

Case Name:
**7895 Tranmere Drive Management Inc. v. Helter
Investments Ltd.**

**Between
7895 Tranmere Drive Management Inc., plaintiff, and
Helter Investments Limited, defendant
And between
Helter Investments Limited, plaintiff by defendant's
claim, and
7895 Tranmere Drive Management Inc., Royal LePage
Commercial Inc., Britannia Property Management Inc.,
J. Ronald Smith and Fred Mansoor, defendants by
defendant's claim**

[2005] O.J. No. 2847

Court File No. CV-04-012611-00

Ontario Superior Court of Justice

J.R. Sproat J.

July 7, 2005.

(59 paras.)

Civil procedure -- Judgments and orders -- Summary judgments -- Debt or liquidated demand -- Effect of counterclaim -- Whether genuine issue for trial -- Injunctions -- Circumstances when not granted -- Considerations affecting grant -- Balance of convenience -- Irreparable injury.

Motion by the plaintiff mortgagee, Tranmere Drive Management, for summary judgment in its action against the defendant mortgagor, Helter Investments. The mortgagee sold a commercial property to the mortgagor in 2003 for \$5.12 million; the agreement included a vendor take back second mortgage of \$950,000. The mortgagee claimed \$987,320 due and owing under the mortgage. The mortgagor opposed the motion for summary judgment; it argued that its counterclaim for \$2.5 million for fraudulent or negligent misrepresentation should be set off against damages awarded, and that a trial was therefore necessary. It therefore argued that if summary

judgment were granted, the judgment should be stayed pending trial of the counterclaim.

HELD: Motion allowed. The mortgagee was granted summary judgment in the amount of \$987,320; its rights under the mortgage were clear and unambiguous. There was no genuine issue for trial with respect to the mortgagee's claim under the mortgage. The mortgagor did not have a claim in equitable set-off, and in any event, there was no evidence that irreparable harm would result if the judgment were not stayed. Further, the balance of convenience favoured the mortgagee's right to enforce its rights under the mortgage.

Counsel:

Paul H. Starkman, for the Plaintiff

Heather Devine (and Louis Frapporti by written submissions), for Helter Investments Limited

Brian P. Bellmore and Karen M. Mitchell for the Defendants by Counterclaim 7895 Tranmere Drive Management Inc., Britannia Property Management Inc. and Fred Mansoor

REASONS FOR JUDGMENT

J.R. SPROAT J.:--

Introduction

1 The plaintiff 7895 Tranmere Drive Management Inc. ("Tranmere") applies for summary judgment for amounts due and owing by Helter Investments Limited ("Helter") pursuant to a vendor take back mortgage.

2 The Statement of Claim in this action was issued December 15, 2004 and the Statement of Defence and Counterclaim was issued January 24, 2005. The Notice of Motion claiming summary judgment was originally returnable March 8, 2005 and adjourned to a long motion day to be confirmed with the trial office after the parties had agreed upon a timetable to accommodate the filing of materials and cross-examinations.

3 This long motion was scheduled for May 9, 2005. Helter decided it wanted an adjournment and to that end cancelled an expedite on cross-examination transcripts without first advising counsel for Tranmere. This resulted in transcripts ordered for Friday May 6 not being available until May 9. Helter did not file a factum on the motion although it did prepare a lengthy affidavit in support of the adjournment request on May 6 which was not provided to Tranmere until after argument of the contested adjournment on May 9, 2005 had commenced.

4 For oral reasons I declined to grant the adjournment for a number of reasons including that to do so would waste valuable court time and the next available court date was August 17.

5 Counsel on May 9, 2005 expressed Helter's preference to file comprehensive written submissions instead of presenting oral argument on that day as senior counsel, Mr. Frapporti, was not in attendance. I have, therefore, reviewed Helter's written submissions and reply submissions from Tranmere.

