

# COURT OF APPEAL FOR ONTARIO

CITATION: Ontario Securities Commission v. Money Gate Mortgage Investment Corporation, 2020 ONCA 812

DATE: 20201216

DOCKET: C68064

MacPherson, Zarnett and Jamal JJ.A.

BETWEEN

Ontario Securities Commission

Applicant

and

Money Gate Mortgage Investment Corporation

Respondent

Eli Karp, for the non-party appellant, 2496050 Ontario Inc.

Maya Poliak, for the respondent, Grant Thornton Limited in its capacity as court-appointed receiver of Money Gate Mortgage Investment Corporation

Heard: November 26, 2020 by video conference

On appeal from the order of Justice Cory A. Gilmore of the Superior Court of Justice, dated March 17, 2020, with reasons reported at 2020 ONSC 783.

**Zarnett J.A.:**

## INTRODUCTION

[1] The appellant, 2496050 Ontario Inc., appeals from a final determination of rights made on a motion for advice and directions in receivership proceedings. The motion judge's order declared that a mortgage (the "254 Mortgage") in favour of

the company in receivership, Money Gate Mortgage Investment Corporation (“Money Gate”), was valid and enforceable. It also ordered that funds realized from the sale of the property against which the mortgage had been registered (the “Sale Proceeds”) be paid to the respondent, Grant Thornton Limited, Money Gate’s court-appointed receiver (the “Money Gate receiver”), for distribution.

[2] The 254 Mortgage was a second mortgage granted by a company in which the appellant is a shareholder, 254656 Ontario Limited (“254”), as security for a loan that, prior to its receivership, Money Gate had made to 254. Upon the sale of the property secured by the mortgage, funds (that is, the Sale Proceeds) were available in excess of what was required to be paid to the first mortgagee.

[3] The Money Gate receiver’s position was that the Sale Proceeds were an asset of Money Gate and should be available for distribution to those with proper claims against Money Gate’s assets, primarily the investors who had funded Money Gate’s mortgage lending activities.

[4] The appellant took the position that the 254 Mortgage was invalid because: (i) 254 required unanimous shareholder approval to borrow and grant security; (ii) the appellant had not consented to the 254 Mortgage, or had only consented conditionally and the condition (that it receive a portion of the mortgage proceeds) was not fulfilled; and (iii) fraud was involved.

[5] On a motion for advice and directions by the Money Gate receiver, the motion judge found that the validity of the mortgage could be determined in a summary fashion. She found that the mortgage was valid, as there had been shareholder consent. Furthermore, even if the appellant had consented on the condition that 254 would pay it a portion of the loan proceeds when received, the non-fulfillment of the condition did not affect the validity of the mortgage but was an issue between the appellant and 254's other shareholder. And although the appellant alleged fraud, the motion judge held that there was no evidence to support this contention.

[6] The appellant argues that the motion judge was not entitled to decide the matter summarily, and that in any event her decision was legally flawed, made on the basis of factual findings that were unavailable on a paper record, and improperly granted what was, in effect, partial summary judgment. The appellant asks us to direct what it says the motion judge should have directed—a trial.

[7] For the reasons that follow, I would dismiss the appeal.

[8] It is important, given the exigencies of receivership proceedings, that a court supervising the receivership decide issues on a summary basis, rather than pursuant to the costlier and more time consuming process of a trial, in cases where a summary process can determine the merits of a dispute fairly and justly. The motion judge did not err, in deciding that this matter could be dealt with summarily,

by borrowing from the approach applied on motions for summary judgment, an approach designed to ensure that a case is disposed of without a trial only where to do so will result in its fair and just determination.

[9] The factual findings the motion judge made were available on the record and her rejection of the appellant's argument of invalidity based on an unfulfilled condition of consent was free of legal error.

[10] The principles that inform when a court should decline to grant what would be a partial summary judgment ought to be applied in the receivership context with due consideration for the time sensitive and multi-stakeholder nature of a receivership proceeding. The motion judge did not infringe any principle against granting partial summary judgment in the context of this case.

## **BACKGROUND**

### **(i) Money Gate's Receivership**

[11] Money Gate was a mortgage investment corporation that lent money secured by residential and commercial mortgages. Between August 2014 and April 2017, in order to fund its activities, it raised approximately \$11 million from multiple investors by selling them preferred shares. However, Money Gate never filed a prospectus, was not a reporting issuer, and was not registered with the Ontario Securities Commission ("OSC") in any capacity.

