thestar.com

Bob Aaron *bob@aaron.ca*

August 16, 2008

Mortgage fraud scheme manipulated 'puppet' purchasers

Norman Ave. is a two-block long street near St. Clair Ave. W., and Lansdowne Ave. Number 16A is a small row house that recently became the subject of an apparent mortgage fraud case in Ontario Superior Court.

A title search of the property shows that it was sold to Winchester Financial Corporation in November 2004, for $153,500. Just four months later it was "flipped" to Danny Meneses at the inflated price of $299,000, almost double the original cost. National Bank provided Meneses with high ratio financing of $293,230. The mortgage was guaranteed by Oldemiro Demeneses.

Default occurred under the mortgage, and in July 2007, National Bank sold the property under the power of sale in its mortgage for $212,000. After deducting expenses, real estate commission, property management fees, legal fees and realty taxes, the net proceeds of the sale were just under $192,000. The bank was left with a shortfall of $98,642.67, and sued the borrower and guarantor to recover its loss.

After receiving statements of defence from the defendants, the bank applied to the court for what is known as a summary judgment in effect, a final decision in the bank's favour based on its assertion that there was no genuine issue for trial.

At the hearing before Master Andrew Graham in Superior Court in March, the defendants Meneses and Demeneses claimed that they were innocent victims of a fraud, and that the bank had a duty to exercise "due diligence" to prevent the fraud. (A master is a court official who makes judge-like decisions on procedural matters.)

The defendants claimed that they had been approached by a family friend who was interested in buying a property to renovate, lease and then resell, and that in return for signing the paperwork, Meneses would be paid $5,000. Meneses was told that mortgage payments would be made by a third party, and that he would have no personal liability.

Meneses admitted receiving payment of $5,000 for signing "the paperwork," but claimed that if the bank had taken more care and appraised or inspected the property, it would not have made the loan. In effect, he argued that the bank was the author of its own misfortune.

Meneses and Demeneses also argued that they were innocent victims of a fraud involving a property flip at an inflated price, and that their lawyer never explained to them the consequences of the documents they were signing.

It turns out that the facts in the case of National Bank v. Meneses are not unique. Twice in 2007 alone, the Ontario Superior Court heard cases involving the use of "puppet" purchasers in circumstances similar to the Norman Ave. case. Both cases were sent on for a full trial based on allegations of fraud against the lawyer involved in one case, and the lawyer's misrepresentations in the other case.

Analyzing these two cases, Master Graham noted that there was no allegation that the lawyer in the Meneses case made any fraudulent representations which could cancel the bank's right to recovery on the loan. The borrower and guarantor were not induced to sign anything by misrepresentations of the lawyer even though the allegations against him, if proven, might amount to negligence.

The court concluded that the alleged negligence of the lawyer did not raise a genuine issue for trial, and it awarded judgment against the borrower and guarantor for $98,642.67.

Offering puppet purchasers a tempting sum of money to sign "some papers" is the latest development in the techniques of fraudsters in mortgage scams.

If anyone offers you or anyone you know to sign "some mortgage papers," consult an independent lawyer or call the police. If it sounds too good to be true, it probably is.

Bob Aaron** is a Toronto real estate lawyer. He can be reached by email at bob@aaron.ca, phone 416-364-9366 or fax 416-364-3818. **Visit the column archives at http://aaron.ca/columns/toronto-star-index.htm for articles on this and other topics.

National Bank of Canada v. Meneses, 2008 CanLII 25064 (ON S.C.)

Date: 2008-05-15
Docket: 05-CV-301403PD2
URL: http://www.canlii.org/en/on/onsc/doc/2008/2008canlii25064/2008canlii25064.html

Reflex Record (related decisions, legislation cited and decisions cited)

Related decisions

- **Superior Court of Justice**

  Iroquois Falls Community Credit Union Ltd. v. Glendale Motor Hotel Ltd., 2006 CanLII 38235 (ON S.C.)

