

CITATION: *Chan v Chan*, 2023 ONSC 6143
COURT FILE NO.: CV 23-168
DATE: 20231031

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: YAN MIU EUNICE CHAN, Plaintiff

AND:

PO YUK CHAN, aka PEGGY CHAN et al, Defendants

BEFORE: C. M. SMITH J.

COUNSEL: Scott Au and Allen Chang, Counsel for the Plaintiff

Demetrios Yokaris and Niki Manwani, Counsel for the Defendant, Anant Jain

Michael Myers and Parjot Benipal, Counsel for the Defendant, Ying Wang

HEARD: September 8 and 19, 2023 by ZOOM

ENDORSEMENT

OVERVIEW

- [1] This action arises as a result of allegations of financial improprieties involving mortgage transactions between the various parties.
- [2] The Plaintiff, Yan Mi Eunice Chan (“The Plaintiff”), claims she was duped into entering into the mortgage by the defendant, Po Yuk Chan (“Peggy”). The Plaintiff commenced an action in January 2023 in which she claims various forms of relief as against Peggy, against the lawyer who represented her in the mortgage transaction, Anant Jain (“Jain”), and against the mortgagee Ying Wang (“Wang”), among others.
- [3] On January 25, 2023, the Plaintiff brought an *ex parte* motion for injunctive relief before Justice Christie who granted the relief sought in part. The matter was adjourned to a subsequent date before me at which time I continued the order of Justice Christie.
- [4] Three motions were heard in this matter on September 8 and 19, 2023:
- (i) Jain brought a motion to challenge the *ex parte Mareva* order made by Justice Christie on January 25, 2023, and continued by my order of February 9, 2023.
 - (ii) The Plaintiff brought a motion for a *Norwich* order.

(iii) Wang brought this motion for a determination of the validity of her mortgage with the Plaintiff.

[5] The facts underlying the action were set out in detail by Justice Christie J. at paragraphs 4-27 of her endorsement on the original *ex parte* motion, cited as *Chan v Chan*, et al, 2023 ONSC 701. I will not reiterate the entire factual background here.

[6] For the reasons that follow, I have concluded the underlying facts and the overall circumstances of this case have changed fundamentally since Justice Christie made her order for injunctive relief. As a result, I am ordering the *ex parte* Mareva order be vacated. That being the case, I am dismissing the plaintiff's motion for a *Norwich* order as being moot. I have also concluded the mortgage between Yang and the Plaintiff is a legal, valid, and binding mortgage which is enforceable against the property in accordance with its terms.

Credibility and Reliability of the Plaintiff/Responding Party

[7] The Plaintiff plays a pivotal role in each of the three motions before me. There are a number of features about her evidence and conduct in this matter that I found very troubling. Because of her pivotal role in these matters, and because I am addressing each of the three motions in this one endorsement, I feel it is appropriate to enumerate my concerns prior to addressing each of the motions. In no particular order, my concerns are as follows:

- The Plaintiff originally claimed that her signatures on all of the documents involved in this matter were forged. She subsequently admitted she actually did sign, and initial, all of the sixty or so documents.
- The Plaintiff originally made allegations of fraud as against Jain arising from this particular mortgage transaction. She has since withdrawn those allegations of fraud and has amended her Statement of Claim such that her allegations against Jain are now rooted in negligence only.
- The Plaintiff swore she had no contact with Jain other than the single meeting when Peggy was in attendance in the fall of 2021. In March 2023 the Plaintiff changed her evidence in that regard and conceded under oath she had attended to sign documents with Jain or his agents on another occasion and for another purpose in March 2022.
- The Plaintiff intentionally altered an entry in her diary and then offered that entry in support of her evidence on the point in question. In her original affidavit the Plaintiff said she met with Jain on November 30, 2021. In her second affidavit she corrected herself and said that after consulting her diary she realized the meeting was in fact on December 3, 2021. During her subsequent cross examination on those affidavits the Plaintiff admitted she entered this supposedly corroborative diary entry into her diary *after* she reviewed the affidavits of Jain and Hitesh Sharma, both sworn April 5, 2023. The Plaintiff then agreed with counsel's suggestion nothing really turned on the actual date of the meeting.

As nothing turned on the date of the meeting, I cannot understand why the Plaintiff would engage in such intentionally deceptive behaviour, when all she needed to have done was be honest about the fact she could not remember the exact date of the meeting.

- In her original affidavit the Plaintiff stated she signed “several papers, some of which had blanks.” Jain’s file on the mortgage transaction was produced to the Plaintiff prior to the hearing of the *ex parte* motion. It contains some 60 documents signed by the Plaintiff. The Plaintiff now swears that many of those sixty or more documents had large sections blanked out when she signed them.

