CITATION: Lakewoods Resort Developments, Inc. v. Frontenac Mortgage Investment Corporation, 2019 ONSC 743
COURT FILE NO.: CV-18-611006
DATE: 20190226

APPLICATION UNDER RULE 14.05 OF THE RULES OF CIVIL PROCEDURE, R.R.O. 1990, REG. 194, & SECTIONS 22 AND 31 OF THE MORTGAGES ACT, R.S.O. 1990, c M.40

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Lakewoods Resort Developments, Inc., Applicant

AND:

Frontenac Mortgage Investment Corporation, Respondent

BEFORE: Pollak J.

COUNSEL: *Shane Greaves*, for the Applicant

David Contant, for the Respondent

HEARD: January 28 with further submissions due February 4, 2019

ENDORSEMENT

[1] The Applicant, Lakewoods Resort Developments, Inc. ("Lakewoods") is the owner and developer of the properties which are mortgaged in favour of the Respondent, Frontenac Mortgage Investment Corporation ("Frontenac").

[2] Lakewoods has defaulted under the terms of the Mortgage.

[3] On August 24, 2018, Frontenac sent a Notice of Sale Under Mortgage (the "Notice of Sale") to the Applicant advising of a Power of Sale of its property.

[4] The following is a chronology of events:

- August 24, 2018 - Notice of Sale issued
- October 7, 2018 - Redemption period in Notice of Sale expires
- November 1, 2018 - Financing agent issues term sheet to Lakewoods

- November 7, 2018 - Lakewoods solicitor contacts Frontenac's solicitor and advises that term sheet was issued
- November 7, 2018 - Frontenac enters into Listing Agreement with real estate broker
- November 8, 2018 - Frontenac receives offer to purchase the property
- November 15, 2018 - Frontenac accepts offer and executes Agreement of Purchase and Sale

[5] At the hearing of the Application brought on an "urgent" basis, the Court requested the Applicant to provide a "draft order" setting out the relief claimed. The draft Order given to the Court is for:

(i) a Declaration that the Notice of Sale Under Mortgage is null and void and an Order setting aside the Notice of Sale Under Mortgage on the basis that it does not comply with the prescribed form pursuant to the *Mortgages Act,* R.S.O. 1990, c. M.40 ("*Act*");

(ii) a stay of the sale of the Property as set out in Schedule "A" and an interim injunction for at least 75 days restraining the Respondent from completing the sale of the Property to 2662115 Ontario Inc. (in trust for entities or a company to be formed/incorporated) pursuant to an Agreement of Purchase and Sale dated November 8, 2018, or otherwise.

[6] Frontenac does not agree that this Application is urgent and refers the Court to the chronology above, which it submits shows the lack of action taken by the Applicant and that any urgency is created through the inaction of the Applicant. For the reasons set out below, I agree that any urgency was created by the Applicant and that this Application should not have been heard as an "urgent" motion.

[7] In this Application, Lakewoods argues that that the Notice of Sale should be set aside because it does not comply with the legal requirements set out in the *Act*, on these grounds:

(a) the Notice of Sale received by Lakewoods was not signed;

(b) the Notice of Sale failed to adequately describe the Property; and

(c) the calculation of the principal and interest amounts under the Mortgage were wrong.

[8] The evidence of Lakewoods is that the amounts listed below on the left are the proper amounts that should have been included in the Notice of Sale. The amounts on the right below are the alleged incorrect amounts referred to in the Notice.

Principal	$10,855,991.00	$14,311,326.41
Interest	$7,933,757.00	$4,426,259.99 + $65,152.80
Total	$18,789,747.00	$18,868,489.92

[9] Lakewoods submits that Frontenac has overstated the principal amount owing by the significant amount of $3,455,335.41 and that even though the total amounts are similar, the jurisprudence supports the setting aside of the Notice of Sale.