Decisions cited

- Aguonie v. Galion Solid Waste Material Inc., 1998 CanLII 954 (ON C.A.) (1998), 38 O.R. (3d) 161 (1998), 156 D.L.R. (4th) 222 (1998), 107 O.A.C. 114
- Bank of Montreal v. Duguid, 2000 CanLII 5710 (ON C.A.) (2000), 47 O.R. (3d) 737 (2000), 185 D.L.R. (4th) 458 (2000), 5 B.L.R. (3d) 1 (2000), 132 O.A.C. 106
- Guarantee Co. of North America v. Gordon Capital Corp., 1999 CanLII 664 (S.C.C.) [1999] 3 S.C.R. 423 (1999), 178 D.L.R. (4th) 1 (1999), 49 B.L.R. (2d) 68 (1999), 126 O.A.C. 1
- Irving Ungerman Ltd. v. Galanis, (1991), 4 O.R. (3d) 545 (1991), 83 D.L.R. (4th) 734 (1991), 50 O.A.C. 176
- Rogers Cable TV Ltd. v. 373041 Ontario Ltd., 1994 CanLII 7367 (ON S.C.) (1994), 22 O.R. (3d) 25
- Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co., 1996 CanLII 7979 (ON S.C.) (1996), 28 O.R. (3d) 423
- Transamerica Occidental Life Insurance Company v. Toronto-Dominion Bank, 1999 CanLII 3716 (ON C.A.) (1999), 44 O.R. (3d) 97 (1999), 173 D.L.R. (4th) 468 (1999), 118 O.A.C. 149
- Weitzman v. Hendin, (1989), 69 O.R. (2d) 678 (1989), 61 D.L.R. (4th) 525 (1989), 35 O.A.C. 61

COURT FILE NO.: 05-CV-301403PD2

DATE: 2008/05/15

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: National Bank of Canada v. Danny Meneses and Oldemiro Demeneses

BEFORE: MASTER GRAHAM

HEARD: March 5, 2008

COUNSEL: Mikel Pearce for the plaintiff (moving party)

Edwin Upenieks for the defendant

REASONS FOR DECISION

(Plaintiff s motion for summary judgment)

[1] The National Bank of Canada (the Bank) claims against the defendant Danny Meneses for amounts owing to it under a Charge/Mortagage of Land dated March 21, 2005 (the Charge). The Bank s action against the defendant Oldemiro Demeneses is on a Guarantee dated March 21, 2005 (the Guarantee) in respect of amounts owing under the Charge. The Charge was given to the Bank as security for a loan for $293,230.00. It is alleged that default occurred under both the Charge and the Guarantee on or about January 1, 2007. The property with respect to which the Charge was given (identified in the evidence although not in the statement of claim as 16A Norman Avenue, Toronto), was sold under power of sale for $212,000.00 on July 5, 2007, and the proceeds of the sale, net of real estate commission, property management fees, legal fees and realty taxes, were $191,979.86. The deficiency now claimed from the defendants is $98,642.67.

[2] The plaintiff now moves for summary judgment pursuant to Rule 20.01(1).

[3] The defendants plead in their statement of defence that they are the innocent victims of a fraud, that they were not properly and independently represented by legal counsel arranged for them and that the plaintiff should have exercised due diligence to prevent the fraud. They allege that in 2005, the defendant Oldemiro Demeneses (Oldemiro) was approached by Paul Viveiros, a family friend, with an opportunity to make $5,000.00 on completion of some paperwork. Oldemiro advised that he was not interested but that his son Danny Meneses (Danny) might be. Viveiros s proposal was that a property would be purchased, renovated, leased to new tenants and then resold, and that in return for completing the paperwork, Danny would be paid $5,000.00.

[4] The defendants plead that Danny was interested in the proposal and was then instructed which lawyers to see to complete the transaction and which National Bank branch to attend to obtain financing. Danny was informed that all mortgage payments would be made by Reliance Financial Corporation or its principals, Desmond Joseph or Anthony Romano, and that he would have no personal liability.

