

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: RALLION GENTLES, Plaintiff

AND:

SHEREDA LYNCH and TERRENCE REEFER, Defendants

BEFORE: The Honourable Mr. Justice C.F. de Sa

COUNSEL: Matthew Thomson and Andrew Francis, Counsel for the Plaintiff

Mark Klaiman, Counsel for the Defendant, Shereda Lynch

HEARD: April 23, 2024

ENDORSEMENT

Overview

- [1] This action concerns a partnership dispute between the Plaintiff Rallion Gentles (“Mr. Gentles”), the Defendant Shereda Lynch (“Ms. Lynch”) and the Defendant Terrence Reefer (“Mr. Reefer”) (collectively, the “Partners”).
- [2] In 2019, the Partners entered into a partnership agreement to jointly purchase a pre-build home located at 31 Bannister Road, Barrie, Ontario (the “Barrie Property”).
- [3] It was agreed that each of the three Partners would hold a one-third interest in the Barrie Property. All three Partners contributed funds towards the purchase.
- [4] Prior to closing, there was a breakdown in the romantic relationship between Ms. Lynch and Mr. Gentles. Accordingly, the Partners agreed that title could be taken solely in the name of Ms. Lynch pursuant to a Consent Order dated June 14, 2022, which included an undertaking that Ms. Lynch would not sell or otherwise encumber the Barrie Property for a period of two years while the parties’ interests could be adjudicated in this action (the “Undertaking”).
- [5] The Undertaking will expire before the outcome of this action, which is scheduled for a pre-trial conference in December 2024. Ms. Lynch will not agree to extend the Undertaking until after trial.
- [6] Mr. Gentles has now brought a motion seeking:
 - a) leave to bring this motion notwithstanding that the action has been set down for trial;

- b) an Order varying the June 14, 2022 Order of the Honourable Justice Vallee such that the Undertaking (defined hereafter) shall not expire until a decision has been rendered after the trial of this action;
- c) in the alternative, an Order authorizing issuance of a Certificate of Pending Litigation (a “CPL”) with respect to the Barrie Property which is municipally described as 31 Bannister Road, Barrie, Ontario, and legally described as LOT 42, PLAN 51M1194; SUBJECT TO AN EASEMENT FOR ENTRY AS IN SC1905909; CITY OF BARRIE (PIN: 58091-3952 (LT)), more particularly described in Schedule "A" to the Simplified Procedure Motion Form; and
- d) in the further alternative, an interim preservation Order directing that upon any sale or mortgaging of the Barrie Property, the entirety of the net sale proceeds or mortgage proceeds shall immediately be paid into Court to the credit of this action pending further Order of this Court directing for their release.

[7] Having considered the matter, I agree that a CPL is warranted in the circumstances of this case.

[8] Mr. Gentles is granted leave to issue a CPL in relation to the Barrie Property.

[9] The reasons for my decision are outlined below.

Summary of Facts

[10] Mr. Gentles and Ms. Lynch were in a romantic relationship until approximately mid-2021 and have a child together.

[11] In July 2019, Mr. Gentles discovered an opportunity to purchase the Barrie Property. It was a pre-construction project. Mr. Gentles told his friend Mr. Reefer about the Barrie Property. Mr. Gentles and Mr. Reefer decided to become partners in a venture to purchase the Barrie Property as partners (the “Partnership”). The Partnership was not formalized in a written partnership agreement.

[12] After attending a meeting with the builder of the Barrie Property with Mr. Gentles in September 2019, Ms. Lynch expressed an interest in participating in the purchase. Mr. Reefer and Mr. Gentles agreed to allow Ms. Lynch to join the Partnership. It was agreed that the Partners would share equally in the purchase price, expenses and profits generated from the Barrie Property, including profits realized upon its resale.

[13] On October 10, 2019, the Partners met at the offices of the builder, Fernbrook Homes, to execute the Agreement of Purchase and Sale (the “APS”) to effect the purchase of the Barrie Property. Mr. Gentles was not included as a purchaser on the APS because he was late to the meeting and not available to sign. The Partners agreed that Mr. Gentles would be added to the APS at a later date via an amendment.

