CITATION: Khmelevskikh v. Zubashvili, 2018 ONSC 2160
COURT FILE NO.: CV-15-528683
MOTION HEARD: 20180306
REASONS RELEASED: 20180404

SUPERIOR COURT OF JUSTICE – ONTARIO

BETWEEN:

OLGA KHMELEVSKIKH and VASILY KHMELEVSKIKH

Plaintiffs

- and-

MARINA ZUBASHVILI and ALEXANDR FURMANOV a.k.a ALEXANDRE FURMANOV a.k.a. ALEXANDER FURMANOV a.k.a. ALEX FURMANOV

Defendants

BEFORE: MASTER M.P. McGRAW

COUNSEL: V. Scalisi for the Defendants
Email: vito@scalisilaw.ca
-for the Defendants

A. Bouchelev
Email: arkadi@bouchelevlaw.com
-for the Plaintiffs

REASONS RELEASED: April 4, 2018

Reasons For Endorsement

I. Introduction

[1] Pursuant to the Order of Master Hawkins dated May 22, 2015 (the "CPL Order"), the Plaintiffs registered a Certificate of Pending Litigation (the "CPL") against the property known municipally as 18 Kenlea Court (formerly known as 24 Hilldale Road) in Aurora, Ontario (the "Aurora Property"). The CPL was discharged on consent pursuant to the Order of Master Muir dated May 30, 2017 (the "Discharge Order").

[2] Pursuant to the Discharge Order, Defendants' counsel is holding $114,000 in trust as security in place of the CPL. On this motion, the Defendants seek the release of the Trust Funds.

II. Background

The Parties and The Action

[3] Many of the material facts are in dispute.

[4] The Plaintiffs Olga Khmelevskikh ("Olga") and her husband Vasily Khmelevskikh ("Vasily", together with Olga, the "Plaintiffs") moved to Canada from Russia in or about June 2011. Prior to their move, Vasily visited Toronto to purchase a home. He met with Elena Chatrova, a Russian speaking realtor who worked for Arc Reality Inc. ("Arc") a Toronto-based real estate brokerage.

[5] Ms. Chatrova introduced Vasily to the Defendants Marina Zubashvili ("Marina"), a real estate agent and principal of Arc, and her husband, Alexandr Furmanov ("Alex", together with Marina, the "Defendants"), a home builder. The Defendants advised Vasily that they were in the business of buying and demolishing older homes in desirable neighbourhoods throughout the Greater Toronto Area and constructing and selling larger homes on the properties.

[6] Pursuant to an Agreement of Purchase and Sale dated June 29, 2012, Vasily purchased the property known municipally as 132 Crestwood Road, Vaughan, Ontario (the "Vaughan Property"). Marina and Ms. Chatrova acted as Vasily's real estate agents with respect to this purchase.

[7] Pursuant to a one-page agreement dated July 12, 2012 (the "Construction Agreement"), Vasily and Alex agreed that Alex would build a home for the Plaintiffs on the Vaughan Property (the "Project"). Among other things, the Construction Agreement provides that Alex would receive a management fee of 12% of the building cost payable in 4 instalments with $80,000 payable upon signing. While the Construction Agreement does not provide for the cost of the Project, Vasily alleges that Alex represented that costs would be approximately $800,000-$900,000, including borrowing and legal costs.

[8] To finance the purchase of the Vaughan Property, on September 6, 2012, the Plaintiffs obtained a mortgage from Home Trust Company in the amount of $600,000. On January 29, 2013, the Plaintiffs obtained a private construction loan of $528,000.

[9] Unrelated to the Project, on or about September 10, 2012, Vasily agreed to lend $150,000 to Marina (the "Loan") at an interest rate of 8% per annum. The Loan was secured by a mortgage registered on title to Marina's home, the Aurora Property on September 10, 2012 (the "Mortgage"). The Mortgage and related documents were executed at the offices of Martha Zotov, a lawyer who was retained and paid by the Defendants to purportedly act for the Plaintiffs.

[10] Vasily alleges that on September 6, 2012 he attended Ms. Zotov's office with Marina. He was asked to execute two documents: "Form 9D – Investment Authority" authorizing Ms. Zotov to act on his behalf with respect to the Mortgage; and an Authorization and Direction with

respect to the registration of the Mortgage.

