

## Mortgage fraud and the balancing of interests

By **James R.G. Cook**

Law360 Canada (August 27, 2024, 2:08 PM EDT) -- The prevalence of real estate title and mortgage fraud in recent years has led to situations where a court is faced with a balancing of interests between innocent parties. In *Hillmount Capital Mortgage Holdings Inc. v. Onsori-Saisan*, 2024 ONSC 4481, an innocent lender's mortgage was held to be enforceable notwithstanding the arguments of the home owner that she was an innocent victim of a title fraud.

The decision arose from the efforts by the applicant lender to appoint a receiver over a property in King City, Ont., following default under a mortgage apparently provided by the registered homeowner. The mortgage agreement entitled the lender to realize on its security through a court-appointed receiver over the mortgaged property.



James R.G. Cook



AndreyPopov: ISTOCKPHOTO.COM

In May 2023, the respondent borrower Valiollah Onsori-Saisan, entered into the mortgage that was registered on title in favour of the lender to secure a loan of \$1,945,000. In the mortgage application, Onsori-Saisan represented that he owned the property and that it was his primary residence.

The mortgage matured in June 2024, without payment. No payments were made since maturity. The full amount of the loan principal and accrued interest due as of June 24, 2024, was \$2,026,624. Interest, fees and expenses continued to accrue. Onsori-Saisan was also in default in payment of 2023 and 2024 realty taxes totalling over \$28,000.

There was also a second mortgage registered on the property by another lender. A recent valuation of the property indicated that net proceeds of sale may be insufficient to satisfy the two mortgages and tax arrears.

In May 2024, a *Mareva* injunction was registered on title to the property by a plaintiff in a separate action claiming that Onsori-Saisan and others were liable for, among other things, damages for conspiracy, conversion, fraudulent misrepresentation, breach of fiduciary duty, breach of trust and unjust enrichment. The *Mareva* injunction restrained Onsori-Saisan from utilizing his assets.

Onsori-Saisan consented to the lender's appointment of a receiver. However, an adjournment of the application was sought by Farnaz Afkari, who claimed to be the true owner of the property. The parcel register for the property showed that it was originally purchased by Afkari in June 2017, and was transferred in a power of sale to Onsori-Saisan in January 2023. Afkari alleged that she had occupied the property since 2017 and had resided there with her husband, from whom she had since separated and was in the process of obtaining a divorce.

Afkari further claimed that she had been romantically involved with an individual named Arash Missaghi, whom she understood was a real estate broker and that Missaghi had arranged for a second mortgage on the property from a private lender. Missaghi allegedly offered to take care of the mortgage payments for both the first and second mortgages to "alleviate" Afkari's financial burden. Afkari claimed that, unbeknownst to her, Missaghi fraudulently transferred the title of the property to Onsori-Saisan, who was one of his business partners.

While Afkari did not deny signing the relevant mortgage documents, she claimed that Missaghi called her to his lawyer's office to sign documents and never provided copies or explained their content. She claimed to have been duped by him and his associates. Afkari alleged that after the transfer of title to Onsori-Saisan, Missaghi secured a first mortgage with the applicant lender for \$1.95 million. She further alleged that the second mortgage was fraudulent.

The application judge noted that Afkari was a real estate broker with an MBA. The mortgage acknowledgment was brief and straightforward, and she ought to have been able to understand the references to the principal amount and monthly payments. Although Afkari alleged that Missaghi told her that he would make the mortgage payments, there was no evidence that any such payments were actually made, and it belied belief that Missaghi would agree to make such payments simply to "alleviate" her financial burden.

As a matter of law, Afkari could not avoid a signed mortgage acknowledgment by simply asserting that she signed it without reading it, or that it was not explained to her. A person signing a document cannot avoid their obligations simply by claiming that they were careless and did not read it: *The Guarantee Company of North America v. City Excavating & Grading Ltd.*, 2016 ONCA 125, at paragraph 15.

In any event, for the purposes of the application, it did not matter whether Afkari was a victim of Missaghi or an accomplice. In that regard, once the property was transferred to Onsori-Saisan in the power of sale, Onsori-Saisan became the registered owner.

The subsequent mortgage from Onsori-Saisan to the applicant lender was governed by the *Land Titles Act* (LTA). Section 1 of the LTA defines a "fraudulent instrument" as 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 s. 1 of the LTA to mean a person who executes or purports to execute an instrument if:

- (a) the person forged the instrument,
- (b) the person is a fictitious person, or

(c) the person holds oneself out in the instrument to be, but knows that the person is not, the registered owner of the estate or interest in land affected by the instrument.

In the case at hand, Onsori-Saisan was (a) not a fraudulent person as he did not forge the mortgage instrument, (b) was not a fictitious person and (c) not an imposter who knowingly and falsely held himself out to be the registered owner. Rather, he was the registered owner at the material time. As noted by the Court of Appeal for Ontario in *Froom v. Lafontaine*, 2023 ONCA 519, at paragraph 62, “[a] person cannot falsely hold itself out as something that it actually is.”

Accordingly, the mortgage was not a fraudulent instrument as defined by the LTA. The lender was entitled to rely on both “the mirror principle” (the register is a perfect mirror of the state of title) and the “curtain principle” (a purchaser need not investigate the history of past dealings with the land, or search behind title): *CIBC Mortgages Inc. v. Computershare Trust Company of Canada*, 2016 ONSC 7094, at paragraph 63.

The application judge refused Afkari’s adjournment request and ordered the appointment of a receiver. The consequences of the “fraudulent instrument” framework in the LTA are illustrated by this result. While Afkari may well be an innocent party, so too was the lender who advanced \$1,945,000 to the property’s registered owner. In the court’s view, the appointment of a receiver to conduct a court-supervised sale would ensure that the property was marketed and sold at the highest price attainable, potentially avoiding further litigation that would otherwise arise among the stakeholders concerning the process. The underlying claims in the proceedings between Afkari and the other parties will continue in the ordinary course.

*James R.G. Cook is a partner at Gardiner Roberts LLP and has been with the firm since he articulated there in 2002. As a litigator in the firm’s dispute resolution group, he has experience in a broad range of commercial, real estate and professional liability litigation.*

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of the author’s firm, its clients, LexisNexis Canada, Law360 Canada or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

*Interested in writing for us? To learn more about how you can add your voice to Law360 Canada, contact Analysis Editor Richard Skinulis at [Richard.Skinulis@lexisnexis.ca](mailto:Richard.Skinulis@lexisnexis.ca) or call 437-828-6772.*