

CITATION:

ONTARIO SUPERIOR COURT OF JUSTICE (TORONTO REGION)
CIVIL ENDORSEMENT FORM
(Rule 59.02(2)(c)(i))

BEFORE Judge/Case Management Master Court File Number:
Myers J CV-21-00658698-0000

Title of Proceeding:
Lamanna Plaintiff(s)
-v-
Kamra et al Defendants(s)

Case Management: Yes If so, by whom: X No

Participants and Non-Participants:(Rule 59.02(2)((vii))

Party	Counsel	E-mail Address	Phone #	Participant (Y/N)
1 Applicant)	J. Daniel McConville	dmccconville@swlawyers.ca		Y
2 Respondents)	Jordan D. Sobel	Sobel@usalaw.ca		Y
3)				

Date Heard: (Rule 59.02(2)(c)(iii)) May 14, 2021

Nature of Hearing (mark with an "X"): (Rule 59.02(2)(c)(iv))

Motion Appeal Case Conference Pre-Trial Conference X Application

Format of Hearing (mark with an "X"): (Rule 59.02(2)(c)(iv))

In Writing Telephone X Videoconference In Person

If in person, indicate courthouse address:

Relief Requested: *(Rule. 59.02(2)(c)(v))*

Determination of the amount due under a mortgage and an ancillary injunction.

Disposition (operative terms ordered): *(Rule 59.02(2)(c)(vi))*

Order to go:

- 1. Directing that upon the applicant's real estate counsel's undertaking or agreeing to pay the respondent 2724582 ONTARIO INC. the sum of \$605,292.39 from the proceeds of sale of 30 Westbury Way, Whitby, ON, L1M 0L9, and to pay into her litigation counsel's trust account an additional sum of \$98,952.64 from those proceeds, 2724582 ONTARIO INC. shall provide a discharge of its mortgage dated January 16, 2020;**
- 2. The applicant's real estate counsel shall pay from the proceeds of sale the sum of \$605,292.39 to 2724582 ONTARIO INC. and the sum of \$98,952.64 to Stevenson Whelton LLP in trust, both within 48 hours of the closing of the sale;**
- 3. Stevenson Whelton LLP shall hold the funds deposited with it under paras. 1 and 2 in trust for the successful party in this and the related application between the same parties under Court File No. CV-21-00656411-0000. The funds in trust shall be released only under a court order or agreement between all of the parties;**
- 4. This application and CV-21-00656411-0000 are consolidated and converted to an action under the remaining Court File No. CV-21-00656411-0000. The parties are to agree on whether any pleadings and discoveries are required so as to make the most efficient use of the existing application materials and cross-examination transcripts. If the parties cannot agree, they are to convene a case conference to enlist the assistance of a judge to do so;**
- 5. The respondents, their officers, directors, shareholders, agents, and employees, anyone acting on behalf of any of the foregoing, and anyone with notice of this order, including any brokerage with whom the respondent Kamra is or was associated, are prohibited from taking any steps to enforce the mortgage held by 2724582 ONTARIO**

INC. dated January 16, 2020 and from interfering in any manner, directly or indirectly, with the sale of the mortgaged premises scheduled for June 21, 2021. This order is without prejudice to any claims that anyone may have against the applicant for damages;

- 6. The applicant may deliver cost submissions no later than May 25, 2021. The respondents may deliver cost submissions no later than June 1, 2021. In addition, the parties may deliver copies of any offers to settle on which they rely. Submissions shall be no longer than three pages. Both parties shall deliver Costs Outlines if they deliver submissions.**
- 7. All costs material is to be filed through the Civil Submissions Online portal and uploaded to Caselines although counsel will not have received confirmation of the acceptance of their filings from the registrar.**
- 8. No case law or statutory material is to be submitted. References to case law and statutory material, if any, shall be embedded in the parties' submissions as hyperlinks to CanLII.**

Costs: Asset out above		indemnity basis, fixed	are
		at \$	payable
by	to	[when]	

