

CITATION: Trez v. Wynford, 2015 ONSC 2794
COURT FILE NO.: CV-14-10493-00CL
DATE: 20151210

SUPERIOR COURT OF JUSTICE – ONTARIO

IN THE MATTER OF Section 101 of the *Courts of Justice Act* and Section 243
of the *Bankruptcy and Insolvency Act*

RE: Trez Capital Limited Partnership and Computershare Trust
Company of Canada, Applicants

AND:

Wynford Professional Centre Ltd. and Global Mills Inc.,
Respondents

BEFORE: L. A. Pattillo J.

COUNSEL: *Shawn Pulver and Debora Miller-Lichtenstein,*
For Metro Toronto Condominium Corporation No. 1037

J. R. V. Marks and Dominique Michaud,
For Trez Capital Limited Partnership

Danielle Glatt,
For DBDC Spadina Ltd. et al.

HEARD: April 28, 2015

ENDORSEMENT

Introduction

[1] Metro Toronto Condominium Corporation No. 1037 (“MTCC 1037”) brings this motion seeking priority over a mortgage held by the applicants’ Trez Capital

Limited Partnership (“Trez”) and Computershare Trust Company of Canada (“Computershare”) on certain units in MTCC 1037 (the “Mortgage”).

[2] Specifically, MTCC 1037 seeks an order granting it an equitable mortgage over the units in question on account of arrears of common expense fees owing on the units and granting it priority over the Mortgage. In the alternative, MTCC 1037 seeks an order reviving its right to a lien against the units in question pursuant to s. 85 and 86 of the *Condominium Act*, 1998, S.O. 1998 (the “Act”) and granting it priority over the Mortgage.

[3] For the reasons that follow, MTCC 1037’s motion is dismissed in its entirety.

Background

[4] MTCC 1037 is a commercial condominium, created pursuant to the Act on October 6, 1992. It is comprised of 119 commercial units, 361 parking units and 2 storage units and is located at 18 Wynford Drive, Toronto, Ontario (the “Wynford Property”).

[5] Trez is a limited partnership that operates as a commercial mortgage lender. Computershare holds the mortgage security as the custodian for Trez on Trez loans.

[6] On or about February 7, 2011, Wynford Professional Ltd. (“Wynford”) purchased 83 condominium units and 297 parking spaces in MTCC 1039 (the “Wynford Units”). Wynford was controlled by Norma Walton (“Norma”) and her husband Ronauld Walton (“Ronauld”) (collectively the “Waltons”) who, at the time of the events in issue, were both lawyers in good standing with the Law Society of Upper Canada.

[7] Upon the purchase of the Wynford Units, Wynford, as the owner of the majority of the units in MTCC 1037, assumed control of its board of directors (the “Board”) and management. The Waltons became officers and directors of the Board. Norma was the President and Chairman of the Board and Ronauld was the Secretary. The other directors, who were independent, were Dr. Stanley Bernstein (“Dr. Bernstein”), a business partner of the Waltons, George Habib, the president and Chief Executive of an association which owns units in MTCC 1037 (“Habib”) and Jonathan Griffiths, a lawyer who also owns a unit in MTCC 1037. Dr. Bernstein has subsequently denied any knowledge that he was appointed a director.

[8] MTCC 1037 also appointed the Rose and Thistle Group Inc. ("Rose and Thistle"), a company controlled by the Waltons, as property manager of the Wynford Property.

[9] In or around February 2013, Wynford approached Trez about providing mortgage financing to enable it to refinance the Wynford Units. Trez had a pre-existing business relationship with the Waltons and Rose and Thistle. On February 19, 2013, Trez issued a commitment letter to Wynford agreeing to lend it \$9,850,000 (the "Loan") on terms and conditions set out therein (the "Commitment Letter"). The Commitment Letter was agreed to by Wynford.

[10] Following due diligence undertaken by both Trez and its lawyers, the Loan was fully advanced to Wynford on March 7, 2013. As security for the Loan, Wynford provided, among other things, a charge/mortgage to Computershare which was registered in Land Titles as a first position on the Wynford Units (the "Mortgage").

