

ZTW Properties Inc. v. 799374 Ontario Ltd.

Between

ZTW Properties Inc., plaintiff, and
799374 Ontario Limited, The Geo. Cluthe Manufacturing Co.
Limited and The Nith & Grand River Corp., defendants

[1995] O.J. No. 2536

DRS 95-19587

Court File No: 49482/90

Ontario Court of Justice (General Division)

Toronto, Ontario

Lissaman J.

Heard: December 20, 1994. and March 9, 1995.

Judgment: August 31, 1995.

(12 pp.)

Fraud and misrepresentation — Fraudulent conveyances and preferences — Mortgages — Priorities — Registry Act — Priority between mortgagee and purchaser — Purchaser claiming return of deposit — Practice — Judgment and orders — Summary judgment.

This was a motion for summary judgment dismissing an action on the grounds that there was no genuine issue for trial. The moving parties argued that there was no merit to the case and no evidence that would enable a court to grant the plaintiff an equitable lien ranking ahead of the existing mortgage. One of them had been a mortgagor as of March 1989 on a \$4.5 million mortgage. This went into default in August 1989 and power of sale proceedings began. No one redeemed the mortgage. The defendant mortgagee rejected several offers between \$3.1 to \$3.625 million. It later sold the property to the other corporate defendant for \$4.5 million with a vendor takeback mortgage for the full amount. The principal shareholder of the mortgagee owned 51 per cent of the purchaser's shares. The plaintiff sought return of its \$300,000 deposit on a July 1989 agreement of purchase and sale, declarations of conspiracy, fraudulent conveyance, voidable sale, entitlement to equitable lien and breach of fiduciary duty, an order for an accounting, and an injunction. The plaintiff had also obtained a certificate of pending litigation against the property.

HELD: The motion was dismissed. Although many of the plaintiff's claims were far reaching, they were not entirely without merit. The certificate was ordered vacated if either defendant posted a letter of credit to the credit of the action.

Statutes, Regulations and Rules cited:

Fraudulent Conveyances Act, R.S.O. 1990, c. F.29.

Counsel:

J.G. Hodder, counsel for the plaintiff.

I.A. Duncan and W.J. Poulos, counsel for the defendants, The Geo. Cluthe Manufacturing Co. Limited and the Nith & Grand River Corp.

No appearance for the defendants, 799374 Ontario Limited.

¶ 1 **LISSAMAN J.**:— This is a motion by the defendants, The Geo. Cluthe Manufacturing Co. Limited and The Nith and Grand River Corp. for summary judgment dismissing the plaintiff's claim on the grounds that there is no genuine issue for trial.

The Parties:

¶ 2 The plaintiff ZTW Properties Inc. is referred to as "ZTW". The defendant 799374 is referred to as "799374". The defendant The Geo. Cluthe Manufacturing Co. Limited is referred to as "Cluthe". The defendant The Nith & Grand River Corp. is referred to as "Nith".

¶ 3 The defendants Cluthe and Nith seeking summary judgment allege that the various techniques used by ZTW to resist summary judgment are shallow, spurious and of no merit whatsoever. In particular Mr. Duncan submits that there is no evidence before a Court that would enable it to grant ZTW an equitable lien ranking ahead of an existing mortgage (in the case at Bar the Cluthe Mortgage).

The Facts:

¶ 4 1. In or about 1989, the defendant 799374 was the registered owner of a property located in the Town of Paris, County of Brant (the "property") in the Province of Ontario;

¶ 5 2. 799374 mortgaged the property to Cluthe by mortgage registered on title on March 17, 1989 in the Registry Division of Brant (the "Cluthe Mortgage"). The Cluthe Mortgage was for the principal amount of \$4,500,000.00 and was secured by other collateral security.

¶ 6 3. On August 28, 1989 by reason of default under the Cluthe Mortgage, Cluthe commenced power of sale proceedings.

¶ 7 4. On or about October 13, 1989 a Notice of Sale under the mortgage was served upon all persons entitled to notice in accordance with the requirements of the Mortgages Act.

