CITATION: Nguyen v. Tong, 2022 ONSC 6251
COURT FILE NO.: CV-22-895 (London)
DATE: 20221103

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
Hiep Tan Nguyen	)	
	)	Yan David Payne, for the Applicant
Applicant	)	
– and –	)	
	)	
Quang Van Tong and Tri Quang Tong	)	
	)	Sandra Hsia, for the Respondents
Respondents	)	
	)	
	)	
	)	**HEARD:** September 2, 2022

RULING ON APPLICATION

DUBÉ J.

A. INTRODUCTION

[1] The applicant brings an application, in part, for:

a. An order that the property known as 2019 Pennyrole Street, Unit 12, London, Ontario, N5X 0E5 ("the Property") be sold, and

b. The net proceeds of the sale be paid into the court and that no money be distributed or paid out in accordance with the interests of the parties entitled to share in it except by order of a judge or, on a reference, by order of the referee after all necessary inquiries are made, accounts taken, and costs assessed.

[2] The respondents oppose the application, claiming that exceptional circumstances exist to deny the applicant's request that the Property be sold.

B. BACKGROUND

[3] My review of the background evidence is limited to those facts that are significant to the central issues, or that provide context necessary to appreciate and determine the relevant issues.

[4] The applicant, Hiep Tan Nguyen, is the son-in-law of the respondent Quang Van Tong (“Quang”) and the brother-in-law of the respondent Tri Quang Tong (“Tri”).

[5] The applicant is married to Quang’s daughter, Huong Thi Tong.

[6] In 2016, the applicant and his wife, together with Quang decided to buy a house. The understanding was that Quang and Tri would reside at the house and pay the mortgage and utilities.

[7] At the time, Tri wanted his wife to immigrate from Vietnam and was in the process of sponsoring her. To improve his sponsorship application, it was decided that he would go on title for the Property as well.

[8] The applicant and Quang signed an Agreement of Purchase and Sale (the “APS”) on November 28, 2016, for purchasing the Property, a pre-construction condominium. The net purchase price for the Property was $276,266.11. The closing took place on March 31, 2017.

[9] The respondents did not qualify for a mortgage, so the applicant agreed to co-sign the mortgage documents. The remainder of the closing funds was paid by a Scotiabank mortgage in the amount of $228, 297.

[10] Initially, the title in the Property was divided between all three parties as follows: 89 percent under Quang’s name, 10 percent under Tri’s name, and one percent under the applicant’s name. All parties hold title as tenants in common.

[11] On March 19, 2021, a transfer of title was conducted for consideration of $103,173, which had the effect of removing Tri from title and increasing the applicant’s share from one percent to 50 percent. The transfer also reduced Quang’s share from 89 percent to 50 percent. It appears that Tri had been removed earlier from the mortgage, although Quang remained.

[12] The respondents claim that the transfer of title was fraudulent and performed without their knowledge or consent. Also alleged is that they received no consideration when the title was transferred. The respondents believe that the transfer was allegedly conducted by way of the applicant’s wife (Quang’s daughter) fraudulently using a Power of Attorney purportedly executed by Quang and Tri.

[13] The relationship between the parties has obviously broken down.

[14] Since its completion, the respondents have resided at the Property and have serviced the mortgage payments and utilities bills. However, in December 2021, they stopped paying the mortgage but continued to pay the utilities. The applicant assumed paying the mortgage at this time, which comes due for renewal in November 2022.

[15] There is a writ outstanding on the Property by Toronto-Dominion Bank against Tri in the approximate amount of $30,000.

[16] Currently residing at the property is Quang, who is elderly, Tri, Tri's wife, and their five-year-old son.

[17] There is no family law relationship between the parties.

