

CITATION: 2637897 *Ontario Limited et al. v. Toronto (Bayview Car Wash) LP et al.*, 2026 ONSC 3875

COURT FILE NO.: CV-25-00743811-0000

DATE: 20260703

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 2637897 ONTARIO LIMITED and PINTI ENTERPRISES LIMITED, Plaintiffs

AND:

TORONTO (BAYVIEW CAR WASH) LP and TORONTO (BAYVIEW CAR WASH) GP INC, Defendants

BEFORE: Schabas J.

COUNSEL: *Frank L. Gardner*, for the Plaintiffs

Mark Dunn, for the Defendants

HEARD: June 29, 2026

REASONS ON MOTION

Background

- [1] This is a motion to stay an action and to set aside a default judgment.
- [2] In 2022, the plaintiffs sold a property at 1802 Bayview Avenue in Toronto to the defendants - two single purpose entities created to acquire and develop the property. The Agreement of Purchase and Sale provided that the plaintiffs would receive \$27,000,000 in cash and \$8,000,000 by way of a vendor-take-back (“VTB”) mortgage secured against the property.
- [3] As part of the negotiations, the plaintiffs agreed to the following term in the purchase agreement:
- The Seller agrees that the VTB shall be fully postponed and subordinated to any land financing arranged by the Buyer from time to time and the Seller agrees to enter into any subordination and standstill agreement which may be required by a lender providing such land financing to the Buyer.
- [4] To finance the purchase price, among other things, the defendants (who assumed the purchase agreement) obtained a first mortgage from Canadian Mortgage Servicing Corporation (“CMSC”) in the amount of \$27,000,000. The VTB mortgage was to be a second mortgage, standing behind the first mortgage in priority.

- [5] In connection with the first mortgage, the plaintiffs, defendants and CMSC entered into a “Postponement and Standstill Agreement” on July 31, 2023 (the “Standstill Agreement”). In that agreement the plaintiffs, who were defined as the “Subordinate Mortgagee”, agreed in s. 7.1(d) that:

it shall not take or authorize to be taken any action by way of suit, power of sale, foreclosure, summary proceedings, or otherwise, or exercise any rights or remedies under the Subordinate Mortgage Security or otherwise for the purpose of directly or indirectly, realizing on any of the Charged Property, until having received the prior written consent of the Lender, which consent may be unreasonably withheld.

- [6] The term “Charged Property” “means the Lands, all leases pertaining thereto, all rents, revenues and personal property of the Borrower, and all associated rights, benefits and proceeds therefrom, as charged, assigned, pledged or in which a security interest has been created by the Lender Security.” The “Lender” is CMSC, the holder of the first mortgage.
- [7] In early 2025 the defendants stopped paying interest to the plaintiffs as required by the VTB mortgage.
- [8] On May 23, 2025, without seeking the consent of CMSC, the plaintiffs commenced this action specifically seeking judgment against the defendants for principal and interest under the VTB mortgage, as stated in para. 1(a) of the Statement of Claim:

Judgement for payment of the sum of \$8,078,143.84, which sum includes interest to and including May 23, 2025, and costs to the date hereof, pursuant to a Loan Agreement and Charge/Mortgage from the said defendants...

- [9] Counsel for the plaintiffs and defendants engaged in correspondence following the issuance of the claim. The defendants objected to the claim, citing the Standstill Agreement. However, the defendants did not bring a motion to stay the action at that time, and the plaintiffs noted the defendants in default and, in due course, obtained default judgment. The plaintiffs have sought to take steps against the defendants, including seeking to conduct examinations in aid of execution of the judgment. This provoked the defendants’ motion.

Issues

- [10] There are two issues to be addressed:
- (a) Whether the action should be stayed because it is barred by the Standstill Agreement; and
 - (b) Whether the noting in default and default judgment should be set aside.

