

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

BETWEEN:

MAYER TCHELEBON

Plaintiff

and

DAVE RAVINDRA (also known as "RAVINDRA DAVE")

Defendant

**ENDORSEMENT**

Ryan Naimark for Plaintiff  
John Johnson for Defendant

**November 21, 2008**

The plaintiff moves for summary judgment based on 2 mortgages provided to the defendant. These mortgages were held by the plaintiff through his RRSP. They went into default in August 2006.

The defendant argues that there is a genuine issue for trial, which should defeat the motion. Essentially, he argues that the parties, who had known and worked together for years, had gone into certain business investments in Barrie, Ontario and Guyana. He submits that they had an oral agreement with respect to those investments and that the funds advanced pursuant to the mortgages really represented the plaintiff's investment in Barrie/Guyana and as such, the plaintiff is not entitled to repayment on those mortgages.

I reject the defendant's argument in its entirety and find that there is no genuine issue for trial, for the following reasons:

1. Any evidence regarding an oral agreement is inadmissible under the Parole Evidence Rule, where it seeks to vary the clear and unambiguous language of a written contract: *Famous Players v. Capital Life* [1996] O.J. No. 3879.

The defendant argues that the oral agreement can be admitted as an exception to the Rule since it is a collateral agreement. I disagree. A collateral contract cannot be established where it is inconsistent with or contradicts the written agreement. *Hawrish v. Bank of Montreal* (1969) SCR 515 (SCC).

The oral, collateral contract would seek to contradict the clear payment terms and conditions in the mortgage. It is not admissible.

2. Even if I allowed the oral agreement in not withstanding the Parole Evidence rule, it would contravene the *Statute of Frauds* which requires that all agreements concerning land would be in writing. According to *Shook Estate* [1948] SCR at p. 4, if parties verbally agree to vary or place conditions on a contract and if the contract is one which must be evidenced in writing under the *Statute of Frauds*, the variation or condition must also be in writing, failing which the oral argument is unenforceable.
3. Quite apart from the admissibility bars to the oral agreement in 1 and 2, which in my view are complete bars to the oral agreement, the evidence put forth by the defendant fails to raise a genuine issue for trial. First, his counsel stated that the defendant conceded on cross-examination that no funds were advance under the second mortgage - it arose as a transfer of the mortgage originally placed on Tomken Road - therefore, no funds from that mortgage were used for the Guyana project.

With respect to the first mortgage, there is no evidence before me, other than the defendant's affidavit, which states that those funds went into the Barrie project and were then put into the Guyana one. He has no documentation to support that statement or any other evidence at all. On the contrary, the plaintiff has put forth evidence to support his position that the funds he invested in the Barrie project came from sources other than the first mortgage. This is outlined in detail in his reply affidavit of August 13, 2008; no evidence was put forth by the defendant to refute the contents of this affidavit. The plaintiff also outlines how the defendant continued to make the precise payments under the mortgages for almost 2 years after the Barrie/Guyana investments were terminated. There is no specific evidence or explanation by the defendant why he would do so after termination of the investments if the mortgages represented the investment loans.

The defendant must put his best foot forward to establish a genuine issue for trial on this motion. The evidence does not, in my view, establish a genuine issue for trial on the oral contract somehow varying or qualifying the two mortgages. In any event, as mentioned above, evidence on the oral argument is inadmissible.

I grant summary judgment to the plaintiff for the relief claimed for paragraph 1 of the Statement of Claim, together with interest owing under the mortgages to the date of payment. The amount of the Judgment, inclusive of interest to today is \$286, 225.70.<sup>1</sup>

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<sup>1</sup> With respect to the order for possession of the property, keys shall be delivered to the plaintiff's counsel within 7 days. All rents which the plaintiff is entitled to attorn shall be payable,

The defendant seeks to amend his Statement of Defence to assert a counterclaim. The plaintiff does not oppose this amendment. Order to go accordingly, in the form signed by me, provided that this will not stay the enforcement of the summary judgment in favour of the plaintiff.

Costs are payable on a partial indemnity scale. The issues were not complex, but there were 2 court attendances and 2 days of cross-examination. I exercise my discretion and award costs of \$25,000.00, inclusive of GST and disbursements, to the plaintiff, payable within 30 days. I consider this a fair and reasonable amount for the defendant to pay for this proceeding.

**November 21, 2008**

Order to go, unopposed, granting leave to amend the Statement of Defence, in the form signed by me, to include a counterclaim. This will not stay the summary judgment granted by me today in favour of the plaintiff.

JUSTICE CONWAY

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when received by the defendant, to the plaintiff's counsel in trust.

Nov 21/08 R. Naimark, for pl.  
J. Johnson, for def.