[12] In April 2017, the staff of the OSC (“Staff”) commenced an investigation of Money Gate, an affiliated corporation, and two individuals, Ben and Payam Katebian (the “Katebians”), who were Money Gate’s directors and officers. A temporary cease trade order was made by the OSC, preventing Money Gate from raising more capital. In December 2017, Staff filed a Statement of Allegations against the targets of its investigation alleging that they had misled investors and engaged in unregistered trading and illegal distributions of securities. In October 2018, the allegations were expanded to include diversion of corporate funds.

[13] The OSC has the power to apply to the Superior Court for the appointment of a receiver of a company where the appointment is in the best interests of the company’s creditors, security holders, or subscribers, or is appropriate for the due administration of Ontario securities law: *Securities Act*, R.S.O. 1990, c. S.5, ss. 129 (1) and (2).

[14] In November 2018, the OSC made such an application in respect of Money Gate. The affidavit in support of the application stated that as at November 2, 2018, Money Gate’s loan portfolio consisted of nine outstanding loans, the majority of which were in default, and that the portfolio had a realizable value that was significantly less than the amounts Money Gate had raised from investors.

[15] On November 6, 2018, Hailey J. made an order appointing the respondent as receiver in relation to all of the assets, undertaking and properties of Money

Gate, including any mortgages in favour of Money Gate. The Money Gate receiver was given broad powers to take possession and control of Money Gate's assets, and collect any money owing to it. Proceedings against the Money Gate receiver were not to be taken or continued without its consent or leave of the court. The Money Gate receiver was given the power to take or defend proceedings relating to Money Gate's assets, and was granted leave to apply to the court for advice and directions in the discharge of its powers and duties.

**(ii) The 254 Mortgage**

[16] One of the mortgages that Money Gate held at the time of the receivership was the 254 Mortgage. Using funds that had been raised from investors, Money Gate advanced \$611,000 to 254's lawyers on May 29, 2017. On June 5, 2017, the 254 Mortgage, signed by 254's sole director, was registered as a second mortgage against property owned by 254 on Dovercourt Road, Toronto (the "Dovercourt Property"), charging that property in favour of Money Gate as security for the repayment of the loan.

[17] It is not in dispute that the funds advanced by Money Gate to 254 were not repaid.

**(iii) 254**

[18] 254 was incorporated in November 2016. Until May 24, 2017, its sole shareholder was Payam Katebian.

[19] On May 15, 2017, 254's sole shareholder executed a resolution (the "Resolution") amending its Articles by restricting 254's ability to borrow or grant a mortgage without the consent of a majority of its shareholders voting at a meeting, or the consent in writing of all of its shareholders.

[20] On May 24, 2017, the appellant acquired 50% of the shares of 254.

[21] The sole director of 254 at the time of the 254 Mortgage was Rouzbeh Behrouz ("Behrouz").

**(iv) The Dovercourt Receivership and the Sale of the Dovercourt Property**

[22] On July 4, 2018, on the application of Money Gate, a receiver was appointed over the Dovercourt property. In January 2019, the Dovercourt property was sold, with court approval. From the proceeds, the first mortgagee and the expenses of sale were paid. The balance—the Sale Proceeds—were to be paid to the Money Gate receiver, to be held pending a court order for distribution. The Sale Proceeds ultimately received by the Money Gate receiver (\$556,078.73) are significantly less than the amount of investor provided funds (\$611,000) that were originally advanced under the 254 Mortgage, and the amount owing by 254 on that mortgage at the time of the property sale (\$768,161.45).

**(v) The Money Gate receiver's motion for advice and directions**

[23] In order to determine if it could distribute the Sale Proceeds to investors, the Money Gate receiver brought a motion seeking advice and directions of the court.

In the motion, the Money Gate receiver noted that it had “heard from” the appellant, who claimed an entitlement to the funds on the basis that the 254 Mortgage should be declared invalid as the appellant did not consent to the granting of that mortgage and its consent, as a 50% shareholder of 254, was required.<sup>1</sup>

**(vi) The Motion Judge’s Decision**

[24] The motion judge granted the Money Gate receiver’s request that the 254 Mortgage be declared valid and enforceable, and directed that the Sale Proceeds could be released for distribution.

[25] The motion judge recognized that the motion for advice and directions resulted in a form of summary judgment, as it disposed of the appellant’s claim that the 254 Mortgage was invalid and its claim to the proceeds of the sale of the Dovercourt Property. She rejected the argument that this was procedurally improper, and held that there was sufficient evidence before her to meet the high threshold for a summary judgment type determination, which she noted was the absence of a genuine issue requiring a trial.

