

CANADA / JUDGMENT

1133823 BC Ltd. v. Arvind

2022 BCSC 165

COURT

Supreme Court of British Columbia

DECIDED

18 January 2022

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2022 BCSC 165 1133823 BC Ltd. v. Arvind

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

1133823 BC Ltd. v. Arvind,

2022 BCSC 165

Date: 20220118

Docket: H210140

Registry: Vancouver

Between:

1133823 B.C. Ltd.

Petitioner

And

Jaymala Arvind, Arvind Shankar, Konnect Brookside Holdings Ltd.,

Konnect Developments Ltd. and John Doe

Respondents

Before: Master Bilawich

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioner:

H.A. Frydenlund

Counsel for the Respondents:

J.A. Van Netten

Place and Date of Hearing:

Vancouver, B.C.

January 11, 2022

Place and Date of Ruling:

Vancouver, B.C.

January 18, 2022

- [1] THE COURT: The petitioner applies for an order nisi foreclosure with a one-day redemption period and immediate conduct of sale.
- [2] The respondents oppose all of the relief sought, say there are numerous triable issues and ask that the matter be referred to the trial list.

Background

- [3] This is a foreclosure proceeding relating to a second mortgage on a penthouse strata property with municipal address 3001 - 1155 The High Street, Coquitlam B.C. (the "Coquitlam Property"). The respondent Jaymala Arvind ("Ms. Arvind") is registered owner of the property. On title is a first mortgage and assignment of rents to the Bank of Nova Scotia with Land Title Office registration numbers CA3094371 and CA3094372, and a second mortgage (the "Second Mortgage") and assignment of rents registered by the petitioners on April 4, 2019, under Land Title Office registration numbers CA7440234 and CA7440235. The respondents Arvind Shankar ("Mr. Shankar"), Konnect Brookside Holdings Ltd. and Konnect Developments Ltd. are all covenantors on the Second Mortgage.
- [4] The principal amount of the Second Mortgage was originally \$950,000. The interest rate is 5.05 percent per annum, calculated monthly and monthly interest-only payments were \$3,997.92. This mortgage matured on April 15, 2020.
- [5] The petitioner applies for order nisi foreclosure with a one-day redemption period. It says that the redemption amount was \$1,092,671.95 as of January 11, 2022. It seeks personal judgment against Ms. Arvind, Mr. Shankar and Konnect Developments Ltd., jointly and severally, costs at scale C, right to apply for a further summary accounting and immediate conduct of sale of the Coquitlam Property.

- [6] The evidentiary basis for a shortened redemption period and immediate conduct of sale is an appraisal prepared by Raymond Hull of Gateway Appraisal & Consulting Group Inc. dated as of December 17, 2020. I note the appraisal is somewhat dated. Mr. Hull opined that the Coquitlam Property's market value was \$875,000 at that time. The petitioner argues this establishes it will suffer a substantial shortfall.

Evidence of the Petitioner

- [7] Nadeem Chagan ("Mr. Chagan") is director of the petitioner. The petitioner has tendered two affidavits from Mr. Chagan. In the second, he states the petitioner, himself and Mr. Shankar have had a business relationship for many years which involves numerous loans being advanced to Mr. Shankar for various projects.
- [8] Mr. Chagan says that on April 8, 2019, Ms. Arvind granted the petitioner the Second Mortgage as security for funds it advanced to Mr. Shankar. The petitioner attached as exhibits copies of several executed documents relating to the transaction, including:
- a) An April 8, 2019 promissory note to the petitioner for \$950,000 from Mr. Shankar as borrower and Ms. Arvind, Konnect Brookside Holdings Ltd. and Konnect Developments Ltd. as covenantors. It states that Mr. Shankar was indebted to the petitioner in the sum of \$640,000 as of April 8, 2019, and that he wished to borrow from the petitioner a further \$310,000 [making the total borrowed \$950,000].
 - b) An April 8, 2019 guarantee of all debts and liabilities, present or future, that Mr. Shankar owes to the petitioner given to the petitioner by Ms. Arvind. This refers to Ms. Arvind granting the petitioner the Second Mortgage to secure the guarantee.
 - c) A statutory declaration from Ms. Arvind stating she is the mortgagor of the Coquitlam Property and that the purpose of the loan is to "fund loan to Arvind Shankar."
 - d) An April 8, 2019 certificate of independent legal advice confirming Ms. Arvind received independent legal advice regarding the liability she would incur by executing the relevant documents.
 - e) An April 9, 2019 certificate of independent legal advice confirming Mr. Shankar, Konnect Brookside Holdings Ltd. and Konnect Developments Ltd. had received independent legal advice regarding the liability they would incur by executing the relevant documents.
 - f) An order to pay dated April 8 and 9, 2019, regarding payout of mortgage proceeds of \$310,000, approved and accepted by all of the respondents.
- [9] Mr. Chagan says the Second Mortgage was registered for the sole benefit of the petitioner and as security for funds it advanced to Mr. Shankar. It was not repaid as agreed, which led to the petitioner to start this foreclosure on March 17, 2021.