In accordance with normal practice in such transactions, those documents were prepared by the solicitor for the lender who then forwarded them to Jain for execution by the Plaintiff. The being so, if there were blank sections someone in Jain’s office would have to have covered the sections of the document in question with another sheet of paper and then photocopied the document so as to be ready for the Plaintiff to sign. That process would then have to have been reversed before the executed documents could be returned to the solicitor for the lender. That process would require a high degree of perfection in order to ensure there would be no misaligned margins or improper spacing between paragraphs. That being so, at best the Plaintiff’s evidence on the point would appear to be unlikely, at worst it is preposterous.

Furthermore, the Plaintiff claimed in her original affidavit she was rushed by Peggy when she signed the documents in question. In essence, the Plaintiff just signed where Peggy told her to sign and did not seek details about the documents. During her testimony when she was cross examined on her affidavit, the Plaintiff was asked to circle the parts of the various documents she claimed had been blanked out. There are 130 pages of the mortgage transaction documents attached as an exhibit to the affidavit of Jain sworn September 2, 2023. By my estimate fully one third of those documents bear the marks put there by the Plaintiff during her testimony. For someone who originally professed her signature on the documents had been forged, and who professed to barely have looked at the documents in question, that is a truly remarkable feat of memory.

- English is the Plaintiff’s second language which she claimed put her at a distinct disadvantage in her dealings with Peggy and Jain, so much so that she insisted on using an interpreter during her testimony. During that testimony the Plaintiff made some admissions and engaged in a pattern of conduct which appear to put the lie to that claim. The admissions and conduct are summarized at paragraphs 46 and 47 of Jain’s factum in the companion motion which for ease of reference I reproduce here:

46. Eunice completed her college studies and postgraduate degree in Hong Kong and Australia entirely in English. Eunice became a licenced registered nurse (“RN”) in Ontario in 1997, which licence she obtained by demonstrating her proficiency in English. Over the past 25 years, Eunice has communicated with patients and doctors in English; has reviewed and completed patient medical records and charts in English; and has consistently taken continuing

education courses, in English, as part of her nursing licencing requirements.

47. Despite her proficiency in English, Eunice obtained a translator for her cross examination. Despite that, Eunice: a) repeatedly responded without the interpreter; b) repeatedly corrected her interpreter and the examiner in English; c) corrected nuanced statements about property translations in English; d) privately spoke with her counsel during cross and was repeatedly asked to stop; e) completed the examiners sentences in English before there was any translation; f) interrupted the examiner to pre-empt answers to lengthy questions without the need for the interpreter; g) bypassed the interpreter when seeking clarification of a question; h) corrected the translator if she mistranslated Eunice's answers into English; and i) Eunice acted as a translator/interpreter to translate English to Chinese for Andy Chao, an individual who raised a similar mortgage claim as Eunice.¹

The Plaintiff's own evidence and behaviour, while she was under oath, directly contradict her assertion she was at a linguistic disadvantage during her dealings with Peggy and Jain.

- [8] The internal inconsistencies, contradictions, and changes in the Plaintiff's evidence, coupled with her behaviour during her cross examination on her affidavits, leads inexorably to the conclusion the Plaintiff is careless with the truth. In fact, given the diary incident, it is also clear the Plaintiff will lie and dissemble when the truth will serve. In my view such statements and conduct deal a fatal blow to the credibility of the Plaintiff. I find she is neither a credible nor a reliable witness.

A. THE JAIN MOTION TO CHALLENGE THE *EX PARTE MAREVA* ORDER

1. Who has the burden of proof?

- [9] My order of February 2, 2023, provides the *ex parte Mareva* relief "shall continue pending further order of the court."
- [10] In Jain's view the original order remains open to challenge. This is because the original claim for relief as against Jain's law firm, as well as the claim for the *Norwich* orders against each of the Jain defendants, were not addressed until after the Jain motion was argued. Jain also argues that because the Plaintiff has withdrawn fundamental allegations of fraud and unjust enrichment, which were advanced at the original hearing, she must now

¹ Transcript page references for each fact asserted in paragraphs 46 and 47 are included in the Jain factum.

re-establish her entitlement to, and/or continuation of, the *Mareva* relief in light of the change of circumstances.

