

MEMBRE DU
MODIFIÉ CE

RÈGLE LA RÈGLE 26.02

THE ORDER OF
L'ORDONNANCE DU

DATE / FAIT

LOCAL REGISTRAR
SUPERIOR COURT OF JUSTICE (Seal)

PURSUANT TO
CONFORMÉMENT À

BETWEEN

ESTRIER LOCAL
COURT SUPERIEURE DE JUSTICE

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BDO CANADA LIMITED IN ITS CAPACITY AS TRUSTEE OF THE ESTATE
OF 2283942 ONTARIO INC., A BANKRUPT

Plaintiff

and

SHIU KWAN LO AND SONS LTD., 2433591 ONTARIO INC.,
2435982 ONTARIO INC. and HERMAN KUANG

Defendants

AMENDED STATEMENT OF CLAIM

TO THE DEFENDANT

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff.
The Claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a Statement of Defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the Plaintiff's lawyer or, where the Plaintiff does not have a lawyer, serve it on the Plaintiff, and file it, with proof of service in this court office, WITHIN TWENTY DAYS after this Statement of Claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your Statement of Defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a Statement of Defence, you may serve and file a Notice of Intent to Defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your Statement of Defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date "October 9, 2014" Issued by Sylvia Slaunwhite
Registrar, Superior Court of Justice
"signed by Local Registrar" For J. GATTI
Local Registrar

Address of court office: 393 University Avenue, 10th Floor
Toronto, Ontario
M5G 1E6

TO: Shiu Kwan Lo and Sons Ltd.
c/o Chan & Co. Professional Corporation
Attn: Man Yi Kan
1200 Sheppard Avenue East, Suite 103
Toronto, Ontario
M2K 2R8

AND TO: 2433591 Ontario Inc.
4168 Finch Avenue East, Suite 308
Toronto, Ontario
M1S 5H6

AND TO: 2435982 Ontario Inc.
30 Wertheim Court, Suite 8
Richmond Hill, Ontario
L4B 1B9

AND TO: Herman Kuang
4168 Finch Avenue East, Suite 308
Toronto, Ontario
M1S 5H6

CLAIM

1. The Plaintiff claims

- (a) a Declaration that instrument No. AT3705439 is fraudulent and void and of no effect;
- (b) an Order directing the Registrar of Titles to delete instrument No. AT3705439 from title to the property located at 3320-3330 Midland Avenue, Toronto, ON, and bearing PIN No. 06020-0033 (LT);
- (c) an Order directing the Registrar of Titles to delete instrument No AT3705440 from title to the property located at 3320-3330 Midland Avenue, Toronto, ON, and bearing PIN No. 06020-0033 (LT);
- (d) leave to issue a Certificate of Pending Litigation as against the property described in Schedule A attached hereto.

~~an Order that the plaintiff be allowed to redeem mortgage No. AT3012559 as amended by AT3506673 by payment into Court of the sum of \$2,608,164.40, and upon payment into Court of the said sum that instrument No. AT3012559 and AT3506673 be deleted from the Registrar of the property;~~

- (e) in the alternative to (a) to (d) above, an accounting of the proceeds of sale received by the defendant 2433591 Ontario Inc. from the sale of the property known municipally as 3320-3330 Midland Avenue, in the City of Toronto, to the defendant 2435982 Ontario Inc.;

~~(e)~~(f) in the alternative to (a) to (e) above, damages in the amount of \$4,340,000;

~~(f)~~(g) punitive, exemplary and aggravated damages in the amount of \$5,000,000.00;

~~(g)~~(h) pre-judgment interest in accordance with the *Courts of Justice Act*;

~~(h)~~(i) their costs of this action on a complete indemnity basis;

~~(i)~~(j) In an order that interest on Mortgage No. AT3012559 as amended by AT3506673 terminate as of the 18th day of September, 2014, the date the plaintiff requested a mortgage statement for discharge purposes.

