

COURT OF APPEAL FOR ONTARIO

CITATION: Zapfe Holdings Inc. v. 1923159 Ontario Inc., 2023 ONCA 190

DATE: 20230317

DOCKET: C70682

Fairburn A.C.J.O., Brown and Sossin JJ.A.

BETWEEN

Zapfe Holdings Inc. and Michael Sourlis

Applicants (Appellants)

and

1923159 Ontario Inc.

Respondent (Respondent)

Michael Myers, Michael Krygier-Baum and Parjot Benipal, for the appellants

Scott Harkness, acting in person for the respondent

Heard: March 15, 2023

On appeal from the order of Justice Vanessa V. Christie of the Superior Court of Justice, dated July 6, 2022, with reasons reported at 2022 ONSC 3062.

REASONS FOR DECISION

[1] At the hearing, we granted Mr. Harkness's motion to represent the corporate respondent and we dismissed the appeal, with reasons to follow. These are those reasons.

BACKGROUND FACTS

[2] The appellants, Zapfe Holdings Inc. and Michael Sourlis (the “Mortgagees”), loaned \$3 million to the respondent, 1923159 Ontario Inc. (the “Mortgagor”), secured by a charge on its commercial property in Bracebridge. The Mortgagor defaulted on the mortgage, whereupon the Mortgagees issued a notice of sale under the mortgage.

[3] On May 6, 2022, the Mortgagees attempted to take possession of the property, as permitted by the mortgage. However, the Mortgagor refused to vacate the premises, which were occupied by it and by some commercial tenants.

[4] Instead of commencing a proceeding to obtain a writ of possession and enforce the mortgage, the Mortgagees made a second self-help effort to take possession of the property in the early morning hours of May 18, 2022, when neither the Mortgagor nor the property's tenants were present.

[5] The application judge described what occurred, at paras. 12 to 15 and 20 of her reasons:

Early this morning, May 18, 2022, the Applicants, as first mortgagees, took possession of the Property by changing the locks and denying entry to the Respondent and all tenants (other than one tenant, Simply Cottage, which holds a lease that is registered against title to the Property in priority to the Mortgage). Other tenants and the principal of the owner / Respondent, Scott Harkness, were each denied entry into the building by the mortgagee.

Subsequently, someone called the Ontario Provincial Police who attended at the Property. After speaking to both counsel, the officer told the Applicants to return possession of the property to the Respondent because the officer was hearing different versions of the law and was not certain of the law of possession in mortgage actions. The Applicants refused to give up possession notwithstanding the direction by the OPP.

The Respondent advised that he intended to cut the new locks installed by the Applicants with a bolt cutter and re-enter and re-take possession of the Property.

Later this morning, the door was open to the public, it appearing that someone had cut the locks and entered the property. A tenant advised that Scott Harkness had re-entered the Property and was asserting his right to occupy the Property.

...

This court does note that when the mortgagee attended the property this morning, there appears to have been no one present. They changed the locks. However, a short time later, the principal of the numbered company Respondent, Scott Harkness, and other tenants were denied entry by the mortgagee. Subsequently, someone called the OPP, who attended at the Property. After speaking to both counsel, the officer told the Applicants to return possession of the property to the Respondent because the officer was hearing different versions of the law. The Applicants refused to give up possession. The Respondent cut the locks and re-entered. This reaction from Mr. Harkness should have been anticipated given the history of this matter to date.

[6] The Mortgagees thereupon applied, on short notice, for an order restraining the Mortgagor from access to and possession of the property, a declaration that the applicants were mortgagees in possession of the property as permitted under the mortgage, and an order restoring the state of affairs to that which prevailed on

the morning of May 18 when the Mortgagees had taken possession of the property. The application judge dismissed the application. The Mortgagees appeal.

ANALYSIS

[7] There is no dispute that the Mortgagees had contractual and statutory rights, upon default, to enter onto the property and have quiet possession of it.