[10] To resolve the conflict in the evidence with respect to these amounts (which I review below), Frontenac accepts Mr. Medwid's evidence (for Lakewoods) on the figures set out on the left in the above-noted chart, for the purposes of this Application only. The parties also agree that the balance owing on the Mortgage was $18,789,747.00 as of August 24, 2018. Frontenac therefore agrees that for the purposes of this Application, the principal amount of the mortgage was overstated in the Notice of Sale as alleged by Lakewoods in the amount of $3,455,335.

[11] Frontenac's position on this Application is that the Notice of Sale "issues" argued by Lakewoods are irregularities that do not mislead or affect the substance of the document, and that Lakewoods was not confused or prejudiced by any "errors" in the Notice of Sale.

- Lakewoods knew at all material times that Computershare was never a beneficial owner of the Mortgage.
- Lakewoods knew at all materials times that any Mortgage payments should be given to Frontenac's agent, Pillar. This was discussed as a term of the initial Mortgage and documented in correspondence between the parties.
- A signed copy of the Notice of Sale was provided in accordance with the *Act*.
- Lakewoods knew at all material times which property the Notice of Sale was describing. There is no statutory requirement that the property in question be described using the respective PINS or legal descriptions.
- All necessary parties were served with the Notice of Sale.

[12] Frontenac emphasizes that there was no prejudice to Lakewoods caused by any errors in the Notice of Sale and that the evidence is that Lakewoods cannot raise the funds necessary to redeem the Mortgage. At the hearing of this Application, there is no evidence that financing has

been arranged. Lakewoods has not tendered the amount owing under the Mortgage to Frontenac, to their counsel in trust or made a payment into court.

[13] Lakewoods further submits on this Application that even though allegations of improvident realization (or a failure to take reasonable precautions) are usually made after a sale is completed, the Court may grant an injunction to prevent a sale which does not take reasonable precautions before that sale closes. Lakewoods submits on this Application that an injunction should be granted prohibiting the sale of the property by Frontenac on the ground of an improvident realization.

[14] Frontenac emphasizes that although Lakewoods asks for an injunction on the basis that the proposed transaction would amount to an improvident realization, no proceeding has been commenced with respect to damages for an improvident sale. As well Lakewoods has withdrawn its request for a permanent injunction and therefore no permanent injunction is being sought in this Application. It is argued that the injunctive relief sought is not ancillary to any relief claimed within the proceeding. Lakewoods replies that the injunctive relief is "ancillary" to the relief requested to set aside the Notice of Sale. There is no reason for the Applicant to commence an action for improvident sale until this Application is decided to prevent the sale from closing on February 28, 2019. The cause of action for improvident realization crystallizes only when the sale transaction has been completed. I disagree with Lakewoods and find that the injunctive relief claimed in this Application cannot be characterized as ancillary. The allegations of an "improvident sale" are not related to or affected by the alleged invalidity of the Notice of Sale and the relief requested to set aside the Notice of Sale. I therefore dismiss the Applicant's request for an injunction on this Application. Further, the evidence with respect to this allegation is conflicting and deficient. A trial of an issue would be required to resolve this dispute. As the injunction request is not properly brought in the Application, it is not necessary to direct a trial of an issue.

Is the Notice of Sale Valid

[15] Section 31 of the *Act* requires a notice of sale to be given in a certain form.

[16] Although the Applicant relies on certain jurisprudence to support its position, the jurisprudence has evolved with respect to errors in a Notice of Sale. Most recently, the Ontario Court of Appeal in *1173928 Ontario Inc. v. 1463096 Ontario Inc.*, 2018 ONCA 669, held that:

> "The law has generally required strict compliance with the legal requirements for the exercise of a power of sale. This is because '[t]he exercise of the power of sale is considered a self-help measure, with serious consequences for all persons having an interest in the property'. The recipients of the notice of sale are in danger of losing their interest in the property through its sale by the mortgagee." (citations omitted) …

[17] Our Court of Appeal also held that the jurisprudence recognizes a "degree of tolerance for errors", such that notices of sale should not be held inoperative because of minor

irregularities but that "serious errors will invalidate a notice of sale". The following summarizes the most recent guidance provided by our Court of Appeal:

