

2017 ONSC 6828
Ontario Superior Court of Justice

58 Cardill Inc. v. Rathcliffe Holdings Limited

2017 CarswellOnt 17908, 2017 ONSC 6828, 285 A.C.W.S. (3d) 635, 55 C.B.R. (6th) 230, 84 R.P.R. (5th) 44

**58 CARDILL INC. (Applicant) and RATHCLIFFE
HOLDINGS LIMITED (Respondent)**

Sanfilippo J.

Heard: November 1, 2017
Judgment: November 15, 2017
Docket: CV-575043

Counsel: Richard Worsfold, for Applicant
Robert S. Choi, for Respondent

Sanfilippo J.:

A. Overview

1 This application addresses whether a mortgagee can recover a three-month interest charge when realizing on a secured property through the private appointment of a receiver.

2 The applicant mortgagor disputes the respondent mortgagee's imposition of a three-month interest charge. The applicant contends that this charge is available only when the mortgage contains an express term supporting its assessment, which the applicant submits is absent in the mortgage entered into with the respondent.

3 The parties agree that the mortgage was in default, that the mortgagee was entitled to appoint a receiver and that the amounts realized upon the successful completion of the sale of the secured property are correctly accounted. The applicant's contention is that the mortgagee's entitlements are fully satisfied through realization on the date of closing of the sale transaction, June 29, 2016, of principal and interest calculated to the date of closing plus disbursements, receiver fees and legal fees.

4 The issue in dispute is the respondent mortgagee's assessment and withholding of the amount of \$351,000, which consists of three months of interest payments. The applicant seeks a determination that the respondent is not entitled to this interest charge.

5 The entitlement claimed to the three-month interest charge must be established either on the *Mortgages Act*, R.S.O. 1990, c. M.40, and in particular s. 17, or on the wording of the mortgage, in regard to which only provision 12 has been identified as potentially pertinent. Provision 12 of the mortgage provides that, in the event of non-payment of the principal amount of the mortgage, a mortgagor may not require a mortgagee to accept payment of the mortgage without first providing three months' notice in writing or advance payment of three months' interest.

6 On the basis set out in these Reasons, I have determined that the respondent mortgagee, in realizing on its mortgage through sale of the secured property by a privately-appointed receiver, is not entitled, under either the *Mortgages Act* or on the terms of the mortgage, to the three months' interest charge that was assessed and withheld.

B. Background to Dispute

7 The applicant, 58 Cardill Inc. ("Cardill" or the "applicant") was the owner of a property known municipally as 58 Cardill Crescent, Waterloo, Ontario (the "Property"). In December 2013, Cardill retained a general contractor to build a student residence on the Property.

8 By mortgage commitment agreement dated December 17, 2013 (the "Mortgage Commitment"), the respondent, Rathcliffe Holdings Limited ("Rathcliffe" or the "respondent") agreed to provide mortgage financing to Cardill in the amount of \$11,700,000 to be secured by a mortgage registered against title to the Property.

9 On January 20, 2014, a mortgage was registered in favour of Rathcliffe in the principal amount of \$11,700,000, with interest at the rate of 8% per annum for months one to 14 and at the rate of 12% per annum thereafter (the "Mortgage"). The term of the Mortgage was sixteen months such that it would mature on June 1, 2015.

10 By October 14, 2014, a dispute arose between Cardill and its general contractor with the result that work ceased. On November 12, 2014, the general contractor registered a claim for lien against title to the Property.

The Default and Forbearance Agreement

11 Rathcliffe discovered that four liens had been registered against the Property and on this basis delivered, on March 5, 2015, a Notice of Default under the Mortgage. Rathcliffe thereby set upon realization of the amounts due under its Mortgage further to its rights in the Mortgage Commitment.