[5] The defendants plead that at the time of the transaction, Danny was a labourer and had just turned 22 years of age. He provided the Bank with the financial information that it required to determine whether he should be granted the loan. Owing to Danny s limited means, Oldemiro was required to provide a guarantee. The defendants plead that the guarantee is unenforceable on the basis that Oldemiro did not receive independent or proper legal advice prior to executing the guarantee.

[6] The defendants plead that Danny never to his knowledge signed any agreement of purchase and sale, never received any keys to the property and never visited the property before closing. Danny did receive the promised payment of $5,000.00 for signing the paperwork . Late in 2006, Reliance Financial Corporation defaulted on the payments that it had been making.

[7] The defendants allege that they learned that 16A Norman Avenue (the Property) was transferred on November 26, 2004 for $153,500.00. They allege that this property was then flipped at the inflated price of $299,000.00 and that this price was the basis of the Bank s high ratio mortgage for $293,230.00. The solicitor acting on the transaction for both the defendants and the Bank was Harry Solomon Goldstein.

[8] The defendants plead that the Bank ought to have taken more care and exercised greater due diligence before advancing the funds and further that the Bank failed to appraise or inspect the Property. They allege that the Bank was the author of its own misfortune.

[9] The defendants also plead that they are innocent victims and that their solicitor never explained to them the consequences of the documentation that they were signing or took steps to ensure that they had no personal liability as promised. (It should be noted that there is no allegation that the solicitor made any promises that there would be no personal liability.) They plead in the alternative that if they are liable for the plaintiff s loss, the loss resulted from the negligence of their solicitor (i.e. Goldstein) and the actions of Reliance Financial Corporation, Paul Viveiros, Desmond Joseph and Anthony Romano , and that they should be indemnified by those parties. In this regard, on the day that the motion for summary judgment was argued, this court granted the defendants leave to commence a third party action against Goldstein, Viveiros, Joseph, Romano and Reliance Financial Corporation.

[10] The defendants also plead that the transaction handled by Goldstein was an escrow transaction based on a condition that there would be indemnities provided to them,

which condition was not fulfilled. On this basis, the mortgage to the Bank should not have been registered and the funds should not have been advanced. Alternatively, if the transaction was a trust, the trust was never constituted because the conditions requiring a mortgage were never fulfilled.

-

Plaintiff s evidence

[11] The Bank s evidence in support of the motion, as contained in the affidavit, including exhibits, of Lisa Hunt, is as follows:

1. The Bank s loan of $293,230.00 to Danny was guaranteed by Oldemiro and secured by a first charge against 16A Norman Avenue, Toronto, made by Danny in favour of the Bank (Exhibit A). The charge refers to Harry Solomon Goldstein as acting for Chargor . The charge was registered March 21, 2005 and was subject to certain Standard Charge Terms . On March 21, 2005, both Danny and Oldemiro signed an acknowledgment that they received those Terms.

2. A Statement of Disclosure was provided to Danny setting out the cost of borrowing and Danny acknowledged receipt of the Statement by signing it on March 21, 2005. This Statement was also signed by Oldemiro.

3. On March 21, 2005, both Danny and Oldemiro also signed an Acknowledgment and Direction which confirms that they reviewed the information set out in the document, including the principal amount of the mortgage, the interest rate and the monthly payments and the fact that the mortgage to the Bank could be registered electronically.

4. On March 21, 2005, both defendants also signed an Agreement for an Advance Secured by a Charge/Mortgage on Real Property . Paragraph 11.2 of this Agreement, under the heading Remedies states: If a default occurs under this Agreement, all principal, interest, fees and other amounts owing to us in respect of the Loan become immediately due and payable to us, if we so choose.

5. An Insurance Binder dated March 21, 2005 indicates that insurance was placed on the Property. Although the sworn statement in the affidavit is that Danny placed the insurance, the Binder simply names Danny as the insured but does not indicate who actually arranged the coverage.