> "[65] While s. 31 of the *Mortgages Act* has been interpreted to require accuracy, the cases show a degree of tolerance for errors. **The required degree of accuracy has not been definitively resolved in the cases; in my view, it is evolving towards a standard of commercial reasonableness**: *Hornstein v. Gardena Properties Inc.* (2005),34 R.P.R. (4th) 301 (Ont. S.C.), appeal dismissed, (2006), 46 R.P.R. (4th) 56 (Ont. C.A.), at paras. 4-5." [emphasis added]

The jurisprudence relied on by the Applicant predates this recent decision.

[18] The following is a summary of the conflicting evidence in this Application regarding the alleged deficiencies in the Notice of Sale:

- Frontenac's evidence is in paragraph 49 of Mr. Smith's affidavit, who deposes that a signed Notice Sale was "properly delivered" to the Applicant and that the outstanding amount of principal and interest listed on the Notice of Sale were correct. Evidence with respect to the proof of service was given by way of Frontenac's answer to undertaking to Lakewoods. That evidence is that a signed Notice of Sale and cover letter were sent to the Applicant via registered mail. The registered mail was returned unclaimed and unopened. He deposes that the outstanding amounts with respect to interest and principal reflected on the Notice of Sale were generated electronically by computer and reflect the agreed upon interest rate. He deposes that the total amount alleged to be owed by Lakewoods (less legal and other fees) is almost the same as the amount which Frontenac claims in the Notice. However, as noted for the purposes of this Application, Frontenac is prepared to accept Lakewoods' figures.

- The evidence of Mr. Medwid for Lakewoods is that the Notice of Sale he received was unsigned and that the calculation of the principal and interest amounts owing to Frontenac was wrong. It also did not accurately describe the Property. He deposed that the calculation of the principal and interest amounts owing under the Mortgage as shown in the Notice of Sale were "clearly and patently incorrect". Attached to his affidavit is a copy of a statement from the accountant for Lakewoods indicating the amounts owing to Frontenac as of August 24, 2018. There is no further explanation or evidence of how or when the statement was generated.

[19] Frontenac challenges Lakewoods' evidence that the interest calculations are wrong by submitting that Mr. Medwid's evidence is not credible. Mr. Medwid deposes that the interest owing is $8,248,416, but during his cross-examination he testified that the interest outstanding should have been approximately $1,500,000. Further, no calculations have been provided for the schedule prepared by Mr. Medwid's accountant and Mr. Smith was not cross-examined on Frontenac's interest calculations.

[20] Lakewoods submits that on this Application, there are two disputed issues with respect to the alleged deficiencies in the Notice of Sale. The first issue is whether the Notice of Sale was signed. Mr. Medwid deposes that the Notice of Sale which he received was unsigned. This is in addition to Frontenac's evidence referred to above that the signed Notice of Sale was sent by registered mail and returned. The second issue is with respect to the characterization of amounts owing on the principal.

[21] Frontenac also submits that because of its concession on the characterization of the amounts owing, there are no material facts in dispute which require a trial to be resolved. The evidence with respect to whether there are significant errors, or any errors at all, in the Notice of Sale with respect to the amount of principal and interest amounts owing under the mortgage, is deficient and would not be acceptable on a trial of an issue. The Court would have to evaluate two uncorroborated versions of the evidence with respect to what the proper amounts of principal and interest that have been paid on this Application. There is no reasonable way for the Court to resolve the conflict in the evidence. Normally this would require a trial of an issue. In order to resolve this difficulty, the Court will assume that there are errors in the Notice of Sale as alleged by Lakewoods with respect to the amounts owing under the mortgage, in accordance with the agreement of counsel for Frontenac that I have referred to above. This assumption is made in order to accommodate the parties so that the Court can release its decision prior to the sale which is scheduled to close on February 28, 2019.