12 Cardill sought a period of forbearance in order that it could attempt to resolve the liens and their attendant litigation. On June 5, 2015, Rathcliffe and Cardill entered into an agreement whereby Rathcliffe would forbear in the enforcement of its rights until July 31, 2015 (the "Forbearance Agreement") on the understanding that Rathcliffe reserved its right to enforce its entitlements under the Mortgage. The Forbearance Agreement provides in part as follows:

1.2 The Borrower acknowledges that as of June 1, 2015, the Borrower is indebted to the Lender in the aggregate amount of \$11,951,815.16 (including all unpaid interest to and including the interest payment due June 1, 2015), plus accrued and ongoing interest accruing after June 1, 2015.

...

6.8 The provisions hereof shall operate and apply without prejudice to any rights which the Lender may now or in the future have in respect of the Loan, or other liabilities, indebtedness or obligations, whether direct or indirect, matured or not, contingent or otherwise, of the Borrower or to the Lender.

13 On August 7, 2015, the respondent served notice of the appointment of Schwartz Levitsky Feldman Inc. ("SLF Inc.") to act as receiver-manager of the construction project and the Property with the power to sell the Property. The private appointment of SLF Inc. was further to the rights available to Rathcliffe in the event of default as contained in the Mortgage Commitment and in particular the Additional Provisions contained in its Schedule "B".

The Accounting on Sale of the Property

14 SLF Inc. caused the Property to be marketed for sale. On February 28, 2016, SLF Inc. entered into an agreement to sell the Property (the "Property Sale Agreement") for the amount of \$14,390,000. Although the Property Sale Agreement called for a closing date of May 2, 2016, a series of extensions were requested by the purchaser and accommodated with the result that the sale of the Property completed on June 28, 2016.

15 By reason of the various extensions, which included non-waiver of the due diligence condition and resultant delays, Rathcliffe contends that it could not make plans to redeploy its capital while the sale of the Property was pending. Rathcliffe did not establish, however, how its knowledge that an agreement had been executed for the sale of the Property

provided any less notice of pending receipt of funds than notice from a mortgagor of an intention to pay-out and redeem a mortgage.

16 After the June 28, 2016 closing of the Property Sale Agreement, the respondent provided an accounting to the applicant. The three lien claimants reviewed and approved the accounting without objection. The Mortgage was discharged as part of the conveyance of the Property.

The Amount in Dispute

17 On November 14, 2016, Rathcliffe provided Cardill with a further, more detailed accounting pertaining to the sale of the property that allowed Cardill to understand that the amount of \$351,000 had been assessed and withheld by Rathcliffe as an additional three months' interest charge that was supplementary to the mortgage interest that had been calculated to the date of closing.

18 On January 19, 2017, Cardill objected to the three-month interest charge on the basis that it is not permitted on a forced sale of security by a privately-appointed receiver. Rathcliffe rejected this position, spawning this application.

C. Analysis

Section 17 of the Mortgages Act

19 Section 17(1) of the *Mortgages Act* provides as follows:

17 (1) Despite any agreement to the contrary, where default has been made in the payment of any principal amount secured by a mortgage of freehold or leasehold property, the mortgagor or person entitled to make such payment may, at any time, upon payment of three months interest on the principal amount so in arrear, pay the same, or the mortgagor or person entitled to make such payment may give the mortgagee at least three months notice, in writing, of the intention to make such payment at a time named in the notice, and in the event of making such payment on the day so named is entitled to make the same without any further payment of interest except to the date of payment.

20 Section 17 of the *Mortgages Act* is available to a mortgagor in the event of default or in repayment of a mature mortgage: see *Gullett v. Income Trust Co.* (1985), 37 R.P.R. 123 (Ont. C.A.). Section 17 operates as a shield to the mortgagor to allow for payment of arrears without imposition of three months' interest when three months' notice is provided. The benefit to the mortgagee by giving three months' notice of repayment is that it can plan the reinvestment of the funds that it anticipates receiving on repayment, or receive a lump sum of three months' interest in lieu thereof: see *Mintz (In Trust) v. Mademont Yonge Inc.*, 2010 ONSC 116, 91 R.P.R. (4th) 303 (Ont. S.C.J.), at para. 9.

