

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** *Eleonora Grillo v. Arturo Spadafora and Desma Investments Ltd.*

**BEFORE:** Associate Justice Rappos

**COUNSEL:** *Peter Neufield*, for the Plaintiff

*Michael Suria*, for the Defendants

**HEARD:** December 7, 2023

**ENDORSEMENT**

**Overview**

[1] The Plaintiff claims to have loaned \$150,000 to the Defendants, which remains unpaid. She commenced this action in March 2021 to recover the unpaid amount of the loan.

[2] The Plaintiff brings a motion for leave to amend her statement of claim and to register a certificate of pending litigation (“**CPL**”) against title to the Property (as defined below). The Plaintiff claims that she has an equitable mortgage over the Property as a result of a promissory note signed by the Defendants that granted her an interest in “any assets or property owned by the borrowers” as security for the loan.

[3] The Defendants argue that, among other things, the Plaintiff does not have a reasonable interest in the Property and that her request for leave to register a CPL against title to the Property should be dismissed.

[4] For the reasons that follow, the Plaintiff’s motion for leave to amend her statement of claim is granted on consent, and her motion for leave to register a CPL is dismissed.

**Factual Background**

[5] Arturo Spadafora (“**Arturo**”) and Salvatore Grillo (“**Salvatore**”) were friends who regularly would meet up for coffee. Arturo is a building contractor and often is in need of funds to help complete the projects he is involved with.

[6] During some of those coffee talks, they discussed Arturo’s financial issues. The parties agree that between February 24, 2019 and December 29, 2019, the sum of \$150,000 was loaned to Arturo (the “**Loan**”). It was a cash loan made in four (4) advances.

[7] Arturo alleges that the terms of the Loan were orally agreed to by him and Salvatore and that the Loan was made to him by Salvatore.

[8] Eleonora Grillo (“**Eleonora**”) is Salvatore’s wife. She alleges that, while the arrangements were made by Salvatore, it was she that loaned \$150,000 to Arturo and his company Desma Investments Ltd. (“**Desma**”).

[9] Eleonora claims that the parties signed a promissory note dated March 31, 2019 (the “**Promissory Note**”) with respect to the Loan.

[10] Arturo says he does not recall signing the Promissory Note, and that the first time he saw the Promissory Note was when it was produced during this litigation. He says he never agreed to borrow money from Eleonora, and had no interactions with her regarding the Loan he borrowed from Salvatore.

[11] Sections 6, 7 and 8 of the Promissory Note deal with security to be granted in connection with the Loan.

[12] The typed portion of Section 7 provides that “This Note is secured by the following security (the ‘Security’): cheques.” The following handwritten words were added to the end of the section “or any assets or property owned by the borrowers.” There are initials by the handwritten portion.

[13] Section 7 states that “The Borrower granted to the Lender a security interest in the Security until this Note is paid in full. The Lender will be listed on title of the Security whether or not the Lender elects to perfect the security interest in the Security.”

[14] Section 8 provides that “If the Borrower defaults in payment as required under this Note or after demand for ten (10) days, the Security will be immediately provided to the Lender and the Lender is granted all rights of repossession as a secured party.”

[15] Arturo alleges that he never agreed with Salvatore or Eleonora that the funds he borrowed from Salvatore would be secured against any real property that he, or any affiliated company, owns. He says that the terms of the Promissory Note do not reflect his agreement with Salvatore.

[16] Arturo also states that, as he has never seen an original of the Promissory Note, with original signatures, he does not believe that the Promissory Note is authentic.

[17] Eleonora’s affidavit provides no details as to when or where the Promissory Note was signed by Arturo. There is no witness to Arturo’s signature. There is also no discussion concerning the initials included beside the handwritten portion of section 7.

[18] Eleonora relies on a report prepared by Brenda Petty, a Certified Questioned Document Examiner designated by the International Association of Document Examiners. In that report, Ms. Petty states that she reviewed six examples known to be Arturo’s signature (from his affidavit of documents and five (5) cheques he signed on behalf of Desma that were produced in the litigation), and compared it to the signature on the Promissory Note. She concluded that the signature on the

Promissory Note for Arturo was authored by the same person (Arturo) who signed the affidavit of documents and five cheques.

