

CITATION: C & K Mortgage Services Inc. v. Camilla Court Homes Inc., 2020 ONSC 5071
COURT FILE NO.: CV-20-00643021-00CL
DATE: 20200827

SUPERIOR COURT OF JUSTICE - ONTARIO

**IN THE MATTER OF SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*,
R.S.C. 1985, C. B-3, AS AMENDED, SECTION 101 OF THE *COURTS OF JUSTICE ACT*,
R.S.O. 1990 C. C.43, AS AMENDED AND SECTION 68 OF THE *CONSTRUCTION ACT*,
R.S.O. 1990, C. 30**

RE: C & K MORTGAGE SERVICES INC., Applicant

AND:

CAMILLA COURT HOMES INC. and ELITE HOMES INC., Respondents

BEFORE: Dietrich J.

COUNSEL: *Richard Macklin and Yolanda Song*, for the Moving Party Yong Yeow (Jeremy)
Tan

David P. Preger and David Z. Seifer, for the Applicant

Eric Golden, for the Receiver, Rosen Goldberg Inc.

HEARD: August 21, 2020

ENDORSEMENT

[1] Yong Yeow (Jeremy) Tan and his wife Melissa, a Canadian citizen, live in Ho Chi Min City, Vietnam. When Mr. Tan retired from his employment in logistics, Melissa and he decided to use his savings and retirement bonus to purchase a residence in the City of Mississauga, Canada, where they would live. There, they would be closer to Melissa's family and Mr. Tan would work as a logistics consultant.

[2] On February 12, 2020, Mr. Tan entered into an agreement of purchase and sale (the "APS") with the Respondent Elite Homes Inc. ("Elite Homes") to purchase a residential unit within a condominium project, municipally known as 180 Mateo Place, Mississauga, Ontario (the "Mateo Property"). In accordance with the APS, Mr. Tan paid a deposit of \$500,000, \$100,000 of which he paid to the real estate broker, in trust, and \$400,000 of which he paid directly to Elite Homes.

[3] Prior to the parties entering into the APS, the applicant/responding party C & K Mortgage Services Inc. carrying on business as Rescom (the "Applicant"), had made a loan to the Respondents Elite Homes and Camilla Court Homes Inc. ("Camilla Court"). The loan was secured

by a first mortgage against the Mateo Property and other properties included in the condominium project, of which Camilla Court was the registered owner.

[4] When the Mateo Property was close to completion, on or about June 10, 2020, the principal of Elite Homes, Junaid Sudiq, advised the Applicant that the Respondents would be seeking a discharge of the Applicant's first charge on the Mateo Property to complete the sale to Mr. Tan. Mr. Sudiq also advised the Applicant that the proceeds from the sale of the Mateo Property would not be sufficient to obtain a discharge in accordance with the terms of the loan because the Respondents had used Mr. Tan's \$400,000 deposit to fund ongoing construction and development activity and they had no funds to it.

[5] The Applicant then applied to this court to have a receiver appointed. On July 2, 2020, Justice Conway appointed Rosen Goldberg Inc. (the "Receiver") as receiver over the Mateo Property and one other property in the condominium project. At that time, the Applicant's loan had been in financial arrears since May 15, 2020.

[6] Once the Receiver was appointed, Elite Homes could not close the sale pursuant to the APS. The Receiver decided to disclaim the APS.

[7] Mr. Tan brings this motion for an order directing the Receiver to refrain from disclaiming the APS and, instead, to complete it. Mr. Tan asks the court to find that he has an equitable or proprietary interest in the Mateo Property equal to the \$500,000 paid as a deposit.

[8] For the reasons that follow, I decline to grant the relief sought. In weighing the equities, I find that the Receiver has not breached its fiduciary duty in its decision to disclaim the APS.

Issue

[9] The issue in this matter is whether Mr. Tan has an interest in the Mateo Property that should subordinate the interest of the Applicant first mortgagee.

Background Facts

[10] Pursuant to a commitment letter dated October 6, 2018, the Applicant advanced a secured loan in the principal amount of \$4,550,000 to the Respondents. As security for the loan, the Applicant obtained a first charge against the Mateo Property and other properties in the condominium project. A second mortgage and a number of construction lien claims were subsequently registered on title to the Mateo Property.

