NOVA SCOTIA COURT OF APPEAL
Citation: *Bank of Nova Scotia v. Allen*, 2010 NSCA 47

Date: 20100528
Docket: CA 318661
Registry: Halifax

Between:

The Bank of Nova Scotia

Appellant

v.

Terry J. Allen

Respondent

Judges:	MacDonald, C.J.N.S.; Saunders and Beveridge, JJ.A.
Appeal Heard:	May 17, 2010, in Halifax, Nova Scotia
Held:	The appeal is allowed and the order of the lower court is varied, per reasons for judgment of MacDonald, C.J.N.S.; Saunders and Beveridge, JJ.A. concurring.
Counsel:	Stephen Kingston and Ian R. Dunbar, for the appellant Terry J. Allen, the respondent not appearing

Reasons for judgment:

OVERVIEW

[1] The narrow issue in this appeal involves whether a mortgagee can recover protective disbursements incurred in circumstances where the mortgagee, having purchased the property at the sheriff's sale, still retains title at the time of the deficiency judgment application. LeBlanc, J. of the Supreme Court, sitting in Chambers, denied this aspect of the appellant Bank's claim. (See: **The Bank of Nova Scotia v. Terry J. Allen**, 2009 NSSC 290.) However, I respectfully believe that this conclusion reflects reversible error. Therefore, for the reasons that follow, I would allow the Bank's appeal and add the disputed disbursements to its deficiency judgment.

BACKGROUND

[2] The facts are simple and not uncommon. The respondent mortgagor defaulted and the Bank foreclosed. At the foreclosure sale, the bids were low and so, to protect its interests, the Bank as mortgagee purchased the property. The Bank then took possession of the property with a view to selling it privately. Customarily, in such situations, the anticipated proceeds of the sale would be applied against the debt. The Bank would then be entitled to a "deficiency judgment" against the mortgagor for any shortfall.

[3] In the meantime, the Bank must maintain the property in order to secure an optimum sale price down the road. According to the typical mortgage contract, these maintenance costs would be to the mortgagor's account and included in any deficiency judgment. The relevant clause in this case provides:

> 16. Enforcing our Rights
>
> If you do not repay the Obligations Secured after we have demanded payment of them or if you have not corrected any other default under this Mortgage or Agreements we can take immediate possession of your property. Upon giving you notice as required by law, we may sell the property or lease it or pursue any other remedies available to us under Nova Scotia law. <u>You will immediately pay all our expenses of enforcing or protecting our security or any of our rights under the Mortgage or any Agreements. Our expenses include the cost of taking or keeping possession of the property, and allowance for the time and services of our</u>

> employees utilized in so doing, our legal fees on a solicitor and own client basis and all other costs related to protecting or enforcing our interest under the Mortgage. These expenses will form part of the Obligations Secured and will bear interest as provided for in the Agreements. If the amount we receive from the sale or lease of the property is less than what you owe under the Obligations Secured, you will have to pay us the difference. (Emphasis added).

[4] Therefore, pursuant to this clause, the Bank applied for its deficiency judgment. As noted it did so before selling the property; something it was also entitled to do under the mortgage contract. In such circumstances, the mortgagor's credit from the anticipated sale proceeds is based on independent appraisals.

[5] In denying the Bank its protective disbursements, the Chambers judge felt it significant that the property was still owned by the Bank. This rendered the ultimate sale price (and the mortgagor's consequential credit) somewhat speculative. Thus, feared the judge, the door would be open for the Bank to receive a potential windfall should the ultimate sale price exceed the appraised value. Furthermore, such a windfall, he felt, would be secured on the back of the mortgagor should the protective disbursements be approved.

[6] In taking this approach, the judge explained how he was persuaded by his colleague MacAdam, J. who earlier in **Bank of Montreal v. Kennedy** (2006), 243 N.S.R. (2d) 126, [2006] N.S.J. No. 150, had applied the same logic:

> ¶ 13 This issue was addressed by MacAdam, J. in *Bank of Montreal v. Kennedy* (2006), 243 N.S.R. (2d) 126, where there was an application by the mortgagee for a deficiency at a time when the mortgagee still had title. The deficiency covered expenditures incurred before and after the Sheriff's sale, and included the plaintiff's taxed costs, protective disbursements, sheriff's fees and the appraised value of the property. ...
>
> ¶ 14 The mortgagee in *Kennedy* relied on *Marjen* in support of its claim for the deficiency judgment, including protective disbursements. MacAdam, J. referred to Justice Bateman's tracing (in *Marjen*) of the development of earlier versions of Rule 47.10, including Rule 47.10(2), as originally enacted in 1984. He noted the distinction between a situation where a third party purchased the foreclosed