[11] Prior to closing, Trez received two separate status certificates from MTCC 1037 dated March 6, 2013 (the "Status Certificates") signed by Norma in her capacity as President of MTCC 1037 and a statutory declaration, also dated March 6, 2013, sworn by Norma on behalf of Wynford (the "Statutory Declaration").

[12] The Status Certificates were in relation to the condominium units and the parking units respectively and, among other things:

- a) stated that Wynford was not in default of payment of common element fees for the Wynford Units;
- b) appended a list of all the Wynford Units which clearly stated under the column "Common Expenses Payment" that the Wynford Units were not in default; and
- c) stated that the MTCC 1037 reserve fund was in good order.

[13] The Statutory Declaration stated, among other things, that:

- a) Norma was unaware of any corporation who would have any claim or interest in the Wynford Property that is adverse or inconsistent with Wynford's title to the Wynford Units;

- b) there were no special assessments contemplated by MTCC 1037 and there were no legal actions pending or in conflict by or against MTCC 1037;
- c) Wynford had complied with all terms, conditions, rules and regulations contained in the respective Condominium Declaration, By-Laws and Regulations since Wynford purchased the Wynford Units; and
- d) the representations made to Trez in the Commitment Letter and the other related security arising therefrom was true and accurate.

[14] As a result of a dispute which arose between the Waltons and Dr. Bernstein in respect of Rose and Thistle, Trez applied for and obtained an order dated January 5, 2013, appointing a Manager of Wynford and 31 other companies related to Rose and Thistle.

[15] In or around December 2013, MTCC 1037's evidence is that the minority directors of the Board learned that the Waltons potentially had been negligent or worse fraudulent and acted in bad faith in their role as directors and officers of MTCC 1037. Subsequently, at a court ordered annual general meeting of MTCC 1037 held on February 13, 2014, the Waltons were removed as directors and a new board of directors was elected.

[16] It was at the February 13, 2014 AGM that the MTCC 1037 unit owners say that they learned for the first time that Wynford was in arrears of payment of its common element fees and that no statutory lien for common element fee arrears had been registered against the Wynford Units. MTCC 1037's evidence is that the new board did not learn the exact amount of the arrears until sometime in March 2014.

[17] By order dated April 2, 2014, the Wynford Units were removed from the Manager and Collins Barrow Toronto Limited was appointed receiver of Wynford (the "Receiver").

[18] In May 2014, the Receiver made payment of Wynford's common element fee arrears to MTCC 1037 for the months of February, March and April 2014. The Receiver then continued to keep Wynford's common element fees current.

[19] Wynford's common element fee arrears are \$1,284,508.23. Up to March 7, 2013, the date when the Loan was fully advanced and the Mortgage registered, Wynford's arrears were \$811,841.34.

[20] On March 27, 2015, in contemplation of the sale of the Wynford Units, the Receiver obtained an approval, vesting and distribution order from the court (the "Order"). The Order provided, in part, that \$1,284,508.23 was to be held in trust by the Receiver from the proceeds of the sale of the Wynford Units in respect of MTCC 1037's priority claim for common expense arrears and not paid until further order of the court.

[21] MTCC 1037 has commenced an action against, among others, the Waltons and have sought, among other things, the following declarations against them: that they acted fraudulently, negligently and in bad faith by failing to pay Wynford's share of its common expenses totaling \$1,284,508.23; that they acted fraudulently, negligently and in bad faith by failing, as controlling members of the Board, to lien the Wynford Units for arrears of the common element fees pursuant to s. 86 of the Act; and that they breached s. 37 of the Act by failing to act honestly and in good faith (the "Fraud Action").

[22] For the purposes of this motion, MTCC 1037 and Trez/Computershare have agreed to proceed on the presumption that MTCC 1037 will be able to subsequently establish its allegations of fraud, negligence and bad faith against the Waltons in the Fraud Action.

The Issues

[23] The issues on this motion, as framed by MTCC 1037, are:

- 1) Should MTCC 1037 be granted an equitable lien;
- 2) If MTCC 1037 is granted an equitable lien, does it take priority over the Mortgage; and
- 3) In the alternative, if an equitable lien is not granted, should MTCC 1037 be granted the right to revive its lien rights with respect to Wynford's common element fee arrears pursuant to ss. 85 and 86 of the Act.