[10] Mr. Chagan denies the respondent's allegations that the Second Mortgage was registered to secure the funds advanced by any third parties to Mr. Shankar. He says it was not registered for the benefit of anyone other than the petitioner. He expressly denies the Second Mortgage was registered by the petitioner acting as agent for the Five Lenders (defined below).

Evidence of the Respondents

- [11] Mr. Shankar is married to Ms. Arvind, is a personal covenantor and is a director of two of the corporate covenantors.
- [12] Mr. Shankar swore an affidavit stating he has known Mr. Chagan since 2009. At the time, Mr. Shankar was a mortgage advisor for Scotiabank and Mr. Chagan was a registered and licensed mortgage broker. Mr. Shankar branched out into property development in 2014, initially building on single lots and residential homes and later expanding into larger developments.
- [13] In late 2016, he subleased 3.5 acres of bare land owned by Westbank First Nation. Mr. Chagan found investors/lenders to advance money to complete the transaction and found two pre-sale buyers, one of whom was Mohammad Janief ("Mr. Janief"). In 2018 he ran into financial difficulties and asked Mr. Chagan to help find additional funding. Mr. Chagan found five lenders (collectively, the "Five Lenders"), who agreed to make unsecured loans at 15 percent per annum interest, and which were supposed to be for terms of 6-12 months.

Lender

Amount

Mohammed Janief

\$355,000

Amin Karim

\$600,000

Farouk Mohammed

\$300,000

Rahim Manji

\$350,000

Zulfikar Visram

\$125,000

Total

\$1,730,000

- [14] Mr. Shankar says he was unable to pay and defaulted on his obligations to the Five Lenders. He says Mr. Chagan began calling him and saying he was under pressure from the Five Lenders, all of whom had expressed concern about being repaid. Mr. Chagan became insistent that Mr. Shankar provide security for these loans. Mr. Shankar says he did not have additional security to offer at the time, as all of his funds were tied up in four development projects he had on the go at the same time and each was in a precarious financial position.
- [15] Mr. Shankar says Mr. Chagan was familiar with his and Mr. Arvind's financial circumstances and raised the idea of Ms. Arvind providing a second mortgage on the Coquitlam Property. Tendered in evidence is a January 26, 2019 email from Mr. Chagan to Mr. Shankar regarding Ms. Arvind providing the second mortgage on a property referred to as M1. It sets out a list of lenders and loan details which states in part:

Please review. We will need to put a second mortgage on M1 with guarantee from Arvind and all of his companies approx. amount of 4.7M of which 3.1M is not secured and the payments have been defaulted, if you could please sign and email back, we can get Cobbett & Cotton instructed. Thank you.

- [16] The Five Lenders are included in a list of lenders, albeit some of the loan amounts differ.
- [17] Mr. Shankar says Mr. Chagan increased pressure over subsequent months. He felt bad about what had happened and eventually his concerns about getting his wife involved were outweighed by the obligation he felt to the Five Lenders.
- [18] Mr. Shankar says at no time did Ms. Arvind borrow any monies from the petitioner. Rather, the purpose of the Second Mortgage was to provide security in the form of a collateral mortgage which was for the benefit of the Five Lenders, as referenced in the January 26, 2019 email. The documents were prepared by Mr. Chagan's lawyers, Cobbett & Cotton. He has no recollection of receiving any new funds from the petitioner at the time. He says he and Mr. Chagan were involved in a number of transactions where money flowed back and forth between them. He says he has requested an accounting of those transactions, but Mr. Chagan has thus far refused.
- [19] On November 12, 2020, the respondents received a demand letter from Owen Bird, counsel for the petitioner, regarding the Second Mortgage debt due to the petitioner. He says this surprised him because he had received no prior indication from the Five Lenders that they had instructed Mr. Chagan to issue a demand. He says he had pointed discussions with Mr. Chagan about why the demand had been made, particularly in light of the fact that he had previously [February 27, 2019] transferred \$75,000 to Mr. Chagan, which was intended for the Five Lenders. This was in response to Mr. Chagan's advice they were becoming restless and some payment was needed.

