

FORM 59A  
*Courts of Justice Act*

ORDER

Court file number: CV-12-468709

ONTARIO SUPERIOR COURT OF JUSTICE

The Honourable  
Mr. Justice Spence  
(Court seal)

Order made: April 4, 2013

NEIL KISTODIAL and CECILE MCDONALD

Applicants

- and -

DEONORINE (DAVE) KISTODIAL, CHANDROWTI KISTODIAL,  
PREACHER KISTODIAL, RENEIL KISTODIAL, and SHOBHA KISTODIAL

Respondents

ORDER

THIS MOTION, made as an Urgent Motion by the Applicants is for an Order of Eviction and Related Relief.

The Applicants appeared represented by Counsel, Ms. Roth, this day, April 4, 2013, at the Superior Court of Justice, at 393 University Avenue, Toronto, Ontario. Affidavits of Service filed with respect to the Motion Record, the Factum and the Book of Authorities as to all five Respondents. The Respondents appeared without any materials filed with the Court.

This matter began with a Notice of Application dated November 27, 2012 seeking a Declaration and Permanent Injunction against the Respondents relating to the ownership and use of the Subject Property and in particular with regard to the proposed sale of the property, and other related relief.

On Feb 1/13 Allen J. adjourned the Application to March 13/13 peremptory to the Respondents, with a timetable for materials. On March 13/13, Chiappetta made interim orders against the Respondents and directed a trial in respect of the claim for damages for trespass and property damages. The interim orders are directed to the alleged interference by the Respondents with the proposed sale of the property. The Applicants contend that the Respondents are in breach of those orders and are expected to continue to breach those orders unless they are evicted.

No materials were filed for the Respondents on the Motion before Chiappetta J. or before Allen J.

The Court heard submissions for the Applicants and the Respondents. The oral submissions for the Applicants addressed the matters that are also addressed in the Factum of the Applicants. The Factum provides cross-references to the Affidavits filed on behalf of the Applicants.

**BASED ON THE MATERIALS FILED on the Motion and the submissions of the Applicant based on those materials, the Applicants have established that the Respondents have been trying successfully to thwart inspection of the house for purposes of the sale, in contravention of the orders of the court and they are likely to continue to do so as long as they continue to occupy the premises. Meanwhile, the liabilities against the property are likely to continue to increase, to the detriment of the Applicants and the price at which the house can be sold is likely to be adversely affected, also to the detriment of the Applicants. Moreover, if the first mortgage cannot be paid, and the evidence suggests it cannot, RBC will be in a position to foreclose and if a sale is not a reliable prospect, RBC would not have a good reason not to do so, to the detriment of the Applicants.**

**ON THE BASIS OF THE MATERIALS FILED and for the reasons submitted by the Applicants orally and as set out satisfactory in their Factum as to the facts in dispute and as to the applicable law, including in particular the law as to the requests for a writ of possession, and the application of that law to the facts in this case, an order of the court is to go as requested by the Applicants.**

**FOR THE ABOVE REASONS, order to go in favour of the Applicants in the terms of the order requested on page 1 of the Notice of Motion and the Further Orders requested on page 2 of the Notice of Motion, with the specific provisions that the date for all purposes of the orders as to Possession, Eviction and Vacation on page 2 of the Notice of Motion shall be April 27, 2013 and not later.**

- 1. THIS COURT ORDERS A Writ of Possession to be enforced by the City of Toronto Sheriff by removing the Respondents from 57 Lanark Avenue, Toronto, Ontario M6C 2B5 [the Subject Property] to effect the immediate possession by the Applicants no later than April 27, 2013;**
- 2. THIS COURT ORDERS that the Respondents shall comply with all prior orders of this Honourable Court;**
- 3. THIS COURT ORDERS that the Respondents are to comply with the Orders as listed in the Notice of Motion included in the Motion Record before the Court; and more specifically:**
- 4. THIS COURT ORDERS that the Respondent are to cease any further interference with the sale of the Subject Property, as previously ordered by this Honourable Court on March 13, 2013;**
- 5. THIS COURT ORDERS that the Respondents are to cease preventing real estate agents from entering the Subject Property and prospective Purchasers to view the**

inside of the Subject Property, as previously ordered by this Honourable Court on March 13, 2013;