The effect of the Standstill Agreement

- [11] The dispute in this case is over the interpretation of s. 7.1(d) of the Standstill Agreement. The defendants submit that any action is barred without the consent of CMSC, which was neither sought nor obtained. The plaintiffs argue that the provision only bars steps that are taken to enforce or collect on the judgment that would be realized from the Charged Property.
- [12] The principles governing the interpretation of contracts are well-settled. The court's task is to ascertain the objective meaning of the words chosen by the parties, read in their proper context and in light of the contract as a whole. The starting point is the language of the agreement: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 47.
- [13] The court “must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract”. The surrounding circumstances, or factual matrix, include the genesis of the agreement, its commercial purpose, and contemporaneous communications, but not the parties' subjective intentions. However, the surrounding circumstances should not overwhelm the words of the agreement: *Sattva* at paras. 47 – 59.
- [14] The court should only rely on “objective evidence of the background facts at the time of the execution of the contract”, including “knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting”: *Sattva* at para. 58. Post-contract conduct is admissible only if the contract remains ambiguous after considering the text and factual matrix: *Prism Resources Inc. v. Detour Gold Corporation*, 2022 ONCA 326 at para. 18.
- [15] “Commercial reasonableness is a crucial consideration ... courts seek to reach a commercially sensible interpretation, since doing so is more likely than not to give effect to the intention of the parties” and avoids constructions that are absurd or arbitrary: *Resolute FP Canada Inc. v. Ontario (Attorney General)*, 2019 SCC 60 at para. 142.
- [16] In my view, having regard to the words of the Standstill Agreement and the broader factual matrix of the sale of the property, including the terms of the purchase agreement, the VTB mortgage and the first mortgage, the position of the defendants should prevail.
- [17] The wording of s. 7.1(d) is broad. It prohibits the plaintiffs, without the consent of the first mortgagee, from taking “any action by way of suit...or exercise any rights or remedies” under the VTB mortgage “or otherwise for the purpose of directly or indirectly, realizing on any of the Charged Property.” [emphasis added] The plain wording of this clause prohibits any attempt to “realize on” the defendants’ property, “directly or indirectly”, arising from the VTB mortgage, without CMSC’s consent.
- [18] The defendants argue that they are simply suing on a personal covenant to obtain a personal judgment against the defendants, arguing that the clause only prevents enforcement steps on the mortgage. However, this is inconsistent with the broad wording of s. 7.1(d) which

prohibits “any action.” It prohibits the “exercise” of “any rights or remedies” under the VTB mortgage, “directly or indirectly.”

- [19] Although the wording is slightly different, the broad wording of s. 7.1(d) is similar to that found in *Cerieco Canada Corp. v. Mizrahi*, 2022 ONSC 6211, in which an oppression action was recognized as a “remedy” arising from an indebtedness which was prohibited by a standstill agreement. As Kimmel J. stated in that case at para. 62:

CERIECO argues that the oppression remedy claim somehow takes this outside of the standstill provision. The oppression remedy is, as the name suggests, a remedy. It does not change the underlying nature of the actions complained of or the commercial agreements that contextualize the relationship of the parties. CERIECO loaned money to the Owner, took security for that loan and wants to be repaid through enforcement of the loan agreements or underlying security, or wants damages in lieu of those direct enforcement remedies. This is precisely the type of Enforcement Action that it agreed not to take under the standstill provision.

- [20] In this case, the action is more direct. The plaintiffs’ statement of claim seeks judgment on the mortgage itself; it is not asserting some other remedy such as relief from oppressive conduct or declaratory relief which, in any event, would likely also be a prohibited “indirect” attempt to obtain a remedy for non-payment. To the extent the plaintiffs claim they are seeking monetary relief which may not come from the mortgage, but perhaps from some other source, this is barred by the broad definition of “Charged Property” which includes the “personal property” of the defendants.
- [21] The factual matrix also informs my decision.
- [22] The purchase agreement, which predates the Standstill Agreement contemplated that the VTB mortgage would “be fully postponed and subordinated to any land financing arranged by the Buyer from time to time and the Seller agrees to enter into any subordination and standstill agreement which may be required by a lender providing such land financing to the Buyer.” [emphasis added] This is an important contextual factor demonstrating the intentions of the parties and the understanding of the plaintiffs of the position to which they agreed.
- [23] The defendants have provided me with the General Security Agreement between CMSC and the defendants in which the defendants have pledged all their assets, including “money”, to CMSC. This is consistent with the nature of the defendants, which are single purpose entities created to develop the property. It also means that there is no money available to the plaintiffs without consent of the first mortgagee.
- [24] The purpose of the Standstill Agreement is to benefit CMSC and the defendants. As the primary lender, it is not in CMSC’s interest to have its debtor facing other actions which could prevent the development or interfere with the defendants’ ability to meet their obligations under the first mortgage. The Standstill Agreement also benefits the defendants who, as now, are in financial distress due to the downturn in the market. In accordance with

s. 7.1(d), however, the defendants do not need to defend or otherwise respond to an action by the plaintiffs. This does not mean the defendants' obligations to the plaintiffs go away, just that its indebtedness cannot be enforced without consent of the first mortgagee or until the agreements terminate.