> property at the Sheriff's sale, and where the property was sold by the mortgagee prior to making an application. ...
>
> . . .
>
> ¶ 17 MacAdam, J. cited Justice Bateman's observation that it was Nova Scotia practice to "allow the mortgagee on a deficiency application to claim reasonable expenses incurred up to the date of the application and to require the mortgagee to account for any income earned on the property during that same period," taking the view this comment related to situations where the property has been resold, as in *Marjen*, rather than where the mortgagee still held the property, as in *Offman* (para. 30). He continued, at paras. 31-34:
>
> > Nowhere in the reasons of Justice Bateman is it suggested the failure of the Supreme Court in 1995, to stipulate a new procedure for deficiency judgments resulted in the law remaining the same where the mortgagee has resold the property but changed where the mortgagee has not resold the property. Such an inconsistency is nowhere evident in the reasons of Justice Bateman. To permit mortgagees to enter judgment against mortgagors for expenditures designed to improve the value of the foreclosed property, which they then own, and where the mortgagor does not receive the benefit of any such enhanced value is unconscionable. Nor is it an adequate response that appraisals, as at the date of the application, will sufficiently compensate the mortgagor for these costs. ...

[7] Thus, LeBlanc, J. concluded:

> ¶ 20 In my view, *Kennedy* is persuasive in these circumstances, and I apply it accordingly. I am disallowing any protective disbursements incurred after the Sheriff's sale.

THE ISSUE

[8] Thus the narrow issue on this appeal emerges. Specifically, LeBlanc, J. acknowledged this court’s direction in **Royal Bank v. Marjen Investments Ltd.**, [1998] N.S.J. No. 4, that a mortgagee when claiming a deficiency judgment, can include its reasonable protective disbursements flowing from its decision to purchase the property at the foreclosure sale. The finer question becomes whether it matters that the mortgagee still holds the property at the time of the deficiency judgment application. As I will now elaborate, in my view, it should make no

difference and the Bank in this case should have recovered its protective disbursements.

STANDARD OF REVIEW

[9] At the outset, let me briefly consider our appropriate standard of review. The judge's decision to deny the disputed disbursements involved an exercise of discretion thereby commanding deference. That said, this discretion must be exercised judicially. Bateman, J. A. in **Marjen** explains:

> ¶ 52 The discretion in determining to refuse a deficiency judgment, or in assigning a value to the property, whether pursuant to the Court's equitable jurisdiction or the *Civil Procedure Rules*, must be exercised judicially. (See *R. v. Casey* (1988), 80 N.S.R. (2d) 247, at p. 248, per Macdonald J. A., and *Sharp v. Wakefield et al* , [1891] A.C. 173 at p. 191, per Lord Halsbury regarding the judicial exercise of a discretionary power).
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> ¶ 53 In *Ward v. James*, [1965] 1 All E.R. 563 at p. 570, Lord Denning approved the following comment from *Grimshaw v. Dunbar*, [1953] 1 All E.R. 351 (H.L.), at p.353, where Jenkins, L.R. said:
>
> > ... did the judge here exercise his discretion on wrong considerations or wrong grounds, or did he ignore some of the right considerations? If so, then he decided on wrong principles, his error was a matter of law, and this court can interfere...
> >
> > ... In my view, although no reasons are given by a judge exercising, or refusing to exercise, a discretionary jurisdiction, it may nevertheless, be possible, on looking at the facts, to say that, if the judge has taken all the relevant circumstances into consideration and had excluded from consideration all irrelevant circumstances, he could not possibly have arrived at the conclusion to which he came, because on those facts that conclusion involves a palpable miscarriage of justice....