- [14] The APS featured a purchase price of \$814,990. Deposits were due by the purchasers in various installments at different intervals. The total deposit was \$60,000. The balance of the purchase price would be due and payable upon closing.
- [15] Thereafter, all three Partners made equal contributions towards the deposit payment obligations under the APS, despite Mr. Gentles not technically being stated as a purchaser on the APS.
- [16] In mid-2021, prior to closing on the Barrie Property, the personal relationship between Mr. Gentles and Ms. Lynch deteriorated.
- [17] On September 24, 2021, Mr. Reefer contacted the builder, Fernbrook Homes, and requested that the APS be amended to include Mr. Gentles as a purchaser. Mr. Reefer advised Fernbrook Homes that Mr. Gentles' name was removed in error at the day of signing and had not been re-added to date.
- [18] On or around October 7, 2021, Mr. Gentles requested that Mr. Reefer and Ms. Lynch sign an amendment to the APS to add Mr. Gentles as a purchaser. Mr. Reefer advised he would sign such an amendment. Ms. Lynch objected and did not agree to same.
- [19] On March 9, 2022, Mr. Gentles commenced this action for, *inter alia*, damages, a Certificate of Pending Litigation, and a declaration that Ms. Lynch as the title owner holds his 33.3% interest in the Barrie Property in trust.
- [20] Mr. Reefer has cross-claimed against Ms. Lynch to have his own one-third interest in the Barrie Property recognized. Ms. Lynch has counter-claimed against Mr. Gentles and cross-claimed against Mr. Reefer for a declaration that neither of them hold an interest in the Barrie Property.
- [21] On March 14, 2022, the vendor advised that the new first tentative closing date and firm closing date for purchase of the Barrie Property was June 15, 2022.
- [22] On June 10, 2022, Ms. Lynch issued an Application against Mr. Reefer seeking leave to complete the purchase of the Barrie Property in her name only.
- [23] In the interest of closing the transaction, the Partners consented to Ms. Lynch completing the APS and being registered as the owner on title to the Property on an interim basis while Mr. Reefer and Mr. Gentles' claimed interests were adjudicated. At no time did they intend to abandon their 1/3 interest in the Barrie Property.
- [24] On June 14, 2022, Justice Vallee issued an Order, (the "June Order") on consent, that:
- a) Ms. Lynch's Application was granted, without prejudice to Mr. Reefer's rights to assert any interest he may claim in the Property in either a separate action or in the action commenced by Mr. Gentles;

b) Ms. Lynch would undertake to not sell, dispose of or otherwise encumber the Property for a period of two (2) years from the date of the Order (the “Undertaking”).

- [25] On or around June 16, 2022, the purchase of the Property was completed with Ms. Lynch as the registered owner on title.
- [26] Examinations for discovery for this action took place on February 7, 2023. A Notice of Readiness for Pre-Trial Conference was filed with this Court on May 19, 2023 by Mr. Gentles. On September 18, 2023, the parties received notification that a pre-trial conference had been scheduled for December 16, 2024.
- [27] The Undertaking is set to expire June 14, 2024, long before the pre-trial conference or the trial in this matter will be completed. Ms. Lynch has declined reasonable requests to extend the Undertaking until after completion of the trial in this action.

Analysis

1) **Should the June 14, 2022 Order be varied such that the Undertaking is extended until after the conclusion of Trial?**

- [28] Mr. Gentles seeks to have the Undertaking extended, relying on Rule 3.02(1) which provides that “the court may by order extend or abridge any time prescribed by these rules or an order, on such terms as are just.”
- [29] The June 14, 2022 Order of Justice Vallee was issued on consent of all the parties involved in this action. Mr. Gentles takes the position that a consent order can be rectified or varied on the same grounds on which a contract can be rectified. Mr. Gentles argues that the intention of the parties regarding the June 14, 2022 Order was to allow Ms. Lynch to complete the purchase of the Barrie Property solely in her name without prejudice to the rights of Mr. Gentles and Mr. Reefer to assert their interest in the Barrie Property in this action or a separate action.
- [30] Mr. Gentles requests that this Court exercise its equitable discretion under Rule 3.02(1) to rectify the June 14, 2022 Order, such that it accord with the parties’ true intentions by extending the expiration date of Undertaking until after conclusion of trial in this action and a decision on merits.
- [31] Ms. Lynch opposes the variation of the order. She takes the position that she never had the intention to have the Undertaking extend beyond the two year period.
- [32] I do not agree with Mr. Gentles that the Undertaking can be extended in these circumstances.
- [33] Ms. Lynch does not agree to the variation. Nor is there anything indicating there was an intention on the part of Ms. Lynch to have the agreement exceed the specified period of 2 years.

[34] As such, I see no basis to vary the prior Undertaking/Agreement.

2) **Should a Certificate of Pending Litigation be Granted?**

[35] A certificate of pending litigation may be issued where a proceeding is commenced in which an interest in the land is in question; *Courts of Justice Act*, R.S.O. 1990, c. C. 43 (“CJA”), at Section 103; Rule 42 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[36] In determining whether to grant a CPL, the court must conduct a threshold inquiry of whether there is a triable issue in respect of the moving party’s claim to an interest in the property. The threshold test is met where there is sufficient evidence before the court to establish a claim to an interest in the land upon which the moving party *could* succeed. The moving party need not show a likelihood of success on the merits. There may be a triable issue even where the moving party’s evidence appears weak.: *2254069 Ontario Inc. v. Kim*, 2017 ONSC 5003 (CanLII), at para. 26.