21 Courts have held that s. 17 of the *Mortgages Act* is not applicable in a receivership, forced sale situation. In *Ialongo v. Serm Investments Ltd.* (2007), 54 R.P.R. (4th) 310 (Ont. S.C.J.), a circumstance similar to the current case was considered in that a mortgage debt had matured and was in default, a forbearance had been sought and provided, and a Notice of Sale was issued wherein the mortgagee claimed three months' interest on the basis of s. 17 of the *Mortgages Act*. The court determined that the three months' interest was not allowed under s. 17 of the *Mortgages Act* once the mortgagee takes steps to realize on its security, stating as follows at para. 30:

In my view the reasoning in *O'Shanter Development* is consistent with the view expressed by the Court of Appeal in *Mastercraft, supra*, that the rights afforded by section 17 are options made available to the mortgagor on default: it can give notice or pay the bonus prior to the expiry of the notice period. Once, however, the mortgagee takes steps to realize on its security, such as by issuing a notice of sale (see: *Shankman v. Mutual Life Insurance Co. of Canada* (1985), 52 O.R. (2d) 65 (Ont. C.A.)), it cannot convert the rights of the mortgagor under section 17 into obligations of the mortgagor upon the realization of the security. The amounts a mortgagee may demand from a mortgagor upon realization are those spelled out in the mortgage contract, not in section 17 of the *Mortgages Act*.

22 I agree with the finding made in *Ialongo* and other courts that s. 17 of the *Mortgages Act* cannot be used to establish entitlement to three months' interest in the circumstances of a mortgage realization through appointment of a private receiver.

23 The respondent must thereby establish entitlement for the three months' interest payment sought on a term of the Mortgage: see *Dickson v. Bluestein* (1990), 2 O.R. (3d) 131 (Ont. Gen. Div.); *Parkhill v. Moher* (1977), 17 O.R. (2d) 543 (Ont. H.C.).

Rights in Realization through a Receiver

24 The ready solution for a mortgagee seeking an entitlement to impose a three-month interest charge upon realization of the secured property through the commencement of an enforcement proceeding, including the private appointment of a receiver, is to draft into the mortgage terms or the commitment agreement a clause that provides for this entitlement. Reference to other cases allows for identification of instances in which just this was done.

25 In *1746534 Ontario Inc. v. Phillips*, 2015 ONSC 2232 (Ont. S.C.J.), at para. 36, the imposition of a three months' interest bonus in a mortgagee's realization on a mortgage in default was established on the basis of the following clause:

[S]hould the mortgage (*sic.*) commence action due to default under the Mortgage that the Mortgagee at it's (*sic.*) option shall be entitled to charge an additional fee equivalent to three (3) Months interest.

26 Similarly, in *Piesok v. Chessell*, 2016 ONSC 1647 (Ont. S.C.J.), at para. 16, and in *Piesok v. Johnson*, 2010 ONSC 1284, 92 R.P.R. (4th) 283 (Ont. S.C.J.), the following clause was determined to allow for the imposition of a charge of three months of interest in the event of realization by the mortgagee:

The Chargor agrees that should this Charge not be discharged on the "Balance Due Date" or if the Chargor fails to renew/extend this Charge on or before the "Balance Due Date" together with the applicable renewal/extension fees or if the Chargees commence an action due under any default of the Charge, that the Chargees, in addition to all the revenues available, at their options shall be entitled to charge an additional amount equal to the payment of three months interest on the principal then outstanding.

27 Rathcliffe concedes that the Mortgage contains no such clause. The Mortgage does not have a term that expressly entitles the mortgagee to impose a three-month interest payment obligation in the event the mortgagee initiates a mortgage enforcement proceeding. However, Rathcliffe contends that provision 12 of the Mortgage can be interpreted to have the same effect.

The Three-Month Interest Provision

28 The Mortgage provision relied upon by the respondent to justify the receipt and withholding of a charge of three months' interest is provision 12, which states as follows:

12. The said Chargor covenants with the Chargee that in the event of non-payment of the principal amount at the time or times above provided in the mortgage then he shall not require the Chargee to accept payment of the said principal amount without first giving three months' previous notice in writing, or paying a bonus equal to three months' interest in advance on the said principal amount (the "Three-Month Interest Provision"). [Emphasis added.]