[26] The motion judge examined the evidence, and concluded that on its face, the 254 Mortgage was valid. She found that there was no evidence of fraud. She

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<sup>1</sup> The appellant commenced an action against the Money Gate receiver, Payam Katebian, 254 and Rouzbeh Behrouz in early 2019. It included a claim to declare the 254 Mortgage invalid. The appellant did not obtain leave to commence that action against the Money Gate receiver, as required by the order of Hainey J. appointing it. The Money Gate receiver advised the appellant it would not respond to the action and considered it a nullity. The action has not proceeded.

rejected the argument that the 254 Mortgage was invalidated by an alleged lack of consent by the appellant. She found that the appellant had consented. The non-fulfillment of the condition the appellant imposed on its consent, that 254 pay it a portion of the loan proceeds, did not invalidate the mortgage. It gave rise, rather, to an issue between the appellant and Payam Katebian, who had allegedly retained or diverted those funds.

[27] Alternatively, the motion judge reasoned that Money Gate was entitled to an equitable mortgage and the indoor management rule could be applied to overcome any complaint of non-compliance with the Resolution. She rejected the argument that Payam Katebian's role at Money Gate and 254 prevented either conclusion, given that the investors who funded the mortgage advance had no knowledge of any wrongdoing or corporate non-compliance.

## **ISSUES ON APPEAL**

[28] The appellant advances what are essentially three arguments.

[29] First, the appellant argues that the motion judge lacked the authority, on a motion for advice and directions, to grant what was effectively summary judgment.

[30] Second, the appellant submits that the factual record, viewed against the backdrop of the prevailing law, made the case inapposite for summary disposition without a trial. The appellant submits that there are issues surrounding whether and on what terms it consented to the mortgage, and about the conduct of the

Katebians and Behrouz in orchestrating the transaction and the flow of funds, that require a trial for their proper resolution. Additionally, the appellant argues that the motion judge made an error of law in conflating the investors whose money went into Money Gate, with Money Gate itself, thereby disregarding the separate corporate identity of Money Gate.

[31] Third, the appellant complains that what was granted was an improper partial summary judgment in light of the claims it wishes to continue against the Katebians and Behrouz.

## **ANALYSIS**

### **(i) The Availability of Summary Disposition in a Receivership Proceeding**

[32] The motion below was for advice and directions, brought in a receivership proceeding. In my view, this gave the motion judge the power to decide the merits of the dispute about the validity of the 254 Mortgage, and the entitlement to the Sale Proceeds, in a summary way without a trial, following an approach modelled upon that used on motions for summary judgment. The context and purpose of the receivership support that conclusion.

[33] The Money Gate receiver was appointed under statutory authority that aims at the protection of the best interests of a company's creditors and security holders. The receiver's broad powers, to bring in Money Gate's assets and to hold them for distribution, are in the service of that purpose.

[34] It is clearly foreseeable that, in seeking to collect the company's assets with a view to maximizing what will be available to creditors and security holders, the receiver's efforts may come into collision with positions taken by third parties who dispute the company's ownership or entitlement, and assert their own. Resolving such disputes in a timely way can be key to the effective fulfillment of the object of the receivership.

[35] I see no reason in principle why the receiver's right to apply to the court for advice and directions, a right specifically provided for in the receivership order, cannot be used to resolve a dispute of the type presented here. The asset in question, the 254 Mortgage, was ostensibly an asset of Money Gate, as it was given in its favour. The Sale Proceeds had been paid over to the Money Gate receiver. The question as to entitlement was being raised by the appellant, who was otherwise an outsider to the receivership. The Money Gate receiver was entitled to advice and directions of the court as to whether the asset—the Sale Proceeds representing a recovery under the 254 Mortgage—was properly available for distribution in light of the appellant's claim.

[36] In support of its position that there are severe limits on what can be done under a motion for advice and directions, the appellant relies on *Re Urbancorp Cumberland 2 GP Inc.*, 2017 ONSC 7649, 56 C.B.R. (6th) 86, a case in which a motion for advice and directions by a company's Monitor, appointed under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"), was

dismissed. Myers J. held that the Monitor was not truly seeking advice and directions, but was seeking under that guise to assert a claim of the CCAA debtor against a third party for monetary relief: at para. 19.

[37] In *Urbancorp*, however, the Monitor had not been given the power to bring proceedings on behalf of the CCAA debtor. The issue in *Urbancorp* was therefore not about whether a summary determination of rights between a third party and the debtor's estate could ever be accomplished by a motion for advice and directions. It was about whether the Monitor actually had the power to assert the type of claim it was advancing. Myers J. observed that if the Monitor had the power to bring proceedings, "they can be brought summarily": at paras. 18-22.