¶ 8 5. 799374 remained in continuous default under the Cluthe Mortgage. Neither 799374 or any other person or entity including ZTW redeemed the Cluthe Mortgage.

¶ 9 6. Cluthe listed the property for sale with Hurley Real Estate Ltd. An appraisal was obtained from Lewis A. Emsley valuing the property at \$1,500,000.00. Three offers to purchase lands which included the property were received by Cluthe as follows:

(i) An offer dated October 20, 1990 from Kubassek Holdings Ltd. in trust for

a company to be incorporated for \$3,500,000.00.

- (ii) An affidavit dated April 5, 1991 from Hans Kahlen in trust for a company to be incorporated for \$3,625,000.00.
- (iii) An offer dated October 28, 1991 from Kedvel Park Estates Ltd. (in trust) for \$3,100,000.00.

None of these offers were acceptable to the defendant Cluthe.

¶ 10 7. On February 3, 1992 Cluthe sold the property to Nith for \$4,500,000.00. Under the terms of the agreement Cluthe agreed to take back a mortgage for the full amount of the purchase price being \$4,500,000.00. This transaction was completed when a deed was registered to Nith.

¶ 11 8. George Cluthe, principal shareholder of Cluthe, owns 51% of the issued shares of Nith.

¶ 12 9. In July 1989 ZTW entered into an agreement of purchase and sale with 799374 which covered the lands included in the mortgage. ZTW takes the position that it legally backed out of its agreement with 799374 and accordingly was entitled to the return of the \$300,000.00 deposit paid by it to 799374.

¶ 13 10. 799374 has not defended this action that is in default.

¶ 14 11. ZTW takes the position that it had the legal right to back out of its agreement with 799374 and it was therefore entitled to the return of its deposit.

¶ 15 12. ZTW acknowledges that its transaction with 799374 was in point of time after the creation of the mortgage in favour of Cluthe.

¶ 16 13. ZTW noted 799374 in default on or about August 16, 1990 and it is common ground between the parties that 799374 is a shell company without any assets.

¶ 17 14. On May 16, 1990 ZTW commenced this action against 799374 and obtained an ex parte order granting the certificate of pending litigation which was registered on May 17, 1990 against the property, the subject of this motion.

¶ 18 15. On or about May 17 and May 28, 1990 ZTW's solicitors wrote to 799374 advising that no extensions would be granted and demanded return of the \$300,000.00 deposit. It is the position of ZTW that at least as of May 20, 1990 the July 8, 1989 agreement between ZTW and 779374 was at an end.

¶ 19 16. Bruno Schickedanz, the controlling shareholder of ZTW Properties Inc., has on several occasions stated that it is only interested in recovering the return of the \$300,000.00 deposit presumably with interest.

¶ 20 17. On or about May 5, 1993 ZTW amended the Statement of Claim herein adding "Cluthe and Nith" as defendants claiming an interest in land and a certificate of pending litigation which was obtained and registered.

¶ 21 ZTW claims substantial damages from 799374 but basically is seeking the return of its deposit with interest. As against the defendants, other than 799374, ZTW claims the following:

- (a) A declaration that Cluthe and Nith or any of them wilfully conspired with each other to injure the plaintiff by avoiding the contractual obligations between ZTW and 799374, thereby attempting to obstruct the return of \$300,000.00 being the deposit money by 799374 to ZTW which it alleges was used to improve the property.
- (b) A declaration that the sale by Cluthe to Nith dated February 3, 1992 is a fraudulent conveyance pursuant to the Fraudulent Conveyances Act, R.S.O. 1990, c. F29, as amended;
- (c) A declaration that the sale by Cluthe to Nith was a sale by the principals of Cluthe to the same principals, and accordingly that this sale be set aside or voidable as being a sale by a mortgagee to himself;
- (d) A declaration that Cluthe breached its fiduciary duties as a mortgagee when it sold the land to Nith purportedly pursuant to a power of sale proceeding.
- (e) A declaration that ZTW is entitled to an equitable lien for its deposit in the sum of \$300,000.00 plus interest, which lien stands in priority to the interests of Cluthe and Nith in the subject property;
- (f) an order that the property be sold and that all necessary enquiries be made and accounts taken for the sale of the property in order to satisfy the lien claimed by ZTW;
- (g) an interim and final injunction prohibiting Cluthe and Nith in any way from dealing with, selling or disposing of an interest in the said lands.