C. LEGAL PRINCIPLES

[18] Section 2 and 3(1) of the *Partition Act*, R.S.O. 1990, c. P.4 ("*Partition Act*") provides:

> **Who may be compelled to make partition or sale**
>
> **2** All joint tenants, tenants in common, and coparceners, all doweresses, and parties entitled to dower, tenants by curtesy, mortgagees or other creditors having liens on, and all parties interested in, to or out of, any land in Ontario, may be compelled to make or suffer partition or sale of the land, or any part thereof, whether the estate is legal and equitable or equitable only.
>
> **Who may bring action or make application for partition**
>
> **3(1)** Any person interested in land in Ontario, or the guardian of a minor entitled to the immediate possession of an estate therein, may bring an action or make an application for the partition of such land or for the sale thereof under the direction of the court if such sale is considered by the court to be more advantageous to the parties interested.

[19] In *Brienza v. Brienza,* 2014 ONSC 6942 ("*Brienza*"), Perrell J. summarized the applicable principles at paras. 22 to 25:

> Section 2 of the *Partition Act* states that a joint tenant or tenant in common may be compelled to make or suffer partition or sale. The general principles to determine when partition and sale should be granted were laid down in *Davis v. Davis*, [1954] O.R. 23 (C.A.), where the Court of Appeal stated:
>
>> There continues to be a *prima facie* right of a joint tenant to partition of sale of lands. There is a corresponding obligation on a joint tenant to permit partition or sale, and finally the Court should compel such partition or sale if no sufficient reason appears why such an order should not be made.
>
> The onus is on the party resisting partition or sale to demonstrate sufficient reasons for refusal: *Davis v. Davis, supra*; *Silva v. Bettencourt*, [2002] O.J. No. 1878 (S.C.J.).
>
> In cases after *Davis*, the Act has been interpreted to mean that the court has a very limited discretion to refuse an application for partition or sale: *Silva v. Silva,* [1990] O.J. No. 2183*, supra*; *Hay v. Gooderham* (1979), 24 O.R.

> (2d) 701 (Div. Ct.); *Garfella Apartments Inc. v. Chouduri,* [2010] O.J. No. 2900 (Div. Ct.).
>
> Only in exceptional circumstances will a joint tenant or tenant in common be denied his or her request that the property be partitioned or sold. The court's discretion to refuse partition and sale is narrow, and there must be malicious, vexatious or oppressive conduct to justify the refusal to grant partition and sale: *Silva v. Silva, supra*; *Osborne v. Myette*, [2004] O.J. No. 3383 (S.C.J.); *Latcham v. Latcham*, [2002] O.J. No. 2126 (C.A.), affg. [2001] O.J. No. 5291 (Div. Ct.); *Fellows v. Lunkenheimer* (1998), 21 R.P.R. (3d) 142 (Ont. Gen. Div.); *Kalita v. Freskiw Estate*, [1998] O.J. No. 5180 (Gen. Div.); *Jakubiszyn v. Tekielak*, [1991] O.J. No. 2362 (Gen. Div.); *Garfella Apartments Inc. v. Chouduri, supra*.

[See also *Billimoria v. Mistry*, 2022 ONCA 276, at para. 38; *Duskocy v. Duskocy*, 2017 ONSC 4479, at paras. 8-9.]

[20] *Partition Act* proceedings are governed by Rule 66 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, which provides:

> **WHERE AVAILABLE**
>
> **66.01(1)** A person who is entitled to compel partition of land may commence an action or application under the *Partition Act*.
>
> **…**
>
> **FORM OF JUDGMENT**
>
> **66.02** A judgment for partition or sale shall be in Form 66A.
>
> **PROCEEDS OF SALE**
>
> **66.03** All money realized in a partition proceeding from sale of land shall forthwith be paid into court, unless the parties agree otherwise, and no money shall be distributed or paid out except by order of a judge or, on a reference, by order of the referee.

D. ANALYSIS

[21] The respondents submit that there are serious issues regarding the applicant’s ownership in the Property that need to be settled before a sale is ordered.

[22] The first issue is with respect to the applicant allegedly obtaining a 50 percent interest in the Property as a result of fraudulently using documents purported to be Power of Attorney of the respondents.

