

## Non-party to mortgage contract has claim against lender and lawyer struck

By **Stephen A. Thiele**

Law360 Canada (February 19, 2026, 11:13 AM EST) -- The *Rules of Civil Procedure* contain powerful rules for the pretrial disposition of actions. One of those rules is rule 21, which, among other things, permits a defendant to strike out an action on the grounds that it discloses no reasonable cause of action or on the grounds that it is frivolous, vexatious or an abuse of process. For malpractice lawyers who defend claims against lawyers, rule 21 is often relied upon to seek the early dismissal of an action in circumstances where the plaintiff and the defendant lawyer were not in a solicitor-and-client relationship.

In *Anthonipillai v. Ghorbankhani*, 2026 ONSC 470, lawyers representing the defendant lawyer in a mortgage transaction relied on rule 21 to successfully obtain an order dismissing the plaintiff's action for breach of contract, negligence and breach of fiduciary duty against their client.



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The facts of this case involved the granting of a \$5.5-million construction mortgage to a borrower, who allegedly was a partner of the plaintiff and who had his own lawyer. The construction mortgage was placed on a property that was destroyed by arson.

The plaintiff pleaded that she had an interest in the property and that the defendant lawyer breached the mortgage agreement by releasing mortgage funds to the borrower, who, in turn, used it for purposes unrelated to the construction of the property.

However, the plaintiff was not a contracting party to the mortgagee agreement.

In addition, the plaintiff pleaded that the defendant lawyer failed to ensure there was sufficient insurance on the property. She claimed the property was under-insured.

Pursuant to rule 21, the lender and defendant lawyer brought separate motions to strike the plaintiff's action. Critical to the motions was the fact that the plaintiff was not a party to the

mortgagee agreement. This fact was used to contend that the plaintiff's claim disclosed no reasonable cause of action.

As well, the defendant lawyer argued that the plaintiff was not her client. In support of this argument, the defendant lawyer relied on well-established law that stated that a lawyer only owes a duty of care to their client and does not owe a duty of care to clients who are represented by their own lawyer. The defendant lawyer showed that the plaintiff had been represented at all relevant times by her own lawyer.

A rule 21 motion is guided by the following principles:

First, a court is obligated to read the plaintiff's pleading generously and presume that the facts pleaded are true and can be proved. In this regard, a pleading will be read to allow for drafting deficiencies and will take into consideration a plaintiff's potential lack of access to key documents and discovery information.

Second, a motion to dismiss a claim on the grounds that it discloses no reasonable cause of action will be dismissed unless it is plain and obvious that there is no reasonable prospect that the action will succeed.

Third, in circumstances where there are drafting deficiencies, a court is required to consider if a plaintiff should be granted leave to amend their pleading to cure the deficiencies. Jurisprudence, such as *Burns v. RBC Life Insurance Co.*, 2019 ONSC 6977, has stated that pleadings "should not lightly be struck without leave to amend" and that leave "should only be denied in the clearest of cases when it is plain and obvious that no tenable cause of action exists on the alleged facts and there is no reason to expect that" amending the pleading will cure its deficiencies.

The court found that it was plain and obvious that the plaintiff's action against the lender had no reasonable chance of success because she simply was not a party to the construction mortgage agreement. Relying on the principle of privity of contract, the court concluded that the plaintiff could not sue on the agreement.

With respect to the defendant lawyer's rule 21 motion, the court also held that the plaintiff's claim should be struck in its entirety.

The court explained that the plaintiff's breach of contract claim could not succeed because the plaintiff and the defendant lawyer were not parties to the construction mortgage.

With respect to the claim for negligence and breach of fiduciary duty, the court explained that since the plaintiff and the defendant lawyer were not in a solicitor-and-client relationship, the plaintiff could only succeed if:

1. the defendant lawyer had actual knowledge that the plaintiff was relying on her;
2. the plaintiff in fact relied upon the defendant lawyer; and
3. the plaintiff's reliance was reasonable.

However, the plaintiff's pleading admitted that the defendant lawyer was completely unaware of her alleged interest in the property.

Relying on *Hamid v. Milaj*, 2013 ONSC 2104, the court also stated that it had consistently been held that a lawyer acting for one party in a proceeding owes neither a duty of care nor a fiduciary duty to the opposite party. Accordingly, the plaintiff's claim against the defendant lawyer was struck.

In the circumstances, the court refused to allow the plaintiff leave to amend her statement of claim against either the lender or the defendant lawyer because no amend could establish a contractual relationship between the plaintiff and lender or the plaintiff and the defendant lawyer. Furthermore, no amendments could create a duty of care or a fiduciary duty between the plaintiff and the defendant lawyer.

The key takeaway from this decision is that lawyers representing defendants should carefully review a plaintiff's pleading to assess if a rule 21 motion can be brought to dismiss an action at an early stage. A rule 21 motion is particularly useful in obvious cases where a pleading discloses no reasonable cause of action or is frivolous, vexatious or an abuse of process because it is efficient and allows a defendant to avoid potentially costly litigation. On the other hand, plaintiffs should also carefully consider whether their claims can be easily struck on the grounds that they do not disclose a reasonable cause of action. A plaintiff that loses a rule 21 motion will be liable for the costs of the motion. In this case, the defendants were awarded a total of \$22,000, inclusive of all fees, disbursements and taxes.

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