[38] Here, the Money Gate receiver was expressly given the power, in the receivership order, to initiate, prosecute and defend proceedings with respect to Money Gate or its assets. The Money Gate receiver is not simply attempting, under the guise of a motion for advice and directions, to exercise a power it does not have.

[39] Accordingly, *Urbancorp* does not support the appellant's position.

[40] The question of whether a motion for advice and directions may be resorted to by a receiver for the resolution of a dispute with a third party about the company's assets is a separate question from whether the court should deal with the motion summarily, or order a trial. In my view, on the latter question, the key

determinant should be whether the dispute raises a genuine issue requiring a trial, in other words, by analogy to the procedure for summary judgment. I reach that conclusion for several reasons.

[41] First, the summary judgment process is designed to be a means to adjudicate and resolve disputes without undue process and protracted trials, and thus avoid unnecessary expense and delay: *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87. A receivership signals that creditors and other stakeholders are in need of protection. Unnecessary expense and delay can further imperil their positions.

[42] Second, summary judgment is designed to be a fair and just process to resolve a dispute and apply the relevant legal principles to the facts as found: *Hryniak*, at para. 28. The interests of the third party—the stranger to the receivership—are therefore respected.

[43] Third, the dividing line between a case that can be disposed of summarily and one where there should be a trial—the genuine issue requiring a trial test—has been the subject of authoritative jurisprudence and is dealt with regularly by Superior Court judges. The same is true of the surrounding features of the test which address how the record is developed and whether it is adequate to make summary judgment the proportionate, expeditious and less expensive means of achieving a fair result. It is preferable to use an established test than to try to

construct a new one. In motions seeking a final decision that are not formally motions for summary judgment, the summary judgment procedure provides useful assistance by analogy: *Polywheels Inc. (Re)*, 2010 ONSC 1265, at paras. 6-7.

[44] I therefore conclude that the motion judge did not err in entertaining the matter although it was raised by a motion for advice and directions, and in analogizing it to a motion for summary judgment.

[45] Nor was there unfairness to the appellant in the motion judge proceeding this way. The Money Gate receiver had been directed to hold the Sale Proceeds pending a distribution motion. The Money Gate receiver's material on the motion described the history of the 254 Mortgage, noted the appellant's position that it was asserting a claim to the Sale Proceeds, and set out the receiver's position that the appellant was aware of and supported 254 borrowing funds and providing a second mortgage. It was clear that the receiver was seeking a final disposition of the appellant's claim by motion, not by a trial. It was equally clear that the appellant was required, if it wished to oppose the receiver's request, to support its position as to the merits of its claim and the appropriate process to determine it, on the basis of evidence, which it had the opportunity to file.

**(ii) Did The Motion Judge Err in Deciding that the 254 Mortgage was Valid and that The Sale Proceeds Should Be Available For Distribution Without Ordering A Trial?**

[46] In my view the motion judge's essential finding, that there was no genuine issue that required a trial, is unassailable.

[47] The Money Gate receiver's position that the 254 Mortgage was valid and the Sale Proceeds should be available for distribution was firmly rooted in uncontested facts. Money Gate advanced \$611,000 to 254 as a loan, and it was not repaid. The 254 Mortgage was signed by 254's sole director and registered against property owned by 254. The Sale Proceeds were funds available to the second mortgage holder, and thus were paid to the Money Gate receiver.

[48] On the other hand, the appellant's position that there was a lack of required shareholder consent to the mortgage, and that a fraud was perpetrated on the appellant, suffers from factual and legal infirmities.

[49] The motion judge found that there was no evidence of fraud. The principal of the appellant who filed an affidavit did not mention fraud. The appellant did not seek or obtain the evidence of the Katebians or Behrouz. By analogy to summary judgment, the appellant was required, by affidavit or other evidence, to set out specific facts showing a genuine issue requiring a trial. It was required to put its best foot forward.

[50] In any event, the fraud that the appellant alleges was perpetrated on it—inducing it to consent to 254 granting a mortgage on the condition that 254 would pay it a portion of the proceeds, and then not honouring that commitment, would not impugn the validity of the 254 Mortgage.

[51] A mortgage that is registered is valid and enforceable according to its nature and intent unless it is a “fraudulent instrument”: *Land Titles Act*, R.S.O. 1990, c. L.5 (“*LTA*”), ss. 78 (4) and (4.1).

