

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

B E T W E E N:

CANADIAN IMPERIAL BANK OF COMMERCE

Applicant

and

1299746 ONTARIO INC. o/a COMPUQUEST2000 and
2252709 ONTARIO INC.

Respondent

**BRIEF OF AUTHORITIES OF
GRANT THORNTON LIMITED,
(in its capacity as Receiver and Trustee)
(Hearing July 17, 2017)**

July 12, 2017

MINDEN GROSS LLP
Barristers and Solicitors
2200 - 145 King Street West
Toronto, ON M5H 4G2

Catherine Francis (LSUC# 26900N)
cfrancis@mindengross.com
Tel: 416-369-4137
Fax: 416-864-9223

Lawyers for Grant Thornton Limited, in its
capacity as Receiver of Compuquest and
7472 Ashburn Road and in its capacity as
Trustee in Bankruptcy of Compuquest and
Gary Bodimeade

TO: **MILLER THOMSON LLP**
Scotia Plaza
40 King Street West, Suite 5800
P.O. Box 1011
Toronto, ON M5H 3S1

Greg Azeff (LSUC #: 45334C)
Tel: 416-595-2600
Fax: 416-595-8695
Email: gazeff@millerthomson.com

Stephanie De Caria (LSUC #: 68055L)
Tel: 416-595-2652
Fax: 416-595-8695

Lawyers for the Respondents and Gary Bodimeade

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TAB 1

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Ontario Securities Commission, Applicant

AND:

Lance Kotton, Titan Equity Group Ltd., Executive Leasing Capital Corp., Executive Leasing Inc., Titan 230 Major Mack Inc., Titan 10703 Bathurst Inc., Shan-Kael Group Inc., Tread Finance Corp., 230 Major Mack Holdings Inc., Titan 10703 Bathurst Holdings Inc., Titan Real Estate Acquisition & Development Corp., Titan Real Estate Equities Inc., 2216296 Ontario Inc. and 2302604 Ontario Inc., Respondents

BEFORE: Mr. Justice H.J. Wilton-Siegel

COUNSEL: *H. Chaiton* and *M. Kril-Mascarin*, for the Receiver

T. Corsianos, for Deighton Warner

HEARD: February 27, 2017

ENDORSEMENT

[1] Grant Thornton Limited, in its capacity as the receiver of the debtor companies in this proceeding (the “Receiver”), seeks an order declaring that Deighton Warner (“Warner”) does not have an equitable mortgage against the property referred to as “The Oxford on Bathurst” (the “Property”) and has no claim against either Titan 10703 Bathurst Inc. (“Bathurst Inc.”) or Titan 10703 Bathurst Holdings Inc. (“Bathurst Holdings”).

[2] Warner filed a claim in the amount of \$400,500 against Titan Equity Group Ltd. (“Titan”). He subsequently advised that his investment in Titan was intended to be in respect of a pooled mortgage on the Property. Accordingly, he now asserts an equitable mortgage on the Property and seeks the right to amend his claim to include claims against Bathurst Holdings and Bathurst Inc. The Receiver opposes Warner’s motion.

The Factual Background

[3] In December 2012, Warner attended at the offices of Titan and discussed two investment offerings of Titan in connection with the development of the Property – an equity investment through the investment in shares of Bathurst Holdings, the parent company of Bathurst Inc.

which was the owner of the Property, and an investment in unsecured debentures of TREAD Finance Corp. (“Tread”), the proceeds of which financing were to be loaned to Bathurst Holdings to be used in the development of the Property. Warner rejected both investment opportunities. However, his counsel says that the use of the funds in both offerings, and in particular in respect of the Tread debentures, shows that at all times Warner was interested in an investment in the Property. I do not find this evidence to be useful in the determination herein.

[4] Warner says that, in the spring of 2013, he inquired about secured offerings for the Property. He was first sent a general notice sheet regarding pooled mortgage investments through Titan (a “PMI”). No mention was made of the Property on this notice sheet. He was then sent a notice sheet regarding a syndicated mortgage investment offering of \$2,400,000 offered by Titan to be secured on the Property (an “SMI”). The evidence indicates that the only pooled mortgage offerings of Titan that were ever completed pertained to two other projects of Titan. There is no evidence that Titan ever completed any offering of syndicated mortgages on the Property or on any other property.