- [11] The Plaintiff submits that while Jain is entitled to challenge the *Mareva* order, the language used in the original orders does not require her to re-establish her entitlement to the *Mareva* relief. Rather, the onus is on Jain to do so.
- [12] I find the argument of the Plaintiff on this point to be more persuasive. A motion to re open, vary, or dissolve a *Mareva* order is itself a request for extraordinary relief, so the burden is properly on the moving party: see the decision of Justice Himel in *Jack Digital Productions Inc. v Comex Foreign Exchange Inc.*, 2007 O.J. No.3994. (Ont.S.C.J.) at paragraph 15.

2. Should the *Mareva* order be dissolved or vacated?

- [13] The parties agree the appropriate test for dissolving or vacating a *Mareva* order is as set out in the *Jack Digital Productions* case, *supra*:
- (a) Whether there has been inordinate delay in advancing the claim:
 - (b) Whether there has been harm to the defendant:
 - (c) Whether the present facts are substantially different from the facts upon which the original was given; and
 - (d) The balance of convenience.

I will consider each of the four elements of the test in turn.

(a) Has there been inordinate delay?

- [14] The Plaintiff suggests this matter has progressed quite quickly without inordinate delay, which Jain does not contest.

(b) Has there been harm to the defendant?

- [15] The parties agree Jain is suffering harm as a result of the *Mareva* order. Both the Plaintiff and Jain agree that harm consists of the continuing financial losses being suffered by Jain's law firm, the income from that firm being the sole source of support for the Jain family, as well as Jain's ever increasing personal debt load. The parties differ in how they quantify the impact of this harm.
- [16] Jane asserts his law firm has been unable to conduct most of its business, which largely consists of real estate transactions, as the title insurance companies have declined to issue insurance to any of his clients in light of the *Mareva* order. A letter dated February 16, 2023, from FCT, one of the title insurance companies, is attached to Jain's affidavit sworn April 3, 2023. It confirms FCT will not insure the particular transaction in question but, as the plaintiff rightly points out, the letter does not explain why. The plaintiff suggests it is

more likely the multiplicity of legal proceedings Jain is involved in that has caused the denial of title insurance coverage.

- [17] Jain asserts, indeed he has sworn, it is in fact the *Mareva* order that led to this development. I find his argument on the point persuasive for two reasons: I have not been given any particular reason why I should reject Jain’s sworn evidence on the point, which is detailed, and the denial of coverage started immediately after the January 25, 2023, *ex parte* order of Christie J, and my own order of February 2, 2023, were issued.
- [18] I am also persuaded that Jain has been suffering ongoing financial losses since the *Mareva* order. Those losses have likely been ameliorated to some degree by my order of September 8, 2023, which allowed Jain to access his monthly salary from the law firm to cover living expenses for his family (something which I note is typically done on consent in matters involving injunctive relief). However, the fact remains that a significant amount of Jain’s work-load, and consequent income stream, has been severely curtailed by his inability to obtain title insurance for his client’s transactions. In my view, that is more than just “some harm”; it is real and pervasive harm, which is occurring on a daily, and ongoing, basis.
- [19] Lastly on this point, I am mindful the plaintiff’s undertaking as to damages is of little, if any comfort or value to Jain given the plaintiff’s acknowledgement that she is effectively penniless, and no longer has sufficient assets to satisfy any potential damages award that could result from the *Mareva* order.

(c) Are the present facts substantially different from the facts upon which the original order was given?

- [20] Jain points to a number of significant, material changes in the Plaintiff’s evidence, and in her approach to this matter, which have occurred since the *Mareva* order was made, which I have listed below. In my view, when taken together the following changes in the Plaintiff’s evidence constitute a substantial and material change to the factual basis of this matter:
- The Plaintiff has conceded the \$200,000 payment received by Jain from the mortgage proceeds was not in fact “dissipated or secreted” by Jain as originally alleged by the Plaintiff. Jain explained he had received those funds from the lead defendant, Peggy, for the purpose of payment to another lender unrelated to this action. Unbeknownst to both Jain and the Plaintiff, those funds had been obtained by Peggy from the proceeds of the mortgage on the Plaintiff’s property. The Plaintiff now acknowledges the veracity of Jain’s explanation. She has consequently withdrawn her unjust enrichment claim against Jain and has amended her claim to one based only in negligence. I note Justice Christie relied in part on the Plaintiff’s original allegations regarding these funds in determining the Plaintiff had a *prima facie* case against Jain.
 - The Plaintiff withdrew her *Mareva* injunction motion as against Jain’s law firm 36 days after the order was made. As Jain points out, that claim “was intertwined in the purported allegations that grounded the interim *ex parte* *Mareva* when it was granted” by Justice Christie.

