

CITATION: Mei Ki Ching v. Carleton Condominium Corporation No. 203 2019 ONSC 4338
COURT FILE NO.: CV-18-77866
DATE: 09/10/2019

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
Mei Ki Ching)
) Wayne D. Young for the Plaintiff
)
) Plaintiff)
) (Moving party))
- and -)
)
Carleton Condominium Corporation No.) Rodrigue Escayola, for the Defendant
203) Carleton Condominium Corporation No. 203
)
- and -)
)
Bryan McIntosh)
)
) Defendants)
) (Respondents))
)
)
)
)
) HEARD: June 13, 2019

REASONS FOR DECISION ON SUMMARY MOTION

OVERVIEW

[1] In this case, Bryan McIntosh was the registered owner of a condominium unit, when he separated from his wife, Mei Ki Ching (“Ms. Ching”). He continued to reside in the unit which was their matrimonial home. The Plaintiff spouse, who had left the matrimonial home, filed a Designation of Matrimonial Home (“DMH”) in the Land Titles Office, which contained her new address. She then commenced family law proceedings.

[2] After the DMH was registered, Mr. McIntosh defaulted in paying the monthly common expenses to Carleton Condominium Corporation No. 203 (“CCC 203”). CCC 203 sent a notice

to the registered owner, advising him that if the arrears were not paid within 10 days, a certificate of lien would be registered against the unit. Notice was not sent to his spouse. CCC 203 then registered a certificate of lien against the unit but did not give notice to the registered owner's spouse that the certificate of lien had been registered against the matrimonial home.

[3] CCC 203 then commenced power of sale proceedings and sent notice to the registered owner and to the spouse of the registered owner at the condominium unit's address. Notice was not sent to the spouse at her address set out in the DMH. CCC 203 then retook possession of the unit, removed and stored the contents, without a court order and without giving notice to Ms. Ching.

[4] After CCC 203 had taken the above steps, Ms. Ching obtained an order granting her exclusive possession of the matrimonial home and vesting it in her name. The wife then took possession of the condominium unit but by this time CCC 203 had incurred substantial legal and other expenses of over \$41,000.00. The common expense arrears owing when the Plaintiff retook possession were only \$6,007.45, but with the legal costs and storage costs the amount claimed by CCC 203 is now over \$90,000.00.

[5] The Plaintiff has brought a motion for partial summary judgment seeking an order: a) declaring that the certificate of lien and the power of sale proceedings taken by CCC 203 are null and void; b) discharging the certificate of lien filed by CCC 203 for arrears of common expenses and for the legal costs of enforcement proceedings under the lien; and c) allowing the Plaintiff to proceed to trial with her claim for other damages.

ISSUES

[6] The issues to be decided are as follows:

1. Was CCC 203 required to give notice to Ms. Ching, the spouse of the unit owner, at her address registered on title in the DMH;
 - (a) that it would register a certificate of lien against the unit/matrimonial home unless the common expense arrears were paid within 10 days;
 - (b) when a certificate of lien was registered against the unit/matrimonial home for arrears of commons expenses;
 - (c) when power of sale proceedings were taken against the unit/matrimonial home; and
 - (d) that it would take possession of the unit/matrimonial home unless the arrears were paid.
2. Is the certificate of lien valid; and
3. what amount of legal fees and other expenses incurred by CCC 203 to realize upon its lien should be paid by the Plaintiff?

