

ONTARIO SUPERIOR COURT OF JUSTICE (COMMERCIAL LIST)

B E T W E E N:

OWEMANCO MORTGAGE HOLDING CORPORATION

Applicant

-and-

CONCEPT LOFTS LTD. and DONALD DESROCHERS

Respondents

FACTUM OF THE MOVING PARTY LAURA LAWRENCE

November 23, 2022

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TABLE OF CONTENTS

	PAGE
PART I-OVERVIEW	4
PART II-THE FACTS	4
PART III-ISSUES AND THE LAW	8
Issue One: What rights does Ms. Lawrence have with respect to the Balmoral Property?	8
Issue Two: Should the November 7, 2022 Order be amended or varied?	11
Issue Three: Should the proceedings and the writ of possession against the Balmoral Property be stayed?	11
Issue Four: Should Ms. Lawrence be allowed to put the mortgage against the Balmoral Property in good standing?	11
PART IV-ORDER REQUESTED	12
SCHEDULE “A”-LIST OF AUTHORITIES	14
SCHEDULE “B”-TEXT OF STATUTES, BY-LAWS AND REGULATIONS	15

PART I-OVERVIEW

1. At issue on this motion are whether the rights granted to the Moving Party, Laura Lawrence, under the *Family Law Act* and the *Mortgages Act* to remain in her home should be respected, especially when doing so will not cause the Applicant to suffer any prejudice.
2. As the wife of the Respondent Donald Desrochers, Ms. Lawrence is entitled, despite any agreement to the contrary, to put the Applicant's mortgage against their matrimonial home in good standing, and the right to redeem it, but those rights will be thwarted if this Court's November 7th Order is not varied or amended.
3. Furthermore, as there is sufficient equity in the other property over which it holds security, the Applicant will not suffer any prejudice if the relief that Ms. Lawrence is seeking is granted.

PART II-THE FACTS

The Balmoral Property

4. Ms. Lawrence is the wife of the Respondent Donald Desrochers. They currently reside at Units 502 and 503, 1 Balmoral Avenue, Toronto, Ontario ("the Balmoral Property").

Affidavit of Laura Lawrence sworn November 23, 2022, at paragraphs 1 and 3 to 5, Moving Party's Motion Record, pages 7 to 8

5. The Balmoral Property has tremendous sentimental value to both Ms. Lawrence and Mr. Desrochers as it was originally purchased by Mr. Desrochers former wife.

It is where Mr. Desrochers tended to his former wife as she was dying of cancer, and it is where Mr. Desrochers and Ms. Lawrence have made a home that reflects their unique tastes and passions.

Affidavit of Laura Lawrence sworn November 23, 2022, at paragraphs 3 to 6, Moving Party's Motion Record, page 8

The Mortgages

6. In February 2020, Mr. Desrochers' company, the Respondent Concept Lofts Ltd., granted the Applicant \$6,675,000 first mortgage against a condominium property that it was developing on Dufferin Street in Toronto ("the Dufferin Property"). This was not Mr. Desrochers first dealings with the Applicant, as he had \$1,200,000 invested with Owemanco.

Affidavit of Laura Lawrence sworn November 23, 2022, at paragraphs 7 and 13, Moving Party's Motion Record, pages 8 and 10

7. One year later, Concept Lofts granted the Applicant a \$1,600,000 second mortgage against the Dufferin Property. As a condition of granting the second mortgage, the Applicant requested that it be cross-collateralized against the Balmoral Property. Ms. Lawrence, as Mr. Desrochers' spouse, provided spousal consent to the cross-collateral mortgage against their matrimonial home, the Balmoral Property.

