

KEEPING CURRENT

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Court critical of mortgage lender and Director of Titles for failing to consent to removal of fraudulent mortgage instrument from title (*Sun v. Ryan Mortgage Income Fund Inc.*)

By James R.G. Cook

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In a decision which removed a fraudulent mortgage instrument from title to the applicants' property, the Ontario Superior Court of Justice was critical of the Ontario Director of Titles and the mortgage lender for failing to consent to the relief sought, which would have obviated the time and delay associated with the hearing. Given the well-publicized circumstances of the court's current backlog and constrained resources, the respondents' decisions to require the applicants to bring this unnecessary proceeding could have resulted in costs sanctions: *Sun v. Ryan Mortgage Income Fund Inc.*, [2024 ONSC 1168 \(CanLII\)](#).

The applicants in the case sought an order from the Ontario Superior Court of Justice to direct the Director of Titles to rectify the register to their property under [section 57 \(13\)](#) of the Ontario [Land Titles Act](#) (the "LTA"). In particular, they asked the court to find that a mortgage instrument registered against their home was void as it was a fraudulent instrument. The respondents to the application were the mortgage lender and

the Director of Titles.

Under [section 57 \(13\)](#) of the [LTA](#), an applicant is required to establish one of the following facts to obtain such an order:

- (a) a registered instrument would be absolutely void if unregistered;
- (b) the Director of Titles or a court, as the case may be, is satisfied, on the basis of evidence that the Director of Titles specifies or the court orders, that a fraudulent instrument has been registered on or after October 19, 2006; or
- (c) the effect of the error, if not rectified, would be to deprive a person of land of which the person is legally in possession or legally in receipt of the rents and profits.

A "fraudulent instrument" is defined in [section 1](#) of the [LTA](#) as follows:

“fraudulent instrument” means 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 the same section to include a person who “forged the instrument”.

While the mortgage at issue was registered in the applicants’ names, they provided solid evidence that they had not signed the mortgage documents and that the identification provided by the purported borrowers to the mortgage lender was forged. Further, the applicants did not receive the mortgage funds.

The true identities of the fraudsters were unknown. The application judge noted that the title insurer for the mortgage lender had apparently investigated the circumstances and did not contest these facts.

The court therefore concluded that the subject mortgage was a fraudulent instrument as it was forged and that it was given by a fraudulent person to perpetuate a fraud. The application was granted.

While this decision resolved the matter, the application judge went on to address the fact that the applicants had commenced the proceeding to remove the fraudulent mortgage

from title to their property in October 2022, but because of the shortage of judges hearing civil matters in Toronto, they had to wait until February 2024 for the matter to be heard.

It was not clear to the application judge why the mortgage lender did not simply discharge its mortgage upon accepting that the applicants had been defrauded. Similarly, it was not clear why the Director of Titles did not make the decision to discharge it, using the same section of the statute under which the court has acted. Since neither the mortgage lender nor the Director of Titles opposed the relief sought, the application judge wondered why they did not act to remove the forged mortgage themselves:

“If there was a reason that the mortgagee and the Director of Titles were not willing to act, perhaps they ought to have told me. Otherwise, there is no apparent reason why they felt it necessary to require the applicants to endure the court’s 16-month backlog and to incur unrecoverable costs to obtain the cover of a court order rather than making the decision themselves.”

The court noted that had the mortgagee and the Director of Titles consented to the relief sought, rather than saying they were “unopposed,” the matter could have been heard in writing more than a year earlier. The respondents had counsel and yet neither instructed them to attend the application to make submissions as to why the applicants had to bring the proceeding or why they were not consenting to it. Instead, in the application judge’s view, the respondents chose to leave the court to wonder if anything was preventing them from accepting the applicants’ evidence “other than a bureaucratic desire to have someone else take responsibility for the decision that each of them was empowered to make without the need for this proceeding.”

While costs were not sought by the applicants, the application judge stated that he would have considered a request to order the mortgagee and the Director of Titles to pay the applicants' full costs under [Rule 57.01](#) of the [Rules of Civil Procedure](#) since they had the ability to obviate the need for these apparently unnecessary proceedings. Absent a good reason to require this matter to come to court, it seemed "cruel" to have required the applicants to wait from the commencement of proceedings in October 2022 to obtain the relief that the respondents themselves could have granted.

While the decision offers some important lessons arising from the current state of affairs of the Ontario courts, it is not clear why the applicants did not avail themselves of a procedural hearing offered directly by the Director of Titles under the *LTA* to have the subject mortgage declared a fraudulent instrument and removed from title. In this writer's experience, a Director of Titles can be an efficient, faster, and more cost-effective procedure to address an allegedly fraudulent mortgage than bringing a court application.

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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