6. On March 21, 2005, Danny signed a Direction to the Bank directing that the mortgage funds be paid to Harry S. Goldstein, in Trust. This document describes Goldstein as my/our solicitor .

7. On March 21, 2005, Danny signed a Statutory Declaration that the Property would be owner occupied by myself .

8. On March 14, 2005, Danny signed an Amendment to the Agreement of Purchase and Sale, amending the completion date for the sale. (Danny, in his affidavit, denies that he signed this document, and Ms. Hunt admitted on cross-examination that the signature purporting to be Danny s on the Amendment looks different from his admitted signature on the Direction.)

9. On March 21, 2005, Oldemiro signed the Guarantee in respect of Danny s mortgage to the Bank.

10. Both Danny and Oldemiro, as Borrower and Guarantor respectively, were represented by Harry S. Goldstein with respect to the purchase and the Charge. Goldstein signed a Solicitor s Final Report dated April 4, 2005, directed to the Bank, in which he states that we have acted as your solicitors in the above transaction (Exhibit L).

11. The Charge went into default when the monthly payment due January 1, 2007 was not received by the Bank. The Bank then commenced enforcement and collection procedures under the terms of the Charge. As no payments were received from either defendant, on April 16, 2007, the Bank issued a Notice of Sale, which was served on both defendants.

12. On May 1, 2007, Ms. Hunt received a telephone call from a representative of the insurer of the Property who informed her that the owner had made a claim in March. This individual also stated that there may not be coverage.

13. On May 9, 2007, Ms. Hunt received a telephone call from Oldemiro enquiring as to the amount of the arrears expressing an intention to repay the amount. On May 10, 2007, an individual identified as Paul called on behalf of Oldemiro and advised that Danny had moved out of the property because of water damage. He also asked her to fax a Statement of Arrears, which she did.

14. No payments were received with regard to the Notice of Sale. The Property was listed for sale on June 6, 2007 for $214,900.00 and an offer was accepted on June 19, 2007 for $212,000.00. The net proceeds of the sale received by the Bank were $197,116.10. In addition, the Bank incurred property management fees of $5,136.24, which reduced the net recovery to $191,979.86. The net deficiency on the sale of $98,642.67 (referred to in paragraph 1 above) is the difference between the amount owing on the loan of $290,622.53 and the net proceeds of the sale of $191,979.86.

Defendant s evidence

[12] The defendant s evidence on the motion is contained in the affidavits of Oldemiro Demeneses and Danny Meneses and the exhibits to those affidavits.

[13] The evidence of Oldemiro is as follows:

1. He states that a fraud was perpetrated upon himself, Danny ***and National Bank of Canada*** (emphasis added) by various third parties. He alleges that he and Danny were induced into entering into the mortgage agreement based on false promises that there would be no liability or risk to them and that all mortgage payments would be made by third parties. He and Danny realized that they were victims of a fraud when the third parties stopped making the mortgage payments and the Bank began to pursue them for the balance of the debt.

2. In 2005, he was approached by Paul Viveiros with a proposal whereby a property would be purchased, renovated, leased to new tenants and then resold with no liability or risk to him, and that he would be paid $5,000.00 for completing the paperwork. Oldemiro advised that he was not interested but that his son Danny might be.

3. Viveiros further advised that Reliance Financial Group and its principals Desmond Joseph and Anthony Romano would attend to the mortgage payments and the management of the property. Danny indicated that he would be interested.

4. Viveiros scheduled an appointment for Danny to meet with Goldstein and both Danny and Oldemiro attended. Danny was instructed which branch of the Bank to attend to sign the mortgage documentation and set up an account and he did so. Owing to Danny s limited financial means, Oldemiro was required to provide a guarantee.

5. Oldemiro at no time received any legal advice, independent or otherwise before executing the guarantee.

6. Danny and Oldemiro did not read the documents that the Bank asked them to sign nor did the Bank or their solicitor explain the contents of those documents to them. They signed the documents that they were asked to sign.

