

CANADA / JUDGMENT

4D Homes Ltd. v. 1176256 B.C. Ltd.

2025 BCSC 420

COURT

Supreme Court of British Columbia

DECIDED

19 February 2025

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2025 BCSC 420 4D Homes Ltd. v. 1176256 B.C. Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

4D Homes Ltd. v. 1176256 B.C. Ltd.,

2025 BCSC 420

Date: 20250219

Docket: H255702

Registry: New Westminster

Between:

4D Homes Ltd. and 0741349 B.C. Ltd.

Petitioners

And:

1176256 B.C. Ltd., Asia Arts and Crafts Ltd., Naresh Kumar Judge,

Nirlaip Singh Bal, Naranjan Singh Dhanoya, Dave Mourh Consultants Ltd.,

SKN Enterprises Ltd., Gurvinder Singh Sandher,

The Owners, Strata Plan NW2720 and All Tenants or

Occupiers of the Subject Lands and Premises

Respondents

Before: Associate Judge Krentz

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioner 4D Homes Ltd.,

appearing via videoconference:

J. Singh

Counsel for the Respondents, Gurvinder Sandher and SKN Enterprises Ltd.,

appearing via videoconference:

R.S. Deol

Counsel for the Respondents, 1176256 B.C. Ltd., Asia Arts and Crafts Ltd., Nirlaip Bal, Naranjan Dhanoya and Naresh Judge,

appearing via videoconference:

F. Ju

Place and Date of Hearing:

New Westminster, B.C.

February 11, 2025

Place and Date of Judgment:

New Westminster, B.C.

February 19, 2025

[1] THE COURT: This is my decision in this matter.

[2] This proceeding involves the foreclosure of four properties. I will refer to the properties as identified in the materials. The "514 property" is located in Maple Ridge and is owned by the respondent numbered company and the petitioner is the first mortgagee. The "11363 property", also located in Maple Ridge, is also owned by the numbered company and the petitioner is the second mortgagee. The "12851 property", located in Richmond, is owned by the respondent Asia Arts and Crafts Ltd. and the petitioner is the second mortgagee. The "7427 property", located in Delta, is owned by the respondents Judge and Bal and the petitioner is the second mortgagee. The respondents SKN Enterprises Ltd. and Gurvinder Sandher were initially granted a first mortgage on the 11363 property in the amount of \$800,000 but then granted priority to the petitioner over their mortgage.

[3] In July 2023, the lender and borrower signed a commitment letter that included terms that the amount of the loan would be \$2.1 million, to be repaid after 12 months and provided that the "mortgage rate for first six months is 13% and the rate after six months changes to 17%." It further provided "if the mortgage is not paid out by the maturity date, a mortgage renewal fee of 4% is payable."

- [4] The terms of the mortgage included that the date of maturity was August 15, 2024 and had attached to it a schedule with respect to additional terms. They included the following found under the heading Interest Rate:

The interest rate for the first six months will be calculated at 13 percent per annum compounded monthly. The last six months' interest will be calculated at 17 percent per annum compounded monthly.

- [5] Then under the heading of Additional or Modified Terms, there is a subheading NSF Provision, that stated the following:

If the mortgagor shall not make the mortgage payments on the due date or if payment shall be returned for any reason whatsoever, then the mortgagee shall charge the mortgagor the sum of \$500 for each late payment or payment that is returned for any reason whatsoever, and the said sum of \$500 shall be added to the balance owing under this mortgage and shall bear interest at the rate aforesaid. It is understood and agreed that the 500 charge presents a predetermined agreed-upon fee for administration services and expenses incurred by the mortgagee on account of the failure of the mortgagor to pay a mortgage payment or other payment agreed to be made pursuant to the terms of the mortgage.

- [6] Further, under that heading, it says:

It is not a penalty levied by the mortgagee against the mortgagor.

- [7] Then under subparagraph (g) is the following under the heading Renewal Fee:

If the mortgage is not paid out by August 15, 2024, a renewal fee of 4 percent of the principal amount will be paid by the borrower to the lender (2 percent payable to the lender and 2 percent payable to the broker).

