

# COURT OF APPEAL FOR ONTARIO

CITATION: L-Jalco Holdings Inc. v. MacPherson, 2018 ONCA 488

DATE: 20180525

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Pepall, van Rensburg and Paciocco JJ.A.

BETWEEN

L-Jalco Holdings Inc.

Plaintiff (Appellant)

and

Beverly Ann MacPherson

Defendant (Respondent)

Bryan Skolnik, for the appellant

Mark Ross, for the respondent

Heard and released orally: May 22, 2018

On appeal from the judgment of Justice Graeme Mew of the Superior Court of Justice, dated June 29, 2017.

## REASONS FOR DECISION

[1] On September 3, 2008, the appellants, L-Jalco Holdings, lent money to 837047 Ontario Limited (“837”). That loan was secured, in part, by a \$1,100,000 mortgage placed on a commercial building at the corner of Queen and Division Streets in Kingston, Ontario. There were two prior mortgages on the property at the time. Mr. Dwight Powell held the first mortgage in the amount of \$449,070.37.

The Respondent, Beverly MacPherson, held the second mortgage in the amount of \$49,900. L-Jalco paid off Mr. Powell's mortgage and more than \$75,000 in tax arrears, but not Ms. MacPherson's mortgage.

[2] 837 subsequently defaulted on its payments on the L-Jalco mortgage, and on June 13, 2012, the property was sold under power of sale. This was done without notice to Ms. MacPherson. The building sold for \$425,000. L-Jalco now claims all of the proceeds of sale. It brought an action against Ms. MacPherson claiming that even though her mortgage was registered in priority to theirs, it is entitled to priority based on equitable subrogation for having paid off Mr. Powell's mortgage and the taxes. Ms. MacPherson counter-claimed for priority payment of the amount outstanding on her mortgage.

[3] In claiming equitable subrogation, L-Jalco relied on its claim that Ms. MacPherson's lawyer failed to fulfill an undertaking to discharge her mortgage that L-Jalco claims he provided. L-Jalco also argued that Ms. MacPherson should not be enriched by assuming first priority as a result of L-Jalco's act of paying off the first mortgage. L-Jalco argued that it could simply have taken an assignment of the Powell mortgage, thereby securing priority over her mortgage, making it equitable that it receive priority through subrogation.

[4] On June 29, 2017, Ms. MacPherson was granted summary judgment. The motion judge rejected L-Jalco's claim that Ms. MacPherson's lawyer undertook to

discharge her mortgage. He found as a fact that when L-Jalco advanced the mortgage funds it knew or was indifferent that Ms. MacPherson refused to postpone her mortgage. The motion judge held that, in any event, it would not be equitable to give L-Jalco a priority for a much larger mortgage carrying a higher interest rate than the Powell mortgage. In these circumstances, the motion judge found it to be unfair to leave Ms. MacPherson with nothing. The motion judge therefore dismissed L-Jalco's claim to equitable subrogation and ordered L-Jalco to pay Ms. MacPherson the sum secured by her mortgage of \$49,900.

[5] L-Jalco appeals. It contends that the motion judge erred in:

- placing the onus on L-Jalco to establish the availability of the remedy of equitable subrogation when the summary judgment motion was brought by Ms. MacPherson;
- determining that facts were readily discernible even though there was disputed evidence relating to central issues;
- making a number of factual and credibility determinations; and
- in failing to properly apply the doctrine of equitable subrogation.

[6] We dismiss L-Jalco's appeal.

[7] The motion judge was correct to impose the burden on L-Jalco to prove its entitlement to equitable subrogation, notwithstanding that Ms. MacPherson initiated the summary judgment motion. The motion judge raised this issue with

the parties, stating that the onus is on L-Jalco. He invited comments from counsel for L-Jalco and no issue was taken with this position. Once Ms. MacPherson proved that her mortgage was registered in priority to L-Jalco's mortgage, the burden fell squarely on L-Jalco to prove the equitable subrogation claim it relied upon, in answer.

[8] The motion judge's conclusion that the facts required to render summary judgment were readily ascertainable, despite disputed evidence, is entitled to deference. At the commencement of the motion, L-Jalco encouraged the trial judge to proceed by way of summary judgment by commenting that, "there really isn't much dispute about the facts". It does not lie easily in L-Jalco's mouth to contend now that this was not a proper case for summary judgment. Moreover, L-Jalco relied heavily on documentary evidence to establish its claim that Ms. MacPherson had undertaken to discharge her mortgage. The motion judge was well situated to assess this evidence. Crucial testimony from Mr. Murano, the principal of 837, that he advised L-Jalco's lawyer that Ms. MacPherson would not agree to postpone her mortgage was not contradicted. We therefore see no palpable or overriding error in the motion judge's decision to proceed by summary judgment despite the evidence in dispute.

[9] Nor have any palpable or overriding errors been identified in the factual and credibility findings impugned by L-Jalco. The challenges L-Jalco makes represent an attempt to re-argue the dispute. The material findings were for the motion judge

to make, and all of his findings of fact are amply supported on the evidence before him.

[10] Finally, the motion judge's decision not to grant the remedy of equitable subrogation is discretionary. As this court recognized in *Mutual Trust Co. v. Creditview Estate Homes Limited*, [1997] O.J. No. 3258 (C.A.), at pp. 6-7, "the fundamental principle underlying the doctrine of subrogation [is] one of fairness in the light of all the circumstances". On the findings the motion judge was entitled to make, L-Jalco went ahead with the loan to 837 knowing that Ms. MacPherson's mortgage stood in priority to their own and that she would not postpone her interest. Moreover, L-Jalco seeks a subrogated priority over Ms. MacPherson for a mortgage that is more than double in value to the Powell mortgage, and that carries a much higher interest rate than the mortgage it replaced. These are cogent and proper reasons for the motion judge's decision to reject L-Jalco's request for equitable subrogation that, if granted, would leave Ms. MacPherson with nothing. There is no basis to interfere.

[11] The appeal is dismissed with costs of \$15,000 inclusive of disbursements and applicable taxes to be paid by the appellant to the respondent.

"S.E. Pepall J.A."

"K. van Rensburg J.A."

"David M. Paciocco J.A."