6 As indicated in my May 9, 2005 endorsement, I allowed Helter to make submissions as to any refusals on the cross-examinations indicating that if I found that the refusals were unjustified, and that the evidence could be relevant to the motion for summary judgment, I would order that questions be answered and documents produced and adjourn my consideration of the summary judgment motion pending receipt of further evidence and argument.

7 Helter made written submissions complaining about inadequate document production by Tranmere. In particular Helter points to the fact that at Smith's cross-examination on May 4, 2005 counsel for Tranmere took the position that "This is not an examination for discovery. We've produced what we believe to be relevant to the motion for summary judgment".

8 I agree that, as a matter of law, this is not a tenable position. The significance of this must, however, be considered in the context of the facts of this case. Helter commenced an action in Hamilton on November 4, 2004 making the same allegations as in its counterclaim in this action. Helter did not serve an Affidavit of Documents in that action nor in this action. Helter did not request an Affidavit of Documents from Tranmere in this action until May 4, 2005. To accede to the position of Helter would mean that counsel can derail a long motion date by demanding an Affidavit of Documents at the last minute.

9 In any event, the documents requested by Helter relate to electronic discovery and other matters Helter hopes might bolster the strength of its case. As I am not weighing the evidence, drawing inferences or making findings of fact in dispute, this evidence would not be material to my decision on this motion.

The Agreement of Purchase and Sale and Mortgage

10 By agreement dated November 17, 2003 (the "Agreement"), Tranmere sold to Helter a commercial property municipally known as 7895 Tranmere Drive, Mississauga, Ontario (the "Property"). The transaction closed November 28, 2003.

11 Among other things, the Agreement provided for a purchase price of \$5,125,000., and a vendor take back second mortgage in the amount of \$950,000. The mortgage is dated November 28, 2003 and made between Helter as mortgagor, and Tranmere as mortgagee. The standard mortgage charge terms include:

5. The Chargor will pay or cause to be paid to the Chargee the full principal amount and interest secured by the Charge in the manner of payment provided by the Charge, without any deduction or abatement, ...

12 The terms of the Agreement include the following:

1.12 Whole Agreement

This agreement and any agreement made between the parties in accordance with the terms hereof constitute the only agreements between the parties relating to the transaction of purchase and sale contemplated herein.

1.13 Representations and Warranties

Except as herein expressly set forth, there are no representations or warranties by either party with respect to the transaction or purchase and sale contemplated herein.

1.16 Merger

The representations, warranties, covenants and agreements of the Vendors and Purchaser contained in this Agreement shall merge upon the closing of the transaction of purchase and sale contemplated herein.

2.5 Conditions Precedent for Purchaser

Completion of the transaction of purchase and sale contemplated in this Agreement is subject to the following conditions precedent, each of which is inserted for the sole and exclusive benefit of the Purchaser, namely:

- (a) That on or before the Purchaser's Condition Date the Purchaser is satisfied (in its sole and absolute discretion) with the results of its reviews,

inspections and considerations of the Property and matters relating thereon, including without limiting the generality of the foregoing

- (i) an examination and evaluation of the terms of all leases, documents, contracts, financial information, correspondence, and other materials required to be delivered pursuant to the provisions of Section 2.6;

[...]

3.1 Vendor's Representations and Warranties

In order to induce the Purchaser to enter into this Agreement, the Vendor represents and warrants to the Purchaser, as representations and warranties that are true as at the date of execution of this Agreement and as at the Closing Date unless otherwise expressly stated that:

- (i) The Estoppel Certificates required to be delivered by the Vendors pursuant to Section 4.01 shall not contain any statement by a tenant conflicting with any of the preceding representations and warranties of the Vendor.
- (m) With respect to the Leases:
 - (i) The Leases are good, valid, subsiding and binding against the tenants in accordance with the terms of the Leases;
 - (ii) There are no financial obligations of any nature whatsoever owing to any of the tenants by the Vendor pursuant to the leases other than those specified in the leases and
 - (iii) To the best of the Vendors' knowledge, no notice has been received from any tenant indicating an intention to vacate its premises prior to the expiration of its Lease;

- 3.2 Except as otherwise set forth herein, the representations and warranties of the Vendor and the Purchaser shall merge on closing.

