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Land Titles Act

R.S.O. 1990, Chapter L. 5., as amended

IN THE MATTER OF the *Land Titles Act*, R.S.O. 1990, c. L.5, s. 57;

AND IN THE MATTER OF land registered as Lot 47, Plan 4332 North York; S/T NY154468; City of Toronto, being PIN 10117-0102 (LT)(the “property”);

AND IN THE MATTER OF a charge of the property given by T.P.W.C in favour of J.W, registered on February 7, 2003 as Instrument No. AT98008 (the “Charge”);

AND IN THE MATTER OF an allegedly fraudulent discharge of the Charge, registered on April 16, 2003 as Instrument No. AT146084 (the “Discharge of Charge”);

AND IN THE MATTER OF an application by J.W on April 16, 2007, for payment of compensation out of the Land Titles Assurance Fund, in respect of an alleged wrongful deprivation of an interest in the property arising from the Discharge of Charge.

DECISION

HEARING

A hearing was held in this matter on October 15, 2009. Appearing before me was the claimant, J.W and his solicitor Pandora Du of the Hung Law Office. Appearing as witnesses were the solicitor that prepared and registered the allegedly fraudulent discharge - Metz Ngan, a.k.a. Kwok Keung Ngan; and Mr. L, a friend of the claimant, who testified in Cantonese through interpreter John Choi.

Schedule A to this decision is a list of the Exhibits submitted at the hearing.

FACTS

Mr. L testified as a witness for the applicant J.W.. Mr. L has known J.W. for more than 10 years. In 2002 Mr. L introduced J.W. to a woman he had known for about 6 or 7 years named T.C.. T.C. needed money but Mr. L could not lend her any, so he asked J.W. if he was interested in helping her out. J.W. met with T.C. and agreed to lend her money.

There was no written loan agreement, and any terms agreed upon orally were not clearly recalled by J.W.. In the affidavit accompanying his application for compensation, J.W. stated that when he was asked to loan money to T.C., “I was willing to help provided that my loan was secured by a mortgage” however he testified at this hearing that it was not until much later that a mortgage was proposed. J.W. also stated in his affidavit that he agreed to loan T.C. \$44,000 at an interest rate of 19% per annum. At the hearing, he stated that there was no set amount discussed for a loan, and he thought that the interest rate agreed on was around 15%.

When J.W. met with T.C. he made a photocopy of her identification (Exhibit A-8). The signature on the back of her driver’s licence is that of T.C., however the name on the front is T.P.W.L.. J.W. stated that she went by both names, as T.P.W.L. was her married name. Mr. L reviewed Exhibit A-8 and confirmed that the woman in the photo is the woman he knew as T.C.. He had not known her married name.

J.W. testified that over the course of 2002-2003 he provided T.C. with money on a number of occasions, whenever she asked for it. He always gave her cash but he was not sure how much cash he had given, or when it was given, because no records were kept. He testified that she asked for \$3,000 or \$4,000 the first time, and that was followed by more requests for varying amounts. He said she repaid some of the money in small amounts of cash from time to time, but no records were kept of the repayments. He also submitted copies of 24 post-dated cheques which he said T.C. gave him as repayment (Exhibit A-1), and he brought the originals of these cheques to the hearing. The cheques are not made out to J.W. or any other payee,

and no reason for payment is inserted on the "memo" line. Each cheque is in a different amount. J.W. advised that he never attempted to deposit any of the cheques because when T.C. gave him some cash payments he got confused as to whether or not he should also be depositing the cheques.

According to J.W., by February of 2003 he had given T.C. about \$27,000 or \$28,000, though the post-dated cheques add up to just over \$29,000. He did not recall the exact amount. T.C. then asked for a further \$17,000, but J.W. said he decided that before he gave her any more money he should get some security for his loans. He asked a lawyer, Mr. Ngan, to prepare a mortgage and register it on the title to property that T.C. owned on _____ in Toronto. J.W. and T.C. attended at Mr. Ngan's office on February 7, 2003 to complete these arrangements. Mr. L went with them, but he testified that he did not know what went on in the meeting because everyone was speaking English.