[11] Pursuant to the secured loan agreement, the Applicant agreed to provide partial discharges of the loan for individual house sales provided that it received 100 percent of the net proceeds of sale, less the borrower's real estate commission, legal fees and HST, but not less than \$1,750,000 per house.

[12] Prior to executing the APS, Mr. Tan retained a lawyer, Stephen Poquiz, to review it.

[13] Paragraph 41 of Schedule “A” to the APS provides that the APS “shall be, and is hereby, subordinate to and postponed to any mortgage(s) arranged by the Vendor and any advances made thereunder from time to time or liabilities secured thereunder ...”

[14] The closing of Mr. Tan’s purchase was set to take place on April 30, 2020, when the balance of the purchase price of \$1,758,000 would be due. The closing date was extended to June 26, 2020.

[15] Because the Respondents had used Mr. Tan’s \$400,000 deposit to fund ongoing construction and development activity, the net sale proceeds of sale for the Mateo Property would be less than the amount required under the loan agreement. Prior to the scheduled closing date, the Applicant declined to grant a partial discharge of the mortgage and ceased to make any further advances on its loan to the Respondents.

[16] Mr. Poquiz represented Mr. Tan at both the June 18, 2020 hearing of the Applicant’s application for the appointment of the Receiver, which was adjourned at his request, and the July 2, 2020 hearing at which the Receiver was appointed. Mr. Tan did not apply to vary or appeal the Receivership Order.

[17] Following its appointment, the Receiver advised Mr. Tan of its intention to disclaim the APS. The Receiver confirmed that Mr. Tan could make an offer on the Mateo Property, and compete with any other purchaser, but that he would not receive any credit for his deposit.

[18] If the Receiver disclaims the APS, Mr. Tan would lose at least \$300,000 of his deposit. He will likely recoup \$100,000 through the Tarion Corporation; and he could likely recover an additional \$100,000 of the deposit if he releases all claims against the realtors and Elite Homes.

Positions of the Parties

[19] Mr. Tan asserts that a court-appointed receiver, as an officer of the court, owes a fiduciary duty to act in the best interests of all stakeholders in the debtors’ estate and must not favour the interests of a secured creditor over others. Mr. Tan further submits that a court-appointed receiver does not have unlimited authority to disclaim contracts entered into by the debtor prior to the receivership, and that, in the case of Mr. Tan’s APS, a disclaimer would be a breach of the Receiver’s fiduciary duties.

[20] Mr. Tan also asserts that he has a proprietary or equitable interest in the Mateo Property to the extent of his \$500,000 deposit. Accordingly, he asserts that the Applicant should complete the APS by conveying the Mateo Property to Mr. Tan for the difference between the purchase price agreed to in the APS and the deposit he paid. He further asserts that the equities weigh in favour of completing the APS and that the Applicant’s legal priority is but one consideration in the decision to disclaim a contract.

[21] Mr. Tan submits that the Receiver should not be permitted to disclaim the APS because: a) it is grossly unfair and would cause significant financial hardship to Mr. Tan; and b) completing

the APS would not be onerous or commercially unreasonable, and it would not create a significant preference in favour of Mr. Tan.

[22] The Applicant asserts that if the Receiver is directed to complete the APS, its priority under the first mortgage will be subordinated to the APS, which is contrary to both the terms of the APS and the Receivership Order.

[23] The Applicant submits that such a direction would mean that no lender of funds for the construction of residential housing could rely on its registered priority pursuant to the *Land Titles Act* or protect itself from a buyer (with whom it would have no privity of contract) who signs an agreement of purchase and sale with the lender's mortgagor after the mortgage is registered.

[24] The Applicant also asserts that Mr. Tan's motion is a collateral attack on the Receivership Order, which Mr. Tan did not appeal.

[25] The Receiver submits that the \$400,000 paid by Mr. Tan to Elite Homes is not a deposit, but an unsecured loan to a builder.

