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Is Mortgage Assignment Valid if it is Not in Writing?

The Allens lived in a home situated on land with great development potential. They were having trouble servicing their mortgage, so in 2012 they borrowed $200,000 from a neighbor, Jass. The short-term loan was secured by a second mortgage.

When the Allens immediately fell into default on payment, Jass agreed to extend the loan for 14 months, in return for $1,000 cheque as an extension fee. That cheque was returned NSF, as were all the larger monthly cheques purporting to make up for past defaults. In the end, the Allens did not make even a single payment under the second mortgage over a two-year period, nor did they comply with a court judgment directing them to pay. Jass had a Notice of Sale issued, to trigger his rights under the *Mortgages Act*.

Rather than sell the property himself, Jass assigned the second mortgage to a man named Wilson, in exchange for $300,000. The idea was that Wilson would find a buyer, and would use the proceeds to pay off the second mortgage with Jass, as well as the first mortgage. Wilson quickly found such a buyer to whom he agreed to sell the property for $850,000. This was arguably on the low end of the scale considering the land's development potential.

The Allens objected, challenging both the sale by Wilson, and the assignment from Jass on which it was predicated. The assignment was not in writing, they said, and was made without giving them proper notice. This, they claimed, invalidated the sale to the home buyer, which they said was a sham transaction in the first place, designed to foil their right to redeem the mortgage. They noted the sale agreement was reached immediately after the alleged assignment, on the first day the property was listed, and for a price far below market value.

The court considered whether Wilson's sale to the new buyer for $850,000 should be confirmed, or whether the Allens were entitled to redeem the mortgage and bring it into good standing.

Wilson claimed the assignment from Jass, which was registered on title, was equitable in nature. It gave him the right to sell the property to the new buyer, subject only to the provisions of the *Mortgages Act* and any prior encumbrances. The agreement to sell was also legitimate, and it foreclosed the Allens from trying to redeem the mortgage after-the-fact.

The court agreed with Wilson. There had been an equitable assignment of the second mortgage by Jass to Wilson. There was no requirement for it to be in writing, nor was there a particular form of transfer that was needed to make it valid. The parties needed only to show intent. Here, Wilson had paid out the second mortgage to Jass in full, and had also paid out the bank's first mortgage. This demonstrated that he was acting in good faith as the transferee of the second mortgage. The Allen's complaints over the lack of notice also had no merit.

Once Wilson accepted the offer to purchase, there was a "sale" for the purposes of the *Mortgages Act*, and it extinguished the Allens' right as second mortgagors to redeem. The court found no evidence that the quick re-sale by Wilson was suspicious, nor improvident. Although the Allens did tender evidence showing that offers of up to $1.5 million might have been elicited, Wilson had investigated the property's market value to the court's satisfaction, and in light of its poor condition, had acted reasonably in accepting the price he was offered. Even if the price was disadvantageous to the Allens, the court would only interfere if it was so low as to suggest fraud, which was not the case here. If the Allens felt the sale was improvident, they could sue Wilson separately for damages.

Once the transfer of the second mortgage to Wilson had been duly registered, his rights were solidified in law. The court found the equitable assignment was valid; the sale to the home buyer was allowed to proceed. See *Wilson v. Gooden-Allen*, 2017 ONSC 3197 (CanLII).

Buyer Claims Seller Failed to Give Clear Title

The buyer, Kennelly, put down $40,000 as a deposit in connection with an agreement to buy property in Niagara-on-the-Lake. At that time, there were several encumbrances registered on title to the property, including a caution from a prior deal that failed to close. The agreement therefore required the seller to remove the caution at her own expense prior to the closing date, which was set for February 14. However, the agreement allowed the seller to delay closing by up to two weeks.

On February 13, the seller advised that while she was still working on it, she had not obtained a release of the caution filed on title, and would be unable to close the next day as scheduled. Relying on the two-week extension option, she set a new closing date of February 23.

Shortly after, the seller advised Kennelly

that she had assigned the purchase agreement to Hashemi, who was a tenant in possession of the property at the time.

In the role of seller, Hashemi took steps to have the caution removed from title. Two days prior to the new February 23 closing date, he registered a court order on title which (among other things) contained a direction that the caution was to be discharged. From the perspective of anyone checking the land registry records, the caution itself was not actually withdrawn until a few months later.