- The Plaintiff has withdrawn her allegations that her signature was forged on the subject documents and has now admitted that she actually signed and initialed all of them.
- The Plaintiff has withdrawn her allegations of fraud as against Jain, arising from the subject mortgage transaction, which she advanced before Justice Christie. She has amended her Statement of Claim such that her allegations against Jain are now rooted in negligence only.
- The mystery about the purchaser of the Coral property, which was a significant and alarming issue at the time of the *ex parte* motion, has since been determined to have been caused by a simple typo in the name of the numbered company.
- In her original affidavit, the Plaintiff asserted she had never discussed getting a mortgage on her house and had never intended to get one. She also swore she had no further contact with Jain other than the single meeting when Peggy was in attendance. In March 2023 the Plaintiff changed that evidence and conceded under oath she had signed documents with the firm as late as March 2022, at which time representatives of the firm took further copies of her ID. The Plaintiff conceded the documents she signed at that time involved the Cheng mortgage.

The Plaintiff also confirmed she knew the documents related to the Cheng mortgage at the time she signed them. She thought they were for a mortgage on another property she wanted to buy with Peggy. When asked why she did not refer to that in the multiple affidavits she swore in support of the *ex parte* order, rather than leaving Justice Christie with the impression she had no interest in or knowledge about a mortgage, the Plaintiff refused to respond.

- The Plaintiff conceded the reference to the discharge of her Manulife mortgage in Jain's reporting letter, which caused so much concern at the hearing of the *ex parte* motion about Jain usurping funds, was an honest mistake.
- In her reasons for decision Justice Christie expressed concern that Jain had discharged the Manulife mortgage on the Plaintiff's property when he was not authorized by the Plaintiff to do so. Since that time the Plaintiff has conceded she herself authorized the discharge of this mortgage which she did in furtherance of her investment plans with Peggy.
- As outlined above, in her original affidavit the Plaintiff claimed "several" of the papers she signed at the direction of Peggy contained blanked out sections. It has since become known the Plaintiff signed some 60 separate documents each of which she now asserts had large sections blanked out. Had Justice Christie been apprised of the full nature and extent of the Plaintiff's allegations of such fraudulent and deceptive behaviour, and had Justice Christie been afforded an opportunity to peruse the documents in question and make her own fully informed assessment of the evidentiary foundation of that allegation, Justice Christie may well have decided the matter differently. The plaintiff

now concedes those documents should have been disclosed by her at the original motion.

- The Plaintiff 's evidence and conduct during her cross examination on her affidavits put the lie to her claim to be disadvantaged by a limited understanding of the English language.
- The Plaintiff also failed to disclose the fact that in March or April of 2022 she made a large personal loan to Peggy, of some \$63,000. These funds were not related to the purchase of the subject property nor was the loan documented in any way. This too was not disclosed to Justice Christie.
- The Plaintiff has acknowledged some \$220,000 of the funds involved in this action belong to her mother. When asked for supporting documents the Plaintiff refused to produce any. The plaintiff now asserts those monies were a gift. Again, that was not disclosed to Justice Christie.
- At the time the original orders were made there was a considerable level of concern and anxiety surrounding the Bhatia loan and mortgage and the transfer of ownership of Jain's Coral St. property. The history and circumstances of those transactions have been explained in considerable detail by Jain in his affidavit of April 3, 2023, at paragraphs 250 to 265. The Plaintiff has admitted she has no evidence to challenge Jain's evidence regarding the validity and *bona fides* of that loan, its history, or that it was made for a legitimate purpose. On July 13, 2023, at the Plaintiff's request, I ordered Mr. Bhatia be added as a party to this matter so he can now be examined by the Plaintiff about the history and circumstances of that loan.

[21] Allegations of forgery and fraud, issues like the mysterious \$200,000 payment and the discharge of the Manulife mortgage, the mystery surrounding the transfer of ownership of the Coral property, and allegations about blank documents, all ring one's internal alarm bells. Mine certainly went off when I first read the Plaintiff's affidavit material. When, as is the case here, innocent explanations emerge to explain such things, the alarm bells stop ringing and the general anxiety level of all concerned is greatly diminished. That being so, I fail to see how the admissions and concessions of the Plaintiff as enumerated by Jain, as well as the explanations that have now been provided for previously unexplained events, can possibly constitute anything less than a substantial and material change in the factual underpinning of this matter from that which obtained at the time of the *ex parte* motion.