[22] With respect to the validity of the Notice of Sale, Frontenac relies on Mr. Medwid's admissions on cross-examination:

(a) He was aware that both Computershare and Frontenac were involved in the Mortgage;

(b) He knew that collectively Computershare and Frontenac could be reached through Frontenac at its Sharbot Lake address;

(c) He understood that the principal balance advanced was $14,500,000;

(d) He understood that the Notice of Sale referred to the Property (as defined in the Notice of Application).

[23] Further, Frontenac submits that:

(a) Lakewoods and Frontenac always contemplated that the Mortgage would be for the sum of $14,500,000.00. The error in the schedule attached to the Mortgage defining the principal amount was a clerical error. At all materials times, Lakewoods knew that the Mortgage was registered for the sum of $14,500,000.00.

(b) Lakewoods also understood prior to executing the Mortgage that Computershare was a custodian of Frontenac and had no beneficial interest in the Mortgage.

> Lakewoods only stated that it was confused by Computershare's role in the Mortgage when Lakewoods commenced injunctive proceedings.

[24] Frontenac relies on the principles of equity that a valid assignment does not require a particular form. The notice used must demonstrate an intention that the assignee has the benefit of the assignment.

[25] Frontenac relies on the case of *Paradigm Quest Inc. v. Mian*, 2010 ONSC 4015, wherein the court held that notice can be provided in a notice of sale. This form of notice is sufficient where the mortgagor is in default prior to the assignment and continues to be in default after the assignment.

[26] Frontenac's position is that it provided an equitable notice of assignment to Lakewoods in the Notice of Sale that Computershare's interests in the Mortgage would be assigned to Frontenac for the purpose of commencing a mortgage action.

[27] Lakewoods was in default prior to the assignment and continued to be in default after the assignment. Mr. Medwid admitted on cross-examination that he "was aware that there was an assignment from Computer Share to Frontenac." I agree with the submissions of Frontenac that Lakewoods did get proper notice of an equitable assignment to Frontenac, in the Notice of Sale.

[28] Frontenac's Notice of Sale describes the Property as follows:

> "lands encompassing 2000 acres more or less adjacent to Bark Lake in the Province of Ontario which mortgage was registered on the 19th day of March, 2015 … as Instrument No. RE 191211".

[29] It is submitted by Lakewoods that the Notice of Sale is invalid as it fails to adequately describe the Property which is subject to the Mortgage. Lakewoods argues that that description of the property in Frontenac's Notice of Sale does not provide a means of identification of the property. The wording "lands encompassing 2000 acres more or less adjacent to Bark Lake" is exceptionally vague, is not indicative of the actual size of the Property, and provides no further identifiers. It also provides no legal description, no reference to Subdivision Plans, and no municipal addresses. Frontenac objects to this position relying on the evidence that Lakewoods knew exactly which property was subject to the sale. I agree that Lakewoods knew exactly what property was subject to the sale.

[30] Frontenac also submits that because Lakewoods waited a significant period of time to challenge the Notice of Sale and waited until after an agreement for purchase and sale was entered into, the Court can infer that Lakewoods' only purpose on this Application is to postpone the sale. In particular, Frontenac relies on the case of *Hornstein v. Gardena Properties Inc.,* 141 ACWS (3d) 485, wherein the court held at para 57, that:

> "[57] The mortgage has been in default for 33 months. The Notice of Sale was issued 25 months ago. The mortgagor has been unable to refinance the Property or redeem the mortgage since the time of default. At no time did the mortgagor