Kennelly was unaware of Hashemi's efforts in this regard. What he did know, was that in the time leading up to the February 23 extended deadline, there was a great deal of uncertainty. This included the late-breaking notice of the original seller's assignment to Hashemi, and indications that Hashemi was having difficulty finding the right lawyer to help with the transaction, since he had switched lawyers multiple times. Kennelly agreed to extend the deal by one additional day, to February 24, but by that day's end, the registered caution was not yet deleted from the parcel abstract to the property and the seller had not obtained a mortgage discharge statement (as the agreement also required).

Since Kennelly was unwilling to extend the deadline any further, the deal did not close. He sued for the return of his $40,000 deposit, claiming that Hashemi's inability to remove the caution from title was a breach of contract. Hashemi countered that it was actually Kennelly who was in breach, since he had refused to close even though the court order discharging the caution had been registered on title. Hashemi claimed that he had been ready, willing and able to close as agreed.

The court reviewed the circumstances, and sided with Kennelly; Hashemi had been in breach. Despite the registered court order, on the closing date he was not in a position to convey title free of encumbrances as he had agreed to do. The caution itself was still showing on title. Nor was there any basis for Kennelly to expect Hashemi to be in a position to convey good title, since his option to extend the closing date had been used up. Having extended it once to February 23, he did not have the right to additional extensions at his discretion within the two week extension period.

Clearly, the court said, a property that was still subject to a caution from a prior putative buyer was not "free of encumbrances" as required by the purchase agreement. The existence of the caution was an impediment to Kennelly's use and enjoyment of the property, if only because it may impede his access to financing. Hashemi was ordered to return the deposit. See: *Kennelly v. Hashemi*, 2017 ONSC 5502 (CanLII).

Missing Will: Did 96-Year Old Millionairess Intend to Revoke It?

At the age of 96, a woman named Sarah Stoller ("Sarah") passed away, leaving an estate worth nearly $7 million. Under her Will she made in 2010, she left all her money to a Charitable Home for seniors. Although her lawyer later gave evidence that he had helped Sarah make a Will, she had taken it home with her to store in her safety deposit box and he no longer had the original. Unfortunately, it could not be found, although a copy of it was located after Sarah's death in a binder in her home office.

Under Canadian law, and absent the original, there is a legal presumption that Sarah intentionally destroyed her Will with the intent of revoking it entirely. This presumption could be overcome or rebutted with proper evidence to the court's satisfaction.

Evidence of rebuttal was precisely what the court was asked to consider. Sarah's next-of-kin, her niece and nephew, contended that there was insufficient evidence on the balance of probabilities to rebut the presumption that Sarah destroyed the Will. Instead, the presumption should stand and the Will should be considered revoked; this would result in Sarah being deemed to have died intestate (in which case the niece and nephew would stand to benefit).

After examining the facts, the court found enough evidence in place to rebut the presumption on the balance of probabilities that Sarah intentionally revoked her Will, and that she died intestate as a result.

For a revocation to be effective, the law requires that the Will was either destroyed by "burning, tearing, or otherwise destroying it" or else that it was destroyed in Sarah's presence, at her direction, and with her actual intent to revoke it. For the niece and nephew to succeed, they had to show that either: 1) the Will was not actually destroyed; or 2) Sarah did not have the requisite intent. Their evidence had to be corroborated by other material evidence.

The court considered numerous factors, including Sarah's existing relationship to the intended beneficiary (the Charitable Home), her nature in taking care of her personal effects, whether she was of the type to store valuable papers, and whether she had a place to store them. It also considered whether Sarah understood the consequences of not having a Will, and whether she had made statements to others indicating that she had one.

The facts all favoured a ruling that Sarah had not destroyed her Will deliberately. In the five-year period leading up to her death, Sarah had made sizeable donations to the Charitable Home, and made it known that she intended to leave her entire estate to that facility. She was also a highly-organized, meticulous person, as reflected by the way in which she stored documents. Since she understood the importance of having a Will, it was unlikely that she had simply misplaced it.

On all the evidence, the court found there was sufficient proof to establish, on the balance of probabilities, that Sarah did not intend to revoke her Will. Its existence had been proven, and the copy in her office binder was admitted as evidence for probate, with the entire $7 million estate being distributed to the Charitable Home as she intended. See *Levitz v. Hillel Lodge Long Term Care Foundation*, 2017 ONSC 6253 (CanLII).