- [20] After the demand, he says Mr. Chagan told him to make additional payments to the Five Lenders, which would eliminate any further steps being taken under the Second Mortgage. He paid a further \$60,000 in several cheques, all payable to the petitioner, with a memo indicating these were mortgage payments for the Coquitlam Property. The cheques were dated between November 30, 2020 and February 1, 2021.
- [21] Mr. Shankar has produced text messages between himself and Mr. Chagan regarding these payments. Mr. Chagan provided the petitioner's VanCity Savings account number. At one point in the text exchange Mr. Chagan suggests "I need something to by us all time" and later "unfortunately Owen Bird is not waiting. PLS call." Mr. Shankar responded that "it's not Owen Bird. It's you, partner." Mr. Chagan responded, "Yes, it's me sending the email. BUT scratchy, Annandale, Rahim, MJ, Farouk all pushing. Mr. Shankar says these are the Five Lenders. Mr. Shankar asked him to just hold it this week and that the "WR deal" was closing Thursday.
- [22] Later in January 2021, Mr. Chagan texted "Guys are saying I am BS'ing, and they want me to email lawyer this evening." Mr. Shankar says the reference to "Guys" is the Five Lenders, and the reference to emailing the lawyer is meant to suggest the Five Lenders were the ones giving instructions regarding this demand.
- [23] Mr. Chagan later texted RBC and CIBC account numbers, which he indicated were personal accounts. In February 2021, he texted "My time is up help," and "They have made an appointment for me to see lawyer to sign affidavit tomorrow 10am". Mr. Shankar asked who made the appointment and whether it would help for him to call MJ, Farook and Amin now to ask them to stop this madness. He also asked who is driving this process. Mr. Chagan's response was "Pls do" and "I was to go sign last week Monday".
- [24] Mr. Shankar says he contacted the Five Lenders individually and they denied having instructed Mr. Chagan to issue the demand.
- [25] These are followed by several texts in which Mr. Chagan tells Mr. Shankar that he had sent funds received from Mr. Shankar to some of the Five Lenders. "Arvind, any luck with the 13k, I have given the 6k already". Mr. Shankar's response includes "will have the 13k tomorrow". Mr. Chagan responds "2,500 and 2,500 has been sent already". Mr. Shankar asked "To Farook and Amin?" Mr. Chagan responds "Yes" followed by Mr. Shankar stating "He texted me this morning why I am playing game with you and how can I not deposit this to his account directly". Mr. Shankar says he was in contact with some of the Five Lenders, who indicated they had not received any of the payments Mr. Chagan claimed he was sending them.
- [26] Mr. Shankar says he paid a total of \$135,000 towards the balance owing on the Second Mortgage, of which \$60,000 was paid after demand. None of this has been credited against the balance owing on the Second Mortgage.