- [25] There is nothing commercially unreasonable about the result of the defendants' interpretation. In a transaction of this size it is reasonable to infer that there was negotiation between the defendants and the plaintiffs over how much of the total purchase price would be in cash and how much would be advanced by way of a VTB loan, the latter of which involves taking on some risk. The plaintiffs knew of the limitations on their ability to enforce their debt when they signed the purchase agreement, later confirmed by the Standstill Agreement. The plaintiffs knew they were taking on risk as holders of a second mortgage which could not be enforced without CMSC's consent. This is the nature of financial agreements which stand below others in priority. On the other hand, accepting the plaintiffs' interpretation would be inconsistent with the intention of the Standstill Agreement, and deny the defendants, and CMSC, which is a party to that agreement, the benefits they negotiated.
- [26] Although not necessary for my decision, the plaintiffs' conduct under the agreements is also consistent with the defendants' position. After commencing this action, the plaintiffs wrote to CMSC acknowledging the Standstill Agreement and sought CMSC's consent to sell the property under power of sale. No consent was provided.
- [27] In short, the language of the agreement and the factual matrix support the commercially reasonable interpretation that the plaintiffs specifically agreed not to commence a suit to enforce the mortgage without consent of the CMSC. This action does exactly that.
- [28] To the extent that counsel complains that the plaintiffs are "in the dark" on the status of the property or when they will recover their funds, this was part of the risk they bargained for. Had they wanted a right to ongoing information, that could have been requested. Perhaps it was. But the plaintiffs continue to be second mortgagees, entitled to interest and ultimately repayment of the principal amount by the defendants; they simply cannot enforce that debt at this time, as they agreed.
- [29] Section 106 of the *Courts of Justice Act*, RSO 1990, c C.43, and Rule 21.01(3)(d) of the *Rules of Civil Procedure* give the court the power to stay or dismiss an action on the basis that it is "frivolous or vexatious or is otherwise an abuse of the process of the court." This power has been used to stay actions brought in violation of standstill agreements or similar contracts governing parties' recourse to the courts.
- [30] In *Sinclair-Cockburn Insurance Brokers Ltd. v. Richards*, 2002 CanLII 45031 (ON CA), it was found to be an abuse of process to bring claims barred by a release that was negotiated between the parties. In upholding a stay of proceedings, the Court of Appeal quoted the trial judge who stated that "[p]arties should be held to their promises" and held that: "[t]he court is entitled to enforce these promises by exercising its stay jurisdiction either under s. 106 of the *Courts of Justice Act* or Rule 21.01(3)(d) to prevent an abuse of process."

- [31] In *Cirieco*, Kimmel J. also entered a stay of proceedings (see paras. 78 – 81).
- [32] In my view, a stay is the appropriate remedy, and I order that the action, including any steps to enforce the judgment, be stayed.

Setting aside the default judgment

- [33] To set aside a default judgment, the moving party must satisfy the court that doing so is in the interests of justice: *Mountain View Farms Ltd. v. McQueen*, 2014 ONCA 194 at paras. 47-49. The court must consider the following factors:
- (a) whether the motion was brought promptly after the defendant learned of the default judgment;
 - (b) whether there is a plausible excuse or explanation for the defendant's default in complying with the Rules;
 - (c) whether the facts establish that the defendant has an arguable defence on the merits;
 - (d) "the potential prejudice to the moving party should the motion be dismissed, and the potential prejudice to the respondent should the motion be allowed"; and
 - (e) "the effect of any order the motion judge may make on the overall integrity of the administration of justice."
- [34] As the Court of Appeal stated in *Mountain View Farms* at para. 50, "[t]hese factors are not to be treated as rigid rules; the court must consider the particular circumstances of each case to decide whether it is just to relieve the defendant from the consequences of his or her default."
- [35] In this case, the defendants meet the first two factors. They served a notice of intent to defend promptly, and this motion was brought in a reasonably prompt manner once it became clear that the plaintiffs were not backing down from their position and sought to examine representatives of the defendants. However, the defendants have not shown that they have an "arguable defence" to the action; indeed, they admit their default on the VTB mortgage, relying instead on the plaintiffs' lack of a right to sue as found in the Standstill Agreement.
- [36] As I have stayed the action, including the judgment, there is little prejudice to the defendants in dismissing their motion to set aside the default, as the judgment cannot be enforced. The parties acknowledged this in submissions before me.
- [37] The judgment, although improperly obtained, reflects the reality that the defendants have acknowledged their default on the VTB mortgage, and have no defence on the merits. In these circumstances, I see no reason to set aside the default judgment. Indeed, in due course, should circumstances change and the plaintiffs find themselves able to enforce the

obligations of the defendants, the existence of the default judgment may assist the plaintiffs in moving forward in exercising their rights. Accordingly, balancing the relevant factors, the interests of justice favour the plaintiffs on this issue. I therefore decline to set aside the noting in default and the default judgment.

Conclusion

- [38] The defendants' main objective on this motion was to obtain a stay of the action, which they have achieved. This was the main point of contention between the parties. Although the defendants did not succeed in setting aside the default judgment, the defendants were largely successful on the motion and should be awarded costs.
- [39] Both parties agreed that costs should follow the event and be on a partial indemnity scale. Both parties agreed that the amount sought by the defendants, which is approximately \$18,000, is fair and reasonable in the circumstances.
- [40] Accordingly, the plaintiffs shall pay the defendants costs of the motion on a partial indemnity scale in the amount of \$18,000.00.

Paul B. Schabas J.

Date: July 3, 2026