Equitable Lien

[24] An equitable lien is a form of equitable charge upon property until certain claims are satisfied. It arises by operation of equity from the relationship of the parties, rather than by any act of theirs: *Snell's Equity*, 32nd edition, General Editor John McGhee (2010, Thomson Reuters) at Ch. 44-004, p. 1146.

[25] Equitable liens will be available in circumstances that would give rise to a constructive trust (such as breach of fiduciary obligation and breach of confidence) as well as circumstances outside the fiduciary context such as response to improvements made to land under mistake and in the context of indemnity insurance: Maddaugh and McCamus, *The Law of Restitution*, Looseleaf Edition, at pp. 5-45 and 5-46.

[26] MTCC 1037 submits that it is entitled to an equitable lien based on Wynford's unjust enrichment (not having to pay its 2012 and 2013 common expense fees) to MTCC 1037's corresponding detriment.

[27] Trez/Computershare submit that MTCC 1037's lien rights are restricted to the provisions of the Act which it has failed to comply with and accordingly, it is not entitled to an equitable lien.

[28] Part VI of the Act, sections 84 to 88 deal with common expenses.

[29] Section 84(1) of the Act provides that the owners shall contribute to the common expenses in the proportion specified in the declaration.

[30] Section 85 of the Act allows a condominium corporation to register a lien against an owner's unit for up to three (3) months of common expense fee arrears. If a certificate of lien is not registered on title during this time period, the lien expires. Once a certificate of lien is registered, s. 85(3) provides that all future unpaid common expense fee arrears are captured under the registered lien.

[31] Section 86 of the Act provides that a certificate of lien registered pursuant to s. 85 has priority over all mortgages registered against the unit in question provided that the condominium corporation complies with the notice provision in s. 86(3). That subsection requires that the condominium corporation shall, on or before the day the certificate of lien is registered, give written notice of the lien to everyone whose encumbrance is registered against the title of the unit affected by the lien.

[32] I agree with Trez/Computershare's submission. The Act clearly sets out MTCC's right to a lien for common expense arrears. As a result, it is not proper for the court to create an equitable lien in its place. The principle is analogous to case law under similar statutes, such as the *Construction Lien Act*, which have held the court cannot create an equitable lien where a statute has occupied the field by creating a lien for the same purpose. See: *Talbot v. Pawelzik*, [2005] O.J. No. 748 (S.C.J.) at para. 20 and *Rafat General Contractor Inc. v. 1015734 Ontario Ltd.* (2005), 81 O.R. (3d) 798 (S.C.J.).

[33] The purpose of ss. 85 and 86 of the Act is to safeguard the financial viability of the condominium corporation in a manner that balances the rights of all the stakeholders, including, among others, both the condominium corporation and mortgagees: *Toronto Standard Condominium Corp. No. 1908 v. Sefco Plumbing & Mechanical Contracting Inc.*, 2014 ONCA 696 (C.A.) at para. 41. To interfere with that balance by granting an equitable lien in circumstances where the statutory lien has expired, regardless of the reason, would be contrary to the purpose of Act.

Priority

[34] Even if an equitable lien was available, on the facts of this case, it would not have priority over the Mortgage.

[35] Section 93(3) of the *Land Titles Act*, R.S.O. 1990, c. L5 ("LTA") provides that when registered, a charge/mortgage takes priority over all unregistered interests in the land. An equitable lien is an unregistered interest.

[36] If the equitable lien arises as of the date of the court order, the Mortgage has priority, having been registered long before. Even if the equitable lien attaches as of the date of the arrears, I agree with Wilton-Siegel J. in *Romspen Investment Corporation v. Woods Property Development Inc.*, 2011 ONSC 3648 at para. 185 (reversed on other grounds, 2011 ONCA 817) that there is nothing in the language of s. 93(3) that permits an unregistered equitable lien to override its provisions.

[37] Further, and even if the doctrine of actual notice applies, the record establishes and I so find that Trez/Computershare did not have actual notice of MTCC 1037's equitable lien for common expense arrears. In my view, the record doesn't even establish constructive notice.