Mr. Ngan testified that he had known J.W. for a long time, through the real estate world, as J.W. is a real estate sales representative. Mr. Ngan did not know T.C. prior to the meeting on February 7, 2003, so he took a copy of her driver's licence. Mr. Ngan did not bring the photocopy to the hearing, nor did he bring anything else from his file. He said he could not find the file. He undertook to try and locate it after the hearing but later advised he was unsuccessful.

Mr. Ngan was asked to compare the driver's licence at Exhibit A-8 (obtained by J.W.) to the one at Exhibit A-22 (obtained later by the RBC, see below), and he stated that he thought it was possible they were both photos of the woman he met on February 7, 2003, being T.C.. He also stated that he discussed the charge with the parties, and confirmed that the principle amount to be shown was \$44,000, with an interest rate of 19%. It was to be a third charge. He said he conducted a subsearch of title and the Writs database. Mr. Ngan was asked if he had discussed title insurance with J.W., but he could not recall for sure if he had done that. No title insurance was purchased.

In J.W.'s affidavit filed with his application for compensation, he stated that he had given \$44,000 to T.C. while at the meeting in Mr. Ngan's office. At the hearing, however, he said that what he gave her that day was the \$17,000 she had asked for, in cash, but there is no record of any amount being given. Mr. Ngan testified that he did not see J.W. give any money to T.C.. Mr. L also did not recall seeing any money being given, but he said that he was not in the office for the entire meeting because he had left the room at some point.

The result of the meeting on February 7, 2003 was the registration of a Charge on T.C.'s property (Exhibit A-2). After that, however, T.C. did not make any payments to J.W.. His attempts to reach her were unsuccessful, so in June of 2003 he gave Mr. Ngan instructions to send her a demand letter (Exhibit A-10). When she did not comply, J.W. instructed Mr. Ngan to proceed with a power of sale of her property. When Mr. Ngan looked at the parcel register for T.C.'s property in July of 2003 to prepare for the power of sale, he saw that J.W.'s Charge had been discharged on April 16, 2003. The Discharge (Exhibit A-4) was registered as a paper document, and all of the information was filled in by hand. Mr. Ngan's office address was written in as the chargee's address. J.W.'s name and signature were on the document with a phone number, but he testified that his signature was forged and the number was not his. J.W. submitted his driver's licence and two credit cards (photocopy, Exhibit C) to show that his signature is not the same as the one on the Discharge. He also pointed out that his signature on the affidavit submitted with his application did not resemble the one on the Discharge.

The day after the Discharge was registered for J.W.'s charge, T.C. gave a new mortgage to a private individual lender and a month later she transferred the property to T.P.W.L. (Transfer, Exhibit A-5). T.P.W.L. then gave a first charge on the property to the RBC (Exhibit A-6), and registered a Discharge of the private lender's mortgage. After all of this was discovered by Mr. Ngan in July of 2003 he advised J.W. to report the matter to the police, which he did. There was no Report provided, and J.W. stated that he never heard from the police again.

J.W. believed that T.C. simply transferred the property to herself while pretending to be two different persons. The dates of birth of T.C. and T.P.W.L. are the same, as shown on the Transfer whereby T.C. first obtained title to her property in 1999 (Exhibit A-7), and on the driver's licence in the name of T.P.W.L. which was shown to J.W. when he first agreed to loan T.C. money (Exhibit A-8).

On May 18, 2004, a year after J.W.'s charge was discharged, the RBC sold the property under power of sale. J.W. did not receive any portion of the sale proceeds because his charge was no longer on title.

J.W.'s solicitor obtained from the RBC a number of documents relating to Ms. T.P.W.L.'s initial application for her RBC mortgage which further support the assertion that T.C. and Ms. T.P.W.L. were the same person. The documents include Exhibit A-22, a copy of T.P.W.L.'s driver's licence and S.I.N. card, and Exhibit A-24 which is a statement that T.C. wrote, on which

she gave her phone number. It is the same number that was written on the Discharge document as J.W.'s phone number.