Affidavit of Laura Lawrence sworn November 23, 2022, at paragraphs 7 and 13, Moving Party's Motion Record, pages 8 and 10

8. Paragraph 33 of the Blanket Mortgage Agreement that Concept Lofts and Mr.

Desrochers agreed to states that:

The occurrence of an event of default under the provisions of this Charge, under any security document referred to in the commitment letter dated February 23, 2021 (the "Commitment") issued by the Chargee in respect to this Charge or pursuant to any other charge or security document between the Chargor and the Chargee, including any document pursuant to which the Chargor is a guarantor, shall be deemed to be an event of default under all such security documents and shall entitle the Chargee to pursue its remedies under any or all of the aforesaid security documents.

Exhibit "B" to the Affidavit of Laura Lawrence sworn November 23, 2022, Blanket Mortgage Agreement, Moving Party's Motion Record, page 45

9. In July 2022, Mr. Desrochers and the Applicant entered into an agreement whereby the two mortgages on the Dufferin Street Property, and the mortgage on the Balmoral Property, would be renewed for a period ending on March 1, 2023 in return for renewal fees of \$50,000 on the first mortgage and \$10,250 on the second, plus legal fees and disbursements of \$5,930.

Affidavit of Laura Lawrence sworn November 23, 2022, at paragraph 10, Moving Party's Motion Record, page 9

10. While Mr. Desrochers was ready, willing, and able to pay the fees for the second mortgage renewal, the other directors of Concept Lofts refused to pay the fees to renew the first mortgage. As the other directors also refused to make the monthly mortgage payments, both mortgages subsequently went into default.

Affidavit of Laura Lawrence sworn November 23, 2022, at paragraph 11, Moving Party's Motion Record, page 9

11. Although Mr. Desrochers attempted to put the second mortgage in good standing, the Applicant, relying on paragraph 33 of the Blanket Mortgage Agreement,

refused to allow him to do so unless he put the first mortgage in good standing as well.

Affidavit of Laura Lawrence sworn November 12, 2022, at paragraph 12, Moving Party's Motion Record, pages 9 to 12

The November 7, 2022 Order

12. On November 7, 2022, this Court granted the Applicant's request, and appointed Rosen Goldberg Inc. as Receiver over, not only all of Concept Lofts' assets, undertakings, and properties, but the Balmoral Property as well. The Court's Order also granted the Receiver a Writ of Possession for the Balmoral Property and the right to sell it.

Exhibit "A" to the Affidavit of Laura Lawrence sworn November 23, 2022, Order of the Honourable Justice Cavanagh dated November 7, 2022 at paragraphs 2 to 5, Moving Party's Motion Record, pages 15 to 19

13. Pursuant to Paragraph 33, any interested party may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to the Receiver and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

Exhibit "A" to the Affidavit of Laura Lawrence sworn November 23, 2022, Order of the Honourable Justice Cavanagh dated November 7, 2022 at paragraph 33, Moving Party's Motion Record, page 26

14. As there is more than enough equity in the Dufferin Property, the entire debt to the Applicant can be satisfied without the need to sell the Balmoral Property.

Affidavit of Laura Lawrence sworn November 23, 2022, at paragraphs 12 to 15, Moving Party's Motion Record, Tab 2

PART III-ISSUES AND THE LAW

Issue One: What rights does Ms. Lawrence have with respect to the Balmoral Property?

15. As defined in the *Family Law Act*, every property in which a person has an interest and that is or, if the spouses have separated, was at the time of separation ordinarily occupied by the person and his or her spouse as their family residence is their matrimonial home.

Subsection 18(1) of the Family Law Act, R.S.O. 1990, c. F.3

16. The Act goes on to provide that both spouses have an equal right to possession of a matrimonial home, and that when a person proceeds to realize upon a lien, encumbrance or execution or exercises a forfeiture against property that is a matrimonial home, the spouse who has a right of possession has the same right of redemption or relief against forfeiture as the other spouse and is entitled to the same notice respecting the claim and its enforcement or realization.

Subsections 19(1) and 22(1) of the Family Law Act, R.S.O. 1990, c. F.3

17. Furthermore, if a spouse makes a payment in exercise of the right conferred by the Act, the payment shall be applied in satisfaction of the claim giving rise to the lien, encumbrance, execution or forfeiture.