ANALYSIS

[10] I begin with this basic premise. By paying protective disbursements, the Bank protects not only its own interests but also those of the mortgagor. I say this because protecting the value of the property optimizes its sale price. Thus, the higher the sale price, the lower the shortfall payable by the mortgagor (or conceivably the higher the surplus payable to the mortgagor). The corollary to this

is obvious. Denying a mortgagee recovery for such expenses would serve as a disincentive to incurring them. This in turn would lead to lower sale prices and indirectly greater risk to the mortgagor. Hallett, J.A. of this court in **Nova Scotia Savings & Loan Co. v. MacKay and MacCulloch** (1979), 41 N.S.R. (2d) 432, summarized it this way:

> ¶ 12 However, there are advantages to the mortgagor when the mortgagee bids in the property at the Sheriff's Sale in the absence of other reasonable bids as the mortgagee can then properly expose the property to the market and obtain the best price possible. Normally this results in a claim for a lesser deficiency than that claimed in the pleadings. Mortgagees should not be discouraged from following such a course and, in my opinion, should have available a reasonably inexpensive remedy to recover the ultimate deficiency even where it exceeds the deficiency on the Sheriff's Sale.
>
> ¶ 13 It would seem to me that such a claim which includes the recovery of expenses reasonably incurred by the plaintiff to maintain the property if purchased by the plaintiff at the foreclosure sale and expenses incurred on the resale could be made in the Statement of Claim commencing the foreclosure proceedings *provided* the mortgage document contained a term that made the mortgagor liable for the same and provided further that such expenditures could be added to the principal owing on the mortgage even though incurred after the Sheriff's Sale. The standard mortgage document contains covenants of the mortgagor to maintain the property in a good state of repair, pay taxes and insurance and entitles the mortgagee to pay the same if they are not paid by the mortgagor and add any sums expended for this purpose to the mortgage debt. It would simply be a matter of extending the scope of these covenants.

[11] Nor, in my view is there any reason to distinguish between cases where, at the time of the deficiency judgment application, the property has been sold from those cases where the mortgagee retains the property. Granted, and as noted, in the latter situation, the ultimate sale price could exceed that which was estimated. Yet, this cuts both ways. It could also be lower than that estimated. In any event, the mortgagee would have to absorb the maintenance costs from the time of the deficiency judgment application to the date of the ultimate sale.

[12] Respectfully, it strikes me that the Chambers judge fell into error when classifying the purpose of protective disbursements. There he specifically relied on MacAdam, J. in **Kennedy**. Yet, MacAdam, J. said this:

> ¶ 17 ... To permit mortgagees to enter judgment against mortgagors for expenditures designed to *improve* the value of the foreclosed property, which they then own, and where the mortgagor does not receive the benefit of any such *enhanced* value is unconscionable. ...
>
> [Emphasis added.]

[13] This presumption that protective disbursements are designed to better the property respectfully misses the mark. They are not designed to "improve" or "enhance" the property as MacAdam, J. describes. Instead, they are, as the name suggests, simply designed to protect its value pending sale.

[14] Finally it must be remembered that, under our *Civil Procedure Rules*, the court serves as a watchdog, overseeing every expenditure claimed by a mortgagee. Specifically, the mortgagee must establish that each and every claim is, (a) supported by the mortgage contract; (b) necessary to "preserve" or "protect" the property, and (c) reasonable:

> 72:13 (2) A mortgagee who claims that an expenditure is a reasonable charge authorized by the mortgage instrument must demonstrate the claim by evidence specifically set out in an affidavit of the mortgagee, or its agent, showing all of the following:
>
> (a) the term in the instrument authorizing the expenditure to be made and charged to the mortgage debt;
>
> (b) the necessity of the expenditure for preserving or otherwise protecting the mortgaged property;
>
> (c) the reasonableness of the amount of the expenditure both in its fairness for the work done or materials supplied, and its value for protecting the property.

In my view, these safeguards go a long way to prevent the type of windfall that the Chambers judge feared.

[15] For all these reasons, I would conclude that the judge's decision to deny these disbursements was based on the mistaken belief that they were designed not simply to protect the property but to improve it. Therefore his exercise of discretion was based on a misapprehension serious enough for us to have to

intervene. Furthermore, there is nothing to suggest that these disbursements were otherwise unreasonable. I would therefore allow the appeal and vary the order below by increasing the deficiency judgment to include the disputed protective disbursements, thereby bringing the total to $8,422.08. I confirm that the appellant seeks no costs and I would so order.

MacDonald, C.J.N.S.

Concurred in:

Saunders, J.A.

Beveridge, J.A.