CITATION: Tuerr Holdings Inc. v. Vrankovic, 2012 ONCA 5
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COURT OF APPEAL FOR ONTARIO

Cronk, Lang and Watt JJ.A.

BETWEEN

Tuerr Holdings Inc.

Respondent/Plaintiff

and

Peter Vrankovic

Appellant/Defendant

Lisa S. Corne, for the appellant

J. Greg Murdoch, for the respondent

Heard: December 8, 2011

On appeal from the judgment of Justice W. L. MacPherson of the Superior Court of Justice, dated March 9, 2011.

ENDORSEMENT

[1] Peter Vrankovic (Vrankovic) appeals from an order granting summary judgment to Tuerr Holdings Inc. (Tuerr) on Vrankovic's guarantee of a second mortgage on a

commercial property owned by Cambridge Place Commercial Corporation (Cambridge) of which Vrankovic was the president and a director.

[2] Vrankovic says that the motion judge erred in granting summary judgment to Tuerr. He submits that the judge erred in holding that Vrankovic had waived his right as guarantor to advance deficiencies in Tuerr's prior attempt to enforce its security in response to the motion for summary judgment. Vrankovic also argues that the motion judge was wrong in her conclusion that the evidence adduced by him on the motion raised no genuine issues requiring a trial.

[3] We would not give effect to either argument advanced by Vrankovic and, for the reasons that follow, would dismiss the appeal.

The Background

[4] In April 2010, Cambridge was in default on its second mortgage to Tuerr. As a result of Cambridge's default, Tuerr served a Notice of Intention to Enforce Security on Cambridge and a Notice to Attorn Rents on Cambridge's tenants.

[5] On April 29, 2010, Cambridge sought injunctive relief requiring Tuerr to withdraw its Notice to Attorn Rents and to inform all Cambridge's tenants that their rents were to be paid to Cambridge rather than to Tuerr. Cambridge also sought relief from the consequences of its default on payment into court or to Tuerr of the amount of the outstanding arrears.

[6] On May 14, 2010, the parties executed Minutes of Settlement and Forbearance Agreement. This document included an agreement by Tuerr to suspend any further enforcement proceedings on the mortgage until September 5, 2010, provided Cambridge paid the arrears owing to Tuerr and kept its first mortgage on the property, held by Meridian Credit Union (Meridian), in good standing. The parties' agreement under the Minutes of Settlement and Forbearance Agreement was subsequently confirmed by a consent court order dated May 17, 2010.

[7] Vrankovic signed the Minutes of Settlement and Forbearance Agreement as president of Cambridge, with authority to bind the corporation, and also in his personal capacity.

[8] Contrary to the terms of the Minutes of Settlement and Forbearance Agreement, and of the consent court order, Cambridge did not pay the arrears owing to Tuerr and defaulted on its first mortgage to Meridian. Under s. 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, Meridian obtained an order appointing a Receiver to sell the property.

[9] Tuerr sued Vrankovic on his guarantee of the second mortgage and obtained summary judgment on the claim on March 9, 2011.

The Grounds of Appeal

[10] The appellant seeks reversal of the order granting summary judgment on two main grounds, which we would paraphrase in these terms:

i. that the motion judge erred in concluding that Vrankovic had waived his right to raise deficiencies in the Notice of Intention to Enforce Security sent by Tuerr by signing the Minutes of Settlement and Forbearance Agreement; and

ii. that the motion judge erred in failing to find that the evidence filed in response to the motion, affidavits from Vrankovic and his son, raised genuine issues requiring a trial.

Discussion

[11] We would not give effect to either ground of appeal.

Deficiencies in the Notice and Waiver

[12] On April 29, 2010, Cambridge sought relief from the consequences of its default under the second mortgage. On May 14, 2010, Cambridge and Tuerr executed the Minutes of Settlement and Forbearance Agreement. According to that document, Cambridge withdrew its application seeking injunctive and other relief against Tuerr and Tuerr agreed to hold off on any further enforcement proceedings until September 5, 2010,

as long as Cambridge did not default under the terms of the agreement or on the first mortgage to Meridian.

