

# COURT OF APPEAL FOR ONTARIO

CITATION: MCC Mortgage Holdings Inc. v. Mundulai, 2020 ONCA 312

DATE: 20200521

DOCKET: M51539 (C68332)

Pardu J.A. (Motion Judge)

BETWEEN

MCC Mortgage Holdings Inc.

Plaintiff  
(Respondent/Responding Party)

and

Aliamisse Omar Mundulai and Ying Huang

Defendants  
(Appellant/Moving Party)

Jeffrey Kukla, for the responding party

Aliamisse Omar Mundulai, acting in person

Heard: May 12, 2020, by teleconference

## REASONS FOR DECISION

[1] Mr. Mundulai brings this motion on short notice on the ground of urgency. Because of this urgency I indicated at the teleconference hearing that the motion was dismissed, with reasons to follow. These are those reasons.

### **Background**

[2] Mr. Mundulai, a defendant mortgagor, brings this motion to prevent the proposed sale of real property that was scheduled to close on the date this motion

was heard. The responding party, the plaintiff mortgagee, wishes to sell the property to realize the amounts owing on the mortgage, long in default. Mr. Mundulai seeks a stay pending appeal of enforcement of a writ of possession, a stay which was refused by the Superior Court. He proposes to appeal to this court from that decision and also asks to extend the time to appeal from a July 23, 2019 decision of the Superior Court refusing to set aside default judgment against him.

[3] The plaintiff mortgagee recovered possession of the property the day before this motion was heard, when the writ of possession was executed for a second time.

[4] The mortgage is dated May 31, 2016, given by Mr. Mundulai and his then spouse, Ying Huang. The original term was for two years. It is a second mortgage.

[5] Default in payment on the mortgage occurred on July 1, 2018 and continues. Property taxes are in arrears in the sum of \$29,562.15, a further event of default under the mortgage.

[6] The mortgage matured on June 1, 2019 and has not been discharged.

[7] The mortgagee issued a statement of claim on August 22, 2018, seeking judgment for payment of the amounts owing and possession. It was served on Mr. Mundulai on October 25, 2018, by an alternative to personal service. The mortgagors did not defend the action and default judgment issued on February 12, 2019, for the sum of \$218,025.47 plus interest and for possession of the

mortgaged property and costs. A copy of the default judgment was delivered to the mortgagors' lawyer on February 20, 2019.

[8] The Superior Court granted leave to the mortgagee to issue a writ of possession on April 12, 2019, and the writ of possession was issued on April 26, 2019.

[9] Mr. Mundulai brought a motion to set aside the default judgment, which was dismissed on July 23, 2019. McCarthy J. found that there was no explanation for the delay in bringing the motion to set aside the default judgment, and that the mortgagors had been well aware of the substance of the claim and would have had time to formulate a defence. He found that the mortgagors had no arguable case on the merits. He found that service of the statement of claim was made properly under the rules and came to the attention of the defendants. He noted that the defendants had no evidence that the amounts set out in the discharge statement were inaccurate or not amenable to calculation as a liquidated sum by the registrar. There was no subsequently concluded agreement arriving at a compromise amount. He found that the mortgagee would be prejudiced by an order setting aside a properly obtained default judgment and doubted that the mortgagors had the ability to pay the amounts owing.

[10] The writ of possession was enforced and the mortgagee took possession on January 8, 2020. Mr. Mundulai was asked to remove his personal belongings. He

did not do so and the belongings were placed in storage by the mortgagee. Mr. Mundulai was not then living in the property, having separated from the co-defendant, his spouse. She agreed to leave the property and has not participated in this motion nor in the earlier motion brought by Mr. Mundulai to set aside the writ of possession.

[11] The mortgagee entered into an agreement of purchase and sale of the property with a closing date set for May 12, 2020. The proposed purchasers sold their property in anticipation of acquiring this new home.

[12] The mortgagee discovered that the locks had been changed by Mr. Mundulai on or about April 4, 2020. From correspondence sent by Mr. Mundulai to the mortgagee's lawyer, it appears that he asserts a right to possession of the property despite the judgment and the writ of possession. He acknowledged to the motion judge that he re-occupied the property at some point after March 29, 2020. He broke the existing locks on the property to effect entry. The mortgagee changed the locks again but discovered that Mr. Mundulai changed them a second time.

[13] Competing motions were brought in the Superior Court. The plaintiff mortgagee sought a further writ of possession and removal of Mr. Mundulai from the property. Mr. Mundulai sought an order staying mortgage enforcement proceedings, setting aside the default judgment, and discharging the mortgage upon payment into court. By order of April 30, 2020, Boswell J. dismissed Mr.

Mundulai's motion and granted the mortgagee's motion. Mr. Mundulai proposes to appeal from that order, and also seeks to extend the time to appeal from the order of McCarthy J. refusing to set aside the default judgment of July 23, 2019. Boswell J. concluded that there was no merit to Mr. Mundulai's position, that he was stalling to take advantage of the temporary suspension of evictions resulting from the COVID crisis, that he unlawfully broke into the premises, and that his claim to pay \$190,388.90 into court was disingenuous. The motion judge doubted that he had the funds available or that they would be sufficient to discharge the amount now owing, estimated at \$240,000 plus the unpaid costs from the refusal of the motion to set aside the default judgment.