[19] Arturo claims that by March 8, 2020, he had repaid \$137,750 in cash to Salvatore. As a result of an interruption to his business due to the COVID-19 pandemic, he had difficulty making further payments. At the request of Salvatore, he wrote two cheques each in the amount of \$5,000.

[20] These cheques were made payable to Eleonora. Arturo claims that when he signed the cheques, he did not know that “Eleonora Grillo” was Salvatore’s wife, as he knew her as Laya.

[21] Eleonora alleges that Arturo and Desma have breached the terms of the Promissory Note by failing to pay amounts when due. She claims that all that she has received from Arturo from the Loan is a \$5,000 cheque and \$14,302 of renovations completed by Arturo on her home that she has credited against the Loan.

[22] On March 2, 2021, Eleonora commenced this action by way of statement of claim (the “**Statement of Claim**”), seeking payment of the sum of \$139,189.66. The Statement of Claim does not include a request for leave to issue a CPL, nor does it directly claim an interest in land. It does cite the security provisions of the Promissory Note detailed above.

[23] In their statement of defence dated March 25, 2021, Arturo and Desma deny that they entered into a loan agreement with Eleonora and deny that she advanced any funds to her. They claim that they have already provided payment and services to Salvatore totaling \$162,052.

[24] Arturo commenced a third-party claim against Salvatore on April 1, 2021 seeking, among other things, payment of \$12,052, a declaration that the Loan had been repaid, and a declaration that the interest charged was unconscionable and unenforceable as it was usurious.

[25] Eleonora delivered a reply dated May 7, 2021. Salvatore delivered a third party Defence dated June 2, 2021.

[26] Eleonora’s states that, following her attendance at a mediation on July 12, 2023, her lawyers discovered that Arturo is the registered owner of property municipally known as 1 Lund Street, Richmond Hill (the “**Property**”).

[27] The parcel register for the Property shows that on March 24, 2021 there was a Transmission By Personal Representative-Land registered, transferring ownership from Giuseppina Spadafora to Arturo and Giulio Spadafora, as Estate Trustees With a Will. On that same day, a Transfer by Personal Representative was registered by Arturo and Giulio Spadafora in favour of Arturo.

[28] Giuseppina Spadafora had been the sole owner on title to the Property since May 2018, and prior to that was on title with Gaetano Spadafora since July 1987.

[29] Arturo says that Giuseppina Spadafora was his mother, and that she passed away on January 1, 2021. He and his brother Giulio were appointed as estate trustees under her will.

[30] Arturo claims that he and his five siblings are the beneficiaries of his mother's estate, and that he and his siblings agreed that the existing loans on the Property would be consolidated under one mortgage and that he would be placed on title to the Property for the purposes of re-financing the Property and consolidating the existing loans.

[31] Arturo has produced a declaration of trust dated March 24, 2021 (the "**Declaration of Trust**"), which provides that Arturo holds title to the Property in trust for himself and his siblings notwithstanding that he is the sole registered owner of the Property. It also states that he intends to buy his siblings out in the future.

[32] Arturo claims that the refinancing has been complete, and that there are now two charges registered on title to the Property: one in the amount of \$920,000 and the other in the amount of \$450,000. He claims that the second mortgage is a loan made to him to support his business.

[33] Eleonora claims that Arturo encumbered the Property after being served with the Statement of Claim "in an attempt to hinder me from recovering any funds in the event that I successfully secured a judgment against him and Desma for the amounts owing under the promissory note".

[34] She also alleges that "it is critical that a certificate of pending litigation be registered on the Property pending the collection of the amounts owing to me under the promissory note", and that "there is a real risk that [Arturo] will continue to encumber his Property until there is no equity left, which will effectively preclude me from collecting against [Arturo] in the event of a successful judgment."

[35] Eleonora registered a Caution against title to the Property on July 24, 2023 to prevent Arturo "from completely diluting the equity in the Property".

[36] Eleonora also refers to a sale of real property completed by Desma in January 2022, after this action was commenced. Eleonora notes that she is "also concerned that Desma's sale of the [property] was done in an attempt to hinder me from successfully collecting against Desma were I ultimately successful in securing a judgment against it".