[22] When taken together the foregoing changes in the evidentiary foundation of this case all suggest the Plaintiff has fundamentally failed to comply with the primary obligation of a plaintiff seeking equitable relief on an *ex parte* basis, such as an injunction: she has failed to make full and frank disclosure of all material matters within her knowledge: see *Sibley & Associates LLP v Ross* 2011 ONSC 2957.

(d) The balance of convenience

- [23] The Plaintiff argues her claim in negligence against Jain for \$2,000,000 in damages will be irreparably harmed if the *Mareva* order is not continued, and if Jain regains his ability to deal with, and perhaps dissipate, his assets. The Plaintiff also has ongoing concerns, which she describes as valid and reasonable, that Jain is hiding assets through the transfer of the Coral St. property. She therefore submits the balance of convenience favors her, not Jain.
- [24] Jain argues the balance of convenience favors him. He submits that neither he nor his law firm have any material assets of any kind which means there can be no risk of dissipation. He submits he has made full and complete disclosure of his assets in the form of the Sworn Statement of Assets dated February 28, 2023, filed in these proceedings. He also argues he has strong ties to this jurisdiction as he, as well as his wife, his teenage daughter, and his extended family, have all lived here for many years. He also points to the fact he has expended considerable effort, time, and money in order to become an accredited member of the Law Society of Ontario.
- [25] Jain's Sworn Statement of Assets consists of a detailed inventory of all assets in his name including such things as motor vehicles, home and office furnishings and equipment, bank accounts and debts. A number of banking records and the like are attached as exhibits in support. That affidavit remains unchallenged by any of the other parties. It clearly shows that neither Jain nor his law firm have any material assets and that to date Jain has complied fully with all of the requirements of the *Mareva* order.
- [26] Jain also points to the ongoing business and financial losses being suffered by his law firm as a result of the *Mareva* order, and the fact the Plaintiff's undertaking as to damages is of no practical value given her own financial circumstances.
- [27] At the time Justice Christie made her original order the Plaintiff was in an information vacuum about the nature, extent, and whereabouts of Jain's assets. Through the examinations of the various parties, and with the filing of Jain's Sworn Statement of Assets, that vacuum has now been largely filled.
- [28] To be sure, the plaintiff has some not unreasonable concerns and anxiety about the transfer of ownership of the Coral St. property and whether there were hidden assets involved in that transaction. However, that transfer was completed long before the *Mareva* order came into effect, so that horse had already left the proverbial barn. Now that Mr. Bhatia is a party to this action the plaintiff can utilize the normal discovery process to determine whether there were in fact any inappropriate steps taken by Jain in the course of that transaction. In such circumstances I cannot see what a *Mareva* order would add to the plaintiff's tool kit that the discovery process does not already provide.
- [29] I therefore find the balance of convenience favors Jain.

CONCLUSION

[30] There was no inordinate delay in advancing the Plaintiff's claim. However, I have found there has been harm done to Jain, that the present facts are substantially different from the facts upon which the original order was based, and that the balance of convenience favors Jain. That being the case, I am granting Jain's motion and ordering the *Mareva* order be vacated effective immediately.

Order to go as follows:

1. The *ex parte Mareva* order of Christie J. dated January 27, 2023, and continued by my order of February 9, 2023, is set aside and vacated with immediate effect.
2. This order is without prejudice to the rights of the Jain Defendants to move at a later date for an order requiring the Plaintiff to enforce or post security for the undertaking as to damages and/or to otherwise establish that the Plaintiff has insufficient assets in Ontario to satisfy her undertaking as to damages and/or costs.

B. THE PLAINTIFF'S MOTION FOR A NORWICH ORDER

[31] As I have vacated the *Mareva* order in this matter the question of whether there should be a *Norwich* order has become moot. The plaintiff's motion for the *Norwich* relief is therefore dismissed.

C. THE WANG MOTION RE: VALIDITY OF THE MORTGAGE

Positions of the Parties

1. The Plaintiff

[32] The Plaintiff seeks to invalidate the mortgage on the basis of the equitable doctrine of *non est factum*. She claims she was told the documents she was signing related to the investment property she sought to purchase with Peggy, and that neither Peggy nor Jain gave her any information, advice or assistance to help her understand what it was she was signing. The Plaintiff has acknowledged she did not read the documents before she signed them, nor did she actually ask Peggy or Jain what the documents were or what they related to.

[33] The Plaintiff asserts the mortgage in question was unconscionable in that it was an improvident bargain and there was an inequality of bargaining power.

[34] The Plaintiff also submits the mortgage should be found invalid because certain of the preconditions were not met, and because Jain breached a written undertaking “to make the net mortgage proceeds payable in the name of the mortgagor and not to any other third party.”