29 The distinction between the Three-Month Interest Provision and the clauses considered by the courts in *1746534 Ontario Inc. v. Phillips* and in the *Piesok* decisions is that the mechanism for repayment of a mortgage on three months' notice or payment of three months' interest contained in the Three-Month Interest Provision is the right of a mortgagor, figuratively a shield, unlike the clauses applied in those cases, which are rights of the mortgagee, figuratively a sword, for use in the event of realization.

30 Indeed, in submission, counsel for the respondent conceded candidly that not a single case authority has been identified where a mortgagee was determined to have entitlement to impose a three months' interest bonus on realization of a secured property through a receiver on the basis of a clause substantively similar to the Three-Month Interest Provision.

31 I accept the respondent's submission that the Three-Month Interest Provision does not constitute a penalty or fine, because it requires only the payment of three months' interest when this interest is not paid during the notice period, and is therefore a valid and enforceable mortgage term. This is clear from *Mastercraft Properties Ltd. v. EL EF Investments Inc.* (1993), 14 O.R. (3d) 519 (Ont. C.A.), wherein it was determined that a mortgage clause substantively similar if not identical to the Three-Month Interest Provision does not offend s. 8 of the *Interest Act*, R.S.C. 1985, c. I-15, which prohibits the payment of a fine, penalty or rate of interest on arrears of principal or interest that increases the charge on the arrears beyond the rate of interest payable under the mortgage.

32 The challenge to the respondent is not in establishing the viability of the Three-Month Interest Provision, but rather that it can be used by the respondent to charge three months' interest in the case of a mortgage realization proceeding in addition to the purpose for which it was intended: a mortgage pay-out. The purpose of this form of clause was addressed in *Mastercraft*, at para. 7, as follows:

The obvious purpose of such a stipulation is to give the mortgagee the benefit, when the mortgagor defaults, of a reasonable period during which to arrange for the alternate investment of its funds when the mortgagor does finally retire the mortgage. If the mortgagor wishes (obviously for its own benefit) to retire the mortgage at a date earlier than the termination of the three months' notice period, it has the contractual right to do so, but must pay for that right in an amount equal to three months' interest. . . . If he wished a discharge at any time after default without giving notice, he would have to pay all arrears of principal and interest, plus a charge equal to three months' interest, for the privilege of being allowed to pay the arrears without giving the agreed three months' notice. [Emphasis added.]

33 The decision in *Mastercraft* makes clear that the Three-Month Interest Provision is activated when the mortgagor seeks to require the mortgagee to accept payment of the amounts owed under the Mortgage in exchange for a discharge of the mortgage obligation. This is the central, foundational element of the Three-Month Interest Provision: "he shall not *require the Chargee to accept payment* of the said principal amount without first giving three months' previous notice in writing".

34 In *Mintz*, a clause similar to the Three-Month Interest Provision was upheld as requiring the mortgagor to pay an additional three months' interest in circumstances of default where the *mortgagor sought* a discharge of the mortgage. A similar result is seen in *Gullett* where the *mortgagor sought* a discharge of a mature mortgage without having provided the requisite three months' notice. Three months' interest bonus was ordered in *SK Properties & Development Inc. v. Equitable Trust Co.*, [2003] O.T.C. 499 (Ont. S.C.J.), on the basis of s. 17 of the *Mortgages Act* where a default occurred on mortgage maturity and the *mortgagor sought* to repay the mortgage without first providing notice.

35 The Three-Month Interest Provision, while distinct from s. 17 of the *Mortgages Act*, nonetheless shares the characteristic that it is mortgagor-centric. That is, both are intended to embody a right available to the mortgagor. Their purpose is not to constitute a basis for a claim by a mortgagee unless first the mortgagor seeks a pay-out.

36 In order to validate the imposition of a three months' interest charge on the basis of the Three-Month Interest Provision, Rathcliffe has to establish that Cardill sought to re-pay the Mortgage. Rathcliffe submitted that a determination can be made that precisely this was done, not by Cardill but rather on Cardill's behalf by SLF Inc. Rathcliffe's submission, in this regard, is based on the contention that SLF Inc. acted as the agent of Cardill in the forced sale of the Property and, in so doing, requested a pay-out of the Mortgage on behalf of Cardill consistent with the Three-Month Interest Provision.

