Court File No. CV-23-00701672-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

B E T W E E N:

CAMERON STEPHENS MORTAGE CAPITAL LTD.

Applicant

and

CONACHER KINGSTON HOLDINGS INC. AND 5004591 ONTARIO INC.

Respondents

FACTUM OF 2478659 ONTARIO LTD

October 7, 2024

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FACTUM OF THE MOVING PARTY/2478659 ONTARIO LTD

PART I - INTRODUCTION

1. This factum is filed on behalf of 2478659 Ontario Ltd. ("247 Ontario"), the third mortgagee, under a mortgage registered against the property municipally known as 311 Conacher Drive, Kingston, Ontario (the "Kingston Property") owned by the Respondent Conacher Kingston Holdings Inc., in the amount of $8,500,000.

2. 247 Ontario seeks an order that the doctrine of marshalling applies to require Cameron Stephens Mortgage Capital Ltd. ("Cameron Stephens") to first realize on its security against properties municipally known as 2849, 2851, 2853, 2855 and 2857 Islington Avenue, Toronto, Ontario (the "Toronto Properties") before realizing on its security against the Kingston Property.

3. The application of the equitable doctrine of marshalling in these circumstances would protect 247 Ontario's interest as a subsequent encumbrancer on the Kingston Property, while still allowing Cameron Stephens to fully recover its debt.

PART II - SUMMARY OF FACTS

4. 247 Ontario holds a third mortgage registered as Instrument No. FC362038 against the Kingston Property for the principal sum of $8,500,000.00. 247 Ontario has no mortgage interest in the Toronto Properties.

Affidavit of Robert Marchioni sworn October 4, 2024 ("Marchioni Affidavit), **Responding Record** ("RR"), pg 2, para 2

5. 5004591 Ontario Inc. is the guarantor of the debt of Cameron Stephens pursuant to a commitment letter dated November 22, 2019 and a guarantee dated December 5, 2019.

Marchioni Affidavit, RR, pg 3, para 5; **Letter of Commitment and Guarantee**, **Application Record dated June 27, 2024** Tab 2C and 2D, pg 37 and 61

6. Cameron Stephens holds a mortgages registered against the Kingston Property and the Toronto Properties to secure a single debt in the amount of $15,600,000.

Marchioni Affidavit, RR, pg 2, para 4

7. By order of the court, TDB Restructuring Limited was appointed as receiver (the "Receiver") of the Kingston Property and the Toronto Properties. The Kingston Property is held by Conacher Kingston Holdings Inc. and the Toronto Properties are held by 5004591 Ontario Inc. Both companies were owned by Nick Kyriacopoulos, now deceased.

Marchioni Affidavit, RR, pg 3, para 6

8. By letter dated January 24, 2024, counsel for 247 Ontario requested that Cameron Stephens and the Receiver apply the doctrine of marshalling by either: (a) selling the Toronto Properties first and using those proceeds to extinguish as much of the Cameron Stephens debt as possible before selling the Kingston Property; or (b) if both properties are sold, applying the proceeds from the Toronto Properties first to the Cameron Stephens debt before using any proceeds from the Kingston Property.

Marchioni Affidavit, RR, pg 3, para 7 and **Exhibit "A"**, pg 7

9. The Receiver rejected this proposal, stating it would list both properties for sale and allow the market to dictate the order of sales. However, the Receiver agreed that it would hold the net sale proceeds from each property in separate trust accounts and seek court approval for any distributions.

Marchioni Affidavit, RR, pg 3, para 8, and **Exhibit "B"**, pg 11

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

Issue 1: The Doctrine of Marshalling

10. The sole issue is whether the doctrine of marshalling should be applied in these circumstances to require Cameron Stephens to first realize on its security against the Toronto Properties before realizing on the Kingston Property.

11. The doctrine of marshalling is an equitable principle that provides where a creditor has two or more funds to satisfy its debt, it may be required to resort to the fund(s) that will not prejudice another creditor who has security over only one of those funds.

