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Case Name:

**I Canada Trustco Mortgage Co. v. Casuccio**

Between

Canada Trustco Mortgage Company, plaintiff, and  
Carmen Casuccio also known as Carmelo Casuccio,  
defendant

[\[2005\] O.J. No. 3094](#)

Court File No. 03-CV-245251SR

**Ontario Superior Court of Justice**  
**E.M. Stewart J.**

Heard: May 25, 30 and June 2, 2005.

Judgment: July 20, 2005.

(47 paras.)

*Real property law — Mortgages — Mortgagee's remedies — Power of sale — Conduct of sale — Validity — Deficiency judgment — Setting aside sale.*

Action by Canada Trustco Mortgage Company against the defendant Casuccio for \$144,974. This was the loss it sustained after it sold Casuccio's property under power of sale proceedings. The property was a small commercial plaza. Casuccio granted a mortgage for \$418,300 and personally guaranteed it in November 1999. Casuccio fell into default in August 2001. The default was not remedied. Canada Trustco issued a notice of sale in December 2001 for \$425,970. It had two appraisals for the property. One valued it at \$300,000 and the other valued it at \$370,000. The property was listed for sale for \$419,000 in September 2002. Canada Trustco accepted an offer for \$410,000. The transaction closed in November 2002. Canada Trustco received \$391,734. After the real estate commission, water, sewer and tax arrears were paid there remained \$296,654 to be applied to the mortgage. This reduced the balance to \$112,743. Interest and legal costs increased it to \$172,758. Casuccio claimed that the sale was improvident. Greater proceeds of sale would have been realized if the sale was properly carried out. Casuccio had been trying to sell the property since August 1997. However, no one would buy it at his reduced selling price of \$599,000. The property was sold in January 2003 for \$500,000. It had been substantially renovated in the interim.

**HELD:** Action allowed. Canada Trustco took reasonable and prudent steps to ascertain the value of the property. It listed it for sale appropriately and took advantage of a reasonable offer to purchase when it was made. The fact that another purchaser paid more for the property shortly after it was sold by Canada Trustco did not prove that its sale was improper. Casuccio did not provide an appraisal to prove that the sale was improvident. He also did not prove that Canada Trustco's appraisals were unreasonably low.

**Statutes, Regulations and Rules Cited:**

Ontario Rules of Civil Procedure, Rule 76

**Counsel:**

Robin A. Dodokin, for the Plaintiff

J. Reed Hunter, for the Defendant

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**REASONS FOR JUDGMENT****E.M. STEWART J.:—**

## Nature of the Action

¶ 1 Canada Trustco Mortgage Company brings this action against the Defendant, Carmen Casuccio for payment of \$147,545.67 plus interest and costs because it sustained a loss as a result of selling property under Power of Sale and pursuant to Casuccio's mortgage and guarantee obligations. The property (the "Mortgaged Property") is at 293-295 Highway #8 in Stoney Creek, Ontario.

¶ 2 Casuccio defends and counterclaims on the basis that Canada Trustco's sale of the Mortgaged Property was improvident and that significantly greater proceeds of sale would have been realized if the sale had been carried out properly.

## Background

¶ 3 This action proceeded to trial under Rule 76 as a summary trial. The affidavits and cross-examinations establish the following facts.

¶ 4 The Mortgaged Property is a small commercial plaza with four retail units on the main floor and three residential units on the second floor.

¶ 5 On November 10, 1999, Casuccio executed a mortgage in favour of Canada Trustco to secure the principal sum of \$418,300.00. The mortgage provided for monthly payments of principal and interest.

¶ 6 The mortgage made reference to and incorporated its Standard Charge Terms, a copy of which was provided to Casuccio. Pursuant to the Standard Charge Terms, Casuccio agreed to pay Canada Trustco all of its costs and expenses resulting from, among other things, repairing and managing the property, and for its legal fees and expenses incurred in selling it and collecting the debt.

¶ 7 As further security for the mortgage loan, Casuccio executed a personal guarantee in writing under seal whereby he guaranteed payment of all present and future debts, liabilities and obligations to Canada Trustco.

