

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

GAIL HERRINGTON

Applicant

- and -

IAN HARVEY and LAURENTIAN BANK OF CANADA

Respondents

AFFIDAVIT OF IAN HARVEY

I, IAN HARVEY, of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY AS FOLLOWS:

1. I am the Respondent in this proceeding and as such, I have personal knowledge to the matters hereafter deposed. Where my information comes from others, I state the source of my knowledge
2. I have reviewed the Notice of Application in this matter and read Gail Herrington's affidavit. I agree with paragraphs 1, 2, 3, 4, 11, 12, and 13 of her affidavit dated April 5, 2017.
3. The Applicant and I purchased a property municipally known as 299 Warden Avenue, Toronto, Ontario M1N 3A3 ("the property") in 1981. We were involved in a contested family law proceeding that ended with the signing of minutes of settlement. The minutes of settlement were signed on April 12, 1995 (attached as "Exhibit A") and remain in force to this date.
4. The Respondent/Mother and I were divorced on October 1, 1996.

5. I support the Applicant's claim to delete from title the mortgage transferred to the Laurentian Bank of Canada (instrument number C820125) ("the mortgage"). I oppose all other claims sought by the Applicant.

The Minutes of Settlement dated April 12, 1995 prevent the Applicant from seeking Partition and Sale of the Property

6. The minutes of settlement dated April 12, 1995 comprehensively settles the issue relating to ownership of the property.
7. The Applicant wrongfully states in her affidavit dated April 5, 2017 that the minutes of settlement provide for the property to be sold.
8. It is misleading for the Applicant to also state at paragraph 8 of her affidavit dated April 5, 2017 that the divorce order does not deal with property issues. Property issues are dealt with in the minutes of settlement dated April 12, 1995.
9. Paragraph 1(a) of the minutes of settlement dated April 12, 1995 provide that an appraisal of the value of property is to be obtained. The appraisal was completed on May 1, 1995 by Approved Appraisal Services Ltd. The appraiser valued the property at \$180,000. Attached as "Exhibit B" is a copy of the appraisal report dated May 1, 1995.
10. Paragraph 1(a) of the minutes of settlement dated April 12, 1995 also states that the property will only be sold if I'm "unwilling or unable to purchase the [Applicant's] half interest in the matrimonial home after the deductions set out herein".
11. In this context 'unwilling and unable' clearly means unwilling to buy at the appraised price or unable to finance the purchase. There is no other reasonable inference.
12. Paragraph 1(g) of the minutes of settlement dated April 12, 1995 however makes this payment or order for sale conditional upon meeting the following conditions:
 - i. That the present holder of the second mortgage registered by the Petitioner [the Applicant] is satisfied.
 - ii. That all other charges, executions, liens, judgements, present or future registered against the Matrimonial Home as a result of the Petitioner's [the

Applicant] action are satisfied either in full or in partial payment and said executions are removed from the Matrimonial Home to permit clear title to be conveyed to the Respondent [Myself].

iii. That the action commenced by Laurentian Bank et al is satisfied.

13. Since the minutes of settlement dated April 12, 1995 was signed I have been completely willing and able to purchase the Applicant's interest in the matrimonial home pursuant to paragraph 1(a) of the minutes of settlement.
14. However, the Applicant has not met any of the conditions pursuant to paragraph 1(g) of the minutes of settlement dated April 12, 1995 entitling her to payment from myself. Most notably the mortgage remains unpaid on title.
15. Without meeting all of the conditions set forth in paragraph 1(g) of the minutes of settlement dated April 12, 1995 and without being able to give me clear title to the property, the Applicant is not entitled to any payment for her interest in the property, either through payment from myself or from selling the property and splitting the proceeds of sale.
16. Since the minutes of settlement dated April 12, 1995 are binding and are still in effect, the Applicant is currently estopped from seeking payment for her interest in the property.

The Applicant is improperly trying to vary the minutes of settlement dated April 12, 1995.

17. The minutes of settlement dated April 12, 1995 is a domestic contract. It is in writing, it is signed both parties and witnessed and it governs the issue over each party's equity in the property.
18. The Applicant has not commenced a motion to change a final order or agreement pursuant to Rule 15 of the *Family Law Rules*.
19. No family law case conferences has been held prior to the hearing of this application.
20. The Applicant has not provided any evidence that she has filed the minutes of settlement pursuant to section 35.1 of the *Family Law Act*.
21. I am advised by my Lawyer and I do believe that without commencing a motion to change a final order or agreement pursuant to Rule 15 of the *Family Law Rules*,

without a case conference and without filing the agreement pursuant to section 35.1 of the *Family Law Act*, this court does not have jurisdiction to vary the minutes of settlement dated April 12, 1995.

