

Business

Court rules no 'fraud and conspiracy' in power of sale following default on mortgages

By **Heidi Exner**

(October 19, 2022, 6:00 PM EDT) -- The Ontario Court of Appeal has dismissed an appeal of a June 2021 decision that found a real estate transaction, which concluded unfavourably for the appellant, was not due to fraud or conspiracy on the part of her creditors and their legal counsel.

"There was no evidence supporting fraud in this case. Nor was there any evidence of conspiracy," Justice David Doherty wrote in the unanimous Oct. 18 decision, *Sheth v. Randhawa* 2022 ONCA 707.

"It is difficult to overturn on appeal a decision that found there is no fraud and conspiracy, where there are robust and cogent reasons [in the underlying decision]," said Demetrios Yiokaris, counsel for the respondents TSD Law Professional Corporation and Anoop Singh Dhillon, which had represented the buyer in a power-of-sale purchase of the appellant's Toronto property.

In a June 14, 2021 endorsement, Ontario Superior Court Justice Cynthia Petersen had dismissed Lovera Sheth's claim seeking an order to set aside the conveyance of her property to a numbered company and instead require the transfer of the property to an individual to whom she believed she had sold the property.

Sheth had purchased the property in 2017 and registered three mortgages totalling \$860,000 against it. Bindaas Capital eventually came to hold first and second mortgages in the amount of \$770,000.

By July 2018, Sheth had defaulted on the mortgages.

After a series of failed negotiations and compromises between July 2018 and January 2020, Bindaas eventually sold the property under power of sale. Bindaas did not notify Sheth it was seeking to sell or had sold this property.

Nor did Sheth inform Bindaas of her efforts to sell the property herself.

In March 2020, 11035738 Canada Inc. (1103 Corp.) purchased the property from Bindaas for \$970,000. At around the same time, Sheth accepted an offer from Bobby Abraham of \$1 million, "which included a collateral agreement allowing her to remain on the property," according to the decision.

"A lawyer and lender do not necessarily have an obligation to disclose a pending power of sale to the borrower," Yiokaris said.

On March 3, 2020, 1103 Corp. had retained the respondent Anoop Singh Dhillon of TSD Law as its real estate solicitor with respect to the registration of the transfer of title. Dhillon forwarded a copy of the executed Agreement of Purchase and Sale to Karanpaul Randhawa, who was acting for Bindaas on the transaction.

The June 2021 decision notes that counsel for Randhawa acknowledged that upon completion of the transaction, Randhawa "ought to have notified the Plaintiff's lawyer of the transfer of title, as a matter of professional courtesy."

Sheth "continued to occupy the property and paid no rent," the decision noted.

On May 12, 2020, 1103 Corp. issued a notice requiring Sheth to vacate within the next five days. The following day, Sheth filed a statement of claim that sought an order to set aside the conveyance of the property to 1103 Corp.

Sheth alleged "the conveyance was the product of their fraud and conspiracy," relying on *Botiuk and Collison et al.*, [1979] OJ No 4429. She sought a requirement to complete the sale of the property to her own buyer.

"In this case, the Notice of Power of Sale had been served almost two years earlier, and the Plaintiff repeatedly was unable to pay out the mortgages despite having ample time to do so," Yiokaris said in an e-mail.

"*Botiuk* stands for the proposition that the original Notice of Sale under Power of Sale can be held invalid where the borrower and lender subsequently enter into a settlement deal and then there is a default" on mortgage payments, said Yiokaris.

In *Botiuk*, both the purchaser and lender who attempted to uphold a power of sale had the same lawyer. "In that case, the borrower was deemed to have the same knowledge as the lender," Yiokaris added.

The case at bar "was distinguishable" because Bindaas did not accept any payments from Sheth under the settlement, the [balance owing] did not change, and no revisions or new amounts were owing since Sheth's default, according to Yiokaris.

The court ruled that under the circumstances, "the 'secrecy' surrounding the sale was not a badge of fraud."

"I am happy to have vindicated and cleared the good name of Anoop Dhillon," said Yiokaris.

Demetrios Yiokaris and Abir Shamim of Koskie Minsky LLP represented TSD Law Professional Corporation and Anoop Singh Dhillon.

Criminal defence lawyer Doug LaFramboise represented Lovera Sheth.

Sole practitioner Samir Chhina represented 11035738 Canada Inc., Shan Mangal and Gurpal Singh.

Matthew Harris of Matthew R Harris Law P.C. represented Bindaas Capital, Ash Karia, Sujoy Pal, and Dr. Mangesh Inamdar Medicine Professional Corporation.

These counsel were not immediately available for comment.

Michael R. Kestenberg and Aaron Hershtal from Michael R. Kestenberg represented Karanpaul Randhawa. Counsel declined comment.

If you have any information, story ideas or news tips for The Lawyer's Daily, please contact Heidi Exner at Heidi.Exner@lexisnexis.ca or (905) 415-5825.