

COURT OF APPEAL FOR ONTARIO

CITATION: V2 Investment Holdings Inc. v. Mizrahi, 2026 ONCA 275

DATE: 20260417

DOCKET: COA-25-CV-0493

Simmons, Paciocco and Osborne JJ.A.

BETWEEN

V2 Investment Holdings Inc.

Applicant (Respondent)

and

Sam Mizrahi, Mizrahi Development Group (1451 Wellington) Inc., Mizrahi
Developments Inc., and 2659100 Ontario Inc.

Respondents (Appellants)

Jonathan Lisus and Annecy Pang, for the appellants

Daniel Rosenbluth and Ryan Shah, for the respondent

Heard: February 26, 2026

On appeal from the judgment of Justice Charles T. Hackland of the Superior Court
of Justice, dated March 18, 2025 with reasons reported at 2025 ONSC 1715.

REASONS FOR DECISION

Overview and Background

[1] The appellants seek to set aside a judgment in favour of the respondent relating to an outstanding loan.

[2] The appellant, Mr. Sam Mizrahi, is a real estate developer and the principal of the corporate appellants Mizrahi Developments Inc. (“MDI”), Mizrahi Development Group (1451) Wellington Inc. (“Wellington”) and 2659100 Ontario Inc. (“9100”). Wellington owns a property located at 1451 Wellington Street, Ottawa, Ontario which is a partially completed mixed-use condominium development project (the “Wellington Project” or the “Ottawa Property”).

[3] The respondent, V2 Investment Holdings Inc., (“V2”), is owned and controlled by Henry Wolfond. Until the events giving rise to this litigation, Wolfond and Mizrahi were friends.

[4] Pursuant to a loan agreement dated October 31, 2019, V2 loaned Mizrahi \$12,900,000. The principal was initially repayable in full on October 31, 2022. Interest was payable at a rate of 10 percent compounded annually and payable monthly in arrears, but the loan agreement further provided that following maturity, the interest rate increased to 16 percent per annum.

[5] The application judge found that the purpose of the loan was to provide bridge financing for the Wellington Project.

[6] The principal security granted for the loan was a demand debenture granted by Wellington in favour of V2. The debenture granted V2 a charge over the Ottawa property (the “V2 Mortgage”). The loan was also guaranteed by MDI, Wellington and 9100.

[7] The Wellington Project was funded by construction financing from Trez Capital Limited Partnership (“Trez”) and was secured by a first mortgage on the Ottawa Property held on behalf of Trez as lender. Under the terms of the Trez first mortgage, Wellington agreed not to permit the registration of any other encumbrances on the property without the consent of Trez.

[8] Trez had not consented to the V2 Mortgage, the registration of which could put Wellington in default of its obligations under the Trez first mortgage. Accordingly, and as agreed by the parties, the V2 Mortgage on the Ottawa property was not registered at the time the loan was advanced. However, the loan agreement provided that V2 was permitted “in its sole discretion” to register the V2 Mortgage (and any or all of its security) on title to the Ottawa property in the event of a default by Mizrahi under the loan agreement.

[9] The loan agreement further provided that in the event of a continuing default, Mizrahi and Wellington would use best efforts to obtain the consent of the senior mortgagees and senior secured lenders (including Trez) to the registration of the security on title to the Ottawa property “provided that such consent shall not be a condition to the registration, or enforcement, of such Security”.

[10] Mizrahi defaulted on numerous obligations under the loan agreement. In June 2022, he failed to make the required monthly interest payments and advised

V2 that he would be unable to repay the loan in full on maturity. Mizrahi then in fact failed to repay the loan on the initial maturity date of October 31, 2022.

[11] On March 31, 2023, Mizrahi and V2 entered into an amending agreement which, in relevant part, extended the maturity date of the loan to December 31, 2023 and retroactively revised the scheduled monthly interest payments through to that date. Again, however, and notwithstanding the extension, Mizrahi failed to repay the loan when due on the extended maturity date of December 31, 2023.

[12] There were other defaults by Mizrahi under the loan agreement in addition to the failure to pay the outstanding amount when due. On December 1, 2021, Wellington granted a second mortgage to Trez without the consent of V2, which constituted a default under the loan agreement. Furthermore, although Mizrahi made the required monthly interest payments from March 2023 through May 2024, he ceased doing so entirely beginning in June 2024.