6. THIS COURT ORDERS that the Respondents are to cease usurping themselves jointly and severally as the owners of the Subject Property, as previously ordered by this Honourable Court on March 13, 2013;
7. THIS COURT ORDERS that the Respondents are to not interfere with any person carrying out a house inspection on behalf of the Applicants, their Agents, or Prospective Buyers, authorised by the Applicants;
8. THIS COURT ORDERS that the Respondents are to comply with the order to forthwith pay costs in the amount of \$9,000.00, as was ordered by this Honourable Court on March 13, 2013;
9. THIS COURT ORDERS that the Respondents are to be Evicted from the Subject Property, by enforcement provided by the Sheriff of the City of Toronto, and for the immediate possession of the Subject Property by the Applicants, and such enforcement to be implemented no later than April 27, 2013;
10. THIS COURT ORDERS that the Sheriff of the City of Toronto is to enforce estopping the Respondents from dilapidating the value of the property and from physically damaging the said residential property;
11. THIS COURT ORDERS that the Sheriff of the City of Toronto is to enforce estopping the Respondents from removing Chattels from the said premises pursuant;
12. THIS COURT ORDERS that the Sheriff of the City of Toronto is to enforce ALL OF WHICH NO LATER THAN AP APRIL 27, 2013.

May 3/13  
The enforcement of these orders is to be expedited -  
Spence J

April 28/13  
These orders are to be issued and entered in this form  
Spence J

  
\_\_\_\_\_  
(Signature of judge, officer or registrar)

NEIL KISTODIAL, ET AL.  
Applicants

-and-

DAVID KISTODIAL, ET AL.  
Respondents

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**PROCEEDING COMMENCED AT**  
**TORONTO, ONTARIO**

**ORDER**

M. Christine Roth  
Roth & Associates  
Barristers & Solicitors, Notaries Public  
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LSUC#: 49897L  
Counsel for the Applicants

*expedited note  
ordered on  
p 3*

ONTARIO  
SUPERIOR COURT OF JUSTICE

BETWEEN:

Neil Kistodial & Cecile McDonald

Applicants

- and -

Deonorine (Dave) Kistodial, Chandrowli Kistodial,  
Preacher Kistodial, Reneil Kistodial. and Shobha Kistodial

Respondents

NOTICE OF MOTION

THE APPLICANTS WILL MAKE A MOTION TO THE COURT ON (DAY) WEDNESDAY, (DATE) APRIL 3, 2013, AT (TIME) \_\_\_\_\_, OR SOON AFTER THAT TIME AS THE MOTION CAN BE HEARD. AT 393 UNIVERSITY AVENUE, TORONTO, ONTARIO.

PROPOSED METHOD OF HEARING: The motion is to be heard (choose appropriate option)

- in writing under subrule 37.12.1 (1) because it is (insert one of on consent, unopposed or made without notice);
- in writing as an opposed motion under subrule 37.12.1 (4); (14 days)
- orally.

THE MOTION IS FOR an order ordering the respondents:

- to comply with all prior orders of this Honourable Court regarding the residential property located at 57 Lanark Street, Toronto, Ontario;
- to cease any further interference with the sale of the said property, as previously ordered by this Honourable Court;
- to cease preventing real estate agents from entering the said residential property accompanied by potential buyers to view the inside of the said residential property, as previously ordered by this Honourable Court;
- to cease to represent themselves separately and severally as the owners of the said property, as previously ordered by this Honourable Court;
- to not interfere with any person carrying out a house inspection as a precondition to the sale of the said property;
- to comply with the order to forthwith pay costs in the amount of \$9,000, as was previously ordered by this Honourable Court;

AND FURTHER THE MOTION IS FOR

- an order, to be enforced by the sheriff, for the immediate possession by the applicants of the residential property located at 57 Lanark Street, Toronto, Ontario or at the earliest date that this Honourable Court may determine as reasonable; or, in the alternative,
- an order, to be enforced by the sheriff, for the immediate eviction of the respondents occupying the said residence or at the earliest date that this Honourable Court may determine as reasonable; or, in the alternative,
- an order, to be enforced by the sheriff, ordering the respondents to vacate the said premises by the earliest date that this Honourable Court may deem reasonable;

AND FURTHER THE MOTION IS FOR

- an order, to be enforced by the sheriff, estopping the respondents from dilapidating the value of the property by making good on promises of one or more of the respondents to physically damage the said residential property if the respondents are forced to quit the premises;
- an order, to be enforced by the sheriff, estopping the respondent from illegally removing chattels from the said premises pursuant to previous threats made by one of more of the respondents if the respondents are forced to quit the premises;
- any other remedy that this Honourable Court may choose to grant.