Evidence of Mohammed Janief

- [27] Mr. Janief says that Mr. Chagan became his accounting client in about 1995 or 1996. In early 2005, following the sale of certain family-owned businesses, Mr. Chagan obtained licensing as a mortgage broker and realtor and formed his own mortgage broker business, Access Mortgage Inc.
- [28] Mr. Janief says Mr. Chagan introduced him to Mr. Shankar in 2010. Thereafter, using Mr. Chagan as his mortgage broker, he invested from time to time in projects involving Mr. Shankar.
- [29] He says in 2017, Mr. Chagan brought the Brookside development to his attention. Mr. Shankar sought funding for the development. Mr. Chagan recommended it as good investment. Mr. Janief purchased a pre-sale townhome, which involved a \$49,900 deposit and he agreed to make what was supposed to be a short-term unsecured loan to Mr. Shankar in two parts in the total sum of \$355,000 for pressing development expenses. Interest payable on the loan was 15 percent per annum. It was to be repaid within a year.
- [30] The loan was not repaid as promised. Mr. Janief says in 2018-2019 he made repeated and escalating inquiries of Mr. Chagan expressing his concerns about delay in payment and lack of security. He received explanations from Mr. Chagan which placated his concerns. Eventually, in late August 2019, he attended at the development site and was troubled to see it was nowhere near completed.
- [31] In September 2019, he had further pointed conversation with Mr. Chagan regarding his concern that his investment was at risk and unsecured. He says Mr. Chagan told him that earlier he had taken steps to secure Mr. Janief's loan with a mortgage through his company and that there were four other unsecured lenders in the same situation whose loans had been secured by the same mortgage. Mr. Chagan refused to tell him who the other four lenders were.
- [32] He says Mr. Chagan later told him that a receiver had been appointed over the project and direct questions to Mr. Shankar.
- [33] In March 2021, Mr. Janief received a telephone call from Mr. Shankar, who was upset about himself and his wife having received the foreclosure petition and supporting affidavit material. Mr. Janief says that at no time did he authorize Mr. Chagan to commence foreclosure proceedings relating to the Second Mortgage.
- [34] Mr. Janief also expresses concern that he had not received any payments from Mr. Chagan from the funds that Mr. Shankar indicated he had paid towards the balance owing on the Second Mortgage. He obtained the names of the other four lenders from Mr. Shankar and contacted them.

- [35] He says he is now coordinating efforts with the other four lenders and they are taking steps to assume control of the Second Mortgage, including making a demand of Mr. Chagan that the Second Mortgage and related rights be assigned to them. He alleges that Mr. Chagan took part in a conference call with the Five Lenders. He alleges Mr. Chagan admitted the Second Mortgage had been established to provide security for the Five Lenders and that he did not object to assigning it to them. Afterwards, however, Mr. Chagan refused to do so.
- [36] Mr. Janief says that it is his position that the Five Lenders are the rightful owners of the Second Mortgage and that it was put in place to protect their interests.

Position of the Petitioner

- [37] The petitioner says that the respondents have not identified a triable issue. Counsel argued that the Second Mortgage, promissory note, guarantee and related paperwork is all clear and unambiguous on its face. The relate to a mortgage in favour of the petitioner for funds that were advanced to Mr. Shankar in the amounts and on the dates indicated.
- [38] Counsel noted that the dates and amounts involved in the January 2019 email, the February 2019 direct deposit and various cheques and texts are different than the unsecured amounts loaned by the Five Lenders and did not involve the petitioner. Counsel says there were numerous transactions back and forth between Mr. Chagan and Mr. Shankar around these times and that these particular transfers or amounts each related to completely different matters. Counsel referred to *Gupta v. 0856716 B.C. Ltd.*, 2012 BCSC 1407, at para. 41; and *Southeast Toyota Distributors Inc. v. Branch*, [1997] B.C.J. No. 1426 (S.C.), aff'd (1998), 47 B.C.L.R. (3d) 1 at para. 69 as examples of cases where the court concluded it could resolve issues by referring to documentary evidence and did not need oral evidence.
- [39] The petitioner says this is an appropriate case to grant the relief sought on a summary basis.

Position of the Respondents

- [40] The respondents deny the facts alleged in the petition. They say the petitioner is trustee or agent of the Five Lenders and the Second Mortgage was created to provide security for amounts owed to them. They say they did not receive any new consideration for the Second Mortgage, promissory note or guarantee.
- [41] The respondents say the petitioner is pursuing this proceeding for an improper purpose and without authority from the Five Lenders and that it appears uncertain whether any recovery would actually benefit the Five Lenders.