[11] Approximately one week later, on September 17, 2012, Vasily re-attended at Ms. Zotov's office with Marina and Alex where they executed a Promissory Note dated September 13, 2012 (the "Promissory Note") pursuant to which Marina (with Alex as guarantor) agreed to pay $60,000 on or before September 13, 2013 and Alex agreed to discharge the Mortgage (the "Discharge"). Olga's signature line remains blank. The effect of the Promissory Note and the Discharge was to convert Vasily's $150,000 secured Loan into a $60,000 unsecured loan.

[12] As set out in the Promissory Note, the reduction of $90,000 was to account for a $90,000 construction management fee for Alex with respect to the Project. The Defendants allege that Vasily agreed to apply $90,000 from the Loan because no payments had been made to Alex. The Plaintiffs dispute that they agreed to forgive $90,000 given that they paid Alex $80,000 upon signing the Construction Agreement. Over 4 months after the Construction Agreement was signed, Vasily and Olga signed an additional agreement dated January 31, 2013 (the "Management Agreement"), under which they agreed to pay Alex a management fee of $90,000 with respect to the Project. Vasily states that he was not provided with a copy of the Management Agreement after he signed it.

[13] The circumstances surrounding Vasily's attendances at Ms. Zotov's office, the terms, validity and execution of the Promissory Note, the Discharge and Ms. Zotov's role are also in dispute and material to this action and motion.

[14] The Plaintiffs submit that on or about September 17, 2012, Marina advised Vasily that he needed to re-attend at Ms. Zotov's office to sign "additional paperwork" with respect to the Loan which was merely a formality and had no legal effect. Vasily alleges that he signed the Promissory Note without reading it but states it is unlikely he would have been able to understand given his limited English and understanding of Canadian law. Vasily further states that Ms. Zotov did not provide any legal advice, did not explain the purpose or substance of the Promissory Note including that he was giving up a secured loan for an unsecured loan and only signed the Promissory Note as a witness. Vasily also states that he had no communications with Ms. Zotov outside of these 2 meetings. Ms. Zotov stamped the following above her witness signature on the Promissory Note: "AS TO EXECUTION ONLY NO LEGAL ADVICE SOUGHT OR GIVEN".

[15] In a letter dated November 15, 2017 responding to questions from the Defendants' counsel, Ms. Zotov states that her Firm "did act" for Vasily, that she provides legal advice in Russian, registered the Mortgage and Discharge based on the Promissory Note and did not act for the Defendants.

[16] The Plaintiffs submit that by September 2013, they had already spent approximately $682,648.97 on the Project, including $41,095.05 to discharge a construction lien registered by Argo Lumber Inc. The Plaintiffs further submit that at the time, the Project was only 50-60% complete and significantly over budget.

[17] Pursuant to an email message to Alex dated November 1, 2013, Vasily states: "As per my personal loan to Marina Zubiashvili and Alex Furmanov, the current balance is 30,000 CAD due to pay to Vasily Khmelevskikh on November 1, 2013". The Defendants submit that this confirms that only $30,000 remained outstanding pursuant to the Loan which Marina paid on November 8, 2013, as discussed below. The Plaintiffs dispute this assertion and submit that the email means that the next payment was $30,000 due on November 1, 2013, not that the total outstanding was $30,000.

[18] On or about November 8, 2013, Vasily executed a handwritten acknowledgement that the Loan had been paid in full (the "Acknowledgement"). The circumstances with respect to the preparation, validity and execution of the Acknowledgement are also substantially in dispute.

[19] Vasily alleges that Marina contacted him and asked him to attend Arc's offices on November 8, 2013 to pick up a cheque of $30,000 as part payment of the outstanding amount owing under the Loan. Vasily further alleges that when he arrived to pick up the cheque, Marina requested that he execute a note acknowledging the receipt of $60,000 plus $12,000. Marina then dictated the wording of the Acknowledgement which Vasily claims he simply wrote down and signed. Vasily states that the Acknowledgement is accurate in that it states that the Defendants repaid $60,000 plus $12,000 however, disputes that it is evidence that their entire debt to him was $60,000 and this was not his understanding when he signed it. It is Marina's evidence that she was not present when the Acknowledgement was written and signed. Vasily states that he did not receive a copy of the Acknowledgement when he left Arc's offices.

[20] Vasily states that in or about November 2013, Alex abandoned the Project when Vasily requested copies of invoices and refused to advance further funds to Alex until the invoices were received. Alex states that Vasily terminated the Construction Agreement. The Aurora Property was also not registered with Tarrion Warranty Corporation which Vasily states was Alex's responsibility. The Defendants continued to make interest payments on the Loan until when the Plaintiffs refused to advance further funds for the Project. Vasily states he then sought independent legal advice and for the first time understood the effect of the Promissory Note and learned of the registration of the Discharge.