22. I am also advised by my Lawyer and I do believe that the Applicant has not provided any evidence that would be grounds for setting aside a final order or agreement.

The Applicant is the author of her own misfortune involving the Laurentian Mortgage

23. The difficulty involving discharging the mortgage is completely the fault of the Applicant.

24. In 1991, the Applicant wanted to raise money to purchase a nude maid business. In order to do so, the Applicant took out a \$36,000 private mortgage with Richard Kernohan. The mortgage has now been assigned to the Laurentian Bank of Canada.

25. As acknowledged in her affidavit dated December 23, 1994 [attached as "Exhibit C"], at the time the private mortgage was signed, the Applicant and I were separated and the Applicant expressed to the private lender that I would not consent to the mortgage.

26. The Applicant's nude maid business failed and the Applicant defaulted on the mortgage.

27. This mortgage has had an annual interest rate of 49.436% interest rate since May 26, 1992. If the mortgage were enforceable, the amount owed right now would be over \$1.1 billion dollars with 49.436% annual interest continuing to accumulate.

28. I never consented to this mortgage being placed on title. It is my position that the mortgage should be set aside pursuant to s. 21(2) of the *Family Law Act* since my consent was not provided and the lender at the time likely knew it was a matrimonial home.

29. The mortgage has caused me considerable stress and anguish because I am a victim in this transaction and the Applicant and I could not possibly pay off the mortgage.

30. The Applicant and I tried to sell the property in 1993 but we didn't get a single offer in large part likely out of concern about this mortgage and whether we could provide clear title.

31. I am unable to sell the property now with this mortgage because I would be unable to give clear title.

32. I have also not been able to access a home equity line of credit because of the mortgage.

33. I have previously attempted to set aside this mortgage including in 1994 (attached as "Exhibit D" is my notice of application) but I have been unable to afford the cost of continuing litigation to conclusion.

The Applicant has improperly claimed Occupancy Rent

34. I am opposed to the Applicant's claim for occupancy rent.

35. The Applicant has not paid any amount for the carrying costs of the property since the date of separation of June 1991.

36. The Applicant was not ousted from the property. She left voluntarily.

37. In 2006, both children started living with me as they fled the emotional abuse inflicted by their step-father Rick Pinto, the Applicant's husband

38. In 2007, the court granted me \$100 a month in child support for both children. Attached as "Exhibit E" is a copy of the endorsement. The Applicant did not pay child support despite the order.

39. I have not received rental income from third party tenants to the property.

40. The Applicant is now claiming occupancy rent 26 years after she left the matrimonial home and 22 years after we reached minutes of settlement. This is an egregious delay in pursuing this claim.

41. The Applicant has not provided any evidence as to the market rental value of the property to base a claim for occupancy rent.

If the Mortgage is removed and partition is ordered, the May 1, 1995 value should be used for determining the Respondent's interest

42. If the mortgage is removed, the Applicant still has a responsibility to solely pay the Legal Aid lien on title which is currently at \$37,702.58 as of March 2, 2015 with 3% annual interest. The Legal Aid lien was placed on title solely for the benefit of the Applicant. Attached as "Exhibit F" is a copy of the Legal Aid lien statement dated March 2, 2015.

43. Paragraph 1(c) of the Minutes of Settlement provide that the Applicant's share of the value of the matrimonial home is to be deducted for the Legal Aid lien as well as any other valid or invalid mortgages other than the first mortgage with CIBC.
44. The parties specifically agreed in paragraph 1(a) of the minutes of settlement dated April 12, 1995 that the Applicant's value of the property would be determined based on the appraisal which was completed on May 1, 1995. The minutes of settlement dated April 12, 1995 are still in effect.
45. The Applicant has not contributed in any way to the property since the minutes of settlement dated April 12, 1995 were signed. I have paid for all the carrying costs for the property including mortgage costs, property taxes, utilities, gas, hydro and home insurance.
46. It would not be inequitable to allow the Respondent to claim an interest in the property based on the current market value of the property when she has not contributed to the property in any way since separation and when the delay in realizing her equity in the property was caused by her own fault in improperly registering the mortgage on title without my consent with a mortgage that she could not pay.
47. If the mortgage is removed and the Applicant can give me clear title to the property, I am seeking for the Applicant's interest in the matrimonial home to be calculated as half the value of the property on May 1, 1995 (\$90,000) minus the cost to remove the current legal Aid lien and half the value of the CIBC first mortgage on April 12, 1995. I am willing and able to make this payment.

SWORN BEFORE ME at the City of
Toronto in the Province of Ontario on

Ian Harvey

A Commissioner for Taking Affidavits