7. Danny did not sign any agreement of purchase and sale, never received any keys to the property and never visited the property before closing.

8. Danny did receive a $5,000.00 cash payment from Viveiros.

9. Reliance initially paid the mortgage payments but defaulted on the payments late in 2006. It was never Danny s responsibility or obligation to supply the mortgage payments and the Bank was aware that he was financially unable to do so. In 2007, after the mortgage went into arrears, Danny attended at the property and saw that it was not leased or renovated.

10. The defendants subsequently learned that the Property was purchased by Winchester Financial Corporation for $153,500 on November 26, 2004. This transaction was handled by Harry Goldstein. The Property was then flipped to Danny for $299,000.00 on March 21, 2005 and based on that price, the Bank gave a high ratio mortgage for $293,230.00. The Bank s solicitor for this transaction was Harry Goldstein.

11. Oldemiro believes that prior to advancing the mortgage funds, the Bank failed to appraise or inspect the Property. He attaches as Exhibit E to his affidavit a photograph of the property, which shows a small fully attached house. He expresses the defendants position that the Bank ought to have taken more care in advancing almost $300,000.00 and should have exercised due diligence to prevent the fraud from being perpetrated.

-

[14] Danny s affidavit essentially reiterates the contents of Oldemiro s affidavit and includes the following evidence:

1. He confirms that the case concerns a mortgage fraud perpetrated upon him, his father Oldemiro and the National Bank of Canada by various third parties.

2. He confirms that he and Oldemiro did not read the documents that the Bank asked them to sign nor did the Bank or its solicitor explain the contents of the documents. The solicitor Goldstein never explained to Danny that he or his father would be personally liable.

3. He denies that the signature on the Amendment to Agreement dated March 14, 2005 is his. (See paragraph [11]8. above)

4. He acknowledges signing the Statutory Declaration stating that the Property was to be owner occupied by him but states that he did not read any of the documents put before him. He never had any intention of living at the property.

-

Law re: Rule 20 summary judgment motions

[15] Rule 20.01(1) is as follows:

20.01 (1) A plaintiff may, after the defendant has delivered a statement of defence or served a notice of motion, move with supporting affidavit material or other evidence for summary judgment on all or part of the claim in the statement of claim.

[16] The disposition of the motion is governed by Rule 20.04, the relevant provisions of which are as follows:

20.04 (1) In response to affidavit material or other evidence supporting a motion for summary judgment, a responding party may not rest on the mere allegations or denials of the party s pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue for trial.

(2) The court shall grant summary judgment if,

(a) the court is satisfied that there is no genuine issue for trial with respect to a claim or defence; . . .

[17] The courts have developed a number of guiding principles with respect to the application of Rule 20.04, as follows:

1. The party responding to a summary judgment motion may not rest on the pleadings, but must provide evidence from which the motions judge can conclude that there is a genuine issue for trial. (*Transamerica Occidental Life Insurance Co. et al. v. Toronto Dominion Bank* 1999 CanLII 3716 (ON C.A.), (1998), 173 D.L.R. (4th) 468 at 482 (O.C.A.))

2. In ruling on a motion for summary judgment, the court will never assess credibility, weigh the evidence, or find the facts. Instead, the court s role is narrowly limited to assessing the threshold issue of whether a genuine issue exists as to material facts requiring a trial. Evaluating credibility, weighing evidence, and drawing factual inferences are all functions reserved for the trier of fact. (*Aguonie v. Galion Solid Waste Material Inc.* 1998 CanLII 954 (ON C.A.), (1998), 38 O.R. (3d) 161 at 173 (C.A.))

3. The motions judge is entitled to assume that the record contains all the evidence which the parties will present if there is a trial. If there is a genuine issue with respect to material facts then, no matter how weak may appear the defence, the case must be sent to trial. (*Dawson v. Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4th) 258 at 267 (O.C.A.))