¶ 8 Casuccio fell into default on mortgage payments in August 2001. Canada Trustco delivered a demand letter on August 15, 2001 for payment of the mortgage arrears of \$9,210.55.

¶ 9 Casuccio failed to remedy the default under the mortgage. As a result, Canada Trustco issued a Notice of Sale under Mortgage on December 10, 2001 and claimed payment of the sum of \$425,970.60 owing.

¶ 10 In January 2002, Casuccio advised Canada Trustco that his associate, Christopher Schneyderberg, would bring the mortgage into good standing.

- ¶ 11 Canada Trustco's lawyer delivered a letter to Schneyderberg enclosing a Statement of Mortgage Arrears and advising that mortgage arrears must be paid by January 25, 2002. Casuccio, through Schneyderberg, accepted Canada Trustco's accounting and agreed to pay the mortgage arrears.
- ¶ 12 By letter dated January 22, 2002, Schneyderberg advised that he would pay the mortgage arrears by monthly instalments of \$7,650.00 starting at the end of January 2002. The payments were to be automatically debited from the bank account of a third party.
- ¶ 13 By letter dated January 24, 2002, Canada Trustco's lawyer advised Schneyderberg of the terms upon which the Bank would accept payment of the arrears, which included the provision of a signed authorization from the holder of the bank account from which the payments were to be deducted. Once all arrears had been paid, Canada Trustco would start to deduct monthly mortgage payments from the account. The documentation does not refer to any agreement by Canada Trustco to accept regular mortgage payments until such time as the arrears had been paid.
- ¶ 14 By letter dated January 27, 2002 Canada Trustco's lawyer delivered a Direction and Authorization to Schneyderberg to be signed by Brenda McKinlay, the holder of the account from which the mortgage arrears were to be deducted.
- ¶ 15 Canada Trustco's lawyer received a signed Direction and Authorization authorizing it to deduct \$7,650.00 on January 30, 2002 and \$13,570.09 on February 5, 2002. Once all arrears had been paid, monthly mortgage payments were to be deducted on the 5th day of each month from this bank account. However, the February 5, 2002 payment of \$13,570.09 to be applied towards arrears was not received.
- ¶ 16 Brenda McKinlay then told Canada Trustco's lawyer that she would pay the \$13,720.90 from the proceeds of a pending sale of property owned by her. On February 26, 2002, Canada Trustco's lawyer received a Direction and Undertaking signed by Brenda McKinlay's lawyers confirming that the arrears would be paid upon closing the transaction.
- ¶ 17 On April 10, 2002, Canada Trustco's lawyer was informed by Brenda McKinlay's lawyers that they were unable to comply with their Undertaking as there were insufficient funds to do so following closing.
- ¶ 18 By letter dated April 11, 2002, Canada Trustco's lawyer advised Schneyderberg that, since the \$13,720.29 had not been paid, Ms. McKinlay's solicitors had been released of the undertaking and Canada Trustco would proceed to enforce the mortgage.
- ¶ 19 Schneyderberg apparently alleged that Canada Trustco did not implement the "agreement" regarding the mortgage arrears. In my view, the correspondence outlined above demonstrate that Canada Trustco complied with its obligations fully. In fact, Canada Trustco was quite reasonable to the point of generosity in its dealings with McKinlay, Schneyderberg and Casuccio.
- ¶ 20 On May 24, 2002, Canada Trustco retained Chambers Hall Real Estate Inc. (the "Property Manager") to take possession of and manage the Mortgaged Property. Notices to Attorn Rents were delivered to tenants by the Property Manager.
- ¶ 21 The Property Manager attempted to collect rents from the commercial and residential tenants of the Mortgaged Property from May 2002 through November 2002. The Property Manager provided periodic reports to Canada Trustco indicating the state of repair at the property and the failure of some tenants to pay rent. A complete set of financial statements was prepared showing revenues collected and expenses paid.
- ¶ 22 The Property Manager's reports outline difficulties collecting rents from Azzuri Sports Club, as well

as the cost of necessary repairs to the residential units, including repairs for water damage or done due to safety concerns.