[23] Second, there is an issue as to whether the applicant is even a beneficial owner of the Property. The applicant initially held only a one percent interest in the Property and co-signed the mortgage for the sole purpose of assisting the respondent to qualify for a

mortgage: see Tri's affidavit, sworn August 4, 2022. Since that time, the applicant has not contributed to mortgage payments or any other carrying costs for the Property and allegedly did not contribute to the down payment. As a result, an order under the *Partition Act* should not be made if a party has made a claim that disputes ownership of the party and the claim is serious enough to raise a genuine issue requiring a trial: see *Investissements Aperdev Inc. v. Gestions Remer Inc.*, [2006] O.J. No. 2632 (SCJ), 2006 CanLII 22113 (ON SC) at para. 14; *Glass v. 618717 Ontario Inc.*, 2011 ONSC 606, at paras. 36-37.

[24] I am satisfied that pursuant to s. 3(1) of the *Partition Act*, the applicant is a "person interested in land in Ontario" and therefore "may … make an application … for the sale thereof under the direction of the court …" The respondents submit that not only did the applicant fraudulently obtain his current 50 percent interest, but he was also not a beneficial owner based on his initial one percent share. I disagree. I am satisfied under the circumstances, that the applicant has standing under the *Partition Act* to bring an application for the sale of the property. By keeping the applicant on title as a tenant in common since 2017, the respondents ran the risk of an application being brought for the partition and sale of the Property even though the purpose was to assist the respondents qualify for a mortgage. Considering the limited purpose for which the applicant was placed on title, the respondents could have easily eliminated the risk of an application by way of a contractual agreement. An agreement would have crystalized the nature of the relationship between the parties and address the concerns now raised by the respondents, since it takes precedence over the right for partition or sale under the *Partition Act*: see *Brienza*, at paras. 33-34. When the Property was purchased, the respondents took no steps to contractually define what interest, if any, the applicant was intended to have in the Property. As it stands now, without an agreement stating otherwise, the applicant's ownership interest in the Property is at least one percent.

[25] Both the applicant and Tri claimed that they were responsible for sizeable payments towards the purchase of the Property. According to Tri's affidavit, sworn August 4, 2022, he deposed that his stepmother contributed $60,000 towards the purchase price. The applicant claimed in his affidavit, sworn June 13, 2022, that he paid $59,852.95, which included a $14,000 down payment, of which $2,548.63 was returned to him after closing. He further stated that he provided the real estate lawyer with a bank draft for $48,401.58. Given the difference between the purchase price and the mortgage, only one party was the source of these funds – but since both claims are unverified, I am unable to determine whether that person was Tri or the applicant.

[26] In any event, I am satisfied that the applicant has a *prima facie* right to statutorily compel the sale of the Property as a result of being a co-signer on the mortgage: see Donald J. Donahue, Peter D. Quinn & Danny C. Grandilli, *Real Estate Practice in Ontario*, 8th ed (Toronto: LexisNexis Canada, 2016) at p. 91. Over the years, the applicant assumed the risks associated with being a co-signer on the mortgage and, as I will explain later in my decision, because the respondents unilaterally and without notice to the applicant stopped paying the mortgage, the applicant is now responsible for making those payments.

[27] In sum, based on the applicant's interest in the Property as a tenant in common, together with being a mortgage co-signer who is currently making mortgage payments, I am not satisfied that the claim for sole ownership of the disputed property is sufficiently serious to raise a genuine issue for trial: see *Ames v. Bond*, [1992] O.J. No. 3614 (C.A.), 39 R.F.L. (3d) 375 ("*Ames*"), at para. 2.

[28] Instead, as opposed to a claim for sole ownership, the real issue for trial is determining the percentage of ownership each party has in the Property. In this regard, does the applicant and Quang each have a 50 percent ownership interest and Tri zero percent, as the applicant claims, or, accordingly to the respondents, does Quang own 89 percent, Tri 10 percent, and the applicant a one percent interest? Considering the nature of the proceedings, including the serious allegation of fraud and the deteriorating relationship among the parties, I am satisfied that the sale of the Property would have been the inevitable result of a trial: see *Ames*, at para. 2.

[29] The respondents argue also that the alleged fraudulent transfer of title amounts to malicious, oppressive, or vexatious intent by the applicant, and therefore I ought not order that the Property be sold. I disagree. There appears to be a tenuous relationship between the transfer of title and the application under the *Partition Act*. In fact, what prompted the application was the applicant discovering that the respondents were no longer paying the mortgage payments. Accordingly, even if I were satisfied that the alleged fraudulent transfer of title was malicious, oppressive, or vexatious, which I am not, I do not find that this motivated the application.

