Ontario Superior Court Reaffirms Legal Test For Certificates Of Pending Litigation

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Pacione v. Pacione, 2019 ONSC 813 and Bains v. Khatri 2019 ONSC 1401

A certificate of pending litigation (CPL) is registered on title to a property to provide a notice and warning to the public that the property is subject to a court dispute. Registering a CPL has the practical effect of restraining all dealings with the property (financing, mortgaging, sale, *etc.*) while the litigation is pending. Once the court dispute is resolved, a CPL can be discharged from title to the property.

Two recent decisions from the Ontario Superior Court have reaffirmed and set out the factors a court will consider when determining if a court order for a CPL will be granted: (1) Pacione v. Pacione, 2019 ONSC 813(the Pacione Decision) and (2) *Bains v.* Khatri 2019 ONSC 1401(the Bains Decision).

In determining whether to grant a CPL, a court will first determine whether the threshold test has been met: is there a triable issue in respect of the moving party's claim to an interest in the property? If the threshold test has been met, a court will then consider a number of factors to determine if the granting of a CPL is an equitable form of relief. Some of the factors the court will consider include:

1. whether the plaintiff is a shell corporation;
2. whether the land is unique;
3. the intent of the parties in acquiring the land;
4. whether there is an alternative claim for damages;
5. the ease or difficulty in calculating damages;
6. whether damages would be a satisfactory remedy;
7. the presence or absence of a willing purchaser;
8. the harm to each party if the CPL is or is not removed with or without security;
9. whether the interests of the party seeking the CPL can be adequately protected by another form of security; and
10. whether the moving party has prosecuted the proceeding with reasonable diligence.

The *Pacione* Decision

Background

Robert Pacione (Robert) loaned $250,000 to his brother, Mario Pacione (Mario), pursuant to a promissory note signed by Robert and Mario dated June 7, 2016 (the Promissory Note). The Promissory Note stated that $250,000 must be paid by Mario to Robert within 90 days, without interest or penalty, unless the parties agreed to a structured repayment plan within those 90 days. The Promissory Note also expressly stated that should Mario fail to make payments, he would authorize and consent to a third mortgage being placed against the property identified as 1890 Lawrence Avenue East in Scarborough, Ontario (the Lawrence Property). Further, the Promissory Note stated that the Lawrence Property was owned by an Ontario corporation, 1884750 Ontario Inc. (188), and that Mario was the sole principal of that corporation.

Mario did not pay back the money loaned to him by Robert. In addition, no mortgage was placed against the Lawrence Property because, as it turned out, Mario was not a director or officer of 188 at the time that the Promissory Note was executed.

Robert brought an action against Mario, 188 and Luciano Pacione for $250,000, plus interest and other relief. On notice to the defendants, Robert moved for a CPL to be issued against the Lawrence Property. The motion was opposed by the defendants.

The Superior Court Decision

The Superior Court agreed with Robert and ordered that a CPL be registered against the Lawrence Property.

In rendering the court's decision, Justice Conlan reaffirmed the threshold test for the granting of a CPL as set out by Justice Peterson in 2254069 Ontario Inc. v. Kim, 2017 ONSC 5003(the Kim Decision*)*. In determining whether to grant a CPL, a court must ask the following question: is there a triable issue in respect of the moving party's claim to an interest in the property? Once this threshold test is met, the Kim Decision states that a court must then assess whether the granting of a CPL is an equitable form of relief by considering a number of factors such as: (i) whether the land in question is unique, (ii) whether there is an alternative claim for damages, (iii) the ease or difficulty in calculating damages, (iv) whether damages would be a satisfactory remedy, (v) the presence or absence of a willing purchaser, (vi) the balance of convenience, or potential harm to each party, if the CPL is or is not granted, (vii) whether the CPL appears to be for an improper purpose, (viii) whether the interests of the party seeking the CPL can be adequately protected by another form of security and (ix) whether the moving party has prosecuted the proceeding with reasonable diligence.

The defendants raised four arguments in support of their position that a CPL should not be granted against the Lawrence Property: (i) a CPL is not necessary because Robert has claimed for monetary damages, (ii) Robert does not have a reasonable interest in the Lawrence Property, (iii) because Robert knew in September 2016 (90 days after the Promissory Note was executed) that he was not getting paid and was not getting a mortgage against the Lawrence Property, and because his claim was not issued until October 2018 (more than two years after September 2016), his request for a CPL (or any interest in the Lawrence Property) is out of time, and (iv) the defendants will suffer undue prejudice if the CPL is granted because other secured creditors (mortgage

holders) of 188 are taking enforcement steps against the Lawrence Property, and the defendants cannot refinance the Lawrence Property if the CPL is on title.

Ultimately, Justice Conlan determined that the terms of the Promissory Note established that Robert had a reasonable claim to an interest in the Lawrence Property. Further, Justice Conlan noted that none of the arguments put forward by the defendants were persuasive.

The fact that Robert requested both monetary damages and a CPL in his statement of claim was in no way a bar to the success of the motion. If it was, no mortgage holder who sues the debtor could ever get a CPL.

While counsel for the defendants was correct that an equitable mortgage, by itself, will not always give rise to a successful bid for a CPL, the court said that in this case, no reasonable observer looking at the Promissory Note and knowing that Mario failed to pay the money back within its terms would conclude that Robert had no interest in the Lawrence Property against which the mortgage was to be registered.

In addition, the court said that while Mario may have had no lawful authority to bind 188 and the Lawrence Property in June 2016, this did not defeat Robert's interest in the Lawrence Property as there was no evidence that Robert in any way knew or suspected that Mario lacked any such authority. Mario and/or Luciano cannot benefit from his/their own alleged misrepresentation.