[13] Following the expiry of the extended maturity date on December 31, 2023, Mizrahi and V2 engaged in negotiations concerning a further, second, amending agreement as well as a potential intercreditor agreement between V2 and Trez. If agreed to, an intercreditor agreement would facilitate the registration of the V2's mortgage on title to the Ottawa Property with the consent of Trez, thereby avoiding a default by Wellington under the terms of the first Trez mortgage.

[14] Mizrahi and Wolfond met on March 3, 2024 to discuss the terms of this potential second amending agreement. What happened at that meeting is the subject of the application below and this appeal.

[15] V2 and its principal, Wolfond, deny that any agreement was reached on March 3, 2024, or at all. Mizrahi maintains that an oral agreement was reached at the meeting which provided, among other things, that the maturity date would be extended again to January 1, 2025, and that V2 would register a charge on title to the Ottawa property after it entered into an intercreditor agreement with Trez.

[16] While there were discussions among the parties thereafter, no further agreements were ever signed.

[17] On April 15, 2024, V2 delivered a notice of intention to enforce security and registered the V2 Mortgage on title to the Ottawa property, causing a default under the first Trez mortgage.

[18] V2 then commenced this application seeking judgment on the loan against Mizrahi as borrower and against MDI, Wellington and 9100 as guarantors. V2 also sought the appointment of a receiver over the Ottawa property.¹

[19] Development of the condominium project remains unfinished.

¹ On October 15, 2024, Wellington became insolvent and commenced restructuring proceedings under the *Companies Creditors' Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA"). The initial order made in that proceeding imposed a stay of proceedings against Wellington, which was subsequently continued and extended by further orders. As a result, V2 withdrew the request for the appointment of a receiver in this application and its request for any relief against Wellington. Further, the only relief sought and obtained in the application was judgment on the loan against Mizrahi as borrower and MDI and 9100 as guarantors.

The Judgment Below

[20] The application judge granted judgment in favour of V2 against Mizrahi and the corporate appellants, MDI and 9100 for the full amount of the loan, together with interest, on a joint and several basis.

[21] With respect to the negotiations following the extended maturity date (December 31, 2023), the application judge found that although the loan remained in default (and continued to be in default as of the date the application was heard), Mizrahi and Wolfond had engaged in negotiations concerning a potential second amending agreement and an intercreditor agreement between V2 and Trez as discussed above.

[22] However, the application judge ultimately found that these negotiations were “inconclusive”, and V2 and Mizrahi never reached a binding agreement to further amend the loan agreement. He also found that V2 never entered into a standstill and intercreditor agreement with Trez, notwithstanding protracted negotiations between V2 and Mizrahi with the active involvement of their respective lawyers.

[23] Having reviewed the record of correspondence between Mizrahi and Wolfond following the meeting of March 3, 2024, largely in the form of text messages and electronic mail messages, the application judge found that the conduct of Mizrahi, and in fact both parties, was consistent with the finding that no binding agreement was ever reached. Rather, the evidence reflected continued negotiations concerning a prospective agreement that was never concluded.

[24] He found that proposals about potential agreements were being consistently negotiated and revised through April 2024 without any definitive consensus being reached, either before or after the registration of the V2 Mortgage on title to the Ottawa property on April 15, 2024.

[25] Furthermore, the application judge rejected what he described as Mizrahi's principal defence to the loan, being Mizrahi's allegation that Wolfond acted in bad faith by indicating he would sign an amending agreement to again extend the term of the loan and enter into the intercreditor agreement with Trez, and then refusing to do so. He found that there was no trickery or bad faith on Wolfond's part.

[26] The application judge concluded that, having found there was no agreement to vary or waive the lender's rights on default, V2 was entitled to judgment on the liquidated debt in the amount of \$12.9 million plus interest, the terms of which were not in dispute and which was admitted to be owing.

Issues and Analysis

[27] The appellants advance four² grounds of appeal. They submit that the application judge made the following errors:

- a. an error in law in failing to consider in his reasons whether the application should be converted to an action;

² Although raised in their Notice of Appeal, the appellants did not pursue the fourth ground of appeal listed below in their factum. As the respondent raised it in oral argument, we discuss it briefly below.