[26] The Receiver further submits that Mr. Tan was advised by counsel regarding the APS, which makes specific reference to the possibility of a mortgage against the Mateo Property. The Receiver adds that there is no evidence that Mr. Tan was unaware of the Applicant's mortgage when he made the \$400,000 payment to Elite Homes, or that he was unaware of the risks or consequences of such action. The Receiver asserts that it was the Receiver that was unaware of Mr. Tan's \$400,000 payment to Elite Homes until the Respondents requested a partial discharge of the mortgage to permit a conveyance to Mr. Tan.

Law

Land Titles Act, R.S.O. 1990, c. L.5 (the "*Land Titles Act*")

[27] Section 93 of the *Land Titles Act* provides as follows:

93 (1) A registered owner may in the prescribed manner charge the land with the payment at an appointed time of any principal sum of money either with or without interest or as security for any other purpose and with or without a power of sale.

Statement of principal

(2) A charge that secures the payment of money shall state the amount of the principal sum that it secures.

Effect of charge when registered

(3) The charge, when registered, confers upon the chargee a charge upon the interest of the chargor as appearing in the register subject to the

encumbrances and qualifications to which the chargor's interest is subject, but free from any unregistered interest in the land.

Receivership Order

[28] The Receivership Order includes the following provisions:

Paragraph 3(c) provides as follows:

3. THIS COURT ORDERS that the Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:

...

(c) to manage, operate, and carry on the business of the Debtors, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of the business, *or disclaim or cease to perform any contracts of the Debtors, including, without limitation, agreements of purchase and sale entered into by the Debtors with respect to the Property* [emphasis added];

Paragraph 34 provides as follows:

34. THIS COURT DECLARES that the Applicant's security over the Property ranks in priority to the interests, if any, of the purchasers under the agreement of purchase and sale between Elite Homes Inc. and Yong Yeow Tan, aka Jeremy (*sic*) Tan dated February 11, 2020, and the agreement of purchase and sale between Elite Homes Inc. and Sukhdeep Sandhu dated December 13, 2019.

Analysis

Mr. Tan's challenge to the Receivership Order

[29] The Receivership Order, at paragraph 3(c), specifically authorizes the Receiver to "disclaim or cease to perform any contracts of the Debtors, including, without limitation, agreements of purchase and sale entered into by the Debtors with respect to the Property."

[30] Mr. Tan argues that the order permitting disclaimer was not appropriate on the application for the appointment of a receiver, and that the mortgagee did not seek this order on its application. I disagree. The record shows that Justice Conway, in making the Receiver Order, was well aware of Mr. Tan's concern and the real possibility that his APS would be disclaimed. Mr. Tan's counsel was present and made submissions at the hearing. Justice Conway's endorsement dated July 2, 2020 reflects Mr. Tan's concerns: "Overall, I consider it just and convenient for a receiver to be

appointed to take possession and control of the properties, finance the remaining construction as necessary and then market and sell the properties, all taking into account the interests of the various stakeholders. While I am sympathetic to the concerns of the purchasers, unfortunately they are caught in a situation created by the respondent who independently used the deposit money to fund the construction.” Mr. Tan did not take any steps to appeal the Receivership Order. Because Mr. Tan was represented at the hearing of the application, his ability to seek a variation of the order is limited: *Textron Financial Canada Limited v. Beta Limitée*, 2007 CanLII 30473 at para. 89.

Equitable Interest

[31] Mr. Tan and the Applicant disagree on whether Mr. Tan has a proprietary or equitable interest in the Mateo Property. The Applicant asserts that he does not, and that the Applicant, as first mortgagee, has a legal priority to which any interest Mr. Tan may have in the Mateo Property is subordinate.