FACTS

- [7] The Plaintiff, Ms. Ching, is the spouse of the registered owner of a condominium unit that they lived in as their matrimonial home, before they separated in July of 2014. The Plaintiff's husband, Bryan McIntosh, continued to reside in the condominium unit after separation. In May of 2015, the Plaintiff registered a designation that the condominium unit was a matrimonial home ("DMH"), in the Land Titles Office, which stated her name and her current address. The DMH also included her lawyer's name and address.
- [8] In March of 2017, the Plaintiff's spouse (the registered owner) failed to pay the common expense fees to CCC 203. The Condominium Corporation gave ten (10) days written notice to the registered owner before it registered a certificate of lien, but did not give this notice to his spouse Ms. Ching.
- [9] CCC 203 then registered a certificate of lien against the unit on May 31, 2017, but did not give this notice to Ms. Ching at her current address as set out in the DMH.
- [10] On November 27, 2017, CCC 203 prepared and executed a notice of sale of the unit under Part II of the *Mortgages Act*, R.S.O. 1990, c. M.40, s.1. The notice of sale was served by mailing it to the registered owner and the "spouse of the registered owner" at the condominium unit's address. Notice was not sent to Ms. Ching at her address as shown on the DMH registered on title. Notice was also sent to the mortgagee that was registered on title.
- [11] The arrears were not paid within the redemption period and CCC 203 sent a notice to the registered owner demanding vacant possession. After conducting an inspection of the unit on April 25, 2018, CCC 203 determined that the registered owner had vacated the unit and it took possession. Ms. Ching was not given notice of CCC 203's demand for vacant possession or notice of the fact that it had taken possession of the unit/matrimonial home.
- [12] On May 29, 2018, Ms. Ching obtained an order in the Family Law proceedings granting her the right of exclusive possession and vesting title to her of the condominium unit. The unit was registered in the Plaintiff's name on August 21, 2018 and she retook possession of the condominium unit on September 4, 2018.
- [13] On November 6, 2018, Ms. Ching provided a bank draft to CCC 203 in the amount of \$9,344.63 for the amount of arrears of common expenses to September of 2018 (\$6,007.43), interest of \$855.00, a late fee of \$140.00, a special assessment of \$345.00 and legal fees of \$2,000.00. The draft was marked "fully paid up" but was refused by CCC 203.
- [14] The Arrears Statement from CCC 203 as of September 4, 2018 was \$6,489.57 for arrears of common expenses, \$13,272.69 for charge backs, \$140.00 for late fees, Real Estate fees to retake possession of \$11,582.50, interest of \$855.08, plus legal fees of \$9,150.31 for a total of \$41,214.03. The amount claimed by CCC 203 as arrears of common expenses of \$6,489.57 and enforcement costs have risen to \$93,609.68 as of April 12, 2019 plus the costs of this motion.

ANALYSIS

[15] The Plaintiff seeks an order discharging the certificate of lien upon the payment of \$9,844.65, and the recovery of her items stored by CCC 203. The Plaintiff and Defendant both agree that the issue of the validity of the condominium lien, whether notice of the enforcement of the lien should have been given to Ms. Ching, and the amount owing to discharge the lien should be determined on this summary judgment motion. The Plaintiff proposes that her claim for damages be determined at trial.

[16] CCC 203 seeks an order confirming the validity of its lien and a dismissal of the Plaintiff's claim to damages on this summary motion.

No Genuine Issue Requiring A Trial

[17] I am satisfied that I can reach a fair and just determination of the above issues, which the parties agree can be decided on a summary motion, following the principles set out in *Hryniak v. Mauldin*, 2014 SCC 7 as they largely involve statutory interpretation. A summary motion is the most proportionate, expeditious and least expensive procedure in this case as there is no genuine issue requiring a trial to decide those issues.

Applicable Law

[18] Section 18 of the *Family Law Act*, R.S.O. 1990, c. F.3 ("*FLA*"), states as follows:

“Every property in which a person has an interest and that is or, if the spouses have separated, was at the time of separation ordinarily occupied by the person and his or her spouse as their family residence is their matrimonial home”.

[19] The parties agree that the unit was a matrimonial home and after the parties separated, Ms. Ching registered a notice of DMH on the title of the unit on May 13, 2015 as permitted under Section 20 (1) and (3) of the *FLA*.

[20] Section 19 (1) of the *FLA* states that both spouses have an equal right to possession of the matrimonial home. Ms Ching and the registered owner of the condominium unit, Bryan McIntosh, were married on October 2, 2007, lived together in the unit, and separated on July 24, 2014. The parties had not obtained a divorce during the relevant period.

[21] Section 22 (1), of the *FLA* states that when a person proceeds to realize upon a lien against a property that is a matrimonial home, the spouse that has a right of possession has the same right of redemption or relief from forfeiture and is entitled to the same notice respecting the claim and its enforcement or realization and reads as follows:

22 (1) When a person proceeds to realize upon a lien, encumbrance or execution or exercises a forfeiture against property that is a matrimonial home, the spouse who has a right of possession under Section 19 has the same right of redemption or relief against forfeiture as the other spouse and is entitled to the same notice respecting the claim and its enforcement or realization.

(2) A notice to which a spouse is entitled under subsection (1) shall be deemed to be sufficiently given if served or given personally, or by registered mail addressed to the spouse at his or her usual or last known address or, if none, the address of the matrimonial home, and, if notice is served or given by mail, the service shall be deemed to have been made on the fifth day after the day of mailing.
(emphasis added)

Idem: power of sale

(3) When a person exercises a power of sale against property that is a matrimonial home, Sections 33 and 34 of the *Mortgages Act* apply and Subsection (2) does not apply.