J.W. started a court action in 2005 (Tab A-12). Default Judgment was obtained in February of 2006, for \$67,293.47 plus costs and interest at 19%, and a Writ of Seizure and Sale in that amount has been filed. It is not clear how that amount was calculated, as the Statement of Claim indicates that the claim was for \$44,000 for the unpaid principle of the loan plus \$25,000 in punitive damages, but those two amounts add up to more than the amount of the judgment. J.W. testified that he took no steps to enforce the judgment because he did not know where T.C. was. He thought maybe she had left the country. Mr. L stated that he has also been unsuccessful in his attempts to find T.C., and he has not seen her since the meeting on February 7, 2003. Exhibit B contains the results of an MTO records search of T.C.'s driver's licence, which was done by J.W.'s solicitors the day before this hearing. The results indicate that T.C. lives in Toronto.

SUBMISSIONS

Ms. Du acknowledged that there was no loan agreement between J.W. and T.C., but said that was because of the nature of the loan where small amounts were given on different occasions. She submitted that the post-dated cheques from T.C. prove that the funds were advanced, as well as the Acknowledgment and Direction which sets out the details of the charge to be registered. As evidence that the Discharge document was fraudulent, she drew attention to the date on the Discharge which was two days before the actual Charge was registered. She also listed the peculiarities among the various pieces of photocopied I.D – the names, addresses, signatures and phone numbers - and submitted that the only possible conclusion to draw from this was that T.C. had forged and registered the Discharge, and put her own phone number on it in case someone from the Land Registry Office called to check something. She noted that J.W.'s position was that T.C. and T.P.W.L. were the same person, and that there was no other possible explanation.

Ms. Du also argued that J.W. had taken every possible step to recover his loss. He reported it to the police, commenced a court action, obtained a default judgment, and filed a Writ of Seizure and Sale. She submitted that there are no other steps available.

ANALYSIS

Sections 57 through 59 of the *Land Titles Act* set out the elements which must be satisfied in order for a claim for compensation to be successful. Section 57(1) of the Act provides that if a person is wrongfully deprived of an interest in land because of fraud, they are entitled to recover what is just, by way of compensation or damages, from the person who perpetrated the fraud. If they are unable to recover their loss from the person who perpetrated the fraud, or otherwise unable to recover, the claimant is entitled to compensation from the Land Titles Assurance Fund under s.57(4). In other words, with few exceptions, the Fund is one of last resort for most claimants.

J.W. claimed that he was wrongfully deprived of an interest in T.C.'s land when his charge was discharged without his knowledge or consent. J.W. did obtain an interest in the land owned by T.C., by registration of a charge against that land on February 7, 2003, and on my review of the evidence I find that the discharge of that charge was fraudulent. The signature of J.W. on the Discharge document does not resemble the several signature samples he provided, it was dated two days before the date of his Charge, the phone number given for J.W. was a number shown on other documents as either T.C.'s or T.P.W.L.'s number. There is also sufficient evidence from the identification supplied by T.C. to J.W. and the RBC, and from the other documents she gave to the RBC, to support the allegation that T.C. and T.P.W.L. are the same person.

J.W. attempted to pursue his loss by way of a court action against T.C., and he obtained a judgment against her. His position was that he has been unable to enforce the judgment against her because he could not locate her, and he has therefore come to the Fund for compensation. The issue for this tribunal, however, is that J.W. is claiming an amount for compensation when he has no proof that he has suffered a loss in that amount. His court judgment was a default judgment; there was no hearing on the merits of his claim and he did not prove to the court the amount of his loss.

During his testimony, J.W.'s recollections were unclear and were inconsistent with what he had stated in the affidavit he submitted with his application for compensation. His testimony was that he gave T.C. some amounts of money, several times, and that she paid him back some amounts of money at several other times. There was no written agreement, which was odd considering J.W. was a professional real estate sales representative and would have been familiar with formal agreements. There are no records of the dates or amounts of money advanced to her, or of the payments she allegedly made in return. Mr. L did testify that he introduced his two friends for the purpose of arranging a loan, but I accept his testimony that he

was not involved with, and knew nothing about, the total amount of money loaned or the terms of the arrangement. He may have been present on the day the Charge was registered, but he did not appear to understand what was being discussed or signed, and he did not see any money being given to T.C.. Mr. Ngan's testimony was consistent with this in that he also didn't see any money changing hands that day.