THE GROUNDS FOR THE MOTION ARE

- Costs for this motion on substantial in default*  
*Rule 37.05(3) + Rule 60, Rules of Civ. P. 1990*
- the respondents have frustrated attempts to sell the residential property, owned by the applicants, at 57 Lanark St., Toronto Ontario;
  - the respondents have continued to frustrate the sale of the said property by failing to comply with prior court orders relating to the sale of the house;
  - the respondents have consistently put themselves above the law;
  - the respondents have failed to comply with court orders to cease actively interfering with real estate agents who are prevented by the respondents, under various false pretexts, from showing the interior of the said premises to potential buyers;
  - the respondents have failed to comply with court orders to cease continuing to claim to be and present themselves as the the owners of the said premises;
  - the bank holding the mortgage, because the mortgage has remained unpaid for a substantial period, is set to foreclose on the property unless the mortgage owed can be paid in total in the near future;
  - that a foreclosure by the bank would cause substantial financial prejudice to the respondents by not only depriving them from realizing the increase in the value of the said property over the period that they have owned it, but forcing them as well to pay the difference between the outstanding mortgage and the price obtained for the house under a power of sale;
  - that a foreclosure by the bank would cause irreparable harm to the credit rating of the applicants and perhaps force them into bankruptcy;
  - that threats have been made by one or more of the respondents to physically damage the said residential property if the respondents are forced to quit the premises;

The Respondents have failed to accept responsibility for their actions and to follow the *Rules*, after they were served with the Applicants' materials on January 23, 2013. They claimed if the materials were ready in November that they should have received them at the time. They refused to acknowledge the *Rules* and that the Applicants acted within the *Rules*. They have persistently refused acceptance of service or denial of receipt of service. When in court on February 1, 2013, they were advised by the court of the next court date and that it was peremptory on them. The Endorsement clearly outlined the meaning of the term peremptory. They frequently alleged that to have retained counsel. However, when such counsel were contacted by any party, they denied representing the Respondents. They appeared in court again, on March 13, 2013, making same allegations. They since have refused to comply with the order of March 13, 2013. Where the defendants have a protracted record of breaches and the plaintiffs suffer prejudice, the court struck out the statement of defence in *Madonia v. Mulder* [2002].

REF: Affidavit of Neil Kistodial, dated April 1, 2013, at para. 7 [Motion Record - Tab 2]

REF: Affidavit of Moon Gue (Michael) Chung, paras. 4-9, dated April 1, 2013, and Exhibits B, C, D, and E [Motion Record - Tab 3]

REF: *Madonia v. Mulder* [2002] CarswellOnt. 481, 17 C.P.C. (5<sup>th</sup>) 349, [2002] O.J. NO. 487 (Ont. S.C.J. Feb. 11, 2002), **Paras 8 & 9** [Book of Authorities Tab 5].

#### **PART IV – ORDER REQUESTED**

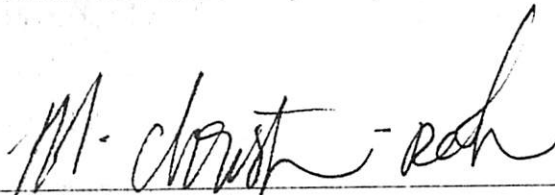
It is therefore respectfully requested that the Court orders that:

- a. A Writ of Possession to be enforced by the City of Toronto Sheriff by removing the Respondents from 57 Lanark Avenue, Toronto, Ontario M6C 2B5 [the Subject Property] to effect the immediate possession by the

Applicants or, in the alternative, at the earliest date as this Honourable Court may deem just:

- b. An Order that the Respondents comply with all prior orders of this Honourable Court;
- c. More specifically, Orders as listed in the Notice of Motion included in the Motion Record before the Court; and
- d. An Order for costs of this motion on substantial indemnity basis.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3<sup>rd</sup> day of April, 2013.



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M. Christine Roth  
Roth & Associates  
Barristers & Solicitors, Notaries Public  
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Toronto, Ontario M5A 2L2  
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Facsimile: 416-926-8968  
Email: mchristineroth@rothatlaw.ca  
Lawyer for the Applicants  
LSUC#: 49897L



April 4/13

Ms Roth of the Applicants

Deonvide (Dave) Kistodial, Chandrowti Kistodial  
ad Rencil Kistodial in person \* at 10:40 AM

Motion for an order of eviction  
and related relief.

Affidavits of service filed with  
respect to the Motus Recad, the Factum  
ad the Book of Authorities onto all five Respondents

Motus scheduled as an urgent motion  
by Pollock J dated April 2/13 but on  
and subject to the terms of her order.

No materials were filed by the  
Respondents

The Respondents have not paid the  
costs order for \$9000 ordered by  
Chappetta J.