The Defence and Counterclaim - Position and Evidence of the Defendant

13 In its counterclaim, the Defendant seeks damages in the amount of \$2,500,000 and to have the amount due under the mortgage set-off against damages.

14 In response to Tranmere's summary judgment motion Helter filed the Affidavit of Mr. Maurice Fagan sworn March 23, 2005. Mr. Fagan is the principal of Helter and a lawyer by profession with many years of experience in the real estate business.

15 Helter does not take issue with the fact that the amount due and owing under the mortgage was \$987,320.83 as of May 9, 2005.

16 Helter agreed to purchase the subject property for \$5,125,000. The value of any commercial building is obviously related to the revenue it is currently generating under existing leases and its potential to generate revenue in the future from existing and new tenants. (There can be other factors unrelated to revenue, however, they are not germane to this case.)

17 Helter alleges that prior to the November 17, 2003 Agreement, Tranmere by its agent made fraudulent or negligent misrepresentations which caused Helter to enter the Agreement. Specifically, Helter states that it was represented that tenant Muscletech did not intend to relocate at the end of its lease the following year and that tenant Applied Precision would take over an additional unit and enter into a three year lease. Tranmere denied any fraudulent or negligent misrepresentation.

18 Applied Precision vacated in early December, 2003 and paid rent to the end of its lease term on December 31, 2003. Muscletech indicated in February, 2004 that it did not intend to renew at the end of its lease on June 30, 2004.

19 In his initial Affidavit Mr. Fagan did not provide any evidence with respect to Helter's alleged damages which the counterclaim indicates relate to the difference in value between the purchase price and the fair market value of the property, acquisition costs and out of pocket costs incurred in acquiring the property or with respect to efforts to secure new tenants.

20 Muscletech held leases on Units 17, 18, 26, 27 and 201 with a total area of 14,134 sq. ft. subject to a lease agreement to expire June 30, 2004. Tranmere's evidence was that after Muscletech vacated, most of the space was soon leased to new tenants. It is not disputed that the Credit Bureau of Canada leased 5,915 sq. ft. of this space effective July 1, 2004.

21 Responding to Tranmere's evidence, in his responding affidavit dated April 19, 2005, paragraph 15, Mr. Fagan makes the somewhat vague statement:

Finally, with regard to the allegations made in paragraph 44, Units 17, 18, 16 and 27 remain vacant and were not leased to tenants on terms better than or equal to Muscletech for some time, and as of today, Unit 27 remains vacant despite efforts to locate an appropriate tenant. [Unit 27 is 2,554 sq. ft.].

22 Applied Precision leased units 2 and 217, a total of 2,717 sq. ft., (less than 4% of the total rentable area) subject to a lease which expired December 31, 2004. Mr. Fagan's responding affidavit states that a tenant located by the defendant Britannia Property Management Inc. did not lease the premises but does not state whether Helter subsequently leased these premises.

23 At his cross-examination on May 3, 2005 Mr. Fagan was asked the following question, and by his counsel answered:

Q. And so as of today, you are not in a position to address what the damages are?

A. Not to quantify them with any particularity. (page 127)

24 In reviewing the cross-examination transcript it appears that Mr. Fagan could provide few particulars as to what tenants had been secured, when and at what rental rate.

25 Further, by letter dated May 5, 2005 the solicitors for Tranmere confirmed an April 27, 2005 request to Helter to produce leases. In its reply submissions Tranmere states that these are the leases under which tenants now occupy certain of the premises vacated by Muscletech and Applied Precision at the end of their leases. Tranmere in its reply submissions dated May 24, 2005 states such leases have still not been produced and undertakings related to damages have not been answered. Helter has not taken issue with these assertions. These leases would seem to be the single most important source of information as to damages and readily available to Helter by opening a file folder, yet they have not been produced.