- b. an error in law in not converting the application to an action;
- c. an error in law by conducting a credibility analysis relating to disputed material facts on a paper record; and
- d. an error in principle in foreclosing the ability of the appellants to plead and advance the defence of equitable setoff and counterclaim.

[28] Given the overlap among the first three grounds of appeal, we will address these together.

Issues 1, 2 and 3: Converting the Application to an Action

[29] In our view, the application judge's reasons are clear and sufficient. They are not so deficient as to foreclose meaningful appellate review: *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, at para. 25. The application judge acknowledged the appellants' request for an order converting the application to an action in paragraph 3 of his reasons. His analysis that follows reflects his conclusion that converting the application to an action was not necessary since the proceeding could be properly resolved as an application. It was not a close call. As he expressed it, "the Lender is clearly entitled to judgment for this liquidated debt".

[30] The application judge found that the record revealed a negotiation between a sophisticated and experienced real estate developer and a commercial lender, each working through lawyers, dealing with the ongoing financial needs in a

troubled project. The loan documentation specifically allowed the lender to register a mortgage in the event of default, as was admitted to have occurred. The negotiations did not amount to any agreement varying the lender's rights on such a default.

[31] Read as a whole, the reasons clearly explain and support the conclusion of the application judge that converting the application to an action was not necessary. We agree.

[32] The decision with respect to whether an application should be converted to an action is a discretionary decision entitled to deference: *Gatoto v. 5GC Inc.*, 2024 ONCA 210, 52 B.L.R. (6th) 186, at para. 14; *Obolus Ltd. v. International Seniors Community Care Inc.*, 2023 ONCA 708, 487 D.L.R. (4th) 317, at para. 10; *Thompson v. Casey*, 2020 ONCA 5, 150 O.R. (3d) 61, at para. 10; *Genstar Development Partnership v. The Roman Catholic Episcopal Corporation of the Diocese of Hamilton in Ontario*, 2019 ONCA 506, 3 R.P.R. (6th) 1, at para. 23.

[33] As stated by this court in *Obolus* at para. 10:

The application judge was required to review evidence to make findings of fact to determine whether the proceeding was properly commenced by way of an application, and whether it could be properly resolved as an application. An appellate court will only interfere with such a determination if the “lower court misdirected itself, came to a decision that is so clearly wrong so as to amount to an injustice, or gave no or insufficient weight to a relevant consideration”.: [*Genstar*], at para. 23; *Pennyfeather v. Timminco Limited*, 2017 ONCA 369, at

para. 135, citing *Penner v. Niagara Regional Police Services Board*, 2013 SCC 19, [2013] 2 S.C.R. 125, at para. 27.

[34] An application will not be converted to an action unless there is a justifiable reason to do so, such as when the judge hearing the matter cannot make a proper determination of the issues on the application record. The mere presence of a factual dispute is not self-sufficient to convert an application to an action. The facts in dispute must be material to the issues before the court before a trial may be required: *Collins v. Canada (Attorney General)*, (2005), 76 O.R. (3d) 228 at paras. 28-31, cited with approval by this court in *Obolus* at para. 11. This is reflected in the language of r. 14.05(3)(h), which states that an application may be brought where the relief claimed is in respect of any matter where it is unlikely that there will be any material facts in dispute requiring a trial. Even where there are material facts in dispute, a trial will not be necessary if the factual dispute can be resolved on the application record. When *viva voce* evidence is required to resolve material issues of credibility, the matter should proceed as an action.

[35] As in *Obolus*, the application judge here determined, as a review of his reasons as a whole reflect, that there was no justifiable reason to convert the application to an action, and that he was satisfied that he could make a proper determination of the issues on the application record.

[36] The application judge found, and we agree, that the documentary evidence was clear and supported the findings made. A fair reading of the reasons of a

whole make it clear that the application judge did not need to resort to credibility assessments to make the findings he did: see *Grand River Conservation Authority v. Ramdas*, 2021 ONCA 815, 160 O.R. (3d) 348, at paras. 13, 16.

[37] He found that the correspondence between the parties and their conduct in the period following the meeting of March 3, 2024 was inconsistent with any agreement having been reached. On the contrary, it clearly demonstrated the fact that negotiations were continuing.

[38] The application judge stated that: “[i]mportantly, these ongoing and ultimately inconclusive negotiations occurred after March 3, 2024, the date that [V2 and Mizrahi] are alleged to have formed a conclusive agreement”.

