

Equitable mortgage principles affirmed by Ontario Court of Appeal (*Greenspan v. Van Clieaf*)

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In *Greenspan v. Van Clieaf*, 2023 ONCA 681 (CanLII), the Ontario Court of Appeal affirmed that a lender may be entitled to an equitable mortgage where funds were advanced as a loan intended to be secured by a mortgage but for some reason a formal charge/mortgage was not registered on title. Depending on the circumstances, a lender's equitable mortgage may have priority over other interests as if it had been formally registered.

The appellants, Greenspan and her lending company JKSD Management Inc., made two loans to Jaymor Securities Ltd. The first loan was for \$250,000 and was secured by a third mortgage on a property in Richmond Hill, Ontario owned by Jaymor. Jaymor's principal sought a further loan and provided an appraisal to show that the property could support a fourth mortgage.

On 1 August 2019, the parties executed a promissory note under which JKSD agreed to lend Jaymor a second loan of \$125,000. Jaymor was to repay the loan within thirty days. Security for the loan was to be the personal guarantee of Jaymor's principal, a guarantee provided by a related company, and, in the event that the loan was not paid in full on maturity and the default was not cured thereafter, then by registration of a fourth mortgage against the Richmond Hill property.

Jaymor defaulted on both loans. No fourth mortgage was registered on the property, in part, because Jaymor subsequently refused to execute an authorization for the mortgage registration.

In the interim, the respondent execution creditors obtained a judgment for \$1,152,373.72 against Jaymor and registered a writ of seizure and execution against the property.

The Richmond Hill property was sold on 12 March 2021, for \$1,560,000.00. After the pay out of the first and second mortgages, tax arrears and the real estate commission, a balance of \$548,437 remained that was subject to a dispute between the appellants and the respondents. The appellants claimed an "equitable mortgage" over the property that took precedence over the respondents' writ of execution.

An equitable mortgage is meant to enforce "a common intention of the mortgagor and mortgagee to secure property for either a past debt or future advances, where that common intention is unenforceable under the strict demands of the common law": *Elias Markets Ltd., Re*, (2006) 2006 CanLII 31904 (ON CA), at paragraph 63.

An equitable mortgage can be created in several ways, including by the fact that the mortgagor had not properly executed an instrument sufficient for the mortgage registration or other issues regarding the legal formalities of the registration. The key factor is the common intention of the mortgagor (borrower) and mortgagee (lender) to secure property for either a past debt or future advances: *Emmott v. Edmonds*, 2010 ONSC 4185, at paragraph 64.

At first instance, the Ontario Superior Court of Justice decided that the appellants did not have an equitable fourth mortgage on the property. The application judge noted that Jaymor refused to execute the fourth mortgage and, at the time of maturity, had no intention of granting one. It was not a case where the parties intended to register a mortgage but the formalities could not be done or a mistake was made. In the application judge's view, the appropriate remedy for the lender was to sue for breach of contract and/or negligent misrepresentation rather than impose an equitable mortgage that interfered with the rights of execution creditors who had no other pocket to pursue and who had taken all the necessary steps (even during the COVID-19 pandemic), to solidify and register their

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interest.

On [appeal](#), the Court of Appeal for Ontario held that the application judge erred in finding that JKSD did not have a valid equitable fourth mortgage. The decision focused on the written terms of the promissory note which established that the parties intended that a fourth mortgage would be registered on the property if Jaymor defaulted on the loan. There was no language in the promissory note suggesting that Jaymor retained discretion to decide whether or not the mortgage would be registered.

Based on the terms of the promissory note, it was clear that the parties had a common intention, at the time it was signed, to grant a fourth mortgage to the appellants. The fact that Jaymore subsequently refused to consent to the registration of the fourth mortgage, and sought to resile from the agreement, did not create ambiguity or uncertainty in the prior agreement to provide the fourth mortgage. It was an error of law to take into consideration the conduct of the parties after the formation of the promissory note without first determining whether the note was ambiguous.

Further, the Court of Appeal determined that the application judge made an error of law in finding that the terms of the agreement were uncertain because a subsequent promissory note also stated that, in the event of default, a fourth mortgage would be registered on the property. Again, this involved subsequent conduct and there was never any conflict between enforcing the two promissory notes. More importantly, the existence and terms of the subsequent promissory note could not create ambiguity in the terms of the earlier one if none existed at the time the parties entered into it.

In the Court of Appeal's view, to accept that the subsequent conduct created ambiguity would give undue power to contracting parties to create ambiguity where none existed by refusing to follow through on their obligations in an agreement, or by acting in a self-serving manner after the formation of an agreement.

Lastly, the Court of Appeal held that it was an error of law to consider the fact that the appellants had other means of enforcing their rights under the promissory note than by granting an equitable mortgage or whether they had delayed in taking steps to enforce their rights. Rather, the focus should remain on the terms of the promissory note at the time it was made. In the circumstances, it was clear based on the note that the parties agreed that the JKSD would have a mortgage on the property if Jaymor defaulted on the loan.

The [decision](#) affirms the fundamental principles involved in determining whether an equitable mortgage may be enforced in circumstances where a charge/mortgage was not formally registered. While the result may appear at first blush to be unfair to the execution creditors, it does not turn upon competing equitable claims between the parties. The terms of the agreement between the appellants and Jaymor were not uncertain and subsequent events or surrounding circumstances at the time of enforcement are not relevant in determining whether there was an equitable mortgage in the first place. A PDF version is available for download [here](#).

(This blog is provided for educational purposes only, and does not necessarily reflect the views of Gardiner Roberts LLP).

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