

# KEEPING CURRENT

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## Home owner obtains certificate of pending litigation to stop power of sale

By James R.G. Cook

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Parties who are seeking an interest in a property may seek to register a certificate of pending litigation (CPL) on title for the purpose of providing non-parties notice of their claims. CPLs are commonly registered by non-owners in cases where there is a dispute over the purchase and sale of property. Less commonly, an owner may seek to register a CPL over their own property in order to provide notice to non-parties that there is a dispute over a potential sale.

In *Laekeman v. 2748204 Ontario Inc. o/a Flex Homes Loans*, [2022 ONSC 6309 \(CanLII\)](#), the Ontario Superior Court of Justice addressed whether a mortgagor could obtain a CPL over their own property in the face of a pending notice of sale by a mortgagee.

The applicant was a 64-year-old retiree who owned a residential property in Kitchener, Ontario. The property was her primary asset and she intended to live there indefinitely.

In October 2020, the applicant executed certain loan and mortgage documentation authorizing and directing Flex Home

Loans (Flex Loans) to register a mortgage on the property to secure a loan in the principal amount of \$24,000. The registered mortgage was for the principal amount of \$30,999.85, comprising the loan amount, administration and registration fees, and 15 months' deferred interest. The stated interest rate was 15.48% per annum. The applicant's evidence was that she agreed to the Flex Loans mortgage after an unidentified person attended at her home and identified himself as representing a law firm recruiting claimants for a class-action lawsuit against a business called Eco-Global. The applicant had contracted with Eco-Global in 2016 for an air purifier system to be installed in her home.

The applicant deposed that, in the course of the meeting, the person placed various papers before her and told her to sign them. He did not explain the particulars of the documents but told her that the documents were for her to agree to participate in the lawsuit against Eco-Global and to get various home services installed.

As part of the Flex Loans “verification process” the applicant was also required to meet by video conference with a paralegal to confirm that she had agreed to, understood and received a copy of the Flex Loans mortgage documents and understood the terms of the loan and mortgage. The applicant acknowledged in the documents being strongly recommended to obtain independent legal advice and/or representation.

The loan from Flex Loans was used to pay an invoice from Complete Home Comfort (CHC) for various household goods and services. The mortgage funds were advanced by Flex Loans directly to CHC and not to the applicant.

Flex Loans then sold the mortgage to two individuals (the Malcas) for the discounted sum of \$27,124.87 and a Transfer of Charge was registered in their favour. Flex Loans continued to manage and administer the mortgage for the Malcas thereafter.

In July 2020 the applicant noticed a withdrawal of \$399 from her Bank of Montreal account from Flex Loans. She contacted BMO and instructed it to stop payment on any future withdrawals from Flex Loans. BMO reversed three monthly payments.

After the applicant caused her bank to reverse three months of mortgage payments, Flex Loans issued a Notice of Sale on the Malcas’ behalf. As of October 27, 2022, the applicant was alleged to be indebted to the Malcas for \$39,404.77, comprising principal, interest in arrears, and legal fees for the power of sale proceeding.

The applicant commenced proceedings to declare that the agreements with the respondents were void and sought damages sufficient to discharge the mortgage.

In response to the application, the director of Flex Loans deposed that he had no knowledge of

any of the facts stated by the applicant relating to her earlier involvement with Eco-Global or the male individual who approached her at her property making representations respecting a class-action lawsuit against Eco-Global. The director stated that he has never heard of a company called Eco-Global and had no idea how they relate to the matter involving the mortgage to Flex Loans.

The Malcas deposed that they had never met the applicant and never had any interaction with CHC, and never heard of a company named “Eco-Global.”

[Section 103](#) of the Ontario [Courts of Justice Act](#) provides that the commencement of a proceeding in which an interest in land is in question is not notice of the proceeding to a person who is not a party until a CPL is issued by the court and registered in the proper land registry office. Accordingly, the applicant sought to register a CPL to put non-parties on notice of her challenge to the mortgage.

While there are a number of factors that a court will look to concerning whether or not a CPL should be issued, the governing test is whether 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: *Perruzza v. Spatone*, [2010 ONSC 841 \(CanLII\)](#), at para. [20](#).

In the case at hand, the applicant was seeking the issuance of a CPL with a view to preventing the enforcement of a mortgage. The court noted that there is generally a strong public interest in allowing mortgagees to enforce their contractual rights and that in the absence of fraud, a mortgagor may not obtain a certificate of pending litigation to stop power of sale proceedings without having offered to redeem the mortgage: *Maletta v. Thiessen* (1996), [1996](#)

[CanLII 11765 \(ON CA\)](#). The applicant did not offer to redeem the mortgage.

The court accepted the principle that a CPL may only be granted where the mortgagor is able to show a connection between the alleged fraud in the loss of its right to redeem where fraud not going to the granting of the mortgage itself or its enforceability is alleged.

However, the court reasoned that in circumstances where the applicant mortgagor was seeking a CPL to restrain a mortgage sale on the basis of fraud going to the formation of the mortgage itself, there was no reason in principle to require the applicant to demonstrate a connection between the alleged fraud and the loss of her right to redeem. Indeed, it may work an injustice to the mortgagor to require it to redeem the mortgage or be able to demonstrate a connection between the alleged fraud and the loss of its right to redeem as a precondition to a CPL in a case where the mortgagor alleges fraud going to the grant of the mortgage itself. In the court's view, "[the public interest in allowing mortgages to enforce their contractual rights does not apply with the same vigour in cases where the validity of the mortgage itself is called into serious question on the basis of fraud."

In the result, the court concluded that where a mortgagor alleges fraud going to the grant of the mortgage, there is no rigid rule requiring it to redeem the mortgage or show a connection between the alleged fraud and the loss of its right to redeem as a precondition to the granting of a CPL.

The court therefore engaged in a consideration of the equities between the parties and determined that the CPL should be issued.

The case is an unusual example of where a mortgagor has successfully established grounds to register a CPL against their own property

in the face of power of sale proceedings. The mortgagor had sufficient evidence of potential fraud to allow the court to tip the equities in her favour over the mortgagees. Whether the applicant will ultimately succeed against the mortgagees remains to be seen.

### **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](mailto:jcook@grllp.com).  
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