[21] The Plaintiffs commenced this action by Notice of Action issued on May 21, 2015 and Statement of Claim issued on June 19, 2015 in which they claim that $90,000 is owed under the Loan. The Plaintiffs seek declarations that the Discharge is null and void, that Vasily is a mortgagee of the Aurora Property, an order permitting Vasily to register a charge in the amount of $90,000 on title to the Aurora Property and a declaration that the Mortgage shall have the same priority as when it was registered on September 10, 2012. The Plaintiffs also claimed the CPL and in the alternative, an Order directing that $90,000 of the proceeds of any sale of the Aurora Property be paid into Court if it is sold prior to a final determination of this action. The Plaintiffs also seek general and special damages of $750,000 and punitive, aggravated and exemplary damages of $150,000.

[22] In their Statement of Defence dated August 31, 2015, the Defendants state, among other things, that the $90,000 was an advance on Alex's management fee pursuant to the Construction

Agreement; that it was Vasily who terminated the Construction Agreement; that Alex made no representations regarding Project costs; and that all arrangements for the payment of trades was between Vasily and the trades.

The Certificate of Pending Litigation, the CPL Order and the Discharge Order

[23] The Plaintiffs obtained the CPL Order on an ex parte motion (the "CPL Motion") before Master Hawkins on May 22, 2015. In or about February 2017, Defendants' counsel contacted Plaintiffs' counsel and advised that the Defendants needed to sell the Aurora Property and could not do so without discharging the CPL.

[24] In order to allow the sale to close, the parties consented to the Discharge Order including that Defendants' counsel would hold the Trust Funds of $114,000 from the proceeds of sale. The amount of $114,000 represents $90,000 of the $150,000 total Loan which is in dispute plus $24,000 in disputed interest.

III. The Law and Analysis

The Law

[25] The CPL was discharged pursuant to the Discharge Order. However, since the Trust Funds stand as security in place of the CPL, the parties agree that the law with respect to the discharge of a CPL applies to this motion.

[26] Section 103(6) of the *Courts of Justice Act* (Ontario) (the "CJA") states:

> "(6) The court may make an order discharging a certificate,
>
> (a) where the party at whose instance it was issued,
>
> (i) claims a sum of money in place of or as an alternative to the interest in the land claimed,
>
> (ii) does not have a reasonable claim to the interest in the land claimed, or
>
> (iii) does not prosecute the proceeding with reasonable diligence;
>
> (b) where the interests of the party at whose instance it was issued can be adequately protected by another form of security; or
>
> (c) on any other ground that is considered just,
>
> and the court may, in making the order, impose such terms as to the giving of security or otherwise as the court considers just."

[27] Master Glustein (as he then was) summarized the factors to be considered on a motion to discharge a CPL in *Perruzzo* v. *Spatone*, 2010 ONSC 841 at para. 20:

(i) The test on a motion for leave to issue a CPL made on notice to the defendants is the same as the test on a motion to discharge a CPL (*Homebuilder Inc. v. Man-Sonic Industries Inc.*, 1987 CarswellOnt 499 (S.C. - Mast.) ("*Homebuilder*") at para. 1);

(ii) The threshold in respect of the "interest in land" issue in a motion respecting a CPL (as that factor is set out at section 103(6) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43) is whether there is a triable issue as to such interest, not whether the plaintiff will likely succeed (*1152939 Ontario Ltd. v. 2055835 Ontario Ltd.*, 2007 CarswellOnt 756 (S.C.J.), as per van Rensburg J., citing *Transmaris Farms Ltd. v. Sieber*, [1999] O.J. No. 300 (Gen. Div. - Comm. List) at para. 62);

(iii) The onus is on the party opposing the CPL to demonstrate that there is no triable issue in respect to whether the party seeking the CPL has "a reasonable claim to the interest in the land claimed" (*G.P.I. Greenfield Pioneer Inc. v. Moore*, 2002 CarswellOnt 219 (C.A.) at para. 20);

(iv) Factors the court can consider on a motion to discharge a CPL include (i) whether the plaintiff is a shell corporation, (ii) whether the land is unique, (iii) the intent of the parties in acquiring the land, (iv) whether there is an alternative claim for damages, (v) the ease or difficulty in calculating damages, (vi) whether damages would be a satisfactory remedy, (vii) the presence or absence of a willing purchaser, and (viii) the harm to each party if the CPL is or is not removed with or without security (*572383 Ontario Inc. v. Dhunna*, 1987 CarswellOnt 551 (S.C. - Mast.) at paras. 10-18); and

(v) The governing test is that the court must exercise its discretion in equity and look at all relevant matters between the parties in determining whether a CPL should be granted or vacated (*931473 Ontario Ltd. v. Coldwell Banker Canada Inc.*, 1991 CarswellOnt 460 (Gen. Div.); *Clock Investments Ltd. v. Hardwood Estates Ltd.*, 1977 CarswellOnt 1026 (Div. Ct.) at para. 9).