The Receiver's Role in the Realization

37 Schedule "B" of the Mortgage Commitment Agreement provides Rathcliffe with the power to appoint a private receiver in the event of default under the Mortgage. There is no dispute between Rathcliffe and Cardill that the Mortgage was in default on August 7, 2015 and that Rathcliffe was entitled to appoint SLF Inc. to act as receiver-manager of the construction project and the Property with the power to sell the Property.

38 Rathcliffe contends that SLF Inc. carried out its function as receiver-manager as agent for Cardill even though SLF Inc. was privately appointed by Rathcliffe. In furtherance of this submission, Rathcliffe relies upon s. 5(g) of the Mortgage Commitment Agreement, which provides as follows:

5. At any time after the security hereby constituted becomes enforceable, or the monies hereby secured shall have become payable, the Chargee may from time to time appoint by writing a Receiver of the property, with or without a Bond, and may from time to time remove the Receiver and appoint another in his stead, and any such Receiver appointed hereunder shall have the following powers.

...

(g) To execute and deliver to the purchaser of any part or parts of the charged lands, good and sufficient deeds for the same, the Receiver hereby being constituted the irrevocable attorney of the Chargor for the purpose of making such sale and executing such deed, and any such sale made as aforesaid shall be a perpetual bar both in law and in equity against the Chargor, and all other persons claiming the said property or any part of parcels thereof by, from, through or under the Chargor, and the proceeds of any such sale shall be distributed in the manner hereinafter provided. [Emphasis added.]

39 Rathcliffe submits that SLF Inc. is the agent of Cardill and that, in this capacity, Cardill requested Rathcliffe to accept pay-out of the outstanding mortgage debt in the receiver's alleged capacity as agent. Rathcliffe's submission is that reading the Mortgage in its entirety yields two conclusions: that Rathcliffe was entitled to appoint the receiver to realize on its security, a submission conceded by Cardill; and that the receiver so appointed acted at all times as agent for Cardill.

40 The respondent's submission, therefore, is that the Three-Month Interest Provision is activated because the receiver acted as agent for the mortgagor in the realization of the secured property, and has thereby sought to "require the Chargee to accept payment of the said principal amount without first giving three months' previous notice in writing".

41 This submission is not supported by the case law or, indeed, s. 5(g) of the Mortgage Commitment. Enabling provisions similar to s. 5(g) of the Mortgage Commitment have been determined to have the effect of permitting the receiver to take steps in the name of the borrower for the purpose of advancing realization on the secured property: see *Lumberking Home & Garden Centre Ltd., Re* (1975), 8 O.R. (2d) 563 (Ont. H.C.), aff'd (1975), 8 O.R. (2d) 563n (Ont. C.A.). In the present case, this would authorize SLF Inc. to act as the attorney of Cardill for the purpose of effecting the sale of the secured Property and executing any deed relating to any such sale.

42 However, this does not constitute SLF Inc. as the agent for Cardill for all purposes. In *Peat Marwick Ltd. v. Consumers' Gas Co.* (1980), 29 O.R. (2d) 336 (Ont. C.A.), the issue arose as to whether a receiver appointed pursuant to a general security agreement would be the agent of the lender or the agent of the borrower. The floating charge debenture in that case specified the rights of the lender in the event of default, which included broad powers on the part of the receiver, including the following:

The receiver shall for all purposes be deemed to be the agent of the Company and not of the Bank, and the Company shall be solely responsible for his acts or defaults and for his remuneration.