4. To avoid summary judgment, a party is required to put its best foot forward. The onus remains on the moving party to show that there is no genuine issue for trial, but the responding party must lead trump or risk losing . (*Transamerica Life Insurance Co. of Canada v. Canada Life Insurance Co.* 1996 CanLII 7979 (ON S.C.), (1996), 28 O.R. (3d) 423 at 434 (Gen. Div.))

5. A self-serving affidavit is not sufficient in itself to create a triable issue in the absence of detailed facts and supporting evidence. (*Guarantee Co. of North America v. Gordon Capital Corp.* 1999 CanLII 664 (S.C.C.), (1999), 3 S.C.R. 423)

6. The proposition that an issue of credibility precludes the granting of summary judgment applies only when what is said to be an issue of credibility is a genuine issue of credibility. (*Irving Ungerman Ltd. v. Galanis* reflex, (1991), 4 O.R.(3d) 545 at 552 (C.A.)) For example, where a defendant swore that it did not owe a debt, notwithstanding overwhelming evidence to the contrary presented by the plaintiff, and in the absence of any additional evidence by the defendant to support its denial, there was no genuine issue for trial. (*Rogers Cable T.V. Ltd. v. 373041 Ontario Ltd.* 1994 CanLII 7367 (ON S.C.), (1994), 22 O.R. (3d) 25 (Gen. Div.))

Analysis

[18] Based on Rule 20.04 and the case law reviewed above, the issue on this motion is whether the plaintiff has demonstrated that there is no genuine issue for trial and is therefore entitled to default judgment.

[19] The Bank s evidence is that the defendant Danny signed the loan documents, the defendant Oldemiro signed the Guarantee, and the Charge went into default when the payment for January 1, 2007 was not received. The loan for which the Charge was given as security was never restored to good standing and the Bank sold the property. There was a deficiency on the sale of the property in the amount of $98,642.67. The Bank has therefore provided evidence that would *prima facie* entitle it to summary judgment for $98,642.67 and it is necessary to determine whether the defendants have presented evidence sufficient to demonstrate a genuine issue for trial as required by Rule 20.04(1).

[20] The defendants submit that where a solicitor acts on both sides of a mortgage transaction, in this case the solicitor Goldstein, and there is evidence of fraud or misrepresentation on the part of the solicitor, there is a genuine issue for trial. They further submit, in paragraph 33 of their factum, that they have put forth evidence to show that Goldstein played an active role in the fraud. They argue that the genuine issue for trial is whether the plaintiff s mortgage security is vitiated by the actions of Goldstein, who acted on both sides of the mortgage.

[21] The defendants rely on *MCAP v. Allen*, 2007 CarswellOnt 943, [2007] O.J. 627 (Ont. S.C.J.) (*MCAP*) and *Bank of Nova Scotia v. Villafuerte* (2007), 52 R.P.R. (4th) 142 (Ont. S.C.J.) (*Villafuerte*).

[22] In *MCAP*, a plaintiff lender moved for summary judgment against a defendant mortgagor who had defaulted on a loan. As in the case before me, the defendant alleged both fraud by third parties and wrongdoing on the part of a solicitor acting for both herself and the lender. The defendant was led to believe by a third party and the solicitor that her involvement in the purchase of a property was limited to having her name placed on title. Her evidence was that she was neither asked nor did she ever consent to being a mortgagor in respect of the property. She never intended to sign any mortgage documents and when she signed the documents relating to the transaction, the solicitor simply told her that the documents were those necessary to have her name placed on title and provided no explanation as to the nature or content of any of the documents. Unlike the defendants in the case before me, she wished to plead a defence of *non est factum.*

[23] With respect to the involvement of the solicitor, Gray J. stated as follows: Critical to a resolution of this motion, in my view, is that Marcia Barrett [the solicitor in question] was at all times acting on behalf of both the plaintiff and the defendant in the mortgage transaction (*MCAP, supra* at 13). Gray J. also stated as follows (at 17):