Brief Reasons, if any: (Rule 59.02(2)(b))

1. I will limit my findings as the bulk of the issues will go to trial in the action into which I have converted and consolidated this and the application under Court File No. CV-21-00656411-0000. However, to make findings on the amount of the mortgage outstanding, I need to address some of the merits.
2. The applicant borrowed \$670,000. The funds were used to pay the prior mortgage, legal fees, broker fees, and a fee of \$81,000 to the mortgagee 2724582 ONTARIO INC.
3. I make no findings under the *Criminal Code* including whether the \$81,000 is included in the base for the purpose of calculating the effective rate of interest under the *Criminal Code*.
4. The applicant agrees that as at June 22, 2021, the day after the proposed closing of her sale of the house, she will owe \$605,292.39 on the mortgage (I include the \$300 as having been advanced). This amount is to be paid to 2724582 ONTARIO INC. from the proceeds of the sale of the property.

5. The mortgagee claims entitlement to be reimbursed for the portion of the advance used to pay itself its fee of \$81,000. In its notice of sale dated April 23, 2021, the mortgagee also claims a late fee of \$350, an administration fee of \$2,500, legal costs for the notice of sale of \$1,921 including HST, and costs of enforcement to April 23, 2021, including HST, of \$13,181.64. The validity of these fees and costs turn on the outcome of whether the notice of sale was validly given and whether either or both respondents are liable to the applicant as alleged. Accordingly, I order these amounts, aggregating to \$98,952.64 to be held back from the proceeds of sale by the applicant's counsel in trust for the successful party in the remaining litigation.
6. Upon these arrangements being made, the mortgagee 2724582 ONTARIO INC. shall provide a discharge to facilitate the closing of the applicant's sale.
7. To explain, the parties both agree that the applicant was in extreme financial circumstances in November, 2020. She was not incapacitated. Neither was she under duress. She could have let her property be sold by the mortgagee or sell it herself. She wanted to stay there; but she had been unable to refinance the pre-existing mortgage.
8. The respondent Kamra agreed to be Ms. Lamanna's real estate agent thereby undertaking fiduciary duties to help her selflessly. He agreed to buy the house for \$700,000 and to lease it back to her. The applicant decided that to stay in the house she was willing to enter into this transaction rather than selling the house on the open market to try to maximize her equity.
9. I do not really understand the next steps. The respondent Kamra suggested that pending his purchase, he would loan the applicant money to pay out the prior mortgagee who was threatening to evict her. I am not sure why they did not just close the sale right away to pay out the mortgagee. There is evidence that Mr. Kamra pushed the applicant and heightened her sense of urgency.
10. The argument that because the mother signed the documents therefore Mr. Kamra was not involved strains credulity and reason at this stage to say the least. I give little to no shrift to the evidence of Mr. Kamra, and especially of his mother, to the effect that the mortgage was made independently of him. The mother's cross-examination makes it clear that she is not in the mortgage lending business independently. The explanation of the role of her son Amer was equally incredible. If necessary, bank statements and financial documents will show how the mortgage money was sourced by the Kamras.