[37] Eleonora affirmed two affidavits in support of her motion. Arturo swore a responding affidavit. There is no affidavit from Salvatore. There were no cross-examinations on the affidavits, as the action is governed by Simplified Procedure.<sup>1</sup>

### **Relief Sought by Eleonora**

[38] Eleonora brings a motion for an order granting her leave to: (a) amend her Statement of Claim so that she may make a claim for a CPL over the Property and plead facts related to her claim for an interest in the Property; and (b) register a CPL on title to the Property.

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<sup>1</sup> Eleonora asked the Court to draw a negative inference based on Arturo's original agreement to be cross-examined on his affidavit, and then withdrawing that agreement based on the prohibition on cross-examinations in a Simplified Procedure action. I have not done so, as Arturo was entitled to refuse to be cross-examined due to subrule 76.04.

[39] Arturo and Desma have consented to Eleonora’s motion for leave to amend her statement of claim in the form included as Schedule “A” to her Amended Notice of Motion dated November 28, 2023 (the “**Amended Statement of Claim**”).

[40] Accordingly, the issue for the Court to determine is whether Eleonora’s request for leave to register a CPL against title to the Property should be granted.

### **Analysis**

#### *Test for a CPL*

[41] Section 103 of the *Courts of Justice Act* and rule 42.01 of the *Rules of Civil Procedure* provide that the Court may grant leave to the registrar to issue a CPL to be registered against land. The decision to grant leave is a discretionary one.

[42] Subrule 42.01(2) sets out two procedural requirements: (a) the statement of claim must include a claim for a CPL; and (b) the statement of claim must include a description of the land in question sufficient for registration.

[43] I have reviewed the Amended Statement of Claim, and Eleonora has satisfied both of these procedural requirements.

[44] The threshold in respect of the “interest in land” issue under section 103 is whether there is a triable issue as to such interest, not whether the plaintiff will likely succeed.<sup>2</sup> The threshold for establishing a triable issue is low.<sup>3</sup>

[45] The onus is on Arturo, as the opposing party, to demonstrate that there is no triable issue in respect to whether Elenora has a reasonable claim to the interest in land claimed.<sup>4</sup>

[46] The governing test is that the court must exercise its discretion in equity and look at all relevant matters between the parties in determining whether a CPL should be granted or vacated.<sup>5</sup> There are a number of factors to be considered, including the harm to each party if the CPL is not granted, which are known as the *Dhunna* factors.<sup>6</sup>

[47] In determining whether there is a reasonable claim to an interest in land, the court must not simply rely on the pleadings or accept affidavits uncritically. The court has a duty to examine the whole of the evidence as it stands after cross examination and, without deciding disputed issues of fact and credibility, consider whether on the whole of the evidence, a reasonable claim to an interest in land has been made out.<sup>7</sup>

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<sup>2</sup> *Roseglen Village for Seniors Inc. v. Doble*, 2010 ONSC 3239 (“*Roseglen*”), para. 10.

<sup>3</sup> *1061307 v. Zang*, 2023 ONSC 217, para. 11.

<sup>4</sup> *Roseglen*, para. 10.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*, para. 10 and 16.

<sup>7</sup> *Ibid.*, para. 11.

[48] I have applied these factors and considerations to the facts before me in determining whether to grant leave to Eleonora to register a CPL against title to the Property.

*Promissory Note*

[49] In the Amended Statement of Claim, Eleonora makes a claim for a declaration that she holds an equitable mortgage against title to the Property for the amounts owing under the Loan.

[50] The starting point of the analysis is the Promissory Note. As detailed above, Arturo does not recall signing it, does not believe it is authentic, had not seen it before this litigation was commenced, and that he never agreed to the terms set out therein.

[51] Eleonora's materials do not directly respond to Arturo's position. There is no discussion in Eleonora's affidavits as to when Arturo signed the Promissory Note, who was with Arturo when he signed it, and how it was delivered to Eleonora. Arturo's signature is not witnessed by anyone, and the operative language in section 6 of the Promissory Note, which is the basis of Eleonora's case, is handwritten and contains unknown initials.