[8] Amongst the cases referred to by the application judge in her reasons was the lower court decision in *Hume v. 11534599 Canada Corp.*, 2021 ONSC 4565. Drawing on earlier criminal law jurisprudence, that decision equated a mortgagee taking peaceable possession of a property as possession that was “not seriously challenged by others.” After the application judge released her reasons, this court issued its decision in *Hume v. 11534599 Canada Corp.*, 2022 ONCA 575, which contained an extensive review of the jurisprudence on the requirement that a mortgagee take peaceable possession of a property.

[9] The Mortgagees contend, in part, that since this court’s decision in *Hume* restated the law of possession by a mortgagee, the application judge’s analysis employed incorrect legal principles, with the result that her order must be set aside.

[10] We are not persuaded by that submission. Since the application judge did not have the benefit of this court’s decision in *Hume*, it is not surprising that her reasons made some reference to principles found in the pre-*Hume* jurisprudence that were clarified or disavowed by this court in *Hume*. However, in our view her

decision rested on the core legal principles affirmed by this court in *Hume*, which are:

- a mortgagee entitled to take possession of a property must do so peaceably;
- taking peaceable possession refers to the manner in which a mortgagee who has a legitimate entitlement to possession of a property actually takes possession of that property;
- whether a mortgagee has taken peaceable possession of a property is a fact-driven inquiry that depends on the circumstances;
- at a minimum, taking peaceable possession means taking possession of a property without violence or threat of violence;
- factors that will inform a court's assessment of a mortgagee's conduct include whether the property was vacant or unoccupied at the time of taking possession; whether there was any physical or verbal resistance to the taking of possession at the time the mortgagee took possession; whether the property was used as a dwelling-place; and whether the mortgagee's possession would dispossess any person of their home; and
- as well, whether changing the locks constitutes peaceable conduct will depend upon the circumstances.

[11] As we read her reasons, the application judge applied these core legal principles to the specific facts of this case.

[12] The Mortgagees also contend the application judge erred in concluding that they did not act peaceably in taking possession of the property on May 18, 2022. The standard of review of that finding on this appeal is strict: the appellants must demonstrate that the application judge made a palpable and overriding error in reaching that conclusion. We see no such error.

[13] There was no dispute that the mortgage was in default and that a term of the mortgage provided that upon default "the Chargee may enter into and take possession of the land hereby charged." The application judge inquired into the circumstances by which the Mortgagees took possession and concluded that they had not acted peaceably. Her key findings are set out at paras. 30 and 31 of her reasons:

[T]he Applicant knew that there would be serious resistance to them taking control of this property. This would have been obvious from the earlier attempt at taking possession. The Applicant changing the locks also indicated that they expected resistance. This property is not vacant. While the property may not be as lucrative as hoped, there are paying tenants at the property.

Contrary to the Applicant's submissions, there is no evidence that the property is depreciating in value, no evidence that the rental income will not be able to recuperate the losses, and no evidence about the dire financial circumstances of Mr. Harkness.

[14] Those findings were supported by the evidence. Given those circumstances, we see no palpable and overriding error in the application judge concluding that the Mortgagees did not take peaceable possession of the property. Accordingly,

we see no reversible error in her dismissal of the Mortgagee's application for an order restraining the respondent Mortgagor from access to and possession of the property.

[15] As this court stated in *Hume*, whether a mortgagee has taken peaceable possession of a property is a fact-driven inquiry that depends upon the circumstances. We have found that the application judge did not commit a palpable and overriding error in finding that the Mortgagees failed to act peaceably in the specific circumstances of this case. Accordingly, there is no need to address the other comments of the application judge in her reasons with which the Mortgagees take exception, save for one.

[16] The Mortgagees further submit that even if their taking of possession was not peaceable, once in possession they were entitled to remain on the property. The facts-on-the-ground were that following the intervention of the police, the Mortgagees placed locks on the property, left it, but shortly thereafter the Mortgagor resumed possession. In those circumstances, we see no basis to interfere with the application judge's discretionary decision not to grant the Mortgagees' request for an order that would restore its lost possession.

DISPOSITION

[17] The appeal is dismissed.

[18] The respondent is entitled to nominal costs of this appeal fixed in the amount of \$1,000.

“Fairburn A.C.J.O.”

“David Brown J.A.”

“L. Sossin J.A.”