11. At the same time as buying the house from the applicant and bridging her with a fresh advance to keep the old mortgagee at bay, all ostensibly to help the applicant stay in her house, Mr. Kamra had the applicant sign a new listing agreement with him. I cannot understand why and counsel was not able to help me understand despite my efforts to elicit a satisfactory response from him.
12. Then, within days of signing the documents, Mr. Kamra started discussing flipping the house and threatening that he would evict the applicant as an uncompromising landlord. He might have failed to mention his views about being a landlord when he was ostensibly helping Ms. Lamanna to keep possession of her house. He then plainly refused to lease the property to her on the basis that no lease had been signed within 10 days as required by the agreement of purchase and sale. He did not deliver a notice of default. He did not re-assert that time was of the essence or otherwise insist on performance. He did to send her his draft lease. He did not set a new or reasonable deadline for performance. He just announced that he was free from the agreement to lease the house back to Ms. Lamanna.
13. One can argue that Mr. Kamra took Ms. Lamanna's equity with the fee in the mortgage and then, by refusing to lease the property back to her, he eliminated her consideration and purpose for the entire transaction including the mortgage and the alleged fee. If one were to characterize Mr. Kamra's conduct in this way, the question of how he could have been acting in Ms. Lamanna's best interest is squarely presented. I find that there is a serious issue to be tried as to whether Mr. Kamra, aided by the numbered company respondent, breached fiduciary duties owing to the applicant.
14. The applicant elected to treat Mr. Kamra's refusal to lease the property back to her as a repudiation of the agreement of purchase and sale. She refused to close that transaction although Mr. Kamra purported to tender the purchase price on the closing date.
15. It subsequently appears that the agreement of purchase and sale may have terminated on its own terms in any event because the respondent Kamra failed to waive conditions within the time prescribed by the agreement. The agreement provides that it terminates unless the conditions were duly waived in writing on a timely basis. Counsel for the respondent declined to discuss the merits of this issue when I raised it. He rightly submitted that the merits of the question are an issue for the trial.
16. However, counsel for Mr. Kamra also submits that I should require the applicant to hold in trust the full proceeds of sale of the house on the basis that Mr. Kamra should be entitled to 100% of the equity under his agreement of purchase and sale. I need to assess,

among other things, the strength of that claim in order to decide if it is fair to require the applicant to post security for the possibility of judgment on that basis. This is not a claim under the mortgage. Mr. Kamra seeks, in effect, execution before judgment on his contract claim under the agreement of purchase and sale.

17. In light of the evidence that the agreement is *prima facie* void due to Mr. Kamra's failure to waive the conditions on a timely basis and that his alleged repudiation was accepted, I do not see a serious issue that ought to be protected by holding funding in advance as security for that claim. To be clear, I am not deciding Mr. Kamra's claim. He can try to advance a claim for damages under the agreement of purchase and sale. At this stage, on the evidence and arguments before me, the claim is too weak to justify holding funds in trust for it. Similarly, as he has not brought a claim for specific performance as yet, and expressly discussed with the applicant flipping the property for profit, I would not recognize a putative claim to specific performance for interim protection at this stage either.
18. As to the \$81,000 fee, I do not yet have clarity into whether it was expressly brought to Ms. Lamanna's attention as compared to being buried in a pile of documents she was asked to sign. She did have experience paying mortgage fees and I have no doubt that she saw the mortgage total of \$670,000 which is only explicable by including the \$81,000 fee.
19. Despite this, I find that there is a *prima facie* case (a serious issue to be tried) of unconscionability and invalidity of the fee under *Tilden Rent-A-Car Co. v. Clendenning*, 1978 CanLII 1446 (ON CA), *Forest Hill Homes v Ou*, 2019 ONSC 4332 (CanLII) at para. 20, *Uber Technologies Inc. v. Heller*, 2020 SCC 16 (CanLII), and the *Unconscionable Transactions Relief Act*, RSO 1990, c. U.2. I noted previously that I see no duress or incapacity. I see decisions made by someone who knew what she was doing generally but whom all parties acknowledge was in extreme conditions. She was vulnerable to being preyed upon especially by someone whom she was entitled to trust as being selflessly forsaking his self-interest and acting solely on her behalf and in her best interest.
20. There was a serious imbalance of bargaining power and *prima facie* the fee appears capable of being found to be harsh and improvident. It was given to support a loan that was not clearly needed in light of the agreement of purchase and sale. Moreover, the loan was just to bridge the applicant to closing. While Ms. Lamanna's personal covenant was not a good credit risk, repayment of this loan did not turn on her creditworthiness. Mr. Kamra, a member of the family, had already entered into a binding agreement to buy the property. He was bound to provide the funds for the payout of the bridge loan in the near term. Yet the fee for this short term bridge pending payment by Mr. Kamra represented Ms. Lamanna's

entire equity in the house at the time. It might have also amounted an illegal interest rate. The evidence on that point is too thin to support more than a finding that this issue is not frivolous. Perhaps the fee can be objectively justified. But that will take (a) independent evidence and (b) evidence that the applicant agreed to the fee expressly and knowingly.