[39] The application judge found that, following the March 3, 2024 meeting, Mizrahi and Wolfond were “engaged in an extensive back-and-forth” about the terms of potential amending and intercreditor agreements, with proposals being consistently negotiated and revised through April 2024, without any definitive consensus reached either before or after the registration of the V2 Mortgage.

[40] He noted in particular the fact that on April 18, 2024 (approximately six weeks after the date of the alleged oral agreement), Mizrahi sent Wolfond a copy of a proposed second amending agreement for Wolfond’s consideration, to which Wolfond responded that it was “totally unacceptable”. It is that draft agreement that

contained the proposed further extended maturity date for the loan. The terms were never agreed, and no written agreement was ever executed.

[41] In further addition, the electronic mail messages attached to Mizrahi's own affidavit as exhibits include his message to Wolfond of March 15, 2024 (approximately two weeks after the meeting) in which Mizrahi states that he was intending to repay the loan from the proceeds of unit sales in the Ottawa project and that he was targeting October 2024 for condominium registration and unit sales would occur thereafter. As a result, Mizrahi stated, he "would like to extend [the] loan to January 1, 2025 to align with this time line." This too is entirely inconsistent with the submission that any agreement to extend the loan maturity date was reached at the meeting on March 3, 2024.

[42] Both the fact that negotiations on key terms were continuing, and the absence of any evidence that Mizrahi took the position with Wolfond following the March 3 meeting that an agreement had been reached, are inconsistent with the finding that the parties had come to terms.

[43] The appellants submitted that the oral agreement reached by the parties included, in addition to the further extension of the maturity date of the loan, an intercreditor agreement between V2 and Trez, which in relevant part would provide for the registration of the V2 Mortgage without that act constituting a default under the first Trez mortgage.

[44] Yet, by its very nature, such an agreement between creditors would have required the agreement of both V2 and Trez. There is no evidence in the record as to any intercreditor discussions about any such proposed agreement, let alone any commitment on the part of Trez. The appellants led no evidence from Trez about the alleged intercreditor agreement although they could have done so. In any event, and even if there had been an intercreditor agreement reached between V2 and Trez (or even an agreement by V2 to enter into same), such is irrelevant to the fundamental issue of whether Mizrahi on behalf of all of the appellants and Wolfond on behalf of V2 reached an agreement to extend the maturity date of the loan.

[45] We also observe that in his affidavit filed on the application, Mizrahi described his recollection of the March 3, 2024 meeting at paragraph 16. There is no reference to an alleged agreement to extend the maturity date of the loan.

[46] Again, there is no dispute that the funds were advanced and the loan has not been repaid. The only relief sought on the application was judgment on the loan. We agree with the application judge that there was no need for discovery or trial.

[47] Furthermore, even if there were issues of credibility, such issues do not always require *viva voce* evidence to be determined: *Temagami (Municipality) v. Temagami Barge Ltd.*, 2025 ONCA 315, at para. 8. To the extent

that there was any issue of credibility, the record before the application judge included the necessary evidence of the two witnesses whose credibility could matter.

[48] Moreover, as submitted by the respondent, the appellants did not seek the trial of an issue as an alternative position before the application judge, nor did they seek leave to present oral evidence at the hearing of the application.

[49] Even on appeal, the appellants cannot identify any documents that were not before the court on the hearing of the application but should have been. They had the opportunity, which they exercised, to cross-examine Wolfond. He is the only counterparty to the alleged oral agreement said to have been reached at the meeting with Mizrahi on March 3, 2024. The appellants did not cross-examine Wolfond on his evidence that no agreement was reached at the meeting on March 3, 2024.

[50] Further, the appellants submitted that Wolfond had contemporaneous notes of the meeting, but the notes were never produced. The appellants never sought their production by way of undertaking during Wolfond's cross-examination and never pursued the issue, though it was open to them to do so.

[51] Rule 38.10 is clear that on the hearing of an application, a judge may grant the relief sought, or dismiss the application in whole or in part and with or without terms, or order that the whole application or any issue proceed to trial and give

such directions as are just. Where a trial of the whole application is directed, the proceeding shall thereafter be treated as an action, subject to the directions in the order directing the trial. The application judge had those powers available to him and declined to direct that the application or any issue therein should proceed to trial. He found it unnecessary to do so, and that finding does not warrant appellate intervention.

