# COURT OF APPEAL FOR ONTARIO

CITATION: Maxwell v. Altberg, 2023 ONCA 305
DATE: 20230428
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Hoy, Zarnett and Sossin JJ.A.

BETWEEN

Thomas Maxwell

Plaintiff (Respondent)

and

Pauline Altberg

Defendant (Appellant)

John Contini, for the appellant

J. David Keith, for the respondent

Heard: April 18, 2023

On appeal from the judgment of Justice R. Cary Boswell of the Superior Court of Justice, dated June 23, 2022, with reasons reported at 2022 ONSC 3680.

## REASONS FOR DECISION

[1] The appellant, Pauline Altberg, appeals from a summary judgment discharging a mortgage made by the respondent, Thomas Maxwell, in favour of Ms. Altberg, and dismissing her counterclaim for payment of amounts that remain unpaid under the mortgage.

[2] After hearing oral argument, we dismissed the appeal with reasons to follow. These are those reasons.

[3] The issue before the motion judge turned on whether enforcement of the mortgage was precluded by s. 23(1) of the *Real Property Limitations Act*, R.S.O. 1990, c. L.15. That section provides that no action to enforce a mortgage may be brought more than 10 years after the mortgage went into default, unless in the meantime there has been a payment made or a written acknowledgment of the indebtedness, in which case the limitation period is 10 years from the payment or acknowledgment.

[4] The mortgage in question was registered on December 22, 1995. It collaterally secured indebtedness under a promissory note. The note was due on December 28, 1998. According to Mr. Maxwell, he last made a payment in respect of the mortgage debt in 2005.

[5] Mr. Maxwell's position on the summary judgment motion was that enforcement of the mortgage was statute-barred, as legal proceedings concerning the mortgage were not started until 2018. Ms. Altberg's position was that the limitation period had not expired, because a payment of $4,000 toward the mortgage indebtedness was made by Mr. Maxwell on May 28, 2010, meaning that the limitation period ran from that date which was within ten years of the

commencement of proceedings. Mr. Maxwell denied that he made any such payment.

[6] Ms. Altberg and her spouse deposed that the 2010 payment had been made. The motion judge considered them to be generally credible witnesses. But he noted that Mr. Altberg's evidence about the payment was completely derivative of Ms. Altberg's, and that she had no independent recollection of the payment. Her evidence that there had been a payment was solely based on a notation in her bank book of a $4,000 receipt in May 2010. The notation was ambiguous about who made the payment and to what it pertained. The best Ms. Altberg could do was to say that she assumed it referred to a payment made by Mr. Maxwell that related to the mortgage.

[7] Mr. Maxwell and his spouse gave evidence that he had not made a payment in May 2010. The motion judge noted various problems with that evidence, and with Mr. Maxwell's credibility and reliability.

[8] The motion judge referred to the two-stage approach set out in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 He found that at the first stage − reviewing the evidence without resorting to the enhanced fact-finding powers in r. 20.04(2.1) of the *Rules of Civil Procedure* − he "lack[ed] the confidence necessary … to make a finding about whether a payment on the loan in issue was made in 2010". He further noted that he "face[ed] a record that is little more than

the classic he said/she said account of a single historical event. There is little to choose from between the two accounts".

[9] He then turned to the second stage of the *Hryniak* approach, which involved the use of enhanced fact-finding powers. He did not consider that hearing oral evidence would assist, as the court had the evidence from the witnesses who might have knowledge, and little would turn on the ability to observe their demeanours. Although he considered the Altbergs generally credible, they had no independent recollection of the payment and were simply interpreting a bank book entry. And although he had concerns about Mr. Maxwell's credibility and reliability, they were not "sufficient … to outright reject his evidence, particularly in the face of such tepid evidence that a loan payment was indeed made in May 2010".

[10] The motion judge concluded that he was unable to say, even with the benefit of enhanced fact-finding powers, whether the $4,000 payment was made. He noted that although in most instances the inability to make findings on central facts in dispute on a summary judgment motion would "support the conclusion that there is a genuine issue requiring a trial", that result did not follow in this case.

[11] He reasoned as follows. The quality of the evidence was not going to improve if the matter was referred to a mini-trial or a trial. Therefore, the matter could be decided on a motion for summary judgment. The question was what the result would be where the court, regardless of the fact-finding forum, could not be

satisfied that the 2010 payment was made against the loan. In his view, the onus was on Ms. Altberg to establish that enforcement of the mortgage was not statute-barred, which meant establishing that the May 2010 payment was made by Mr. Maxwell in respect of the mortgage debt. Because the evidence did not establish this, Ms. Altberg had not met her onus.

[12] Ms. Altberg argues on appeal that the motion judge's reasoning was flawed, for two principal reasons.

[13] First, Ms. Altberg submits that since the motion judge was unable to resolve, under either stage of the *Hryniak* approach, the key factual issue of whether the 2010 payment was made in respect of the mortgage debt, he should have directed a mini-trial or a trial.

[14] We reject this argument. Absent an error of law, the exercise of powers under the summary judgment rule are entitled to deference on appeal; this includes when a judge determines there is no genuine issue requiring a trial after comparing the evidence on the summary judgment motion to what would be expected at a mini-trial or a trial: *Hryniak*, at para. 81. The motion judge was entitled to find that the quality of the evidence at trial would not be different than what was before him, and that little would turn on an opportunity to observe demeanour. He was accordingly permitted to conclude that he could reach a fair and just determination on the merits on the summary judgment motion: *Hryniak*, at paras. 49-50.

[15] Second, she argues that the motion judge made a legal error that resulted in a reversal of the onus of proof. She submits that the motion judge erroneously relied on *Findlay v. Holmes*, (1998), 111 O.A.C. 319 (C.A.), at para. 25, for the proposition that where a limitation defence is pleaded the person seeking to enforce a right has the onus of showing that the action was brought within the limitation period. According to Ms. Altberg, that proposition applies at trial. She argues that on a motion for summary judgment, the moving party (here Mr. Maxwell) bore the onus of showing there is no genuine issue for trial regarding a limitation period defence: *Noddle v. The Ontario Ministry of Health*, 2019 ONSC 7337, at para. 58.

[16] In our view, the motion judge did not lose sight of the proposition that on a motion for summary judgment, the legal burden is on the moving party to establish that there is no genuine issue requiring a trial. In determining whether that burden was met, the motion judge was entitled to consider who would bear the onus at trial to prove any contested fact. Ms. Altberg does not dispute that, if the matter proceeded to trial, she would bear the burden of proving that Mr. Maxwell made the 2010 payment in respect of the mortgage debt. In light of this, it was open to the motion judge to consider that the evidence adduced by Ms. Altberg was insufficient to prove the 2010 payment and that no evidence adduced at a mini-trial or trial would assist her in discharging this onus. Accordingly, he was entitled

to conclude that the moving party had met his burden of proving there was no genuine issue requiring a trial about the limitation period defence.

[17] As this court stated in *Soper v. Southcott* (1998), 39 O.R. (3d) 737 (C.A.), at p. 742, if the person relying on the limitation period moves for summary judgment and satisfies the court that there is no issue of fact requiring a trial for its resolution, the limitation defence will have been made out, and summary judgment will be appropriate.

[18] For these reasons, the appeal was dismissed.

[19] Costs of the appeal are awarded to the respondent fixed in the sum of $10,000 inclusive of disbursements and applicable taxes.

“Alexandra Hoy J.A.”
“B. Zarnett J.A.”
“L. Sossin J.A.”