

Central Guaranty Trust Co. v. Frasca

Between
Central Guaranty Trust Company, Plaintiff, and
Carlo Frasca, Denise Frasca, Dino Frasca, Teresa Frasca and
Ottavio Frasca, Defendants

Ontario Judgments: [1992] O.J. No. 994
Action No. 14683/91U

Ontario Court of Justice - General Division
Toronto Weekly Court
Adams J.

Heard: March 17 and 19, 1992
Judgment: May 12, 1992
(8 pp.)

Raymond H. Raphael and Aviva R. Harari, for the Applicants/ Defendants, Carlo Frasca,
Denise Frasca, Dino Frasca, and Teresa Frasca.
Keith M. Landy, for the Applicant/Defendant Ottavio Frasca.
Mark Hartman, for the Respondent/Plaintiff.

ADAMS J. (Orally):— I have before me two motions. One of the motions is by Carlo, Denise, Dino and Teresa Frasca and the other by Ottavio Frasca, the father of Carlo and Dino. Each motion seeks to restrain Central Guaranty Trust Company from closing the sale of four properties having particular regard to the fact that CGT has already entered into an agreement of purchase and sale for 11900 Keele Street, Maple, Ontario. This property, jointly owned by Carlo, Dino, and Ottavio, is currently zoned for agricultural use but was purchased as an investment with an eye to its rezoning. The other three properties are the homes of Carlo and Dino and a factory of Ottavio which is leased to others and provides him with rental income. Ottavio also seeks an order restraining CGT from seizing these rental monies pursuant to a guarantee and a collateral mortgage to which I will now refer.

The sons operate a business called Maple Precast Investments Inc.. Ottavio was once involved in that business but has been retired from it for some years. The brothers had been successful in the operation of the business from 1977 onward and in 1987 began a business relationship with the lenders CGT. At this time Carlo was 33 and Dino was 25 years of age. CGT advanced monies to Maple Precast pursuant to two credit facilities. Under the first facility, CGT loaned Maple Precast \$1,000,000. By the second credit facility the plaintiff agreed to provide the company with an operating line of credit up to the sum of \$1,000,000. Both facilities were supported by promissory notes executed by the company.

To provide security for the credit facilities, all the defendants executed under seal written guarantees dated April 3, 1989 in favour of CGT. These are joint and several and up to the sum of \$2,000,000. Certificates of independent legal advice were executed by Denise, Teresa and Ottavio.

To secure payments under the notes and to secure the personal guarantees, the defendants provided collateral mortgages in favour of CGT on the four parcels of land. Denise, Teresa and Ottavio, as with respect to their personal guarantees, and prior to the execution of the collateral mortgages, sought and obtained independent legal advice as evidenced by executed certificates to this effect. Funds were advanced to Maple Precast. As of November 7, 1990, it was indebted to CGT in the sum of \$1,976,872.44. Maple Precast defaulted on its October 1990 payment obligations. Demand was made. A statement of claim was issued January 31, 1991. Default judgment was obtained. No portion of outstanding amounts have been paid. Demands have been made against the defendants personally, and no payment has been made. CGT asserts each is jointly and severally liable under the mortgages and guarantees for a sum of \$2,126,724.08 as of June 14, 1991.

Actions were then commenced against the defendants on February 15, 1991, defences and cross claims subsequently filed. The plaintiff commenced a motion for summary judgment originally returnable June 24, 1991 but adjourned sine die. Affidavit material was filed by Carlo, Dino and Ottavio and Carlo was cross-examined November 26, 1991 and February 14, 1992. Settlement discussions took place in the summer of 1991, broke off, and commenced again in the fall of 1991. When they last broke down, CGT had listed 11900 Keele Street for sale by MLS and, within a week of the listing coming out on the MLS, the property was sold. Two lower offers had been rejected before a third was accepted and this offer was within the range of several appraisals which had been obtained.

The defendants all assert the sale price is far too low and that the land is much more valuable because it can be rezoned M2 or M4 (commercial or industrial use). The defendants' views as to whether and when the zoning can be changed is based on hearsay and are inconsistent with the content of several appraisal reports. The defendants currently have an application for rezoning before the Town of Vaughan. I note the listing referred to the land's "development potential".

Carlo and Dino defend this action on the basis of alleged acts of "dominance" of Phyllis Posa, an assistant manager of CGT. It is alleged that they came to rely on her advice and that there were joint investments, gifts and lost opportunities on certain investments. However, at pages 242 and following in the cross-examination of Carlo on his affidavit, it is admitted that monies from CGT were advanced and spent as he intended. Borrowing between 1987 and 1989, with one exception, is not the subject matter of any claim he has against CGT and Phyllis Posa because the impugned conduct is alleged to have occurred after that period of time. Thus, whatever the claims against CGT the defendants may have, the outstanding liability will remain substantial and well in excess of the monies to be received from the sale of 11900 Keele Street.