[30] I also do not find that the respondents will be prejudiced by the sale of the Property. While the respondents commenced a claim with Stewart Title on January 19, 2022, and are awaiting a determination, any issues that arise with respect to the alleged fraudulent transfer and ownership of the Property can be dealt with by a court before the proceeds are released, once there has been a taking of accounts.

[31] The respondents also assert that the sale of the Property will amount to oppression, which includes hardship because elderly Quang, Tri, Tri's wife, and five-year-old son face the uncertainty of being uprooted from the Property and may then be forced to relocate to a new residence: see *Greenbanktree Power Corp v. Coinamatic Canada Inc.*, (2004), 75 O.R. (3d) 478, [2004] O.J. No. 5158, at para. 2. As noted above, the court has very limited discretion to refuse an application for sale, and the onus is on the party resisting the sale to demonstrate sufficient reasons for refusal. In certain circumstances, a court may consider exercising its discretion not to grant the sale but that is only "where there is a preponderance of evidence to indicate serious hardship would result to the respondent in the event that the order was granted:" see *Re MacDonald and MacDonald* (1977), 14 O.R. (2d) 249 (Div. Ct.), 73 D.L.R. (3d) 341 ("*MacDonald*"), at p. 4.

[32] In *Economopoulos (Re)*, 2014 ONCA 687, the Court of Appeal for Ontario affirmed the narrow discretion afforded to trial judges in refusing to order a sale under the *Partition Act* at paras. 89-90:

> This court has affirmed the strength of that *prima facie* statutory right, holding that the courts have only a narrow discretion to refuse to make such an order. The scope of the court's discretion to refuse to make an order of petition or sale is limited to circumstances of malice, oppression and vexatious intent. See *Greenbanktree Power Corp. v. Coinamatic Canada Inc.* (2004), 75 O.R. (3d) 478, 193 O.A.C. 204 (C.A.), at paras. 1-2.
>
> It goes without saying that the rights of other parties interested in the land can be affected by the partition or sale of the land. Nonetheless, in the words of s. 2 of the *Partition Act*, they may be compelled to "suffer" partition or sale.

[33] In this case, there is no evidence before me that the respondents or family members residing at the Property would suffer anything other than the inconvenience of having to move and find a new residence, and certainly no evidence of hardship, let alone serious hardship: see *MacDonald*, at p. 4. At most, the respondents and family members are primarily concerned with being "dislocated" by the sale (Tri's affidavit, para. 9, sworn August 26, 2022), rather than lacking the financial means to find a new residence. In fact, from the evidence, it appears that the respondents not only had the means to make mortgage payments for several years, but they also attempted to refinance a new mortgage on the Property shortly after they discovered the alleged fraudulent transfer of title by the applicant (Tri's affidavit, para. 6, sworn August 26, 2022).

[34] If anything, I find that it is the applicant who likely will experience some hardship if the Property is not sold because he assumed responsibility for paying the mortgage after the respondents failed to do so. Since that time, the respondents have remained in the Property rent-free. Although the respondents offered to resume paying the mortgage, the applicant is reluctant to allow them to do so given the history and the real possibility that the respondents may again refuse to make the mortgage payments in this highly contentious matter. I do not find the applicant's position to be unreasonable.

[35] Tri claims that he and Quang intended to continue to make mortgage payments but were advised by the bank shortly after discovering the applicant became the main borrower of the mortgage that the payments would come out of the applicant's bank account instead of their account (Tri's affidavit, sworn August 26, 2022). However, I find based on the banking evidence, including the charges for non-sufficient funds incurred by the respondents, that the respondents unilaterally and without notice to the applicant, intentionally stopped making payments on the mortgage (applicant's affidavit, sworn August 29, 2022). While I will not exercise my discretion in favour of the respondents to prevent the sale of the Property, I have decided that to mitigate some of the negative consequences associated with their relocation, I will extend the closing date and order the immediate release of funds to the respondent, Quang, from the net proceeds of the sale.