- [42] The respondents say the \$135,000 in payments were made to the petitioner and/or its principal, Mr. Chagan as agent or trustee of the Five Lenders. Those should have been applied to the Second Mortgage. This includes funds paid after demand was made. The Five Lenders have indicated Mr. Chagan failed to pass these payments along to them. The petitioner has not accounted for the payments when calculating the amount required to redeem the Second Mortgage.
- [43] The respondents also allege that the Second Mortgage and related agreements were entered into:
- a) Without adequate consideration or with no new consideration;
 - b) While under duress from the petitioner;
 - c) Without proper legal advice being obtained by the respondents; and
 - d) For a collateral or an improper purpose.
- [44] The respondents say the petitioner's breach of the mortgage and related agreements were a manifest error of the petitioner in relation to them and render them void and unenforceable, or alternatively relieve the respondents of any obligations to pay interest under the agreements.
- [45] Alternatively, the respondents say if the petitioner is correct and the Second Mortgage did not relate to the debt owed to the Five Lenders, then the petitioner has failed to tender evidence proving it advanced any money to the respondents under the Second Mortgage or related agreements. Alternatively, if the funds were advanced, they were advanced by third parties and not the petitioner. The respondents argue that a mortgage stands as security only for the funds that were actually advanced to a borrower or by a lender, citing *Hild Holdings Ltd. v. Adams*, 1992 CanLII 1262 (BCSC), at p. 4.
- [46] The respondents say the petitioner has an obligation to conduct itself under the mortgage and related agreements honestly and in good faith, which it has failed to do. The appropriate remedy for a breach of duty in honesty and good faith is damages, to be set off against the amounts due under the mortgage and related agreements.
- [47] Finally, counsel for the respondents suggested there is also an issue as to whether a forbearance agreement had been made between the parties and if so, whether it had been breached.
- [48] The respondents say the issues they have raised are not suitable for summary determination. There are numerous bona fide triable issues that go to the root of the Second Mortgage.
- [49] They also say that where the amount due and owing under the mortgage is uncertain and one cannot be sure of the amount required to redeem, it is appropriate to refer the matter to trial, citing *Western Arres Capital Inc. v. Currey*, 2011 BCSC 522, at para. 9.

Legal Basis

[50] The powers of the court on a foreclosure proceeding are set out under Rule 21-7(5). Under sub-para. (k), the court may make an order under Rule 22-1(7). Sub-para. (d) provides

on a hearing of a chambers proceeding, the court may

(d) order a trial of the chambers proceeding, either generally or on an issue, and order pleadings to be filed and, in that event, give directions for the conduct of the trial and of pre-trial proceedings and for the disposition of the chambers proceeding.

[51] In a foreclosure proceeding, the test applied when considering whether to order a trial of the proceeding or of an issue in the proceeding is whether there is a bona fide triable issue that goes to the root or foundation of the foreclosure action. See Justice Fitzpatrick's summary in *Griffin v. 0904713 B.C. Ltd.*, 2013 BCSC 273, at para. 41:

[41] What I take from the above cases is the bona fide issue must go to the root or foundation of the foreclosure action. Those foundational issues must relate to the validity of the mortgage, the ability of the mortgagee to claim under the mortgage and commence the foreclosure, or the amount due and owing under the mortgage: See *TCC Mortgage Holdings Inc. v. Alysén Place Developments Inc.*, 2011 BCSC 383 at para. 15.

[52] See also *HGE Administrative Services Ltd. v. Perrick*, 2011 BCCA 308, at paras. 17 to 20:

[17] It is well established that an order nisi will not be granted unless it is "manifestly clear" that there is no bona fide triable issue. In *Northland Bank v. Kocken* (1993), 1993 CanLII 287 (BC CA), 100 D.L.R. (4th) 753 at 760, 77 B.C.L.R. (2d) 377, this Court found:

The issue raised by the appellants was whether the proceeding should go to trial in the ordinary way or be determined on affidavit evidence. In *Bank of British Columbia v. Pickering* (1983), 1983 CanLII 178 (BC CA), 62 B.C.L.R. 136 (C.A.), this court set out the question that must be asked in deciding just such an issue. At p. 138 Mr. Justice Taggart said:

On an application such as this the provisions of R. 52(11) govern. ... There has been some suggestion in some of the authorities to which we were referred that there is a distinction to be drawn between what must be found in order to act under R. 18, the summary judgment rule, and that which must be found in order that the court may act under R. 52(11). I think the distinction is somewhat illusory. To me, I think the matter is stated as clearly as it can be stated by Seaton J.A. in the *Skalbania* case, [*Memphis Rogues Ltd. v. Skalbania* (1982), 1982 CanLII 469 (BC CA), 38 B.C.L.R. 193, 29 C.P.C. 105 (C.A.)]. There at p. 202 he said:

"The question has been stated in a number of ways: Is there no real substantial question to be tried? Is there no dispute as to facts or law which raises a reasonable doubt? Is it manifestly clear that the appellants are without a defence that deserves to be tried? Although cast in different terms, all point to the same inquiry, namely, is there a bona fide triable issue."