Subsection 22(4) of the Family Law Act, R.S.O. 1990, c. F.3

18. Under the *Mortgages Act*, and despite any agreement to the contrary, where default has occurred in making any payment of principal or interest due under a mortgage or in the observance of any covenant in a mortgage and under the terms of the mortgage, by reason of such default, the whole principal and interest secured thereby has become due and payable,

- a. at any time before sale under the mortgage; or
- b. before the commencement of an action for the enforcement of the rights of the mortgagee or of any person claiming through or under the mortgagee,

the mortgagor may perform such covenant or pay the amount due under the mortgage, exclusive of the money not payable by reason merely of lapse of time, and pay any expenses necessarily incurred by the mortgagee, and thereupon the mortgagor is relieved from the consequences of such default.

Subsection 22(1) of the Mortgages Act, R.S.O. 1990, c. M.40

19. The *Mortgages Act* further provides that, despite any agreement to the contrary, where default has occurred in making any payment of principal or interest due under a mortgage or in the observance of any covenant in a mortgage and under the terms of the mortgage, by reason of such default, the whole principal and interest secured thereby has become due and payable, in an action for enforcement of the rights of the mortgagee or of any person claiming through or under the mortgagee, the mortgagor, upon payment into court of the sum of \$100 to the credit of the

action as security for costs, may apply to the court and, conditional upon performance of such covenant or upon payment of the money due under the mortgage, exclusive of the money not payable by reason merely of lapse of time, and upon payment of the costs of the action, the court,

- a. shall dismiss the action if judgment has not been recovered; or
- b. may stay proceedings in the action, if judgment has been recovered and if no sale or recovery of possession of the land or final foreclosure of the equity of redemption has taken place.

Subsection 23(1) of the Mortgages Act, R.S.O. 1990, c. M.40

20. The payment of the money is not a condition precedent to relief under s. 23, and the court has the discretion to set the conditions and terms of the order for the mortgagor to perform the covenants of the mortgage and the payment of the arrears.

Armanasco v. Linderwood Holdings Inc., 2016 ONSC 1605, at paragraph 50

21. Separate mortgages, even if held by the same party, should be treated distinctly.

Posocco v. Battista, 2016 ONSC 4910, at paragraph 18

22. As she is Mr. Desrochers' spouse, and as the property is a matrimonial home, Ms. Lawrence submits that, notwithstanding the terms of the blanket mortgage agreement, she has the right to redeem the mortgage on the Balmoral Property, which can be done through the proceeds from a sale of the Dufferin Property.

23. Ms. Lawrence further submits that, as Mr. Desrochers signed the Extension Agreement with respect to the Balmoral Property and was willing and ready to pay the renewal fees, she should be permitted to place the mortgage against the Balmoral Property in good standing, and that, as the mortgages against the Dufferin and Balmoral Properties are separate mortgages, there is nothing precluding her from paying the renewal fees with respect to the Balmoral Property.

Issue Two: Should the November 7, 2022 Order be amended or varied?

24. As the November 7, 2022 Order failed to take into consideration her rights, Ms. Lawrence submits that it should be amended or varied by deleting paragraphs 3, 4, and 5 as they relate to the Balmoral Property.

Issue Three: Should the proceedings and the Writ of Possession against the Balmoral Property be stayed?

25. As explained above, the *Mortgages Act* gives the Court the power to stay the proceedings and, as the entire amount owed to the Applicant can be paid from the proceeds of the Dufferin Street Property, Ms. Lawrence says that it ought to do so.

[Subsection 23\(1\)\(b\) of the Mortgages Act, R.S.O. 1990, c. M.40](#)

Issue Four: Should Ms. Lawrence be allowed to put the mortgage against the Balmoral Property in good standing?

26. As also explained above, Ms. Lawrence submits that she has a right to put the mortgage on the Balmoral Property in good standing and should be permitted to do so.