[52] Finally with respect to these grounds of appeal, we address one additional issue initially raised in the respondent's factum that the enhanced fact-finding powers available under r. 20 (summary judgment) are also available on an application. The appellants disagree. The appellants invited us to find that the application judge exceeded his jurisdiction under r. 14 by determining whether there were material facts in dispute requiring a trial using the much more expansive fact-finding powers available to a summary judgment motion judge pursuant to r. 20. The appellants further submitted that if the respondent is correct that the application judge had those enhanced fact-finding powers available to him, the application judge in this case erred in failing to assess whether to use those expanded powers once he had identified contradictions in the evidence, according to decisions of this court including *Royal Bank of Canada v. 1643937 Ontario Inc. et al*, 2021 ONCA 98, 154 O.R. (3d) 561 and *Pichelli v. Kegalj*, 2021 ONCA 445, 75 C.P.C. (8th) 273, two cases decided in the summary judgment context.

[53] Given our findings above with respect to the findings of the application judge, we see no error in his having proceeded as he did. Pursuant to r. 14.05(3), a proceeding may be brought by application where the rules authorize such or where the relief claimed is, as set out in subrule (h), in respect of any matter where it is unlikely that there will be any material facts in dispute requiring a trial. Rule 14.05(3)(h) addresses the commencement of a proceeding and when it may proceed by way of application, rather than delineating the jurisdiction of a judge hearing the application on the merits. Moreover, and as discussed above, the application judge here found that there were no material facts in dispute requiring a trial. We agree.

[54] In this case, we are satisfied that the application judge's findings were amply supported by the documentary record before him, and the reasons are clear that this is what he relied on. The application judge did not rely on, nor did he need to rely on, additional fact-finding powers to determine whether there were material facts in dispute requiring a trial.

[55] It is therefore not necessary for this court to address further the limits of a judge's fact-finding powers when hearing an application pursuant to r. 14, or whether a judge hearing an application has fact-finding powers analogous to those available to a judge hearing a summary judgment motion under rr. 20.04(2.1) and (2.2). That is for another day.

[56] For all of these reasons, we are satisfied that the application judge's reasons are sufficient and we see no reviewable error in his conclusion that the application should not be converted to an action, and that a trial was not necessary.

Issue 4: Equitable Set-Off and Counterclaim

[57] The fourth ground of appeal was not pressed extensively in argument before us and not referred to in either factum. For completeness, we address it now. The appellant submitted in its Notice of Appeal that the determination of the matter by way of application instead of an action foreclosed the appellants' ability to plead and advance a viable defence of equitable set-off and counterclaim. This is based upon claims that Mizrahi may personally have against Wolfond related to a condominium project in Toronto.

[58] We are satisfied, as the respondent submits, that since the application judge found, and we agree, that there was no further amending agreement reached, equitable set-off cannot and does not arise. In any event, and even if we had been satisfied that a further amending agreement had been reached, the party to such an agreement would be Wellington, not Mizrahi in his personal capacity. Accordingly, we need not address this argument further.

Disposition

[59] For all of these reasons, the appeal is dismissed.

[60] The parties were unable to agree on costs of the appeal.

[61] The appellants seek costs if successful, and submitted a bill of costs reflecting partial indemnity costs of \$30,026.18, substantial indemnity costs of \$44,030.27 and full indemnity costs of \$48,698.30. All figures are inclusive of fees, disbursements and HST.

[62] The respondent also seeks costs if successful, and submitted a bill of costs reflecting partial indemnity costs of \$47,385.42, substantial indemnity costs of \$71,078.13 and full indemnity costs of \$78,975.70. It seeks full indemnity costs on the basis of article 12.02 of the loan agreement between the parties which provides in relevant part that the borrower shall pay all out-of-pocket expenses incurred by the lender, including but not limited to costs and expenses in connection with the enforcement or protection of its rights in connection with or under the agreement.

[63] The respondent was successful, and is entitled to its costs of the appeal. We are satisfied that the appropriate quantum of those costs is \$55,000, all-inclusive. Accordingly, those costs are payable by the appellants to the respondent.

“Janet Simmons J.A.”
“David M. Paciocco J.A.”
“P.J. Osborne J.A.”