

# COURT OF APPEAL FOR ONTARIO

CITATION: Everest Finance Corporation v. Jonker, 2023 ONCA 87

DATE: 20230208

DOCKET: C70785

Huscroft, Miller and Nordheimer JJ.A.

BETWEEN

Everest Finance Corporation

Plaintiff (Appellant)

and

Richard John Jonker and France Scimmi

Defendants (Respondents)

David G. Boghgosian and George M. Pakozdi, for the appellant

Richard John Jonker, acting in person

Heard: in writing

On appeal from the amended judgment of Justice Annette Casullo of the Superior Court of Justice, dated July 19, 2022.

## REASONS FOR DECISION

[1] Everest Finance appeals from the decision of the motion judge who, while granting summary judgment to the appellant, reduced the amount of arrears to which it was entitled. If successful, the appellant also seeks to increase the costs awarded on the motion to a full indemnity award.

[2] The appeal was scheduled to be heard on February 3, 2023 but Mr. Jonker said he could not hear the court on the Zoom connection notwithstanding that he could hear the Registrar. The court staff made numerous efforts to fix the claimed problem. When those efforts failed, the court advised Mr. Jonker that he could participate in the hearing by telephone. Mr. Jonker did not call into the number provided for this purpose and all efforts by the court staff to call Mr. Jonker went to his voicemail. After more than an hour of effort, the court advised all parties that it would deal with the appeal based on the written materials filed.

[3] The respondents had a mortgage over their home with the appellant. They defaulted in making the required payments on the mortgage. The appellant commenced power of sale proceedings. On November 20, 2019, the appellant brought its motion for summary judgment.

[4] The motion was originally scheduled to be heard in May 2020 but it was not due to the intervention of the COVID-19 pandemic. The motion was eventually heard on December 10, 2021.

[5] The respondents did not dispute that they had not made the required payments. Summary judgement was therefore granted. The appellant had sought \$412,834.81 due and owing on the mortgage. The motion judge required further information on the component parts of this amount. The appellant filed further material. In her reasons, the motion judge granted judgement for the principal

amount, taxes, disbursements and other items. She declined to allow an amount for legal fees in another somewhat related matter. That refusal is not an issue before us.

[6] The issue that is before us is that the motion judge reduced the interest arrears from \$63,010.50 to \$20,000. In doing so, the motion judge said that the increase in the interest arrears:

... lies primarily at the fee of the pandemic, which prevented the Court from hearing the Plaintiff's motion in a timely manner. This lacuna in time should not be borne by the Defendant in its entirety. I find a reasonable figure for arrears to be \$20,000.

[7] The motion judge does not cite any authority for the proposition that a court may reduce interest owed on a debt pursuant to a contractual term because of delays in the court system and we are not aware of any such authority. While interest may be denied to a party who is dilatory in pursuing its rights, that is not the situation here. The respondents owed a contractual debt to the appellant which includes interest that accrues on that debt until it is paid. There is no basis to reduce the amount legally due out of some judicial sense of what is fair and equitable.

[8] In a similar vein, the motion judge reduced the amount that the appellant sought for costs from \$34,846.85 to \$20,000. The motion judge said that she did so in the exercise of her "discretion". The motion judge does not appear to have appreciated that her discretion in awarding costs did not extend to changing the

contractual terms of the mortgage. The mortgage provided for full indemnity costs for steps taken to recover the amount due. While the motion judge might vary the amount sought if it included amounts that were not appropriate, or because excessive rates or time were charged, she did not have the authority to essentially change the contracted full indemnity costs provision to a partial indemnity one. That is not an authority included under the well-established parameters of a judge's discretion when it comes to awarding costs.

[9] The appeal is allowed. Paragraph one of the judgment below is varied to increase the amount to \$384,099.01. Paragraph five of the judgement is varied to increase the amount for costs to \$34,846.85.

[10] The parties may make written submissions on the costs of the appeal. We have the appellant's bill of costs. If the appellant wishes to make any additional submissions, it shall do so within five days of the date of these reasons. The respondents shall deliver their submissions within five days thereafter. The submissions shall be limited to no more than three pages. No reply submissions are to be filed.

"Grant Huscroft J.A."  
"B.W. Miller J.A."  
"I.V.B. Nordheimer J.A."