Court of Appeal File Number:
Court File No.: CV-18-00608086-00CL

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

ONTARIO SECURITIES COMMISSION

Applicant

-and-

MONEY GATE MORTGAGE INVESTMENT CORPORATION

Moving Party on Motion/Respondent on Appeal

APPLICATION UNDER

Sections 126 and 129 of the *Securities Act* as Amended

NOTICE OF APPEAL OF THE NON-PARTY RESPONDENT 2496050 ONTARIO INC.

THE NON-PARTY RESPONDENT APPEALS to the Court of Appeal from the judgment of Justice C. Gilmore (the "Motion Judge") dated February 5, 2020 made at the Commercial List in Toronto (the "Judgement").

THE APPELLANT ASKS that the Judgment be set aside and the matter be directed to a trial of an issue, or in the alternative, the motion dismissed.

THE GROUNDS OF APPEAL are as follows:

1. The Judgement appealed from is a final order as it relates to the claim by the Appellant that the mortgage previously held by MGMIC was invalid, as it was procured by fraud.

2. The Judgement was ordered in the context of a motion for directions brought by Grant Thornton Ltd ("GTL") in its capacity as Receiver of the assets and undertakings of Money Gate Mortgage Investment Corporation ("MGMIC").

3. GTL was appointed pursuant to sections 126 and 129 of the *Securities Act* and not under the *BIA*.

4. Appeal lies to this court under Rule 61.01 of the *Rules of Civil Procedure*.

5. The Judge erred in law and principle in determining, on a summary basis, that MGMIC was entitled to the proceeds of sale attributable to the Mortgage with instrument number AT4588484 that was, prior to the sale of 558 Dovercourt Rd, previously registered in the name of MGMIC against that Property, on a motion for advice and directions brought by Grant Thornton Ltd, as Receiver of MGMIC.

6. Furthermore, in granting the Judgement the court made palpable and overriding errors in making factual findings that were not supported in the evidence before the court.

7. The Court made, *inter alia*, the following intertwined and intra-connected errors of law and principle:

   a. Treating Money Gate Mortgage Investment Corporation as a pass-through entity disregarded and **not separate from its preferred shareholders**, instead of treating it properly as a corporation with an identity unique from its preferred shareholders, which operated through its directors Ben and Payam Katebian;

b. As a result of that error, failing to deal with the issue of whether the knowledge and intent of Payam and/or Ben Katebian is imputed to MGMIC, contrary to this Court's decision in *Livent Inc. v. Deloitte & Touche*, 2016 ONCA 11;

c. As result of the above errors of law, failing to require any response or evidence from MGMIC on the issue of whether or not Payam and Ben Katebian used MGMIC to deliberately defraud the Appellant (given Justice Gilmore's findings that the Katebians' intention was irrelevant to MGMIC), which failure to require evidence from MGMIC at all on the key issue is contrary to this court's holding in *Johnston v. Futerman,* 2012 ONSC 4092;

d. Failing to recognize that MGMIC has the burden of leading evidence showing that there is no genuine issue requiring a trial before shifting the burden to the Defendant to show that there is a genuine issue requiring a trial;

e. Finding that the Appellant should have called Ben or Payam as witnesses under 39.03, which finding has the effect of shifting the burden to the Appellant in circumstances where MGMIC as moving party has the burden to prove its own case;

f. Not accepting the argument of the Respondent, that *res ipsa loquitur* that Ben and Payam intentionally defrauded the Appellant, where there was no evidence from MGMIC or any denial from MGMIC that the same had occurred, because of the errors in a, b, c, d, and e above;

g. All of which errors compounded and led to the Motion Judge, granting MGMIC (what amounts to) partial summary judgement, where the issues and findings made by the court in the Judgement will have a continuing effect outside the motion for summary judgement, and where: 1) it was not the case that every party to the litigation had been served with the summary judgment motion material 2) there was a real risk of duplicative proceedings and inconsistent factual findings, including with respect to the Appellants Respondent's claim with court file no CV-19-00613363-0000, all of which are contrary to this court's holding in *Butera v. Chown, Cairns LLP*, 2017 ONCA 783 and contrary to this court's recent holding in *Service Mold + Aerospace Inc. v. Khalaf*, 2019 ONCA 369 (CanLII);

h. Finding that MGMIC had an equitable claim on the basis of its errors in a and b above;

i. The court's reasons are inadequate as the court did not properly enunciate the legal test applied to grant judgement and did not explicitly aver to any *Rule of Civil Procedure* or other legislative provision in granting the judgement;

j. The Motion Judge speculated as to whether or not the conduct of the Respondent was "consistent with someone who had been defrauded", and the same was not an inference or grounded in any evidence in the record, and subsequently based a factual finding on such speculation without any opinion evidence adduced by MGMIC, and without any evidentiary foundation for same;

k. The Motion Judge further erred by accepting counsel submissions as evidence and making a finding that Appellant's counsel had consented to the matter being decided on a motion for directions, merely because the court had set a hearing date at a 9:30 appointment where counsel appeared, rather than properly accepting the same as evidence that counsel was aware of the hearing date, but not evidence that counsel had consented to the matter being determined summarily, especially where the Motion Record served by MGMIC had not been served at the time of the 9:30 appointment, and counsel could not have known that MGMIC would not serve any evidence in support of its motion at that time; and

l. Such further and other grounds as counsel may advise and this court permit

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:

1) Rule 61.01 of the Rules of Civil Procedure;

2) The order is final, and leave is not required

February 10, 2020

DJD LAW PROFESSIONAL CORPORATION
1186 Eglinton Avenue West
Toronto, Ontario M6C 2E3

Eli Karp
Tel: (416) 769-4107
Fax: (416) 352-7638
ek@djdlaw .ca

Lawyer for the Appellant

TO: **Chaitons LLP**
5000 Yonge St, 10th Floor,
Toronto, Ontario, Canada, M2N 7E9

Maya Poliak
Tel: 416.218.1161
Fax: 416.218.1844
Email: Maya@chaitons.com

ONTARIO SECURITIES COMMISSION v **MONEY GATE MORTGAGE INVESTMENT CORPORATION**
Applicant — Respondent

Court of Appeal File No.:
Court File No.: CV-18-00608086-00CL

COURT OF APPEAL FOR ONTARIO

NOTICE OF APPEAL

DJD LAW
PROFESSIONAL CORPORATION
1186 Eglinton Avenue West
Toronto, Ontario M6C 2E3

Eli Karp (LSO #54317P)
Tel: (416) 769-4107
Fax: (416) 352-7638
ek@djdlaw.ca

Lawyer for the non-party,
2496050 Ontario Corp.