[22] Section 1 (1) (a) of the *Condominium Act* defines an owner as follows:

“owner” means,

(a) in relation to a corporation other than a leasehold condominium corporation or a common elements condominium corporation, a person who is shown as the owner of a freehold interest in a unit and its appurtenant common interest, according to the records of the land registry office in which the description of the corporation is registered, and includes a mortgage in possession and a declarant with respect to any unit that the declarant has not transferred to another person.

[23] Section 85 (1) of the *Condominium Act* states that a condominium corporation has a lien against the owner’s unit: for the unpaid amount together with all interest owing and reasonable legal costs and reasonable expenses incurred by the corporation.

85 (1) If an owner defaults in the obligation to contribute to the common expenses payable for the owner’s unit, the corporation has a lien against the owner’s unit and its appurtenant common interest for the unpaid amount together with all interest owing and all reasonable legal costs and reasonable expenses incurred by the corporation in connection with the collection or attempted collection of the unpaid amount.

(emphasis added)

[24] Section 85 (4) of the *Condominium Act* requires that notice be given to the registered owner ten (10) days before a certificate of lien is registered and states as follows:

(4) At least 10 days before the day a certificate of lien is registered, the corporation shall give written notice of the lien to the owner whose unit is affected by the lien.

[25] To summarize, where a person proceeds to realize upon a lien against a matrimonial home, Section 22 (1) of the *FLA* gives the spouse of the registered owner of a matrimonial home the same right of redemption and the right to receive the same notice respecting the claim, its enforcement or realization as the other spouse that is the registered owner.

[26] Section 22 (2) of the *FLA* states that the notice which a non-titled spouse is entitled to receive shall be sufficiently given if a) served or given personally; b) sent by registered mail to his or her usual or last known address or c) if none, then the address of the matrimonial home. In this case the Plaintiff's usual or last known address was known or should have been known to CCC 203 upon making reasonable inquiries, because her usual or last known address was registered on title in the DMH.

[27] Section 22 (3) of the *FLA* states that where a person exercises a power of sale against a property that is a matrimonial home, Sections 33 and 34 of the *Mortgages Act* apply and the notice provisions of Section 22 (2) of the *FLA* does not apply.

Applying the Law to the Facts

[28] Once a condominium corporation registers a certificate of lien against the title to a condominium unit for arrears of common expenses, it may proceed to sell the unit by way of power of sale under the *Mortgages Act*. The giving of the 10 day notice is the first step in proceeding to allow the corporation to sell the unit to recover proceeds to pay the arrears owing.

[29] Section 33 (1) of the *Mortgages Act* sets out the rules for the manner of giving notice when exercising power of sale. Section 33 (1) states that notice shall be given by a) personal service; or b) by registered mail at the person's usual or last known place of address; or c) where the last known place of address is that shown on the registered instrument under which the person acquired an interest, to such address or d) by leaving it at one of such places of address. CCC 203 sent the notice of power of sale by registered mail to the spouse of the registered owner at the condominium unit's address and did not sent the notice to her usual or last known place of address, which was indicated on the DMH registered on the title of the unit.

[30] I find that before a condominium corporation takes a step that may affect the possessory rights of an untitled spouse in a matrimonial home, it must first make reasonable inquiries about whether the unit is a matrimonial home and the existence and address of any untitled spouse. Conducting a review of the title to the unit would constitute a reasonable inquiry in this case, which would have revealed sufficient particulars to determine that the unit was a matrimonial home, and the name and current address of the untitled spouse. If this had been done Ms. Ching would have been served with notice at her address set out in the DMH.

[31] The units of a condominium corporation are registered under the Land Titles Act, which states that the title is subject to the possessory rights granted under Part II of the *FLA*. The spouse of a registered owner of a matrimonial home is entitled to receive notice of any steps that could affect his or her right to exclusive possession and provide them with an opportunity to redeem any arrears arising from a claim on its enforcement.

[32] *Black's Law Dictionary* defines "realization" as "1. Conversion of non-cash assets into cash assets." The *Concise Oxford English Dictionary* defines "realize" as "Conversion of (an asset) into cash."

[33] Section 85 (1) of the *Condominium Act* states that upon default of paying their share of common expenses, the Condominium Corporation has a lien against the owner's unit for all unpaid amounts plus reasonable legal and collections costs. The lien expires three months after the default occurred unless a certificate of lien is registered against the unit within that time.