2. The Defendant

[35] Wang submits the mortgage is valid on its face. She maintains she is a good faith lender who was given no reason to believe this was anything other than a routine private mortgage transaction between two parties, each of whom were represented by counsel.

[36] Wang argues that both she and the plaintiff were parties to the mortgage commitment letter. Acting in accordance with that commitment, Wang caused her solicitor to prepare the appropriate documentation required to give effect to the mortgage commitment and to forward those documents to Jain for execution by the Plaintiff. Thereafter, the documents were returned to Wang, duly executed by the Plaintiff, whereupon Wang verified she had a good and valid first charge on the property. Having done so, Wang advanced the funds in question to the Plaintiff/Mortgagor’s lawyer, Jain, free of any escrow or other conditions. Wang submits those facts meet the requirements for a valid mortgage.

[37] Wang submits the doctrine of *non est factum* is not available to the Plaintiff as by the Plaintiff’s own admission she was clearly indifferent to the content of the documents in question and was therefore careless and negligent when she signed them.

[38] Wang also denies the transaction was improvident or that there was an inequality of bargaining power. In that regard Wang points to the fact that each of the parties had independent legal representation at all times.

Issues

[39] There are two issues in this motion;

1. Is the Wang mortgage a legal, valid, and binding mortgage enforceable in accordance with its terms?
2. If so, is Wang entitled to an order for possession of the property and to leave to issue writ of possession against the property?

Law and Analysis

Issue #1: Is the Wang mortgage valid?

[40] The Plaintiff does not challenge the Defendant’s list of the basic elements required to make a valid mortgage. Rather, the Plaintiff asserts the defence of *non est factum*, alleges the transaction was unconscionable, submits certain pre-conditions were not met, and alleges Jain breached his undertaking re: payment of funds. I will address each in turn.

(a) *Non est factum*

- [41] The defence of *non est factum* is only available to someone who, as a result of misrepresentation, has signed a document when they were mistaken as to its nature and character **and** was not careless in doing so. (my emphasis): see *Bulut v. Carter*, 2014 ONCA 424, at para 18.
- [42] In her original affidavit the Plaintiff describes a meeting she had with Peggy and Jain at Jain's office during the course of which she signed numerous documents at the direction of Peggy. The Plaintiff swears that during that meeting neither Peggy nor Jain said anything to her about the nature and content of the documents she was signing. She said "Peggy ran the meeting" and further that "[Peggy] just pointed to where to sign. She rushed me through them." The Plaintiff also said she "did not seek details about the papers from her [Peggy]."
- [43] In his affidavit sworn April 3, 2023, Jain describes meeting with the Plaintiff alone in his office on December 9, 2021, at which time he reviewed the mortgage documents with the Plaintiff, advised her "regarding the liabilities and obligations of the Wang mortgage" and attended on her execution of same. He asserts Peggy was not in the room at the time as he had asked her to remain in the office reception area while he met with the Plaintiff. His evidence on the point is corroborated in the affidavit sworn April 3, 2023, by his assistant, Hitesh Sharma, who worked at his desk in the reception area while Peggy waited there. Mr. Sharma also swears he supplied the Plaintiff with a package containing copies of all documents signed by her that day, one of which was the Wang mortgage commitment letter which the Plaintiff had signed the week before on November 30, 2021.
- [44] If I were to accept the evidence of the Plaintiff that she signed the documents in a rush, at the direction of Peggy, without seeking details about the documents she was signing, then I would be compelled to find the Plaintiff was careless when she signed the documents. The Plaintiff would not therefore be entitled to the defence of *non est factum*.
- [45] If I were to accept the evidence of Jain, as corroborated by his assistant Mr. Sharma, that he explained the nature and effect of each document to the Plaintiff as she signed them, including the mortgage commitment letter, and then gave the Plaintiff her own copies of each of those documents, then I would be compelled to find the Plaintiff was **not** mistaken as to the nature and effect of the documents in question. Again, the plaintiff would not then be entitled to the defence of *non est factum*.
- [46] In light of the concerns I have already expressed about the Plaintiff's credibility, I prefer the corroborated evidence of Mr. Jain on the point to that of the Plaintiff. In the end though, that makes little difference as either way the Plaintiff is not entitled to the defence of *non est factum*.

(b) *Unconscionability*

- [47] The Supreme Court of Canada has found that for an agreement to be found unconscionable there must be an inequality of bargaining power and an improvident bargain: see *Uber Technologies Inc. v. Heller*, 2020 SCC16.