[5] Unfortunately, Warner became seriously ill in July 2013. He was hospitalized at that time and again in October 2013. He has not fully recovered to date. It appears that he may have initiated a transfer of USD \$285,000 to Lance Kotton (“Kotton”), the president of Titan, shortly before he was hospitalized but the transfer was never completed.

[6] In November 2013, Warner completed the transfer of USD \$285,000 to a personal account of Kotton in New York. At about the same time, he signed a form faxed to him by Titan that was entitled a “New Reservation Application” (the “NRAP”). Warner says the NRAP “makes clear that the nature of [his] investment into Titan would be secured via a mortgage.” In particular, Warner relies on certain disclosure on page 3 of the document pertaining to Titan syndicated mortgage products and containing an acknowledgement regarding the licensed mortgage/agent providing mortgage services in respect of such products.

[7] Warner was never provided with any evidence that a mortgage was registered on the Property in his favour, whether as a pooled mortgage or otherwise. In November 2014, in connection with a house purchase, he obtained a letter signed by Kotton confirming a \$300,000 investment with Titan. The letter indicated that his investment was in a 36-month debt instrument. It also described Warner as an “authorized agent” of Titan. Concurrently, Warner was asked to sign an acknowledgment letter from Titan dated November 26, 2014. In this document, Warner acknowledged, in effect, that his investment was placed in a 36-month debt instrument of Tread (or another Titan company with a similar name), maturing June 2016. He now says that this is inaccurate.

[8] In December 2014, Warner also attempted without success to obtain documentation from Titan pertaining to his investment. In his email dated December 11, 2014, however, he states that “...my original documents are somewhere in storage and I have no idea where exactly as various family members moved my things while I was in hospital.” This suggests that there may have been other investment documentation that is not before the Court.

[9] Based on its review of the records of the Titan group of companies, the Receiver says it is unable to confirm that the funds advanced to Kotton were, in turn, advanced to Bathurst Inc. for use in respect of the Property or to another Titan entity. Warner is not shown as an investor in any of the Titan group companies and the use of the monies he wired to Kotton remains unclear.

Applicable Law

[10] The parties agree that the decision of the Court of Appeal in *Elias Markets Ltd., Re*, [2006] O.J. No. 3689 at paras. 63-65 sets out the applicable principles pertaining to equitable mortgages:

An equitable mortgage is distinct from a legal mortgage. “An equitable mortgage is one that does not transfer the legal estate in the property to the mortgagee, but creates in equity a charge upon the property”: A.H. Oosterhoff & W.B. Rayner, *Anger and Honsberger: Law of Real Property*, 2d ed. (Aurora, Ont.: Canada Law Book) at 1643.

The concept of an equitable mortgage would seem to find its foundation in the equitable maxim that “equity looks on that as done which ought to be done”. Historically, the courts of equity mitigated the rigour of the common law, tempering its rules to the needs of particular cases on principles of justice and equity. The common law courts were primarily concerned with enforcing the strict legal rights of the parties, whereas equity was a court of conscience; it would step in to prevent an injustice that would otherwise arise from the strict application of the law

In essence, the concept of an equitable mortgage seeks to enforce a common intention of the mortgagor and mortgagee to secure property for either a past debt or future advances, where that common intention is unenforceable under the strict demands of the common law.

The Positions of the Parties

[11] Warner’s principal position is that the NRAP, together with the PMI and SMI notice sheets received in the spring of 2013, “clearly evince a mutual agreement between Titan, on the one hand, and [Warner], on the other, for the registration of a charge on the [Property] as security for the investment that [Warner] would make with Titan.” As an alternative, Warner suggests that the Court should impose an equitable lien on the Property in his favour.