(\* Shortly before I pm Shobha Kistodial  
and Preacher Kistodial attended in person)

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NEIL KISTODIAL, ET AL.  
Applicants

and

DAVID KISTODIAL, ET AL.  
Respondents

Court File No. CV-12-468709

ONTARIO  
SUPERIOR COURT OF JUSTICE  
PROCEEDING COMMENCED AT  
TORONTO, ONTARIO

MOTION RECORD  
OF  
APPLICANTS

M. Christine Roth

ROTH & ASSOCIATES

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LSUC#: 49897L

Counsel for the Applicants

This matter began with <sup>notice of</sup> application dated November 27, 2012 seeking a declaration and permanent injunction against the Respondents relating to the ownership and use of the subject property <sup>in particular</sup> with regard to the proposed sale of the property, and other related relief.

On Feb 1/13 Allen J. adjourned the application to March 13/13 pursuant to the Respondents, with a timetable for materials. On March 13/13, Chiappetta made interim orders against the Respondents and ordered a trial in respect of the claim for <sup>damages for</sup> trespass <sup>and</sup> <sup>property</sup> damages. The interim orders are directed to the alleged interference by the Respondents with the proposed sale of the property. The Applicants contend that the Respondents are in breach of those orders and are expected to continue to breach those orders unless they are evicted.

No materials were filed for the Respondents on the motion before Chiappetta J. ~~There or before~~ ~~either of Allen J. do not mention whether any~~ ~~materials were filed for the Respondents for the~~ ~~hearing on~~

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The Court heard submissions for the Applicants and the Respondents. The oral submissions for the Applicants addressed the matters that are also addressed in the Factum of the Applicants. The Factum provides cross-references to the Affidants filed on behalf of the Applicants.

The Respondents' submissions combined submissions on the facts and the issues ~~which~~ with evidence on the facts in dispute. The oral evidence of the Respondents was not admissible. The present hearing is a motion and it proceeds on the record constituted by the materials filed with the Court and served on the parties. The oral evidence of the Respondents was not in writing, was not sworn and was not subject to cross-examination. It was not admissible and cannot be taken into account in determining the matters before the Court.

Based on the materials filed on the motion and the submissions of the Applicant based on those materials, the Applicants have established that the Respondents have been

successfully p 4

to try to thwart inspectors of the  
have for purposes of the sale, in  
contumacious of the orders of the court  
and they are likely to continue to do so  
as long as they continue to occupy the  
premises. Meanwhile, the liabilities  
against the property are likely to  
continue to increase, to the detriment of  
the Applicants and the price at which the  
house can be sold is likely to be  
adversely affected, also to the detriment of  
the Applicants. Moreover, if the first  
mortgage cannot be paid, and the evidence  
suggests it cannot, RBC will be in a  
position to foreclose and if a sale is not  
a reliable prospect, RBC would not have  
a good reason not to do so, to the  
detriment of the Applicants.

The Respondents - or at least Mr.  
Deonovum (Dabc) Kistodial. Submits that  
the Court should not order an writ eas now  
but should instead await a decision in  
the Court on the pending trial of the issues  
as to damages ~~ab~~ <sup>ab</sup> ~~fa~~ <sup>fa</sup> property damage and  
trespass on the basis that there is an  
issue as to the <sup>to</sup> ~~the~~ <sup>the</sup> ~~propn~~ <sup>propn</sup> ownership of the  
property - i.e. the Applicants or one or more  
of the Respondents - and the trial will

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resolve that issue. However, there is no material before this Court on which it could be concluded that there is an issue as to ownership that is sufficiently serious to warrant such a disposition, particularly in view of the fact that it appears no statement of claim and no statement of defence have yet been served and filed and in the absence of a statement of defence it cannot be said that an issue as to ownership is before the court in any way.

On the basis of the materials filed and for the reasons submitted by the Applicants orally and as set out satisfactorily in their Factum as to the facts in dispute and as to the applicable law, including in particular the law as to the requirements for a writ of possession, and the application of that law to the facts in this case, an order of this Court is to go as requested by the Applicants.

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For the above motion, order to go in  
favor of the applicants on the terms of  
the order requested on page 1 of the  
Notice of motion and the further orders  
requested on page 2 of the Notice of  
motion, with the specific provision  
that the date for all purposes of the  
order as to possession, written and vacation  
on page 2 of the Notice of motion shall  
be April 27, 2013 and not later.

If necessary, the parties may make  
written submissions as to costs as follows:  
the applicants within 15 days of ~~today~~  
the date of the release of these reasons;  
the respondents within 15 days after those  
submissions, and any reply submissions  
within the next 15 days. Please send  
a copy by email to my assistant.