[32] Mr. Tan relies on the case of *Armadale Properties Ltd. v. 700 King Street (1997) Ltd.*, 2001 Can LII 28461 (ON SC) in support of his claim for an equitable interest. In *Armadale*, a construction lien trustee/trustee in bankruptcy sought guidance on whether it should perform an agreement of purchase and sale where the estate would receive no benefit. The purchaser, Mr. Goldschlager, had entered into an agreement of purchase and sale with the vendor/bankrupt 700 King Street (1997) Ltd. (“700 King”) to purchase a condominium unit. The purchaser paid the entire purchase price, in three instalments, by way of deposit, to a personal company of the sole officer and director of 700 King. Mr. Goldschlager then moved into the unit and made \$80,000 worth of improvements to the unit at his own expense. The transfer date for the unit was scheduled and postponed, but never took place. Receivership and bankruptcy followed. The trustee discovered that the entire purchase price for Mr. Goldschlager’s condominium unit had been paid to the officer/director’s personal company and 700 King had received none of these proceeds.

[33] In directing the trustee to use its construction lien powers to convey clear title to Mr. Goldschlager, Justice Lax held that the trustee could not disclaim the agreement of purchase and sale. A disclaimer was not appropriate because the trustee could only succeed to the rights of the bankrupt, and the trustee could not terminate property rights that had passed under an agreement of purchase and sale prior to the bankruptcy. Justice Lax found that the equitable interest in property under Mr. Goldschlager’s agreement of purchase and sale had indeed passed prior to the bankruptcy because Mr. Goldschlager had paid the full purchase price and could have enforced the transfer of title by way of specific performance. The property had been validly conveyed but for the delivery of a deed: see para. 12. It is also noteworthy that, unlike in the case of Mr. Tan’s APS, in *Armadale*, there was no reference to a contractual provision negating Mr. Goldschlager’s interest in land or subordinating it to the mortgagee’s interest.

[34] At the outset of her reasons, Justice Lax acknowledges that the facts of the *Armadale* case are “unique.” I agree and also find that they are distinguishable from the case at bar. Unlike Mr. Goldschlager, Mr. Tan did not pay the entire amount owing under the agreement of purchase and sale, with the result that he could have, at any time prior to the receivership, enforced the transfer of title by way of specific performance. For Mr. Tan, there was no valid conveyance of the Mateo

Property to him but for the delivery of a deed. In *Armada*, Mr. Goldschlager had an equitable interest in the whole of the property prior to the bankruptcy. The bankrupt had an obligation to convey title to Mr. Goldschlager prior to the bankruptcy. The trustee stood in the shoes of the bankrupt and took on the obligation to deliver the deed in recognition of Mr. Goldschlager's equitable interest in the whole of the property.

[35] Mr. Tan argues that notwithstanding that he does not have an equitable interest in the whole of the Mateo Property, the \$500,000 deposit payment creates an equitable interest that should be elevated above the secured interest of the Applicant based on the equities.

[36] Mr. Tan argues that according to the jurisprudence, disclaimer should only be permitted where: a) the mortgagee will face an onerous burden or greater financial hardship than the purchaser under the agreement of purchase and sale; or b) the purchaser paid less than fair market value; or c) the purchaser has been repaid his deposit. Mr. Tan asserts that none of these circumstances apply in this case.

[37] The Applicant submits that any equitable interest that Mr. Tan may have had is extinguished by clause 27 of Schedule "A" to the APS, which provides as follows:

NO REGISTRATION

27. The Purchaser acknowledges that this Purchase Agreement does not create an interest in the Real Property and that until a Transfer/Deed of Land is registered in favour of the Purchaser, he shall have no interest in the Real Property. The Purchaser further covenants and agrees that he will not register or cause or permit this Purchase Agreement to be registered on title to the Land and that no reference to it, or notice of it or any caution or any certificate of pending litigation, Purchaser's lien or any other notice or document of any type shall be registered on title whether or not the Vendor is in default hereunder. In the event that the Purchaser creates any encumbrance or makes any registration or causes or permits any encumbrance or registration to be made on title to the Land on or before Closing, any such action will constitute an event of default under this Purchase Agreement and the provision of Section 30 shall apply.

[38] Further, the Applicant submits that, at clause 41 of Schedule "A" to the APS, Mr. Tan agreed that the APS "shall be, and is hereby, subordinate to and postponed to any mortgage(s) arranged by the Vendor and any advances made thereunder from time to time or liabilities secured thereunder ..."