- [8] On August 6, 2024, as the mortgagors had defaulted in payment, a demand letter was forwarded to them advising that the total amount owing as of July 30 was \$2,396,690.41. A prepayment had been arranged for the first six months of the mortgage. Thereafter, no payments were made by the respondent owners.
- [9] This petition was filed on October 10, 2024 and the petitioner seeks an order nisi with a six-month redemption period. The petition sets out the same amount owing as of July 30, 2024, with interest to accrue thereafter at 17%.
- [10] At the hearing of the petition, the petitioner sought an order setting the redemption amount as of January 22, 2025 in the sum of \$2,566,318.56. This calculation is set out in a spreadsheet attached to the Statement of Relief filed by the petitioner. The spreadsheet indicates that on January 15, 2024, a late payment fee of \$1,000 was charged. The same was applied each month thereafter up to and including August 15, 2024.

- [11] The next charge was a renewal fee in the sum of \$84,000 calculated based on the amount owing as of August 15, 2024. The next charge is September 15, 2024, which is interest calculated at 17% on the outstanding amount, along with another late payment fee of \$1,000. Both were calculated and added to the balance owing each month thereafter, up to and including January 2025.
- [12] Mr. Deol, on behalf of Gurvinder Sandher and SKN Enterprises Ltd., filed a response opposing the proposed redemption amount, as did Mr. Ju on behalf of the owners. Initially they argued that the calculation noted above is not corroborated by affidavit evidence. However, at the hearing all parties agreed it was not necessary and that I could rely upon the factual basis set out in the application record.
- [13] The respondents submit that there are several different inconsistent amounts put forward by the petitioner within the materials. For example, the amount in the demand letter and the petition is different than shown in the spreadsheet I just referred to. This may be explained as a renewal fee was not included within the demand letter calculation. On that point, the respondents argue that an \$84,000 renewal fee should not be added to the principal as the mortgage at maturity was never renewed.
- [14] The respondents also submit that what the petitioner refers to as a \$1,000 late payment fee could only be supported by the mortgage term that refers to an NSF fee and that the amount is actually \$500.
- [15] Lastly, the respondents submit that pursuant to the mortgage, the petitioners are only entitled to interest at the rate of 13% for the first six months of the mortgage and then 17% for the next six months but not after the maturity date.

Analysis

- [16] I must first determine if it is appropriate for me as an associate judge to adjudicate on this matter. It is settled law that an order nisi is a final order. Practice Direction 50 states that an associate judge has jurisdiction to make final orders in a foreclosure proceeding when there is no triable issue.
- [17] Pursuant to Rule 21-7(7) of the Supreme Court Civil Rules, at a chambers proceeding the court may order a trial of the proceeding, either generally or on an issue. In *Western Arres Capital Inc. v. Currey*, 2011 BCSC 522, Justice Grauer (then a member of this Court) stated the following:
- [19] ... Once it is determined that no triable issue is raised, then the master has jurisdiction to make the final order ...
- [20] As for practicality, I conclude that it makes more sense, and is more proportionate, for the master to proceed to make the appropriate foreclosure order once it has been determined that no triable issue has been raised.

- [18] Accordingly, pursuant to the practice direction, I have the jurisdiction to determine whether or not a triable issue has been raised, and if there is no triable issue, the proper course is to proceed with the petitioner's application.
- [19] None of the parties argued that there was a triable issue. From that, I assume the parties agree that these issues can be resolved on a summary basis. In any event, I do not find there to be a triable issue, so I will determine the issues on that basis.
- [20] There is no issue taken with respect to the length of the redemption period, so I will be ordering that the six-month redemption period will commence on February 11, 2025, which was the date of the hearing. I will now determine the redemption amount.

Late Payment Fee

- [21] As I mentioned earlier, if this is charged pursuant to the mortgage, in each instance it would be \$500, not \$1,000. Section 8(1) of the Interest Act, R.S.C. 1985, c. I-15 provides the following:

8(1) No fine, penalty or rate of interest shall be stipulated for, taken, reserved or exacted on any arrears of principal or interest secured by mortgage on real property or hypothec on immovables that has the effect of increasing the charge on the arrears beyond the rate of interest payable on principal money not in arrears.

- [22] In *First Island Financial Services Ltd. v. 557596 B.C. Ltd.*, 2002 BCSC 1348 [First Island], the court noted the following at para. 41 in reference to s. 8(1):

... A clear reading of the section requires that unless one first finds a "fine", "penalty", or "rate of interest" charged on "arrears of principal or interest" it is unnecessary to consider whether the charge involved has the prohibited effect. In other words, the covenant must both stipulate for a "fine", "penalty" or "rate of interest" and have the prohibited effect.

It is obvious, of course, that mortgagees do not escape the operation of s. 8 by using the word "bonus" to describe something which is in substance a "fine" or "penalty".