[34] I find that when a corporation takes the step to register a certificate of lien against the title of a unit, including the giving of the 10 day notice, it is proceeding to realize upon the lien. Section 22 of the *FLA* states that the untitled spouse of the owner of a matrimonial home is entitled to receive the same notice as the other spouse respecting the claim, and its enforcement or realization. The giving of the 10 day notice before registering a certificate of lien, constitutes notice of a claim for the arrears, which should have been given to Ms. Ching to allow her an opportunity to redeem to protect her possessory interest in the same manner as her spouse.

[35] CCC 203 was proceeding to realize upon its unregistered lien when it gave the ten (10) day notice to pay the arrears or else it would register a certificate of lien against the unit. This interpretation of Section 22 (1) of the *FLA* would allow the non-titled spouse to redeem and protect their possessory interest in the matrimonial home and would be consistent with the scheme, object and intention of the legislature when enacting of s. 22 (1) of the *FLA*. The object and intention of the legislation in enacting s. 22 (1) of the *FLA* was to provide the untitled spouse of a matrimonial home with the same notice as their spouse, of any claim or proceeding that would affect their possessory interest and to provide them with the opportunity to redeem.

[36] Section 85 (4) of *The Condominium Act* states that notice must be given to the registered owner ten (10) days before the certificate of lien is registered against the unit. The section is silent on whether that notice must also be given to the registered owner's spouse if the unit is a matrimonial home.

[37] The Supreme Court has adopted Professor Driedger's approach to statutory interpretation as follows: "The words of the *Act* are to be read in their entire context and their grammatical and ordinary sense harmoniously with the scheme of the *Act*, the object of the *Act*, and the intention of Parliament."

[38] When CCC 203 proceeded to give the ten (10) day written notice that it would register a certificate of lien against the title of the unit for arrears of common expenses, unless the arrears were paid within 10 days, it had commenced a process to realize upon its unregistered lien, namely to convert the unit into cash to pay the arrears of common expenses. The spouse of the registered owner of a matrimonial home has the right to redeem under s. 22 (1) of the *FLA*. Giving notice that a certificate of lien would be registered against the title to the unit constitutes the commencement of a proceeding to realize on the lien, that already existed pursuant to s. 85 (1), for arrears of common expenses.

[39] Section 22 (1) of the *FLA* requires notice to be given to the non-titled spouse in the same manner as the spouse who is the registered owner respecting any claim and its enforcement or realization. The notice that a certificate of lien would be registered unless the arrears of common expenses were paid within 10 days is a claim for the arrears owing. The registered owner was

entitled to receive this notice and as a result their spouse is entitled to receive the same notice to give him or her a meaningful opportunity to redeem.

[40] Section 22 (1) of the *FLA* states that “where a person proceeds to realize upon a lien” the spouse of a matrimonial home owner is entitled to receive the same notice and the same right to redeem as the registered owner. CCC 203 was clearly proceeding to realize on its lien when it proceeded with power of sale proceedings against the unit under the lien and took possession of the unit. I find that CCC 203 was required to give notice to the Plaintiff’s spouse when it took these steps to realize on its lien.

[41] The requirement to give notice to the registered owner of a condominium corporation’s intention to register a certificate of lien against the unit unless the arrears were paid within 10 days pursuant to s. 85 (4) of the *Condominium Act*, must be read in conjunction with the untitled spouse’s right to redeem any claim and to their right to possession to a matrimonial home under the *FLA*. In this case, CCC 203 was required to make a reasonable inquiry to determine if the condominium unit was a matrimonial home and to determine the particulars of the untitled spouse, including their name and usual or last known address. A review of the title to the unit would be a reasonable inquiry in these circumstances which would have revealed Ms. Ching’s name and current address and that the unit was a matrimonial home.

[42] In these circumstances I find that notice should have been given to the non-registered spouse in a manner set out in either s. 22 (2) of *FLA* for the 10 day notice and notice of the power of sale proceedings should have been given to the non-registered spouse in accordance with s. 33 (1) of the *Mortgages Act* at her address set out in the DMH registered on title.

[43] When a corporation registers a certificate of lien against the title to the unit, notice must also be provided to all encumbrancers. The title of the condominium unit must be reviewed by the corporation in any event to determine if there are any encumbrancers. CCC 203 reviewed the title to this unit because it gave notice of the registration of a certificate of lien to the first mortgagee. Even though the registration of DMH is not a common occurrence, CCC 203 ought to have noticed the Designation as a Matrimonial Home and the name and address of the spouse of the registered owner when it reviewed the title to the unit.