¶ 22 The defence of Cluthe and the Nith in essence is that there is absolutely no merit whatsoever to the claim by ZTW and all allegations made by ZTW are denied.

¶ 23 The Statement of Claim filed by ZTW is very complicated but its essence, as far as Cluthe and Nith are concerned, is that they conspired with each other and with 799374 Ontario Limited to obtain the benefit of the \$300,000.00 deposit made by ZTW which by agreement between ZTW and 799374 Ontario Limited was released to 799374. As an alternative to the claims that I have already mentioned, paragraph 42 of the Amended Statement of Claim reads as follows:

In the alternative, by virtue of the defendant Cluthe having improvidently conveyed the subject property to a corporation or corporations under its control, and by virtue of the plaintiff's deposit funds having been applied in and toward improving the subject property, the defendants Cluthe and Nith retain the value of said deposit on a constructive trust for which the plaintiff claims an equitable lien. The plaintiff states and pleads that the said equitable lien should be realized in favour of the plaintiff in priority to the interests of the defendants to prevent

the unjust enrichment of the defendants Cluthe and Nith.

The Issues:

¶ 24 The plaintiff claims the following issues should be tried:

- (a) Did the sale by Cluthe to Nith constitute an improvident sale by a mortgagee when exercising power of sale?
- (b) In view of the sale by Cluthe to a Corporation, in which George Cluthe is a majority shareholder, who bears the onus of proving that the sale was provident or improvident?
- (c) Is the sale of the property by Cluthe a fraudulent conveyance within the meaning of the Fraudulent Conveyances' Statute.
- (d) Did Cluthe and other conspire to eradicate ZTW's claim?
- (e) Is this a case where ZTW has an equitable lien against the property? If ZTW has an equitable lien does it stand in ahead of the Cluthe Mortgage?
- (f) Can ZTW invoke the doctrine of unjust enrichment to secure a priority position to the extent of its deposit?
- (g) Is this a case where the principles of unjust enrichment would motivate a Court to put the ZTW's claim ahead of the Cluthe Mortgage?
- (h) Was the sale to Nith a sale with secret profits because of George Cluthe's 51% ownership of Nith?

¶ 25 In a nutshell ZTW submits that there are issues that should be tried and the Cluthe and Nith motion for summary judgment should be dismissed.

Position of Defendants, Cluthe and Nith:

¶ 26 Cluthe and Nith vigorously oppose ZTW's allegations and its allegations as analyzed. These defendants argue that the evidence clearly supports the value of \$4,500,000.00 put on the property as the market value of the property.

¶ 27 In my view ZTW is perhaps grasping at straws in maintaining this action particularly by the allegation that the ZTW claim has priority over the Cluthe Mortgage. The proposition that I should give summary judgment with respect to the assertion by ZTW that it has an equitable lien in priority to the Cluthe mortgage is somewhat attractive to me, however I have decided that this is not a case for summary judgment in whole or in part dismissing the action because of the various claims made by ZTW although many of them are clearly far reaching and therefore the motion for summary judgment fails.

¶ 28 I am disturbed by the ability of ZTW through its certificate of pending litigation to cause considerable financial loss to the defendants, Cluthe and Nith, and accordingly I am of the opinion that the plaintiff's claim for a certificate of pending litigation against the defendants, Cluthe and Nith, should be satisfied by the defendant Cluthe or the defendant Nith posting a letter of credit to the credit of the action and on such posting the certificate of pending litigation

should be vacated. I have asked Counsel to attend before me to make submissions with respect to the amount of the proposed letter of credit as soon as possible. My endorsement when made should include an Order that trial of this action be expedited.

LISSAMAN J.