- [23] The court continues at para. 42:

... The question is not whether a provision increases the cost of borrowing but whether the mortgage provides for a fine, penalty or increase of interest on default.

- [24] In *First Island*, the court noted the extension fees were agreed to by the mortgagor for consideration, namely a renewal of the loan agreement and the extension fees were not triggered by default. In addition, there was a valid commercial reason for the extension fees. It allowed the borrower to purchase more time for them to develop the property.

- [25] Pursuant to the Additional Terms that form part of the mortgage, although para. 10(a) says it is not a penalty, in substance it is a penalty that is added to the principal amount. Furthermore, upon a strict interpretation of the term, the charge should only be made for a

late payment or a payment that is NSF, which did not happen. Rather the owners simply failed to make any payments. Therefore, I cannot conclude that such charges are available to the petitioner pursuant to the mortgage. If I am wrong in that interpretation, I also find that such a charge is a penalty that contravenes s. 8(1) of the Interest Act.

Renewal Fee

- [26] Paragraph 10(g) of the mortgage does state that if the mortgage is not paid in full by the maturity date, a renewal fee will be paid. However, upon reviewing the facts in First Island, there were five extensions agreed upon over a two-year period after the maturity of the mortgage. In each occasion, a renewal fee of \$15,000 was agreed upon. The court did not find that to be a penalty. Rather, the court concluded, as I referred to earlier, that there was a valid commercial reason for the extension fees.
- [27] In the instant case, there was no renewal as contemplated by the mortgage. If there was, the renewal fee was to be divided between the lender and the broker. The proper interpretation of this term is that, such as in First Island, it was only payable if there was a renewal of the mortgage, which there was not. In my view, the \$84,000 renewal fee is not available to the petitioners. Again, if I am wrong in that interpretation, I also find it is a fee that is payable upon default and added to the arrears of principal and interest and therefore contravenes s. 8(1).

Interest Rate

- [28] No issue was taken with the interest rate charged during the 12 months of the mortgage. However, the respondents submit that there is no contractual term for an interest rate to be charged after the maturity of the mortgage. Mr. Deol, referred the court to the mortgage that is held by his clients, wherein under the heading Interest Rate their mortgage says:
- "12 percent for the first 12 months and 18 percent thereafter".
- [29] The petitioner's mortgage does not say "and 17 percent for the last six months and thereafter." It specifically says "the last six months' interest will be calculated at 17 percent per annum compounded monthly". The respondents submit there is no contractual term for an interest rate payable after maturity and that the 17% rate only applies for the last six months of the mortgage term. Accordingly, any interest to be added after maturity would likely fall under the Court Order Interest Act, R.S.B.C. 1996, c. 79 [COIA].
- [30] In *Pfeiffer v. Pacific Coast Savings Credit Union*, 2000 BCSC 1472, the court was tasked with calculating interest payable pursuant to a mortgage, including on the prepayment amounts. After interpreting the interest terms and arriving at a calculation, the court stated that if it was in error in coming to its conclusions, it found the contractual provisions were ambiguous and therefore would apply the doctrine of contra proferentem.

[31] In Pfeiffer, the court says at para. 68, quoting from McClelland and Stuart Ltd. v. Mutual Life Assurance Co. of Canada, [1981] 2 S.C.R. 6 at 15:

That principle of interpretation applies to contracts and other documents on the simple theory that any ambiguity in a term of a contract must be resolved against the author if the choice is between him and the other party to the contract, who did not participate in the drafting.

[32] I conclude that the interpretation of the interest term but must be resolved in favour of the respondents, given the ambiguity. Section 1 of the COIA states that the court must add an amount of interest calculated on the amount ordered to be paid from the date the cause of action arose to the date of the order. In absence of a contractual term of interest within the mortgage post-August 15, 2024, the interest rate will be pursuant to the COIA.

[33] In summary, all of the late payment fees and the renewal fee will be deducted from the calculation presented by the petitioners. I leave it to counsel to calculate the amount owing as of the date the mortgage matured, applying the appropriate 13% and 17% interest rates to that date. Thereafter, interest would be payable pursuant to the COIA. If there is disagreement as to the redemption amount as of February 11, 2025, the matter can come back before me by written submissions and I will endeavour to fix the redemption amount.

[34] Lastly, if the parties are unable to agree on costs with respect to this petition and for the hearing before me, the parties also have liberty to provide to the court written submissions and I will determine the issue of costs.

"Krentz A.J."

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