21. The question is not simply whether the deal was a good one or a bad one. The law protects freedom of contract even when a deal may be a later turn out to have been a poor exercise of business judgment. The question raised here is whether the applicant was preyed upon by someone who was duty-bound to protect her and who led her to believe that he was doing so (until the day she signed on the dotted line). The law also protects people who suffer an imbalance of bargaining power from harsh and unconscionable outcomes.
22. As mentioned above, if Mr. Kamra intended to lease the property back to the applicant, I do not understand why he had her sign a new listing agreement. However, if he intended to take her equity, evict her, and flip the property, then it makes sense that he was preparing to do so and had her sign a document before she realized that it could be used to protect his exclusive entitlement to act for Ms. Lamanna while he negotiated a proposed flip before closing his purchase. That may sound far-fetched but it may well be what actually happened. After Ms. Lamanna purported to accept Mr. Kamra's repudiation of the agreement of purchase and sale, she re-listed the property with another agency. Mr. Kamra's broker asserted the listing agreement to threaten her new real estate brokerage and force them to cancel their listing.
23. Ms. Lamanna submits that the respondents wrongly forced her to keep the property off the market through March and April, 2021 by asserting the listing agreement. She argues that she should not be liable for interest on the mortgage during that period. This too is an issue for trial.
24. The mortgagee should want the property sold. But the respondents have more than once threatened to leave the applicant homeless. Those threats at the best of times are unworthy of professionals. But made to an over-extended single mother who cannot get a job during the pandemic, the threats are objectively frightening and were probably intended to be so. They suggest a strategic approach to bully and intimidate the applicant, an ulterior purpose to scoop her equity over and above the mortgage debt, and support a finding of a real risk that absent injunctive relief, the applicant will suffer irreparable harm being rendered homeless with her children before she can get the case to trial.
25. The balance of convenience favours separating the parties, monetizing the mortgage security, and proceeding with litigation over money without the imbalance of bargaining power and threats.

26. I agree with Mr. Sobel that although s. 12 (3) of the *Mortgages Act*, RSO 1990, c M.40 speaks about cases where parties to a mortgage cannot be found, it is also used to fix amounts in dispute so as to provide for the discharge of a mortgage.

27. Subsection 12 (6) allows the court to order additional amounts to be posted, in effect, as security for costs. I decline to exercise the discretion to do so in the circumstance and evidence before me. I have no issues routinely enforcing costs provisions in mortgages that entitle the mortgagee to costs on a full or at least a substantial indemnity basis. However, given the real issues of predation by Mr. Kamra and his family, in my view the justice of the case would not allow for security of costs. *Yaiguaje v. Chevron Corporation*, 2017 ONCA 827 (CanLII), at para. 23. I am not precluding a future motion for security for costs. At this stage, I am just following the dictate of the Court of Appeal that:

Courts must be vigilant to ensure an order that is designed to be protective in nature is not used as a litigation tactic to prevent a case from being heard on its merits, even in circumstances where the other provisions of rr. 56 or 61 have been met.

28. I order the injunction in this application as ancillary to the determination under s. 12 of the *Mortgages Act* that is properly before the court for determination. Although expressed as a “declaration” in the notice of application, no actual declaration of right is sought by the applicant. Rather, she seeks a statutory remedy as authorized by Pollak J. The injunction is ancillary as it is needed in my view to effectuate the purpose of the statutory determination – the closing of the sale and the discharge of the mortgage.

29. In the event that the sale does not close on June 21, 2021, the parties may seek a case conference to discuss next steps. If the sale does close, then the parties will agree to a litigation schedule and proceed accordingly.

**Additional pages
attached:**

Yes No

May 17,

20 21

Release Date of Endorsement
(Rule 59.02(2)(c)(ii))

Signature of Judge/Case Management Master
(Rule 59.02(2)(c)(i))