[38] As noted, prior to advancing the Loan, Trez did extensive due diligence, both by itself and through its lawyers. It had a prior business relationship with the Waltons and Rose and Thistle and had no basis to believe that there were any problems or issues in respect of them, Wynford and MTCC 1037. The Waltons

were involved in running a substantial successful real estate business at the time. Further, the fact that the Waltons were in control of Wynford and on MTCC 1037's Board was not unusual or cause for suspicion. They were just two of five directors and given the units that Wynford owned, it was not unusual that the Waltons would be on the Board and hold positions as officers of MTCC 1037. Finally, Trez received both the Status Certificates and the Statutory Declaration, which expressly stated that Wynford was not in default of its common expense fees.

[39] Both MTCC 1037 and Trez filed affidavits from condominium experts addressing the issue of Trez's due diligence and, in particular, the effect of the Status Certificates. MTCC 1037 retained Ms. Denise Lash, Chair of the Condominium Corporation Group at Aird & Berlis LLP. Trez retained Ms. Audrey Loeb, head of the Miller Thompson LLP's Condominium Practice Group. Both lawyers are well qualified based on experience to testify in respect of status certificates.

[40] Relying on s. 76 of the Act, Ms. Loeb states it is her opinion that it was reasonable for Trez and its counsel to rely on the Status Certificates and that they contained no representations which would raise suspicions on the part of counsel or Trez that would shift the onus to them to "look behind" the Status Certificates.

[41] Ms. Lash on the other hand states that there were several issues or potential issues, including significant breaches of the Act, which were clear on the face of the Status Certificates which should have alerted Trez and its counsel to potential issues with the information contained therein and given rise to further inquiry. In particular, Ms. Lash points to the non-arm's length relationships of the Walton to MTCC 1037 and Wynford; the failure to include a reserve fund balance in the Status Certificates within the time period prescribed by s. 76(1)(m)(ii) of the Act; and the failure to include current audited financial statements for MTCC 1037 with the Status Certificates as prescribed by s. 76(2)(i) of the Act.

[42] The Act contains detailed provisions to provide information to purchasers and mortgagees of both newly-built condominium units and re-sale units. For re-sale units, s. 76 of the Act provides for status certificates. Section 76(1) provides that the status certificate, which is a prescribed form, must contain a variety of organizational and financial information about both the unit and the corporation as a whole. In particular, s. 76(1)(i) requires a copy of the budget of the corporation for the fiscal year, the last annual audited financial statements and the auditors' report on the statements and s. 76(1)(m)(ii) requires the amount of the reserve fund no earlier than at the end of a month within 90 days of the date of the certificate.

[43] Section 76(6) provides:

The status certificate binds the corporation, as of the date it is given or deemed to be given, with respect to the information that it contains or is deemed to contain, as against a purchaser or mortgagee of a unit who relies on the certificate.

[44] In the present case, the Status Certificates specified an amount of the reserve fund as at December 31, 2010, a date some two years before the Status Certificates were issued. Further, the financial statements attached to the Status Certificates were for the year ending December 31, 2010. Ms. Lash states that because these documents were not in accordance with the Act's requirements for condominium corporations, that it should have raised red flags for Trez and its counsel requiring further inquiry.

[45] The issue here is the arrears of common element expense fees. The Status Certificates clearly stated there were no arrears of common element expense fees. Trez and its counsel were entitled to rely on that statement.

[46] In my view, the documents provided by the Act to be appended to the status certificate are provided for information purposes only. Section 76(4) of the Act provides that if the status certificate omits material information that it is required to contain, it shall be deemed to include a statement that there is no such information.

[47] I do not accept Ms. Lash's evidence that a purchaser is required to go behind the status certificate where the information provided is incomplete or missing and inquire further. The Act is clear that a purchaser or mortgagee is entitled to rely on the information contained in the status certificate.

[48] I agree with Ms. Loeb's statement at paragraph 16 of her February 20, 2015 affidavit where she states:

16. If the recipient of a status certificate were given the onus of confirming the statements by the condominium corporation by cross-referencing and analyzing the corporation's documents, then the very purpose of the status certificate would be severely diluted. Few, if any, purchasers or mortgagees would take any comfort in the status certificate if they knew that, at some point in the future, they may be held to account for their efforts to cross-check and verify the corporation's representations.

