

KEEPING CURRENT

June 20, 2022

Mortgage provided by corporate borrower not a “fraudulent instrument”

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The Ontario [Land Titles Act](#) (“*LTA*”) provides that a registered mortgage that is determined to be a fraudulent instrument is void and may be deleted from title. This provision is commonly used in circumstances where an imposter has posed as a mortgagor in order to secure funds from a lender without the knowledge of the true owner. Where the borrower is a corporation, however, the issue of whether the corporation was fraudulently represented may be less clear. Internal governance issues regarding whether or not the corporation properly authorized the mortgage do not necessarily mean that the mortgage was a “fraudulent instrument” under the [LTA](#).

In *Froom v. LaFontaine*, [2022 ONSC 2930 \(CanLII\)](#), a property in Toronto was purchased in the name of a corporation (“128 Ontario”) in 2003. The individual owner of 128 Ontario (“AF”), was the sole registered director and officer and held all the issued shares.

AF lived in the property until 2008, when he was convicted and incarcerated in the United States in connection with various healthcare fraud offences. AF did

not return to Canada after 2008.

In 2011, AF’s former spouse (“SL”)—from whom he was not divorced—arranged for a change notice to be registered showing that she was the sole officer and director of 128 Ontario. SL also took steps to take over the corporation’s bank accounts. A document showing that SL acquired 100 shares of 128 Ontario was allegedly forged.

In 2013, 128 Ontario commenced an application at SL’s behest for possession of the property, which was occupied by AF’s girlfriend and their daughter. In response, AF commenced a proceeding to obtain a divorce from SL and a declaration that he owned 128 Ontario, along with other relief relating to the dissolution of the marriage.

In August 2014, 128 Ontario obtained a mortgage from a private lender. The mortgage was initially for \$100,000, but was later increased to \$300,000. SL signed the mortgage documents on behalf of 128 Ontario and personally guaranteed the mortgage. In the sworn declaration for the mortgage, SL

represented that she was unaware of any other claim or interest in respect of the property, without disclosing the ongoing family law proceedings. The mortgage was renewed and amended several times thereafter.

Default in payment of the mortgage occurred in March 2019, and the lender commenced enforcement proceedings against 128 Ontario and SL.

In 2021, the lender brought a motion for summary judgment against 128 Ontario and SL to enforce the mortgage and guarantee. SL supported the lender's motion.

In response, AF and 128 Ontario took the position that the lenders' mortgage was void as it was a "fraudulent instrument" under the [LTA](#). AF argued that the lender was in the best position to prevent fraud and had failed to exercise due diligence. In that regard, the lender did not take steps to investigate the use or occupancy of the property and did not appear to have obtained an appraisal.

[Section 1](#) of the [LTA](#) defines a "fraudulent instrument" as an instrument,

- (a) under which a fraudulent person purports to receive or transfer an estate or interest in land,
- (b) that is given under the purported authority of a power of attorney that is forged,
- (c) that is a transfer of a charge where the charge is given by a fraudulent person, or
- (d) that perpetrates a fraud as prescribed with respect to the estate or interest in land affected by the instrument.

A "fraudulent person" is defined in [section 1](#) of the [LTA](#) to mean a person who executes or purports to execute an instrument if,

- (a) the person forged the instrument,

(b) the person is a fictitious person, or

(c) the person holds oneself out in the instrument to be, but knows that the person is not, the registered owner of the estate or interest in land affected by the instrument.

AF and 128 Ontario took the position that SL was a "fraudulent person" because she fraudulently held herself out to the lender to be an officer and director of 128 Ontario. They submitted that AF was the sole shareholder, officer, and director of 128 Ontario.

In response, the lender argued that SL was not a "fraudulent person" as defined in the [LTA](#) since (a) she did not forge the mortgage, (b) she was not a "fictitious" person, and (c) she did not hold herself out to be the registered owner of the property affected by the mortgage. The lender's position was that even if SL had fraudulently held herself out as an officer and director of 128 Ontario, she did not hold herself out to be the registered owner of the property. The lender argued that the alleged fraud committed by SL was not one of the categories of fraudulent activity that is captured by the definitions of "fraudulent person" and "fraudulent instrument".

In [Reasons for Decision](#) granting the lender's motion, the court agreed that SL was not a "fictitious person" even if she had falsely pretended to be an officer and director of the corporate owner of the property when she signed the mortgage.

The motion judge referred to the decision of the Divisional Court in *1168760 Ontario Inc. v. 6706037 Canada Inc.*, [2019 ONSC 4702 \(CanLII\)](#), at paras. [36-37](#), concluding that a "fictitious person" means a person who does not exist; e.g. where someone has created a false identity in order to transfer the title or interest in the land that he or she purports to

convey. It would not encompass an existing person who was the true registered owner of the property conveyed. SL exists and is a real person and 128 Ontario owned the property.

In [6706037 Canada Inc.](#), a bare trustee who had transferred property without the consent of the beneficiaries was determined not to be a fraudulent person notwithstanding the lack of authority to enter into the transaction.

128 Ontario and AF argued that the allegations against SL brought her within clause (c) of the definition of “fraudulent person” as being “the person holds oneself out in the instrument to be, but knows that the person is not, the registered owner of the estate or interest in land affected by the instrument”.

While clause (c) does not expressly deal with situations where a corporation owns the land in question, AF and 128 Ontario submitted that this provision should apply given that a corporation can only act through its officers and directors. Therefore, they argued, by claiming she was an officer and director of the Company, SL held herself out as 128 Ontario and the registered owner of the property, when, in fact, she was not.

The court noted that the issue appeared to have been addressed on only one prior occasion, a hearing under [section 57\(16\)](#) of the [LTA](#) to rectify the registry where a person had used stolen identification to file corporation information notices showing that he was the sole officer and director of a company before he obtained a mortgage on its behalf. In that case, the Director of Titles determined that a mortgage granted in respect of land owned by a corporation and executed by an individual that was not authorized to bind the corporation was a “fraudulent instrument”.

In the case at hand, however, the motion

judge reasoned that a shareholder, officer or director of a corporation is not the owner of that corporation’s land. No principle of law was provided by the parties for the proposition that holding oneself out as an officer or director of a corporation to obtain a mortgage on its behalf is equivalent to holding oneself out to be the registered owner of the corporation’s land.

Given that SL was not the registered owner of the property, the court found that even if the allegations of 128 Ontario regarding her conduct were true, 128 Ontario failed to demonstrate that SL met the test as set out in clause (c) of the definition for a “fraudulent person” and thus failed to establish that the mortgage was a “fraudulent instrument” within the meaning of the [LTA](#).

As a result, the motion for summary judgment was granted and the lender obtained judgment under the mortgage and a writ of possession for the property. The matrimonial proceedings between SL and AF continue.

The case shows that whether a corporate borrower or other person has the proper authority to enter into a mortgage is distinct from the issue of whether they were a fraudulent person. There was no evidence showing that the lender was aware of any issues regarding the authority of 128 Ontario or SL to enter into the mortgage. 128 Ontario could not avail itself of the provisions of the [LTA](#) to avoid liability under the mortgage.

Contact us

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact [James Cook](#), at 416.865.6628 or jcook@grllp.com.

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