Assuming that the claim for a CPL had to be made within two years of the discovery date, the court said that there would be a triable issue as to whether the clock started to run in September 2016, as alleged by the defendants. However, the court said that it is reasonable to allow Robert some time to recognize the default, make a demand on the loan, and, failing payment, make a demand that the third mortgage be registered.

Finally, the court said that any alleged prejudice to the defendants in not being able to refinance the Lawrence Property in order to satisfy the hawks swirling around who want their mortgages paid must surrender to the very significant prejudice that will be suffered by Robert if the CPL is not registered against the Lawrence Property.

The *Bains* Decision

Background

The plaintiffs brought an action concerning ownership of property located on Braidwood Lake Road (the Braidwood Property). There are competing versions with how the parties came to be involved with the Braidwood Property.

1. The Plaintiffs' Version

   The plaintiffs claim that they jointly purchased the Braidwood Property as an investment along with the defendant and a further investor (collectively, the Investors). The Investors are said to have tendered an offer to purchase the Braidwood Property for $495,000, which the seller accepted. The offer was made solely in the defendant's name, purportedly to allow the Investors to benefit collectively from his status as a first-time homebuyer. On December 23, 2013, the

purchase transaction for the Braidwood Property closed with the defendant allegedly holding title to the Braidwood Property in trust for the Investors. The Investors documented the joint investment by executing a trust agreement dated January 4, 2014 (the Trust Agreement). Under the terms of the Trust Agreement, the defendant took a 20 per cent personal share of the Braidwood Property while holding title in trust as the solely named registered owner and trustee for the beneficial owners, namely the other Investors. The balance of the purchase price is said to have been financed by a mortgage held solely in the defendant's name.

2. The Defendant's Version

   The defendant claims to have been the sole purchaser of the Braidwood Property, which he bought to be his personal residence. The defendant denies that he intended to buy the Braidwood Property as an investment property and denies entering into the investment arrangement described by the plaintiffs. According to the defendant, the plaintiffs colluded to defraud him by fraudulently misrepresenting the alleged Trust Agreement and its registration on the Braidwood Property. The defendant claims that he signed the Trust Agreement after he was falsely advised that it was a tax benefit document and alleges that the plaintiffs acted without his knowledge or consent in registering the Trust Agreement as a caution on the Braidwood Property.

The Superior Court Decision

The plaintiffs brought a motion for partial summary judgement for declarations that (i) the Trust Agreement was valid and binding and (ii) that they each own a 20 per cent interest in title to the Braidwood Property under the terms of the Trust Agreement. In the alternative, the plaintiffs sought leave to register a CPL on title to the Braidwood Property.

In rendering the court's decision, Justice Doi dismissed the motion for partial summary judgement on the basis that there was a genuine issue requiring a trial. Given that the credibility of the parties could not be determined on the affidavits, documents and transcripts filed on the motion, the court determined that a trial was necessary.

The court also dismissed the plaintiffs' motion for leave to issue a CPL. In considering whether to grant leave to issue a CPL, Justice Doi relied on the factors set out in Perruzza v. Spatone, 2010 ONSC 841 (the Perruzza Decision). In the Perruzza Decision, the court set out the following principles to be considered on a motion for leave to issue a CPL:

1. The test on a motion for leave to issue a CPL made on notice to the defendants is the same as the test on a motion to discharge a CPL;
2. The threshold in respect of the "interest in land" issue in a motion respecting a CPL is whether there is a triable issue as to such interest, not whether the plaintiff will likely succeed;
3. The onus is on the party opposing the CPL to demonstrate that there is no triable issue in respect to whether the party seeking a CPL has "a reasonable claim to the interest in the land claimed";
4. Factors the court can consider on a motion to discharge a CPL include (i) whether the plaintiff is a shell corporation, (ii) whether the land is unique, (iii) the

intent of the parties in acquiring the land, (iv) whether there is an alternative claim for damages, (v) the ease or difficulty in calculating damages, (vi) whether damages would be a satisfactory remedy, (vii) the presence or absence of a willing purchaser, and (viii) the harm to each party if the CPL is or is not removed with or without security; and

5. The governing test is that the court must exercise its discretion in equity and look at all relevant matters between the parties in determining whether a CPL should be granted or vacated.

The court found that the plaintiffs met the initial threshold of demonstrating a triable issue with respect to their claim to an interest in the Braidwood Property. While the circumstances surrounding the claimed investment and the Trust Agreement were unclear and in dispute, the court was satisfied that the record contained sufficient evidence to meet the relatively low threshold of demonstrating a triable issue with respect to the subject property.

However, after a review of the other applicable factors, the court decided against granting leave to issue a CPL. Justice Doi explained that there is no evidence that the Braidwood Property is unique to the plaintiffs. The evidence is clear that the plaintiffs acquired the Braidwood Property to earn a profit. In the circumstances, damages can be easily quantified based on the cost of purchasing the Braidwood Property against costs incurred. The plaintiffs also included a claim for damages in their statement of claim, such that an award of damages would appear to be readily calculated and offer an adequate remedy. The court also found that the balance of convenience favors the defendant. While the registration of a CPL may inconvenience the defendant and complicate any future sale of the Braidwood Property that may be contemplated, the CPL may be discharged when future sale proceeds are paid into court. To the extent that the moving plaintiffs sought a CPL as a form of security for their claim, Justice Doi noted that the defendant is not a shell corporation but an individual who testified during his cross-examination that he is employed. Justice Doi explained that should the moving plaintiffs have concerns about the dissipation of assets, it is open for them to seek relief by way of a *Mareva* order. A CPL is intended to protect an interest in land in situations where other remedies would be ineffective.

For the foregoing reasons, the court dismissed the motion for leave to issue a CPL.

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