. The responding affidavit from the plaintiff was that the corruption happened through a copying error, and the driver's licence copy was replaced with an uncorrupted version. The defendants even suggest that the plaintiff is not a real person, and that the summary judgment motion is brought to avoid exposing that ruse.
- [31] Mere suspicion is insufficient to defeat an otherwise legitimate claim for summary judgment. The court must make its decision based on evidence, not conjecture.
- [32] The defendants are expected to "put their best foot forward" and to include by affidavit, all evidence that would demonstrate the existence of a genuine issue requiring a trial. As noted in *Yamada* at para. 21, "[t]he anticipation of a party to have better evidence at trial will not defeat a motion for summary judgment" (citing *Van Nispen v. McCarron & Chobotiuk Financial Services Inc.*, 2020 ONCA 146, at para. 4.)
- [33] I conclude that there is a lack of evidence to support the suspicion of civil fraud or conspiracy.

***Does the presence of a tenant preclude foreclosure?***

- [34] The defendants note the existence of a lease with Mr. Shishman as a possible bar to the foreclosure and claim it to be a genuine issue requiring a trial. Whether a valid lease exists is not a question for the court in this action. A foreclosure relates to the relationship as between the chargor and the chargee, and a foreclosure order in the chargee's favour would be subject to the possessory rights of a legitimate tenant. As such, there is no genuine issue on that point.

***Was the lockout illegal?***

- [35] The defendants assert that due to the lack of signature on the commitment letter, standard charge term clause 10 permitting the chargee to take possession on default should not apply. That argument fails based on my prior finding as to the validity of the commitment letter.

***Was the taking of possession peaceable?***

- [36] The defendants allege that the taking of possession by the plaintiff when the locks were changed, albeit temporarily, was not done "peaceably". The events were said to have occurred on or about July 24 and 25, 2025 and September 14, 2024.

- [37] The standard charge terms do permit taking possession without notice. Those terms, the common law, and the *Mortgages Act*<sup>2</sup> combine to require that the chargee do so “peaceably”. That concept was discussed in the decision of *Hume v. 11534599 Canada Corp.*, 2022 ONCA 575. There, the Ontario Court of Appeal opined at para. 59 that the question about whether the actions were peaceable depends on the circumstances of the case.
- [38] There is no suggestion that violence or the threat of violence was applied in this case. The property was apparently being used as a short-term vacation rental, and there is no allegation that it was physically occupied by anyone at the time the re-entries happened and the locks were changed.
- [39] If the defendants consider that they have a claim for trespass giving rise to damages, they have the right to assert that claim in a civil action. However, the potential for such a claim is not relevant to the contractual ability of the plaintiff to claim foreclosure.

***Was there a failure of the plaintiff to act with due diligence?***

- [40] The statement of defence alleges that the plaintiff failed to act with due diligence in advising the defendants whether the charge would be renewed after maturity. The defendants improved the property at their cost, and it would be unfair to permit the plaintiff to reap a corresponding benefit.
- [41] On review, there was no provision that the charge would automatically renew. That fact is admitted by the defendants. They allege in para. 10 of the statement of defence that Ms. Chaly began contacting the broker and lawyer about the possibility of renewal in December 2022 prior to the maturity of the charge in February 2023. Although she understood that there would be a renewal, she had no contact with the plaintiff. In para. 12, the defendants allege that the first contact from the plaintiff was by letter dated July 4, 2023, confirming that there would be no renewal.
- [42] The plaintiff asserts that no enforcement steps were taken initially despite the maturity of the charge because he anticipated the imminent sale of the property. It had been listed for sale, and in May 2023 an offer of purchase and sale was signed by the defendants, but that deal did not close in July as anticipated or at all. The plaintiff’s reason for deferring collection efforts is reasonable.
- [43] There is an absence of any evidence to suggest that the defendants were misled by the plaintiff as to a renewal.
- [44] In addition, clause 19 of the standard charge terms prevents any extension of time given by the chargee from prejudicing the chargee’s rights against the chargor.

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<sup>2</sup> RSO 1990, c M.40

- [45] The counterclaim contains allegations that the lack of information from the plaintiff as to a possible renewal meant that the defendants could not decide whether to renew, and that it was not possible for the defendants to find an alternative lender. The affidavits filed by the defendants in response to the summary judgment motion contain no evidence in support of that allegation.
- [46] I conclude that there are no facts supporting an allegation that the plaintiff's collection efforts create a genuine issue for trial.

### **Should a Writ of Possession Issue?**

- [47] The claim for possession flows as a necessary adjunct to the default, as set out in clause 10 of the standard charge terms.
- [48] Rule 60.10 provides that a writ of possession may be issued at the time an order entitling the party to possession is made. The granting of a foreclosure order is such a time.
- [49] The court will only grant leave to issue a writ of possession where it is satisfied that all persons in actual possession of the property have received sufficient notice to have enabled them to apply to the court for relief.
- [50] In this case, the only person currently in possession other than Ms. Chaly is Mr. Shishman. A letter was sent to him dated November 4, 2024, as well, on the same day, as a letter to "All Occupants of 5759 Robinson St." While often an occupancy report prepared at the time of the motion for the writ of possession is needed, in this case the court is satisfied by the evidence from Ms. Chaly that no one else is in occupation.
- [51] Therefore, leave to issue a writ of possession will be granted.

### **Cross-claim**

- [52] The defendants have crossclaimed against the City of Niagara Falls and its co-defendants alleging that attempts by the defendants to sell the property have been thwarted by the registrations against title, with a corresponding financial loss to the defendants.
- [53] The crossclaim is unaffected by the grant of a foreclosure order and writ of possession.

### **Summary**

- [54] The undisputed claims by the plaintiff, namely the existence of the charge, its default, and the admission about the occupants of the property are, without clear evidence to the contrary, reasons to grant a summary judgment.
- [55] The concerns raised by the defendants do not rise to the level of genuine issues requiring a trial, in that they do not disclose evidence to challenge the plaintiff's entitlement.

[56] On review of all the material, I am confident that I can make the necessary findings of fact, most of which are undisputed, and apply the relevant legal principles to resolve this dispute. As between the parties, there is no reason to expend more money and time on the claim and defence. To the extent that the defendants may have a cross-claim against the City, they are free to continue to advance it.

### **Costs**

[57] Discretion to grant an order for costs flows from s. 131 of the *Courts of Justice Act*<sup>3</sup> and the factors to determine how that discretion is to be exercised are found in rule 57.01.

[58] Success is presumptive of a costs award. The standard charge terms at clause 8 call for costs to be added to any amount owing under the charge, calculated at a solicitor and his own client scale.

[59] The plaintiff has submitted a costs outline claiming costs of \$27,662.45 inclusive of HST and disbursements. Having reviewed the costs outline, including the rates charged and hours spent, I do not find the amount to be unreasonable or disproportionate to the nature of the claim.

[60] Therefore, there will be an order that the defendants pay the plaintiff that sum.

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Reid J .

**Date:** December 3, 2024

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<sup>3</sup> R.S.O. 1990, c. C.43



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**BETWEEN:**

**JAY PATEL**

Plaintiff

**AND**

**2811230 ONTARIO LTD., ALISA CHALY,  
THE CORPORATION OF THE CITY OF  
NIAGARA FALLS, 1000247710 ONTARIO  
INC. and AMB X ENERGY INC.**

Defendants

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**DECISION ON SUMMARY JUDGMENT  
MOTION**

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Reid J.

**Released:** December 3, 2024