[52] Instead of responding to the issue of authenticity with direct evidence, Eleonora relies on a handwriting expert whose report states that Arturo is the individual who authored the signature on the Promissory Note, given her review of signatures known to be Arturo's and comparing them to the signature on the Promissory Note.

[53] I have reservations concerning the evidence surrounding the Promissory Note. However, as is detailed below, I need not render a ruling concerning the Promissory Note, as, even assuming the Promissory Note was signed by Arturo and is a valid and enforceable contract, I am of the view that Eleonora does not have a reasonable claim to an interest in the Property based on the Promissory Note or under equitable principles.

*Claim to an Equitable Mortgage Over the Property*

[54] Eleonora's claims that the language in the Promissory Note entitles her to an equitable mortgage over the Property.

[55] An equitable mortgage is distinct from a legal mortgage, and is meant to enforce a "common intention of the mortgagor and mortgagee to secure property for either a past debt or future advances, where that common intention is unenforceable under the strict demands of the common law."<sup>8</sup>

[56] An equitable mortgage is a contract which creates in equity a charge on the property, but does not pass the legal estate to the mortgagee. An equitable mortgage can be created in several

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<sup>8</sup> *Greenspan v. Van Clieaf*, 2023 ONCA 681, para. 44, citing *Elias Markets Ltd., Re*, (2006) 274 D.L.R. (4th) 166 (Ont. C.A.), paras. 63 and 65.

ways, including by the fact that the mortgagor has not executed an instrument sufficient to transfer the legal estate.<sup>9</sup>

[57] Where an equitable mortgage derives from an agreement, determining whether there is an equitable mortgage is a matter of contractual interpretation. The normal principles of contractual interpretation apply. The court is to determine the intent of the parties, based on the words in the contract used in their ordinary and grammatical meaning, consistent with the surrounding circumstances reasonably known to the parties at the time the contract was formed.<sup>10</sup>

[58] The language of the Promissory Note is that it is secured by “any assets or property owned by the borrowers...The Lender will be listed as a lender on title of the Security whether or not the Lender elects to perfect the security interest in the Security.”

[59] The Promissory Note is dated March 31, 2019. At that time, the Property was not owned by Arturo, as it was owned by his mother. Arturo did not obtain an interest in the Property until after his mother’s passing in January 2021, almost two years after the Promissory Note was signed.

[60] Additionally, the language in the Promissory Note does not include any reference to it extending to future or after-acquired property of the borrowers.

[61] Applying the principles of contractual interpretation, I do not see how the parties could have intended for Arturo to grant a charge over his mother’s property which, if his mother had remained in good health, he may not have had an interest in for years and years to come. There is nothing in the Promissory Note that refers to the Property. There is no suggestion in Eleonora’s affidavit that it was the intent of the parties for her to get a charge on the Property at the time the parties entered into the Promissory Note. Her evidence is that she was not aware of the existence of the Property until the summer of 2023, over four (4) years after the Promissory Note was said to be signed and over two years after this action had been commenced.

[62] As well, I do not believe that the language in the Promissory Note is sufficient to create an equitable interest in property that Arturo did not own at that time. The parties have not directed me to any case law that stands for the proposition that an equitable mortgage can be created and enforced by a mortgagee over future property that mortgagor did not own at the time the equitable mortgage was granted, and may have never owned during the life of the loan.

[63] As a result, based on the record before me, I am of the view that Eleonora does not have a reasonable claim to an equitable mortgage interest in the Property based on the language of the Promissory Note.

[64] During reply submissions, counsel for Eleonora raised for the first time that the language contained in the Promissory Note could also be interpreted to be a floating charge over all of Arturo’s future property and assets, which would include the Property.

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<sup>9</sup> *Ibid.*, para. 45.

<sup>10</sup> *Ibid.*, para. 47.

[65] In my view, this argument is not properly before the Court. The Amended Statement of Claim contains no reference whatsoever to a claim by Eleonora to an interest in the Property based on the concept of floating charges. As well, raising the issue for the first time in reply was improper. As a result, it cannot serve as the basis for Eleonora's request for the CPL.