26 The stated inability to quantify damages with any particularity is inexplicable. Mr. Fagan testified that in deciding to purchase the property he valued the building based upon a "cap rate of around 10%" (q. 684) and he appears to equate \$27,000 in lost rental revenue with a reduction of \$270,000 in value. Clearly Mr. Fagan was in a position to provide a precise calculation of lost revenue and evidence as to how in his opinion this affected value and he did not.

27 At q. 686 Mr. Fagan stated:

- A. There may be a lot of additional costs. There may be commissions payable. There may be work done on the units. I don't have that in front of me.

28 Clearly, it was within Mr. Fagan's power to adduce precise evidence as to any commissions paid or work done. It was also within his power to adduce precise evidence as to other aspects of the alleged damages such as out of pocket expenses in securing new tenants.

29 In the Hamilton action commenced November 4, 2003 Helter alleged fraud but did not seek to rescind the Agreement or the mortgage. Further, subsequent to the hearing of the motion, by letter dated June 2, 2005, the solicitors for Helter advised that Helter requested an opportunity to redeem the mortgage. Enclosed was a copy of a June 2, 2005 letter from the solicitors for Helter to the solicitors for Tranmere stating in part:

My client wishes to make clear that in the event judgment is granted subject of course [sic] of any right of appeal, it is prepared to pay out the amount owed pursuant to the mortgage immediately to avoid the substantial prejudice that would arise as a result of the foreclosure.

30 The right to redeem is contested by the solicitors for Tranmere and I will return to that substantive point later. For present purposes the point is that Helter does not seek to rescind the Agreement and mortgage but instead advances a damage claim.

Settlement Agreement Among Britannia, Tranmere and Helter

31 In May, 2004 a dispute arose as to payment of Britannia's April, 2004 invoice for property management services. On May 17, 2004 the parties entered a settlement agreement. It is not clear to me, on the submissions received, the basis on which Helter now purports to claim \$50,000 for negligence and breach of the property management agreement.

Whether Summary Judgment Should be Granted

32 It is conceded by the Defendant that the mortgage has been in default since December 1, 2004. As set out above, the mortgage standard terms provide that the Defendant is obliged to pay the amount due on maturity "without any deduction or abatement". With respect to the Plaintiff's claim under the mortgage, there is no genuine issue of material fact requiring trial. Helter does not seek to rescind the Agreement or mortgage and the amount due is not contested.

33 In its counterclaim Helter's principal claims are for an interlocutory injunction restraining Tranmere from exercising its rights under the mortgage and for damages for fraudulent and negligent misrepresentation. On this summary judgment motion Helter argued that it had a tenable claim to equitable set-off and that the mortgage action, or any summary judgment awarded, should be stayed pending trial of Helter's damage claims.

34 As to the validity of Helter's claims for damages for negligent and fraudulent misrepresentation, there are material facts in dispute and inferences to be drawn which I am not permitted to resolve on this motion for summary judgment. It would be academic for me to address Tranmere's legal arguments that the negligent misrepresentation claim is untenable because the claim for fraudulent misrepresentation would remain. As those claims will come before another judge on another day, I will refrain from commenting on the merits except to the extent necessary to decide this motion.

Issues

35 The remaining issues before me, therefore, are:

- (a) Does Helter's claim to equitable set-off create a genuine issue for trial in the context of this mortgage action?
- (b) Whether Tranmere should be restrained from exercising its rights under the mortgage pending the hearing of Helter's counterclaim and/or should there be a stay of judgment pending hearing of Helter's counterclaim?

