

KEEPING CURRENT

May 4, 2021

Power of sale set aside due to mortgagee's refusal to provide discharge statement

By James R.G. Cook

Founded in the 1920s, Gardiner Roberts LLP has grown to become a strategically placed mid-sized business law firm with a diverse client base which includes several of Canada's largest banks, public companies including mining, high tech and software companies, real estate enterprises, lenders and investors.

James R.G. Cook
Partner
416.865.6628
jcook@grllp.com

A mortgagor has a right to request a discharge statement from a mortgagee at any time prior to the mortgaged property being sold by the mortgagee. A mortgagee who has commenced power of sale proceedings cannot refuse to provide a discharge statement even after the 35-day standstill period has expired. A sale by a mortgagee which violates these rules contravenes [section 22](#) of the Ontario *Mortgages Act* and may be set aside, as demonstrated by the decision in *2544176 Ontario Inc. v. 2394762 Ontario Inc.*, [2021 ONSC 3067 \(CanLII\)](#).

The case involved a gas station which had been purchased by the owner/mortgagor for approximately \$5.4 million. The purchase was financed with a mortgage of approximately \$3.79 million through a mortgage that was assigned to several mortgagees.

On November 13, 2020, the mortgagor entered into a conditional agreement to sell the property for \$8.7 million with a closing set for February 15, 2021.

On December 9, 2020, the mortgagees delivered a notice of sale to commence private power of sale proceedings under

the mortgage. They were not aware of the conditional sale entered into by the mortgagor.

The 35-day mandatory standstill required in power of sale proceedings expired January 13, 2021. The next day, on January 14, 2021, counsel for the mortgagor told the mortgagees that the property had been sold with a February 15, 2021 closing date. Counsel for the mortgagor also requested a discharge statement for the amount required to discharge the mortgage.

Counsel for the mortgagees refused to do so, and took the position that because the notice of sale period had expired on January 13, 2021, the mortgagor's "equity of redemption" had expired. The next day, the mortgagees listed the gas station property for sale.

On February 4, 2021, the mortgagor's sale to its buyer went firm at a reduced price of \$5.4 million. The closing date was deferred from February 15, 2021 to March 31, 2021.

On February 10, 2021, the mortgagees entered into an agreement to sell the

property to another buyer, who agreed to accept title to the property pursuant to the [Mortgages Act](#), for \$4.9 million. The mortgagees' sale closed March 2, 2021.

Understandably, the mortgagor commenced litigation to stop the power of sale by the mortgagees given that the sale price was \$500,000 lower than its own negotiated sale price. An application was heard by Justice F.L. Myers in April 2021.

At issue was whether the mortgagees conveyed good title when they sold mortgaged land by private power of sale without providing the mortgagor a discharge statement when requested under [section 22](#) of the [Mortgages Act](#), which deals with the rights of an owner/mortgagor to cure defaults that have led a mortgagee to accelerate the mortgage debt and declare it all due under the terms of the mortgage. Despite acceleration, the mortgagor/owner is entitled to pay the arrears, with interest and costs, to bring the mortgage back into good standing. The right to cure applies despite anything in the mortgage to the contrary, and it does not matter if a power of sale is in progress: *1173928 Ontario Inc. v. 1463096 Ontario Inc.*, [2018 ONCA 669 \(CanLII\)](#) at para. [41](#).

Justice Myers noted that there was nothing untoward about the mortgagees listing the property for sale under their power of sale while the owner was also trying to sell it, and vice versa. If the mortgagees lawfully sell the property, the owner will lose its ability to redeem the mortgage. The owner cannot interfere with the mortgagees' sale of the property provided they have acquired the right to do so.

Similarly, there is nothing stopping the owner/mortgagor from trying to sell the property while

the mortgagees are also trying to do so. If the owner sells the property before the mortgagees sell it, then the owner will only be able to provide clear title to its purchaser by paying the mortgagees in full to obtain a discharge. Under [section 43](#) of the [Mortgages Act](#), if the owner pays the mortgagees in full before they have sold the property pursuant to their power of sale, the mortgagees must discharge the mortgage.

Justice Myers determined that counsel for the mortgagees was "patently incorrect" when he asserted that the mortgagor was foreclosed from selling just because the 35-day notice period had expired after service of the notice of sale. A mortgagor's "equity of redemption" is not foreclosed by the expiry of the 35 day notice period. Under [section 22\(1\)\(a\)](#) of the [Mortgages Act](#), the owner/mortgagor retains the right to redeem until the mortgagee sell the property, namely when the mortgagee enters into an agreement of purchase and sale for the mortgaged property. That had not yet occurred in this case when the mortgagor requested the discharge statement.

In Justice Myers's view, the mortgagees had no reasonable excuse to refuse to provide a discharge statement, or grounds to question the legitimacy of the sale by the mortgagor. The mortgagees only had to provide a discharge of the mortgage if they were paid in full. In the circumstances, the mortgagees frankly should not have cared where the money came from. While the mortgagees may have a practical interest in deferring effort and cost on their own sale if they thought the owner had found a live purchaser, this had nothing to do with the mortgagor's legal rights. What the mortgagees could not do was refuse to provide a discharge statement in order to pursue their own preferred buyer.



By failing to supply the discharge statement as required by the [Mortgages Act](#), the mortgagees' rights to enforce the mortgage were suspended. Justice Myers found that the sale by the mortgagees was therefore void.

In the result, the sale by the mortgagees was set aside, and they were declared to have violated the provisions of the [Mortgages Act](#). While the buyer of the property from the mortgagees was an innocent party, the agreement to purchase the property was to take title subject to the [Mortgages Act](#), which indicated an acceptance of a potential risk of breach by the mortgagees, which is what occurred in this case. Mortgagees seeking to avoid similar results would do well to provide a discharge statement to a mortgagor immediately upon request and to ensure that the power of sale complies with their statutory obligations.

Contact us

If you have a litigation matter and are in need of legal advice, please contact [James Cook](#), at 416.865.6628 or jcook@grllp.com.

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