12. The decision of *Re Allison* is factually very similar to the matter before the court in this proceeding. In that case, Mrs. Allison had acquired a lot, which was subsequently severed into two lots. Mrs. Allison retained parcel one and conveyed parcel two to Allison Inc. Both parcels were mortgaged several times, with both primary mortgages and collateral mortgages. Allison and Mrs. Allison jointly covenanted to be liable for the payments due under each mortgage. Mrs. Allison was the principal debtor on parcel one and guarantor on parcel two, while Allison Inc. was the principal debtor on parcel two and guarantor on parcel one.

Re Allison *[1995] O.J. No. 324, at para 4-5*

13. In stating that the application of marshalling was applicable in these circumstances, the court stated:

> "The doctrine of marshalling, in its application to mortgages or charges upon two estates or funds, may be stated as follows: If the owner of two estates mortgages them both to one person, and then one of them to another, either with or without notice, the second mortgagee may insist that the debt of the first mortgagee shall be satisfied out of the estate not mortgaged to the second, so far as that will extend. This right is always subject to two important qualifications: first, that nothing will be done to interfere with the paramount right of the first mortgagee to pursue his remedy against either of the two estates; and, second, that the doctrine will not be applied to the prejudice of third parties...".
>
> ***Re Allison*** *[1995] O.J. No. 324, at para 11*

14. While the court in Re Allison discusses two debts and different debtors with the same creditor, our situation involves one debt and two debtors who are responsible for that one debt. Applying the principles from Re Allison, it's clear that the equities would support the application of marshalling in the case at bar.

15. The doctrine of marshalling should be applied in this case for the following reasons:

(a) Cameron Stephens has two funds available to satisfy its debt - security on both the Kingston Property and the Toronto Properties.

(b) 247 Ontario has security on only the Kingston Property.

(c) Requiring Cameron Stephens to first realize on the Toronto Properties would not prejudice its ability to recover its debt.

(d) Failing to apply marshalling could result in 247 Ontario's security being discharged and defeated if Cameron Stephens chooses to realize solely or primarily on the Kingston Property.

16. Cameron Stephens has security on both the Kingston Property and the Toronto Properties, while 247 Ontario has security only on the Kingston Property. The doctrine of marshalling should be invoked to require Cameron Stephens to pursue its remedies

against the Toronto Properties before the Kingston Property. There is no prejudice to third parties.

17. In this case, no prejudice to third parties would result from applying marshalling in this case. Cameron Stephens would still be able to fully recover its debt, just in a particular order that preserves 247 Ontario's security interest.

18. While the Receiver has indicated it intends to sell both properties, maintaining the proceeds in separate accounts does not negate the applicability of marshalling. The doctrine can still be applied at the distribution stage by requiring the Toronto Property proceeds to be applied to the Cameron Stephens debt before the Kingston Property proceeds.

PART IV - ORDER REQUESTED

19. 247 Ontario respectfully requests an order that:

(a) A declaration that the doctrine of marshalling be applied to require Cameron Stephens to first realize on its security against the Toronto Properties before realizing on the Kingston Property;

(b) If both properties are sold, the proceeds from the sale of the Toronto Properties shall be applied to the Cameron Stephens debt before any proceeds from the sale of the Kingston Property are applied;

(c) The Receiver be directed to maintain the sale proceeds from the Toronto Properties and Kingston Property in separate interest-bearing accounts pending further order of this Court regarding distribution; and

(d) The mortgage of Cameron Stephens on the Toronto Properties shall not be discharged.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of October, 2024.

Paul H. Starkman
of counsel for the 247 Ontario

SCHEDULE “A”

Re Allison [1995] O.J. No. 324

Cameron Stephens Mortgage Capital Ltd -and- **Conacher Kingston Holdings Inc. et al.**

Applicant

Respondent

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PROCEEDING COMMENCED AT
TORONTO

FACTUM OF THE RESPONDING PARTY, 2478659 ONTARIO LTD

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Our file: 24-0029

RCP-E 4C (May 1, 2016)