

COURT OF APPEAL FOR ONTARIO

CITATION: Acquaviva v. Holmes, 2022 ONCA 891

DATE: 20221220

DOCKET: C70484

Pepall, van Rensburg and Benotto JJ.A.

BETWEEN

Aurelio Acquaviva and Maria Acquaviva

Plaintiffs (Respondents)

and

Joan Holmes

Defendant (Appellant)

Dominic Saverino, for the appellant

Bryan Fromstein and Kristy Kerwin, for the respondents

Heard: December 14, 2022

On appeal from the order of Justice Michael G. Emery of the Superior Court of Justice, dated March 1, 2022, with reasons at 2022 ONSC 1295.

REASONS FOR DECISION

[1] The appellant appeals from the summary judgment granted in favour of the respondents. At the conclusion of submissions, we dismissed the appeal with reasons to follow. These are those reasons.

[2] This was a straightforward mortgage enforcement action. The appellant granted the respondents a first charge on her property in Brampton for a six-month

term. The appellant defaulted in payment on July 1, 2019. The respondents demanded payment and subsequently sued on the covenant and for possession. More than 20 months after the respondents commenced their action, and after their motion for summary judgment had been served on the appellant, the appellant commenced an action against the respondents and 16 other defendants alleging an elaborate mortgage fraud.

[3] The motion judge granted summary judgment in favour of the respondents but ordered a trial on the quantum owed and costs. At the time of the motion, the appellant was still in possession having not paid any interest since June 2019.

[4] On appeal, the appellant asserts that the motion judge erred in concluding that this was an appropriate case for summary judgment and that the record was sufficient to adjudicate all issues. She submits that the issues in this action were intertwined with those in her action and there was a risk of inconsistent verdicts.

[5] We disagree with these submissions.

[6] In careful reasons, the motion judge considered the appellant's arguments and the evidence. He concluded that she had borrowed more than she could afford to repay, she had not repaid the respondents, and the charge she had granted them as security had matured over three years ago. The appellant had the benefit of independent legal advice before granting the charge, signed an acknowledgment to that effect, understood her rights and obligations, and signed

the charge voluntarily. There was no evidence that the respondents agreed to renew the charge for one year other than a bald allegation, and in any event, that time limit would have expired on January 1, 2020.

[7] The appellant had not pleaded fraud or conspiracy to defraud against the respondents arising from the alleged agency of the real estate agent or the law clerk in her statement of defence but in any event, she had not provided evidence to raise a genuine issue requiring a trial on those issues.

[8] The motion judge considered the other action in which the appellant asserted that the respondents were required to ensure that all the mortgages against title should not exceed fair market of the property and that they owed fiduciary duties to the appellant. He instructed himself to consider whether the claims made by the appellant in her action were severable from the claims of the respondents in this action. He reasonably concluded that the amounts owed were liquidated amounts and separate and distinct from her claims in her action. Moreover, she had led no evidence of any wrongdoing by the respondents. Indeed, on cross-examination, she had admitted that she had no evidence tying the respondents to any fraud. There was no risk of inconsistent verdicts, and the actions were not intertwined. We see no error in his analysis or conclusion.

[9] Based on the record before him, the findings made were available to the motion judge and we see no basis on which to interfere. He correctly concluded that there was no genuine issue requiring a trial.

[10] The appeal is dismissed.

[11] The respondents seek costs on a full indemnity scale in the amount of \$17,444.38 based on the terms of the charge. Although the agreement of the parties does not operate to exclude the court's discretion (see *Bossé v Mastercraft Group Inc.*, 123 D.L.R. (4th) 161 (Ont. C.A.), at paras. 62-69), we are satisfied that the costs requested are justified and fair and reasonable in the circumstances of this case. Accordingly, the appellant is to pay the respondents their costs on a full indemnity scale fixed in the amount of \$17,444.38 inclusive of disbursements and applicable tax.

"S.E. Pepall J.A."
"K. van Rensburg J.A."
"M.L. Benotto J.A."