- [48] The Ontario Court of Appeal has also made similar findings. In *Titus v. William F. Cook Enterprises Inc.*, 2007 ONCA 573, the Court found there were four elements required to establish unconscionability:
1. a grossly unfair and improvident transaction;
 2. a lack of independent legal advice or other suitable advice;
 3. an overwhelming imbalance in bargaining power caused by the victim's ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility, or similar disability; and
 4. the other party knowingly taking advantage of the vulnerability.
- [49] The Plaintiff argues in her factum that she had no bargaining power "as she was not even aware that she obtained a mortgage from Wang." For the reasons outlined above, I have rejected that assertion as I prefer Jain's evidence on the point.
- [50] In the alternative, the Plaintiff argues that even if she did know about the mortgage there was still an imbalance of bargaining power as she "is not sophisticated or well-informed about the mortgages and terms of mortgages."
- [51] I note that during this time the Plaintiff and Peggy were contemplating the purchase of an investment property worth approximately 1.4 million dollars. Furthermore, between November 26, 2021, and December 30, 2021, ie: the week before the meeting in question, the Plaintiff made four deposits, drawn from her own funds, totalling \$220,000 into the joint account she had opened with Peggy, ostensibly for use in the purchase of the proposed investment property. Moreover, in the early spring of 2022 the Plaintiff deposited a further \$63,000 into the joint account which she testified was a personal loan from her to Peggy, entirely unrelated to the purchase of the investment property.
- [52] I also note the Plaintiff has spent the last 25 years or so working very hard as a nurse in the GTA. For most of that time she has lived in the home she owns in Markham which is the property now subject to the Defendant's mortgage. At the time of these events that property was said to be worth 1.2 million dollars and the mortgage on it had been paid down to a zero balance.
- [53] The Plaintiff's implicit suggestion that she is naïve, vulnerable, and without experience or financial acumen, flies in the face of her evident success as a property owner, and the apparent extent of her financial resources. On the evidence before me I can only conclude the Plaintiff possesses a high degree of financial acumen.
- [54] Both the Plaintiff and Wang dealt through intermediaries, both had independent legal representation when the deal was signed, and both had other options available to them. They chose to do this deal. There is no evidence either took advantage of the other when they did it. There was no inequality of bargaining power.
- [55] I also find this was not an improvident bargain. This was a relatively straightforward transaction involving a first mortgage loan. The costs and charges of the transaction appear to be commensurate with what one would expect to see in any such transaction. Moreover

the 7.99 per cent rate of interest charged is not excessive or out of the ordinary for private mortgage financing, particularly in late 2021 when this deal was made.

[56] I find therefore this was not an unconscionable transaction.

(c) **Unfulfilled conditions**

[57] The mortgage commitment letter contained a requirement the Plaintiff supply a satisfactory appraisal report showing her home had a minimum value of \$1.2 million, that she obtain independent legal representation, and that she provide a current credit report. These conditions remain unfulfilled.

[58] The Plaintiff argues the fact these conditions remain unfulfilled shows Wang failed to do the due diligence required of a mortgage lender, and had she done so she would somehow have been alerted to the possibility of “potential fraud or issues with the mortgage.” I have been supplied with no authorities to support the proposition the Defendant was obliged to do so.

[59] In any event, the evidence of the various parties involved in this transaction is that the particular commitment letter used by the defendant Wang was a boilerplate template she is in the habit of using when providing private mortgage loans. Moreover, it would appear from the evidence and submissions of counsel that Wang is an “equity lender” who decides whether or not to lend funds based on her own assessment of the value of the property in question as opposed to the borrower’s income level or net worth.

[60] In my view the conditions that remain unfilled were there for the benefit of the lender, in this case the defendant Wang, and were therefore hers to waive. As Wang correctly argues, when consideration has passed a contract that was properly entered into remains valid and enforceable notwithstanding the decision of a party to waive a condition originally included in the contract for that party’s benefit.

(d) **Alleged breach of undertaking by Jain**

[61] The evidence shows that Jain signed a standard form undertaking to the Defendant and her solicitor “To make the net mortgage proceeds payable in the name of the mortgagor and not to any other third party...”. Following closing of the deal Jain deposited the funds into the joint account the plaintiff held with Peggy. The Plaintiff contends Jain ought not to have done so as that enabled Peggy to access the funds.