2. The plaintiff is a corporation incorporated under the laws of the Province of Ontario, and was at all material times the registered owner of the property 3320-3330 Midland Avenue, in the City of Toronto, and is the mortgagor of the said property under the mortgage bearing the Instrument No. AT3012559.
3. The defendant, Shiu Kwan Lo and Sons Ltd., is a corporation incorporated under the Laws of the Province of Ontario, and was at all material times the mortgagee of Mortgage No. AT3012559 as amended by instrument No. AT 3506673.
4. The defendant, 2433591 Ontario Inc., is a corporation incorporated under the Laws of the Province of Ontario, and purported to become the registered owner of Charge No. AT3012559 by Transfer of Charge bearing Instrument No. AT3688895.
5. The defendant, 2435982 Ontario Inc., is a corporation incorporated under the laws of the Province of Ontario, and purported to be the purchaser of the property under Power of Sale from the defendant, 2433591 Ontario Inc. by Instrument No. AT3705439.

6. 2435982 Ontario Inc. gave back a Vendor Take back mortgage to the defendant, 2433591 Ontario Inc., in the amount of \$4,000,000.00.
7. The defendant, Herman Kuang, is the controlling mind of the defendant companies, 2433591 Ontario Inc., and 2435982 Ontario Inc., thereby being the controlling mind for both the seller and purchaser of the said property pursuant to the Power of Sale;
8. The plaintiff purchased the property located at 3320-3330 Midland Avenue, in the City of Toronto, from the defendant, Shiu Kwan Lo and Sons Ltd. in May of 2012. The purchase price for the said property at the time was \$5,680,000.00, and at the time the plaintiff gave a vendor take back mortgage to the said defendant in the amount of \$4,000,000.00. This mortgage was due on May 9, 2013.
9. The mortgage was not paid off by that date, and the parties entered into an extension agreement which was registered on title on January 27, 2014 by instrument No. AT3506673.
10. The plaintiff paid an additional sum of \$1,500,000.00 to the defendant, Shiu Kwan Lo and Sons Ltd., thereby reducing the principal balance to \$2,500,000.00. The mortgage was due and payable in June of 2014.
11. Because of environmental issues, the plaintiff was unable to obtain financing in June of 2014 and on the 22nd day of July, 2014, the defendant, Shiu Kwan Lo and Sons Ltd., issued a Notice of Sale Under Mortgage. The said Notice of Sale Under Mortgage provided the following:

“And unless the said sums are paid on or before the 15th day of September 2014, Shiu Kwan Lo and Sons Ltd. shall sell the property covered by the said mortgage under the provisions contained in it.”

12. This Notice was served in accordance with the *Mortgages Act* at the address for service of the plaintiff contained in the mortgage.

~~12.~~13. The defendant, Shiu Kwan Lo and Sons Ltd. failed to give a notice pursuant to section 244 of the *Bankruptcy and Insolvency Act*. The Plaintiff pleads that any subsequent sale of the subject property is void as a result of this failure.

~~13.~~14. Notwithstanding that the notice period expired after September 15, 2014, the defendant, Shiu Kwan Lo and Sons Ltd., purported to list the property for sale on or about September 8, 2014, contrary to the provisions of Section 42 of the *Mortgages Act*.

14.15. The plaintiff states that by listing the property for sale during the said notice period the actions of the plaintiff voided the Notice of Sale that was given, and any action taken under the said Notice of Sale would therefore be improper.

~~15.~~16. The defendant, Shiu Kwan Lo and Sons Ltd., then first suspended the listing and then terminated the listing on or about September 12, 2014.

~~16.~~17. On or about the 15th day of September, 2014, during the notice period, the defendant, Shiu Kwan Lo and Sons Ltd., purported to transfer the Charge to the defendant, 2433591 Ontario Inc. for a named consideration of \$2,608,164.40. The defendant, 2433591 Ontario Inc., never provided Notice of the Assignment to the plaintiff or to the guarantors of the mortgage.

~~17.~~18. By email dated September 16, 2014, the lawyer for Shiu Kwan Lo and Sons Ltd. purported to notify the plaintiff of the transfer of Charge. The plaintiff states that the said email did not constitute notice as required by the *Conveyancing and Law of Property Act*, Section 53, and accordingly the transfer was not properly assigned. The said Notice, while being sent

by email to a director of the corporation was not sent to the corporation at its address for service, and the said Notice provided an incorrect address for the assignee of the mortgage, thereby rendering it void. The lawyer for the assignor, however, electronically signed the Assignment of Mortgage on behalf of both the assignor and assignee indicating he was acting for both parties.