[39] Mr. Tan argues that the Applicant cannot rely on clauses 27 and 41 because the APS was terminated. In my view, Mr. Tan has not demonstrated that the APS was terminated. The record shows that in an email exchange with Mr. Sudiq relating to the closing of the Mateo Property, Mr. Sudiq stated that he was trying very hard to close the transaction. There is no evidence that either the vendor or the purchaser took any step to terminate the APS. The receivership intervened and now the Receiver plans to disclaim the APS while Mr. Tan seeks to have it completed. Mr. Tan's position is supportive of the existence of the APS.

[40] Mr. Tan relies on *McGrath v. B.G. Schickedanz Homes Inc.*, [2000] O.J. No. 4161 in support of his position that a vendor, who unilaterally terminates an agreement, cannot rely on a clause in that agreement inserted for the protection of the vendor. However, in *McGrath*, it was clear that the vendor chose to treat the purchaser's alleged breaches of the Agreement as conduct constituting repudiation of the Agreement entitling the vendor to accept that repudiation and terminate the contract. Regarding the APS, there is no evidence of conduct constituting repudiation and no evidence that either party accepted the repudiation and terminated the APS. Further, in the case at bar, it is not the vendor but, rather, the Applicant who seeks to rely on the APS.

[41] The Applicant asserts that clauses 27 and 41 of Schedule "A", which remain in effect, are determinative of the Applicant's priority and that Mr. Tan was aware of these provisions at the time he entered into the APS. He had retained legal counsel to advise him on the APS before he signed it.

[42] In addition to confirmation of the Applicant's priority in the APS, paragraph 34 of the Receivership Order specifically provides that: "the Applicant's security over the Property ranks in priority to the interests, if any, of the purchasers under the agreement of purchase and sale between Elite Homes Inc. and Yong Yeow Tan, aka Jeremy (*sic*) Tan dated February 11, 2020, and the agreement of purchase and sale between Elite Homes and Sukhdeep Sandhu dated December 13, 2019." This declaration is consistent with s. 93(3) of the *Land Titles Act*.

[43] Mr. Tan further argues that Justice Conway's endorsement is clear that the Receiver is to take into account the interests of all the various stakeholders. He asserts that the Receiver did not. Instead, he alleges that it rushed into its decision to disclaim the APS without undertaking sufficient research into the Respondents' assets. I do not accept this allegation. The Receivership Order covered only the Mateo Property and one other property, thus limiting the scope of the Receiver's research into the Respondents' assets. Further, the Receiver was aware that even if there were sufficient assets to pay the Applicant in full (which is not the case), there was another secured creditor and a number of construction lien claimants who also had registered claims on title to the Mateo Property. Based on the record, there is little doubt that the Receiver's marketing and selling the Mateo Property would yield a higher recovery for the estate than would be the case if the APS were completed and Mr. Tan were given full credit for the \$500,000 deposit.

[44] Mr. Tan also asserts that a disclaimer of the APS is unfair because it benefits the Applicant only at Mr. Tan's expense. He further asserts that the loss to him on a disclaimer is disproportionate to the loss to the Applicant if the Receiver completes the APS. I disagree with this reasoning. If the Applicant does not disclaim, but completes, the APS, Mr. Tan alone would benefit, at the expense of the Applicant whose interest in the property is secured. Mr. Tan would enjoy a preference and the Applicant would be subordinated by the shortfall in the deposit plus any incremental amount above the agreed upon purchase price that the Receiver might realize in the market. All of the equity in the Mateo Property is charged by the first mortgage. According to the First Report of the Receiver, dated August 17, 2020, filed in this motion, the Receiver has also incurred approximately \$40,000 in expenses for work required to market the Mateo Property for sale. Mr. Tan appears to be asking this court to resolve one inequity by creating another.

[45] I find that Mr. Tan has not met his burden to prove that the Receiver should prefer Mr. Tan over the secured creditor. The equities do not justify the subordination of the Applicant's legal priority. Such subordination is contrary to the terms of the APS and the Receivership Order.