Equitable Set-Off

36 In my opinion there is no tenable argument that the claims for damages for negligent misrepresentation can give rise to an equitable set-off given the language of the mortgage that the amount due is payable "without any deduction or abatement". As stated by Justice Cameron in Shirley Marshall Holdings Inc.:

Arnold v. Bronstein et al. is authority that there is no right of equitable set-off against a liquidated claim under a mortgage which is to be paid "without deduction or abatement". However, this is based on the mortgagee acting in good faith and without fraud. See [1971] 1 O.R. 467 (H.C.J.) at 468.

37 Assuming, therefore, that the claims for damages for fraudulent misrepresentation allow Helter to claim equitable set-off, notwithstanding the "without any deduction or abatement" language of the mortgage, I turn to the governing principles.

38 In *Chiarotto v. S. Parks Investments Ltd.*, [1995] O.J. No. 3003 (Ont. Ct. Gen. Div.) Justice Somers stated:

12. Later cases have pointed out the trend in our courts to apply under certain circumstances an equitable set off against a debt for liquidated damages. The British Columbia Court of Appeal in the case of *Coba Industries Limited v. Millie's Holdings Canada Ltd.*, [1985] 6 W.W.R. 14 stated:

The principles to be applied in determining whether a party will be entitled to an equitable set-off are:

1. The party relying on a set-off must show some equitable ground for being protected against his adversary's demands.
2. The equitable ground must go to the very root of the plaintiff's claim before a set-off will be allowed.
3. A cross claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross claim.
4. The plaintiff's claim and the cross claim need not arise out of the same contract.
5. Unliquidated claims are on the same footing as liquidated claims.

39 With respect to the second principle, the uncontradicted facts demonstrate that the fraudulent misrepresentations alleged by Helter do not go to the very root of the contractual relationship. Helter received good title to the subject property. Tranmere's express representations and warranties with respect to the leases in section 3.1(m) of the Agreement, which focussed on whether the leases were valid and subsisting and that tenants had not indicated an intention to leave prior to lease expiry, were accurate.

40 In my opinion the alleged negligent or fraudulent misrepresentations, relating to the present intention of two tenants as to whether they would renew, does not go to the very root of the Agreement. Intentions are not always reliable and tenants can change their mind. Further, the fact that Helter has not quantified its damages lends further support to my conclusion that the alleged fraudulent misrepresentations do not go to the very root of the Agreement and certainly not to the very root of the mortgage.

41 With respect to the third principle, the words of Justice Somers have equal application to this case. Justice Somers stated:

14. [the] ... claim is on the mortgage transaction which, though part of the Agreement of Purchase and Sale, is a separate document separately negotiated and which contains specific provisions which I am now in effect bring asked to disregard.

42 Finally, the following observation of Justice Somers is apt:

17. ... I am inclined to agree with the statement made by Potts J. in the case of *Lehndorff Canadian Pension Properties Ltd.*, (1989) 4 R.P.R (2d) 148. In an application for set-off in similar circumstances he stated:

This strikes me as a situation, not of set-off, but one where the mortgagor is attempting to get a Mareva-type injunction under the Mortgages Act. What the mortgagor seems to want is to have the amount of its claim for damages held in court so that payment is readily available should it obtain judgment at trial.

43 The considerations above apply with even greater force to Helter's claim for \$50,000 for negligence or breach of the property management contract. Further, Britannia, not Tranmere, was party to the property management agreement.

44 In my opinion Helter does not have any tenable claim to equitable set-off and the Plaintiff is entitled to summary judgment in the amount claimed.

Stay of Mortgage Action or Stay of Judgment Pending Counterclaim

45 In its factum Tranmere set out its submissions as to why a stay was not appropriate. Helter's factum is vague, however, in the final paragraph it does refer to the alleged harm it would suffer if summary judgment was granted and the balance of convenience.

46 Thus, while Tranmere's position in reply is that Helter has not requested a stay, I think it incumbent on me to address this issue. The same considerations apply regardless of whether the relief is characterized as a stay of the mortgage action or a stay of any judgment granted in the action.

