

Property Disputes during a Pandemic

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In Ontario regular civil court operations have been largely suspended since mid-March 2020 due to the COVID-19 pandemic. One consequence of this has been the temporary postponement of adjudication of disputes involving real estate during what would otherwise be the torrid activity of the Spring market. Without the availability of the courts, parties may be unable to market or develop properties, and sales may be delayed or jeopardized entirely. A few cases that have been decided in recent weeks show how courts are dealing with disputes where an urgent order is required, particularly where a sale or other deadline has been affected by the current circumstances.

In *Ali v. Tariq*, 2020 ONSC 1740 (CanLII), a property owner brought an urgent motion to lift a writ of seizure and sale registered against a property that was scheduled to be sold the following day. The Court agreed that the writ should be lifted so that the sale could proceed but ordered that sufficient funds from the sale be held in trust to pay the amount of the judgment secured by the writ. The issue of the validity of the judgment underlying the writ was left to be determined on another day.

Conversely, in *Sibyl Investment Holding Inc. v. Vlachich*, 2020 ONSC 2191 (CanLII), Justice LeMay heard and dismissed a property owner's motion for an injunction to stop a mortgagee's sale of his property. Efforts by the mortgagee to sell the property had been well underway prior to the COVID-19 pandemic, and the property owner had not taken any meaningful steps to challenge the default until the sale was imminent. Justice LeMay heard the property owners' urgent motion via teleconference and dismissed the motion to stop the sale. There was nothing particularly unique about the property, in Justice LeMay's view, and the issues of whether the property had been wrongfully sold or undervalued could be left to be determined on another day.

In *Corfinancial Corp. v. Amazon Land Development Corp.*, 2020 ONSC 1879 (CanLII), Justice Boswell heard a number of urgent motions by telephone conference in a dispute relating to an imminent sale of commercial lands pursuant to an agreement dating back to August, 2019. The property owner sought to complete the sale, but was challenged by a party seeking to enforce an alleged agreement to form a partnership to develop the lands prior to the sale. Justice Boswell sorted through various issues raised and decided that most of them were not capable of summary determination. The Court allowed the completion of the sale with the net proceeds to be paid into court to the credit of the action. The balance of the dispute was left to be determined on another day.

In *2676547 Ontario Inc. v Elle Mortgage Corporation*, 2020 ONSC 2041 (CanLII), the plaintiff alleged that a mortgagee improperly sold a property to another buyer in the face of a prior binding agreement of purchase and sale with the plaintiff. The disgruntled plaintiff had obtained a certificate of pending litigation (CPL) without notice prior to the COVID-19 pandemic shut down. In March 2020, the property owner brought a motion to have the CPL discharged, which was heard by the Court via remote conference pursuant to the COVID-19 practice directions. The plaintiff then brought a motion for a stay of the Court's decision to discharge the CPL pending appeal. Prior to the hearing, the property owner had agreed not to sell or transfer title without notice to the plaintiff or court order.

Justice Myers noted that the current Notice to the Profession from the court was intended to give notice to the public of the need to curtail normal court services and of the terms under which the court would endeavour to provide urgent services going forward. For civil lawsuits, the Notice to the Profession provides for the hearing of "urgent and time-sensitive" matters, including those where "immediate and significant financial repercussions may result if there is no judicial hearing." Justice Myers further noted that during the suspension of regular operations, the court calls upon the cooperation of counsel and parties to engage in every effort to resolve matters. In the matter at hand, he commended the parties for protecting the plaintiff's claim to title pending the appeal, as the owner agreed that he would not sell or transfer the property without an order of the court that they can only seek after giving at least ten days' notice (which Justice Myers stated should include encumbering the existing equity). As a result, the appeal was left to proceed in the ordinary course.

Gardiner Roberts

Bay Adelaide Centre — East Tower
22 Adelaide Street West, Suite 3600
Toronto, ON M5H 4E3

Phone: 416.865.6600
Fax: 416.865.6636
contactGR@grllp.com

In *Powers v. Webber* (Estate of), 2020 ONSC 2359 (CanLII), the plaintiff filed an urgent motion in writing for a certificate of pending litigation to be registered on the title to the home in which she resided. Title was not in the plaintiff's name but she alleged that she cohabited with the late owner from 2007 until he passed away in 2018, and she was seeking an interest in the property on the basis of constructive trust. The motion was alleged to be urgent because the Estate Trustee for the deceased had informed the plaintiff that he intended to put the property up for sale. The Estate Trustee was not served with notice of the motion. Madam Justice Corthorn reviewed the material filed by the plaintiff and found that the motion ought not proceed on a without notice basis as the plaintiff's counsel had been in ongoing communication with the Estate Trustee's lawyer since 2019, and there was no evidence that a sale of the property was imminent.

Justice Corthorn noted that the COVID-19 measures in effect in Ontario included a restriction on open houses for residential real estate sales and that such measures created uncertainty for the Estate Trustee in his efforts to sell the Property. At the same time, the pandemic conditions created uncertainty for the Plaintiff should she ultimately be required to find alternate accommodation. Justice Corthorn ordered that the Estate Trustee was precluded from agreeing to a closing date for the sale of the Property without either the consent of the Plaintiff or further order of the court. Accordingly, Justice Corthorn effectively imposed a restriction on the Estate Trustee's ability to sell the Property even without a judicial determination of the Plaintiff's claim, until the motion was heard.

Of interest to developers, *Saine v. Niagara Escarpment Commission*, 2020 ONSC 2151, involved a dispute relating to the intended construction of a driveway in an area of developmental control. The applicant secured a development permit after committing years of time and significant expense. A variation to the permit conditions was required but rejected by the Niagara Escarpment Commission and Niagara Escarpment Hearing Office. The applicant sought to challenge that decision through a statutorily mandated appeal process, but the permit was due to expire on 13 April 2020, which would have required the entire lengthy and expensive permit process to be recommenced. Therefore, the applicant sought a mandatory order staying the expiry of the permit or alternatively an order declaring that the permit expiry date was automatically extended by operation of the *Emergency Management and Civil Protection Act*. The Court agreed that the matter was urgent but encouraged the parties to attempt to resolve the issue of whether the expiry of the permit was suspended by agreement without a hearing, failing which the matter would be scheduled for hearing pursuant to the current COVID-19 practice. At the time of this writing, it is not clear whether they have done so.

At this time, all regular, non-urgent matters in the Ontario Superior Court of Justice continue to be suspended until at least 1 June 2020. However, what will occur over the next few weeks is unknown and accordingly parties should be prepared to deal with truly "urgent" matters via remote hearing for some time. Based on the urgent COVID-19 decisions that have been released to date, it is clear that the courts expect the parties to work together to reach an interim agreement on the most pressing issues where possible, including the completion of scheduled sales, and to delay a full hearing on the underlying dispute until the courts resume ordinary operations.

For more information please contact: **James Cook** at **416.865.6628** or **jcook@grllp.com**

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Author



James R.G. Cook

Partner

416.865.6628

jcook@grllp.com

Gardiner Roberts

Bay Adelaide Centre — East Tower
22 Adelaide Street West, Suite 3600
Toronto, ON M5H 4E3

Phone: 416.865.6600
Fax: 416.865.6636
contactGR@grllp.com