The defendant has put forward significant evidence to demonstrate that her execution of the documents relied upon by the plaintiff was secured by the misrepresentations, and indeed fraudulent misrepresentations, of Marcia Barrett, who, it is undisputed, was acting as solicitor for both parties in the transaction. As the plaintiff s solicitor, Ms. Barrett was clearly the agent of the plaintiff, and it is at least arguable that the plaintiff is bound by the fraudulent misrepresentations of its agent. Indeed, Ms. Barrett is not an ordinary agent; as a solicitor, she has fiduciary obligations as well, to both the plaintiff and the defendant.

[24] In dismissing the motion for summary judgment, Gray J. concluded that it was clear that the solicitor Barrett was acting as solicitor for the plaintiff lender, and that as a result, it is at least arguable that any fraud she committed, and any misrepresentations she made to induce the defendant to enter in to the transaction, bind the plaintiff .

[25] In *Villafuerte*, the defendant, against whom the plaintiff bank was moving for summary judgment on a mortgage, argued that the mortgage was invalid because she was induced to enter into it by the misrepresentations of the solicitor acting for both her and the bank. The solicitor was also the defendants son-in-law. The issue was whether the misrepresentations of a solicitor acting on both sides of a transaction invalidated the security of the lending institution. The solicitor s misrepresentations consisted of informing the defendant that, owing to a problem with his credit rating, he needed her to take title to a property in her name but she would have no personal obligation under the mortgage. The solicitor also told the defendant that he would make all of the payments on the mortgage.

[26] When the mortgage lapsed into default, the plaintiff bank sold the property and sued the defendant for the deficiency. The solicitor ultimately confirmed that he misrepresented the mortgage to the defendant and specifically that he misled her into believing that she would have no liability under the mortgage and was signing it as a trustee.

[27] The defendant argued that the plaintiff bank was responsible for the misrepresentations of its agent, the solicitor, even if the bank was unaware of the solicitor s actions. Based on the fact that the solicitor was retained by the bank before the mortgage was registered and that a law clerk employed by the solicitor was instrumental in having the defendant sign any necessary documents, Baltman J. found that it was at least arguable that the solicitor was acting as the bank s agent at the relevant time. She followed *Weitzman v. Hendin* reflex, (1989), 69 O.R. (2d) 678 (C.A.) in holding that a bank may be liable for the misrepresentations of its solicitor, even where the bank was unaware of his actions. She concluded that there was a triable issue that the bank was liable for the solicitor s misrepresentations and dismissed the motion for summary judgment.

[28] The plaintiff relies on *Canada Life Services v. Beasley*, 1999 CarswellOnt 829, [1999] O.J. 872 (*Beasley*), which was reviewed by Gray J. in *MCAP*. On a motion for summary judgment brought by a plaintiff lender against the defendant mortgagors, Wein J. considered the issue of whether a mortgagee is potentially vicariously liable for a solicitor s breach of duty to the mortgagors where the solicitor acted for both the mortgagors and the mortgagee on the mortgage transaction.

[29] The case involved two sets of mortgagors, the Hammonds and the Beasleys. The Hammond mortgagors argued that the lender was vicariously liable for the solicitor s failure to explain to them the impact or effect of CMHC insurance, to explain the mortgage documentation before signing, and to explain that their personal covenant was unconditional and would survive a power of sale. The Hammonds also claimed that the solicitor improperly paid out excess mortgage proceeds to the Beasleys on the basis of an invalid direction, with respect to which he failed to make proper inquiries. The Hammonds had commenced a separate action against the solicitor.

[30] Wein J. concluded that there was no basis for imputing the alleged improper conduct of the solicitor to the plaintiff mortgagee. She also commented that the mortgagors real complaint was against the solicitor and not against the party that advanced the money. She granted summary judgment against the Hammond mortgagors.

[31] Gray J. in *MCAP* noted that *Beasley* did not involve an allegation of fraud on the part of the solicitor.

