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Court Affirms Extreme Circumstances Required to Restrain Power of Sale

A power of sale is a very common mortgage remedy used by lenders where a borrower defaults under the applicable mortgage agreement. In light of the current interest rate environment, the power of sale process has anecdotally been exercised more frequently. Lenders (and borrowers), however, should keep in mind when such a right can be restrained.

In *Mao v Liu*, the Court reviewed the circumstances in which a mortgagee can be restrained from exercising its right to a power of sale. The Plaintiff/Mortgagor, Jian Mao, brought a motion:

- (1) for an interlocutory injunction to restrain the Defendant/Mortgagee, Zhen Liu, from exercising his right to a power of sale; and
- (2) to appoint a receiver.

Justice Perell dismissed the motions and confirmed that subject to a mortgagor's right to bring the mortgage into good standing or to redeem under the *Mortgages Act*, a mortgagee acting in good faith and without fraud will not be restrained from exercising a power of sale. Mortgagees will only be restrained from exercising their power of sale rights in extreme cases.

The Motions

This case arises from a messy dispute between two wealthy businessmen.

Jian Mao was a minority shareholder and director of Ecounion. Ecounion operated a gas station in Brantford, Ontario. The gas station was purchased with a first mortgage from the Royal Bank of Canada. In November 2021, RBC refused to renew the mortgage because, among other reasons, Ecounion failed to satisfy the debt service ratio required under the mortgage.

Ecounion subsequently refinanced with a mortgage from Toronto Dominion Bank. In mid-2022, TD terminated Ecounion's credit facility. TD Bank alleged that Ecounion had falsified the financial statements relating to the credit agreement.

Having lost two conventional lenders, Ecounion could not find conventional replacement financing. Instead, Zhen Liu, the

majority shareholder of Ecounion, personally made a \$3.8 million mortgage loan to Ecounion to replace TD Bank's financing. The Liu Mortgage quickly fell into default.

As a result of Ecounion's inability to pay the mortgage, Zhen Liu decided to sell the business. A real estate agent secured an offer to purchase the business, but Jian Mao refused to proceed with the sale. That dispute led to this action which claimed that Zhen Liu breached his fiduciary duties and that he operated the business in an oppressive manner.

Zhen Liu proceeded to serve Ecounion with the appropriate notices under s. 244 of the *Bankruptcy and Insolvency Act* followed by a mortgage enforcement action and a notice of sale. In response, Jian Mao brought a motion seeking to restrain the mortgage enforcement and the appointment of a receiver.

The Result

Justice Perell denied Jian Mao's request for an interlocutory injunction to restrain mortgage enforcement and held that the facts of this case were not extraordinary. Zhen Liu had provided Ecounion with an opportunity to redeem the mortgage but it was clear from the evidence that Ecounion was not financially capable of doing so. Further, Jian Mao was not the guarantor of the indebtedness and therefore had no right to redeem the mortgage nor had he attempted to do so. Justice Perell also noted that Jian Mao and Ecounion had personally benefited from Zhen Liu's loan, without which Ecounion would have been out of business.

Jian Mao fared no better with the request for the appointment of a receiver. Justice Perell held that Jian Mao failed to meet any of the elements of the necessary test. Appointing a receiver would only erode the recovery on the mortgage loan. Zhen Liu was entitled to full indemnity costs.

Takeaways

Mao adds certainty for mortgagees seeking to exercise a power of sale right. Mortgagors seeking to restrain mortgage enforcement through an interlocutory injunction should carefully consider the provisions applicable to the power of sale. Subject to tendering full payment of the mortgage indebtedness or a *prima facie* case of extreme circumstances, restraining a mortgagee from exercising its rights under the mortgage is a challenging exercise.