[12] The Receiver submits that there is no documentary evidence that establishes a common intention of Warner and Kotton, on behalf of Bathurst Inc., to secure a mortgage on the Property in favour of Warner as security for repayment of the monies transferred by Warner to Kotton. As mentioned, the Receiver also says that there is no evidence that any monies were advanced to Bathurst Inc. from the monies transferred by Warner to Kotton. The Receiver further suggests, on the basis of certain additional documents that it has located, that Warner had significant involvement with the Titan group of companies that extended beyond being a mere innocent

investor, such that he would have known or ought to have known of the nature of Titan's investment products. On this basis, the Receiver says that the circumstances do not warrant the Court's equitable intervention to find an equitable mortgage or to impose an equitable lien.

Analysis and Conclusions

[13] On this motion, Warner, as the claimant, bears the onus of establishing on a balance of probabilities that he and Kotton had a common intention to secure the monies advanced by Warner to Kotton against the Property.

[14] For this purpose, it is not enough to assert such a common intention and to rely on the decision of the Receiver not to cross-examine on this assertion of mixed fact and law. Nor is it sufficient to establish Warner's subjective intent. Whether an agreement was reached to grant Warner a mortgage in the Property which was never completed by Bathurst Inc. is a question to be determined by objective evidence in the sense of what a reasonable person in the position of the parties would have had in mind rather than subjective evidence of the parties' actual intentions. The test to be applied is whether a reasonable bystander observing the parties would conclude that both parties intended to enter into a legal agreement to grant Warner a mortgage on the Property to secure his investment.

[15] It is clear that Warner was defrauded by Kotton. I have considerable sympathy for him, particularly to the extent that his medical condition prevented him from attending to the proper documentation of his investment prior to his transfer of USD \$285,000 to Kotton. However, I find that he has not satisfied the onus on him. While Warner may have intended to invest in a pooled mortgage on the Property, there is no evidence of a common intention, that is, of any intention on the part of Kotton, on behalf of Bathurst Inc., to effect such a mortgage for the following four reasons.

[16] First, Warner relies on the NRAP, together with the PMI and SMI notice sheets received six months earlier, as evidence of such an agreement. However, the NRAP is clearly not an application for a pooled fund mortgage product of Titan, much less an application to invest in a pooled mortgage in the Property. The Property is never referred to in the NRAP. Indeed, the NRAP is not an application form for any particular investment product of Titan. To the contrary, the NRAP also contains a paragraph which specifically contemplates the execution of specific loan/subscription documents and other actions before Titan will ensure participation in any particular project. It also includes an express acknowledgement that it applies to "the purchase of investment products made subsequently". The NRAP appears to be no more than an administrative form to be signed by prospective new clients that is necessary, among other things, to enable funds to be transferred to Titan.

[17] Second, as a related matter, Warner was sophisticated in financial matters. He would have been aware that he had not executed any documentation constituting an application for a specified investment or the necessary loan documentation contemplated by the NRAP when he sent his money to Kotton. Moreover, it appears that Warner had already become an "authorized agent" of Titan by the time of payment of his monies to Kotton. This is evidenced by the fact that

he received an agent's commission of \$5,800 for his own investment. I do not take this to imply any involvement on his part that would disentitle him to any relief sought on equitable grounds. However, as an agent, he would have known of the specific products offered by Titan at that time. He would also have known that Titan required more than an executed NRAP to place an investor in a specific investment product. Accordingly, he would have known that there was no public offering of a pooled mortgage product on the Property at the time and that any such investment would have required particularized documentation which was not executed before he sent Kotton his funds.

[18] Third, it is also important to note that Warner says that he intended to invest in a pooled mortgage product in order to have a mortgage registered in his name. While the SMI notice described above refers to a proposed offering of a syndicated mortgage product, there is no evidence of any pooled mortgage offering of Titan in the Property or otherwise in 2013. At best, Warner's actions amounted to giving Kotton his money in the expectation that the Titan group might find other investors sufficient to create such a mortgage product failing which it would be used for some other investment.

[19] Fourth, while Warner says he was given assurances at the time that he executed the NRAP and sent Kotton his monies that he would be provided with a fully executed copy of the NRAP and registered mortgage documents, there is no evidence to this effect.