[49] In my view, for the reasons stated, I am satisfied that Trez and its lawyers carried out satisfactory due diligence in respect of the Loan. There was nothing in the Status Certificates that should have raised any concerns about MTCC 1037 or its financial situation and in particular Wynford's common expense fees. Trez was entitled to rely on the Status Certificates and particularly the explicit representation that Wynford had no common expense arrears.

[50] For the above reasons, I do not consider that MTCC 1037's criticisms of Trez's due diligence are well founded. As between Trez and MTCC 1037, it is the latter, in my view, that was in the better position to have discovered Wynford and the Walton's failure to pay common element fees. It is no answer to say that the minority directors were kept in the dark. As Board members they had a duty to "exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances" (the Act, s. 37(1)(b)). They should not have acceded full control of the Board to the Waltons. Nor should they or the unit holders have acquiesced in the failure to provide up to date financial statements.

Revival of the s. 85 Lien

[51] MTCC 1037 seeks, in the alternative, to revive its lien rights under ss. 85 and 86 of the Act pursuant to s. 134 of the Act.

[52] Section 134 of the Act provides that an interested party (including a condominium corporation) may make an application to the Superior Court for an order enforcing compliance with, among other things, the Act, a declaration or by-law. Section 134(3) gives the court wide remedial powers including granting relief that is "fair and equitable in the circumstances."

[53] In *Sefco*, the Court of Appeal considered the issue of whether a condominium corporation's s. 85 lien rights could be revived pursuant to s. 134 of the Act. The Court held that the s. 85 lien rights could not be revived because to do so was inconsistent with the purpose of the Act and the intention of the legislature.

[54] MTCC 1037 submits that *Sefco* can be distinguished on the basis that there was no allegation in that case of fraud, negligence and bad faith. In my view, the presence of fraud, negligence and bad faith is immaterial. Regardless of how the arrears arose, the revival of the lien would clearly upset the balance provided in the Act. Specifically, in this case it would deprive Trez/Computershare of proper and timely notice to enable it to consider all its options.

Conclusion

[55] For the above reasons, therefore, MTCC 1037's motion for priority over the Mortgage is dismissed. An order shall issue authorizing the Receiver to pay the monies held in trust pursuant to the Order to Trez/Computershare based on their priority.

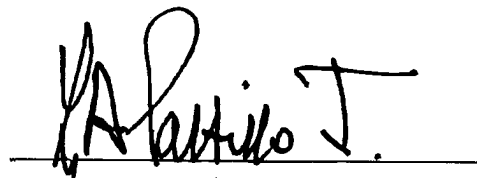
[56] MTCC 1037 submitted that the issues in the case were novel and that there should be no award of costs. I disagree. Having regard to the decision in *Sefco*, I do not consider that the issues can be characterized as novel. Trez/Computershare was successful on the motion and are entitled to their costs on a partial indemnity scale. Both parties have provided Cost Outlines.

[57] Trez/Computershare seeks costs totaling \$66,215.58, made up of fees of \$42,131.50, disbursements of \$16,466.35 and HST. MTCC 1037 seeks costs totaling \$28,595.37 made up of fees of \$16,149, disbursements of \$9,171.50 and HST. Both parties' disbursements were higher than usual due to the expert reports both sides retained.

[58] Upon the exchange of Cost Outlines, counsel for Trez/Computershare conceded that his fee was high and submitted that the fee should be the difference between the fee amount claimed by both parties but that the disbursements should remain the same for each party. Counsel for MTCC 1037 had no issue with that position.

[59] Having regard to the issues raised and the work done, I am satisfied that a fee of \$29,140.25 (the midpoint between the two fees claimed) is fair and reasonable. I am also of the view that the disbursements claimed by Trez/Computershare are also reasonable. Ms. Loeb's fee is somewhat higher than Ms. Lash's but given the reports, I do not consider that to be unreasonable.

[60] Accordingly, Trez/Computershare's costs are fixed at \$51,535.23 inclusive of disbursements and taxes.



L. A. Pattillo J.