47 To obtain a stay Helter must meet the three part test in *R.J.R. MacDonald v. Canada*, [1994] 1 S.C.R. 311, as follows:

- a. A serious issue must be said to exist;

- b. The Defendant must show irreparable harm if the stay is not granted;
- c. The balance of convenience must favour the granting of the stay.

48 The "serious issue" component of the test establishes a fairly low threshold. I proceed on the basis that there is a serious issue given the nature of Helter's allegations and Mr. Fagan's evidence which I am not permitted to weigh or assess on this motion for summary judgment.

49 As to the second component of the test, I do not believe that Helter will suffer irreparable harm if a stay is not granted. Helter agreed to structure the mortgage as a separate agreement which could be enforced without deduction or abatement. The harm Helter complains of, having a mortgage judgment granted prior to the adjudication of Helter's damage claims under the Agreement, is a logical consequence of the contractual relationship Helter agreed to.

50 Tranmere is defending Helter's damage claims and it and related parties can be held liable if Tranmere improperly disburses funds or disposes of assets in the face of this claim. This situation is not, therefore, materially different from many civil cases in which there are non-specific concerns that funds may not be available in a corporation to satisfy a judgment. In my opinion there is no evidence of irreparable harm if a stay is not granted. Further, if the allegation of fraudulent misrepresentation is found to have merit, and I express no view on that, then Fred Mansoor would be personally liable as well as Tranmere.

51 Turning to the balance of convenience, we have on the one hand Tranmere, which has a valid mortgage which came due December 1, 2004 and a clear legal entitlement to approximately \$990,000.

52 On the other hand, Helter has "played the fraud card" and then seeks to prevent Tranmere from recovering the admitted mortgage debt by raising the spectre of a counterclaim which it could have, but has not, quantified in a meaningful manner. Far from putting its best foot forward, Helter has played "hide and seek" as to its damages.

53 In the absence of information from Helter to detail its damage claim, I have no idea if its claim is substantial. That weighs heavily in my conclusion that the balance of convenience favours granting Tranmere its clear legal entitlement to \$990,000 and not staying that entitlement pending a claim that may have nominal value. While that is a sufficient basis for my conclusion, given that I am now addressing Helter's request for a stay, in my opinion this is an appropriate situation in which to draw an adverse inference against Helter as to the quantum of damages and I do so. Helter, in effect,

seeks execution before judgment and there are no extraordinary facts which would justify this relief.

54 In my opinion the balance of convenience favours allowing Tranmere to exercise its clear rights as mortgagee.

Right of Helter to Redeem

55 Helter, by letter dated June 2, 2005, requested that any summary judgment provide for its right to redeem the mortgage. Tranmere's position, outlined in a letter dated June 10, 2005, is that Helter's request to redeem is invalid. I have not heard argument on this and the only material before me consists of letters from counsel.

Conclusion

56 Tranmere claimed foreclosure, possession and the amount due under the mortgage. Having regard to my reasons, Tranmere is certainly entitled to summary judgment in the amount of \$987,320.83 plus per diem interest from May 10 to the date of judgment. Either party may bring a motion before me, on proper material, as to the form of judgment and whether it should provide for a right to redeem. If the parties agree they may make written submissions without the necessity of attendance. I will then determine the final relief and form of judgment to be granted.

57 Helter had raised the concern that granting summary judgment would result in an issue estoppel or somehow prejudice it in pursuing the Hamilton action. I do not agree and Tranmere in its material acknowledged that summary judgment would not prejudice the ability of Helter to proceed with the Hamilton action.

58 Helter also brought a cross-motion to consolidate this action with the earlier Hamilton action. Tranmere's position was that if summary judgment was granted, it did not oppose consolidation of Helter's counterclaim with Helter's claim in the Hamilton action and I so order.

59 Tranmere shall make written submissions as to costs by July 15; Helter shall respond by July 30; with any reply submissions by August 10, 2005.

J.R. SPROAT J.

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