¶ 23 On June 27, 2002 the Property Manager advised Canada Trustco that the City of Hamilton Tax Department had provided a Statement of Realty Tax Arrears for the Mortgaged Property of \$76,583.28.

¶ 24 The Property Manager provided Canada Trustco with monthly financial reports for the period of time of the Bank's possession, including balance sheets, income statements, trial balances, income registers and expense registers from June 2002 through January 2003. There is no remaining issue raised by Casuccio with respect to this information.

¶ 25 The Mortgaged Property was listed for sale by Canada Trustco on September 9, 2002 for \$419,000.00 on the advice of its real estate agent. The Mortgaged Property was advertised on several websites, including the MLS website designed for real estate agents throughout Canada and an Ontario website sponsored by the Government of Ontario designed for brokers and investors interested in acquiring commercial property in Ontario.

¶ 26 On September 15, 2002, the Bank accepted an offer from Paul McDermott to buy the Mortgaged Property for \$410,000.00.

¶ 27 The sale closed on November 8, 2002.

#### Accounting

¶ 28 Canada Trustco's Statement of Adjustments indicates on closing that its lawyer received \$391,734.25. From the \$391,734.25, Canada Trustco's lawyer paid:

- (a) balance owing for real estate commission \$6,322.00 (\$20,000.00 held in trust applied to the real estate agent for commission);
- (b) water and sewer arrears to Hamilton Hydro, \$1,305.18;
- (c) tax arrears from 2000 to December 31, 2002 to the City of Hamilton, \$50,887.30;
- (d) to Canada Trustco \$333,219.77.

¶ 29 Prior to the closing, Canada Trustco had paid the following sums:

- (a) \$6,244.00 for 1999 Realty Taxes;
- (b) \$22,591.00 for 2000 Realty Taxes;
- (c) \$2,867.00 for the Pocrnic Appraisal;
- (d) \$4,863.00 for the Boychuk Appraisal.

¶ 30 These payments reduced the net sale proceeds by \$36,565.00 to \$296,654.77.

¶ 31 The net sum of \$296,654.17 then was applied to Casuccio's mortgage loan, which reduced it to \$119,280.34, plus interest and costs.

¶ 32 Through inadvertence, the Property Manager did not forward to Canada Trustco the sum of

\$6,536.52, being the net income during the period of time Canada Trustco was in possession of the Mortgaged Property. This amount has now been paid and applied to Casuccio's mortgage loan.

¶ 33 As of July 6, 2004 the sum of \$172,758.75 was due and owing under Casuccio's mortgage loan, as follows:

Principal	\$ 112,743.82
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Interest	\$ 27,697.30
Sub-Total:	\$ 140,441.12
Legal Costs to July 6, 2004:	\$ 32,309.63
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TOTAL:	\$ 172,758.75
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#### Issue

¶ 34 There is no remaining dispute concerning the above accounting of the proceeds of sale. The only issue raised by Casuccio at trial is his allegation that the sale was improvident and that the property should have been sold by the Bank for a greater amount.

#### Law

¶ 35 The law relating to the issue raised in this action is quite well established. A mortgagee selling under Power of Sale is under a duty to take reasonable precautions to obtain the true value of the mortgaged property at the date on which a decision is made to sell it. This does not mean that the mortgagee must, in fact, obtain true value. The duty of the mortgagee is only to take reasonable precautions. Perfection is not required. Some latitude is allowed to a mortgagee (*Shuster v. Goldberg*, [1998] O.J. No. 1243 (Ont. Gen. Div.) 113, O.A.C. 364 (C.A.) at p. 3, para. 21; *Hausman et al. v. O'Grady* (1986) 61 O.R. (2d) 96 (Ont. H.C.J.) at pp. 6 and 8).

¶ 36 In deciding whether a mortgagee has fallen short of this duty, the facts must be looked at broadly. A mortgagee will not be adjudged to be in default of these duties unless conduct is "plainly on the wrong side of the line" (*Oak Orchard Developments Ltd. v. Iseman*, [1987] O.J. No. 361 (Ont. H.C.J.) at pp. 4 and 5; *Manufacturer's Life Insurance Co. v. Granada Investments Ltd.*, [2001] O.J. No. 3932 (Ont. C.A.)).