[20] Lastly, the documentation that does exist, and Warner's actions in connection therewith, contradict his position on this motion. None of the documentation that he received subsequent to his transfer of monies to Kotton refer in any way to the Property. Nor is there any correspondence from him to Titan setting out the form of documentation that he expected to receive that would support his position. Moreover, he signed the acknowledgment dated November 26, 2014, which expressed his investment to be in Tread debentures. The assertion that his investment took the intended form of a pooled mortgage on the Property was not made until after the receivership order in this proceeding, when it became clear that there would be no recovery on the Tread debentures. These circumstances cast doubt on the reliability of Warner's claim.

[21] As mentioned, in the alternative, Warner seeks the imposition of an equitable lien on the Property in his favour. However, in the absence of any indication that Bathurst Inc. received any of the monies paid by Warner to Kotton, there is no basis for imposing such a lien in Warner's favour.

[22] Warner's counsel also suggested that he should be given an opportunity to review the books and records of the Titan group of companies to verify the Receiver's finding that there is no evidence that Bathurst Inc. received any of the monies transferred to Kotton. This request is denied for two reasons. First, the Receiver is an agent of the Court rather than a representative of any of the parties. There is no basis for suspecting that the Receiver's investigation was faulty in any way. In the absence of any indication of the possibility of an error on the part of the Receiver, the Court must rely on the investigation of the Receiver. Second, Warner has had ample opportunity to seek such relief prior to the hearing of this motion and has chosen not to do

so until now. This motion is directed to permitting a distribution to the creditors of the debtor companies. These creditors are also entitled to consideration. In the absence of any evidence supporting the request, the equities of the situation compel a denial of the request on the basis that it is out of time.

[23] The evidence before the Court suggests that, due to the combination of his illness and his wish to place his funds in an investment that promised a very favourable rate of return, Warner sent his money to Kotton trusting that Kotton would put it in a suitable investment – possibly but not necessarily the Property. Kotton appears to have abused that trust by appropriating the money for his personal use or for the general corporate use of the Titan group of companies. In any event, there is no evidence of a common intention of Warner and Kotton to secure Warner's investment by way of a mortgage on the Property.

[24] Based on the foregoing, the Receiver is entitled to a declaration that Warner does not have a claim against either Bathurst Inc. or Bathurst Holdings and is not entitled to an equitable mortgage in his favour secured against the Property.

Wilton-Siegel J.

Date: March 22, 2017

TAB 2

Section 95

Preferences

95 (1) A transfer of property made, a provision of services made, a charge on property made, a payment made, an obligation incurred or a judicial proceeding taken or suffered by an insolvent person

(a) in favour of a creditor who is dealing at arm's length with the insolvent person, or a person in trust for that creditor, with a view to giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy; and

(b) in favour of a creditor who is not dealing at arm's length with the insolvent person, or a person in trust for that creditor, that has the effect of giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is 12 months before the date of the initial bankruptcy event and ending on the date of the bankruptcy.

Preference presumed

(2) If the transfer, charge, payment, obligation or judicial proceeding referred to in paragraph (1)(a) has the effect of giving the creditor a preference, it is, in the absence of evidence to the contrary, presumed to have been made, incurred, taken or suffered with a view to giving the creditor the preference — even if it was made, incurred, taken or suffered, as the case may be, under pressure — and evidence of pressure is not admissible to support the transaction.

B E T W E E N

CANADIAN IMPERIAL BANK OF COMMERCE

-and-

1299746 ONTARIO INC. o/a COMPUQUEST2000, et al.

Applicant

Respondents

Court File No. CV-16-11369-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

Proceeding commenced at Toronto

BRIEF OF AUTHORITIES

MINDEN GROSS LLP
Barristers and Solicitors
2200 - 145 King Street West
Toronto, ON M5H 4G2

Catherine Francis (LSUC# 26900N)
cfrancis@mindengross.com
Tel: 416-369-4137
Fax: 416-864-9223

Lawyers for Grant Thornton Limited, in its capacity as
Receiver of Compuquest and 7472 Ashburn Road and
in its capacity as Trustee in Bankruptcy of Compuquest
and Gary Bodimeade