KEEPING CURRENT

June 13, 2024

Mortgage enforcement claim dismissed as statute-barred *(Albrecht v. 1300880 Ontario Inc.)*

By James R.G. Cook

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

If payments have not been made by a borrower under a mortgage loan for more than ten years, a lender may lose the right to enforce the mortgage against the secured property, as illustrated by the Ontario Superior Court decision in *Albrecht v. 1300880 Ontario Inc.*, 2024 ONSC 3328 (CanLII).

The case involved a second mortgage granted by the lender in March 2011, which was registered on the borrower's property in the County of Norfolk. The mortgage secured the principal sum of $43,000, repayable at 14% interest per annum commencing on March 4, 2011, with a one-year term. The mortgage was also registered against title to another property in Brantford, Ontario.

On July 6, 2011, the lender received an NSF cheque, and no payments were ever made by the borrower after that date. As of March 4, 2012, the principal sum was fully due and payable.

A notice of sale for the Norfolk and Brantford properties dated December 16, 2011, was served on the borrower by registered mail. The Brantford property was then sold by the lender under power of sale in early 2012.

The borrower made an assignment in bankruptcy in August 2012, and listed the lender in her statement of affairs as a secured creditor in the amount of $43,000. The lender received a copy of the notice of bankruptcy on or about August 16, 2012, but was apparently not concerned since it was a secured creditor.

However, no further steps were taken to enforce the mortgage or sell the Norfolk property until the lender issued a demand letter in May 2023.

The borrower then commenced an application seeking an order discharging of the mortgage from title on the basis that the lender's attempt to enforce it was statute-barred by Ontario's *Real Property Limitations Act* (*RPLA*).

Section 4 of the *RPLA* provides for a ten-year limitation period to bring an action to "recover any land" once the right to bring such a claim has accrued. Section 15 provides that upon expiry of the ten-year limitation period, the right of any person to bring an action is "extinguished".

In *McVan General Contracting Ltd. v. Arthur*, 2002 CanLII 45035 (ON CA), the Court of Appeal for Ontario affirmed

Continued on page 2

that a power of sale proceeding was statute-barred by these provisions ten years after the first default in payment of interest.

In an attempt to circumvent these sections, the lender pointed to section 23 of the *RPLA* which provides for an extension of the limitation period in cases where "some part of the principal money or some interest thereon has been paid" or "some acknowledgment in writing of the right thereto" has been provided by the borrower.

There was no agreement in writing to vary the mortgage, however, and neither party sent an email or anything in writing evidencing any such agreement.

The lender's evidence was that it would search the property every year on the anniversary date of the mortgage and either leave a message or discuss the mortgage with the borrower or her spouse, and that it always requested an update regarding repayment of the mortgage. This evidence was not persuasive, and the court concluded that no such discussions took place after 2012.

Further, there was no evidence that the mortgage was renewed from year to year. Rather, the mortgage was in default after July 4, 2011.

The application judge referred to a decades-old decision of the Supreme Court of Canada which determined that a "voluntary abstention" by a lender in exercising its rights to enforce a mortgage did not stop the clock from running under the limitation period: *Shook v. Munro*, 1948 CanLII 8 (SCC).

In a more recent case, *Hamilton (City) v. Metcalfe & Mansfield Capital Corp.*, 2012 ONCA 156 (CanLII), the Court of Appeal for Ontario affirmed that the limitation period would not run in cases where a creditor and debtor have specifically agreed to change the repayment terms of the debt obligation.

In the case at hand, however, there was no acknowledgement of debt or intent to pay the mortgage after 2012 because there was no communication between the debtor and lender after 2012. Accordingly, there was no agreement to suspend or extend the limitation period.

The lender also raised the doctrine of "promissory estoppel," which requires a party to establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship, and that they then acted on it or in some way changed their position: *Maracle v. Travellers Indemnity Co. of Canada*, 1991 CanLII 58 (SCC).

The lender pointed to the 2012 statement of affairs, but the court reasoned that this was not the kind of admission of liability contemplated by promissory estoppel but was simply a statement of the obvious – it set out the amount of the mortgage and that the lender was a secured creditor. There was no promise or assurance made by the borrower that was intended to affect the legal relationship with the lender that could amount to a promissory estoppel.

Accordingly, the court determined that there was no oral agreement between the parties and the limitation period was not extended by promissory estoppel or any other doctrine raised by the lender. The court declared that the enforcement of the mortgage was statute barred by the *RPLA*. Since the right to bring an action was extinguished, the court discharged the mortgage and directed that it be deleted from title.

The case is a cautionary tale for lenders about waiting too long to enforce mortgage rights. A lender may have valid reasons for waiting until a borrower has the financial means to repay a loan, but steps should be taken to ensure that the limitation period is not running down in the interim.

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.

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