[Subsection 22\(1\) of the Family Law Act, R.S.O. 1990, c. F.3](#)

Subsection 22(1) of the Mortgages Act, R.S.O. 1990, c. M.40

PART IV-ORDER REQUESTED

27. Based on the foregoing, Ms. Lawrence requests:

- a. An Order amending or varying the Order of the Honourable Justice Cavanagh dated by November 7, 2022, by deleting paragraphs 3, 4, 5 as they relate to the property located at Units 502 and 503, 1 Balmoral Avenue, Toronto, Ontario (“the Balmoral Property”);
- b. In the alternative, an Order staying all proceedings and Writs of Possession against the Balmoral Property;
- c. An Order permitting Ms. Lawrence to put the mortgage against the Balmoral Property in good standing;
- d. An Order requiring the Applicant to pay Ms. Lawrence’s costs of this motion; and
- e. Such further and other relief as this Honourable Court deems just.

All of which is respectfully submitted.

Date: November 23, 2022

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Laura Lawrence

SCHEDULE “A”-LIST OF AUTHORITIES

1. [Armanasco v. Linderwood Holdings Inc., 2016 ONSC 1605.](#)
2. [Posocco v. Battista, 2016 ONSC 4910.](#)

SCHEDULE “B”-TEXT OF STATUTES, REGULATIONS, & BY-LAWS**FAMILY LAW ACT, R.S.O. 1990, c. F.3****SECTION 18****Matrimonial home**

18 (1) Every property in which a person has an interest and that is or, if the spouses have separated, was at the time of separation ordinarily occupied by the person and his or her spouse as their family residence is their matrimonial home. R.S.O. 1990, c. F.3, s. 18 (1).

Ownership of shares

(2) The ownership of a share or shares, or of an interest in a share or shares, of a corporation entitling the owner to occupy a housing unit owned by the corporation shall be deemed to be an interest in the unit for the purposes of subsection (1). R.S.O. 1990, c. F.3, s. 18 (2).

Residence on farmland, etc.

(3) If property that includes a matrimonial home is normally used for a purpose other than residential, the matrimonial home is only the part of the property that may reasonably be regarded as necessary to the use and enjoyment of the residence. R.S.O. 1990, c. F.3, s.

18

(3).

SECTION 19**Possession of matrimonial home**

19 (1) Both spouses have an equal right to possession of a matrimonial home. R.S.O. 1990, c. F.3, s. 19 (1).

Idem

(2) When only one of the spouses has an interest in a matrimonial home, the other spouse's right of possession,

(a) is personal as against the first spouse; and

(b) ends when they cease to be spouses, unless a separation agreement or court order provides otherwise. R.S.O. 1990, c. F.3, s. 19 (2).

SECTION 22

Right of redemption and to notice

22 (1) When a person proceeds to realize upon a lien, encumbrance or execution or exercises a forfeiture against property that is a matrimonial home, the spouse who has a right of possession under section 19 has the same right of redemption or relief against forfeiture as the other spouse and is entitled to the same notice respecting the claim and its enforcement or realization. R.S.O. 1990, c. F.3, s. 22 (1).

Service of notice

(2) A notice to which a spouse is entitled under subsection (1) shall be deemed to be sufficiently given if served or given personally or by registered mail addressed to the spouse at his or her usual or last known address or, if none, the address of the matrimonial home, and, if notice is served or given by mail, the service shall be deemed to have been made on the fifth day after the day of mailing. R.S.O. 1990, c. F.3, s. 22 (2).

Idem: power of sale

(3) When a person exercises a power of sale against property that is a matrimonial home, sections 33 and 34 of the Mortgages Act apply and subsection (2) does not apply. R.S.O. 1990, c. F.3, s. 22 (3); 1993, c. 27, Sched.