[52] “Fraudulent instrument” is a narrowly defined term. It includes a charge given by a “fraudulent person”, meaning a person who forged the instrument, a fictitious person, or a person who holds oneself out in the instrument to be the owner but knows they are not: *LTA*, s. 1. The appellant’s argument does not address or explain how its fraud theory, if proven, could satisfy that aspect of the definition of “fraudulent instrument”. The 254 Mortgage was given by 254, the owner of the property charged, not by a non-existent person. It was executed by 254’s sole director. No signature was forged: *1168760 Ontario Inc. v. 6706037 Canada Inc.*, 2019 ONSC 4702 (Div. Ct.), at paras. 33-42.

[53] The definition of “fraudulent instrument” also includes an instrument “that perpetrates a fraud as prescribed with respect to the estate or land affected by the instrument”. Fraud as prescribed is the registration of a cessation of a charge by a

fraudulent person: *LTA*, s. 1; R.R.O. 1990, Reg. 690, s. 63. The appellant does explain how its fraud theory, if proven, could satisfy this aspect of the definition.

[54] Absent fraud, the appellant's position that the 254 Mortgage lacked its consent as required by the Resolution lands even farther from the statutory requirement of a "fraudulent instrument".

[55] Moreover, the motion judge properly found that the appellant did consent to the 254 Mortgage. She rooted her finding in the appellant's principal's evidence on cross-examination that he consented subject to a condition, and in emails produced by the appellant that referred to the second mortgage transaction proceeding. Her interpretation of this evidence was reasonable, namely that there was a consent, and that fulfilment of the condition of the consent—a payment by 254 to the appellant out of the loan proceeds—did not affect the validity of the loan transaction between 254 and Money Gate.

[56] Indeed, the fundamental flaw in the appellant's position about conditional consent is that for the transaction to have taken place as the conditional consent contemplated, Money Gate would first have had to advance the loan and be granted the 254 Mortgage. Only then would 254 be in a position to fulfill the condition and pay the appellant. The appellant fails to explain how the non-fulfillment of the condition by 254, after Money Gate's advance was made and the

254 Mortgage was granted, justifies Money Gate losing the right to recover what it advanced.

[57] Accordingly, there was no genuine issue requiring a trial. These findings were sufficient to ground the disposition that the motion judge made.

[58] It is therefore unnecessary to address the appellant's arguments that the motion judge conflated the investors and Money Gate. The alleged conflation appears only in the portion of the decision dealing with an alternative theory of equitable mortgage or the ability to rely on the indoor management rule, and does not affect the main ground of the motion judge's decision.

**(iii) The Motion Judge Did Not Grant an Inappropriate Partial Summary Judgment**

[59] The appellant argues that the motion judge's decision was nevertheless improper because it deals with only part of the appellant's dispute, and is based on findings that may be inconsistent with what may be found if the appellant pursues its claims against the Katebians and Behrouz.

[60] I would not give effect to this argument.

[61] The motion judge's decision resolved the entire dispute between the appellant and the Money Gate receiver concerning the validity of the 254 Mortgage and the Sale Proceeds. The fact that the appellant commenced an action in early 2019 against the Money Gate receiver and others does not make this

determination a partial one, in the sense of resolving part of an action while the remainder proceeds. The action against the Money Gate receiver, commenced without leave, was correctly considered a nullity as against the receiver by the motion judge, who also noted that the appellant had not proceeded at all with the action since its commencement.

[62] Nor, in my view, is there a material risk of inconsistent findings even if one were to take into account the appellant's desire to proceed with its action against others. The motion judge made no finding that the non-fulfilment of the appellant's condition was proper as between the appellant and those responsible for that fulfillment. She only held that non-fulfillment did not invalidate the 254 Mortgage. Indeed, the fact that a valid mortgage was created is consistent, not inconsistent, with the appellant's claim that it suffered a loss as a result of the conduct of Behrouz and the Katebians in not following through to fulfill the condition the appellant says it imposed when it gave its consent.

[63] The principles that limit the grant of partial summary judgment are aimed at avoiding proceeding in a manner that will not be cost effective, judicious or expeditious because overlapping issues will proceed to trial: *Service Mold + Aerospace Inc. v. Khalaf*, 2019 ONCA 369, 146 O.R. (3d) 135, at para. 14. As I have stated a material risk of inconsistent results is not present. Directing a trial and waiting for the appellant to proceed with its long dormant claim against others

would involve delays and would not be cost effective, judicious or expeditious. Nor would it be consistent with the goals of the receivership.

## CONCLUSION

[64] For these reasons I would dismiss the appeal.

[65] In accordance with the agreement of counsel, I would award the respondent its costs of the appeal fixed in the sum of \$15,000, inclusive of taxes and applicable disbursements.

Released: December 16, 2020

*JCM*

*B Burnett J.A.*

*I agree. J.C. MacPherson J.A.*

*I agree. Myer J.A.*