[32] In both *Villafuerte* and *MCAP*, the defendants against whom the lenders were moving for summary judgment were induced to enter into their respective mortgage transactions and executed the loan documents on the basis of fraudulent misrepresentations made by the solicitors acting both for the lenders and for themselves. In this case, however, contrary to the assertion in paragraph 33 of the defendants factum that they have put forth evidence that Goldstein played an active role in the fraud, there is no pleading or evidence that Goldstein made any fraudulent misrepresentations to the defendants or that he in any way induced them to enter into the mortgage and guarantee. The only allegations pleaded against Goldstein are that he never explained to the defendants the consequences of the documentation that they were signing or took steps to ensure that they had no personal liability as promised. There is also a general allegation that Goldstein was negligent.

[33] Accordingly, in both *Villafuerte* and *MCAP*, the lenders right to realize on their security instruments was held to be compromised by the fraudulent misrepresentations of their agents, the solicitors who were acting for both the lenders and the borrowers. In this case, however, even accepting that Goldstein, as the Bank s solicitor, was also its agent, there is no evidence that he made any misrepresentations to the defendants that might amount to fraudulent conduct imputed to the Bank that could in turn invalidate the Bank s right to recover the loan under the Charge and Guarantee.

[34] The essential distinction between this case and the *Villafuerte* and *MCAP* decisions is that in this case, the defendants were not induced to enter into the transactions giving rise to their liability through the misrepresentations of the solicitor acting for both the Bank and themselves. Their complaint with respect to Goldstein s conduct is that he failed to explain the significance of the documents that they were signing and to ensure that they would have no personal liability. This conduct, if proven, could amount to negligence, but is very different from the misrepresentations made by the solicitors in *Villafuerte* and *MCAP*. Goldstein s alleged transgression is much more similar to that of the Hammond mortgagors solicitor in *Beasley*, in which the solicitor s conduct was found not to provide the mortgagors with a defence to the lender s action on the security.

[35] For the reasons set out above, and following the decision of Wein J. in *Beasley*, I conclude that the alleged negligent actions of Goldstein do not raise a triable issue in relation to the plaintiff s claim.

[36] Although not raised as triable issues in their factum, the defendants plead both that the Bank ought to have taken more care and exercised greater due diligence before advancing the funds and that the Bank failed to appraise or inspect the Property. Oldemiro in his affidavit expresses the defendants position that the Bank ought to have taken more care in advancing almost $300,000.00 and should have exercised due diligence to prevent the fraud from being perpetrated. These arguments relate to steps that the Bank might have taken to ensure the defendants capacity to repay the loan and to confirm the value of the security. However, a lender owes no duty to a borrower with respect to the making of a loan and specifically no duty to a customer to advise the customer not to undertake the loan: *Pierce v. Canada Trustco Mortgage Co.*, 2005 CarswellOnt 1876 (Ont. C.A.). Similarly, the failure of a bank to follow its internal lending practices does not by itself render a loan unenforceable: *Bank of Montreal v. Duguid* 2000 CanLII 5710 (ON C.A.), (2000), 47 O.R. (3d) 737 (C.A.). Finally, there was no requirement that the Bank obtain an appraisal of the Property for the purpose of warning the defendants that their security might not cover the loan: *West Fort William Credit Union v. McKillop* (2006), 53 R.P.R. (4th) 150 (Ont. S.C.J.). I therefore conclude that the defendants have not demonstrated a triable issue based on the Bank s failure to exercise greater due diligence or to appraise the Property before advancing funds.

Decision

[37] For the reasons set out above, I find that the defendants have not demonstrated any genuine issue for trial with respect to the plaintiff s claim. The plaintiff is therefore granted summary judgment against the defendants in the amount of $98,642.67.

[38] If the parties cannot agree on the issues of interest and costs, they shall provide me with written submissions, not to exceed two pages each, within 20 days of receiving these reasons.

Master Graham

DATE: May 15, 2008