[44] It is not unduly onerous for a condominium corporation that is taking steps to register a certificate of lien on title, to allow it to sell the unit to pay the arrears of common expenses, to also give notice to the non-registered spouse of the matrimonial home, where a designation containing their name and address is registered on the title to the unit. I take judicial notice that the title to a condominium unit may now be reviewed easily on a computer at a minimal cost. Any expenses incurred reviewing the title would be recoverable in any event.

Disposition of Issue # 1

[45] [46] For the above reasons I find that CCC 203 was required a) to make reasonable inquiries to determine if the unit was a matrimonial home and the name and current address of any untitled spouse; and b) to give notice to Ms. Ching at her address registered in the DMH; i) that it would register a certificate of lien if the arrears were not paid within 10 days; ii) when it

registered the certificate of lien against the unit; iii) when it took power of sale proceedings against the unit; and iv) before it took possession of the matrimonial home.

Issue #2: Is The Certificate Of Lien Valid?

[46] [47] The failure of CCC 203 to give notice to the spouse of the registered owner, when it took steps to realize on its lien, does not affect the validity of the lien as against the registered owner or the encumbrancers that were given notice. However, the lien would be ineffective and invalid against Ms. Ching as reasonable inquiries were not made by CCC 203 to determine if the unit was a matrimonial home and the spouses name and address, and she was not given notice in breach of the requirements of s. 22(1) of the FLA.

[47] The arrears of common expenses, the late payment fee, interest on arrears and a special assessment would all continue to exist and could be enforced by giving notice of registration of a lien if they remain unpaid. All of the legal expenses and the costs incurred to realize on its lien, including giving the 10 day notice, the power of sale proceedings, and retaking possession are not recoverable under the lien because the proceedings were defective. CCC 203 failed to make reasonable inquiries and failed to give notice to the non-titled spouse of the matrimonial home at her usual or last known place of address as shown in the DMH of the steps taken to claim and recover the arrears of common expenses.

[48] The expenses claimed by CCC 203 to retake possession of the unit and to remove the contents thereof and the storage costs incurred, without giving notice to the non-titled spouse of the matrimonial home are also not recoverable as reasonable inquiries were not made and notice was not given to Ms. Ching, who was a spouse with a possessory interest in the unit which was a matrimonial home.

Issue #3: What Amount Of Legal Expenses And Other Collection Expenses Are Recoverable By CC 203?

[49] The legal and other collection expenses incurred by CCC 203 for exercising power of sale, retaking possession and removing and storing the contents of the unit are not recoverable against Ms. Ching, because they were steps in proceedings taken to realize on the lien and it failed to make reasonable inquiries to determine if it was a matrimonial home and the particulars of the untitled spouse's name and address, and as a result failed to give her notice as required by s. 22 (1) of the FLA. The cost of giving the 10 day notice to pay the arrears of common expenses or a certificate of lien would be registered against the unit was also the first step in a proceeding to realize on a lien and as such no legal costs or collection costs are recoverable against Ms. Ching. The costs for giving the 10 day notice by mail and the registration of the certificate of lien would be minimal in any event.

DISPOSITION

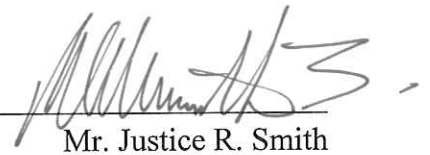
[50] For the reasons given above CCC 203's lien is invalid as against Ms. Ching and as a result the legal costs of realizing on the lien and other collection expenses incurred by CCC 203 are not recoverable against Ms. Ching under its certificate of lien, because notice was not given to her as required by s. 22 (1) of the FLA. The certificate of lien may be discharged upon paying

the amount of the arrears of common expenses, interest on the arrears of \$855.00, a late fee of \$140.00, and a special assessment of \$345.00.

[51] The contents of the unit that were removed and are in storage shall be returned to the Plaintiff at the unit as soon as reasonably possible. The Plaintiff may continue to trial with her claim for damages if she wishes.

COSTS

[52] The Plaintiff shall have 20 days to make written submissions on costs, the Defendant shall have 20 days to respond and the Plaintiff shall have 10 days to reply.



Mr. Justice R. Smith

Date: 09/10/2019

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COURT FILE NO.: CV-18-77866
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**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

Mei Ki Ching

Plaintiff
(Moving party)

– and –

Carleton Condominium Corporation No. 203

– and –

Bryan McIntosh

Defendants
(Respondents)

COUNSELS:

Wayne D. Young, for the Plaintiff

Rodrigue Escayola, for the Defendant
Carleton Condominium Corporation No. 203

HEARD: June 13, 2019

REASONS FOR DECISION

Date released: September 10, 2019