> take issue with the form of the Notice of Sale. At no time did the mortgagor take issue with the manner in which the property was being exposed for sale, indeed, the mortgagor suggested one of the listing agents for the property. **In fact, the mortgagor only took steps to challenge the Notice of Sale after the agreement of purchase and sale with 206 was accepted. The issues that they complain about have been present since the time the Notice of Sale was issued**, and financial particulars of the Receiver's activities were provided to the mortgagor in April of this year. **It seems to me that the mortgagees are raising the issues relating to the Notice of Sale for the sole purpose of trying to block the sale to 206. It is not because they could not ascertain the indebtedness**. It is not because they do not understand the Receiver's accounts. It is being raised as a last ditch effort to stop a sale after they have lost their rights to redeem the mortgage or sell the Property. Unfortunately for the mortgagors – they are too late.
>
> [58] **Once a mortgage is in default, the mortgagee has certain rights and the mortgagee in this case has decided fit to exercise such remedies. One of such remedies is that a Notice of Sale and after exposing the property for sale, the mortgagee has accepted an offer. The mortgagee is entitled to go forward and complete the sale. It may or may not be the end of the story. The mortgagor, or indeed any subsequent encumberancer, may have a right to an accounting of an ability to challenge the sale as being improvident. They do not have the ability, in my view, to enjoin the sale that is scheduled to close on July 29, 2005. This application is hereby dismissed."** [emphasis added]

[31] As well, in the case of *Samra v. 7544405 Canada Inc.*, 2016 ONSC 1817, the defendants claimed that the Notice of Sale should be set aside for miscalculated amounts and deficiencies in the legal and property descriptions. The court held that the errors did not affect the substance of the form of the Notice of Sale and any calculations errors could be resolved by an accounting.

[32] Firstly, on the basis of the evidence before this Court, I find that there is no confusion created by the Notice of Sale with respect to the alleged vague description of the property. The evidence is that all parties know exactly which property is subject to the mortgage. I also accept Mr. Medwid's evidence that there is no confusion created by reason of the assignment of the rights pursuant to the mortgage to Frontenac. Further, I find that the only evidence before the Court with respect to whether or not the Notice was signed, is in the answers to undertaking given by Frontenac to Lakewoods, that the Notice was sent by registered mail and returned. Mr. Medwid did receive an unsigned courtesy copy of the Notice of Sale. The evidence is that Lakewoods was aware of the fact that the Notice of Sale had been issued and what the content of the Notice of Sale was.

[33] In my analysis on whether the Notice of Sale should be set aside, I apply the most recent guidance given by our Court of Appeal with respect to the factors I should consider. When I apply a "standard of commercial reasonableness" to the circumstances surrounding this dispute, I find that the reasoning of the court in the *Hornstein* case is applicable to this case. This is evident

on a review of the chronology of events that I have set out above. In this case there was no objection made to the Notice of Sale until the agreement of purchase and sale was entered into by Frontenac. Further it is also apparent that Lakewoods has not been able to redeem this mortgage. The relief requested on this Application is very clear, Lakewoods requests "a stay of the sale of the property and an interim injunction for at least 75 days restraining the respondent from completing the sale of the property". I find that the purpose of the request for relief on this Application is to permit Lakewoods to arrange for financing in order to be able to redeem the mortgage. The time limit for the redemption of the mortgage expired on October 7, 2018. This application was brought on January 28, 2019.

[34] A consideration of all of these factors, as well as a finding that the errors in the Notice did not cause any prejudice or harm or confusion to the Applicant Lakewoods, leads to my conclusion that the errors were not so "serious" that on a standard of commercial reasonableness, the Notice should be set aside.

[35] In this Application Lakewoods also originally moved for a stay pursuant to s. 22 of the *Act*. This relief was not pursued in the hearing of the Application and is not requested in the draft Order I have referred to above. I therefore make no ruling on this issue.

[36] For all of these reasons the Application is dismissed

Costs

[37] If the parties are unable to agree on costs, they may make brief written submissions to me no longer than three pages in length. The Respondent's submissions are to be delivered by 12:00 p.m. on March 8, 2019, and the Applicant's submissions are to be delivered by 12:00 p.m. on March 15, 2019. Any reply submissions are to be delivered by 12:00 p.m. on March 20, 2019.

[38] Submissions are to be delivered to Room 170, 361 University Avenue or via email to my assistant. After March 20, 2019, if no submissions are submitted for costs, the matter will be considered at an end and the file returned to the motions office.

Pollak J.

Date: February 26, 2019