43 A dispute arose as to whether the debt incurred for the supply of natural gas to the property secured by the debenture ought properly to be the responsibility of the lender, at whose direction the receiver was appointed, or the borrower pursuant to the broad provision of the debenture that constituted the receiver as the agent of the borrower

"for all purposes". Houliden J.A. held that although a receiver can act in dual capacities, the receiver acts as agent for the lender in realization on the security. At p. 344, he writes as follows:

It seems to me that the receiver and manager in a situation like the present is wearing two hats. When wearing one hat, he is the agent of the debtor company: when wearing the other, the agent of the debenture holder. In occupying the premises of the debtor and in carrying on the business, the receiver and manger acts as the agent of the debtor company. In realizing on the security of the debenture holder, notwithstanding the language of the debenture, he acts as the agent of the debenture holder and this is able to confer title on a purchaser free of encumbrances.

44 It would be a mischaracterization of the role of SLF Inc. as the receiver privately appointed by Rathcliffe to state that the steps taken by SLF Inc. to realize maximum recovery of the Property for the benefit of Rathcliffe were actually taken by SLF Inc. on behalf of Cardill for the purpose of requesting a pay-out of the Mortgage. This submission by the respondent misstates the role of the privately-appointed receiver, at law.

45 Apart from my determination that a privately-appointed receiver acts as agent for the lender in realization on security, in this case the only authority relied upon by the respondent to suggest that the receiver acted as agent for Cardill is s. 5(g) of the Mortgage Commitment. This provision limits the appointment of the receiver as agent for the borrower to the specified purpose of "making such sale [of the Property] and executing such Deed [in relation thereto]". This would not support the characterization of SLF Inc. as agent for Cardill for the purpose of requesting pay-out of the Mortgage. In any event, as Houliden J.A. determined, in *Peat Marwick Ltd. v. Consumers' Gas Co.*, above, the characterization of the receiver as the agent of the party enforcing the security is made "notwithstanding the language" of the document empowering the receiver: in that case, a debenture.

46 I note, as well, that there is no evidence in the record that SLF Inc. actually did request a pay-out of the Mortgage on behalf of Cardill, as would be required to activate the Three-Month Interest Provision.

47 I have determined that in the mortgagor's realization on the Property, the Three-Month Interest Provision has not been activated. There is no entitlement on the part of Rathcliffe to the three months' interest charge.

The Prepayment Provision

48 In light of my determination that Rathcliffe is not entitled to three months' interest on realization of its security either in accordance with s. 17 of the *Mortgages Act* or in accordance with the terms of the Mortgage, it is unnecessary to determine whether the Mortgage contained an open right on the part of the mortgagor to prepay any outstanding mortgage obligation, as is contended by Cardill.

49 However, had this issue been material, I would have determined that the prepayment term contained in term (k) of the Mortgage Commitment would not have been applicable as the contention that it applies suffers from the same flaw as the submission that the Three-Month Interest Provision is applicable: namely, term (k) of the Mortgage Commitment applies in the event of pay-out by the mortgagor, not in the event of realization by the mortgagee.

D. Disposition

50 I have determined that the mortgagee, in realizing on its mortgage through sale of the secured property by a privately-appointed receiver, does not have an entitlement to the three months' interest that was assessed and withheld. A declaration will issue, to this effect, in accordance with paragraph 1(a) of the Notice of Application.

51 It is unclear, from the record, whether the amount that the respondent continues to withhold is the full amount of the three months' interest (\$351,000) or whether this amount is now reduced by reason of other expenses properly incurred. Consistent with my finding that the respondent is not entitled to retain the three months' interest that was withheld, but recognizing the possibility that other reasonable expenses may have properly reduced this amount, the respondent shall account to the applicant concerning the amount that it continues to withhold that ought now to be

transferred to the applicant. If this monetary amount can be agreed upon, the term of a consent Order pertaining to the transfer of these funds can be provided to me in writing for consideration and issuance. If not, it can be spoken to at a Chambers appointment to address this term.

E. Costs

52 At the conclusion of the hearing of this matter, the parties exchanged cost outlines. I encourage the parties now to discuss and agree upon the issue of costs resulting from this application.

53 In the event that the parties cannot agree on the issue of costs, counsel for the applicant shall deliver written cost submissions of no more than four pages within seven days of the release of this decision. Counsel for the respondent shall deliver written submissions of a similar length within fourteen days of release of this decision. I will then consider and deliver an endorsement with my decision on the issue of costs.

Application granted.