

FILE/DIRECTION/ORDER

BEFORE
JUDGE

A. RAMSAY

ACTION # 18-00605458-0000

KRISHNA RUPCHAND and ROY RUPCHAND

Plaintiff(s)

-v-

NETTIE GREEN and DEEN GREEN

Defendant(s)

CASE
MANAGEMENT:

YES

NO

COUNSEL:

Ryan Atkinson, for the
Plaintiffs

PHONE
NO.

PHONE
NO.

PHONE
NO.

COUNSEL:

ORDER

DIRECTION FOR REGISTRAR

REPORTED SETTLED ADJOURNED TO TRIAL SCHEDULING
COURT

NO ONE APPEARED ADJOURNED TO BE SPOKEN
COURT

Mr. Atkinson participated in a conference call today by phone to respond to my questions raised at a case conference on September 18, 2020, post motion to strike with respect to clarification on certain items claimed for damages.

On August 26, 2020 I granted judgment to the plaintiff, with oral reasons given, and supplementary reasons to follow, reserved the issue of costs, and set a time table for the exchange of submissions on costs. At a case conference on September 18, 2020, Mr. Atkinson appeared but Ms. Green did not. I raised with Mr. Atkinson issues related

to ancillary damages and since I am not functus addressed those issues initially with Mr. Atkinson on the conference call on September 18th. Mr. Atkinson has provided some additional clarification.

Mr. Atkinson has also provided his Bill of Costs. Ms. Green has not responded to the plaintiff's Bill of Costs though copied with Mr. Atkinson's Bill of Costs at the email address of thegarnett76@gmail.com, which has been provided as the email address for service and is her son's email address, a co-defendant against whom the plaintiff has obtained default judgment.

The plaintiff sought the following amounts in the statement of claim for damages (totaling \$164,586.99):

Principal	\$150,000.00
Monthly interest payments owing \$1,500.00 x 2 (Sept 2018)	\$ 1,500.00
Interest owing from September 1, 2018 to September 19, 2018	\$ 936.99
Demand/Collection Letter Fee	\$ 1,500.00
Non-payment fees	\$ 200.00
Penalty Interest Fee Pursuant to the <i>Mortgages Act 1990</i>	\$ 4,500.00
Issuance of Notice of Sale	\$ 1,500.00
Legal Fees	\$ 4,450.00
TOTAL	\$164,586.99

At the hearing, the plaintiff indicated that he was seeking \$202,843.32 which was inclusive of the principal amount owing on the mortgage, interest owing from August 1, 2018, NSF cheques, a demand letter, a penalty issuance of a notice of sale and statement fee.

As for the Legal Fees claimed in the statement of claim, any duplication replicated in the Plaintiff's Bill of Costs has been reduced accordingly.

The Penalty Interest Fee being claimed by the plaintiff is addressed below.

The plaintiff sought pre-judgment interest at the 12% rate as contained in the terms of the charge and agreed to by Ms. Green from September 19, 2018 to August 26, 2020, but on all the items claimed as damages as set out in their statement of claim amounting to \$38,256.33.00. I have more to say about the calculation of prejudgment interest below.

Penalty for Interest Fee Pursuant to the Mortgages Act 1990

Counsel for the plaintiff has now provided clarification with respect to the claim for the Penalty Interest and I am not inclined to award the \$4,500.00 for the reasons which follow.

The plaintiff relies on s. 17 of the *Mortgages Act* to support his argument that he is entitled to three months interest on the principal. However, the jurisprudence in Ontario establishes that where a mortgagor is in default and the mortgagee proceeds with steps to realize on the mortgage, the mortgagee is only entitled to interest actually owing on the principal and not an additional three months as set out in section 17: *Ialongo v. Serm Investments Limited* (2007), 54 R.P.R. (4th) 310, 2007 CanLII 6242 (ON SC) at para. 30, 58 *Cardill Inc. v. Rathcliffe Holdings Limited*, 2018 ONCA 672 at para. 6, aff'd. 2018 ONCA 672.

In *Mastercraft Properties Limited v. EL EF Investments Inc.* (1993) 1993 CanLII 8545 (ON CA), 14 O.R. (3d) 519 (Ont. C.A.), relied upon by the plaintiff, McKinlay J.A. explained that:

“default occurring at maturity of the mortgage where the mortgagee claimed or attempted to enforce a covenant to pay three months interest in addition to payment of interest in full up to the time of repayment of principal”. In the latter cases, McKinlay J.A. stated, “the amount claimed would clearly constitute a penalty for default and would result in increasing the interest on the arrears beyond the mortgage rate, thus contravening the provisions of s. 8.”

Section 17 of the *Mortgages Act* is also part of mortgage contracts. No evidence has been provided with respect to any provision in the mortgage commitment in which the defendant covenanted to pay an additional three months of interest when in default of payment of the principal. This was a private mortgage and the only evidence of the mortgage is the charge.