¶ 37 The mortgagee is entitled to exercise a Power of Sale in accordance with the mortgagee's own purposes and choices. It does not matter if the moment may be unpropitious and that, by waiting, a higher price could be obtained (*Hausman et al v. O'Grady*, supra).

¶ 38 Even if the duty to take reasonable precautions is breached, the mortgagor must show that a higher price would have been obtained but for the breach to be compensated in damages. (*Hausman et al v. O'Grady*, supra; *Oak Orchard Developments Ltd. v. Iseman*, supra).

#### Analysis

¶ 39 I note that Casuccio had been trying to sell the Mortgaged Property since August 1997. The Mortgaged Property was originally listed by Casuccio at \$647,000.00 but no sale was achieved. By August 2002, Casuccio had reduced the listing price to \$599,000.00. Despite listing the Mortgaged Property off and

on over five years, Casuccio was unsuccessful in his efforts to get an offer that matched his selling price.

¶ 40 Canada Trustco obtained two appraisal reports prepared by appraisers holding AACI designations from the Appraisal Institute of Canada. An appraisal from Mark B. Boyak, dated July 30, 2002, expressed the opinion that the Mortgaged Property had a value of \$300,000.00. An appraisal from Steven Pocrnic, dated August 1, 2002, expressed the opinion that the Mortgaged Property had a market value of \$370,000.00.

¶ 41 After accepting the McDermott offer, Canada Trustco received two letters of intent offering \$380,000.00 and \$385,000.00 respectively to purchase the Mortgaged Property.

¶ 42 Although Casuccio alleges that the Bank sold the property improvidently, no appraisal by an accredited AACI Appraiser has been tendered to indicate whether, how or why the appraisals obtained by Canada Trustco are unreasonably low. There is no evidence that another buyer would have paid more for the property at the time it was sold other than the bare information of the subsequent sale. I find the evidence of Dale Roles, who is not an AACI accredited appraiser nor a full-time real estate broker, concerning the value of the property to be of no assistance in these circumstances.

¶ 43 The Mortgaged Property was ultimately resold to another purchaser for \$500,000.00 on January 16, 2003. Casuccio, however, has not presented any evidence which describes the state of the property at the time of this subsequent sale.

¶ 44 Coincidentally, Mr. Pocrnic was retained by the subsequent purchaser to conduct an appraisal of the Mortgaged Property for financing purposes. Mr. Pocrnic's second inspection of the Mortgaged Property was carried out on February 20, 2003. At that time, he concluded that the Mortgaged Property had a value of \$502,000.00. He indicated that in determining that value he took into consideration the fact that renovations to the property had been undertaken. He observed that a substantial retrofit had been completed to one of the residential apartments and building materials were on site for the second residential unit. In addition, Pocrnic stated that a complete overhaul and renovation of the Azzuri Social Club unit was substantially completed and that flooring materials for a second restaurant on the ground floor were also on site. Mr. Pocrnic also stated that tenants and leases were reported to be in place at the time of his inspection. He believed that between \$80,000.00 and \$100,000.00 in capital upgrades had been invested in the Mortgaged Property prior to the sale.

#### Conclusion

¶ 45 In my opinion, the evidence amply establishes that Canada Trustco is very much on the "right side of the line" in this case. It took reasonable and prudent steps to ascertain the value of the property, listed it for sale appropriately and took advantage of a reasonable offer to purchase when made. The evidence of Casuccio, such as it is, falls far short of that which is required to establish that the sale was in any way improvident. The mere fact that another purchaser ultimately paid more for the property shortly after it had been sold by Canada Trustco for an amount that was reasonable at that time does not demonstrate that the sale was in any way improvident or improper.

¶ 46 Accordingly, Canada Trustco shall have judgment against Casuccio in the amount of \$144,974.81 plus costs.

#### Costs

¶ 47 If the quantum of costs cannot be agreed upon by the parties, written submissions may be delivered for consideration within 20 days of the date of release of this decision.

E.M. STEWART J.

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