[18] In *Royal Bank of Canada v. Rizkalla* (1984), 1984 CanLII 396 (BC SC), 59 B.C.L.R. 324 at 325, 50 C.P.C. 292 (S.C. Chambers), McLachlin J., as she then was, set out the principles that should guide the court in determining whether a petition for foreclosure should be referred to the trial list:

There is no dispute as to the legal principles which should guide this court in determining whether the petitioner's claim should be referred for trial. Unless it is manifestly clear that the mortgagors are without a defence that deserves to be tried, their application to place the matter on the trial list should be granted.... [Emphasis added.]

[19] In determining whether a triable issue exists, the role of a judge in chambers or a master is not to determine any issue of fact or law. Rather, their function is limited to a determination of whether a bona fide triable issue arises on the material before the court in the context of the applicable law: *Re Hughes v. Sharp* (1969), 1969 CanLII 792 (BC CA), 5 D.L.R. (3d) 760 at 763, 68 W.W.R. 706 (B.C.C.A.).

[20] In *Northland Bank*, this Court found at 760-761:

In determining whether there is a bona fide triable issue the chambers judge does not enter upon a detailed consideration of the merits. This is so because there may be a trial of that issue in any event. Rule 18 does not give rise to a summary trial: See *Soni v. Malik* (1985), 1985 CanLII 375 (BC SC), 1 C.P.C. (2d) 53, 61 B.C.L.R. 36 (S.C.).

This distinction is especially relevant in mortgage proceedings. The introduction of Rule 50 recognized that in many, if not most, foreclosure proceedings default is not contested. Removing all foreclosure proceedings into chambers effected a saving in time and money in most cases. In my view, however, Rule 50 was not intended to derogate from the legitimate rights of mortgagors. The same can be said of the interests and rights of guarantors who may be joined in the same petition under Rule 50(3).

[53] The petitioner bears the onus of establishing that it is manifestly clear that there is no triable issue. The onus had been described as being much the same as "beyond a reasonable doubt". See *HGE Administrative Services Ltd. v. Perrick* at para. 23:

[23] Additionally, since HGE did not submit it knew of no defence to the order nisi, it failed to discharge the burden to have the order granted summarily. In *Progressive Construction Ltd. v. Newton* (1980), 1980 CanLII 493 (BC SC), 117 D.L.R. (3d) 591 at 596, 25 B.C.L.R. 330 (S.C.), Mr. Justice Esson, as he then was, found in the context of an application for summary trial judgment under R. 18 that the applicant has the onus of establishing that no bona fide triable issue exists:

The cases do not establish an invariable rule as to what steps must be taken to resist a R. 18 application for summary judgment. On all such applications the issue is whether on the relevant facts and applicable law, there is a bona fide triable issue. The onus of establishing that there is not such an issue rests upon the applicant, and must be carried to the point of making it "manifestly clear," which I take to mean much the same as beyond a reasonable doubt. If the

Judge hearing the application is left in doubt as to whether there is a triable issue, the application should be dismissed.

- [54] In *Freshwest Equities Trading Corp. v. Dosanjh*, 2015 BCSC 952, at para.37, Justice Fitzpatrick considered whether it is required to establish a bona fide defence:
- [37] A person alleging a bona fide defence must establish some evidentiary basis for that defence. The corollary to this is that bald assertions will rarely be sufficient to raise such a defence. Further, some assessment of that evidence is necessary in order for the court to determine whether or not a bona fide triable issue has been raised and whether or not it is bound to fail. In *Pacifica Mortgage Investment Corporation v. Laus Holdings Ltd.* 2010 BCSC 1904 at para. 17, aff'd 2013 BCCA 95, I stated:
- [17] The cases suggest that some weighing of the evidence is necessary in order for the court to determine whether or not a bona fide triable issue has been raised. Depending upon the circumstances, a bold assertion may not be enough: See *Southeast Toyota Distributors Inc. v. Branch*, 1997 CanLII 2089 (BC SC), [1997] B.C.J. No. 1426 (S.C.) at paras. 60 to 63. At paras. 69 and 74 of *Branch*, the court found that when faced with issues concerning the interpretation of documents, the court was in a position to review the matter to determine whether there were any disputed facts or legal issues and whether a valid defence had been raised.
- [55] The threshold for converting that foreclosure petition into an action is low. See *Do v. Nichols*, 2014 BCSC 1082 at para. 39 per Mr. Justice Skolrood:
- [39] In my view, the courts have established a low threshold for converting a foreclosure petition into an action for trial because of a well-placed concern that people should not be deprived of their interest in property by way of a foreclosure without a full canvassing of all the relevant evidence and arguments and that a property owner should have a fair and full opportunity to present their case.