[28] When moving ex parte to obtain a Certificate of Pending Litigation, all evidence put before the court must be accurate and complete (*JDM Developments Inc.* v. *J. Stollar Construction Ltd.*, [2004] O.J. No. 4572 (S.C.J.) at para 24). Failure to disclose any material facts will result in the Certificate of Pending Litigation being discharged particularly where the undisclosed information was of such a nature that in its absence, the court received an incomplete and inaccurate picture and had the court been fully apprised of all of the material facts, the Certificates of Pending Litigation would not have been granted (*JDM* at para. 43).

[29] Rule 39.01(6) states:

> "Where a motion or application is made without notice, the moving party or applicant shall make full and fair disclosure of all material facts, and failure to do so is in itself sufficient ground for setting aside any order obtained on the motion or application."

[30] The test with respect to full and fair disclosure is as follows: i.) the Court must determine whether the plaintiff provided full and fair disclosure of all of the "material facts"; and ii.) if there has not been full and fair disclosure of all the material facts, then the Court must determine whether, if full disclosure had been given, the ex parte order "may well not have been made". (*Baron* v. *Multi-Health Systems and Stein*, 2005 CanLII 32918 (ON SC) at para. 2.

[31] Where a plaintiff demonstrates that it has an interest in the property but did do not make full and frank disclosure in obtaining a CPL, the Court has the discretion under ss. 103(6)(b) and (c) of the CJA to discharge the CPL and protect the plaintiff's interests by another form of security or on any other ground that is considered just (*Choski* v. *Peerani*, 2013 ONSC 5697 at para. 26). In *Choski*, Andre J. found that although the plaintiff had not made full and frank disclosure and the CPL should be discharged, the defendants should pay the greater of $250,000 or 75% of the proceeds of sale into court as security (*Choski* at paras. 28-29).

[32] The Defendants submit that the Trust Funds should be released for two reasons: i.) the Plaintiffs have not demonstrated that they have a reasonable interest in the Property; and ii.) the Plaintiffs failed to make full and frank disclosure of relevant and material documentation and information on the CPL Motion.

[33] Substantially all of the material facts on this motion are in dispute and Vasily, Marina and Alex were not cross-examined on the numerous affidavits they filed on this motion.

Interest In the Property

[34] The Defendants must demonstrate that there is no triable issue with respect to whether the Plaintiffs had a reasonable interest in the Aurora Property such that they now have a reasonable interest in the Trust Funds being held pursuant to the Discharge Order.

[35] The Defendants submit that there is no triable issue for two reasons: i.) the Plaintiffs agreed to the Discharge and now only have an unsecured loan through the Promissory Note which, unlike the Mortgage, did not create an interest in the Aurora Property; and ii.) the Loan has been repaid in full and therefore, even if there is a triable issue with respect to the Plaintiffs' having a secured interest, they have no claim.

[36] For the reasons set out below, I reject the Defendants' submissions and conclude that the Defendants have failed to demonstrate that there is no triable issue with respect to whether the Plaintiffs' had a reasonable interest in the Aurora Property and therefore, the Trust Funds.

[37] The Mortgage, if still registered, would constitute an interest in land which would form the basis for granting a CPL (*Hirji et al.* v. *Khimani et al.*, 1978 CanLII 1491 (ON SC). The circumstances with respect to the execution of the Promissory Note and the registration of the

Discharge raise numerous questions.

[38] Only one week after agreeing to the Loan and the registration of the Mortgage, Vasily executed the Promissory Note and agreed to the Discharge. By doing so, Vasily converted a $150,000 secured interest in the Aurora Property into a $60,000 unsecured loan. Vasily alleges that he did so without independent legal advice and without understanding the nature, content and purpose of the Promissory Note and the Discharge.