Payments by spouse

(4) If a spouse makes a payment in exercise of the right conferred by subsection (1), the payment shall be applied in satisfaction of the claim giving rise to the lien, encumbrance, execution or forfeiture. R.S.O. 1990, c. F.3, s. 22 (4).

Realization may continue in spouse's absence

(5) Despite any other Act, when a person who proceeds to realize upon a lien, encumbrance or execution or exercises a forfeiture does not have sufficient particulars of a spouse for the purpose and there is no response to a notice given under subsection (2) or under section 33 of the Mortgages Act, the realization or exercise of forfeiture may continue in the absence and without regard to the interest of the spouse and the spouse's rights under this section end on the completion of the realization or forfeiture. R.S.O. 1990, c. F.3, s. 22 (5); 1993, c. 27, Sched.

MORTGAGE ACT, R.S.O. 1990, c. M.40**SECTION 22****Relief before action**

22 (1) Despite any agreement to the contrary, where default has occurred in making any payment of principal or interest due under a mortgage or in the observance of any covenant

in a mortgage and under the terms of the mortgage, by reason of such default, the whole principal and interest secured thereby has become due and payable,

(a) at any time before sale under the mortgage; or

(b) before the commencement of an action for the enforcement of the rights of the mortgagee or of any person claiming through or under the mortgagee, the mortgagor may perform such covenant or pay the amount due under the mortgage, exclusive of the money not payable by reason merely of lapse of time, and pay any expenses necessarily incurred by the mortgagee, and thereupon the mortgagor is relieved from the consequences of such default.

Statement of arrears, expenses, etc.

(2) The mortgagor may, by a notice in writing, require the mortgagee to furnish the mortgagor with a statement in writing,

(a) of the amount of the principal or interest with respect to which the mortgagor is in default; or

(b) of the nature of the default or the non-observance of the covenant, and of the amount of any expenses necessarily incurred by the mortgagee.

Idem

(3) The mortgagee shall answer a notice given under subsection (2) within fifteen days after receiving it, and, if without reasonable excuse the mortgagee fails so to do or if the answer is incomplete or incorrect, any rights that the mortgagee may have to enforce the mortgage shall be suspended until the mortgagee has complied with subsection (2). R.S.O. 1990, c. M.40, s. 22.

SECTION 23

Relief after action commenced

23 (1) Despite any agreement to the contrary, where default has occurred in making any payment of principal or interest due under a mortgage or in the observance of any covenant in a mortgage and under the terms of the mortgage, by reason of such default, the whole principal and interest secured thereby has become due and payable, in an action for enforcement of the rights of the mortgagee or of any person claiming through or under the mortgagee, the mortgagor, upon payment into court of the sum of \$100 to the credit of the action as security for costs, may apply to the court and, conditional upon performance of such covenant or upon payment of the money due under the mortgage, exclusive of the money not payable by reason merely of lapse of time, and upon payment of the costs of the action, the court,

(a) shall dismiss the action if judgment has not been recovered; or

(b) may stay proceedings in the action, if judgment has been recovered and if no sale or recovery of possession of the land or final foreclosure of the equity of redemption has taken place. R.S.O. 1990, c. M.40, s. 23 (1).

Idem

(2) Despite clause (1) (b), where judgment has been recovered and recovery of possession of the land has taken place, the court may stay proceedings in the action upon the application of a person added as a party on a reference, made under subsection (1) within ten days after service of notice of the judgment has been made upon the person. R.S.O. 1990, c. M.40, s. 23 (2); 2020, c. 11, Sched. 5, s. 18 (1).

Subsequent default

(3) Where proceedings have been stayed under clause (1) (b) or under subsection (2) and default again occurs under the mortgage, the court upon application may remove the stay.

R.S.O. 1990, c. M.40, s. 23 (3).

ONTARIO WEALTH MANAGEMENT CORPORATION -and- CONCEPT LOFTS LTD. et al.

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Court File No. CV-22-00688570-00CL

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Proceeding commenced at Toronto

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