[14] For some time, Mr. Mundulai and the mortgagee's counsel engaged in discussions over the amount owing. Mr. Mundulai's issues with the amounts claimed related mostly to certain ancillary charges such as renewal and administration fees, costs and interest after maturity. There is no dispute that the mortgage is in default. At one point in May or June 2019 they were close to agreement that \$185,777.75 would discharge the mortgage, but the discussions fell apart when Mr. Mundulai asserted entitlement to a credit for a further \$3,988.86 beyond what the mortgagee was prepared to accept by way of compromise. The mortgagee has lost faith that Mr. Mundulai can truly raise the money to discharge the mortgage or that any further discussions would be fruitful.

### **Arguments on the motion**

[15] Mr. Mundulai argues that the amounts claimed by the mortgagee for ancillary matters such as renewal fees, administrative costs and interest after maturity are excessive. He says these amount to roughly 10% of the principal amount of the mortgage and are significant. He argues that Boswell J. erred by failing to consider ss. 12, 22 and 23 of the *Mortgages Act*, R.S.O. 1990, c. M.40, and erred by failing to allow him to pay money into court on account of the mortgage. He argues that the mortgagee acted in bad faith and has asserted claims for which there is no contractual or legal foundation. He submits that the Notice of Power of Sale was invalid. He says there is no evidence the mortgagee has obtained market value for the property by the proposed sale. He submits that, by virtue of an exit clause in the agreement of purchase and sale with the proposed purchaser, the mortgagee would not be prejudiced if the sale could not proceed. He submits that to deny a stay would allow an overreaching mortgagee to benefit from its conduct and deny him any remedy, rendering his appeal moot. He says that the mortgagee would not be prejudiced if this court grants a stay of enforcement of the writ of possession because it could simply give a new notice that it was exercising its power of sale rights.

[16] The mortgagee asserts that the amount owing on the mortgage has been conclusively settled by the default judgment, and that no appeal has been taken for over nine months from the decision refusing to set aside the default judgment.

Extension of time to appeal from that decision should not be granted. The mortgagee argues that the sections of the *Mortgages Act* cited by the moving party are of no assistance to him, and that Boswell J. exercised his discretion properly in refusing to stay enforcement of the writ of possession.

### **Analysis**

[17] I begin with the request for an extension of time to appeal from the decision of McCarthy J. of July 23, 2019 refusing to set aside the default judgment.

[18] The relevant factors are:

1. Whether the appellant had an intention to appeal within the relevant period
2. The length of the delay and the explanation for the delay
3. Any prejudice to the respondent
4. The merits of the appeal
5. Whether the justice of the case requires granting an extension

The governing principle is whether the justice of the case requires that an extension be granted: see *Chandra v. Canadian Broadcasting Corporation*, 2016 ONCA 448, 349 O.A.C. 93, at paras. 13-14.

[19] Here there is no evidence the appellant intended to appeal within the relevant period. The delay, close to ten months, is substantial and there is no explanation for it. Mr. Mundulai is a former practicing lawyer and would have been aware of the importance of acting promptly. The prejudice to the mortgagee is

substantial. It has taken steps to sell the property to realize the money owed to it. No payments have been made since September 2018. The municipal taxes are in substantial arrears and there is no indication as to how these would be paid. It is not possible to conclude that there is merit to the appeal. It is possible that if he had acted with dispatch and with a proper evidentiary foundation the appellant might have reduced the mortgagee's claims by some amount, but there is no dispute that the principal is outstanding. The appellant has not resided in the home since January 2019, until he broke into the premises around March and April of 2020, in the face of a judgment for possession in favour of the mortgagee. His former spouse takes no part in these proceedings.

[20] It follows that the motion to extend time to appeal from the decision of July 23, 2019, is dismissed. That judgment therefore conclusively settles the amount owing on the mortgage and the mortgagee's right to possession of the property.

[21] I now turn to the request for a stay of the writ of possession pending the appeal to this court from the decision of April 30, 2020.

[22] The factors to be considered are:

1. Is there a serious issue to be tried?
2. Will the appellant suffer irreparable harm if the stay is not granted?
3. Does the balance of convenience favour granting a stay?

See *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.



[23] Given that the amount owing on the mortgage has been conclusively determined by a final decision from which there is no appeal, I am not satisfied that there is a serious issue to be tried as to the amount owed on the mortgage. Given that the accuracy of the money judgment was previously litigated, Boswell J. was correct to decline to embark on a re-consideration of the same issue.

[24] Further, I see no error in Boswell J.'s exercise of discretion to refuse to stay enforcement of the writ of possession. He did not err in considering that the appellant's actions in twice breaking into the premises in the face of a judgment for possession in favour of the mortgagee was a factor weighing against the granting of the stay.

[25] Given the appellant's limited occupation of the property since January 2019, I am not satisfied that he will suffer irreparable harm if the stay is not granted. His spouse and co-owner agreed to vacate the property and appears to have no interest in holding onto it.

[26] The balance of convenience does not favour granting a stay, given the appellant's long, unexplained delay. It is unlikely he can raise the funds to discharge the mortgage. The mortgage commitment he has filed has not been executed by his former spouse and it appears unlikely that she will do so. Default has continued for a long time and the mortgagee should be permitted to realize the money owed to it.

[27] For these reasons the motion was dismissed.

[28] There will be an order for costs of this motion in favour of the mortgagee in the sum of \$3,300.00 inclusive of taxes and disbursements.

Released: May 21, 2020

“G. Pardu J.A.”