[39] While the Defendants submit that Ms. Zotov acted for Vasily with respect to the Promissory Note and the Discharge such that he had the benefit of independent legal advice, the fact that Ms. Zotov stamped "AS TO EXECUTION ONLY NO LEGAL ADVICE SOUGHT OR GIVEN" above her witness signature suggests otherwise. In the face of this and other contradictory evidence, the Plaintiffs' claim for a declaration that the Mortgage is valid, and the circumstances as a whole, I conclude that there is a triable issue with respect to the validity of the Promissory Note and the Discharge and therefore, a triable issue as to whether the Plaintiffs had a secured interest in the Aurora Property and by extension, the Trust Funds.

[40] Similarly, it is far from clear what amount, if any, the Defendants owe under the Loan. The Defendants submit that the Acknowledgement confirms that the Loan was paid in full. However, as with the Promissory Note, the circumstances with respect to the preparation and signing of the Acknowledgement raise numerous questions. While Vasily alleges that he went to Arc's offices to pick up a $30,000 cheque in partial payment of the Loan and wrote the Acknowledgement as dictated by Marina, Marina alleges that she was not even present.

[41] Further, the contradictory and divergent evidence filed on this motion, including evidence of the payments made by the Plaintiffs, does not reconcile why the Plaintiffs paid $80,000 as a management fee upon signing the Construction Agreement but then later agreed to pay $90,000 pursuant to the Management Agreement. In my view, I cannot conclude that the Loan has been repaid in full, rather, there is a triable issue in this regard.

[42] Having considered all of the relevant factors and circumstances, I conclude that the Defendants have not discharged their onus of demonstrating that there is no triable issue with respect to whether the Plaintiffs had a reasonable interest in the Aurora Property. Therefore, I conclude that there is a triable issue that the Plaintiffs have a reasonable interest in the Trust Funds.

Non-Disclosure of Material Facts

[43] The Defendants submit that the CPL should be discharged because the Plaintiffs failed to make full, fair and frank disclosure on the CPL Motion. The Defendants argue that had the Plaintiffs disclosed the following 3 material facts, Master Hawkins may not have granted the CPL Order: i.) the existence of the Management Agreement and the $90,000 fee; ii.) that Vasily confirmed that the Loan was paid in full by preparing and signing the Acknowledgement; and iii.) that Ms. Zotov acted for Vasily with respect to the Promissory Note and the Discharge.

[44] With respect to the Management Agreement and the Acknowledgement, Vasily states in his affidavit that he was not provided with copies after he executed them. Therefore, when preparing materials for the CPL Motion he did have copies and did not remember that he had signed them. The Defendants submit that this is not a reasonable explanation, however, they did not cross-examine Vasily on his affidavit. Given all of the circumstances, including those under which the Management Agreement and the Acknowledgement were prepared and signed, I accept the Plaintiffs' explanation for the non-disclosure of these documents.

[45] In respect of Ms. Zotov, as set out above, Vasily's uncontroverted evidence is that Ms. Zotov did not provide any legal advice, which is supported by her stamp above the witness line of the Promissory Note. Therefore, while she may have acted for Vasily on the Promissory Note and the Discharge, I accept the Plaintiffs' explanation that Vasily did not disclose it given Ms. Zotov's limited retainer and role. In any event, Ms. Zotov's name is on both the Promissory Note and the Discharge which were both before Master Hawkins on the CPL Motion.

[46] I conclude that, in the circumstances, based on the documentation the Plaintiffs had in their possession at the time and Vasily's recollections, the Plaintiffs provided full, frank and fair disclosure when obtaining the CPL Order. Even if all of this information had been disclosed on the CPL Motion, I am not satisfied that Master Hawkins would not have granted the CPL Order.

[47] Even if I had concluded that the Plaintiffs did not made full, fair and frank disclosure, I would have concluded that the Trust Funds should remain with Defendants' counsel. Similar to *Choski*, the Plaintiffs have demonstrated that there is a triable issue with respect to whether they had an interest in the Aurora Property in circumstances where there are many legitimate questions regarding the conversion of their interest from a secured Mortgage to the unsecured Promissory Note. In the present case, the parties have already agreed to the Discharge Order with the Trust Funds as an alternate form of security. Therefore, I am satisfied in all of the circumstances that this status quo should continue.

[48] Having considered all of the relevant factors and circumstances and all of the equities, I conclude that the Trust Funds should continue to be held by Defendants' counsel pending final disposition of this action or further order of the Court.

IV. Disposition

[49] Order to go dismissing the Defendants' motion.

[50] If the parties cannot agree on the costs of this motion they may file costs submissions in writing not to exceed 3 pages (excluding costs outlines) with me through the Masters' Administration Office by June 15, 2018.

Released: April 4, 2018

_____

Master M.P. McGraw