I am therefore non inclined to grant the penalty interest fee of \$4,500.00.

Calculation of Prejudgment Interest

The plaintiff of calculated prejudgment interest at a rate of 12% not only on the principal but on past interest due (making this compound interest), on legal fees etc.

While I am inclined to grant the plaintiff, the relief sought for prejudgment interest at a rate of 12% set out in the charge as opposed to exercising my discretion and awarding interest pursuant to the *Courts of Justice Act*, the court is not prepared to award pre-judgment interest at a rate of 12% on interest, Non payment fees, Demand/Collection, Legal Fees and other related enforcement fees.

COSTS

Motion

The plaintiff submitted a Bill of Costs for the motion seeking substantial indemnity costs in the amount of \$16,443.45 and partial indemnity costs of \$11,187.86. I received no response from the defendant Ms. Green, and sought clarification from Mr. Atkinson on his Bill of Costs. After reducing items representing duplications, I am awarding the plaintiff costs of the motion in the amount of \$5,310.00 payable by the defendant within 90 days of the date of the cost award.

Action

The plaintiff submitted a Bill of Costs with respect to the action seeking substantial indemnity costs in the amount of \$77,364.97 and partial indemnity costs of \$54,527.55. Again, I received no response from the defendant Ms. Green, and heard from Mr. Atkinson with respect to the legal fees being sought.

I declined to award costs for various motion preparation and attendances where costs was not dealt with by the presiding judge, and after reducing items of duplication (some claimed in the statement of claim and some in the Motion Bill of Costs), There were 4 days of cross examinations on affidavits, and counsel advises that there was an agreement with the defendant's former counsel to use the transcripts as discovery transcripts. There were numerous attendances to Civil Practice Court for Scheduling necessitated by the conduct of the defendants. I have not allowed any costs associated with any interlocutory motions where the presiding judge did not reserve the issue of costs to be addressed at the ultimate disposition of the matter.

I awarded costs of the action to the plaintiff in the amount of \$23,431.68 for legal fees inclusive of HST, plus \$5,258.72 for disbursements, for a total cost of \$28,690.40..

Post-Judgement Interest

Post-judgment interest will be at the rate mandated by section 129 of the *Courts of Justice Act*.

DISPOSITION

For the reasons set forth above, the judgment granted on August 26, 2020, has been varied as follows:

- 1) The plaintiff is not entitled to a penalty interest fee pursuant to s. 17 of the Mortgages Act.
- 2) The plaintiff shall have damages including ancillary damages in the amount of \$160,086.99.
- 3) The plaintiff is entitled to prejudgment interest on the principal amount of \$150,000.00 at the rate of 12% per annum set out in the charge from September 2018 to August 26, 2020.
- 4) The plaintiff shall have his costs of the motion in the amount of \$5,310.00 payable by the defendant within 90 days of the date of the cost award.
- 5) The plaintiff is entitled to costs of the action in the amount of \$23,431.68 for legal fees inclusive of HST, plus \$5,258.72 for disbursements, for a total cost of \$28,690.40.
- 6) Post-judgment interest will be at the rate mandated by section 129 of the *Courts of Justice Act*.

Counsel for the plaintiff may submitted a draft judgment for issuance upon completion, where necessary, of the prejudgment interest.



December 14, 2020

DATE

JUDGE'S SIGNATURE

- Counsel and all self-represented parties shall file all required motion documents with the Court through the Justice Services Online Portal at <https://www.ontario.ca/page/file-civil-claim-online>
- Counsel and all self-represented parties shall also upload all of their documents to Caselines in accordance the Supplementary Notice to the Profession and Litigants in Civil and Family Matters – Including Electronic Filings and Document Sharing (Caselines Pilot) (August 5, 2020) found at <https://www.ontariocourts.ca/scj/notices-and-orders-covid-19/supplementarynotice/>
- In addition to uploading their documents to Caselines and to the Justice Services Online Portal, counsel for the plaintiff shall provide a folder at www.sync.com and upload all parties' documents as set out in the attached directions. Documents on Sync.com shall be given the same names as required for Caselines;
- Counsel and all self-represented parties shall file and upload to Sync.com and Caselines a draft of the order that they seek in WORD format.
- Counsel and all self-represented parties shall email Motions Confirmation Forms including the link to the folder at Sync.com to the Motions Coordinator at CivilUrgentMatters-SCJ-Toronto@ontario.ca at least one week prior to the date set for the motion;

Notwithstanding Rule 59.05, this Order is effective from the date it is made and is enforceable without any need for entry and filing. In accordance with Rules 77.07(6) and 1.04, no formal Order need be entered and filed unless appeal or a motion for leave to appeal is brought to an appellate court. Any party to this Order may nonetheless submit a formal Order for original signing, entry and filing when the Court returns to regular operations.