J.W. submitted the post-dated cheques as evidence, but there are a number of issues with respect to these cheques. They are not made payable to J.W. or to anyone else, the payee line is blank. There is nothing on the "memo" line indicating the reason for the cheques. The dates, cheque numbers and differing amounts do not assist in figuring out who or what the cheques were for. They certainly do not add up to \$44,000. J.W. testified that he did not attempt to deposit any of the cheques because T.C. confused him by paying him back some small amounts in cash. As no record exists of those cash payments, we do not know how much was paid or when. Even if it were proven that some money was paid back, it doesn't explain why J.W. did not deposit any cheques to recover the remaining balance owing, especially after the Charge was registered and he received no payments. I find that the cheques submitted do not provide proof of the advancement of any particular amount of money to T.C..

The only other thing submitted as evidence of a loan from J.W. to T.C. was the Acknowledgement and Direction which T.C. signed, directing Mr. Ngan to register the Charge document electronically. It describes the property, notes that J.W. is the Chargee, and includes the provisions for the charge. It is not, however, proof that \$44,000 was actually advanced. It is only proof that, for whatever reason, T.C. directed Mr. Ngan to register a Charge with that amount shown as the face value.

FINDING

Based upon the evidence before me, for the reasons noted above I find that J.W. has failed to establish that he is entitled to compensation from the Land Titles Assurance Fund under the provisions of Section 57 of the *Land Titles Act*.

DATED at Toronto, Ontario, this 26th day of January, 2010.

Original signed by Jan Robertson

Jan Robertson
Deputy Director of Titles

TO:

SCHEDULE A
Exhibits

- A. Applicant's Hearing Document Brief:
1. 24 post-dated cheques;
 2. Copy of Instrument No. AT98008, being a Charge/Mortgage registered on February 7, 2003 in favour of J.W; Acknowledgement and Direction from T.P.W.C dated February 7, 2003; and Affidavit of T.P.W.C sworn February 7, 2003;
 3. Another copy of Acknowledgement and Direction and Affidavit referred to in item 2 above;
 4. Copy of Instrument No. AT146084, being a Discharge of Charge/Mortgage registered on April 16, 2003;
 5. Copy of Instrument No. AT174226, being a Transfer registered on May 22, 2003 from T.P.W.C to T.P.W.L.;
 6. Copy of Instrument No. AT174227, being a Charge/Mortgage registered on May 22, 2003 in favour of Royal Bank of Canada;
 7. Copy of parcel register for PIN 10117-0102(LT), printed September 20, 2005;
 8. Copy of front and back of Social Insurance Card for T.C.; and driver's licence for T.P.W.L.;
 9. MTO Search printout re T.P.W.L. dated August 31, 2005;
 10. (unsigned) Letter from Mr. Ngan to T.P.W.C dated June 11, 2003;
 11. Letter from Edward F. Hung to Detective Bill Riddle dated July 14, 2003;
 12. Statement of Claim issued May 12, 2005 in Court file No. 05-CV-289431SR;
 13. Affidavit of Attempted Service of Christian Phillips, sworn May 20, 2005;
 14. Affidavit of Elaina Man sworn September 20, 2005, with Exhibits A-F thereto;
 15. Order of Master Peterson issued October 13, 2005, and copy of draft Advertisement re Notice to T.C. a.k.a. T.P.W.L.;
 16. Affidavit of Elaina Man sworn November 22, 2005, with Exhibits A-C thereto;
 17. Judgment of Deputy Registrar (Default Judgment) dated February 14, 2006;
 18. Letter from Pandora Du of Hung Law Office to Royal Bank of Canada dated September 4, 2008;
 19. (undated/unsigned) Requisition for Writ of Seizure and Sale against T.P.W.C a.k.a. T.P.W.L.;
 20. Instructions for Process Server from Edward Hung dated April 9, 2009;
 21. Signed and Issued Writ of Seizure and Sale dated April 28, 2009, filed April 30, 2009 at Toronto;
 22. Photocopies of front and back of driver's licence for T.P.W.L. and Social Insurance card for T.P.W.L.;
 23. Copies of Income Tax Notices of Assessment and T1 General forms for T.P.W.L. for the years 2000, 2001 and 2002;
 24. Letter "To Whom It May Concern" from T.C. dated May 7, 2003.
- B. KAP Litigation Services MTO search information to Edward F. Hung dated October 14, 2009;
- C. Photocopies of J.W.'s driver's licence, Visa card and American Express card.