

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

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

**FRESH AS AMENDED REPLY AND DEFENCE TO COUNTERCLAIM TO
THE STATEMENT OF DEFENCE AND COUNTERCLAIM OF THE
DEFENDANT, 2433591 ONTARIO INC.**

REPLY

1. The Plaintiff admits the allegations contained in paragraphs 5, 11, 12, 13, 23, 24, 25, 26 and 29 of the Statement of Defence and Counterclaim.
2. The Plaintiff denies the allegations contained all of the remaining paragraphs of the Statement of Defence and Counterclaim and denies that the defendant 2433591 Ontario Inc. (the “Assignee”) is entitled to the relief sought in paragraph 22 of the Statement of Defence and Counterclaim.
3. Contrary to the allegations contained in paragraph 1 of the Statement of Defence and Counterclaim the Assignee and the defendant 2435982 Ontario Inc. (the “Purchaser”) were aware that:

- (a) The Plaintiff had financing available to it to discharge the mortgage which was held by the Assignee (the "**Mortgage**");
 - (b) The Plaintiff requested a discharge statement prior to the transfer of the Property known municipally as 3320-3330 Midland Avenue, Toronto, Ontario (the "**Property**") from the Assignee to the Purchaser;
 - (c) The Assignee failed to provide a discharge statement to the Plaintiff; and
 - (d) The power of sale proceedings had been rendered defective by virtue of Shiu Kwan Lo and Sons Ltd. having listed the Property for sale before the expiry of the Notice of Sale period and prior to the transfer of the mortgage to the Assignee.
4. Contrary to the allegation contained in paragraph 1 of the Statement of Defence and Counterclaim the Property was not sold for fair market value. The Assignee, the Purchaser and the defendant Herman Kuang ("**Kuang**") deliberately failed to list the Property for sale, obtain an appraisal or to test the open market and instead incorporated the Assignee and the Purchaser for the sole purpose of taking an assignment of the mortgage in order to do a "quick flip" of the Property between related companies.
5. Further the Assignee made no attempt to obtain a cash deal and instead entered into a transaction where the majority of the purchase price was paid via a vendor take back mortgage (the "**VTB**") so as not to pay any equity to the Plaintiff. A higher purchaser price would have been obtained but for these failures on the part of Kuang and the Assignee.
6. The sale purpose of the VTB was to deprive the Bankrupt of the equity in the Property above and beyond the amount owed under the mortgage.

7. The Plaintiff pleads that none of the factors set out in paragraph 2 and 32 of the Statement of Defence and Counterclaim would affect the value of the Property even if such factors existed, which is not admitted and is in fact denied
8. Contrary to the allegations contained in paragraph 4 of the Statement of Defence and Counterclaim the Plaintiff has not delayed this matter. None of the defendants responded to the Statement of Claim. The Plaintiff was forced to bring a motion for substituted service in order to serve the Amended Statement of Claim on Kuang. None of the defendants responded to the Amended Statement of Claim and Kuang, the Assignee and the Purchaser were all noted in default. It was only following the noting in default Kuang and the Assignee retained counsel and served defences. Any delay was caused by Kuang, the Assignee and the Purchaser.
9. Contrary to the allegations contained in paragraphs 6 and 7 of the Statement of Defence and Counterclaim 2283942 Ontario Inc. (the "**Bankrupt**") arranged for financing and had funds available to it to discharge the Mortgage. As set out in paragraphs 21 to 24 of the Amended Statement of Claim, the Bankrupt repeatedly contacted Kuang to request a discharge statement for the Mortgage. Despite these requests, Kuang and the Assignee failed to provide a discharge statement and on October 2, 2014, Kuang caused the Assignee to transfer the Property at undervalue to the Purchaser, a related company.
10. Contrary to the allegation contained in paragraph 14 of the Statement of Defence and Counterclaim, on September 18, 2014, it was not too late for the Bankrupt to redeem the Mortgage and the time to redeem the Mortgage had not expired. The Plaintiff pleads that

no binding agreement of purchase and sale had been entered into prior to September 18, 2014, and accordingly the right to redeem had not been extinguished.