[36] Finally, the respondents submit that considering the applicant engaged in an alleged fraudulent transfer of title, the Property ought not to be sold because the applicant has not

come to court with clean hands. In *Brienza*, Perell J. considered the doctrine of unclean hands in a case that involved the plaintiff sending a series of "threatening and vulgar text messages" that was designed to make the defendant, his sister, believe he was going to expose supposed wrongdoings by her as a mortgage broker and ruin her career. Although less serious than fraudulently transferring title, Perell J., said this about the general applicability of the doctrine in cases coming under the *Partition Act* at para. 30:

> Similarly, Gianluca's bad conduct, if it can be called having unclean hands, does not preclude the court granting the statutory remedy of partition and sale. In other words, the doctrine of unclean hands, which is usually associated with the court's discretion to refuse an equitable remedy, does not add anything or change the law established by the Court of Appeal about the court's limited discretion to refuse partition and sale.

[37] I agree with Perell J. that the equitable doctrine of clean hands has limited applicability when dealing with the statutory remedy of partition and sale, at least in the circumstances of the present case. Therefore, coming to court with unclean hands is not itself a factor that I will consider regarding the sale of the Property under the *Partition Act*.

E. CONCLUSION

[38] In conclusion, I am satisfied, based on the evidence and my very limited discretion, that there are no extraordinary circumstances to deny the applicant's request to sell the Property.

[39] Pursuant to r. 1.06(2) of the *Rules of Civil Procedure*, the judgment for sale as set out in Form 66A, pursuant to r. 66.02, will be amended as required to fit the circumstances of this case.

[40] Accordingly, there will be an order to go as follows:

a. An order that the property known as 2019 Pennyrole Street, Unit 12, London, Ontario, N5X 0E5 shall be sold.

b. From the sale proceeds, the following shall be paid:

1. The mortgage of the property;
2. Real estate commission;
3. Legal fees related to the sale;
4. Outstanding taxes or encumbrances against the property; and
5. Any other amounts as the parties may agree to in writing.

c. An order that from the proceeds of the sale, net of the payments described in (b) above, $10,000, or what if anything remains of the proceeds, shall be paid directly to the respondent, Quang Van Tong.

d. An order that the remaining net proceeds of the sale shall be paid into court and no money shall be distributed or paid out except by order of a judge or, on a reference, by order of the referee.

e. An order that Hiep Tan Nguyen, Quang Van Tong and Tri Quang Tong's interest in the net sale proceeds of the Property paid into court shall be determined by way of a trial of an issue.

f. An order that all necessary inquiries be made, accounts taken, costs assessed, and steps taken by a Justice of the Superior Court of Justice or referee at London, Ontario, for the sale of the Property in accordance with the interests of the parties entitled to share in it.

g. An order that if the proceeds of the sale of the remainder are insufficient to pay the costs of the sale in full, the unpaid costs be paid by the parties according to their interests in the land.

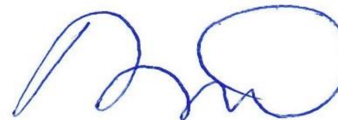
h. An order that the applicant have carriage of the sale and that the closing date of the sale of the Property will take place no earlier than 90 days after the signing of the Agreement of the Purchase and Sale.

i. An order that the respondents shall reasonably co-operate with the applicant and participate in the preparation of the sale of the Property and the conduct of the sale herein.

j. Any part of this order may be amended if the parties, Hiep Tan Nguyen, Quang Van Tong and Tri Quang Tong, all agree to do so in writing.

F. COSTS

[41] The issue of costs can be addressed in writing. If the parties do not reach an agreement as to costs, then the applicant's written submissions consisting of no more than five pages in length, exclusive of the bill of costs, are to be filed within 30 days of the date of the release of this decision. The respondents' submissions consisting of no more than five pages in length, exclusive of the bill of costs, are to be filed within 15 days thereafter and the applicant's reply submissions, consisting of no more than two pages, are to be filed 15 days after that.



Brian D. Dubé
Justice

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