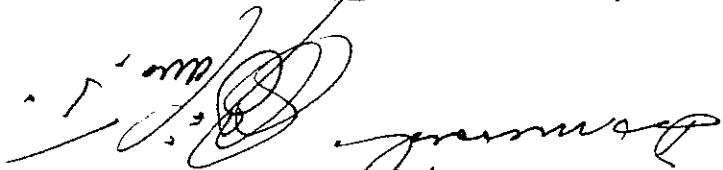
The pl moves for summary judgment based on 2 mortgages provided to the def. These mortgages were held by the pl through his RRSP. They went into default in August 2006.

The def argues that there is a genuine issue for trial which should defeat the motion. Essentially, he argues that the parties, who had known + worked together for years, had gone into certain business investments in Barrie, ON and Guyana. He submits that they had an oral agreement with respect to those investments and that the funds advanced pursuant to the mortgages really represented the pl's investment in Barrie/Guyana and as such the pl is not entitled to repayment on those mortgages.

I reject the def's argument in its entirety + find that there is no genuine issue for trial, for the following reasons:

1. Any evidence regarding an oral agreement is inadmissible under the Parole Evidence Rule, where it seeks to vary the clear + unambiguous language of a written contract: Famous Players v. Capital Life [1996] OJ No 3879.

The def argues that the oral agreement can be admitted as an exception to the Rule since it is a collateral agreement. I disagree. A collateral contract cannot be established where it is inconsistent with or contradicts the written agreement: Hawthorn v Bank of Montreal (SCC) [1997] SCR 515.

  
No oral agreement in the written - Motion  
Oct 21 2008

(2)

The oral, collateral contract would seek to contradict the clear payment terms & conditions in the mortgage. It is not admissible.

2. Even if I allowed the oral agreement notwithstanding the parol evidence rule, it would contravene the Statute of Frauds which requires that all agreements concerning land be in writing. According to Shook Estate [1948] SCR at p. 4, if parties verbally agree to vary or place conditions on a <sup>contract</sup> ~~mortgage~~, if the contract is one which must be evidenced in writing under the S of F, the variation or condition must also be in writing, failing which the oral act is unenforceable.

3. Apart from the admissibility bars to the oral agreement in 1 & 2, which in my view are complete bars to the oral agreement, the evidence put forth by the def fails to raise a genuine issue for trial. First, his counsel ~~conceded~~ stated that the def conceded <sup>on cross-exam</sup> that no funds were advanced under the second mortgage - it arose as a transfer of the mortgage originally placed on Tomken Road - therefore, no funds from that mortgage were used for the Guyana project.

With respect to the first mortgage, there is no evidence before me, other than the def's affidavit, which states that those funds went into the Barrie project & were then put into the Guyana one. He has no documentation to support that statement or any other evidence at all. On the contrary, the pl. has put forth evidence to support his position that the funds he invested in the Barrie ~~project~~

(3)

projects came from sources other than the ~~the~~ <sup>first</sup> mortgages. This is outlined in detail in his reply affidavit of Aug 13/08; no evidence was put forth by the def to rebut the contents of this affidavit. The pl also outlines how the def continued to make the <sup>precise</sup> payments under the mortgages for almost 2 years after the Barrie/Guyana investments were terminated. There is <sup>specific evidence or</sup> no explanation by the def why he would do so after if the mortgages represented the investment loans } termination of the investments

The def must put his best foot forward to establish a genuine issue for trial on this motion. The evidence does not, in my view, establish a genuine issue for trial on the oral contract <sup>somehow</sup> varying or qualifying the 2 mortgages. In any event, as mentioned above, evidence on the oral agt is inadmissible.

I grant summary judgment to the pl. for the relief claimed in par 1 of the statement of claim, together with interest owing under the mortgages to the date of payment ~~of judgment~~. The amount of the judgment, inclusive of interest <sup>today is</sup> to, \$286,025.70.\*

The def seeks to amend his st of defence to assert a counterclaim. The pl does not oppose this amendment. Order to go accordingly, <sup>in the terms signed by me,</sup> provided that this will not stay the enforcement of the summary judgment in favour of the pl.

\* With respect to the order for possession of the property, Karp shall be delivred to the pl's counsel within

(4)

7 days. all rents which the pl is entitled to attract shall be payable, when received by the def, to the pl's counsel in trust.

Costs are payable to the pl on a partial indemnity scale. The issues were not complex, but there were 2 conw attendances & 2 days of cross-examination. I exercise my discretion & award costs of \$25,000, inclusive of GST & disbursements, to the pl, payable within 30 days. I consider this a fair & reasonable amount for the def to pay for this proceeding.

Conway J.