[46] I accept that Mr. Tan is a victim of the improper use of the \$400,000 deposit he paid directly to Elite Homes in the belief that this payment would expedite the construction of the Mateo Property. However, the Applicant in no way participated in Mr. Tan's decision to make the improvident payment and was unaware that such payment had been made until Elite Homes requested a partial discharge of the mortgage to permit a conveyance of the Mateo Property to Mr. Tan. I find that there is no basis in equity or in law that would permit this court to visit the consequences of Mr. Tan's unfortunate decision on the Applicant secured lender.

[47] This conclusion is consistent with leading jurisprudence. See, for example, *Forjay Management Ltd. v. 0981478 B.C. Ltd.*, 2018 BCSC 527. In *Forjay*, Justice Fitzpatrick ordered the receiver to disclaim agreements of purchase and sale and to remarket the subject residential units free of the buyers' interests. Justice Fitzpatrick found that the mortgagee had legal priority over the position of the buyers by virtue of a contractual provision in each buyer's agreement, similar to the provision found in Mr. Tan's APS, negating any interest in land. Justice Fitzpatrick also found that the buyers' interests were grounded in contract and that no equitable interests arose in any of the units.

[48] In *Third Eye Capital Corporation v. Resources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508, the Court of Appeal for Ontario held, at para. 109, that in considering whether an interest in land should be extinguished, a court should consider: (1) the nature of the interest in land; and (2) whether the interest holder has consented to the vesting out of their interest either in the insolvency process itself or in agreements reached prior to the insolvency. The Court of Appeal also held that if these factors prove to be ambiguous or inconclusive, the court may then engage in a consideration of the equities to determine if a vesting order is appropriate in the particular circumstances of the case.

[49] In *Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd.*, Justice Morawetz (as he then was) gave effect to a subordination clause in an agreement very similar to clause 41 of Schedule "A" to the APS. In that case, five buyers of condominium units paid the balance of the purchase price owing under their agreements directly to the debtor. The receiver moved for authorization to market and sell the condominium property and terminate the existing agreements. Justice Morawetz held that the mortgagee had legal priority over the interests of the buyers. His Honour then considered the equities and found that they did not justify overriding the first mortgagee's legal priority. His Honour observed that those purchasers whose deposits were not held in trust may have some remedy against the debtors or its advisors. Regarding those purchasers who paid the balance of their purchase price, notwithstanding the subordination clauses of their agreements, and the fact that they would not be receiving title at that time, Justice Morawetz observed that these purchasers ran the risk of losing those payments but may have recourse against other parties: paras. 27 and 31-38.

[50] Mr. Tan too ran a risk when he paid \$400,000 directly to Elite Homes. It appears that he may have recourse against Tarion Corporation, and he may also have recourse against others as well.

[51] On the evidence, I am satisfied that the Receiver did not breach its fiduciary duty to take into account the interests of the various stakeholders in the Respondents' estate in its decision to disclaim the APS. In assessing whether a disclaimer of an agreement is appropriate, the priority of a secured interest registered under the *Land Titles Act*, while not determinative, weighs heavily.

Disposition

[52] The moving party's motion is dismissed.

Costs

[53] The Applicant submitted a Bill of Costs and asserts that costs should follow the cause on the outcome of the motion. Its costs, on a partial indemnity basis, are \$25,588.51, including HST and disbursements.

[54] The Applicant submits that it should be entitled to the costs it seeks because the motion was unnecessary and a collateral attack on the Receivership Order. It further submits that the principles at issue are of significant importance to the residential construction lending industry.

[55] Mr. Tan did not submit a Bill of Costs but submits that there should be no costs awarded on the motion. Alternatively, if costs are awarded against him, Mr. Tan submits that such costs should be nominal because he is already facing a potential loss of \$300,000 to \$400,000.

[56] Having heard the submissions and considered the principles relating to costs set out in rule 57.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, including the principle of indemnity, the amount of costs that Mr. Tan could reasonably expect to pay in relation to this motion, the complexity of the proceeding, and the importance of the issues, I fix the costs at \$20,000, inclusive of HST and disbursements. This award is fair and reasonable in the circumstances of this case.

Dietrich J.
Dietrich J.

Date: August 27, 2020