11. Contrary to the allegation contained in paragraph 15 of the Statement of Defence and Counterclaim the transfer of the Property from the Assignee to the Purchaser was not an arm's length transaction. The Assignee and the Purchaser are related companies. The principal of the Purchaser and the lawyer for the Purchaser is Diana Young ("**Young**"). Young and Kuang are spouses and business associates of one another.
12. The Assignee, the Purchaser, Kuang and Young were all aware that the Bankrupt was ready, willing, and able to redeem the Mortgage. The transfer of the Property from the Assignee to the Purchaser was done in an attempt to defeat the Bankrupt's right to redeem and at under fair market value.
13. Contrary to the allegation contained in paragraph 17 and 18 of the Statement of Defence and Counterclaim, the failure by Kuang and the Assignee to provide a discharge statement when the Bankrupt requested one is not a technical defect. The effect was to deny the Bankrupt its right to redeem the Mortgage. The Plaintiff pleads that this failure was deliberate and not inadvertent or unintentional.

DEFENCE TO COUNTERCLAIM

14. The Plaintiff repeats and relies upon the allegations in its Statement of Claim and the Reply herein.

15. On October 2, 2014, the Assignee transferred the Property under power of sale to the Purchaser. Part of the consideration paid by the Purchaser was the VTB, which was registered against title to the Property as Instrument No. AT3705440.
16. On or about January 21, 2015, the Plaintiff, the Purchaser and Young consented to an order (the “**Order**”) which provided, among other terms, that the Assignee undertakes to provide the Plaintiff with reasonable advance notice of any payment that will be made toward the interest or principal on the VTB.
17. The Plaintiff pleads that the counterclaim, and in particular paragraphs 22, 29, 30, and 31 of the counterclaim, is a collateral attack on the Order. The appropriate recourse for the Assignee to challenge the Order is to bring a motion to vary or amend the Order.
18. The Plaintiff denies the allegations contained in paragraphs 33, 34 and 37 of the Statement of Defence and Counterclaim that the Bankrupt communicated untruthful information to tenants, occupants, guests, visitors or service providers to the Property, encouraged tenants not to pay rent, provided forged documents to tenants, or interfered with the use of rents received by the Purchaser. In the alternative, if the facts as alleged in these paragraphs are true, which is expressly denied, the Assignee has no cause of action arising from these facts and suffered no damages. The Assignee was no longer the owner of the Property at the time the alleged acts by the Bankrupt are alleged to have been committed. The Assignee was only a mortgagee of the Property. The Plaintiff pleads that the Assignee has no standing to advance the causes of action raised in these paragraphs.
19. The Plaintiff denies the allegations contained in paragraph 35 of the Statement of Defence and Counterclaim that the Bankrupt refused to cooperate to provide management related

documents to the Purchaser. In the alternative, if the facts as alleged in this paragraph are true, which is expressly denied, the Assignee has no cause of action arising from these facts and suffered no damages as the owner of the Property at the time the alleged acts were committed by the Bankrupt. Further, the Plaintiff denies that it had any obligation to provide management related documents to the Purchaser or to the Assignee. The Plaintiff pleads that the Assignee has no standing to advance the causes of action raised in these paragraphs.

20. The Plaintiff denies the allegations contained in paragraph 36 of the Statement of Defence and Counterclaim that the Bankrupt failed to close outstanding building permits before the transfer of the Property to the Purchaser or that it failed to cooperate with the Purchaser to close any such building permits. In the alternative, if the facts as alleged in this paragraph are true, which is expressly denied, the Assignee has no cause of action arising from these facts and suffered no damages as it was not the owner of the Property at the material time. The Assignee has no standing to advance the causes of action raised in these paragraphs.
21. Further, the Plaintiff denies that the Bankrupt had any obligation to the Assignee or the Purchaser to close outstanding building permits prior to the transfer of the Property from the Assignee to the Purchaser or to assist with closing any such building permits after the transfer.
22. The Plaintiff pleads that the Assignee and the Purchaser performed reasonable due diligence on the Property prior to the transfer of the Property to the Purchaser at which time the outstanding building permits were discovered. The Assignee and the Purchaser transferred the Property with full knowledge of the building permits. In the alternative if

the Assignee and the Purchaser were not aware of the outstanding building permit this was caused completely by the Assignee's and the Purchaser's failure to perform any, or in the alternative sufficient, due diligence.

23. The Plaintiff asks that the Counterclaim be dismissed with costs payable to the Plaintiff on a substantial indemnity basis.

October 11, 2017

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Court File No. CV-14-513935

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PROCEEDING COMMENCED AT
TORONTO

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