Ottavio defends on the basis that Phyllis Posa's actions may have discharged his security and that, in any event, he did not know what he was signing. He asserts that, while he was referred to a lawyer to advise him, the consultation was for only a few minutes and he did not choose the

lawyer. He states that he speaks little English although it would appear he was advised by a lawyer who speaks Italian and, of course, he has himself been in business. I also note that the property at 11900 is investment property and his affidavit indicates a certain sophistication. Nevertheless, he states that he thought he was only encumbering his factory and only to the sum of \$200,000.

The defendants assert that CGT is estopped because, through its settlement discussions, it represented that it would not attempt to sell 11900 Keele Street without notice. The material does not make out this claim. Moreover, given the nature of the settlement discussions and the failure of the defendants to execute a settlement negotiated by their then lawyers, CGT's subsequent course of conduct is not sufficiently offensive to invoke the injunctive powers of this Court.

Alternatively, the defendants argue that once CGT elected to proceed by action on personal covenants of the defendants pursuant to the mortgage and seek summary judgment, it was locked into that choice and cannot now "step outside" that action to exercise a private right of power of sale. In this regard counsel relied upon *Canada Permanent Trust Co. et al. v. Welton Ltd.* (1973), 2 O.R. 245. I do not agree having regard to the analysis of Cory J. (as he then was) in *Mackin Holdings Incorporated v. Papadopoulos et al.* (1977), [1 R.P.R. 193](#). A mortgagee may exercise a power of sale under a mortgage either before or after bringing an action on the covenant because the mortgagor remains liable for the deficiency. The technical defence raised by the defendants, however, is available where the mortgagee commences a foreclosure action because of the triggering of rights in others such as a mortgagor's right of redemption. It remains possible, of course, to obtain an injunction as Justice Cory gave but this would be on the general basis by which such relief is available. I will return to this in a moment.

The defendants also claim the sale of 11900 Keele Street is improvident and should be enjoined on that basis. However, I cannot agree on the material before me. *Arnold v. Bronstein et al.*, [\[1971\] 1 O.R. 467](#), a decision of Mr. Justice Lacourciere, makes clear that, except in the most extreme and exceptional cases, a mortgagee acting in good faith and without fraud will not be restrained from the proper exercise of its powers of sale save when there has been a tender by the mortgagor of monies due. Of course, the mortgagee must act prudently and seek to obtain the true market value of the property as set out in *Siskind v. Bank of Nova Scotia* (1984), [46 O.R. \(2d\) 575](#). In the circumstances before me, it cannot be said the required conduct of the mortgagee was breached. CGT need not participate in a rezoning application which at this time remains entirely speculative. It rejected two lower offers. The offer it accepted is within the range of the appraisal reports.

Should an injunction be given restraining the sale in question upon general considerations applicable to such relief? Having regard to the *Arnold v. Bronstein* dicta, the defendants require a strong prima facie case. Whatever the claim against CGT, the sons will owe substantial monies in excess of those to be obtained from the sale of 11900 Keele Street. With respect to Ottavio, I do not think his claim is in any way as strong as those facts which existed in *Lloyd's Bank v. Bundy*, (1974) 3 All E.R. 757. He did obtain legal advice and his own affidavit revealed business experience and acumen.

On a balancing of interests in light of the irreparable harm tests, I also note the property is vacant investment land not a home. Ottavio further admits to the knowledge he was encumbering his factory and it is unclear to me, on the material before me, how the alleged conduct of Phyllis Posa would result in the complete discharge of his security given that his sons will likely remain substantially in debt to CGT. Accordingly, the relief he requests concerning the rental monies is refused. Nevertheless, a balancing of interests might well be different if CGT were seeking to sell the matrimonial home of Ottavio Frasca.

Having said all this, a balancing of interests does justify an injunction for two weeks to permit the defendants to match the purchase price that is contained in the agreement of purchase and sale they seek to enjoin. The ten days will start from Monday, March 23, 1992. Accordingly, the order will go restraining the sale of 11900 Keele Street for a further two weeks commencing from this moment and expiring on April 3, 1992, conditional on the defendants paying the plaintiff \$265,000. In return and upon payment of the monies, the defendants shall discharge those lands from the mortgage and the monies paid will be applied to that mortgage debt without prejudice to any continuing rights of the plaintiff on the covenants or for the balance of its security.

The \$265,000 is to be paid no later than April 3, 1992.

Costs in the cause.

ADAMS J.