[62] In his affidavit sworn April 3, 2023, Jain explained in some considerable detail how the Plaintiff supplied him with a direct deposit form relating to the account in question. Jain also explained how and why he attended at a branch of the Plaintiff’s bank in order to confirm the account in question was in fact the Plaintiff’s account. When the bank confirmed the account in question was the Plaintiff’s, Jain deposited the proceeds of the mortgage into that account. On its face there appears to be nothing wrong with that. It was the very account the Plaintiff directed Jain to.

[63] However, even if I am wrong in that assessment, as the Defendant correctly points out, the mortgage transaction was completed when the funds were advanced to Mr. Jain without any escrow conditions: see *Lin v. CIBC Mortgages Inc.*, [2014] B.C.J. No. 2857. Once Jain was in receipt of the funds, free of conditions, what he did with those funds is then between he and his client, the Plaintiff. The validity of the defendant's mortgage is not affected.

The motion is premature

[64] The Plaintiff also submits the Defendant's motion is premature. If I understand paragraphs 73 and 74 of her factum correctly, the Plaintiff claims the complexity and seriousness of the case means she should be able to discover Peggy before a decision is made on this motion.

[65] I feel compelled to observe that raising such an issue in the penultimate pages of the Plaintiff's factum on the motion, which is dated two days before the return of the motion, is a rather unusual way to pursue such a claim. A review of my own endorsements shows the prospect of this motion was first raised on March 7, 2023. A litigation schedule which specifically includes this motion was ordered on consent of all parties on April 4, 2023. The date for the motion was formally set on May 29, 2023, although I hasten to add that date had been the subject of discussion prior to that date. The motion was also referenced in my subsequent endorsements of June 30th, and August 3rd, 2023. The Plaintiff has had more than ample time to complete whatever further discoveries she felt were necessary. The fact she chose not to do so is her problem, not Ms Wang's.

The Plaintiff's last minute request for further injunctive relief to preclude the Defendant from enforcing her mortgage

[66] Finally, on the second to last page of her factum dated September 6, 2023, the Plaintiff blithely "requests" an interlocutory injunction to preclude the defendant from enforcing her mortgage.

[67] The Plaintiff's request is made without proper notice by way of a Notice of Application prepared in accordance with the Rules, without any new evidence, and, in my view, without any merit.

Issue #2: Is Wang entitled to an order for possession of the property and to leave to issue a Writ of Possession against the property?

[68] Wang submits the mortgage has been in default since it matured and became fully due and payable in December of 2022. She points to section 10 of the Standard Charge Terms which grants her the absolute right to possession of the property without notice upon such default. In my view, the legalities of the situation are unassailable: Wang is entitled to an order for possession of the property and to leave to issue a Writ of Possession.

[69] Sadly, the Plaintiff's contention she will suffer irreparable harm as a result of the legalities of this situation is also unassailable. She points to the fact that she is unemployed and has no money to find another place to live. Apparently, her nephew resides with her at the subject property, and she is also busy taking care of her elderly mother who requires

additional care due to medical issues. These factors in turn mean the plaintiff is unable to hold down gainful employment in order to sustain herself and pay off her debts.

[70] Wang is herself mindful of the realities facing the Plaintiff as evidenced by the concluding paragraphs of her reply factum. She too is a senior citizen who is retired. She lives with her retired husband, their source of income being the interest earned on private mortgages. She also points to the fact she has respected the courts process and has incurred “tens and tens of thousands of dollars in legal fees” leading up to this motion, much of which may ultimately prove to be unrecoverable. The process of enforcing her rights under the mortgage will undoubtedly add to those fees.

[71] In the circumstances of this case it is hard to avoid the conclusion that Peggy has left a trail of financial devastation in her wake.

Conclusion

[72] I have found the mortgage is valid. The mortgage is in default. That being the case Rule 60.10 (1) and (2) apply. I am satisfied the plaintiff is entitled to possession and “the persons in actual possession of any part of the land” received sufficient notice of this proceeding and have had the opportunity to apply for relief.

[73] As I have already observed, there is no evidence before me tending to suggest Wang has done anything other than act in good faith and without fraud throughout this proceeding. That being the case I find the mortgage is a legal, valid, and binding mortgage enforceable against the property in accordance with its terms. I am also granting the Defendant/Moving Party, Ying Wang, an order for possession of the property and granting leave to issue a Writ of Possession against the property.

[74] Order to go accordingly.

Costs

[75] If the parties cannot agree on the costs consequences of these motions, they are free to each supply me with written submissions, no more than 5 double spaced pages in length together with appropriate attachments, on or before November 15, 2023. I acknowledge receipt of Costs Outlines from the Plaintiff and from Jain, and a Bill of Costs from Wang.



C. M. SMITH J

Date: October 31, 2023