[13] Vrankovic signed the Minutes of Settlement and Forbearance Agreement on behalf of Cambridge and in his own capacity. Unbeknownst to Tuerr, when Vrankovic signed the document, Cambridge was already in default in its mortgage payments to Meridian, the first mortgagee, and owed over $500,000 in municipal taxes on the property. The motion judge concluded that by signing this document in his personal capacity, Vrankovic waived his right to raise any previous deficiencies in Tuerr's enforcement proceedings in response to the motion for summary judgment.

[14] We agree. The motion for summary judgment was based on Cambridge's default under the Minutes of Settlement and Forbearance Agreement, which amended the terms of the second mortgage. What had occurred previously, in particular, the adequacy of prior notices sent to Cambridge, was at once irrelevant to a decision on the motion for summary judgment and, in any event, waived by Vrankovic.

[15] The alleged deficiencies in Tuerr's enforcement measures were known to Cambridge and Vrankovic at the time they executed the Minutes of Settlement and Forbearance Agreement. Indeed, they formed a principal basis for Cambridge's injunction application. Moreover, Cambridge breached the terms of the Minutes of Settlement and Forbearance Agreement in two respects: by failing to pay the arrears owing to Tuerr, as it promised to do, and by its default under the Meridian first mortgage.

Thus, whatever the nature of Cambridge's prior complaints regarding Tuerr's attempts to enforce its security, under the bargain made in the Minutes of Settlement and Forbearance Agreement, Tuerr was entitled to enforce its security.

[16] This ground of appeal fails.

The Absence of Genuine Issues Requiring a Trial

[17] Vrankovic contends that the motion judge erred in failing to conclude that his affidavit evidence filed in response to the motion raised genuine issues requiring a trial. In his affidavits and in that of his son, Vrankovic advanced the claim that, by oral agreement, Meridian agreed to forebear on enforcement of its first mortgage and to permit Cambridge to pay reduced rent so that Cambridge could pursue lease negotiations that would yield increased revenue from existing or potential tenants. This evidence, Vrankovic submits, afforded a viable defence to the assertion that Meridian was entitled to enforce its mortgage security.

[18] Vrankovic further argues that the motion judge erred by misapprehending and failing to accept his evidence about the impact of Tuerr's Notice to Attorn Rents on Meridian's willingness to forebear on its enforcement of the first mortgage. Vrankovic further complains that the motion judge relied on unreliable hearsay, or double hearsay, from a declarant who bore Vrankovic ill-will rather than on Vrankovic's own firsthand account.

[19] We disagree.

[20] On the basis of the record before her, the motion judge was well-positioned to have a full appreciation of the evidence and the issues in the matter before her. She rejected, as she was entitled to do, Vrankovic's bald assertions of an oral forbearance agreement with Meridian. These assertions were unsupported by any documentary evidence, at odds with commercial reality, and inconsistent with the terms of the first mortgage. Moreover, even on the most generous reading of Vrankovic's affidavit materials, Cambridge was hopelessly in debt, in breach of the terms of the first mortgage and beyond rescue by any extended lease arrangements that were nowhere near completion.

[21] The preference of the motion judge for the evidence contained in the affidavit of Tuerr's secretary-treasurer to Vrankovic's assertions does not render the motion judge's conclusion erroneous. Setting to one side the hearsay portion of the secretary-treasurer's affidavit, Vrankovic's affidavit materials were replete with unsubstantiated bald allegations of ongoing negotiations, barren of detail and unsupported by any documentary or other evidence from Meridian or existing or proposed tenants. In particular, Vrankovic failed to adduce any convincing evidence of the alleged oral agreement with Meridian or to support his claim that Cambridge suffered damage, including the loss of prospective tenants, as a result of Tuerr's actions. His evidence, therefore, failed to raise any genuine issues requiring a trial.

[22] This ground of appeal lacks substance.

Conclusion

[23] The appeal is dismissed. The respondent shall have its costs of the appeal, which we fix at $15,000 inclusive of disbursements and all applicable taxes.

"E.A. Cronk J.A."
"S.E. Lang J.A."
"David Watt J.A."