~~18-19.~~ On or about the 18th day of September, 2014, the plaintiff was in a position to redeem the mortgage. On that date, its lawyer sent a letter to the lawyer for the mortgagor, Henry K. Hui, asking for a discharge statement. Mr. Hui was the lawyer for the assignor, and also electronically signed the Transfer of Charge on behalf of the assignee.

~~19-20.~~ On the 19th day of September, 2014, Mr. Hui replied to the plaintiff's lawyer that the mortgage had been assigned and that the plaintiff was to contact Mr. Herman Kuang for discharge purposes.

~~20-21.~~ By email dated September 22, 2014, the plaintiff wrote to Mr. Herman Kuang and asked for a discharge. No discharge was forthcoming.

~~21-22.~~ The Plaintiff's solicitor then emailed requests for discharge on the 23rd, 24th and 25th of September, 2014. On September 26th, 2014, Herman Kuang replied by email claiming to have been advised that pursuant to Section 22 of the *Mortgages Act*, he had 15 days to respond to a request for discharge statement, and that he would wait for his lawyer's availability to provide a statement.

~~22-23.~~ On Friday, the 26th day of September, 2014, the plaintiff offered to pay to the defendant interest at the rate of 18% per annum to the end of the 15th day period from the time that he

claimed to have been served with the request for a discharge statement in order that the transaction close immediately and that they be allowed to redeem their mortgage. The said defendant advised that he would be in touch with his lawyer, and would reply shortly.

~~23~~.24. On the 1st of October, 2014, the plaintiff once again requested the discharge statement from the defendant, Herman Kuang, and he advised that his lawyer would reply the next day.

~~24~~.25. Notwithstanding the representation set out above by the defendants, Herman Kuang and 2433591 Ontario Inc., which representation the plaintiff relied upon, the defendants, Herman Kuang and 2433591 Ontario Inc., purported to sell the property by power of sale on October 2, 2014. The said Transfer under power of sale was registered as Instrument No. AT3705439 in favour of 2435982 Ontario Inc.

~~25~~.26. The plaintiff states that the said Transfer was done fraudulently so as to deprive the plaintiff of its right to redeem the mortgage. The actions of the defendants, Herman Kuang and 2433591 Ontario Inc., in transferring the property was for the purpose of depriving the plaintiff its right to redeem the mortgage and was done fraudulently.

~~26~~.27. The plaintiff states that the defendant, 2435982 Ontario Inc., is not a *bonafide* purchaser for value of the property from the defendant, 2433591 Ontario Inc., and that it was a company related to the said defendant, 2433591 Ontario Inc. The plaintiff states that any knowledge of 2433591 Ontario Inc. is thereby knowledge of 2435982 Ontario Inc.

~~27~~.28. On the said Transfer under Power of Sale, the following qualified statements appear:

“The document is authorized under the charge and the *Mortgages Act*.

The sale proceedings and transfer comply with the charge, the *Mortgages Act*, and if applicable the *Bankruptcy and Insolvency Act* (Canada), the *Condominium Act*, the *Construction Lien Act* and the *Farm Debt Mediation Act* (Canada).

The charge was in default at the time Notice of Sale was given and continues to be in default and the money has been advanced under the charge.

Notice of the transfer of charge and the address for the new charge, was served on the registered owner(s) as well as all of the parties having any interest in the land and the charge was in default when the charge entered into an agreement of purchase and sale of the charge and continues to remain in default.

This transaction is not subject to any writs of execution.

Title to the land is not subject to spousal rights under the *Family Law Act*.

Schedule: Notice of Sale was given on July 22, 2014. The Notice of Sale was issued by the original mortgagee/Assignor Shiu Kwan Lo and Sons Ltd. and the sale is carried out by the current mortgagee/assignee 2433591 Ontario Inc.”