Spence J

# Roth & Associates

BARRISTERS & SOLICITORS, NOTARIES PUBLIC

## ENDORSEMENT OF SPENCE J. [Verbatim Copy-Typed]

*{Back-Page of Motion Record}*

April 4/13

**Ms. Roth for the Applicants  
Deonoride (Dave) Kistodial, Chandrowti Kistodial, and Reneil Kistodial in person \* at  
10:40 AM  
Motion for an order of eviction and related relief.**

Affidavits of service filed with respect to the Motion Record, the Factum and the Book of Authorities as to all five Respondents.

Motion scheduled as an urgent Motion by Pollock J. dated April 2/13 but on and subject to the terms of her order.

No materials were filed by the Respondents.

The Respondents have not paid the costs order for \$9,000.00 ordered by Chiappetta J.

(\* Shortly before 1pm Shobha Kistodial and Preacher Kistodial attended in person.)

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*{Back-Page of Motion Record}*

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This matter began with a Notice of Application dated November 27, 2012 seeking a declaration and permanent injunction against the Respondents relating to the ownership and use of the subject property and in particular with regard to the proposed sale of the property, and other related relief.

On Feb 1/13 Allen J. adjourned the Application to March 13/13 peremptory to the Respondents, with a timetable for materials. On March 13/13, Chiappetta made interim orders against the Respondents and ordered a trial in respect of the claim for damages for trespass and property damages. The interim orders are directed to the alleged interference by the Respondents with the proposed sale of the property. The Applicants contend that the Respondents are in breach of those orders and are expected to continue to breach those orders unless they are evicted.

No materials were filed for the Respondents on the Motion before Chiappetta J. or before Allen J.

# Roth & Associates

B A R R I S T E R S & S O L I C I T O R S , N O T A R I E S P U B L I C

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## P 3

The Court heard submissions for the Applicants and the Respondents. The oral submissions for the Applicants addressed the matters that are also addressed in the Factum of the Applicants. The Factum provides cross-references to the Affidavits filed on behalf of the Applicants.

The Respondents' submissions combined admissions on the facts and the issues with evidence on the facts in dispute. The oral evidence of the Respondents was not admissible. The present hearing is a Motion and it proceeds on the record constituted by the materials filed with the court and served on the parties. The oral evidence of the Respondents was not in writing, was not sworn and was not subject to cross-examination. It was not admissible and cannot be taken into account in determining the matters before the court.

Based on the materials filed on the Motion and the submissions of the Applicant based on those materials, the Applicants have established that the Respondents have been

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## P4

trying successfully to thwart inspection of the house for purposes of the sale, in contravention of the orders of the court and they are likely to continue to do so as long as they continue to occupy the premises. Meanwhile, the liabilities against the property are likely to continue to increase, to the detriment of the Applicants and the price at which the house can be sold is likely to be adversely affected, also to the detriment of the Applicants. Moreover, if the first mortgage cannot be paid, and the evidence suggests it cannot, RBC will be in a position to foreclose and if a sale is not a reliable prospect, RBC would not have a good reason not to do so, to the detriment of the Applicants.

The Respondent – or at least Mr, Deonorine (Dave) Kistodial submits that the court should not order an eviction now but should instead await a decision by the court on the pending trial of the issues as to damages for property damage and trespass on the basis that there is an issue as to the proper ownership of the property – ie the Applicants or one or more of the Respondents – and the trial will

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## P5

resolve that issue. However, there is no material before this court on which it could be concluded that there is an issue as to ownership that is sufficiently serious to warrant such a disposition, particularly in view of the fact that it appears no Statement of Claim and no Statement of Defence have yet been served and filed and in the absence of a Statement of Defence it cannot be said that an issue as to ownership is before the court in any way.



# Roth & Associates

B A R R I S T E R S & S O L I C I T O R S , N O T A R I E S P U B L I C

On the basis of the materials filed and for the reasons submitted by the Applicants orally and as set out satisfactory in their Factum as to the facts in dispute and as to the applicable law, including in particular the law as to the requests for a writ of possession, and the application of that law to the facts in this case, an order of the court is to go as requested by the Applicants.

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For the above reasons, order to go in favour of the Applicants in the terms of the order requested on page 1 of the Notice of Motion and the further orders requested on page 2 of the Notice of Motion, with the specific provisions that the date for all purposes of the orders as to possession, eviction and vacation on page 2 of the Notice of Motion shall be April 27, 2013 and not later.

If necessary the parties may make written submissions as to costs as follows: the Applicants within 15 days of the date of release of these reasons, the Respondents within 15 days after those submissions, and any reply submissions within the next 15 days. Please send a copy by email to my assistant.

**Spence J.**