Analysis

- [56] While it appears that the Second Mortgage, promissory note, guarantee and other documents were relatively clear, the respondents have produced evidence which is contemporaneous with the Second Mortgage which does support possible connections to the unsecured loans provided by the Five Lenders. The timing of the January 26, 2019 email from Mr. Chagan to Mr. Shankar requesting security and the timing for registration of the Second Mortgage appear close. The petitioner did not dispute the respondents' suggestion that the reference to putting the Second Mortgage on M1 was referring to the Coquitlam Property. The text exchange suggests that the bank account provided for the February 2019 transfer of \$75,000 belonged to the petitioner. The post-demand cheques totalling \$60,000 were made out to the petitioner and indicate on the memo line that they were mortgage payments for the Coquitlam Property. The text exchanges between Mr. Shankar and Mr. Chagan appear to link the Five Lenders to Owen Bird's demands on the Second Mortgage and suggest Mr. Chagan claimed funds had been paid on to at least some of the Five

Lenders.

- [57] During submissions counsel for the petitioner suggested that the \$135,000 in payments related to other transactions between Mr. Shankar and Mr. Chagan and had nothing to do with the petitioner and Second Mortgage. No explanation was offered for why the \$135,000 was paid to the petitioner and the cheques in particular expressly state that they are mortgage payments for the Coquitlam Property. Counsel suggested that passing the funds through the petitioner was simply an error on Mr. Chagan's part. Mr. Chagan did not offer a detailed response to many of the issues raised on the affidavits of Mr. Shankar and Mr. Janief. Whether Mr. Shankar paid funds towards the Second Mortgage and if so how much must be determined before an amount required to redeem the Second Mortgage can be determined.
- [58] I am satisfied that the respondents have identified a number of bona fide triable issues which go to the core of this foreclosure proceeding and the Second Mortgage, including:
- a) Are the Second Mortgage and related documents valid and enforceable based on the alleged lack of new consideration, duress, lack of proper legal advice or due to alleged collateral or improper purpose?
 - b) Whether the second mortgage relates to:
 - i. Different loans which solely relate to the petitioner or
 - ii. Security for the loans that the Five Lenders made to Mr. Shankar for the Westbank project;
 - c) If b) i, then did the petitioner advance the original \$640,000 to Mr. Shankar and did it advance the additional \$310,000 to him when the Second Mortgage was registered?
 - d) If b) ii, did the petitioner have authority to commence the foreclosure action?
 - e) Were the \$135,000 in payments Mr. Shankar says he made to the petitioner at Mr. Chagan's request payments on the Second Mortgage? If so, what is the balance owing on the Second Mortgage?
 - f) Did the parties enter into a forbearance agreement? If so, has it been breached?
- [59] None of these issues is suitable for summary determination based on the evidence before me at this hearing. Accordingly, I order that the matter be referred to the trial list.
- [60] Counsel for the respondents invited me to give directions regarding the trial of the matter. I did not receive detailed submissions from either party on this point.
- [61] If the petitioner wishes to file a notice of civil claim, it may do so within 21 days from delivery of these reasons. If it is content to have its petition to the court stand as its notice of civil claim, it can so inform the respondents in writing. Thereafter, normal timeframes for the respondents to file a response to civil claim and counterclaim (if desired), subsequent pleadings, lists of documents and examinations for discovery will be as specified in the

Supreme Court Civil Rules. I am not inclined to impose restrictions given the relatively broad scope of the parties' dealings and the scope of the triable issues.

Conclusion

[62] The respondents have raised bona fide triable issues which go to the foundation of this foreclosure and the Second Mortgage. The matter is referred to the trial list.

[63] The petitioner will pay the respondents' costs of this hearing at scale B.

"Master Bilawich"

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Prepared on 28 October 2026 · Esheria