28.29. The plaintiff states that the said statements are false, and were made fraudulently so as to deprive the plaintiff of its right to redeem the mortgage. The statements that are false are:

- (a) that the sale proceedings complied with the *Mortgages Act* in that by listing the property for sale during the notice period, and assigning the mortgage during the notice period, the said actions did not comply with the provisions of the *Mortgages Act*, and accordingly rendered the Notice of Sale void.
- (b) In addition, no notice was given under *Bankruptcy and Insolvency Act* (Canada), as required.

(c) Also the said statement said that Notice of the transfer of charge and the address for the new charge, was served on the registered owner(s) when in fact this statement is false.

29.30. The plaintiff states that the Defendant, 2435982 Ontario Inc., was at all material times aware that the said statements were false.

30.31. The plaintiff pleads and relies upon sections 22 and 23 of the *Mortgages Act* and states that the defendant, 2433591 Ontario Inc., purported to sell the property after the plaintiff had requested mortgage statements for discharge purposes contrary to the said sections.

31.32. The plaintiff states that the Defendants, 2433591 Ontario Inc. and 2435982 Ontario Inc., are not entitled to rely upon Section 36 of the *Mortgages Act*.

33. The plaintiff states that the Transfer of the property so as to defeat the plaintiff's right to redeem was done as part of a conspiracy to extort money from the said plaintiff and to defraud the plaintiff of its right to the property. Accordingly, the actions are worthy of award of punitive, exemplary, and aggravated damages.

34. In the alternative, the plaintiff claims an accounting of the proceeds of sale received by the defendant 2433591 Ontario Inc. from the sale of 3320-3330 Midland Avenue, in the City of Toronto, to the defendant 2435982 Ontario Inc. and damages in the amount of \$4,340,000.

35. On October 2, 2014, the defendant 2433591 Ontario Inc. purported to sell 3320-3330 Midland Avenue, in the City of Toronto, to the defendant 2435982 Ontario Inc. under power of sale. The defendant 2433591 Ontario Inc. has not accounted to the plaintiff for

the proceeds of sale received by 2433591 Ontario Inc. and has not paid the surplus, after payment of the amount owed by the plaintiff to 2433591 Ontario Inc., to the plaintiff.

32.36. At the time of the transfer of 3320-3330 Midland Avenue, in the City of Toronto to the defendant 2435982 Ontario Inc., the property had an appraised value of \$6,870,000. At this time, the balance owing on Mortgage No. AT3012559 as amended by instrument No. AT3506673 was \$2,500,000. The plaintiff pleads that the defendants are jointly and severally liable for the difference between the amount owed on the mortgage and the value of the property.

THE PLAINTIFF proposes that this action be tried at the City of Toronto.

"October 9, 2014"

ROGER A. GOSBEE (LSUC # 19892K)
Barrister & Solicitor
94 Pathlane Road
Richmond Hill, Ontario
L4B 4C7

Tel: (905) 882-2559
Fax: (905) 882-9142

PALLET VALO LLP
Lawyers & Trade-Mark Agents
77 City Centre Drive, West Tower
Suite 300
Mississauga, Ontario
L5B 1M5

WOJTEK JASKIEWICZ (LSUC # 49809L)
Tel: (905) 273-3300
Fax: (905) 273-6920

Lawyers for the Plaintiff

Schedule A

Pin No.: 06020-0033 (LT)

Property Description: PCLS 10-1 & 11-1, SECT M2022 LOTS 10 & 11, PL 661M2022; SUBJ TO
COVENANT & RESTRICTION AS IN C183383 SCARBOROUGH, CITY OF TORONTO

2283942 ONTARIO INC.
Plaintiff

-and- SHIU KWAN LO AND SONS LTD et al.
Defendants

Court File No. CV-14-513935

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

AMENDED STATEMENT OF CLAIM

ROGER A. GOSBEE
Barrister & Solicitor
94 Pathlane Road
Richmond Hill, Ontario
L4B 4G7
Tel: (905) 882-2559
Fax: (905) 882-9142

PALETT VALO LLP
Lawyers & Trade-Mark Agents
77 City Centre Drive, West Tower
Suite 300
Mississauga, ON L5B 1M5

WOJTEK JASKIEWICZ (LSUC # 498091L)
Tel: (905) 273-3300
Fax: (905) 273-6920

Lawyers for the Plaintiff