

NOVA SCOTIA COURT OF APPEAL

Citation: Behner v. Bank of Montreal, 2010 NSCA 54

Date: 20100618

Docket: CA 321628

Registry: Halifax

Between:

Paul D. Behner and Marilla Stephenson

Appellants

v.

Bank of Montreal

Respondent

Judge: The Honourable Justice Linda Lee Oland

Appeal Heard: June 2, 2010

Subject: Guarantees - Collateral Mortgages - Foreclosure - *Res Judicata*

Summary: Mr. Behner gave the Bank two personal guarantees, the first secured by a collateral mortgage on his property and the second unsecured. The Bank obtained judgment pursuant to the second guarantee for the total amount of the indebtedness. It then successfully applied for an order for foreclosure on the collateral mortgage which secured the first guarantee. Mr. Behner and his spouse, Marilla Stephenson, who now owns the property, appeal.

Issue: Whether the motions judge erred in law (1) in holding that the Bank was entitled to an order for foreclosure against property pledged as collateral security to a personal guarantee without having first determined that it was entitled to have judgment on the guarantee; (2) in holding that the doctrine of *res judicata* did not apply; and (3) in holding the Bank was not barred or estopped from seeking an order for foreclosure against property pledged as collateral security to a personal guarantee.

Result: Appeal dismissed. Both guarantees were continuing guarantees which secured the same indebtedness, which has yet to be satisfied. They also were expressly not released until all that indebtedness was paid. In these circumstances and where there is no evidence of it acting in bad faith, the motions judge did not err in granting the order for foreclosure without first determining that the Bank was entitled to judgment on the guarantee which the collateral mortgage secured. The appellants failed to establish the constituent elements of *res judicata*, which would operate as an estoppel barring the Bank from proceeding with its foreclosure action.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 10 pages.