### *Equitable Considerations*

[66] Eleonora also argues that justice and fairness require that a CPL be issued. She points to the fact that the Property was encumbered in 2021 following service of the Statement of Claim. She claims that Arturo is attempting to hinder her ability to collect against him. This position was repeated often in her affidavits and in her counsel's submissions to the Court.

[67] She also argues that damages in this case will be insufficient as Arturo is encumbering the Property.

[68] In my view, the *Dhunna* factor of "whether damages would be a satisfactory remedy" relates is because that case was a case for specific performance. Courts have recognized this fact and have noted that the *Dhunna* factors may not be applicable to all CPL cases.<sup>11</sup>

[69] As well, it is clear from the materials that Eleonora has been motivated to obtain the CPL as a means of preventing Arturo from encumbering the Property until she can obtain judgment. A CPL is intended to protect an interest in land in situations where other remedies would be ineffective. It is not intended to be an instrument to secure a claim for damages."<sup>12</sup>

[70] I also echo the comments made by Justice Papageorgiou in *Angermeyer v Stedman* that "This is essentially a debt collection proceeding and the Plaintiff's motion, in my view, is an attempt to obtain prejudgment execution or secure his claim which is not the purpose of a CPL."<sup>13</sup>

[71] As a result, Eleonora has failed to satisfy me that a CPL should be granted on the basis that damages may not be a sufficient remedy for her if she is successful with her claim.

[72] There is also the issue of ownership of the Property. The evidence before the Court is, that while Arturo is the registered owner of the Property, he holds that registration in trust for himself and his five siblings. As a result, Arturo has a 1/6 beneficial interest in the Property. While his siblings have permitted him to encumber the Property for his own benefit, that does not impact his current 1/6<sup>th</sup> ownership interest in the Property.

[73] Eleonora relies on the decision of Justice Chalmers in *1061307 v. Zang*, where the Court held that a CPL could be registered against a property based on a beneficial interest.<sup>14</sup> However,

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<sup>11</sup> *Roseglen*, para. 15; *Carttera Management Inc. v. Palm Holdings Canada Inc.*, 2011 ONSC 457, para. 21.

<sup>12</sup> *Rahbar v. Parvizi*, 2022 ONSC 1104, para. 40.

<sup>13</sup> *Angermeyer v Stedman*, 2023 ONSC 3587, para. 29.

<sup>14</sup> *1061307 v. Zang*, 2023 ONSC 217, paras. 13-14.



in that case, the moving party took steps to serve all parties that potentially had an interest in the property in question and Justice Chalmers validated service of the materials on those parties.<sup>15</sup>

[74] That is not the case before me, as there is no suggestion that Eleonora served her motion materials on all persons with beneficial interests in the Property. This factor weighs against granting the CPL.

[75] Having considered the impact of granting and not granting a CPL on the parties and balanced the equities, I have concluded that it would not be just or fair to grant Eleonora leave to register a CPL on the Property.

### **Disposition and Costs**

[76] For the reasons above, I hereby dismiss Eleonora's motion for leave to issue a CPL and register it on the Property.

[77] Arturo seeks costs on a partial indemnity basis of \$7,267.58 all inclusive. Eleonora would have sought costs on a partial indemnity basis of \$10,068.30 all inclusive if she was successful.

[78] Costs of a step in a proceeding are in the discretion of the Court, as set out in section 131 of the *Courts of Justice Act*. Rule 57.01 of the *Rules of Civil Procedure* sets out factors that the court may consider in exercising such discretion. The overriding principles in determining costs are fairness and reasonableness.<sup>16</sup>

[79] Based on my review of the costs outline and hearing the submissions of the parties, I believe that \$7,267.58 is a fair and reasonable amount of costs for Eleonora to pay as the unsuccessful party. As a result, I hereby fix costs in the amount of \$7,267.58 payable by Eleonora to Arturo and Desma within 30 days.

[80] The parties shall agree to a form of draft order and send it to my Assistant Trial Coordinator for my review.

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Associate Justice Rappos

**DATE:** March 21, 2024

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<sup>15</sup> *Ibid.*, paras. 2-4.

<sup>16</sup> *Boucher v. Public Accountants Council for the Province of Ontario*, 2004 CanLII 14579 (ON CA), at paras. 24, 26, and 37-38.