

KEEPING CURRENT

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No collusion or bad faith by private mortgagee and co-owner (*1000249084 Ontario Inc. v. Andazesgishahr*)

By James R.G. Cook

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

When a property is purchased by co-owners for development and sale, they may set out their respective obligations in a written agreement that addresses the ongoing costs and the eventual sale of the property. If their relationship deteriorates or the property needs to be sold before they originally contemplated, they may have to determine how to deal with payment of the outstanding mortgages. Rights between co-owners of a property and their lenders are generally subject to the contracts they have made.

In *1000249084 Ontario Inc. v. Andazesgishahr*, [2023 ONSC 5447 \(CanLII\)](#), the Ontario Superior Court of Justice dealt with a dispute between one co-owner and a mortgage lender owned by the son of the other co-owner over the sale of a property.

The property was purchased by Payam and his friend and business partner, Mansour. They entered into a written co-tenancy and trust agreement under which they agreed that neither of them could compel a sale of the property without the other's consent. They agreed

to share liability under a first mortgage, with Payam taking on sole responsibility for any further mortgages. Payam was also responsible for payment of the realty taxes, home insurance, utilities and maintenance. Payam lived in the property with his wife and child.

A second and third mortgage were registered on title for renovation purposes. By June 2022, all three mortgages were in default. Payam wanted to sell the property but Mansour disagreed.

In July 2022, Mansour's son incorporated a numbered company and paid \$509,940.10 for an assignment of the second mortgage. The numbered company then sued Payam for judgment under the second mortgage and sought a court-ordered sale of the property.

In response, Payam took the position that the numbered company was actually controlled by his partner, Mansour, and that the attempt to sell the property contravened their agreement. Payam argued that the plaintiff company and Mansour colluded for the purchase of

the second mortgage in order to give Mansour unfair leverage in the dispute over the sale of the property. Payam claimed that the plaintiff mortgagee was exercising its rights in bad faith and for improper purposes. Since Mansour had refused to consent to the sale of the property, Payam argued that the plaintiff should not be allowed to recover additional interest and fees made payable under the second mortgage.

On a motion for summary judgment brought by the plaintiff mortgagee, the motion judge rejected Payam's arguments. The evidence of Mansour's son was that he took the steps to incorporate the plaintiff and obtain an assignment of the second mortgage because this was a way to enforce the mortgage in an expedited and controlled manner at less cost than would be incurred by a financial institution. The motion judge agreed that this made good business sense.

As to the relationship between Mansour and the mortgagee, the motion judge noted that children often seek to help their parents and the fact that they do so does not mean that they are acting improperly. There was no persuasive evidence to conclude that Mansour's son was motivated by any intention to harm Payam that would contradict his professed intention to assist his father by ensuring that the costs of sale are minimized. Further, any act to deliberately and negatively affect the sale price would mostly harm his father rather than Payam since the majority of the equity belonged to Mansour.

Payam argued that Mansour had breached their agreement not to compel a sale of the property but there was no such contract between Payam and the plaintiff mortgagee. The motion judge noted that it is trite law that a mortgagee acting in good faith and without fraud will not be restrained from a proper exercise of his power of sale except upon tender by the mortgagor of the

principal moneys due with interest and costs: *Arnold v. Bronstein et al.*, [1970 CanLII 245 \(ON SC\)](#). There is no duty on a mortgagee to allow a mortgagor to sell a property when a mortgage has gone into default.

The motion judge also considered Payam's argument that Mansour had deliberately attempted to harm him by refusing to consent to his efforts to sell the property. Payam's position was that Mansour had failed to act reasonably in the exercise of a discretion set out in their co-tenancy agreement, in violation of the duty of good faith required by the Supreme Court of Canada in *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, [2021 SCC 7](#), at para. [84](#).

The court briefly reviewed the evidence about Payam's proposals to sell the property and concluded that Mansour was not obligated to have accepted any of them. The court also noted that Payam admitted he had obtained the third mortgage without Mansour's knowledge or consent, which understandably impacted whether Mansour wanted to have any further dealings with Payam.

In assessing whether Mansour had breached any duty to act in good faith, the motion judge concluded that Mansour was entitled to act in his own best interests and was not required to agree to something that could undermine them: *2343680 Ontario Inc. v. Bazargan*, [2021 ONSC 6752](#) at para. [28](#), citing *Bhasin v. Hrynew*, [2014 SCC 71](#), at para. [70](#) and *Wastech* at para. [73](#). While an earlier sale might have achieved a better sale price based on the subsequent market decline, there was no reason to conclude that Mansour and/or the plaintiff mortgagee knew that the market would decline and that it would continue to do so rather than going back up.

The motion judge therefore rejected Payam's argument that there was a genuine issue as to a breach of the duty of honest contractual performance. The plaintiff did not conceal the relationship between Mansour and the son, nor was there any evidence that anyone had misled Payam as to amounts due and owing under the second mortgage. Mansour had the discretion to refuse to agree to sell the property and in any event, this discretionary power did not arise out of the second mortgage, and there was no privity of contract between the plaintiff mortgagee and Payam.

In the result, the court granted judgment to the plaintiff mortgagee and ordered that it could take steps to sell the property. After the property was sold and the mortgages paid out, any remaining balance would be paid into court subject to determination of the remaining dispute between Payam and Mansour.

The decision shows that it will be difficult to establish bad faith or other improper conduct on the part of a co-owner or mortgagee who are acting pursuant to the terms of the written agreements between the parties. In Ontario, the [Partition Act](#) generally allows a co-owner to seek a court-ordered sale of a property but in the case at hand the parties had agreed that they could not do so without the other's consent. As a result, there was no contractual breach by the co-owner refusing to agree to a sale of which he was not in favour. For its part, the mortgagee was simply enforcing its rights to enforce the second 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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