

Case Name:
Jorg Trust v. Sussman

Between
The Jorg Trust and Marianne Reichert,
Appellants (Plaintiffs), and
Murray Sussman, Sandy Sussman, Mortgage Funding, Gordon
Gampbell, McFlow Capital Corp., the Premium Group and Andy
Pollack, Respondents (Defendants)

[2011] O.J. No. 161

2011 ONCA 45

Docket: C52228

Ontario Court of Appeal
Toronto, Ontario

K.M. Weiler, E.E. Gillese and R.A. Blair JJ.A.

Heard: January 12, 2011.
Oral judgment: January 12, 2011.
Released: January 19, 2011.

(9 paras.)

Civil litigation -- Civil procedure -- Pleadings -- Striking out pleadings or allegations -- Grounds -- Failure to disclose a cause of action or defence -- Injunctions -- Procedure -- Appeal by plaintiffs from striking of statement of claim and ancillary relief dismissed -- Plaintiff litigated defendants' refusal to renew mortgage -- On motion for interim relief, judge struck claim against personal defendant -- Judge granted plaintiffs' request for interim injunction enjoining enforcement on condition that plaintiffs pay renewal fee and make five payments -- Claim was properly struck, as there were no allegations that supported action against defendant personally beyond his capacity as representative of mortgagees -- Judge was entitled to impose payment condition as part of discretionary equitable remedy.

Real property law -- Proceedings -- Appeals and judicial review -- Practice and procedure -- Pleadings -- Injunctions -- Appeal by plaintiffs from striking of statement of claim and an-

cillary relief dismissed -- Plaintiff litigated defendants' refusal to renew mortgage -- On motion for interim relief, judge struck claim against personal defendant -- Judge granted plaintiffs' request for interim injunction enjoining enforcement on condition that plaintiffs pay renewal fee and make five payments -- Claim was properly struck, as there were no allegations that supported action against defendant personally beyond his capacity as representative of mortgagees -- Judge was entitled to impose payment condition as part of discretionary equitable remedy.

Appeal From:

On appeal from the order of Justice James M. Spence of the Superior Court of Justice dated May 11, 2010.

Counsel:

Hans Jorg Reichert for the Jorg Trust and Marianne Reichert, in person.

Hilary Book for the respondents, McFlow Capital Corp. and Andy Pollack.

Paul J. Daffern for the respondents Murray Sussman, Sandy Sussman and Mortgage Funding.

ENDORSEMENT

The following judgment was delivered by

1 THE COURT (orally):-- This appeal arises in the context of an action by The Jorg Trust and Mrs. Reichert (the "appellants") against the Mortgagees and Andy Pollack for damages arising out of the Mortgagees' refusal to renew a \$560,000 mortgage on property in Schomberg, Ontario. The main issue in the action is whether the Mortgagees did or did not agree to renew the mortgage.

2 There was a motion for interim relief of various kinds before Spence J. on May 11, 2010. He made two orders that are at issue on this appeal. First, he struck the appellants' claim against the respondent Andy Pollack personally, as disclosing no cause of action against him in his personal capacity. Secondly, while granting an interlocutory injunction restraining the Mortgagees from exercising their rights to enforce the mortgage prior to October 30, 2010, the motion judge imposed certain terms as a condition of that equitable relief being granted. The terms were that the appellants pay the requested renewal fee of \$22,000 and make five monthly payments of \$9,200 each to be applied against principal and interest. It is these orders that the appellants seek to set aside.

3 Although we understand the personal difficulties the underlying circumstances may have caused the appellants, the issues before us are quite narrow, and the appeal must be dismissed.

4 Whatever Mr. Pollack is alleged to have done or not to have done, there are no allegations in the statement of claim that would support an action against him personally in

that regard. As pleaded, the allegations amount to no more than a claim that he was acting in his capacity as a representative of the Mortgagees, not in any personal capacity.

5 An interlocutory injunction is a discretionary equitable remedy. In the circumstances, the motion judge was entitled to impose the conditions he did. As the motion judge said, the appellants "should not have a free ride." If, as they say, the mortgage has been renewed -- and the effect of the motion judge's order was to renew it for a further six months -- the renewal fee or some portion thereof (a condition or renewal) ought to be paid, and as long as the mortgage is outstanding, the mortgage payments required should be paid as well. Mr. Reichert says that the appellants have made these payments. He now asks that we order the amounts be paid back or paid into court. We would not accede to this request, as in our view it was open to the motion judge, as we have indicated, to impose those conditions as terms of granting the equitable relief he did.

6 The appellants asked us to issue a further injunction restraining the defendants from acting on the notice of sale pending the disposition of the trial. That requested relief is beyond the scope of this appeal, and, if it is to be pursued, is properly pursued at the Superior Court level.

7 The appellants made a number of other submissions, but they relate to the outstanding issues to be determined in the action concerning their claim for damages and to various admittedly difficult circumstances in which the Reicherts find themselves as a result of their problems with the property. These complaints do not relate to the issues we are asked to determine today.

8 The appeal is therefore dismissed.

9 Costs of the appeal are payable by the appellants to the respondents McFlow Capital and Andy Pollack in the amount of \$3,500 and to the respondent Sussman Group in the amount of \$2,500, both inclusive of disbursements and all applicable taxes.

K.M. WEILER J.A.
E.E. GILLESE J.A.
R.A. BLAIR J.A.

cp/e/qlrxg/qlvxw