[37] In determining if there is a triable issue, the evidentiary bar is low. The court is not to assess credibility or decide disputed issues of fact and credibility.: *Karkoulis v. Karkoulis*, 2023 ONSC 499 (CanLII), at para. 19.

[38] In this case, the Amended Amended Statement of Claim seeks a declaration that Ms. Lynch holds Mr. Gentles’ 33.3% interest in the Barrie Property in trust and a vesting Order for the transfer of a one-third ownership interest to Mr. Gentles as tenant-in-common. The pleadings of all parties in this action confirm that they formed a partnership for the purpose of jointly purchasing the Barrie Property. Ms. Lynch even admitted at examinations for discovery that approximately \$20,000 was paid by each of Mr. Gentles and Mr. Reefer, respectively, in deposits towards the purchase of the Barrie Property.

[39] Mr. Gentles also paid approximately \$50,595 to Ms. Lynch between October 6, 2019 – December 15, 2021 via e-transfer to be applied towards the purchase of the Barrie Property.: *Nishi v. Rascal Trucking Ltd.*, 2013 SCC 33, [2013] 2 S.C.R. 438, at para. 21; *Andrade v. Andrade*, 2016 ONCA 368 (CanLII), at para. 58.

[40] Mr. Gentles has clearly established a triable issue to an interest in land.

[41] Once the threshold test is met, the court must then assess whether a CPL should be issued by considering various factors (the “*Dhunna*” factors), including: (i) whether the Plaintiff is a shell corporation, (ii) whether the land is unique, (iii) the intent of the parties in acquiring the lands, (iv) whether there is an alternative claim for damages, (v) the ease or difficulty of calculating damages, (vi) whether damages would be a satisfactory remedy, (vii) the presence or absence of another willing purchaser, (viii) and the harm done to the parties if the certificate is allowed.: *572383 Ontario Inc. v. Dhunna*, 1987 CarswellOnt 551 (Ont. Master), at paras. 10 – 18.

[42] These factors are not intended to be exhaustive nor is any one determinative. Rather, the court must exercise its discretion in equity and look at all relevant matters between the

parties determining whether a certificate of pending litigation should be granted.: *Perruzza v. Spatone*, 2010 ONSC 841 (CanLII), at para. 20.

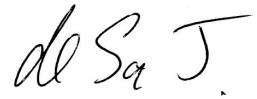
- [43] The moving party, Mr. Gentles, is not a shell corporation.
- [44] The Respondent points out that the Barrie Property is not unique. According to Ms. Lynch, Mr. Gentles is simply looking to preserve his monetary interest in the Barrie Property. He is not seeking to live there.
- [45] There is also clearly an alternate claim for damages in the Statement of Claim. The Plaintiff is seeking a “proportionate share of the appreciation in the value of the property”. The damages would be easily calculated.
- [46] I recognize the points made by the Defendants regarding damages as an adequate alternative remedy.
- [47] However, an alternative claim for damages is not an absolute bar to the issuance of a CPL: *Karkoulis v. Karkoulis*, 2023 ONSC 499 (CanLII), at para. 46.
- [48] Having considered the various factors relating to the transaction, in my view, a CPL is warranted.
- [49] The Barrie Property is the very subject matter of the claim. The Property was purchased understanding that all parties would have an equal share in it. The parties all contributed an equal share. Even the Undertaking that was signed on consent was clearly drafted in a manner that reflected the interest all parties retained in the Property. The Undertaking contemplated that Ms. Lynch was not to sell, dispose or otherwise encumber the Property for a period of 2 years from the date of the Order.
- [50] While the Undertaking specified 2 years, it was clear that it was drafted in the hope that the matter would resolve or conclude within that period. The matter did not.
- [51] The Plaintiff points out that there is also a risk that Ms. Lynch could sell the Barrie Property and dissipate the assets/equity.
- [52] While Ms. Lynch indicates that she has no interest in selling the property, in my view that is not determinative of the issue. Indeed, if there is no intention to sell the property, I fail to see the harm suffered by Ms. Lynch if a CPL was granted. In the circumstances here, a CPL will have the effect of briefly extending the restriction that was set out in the Undertaking until the matter reaches trial.
- [53] Having regard to all the factors listed above, I am satisfied that a CPL should issue.

Disposition

- [54] Having regard to the above:

- a) Leave is granted to bring this motion notwithstanding the action already being set down for trial;
- b) An Order is granted authorizing issuance of a Certificate of Pending Litigation on the Barrie Property, and more particularly described in Schedule "A" to the Simplified Procedure Motion Form.

[55] On the issue of costs, I will accept a 1-page submission from each of the parties on the issue of costs. The Plaintiff has 2 weeks to provide submissions on costs. The Defendants have 1 week after receiving the Plaintiff's submission on costs to provide a response.



Justice C.F. de Sa

Date: May 6, 2024